

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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CANDICE CARDOSA, a Legally Incapacitated  
Person, by HOWARD LINDEN, her Conservator,

UNPUBLISHED  
October 9, 2012

Plaintiff-Appellant,

v

No. 303089  
Kent Circuit Court  
LC No. 09-013130-NH

SPECTRUM HEALTH SERVICES, d/b/a  
BUTTERWORTH HOSPITAL, and AREA WIDE  
OB/GYN SERVICES, P.C.,

Defendants-Appellees.

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Before: METER, P.J., AND SERVITTO AND STEPHENS, JJ.

PER CURIAM.

Plaintiff, Candice Cardosa, appeals by way of leave granted, in this interlocutory appeal, from the trial court's order, entered March 10, 2011, regarding the parameters of independent medical examinations (IMEs) in this medical malpractice action. This appeal involves determining whether the trial court's March 10 order was, in reality, an order requiring a nonparty to submit to an IME and, if not, the extent to which the trial court has the authority to require a nonparty to participate in the IME of a party. We find that the March 10, 2011 order exceeded the authority of the trial court by ordering Kaylea Cardosa, the non-party mother, to appear and answer wide-ranging questions without counsel. We therefore vacate the trial court's order and remand for further proceedings consistent with this opinion.

The underlying complaint in this case alleges that defendants Spectrum and Area Wide were medically negligent during the gestation and birth of plaintiff, Candice Cardosa. Candice suffers from serious medical issues, including cerebral palsy, hypoxic ischemic encephalopathy, severe developmental delays, seizures, and motor and mental deficiencies. Plaintiff's mother is Kaylea Cardosa. The original complaint was brought by Kaylea Cardosa as next friend of her daughter. Subsequently, the probate court entered an order appointing Howard Linden as Candice's conservator. The conservator was substituted for Kaylea Cardosa as a party to the case. No portion of the order at issue directs any action on the part of the conservator.

All parties in the case brought motions for protective orders under MCR 2.311, 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 or blood examination by a physician (or other appropriate professional) or to produce for examination the person in the party's custody or legal control. The order may be entered only on motion for good cause with notice to the person to be examined and to all parties. The order must specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made, and may provide that the attorney for the person to be examined may be present at the examination.

The parties had great disagreement as to the number of examinations to which Candice should be subjected and the terms and conditions under which those examinations should be held. The first such motion was brought by defendant Area Wide. In that motion it was noted that plaintiff had, without any notice to defendants, already had her own experts conduct IMEs. Kaylea Cardosa participated in the IMEs conducted on behalf of plaintiff. Area Wide sought permission to conduct three IMEs of Candice with Drs. Mary Best, David Rosenberg, and Richard Katz. The motion was filed because plaintiff attempted to put certain conditions on the IMEs, which Area Wide believed were overly restrictive. The motion also argued that the restrictions sought by plaintiff were not imposed during the IMEs conducted by plaintiff's own experts. Area Wide sought to have the IMEs conducted without the presence of counsel, but appear to have wanted Kaylea Cardosa to be present. Defendant Spectrum Health filed a motion joining in Area Wide's motion to permit IMEs. In support of the motion, the affidavits of Drs. Best and Rosenberg were filed, outlining what they believed to be the necessary parameters of an IME of Candice. Rosenberg averred that it was necessary to have Kaylea Cardosa present in order to fully perform the examination on Candice. Rosenberg stated that Kaylea Cardosa's presence was necessary to answer certain questions about Candice's behavior and birth because Candice was so young. Best's affidavit indicated that no third-party observers should be present during the conduct of Candice's IME, with the exception of Kaylea Cardosa. Additionally, a journal article was presented that addressed the adverse affect of the presence of third-parties during neurological testing.

Plaintiff filed a response to the motion to permit IMEs objecting to Kaylea Cardosa being questioned at Candice's IMEs without the presence of plaintiff's counsel. Plaintiff also filed a motion for a protective order to limit the scope of the IMEs. Plaintiff complained that the affidavits made it appear that the IMEs would essentially be a "re-deposition" of Kaylea Cardosa and that it would be done without the presence of counsel. Plaintiff did not object to the notion of Kaylea Cardosa being present for the IME, but objected to the underlying conditions proposed by defendants.

After a hearing on the competing motions for protective orders, the trial court issued its ruling. Pursuant to the ruling, no attorneys would be allowed to be present at the IMEs, defendants' experts would be permitted to observe Candice while at school and the experts would be allowed to question Kaylea Cardosa on a wide range of subjects. A proposed order was filed by defendant Area Wide. An objection to the proposed order was filed by plaintiff, who also filed a motion for reconsideration of the trial court's decision. In the motion for

reconsideration, plaintiff raised the question of whether the trial court had jurisdiction over Kaylea Cardosa, as a nonparty, with respect to requiring her presence at the IMEs for Candice.

The Court entered an order regarding the IME's which reads in pertinent part

It is further ordered and adjudged that Drs. Best, Katz and Rosenberg be allowed to question Candice and/or Kaylea Cardosa fully on all matters pertinent to the performance of an appropriate medical examination, including questions relevant to the pregnancy in question, the labor and delivery, Candice and Kaylea Cardosa's medical history, employment history, family history, developmental history, psychiatric history and educational history.

The order further provided that no attorneys were permitted to be present for the independent medical examinations .

The court denied the motion for reconsideration. The trial court also sent a letter to all counsel of record explaining his rulings. That letter noted that since the issue of jurisdiction over Kaylea Cardosa was raised for the first time in the motion for reconsideration, it was not properly before the court. The letter also indicated that trial court believed it was relevant that, while Linden was appointed conservator, Kaylea Cardosa was still the legal guardian of Candice and was responsible for decisions regarding Candice's medical care. Finally, the letter also stated that because the plaintiff's experts had been able to consult with Kaylea Cardosa during their examinations, the trial court thought it was appropriate to allow defendant's experts the same access for purposes of "conducting reasonable examinations of the minor child."

After several other filings in the trial court, plaintiff appealed the March 10, 2011 order denying his motion for a protective order and compelling IMEs. On April 15, 2011, the trial court entered an order staying proceedings, including, it appears, the IMEs in dispute, pending the outcome of this appeal.

On appeal, plaintiff argues that the trial court did not have the authority to order Kaylea Cardosa to submit to an IME nor to participate in any IME relating to Candice. Plaintiff's argument on appeal implicates several distinct standards of review. Decisions regarding the conditions placed on an IME conducted in accordance with MCR 2.311(A) are a matter of the trial court's discretion. *Muci v State Farm Mut Auto Ins Co*, 478 Mich 178, 180; 732 NW2d 88 (2007). Similarly, a trial court's ruling regarding a medical examination is reviewed for an abuse of discretion. See *Dierickx v Cottage Hosp Corp*, 152 Mich App 162, 170; 393 NW2d 564 (1986), 426 Mich 868 (1986). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010). "The interpretation of court rules and statutes presents an issue of law that is reviewed de novo." *Muci*, 478 Mich at 187. Finally, to the extent this issue involves a question of trial court jurisdiction, review is de novo. *Lease Acceptance Corp v Adams*, 272 Mich App 209, 218; 724 NW2d 724 (2006).

We first address whether the trial court order's regarding Kaylea Cardosa, to the extent that it allowed for her to be questioned about her *own* history, was permitted pursuant to MCR 2.311(A). Court rules are construed using the principles of statutory interpretation. *Kopf v*

*Bolser*, 286 Mich App 425, 428; 780 NW2d 315 (2009). “The intent of the rule must be determined from an examination of the court rule itself and its place within the structure of the Michigan Court Rules as a whole.” *Haliw v Sterling Heights (After Remand)*, 471 Mich 700, 706; 691 NW2d 753 (2005). “Court rules are to be interpreted to give effect to the intent of the Supreme Court, the drafter of the rules.” *Vyetal-Rivard v Rivard*, 286 Mich App 13, 21; 777 NW2d 722 (2009). “If the language of the rule is clear and unambiguous, then no further judicial interpretation is required or allowed.” *Id.* at 22.

Contrary to the trial court, we find that MCR 2.311(A) is inapplicable to Kaylea Cardosa. The text of the rule neither grants the court the authority to order her to submit to an IME nor to require that she produce Candice for examination. MCR 2.311(A), by its terms, only applies to “a party, or of a person in the custody or under the legal control of a party.” See *Baker v Oakwood Hosp Corp*, 239 Mich App 461, 475; 608 NW2d 823 (2000) (“When statutory language is clear and unambiguous, we must honor the legislative intent as clearly indicated in that language.”). Our holding is consistent with this Court’s opinion in *Dierickx v Cottage Hosp Corp*, 152 Mich App 162, 170; 393 NW2d 564 (1986), 426 Mich 868 (1986). In *Dierickx*, this Court concluded that the nonparty siblings of a party could not be forced to submit to a medical examination pursuant to GCR 1963, 311.1, the previous version of MCR 2.311. Likewise, FR Civ P 35, which is the federal rule upon which MCR 2.311 is based, *LeGendre v Monroe Co*, 234 Mich App 708, 723; 600 NW2d 78 (1999), has been interpreted to provide that only parties may be subject to medical examinations. See *Schlagenhauf v Holder*, 379 US 104, 115; 85 S Ct 234; 13 L Ed 2d 152 (1964). Therefore, we conclude that Kaylea Cardosa cannot be ordered to submit to an IME pursuant to MCR 2.331(A). It is clear that a nonparty cannot be subjected to an examination under the terms of MCR 2.311(A) because the plain language of the rule clearly limits who may be subjected to an IME. Kaylea Cardosa is not a party or a person in custody or under the legal control of a party and does not fall within the rule.

While we conclude that the order improperly allowed defendants’ experts to question Kaylea Cardosa on a myriad of subjects pursuant to MCR 2.311(A), we note that she has waived any argument that she cannot be compelled to produce Candice for examination. The parties do not dispute the trial court’s statement in its explanatory letter that Kaylea Cardosa agreed to accompany her daughter to the several IME’s. Nothing in MCR 2.311(A) requires a non-party to produce a person for examination. While only the conservator could have been compelled to produce Candice, because Kaylea Cardosa has agreed to accompany Candice, this issue is moot.

Having determined that the trial court’s order was improper under MCR 2.311(A), we next address whether a non-party can be compelled to participate in any manner in the IME of another pursuant to some other authority. There are no Michigan cases directly addressing whether a non-party can be required to participate in the IME of a party. However, our court rules provide for the participation of non-parties in the discovery process. For example, non-parties may be required to participate in oral depositions pursuant to MCR 2.306; may be required to submit to deposition on written questions pursuant to MCR 2.307; and may be required to produce documents and other evidence pursuant to MCR 2.310. Further, MCR

2.302(C) allows a protective order to be sought “[o]n motion by a party or by the person from whom discovery is sought,” thereby recognizing discovery may be sought from a non-party.<sup>1</sup>

Plaintiff has couched some of his argument in terms of a lack of jurisdiction over Kaylea Cardosa. It does not appear this issue has been properly preserved because the first time plaintiff raised the specific issue on appeal was in a motion for reconsideration. *Pro-Staffers, Inc v Premier Mfg Support Servs, Inc*, 252 Mich App 318, 328-329; 651 NW2d 811 (2002); see also *Farmers Ins Exch v Farm Bureau Ins Co*, 272 Mich App 106, 117; 724 NW2d 485 (2006) (“This argument is not properly preserved for our review because defendant raised it for the first time in its motion for rehearing or reconsideration.”). However, what is nominated as jurisdiction is really an argument about the limits of the authority of the trial court to order a nonparty to participate in discovery. It is in that context that we analyze this issue.

We acknowledge the broad authority of the trial court to fashion discovery tools and processes that address the aims of discovery in Michigan. Michigan has an “open discovery process” that is focused on “open and effective discovery.” *Domako v Rowe*, 438 Mich 347, 359; 475 NW2d 30 (1991) (quotation omitted). The purpose of the discovery process is to “promote the discovery of the facts and circumstances of a controversy, rather than aid in their concealment.” *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 616; 576 NW2d 709 (1998), quoting *Domako*, 438 Mich at 360. In *Reed Dairy Farm*, 227 Mich App at 618, the Court stated, in the context of allowing interrogatories to nonparties not explicitly authorized by the court rules:

Because the court rules are simply guidelines for accessing information, and are not designed to be an exhaustive index of every resource available to parties during discovery, we find that a trial court, when essential to facilitate and expedite the search for accurate and relevant information, may order discovery methods it deems appropriate and necessary.

Since MCR 2.311(A) is inapplicable to Kaylea Cardosa, we must address the March 10, 2011 order within the context of MCR 2.302 to determine whether it is an abuse of discretion to require her to appear at multiple examinations and answer unfettered questions about herself without counsel present. The trial court noted that Kaylea Cardosa’s presence at the depositions, by plaintiffs own admission, would be calming for the minor. We cannot disagree, nor can we find fault with the trial court’s determination that neither lawyers nor other third-parties should not be allowed during the IME’s of Candice. However, the record does not support any basis for

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<sup>1</sup> We note that Kaylea Cardosa, as a person from whom discovery is sought, could have filed her own motion for a protective order, but she did not. Similarly, defendants never appear to have served her with a separate motion under MCR 2.303(C). We could remand this matter to the trial court to require that motions be filed against her in her non-party capacity and also require that she file motions independent of Candice. However, because all parties have exhaustively briefed and argued the issues, because counsel for Candice has asserted without objection that he is counsel for Kaylea Cardosa, also because the trial court has addressed the essence of the issues, a remand would be an exercise in form over substance.

Kaylea Cardosa to have to answer questions about her own psychological, medical, educational or other history without counsel present or a record being made. The affidavit of Dr Best addresses the assertion that third-party presence at a neuropsychological examination is distracting to both the examiner and the person being examined. The article Dr. Best provided for the court further addresses the impact of third-parties on reliability of the testing. Dr. Rosenberg's affidavit speaks to the necessity of interviewing Kaylea Cardosa for a "broad range of subjects beyond her assessment of her child's brain injury." Thus, while the record provides a basis for the trial court's determination that the experts should be able to interview Kaylea Cardosa, there is nothing in the record upon which the trial court could find good cause for ordering that those interviews should be conducted without counsel present or a record being made. Nothing in the record indicates that there is a basis to find that the truth seeking function of discovery will be impeded by affording all parties the opportunity to observe an "interview" of Kaylea Cardosa on these subjects. It is an abuse of discretion to compel her to answer any questions concerning her personal history without the benefit of counsel.

Finally, we must determine if it is a reasonable condition of discovery to require Kaylea Cardosa to answer questions regarding Candice at the IME and, if so, to do so without counsel. We find that while it is not an abuse of discretion to require that Kaylea Cardosa answer an examiner's questions regarding her daughter ancillary to the IMEs, no good cause has been demonstrated to require her to do so without counsel or a record being made.

Defendants, in support of their position that the trial court did not err, would have us look to federal courts for guidance since MCR 2.311 is similar to FR Civ P 35. They offer us several cases to support the argument that trial courts have the ability to order non-parties to assist in the IME of parties. In *TC ex rel GB v Chico Unified Sch Dist*, unpublished order of the United States District Court, eastern district California, entered March 26, 2009 (No. CIV S-07-0926-GEB-CMK), at 1,<sup>2</sup> the court was required to address whether defendant could compel the mother of the child to attend the examination for purposes of providing, "background information concerning Plaintiff and Plaintiff's condition and to facilitate meaningful interaction" between the examining doctor and the plaintiff. *Id.* at 3 (quotation omitted). As in the present case, the plaintiff objected on the grounds his mother was "not a party" to the action. *Id.* The court determined that the participation of the plaintiff's mother was a "reasonable request" and the court had authority to order her participation under the discretionary authority to specify the "manner, conditions and scope of the examination." *Id.* However, unlike this case, the mother was the next friend through whom the case was brought.

In *MS v Cedar Bridge Military Academy*, unpublished opinion of the United States District Court, middle district of Pennsylvania, issued May 13, 2011, slip op at 1, as in the present case, the defendant's medical examiner wanted to interview the plaintiff's non-party parents as part of the plaintiff's examination. *Id.* at 4. The court noted that, "Rule 35 itself is silent on this issue." *Id.* at 5. The court recognized that there was some limited authority in

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<sup>2</sup> Unpublished federal cases, while not binding on this Court, may be persuasive or instructive. See *Jodway v Kennametal, Inc*, 207 Mich App 622, 631; 525 NW2d 883 (1994).

support of an argument that the plaintiff's parents could not be compelled to participate, while there was also some authority that ruled a parent *could* be required to participate to some degree. *Cedar Bridge Military Academy* expressly declined to follow *Cutting v United States*, unpublished order of the United States District Court, district Colorado, entered November 24, 2008 (No. 07-cv-02053-PAB-MEH), in which the court determined that it had the authority to require the minor child plaintiff's father, who was next friend for the plaintiff, to appear at the IME, but not the mother, who was not officially affiliated with the case in any way. *Id.* at 2.

In another case involving a similar question, *PS ex rel Nelson v The Farm, Inc.*, unpublished order of the United States District Court, district Kansas, entered September 11, 2008 (No. 07-2210-JWL-DJW), at 1, the defendant's experts, for purposes of an IME under FR Civ P 35, wanted to speak with the minor children's parents. The plaintiffs' counsel objected and informed the defendant that the parents of the plaintiffs would not be available. *Id.* The court recognized that such questioning was *not* a request for an IME of the plaintiffs' parents. *Id.* at 3. Instead, such questioning was merely for purposes of obtaining background information. *Id.* Defendant argued that this procedure was necessary to obtain the background information regarding the plaintiffs. *Id.* While the court recognized that FR Civ P 35 allowed the placement of conditions on the IME, the court determined that the rule did not give the court the authority to order non-parties to be questioned under the IME rule.

We find that MCR 2.311(A) does not authorize or require the questioning of a non-party regarding a party that is properly subject to an IME. The trial court is authorized to fashion discovery tools that meet both the broad goal of open discovery and the fundamental concepts of due process. MCR 2.302 gives the court that authority. In this case, Candice cannot provide the examiners with information that the examiners affidavits say they need. The affidavits from Drs. Best and Rosenberg, indicate that certain information is needed for them to properly test or evaluate Candice. While much of the information can be obtained from medical records, we cannot say that the trial court's determination that Kaylea Cardosa should provide the information is outside the range of principle outcomes. We find that while the trial court did not abuse its discretion in ordering Kaylea Cardosa to provide information, it did abuse its discretion in ordering that this be done *ex parte*. As noted before, nothing in the record, including the journal articles, supports a finding that the integrity of the testing or evaluation would be adversely affected by allowing Kaylea Cardosa's lawyer to be present during her questioning. The fact that she met with plaintiff's examiners outside the presence of defense counsel and without a record being made does not provide good cause to require that she meet the defense examiners without counsel. Witnesses frequently meet voluntarily with investigators and attorneys from one side of a lawsuit while declining, absent a subpoena, to meet with the opposing side's investigators or attorneys. Kaylea Cardosa's status as Candice's mother does not deprive her of the same rights and obligations.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter  
/s/ Deborah A. Servitto  
/s/ Cynthia Diane Stephens