

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

CASE NO. 09-CV-20042-KING-BANDSTRA

ESTHER MANTEL,

Plaintiff,

v.

CARNIVAL CORPORATION
d/b/a CARNIVAL CRUISE LINES;
EXPLORA CARIBE TOURS SA de CV;
VULCAN MATERIALS COMPANY;
and JOHN DOE CORP(S). (1-10);

Defendants.

**ORDER GRANTING DEFENDANT'S MOTION TO COMPEL RULE 35
EXAMINATION AND DENYING PLAINTIFF'S MOTION FOR PROTECTIVE ORDER**

THIS CAUSE comes before the Court upon Defendant's Motion to Compel Rule 35 Examination (DE # 90) and Plaintiff's Motion for Protective Order (DE # 98) to allow Plaintiff's counsel to attend and video tape the examination. After careful consideration, and for the reasons detailed below, the Court determines that Defendant's Motion should be **GRANTED** and Plaintiff's Motion should be **DENIED**.

Defendant has shown that the present matter is a personal injury action in which the Plaintiff alleges to have sustained personal injuries. Plaintiff does not object to such an examination. Therefore, an examination pursuant to Rule 35 of the Federal Rules of Civil Procedure is appropriate.

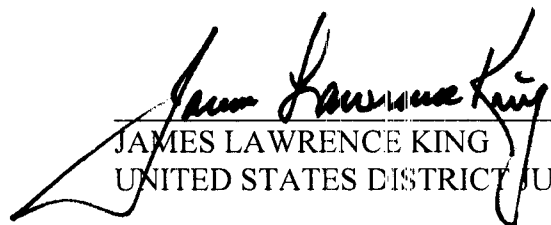
However, Plaintiff has requested that her attorney attend and video tape the examination.

There is substantial case law within the Federal Courts that expressly excludes third parties and any recording devices from a Rule 35 physical or mental examination. *See Holland v. U.S.*, 182 F.R.D. 493 (D.S.C. 1998); *Tomlin v. Holecek*, 150 F.R.D. 628, 631 (D. Minn. 1993). The fear is that inclusion of a third party will contaminate the examination, influence an adversarial atmosphere, and potentially place the plaintiff's attorney in a position to be a witness at trial. *See Hertenstein v. Kimberly Home Health Care Inc.*, 189 F.R.D. 620, 630 (D. Kan. 1999); *McDaniel v. Toledo, Peoria & Western R/R CO.*, 97 F.R.D. 525 (C.D. Ill. 1983). This is contrary to the purpose of an examination that is supposed to be objective. Although Plaintiff has cited to Florida State law that permits the presence of an attorney at physical and mental examinations, this law does not outweigh the majority view.

Accordingly, after careful consideration and the Court being otherwise fully advised, it is **ORDERED, ADJUDGED, and DECREED** that:

1. Defendant's Motion to Compel Rule 35 Examination (DE #90) is **GRANTED**.
2. Plaintiff's Motion for Protective Order (DE #98) is **DENIED**.

DONE AND ORDERED in Chambers, at Miami, Miami-Dade County, Florida, this 8th day of October 2009.



JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE

Cc:

Magistrate Judge Ted E. Bandstra

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