2013 IL App (1st) 123322-U

SECOND DIVISION
November 26, 2013

No. 1-12-3322

RANDY G. PATE, SR.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
v.	)	
	)	
PACE SUBURBAN BUS DIVISION OF THE REGIONAL TRANSPORTATION AUTHORITY, a municipal corporation, JOCELYN ETIENNE, and SAMUEL R. DUENAS,	)	No. 09 L 9122
	)	The Honorable
	)	Drella C. Savage,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court, with order.
Presiding Justice Quinn and Justice Pierce concurred in the judgment and order.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in granting the defendants' motion for a physical examination pursuant to Rule 215(a), and a vocational interview, for purposes of discovery, where defendants showed that the examination and interview would yield or lead to relevant evidence.

¶ 2 Plaintiff, Randy G. Pate, Sr., appeals from the circuit court's grant of defendants' Pace Suburban Bus Division of the Regional Transportation Authority's and Jocelyn Etienne's, motion for a medical examination and vocational interview of Pate pursuant to Illinois Supreme Court Rule 215(a) (Ill. S. Ct. R. 215(a) (eff. Mar. 28, 2011)), and from the court's corresponding order of

contempt for Pate's refusal to submit to the examination and interview. On appeal, Pate contends the court erred in granting the motion where (1) defendants improperly sought information to bolster the already formed opinions of their experts; and (2) the request for a vocational interview went beyond the parameters of acceptable examinations permitted under Rule 215(a). For the following reasons, we affirm the trial court's grant of defendants' motion but reverse its finding of contempt.

¶ 3 JURISDICTION

¶ 4 The trial court granted defendants' motion on August 24, 2012. Pate filed a motion to reconsider which the trial court denied on September 28, 2012. On October 25, 2012, Pate informed the court that he would not comply with the order for examination and the trial court found him in contempt. Pate requested a stay of the proceedings in order to file a notice of appeal which the trial court granted. Pate filed the notice of appeal on November 2, 2012. This court has jurisdiction pursuant to Illinois Supreme Court Rules 304(b)(5) governing appeals from a contempt order that did not dispose of an entire proceedings. Ill. S. Ct. R. 304(b)(5) (eff. Feb. 26, 2010).

¶ 5 BACKGROUND

¶ 6 On August 19, 2008, Pate was a passenger in a bus operated by defendant Pace and driven by defendant Etienne. The bus was involved in a motor vehicle accident. On August 3, 2009, Pate filed a lawsuit claiming injury as a result of the accident. The parties engaged in pre-trial discovery that, although somewhat contentious, yielded among other things the complete files of Pate's expert witnesses, Pate's Social Security Administration (SSA) records, and Pate's answers to standard interrogatories. Pate also appeared for deposition on March 10, 2010. Defendants subsequently learned that Pate was involved in a motor vehicle accident in May 2010, in which he received a

money settlement. Defendants requested an opportunity to re-depose Pate on injuries that had not been disclosed, which the trial court granted on July 29, 2011. From August 17 to September 26, 2011, defendants took video surveillance of Pate which they disclosed and produced to him. The video showed Pate walking without a limp, not wearing a knee brace, and walking without the assistance of a cane.

¶ 7 On August 22, 2011, Pate was examined by Dr. Dennis Gates who is also one of Pate's Illinois Supreme Court Rule 213(f)(3) (Ill. S. Ct. R. 213(f)(3) (eff. Jan. 1, 2007)), disclosed expert witnesses. Pate had not had medical treatment from February 2010 to August 2011. In Dr. Gates's supplemental report, he indicated that Pate used a tall cane for walking "all of the time" and required a knee immobilizer. The report also stated that Pate needed to lean on Dr. Gates during the examination and that Pate walked with a significant lurch. Based on his examination, Dr. Gates concluded that Pate's left knee required total replacement. Dr. Gates opined that "the accident of 8-19-08, caused the aggravation of his pre-existing mild arthritis into a severe arthritis and the tearing of the lateral meniscus, and necessitated the surgery [Pate] had on 3-31-09 of the left knee. It seems that because of this aggravation, the total knee replacement that is most likely needed would be caused by that accident." Dr. Gates further opined that the bus accident "also aggravated the pre-existing arthritis of the right knee, making the knee more symptomatic; making the need for a total knee replacement here sooner than what would have gone on without the accident."

¶ 8 Defendants also conducted surveillance on Pate from April 15, 2012 to May 1, 2012, and tendered the video and reports to Pate's counsel. The video showed Pate engaging in physical activity without the assistance of a cane or use of a knee immobilizer. On May 30, 2012, defendants

disclosed their Rule 213(f)(3) experts Dr. Ellis Nam, an orthopedic surgeon, and Thomas Grzesik, a vocational rehabilitation expert.

¶ 9 Dr. Nam reviewed Pate's medical records, Pate's depositions and the deposition of Dr. Chmell, Pate's treating physician prior to the accident, a report by Dr. Gates, x-rays and radiographs, two CD-ROMs containing information from the SSA equivalent to 817 pages of record, Pate's application for employment at Olympia Oil, and video surveillance tapes. In his report, Dr. Nam noted that Pate claimed he injured both knees in a bus accident on August 19, 2008. Pate stated that he was sitting on the bus, facing forward, when the driver applied the brakes. Pate struck both of his knees against the seat in front of him. A car subsequently struck the rear of the bus causing Pate further pain. X-rays and radiographs taken the next day showed no fractures, although there was evidence of "pre-existing arthritic changes" in the knees. Pate returned to the emergency room on August 24, 2008, complaining of bilateral knee pain and left trapezius pain. An examination of both knees showed "no deformity, no ecchymosis, no swelling, no macerations, no hematoma, no erythema, and no warmth. There was a negative anterior drawer test, negative Lachman test, negative McMurray's test, and minimal tenderness to palpation along the anterior knee." Pate was diagnosed with bilateral knee contusion and discharged.

¶ 10 Dr. Chmell examined Pate for left knee pain on December 22, 2008. He had treated Pate for knee ailments prior to the accident. The examination revealed no indication of an acute meniscal tear, and that the ACL and PCL ligaments were "solid and intact." Dr. Nam noted that there was indication of fraying of the lateral meniscus which indicated a "degenerative condition rather than an acute injury, such as a motor vehicle accident." Dr. Nam disagreed with Dr. Gates's conclusion

that Pate suffered a severe contusion to the left knee. At most, Pate suffered a mild contusion as evidenced by the lack of swelling and bruising found when Pate entered the emergency room five days after the accident. Dr. Nam opined that the mild contusion of the left knee would not aggravate Pate's pre-existing arthritis, although it is possible Pate would eventually need total left knee replacement "independent of this injury." Dr. Nam stated that Pate's injuries from the accident were "not permanent in nature." He noted that Dr. Chmell stated in his deposition that Pate "had a permanent partial disability with respect to his left knee from a previous injury." Dr. Nam also opined that the surgery Pate had on March 31, 2009, was due to his pre-existing condition. Dr. Nam concluded that Pate "was not disabled after this alleged bus accident and no disabilities were caused by this alleged bus accident." He stated that his conclusions were "based on a reasonable degree of medical certainty."

¶ 11 Dr. Nam also viewed surveillance videos taken between August 17, 2011, and September 26, 2011. In the videos, Pate is walking and standing without a limp and without difficulty or support. Pate did not use a cane or knee immobilizer. Pate is also engaging in activities such as filling his car with gas, fixing his car, and getting into his van without difficulty or pain, and without the use of a brace or cane. He concluded that the video "strongly suggests that [Pate] is not suffering from any sort of disability. The only time that Mr. Pate is seen using a brace and a cane is on August 17, 2011, the same day he had his deposition. Every subsequent video surveillance after August 17, 2011 shows [Pate] walking without any difficulty and without the use of a brace or supportive device." Dr. Nam stated that the video "does not change any of my opinions" regarding Pate's injury.

¶ 12 Grzesik's report stated that he reviewed 49 sources of documents, hospital records, and

depositions, including records of the SSA proceedings. He also reviewed surveillance videos taken between August 17, 2011, and May 1, 2012. Employment records from J.I.I. Machining showed that Pate was employed from 10/4/1999 to 12/17/1999, and was fired due to excessive absences and tardiness. In his application for J.I.I. Machining, Pate stated that he graduated from high school and attended 2 ½ years at Ohio State. In his 2005 application for social security disability benefits, Pate did not mention his employment with J.I.I. Machining, but stated that he worked as a cleaning crew chief for a janitorial business, a detail man, a laborer, and a security officer. The work history report he completed for the 2005 social security disability application stated that he worked for the Chicago Public Schools in maintenance. Pate also filed an application for social security benefits in 2009 and filled out another work history report that was not consistent with the 2005 work history report. Given the inconsistencies in the reports, Grzesik concluded that "[i]t is obvious that Mr. Pate was disingenuous in his statements regarding his work history and work responsibilities."

¶ 13 From Pate's earnings records, Grzesik also concluded that prior to the bus accident Pate "performed very little work activity. This is contrary to his claims of employment prior to the alleged date of the injury." He also noted that Pate had applied for a job with Olympia Oil, and Grzesik disagreed with Pate's expert David Gibson that Pate would have been hired at $11.75 an hour. After reviewing various documents, Grzesik noted that on his application Pate "made a false statement regarding his felony. He also made a false statement regarding his education." The application stated that "any information provided by [Pate] *** found to be false, incomplete, or misrepresented in any respect" was sufficient cause for cancelling the application or immediate discharge.

¶ 14 Grzesik noted that Dr. Chmell opined in his deposition that Pate "was limited to Medium and Light work activity" but did not further restrict Pate from working as a result of the bus accident. However, Dr. Nam found Pate suffered no disability and was "capable of performing any work activity that he would otherwise be qualified to perform by way of education and work experience." Using Dr. Chmell's opinion that Pate could perform light to medium work activity, Grzesik listed eight jobs Pate was capable of performing, along with the respective median wages. Grzesik concluded that in his opinion as a Certified Rehabilitation Counselor, "Mr. Pate does not have a loss of future earning capacity." Grzesik requested an "opportunity to interview Mr. Pate" because Gibson had conducted an interview with him, and "to more fully expand my opinions."

¶ 15 Defendants filed a motion for the medical examination of Pate by Dr. Nam pursuant to Rule 215(a), and a vocational interview by Grzesik. In the motion, defendants argued that they disputed Pate's characterization of his injuries and "have a right to level the playing field, by having an examination performed by a doctor not retained by [Pate]." Defendants further argued that they "have a right to interview and examine [Pate] for purposes of vocational rehabilitation opinions" because [Pate's] expert Gibson will offer his testimony based on his "paid expert opinions" and review of the SSA findings. The motion attached Grzesik's opinions and stated that he "has requested an interview of [Pate] to determine the nature and extent of [Pate's] work disabilities."

¶ 16 The trial court granted defendants' motion on August 24, 2012, and set parameters for the examination and interview. The trial court acknowledged that Pate's physical condition was in controversy. It pointed out "issues that are ripe for the trier of fact" that the examination and interview could aid in answering, such as does Pate have to use the brace "all the time" or at all,

"[w]ere there other surgeries that were had resulting in Pate's current condition or [is Pate's condition] a result of this accident that happened after these knee surgeries occurred," will Pate need future treatment, and "what [is] his future ability to work or ability to live or ability to walk." The trial court noted that it had discretion to allow the examinations, and that given the evidence gathered thus far "this is a good case for allowing the examination." The court further reasoned that the defendants did not seek the examination to provide an expert witness because their witnesses "already exist[] and they just want an opportunity to gather additional information" to see if they need to further supplement the opinions their experts "have already made."

¶ 17 Pate filed a motion to reconsider which the trial court denied on September 28, 2012. Pate notified the trial court on October 5, 2012, that he would not appear for the court-ordered Rule 215 examinations and the court held Pate in contempt. Pate filed this timely appeal.

¶ 18 ANALYSIS

¶ 19 Pate argues that the trial court erred in granting defendants' motion for the physical examination and interview pursuant to Rule 215. Generally, discovery orders are appealable only from a final judgment. *Reda v. Advocate Health Care*, 199 Ill. 2d 47, 54 (2002). However, a finding of contempt is final and appealable, and allows a reviewing court to consider the propriety of the underlying discovery order. *Id*. If the discovery order is invalid, we must also reverse the contempt order for failing to comply with the discovery order. *In re D.H.*, 319 Ill. App. 3d 771, 773 (2001).

¶ 20 The purpose of pre-trial discovery is "to enhance the truth-seeking process" by aiding attorneys in preparing for their cases and eliminating surprises as much as possible "so that judgments will rest upon the merits and not upon the skillful maneuvering of counsel." *Mistler v.*

Mancini, 111 Ill. App. 3d 228, 231-32 (1982). The goal of discovery is full disclosure, and therefore the trial court has great discretion in determining the scope of discovery. *Payne v. Hall*, 2013 IL App (1st) 113519, ¶ 13. Discovery is not a tactical game, however, and the Illinois Supreme Court Rules "fix guidelines for a fair and orderly procedure" designed to protect against abuse of the process. *Mistler*, 111 Ill. App. 3d at 232. The right of discovery is also limited to matters relevant to the case at hand, and the trial court should deny discovery if there is insufficient evidence that it is relevant or will lead to material that is relevant. *Leeson v. State Farm Mutual Automobile Insurance Co.*, 190 Ill. App. 3d 359, 366 (1989). A reviewing court will not overturn the trial court's discovery determination absent an abuse of discretion. *Payne*, 2013 IL App (1st) 113519, ¶ 10.

¶ 21 Rule 215(a) states:

> "In any action in which the physical or mental condition of a party or of a person in the party's custody or legal control is in controversy, the court, upon notice and on motion made within a reasonable time before trial, may order such party to submit to a physical or mental examination by a licensed professional in a discipline related to the physical or mental condition which is involved." Ill. S. Ct. R. 215(a) (eff. Mar. 28, 2011).

¶ 22 The rationale behind Rule 215(a) is that when a party seeks to recover damages for physical injuries, his physical condition is at issue and proper discovery concerning his physical condition will aid the trier of fact in reaching a correct determination. *Fosse v. Pensabene*, 362 Ill. App. 3d 172, 180-81 (2005). This rule, however, "does not permit unlimited and indiscriminate mental and physical examinations of persons but by its terms gives a trial court discretion to order such examinations only when certain requirements are met." *In re Conservatorship of the Estate of*

Stevenson, 44 Ill. 2d 525, 529 (1970). Prior to 1995, the rule provided that the trial court has discretion to order the examinations if the following three requirements are met: (1) the person to be examined is a party; (2) the person's physical or mental condition is in controversy; and (3) good cause is shown for the examination. See *In re Marriage of Kutchins*, 157 Ill. App. 3d 384, 387-88 (1987). In 1995 the good cause requirement was removed in order "to effectuate the objectives of the rule with minimal judicial involvement." Ill. S. Ct. R. 215, Committee Comments (eff. Jan. 1, 1996).

¶ 23 Defendants contend that Rule 215(a) as amended leaves little discretion to the trial court. They argue in their brief that "[s]o long as the motion is brought in a reasonable time before trial and there is a physical or mental condition at issue, a court must allow the requested examination by the examiner requested, or a different examiner if the court does not approve of the initial examiner." We are not persuaded by defendants' argument. Applying the rule is decidedly within the discretion of the trial court.

¶ 24 As the fourth district of this court noted in *Jarke v. Mondry*, 2011 IL App (4th) 110150, ¶ 27, Rule 215 provides the trial court with little guidance on how to exercise its discretion under the rule. Although the committee removed the good cause requirement from Rule 215(a), it still left the trial court with discretion to grant or deny the motion. The rule states that if the requirements are met, the court "may" order the requested examination. The word 'may' indicates the intent to leave the grant or denial of relief to the trial court's discretion. *People v. Wright*, 2012 IL App (1st) 073106, ¶ 62; see also *People v. Garstecki*, 234 Ill. 2d 430, 443 (2009) (use of "may" indicates that a rule is permissive). Furthermore, removing the trial court's discretion on this issue improperly restricts the

trial court's authority to exercise its discretion in guiding the discovery process. See *Payne*, 2013 IL App (1st) 113519, ¶ 13 (trial courts have "wide latitude in determining the permissible scope of discovery"). Therefore, we find that under the amended Rule 215(a), the trial court maintains discretion to grant an examination request so long as the requested discovery is relevant or will lead to relevant evidence. See *Leeson,* 190 Ill. App. 3d at 366 (the right of discovery is limited to matters relevant to the case at hand).

¶ 25 Pate argues that the trial court erred in granting defendants' motion because defendants do not seek the physical examination or vocational interview for discovery purposes. Instead, they want "to bolster the credibility of their experts' anticipated testimony by supporting already formed opinions with a subsequent exam and interview of [Pate]."

¶ 26 We are not persuaded by Pate's argument. In filing his claim against defendants, Pate clearly placed his physical condition at issue. Furthermore, defendants do not request the examination in order to create an expert or improperly bolster their expert's opinion. Rather, defendants make a sufficient argument that an additional physical examination will yield relevant information to aid the factfinder in its determination.

¶ 27 Defendants' expert Dr. Nam opined with a reasonable degree of medical certainty that Pate's physical ailments and subsequent knee surgeries did not result from the Pace bus accident. Dr. Nam also concluded that any injuries Pate may have suffered in the accident were not permanent in nature and if Pate requires total knee replacement in the future, it would be due solely to his preexisting arthritis rather than the accident. However, Pate's expert Dr. Gates, who had an opportunity to examine Pate, indicated that Pate had to use a tall cane for walking "all of the time" and also required

a knee immobilizer. Dr. Gates's report stated that Pate needed to lean on Dr. Gates during the examination and that Pate walked with a significant lurch. To complicate matters, video surveillance of Pate taken before and after Dr. Gates' examination shows Pate walking and standing without a limp and without difficulty or support. He is also seen engaging in activities without the use of a brace or cane. Dr. Nam concluded that the video "strongly suggests that [Pate] is not suffering from any sort of disability." From the record it does not appear that Pate has had an examination since the recording of the videos. Such an examination could aid in explaining this disparity.

¶ 28 In granting defendants' motion, the trial court reasoned that an additional physical examination would further assist the factfinder in determining the severity of Pate's injuries from the accident, and his future prognosis. The trial court stated that the examination would give defendants "an opportunity to gather additional information" and to see whether they must "further supplement" their expert's opinions. We find that the trial court's determination was not an abuse of discretion.

¶ 29 Defendants also requested that their vocational rehabilitation expert, Grzesik, be allowed to interview Pate "for purposes of vocational rehabilitation opinions" to determine "the nature and extent of plaintiff's work disabilities." Pate, however, argues that Rule 215(a) does not allow for vocational interviews. Although the fourth district of this court indicated that Rule 215(a) may encompass such examinations in *Roberts v. Norfolk & Western Ry. Co.*, 229 Ill. App. 3d 706, 720-21 (1992), it did not answer the question directly. However, the court stated that it was "not inclined to interpret Rule 215 so strictly as to allow examinations by physicians only" and found that the trial court did not abuse its discretion in denying an examination by an occupational therapist to discover the plaintiff's work capacity. *Id.* Pate's claim for damages is based on his compromised physical

condition and his resulting inability to work as he had before the accident. His work capacity is inextricably connected to his physical condition, and we find that a vocational assessment based in part on Pate's physical condition is a proper examination under Rule 215.

¶ 30 Although Grzesik already reviewed materials and formed an opinion as to Pate's vocational history and potential, he found discrepancies in the work history and earnings reports. He had questions about the truthfulness of Pate's statements on vocational issues. Grzesik concluded that "[i]t is obvious that Mr. Pate was disingenuous in his statements regarding his work history and work responsibilities." Grzesik also looked at the doctors' reports regarding Pate's physical condition and noted the differences in the reports. He based his opinion regarding the jobs Pate could perform on Dr. Chmell's report of Pate's physical condition, which stated that Pate could perform medium to light work activity. However, Dr. Nam opined that Pate has no disability and Dr. Gates stated that Pate needed to use a tall cane and knee immobilizer. Grzesik requested an "opportunity to interview Mr. Pate" in order "to more fully expand my opinions" and if he obtains further information, he will revise his opinions accordingly. The trial court did not abuse its discretion in granting defendants' motion for a vocational interview with Pate.

¶ 31 For the foregoing reasons, we affirm the trial court's grant of defendants' motion for a Rule 215(a) physical examination and vocational interview, and recognizing that the friendly contempt order was entered for purposes of appeal, we reverse the finding of contempt for Pate's failure to submit to the examination and interview. The cause is remanded for further proceedings.

¶ 32 Affirmed in part and reversed in part; cause remanded.