

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

MICHAEL DAVIS,

Plaintiff,

v.

JOHNSON INTERNATIONAL
INDUSTRIES, INC., d/b/a CONTINENTAL
HARDWOOD CO., a Washington
Corporation, and LISA JOHNSON, an
individual and the marital community
comprised of LISA JOHNSON and DON
FULLER,

Defendants.

Case No. 2:16-cv-1660-TSZ

STIPULATION AND ORDER FOR RULE
35 EXAM

A. BACKGROUND INFORMATION

Plaintiff seeks recovery for alleged emotional distress, which is alleged to be the result of the acts and omissions of the Defendants. The Defendants have requested an examination pursuant to FRCP 35. A Rule 35 rule requirement is that there be a mental or physical condition “in controversy.” The parties desire to stipulate to the following without the need for Defendants to file a motion to make a showing of good cause

B. STIPULATION

It is understood and therefore stipulated that:

1. The Rule 35 examination shall take place at the offices of Dr. Mark McClung located at 1200 Fifth Avenue, Suite 2010, Seattle, WA 98101.

1 2. The Rule 35 Examination shall occur beginning at 8:30 am on August 1, 2017.

2 3. The Rule 35 examination shall be conducted by Dr. Mark McClung (“Examiner”). It may
3 consist of a psychiatric interview and administration of a written test and short questionnaires.
4 The Examination with testing shall last no longer than six (6) hours, aside from a lunch break
5 and any other breaks or other delays caused by the Plaintiff or his representative.

6 4. Plaintiff shall have the right to have a single representative present at the examination
7 who may take notes and videotape and/or audiotape the proceedings, at no extra charges by the
8 Examiner, so long as Plaintiff provides the name of the representative in advance of the
9 examination. If Plaintiff’s representative records the examination (video or audio), Plaintiff will
10 provide a copy of the recording to Defendants within five (5) business days after the
11 examination. Plaintiff’s representative will not interfere with or obstruct the examination unless
12 the scope of the examination invades attorney-client or other privileges belonging to Mr. Davis,
13 or violates the terms of this agreement. Defendants have no right to have a representative
14 present at the examination.

15 5. Examiner shall make a written report of the exam; the attorneys for Defendants shall
16 cause a copy of the report to be delivered to Plaintiff’s counsel within five (5) business days of
17 its receipt by Defendants’ counsel, and no later than thirty (30) calendar days after the date of the
18 exam. The written report of the examination shall be detailed and set forth separately:

- 19 a. The findings made by the Examiner;
- 20 b. The results of all tests made by or done at the request of the Examiner;
- 21 c. The diagnosis, if any, made by the Examiner;
- 22 d. The findings upon which the diagnosis is based; and,
- 23 e. The conclusions reached by the Examiner.

24 6. After the delivery of the report, Plaintiff shall have the right to take the discovery
25 deposition of the Examiner. The Defendants will give written notice within thirty (30) days of
26 receipt of the report as to whether they will call the Examiner as a witness at trial. The Examiner
27 shall make himself available for deposition on a mutually agreeable date no later than forty-five

1 (45) days prior to trial in this case, the date of which shall be provided to Examiner by defense
2 counsel prior to the examination.

3 7. The fees to be charged by the Examiner to Plaintiff for a deposition shall be a reasonable
4 fee not to exceed \$600 per hour. Billing records for all fees and costs associated with the exam
5 provided by the Examiner to the Defendant shall be provided to Plaintiff's counsel at least five
6 (5) days prior to any deposition of the Examiner to be taken by Plaintiff's counsel. This
7 agreement does not in any way limit Plaintiff's right to discovery.

8 8. No person, other than the Examiner or Examiner's staff, shall participate in any way in
9 the examination, including scoring or interpretation of tests, with the exception of Caldwell
10 Reports, which Examiner may retain to score written test results. Each such person or entity so
11 participating shall be identified to the Plaintiff on or before the date of examination, or when the
12 person or entity is identified by Examiner, with address and description of the role of each.

13 9. A copy of this Stipulation shall be given to the Examiner at least ten (10) days before the
14 examination. Defendants' counsel will be responsible for ensuring that the Examiner is apprised
15 of the Stipulation's limitations in advance of the examination so that if the Examiner has any
16 issues with the stipulation, they will be resolved prior to the date and time of the examination. If
17 the Examiner obstructs the performance of the examination, at the time of the examination, based
18 on issues that could have been resolved in advance, the examination may be postponed and all
19 costs associated with the postponement will be borne by Defendants.

20 10. If admissibility of the raw test answers and raw test materials is sought by any party, it
21 will be determined by the Court and shall not be offered by a party without prior approval of the
22 trial court.

23 11. All questions posed to Plaintiff by the Examiner or staff shall be confined to issues
24 pertinent to psychological examination and diagnosis. No questions will be asked that invade or
25 attempt to invade Mr. Davis' attorney-client privilege or work product. If Plaintiff's
26 representative determines that specific questions by Dr. McClung would invade attorney-client
27 or work product privileged communications, the representative may instruct Plaintiff not to

1 answer those questions. If Defendants believe that Plaintiff improperly refused to answer a
2 question, the examination can be resumed by agreement of the parties or by order of the Court.
3 The Examiner shall be instructed not to ask Plaintiff about his communications with his attorneys
4 or his opinions or knowledge of the litigation, litigation rationale or strategy, or the damages or
5 settlements or verdict sought.

6 12. Plaintiff shall not be responsible for any charges of the Examiner for the examination and
7 will not be billed for anything related to the examination or the report.

8 13. The Examiner's report shall refer to the examination as a "Civil Rule 35 Mental
9 Examination." Both the Examiner and all defense counsel are specifically prohibited from
10 referring to the examination as an "independent medical examination" at any time and
11 specifically in any deposition, pleading, or at trial.

12 14. Plaintiff will be permitted to take any breaks he feels are necessary, which will not be
13 counted as part of the six (6) hour examination time.

14 15. If the Defendants withdraw the Examiner as a testifying expert and Plaintiff does not call
15 Dr. McClung as a witness, none of the materials or forms from the CR 35 examination, nor the
16 opinions of Dr. McClung, may be used in evidence, nor for impeaching or cross examining other
17 witnesses at trial, without the prior approval of the Court.

18 16. This stipulation in no way waives Plaintiff's rights to challenge the admissibility of
19 opinions or testing done by Dr. McClung or anything arising from the Civil Rule 35 Mental
20 Examination.

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1 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

2 DATED: July 25, 2017

3 /s/ Marina M. Visan

4 Todd W. Wyatt, WSBA #31608

5 Marina M. Visan, WSBA #49127

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9 20 Sixth Avenue NE

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11 Tel: 425-837-4717

12 Attorneys for Plaintiff

13 DATED: July 25, 2017

14 /s/ Darren A. Feider

15 Darren A. Feider, WSBA #22430

16 Tina M. Aiken, WSBA # 27792

17 Email: dfeider@sebrisbusto.com

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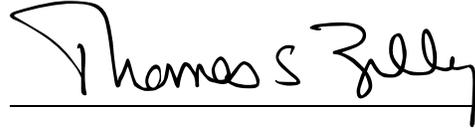
20 Bellevue, Washington 98006

21 Tel: 425-454-4233 / Fax: 425-453-9005

22 Attorneys for Defendants

PURSUANT TO STIPULATION, IT IS SO ORDERED

DATED this 28th day of July, 2017.



Thomas S. Zilly
United States District Judge

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