0037-7516

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1979 UNION STREET CORPORATION dba
THE BLUE LIGHT



SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

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| Aaron Abel,<br><br>Plaintiff,<br><br>vs.<br><br>1979 UNION STREET CORPORATION; HO BET LEE, LAI FONG LEE, AND LEO MING LEE, as co-trustees of the Generation-Skipping Trust established under the HOM HON PING AND KAI TAI LEE REVOCABLE TRUST U/A dated December 2, 1976, as amended May 10, 1989; MAY LEE; LEO M. LEE; LEO Y. LEE; and DOES 1 to 50, inclusive,<br><br>Defendants. | Case No. CGC-15-543471<br><br>**DEFENDANT / CROSS-COMPLAINANT 1979 UNION STREET CORPORATION DBA THE BLUE LIGHT'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION FOR PROTECTIVE ORDER TO COMPEL CONTINUED INDEPENDENT MEDICAL EXAMINATION WITH SPECIFIED CONDITIONS OF PLAINTIFF AARON ABEL; REQUEST FOR SANCTIONS AGAINST PLAINTIFF AARON ABEL AND HIS ATTORNEY OF RECORD JOSEPH MAY [C.C.P. §2032.510]** |
| AND RELATED CROSS-ACTIONS. | DATE: May 24, 2016<br>TIME: 9:30 a.m.<br>DEPT: 302<br>TRIAL DATE: July 5, 2016 |

Defendant / Cross-Complainant 1979 UNION STREET CORPORATION dba THE BLUE LIGHT hereby respectfully submits the following reply to Plaintiff's opposition to its motion for a protective order to compel a continued IME:

1. The most glaring aspect of Plaintiff's opposition is what is not included in it (other than a glancing reference dropped in footnote 4): Golfland Entertainment Centers, Inc. v. Superior

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Court (2003) 108 Cal.App.4th 739. In paragraph 7 of Plaintiff's "response and objections," Golfland was prominently and unhesitatingly cited for the proposition that an independent medical examiner may not ask any questions about medical history or medical treatment. Now? It's an orphan. Plaintiff casually asserts in footnote 4 that "insofar as the case *permitted* questioning by the examiner, that case is completely inapposite as it involved a mental exam." While Plaintiff may now be forced to make such an argument, principles of judicial estoppel or good old fashioned consistency should prevent him from taking the position that the case does not even apply to physical examinations. This case does not involve a mental examination, and Plaintiff should never have relied upon Golfland in the first place if he did not believe it applied to physical examinations.

2. By citing Golfland, which Defendant extensively discussed in its moving papers, Plaintiff should reasonably have expected that he would be asked to provide the same information that the Court of Appeal in that case had specifically held that the examiner could ask.[1] It is not unreasonable to expect that Plaintiff's counsel was aware of the holding in Golfland and would act accordingly. Therefore, even if Plaintiff's "response" was a modification under C.C.P. §2032.230(a), that "modification" includes the subject matters that Golfland explicitly held must be allowed. So, at most, the only limitation would have been questions about the incident itself.

3. Plaintiff is incorrect when he asserts that Defendant did not object to paragraph 7 of the response to the IME notice. In fact, Mark Mittelman specifically stated in his meet and confer letter that he did not stipulate to, or agree with, the remaining objections (including paragraph 7) but that he would wait until they became an issue before seeking judicial intervention.[2] As set forth in the moving papers, Defendant's counsel has seen this boilerplate objection many times before and it has never been an impediment to a reasonably thorough independent medical examination.

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[1] Golfland found that the trial court's limitation on the examiner's questions about the plaintiff's medical history and medical treatment was an **abuse of discretion**. It is therefore difficult to see how Plaintiff interpreted that case to mean that he could refuse to answer any such questions.

[2] Mr. Mittelman's letter dated March 29, 2016 specifically states as follows: "With regard to the additional objections, responses and declinations to comply, we do not agree or stipulate to same, but if necessary will seek relief at a later date." Far from being a "waiver," this letter was consistent with an attorneys' professional obligation to conduct discovery in a reasonable manner and to avoid judicial intervention as much as possible.

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Defendant's counsel did not assume that Plaintiff would wholly object to any and all questions about his medical history and medical treatment. In fact, Defendant's counsel could reasonably assume, given Plaintiff's citation of Golfland, that Plaintiff would limit any objections to questions about the incident itself and to questions about irrelevant medical history and medical treatment. Accordingly, there is no credible basis to find that Defendant waived its right to an IME simply because it did not pursue a motion to compel compliance with the notice pursuant to C.C.P. §2032.250(a).[3] Furthermore, as Defendant argued in its moving papers, there is nothing in the statutory scheme that states that a defendant's failure to make such a motion is a waiver of the examiner's right to suspend the IME pursuant to C.C.P. §2032.510(e).

4. Plaintiff argues that Dr. Lundy did not have grounds to suspend the examination pursuant to C.C.P. §2032.510(e). First of all, regardless of whether Dr. Lundy used the word "suspend" or not is entirely beside the point. It is obvious from the context of what happened that he was not going to proceed with the examination due to the objections and that Dr. Lundy would inform Defendant's counsel of what happened and let Defendant's counsel pursue whatever legal remedies were available. Dr. Lundy is not a lawyer and he should not be expected to cite to the specific statute when he suspended the examination. It is absolutely clear that Dr. Lundy did not "conclude" the examination, as that would have been a nonsensical thing to do since there had been no examination at all. Since he did not "conclude" the examination, the only other thing he could have done is "suspend" it. As for whether there was a "disruption," Plaintiff's counsel clearly interfered with the conduct of the medical examination.[4] While he did not say that a physical examination could not be performed, he still disrupted the examination by refusing to allow his client

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[3] Plaintiff's footnote 1 is off base. A Separate Statement is only required when a motion is made pursuant to C.C.P. §2032.250(a). It makes no sense to require a separate statement for a motion that is based on the totality of the circumstances at the examination, as it does not fit the confines of California Rule of Court 3.1345. In any event, the memorandum of points and authorities would be identical to what would have been included in the separate statement.

[4] Plaintiff objects to Dr. Lundy's use of the term "disrupt" in describing what Plaintiff's counsel did in preventing any questions about medical history and medical treatment. The word "disrupt" is a common word in everyday use, and the fact that it is set forth in the statute does not mean it is verboten in an expert's declaration.

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to respond to questions about medical history and medical treatment.[5]

Unless the Court were to find that Dr. Lundy acted in bad faith,[6] and there are no grounds to find that he did, Plaintiff counsel's conduct justified the suspension of the IME. And even if Plaintiff is correct that there was no "disruption," the statute also permits suspension where the Plaintiff's counsel merely "participates in" the examination. Here, Plaintiff's counsel clearly "participated" by actively objecting to Dr. Lundy's questions. So any argument over whether there was a "disruption" is really academic.

5. Plaintiff's one substantive position is that an IME is limited to a physical examination, although he even hedges that position by stating that some oral questions are necessary to conduct any meaningful physical examination. However, Plaintiff's proposed limitation on the questions that can be asked is simply unreasonable. Any competent medical examiner needs a thorough description of the injuries, description of how they occurred, relevant medical history, and description of the

[5] Plaintiff's counsel uses the term "rebuff" to describe his objections to the questions about medical history and treatment. "Rebuffing" is another way of saying "disrupting." In both cases, the examiner is prevented from doing what he seeks to do. Plaintiff's counsel also states that an attorney attending the IME is "relegated to the status of a potted plant." That is an exaggeration. While the code does not permit the plaintiff's attorney to participate in or disrupt the examination, it does permit the plaintiff's attorney to seek a protective order when the examination is "abusive" or there are "unauthorized" tests or procedures. See C.C.P. §2032.510(d). What the plaintiff's attorney cannot do is prevent questions by the examiner and then say "but you may do the physical examination without those questions." The plaintiff's attorney must either allow the examination to proceed without his involvement (i.e. "the potted plant") **or** seek a protective order. The evident purpose of this limitation on the plaintiff's attorney is that the defendant's attorney cannot be present and any restriction on the examination must be dealt with by reference to the law. Perhaps the inconvenience of seeking a protective order was intended by the legislature to motivate the plaintiff's attorney to permit a reasonable examination.

[6] Defendant submits that bad faith is the limiting principle for suspensions of an IME. If there is evident bad faith, then it may be appropriate to deny a continued medical examination or to at least require reimbursement to the plaintiff for any out of pocket expenses.

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medical treatment. This seems rather obvious, and no parsing of the statute can change that.[7] Plaintiff's position is that all of this information is in his medical records and deposition testimony, and therefore no questions are needed. But as Defendant explained in its moving papers, the medical records ***may*** be incomplete or inaccurate. The deposition questions, as thorough as they may have been, may have missed key medical nuances that only a trained orthopedist would be able to pick up on. This is one of the main reasons a defendant hires a trained physician to conduct an IME in the first place. Plaintiff's counsel argues that the moving papers do not ***prove*** that there was incorrect or incomplete information or that any new information would have been learned by Dr. Lundy from his questions. But that is putting the proverbial cart before the horse. The only way for Dr. Lundy to know if the medical history and treatment is complete is to ask the questions himself and then compare them to the medical records and deposition testimony. He cannot know if something is missing from the medical records, or if something is inaccurate, unless he asks the plaintiff about it. It is of course possible that if there is a variance between what the plaintiff claims and what the medical records indicate that there can be impeachment at trial. Impeachment evidence is a well-accepted part of adversarial litigation. There is absolutely nothing sinister about it.

6. Plaintiff argues that Dr. Lundy should have proceeded with the IME even with his proffered limitations. But the Court should defer to Dr. Lundy's on the spot judgment, informed by his consultation with another IME physician,[8] that he could not do a thorough examination without the information. Dr. Lundy could reasonably conclude that he may not be able to determine such matters as alternative causation, extent of injury, and probability of future problems, without a

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[7] The statutory scheme makes it clear that the relevant distinction is between a "physical examination" and a "mental examination." See C.C.P. §2032.310(a). A "physical examination" pertains to physical injuries (such as a broken ankle). A "mental examination" pertains to psychological injuries and/or brain injuries. The difference does not have anything to do with whether the examiner can ask questions about the plaintiff's medical history and medical treatment. The legislature obviously believed that a defendant should have to obtain a court order before it could subject the plaintiff to psychological or cognitive examination, but that no order was needed for a "physical examination."

[8] Plaintiff objects to consideration of the statement of the other physician. The statement clearly goes to Dr. Lundy's state of mind as to why he suspended the IME, and is therefore admissible.

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complete medical history, and that his lack of such information could impact the type of testing he may have performed.[9] Reasonable time limits preclude the use of every single orthopedic test that is available, and therefore the information gained during the questioning may well dictate what tests are performed. While Defendant is not in any position to state that Dr. Lundy would have learned new information that would have caused him to perform certain additional tests, such proof should not be the standard that is applied here. The whole purpose of an IME is to have a trained physician use his medical training and experience to uncover that information. This is a ***discovery*** device after all!

7. Finally, Defendant contends that monetary sanctions should be imposed against Plaintiff and his Attorney of Record Joseph May since the very case they relied upon stands for the ***exact opposite*** of what they claimed. But in the unlikely event that the Court denies this motion, it should not impose any sanctions against Defendant and its counsel. Defendant has acted with substantial justification because Plaintiff's counsel refused to allow any questions about medical history and medical treatment and that is clearly "disruption" or at least a "participation in" the examination and there is no case that specifically holds that an IME is limited to the type of "touch and feel" process that Plaintiff is advocating.

For the reasons set forth above, and in the moving papers, Defendant hereby seeks a protective order compelling Plaintiff to submit to a continued IME with the specified conditions.

Dated: May 18, 2016

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[9] The Court can reasonably conclude that an orthopedic surgeon involved in medico-legal consulting who has done hundreds of IME's is aware of the standard in the industry for such medico-legal examinations, without a specific declaration by the physician to that effect.

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0037-7516

Abel v. 1979 Union Street Corporation, et al.
San Francisco County Action No. CGC-14-543471

**PROOF OF SERVICE**

I do hereby declare that I am a citizen of the United States employed in the County of Contra Costa, over 18 years old and that my business address is 575 Lennon Lane, Suite 150, Walnut Creek, California 94598. I am not a party to the foregoing action.

On May 18, 2016, I served the following document(s):

**DEFENDANT / CROSS-COMPLAINANT 1979 UNION STREET CORPORATION DBA THE BLUE LIGHT'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION FOR PROTECTIVE ORDER TO COMPEL CONTINUED INDEPENDENT MEDICAL EXAMINATION WITH SPECIFIED CONDITIONS OF PLAINTIFF AARON ABEL; REQUEST FOR SANCTIONS AGAINST PLAINTIFF AARON ABEL AND HIS ATTORNEY OF RECORD JOSEPH MAY**

☐ **(BY U.S. MAIL)** by placing a true copy of the aforementioned document(s) in a sealed envelope and deposited same in the United States mail at Walnut Creek, California, addressed as set forth below. I am readily familiar with this firm's practice of collecting and processing documents for mailing. Under that practice, it would be deposited with the U. S. Postal Service on that same day, with postage thereon fully prepaid, in the ordinary course of business. [Code of Civil Procedure §1013(a)(3)]

☐ **(BY FACSIMILE)** by causing such document(s) to be successfully transmitted via facsimile to the addressee(s) listed below. [Code of Civil Procedure §1013(e)(f)]

☐ **(BY OVERNIGHT DELIVERY)** by depositing a true copy thereof in a sealed envelope and depositing in a repository regularly maintained by an express service carrier with fees fully prepaid. [Code of Civil Procedure §1013(c)(d)]

☒ **(BY ELECTRONIC SERVICE)** by causing such document(s) to be electronically served though File & ServeXpress for the above-entitled case to the parties on the Service List maintained on the File & ServeXpress website for this case. The transmission was reported as complete on the date and time indicated on the File & ServeXpress Transaction Receipt.

I declare under penalty of perjury that the foregoing is true and correct. Executed on the date first set forth above, at Walnut Creek, California.

Katey Riordan

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