Order

Michigan Supreme Court
Lansing, Michigan

May 13, 2022

Bridget M. McCormack,
Chief Justice

162507-8

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

ALIAMA X. SCHAUMANN-BELTRAN,
Plaintiff-Appellant,

v

SC: 162507
COA: 347683
Washtenaw CC: 17-000132-NH

JOSEPH GEMMETE, M.D.,
Defendant-Appellee.

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ALIAMA X. SCHAUMANN-BELTRAN,
Plaintiff-Appellant,

v

SC: 162508
COA: 347684
Ct of Claims: 17-000038-MH

UNIVERSITY OF MICHIGAN REGENTS, d/b/a UNIVERSITY OF MICHIGAN HEALTH SYSTEM, a/k/a MICHIGAN MEDICINE, UNIVERSITY OF MICHIGAN MEDICAL CENTER, and C.S. MOTT CHILDREN'S HOSPITAL,
Defendants-Appellees.

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On April 6, 2022, the Court heard oral argument on the application for leave to appeal the December 10, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals. Under MCR 2.311(A), a trial court has the authority to "order [a] party to submit to a physical or mental . . . examination by a physician" and, when doing so, "must specify the time, place, manner, conditions, and scope of the examination . . . ." A "condition" is defined as "[o]ne that is indispensable to the appearance or occurrence of another; a prerequisite" or as "[o]ne that restricts or modifies another; a qualification[.]" *The American Heritage Dictionary of the English Language* (5th ed). An order that an examination is to be videorecorded if it is to be conducted undoubtedly establishes a "prerequisite" or "qualification" for conducting the examination, meaning that whether to videorecord the examination is plainly a

"condition[]" of the exam and is therefore within the authority of the circuit court to direct.

The Court of Appeals, in reaching the opposite conclusion, relied on *Nemes v Smith*, 37 Mich App 124 (1971), and *Feld v Robert & Charles Beauty Salon*, 435 Mich 352 (1990), to construe the final clause of MCR 2.311(A)—providing that a trial court "may provide that the attorney for the person to be examined may be present at the examination"—as a grant of power to a trial court which may only be exercised in the manner stated. *Schaumann-Beltran v Gemmete*, 335 Mich App 41, 49-53 (2020). This is wrong for two reasons. First, neither *Nemes* nor *Feld* addressed the scope of a tribunal's authority to establish the conditions of an exam; rather, in both cases, the party being examined argued that they were entitled to the presence of additional individuals whom the tribunal had not authorized, and the appellate courts rejected those arguments.[1] Second, this is not the function of the language in MCR 2.311(A) permitting a trial court to provide that an examinee's attorney may be present. Since 1941 PA 18 was enacted, Michigan statutory law has conferred a right to the presence of an attorney when an individual is directed to submit to certain examinations by court order. When the Revised Judicature Act, 1961 PA 236, was enacted, this right was included within it, see MCL 600.1445(1). The contemporaneously drafted General Court Rules of 1963 conformed to the statute and required that a trial court "specify the time, place, manner, conditions, and scope of the examination, . . . and *shall provide* that the attorney for the person to be examined may be present at the examination." GCR 1963, 311.1 (emphasis added). However, "[m]any physicians objected to this practice, most complaining that the presence of the attorney impaired or destroyed their ability to conduct an adequate and thorough examination," 2 Longhofer & Quick, Michigan Court Rules Practice (7th ed), § 2311.7, p 415, so when the Michigan Court Rules of 1985 were enacted, the last clause was changed to state that the trial court "*may provide* that the attorney for the person to be examined may be present," MCR 2.311(A) (emphasis added). Since the statute confers a right to an attorney's presence, while the court rule confers discretion on the trial court, the "discretion is in conflict with the absolute statutory right," meaning "the statute is superceded by the rule." Longhofer & Quick, pp 415-416. The function of the clause, then, is not to confer power upon a trial court to make a binary decision

[1] On the other hand, we disagree with plaintiff's suggestion that the Court of Appeals erred by treating *Nemes* as precedential in light of its age. *Nemes* construed GCR 1963, 311.1, the predecessor to MCR 2.311(A), and as a published opinion of the Court of Appeals, it "has precedential effect under the rule of stare decisis." MCR 7.215(C)(2). While subsequent panels are not bound under MCR 7.215(J)(1) to follow a rule established in a published opinion against their better judgment if it predates November 1, 1990, this does not change the status of older opinions as "precedential . . . under the rule of stare decisis."

about the presence of an attorney or not; rather, it simply supersedes MCL 600.1445(1) and does nothing to limit a trial court's authority to establish the "conditions" of an examination.

In light of our holding that a trial court possesses the authority under MCR 2.311(A) to direct that an exam be videorecorded, we reverse the decision of the Court of Appeals. Defendants separately argue that, even if the trial court had discretionary power to issue the order, it was an abuse of discretion to do so on the facts of this case. The Court of Appeals did not reach that argument, and plaintiff's counsel acknowledged at oral argument that a remand to the Court of Appeals to consider that preserved argument is warranted. As a result, we REMAND this case to the Court of Appeals for it to consider the arguments made by defendants not previously considered.

BERNSTEIN, J., did not participate due to a familial relationship.

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