

Not Reported in S.W.3d, 2007 WL 4279171 (Tex.App.-Hous. (1 Dist.))
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SEE TX R RAP RULE 47.2 FOR DESIGNATION
AND SIGNING OF OPINIONS.

MEMORANDUM OPINION

Court of Appeals of Texas,
Houston (1st Dist.).

In re Michael MEDINA, Oscar Alanis, Jose R. Arellano, Miguel Arenazas, Marco Arevalo, Felix Beltre, Jorge M. Benitez, Fabian de la Cerda, Demetrio Diaz, Deceased, Odiceo Diaz, Elvis Escobar, David Esparza, Andres Flores, Jose Fuentes, Julian Fuentes, Franklin Garcia, Arcadio Gomez, Jose L. Gonzalez, Juan C. Gonzalez, Julio Guerra, Antonio Heredia, Guillermo Hernandez, Adrian Hinojosa, Jaime Jimenez, Martin Juarez, Jesus M. Lopez, Rodolfo Lopez, Aurelio Marquez, Juan M. Martinez, Mario A. Martinez, Jose Morales, Miguel A. Morales, Salvador Morales, Alexander Nation, Pedro Navar, Martin Olivares, Freddy Ortega, Juan Carlos Ortiz, Jose Padilla, Alonzo Perez, Fermin Perez, Martin Perez, Raul Rios, Wilfredo C. Rivas, Juan Antonio Rivera, Robert Rivera, III, Ernesto Rodriguez, Tomas Rodriguez, Javier Rojas, Jose Martin Salinas, Miguel A. Salinas, Abel Sanchez, Bernabe Vasquez, and Jesus Villarreal, Relators.

No. 01-07-00747-CV.
Dec. 6, 2007.

Original Proceeding on Petition for Writ of Mandamus.

Jimmy G. Williamson, Timothy A. Beeton, and Samuel Finegan, for Michael Medina, et al.

Panel consists of Justices TAFT, HANKS, and HIGLEY.

MEMORANDUM OPINION

GEORGE C. HANKS, JR. Justice.

*1 By petition for writ of mandamus, relators (“the Medina Plaintiffs”) challenge the trial court’s order authorizing independent medical examinations (“IME”) to assess physical and mental injuries of the 55 Medina Plaintiffs. ^{FN1} We deny in part and grant in part.

FN1. The underlying case is *Michael Medina, et al. v. The Ammons Law Firm, L.L.P., Robert E. Ammons, Individually, Arthur J. Gonzalez, Individually, Sprain Law Firm, P.C., and Michael L. Sprain, Individually*, Cause No. 06-CV-1043, in the 212th District Court of Galveston County, Texas, the Honorable Susan E. Criss presiding.

Background

The Medina Plaintiffs are workers who suffered personal injuries from the British Petroleum Texas City Refinery (“B.P.”) explosion on March 23, 2005. Ammons represented the Medina Plaintiffs in their suit against B.P. and negotiated a settlement on their behalf. The Medina Plaintiffs later filed a legal malpractice suit against Ammons alleging, among other things, negligence and breach of fiduciary duty.

Ammons filed a Motion for Independent Medical and Psychological Examinations for all 55 of the Medina Plaintiffs. The trial court granted this Motion, and also ruled that no representatives of the Medina Plaintiffs could attend the examinations or videotape or audiotape the examinations.

Standard of Review

Mandamus relief is available only to correct a clear abuse of discretion when there is no adequate remedy by appeal. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex.1992) (orig.proceeding). A court clearly abuses its discretion when it reaches a decision so arbitrary and unreasonable that it amounts to a clear and prejudicial error of law. *Id.*

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IMEs

The Medina Plaintiffs allege that the requirements for obtaining the IMEs had not been satisfied and the global order for all 55 of them was inappropriate. See [TEX.R. CIV. P. 204.1](#). Ammons, however, contends that IMEs are appropriate because a legal malpractice case is actually a “suit-within-a-suit.” Specifically, Ammons argues that, because the common claim of the Medina Plaintiffs' is that they should have received more money for their personal injury suit against B.P., Ammons should be permitted to conduct IMEs to help determine the legitimacy of the claims. Ammons alleges that the examinations are appropriate because the Medina Plaintiffs have claimed that Ammons settled the case before their future medical care was resolved. Moreover, Ammons asserts that the psychological examinations were necessary because the Medina Plaintiffs collectively have asserted [post-traumatic stress disorder](#).

The Law

IMEs are regulated under [Texas Rule of Civil Procedure 204.1](#), which provides in relevant part:

(c) *Requirements for Obtaining Order.* 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.

*2 [TEX.R. CIV. P. 204.1\(c\)](#). Accordingly, good cause must be shown for issuance of the exams. Additionally, the mental or physical condition of the party must be in controversy or the party re-

sponding to the motion must have designated a psychologist as a testifying expert or disclosed a psychologist's records for possible use at trial. Good cause is shown when (1) the examination is relevant to issues in the case and that the examination will produce, or is likely to lead to, relevant evidence; (2) there is a reasonable nexus between the condition of the person to be examined and the examination sought; and (3) it is impossible to obtain the desired information through means that are less intrusive than a compelled examination. [Coates v. Whittington](#), 758 S.W.2d 749, 753 (Tex.1988).

The “in controversy” requirement varies according to whether physical or mental IMEs are at issue. Physical injuries have been held to be in controversy when a party (1) places the condition into controversy by employing it either in support of, or in defense of, a claim or (2) a party affirmatively shows that the condition is in controversy. [Williams v. Sanderson](#), 904 S.W.2d 212, 214-15 (Tex.App.-Beaumont 1995, no writ). Mental IMEs are subject to a more rigorous standard due to their sensitive nature. As noted in [Coates](#), “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.” [Coates](#), 758 S.W.2d at 752. Accordingly, routine allegations of mental anguish or emotional distress accompanying physical injury do not place mental condition “in controversy.” *Id.* at 753. To obtain an IME, the plaintiff must claim a mental injury exceeding the common emotional reaction to an injury or loss. *Id.*

Analysis

In their Ninth Amended Petition, the Medina Plaintiffs allege that the settlements were undertaken “during a time when many of the plaintiffs had not reached maximum medical recovery, nor had the status of their future medical care been resolved.” Moreover, the Medina Plaintiffs assert various allegations that necessarily place their physical status in issue. For example, Demetrio Diaz claims that Ammons did not fully investigate

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and assess his individual claim. Oscar Alanis alleges that Ammons improperly interjected himself in Alanis's medical care and treatment by urging neck surgery to increase the value of his case. Jose R. Arellano claims that Ammons told him that further surgery would not affect the value of his case.

In the Medina Plaintiffs' case against Ammons, physical IMEs will likely reveal relevant evidence because the present physical condition of the 55 plaintiffs will help determine the legitimacy of their claims. Furthermore, there is a reasonable nexus between the condition of the person to be examined and the examination sought based on the Medina Plaintiffs' suit-within-a-suit claim that they should have obtained more money from B.P. than what they procured in settlement. It is impossible to obtain the desired information through means that are less intrusive than a compelled examination. The Medina Plaintiffs have put their physical condition in issue in their Ninth Amended Original Petition. Accordingly, physical IMEs were properly issued.

*3 In contrast, some of the Medina Plaintiffs allege severe mental injury warranting an IME and others do not. Ammons attempts to persuade the Court that psychological IMEs are justified because the Medina Plaintiffs designated psychological experts and collectively asserted [post-traumatic stress disorder](#). In fact, the Medina Plaintiffs did not designate experts and did not collectively assert [post-traumatic stress disorder](#).

With respect to the expert designation, the Medina Plaintiffs responded to Request for Disclosure 194.2(f) with the following:

Plaintiffs, of course, designate themselves and the witnesses identified as individuals having knowledge of relevant facts who may be offering expert testimony in their area of knowledge. Plaintiffs will supplement pursuant to the Texas Rules of Civil Procedure and/or any Scheduling Orders entered in this case.

This information is not responsive to Rule

194.2(f), which demands the subject matter on which the expert will testify and the general substance of the expert's mental impressions and opinions and basis for them. Moreover, the referenced list of "witnesses identified as individuals having knowledge of relevant facts" does not supply this information.

In the suit at bar, the Medina Plaintiffs are not all claiming [post-traumatic stress disorder](#). [Post-traumatic stress disorder](#) justifies a psychological IME because it is the type of mental injury exceeding the common emotional reaction to an injury that was contemplated in *Coates*. See *Coates*, 758 S.W.2d at 752. Only a portion of the 55 Medina plaintiffs are asserting [post-traumatic stress disorder](#). Ammons contends, however, in the underlying suit against B.P., there was a collective claim for [post-traumatic stress disorder](#) in the settlement letter. Ammons has not included this letter in the appellate record.

Ammons notes that the Medina Plaintiffs' responses to interrogatories reference "depression" and "anxiety." Ammons then cites *Coates* to support his contention that depression and anxiety are "mental injuries above and beyond any emotional distress that accompanies personal injury." *Id.* In fact, "anxiety" is never mentioned in *Coates* and "depression" is not necessarily imbued with IME-triggering status. However, *Coates* articulates a standard by which depression and other mental disturbances can be assessed with regard to issuance of an IME. *Coates*, 758 S.W.2d at 753.

If the depression felt by the Medina Plaintiffs is the standard sort that, in all probability, a person would feel if he were injured by, and lost friends in, an explosion, no psychological IME is warranted. See *id.* at 752. However, if the depression exceeds common emotional reaction, is severe, and requires treatment by a professional, an IME is justified. See *id.* at 752-53. In the case at hand, it is impossible for this Court, based on the record provided, to determine which of the 55 Medina Plaintiffs assert mental injury to warrant psychological IMEs.

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*4 Under the standard promulgated in [Texas Rule of Civil Procedure 204.1](#), psychological IMEs are appropriate for some and inappropriate for some of the Medina Plaintiffs. The Medina Plaintiffs explicitly state that only a portion of them will assert deep-seated mental injury. Because no experts have been designated by the Medina Plaintiffs, [Rule 204.1\(c\)\(2\)](#) cannot justify IME issuance. Therefore, the propriety of psychological IMEs for the individual 55 Medina Plaintiffs can only be determined after a showing of (1) good cause and (2) mental condition in controversy. Based on the record before us, there is no evidence that any of the Medina Plaintiffs have placed their mental condition in controversy.

Conclusion

We hold that the trial court did not abuse its discretion by ordering physical IMEs for all of the Medina Plaintiffs. However, because the evidence before the district court showed that not all of the plaintiffs are asserting mental injury beyond the distress normally accompanying physical injury, the district court abused its discretion in granting a global IME to assess psychological health. We conditionally grant the petition for writ of mandamus for the portion of the Order granting IMEs for psychological health. The writ will issue only if the trial judge refuses to rescind the portion of the Order granting IMEs for psychological health.

Tex.App.-Houston [1 Dist.],2007.

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