

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MARISSA MILLER, a Minor, by and)
through her mother and next)
friend, MIRANDA MILLER,)
)
Plaintiffs,)

vs.)

No. 03-2701-MLV

JOHN DACUS, M.D.,)
)
Defendant.)

ORDER GRANTING DEFENDANT'S MOTION TO COMPEL AN INDEPENDENT MEDICAL
EVALUATION BY A SPECIALIST AND A HOME VISIT BY A LIFE CARE PLANNER
AND
ORDER GRANTING DEFENDANT'S MOTION TO COMPEL THE PLAINTIFFS TO
PRODUCE A COPY OF THEIR LIFE CARE PLAN AND TO SUPPLEMENT THEIR
RULE 26(A)(1) DISCLOSURES

Before the court are two motions filed by the defendant, John Dacus, M.D., on April 12, 2004: (1) a motion to compel the plaintiff, Miranda Miller, to make her daughter, plaintiff Marissa Miller, a minor, available for an independent medical evaluation by a specialist and also available for a home visit with a life care planner; and (2) a motion to compel the plaintiffs to produce their life care plan referenced in their initial Rule 26(a)(1) disclosures and to supplement their Rule 26(a)(1) disclosures to include the "subjects of information" pertaining to the individuals listed by the plaintiffs in their initial disclosures who are likely to have discoverable knowledge. These two motions were referred to the

United States Magistrate Judge for determination. For the reasons that follow, the motions are granted.

As stated in a previous order, Marissa Miller, a minor child, alleges in this action that she suffered irreversible neurological damage as a result of the negligence of Dr. Dacus during her mother's labor and her delivery. She initially asserted her malpractice claim in the Circuit Court of Shelby County against the U.T. Medical Group (UTMG), the employer of Dr. Dacus, in an action styled *Marissa Miller, a minor, by and through her mother and next friend, Miranda Miller, v. U.T. Medical Group, Inc.* No. 93115 T.D. (Circuit Court, Shelby Co., Tenn). Dr. Dacus was brought in as a third party defendant. Miller ultimately nonsuited the state court lawsuit and filed the present lawsuit in federal court against Dr. Dacus only.

In his motion to compel a medical examination and a home visit by a life care planner, Dr. Dacus asks the court to compel Marissa Miller, pursuant to Rule 35 of the Federal Rules of Civil Procedure, to submit to an independent medical examination to be performed by a pediatric neurologist and also to be evaluated by a life care planner at her home. Rule 35 states in relevant part that "[w]hen the mental or physical condition . . . 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" FED. R. CIV. P. 35. The Supreme Court made clear in *Schlagenhauf v. Holder*, 379 U.S. 104 (1965), that while some cases are close calls, a plaintiff in a negligence action who asserts mental or physical injury places the injury in controversy and establishes good cause for an independent medical exam to determine the extent of the claimed injury. Here, the plaintiff, by alleging medical negligence and neurological damage in her complaint has put her physical injury at issue and has established good cause for an independent examination by a neurologist. No further showing is required by the defendant.

In opposition to Dr. Dacus's motion for an independent medical examination, the plaintiffs first argue that the motion is procedurally defective because it was not accompanied by a memorandum of law as required by the local rules. Although Dr. Dacus did not file a separate memorandum of law in support of his motion, he did include a briefing of the law within the body of his motion which satisfies the requirements of the local rules.

The plaintiffs also object to an examination because, according to the plaintiffs, extensive medical records already exist evaluating Marissa Miller's neurological condition, IQ status, and intelligence including an evaluation by the University of Tennessee. Without more information, however, the plaintiffs' broad, conclusory allegation that adequate records exist is not sufficient to overcome

the showing of good cause established by the allegations of neurological damage in the tort complaint.

Accordingly, Dr. Dacus's motion for an independent medical examination is granted. Likewise, Dr. Dacus has shown good cause for an evaluation by a life care planner of his choosing. The minor plaintiff, Marissa Miller, therefore shall be made available for an independent medical evaluation by a suitably licensed or certified physician selected by the defendant, Dr. John Dacus, at a mutually agreeable date and time within thirty days of the dates of entry of this order. The minor plaintiff, Marissa Miller, shall also be made available for a home visit with a certified life care planner selected by the defendant Dr. John Dacus, at a mutually agreeable date and time at the home of Miranda and Marissa Miller within thirty days of the date of entry of this order.

In his second motion, Dr. Dacus seeks an order compelling the plaintiffs to produce their life care planner's report and to supplement their initial disclosures by identifying the subject of the knowledge possessed by the persons they listed who may have discoverable knowledge.

The plaintiffs filed their Rule 26(a)(1) initial disclosures on December 5, 2003. Subsection (A) of Rule 26(a)(1) requires a party to provide the names, addresses, and telephone numbers, if known, of individuals likely to have discoverable information and to identify

the subject matter of the information. FED. R. CIV. P. 26(a)(1)(A). The plaintiffs failed to identify the subject matter of the information. Accordingly, the plaintiffs' disclosures are inadequate, and the plaintiffs are ordered to supplement their disclosures within seven days of the entry of this order by identifying the subject matter of the information possessed by the persons listed.

As to the computation of damages required by Rule 26(a)(1)(C), the plaintiffs merely stated in their initial disclosures that a "Life Care Plan will be produced upon completion." To date, the plaintiffs have failed to produce their life care plan. Over four months have passed since the plaintiffs filed their initial disclosures, and the plaintiffs have adequate time to finalize their life care plan. Accordingly, the plaintiffs shall supplement their disclosures within seven days of the entry of this order by providing all reports from their life care planner.

The court finds that a hearing is unnecessary and denies the defendant's request for a hearing.

IT IS SO ORDERED this 22nd day of April, 2004.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE

