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Discovery - Physical Examinations - Schlagenhauf v. Holder

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I. Judicial Power to Order Examinations of Parties: Historical Background

The power of a court to require a party to submit to a physical or mental examination has always been subject to the closest scrutiny.[1] At common law, a court was virtually powerless to issue such an order with but few exceptions.[2] The impotency of the courts in this respect was apparent in the federal court system. The question of whether a federal court had the power to order a litigant to submit to a physical or mental examination reached the Supreme Court for the first time in 1891 in *Union Pacific Ry. Co. v. Botsford.*[3] The Court held that the district court was not possessed of the inherent power to make such an order without "warrant of law."[4] Reasoning that neither the Constitution, nor the laws of the United States, nor the common law granted such authority, the Court affirmed the denial of the motion for physical examinations.

The question was again presented to the Court in 1900 in *Camden & Suburban Ry. Co. v. Stetson.*[5] The Court distinguished *Botsford* on the grounds that the *Stetson* litigation had taken place in New Jersey, a jurisdiction wherein such an order of examination was authorized by state law. The Supreme Court held that the Rules Decision Act,[6] providing that state law "shall be regarded as rules of decision in trials at common law in courts of the United States . . . ."[7] bound federal courts to apply state law unless it be repugnant

[1] See, *e.g.*, Camden & Suburban Ry. Co. v. Stetson, 177 U.S. 172 (1900); Union Pacific Ry. Co. v. Botsford, 141 U.S. 250 (1891).

[2] 8 Wigmore, Evidence § 2220 (1961). Wigmore lists the following exceptions (instances):

> (A) The first of these instances was the *writ de ventre inspiciendo* available to facilitate the proof of heirship, whenever a supposititous birth was to be feared.
>
> (B) In the appeal of *Mayhem*—the historical predecessor of the modern action for personal injury—an inspection of the plaintiff's body by the court, jury and witnesses, to verify the maim was demandable by the defendant.
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> (C) On a bill for *divorce* or nullity, alleging *impotency* or like fact as the cause, it has always been regarded as lawful and proper to compel the party opponent to submit to inspection for ascertaining the fact. . . .
>
> (D) A person sought to be restrained as *insane* is customarily subjected to medical inspection by order of the court. . . .

It should be noted at this point that in instances A, B, and D it was the *defendant* who could have been compelled to submit to a medical examination.

[3] 141 U.S. 250 (1891).

[4] *Id.* at 256.

[5] 177 U.S. 172 (1900).

[6] R.S. 721 (1878), as amended, 28 U.S.C. § 1652 (1958).

[7] See note 6 *supra.*

to the laws or Constitution of the United States. Thus, the Court reasoned, since New Jersey law permitted such an examination, and the Rules Decision Act made this the rule in federal courts in New Jersey, a statute of the United States permitted such an examination. The rule enunciated in *Botsford* was left undisturbed.

In order that a uniform federal procedure be established throughout the several states in this respect, as well as others, Congress passed the Rules Enabling Act[8] in 1934 authorizing the Supreme Court to establish rules governing the procedure in the federal district courts. By sections 723(b) and (c) of this act, it was specifically provided that "[s]uch rules shall not abridge, enlarge, or modify any substantive right. . . ."[9] The Court soon thereafter promulgated the Federal Rules of Civil Procedure which became law on September 16, 1938.

Rule 35(a) of the F.R.C.P. authorizes the federal district courts to order medical examinations under prescribed conditions.[10] Thus the inherent power question was resolved and the necessity of looking to state law done away with.

The power vested in the district court by rule 35(a) was soon challenged, however, in *Sibbach v. Wilson*.[11] Mrs. Sibbach contended that the rule was invalid under sections 723(b) and (c) of the Rules Enabling Act in that it authorized an invasion of her substantive right of privacy. The Supreme Court, after concluding that Congress has the power to regulate the practice and procedure of the federal courts and may delegate such power to the Supreme Court, reasoned that the test of the validity of any of the rules under sections 723(b) and (c) was whether they embodied procedural[12] or substantive law. Applying this test, the Court held that rule 35(a) regulated procedure and was thus clearly within the ambit of the Rules Enabling Act.

Though the validity of the rule was established, its application to

[8] 48 Stat. 1064 (1934), as amended, 28 U.S.C. § 2072 (1958).

[9] See note 8 *supra*.

[10] FED. R. CIV. P. 35(a):

> Physical and Mental Examination of Persons. (a) Order for examination. In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

[11] 312 U.S. 1 (1941).

[12] The Court defined procedure as "the judicial process for enforcing rights and duties recognized by the substantive law and for justly administering remedy and redress for disregard or infraction of them." *Id.* at 14.

specific cases raised many questions based upon the requirements of the rule itself.

II. SCHLAGENHAUF V. HOLDER[13]

A Greyhound bus driven by petitioner Schlagenhauf collided with a tractor and a trailer injuring several of Schlagenhauf's passengers. Some of the injured passengers sued Greyhound, Schlagenhauf, Contract Carriers (the owner of the tractor) and National Lead (the owner of the trailer). Greyhound cross-claimed against Contract Carriers and National Lead alleging in essence that their negligence was the sole proximate cause of the damage to Greyhound's bus. Contract Carriers answered alleging that Schlagenhauf's negligence was the proximate cause of Greyhound's damage due to the fact that "Schlagenhauf was 'not mentally or physically capable' of driving a bus at the time of the accident."[14] Subsequently, both Contract Carriers and National Lead petitioned the district court to order him to submit to a series of examinations pursuant to rule 35(a). Prior to a ruling on this motion, National Lead cross-claimed against Greyhound and Schlagenhauf for damages to its trailer alleging that both were negligent in that they knew "the eyes and vision of the said Robert L. Schlagenhauf was [sic] impaired and deficient."[15] Petitioner was ordered to submit to a series of examinations by specialists, not only in the field of ophthalnology, but also in the fields of psychiatry, neurology, and internal medicine. He then sought a writ of mandamus from the court of appeals to have this order set aside. He alleged an usurpation of power by the district court in that the judge did not have the power under rule 35(a) to order a *defendant* to submit to such examinations, and that even if he had such power, petitioner's mental and physical condition was not "in controversy" and "good cause" had not been shown. The court of appeals determined the first two issues adversely to petitioner, not reaching the issue of good cause,[16] and denied mandamus.[17]

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[13] 379 U.S. 104 (1964).
[14] *Id.* at 107.
[15] *Id.* at 108.
[16] However, Judge Kiley stated in his dissent:

> It seems to me the constitutional right of personal privacy should not be transgressed in search for truth under Rule 35 in civil cases until the trial court has by inquiry established a sufficient basis upon which to exercise discretion as to whether an order for physical and mental examination is the only adequate method of reaching the truth about a matter in controversy and whether the truth sought is relevant. That was not done here. 321 F.2d 43, 52 (7th Cir. 1963).

[17] *Ibid.*

On certiorari, the Supreme Court stated that in determining whether or not respondent abused his discretion under the rule by ordering a defendant to submit to medical examinations, it was within the province of the court of appeals to determine all the issues presented by petitioner's application for mandamus "to avoid piecemeal litigation and to settle new and important problems."[18] The Court then decided that instead of remanding the case to the court of appeals to determine the issue of good cause, it would determine all the issues alleged and formulate necessary guidelines for the application of rule 35(a) in the future.[19]

The Court held that any party to an action is subject to the provisions of rule 35(a), whether or not he be an opponent *vis-à-vis* the movant. Further, the Court held that unless the party sought to be examined asserts his own physical or mental condition as a defense to or in support of his claim, the burden rests upon the movant to show that the party's physical or mental condition is "in controversy" and that "good cause" exists for such examination. Applying these standards to the principal case, the Court determined that petitioner was a party within the scope of the rule, but that the movants under the rule had not made an affirmative showing that petitioner's physical and mental condition was in controversy nor that good cause existed for such examinations.[20] The case was then remanded to the district court in order that the examinations which it had ordered could be reconsidered "in light of the guidelines . . . formulated. . . ."[21]

[18] 379 U.S. at 111. It is well settled that mandamus, being an extraordinary remedy, will issue only upon a determination of an abuse of discretion or usurpation of judicial power. Bankers Life & Casualty Co. v. Holland, 346 U.S. 379 (1953).

The Court held in the instant case that in order to determine whether or not there had been an abuse of discretion the court of appeals should have determined not only whether Schlagenhauf was a party under the rule but also whether good cause for the examinations was shown and whether the party's physical and mental condition was in controversy. This is true because without the satisfaction of all these requirements under the rule, the trial court would be powerless to order a medical examination under rule 35(a).

Mr. Justice Harlan, however, expressed his fear that "this decision may open the door to the extraordinary writs being used to test any question of 'first impression' if it can be geared to an alleged lack of 'power' in the district court." 379 U.S. at 129.

In effect, he believes that the Court is going behind the "correctness" of the district court's order rather than, as he considers proper, merely determining whether the district court had the power to issue the order. *Cf.* Penn. Ry. Co. v. Kirkpatrick, 203 F.2d 149 (3d Cir. 1953).

[19] The Court cited the following from Los Angeles Brush Mfg. Corp. v. James, 272 U.S. 701, 706 (1927), stating: "[W]e think it clear that where the subject concerns the enforcement of the . . . rules which by law it is the duty of this court to formulate and put in force . . . it may . . . deal directly with the District Court. . . ."

[20] The Court did, however, imply that the allegations concerning Schlagenhauf's defective vision, coupled with affidavits to this effect, would have been sufficient to support an order requiring Schlagenhauf to submit to a visual examination, if such had been the only examination ordered. 379 U.S. at 121.

[21] *Id.* at 122.

III. Rationale of the Decision

In deciding this case, the Court considered the three basic requirements of rule 35(a): (1) the "party" requirement, (2) the "in controversy" requirement, and (3) the "good cause" requirement.

A. *Party*

The lower courts have not always been consistent in their solutions to the problems presented by the party requirement. It has been held, for example, that a plaintiff's father, who was also plaintiff's guardian ad litem, was not a party to the action within the scope of the rule and thus could not be compelled to submit to an examination.[22] On the other hand, it has been held that in a suit for child support, plaintiff's child was a party to the action on the theory that the child's interest, as well as that of the mother, was before the court.[23]

The Advisory Committee on Rules for Civil Procedure tried, in effect, to crystallize this latter holding into law by a proposal in 1955 which sought to include within the definition of the term "party," as used in rule 35(a), blood relatives and agents of the parties.[24] This proposal was not adopted by the Supreme Court. The Court's refusal indicates that the term party includes only actual litigants.[25]

Under *Sibbach*, it was made quite clear that a plaintiff may be required to submit to a physical or mental examination under rule 35(a).[26] Until *Schlagenhauf*, however, there had been no reported federal court decision to the effect that a defendant may be so required. The Court in the instant case specifically held that a defendant is no less a party than a plaintiff within the purview of rule 35(a) and is therefore subject to its provisions, presuming, of course, that the other requirements of the rule are met. But the Court went even further in establishing the party guideline by holding that the party

[22] Fong Sik Leung v. Dulles, 226 F.2d 74 (9th Cir. 1955).

[23] Beach v. Beach, 114 F.2d 479 (D.C. Cir. 1940).

[24] Advisory Committee on Rules for Civil Procedure, Report of the Proposed Amendments to the Rules of Civil Procedure for the United States District Courts 41 (1955).

[25] However, a non-party's "privilege against invasion of his body is personal to him, and he is free to waive it if he chooses." Kropp v. General Dynamics Corp., 202 F.Supp. 207, 208 (E.D. Mich. 1962).

[26] However, it should be noted that the decision in *Sibbach* in no way precluded a defendant from being held subject to the provisions of rule 35(a). In this respect *Sibbach* simply held that a *party* could be subjected to medical examinations pursuant to 35(a). It just so happened that the party in *Sibbach* was a plaintiff. 312 U.S. 1 (1941).

whose medical examination is desired need not be an opponent *vis-à-vis* the movant. Thus, whether or not the movant under the rule has filed pleadings against the person whose examination is sought is irrelevant so long as that person is an actual litigant in the action.

B. *In Controversy*

There has been little doubt that a party's physical or mental condition is "in controversy" if that party asserts his condition as a defense to, or in support of his claim.[27] Problems have arisen, however, when another litigant seeks to put a party's physical or mental condition in controversy. This is illustrated by *Wadlow v. Humberd*,[28] wherein plaintiff alleged that defendant had made libelous statements concerning plaintiff's son's physical condition. Defendant pleaded truth as a defense and moved under rule 35(a) that the child submit to a physical examination in order to prove that his statements were in fact, true. The court, after stating that the issues presented were whether defendant made the alleged statements and whether such statements were true, found by some sort of perverse logic that the mental or physical condition of the son was not in controversy within the meaning of rule 35. The court concluded: "Obviously the Rule looks to a situation in which the mental or physical condition of a party shall be immediately and directly in controversy and not merely in controversy, incidentally and collaterally."[29] *Schlagenhauf* disposes of such contrived and highly artificial distinctions.[30] In *Schlagenhauf*, the parties had included in their pleadings statements[31] to the effect that petitioner's negligence was the proximate cause of the collision. The Court held that these were merely conclusory statements and could not alone put petitioner's mental or physical condition in controversy. In addition, the Court would require an affirmative showing that the party's physical or mental condition was in controversy as to each requested examination, which showing, the Court stated, "could be made by affidavits or other usual methods short of a hearing."[32] It follows, then, that the distinction of whether a party's physical or mental condi-

[27] Sibbach v. Wilson, 312 U.S. 1 (1941); *cf.* Coca-Cola Bottling Co. v. Torres, 255 F.2d 149 (1st Cir. 1958).

[28] 27 F. Supp. 210 (W.D. Mo. 1939).

[29] *Id.* at 212.

[30] However, Mr. Justice Douglas in his dissent uses language reminiscent of that in *Wadlow*. 379 U.S. at 124.

[31] See text accompanying notes 14 and 15 *supra*.

[32] 379 U.S. at 119.

tion is immediately or merely incidentally in controversy is irrelevant if the movant makes an affirmative showing that discovery of that party's condition is necessary to the determination of contested issues.

C. *Good Cause*

As the Court took pains to explain, an examination of the other Federal Rules of Civil Procedure relating to discovery reveals that the good cause requirement is contained only in rules 34 and 35. Insofar as the other discovery rules are concerned, "[t]he scope of discovery . . . is limited by Rule 26(b)'s provision that 'the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action'. . . ."[33] The Court's holding makes it quite clear that something more than mere relevancy to the subject matter of the action must be shown in order to obtain a medical examination under the rule.[34] Specifically, the Court requires an affirmative showing that good cause exists as to each requested examination.[35] This showing can apparently be made in the same manner and at the same time that the movant under the rule makes an affirmative showing that the party's physical and mental condition are in controversy since these two requirements are so thoroughly interrelated.[36] Ultimately, however, after motion for medical examinations, and counter motions, it rests solely within the discretion of the court to grant such examinations.[37]

IV. Conclusion

It is settled that a defendant as well as a plaintiff is within the purview of rule 35(a). This holding is seemingly grounded upon a theory that all parties to an action should have equal recourse to the discovery devices provided by the Federal Rules of Civil Procedure. Nevertheless, in so interpreting the rules, the Court carefully restricted court-ordered physical and mental examinations by requiring that, unless a party asserts his own physical or mental condition in support of or in defense of his claim, a movant under the rule must make an affirmative showing that the party's physical or

[33] *Id.* at 117.

[34] The Court adopts, insofar as the good cause requirement is concerned, the language of Guilford National Bank v. Southern Ry. Co., 297 F.2d 921 (4th Cir. 1962), wherein the "good cause" requirement of rule 34 was thoroughly considered.

[35] "[I]t will usually be easy enough to make such a showing where the physical or mental conditon of the party is actually 'in controversy'. . . ." 4 Moore, Federal Practice § 35.04 (2d ed. 1963).

[36] See text accompanying note 32 *supra.*

[37] Bucher v. Krause, 200 F.2d 576 (7th Cir. 1952), *cert. denied,* 345 U.S. 997 (1953), *petition for rehearing denied,* 346 U.S. 842 (1953).