

Serial: 101754

IN THE SUPREME COURT OF MISSISSIPPI

No. 89-R-99001-SCT

FILED

JAN 16 2003

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

***RE: THE MISSISSIPPI RULES OF
CIVIL PROCEDURE***

ORDER

This matter has come before the Court, en banc, on Motion to Amend Mississippi Rules of Civil Procedure By Adopting a Rule Permitting Trial Courts to Order Physical and Mental Examinations. After receiving the motion, the Court referred the matter to the Supreme Court Advisory Committee on rules for study and recommendation and published the motion, requesting comments from the bench, the bar and the public. Having received the benefit of the Advisory Committee's recommendation and studied the comments, the Court finds that the amendment of the Mississippi Rules of Civil Procedure to incorporate a new Rule 35 will promote the fair and efficient administration of justice.

IT IS THEREFORE ORDERED that the Motion to Amend Mississippi Rules of Civil Procedure By Adopting a Rule Permitting Trial Courts to Order Physical and Mental Examinations is granted to the extent set forth herein. Rule 35 and the Comment thereto as set out in Exhibit "A" hereto are adopted. In the compilation of the Rules of Civil Procedure as they appear in the *Mississippi Rules of Court*, the new rule shall replace the reference to Rule 35 as "Omitted" and the existing comment.

IT IS FURTHER ORDERED that the Clerk of this Court shall spread this order upon

the minutes of the Court and shall forthwith forward a true certified copy hereof to West Publishing Company for publication as soon as practical in the advance sheets of *Southern Reporter, Second Series (Mississippi Edition)* and in the next edition of *Mississippi Rules of Court*.

SO ORDERED, this the 10th day of January, 2003.

A handwritten signature in black ink, appearing to read "W. L. Waller, Jr.", written over a horizontal line.

WILLIAM L. WALLER, JR., JUSTICE,
FOR THE COURT

MCRAE, P.J. AND EASLEY, J., DISSENT

EXHIBIT "A" TO ORDER

MISSISSIPPI RULES OF CIVIL PROCEDURE

RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS

(a) Order for Examination.

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 examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. A party or person may not be required to travel an unreasonable distance for an examination. The party requesting the examination shall pay the examiner and shall advance all necessary expenses to be incurred by the party or person in complying with the order.

(b) Report of Examiner.

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of the detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition unless, in the case of a report of examination of a person not a party, the party shows that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the court may exclude the examiner's testimony if offered at trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined

or may thereafter examine the party in respect of the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other rule.

(c) Limited Applicability to Actions Under Title 93 of the Mississippi Code of 1972. This rule does not apply to actions under Title 93 of the Mississippi Code of 1972, except in the discretion of the Chancery Judge.

[Adopted effective January 16, 2003.]

Advisory Committee Historical Note

Effective January 16, 2003, Rule 35 was adopted to allow a court to order a physical or mental examination of a person for good cause on motion. ___ So.2d ___ (West Miss.Cases ___).

Comment

Rule 35(a)(1) is modeled, in general, after *FED. R. CIV. P. 35*. The purpose of Rule 35(a)(1) is to allow a court to order a physical or mental examination of a person for good cause on motion. Previously, the omission in the Mississippi Rules of Civil Procedure of a counterpart to Federal Rule 35 was held to preclude a court from ordering an examination under any circumstances. See *Swan v. I. P. Inc.*, 613 So. 2d 846 (Miss. 1993).

The order may be made only upon good cause and is limited to cases in which the condition of the party or person to be examined is in controversy. For a discussion of the showing required, see Wright & Miller, *Federal Practice and Procedure*, Civil, § 2234.1 (1994). Although some states allow examinations under Rule 35 without an order of the court, Mississippi Rule 35, like the federal counterpart, requires such an order, and, generally, the choice of physicians is left to the party seeking the examination. Addressing federal practice, Wright & Miller have said: "The usual attitude is that the moving party has no absolute right to the choice of the physician, but that when no serious objection arises, it is probably best for the court to appoint the doctor

of the moving party's choice." Wright & Miller, *Federal Practice and Procedure*, Civil, § 2234.2 (1994).

Rule 35(c) provides that in divorce, child custody, and other actions under Title 93 of the Mississippi Code of 1972, examinations are entirely within the discretion of the Chancery Judge.

[Adoptive effective, January 16, 2003.]