

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JOHN C. DEPP, II

Plaintiff,

v.

AMBER LAURA HEARD

Defendant.

Civil Action No.: CL-2019-00029

JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

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**PLAINTIFF'S OPPOSITION TO DEFENDANT'S RULE 4:10 MOTION
FOR AN INDEPENDENT MENTAL EXAMINATION OF PLAINTIFF**

PRELIMINARY STATEMENT

This is a defamation case in which Mr. Depp does not allege that he suffers from any mental disorder or condition. Thus, Mr. Depp's mental condition is not "in controversy" within the meaning of Rule 4:10(a). Nor does "good cause" exist under the rule for an IME of Mr. Depp. Ms. Heard's only proffer for an IME is to have an additional discovery tool to challenge Mr. Depp's credibility regarding events that allegedly occurred more than three and a half years ago. This is an insufficient basis to justify the unwarranted intrusion of an IME, and the Court should deny Ms. Heard's Motion. ¹

ARGUMENT

Under Rule 4:10, "[w]hen the mental or physical condition ... of a party ... is in controversy, the court ... 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 ... employed by the moving party ... only on motion for good cause shown." "But the next sentence limits the Court's discretion by stating that: "The order may be made *only* on motion *for good cause shown*" *Fisher v. S. Ry. Co.*, 10 Va. Cir. 4, at *1 (1985) (emphasis in original). Thus, as the moving party, Ms. Heard bears the burden to prove Rule 4:10's "in controversy" and "good cause" requirements.

I. Because Mr. Depp Is Not Alleging Harm Based On A Specific Physical or Mental Injury, Ms. Heard's Motion Fails to Satisfy the "In Controversy" and "Good Cause" Requirements Imposed by Rule 4:10.

The purpose of Rule 4:10 "is to secure or preserve to a defendant the right, in a proper case, to have the injured person examined." *Virginia Linen Services v. Allen*, 198 Va. 700, 703

¹ It is preposterous notion that an IME now would shed light on Mr. Depp's mental state at the time of Ms. Heard's abuse hoax back in 2016. Ms. Heard's effort treads a well-worn path of victim blaming using the pretext of mental health. By Ms. Heard's tortured credibility logic, current IME's would also be warranted for all the dozens of eyewitnesses who have attested to the various facets of the hoaxes they witnessed years ago.

(1957) (addressing Rule 4:10's predecessor). Mr. Depp does not allege a specific cause of action for intentional or negligent infliction of emotional distress; does not assert that Ms. Heard's actions caused him a specific psychiatric injury; and does not claim that Ms. Heard's actions caused him to experience unusually severe emotional distress.² Ms. Heard effectively concedes this, and instead requests an IME on the empty assertion that it is somehow "central to the truth or falsity of Ms. Heard's statements at issue and to Ms. Heard's credibility and Mr. Depp's lack of credibility." Def.'s Mem. I/S/O Rule 4:10 Mot. ("Mem.") at 3. In attempting to use a medical expert to challenge Mr. Depp's credibility, Ms. Heard ignores her obligation to show that Mr. Depp's mental condition is "in controversy" for the purposes of Rule 4:10 because she is not using the IME to verify Mr. Depp's actual harm. Indeed, Ms. Heard cannot—and did not—cite a single case addressing Rule 4:10(a) in support of her own IME request, because doing so would have highlighted the distinction between her request's improper basis challenging credibility, on one hand, and successful Rule 4:10 motions challenging a plaintiff's actual harm, such as in personal injury cases, on the other.³

Ms. Heard's proffer not only fails to satisfy Rule 4:10's "in controversy" requirement, but also fails to provide the requisite good cause. Indeed, "[a] party's mere assertion that a discovery tool 'is necessary for a movant to investigate fully and prepare his case is clearly

² In his complaint, Mr. Depp alleges damages for "emotional distress". Courts routinely reject arguments suggesting that these type of "garden variety" damages give rise to a proper basis for an IME. See *LaFave v. Symbios, Inc.*, No. CIV.A. 99-Z-1217, 2000 WL 1644154, at *2 (D. Colo. Apr. 14, 2000) (under Rule 4:10's nearly identical Federal equivalent, Fed. R. of Civ. P. 35, the court found that the plaintiff's "garden variety" allegations of emotional distress, while not specific enough to justify a Federal Rule 35 examination, were nevertheless sufficient, in discovery, to permit defendants access to her medical records).

³ See, e.g., *Perkins v. Lillich*, 23 Va. Cir. 526 (1991) (plaintiff alleging permanent injury in a personal injury action); *Firesheets v. Norfolk & W. Ry.*, 53 Va. Cir. 3, *1-3 (2000) (plaintiff alleging damages based on his injuries sustained within course of employment at railroad company).

insufficient as a statement of good cause.” *Richter v. Manning*, No. 1166-12-4, 2013 WL 1897657, at *7 (Va. Ct. App. May 7, 2013) (quoting *Rakes v. Fulcher*, 210 Va. 542, 546, 172 S.E.2d 751, 755 (1970)). Federal Rule of Civil Procedure 35, nearly identical to Rule 4:10(a), also requires a movant to prove that a plaintiff’s mental or physical condition is “in controversy” and show “good cause” for an IME.⁴ Ms. Heard cites no precedent allowing an IME to evaluate a plaintiff’s credibility as to a party’s perception of the facts, as Ms. Heard would have the Court order here.

Federal courts addressing IME requests under Rule 35 have rejected attempts to secure “an assessment of Plaintiff’s credibility by a medical expert.” See, e.g., *Jones v. Perea*, No. CV 05-644 JP/LFG, 2006 WL 8444487, at *5 (D.N.M. Feb. 16, 2006).

Defendants hope to present evidence to convince the fact finder that it should not believe [plaintiff] because he is paranoid; that what he says occurred is a product of his delusional thinking and does not comport with reality; and that his psychological condition causes him to believe things occurred that did not actually occur. Thus, without so stating, Defendants seek a Rule 35 examination so as to challenge [plaintiff’s] credibility.

Id. Citing multiple cases that “rejected requests for Rule 35 examinations when the requester’s need for the exam is couched in terms of testing the opponent’s credibility,” *id.* at *6, the *Jones* court rejected defendants’ request for an IME as lacking good cause. Applying *Jones*, the Court should reject Ms. Heard’s “paranoia” and “delusional ideations” proffer – Mem. at 3 – as lacking good cause. Indeed, “[i]t is not the purpose of Rule 4:10 to create a final arbiter’ of evidentiary disputes because that function must remain with the factfinder.” *Richter*, WL 1897657 at *7 (quoting *Virginia Linen Service, Inc.*, 198 Va. at 703).

⁴ “While federal court decisions applying Fed.R.Civ.P. 35 are not binding on this Court, the Court may look to such decisions for guidance where they are informative and there is no controlling Virginia statute, rule or decision.” *Young v. Food Lion Store No. 622*, 70 Va. Cir. 313, at *4 (2006).

II. Mr. Depp's Current Mental State Has No Bearing On The Truth Or Falsity Of Alleged Incidents Allegedly Occurring Years Ago.

A present-day mental evaluation to prove the truth of incidents that allegedly occurred over three and a half years ago would be unavailing, because the results of such an IME conducted now would not constitute reliable evidence of Mr. Depp's mental state then. The "in controversy" and "good cause" requirements of Rule 4:10 do not carve out an exception to relevance requirements; to the contrary, IMEs are subject to a more stringent standard. Addressing an IME request under Federal Rule 35, the U.S. Supreme Court held "[t]he specific requirement of good cause would be meaningless if good cause could be sufficiently established by merely showing that the desired materials are relevant, for the relevancy standard has already been imposed by Rule 26(b)." *Schlagenhauf v. Holder*, 379 U.S. 104, 118 (1964). Indeed, Rule 4:10's heightened standard is underscored by myriad of cases allowing the discovery of medical records, as the Court recently ordered Mr. Depp to do here, while *disallowing* an IME request. *See, infra* § III.

Several cases flatly reject the "credibility" proffer.⁵ In *Boadi v. Ctr. for Human Dev., Inc.*, for example, the court denied an IME request because it was "not persuaded that personal examination and testing conducted four years after the fact would provide a basis for a reliable expert opinion concerning Plaintiff's mental health impairments and capacities in April 2013." No. 3:14-CV-30162-KAR, 2017 WL 2369372, at *4 (D. Mass. May 31, 2017). Similarly, in *Valdivia v. BNSF Ry. Co.*, the court found that "plaintiff's current medical condition is not 'in

⁵ To support her claim, Ms. Heard relies on two cases that fail to address Rule 4:10, Federal Rule 35, or an IME request. Further, in both *Barnes v. Commonwealth*, 214 Va. 24 (1973) and *McMinn v. Rounds*, 267 Va. 277, 278 (2004), the Supreme Court of Virginia permits evidence of witness testimony on specific acts that allegedly occurred before the misconduct at issue. The Court should disregard Ms. Heard's citation to *Barnes* and *McMinn*, because the type of evidence at issue before the Supreme Court of Virginia is so distinct from the evidence at issue here where Ms. Heard is attempting to assess Mr. Depp's mental condition (not a specific act) to discredit Mr. Depp years *after* (not before) the alleged misconduct occurred.

controversy” and failed to establish good cause because “Defendant has not clearly articulated what information could possibly be learned from a present day examination of plaintiff with regard to the August 19, 2006 headache.” No. 07-2467-KHV, 2008 WL 1774779, at *3 (D. Kan. Apr. 16, 2008). Thus the Court should not find that an IME is “essential to assessing the truth and falsity of Ms. Heard’s statements” regarding alleged incidents in 2016.


III. Because of an IME’s Intrusive Nature and Ms. Heard’s Access to Alternative Evidence, the Court Should Use Its Discretion to Reject the Rule 4:10 Motion.

In exercising its discretion, the Court should balance the needs of the parties by considering the “serious and invasive nature of the examination and [plaintiff’s] privacy rights” versus the fact that the defense could still present admissible evidence of plaintiff’s “conduct, statements, and behavior” and argue that plaintiff’s “perception is not reality” and that plaintiff “should not be believed.” *Jones*, 2006 WL 8444487 at *7. This Court recently granted Ms. Heard’s motion to compel, requiring Mr. Depp to sign a broad HIPPA authorization including any mental health records, with which he has complied, and on which Ms. Heard can depose him. Because many courts have found the availability of medical records to be a proper alternative to IMEs,⁶ and Ms. Heard has several other sources of evidence at her disposal that more directly bear on the incidents she alleges, the Court should find Ms. Heard’s request for an IME unwarranted.

⁶ *See, e.g., Boadi*, 2017 WL 2369372 at *4 (finding an IME “unwarranted” considering that that “defendants’ expert has access to Plaintiff’s medical records from that period as part of the discovery ... [i]n any event, such an opinion [as a result of an IME] would not be significantly more reliable than an opinion based on a review of Plaintiff’s medical records from the relevant time.”); *Valdivia*, 2008 WL 1774779 at *3 (denying request for IME, reasoning that “[i]t appears BNSF has access to all plaintiff’s prior medical records for the relevant time period”) and “[a] present day examination would also not provide any information as to what effect the medication taken by plaintiff had on him on August 19-20, 2006.”); *Schlagenhauf*, 379 U.S. at 118 (“The ability of the movant to obtain the desired information by other means is also relevant.”).

Dated: November 8, 2019

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November 2019, I caused copies of the foregoing to be served via email (per written agreement between the Parties) on the following:

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