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By: WILLIE J FRAZIER
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CAUSE NO. 2015-03070

MARIO EFRAIN ROSALES BARRALAGA	§	**IN THE DISTRICT COURT OF**
Plaintiff,	§	
	§	
V.	§	**HARRIS COUNTY, TEXAS**
	§	
COOPER TIRE & RUBBER COMPANY	§	
and EDWIN REYES EDGARDO-CASTRO	§	
Defendants.	§	**295th JUDICIAL DISTRICT**

PLAINTIFF'S RESPONSE TO COOPER TIRE & RUBBER COMPANY'S MOTION TO COMPEL THE INDEPENDENT MEDICAL EXAMINATION OF PLAINTIFF

Plaintiff Mario Efrain Rosales Barralaga ("Plaintiff"), through his Next Friend, Christina Gomez, files this Response to Cooper Tire & Rubber Company's ("Cooper") Motion to Compel the Independent Medical Examination of Plaintiff ("Motion") and in support states as follows:

I. SUMMARY

Plaintiff was rendered a functional quadriplegic in an incident precipitated by a Cooper tire that failed on the truck in which he was riding – Mr. Barralaga is blind, suffers severe dysarthria and myoclonus and cannot perform basic tasks like feeding himself or using the bathroom. *See* **Exhibit A** (Plaintiff's "Day in the Life" Video). There can be no real controversy regarding Mario Barralaga's profound, utterly debilitating and permanent injuries.

More than eighteen months into the litigation and after experts have been disclosed, after reports authored, and after Plaintiff's life-care expert has been deposed, Cooper seeks an "examination" under Rule 204 that (1) is forbidden by Rule 204, (2) is not a medical exam, (3) will not be performed by a medical doctor, (4) has no safeguards for Plaintiff's health or safety, (5) is to be performed at a time and in a manner calculated to maximize prejudice to Plaintiff's case, and (6) is requested for reasons that have nothing to do with evaluating the existence or extent of Plaintiff's injuries – the only legitimate purpose for an exam under Rule 204. Cooper is

attempting to gain an improper, albeit significant, tactical advantage through this Motion, which is clear from its timing, scope, and impropriety under the Rules of the "exam" requested.

II. BACKGROUND

Plaintiff filed suit January 20, 2015. Plaintiff's counsel produced the attached "Day-in-the-Life" video on July 7, 2015. Mr. Barralaga was deposed by Cooper on July 16, 2015. Plaintiff disclosed experts and provided reports on February 26th, 2016. Cooper disclosed experts on March 29th, 2016. Expert depositions are set (except for the one unilaterally cancelled by Cooper for this hearing) and Plaintiff's life-care planner expert has been deposed. Trial is in less than ninety days.

Beginning on May 20, 2016, Cooper communicated to Plaintiff its desire to have "one of our [Cooper's] doctors to have the opportunity to meet with Mr. Barralaga." *See* **Exhibit B** (Email correspondence between Cooper's counsel and Plaintiff's counsel). In a series of emails, Plaintiff tried to elicit details from Cooper regarding the request in order to come to an agreement. Plaintiff asked for the purpose of the meeting, where it would take place, how long it would last, and the identity of the Cooper individual who would meet with Mr. Barralaga. *Id*. Plaintiff's request for clarification was understandable given Mr. Barralaga's condition, as Plaintiff explained in one of these emails:

> Mr. Barralaga is a blind quadriplegic who requires 24-hour care for mobility, feeding, hygiene and dressing. Setting up a "meeting" with Mr. Barralaga is not an easy task, so before we can provide you with dates we need to get an understanding of these details to try to work out these issues with you before raising them with the Court.

Id. (Email from D. Merman to J. Flynn dated 5/23/16). In response, Cooper stated that it needed this "meeting . . . to check on [Mr. Barralaga's] current status. It has been 10 ½ months since his deposition and the medical records do not provide sufficient information in our estimation." *Id*. (Email from J. Flynn to D. Merman dated 5/25/16). Cooper suggested that the "meeting" would

not likely take more than an hour and a half, and its counsel stated that their chosen representative, Dr. Janyna Mercado, "will not be conducting a formal examination on Mr. Barralaga nor will a physical examination be performed." *Id*. Because Cooper failed to provide the details Plaintiff had asked for, Plaintiff repeated the request, specifically asking if the request for a "meeting" was, in fact, a request under Texas Rule of Civil Procedure 204, and asked for the manner, scope and conditions of the proposed "exam." *Id*. (Email from D. Merman to J. Flynn dated 5/25/16).

In the emails that followed, Cooper admitted the request was "rooted" in Rule 204, but refused to specify the protocol that Dr. Mercado proposed to use during the "meeting" or provide any justification for Cooper's right to such an unspecified "question and answer session" with Plaintiff. Cooper assured Plaintiff that the meeting would take no longer than 2 hours "and will be strictly limited to questions and answers . . . [n]o physical examination will be administered." *Id*. (Email from J. Flynn to D. Merman dated 6/6/16). Plaintiff could not agree to Cooper's request because it failed to meet the requirements of Rule 204 and, as proposed by Cooper, created a significant physical imposition on Plaintiff who is already living in a compromised state, not to mention significantly prejudicing his case as Cooper is seeking an additional expert after the designations have passed.

On June 9, 2016, Cooper filed a "Motion to Compel the Independent Medical Examination of Plaintiff," stating that his "physical condition is in controversy." Mot. 1. In order "to evaluate the extent and nature of Plaintiff's injuries, past, present, and future," Cooper moved to compel Plaintiff to submit to a neuropsychological examination conducted by Dr. Janyna Mercado, Ph.D. *Id.* at 2. On June 21, 2016, after Cooper deposed Plaintiff's expert concerning her proposed life care plan, Cooper filed an "Amended Motion to Compel the Independent Medical Examination of Plaintiff," generally advancing the same arguments. Am. Mot. 2–3. While Cooper "initially

agreed that the examination could occur at Plaintiff's home or wherever was convenient for him, would last no longer than two hours and would be strictly limited to questions and answers," *id.* at 2, it now requests a six-hour examination during which Dr. Mercado will administer a series of unidentified "psychological evaluations and diagnostic tests." Prop. Order ¶¶ 1, 4. While Plaintiff concedes that a truly independent physical examination for a legitimate purpose might be appropriate in this matter, he objects to the examination Cooper has requested, an examination that is not independent, medical nor an examination. For the reasons set forth below, Plaintiff requests that this Court, should it determine a medical exam is warranted, order a truly independent examination to go forward pursuant to the Texas rules with appropriate safeguards and protections as requested herein by Plaintiff.

III. ARGUMENT AND AUTHORITIES

A. Texas Rule of Civil Procedure 204.1 Does Not Entitle Cooper to a Neuropsychological Examination.

Texas Rule of Civil Procedure 204.1 allows a party to move for an order compelling another party to submit to a "physical or mental examination by a qualified physician or a mental examination by a qualified psychologist" if "good cause" is shown and in the following circumstances:

> (1) when the mental or physical condition (including the blood group) of a party, or of a person in the custody, conservatorship or under the legal control of a party, is in controversy; or
>
> (2) except as provided in Rule 204.4, an examination by a psychologist may be ordered when the party responding to the motion has designated a psychologist as a testifying expert or has disclosed a psychologist's records for possible use at trial.

Tex. R. Civ. P. 204.1(c).

Cooper is seeking a psychological examination by a neuropsychologist - Rule 204.1 does not allow such an examination. Plaintiff has neither designated a neuropsychologist as a testifying

expert nor disclosed a neuropsychologist's records for use at trial. To date, Plaintiff has never seen a neuropsychologist and he has never received any form of neuropsychological exam. Thus, under the express terms of Rule 204.1, Cooper is not entitled to a mental examination by a neuropsychologist—including the "psychological evaluation" and "[p]sychological history interview" it seeks—because Plaintiff's mental condition is not in controversy and he did not designate a psychologist.

Moreover, Plaintiff's mental condition is not in controversy. Nowhere does Plaintiff contend that he has suffered psychological damage due to the accident, aside from the mental anguish necessarily associated with catastrophic physical injury. In *Coates v. Whittington*, the Texas Supreme Court held clearly that "sweeping examinations of a party who has not affirmatively put his mental condition in issue may not be routinely ordered simply because the party brings a personal injury action and general negligence is alleged." 758 S.W.2d 749, 751 (Tex. 1988) (citing *Schlagenhauf v. Holder*, 379 U.S. 104 (U.S. 1964)). Like the plaintiff in *Coates*, Plaintiff here alleges only the type of emotional distress that "typically accompanies" the injuries he has sustained. To allow Cooper to compel a mental examination simply because Plaintiff has claimed mental anguish damages "would open the door to involuntary mental examinations in virtually every personal injury suit," and "Plaintiffs should not be subjected to public revelations of the most personal aspects of their private lives just because they seek compensation for mental anguish associated with an injury."[1] *Id.*

To the extent Cooper is seeking a physical, rather than a psychological, examination, Rule 204.1 similarly does not allow one under these circumstances and certainly not by a

[1] Although, as Cooper notes, Plaintiff's expert Terry Arnold has recommended future neuropsychological testing as part of Plaintiff's treatment plan, this plan by no means places Plaintiff's mental condition in controversy.

neuropsychologist.[2] Rule 204.1 expressly states that, where permitted, only a qualified *physician* may conduct a physical examination. "A 'physician' is a 'practitioner of medicine' who is skilled in medicine and surgery. A psychologist is not a physician." *Coates*, 758 S.W.2d at 751. While Cooper has provided no information about the background, training, or qualifications of its proposed examiner, to Plaintiff's knowledge (gleaned from the internet since Cooper provided no credentials) Dr. Janyna Mercado is a clinical psychologist with a Ph.D. but no medical degree. She is not a medical doctor, neurologist or neurosurgeon, and she appears to have no experience providing medical treatment to patients with traumatic brain injuries. As such, she is not qualified to conduct a physical examination of Plaintiff even if it was allowed under Rule 204, which it is not.

As with a mental examination, Rule 204.1 allows a physical examination only upon a showing of "good cause." "Good cause" requires that an examination must be relevant to issues genuinely in controversy, that there must be a reasonable nexus between the condition in controversy and the examination sought, and that it must be impossible to obtain the desired information in a less intrusive manner. *Id.* at 753. The requirement to demonstrate a condition in controversy may not be satisfied by "conclusory allegations" in the movant's pleadings or by "mere relevance to the case." *Id.* at 751.

Here, Cooper has cited no evidence and pointed to no true controversy about the extent of Plaintiff's physical injuries, which have been well documented in his medical records. Plaintiff's injuries were also thoroughly documented in **Exhibit A**, Plaintiff's "Day in the Life" video, which

[2] It is worth noting that, in the context of Cooper's initial request for this examination, Cooper stated, "Dr. Mercado will not be conducting a formal examination on Mr. Barralaga nor will a physical examination be performed." **Exhibit B** (Email from J. Flynn to D. Merman dated 5/25/16). Apparently Cooper has changed its strategy and is now asking for a formal examination to "evaluate . . . his current and future physical and mental condition." Am. Mot. at 4.

demonstrate the severity of his condition and the extreme difficulty Plaintiff faces when attempting to accomplish even simple tasks, such as speaking, eating, or changing positions. And it is certainly possible to obtain the desired information in a less intrusive manner. Extensive medical records prepared by a neutral treating physician with no interest in this litigation are available for Cooper's review, and, in fact, one such physician is scheduled to be deposed: Dr. Sunil Kothari, M.D. one of Plaintiff's treating physicians board-certified in physical medicine and rehabilitation at the TIRR Memorial Hermann Rehabilitation and Research Center. Additionally, and most importantly under Texas law, there is no nexus between Plaintiff's *physical* condition and an examination by a psychologist suggested by Cooper.

B. Cooper's Requested Examination Carries Potential for Harm to Plaintiff.

There is no controversy that Plaintiff has suffered catastrophic physical injuries and that he faces extreme difficulty performing even the most basic tasks of ordinary life. *See* **Exhibit A**. With little regard for Plaintiff's health or well-being, Cooper seeks to compel *six* hours—not including lunch or other breaks—of unidentified tests, procedures, and discussions. As Cooper is well aware, since it briefly deposed Plaintiff in July of 2015, Plaintiff encounters great difficulty speaking or carrying on even the simplest of conversations, which are physically and mentally taxing. He requires constant assistance for all of the basic life functions: moving, eating, washing, and relieving himself. And while six hours of tests and examinations would be exhausting for any able-bodied individual, it would carry great potential for harm to Plaintiff, a functional quadriplegic who requires assistance to simply change positions in his seat.

Additionally, Cooper provides no detail regarding the tests and procedures it seeks Plaintiff to undergo, aside from its general statement that they "may include the following: (a) Psychological history interview; (b) Face-to-face mental status and neurological examination;

and (c) Neuropyschological testing." Prop. Order ¶ 1. As discussed above, Rule 204.1 does not permit Cooper to compel psychological testing, and it does not permit physical examinations to be conducted by a psychologist. Thus, along with lacking any information about the credentials or background of the doctor who will conduct the exam, Plaintiff and this Court lack any understanding of what Plaintiff will be required to do or say or what accepted medical protocols the psychologist will follow during the many hours she spends with Plaintiff. With so little information, this Court cannot be sure Plaintiff's health will be properly safeguarded.

C. Cooper's Requested Examination is sought to Prejudice Plaintiff's Case.

Cooper's timing and manner of its proposed examination seriously prejudice Plaintiff's case. Putting aside for a moment the impropriety of Cooper's request under the Rules and Cooper's disregard for Plaintiff's safety, the impact of allowing Cooper to take what amounts to a six-hour deposition of the Plaintiff, with no rules, objections, procedural safeguards or record, by an "expert" it has not disclosed (or produced a C/V for), upon who's opinion some designated expert is expected to rely, after the deadline to disclose experts has passed, after reports have been authored, and after Plaintiff's expert has been deposed – giving Plaintiff no chance to rebut the findings or retain an expert – creates an absurdly uneven playing field.

Rule 204.1(a) allows a party to move for an order compelling a medical examination "no later than 30 days before the end of any applicable discovery period," Tex. R. Civ. P. 204.1(a). Yet, rather than seeking an examination at during the eighteen months between January 2015, when Plaintiff initially filed this action, and June of 2016, Cooper strategically chose to wait until after the expiration of the deadline for either party to designate experts or prepare their reports. They also waited until after Cooper deposed Plaintiff's life care planner, Terry Arnold, and Cooper's Amended Motion referenced – without actual citation or the attachment of the transcript – the Arnold deposition in an attempt to buttress its argument for the examination it seeks. This is

a plain strategic attempt to gain full access to Plaintiff's experts and their opinions while simultaneously depriving Plaintiff of the same with respect to the psychologist it has chosen to conduct the examination.

As referenced above, Cooper deposed Plaintiff in July of 2015. Cooper's request for a six-hour physical examination as trial rapidly approaches—when it has full access to the information it needs in extensive medical records prepared by an independent treating physician with no interest in this litigation—suggests an improper attempt to secure a second chance to depose Plaintiff.

Cooper is likely hoping to secure an interview during which it can obtain prejudicial information this Court has held to be irrelevant. For example, in its motion where the only conceivable relevant consideration is Plaintiff's physical condition, Cooper attempts to again place Plaintiff's immigration status at issue. *See* Am. Mot. 2 ("Plaintiff, a citizen of Honduras who was in the United States illegally at the time, was a passenger in the Ranger and claims to have suffered personal injuries during the accident."). This language suggests Cooper plans to use its six-hour discussion with Plaintiff to glean information it can use—improperly—to prejudice a jury.

Given the fact that Cooper's "exam" sought provides no information related to a legitimate purpose for conducting an exam under Rule 204, it must be assumed that Cooper's counsel seeks this exam – not to further some legitimate interest in evaluating the Plaintiff whose condition is beyond controversy – but to gain precisely the impermissible tactical advantage described here. Cooper's requested exam is so far removed from permissible that Plaintiff's counsel suspects Cooper's Motion is a ploy to gain some other improper tactical advantage.

D. If the Court Determines that an Independent Physical Examination is Appropriate, Certain Conditions Should Be Imposed.

Despite the numerous concerns Plaintiff has outlined above, and despite the unfortunate (although clearly calculated) timing of Defendant's request, Plaintiff is not opposed to a truly independent physical examination that might serve a legitimate purpose in this action. If the Court is inclined to compel such an examination, it is required to specify the "time, place, manner, conditions, and scope of the examination." Tex. R. Civ. P. 204.1(d). Plaintiff requests that the Court include the following conditions in its Order, to safeguard Plaintiff's health and safety and to minimize the risk of prejudice to his case.

First, Plaintiff requests that this Court choose a medical doctor to conduct a truly independent physical examination. Such a doctor should not be a psychologist or a neuropsychologist, but rather should be a practitioner of medicine with experience treating patients with traumatic brain injuries. Conveniently, Houston is home to the TIRR Memorial Hermann Rehabilitation and Research Center, where many of the country's leading doctors study and treat traumatic brain injuries. As referenced above, one of these doctors is Dr. Sunil Kothari, M.D., who has treated Plaintiff. Dr. Kothari would be a prudent choice to conduct a compelled examination because he has a unique understanding of the progress of Plaintiff's recovery and no interest in the outcome of this litigation, but any of the other medical doctors at TIRR would also be highly qualified to conduct a fair, independent, and safe physical examination.

Plaintiff requests that this Court reduce the length of the physical examination from six hours to two hours, as Cooper originally suggested. Cooper has provided no indication that six hours are necessary for a qualified doctor to reach a conclusion about Plaintiff's past, current, or future physical condition. At the same time, Plaintiff has identified several concerns about the exhaustion and physical harm that may occur in the event of a six-hour examination.

Additionally, Plaintiff requests that the Court clearly delineate the scope of the requested examination; where Cooper seeks a totally unspecified examination, Plaintiff asks that the Court require the examination to be medical in nature and questions limited to those typically used for the purpose of diagnosis and treatment of traumatic brain injuries. Further, in advance of the Court's Order, Cooper must detail the specific medical protocol the doctor will use to evaluate Plaintiff's physical condition, preferably tests that have a name and are sanctioned by the AMA or some other respected medical body. This protocol must be identified and explained in the Order.

Plaintiff also requests that Cooper provide transportation to and from whatever location is determined to be appropriate and translation services—two necessary and expensive items for which Plaintiff should not bear the cost. Plaintiff's attorney and Plaintiff's sister must be present at all times during the examination, and a video recording of the examination should be made. While Cooper appears to agree to the creation of an audio recording, such a recording will be of little use in this context. Due to his injuries, Plaintiff's speech is difficult for most people to understand and impossible for others. *See* **Exhibit A**. A video recording of Plaintiff's responsive hand gestures and facial expressions will be required to accurately and productively document the examination.

Finally, Plaintiff requests, pursuant to Rule 204.2, that a "copy of a detailed written report of the examining physician . . . setting out the findings, including results of all tests made, diagnoses and conclusions" be provided within ten days of the examination. Tex. R. Civ. P. 204.2(a). Without conceding that any testimony by the examining doctor will be admissible, Plaintiff also requests an opportunity to designate additional experts to rebut such testimony.

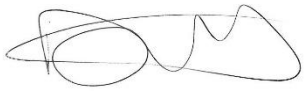
IV. CONCLUSION

Cooper has moved to compel a six-hour cross-examination of the Plaintiff by a neuropsychologist for whom Cooper provided no credentials and who Cooper has retained but did not designate. The Motion does not comply with Rule 204 in several significant respects, including but not limited to the "exam" being prohibited by the Rule. There are no constraints on what the "expert" may ask and there is no name (much less established protocol approved by any medical body) for the interrogation suggested by Cooper. Cooper has chosen to wait until after experts have been designated and Plaintiff's life-care planner has been deposed to ask for this "examination," which puts Plaintiff at a serious disadvantage – his expert has responded to the opinions of the experts who will (it is assumed) rely on the results of the "examination." Cooper could have requested, and Plaintiff's counsel would have agreed to, a medical examination of Mr. Barralaga had Cooper asked in a timely manner for an exam that had a legitimate purpose. But Cooper is not entitled to the thing it is asking for now. That said, Plaintiff is not opposed to an evaluation of Mr. Barralaga by an independent doctor in a manner that does not put Mr. Barralaga in danger or seriously prejudice his case.

For the reasons outlined above, Plaintiff respectfully requests that this Court DENY, or in the alternative, GRANT IN PART, subject to certain conditions, Cooper's Motion to Compel an Independent Medical Examination of Plaintiff as outlined above. If this Court deems it appropriate to order an independent medical examination, Plaintiff respectfully requests that this Court issue an Order including the conditions outlined in the preceding section.

Respectfully submitted,

The Merman Law Firm, P.C.



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Attorneys for Plaintiff Barralaga

CERTIFICATE OF SERVICE

I certify that on the 27th day of June 2016, a true and correct copy of the foregoing document was served by certified mail, regular mail, or facsimile on the Defendants or counsel of record, including:

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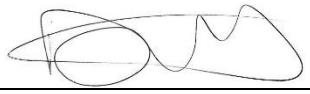

Derek S. Merman

Tommie Yeiter-Vicknair

From: Derek Merman
Sent: Monday, June 27, 2016 10:00 AM
To: Tommie Yeiter-Vicknair
Subject: FW: eFileTexas.gov - Notification of Service - 11340702

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THE MERMAN LAW FIRM, P.C.

Personal Service for Personal Injury Victims

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June 27, 2016

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Re: Cause No. 2015-03070; *Barralaga v. Cooper Tire and Rubber Co. et al.*, In the 295th District Court of Harris County, Texas.

Dear Counsel:

Enclosed please find the following:

- Plaintiff's Response to Cooper Tire & Rubber Company's Motion to Compel the Independent Medical Examination of Plaintiff;
- Exhibit A (including CD with video);
- Exhibit B; and
- Proposed Order.

Sincerely,

THE MERMAN LAW FIRM, P.C.

Tommie Yeiter-Vicknair

x

6-27-16