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Civil Procedure: Adversary Counsel's Visual Inspection of Personal Injuries

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CASE COMMENTS

CIVIL PROCEDURE: ADVERSARY COUNSEL'S VISUAL INSPECTION OF PERSONAL INJURIES*

King v. The Loveable Co., 506 So. 2d 1127 (Fla. 5th D.C.A. 1987)

Petitioner filed a product liability suit against respondents,[1] alleging that a black brassiere that respondent manufactured permanently stained her skin. Respondents moved for an order permitting their attorneys visually to inspect petitioner's injury.[2] Petitioner objected, arguing that respondents intended the inspection to harass and humiliate her,[3] and that such an inspection constituted a physical examination that only a physician could perform.[4] The trial court granted respondents' motion.[5] The Fifth District Court of Appeal denied certiorari,[6] and HELD, the court did not abuse its discretion by allowing adversary counsel visually to examine petitioner's personal injuries.[7]

**Editor's Note*: This paper received the George W. Milam Outstanding Case Comment Award for Fall 1987.

1. 506 So. 2d 1127 (Fla. 5th D.C.A. 1987). The Loveable Company was the original defendant in this case. *Id.* at 1128. The company filed a third party action against Sullivan-Carson, the elastic manufacturer, and Lithulen Dye Company, the dye manufacturer. *Id.*

2. *Id.*

3. *See id.* at 1129.

4. *Id.* at 1128. Petitioner relied on FLA. R. CIV. P. 1.360(a), which provides:

> 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 may order the party to submit to a physical or mental examination by a physician or to produce the person in his custody or legal control for examination. 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 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.

Id.

5. *King*, 506 So. 2d at 1128. The trial court placed several restrictions on the inspection proceedings. The inspection was to take place in petitioner's counsel's office, with no one other than counsel for the respective parties in attendance. No more of petitioner's body was to be exposed than necessary to permit the inspection, which could last a maximum of two minutes. Counsel were to conduct themselves with dignity at all times, and were prohibited from arguing among themselves during the inspection. *Id.*

6. *Id.* at 1129.

7. *Id.*

Under common law, courts had no authority to compel a party to submit to physical examination.[8] This lack of judicial authority was based on the human body's inviolability.[9] Absent clear statutory authority to the contrary,[10] such an examination would virtually amount to an assault.[11] In 1899, however, the Florida legislature enacted a statute[12] allowing physical examination of personal injury plaintiffs,[13] so long as a physician conducted the examination.[14]

The Florida Supreme Court interpreted the 1906 version of this statute[15] in *State ex rel. Carter v. Call*.[16] The plaintiff in *Call* brought a personal injury suit against a railroad.[17] On the railroad's motion, the trial judge ordered a physical examination of plaintiff.[18] When plaintiff refused to allow a photographer chosen by the appointed physician to administer x-rays,[19] defendant sought and was granted a

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8. *See* Union Pac. Ry. v. Botsford, 141 U.S. 250, 252 (1891); *see also* Parker v. Enslow, 102 Ill. 272, 279 (1882) ("The court had no power to make or enforce . . . an order [to compel appellee to submit his eyes to the examination of a physician in the presence of a jury]."); Loyd v. Hannibal & St. Jos. Ry., 53 Mo. 509, 515-16 (1873) ("The proposal to . . . have the plaintiff examined during the progress of the trial as to the extent of her injuries, is unknown to our practice and to the law.").

9. *Botsford*, 141 U.S. at 251. The Court stated that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person." *Id.*

10. *See id.* at 251. The Court conceded that the right could be infringed upon, but only under "clear and unquestionable authority of law." *Id.*

11. *Id.* at 252.

12. Act of May 11, 1899, ch. 4719, 1899 Fla. Laws 112.

13. *Id.* § 1.

14. *Id.* § 2.

15. Examination of Injured Party in Personal Damage Cases, § 3151, 1906 Fla. Gen. Stat. (repealed 1967). The statute provided, in pertinent part:

> In all actions brought in the courts of this State to recover damages for personal injuries alleged to have been sustained, it shall be discretionary with the trial court, upon motion of the defendant, to require the injured party, if living, either before or at the time of the trial of the cause, to submit to such physical examination of his or her person as shall be reasonably sufficient to determine physical condition at the time of trial and the nature and extent of the alleged injuries. The physical examination shall be made by a physician to be named by the court in the presence of one or more physicians or attendants of the injured party, if the party so desires.

Id.

16. 64 Fla. 144, 59 So. 789 (1912).

17. *Id.* at 145, 59 So. at 789. Florida East Coast Railway Company was the defendant in this case. *Id.*

18. *Id.*

19. *Id.* at 146, 59 So. at 790. Plaintiff claimed that the photographer in question was "personally objectionable" to her. *Id.*

continuance.[20] Although plaintiff sought a writ of mandamus in the Florida Supreme Court,[21] the court denied relief,[22] holding that the trial judge properly continued the proceedings until an adequate examination could be made.[23]

The *Call* court recognized that the relevant statute[24] was the sole authority for ordering the examination.[25] Since the statute stated that a physician must conduct the examination, the court concluded that the appointed physician must examine the plaintiff without outside assistance.[26] If that physician were unable to do so, the trial judge had discretion to appoint another physician.[27] The judge could not, however, order anyone but the designated physician to attend the examination.[28]

The Florida Supreme Court reevaluated the physical examination statute[29] in *Depfer v. Walker*.[30] The court held that the statute contemplated any test necessary to determine the examinee's physical condition.[31] Further, the trial court had discretion to appoint as many physicians or specialists[32] as necessary to conduct an effective examination.[33] Thus, while the court retained the requirement that a physician conduct the examination,[34] it expanded the scope of the statute by allowing the physician to utilize assistance from outside sources.[35]

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20. *Id.* at 146-47, 59 So. at 790.

21. *Id.* at 145, 59 So. at 789.

22. *Id.* at 149, 59 So. at 790.

23. *Id.* at 148, 59 So. at 790. Because the x-ray examination was claimed to be crucial to the examination as a whole, the trial court properly continued the proceedings until an adequate examination could be made. *Id.*

24. Examination of Injured Party in Personal Damage Cases, § 3151, 1906 Fla. Gen. Stat. (repealed 1967); *see also supra* note 15 (text of statute).

25. *Call*, 64 Fla. at 147, 59 So. at 790.

26. *Id.* at 148, 59 So. at 790.

27. *Id.* at 150, 59 So. at 791.

28. *Id.*

29. Examination of Injured Party in Personal Damage Cases, § 7055, 1927 Fla. Comp. Gen. Laws Ann. 3352 (repealed 1967). The statutory language was identical to that of 1906 statute. *See supra* note 15.

30. 123 Fla. 862, 169 So. 660 (1935).

31. *Id.* at 866, 169 So. at 662. Thus, an examination could include one or more of the following: "a blood test, X-ray, or any physical or microscopic examination of the person, blood, urine, kidneys, heart, lungs, alimentary tract, or other element or function of the body." *Id.*

32. *Id.* A physician who found himself unable to perform all the necessary procedures could, under court order, "have such examination or analysis made by competent technician, pathologist, toxicologist, or other physician." *Id.* at 868, 169 So. at 663.

33. *Id.* at 866, 169 So. at 662.

34. Examination of Injured Party in Personal Damage Cases, § 7055, 1927 Fla. Comp. Gen. Laws Ann. 3352 (repealed 1967).

35. *Depfer*, 123 Fla. at 866, 169 So. at 663.

The *Depfer* court included in its holding, however, that persons rendering outside assistance must qualify as expert witnesses.[36] The examining physician could not testify based on the reports of various technicians or specialists,[37] since this would amount to hearsay evidence.[38] Instead, those assisting the examining physician would have to testify personally as to their findings.[39] These evidentiary requirements led the *Depfer* court to conclude that an appointed examiner must be competent to testify as an expert.[40]

In 1967, the Florida legislature repealed the physical examination statute.[41] This statute was no longer necessary in light of the generous discovery available under the Florida Rules of Civil Procedure (the Rules).[42] The Rules established a liberal discovery standard: the information sought must be reasonably calculated to lead to the discovery of admissible evidence.[43]

Florida Rule of Civil Procedure 1.360 provides for physical or mental examinations of either party.[44] The moving party must show good cause for the examination,[45] and that the physical or mental condition of the other party is in controversy.[46] Failure to submit to a physical or mental examination, however, is expressly deemed not to constitute contempt of court.[47] Upon request, the examinee is entitled to a copy of the examining physician's report.[48] This represents a departure from

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36. *See id.* at 869, 169 So. at 663.

37. *Id.* at 869, 169 So. at 664.

38. *See id.* at 869, 169 So. at 663.

39. *Id.* at 869-70, 169 So. at 664.

40. *See id.* at 869, 169 So. at 663.

41. Act of May 31, 1955, ch. 29,737, § 30, 1955 Fla. Laws 262, 275, *repealed by* Act of June 27, 1967, ch. 67-254, § 51, 1967 Fla. Laws 560, 692.

42. FLA. R. CIV. P. 1.280(a) provides for discovery by the following methods: "depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection and other purposes; physical and mental examinations; and requests for admission." *Id.*

43. *Id.*

44. FLA. R. CIV. P. 1.360(a); *see also supra* note 4 (text of rule).

45. FLA. R. CIV. P. 1.360(a).

46. *Id.*

47. *Id.* Rule 1.380(b)(2)(E). Nonetheless, a party who fails to submit to such an examination can be sanctioned in a variety of ways. Such a party may be prevented from raising or refuting certain claims or defenses, or from introducing certain matters into evidence. The facts that the examination seeks to establish may be presumed against the party. Portions of the disobedient party's pleadings may be stricken, the action may be dismissed, or default judgment may be entered against the disobedient party. *Id.*

48. *Id.* Rule 1.360(b)(1). If the examinee chooses this option, the other party is entitled to receive reports of similar examinations of the same condition. *Id.* Furthermore, an examinee who obtains a report or deposes the examining physician waives any privilege regarding any past or future examinations of the same condition. *Id.* Rule 1.360(b)(2).

the protection otherwise generally afforded to material prepared in anticipation of litigation.[49] Although originally providing for examinations by physicians or other qualified experts,[50] the Rule was amended and modified in 1972[51] to permit only physicians to conduct examinations.[52]

The effect of this modification was well demonstrated by the Fourth District Court of Appeal's short opinion in *Barry v. Barry*.[53] The trial court ordered that petitioner submit to examination by a vocational rehabilitative counselor to determine the extent to which she could be rehabilitated from alcoholism.[54] The counselor was not a physician.[55] The district court granted certiorari, and after reciting Rule 1.360(a), held that the trial court had no authority to order such an examination.[56] Instead, the Rule required that either a physician or a psychiatrist perform the examination.[57]

In the instant case, the Fifth District Court of Appeal departed from the holding in *Barry* by rejecting petitioner's argument that Rule 1.360 forbade the ordered examination.[58] The court explicitly stated that Rule 1.360 did not govern inspections of this type.[59] The court reasoned that respondents' counsel could assess the extent of petitioner's disfigurement as ably as could a physician.[60] The majority

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49. *Id.* Rule 1.280(b)(3)(B); *see also id.* Rule 1.280(b)(2) (documents or tangible things prepared by another party or that party's representative in anticipation of litigation are discoverable only upon a showing that moving party needs materials to prepare the case, and that the substantial equivalent cannot be obtained without undue hardship).

50. FLA. R. CIV. P. 1.360(a) (1967).

51. *In re* The Florida Bar: Rules of Civil Procedure, 265 So. 2d 21, 35 (Fla. 1972).

52. *Id.*; *see also supra* note 4 (text of current rule).

53. 426 So. 2d 1229 (Fla. 4th D.C.A. 1983).

54. *Id.* at 1230.

55. *Id.*

56. *Id.* The court stated that "[t]here is no case law authorizing a non-physician to perform such examinations." *Id.*; *see also* Webb v. Insurance Co. of N. Am., 396 So. 2d 508, 512 (La. App. 1981) (Louisiana rule of procedure authorizing examinations by a physician did not permit examinations by rehabilitative counselors).

57. *Barry*, 426 So. 2d at 1230. Some federal decisions have interpreted FED. R. CIV. P. 35 to encompass mental examinations by psychologists as well. *See, e.g.*, Anson v. Fickel, 110 F.R.D. 184, 186 (N.D. Ind. 1986) (clinical psychologist allowed to perform mental examination of the plaintiff); Massey v. Manitowoc Co., 101 F.R.D. 304, 306 (E.D. Pa. 1983) (for purposes of FED. R. CIV. P. 35, a licensed psychologist may be considered a physician). *But cf.* Soudelier v. Tug-Nan Servs., Inc., 116 F.R.D. 429 (E.D. La. 1987) (FED. R. CIV. P. 35 does not authorize examinations by vocational rehabilitative experts).

58. *King*, 506 So. 2d at 1128.

59. *Id.*

60. *See id.* at 1128-29. The court also indicated its belief that counsel might be in an even better position than a physician to assess the extent of damages. *Id.* at 1129.

recognized, however, that a medical examination would be required to determine the permanence and the physiological consequences of the disfigurement.[61]

Addressing petitioner's contention that the requested inspection was merely a tool for harassment and embarrassment,[62] the majority found two legitimate reasons for respondents' request.[63] First, the inspection would allow counsel better to advise their clients as to an offer of settlement.[64] Second, the inspection would better enable counsel to determine the accuracy of the injury-depicting photographs that petitioner intended to submit to the jury.[65] The court found that, given the restrictions placed on the inspection,[66] the trial court had acted neither arbitrarily, fancifully, nor unreasonably, and thus had not abused its discretion.[67]

In a strong dissent, Judge Sharp concluded that the trial court's order departed from the essential requirements of law.[68] She found that because the Florida Rules of Civil Procedure did not authorize this type of visual inspection, a court could not order it.[69] Instead, only a physician could perform a physical examination.[70] Judge Sharp rejected the majority's reasons to legitimate the visual examination,[71] contending that those reasons existed in every case involving a visible physical injury.[72]

Judge Sharp pointed out that petitioner had volunteered to submit to two medical examinations, as well as two photographic sessions with a court-appointed photographer.[73] She emphasized that

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61. *Id.*

62. *Id.*

63. *Id.* The majority contended that "many legitimate reasons" existed; however, the court mentioned only two. *Id.*

64. *Id.*

65. *Id.* Petitioner stipulated that she did not intend to display her breasts to the jury. *Id.*

66. *See supra* note 5.

67. *Id.* Judicial discretion is abused when the action taken is "arbitrary, fanciful, or unreasonable." *Id.* (quoting Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980)). Other than FLA. R. CIV. P. 1.360(a), *Canakaris* was the sole authority on which the majority relied. *Id.*

68. *Id.* at 1131 (Sharp, J., dissenting). Judge Sharp also asserted: "*Canakaris* has been cited as supporting many disparate propositions, but I'll wager this is the most bizarre." *Id.* at 1130.

69. *See id.* at 1130-31; *see also supra* note 42 and accompanying text (discovery methods authorized by Florida Rules of Civil Procedure).

70. *See King*, 506 So. 2d at 1130 (Sharp, J., dissenting).

71. *See supra* notes 63-65 and accompanying text.

72. *King*, 506 So. 2d at 1130 (Sharp, J., dissenting).

73. *Id.* at 1129. Petitioner offered to submit to a physical examination by a physician chosen by respondents or the court, and to permit a court-appointed photographer to photograph her

petitioner's approach would generate admissible evidence.[74] Conversely, evidence obtained under the trial court's order would be inadmissible, because respondents' counsel would be ethically precluded from testifying at trial.[75] Judge Sharp concluded that respondents' request was intended to harass, embarrass, and humiliate petitioner.[76] Finally, Judge Sharp strongly objected to respondents' suggestion that they might move the trial court to order petitioner to submit to visual inspection by the jury.[77] She contended that when such a viewing would be unduly embarrassing to an injured party, expert medical witnesses should view the injuries and in turn testify before the jury.[78]

The instant court's decision retreated from the common law concept of bodily inviolability.[79] *Call* had deferred to this rule, explicitly requiring that a physician conduct physical examinations.[80] While the *Depfer* court expanded this statutory interpretation,[81] the court stated that its opinion neither conflicted with nor overruled *Call*.[82] Thus, the statute still required that physicians perform physical examinations.[83] *Barry* did not mention *Call*, *Depfer*, or bodily inviolability, presumably because a counseling session, rather than a physical examination, was at issue.[84] Nonetheless, the *Barry* court held that non-physicians could not conduct physical examinations.[85] By permitting lay persons visually to examine personal injuries,[86] the instant decision conflicted with *Barry* and ignored the common law foundation upon which the earlier cases rested.[87]

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injury. She offered to repeat these procedures one week before trial. In addition, petitioner offered to notify respondents of any change in her condition, and to submit to another physical examination or photographic session upon request. Finally, petitioner offered to rely upon the photographs at trial, rather than exhibit her injury to the jury. *Id.*

74. *Id.* at 1130.

75. *Id.* (citing RULES REGULATING THE FLORIDA BAR 4-3.7, which states the general rule that "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of his or her client").

76. *Id.*

77. *Id.* Judge Sharp wrote, "I have one word for this proposition: outrageous." *Id.*

78. *Id.* (citing 8 WIGMORE ON EVIDENCE § 2220(ii)(a), at 194 (McNaughton rev. 1961)).

79. *See supra* notes 8-11 and accompanying text.

80. *Call*, 64 Fla. at 148, 59 So. at 790; *see also supra* notes 24-26 and accompanying text (*Call* relied on statute that required examination by physician).

81. *Depfer*, 123 Fla. at 868, 169 So. at 663; *see supra* notes 34-35 and accompanying text.

82. Depfer v. Walker, 125 Fla. 189, 197, 169 So. 660, 664 (1936). In denying a second rehearing, the court distinguished its holding from *Call*. *Id.*

83. *See supra* notes 34-35 and accompanying text.

84. *Barry*, 426 So. 2d at 1230; *see supra* note 54 and accompanying text.

85. *Barry*, 426 So. 2d at 1230; *see supra* note 57 and accompanying text.

86. *King*, 506 So. 2d at 1128-29.

87. *See supra* notes 8-11 and accompanying text.

The instant court judicially sanctioned a discovery technique that the Florida Rules of Civil Procedure do not authorize.[88] As the dissent pointed out, respondents' counsel could not testify before the jury, so the visual examination would produce no admissible evidence.[89] Thus, the examination could not be reasonably calculated to lead to the discovery of admissible evidence.[90] The instant court, however, failed to mention this requirement, merely concluding that the discovery order was not arbitrary, fanciful, or unreasonable.[91]

Both the majority and the dissent ignored two ramifications of the instant court's conclusion that Rule 1.360 did not govern the disputed discovery order.[92] Rule 1.360 entitles the examinee to a copy of the examining physician's report.[93] As *Depfer* demonstrated, the physician will likely be called as a trial witness.[94] Thus, an examination report might aid the injured party in effectively cross-examining that physician. The instant decision effectively deprived petitioner of this potential benefit. Even if respondents prepared such a report after counsel's examination, it would consist of materials prepared in anticipation of litigation.[95] The report would thus receive particularly strong protection from discovery under the Florida Rules of Civil Procedure. Moreover, since respondents' counsel could not take the stand, petitioner would have no one to cross-examine.[96]

The instant court's decision could also expose petitioner to the full range of discovery sanctions if she refuses to comply with the trial court's order.[97] A party who refuses to submit to a physician's examination under Rule 1.360 cannot be held in contempt of court,[98] notwithstanding the fact that such an examination can lead to admissible evidence.[99] However, if petitioner refused to submit to visual inspection by respondents' counsel, the trial court would have discretion to jail her for contempt,[100] even though no admissible evidence could

88. *See supra* note 42.
89. *King*, 506 So. 2d at 1130 (Sharp, J., dissenting); *see supra* note 75 and accompanying text.
90. *See* FLA. R. CIV. P. 1.280(a); *see supra* notes 42-43 and accompanying text.
91. *King*, 506 So. 2d at 1129; *see supra* note 67.
92. *King*, 506 So. 2d at 1128; *see supra* notes 58-59 and accompanying text.
93. FLA. R. CIV. P. 1.360(b)(1); *see supra* note 48 and accompanying text.
94. *Depfer*, 123 Fla. at 869-70, 169 So. at 663-64.
95. FLA. R. CIV. P. 1.280(b)(2); *see supra* note 49 and accompanying text.
96. *See supra* note 75 and accompanying text.
97. FLA. R. CIV. P. 1.380(b)(2).
98. *Id.* Rule 1.380(b)(2)(E); *see supra* note 47 and accompanying text.
99. *See King*, 506 So. 2d at 1130 (Sharp., J., dissenting); *supra* notes 73-74 and accompanying text.
100. FLA. R. CIV. P. 1.380(b)(2)(D).

result from the examination.[101] The instant decision therefore compels petitioner to comply with a discovery order that does not meet the standard that the Florida Rules of Civil Procedure prescribe.[102]

The instant court recognized that Florida has adopted a liberal attitude toward discovery.[103] In so doing, however, the instant court altered the standard for permissible discovery by inquiring not whether the request was reasonably calculated to lead to the discovery of admissible evidence,[104] but instead whether the trial judge acted arbitrarily, fancifully, or unreasonably.[105] Inherent in the instant decision is the possibility of increased discovery abuses in the competitive adversary system. Carried to its logical conclusion, the instant case will turn discovery into a tool of coercion, rather than one of preparation.

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101. *See King*, 506 So. 2d at 1130 (Sharp, J., dissenting); *supra* note 75 and accompanying text.

102. *See supra* note 42 and accompanying text.

103. *King*, 506 So. 2d at 1129.

104. FLA. R. CIV. P. 1.280(a); *see supra* note 43 and accompanying text.

105. *King*, 506 So. 2d at 1129; *see supra* note 67 and accompanying text.