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ARE DEFENDANTS ENTITLED TO VOCATIONAL REHABILITATION EXAMINATIONS OF PLAINTIFFS

A recurring issue arising in significant personal injury actions is whether a defendant may compel an injured plaintiff to submit to a vocational rehabilitation examination/interview by a defendant's designated vocational expert.

If a personal injury plaintiff claims in the bill of particulars an incapacity to return to the workforce, coupled with an economic loss of earnings claim, an uncertainty exists as to whether a defendant has an absolute right to compel the injured plaintiff to submit to a vocational examination by his or her expert. Several plaintiffs' attorneys argue that the seminal Court of Appeals decision in Kavanaugh v. Ogden Maintenance Corp., 683 N.Y.S.2d 156 (1998), limits a defendant's entitlement to a vocational examination to cases in which the plaintiff has retained his or her own vocational specialist to testify about the plaintiff's inability to return to work after an injury. On the other hand, counsel for defendants routinely argue that it is unfair and prejudicial to deny access to a vocational examination, especially when significant loss of earnings claims are set forth in an action. It is claimed by defense attorneys that the physicians ordinarily retained to examine the plaintiffs from a medical perspective are unqualified to comment on what vocational possibilities are available to a certain plaintiff. Under New York's discovery statutes, the scope of discovery is very broad and consistent with New York's longstanding policy of permitting far-reaching pre-trial discovery. DiMichel v. South Buffalo Ry. Co., 590 N.Y.S.2d 1 (1992). CPLR Section 3101(a) provides for "full disclosure of all matters material and necessary in the prosecution or defense of an action." McKinney's CPLR Section 3101(a). The caselaw on this issue, however, is far from well-settled.

The Kavanaugh decision limits a defendant's right to a vocational examination. In Kavanaugh, the Court of Appeals held that defendants are entitled to conduct vocational examinations of plaintiffs when the plaintiff's attorney discloses his or her own vocational expert to testify about the injured party's inability to return to work. Kavanaugh *supra*. What the Court of Appeals failed to clarify in Kavanaugh, however, is whether the defendant can compel such an examination when plaintiff does not disclose his or her own vocational expert.

CPLR §3121(a) authorizes a defendant to conduct a physical or mental examination of a plaintiff by a *physician* in personal injury cases, however, it does not expressly authorize an examination of a plaintiff by a *non-physician vocational rehabilitation expert.* The courts have analyzed this important issue and differing decisions have been rendered.

Luxenberg, a Nassau County decision, is frequently relied upon by the plaintiffs bar when the vocational expert issue

arises. In Luxenberg v. Jericho Atrium Associates, Inc., 686 N.Y.S.2d 560 (Sup. Ct. Nassau County 1998), the Supreme Court held that the plaintiffs, who had not designated their own vocational or rehabilitative therapist as an expert, could not be compelled to undergo such an examination by a defendant. The decision in Luxenberg, supra, provided that there was nothing in the CPLR or the Uniform Rules of Trial Court which extended the scope of discovery to include examination of a party by someone other than a physician. Similarly, in Young v. Knickerbocker Arena, 722 N.Y.S.2d 515 (3d Dep't 2001), the Third Department denied defendant's application to compel a vocational assessment by defendant's expert by holding that there was no statutory authority to compel such an examination.

Recent split decisions have held that the defendant is entitled to a vocational examination, even where plaintiff has not retained their own vocational expert. In Freni v. Eastbridge Landing Associates, LP, 767 N.Y.S.2d 5 (1st Dep't 2003), the Appellate Divisoin, First Department, over strong dissent from two justices, held that because plaintiff intended to establish a lack of capacity to perform in the workforce, the plaintiffs thereby made vocational assessment procedures 'material and necessary in the defense' for the purposes of rebuttal, and therefore, affirmed the Order directing that the injured cement mason to submit to an examination by a vocational rehabilitation specialist. Freni, supra. The dissent in Freni reasoned that the defendants offered no reason as to why an assessment of plaintiff's employment potential cannot be made in the usual way from an evaluation of the medical findings in the case.

In McDowell v. Eagle Trans. Corp., 758 N.Y.S.2d 79 (2d Dep't 2003), the Second Department held that after plaintiff's belated amendment of their bill of particulars, it was an abuse of discretion for the Supreme Court to have refused to allow the defendants to conduct both a further physical examination and an examination by a vocational rehabilitation expert.

The opposing views on this issue are strong and well reasoned. It is a hot issue because personal injury actions which claim an inability to return to work usually present serious economic exposure to defendants, and often times, the exposure is in excess of a defendant's insurance policy limits. At this time, it remains worthwhile for a defendant to submit a motion to compel such an examination if that examination is deemed necessary to the defense. The vocational rehabilitation examination issue will likely be clarified by the Court of Appeals in the near future, however, the issue remains open to debate.

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