

CAUSE NO. 2015-03070

MARIO EFRAIN ROSALES
BARRALAGA
Plaintiff,

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IN THE DISTRICT COURT OF

v.

HARRIS COUNTY, TEXAS

COOPER TIRE & RUBBER
COMPANY AND EDWIN REYES
EDGARDO-CASTRO
Defendants.

295TH JUDICIAL DISTRICT

**COOPER TIRE & RUBBER COMPANY'S
AMENDED MOTION TO COMPEL THE INDEPENDENT MEDICAL EXAMINATION
OF MARIO EFRAIN ROSALES BARRALAGA**

Cooper Tire & Rubber Company ("Cooper"), files this Amended Motion to Compel the Independent Medical Examination of Plaintiff Mario Efrain Rosales Barralaga ("Plaintiff"), and would respectfully show the Court as follows:

**I.
SUMMARY OF MOTION**

Plaintiff alleges that he sustained "significant traumatic brain injuries," among other physical injuries, in the accident serving as the basis of this suit and, as a result, seeks millions of dollars in damages from Cooper.¹ Consequently, Plaintiff's physical condition is in controversy. Understanding this, Cooper wishes, consistent with its rights pursuant to the Texas Rules of Civil Procedure, to have Plaintiff examined by a doctor of Cooper's choosing to fully evaluate the claims made by Plaintiff.

Despite Cooper's reasonable request, Plaintiff has refused to cooperate, thereby necessitating the filing of this Motion.

**II.
BACKGROUND**

¹ Plaintiff's Second Amended Petition claims he seeks monetary relief of over \$1,000,000 and Plaintiff has retained an expert who states the costs of Plaintiff's future medical care will cost more than \$12,000,000.

A. The Accident

This complex products liability lawsuit arises from a single vehicle accident that occurred on April 25, 2014, when Edwin Reyes Edgardo-Castro (hereafter “Castro”), an unlicensed driver, lost control of a previously salvaged 2008 White Ford Ranger (hereafter “Ranger”) following the alleged disablement of the Ranger’s right rear tire. 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. He also claims that defects in the design and manufacture of the subject tire by Cooper were a producing cause of these injuries. Cooper strenuously denies liability and contends, among other defenses, that the subject tire complied with all necessary regulations, did not contain any defects and was fit and suitable for its intended purpose at the time of its design and manufacture. Still, at the heart of Plaintiff’s lawsuit are his claims for damages related to personal injuries, including, but not limited to, past and future medical expenses, past and future pain, past and future mental anguish, and past and future physical impairment.

To further evaluate the extent and nature of Plaintiff’s injuries, past, present, and future, Cooper requested that Plaintiff submit to a neuropsychological examination conducted by Dr. Janyna Mercado, a neuropsychologist. 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.² However, Plaintiff would not even agree to these terms. Subsequently, Cooper deposed Plaintiff’s designated life care planner who testified, among other things, that (1) she personally met with Plaintiff on at least three separate occasions; (2) she was aware of Plaintiff’s current physical and mental condition; (3) Plaintiff’s condition

² See email correspondence between counsel regarding the proposed examination attached as Exhibit A.

had improved since the accident and her initial meeting; (4) Plaintiff may become more functional in the future; and (5) she does not believe Plaintiff has reached maximum medical improvement. Additionally, she testified that she recommended Plaintiff undergo a neuropsychological examination. As a result, Cooper now requests that Plaintiff submit to a full neuropsychological examination conducted by Dr. Mercado.

This case is rapidly moving toward trial and Cooper is attempting to complete all necessary discovery in a timely fashion. Time is of the essence and Plaintiff's actions are preventing Cooper from completing discovery that is necessary for Cooper to fully prepare its defenses and hampering Cooper's ability to become fully informed regarding damage allegations asserted by Plaintiff at Cooper's sole prejudice.

III. **ARGUMENT**

A party may be ordered to undergo a physical or mental examination if the movant shows good cause for the request and the party's physical condition is "in controversy." Tex. R. Civ. P. 204.1(c)(1); *Coates v. Whittington*, 758 S.W.2d 749, 753 (Tex. 1988); *In re Transwestern Publ'g Co.*, 96 S.W.3d 501, 504-05 (Tex. App.—Fort Worth 2002, orig. proceeding).

A. Texas Rule of Procedure 204.1 governs mental and physical examinations.

Texas Rule of Civil Procedure 204.1 sets forth the requirements a party must meet in order to compel a mental or physical examination. Under the Rule:

A party may - no later than 30 days before the end of any applicable discovery period - move for an order compelling another party to:

- (1) submit to a physical or mental examination by a qualified physician or a mental examination by a qualified psychologist; or
- (2) produce for such examination a person in the other party's custody, conservatorship or legal control.

...

The court may issue an order for examination only for good cause shown and only 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.

Therefore, Rule 204 requires that Cooper (1) file its motion more than 30 days before the end of the discovery period, which Cooper has done,³ (2) show good cause and (3) the Plaintiff's condition must be in controversy.

B. Good Cause Exists for an Examination of Plaintiff.

Good cause exists if (a) the examination is relevant to issues in the case and the examination will produce, or is likely to lead to, relevant evidence; (b) there is a reasonable nexus between the condition of the person to be examined and the examination sought; and (c) it is not possible to obtain the desired information through means that are less intrusive than a compelled examination. *In re Transwestern*, 96 S.W.3d at 507.

1. An examination is relevant to the issues in this case.

Cooper should be allowed to conduct an independent medical examination of Plaintiff to evaluate the veracity of the claims asserted by Plaintiff and his experts regarding his current and future physical and mental condition.

Plaintiff alleges Cooper's conduct caused him to sustain serious permanent physical and mental injuries that will require millions of dollars in future care and treatment and have resulted

³ The discovery deadline in this case is August 15, 2016.

and will continue to result in significant pain, mental anguish, and impairment. Based on these claims, Cooper is entitled to have an expert of its choosing evaluate Plaintiff's physical and mental condition, the necessity of his medical care and treatment costs, his future prognosis and the necessity and costs of his purported future medical care and treatment. Thus, a neuropsychological examination, conducted by an independent doctor, will assist Cooper in determining Plaintiff's mental and physical state more than two (2) years post-accident, whether such has improved or diminished, and whether his condition is consistent with Plaintiff's allegations and his expert's opinions. Such also allows Cooper the same access and opportunity to exam Plaintiff as Plaintiff's experts have been afforded.

Simply put, Plaintiff's physical and mental condition is the focal point of his damage allegations in this case and an examination is relevant to these issues.

2. A reasonable nexus exists for the neuropsychological examination.

A reasonable nexus exists between the condition in controversy, namely Plaintiff's physical and mental condition, and the examination sought because Plaintiff claims he is severely and permanently injured and will need substantial medical care for the remainder of his life. *Coates*, 758 S.W.2d at 753. As such, Plaintiff's medical needs, functional limitations, and future care are directly relevant to his claims for damages in this case. Thus, Cooper is entitled to an independent medical examination ("IME") in order to prepare its defense to Plaintiff's damage claims, including issues relating to the extent of his alleged physical functional limitations, long-term prognosis, and anticipated future medical care and treatment. Accordingly, there is a reasonable connection between the condition in controversy and the IME sought by Cooper.

3. The requested examination cannot be obtained through other means.

The only possible method to obtain the information Cooper requires to prepare its defense in this matter is for Plaintiff to undergo an IME. Thereby allowing Cooper to conduct an independent analysis into the nature and extent of Plaintiff's condition. Such also allows Cooper to effectively prepare for the upcoming depositions of Plaintiff's experts and trial. Moreover, Cooper should not be required to rely on Plaintiff's expert's opinions, based upon their own examinations, without at least having an independent expert evaluate Plaintiff on behalf of Cooper.

Consistent with the above argument, the *In re Transwestern* court found information from the independent evaluation sought by the defendant was not likely to be found through other means because the only way for the defendant to make its own analysis of the plaintiff's damages claim and to effectively challenge the plaintiff's expert's opinions was for the defendant to conduct its own medical evaluation of the plaintiff. *In re Transwestern Publ'g Co.*, 96 S.W.3d 501, 504-08 (Tex. App.—Fort Worth 2002, orig. proceeding). The court also found deposing the plaintiff's expert to obtain information on the plaintiff's condition was insufficient. *Id.* Therefore, Cooper should be able to conduct its own neuropsychological examination of Plaintiff because it is the fairest way to permit Cooper to analyze Plaintiff's damage claims and to challenge Plaintiff's expert opinions.

IV. CONCLUSION

Plaintiff's current and future physical condition, as well the extent of his purported need for future medical care and treatment, is the focal point of Plaintiff's damages claims in this case. As a result, Cooper respectfully requests that this Court issue an order allowing Cooper's consulting medical expert, Dr. Janyna Mercado, to conduct an IME of Plaintiff at Plaintiff's

CERTIFICATE OF SERVICE

I certify that, in accordance with the Texas Rules of Civil Procedure, a true and correct copy of the foregoing document was served upon all counsel of record and parties on the 21st day of June, 2016.

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