

Medical Malpractice Update

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Genetic Testing, Physical Examinations, and the Future of Illinois Supreme Court Rule 215

Medical malpractice litigators are no strangers to Ill. S. Ct. R. 215 (Rule 215). Knowledge of a party's mental or physical health is pertinent to medical malpractice claims, but who can the court order to submit to such testing? Generally, a defendant may petition the court to order a mental or physical examination of the patient plaintiff in a medical malpractice action. However, the recent case of *Kallal v. Lyons*, 2021 IL App (4th) 200319 may allow parties to request the court order and examination of those other than the injured patient.

Rule 215 provides in pertinent part that a court may order a party with his or her physical or mental condition in controversy to submit to a physical or mental examination by a licensed professional. Rule 215 (a). Generally, courts have broad discretion in determining the scope of the examination. *Zavaleta v. Zavaleta*, 43 Ill. App. 3d 1017, 1021 (1st Dist. 1976). As a discovery rule, the purpose of Rule 215 is to permit the parties to discover facts that will assist the fact finder to reach a correct determination of the issues in question. *In re Estate of Stevenson*, 44 Ill. 2d 525, 529 (1970). However, the rule does not permit unlimited or indiscriminate mental and physical health examinations of parties; the court must exercise its discretion in ordering such examinations. *Stevenson*, 44 Ill. 2d at 529.

Presently, the court may order a physical or mental examination in "any action in which the physical or mental condition of a party . . . is in controversy." Rule 215(a). A court can order a party to submit to examination irrespective of who placed the party's physical or mental condition in controversy. *Stevenson*, 44 Ill. 2d at 530. Historically, for a court to submit a person to an examination, the party requesting an examination of another person must show good cause. *Id.* However, later legislative changes removed the requirement of "good cause" in an attempt to enforce the objectives of the rule more clearly while minimizing judicial involvement. Rule 215.

Unfortunately, despite the legislature's best efforts, legal questions have arisen as technology has evolved to which the courts need to respond. To properly understand how these legal questions will affect the future of Rule 215, we must consider the implications of the recent *Kallal* decision.

Kallal v. Lyons — A Novel Issue

In *Kallal*, plaintiffs Krista and Skylar Lyons gave birth to their biological daughter, Brooke Lyons. Brooke suffered severe hypoxic ischemic encephalopathy, subgaleal hemorrhage, a fractured clavicle, and a pneumothorax as a result of her labor and delivery. *Kallal*, 2021 IL App (4th) 200319, ¶ 4. Krista and Skylar filed a complaint against multiple defendants, including the physician who performed the delivery and the hospital, alleging negligence and lack of informed consent for alleged negligent acts and omissions during Brooke's labor and delivery. *Id.* Krista and Skylar also made claims under the Rights of Married Persons Act, 750 ILCS 65/15, for Brooke's present and future medical expenses incurred on behalf of Brooke because of the alleged defendants' negligence. *Id.*

The defendants retained a geneticist who opined that Brooke’s physical and mental condition likely had a “substantial genetic cause.” *Id.* ¶ 6. Accordingly, the defendants filed a motion pursuant to Rule 215 to compel Krista and Skylar to submit blood samples for the purpose of specific genetic testing. *Id.* To optimally ascertain whether Brooke’s conditions were genetic, the analysis necessitated blood draws from both biological parents. *Id.* Brooke previously underwent a different genetic test with a “normal” result. However, testing requested by the defendant’s geneticist was significantly more comprehensive than the prior study performed. *Id.*

The circuit court ordered Krista and Skylar to submit a blood draw and found their counsel in contempt for refusing to direct them to comply. *Id.* ¶ 1. Krista and Skylar appealed and argued the court did not have authority under Rule 215 to order them to submit to a blood draw. *Id.* Specifically, the plaintiffs stated that their medical conditions were not in controversy and, accordingly, the requested relief under Rule 215 was inappropriate. *Id.* ¶ 8. Krista and Skylar also argued that the testing “went far beyond anything previously allowed in Illinois” and the geneticist’s statement did not provide adequate justification. *Id.*

In response to the plaintiffs’ arguments, the defendants argued that Krista and Skylar made their genetic conditions an issue by asserting independent claims in the lawsuit and denying Brooke’s alleged injuries were connected to any genetic defect. *Id.* ¶ 10. The defendants recognized the novel issue of parental testing but insisted that because the necessary testing requires the blood draws of biological parents, Krista and Skylar’s genetic composition was at issue. *Id.* ¶¶ 10, 12. Ultimately, the circuit court found in favor of the defendants, finding “the probative value outweighs any risk or potential risk to the patient,” which “includes not only the child, but the two parents.” *Id.* ¶ 12. The court ordered all three, Brooke, Krista and Skylar submit to blood draws for the requested analysis. The court, on the defendants’ motion for sanctions for the plaintiffs’ refusal to comply with its order, held the plaintiffs’ counsel in contempt and ordered a \$10 per day fine until they complied. *Id.* ¶ 14.

On appeal, Krista and Skylar further argued that they could avoid the ordered test by withdrawing their claims under the Rights of Married Persons Act. *Id.* ¶ 19. In response, the defendants maintained that Krista and Skylar had a financial interest in the outcome of Brooke’s claims and their claim is “inextricably tied to the cause of Brooke’s impairments.” *Id.* ¶ 20.

On review, the appellate court recognized that the purpose of Rule 215 is to allow the discovery of facts that will assist the fact finder to reach a correct determination of the issues. The court also recognized, however, that Rule 215 does not allow “unlimited and indiscriminate” examinations of persons. *Id.* ¶ 18 (citing *Stevenson*, 44 Ill. 2d at 529). The court acknowledged that parental testing was a “novel issue” in Illinois. *Id.* ¶ 21. The appellate court criticized the trial court for its lack of analysis or findings as to whether Krista and Skylar met the requirement of a party whose mental or physical conditions were in controversy, as required by Rule 215, particularly without Illinois precedent. *Id.* Ultimately, the appellate court vacated the discovery and contempt orders and remanded the case to the circuit court for further proceedings and a more thorough examination of parental testing. *Id.* ¶¶ 24, 25.

The Possible Expansion of Rule 215 and Practical Concerns

The appellate court in *Kallal* recognized a novel issue in using Rule 215 for the purpose of genetic testing in a medical malpractice action. Allowing genetic testing may create a more persuasive defense in the face of negligence claims where a patient’s injuries potentially have genetic causes. While the court did not make any significant determination regarding the requirement for physical examinations for the purpose of genetic testing, it will not be surprising if they allow it here under Rule 215. Federal courts have held blood tests to be within the scope of discovery in other criminal and civil proceedings. See *Beach v. Beach*, 114 F.2d 479, 482 (D.C. Cir. 1940) (holding that the blood of a child and the biological

mother is a controversial factor to be considered in determining paternity). However, the parties cited to a number of labor and delivery cases in other jurisdictions during the appeal and those out-of-state court rulings were mixed in compelling the genetic blood testing of parents in similar circumstances. *Kallal* ¶ 21. The key was a finding of good cause and that the parents were defined as parties to the lawsuit. *Id.*

Ultimately, while we wait for the circuit court to revisit the issue and make its findings and analysis regarding the appropriate use of Rule 215, counsel should consider the following practical concerns of an expansion in scope of Rule 215, including:

- Potential significant litigation delays and costs due to motions pursuant to Rule 215;
- Potential expansion of who is a party to an action and the possible constitutional issues in requiring submission for Rule 215 examination; and
- Pleading changes to avoid exposure of those potentially subject to medical/genetic testing (*i.e.*, parents).

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