IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

PASCALE Z. OTTS, GABRIELE OTTS, AND ANTHONY P. OTTS,
Petitioners,

v.

HON. D. DOUGLAS METCALF, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF PIMA,
Respondent,

and

LAUREN I. MILLER AND MICHAEL R. MILLER,
Real Parties in Interest.

No. 2 CA-SA 2021-0074
Filed February 16, 2022

Special Action Proceeding
Pima County Cause No. CR20204384

JURISDICTION ACCEPTED; RELIEF GRANTED

COUNSEL

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By Christoph M. Diecke, Los Angeles, California
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Counsel for Petitioners

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Counsel for Real Parties in Interest

MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Eckerstrom and Judge Espinosa concurred.

V Á S Q U E Z, Chief Judge:

¶1 In this special action, petitioners Pascale Otts, Gabriele Otts, and Anthony Otts—plaintiffs in the underlying negligence action—challenge the respondent judge's order that Pascale submit to examinations requested by real parties in interest—defendants in the negligence action—Lauren Miller and Michael Miller.[1] Because the respondent ordered examinations by individuals other than physicians and psychologists, as required by Rule 35(a), Ariz. R. Civ. P., we accept special-action jurisdiction and grant relief.

Factual and Procedural Background

¶2 The underlying case stems from a motor-vehicle accident. Lauren hit Pascale, pinning her between the vehicle Lauren was driving and a fence, while Pascale stood behind the vehicle apparently trying to direct Lauren into a parking spot. Pascale and her parents are seeking damages for medical expenses; "continuing, chronic pain, physical limitation, and emotional issues"; and loss of consortium against Lauren and her father.

¶3 The parties stipulated to a scheduling order, classifying the case as a Tier 3 case, which the respondent judge signed on February 8, 2021. In relevant part, the scheduling order provided that the parties would

[1]For ease of identification, petitioners will be referred to collectively as the Otts, and real parties in interest will collectively be referred to as the Millers.

"submit all discovery" pursuant to Rules 33 through 36, Ariz. R. Civ. P., by April 30, 2021.[2]

¶4 In June 2021, the parties filed a stipulation, which the respondent judge approved, to extend certain pretrial deadlines. In part, the respondent ordered the Otts to disclose the identity and opinions of their experts by November 19, 2021, the Millers to disclose the identity and opinions of their experts by January 28, 2022, and both sides to disclose their rebuttal expert opinions by February 28, 2022. The order also provided:

> The Court will retain the present date and time of December 10, 2021 at 9:30 a.m. for purposes of a Status Conference on its calendar, so that in the event that the issues giving rise to the instant Stipulation continue to present difficulties with respect to the court-ordered deadlines, the parties may discuss same with the Court.

¶5 On November 19, 2021, the Otts emailed the Millers the identity and opinions of nine experts. Thereafter, the Millers sent the Otts six notices seeking examinations of Pascale under Rule 35(a). The notices included the following individuals and the scopes of their examinations: Sandy Goldstein, PT, CDMS ("[f]unctional capacity as a result of the alleged injuries"), Marjorie Eskay-Auerbach, M.D. ("[o]rthopedic evaluation of injuries and fractures as well as subjective complaints from injuries sustained in the subject accident"), Staci Schonbrun, Ph.D. ("[i]njuries and/or claims in connection with the subject lawsuit as they pertain to vocational rehabilitation and labor market"), Dr. Gary Dilla ("[i]njuries and/or claims in connection with the subject lawsuit pertaining to physical medicine"), Dr. Paige Brainard ("[i]njuries and/or claims in connection with the subject lawsuit"), and Dr. Scott Belanger ("injuries and/or claims in connection with the subject lawsuit"). The Otts sent two letters to the Millers objecting to the examinations. The Millers subsequently sent the Otts amended notices of examinations for the same individuals, instead listing Rule 35(b).

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[2]This language was intended to parallel that found in Form 13(b), Ariz. R. Civ. P., which says, "The parties will propound all discovery undertaken pursuant to Rules 33 through 36 by _____." Ariz. R. Civ. P. 84.

¶6 On December 9, 2021, the Millers filed a "Joint Statement of Discovery Dispute," pursuant to Rule 26(d), Ariz. R. Civ. P., requesting that the respondent judge order Pascale "to appear for the scheduled [examinations] per existing proper Notices under [Rule] 35(b) or . . . order her appearance on the scheduled dates per [Rule] 35(a)." The Otts filed a written objection that same day.

¶7 The parties addressed the matter at the previously scheduled status conference on December 10, 2021. The Millers asserted that they were seeking examinations "identical to what [Pascale] underwent at [the Otts'] counsel's direction." Although they stated they had six professionals who needed to evaluate Pascale, they conceded that Pascale had only been examined by five of her own experts. As in their written objection, the Otts argued, first, Rule 26 did not apply because "a dispute under Rule 35 is not a delineated motion that may be brought using Rule 26(d)" and, second, Rule 35(b) did not apply because there was no agreement between the parties. The Otts therefore reasoned that although they must be operating under Rule 35(a), the Millers had not filed a motion for good cause and that rule only allows physicians and psychologists to perform examinations. In addition, the Otts asserted that the deadline for the Rule 35 examinations had expired eight months earlier on April 30, 2021, pursuant to the scheduling order. The Otts also argued only four of their experts conducted "in-person" evaluations of Pascale. The Millers responded that the April 30, 2021, deadline "probably shouldn't" include Rule 35 because it must be read "in tandem with . . . [the] expert disclosure deadline, . . . which is well beyond April 30."

¶8 The respondent judge granted the Millers leave to take examinations by "the same disciplines that the [Otts have] disclosed" and ordered that the deadline for the examinations "is the same deadline as the expert disclosure deadline." The respondent explained it was "fundamentally unfair" that the Otts have access to Pascale and can have all their experts evaluate her, while the Millers cannot. This petition for special action followed.[3]

Special-Action Jurisdiction

¶9 "Although we do not 'routinely entertain petitions for extraordinary relief on discovery matters,' special action jurisdiction may be appropriate because a discovery order is not appealable." *Green v.*

[3] The respondent judge entered a stay on January 11, 2022, but Pascale did not attend examinations on January 5, 7, and 10, 2022.

Nygaard, 213 Ariz. 460, ¶ 6 (App. 2006) (citation omitted) (quoting *Jolly v. Superior Court*, 112 Ariz. 186, 188 (1975)). In addition, "if a plaintiff is wrongly compelled to submit to an examination the trial court was not authorized to order, the damage will have been done and cannot be remedied by an appeal." *Avila v. Superior Court*, 169 Ariz. 49, 50 (App. 1991). Special-action jurisdiction is also appropriate when "'the issue involves the interpretation or application of civil procedure rules' and the respondent judge's alleged abuse of discretion concerns 'a pure issue of law that may be decided without further factual inquiry.'" *Clayton v. Kenworthy*, 250 Ariz. 65, ¶ 2 (App. 2020) (quoting *Green*, 213 Ariz. 460, ¶ 6). For all these reasons, we exercise our discretion and accept special-action jurisdiction in this case. *See* Ariz. R. P. Spec. Act. 3.

Discussion

¶10 The Otts argue the respondent judge misinterpreted and misapplied Rule 35 in several ways. Rule 35(a) allows the courts to order examinations of parties:

> (1) Generally. The court where the action is pending may order a party whose physical or mental condition is in controversy to submit to a physical or mental examination by a physician or psychologist. The court has the same authority to order a party to produce for examination a person who is in the party's custody or under the party's legal control.
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> (2) Motion and Notice; Contents of the Order. An order under Rule 35(a)(1):
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> (A) may be entered only on motion for good cause and on notice to all parties and the person to be examined;
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> (B) must specify the time, place, manner, conditions, and scope of the examination; and
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> (C) must specify the person or persons who will perform the examination.

Rule 35(b) provides the process for "[w]hen the parties agree that an examination is appropriate but do not agree on the examiner." We review de novo the interpretation and application of court rules. *Haroutunian v. Valueoptions, Inc.*, 218 Ariz. 541, ¶ 6 (App. 2008).

¶11 The Otts argue that the "respondent judge erred as a matter of law in interpreting Rule 35 as applicable to [their] own experts,"[4] noting that respondent "even went so far as to suggest that [they] had missed the Rule 35 deadline, as if Pascale would have ever utilized Rule 35 procedures for her own experts." They maintain that a Rule 35 examination is intended to be "independent," citing *Martin v. Superior Court*, 104 Ariz. 268 (1969). The Otts further contend that the respondent's "interpretation of Rule 35 provides a superior advantage" for the Millers because they "are being permitted to perform a greater number of examinations of Pascale" than the Otts' own experts.

¶12 In *Martin*, the issue was whether the trial court had erred by ordering an examination under Rule 35(a), over the plaintiff's objection, when the physician directed to conduct the examination had been a former client of the defendant's attorney. 104 Ariz. at 269. The supreme court determined that the trial court had discretion to select the examiner but it should do so "only after an examination of the doctor or the introduction of other competent evidence as to whether the relationship with [the defense attorney] would render his examination less impartial than that intended by Rule 35(a)." *Id.* at 271. The court reiterated that "[t]he defendant seeking a physical examination of a plaintiff has no absolute right to the choice of his own physician." *Id.* Thus, *Martin* requires the trial court to conduct an inquiry "on the question of bias" if raised by the plaintiff. *Id.* Contrary to the Otts' argument, that case does not suggest that a Rule 35 examination is not "independent" merely because it is being

[4]The Otts also maintain the "respondent judge erred as a matter of law in substituting Rule 26(d) procedures in lieu of Rule 35." We disagree. Although the Millers filed a "Joint Statement of Discovery Dispute" pursuant to Rule 26(d), they nonetheless requested relief under Rule 35, and the Otts filed a written objection. In addition, the respondent did not set an expedited hearing under Rule 26(d) because he had reserved the opportunity to address any discovery issues at the December 10, 2021 status conference, where both parties thoroughly argued their positions. Perhaps most notably, the respondent did not rely on Rule 26(d) when entering his order.

performed by an expert retained by the defendant. Additionally, we agree with the Millers that the Otts "never raised any issue of bias" below.

¶13 "Rule 35 is a discovery rule." *Pedro v. Glenn*, 8 Ariz. App. 332, 334 (1968). It "was adopted because 'the need for such examinations [is] in the interest of truth and justice.'" *Avila*, 169 Ariz. at 52 (quoting *Acocella v. Montauk Oil Transp. Corp.*, 614 F. Supp. 1437, 1439 (S.D.N.Y. 1985)). "Discovery is to be encouraged so that all parties may be adequately informed." *Pedro*, 8 Ariz. App. at 334. Here, as the respondent judge noted, the Otts have unlimited access to Pascale while the Millers do not, and Rule 35 is intended to put them on an "equal footing." *Duncan v. Upjohn Co.*, 155 F.R.D. 23, 25 (D. Conn. 1994) (quoting *Tomlin v. Holecek*, 150 F.R.D. 628, 633 (D. Minn. 1993)); *see also Schlagenhauf v. Holder*, 379 U.S. 104, 114-15 (1964) (discovery rules accorded broad and liberal treatment to effectuate purpose that trials "no longer need be carried on in the dark" (quoting *Hickman v. Taylor*, 329 U.S. 495, 501 (1947))); *Hernandez v. State*, 203 Ariz. 196, ¶ 10 (2002) (when interpreting Arizona's evidentiary rules, we look to federal law if our rule mirrors federal rule).

¶14 Because Rule 35 is a discovery rule, the respondent judge had broad discretion in ordering the examinations of Pascale.[5] *See Reid v. Reid*, 222 Ariz. 204, ¶ 8 (App. 2009). This court will not disturb that order absent an abuse of discretion. *Id.* However, an abuse of discretion occurs if there is an error of law in reaching a discretionary decision. *Tritschler v. Allstate Ins. Co.*, 213 Ariz. 505, ¶ 41 (App. 2006). We conclude such error occurred here, as discussed below.

¶15 The Otts assert the respondent judge erred in ordering examinations by Sandy Goldstein and Staci Schonbrun because they are not physicians or psychologists, as required by Rule 35(a).[6] In support of their argument, the Otts rely on *Avila*, 169 Ariz. 49.

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[5]At bottom, the parties' dispute seems to center on the timing of the Rule 35 examinations in relation to the disclosure of experts and whether the respondent judge could extend the deadline in the scheduling order. However, the Otts do not meaningfully develop this issue. We therefore do not address it. *See Tucson Unified Sch. Dist. v. Borek*, 234 Ariz. 364, ¶ 14 (App. 2014) (issue waived where not developed in special-action petition).

[6]The Millers maintain this argument is waived because the Otts "did not raise any specific objection regarding Mr. Goldstein and Ms. Schonbrun" below, instead raising "general objections" to those who are

¶16 In *Avila*, this court determined that the defendant was not entitled to have a vocational rehabilitation specialist examine the plaintiff under Rule 35(a). *Id.* at 52. We observed that "the language of the rule itself specifically limits its application to physicians" and psychologists.[7] *Id.* at 51. In addition, we explained that a Rule 35 examination is "limited in scope" to protect "personal privacy interests." *Id.* at 52. However, we noted that the defendant had "other discovery devices available to him," including compelling an examination of the plaintiff by a physician and then making the results of that examination available to the vocational rehabilitation specialist. *Id.*

¶17 In response, the Millers rely on several cases decided by federal courts to establish that "a vocational and life care planning consultant is permitted under Rule 35 to conduct a vocation rehabilitation . . . examination/interview." However, those cases are unpersuasive because they are based on the broader language of the federal rule that allows a physical or mental examination by "a suitably licensed or certified examiner," Fed. R. Civ. P. 35(a), rather than "a physician or psychologist," Ariz. R. Civ. P. 35(a). And although the Millers point to various statutes to establish that Sandy Goldstein and Staci Schonbrun are "medically licensed individuals," such that they qualify as "physicians," we need not engage in such a complex statutory analysis when the language of the rule is plain and unambiguous.

¶18 When construing a court rule, our goal is to effectuate the intent of the drafters, and we look to the plain language of the rule as the best indicator of that intent. *Fragoso v. Fell*, 210 Ariz. 427, ¶ 7 (App. 2005). "If the language is clear and unambiguous, we give effect to that language and do not employ other methods of statutory construction." *Id.* "We give words and phrases in . . . rules their common or ordinary meanings unless the context reveals a special meaning." *Stout v. Taylor*, 233 Ariz. 275, ¶ 12 (App. 2013).

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not physicians. However, we decline to find waiver here because the respondent judge and the Millers were given an adequate opportunity to correct any defects before the issue was raised before this court. *See Noriega v. Town of Miami*, 243 Ariz. 320, ¶ 27 (App. 2017).

[7]When *Avila* was decided in 1991, Rule 35(a) only allowed for "a physical or mental examination by a physician." 171 Ariz. XLI. The rule was amended in 1992 to also allow examination by a psychologist. *Id.*

¶19 The plain language of Rule 35(a) limits those who can perform examinations to physicians and psychologists. As the terms are commonly understood, a physician is "[a] person licensed to practice medicine; a medical doctor," and a psychologist is "[a] person trained and educated to perform psychological research, testing, and therapy." The American Heritage Dictionary 1050, 1125 (4th coll. ed. 2002). The context of the rule reveals no special meaning. As we explained in *Avila*, we have no "authority to substantially expand [the] rule's scope, insert new language, or create new provisions out of whole cloth." 169 Ariz. at 51 (quoting *Comastro v. Tourtelot*, 118 F.R.D. 442, 443 (N.D. Ill. 1987)).

¶20 In this case, Sandy Goldstein is a physical therapist and a certified disability management specialist who was to evaluate Pascale's "[f]unctional capacity." Staci Schonbrun has a doctorate degree in rehabilitation counseling and is a certified rehabilitation counselor; she was to evaluate Pascale in terms of vocational rehabilitation and the labor market. Neither of these individuals is a physician or psychologist. Accordingly, the respondent judge erred as a matter of law by ordering Pascale to submit to Rule 35(a) examinations performed by Sandy Goldstein and Staci Schonbrun. *See Tritschler*, 213 Ariz. 505, ¶ 41. We therefore vacate the respondent's December 10, 2021, order as to these two individuals.

¶21 The Otts also contend the respondent judge "exceeded his legal authority by compelling examinations without specifying the time, place, manner, conditions, and scope of the examinations." They point out that Rule 35(a) requires specificity but the respondent's order broadly allowed Defendants "to take [examinations] of the same disciplines that the [Otts have] disclosed."

¶22 However, the Otts failed to raise the sufficiency of the respondent judge's order as an issue below. Had they done so, the respondent could have easily clarified the details of the examinations ordered. We therefore deem the issue waived. *See Trantor v. Fredrikson*, 179 Ariz. 299, 300 (1994) ("Because a trial court and opposing counsel should be afforded the opportunity to correct any asserted defects before error may be raised on appeal, absent extraordinary circumstances, errors not raised in the trial court cannot be raised on appeal.").

¶23 That said, during the pendency of this special-action proceeding, the dates of the previously set examinations have all passed. As a result, the respondent judge must enter a new order as to the remaining four individuals, and that order shall "specify the time, place,

manner, conditions, and scope of the examination[s]." Ariz. R. Civ. P. 35(a)(2)(B).

Disposition

¶24 For the foregoing reasons, we accept special-action jurisdiction and grant relief.