NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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August 4, 2023

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Re: ***Rosa Lynne Van Buskirk v. Daniel O'Meara***
Case No. CL–2022–5516

Dear Counsel:

In this negligence/personal injury case, the defendant desires to conduct a routine Rule 4:10 medical examination of the plaintiff to verify the injuries the plaintiff alleges. VA. SUP. CT. R. 4:10. The plaintiff wants the Court to order the examining doctor to permit the plaintiff's husband to observe the examination. The defendant objects. The issue before the Court is whether a third-party may attend the examination over the objection of the defendant.

OPINION LETTER

Parties raise this issue so commonly that it is surprising Virginia circuit courts rule so inconsistently on the question and that no appellate authority exists to directly guide a trial court on how to rule.

The Court generally holds no party-selected third-party may observe a Rule 4:10 medical examination, and no party may record the examination, over the objection of the other party. The Court retains the discretion, however, to select the proposed examiner. It may also, in rare cases, permit observers and recordings if necessary for an accurate examination or for the health of the examined person. In the present case, the plaintiff failed to present the rare exception to the general principle, so the Court will deny her motion to permit her husband to observe her medical examination.

I. FACTUAL OVERVIEW.

Plaintiff Rosa Lynne Van Buskirk ("Plaintiff") alleges that Defendant Daniel O'Meara ("Defendant") negligently reversed his vehicle into Plaintiff's vehicle, injuring her neck, throat, back, and left hip. Plaintiff's husband, Raymond Van Buskirk, was also involved in the accident, and separately sued the Defendant.[1]

Defendant desires to conduct a medical examination of Plaintiff per Rule 4:10. Plaintiff does not object, but the parties dispute one aspect of the examination conditions.

Plaintiff wants her husband to silently observe her examination, asserting his presence would give her comfort. She is 71 years old and proffers that an examination of her hips and pelvis by a doctor other than her own doctor, employed by the opposing party, places her in a vulnerable situation. Under normal circumstances she could insist that her doctor permit her husband to observe her examination. She does not believe that Rule 4:10 should change this. As to any claim that her husband has a bias because he has his own lawsuit against Defendant, Plaintiff reminds everyone that Defendant may cross-examine her husband on that issue.

Defendant objects to a plaintiff-selected third party attending the medical examination. He argues that Plaintiff is an adult and there are no extenuating circumstances necessitating a witness to the medical examination. Defendant complains it would be unfair that while he could not send an observer to Plaintiff's examination by her own doctor, she could send an observer to the Rule 4:10 examination. Specifically objecting to Plaintiff's husband observing the examination, Defendant notes that Mr. Van Buskirk is not a medical professional, is biased due to his own lawsuit against Defendant, and that the Rule on Witnesses[2] would preclude him from sitting in on discovery proceedings, including this pretrial medical examination.

II. ANALYSIS.

Va. Sup. Ct. R. 4:10 states, in relevant part:

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[1] The companion case is *Raymond Van Buskirk, v. Daniel O'Meara*, CL-2022-5518.
[2] VA. R. EVID. 2:615.

> "When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending, upon motion of an adverse party, may order the party to submit to a physical or mental examination by one or more health care providers, as defined in § 8.01-581.1, employed by the moving party or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties, must specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made, and must fix the time for filing the report and furnishing the copies."

No Virginia appellate opinions express a rule or test to guide a trial court on whether to permit observers at a Rule 4:10 examination. The parties provided the Court with a stack of orders they collected from circuit courts throughout Northern Virginia variously denying observers and permitting them. There is little consistency. The Circuit Court of Fairfax, alone, entered four orders denying observers and three orders permitting them. In the absence of direct, controlling legal authority—or even much local persuasive authority, the Court first looked to courts who considered the issue from other jurisdictions.

A. Federal Courts Generally Do Not Permit Third Parties at Examinations Pursuant to their Version of Rule 4:10.

Virginia courts look to federal case law when interpreting discovery rules closely resembling the Federal Rules of Civil Procedure. *RBD of Virginia, LLC v. Bavely*, 2022 WL 6750087 *3 (Fairfax Oct. 7, 2022), citing *Transilift Equipment, Ltd. v. Cunningham*, 234 Va. 84, 90-91 (1987); *Horne v. Milgrim*, 226 Va. 133, 137 (1983); *Rakes v. Fulcher*, 210 Va. 542, 545-46 (1970).

The federal analogue to Rule 4:10 is Rule 35(a) of the Federal Rules of Civil Procedure. It reads, in relevant part:

> "(1) *In General.* The court where the action is pending may order a party whose mental or physical condition—including blood group—is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control. (2) *Motion and Notice; Contents of the Order.* The order: (A) may be made only on motion for good cause and on notice to all parties and the person to be examined; and (B) must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it."

Most federal courts do not permit an attorney to observe the examination of the attorney's client, nor do they permit unobtrusive recordings by the examinee. *Holland v. United States*, 182 F.R.D. 493, 495-96 (D.S.C. 1998). "While federal courts in some instances have permitted an

observer in a Rule 35 examination, '[t]he majority rule adopted by the federal courts is that the court may, and often should, exclude third-party observers, including counsel, from medical or psychiatric evaluations.'" *Flack v. Nutribullet*, 333 F.R.D. 508, 517 (C.D. Cal, 2019) (quoting *Smolko v. Unimark Lowboy Trans., LLC*, 327 F.R.D. 59, 61 (M.D. Penn., 2018)). "'[M]ost courts start with a presumption against the presence of third persons, and then go on to consider whether special circumstances have been demonstrated in a particularly (sic) case.'" *Smolko*, 327 F.R.D. at 62 (quoting *Favale v. Roman Catholic Diocese of Bridgeport*, 235 F.R.D. 553, 556 (D. Conn. 2006)). "[F]ederal courts have found that the party seeking to have the observer present bears the burden of demonstrating "good cause" for the request under Rule 26(b), Fed.R.Civ.P., as the presence of a third party is not typically necessary or proper." *Tarte v. U.S.*, 249 F.R.D. 856, 859 (S.D. Fla. 2008) (citing *Schlunt v. Verizon Directories Sales-West, Inc.*, 2006 WL 1643727, *4 (M.D. Fla. 2006)). *See also Hill v. Jetblue Airways Corporation*, 2021 WL 3164527 (E.D. Cal. 2021) ("plaintiffs have failed to make a showing as to why any plaintiff—let alone all plaintiffs—require emotional support during these examinations or why these examinations should be recorded").

However, some federal courts have found there are "exceptional" cases in which an observer may be allowed to attend a Rule 35 medical examination. *Flack*, 333 F.R.D. at 518. Such circumstances include "(1) fear that the examiner, as a person retained by an opponent, will improperly conduct the examination to obtain admissions or other damaging concessions from the examinee; (2) fear that the examiner will utilize improper, unconventional, or harmful examination techniques; and (3) a need for emotional support or comfort during the examination." *Id.* "Nonetheless, the mere existence of one or more of these factors is not, by itself, dispositive of whether an observer or recording device is appropriate in a particular case. Even where legitimate concerns exist, many courts have emphasized that there are 'other, less drastic means of addressing them…'" *Id.*

B. State Courts are Mixed on Whether to Permit Third Parties at Examinations Pursuant to their Versions of Rule 4:10.

State courts across the United States have also examined and explored whether their specific rules concerning medical examinations allow a third-party observer to attend the medical examination, with diametrically opposed results and findings.

Some states permit observers. *See, e.g., DiFiore v. Pezic*, 254 N.J. 212 (2023) (permitting third party observers and encouraging examination recordings with the burden on the defense to show why either or both should not happen); *Langfeldt-Haaland v. Saupe Enterprises, Inc.*, 768 P.2d 114484 (Alaska 1989) (permitting a party's lawyer to attend the examination).

Other states ban observers. *See, e,g., In Re Society of Our Lady of Most Holy Trinity,* 622 S.W.3d 1 (Tex. 2019) (finding that the trial court abused its discretion when ordering that the medical examination be recorded, finding that there was no good cause for such recording); *Metropolitan Property & Cas. Ins. v. Overstreet*, 103 S.W.3d 31, 38 (Ky. 2003) (finding that an "external presence" may be ordered at a medical examination only upon a showing of good cause by the examinee).

C. Virginia Courts are Mixed on Whether to Permit Third Parties at Rule 4:10 Examinations.

Virginia's circuit courts, without issuing opinion letters easy for litigants to find, routinely enter orders alternately allowing or disallowing third parties or recordings at Rule 4:10 examinations. In the present case, the parties offered four prior Fairfax Circuit Court orders banning witnesses[3] and three Fairfax Circuit Court orders permitting witnesses.[4] Fairfax is not unique. The parties offered orders from other Virginia circuit courts with similarly mixed rulings. No Virginia appellate case law directly examines Rule 4:10 as applied to requests for third-party examination observers to attend the examination.

A reason for lack of appellate authority and the variable circuit court rulings may be that modern personal injury litigation practice somehow sharply deviated from the intent of Rule 4:10. Today, parties typically view the Rule 4:10 examination as the opportunity for a defendant-selected doctor to examine the plaintiff. Thus, the defendant hand-picks and pays the fees for the doctor, and the plaintiff submits to, essentially, the defendant's expert. One circuit court effectively approved this practice unless the plaintiff could raise a valid objection. *Young v. Food Lion Store Number 622,* 70 Va. Cir. 313 (Portsmouth 2003). Understandably, some plaintiffs worry that a doctor both selected and funded by the defendant may have a conscious or implicit bias in favor of the defendant and will intentionally or unintentionally report the exam results in the defendant's favor. Thus, plaintiffs seek to blunt this potential bias by introducing a third-party observer to the examination or by recording the examination so that such bias may be exposed.

However, this modern procedure is not what the Rule establishes. If parties followed the Rule as the Supreme Court of Virginia interprets it, much of a plaintiff's concern regarding a biased examiner would be alleviated. Contrary to modern practice, *the defendant* does not select the Rule 4:10 examiner; *the Court* makes the selection.[5] *Virginia Linen Service, Inc. v. Allen*, 198 Va. 700, 703 (1957); *Fields v. Walke*, 1 Va. Cir. 96 (Richmond 1969) (choosing the defense-requested physician but recognizing the trial court's power to reject defense-requested physicians). There are many ways the Court may appoint the physician. "If the court wishes it may require counsel to make suggestions or furnish a list of qualified persons. The court may investigate their fitness and their availability, then make its selection and name its choice in its

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[3] *Lisa R. Dalton v. Gregory J. Sayadian*, CL-2015-16761 (Fairfax May 3, 2017) (memorandum order); *Michelle Lynn Cornett v. Timothy O'Connor*, CL-2020-14256 (Fairfax Jan. 27, 2023); *Rachel Mendelowitz v. Chenyang Fu*, et. al., CL-2021-5670 (Fairfax Nov. 18, 2022); *Emma Isabel Heisey v. James Andrew Ross*, CL-2021-11546 (Fairfax Dec. 2, 2022).

[4] *Dobrila Lojanica v. Hannah Williams Beal*, CL-2014-3126 (Fairfax Jun. 23, 2016); *Peggy Rosas v. William Cusmano, Administrator, et. al.*, CL-2008-10613 (Fairfax Mar. 12, 2010); *Yang-Hsiu Lin v. Paramita Biswas*, CL-2012-3413 (Fairfax Nov. 5, 2013)

[5] The Court is not required to order an examination, even if desired by a party. *Virginia Linen*, 198 Va. at 703 ("The rule says the court 'may order' the examination. Whether it will do so is in the sound judicial discretion of the court on the [good cause] showing made."); *Richter v. Manning*, 2013 WL 1897657 *6 (Va. App. May 7, 2013) (unpub.) (affirming trial court for denying Rule 4:10 examination where the examination could cause harm to the examinee and was unnecessary).

order." *Virginia Linen Service,* 198 Va. at 703. The moving party (usually the defendant) still pays for the examination. *Id.*; VA. SUP. CT. R. 4:10.[6] However, the doctor may feel more independent knowing that his or her selection or future opportunities to be selected does not depend on the defendant's lawyer.

Because modern litigants do not follow *Virginia Linen* procedure and accept it as given that the examining doctor will be selected by the defendant, plaintiffs make requests like Plaintiff in the present case does to offset the disadvantage of being examined by a doctor perceived to be partisan.[7] For example, in *Thorpe v. Poore*, 83 Va. Cir. 453 (Hanover 2011), the plaintiff agreed to a medical examination, but the parties disagreed on whether a videographer could be present, along with an observer. The Court granted plaintiff's request to have both because the examination was part of the adversarial process. It wrote, "[t]he examination itself is a part of the adversarial process and does not give rise to a duty of care between the examiner and the Plaintiff beyond the most rudimentary, i.e. 'to do no harm.'" *Id.* at *1. This ruling is reasonable in the context of an examination by a doctor the defendant unilaterally chooses. Under this modern practice, the examination does have an adversarial flavor. However, under *Virginia Linen* circumstances, where the examining doctor is not selected by the defendant, the doctor has no motivation to evaluate a subject in favor of one side or the other, the adversarial atmosphere is diminished, and the plaintiff no longer needs protections from potential partisanship.

The Court, naturally, must follow the Supreme Court's interpretation of its own Rule 4:10. Because our high court interpreted its Rule differently than most federal courts or the courts of other states interpreted their similar rules, the Court must be faithful to our Supreme Court's interpretation and will not follow nonbinding authority from those other jurisdictions.

The Court recognizes that faithfully applying *Virginia Linen* could burden trial courts if deadlocking parties routinely call on judges to select examiners. Naturally, our circuit courts are up to challenges like this. *Cf., Commonwealth v. Barney*, 884 S.E.2d 81, 92, n.8 (Va. 2023). Of course, the burden may never come or may be offset by the reduction of current routine motions to permit third parties or recordings. Possibly, once parties internalize *Virginia Linen* and their respective prerogatives, they may be able to negotiate their own terms for Rule 4:10 hearings. Nothing in this Court's opinion prevents parties from negotiating and agreeing to examination terms. Conceivably, for example, a defendant may really want a particular doctor to perform an examination, and the plaintiff could be satisfied with that doctor if given the ability to record the examination. That could be the fodder for feeding a compromise between the parties.

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[6] Rule 4:10 reads that the examiner be "employed by the moving party," suggesting that the moving party gets to choose the doctor. However, *Virginia Linen* interpreted the phrase "employed by" to mean only who pays for the doctor. *Virginia Linen,* 198 Va. at 703 ("The Rule says the person named in the order shall be employed by the moving party. That means he is to be paid by the moving party and it is the business of the court to arrange about that.")

[7] One circuit court declared, without citation, that *Virginia Linen* is outdated. *Fisher v. Southern Railway Co.*, 10 Va. Cir. 4 (Norfolk 1985). In the absence of a citation or logic, this Court does not agree. At the time of *Virginia Linen*, Rule 3:23(d) was the predecessor to Rule 4:10 and both rules are almost identical. *Virginia Linen,* 198 Va. at 702, n.1.

D. Since *Virginia Linen* Provides Parties Access to Neutral Examiners, No Special Protections to Examined Parties is Needed.

Plaintiff, as the party seeking the third-party observer to the examination, has the burden to prove that, under the specific facts and circumstances of this case, the third-party is needed, or the facts of this case and examination are so unique that the Plaintiff is especially vulnerable and needs extra protection. Plaintiff states she is a 71-year-old woman, an orthopedic examination occurring on her hips places her in a vulnerable position, and she needs her husband, or another third-party, to attend the examination to provide emotional support and comfort. Beyond those allegations, Plaintiff provides no other information concerning why a third-party observer is necessary in this case.

Presumably, Plaintiff is satisfied with the doctor selected by Defendant. Otherwise, she would not agree to his selection. Therefore, a witness is unnecessary to provide her comfort that the examination will be proper. As to personal comfort, it is common for physicians to examine patients alone. There are often salutary reasons for doing so. A person may be more candid with a doctor on some issues if a spouse is not present. A third-party may provide distraction to the party being examined to the degree that it spoils the examination. The third-party may cause the doctor or examinee to behave differently than he or she otherwise would, negatively affecting the examination. Even outside of the litigation context, it is unnatural for a patient to record an examination or to bring a witness. And, with a doctor not naturally aligned with one party per *Virginia Linen*, it is unnecessary.

In the present case there are no unusual circumstances to consider for an exemption to the general rule that third parties or recordings are banned from Rule 4:10 examinations. There are no allegations that Dr. Ward performed biased tests in the past. There is no concern that Plaintiff will be unconscious during any part of the examination, unable to later recount what happened. There is no need for an interpreter so that the Plaintiff can understand what is occurring. Plaintiff did not show a necessity for a third-party observer at, or a recording of, the examination.

To be clear, however, nothing in this opinion bars *a physician* on his own volition from recording an examination, or bringing a nurse or chaperone into the examination, if done so in the ordinary course of the practice of medicine.[8] There may be good reasons for a doctor to do so. However, a party may not unilaterally choose to bring a third party or to record the examination over the objection of the other party.

III. CONCLUSION.

The Court will grant Defendant's motion for a Rule 4:10 examination. The Court will deny Plaintiff's request to have her husband, or another third-party observer, present at the examination. Plaintiff may not record the examination. Generally, no party-selected third-party may observe a Rule 4:10 medical examination, and no party may record the examination, over

[8] Naturally, the parties may ask the physician about the presence of a witness or a recording, and the physician must answer.

the objection of the other party. Nothing proffered in the present case presents the rare exception to this general rule to permit observers and recordings for an accurate examination or for the health of Plaintiff.

The parties agreed to the examining physician and to the time and place of the examination. Considering the Court's reexamination of modern personal injury discovery practice per *Virginia Linen*, Plaintiff has leave to change her mind on the acceptability of Dr. Kenneth G. Ward and request that the Court select the examining physician pursuant to a procedure consistent with *Virginia Linen*.

An appropriate Order is attached.

Kind regards,

[redacted]

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

Enclosure

OPINION LETTER

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

ROSA LYNNE VAN BUSKIRK, *Plaintiff,* v. DANIEL O'MEARA, *Defendant.*	CL-2022-5516

ORDER

THIS MATTER came before the Court July 28, 2023, on Defendant's Motion for a Rule 4:10 Medical Examination of Plaintiff. It is

ADJUDGED for the reasons set forth in the Opinion Letter issued this day, which is incorporated into this Order by reference, Defendant's Motion should be granted. Therefore, it is

ORDERED Defendant's Motion for a Rule 4:10 Medical Examination of Plaintiff is GRANTED. Except as provided herein, Plaintiff is to attend the medical examination at the agreed upon time and place, with the agreed upon doctor. Plaintiff is not permitted to bring a third-party observer to the examination, or to record the examination. Plaintiff may file with the Court a request for selection of an examining physician pursuant to *Virginia Linen Service, Inc. v. Allen*, 198 Va. 700, 703 (1957) on or before August 7, 2023. If such request is filed, the agreed examination previously agreed to by both parties shall be suspended pending further action by the Court. Both parties have leave to request modification to the existing Scheduling Order if such request is filed with the Court on or before August 7, 2023.

THIS CAUSE CONTINUES.

[redacted]

Judge David A. Oblon

AUG 0 4 2023

Entered

PURSUANT TO RULE 1:13 OF THE RULES OF THE SUPREME COURT OF VIRGINIA, ENDORSEMENT OF THIS ORDER IS WAIVED BY DISCRETION OF THE COURT. ANY DESIRED ENDORSEMENT OBJECTIONS MAY BE FILED WITHIN TEN DAYS.