

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16

HONORABLE THOMAS S. ZILLY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GEORGE SPENGLER, an individual,)	No. 2:18-cv-00790-TSZ
)	
Plaintiff,)	ORDER GRANTING DEFENDANT’S
vs.)	MOTION TO COMPEL MENTAL
)	AND PHYSICAL EXAMINATIONS
BRAND ENERGY SOLUTIONS LLC, a)	PURSUANT TO FED. R. CIV. P. 35
Corporation,)	
Defendant.)	
)	
)	
)	
)	
)	

THIS MATTER having been before the Court upon Defendant’s Motion to Compel Mental and Physical Examinations Pursuant to Fed. R. Civ. P. 35, docket no. 22, the Court having reviewed the records and the files herein, including the motion and supporting declaration, response and supporting materials, reply and supporting materials, and the pleadings and records on file herein; and the Court deeming itself fully advised; now therefore it is hereby ORDERED that Defendant’s Motion is GRANTED as follows:

1. Dr. Elizabeth Ziegler is permitted to perform a neuropsychological interview and examination of Plaintiff George Spengler as part of his Fed. R. Civ. P. 35 mental

1 (neuropsychological) examination associated with this lawsuit, with the following
2 restrictions:

- 3 a. The examination will be done in Everett, Washington on or before October 31,
4 2019, at a mutually agreeable date and time.
- 5 b. Plaintiff will appear at the examination and submit to the examination as set forth
6 herein without cost to the Plaintiff.
- 7 c. The Defendant shall be responsible for providing to Dr. Ziegler any background
8 materials that she may rely upon in conducting her examination and this
9 information shall be provided to Plaintiff.
- 10 d. The examination shall last no longer than 6 hours with necessary breaks (restroom,
11 coffee, etc.). If desired, Plaintiff can arrange to have the examination scheduled to
12 take place over two half days (3 hours each, with breaks) instead of one full day.
- 13 e. In the event that any problems arise during the course of the examination, Dr.
14 Ziegler will attempt to contact both attorneys for Plaintiff and Defendant in an
15 effort to promptly resolve any such disputes.
- 16 f. Dr. Ziegler will provide a list of her entire proposed collection of
17 neuropsychological tests she proposes to give to Plaintiff at least one week in
18 advance of testing and will only select tests included in this list for her exam.
- 19 g. The scope of the examination shall be a forensic neuropsychological examination of
20 the Plaintiff, consisting of an interview and standard neuropsychological tests and
21 assessments. Dr. Ziegler **will not** be performing a problem-focused physical
22 examination. No x-rays, MRI's, CT scans, nor any other invasive procedures are
23 permitted.
- 24 h. Plaintiff shall not complete any medical history forms, pain diagrams, or intake
25 forms related to the examination. Plaintiff shall complete testing forms provided by
the examiner, if any.

- 1 i. Upon request, Defendant will provide to Plaintiff's expert, Dr. Vandenbelt, a
2 complete copy of Dr. Ziegler's file and all raw MMPI testing data (if any), including
3 her entire written report, within thirty (30) days of the completion of the
4 examination.
- 5 j. Counsel for Defendant shall send a copy of the report, together with a copy of all
6 notes taken by the examiner, with the exception of raw testing data, to Plaintiff's
7 counsel within five (5) business days after receipt by defense counsel.
- 8 k. The report of the examiner shall be detailed and set forth separately all information
9 the examiner has reviewed and relied upon to render opinions in this case; and this
10 shall include, but not be limited to, all of the medical information in this case and
11 any and all research and studies on which she may rely and all:
- 12 i. The examiner's findings;
 - 13 ii. The results of all tests given;
 - 14 iii. The examiner's diagnoses; and
 - 15 iv. The examiner's conclusions and all facts and information reviewed and
16 relied upon to support each opinion.
- 17 l. Dr. Ziegler agrees to appear for deposition at a time and place in the Seattle area
18 and agrees that \$500 per hour is a reasonable hourly rate for time spent during the
19 deposition for billing by her to Plaintiff's lawyer for her deposition time, and that
20 the expert fee for the deposition shall start when she is sworn in and the deposition
21 starts and billing shall stop accruing when questioning ends at the deposition. There
22 shall be no prepayment requirements or minimum charges. Plaintiff's counsel
23 agrees to pay Dr. Ziegler's bill within 14 days.
- 24 m. No person, other than Dr. Ziegler, shall participate in any way in the examination
25 and evaluation in this case (except her administrative / technical staff).

1 n. Defendant's attorneys shall be responsible for providing a copy of this Order to Dr.
2 Ziegler, at least twenty-four (24) hours before the scheduled examination.

3 o. Unless otherwise ordered by the Court, this examination shall constitute
4 Defendant's single neuropsychological Fed. R. Civ. Pro 35 testing of **Plaintiff** for
5 this litigation by Defendant and Defendant shall have one other FRCP 35
6 examination regarding Plaintiff's claimed orthopedic injuries, for which the parties
shall enter a separate Stipulation and Order.

7 2. Dr. John Burns is permitted to perform a physical interview and examination of Plaintiff
8 George Spengler as part of his Fed. R. Civ. P. 35 physical (orthopedic) examination
associated with this lawsuit, with the following restrictions:

9 a. The examination will be done in Seattle, Washington on or before October 31,
10 2019 at a mutually agreeable date and time.

11 b. Defendant shall be responsible for providing to Dr. Burns any background
12 materials that he may rely upon in conducting his examination and this
13 information shall be provided to Plaintiff.

14 c. The examination shall last no longer than 2 hours with necessary breaks (restroom,
15 coffee, lunch, etc.).

16 d. In the event that any problems arise during the course of the examination, Dr. Burns
17 will attempt to contact both attorneys for Plaintiff and Defendant in an effort to
promptly resolve any such disputes.

18 e. The scope of the examination and questions shall include obtaining a medical
19 history, performing a records review of all records and opinions in this case and
20 performing a problem-focused physical examination. No x-rays, MRI's, CT scans,
nor any invasive procedures or tests are permitted.

21 f. The examiner shall submit the entire written report within thirty (30) days of the
22 completion of the examination.
23

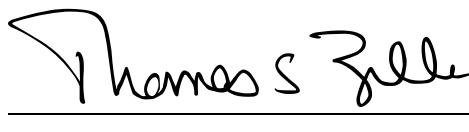
- 1 g. Counsel for Defendant shall send a copy of the report, together with a copy of all
2 notes taken by the examiner, to Plaintiff's counsel within five (5) business days
3 after receipt by Defendant's counsel.
- 4 h. Unless otherwise ordered by the Court, this examination shall constitute
5 Defendant's single physical Fed. R. Civ. P. 35 examination of Plaintiff for this
6 litigation by Defendant.
- 7 i. The examiner shall limit questions during this examination to facts which are
8 relevant to the Plaintiff's physical exam and prognosis.
- 9 j. The report of the examiner shall be detailed and set forth separately all information
10 the examiner has reviewed and relied upon to render opinions in this case; and this
11 shall be limited to the medical information in this case and/or any/all research and
12 studies on which he may rely, all of which shall be stated in his report along with:
- 13 i. The examiner's findings;
- 14 ii. The results of all tests given;
- 15 iii. The examiner's diagnoses; and
- 16 iv. The examiner's conclusions and all facts and information reviewed and
17 relied upon to support each opinion.
- 18 k. Plaintiff shall not complete any written forms related to the examination.
- 19 l. Defendant's attorneys shall be responsible for providing a copy of this Order to Dr.
20 Burns at least twenty-four (24) hours before the scheduled examination.
- 21 m. Defendant and Defendant's attorney shall keep the doctor's reports confidential
22 except for purposes of this case.
- 23 n. Dr. Burns agrees to appear for deposition at a mutually agreeable time and place in
24 the Seattle area. The parties understand that Dr. Burns charges \$900 per hour for
25 his deposition, but Plaintiff does not necessarily agree that this is a reasonable
hourly rate for time spent to take his deposition. This issue may be explored further

1 at a later date. The expert fee for the deposition shall start when the deposition
2 begins and shall stop accruing when questioning at the deposition ends. A true and
3 correct copy of Dr. Burns' fee schedule is attached hereto as Exhibit A. Plaintiff's
4 counsel agrees to pay Dr. Burns' bill within 14 days once they agree on what is a
5 reasonable hourly rate for deposition in this case.

6 3. Plaintiff is prohibited from having any third-party observer attend either the mental
7 (neuropsychological) examination with Dr. Ziegler or the physical (orthopedic)
8 examination with Dr. Burns. The Plaintiff may have a third-party nearby (but not in the
9 exam room), and may visit with that person on breaks.

10 4. Plaintiff is prohibited from recording (video or audio) either the mental
11 (neuropsychological) examination with Dr. Ziegler or the physical (orthopedic)
12 examination with Dr. Burns.

13 DATED this 1st day of October, 2019.



14 Thomas S. Zilly
15 United States District Judge

16 *Presented by:*

17 FISHER & PHILLIPS, LLP



18 By: _____
19 Suzanne Kelly Michael, WSBA #14072
20 Matthew J. Macario, WSBA #26522
21 Fisher & Phillips, LLP
22 1201 Third Avenue, Suite 2750
23 Seattle, WA 98101
24 Phone: (206) 682-2308
25 Facsimile: (206) 682-7908
Email: smichael@fisherphillips.com
Email: mmacario@fisherphillips.com
Attorneys for Defendant

ORDER GRANTING DEFENDANT'S MOTION
TO COMPEL FRCP 35 EXAMINATION - 6

FISHER & PHILLIPS LLP
1201 Third Avenue, Suite 2750
Seattle, WA 98101
(206) 682-2308