

STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT

06-283

**RANDY JAMES HENRY, INDIVIDUALLY, AND AS ADMINISTRATOR
OF THE ESTATES OF HIS MINOR CHILDREN, KAYLA HENRY,
CHRISTOPHER HENRY AND KEVIN HENRY, AND CONNIE HENRY**

VERSUS

**DANNY L. BARLOW, U.S. AGENCIES CASUALTY INSURANCE
COMPANY, INC., AND CLECO UTILITY GROUP, INC.**

**APPEAL FROM THE
FOURTEENTH JUDICIAL DISTRICT COURT
PARISH OF CALCASIEU, NO. 01-5156
HONORABLE WILFORD D. CARTER, DISTRICT JUDGE**

**JAMES T. GENOVESE
JUDGE**

Court composed of Sylvia R. Cooks, John D. Saunders, Jimmie C. Peters, Marc T. Amy, and James T. Genovese, Judges.

COOKS, J., DISSENTS AND ASSIGNS WRITTEN REASONS.

WRIT GRANTED AND MADE PEREMPTORY.

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GENOVESE, Judge.

Defendant, Cleco Utility Group, Inc., seeks supervisory writs from a judgment of the district court granting its motion to compel independent medical examinations of Plaintiff, Randy James Henry, but imposing certain restrictions on the manner in which the examinations are to be conducted, such as requiring Plaintiffs' counsel to be present at said examinations and videotaping said examinations. For the following reasons, we grant Defendant's writ application, make it peremptory, and reverse the judgment of the district court as to the restrictions it imposed on the independent medical examinations.

FACTS

On November 26, 2000, Plaintiff, Randy James Henry (Henry), was involved in an accident in which he suffered electrical burns to his head and feet. Henry received medical treatment for his injuries from several health care providers, including a neurologist and a clinical psychologist. Defendant, Cleco Utility Group, Inc. (CLECO), requested that Henry undergo examinations by a neurologist and psychologist of its own choosing. Henry refused to submit to the independent medical examinations (IME) unless his attorney was present and the examinations were videotaped. When the parties could not agree on the manner in which the examinations were to be conducted, CLECO filed a motion to compel the independent medical examinations.

CLECO's motion to compel was heard on January 20, 2006. The district court granted CLECO's motion compelling Henry to undergo the independent medical examinations, but ordered that Henry's counsel be present during the examinations and that they be videotaped. A written judgment was signed on January 26, 2006.

It is from this judgment that CLECO seeks supervisory writs.

ISSUE

The sole issue presented for our review is whether the district court erred in permitting CLECO to obtain independent medical examinations of Henry only on the condition that Henry's counsel be present and that the examinations be videotaped.

LAW AND ARGUMENT

Louisiana Code of Civil Procedure Article 1464 provides as follows:

When the mental or physical condition 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 for examination the person in his custody or legal control, except as provided by law. In addition, the court may order the party to submit to an examination by a vocational rehabilitation expert or a licensed clinical psychologist who is not a physician, provided the party has given notice of intention to use such an expert. 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.

In the instant matter, it is undisputed that CLECO is entitled to have Henry examined by a neurologist and psychologist of its choice; hence, "good cause" is not at issue. Rather, it is the "manner" and "conditions" imposed upon these examinations which we are called upon to resolve.

CLECO asserts that Henry failed to establish any special conditions warranting the restrictions placed on the requested independent medical examinations. Although Henry raised concerns that the examining physicians would not testify truthfully, CLECO countered that these concerns are common to every independent medical examination. Additionally, while Henry raised the issue of his suffering from a cognitive impairment which may cause communication problems, CLECO contends

that these concerns were adequately addressed by permitting Henry's wife to attend the examinations. We agree with CLECO.

The issue of whether or not a plaintiff has the right to have his or her attorney present during an IME was considered in *Simon v. Castille*, 174 So.2d 660 (La.App. 3 Cir.), *writ denied*, 247 La. 1088, 176 So.2d 145 (La.), *cert. denied*, 382 U.S. 932, 86 S.Ct. 325 (1965). In *Simon*, the plaintiff asserted that this privilege was "an absolute right." *Id.* at 662. To the contrary, the defendant argued that the attorney's presence was "merely one of the 'conditions' within the discretion of the trial judge to specify under [La.Code Civ.P. art. 1464]."¹ *Id.* at 662. This court addressed the issue, stating as follows:

We note at the outset that the plain language of [La.Code Civ.P. art. 1464] does not provide for the presence of plaintiff's attorney at the examination. The article clearly gives great discretion to the trial judge. He may deny the motion unless 'good cause' for the examination is shown. He may 'specify the time, place, manner, conditions, and scope of the examination [. . .]' The defendant does not even have the absolute right to choose the physician, this also being left finally to the court's discretion. Thus, the language of the statute itself appears to support defendant's position.

Id. at 662. Recognizing that this issue was *res nova* in Louisiana, and after considering the jurisprudence of other states and the Federal Courts, this court, in *Simon*, concluded that a "plaintiff does not have an absolute right to have [his or] her attorney present at [a] medical examination requested by defendants," and went on to address "the next question [of] whether plaintiff [had] borne her burden of showing special circumstances . . . requiring [the] attorney's presence." *Id.* at 665.

Hence, in the instant matter, Henry does not have the absolute right to have his attorney present at the IME as he contends. Rather, the legal issue before this court

¹*Simon* cites La.Code Civ.P. art. 1493, the current text of which is presently found in La.Code Civ.P. art. 1464.

is whether Henry has met his legal burden of proving the requisite special circumstances warranting the presence of counsel and videotaping at his IME. As discussed above, a court may subject the examinations to reasonable restrictions or conditions only if special circumstances are shown. In the instant case, there is insufficient evidence in the record establishing special circumstances warranting said restrictions or conditions. Henry has failed to meet his burden of proof.

The very purpose of an independent medical examination is to determine the extent of the physical or mental injuries alleged to have been sustained by Henry. Since good cause and notice are not at issue, CLECO has the right to have Henry examined by physicians of its choosing to determine the nature and extent of Henry's injuries, including his alleged mental impairment. Henry has not alleged, nor does the record reveal, any evidence which even suggests that the physicians chosen by CLECO are not qualified to perform the examinations. Henry's desire to avoid a "swearing match" at trial does not rise to the level of special circumstances warranting the placement of restrictions on these independent medical examinations.

There are allegations of mental injury in this case. If it is shown that Henry needs assistance at these examinations, then Henry's wife, or a designated family representative, could be allowed to assist him. However, permitting Henry's attorney to be present at these examinations makes the attorney himself a potential witness. Requiring the videotaping of an IME would restrict the number of physicians willing to conduct a videotaped IME under such circumstances. If Defendant's IME is allowed to be videotaped, then Defendant could urge that all of Plaintiff's examinations be videotaped as well, and so forth and so on. That is neither the intent nor the spirit of La.Code Civ. P. art. 1464.

In this case, Henry failed to prove that “special circumstances” exist justifying the placement of these restrictions on the independent medical examinations. Accordingly, there is not a sufficient basis for the imposition of the restrictions that Henry’s counsel be present at the independent medical examinations and that said examinations be videotaped.

DECREE

For the reasons set forth above, we grant Defendant’s application for supervisory writs, make it peremptory, and reverse that portion of the district court judgment ordering that Henry’s counsel be present at the independent medical examinations and that the examinations be videotaped. We remand this matter for further proceedings consistent herewith.

Costs of this appeal are assessed against the Plaintiffs, Randy James Henry, individually, and as administrator of the estates of his minor children, Kayla Henry, Christopher Henry and Kevin Henry, and Connie Henry.

WRIT GRANTED AND MADE PEREMPTORY.