

AT STAMFORD
123 HOYT STREET
STAMFORD, CT 06905

DOCKET NO: FST CV 23-6060274 S : SUPERIOR COURT
SHANKAR, RUBY : 2024 MAY 13 P 4: 34 : JUDICIAL DISTRICT OF
: STAMFORD/NORWALK
V. : AT STAMFORD
ZIELINSKI, ALEKSEY : MAY 13, 2024

MEMORANDUM OF DECISION

Plaintiff has objected to the defendant's request that the plaintiff submit to an independent medical examination ("IME") by orthopedic physician Daniel N. Fish whose office is located at Orthopaedic Specialist of Connecticut, 60 Old New Milford Road, Suite 3E, Brookfield, CT. For the reasons stated below, the objection is overruled.

Practice Book Section 13-11(b) provides for an IME as follows:

"(b) In the case of an action to recover damages for personal injuries, any party adverse to the plaintiff may file and serve in accordance with Sections 10-12 through 10-17 a request that the plaintiff submit to a physical or mental examination at the expense of the requesting party. That request shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made. Any such request shall be complied with by the plaintiff unless, within ten days from the filing of the request, the plaintiff files in writing an objection thereto specifying to which portions of said request objection is made and the reasons for said objection. The objection shall be placed on the short calendar list upon the filing thereof. The judicial authority may make such order as is just in connection with the request. No plaintiff shall be compelled to undergo a physical or mental examination by any physician to whom he or she objects in writing." (Emphasis added).

C.G.S. § 52-178a provides: "[i]n any action to recover damages for personal injuries, the court or judge may order the plaintiff to submit to a physical

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examination by one or more physicians or surgeons. No party may be compelled to undergo a physical examination by any physician to whom he objects in writing submitted to the court or judge.” (Emphasis added).

Despite similar language in the Practice Book section and the statute, superior court judges have taken different approaches to application of the statute and rule and the consequences from a plaintiff’s written objection to a designated IME physician. In *Privee v. Burns*, 46 Conn. Supp. 301, 333-35 (1999), Judge Blue conducted an extensive analysis of the statute’s legislative history and concluded that plaintiff has an unconditional right to object to a particular IME physician under C.G.S. § 52-178a. Although P.B. § 13-11(b) requires plaintiff to state reasons for the objection, Judge Blue held courts may not evaluate the reasons for the objection and plaintiff “is entitled to object for any reason, including bias or personal dislike.”

In *Wallace v. Commerce Prop., Inc.*, 1999 WL 1207124 *8 (Conn. Super. 1999), Judge Alander also undertook an extensive analysis of the statute and caselaw and adopted a different approach he labeled “pragmatic.” He dubbed Judge Blue’s decision as taking a “modified absolutist approach which opines that while a plaintiff has an absolute right to object to a particular physician the exercise of that right may be sanctioned in extreme cases. . . .” Under his “pragmatic approach” Judge Alander reads the statute “as authorizing a trial court to overrule a written objection to a particular physician and order the plaintiff to attend [an IME] but not allowing the court to physically compel that attendance.” If the objection is overruled and plaintiff refuses to attend the IME, then sanctions may be imposed.

I agree with the pragmatic approach outlined in *Wallace*, which has been adopted by many other superior court judges, that recognizes a court may not compel an IME before a particular physician but allows the court to evaluate the reasons for plaintiff's refusal to submit to an IME by the physician selected by defendant, rule on the objection and impose sanctions where appropriate. See e.g., *Longobardi v. Plano*, 2012 WL 593431 *2-3 (Conn. Super. 2012) (Gold, J.) (and cases cited therein); *Larsen v. New*, 47 Conn. Supp. 536, 538-39 (2002) (Frazzini, J.); *Copes v. Whelan*, 2015 WL 4880147 *2 (Conn. Super. 2015) (Wilson, J.). See generally, 1 Conn. Prac., Super. Ct. Civil Rules § 13-11 (2017 ed.). Accord, *Nguyen v. Williams*, 2020 WL 927706 *1-2 (Conn. Super. 2020) (Krumeich, J.).

Plaintiff objects that Dr. Fish's office in Brookfield is too far to travel for an IME. The Court declines to impose a requirement, not based on the language of the rule, that the location of the IME be a set distance from plaintiff's residence such as within thirty miles of the plaintiff's residence similar to the rule for place of deposition of state residents in Practice Book § 13-29. Such a limitation would unduly burden defendants' choice of who to designate as the IME physician. Although there is some precedent for restricting the distance to be traveled for an IME, see *Bonaldi*, 2004 WL 1664213 *1 (IME restricted to 25 miles one way trip from plaintiff's residence) and *Hennessey v. Lawless*, 2004 WL 870654 *2 (Conn. Super. 2004) (Bear, J.) (150 mile round trip for IME was "unsupportable"), under the circumstances here an IME at the designated physician's office in Brookfield, a one way trip of 29 miles, is not unreasonable. Compare, *Hansen v. Harrison*, 2008 WL 4740036 *2 (Conn. Super. 2008) (Bellis, J.) (not unreasonable for out-of-state plaintiff's IME to be in Connecticut). The travel distance from Stamford to Brookfield of approximately one hour is not unreasonable.

The Court has overruled the objection to an IME by Dr. Fish and orders plaintiff to undergo an IME by Dr. Fish or risk sanctions but cannot compel plaintiff to submit to an examination by Dr. Fish. See *Longobardi*, 2012 WL 593431 *1. Neither will the Court direct defendant to designate another orthopedic physician to conduct the IME. P.B. § 13-11(b) provides that defendant is to designate the IME physician. Defendant decides who to designate as an IME physician and is not obligated to designate a physician mutually agreeable to the parties. See e.g., *Longobardi*, 2012 WL 593431 *2. If defendant agrees to designate an IME physician other than Dr. Fish, defendant is free to do so. Of course, plaintiff has the right to object to an IME by a qualified physician, but they run the risk of the court granting a motion to impose discovery sanctions as provided by P.B. § 13-14 (b), the severe sanctions of the sort outlined by Judge Blue in *Privee*, 46 Conn. Supp. at 336-37, or such other sanctions the Court deems reasonable under the circumstances. See *Copes*, 2015 WL 4880147 *2; *Camp*, 2016 WL 6496675 *2; *Larsen*, 47 Conn. Supp. at 539.

The Court does not agree that defendant unduly delayed in seeking an IME or that an IME would unreasonably delay trial. There are issues to be tried concerning plaintiff's impairment, permanency, and continuing treatment that an IME may address.

The Court will allow plaintiff the opportunity to avoid sanctions by submitting to an IME before Dr. Fish at a mutually convenient date and time or an IME by such other physician designated by defendant. Counsel are encouraged to confer by May 21, 2024, and agree on the details concerning the IME, including the identification of the IME physician, but the Court will not compel plaintiff to


submit to an IME before any physician to which written objection has been filed pursuant to C.G.S. § 52-178a and P.B. 13-11 (b).

The Court will reserve on the subject of sanctions, which may be imposed at a later date, including at trial, depending on the conduct of the parties and the circumstances then existing. Compare *Sirov v. Amica Mut. Ins. Co.*, 2012 WL 5992497 *2 (Conn.Super. 2012) (Wilson, J.). However, if plaintiff does not submit to examination by Dr. Fish or another orthopedist designated by defendant, she is subject to cross-examination and argument to the jury on this refusal in light of the overruling of their objections to the IME by Dr. Fish, an adverse inference from the refusal to submit for such examination and/or possible preclusion of orthopedic opinion evidence by plaintiff's experts. See *Privee*, 46 Conn.Supp. at 335. Sanctions may also include reimbursement of the costs and fees incurred in connection with Dr. Fish's preparation and records review in anticipation of the IME.

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Krumeich, J.T.R.

Decision entered in accordance with the foregoing.
All counsel and self-represented parties of record notified
5/13/2024. JDNO Notice Sent


Tarcy Castro
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