

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

**RECEIVED**

DEC 21 2018

Walton J. McLeod, IV, Circuit Court Judge

SC Court of Appeals  
88614

Case No. 2017-CP-32-01551

Bronda Perry, ..... Respondent,

v.

Randall Hedges, ..... Defendant,

of whom

Bronda Perry is the. .... Respondent,

and Randall Hedges is the. .... Appellant.

**RESPONDENT’S MOTION TO DISMISS AND EXPEDITED REVIEW**

This motion is made pursuant to Rule 240 of the South Carolina Appellate Court Rules, which governs motions and petitions generally. Respondent Bronda Perry moves this Court to dismiss the appeal that was filed and served on December 13, 2018. The appeal is from an unappealable order and was made solely to delay and avoid trial of this matter that was scheduled to begin December 17, 2018. For the reasons stated below, this Court should expedite its review and dismiss this appeal to avoid further delay.

**BACKGROUND**

This is a case arising out of a motor vehicle collision occurring on April 22, 2016, in which Plaintiff Bronda Perry (hereinafter “Perry”) alleges injuries as a result of Defendant Randall Hedges’ (hereinafter “Hedges”) negligence. During the course of litigating the underlying claim, Perry underwent a functional capacity evaluation to assess her functional status and physical capabilities.

On July 5, 2018, Hedges filed an initial Motion To Compel Physical Examination pursuant to Rule 35, SCRPC, requesting Perry submit to an additional functional capacity evaluation to be performed by a physical therapist of Hedge's own choosing. (See **Exhibit A**). On August 8, 2018, a hearing was held with Judge Lee on the motion in which she entered an order granting Hedge's motion to compel. However, based on the provisions of Rule 35 – along with the supporting case law in South Carolina – Judge Lee's order set forth very specific requirements Hedges would need to meet to obtain the examination. Specifically, Judge Lee's Order of August 13, 2018, states that:

- 1) The physical examination must be performed by a *physician* as required by Rule 35;<sup>1</sup>
- 2) Counsel for Hedges *shall* present the names of 2-3 physicians to counsel for Perry who can conduct the examination. The parties shall agree to select one. If the parties are unable to agree then the names of the physicians should be submitted to the court to select one;<sup>2</sup>
- 3) The physical examination *shall* be completed within 45 days of the Order.

(See **Exhibit B**, Judge Lee's Order dated August 13, 2018) (emphasis added).

After Hedges was unable to find a physician to complete the functional capacity evaluation, he filed a second Motion to Compel Physical Examination on October 15, 2018 – without ever proposing any physicians to counsel for Perry and beyond the forty-five day deadline – now requesting the court order Perry submit to a functional capacity evaluation to be completed by a chiropractor. (See **Exhibit C**). In response, Perry filed a Memorandum in

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<sup>1</sup> Rule 35(a) states, in relevant part, that the court “may order [a] party to submit to a physical or mental examination *by a physician*...” (emphasis added); see Green By and Through Green vs. Lewis Truck Lines, Inc., 314 S.C. 303, 43 S.E.2d 906 (1994) (strictly construing “physician” requirement of Rule 35 as a medical doctor [M.D.] or doctor of osteopathic medicine [D.O.] pursuant to S.C. Code Ann. § 40-47-20[34]); see also S.C. Code Ann. § 40-47-20(34) (defining “physician” as “a doctor of medicine or doctor of osteopathic medicine licensed by the South Carolina Board of Medical Examiners.”).

<sup>2</sup> This language was specifically included to prevent Defendant from unilaterally selecting the potential examiner in violation of Fairchild vs. SCDOT, 398 S.C. 90, 727 S.E.2d 407 (2012). Id. (“[T]he defendant clearly does not have the right to unilaterally select an examining *physician*.”). Id. (emphasis added). The Supreme Court noted that Rule 35 contemplated that the parties will confer on this point to make suggestions and, if not agreeable, submit to the Court for choosing so that Defendant is not permitted to unilaterally select and retain their own expert physician. Id.

Opposition outlining the requirements of Rule 35 and the controlling case law regarding compulsory physical examinations in South Carolina. In her Memorandum, Perry details Hedges' failure to comply with the physician requirement of Rule 35 by requesting a compulsory examination by a chiropractor; Hedges' failure to propose multiple physicians to counsel for Perry to confer on the selection of an examining physician; and Hedges' failure to meet the forty-five day deadline set forth in Judge Lee's initial order.

On November 12, 2018, a hearing was held with Judge McLeod and a subsequent telephone conference on November 16, 2018, to address Hedges' second Motion To Compel Physical Examination. In communications with Judge McLeod, counsel for Hedges acknowledged that he had not met any of the requirements set forth by Judge Lee's initial order granting the physical examination including the physician requirement of Rule 35 as defined by S.C. Code Ann. § 40-47-20(34); including the proposal of multiple physicians to counsel for Perry; and even the failure to comply with the deadline set forth by the initial order.

Based on communications with counsel and the documents on file, Judge McLeod entered an order on November 26, 2018, denying Hedges' second Motion to Compel Physical Examination. (See Exhibit D, Judge McLeod's Order dated November 26, 2018). On December 6, 2018, Hedges filed a Motion to Reconsider. On December 7, 2018, Judge McLeod entered an order denying Hedges' Motion to Reconsider. On December 13, 2018, Hedges filed a Notice of Appeal as trial was set to start in this matter on December 17, 2018.

In its Notice of Appeal of Judge McLeod's November 26<sup>th</sup> order, Hedges simply contends that equity should allow him to obtain a physical examination despite the provisions of Rule 35 and regardless of the fact that he failed to meet any of the requirements set forth by Judge Lee's initial order of August 13, 2018.

## ARGUMENT

The Court should dismiss the appeal of Judge McLeod's November 26<sup>th</sup> order denying Hedges' Motion to Compel Physical Examination as not immediately appealable. "The right of appeal arises from and is controlled by statutory law." Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006). "An appeal ordinarily may be pursued only after a party has obtained a final judgment." Id.; S.C. Code Ann. § 14-3-330 (1976); Rule 72, SCRPC; Rule 201(a), SCACR. "The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by S.C. Code Ann. § 14-3-330." Ex parte Capital U-Drive-It, Inc., at 6, 630 S.E.2d at 467. "Absent a specialized statute, an order must fall into one of several categories set forth in Section 14-3-330 in order to be immediately appealable." Id. Courts in South Carolina have generally held that orders directing a party to participate in or control discovery are interlocutory and not directly appealable under section 14-3-330. See, e.g., Ex parte Whetstone, 289 S.C. 580, 580, 347 S.E.2d 881, 881 (1986); Patterson v. Specter Broadcasting, 287 S.C. 249, 335 S.E.2d 803 (1985); Lowndes Products, Inc. v. Brower, 262 S.C. 431, 205 S.E.2d 184 (1974).

### **A. The Order Denying Hedges' Motion To Compel Physical Examination Does Not Involve The Merits Of The Case Or Affect A Substantial Right**

The Order denying Hedges' Motion To Compel Physical Examination, from which this appeal arises, does not involve the merits of the case or affect a substantial right under § 14-3-330(1)-(2). See Brown v. County of Berkeley, 366 S.C. 354, 361, 622 S.E.2d 533, 537 (2005) (to involve the merits of a case, the order must finally determine some substantial matter forming the whole or a part of some cause of action or defense. To affect a substantial right, the order must determine the action and prevent a judgment from which an appeal might be taken or discontinue the action or defense. (internal quotation marks and citations omitted)).

It is well recognized that orders controlling pretrial discovery, specifically the denial of a motion to compel discovery, is not directly appealable because it is an intermediate or interlocutory decision that does not finally determine any part of the case. See Lowndes Prods. Inc. v. Brower, 262 S.C. 431, 205 S.E.2d 184 (1974); Wieters v. Bon-Secours-St. Francis Xavier Hosp., Inc., 381 S.C. 332, 673 S.E.2d 417 (2009) (pre-trial discovery orders are not immediately appealable); Grosshuesch v. Cramer, 377 S.C. 12, 659 S.E.2d 112 (2008) (discovery orders in general are interlocutory and not immediately appealable because they do not, within the meaning of appealability statute, involve the merits of the action or affect a substantial right); see also, South Carolina Dept. of Transp. V. McDonald's Corp., 375 S.C. 90, 650 S.E.2d 473 (2007) (pretrial motion excluding evidence is not considered a final order on the merits and not immediately appealable).

Judge McLeod's pretrial discovery order denying Hedges' Motion to Compel Physical Examination does not strike his answer or any plead defense, either actually or effectively. The order is not a final judgment on any of the issues. The order does not involve the merits of the action, in whole or part, nor does it prevent Hedges from putting forth an adequate defense in any way. Hedges will be able to call any and all witnesses they have identified, including their own vocational expert who has disputed the results of the initial functional capacity evaluation. Likewise, Hedges will have the ability to cross-examine the witness who performed the initial functional capacity evaluation to attack her findings and results of the evaluation.

Moreover, Hedges has not been deprived of any substantial right by the court denying his request for a physical examination. The United States Supreme Court has specifically held that the access to a physical examination is not a substantial right, or any right for that matter, that is afforded a party by simply engaging in litigation. Schlagenhauf v. Holder, 379 U.S. 104, 118

(1964) (“[S]weeping examinations of a party . . . are not to be automatically ordered merely because the person has been involved in an accident . . . and a general charge of negligence is lodged.”). “Physical examinations are only to be ordered upon a discriminating application by the . . . judge of the limitations prescribed by the Rule.” *Id.* at 121, 85 S. Ct. at 244. “To hold otherwise would mean that such examinations could be ordered routinely in [personal injury] cases. The plain language of Rule 35 precludes such an untoward result.” *Id.*

Judge McLeod’s order does not deprive Hedges of any substantial right and is not immediately appealable. Hedges, as Defendant in the underlying case, does not bear the burden or proof and Hedges is not precluded from putting forth an adequate defense or any specific affirmative defense they have plead. Notably, the court initially granted the request for a physical examination but was only later denied when Hedges, by his own admission, was unable to follow the requirements of Judge Lee’s initial order and the provisions of Rule 35. Hedges’ appeal on hand asks this Court to simply ignore Judge Lee’s order and disregard the requirements of Rule 35 along with the controlling case law so that they are able to obtain the requested examination.

**B. Orders Regarding Motions to Compel Physical Examinations Are Not Immediately Appealable**

It is widely recognized among jurisdictions that rulings on motions to compel physical examinations pursuant to Rule 35 are not immediately appealable. See generally, Court-Ordered Mental and Physical Examinations: A Survey of Federal Rule 35 and Illinois Rule 215, 11 Loy. U. Chi. L. J. 725 (1980) (outlining widely-held view among jurisdictions that Rule 35 orders are not immediately appealable). “If the court denies the motion, the order is interlocutory and generally not appealable.” *Id.* at 733. South Carolina has taken the approach that an order denying a Rule 35 examination is not immediately appealable. In Fairchild vs. SCDOT, plaintiff filed a motion pursuant to Rule 35 requesting a physical examination of defendant, which was

denied by the trial judge. 385 S.C. 344, 683 S.E.2d 818 (Ct. App. 2009). Importantly, from a procedural standpoint, the case then proceeded to a jury trial in which a directed verdict was entered and only thereafter could plaintiff proceed with an appeal of the trial court's order denying his motion for a physical examination under Rule 35. See id.; see also Green By and Through Green v. Lewis Truck Lines Inc., 314 S.C. 303, 43 S.E.2d 906 (1994) (Rule 35 order granting motion to compel addressed after final decision on the merits from the lower court).

The United States Supreme Court has specifically held that an order regarding a physical examination pursuant to Rule 35 is not ordinarily immediately appealable as it does not go to the merits of the case. Schlagenhauf v. Holder, 379 U.S. 104, 118 (1964) (order not immediately appealable as final judgment on the merits). Likewise, numerous other jurisdictions, including the Fourth Circuit, have also held that an order pursuant to Rule 35 denying a physical examination is not immediately appealable. See Bowles v. Commerical Cas. Ins. Co., 107 F.2d 169 (4<sup>th</sup> Cir. 1939) (Rule 35 order does not prevent the court below from rendering final judgment with a later appeal to this [appellate] court, and thus, is interlocutory); see also Reise v. Board of Regents, 957 F.2d 293, 294-95 (7<sup>th</sup> Cir. 1992) (holding that an order compelling a physical examination under Rule 35 of the Federal Rules of Civil Procedure is not immediately appealable. "Details of discovery are a long way from final decision."); Donnelly v. Parker, 486 F.2d 402 (D.C. Cir. 1973) (should defensive efforts failing to obtain physical examination pursuant to Rule 35 prove unsuccessful, Defendant can litigate that ruling on an appeal from the final judgment. "No rights will be jeopardized, no irreparable injury will be suffered, nor will any position be irreversibly compromised.").

Hedges' Motion to Compel Physical Examination is interlocutory and not immediately appealable as the order does not prevent the trial court from rendering a judgment and afford

Hedges the opportunity to later appeal. Judge McLeod's order denying Hedges' request for a physical examination is simply a discovery order affecting the control of evidence. If Hedges' position were that the denial of a physical exam causes irreparable harm by denying access to certain evidence, then virtually every discovery order would then be deemed immediately appealable – such as motions to quash, any and all motions to compel, motions to strike specific evidence, motions to strike certain witnesses, etc. – all of which are well-established to be interlocutory and not immediately appealable.

Based on the foregoing, Respondent respectfully requests this Court immediately dismiss the pending appeal as interlocutory. The appeal is clearly intended to avoid trial and delay the underlying cause of action.

Respectfully submitted



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Mt. Pleasant, SC 29464  
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jwilliams@charlestonlaw.edu

December 20, 2018

**ATTORNEY FOR RESPONDENT  
BRONDA PERRY**

# EXHIBIT A

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

BRONDA PERRY,  
Plaintiff,

Civil Action No. 2017-CP-32-01551

vs.

**NOTICE OF MOTION AND  
MOTION TO COMPEL PHYSICAL  
EXAMINATION**

RANDALL HEDGES,  
Defendant.

TO: PLAINTIFF AND JARED WILLIAMS, ATTORNEY FOR PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that the Defendant, by and through the undersigned attorneys, will move before the Presiding Judge, ten (10) days after the service of this Notice, or at such time as counsel is scheduled to be heard, for an Order pursuant to Rule 35 of the South Carolina Rules of Civil Procedure compelling the Plaintiff to appear for a physical examination.

Defendant's counsel affirms that by communication on June 19, 29, July 1, 2, and 3, counsel for Plaintiff was contacted in a good faith effort to resolve this motion. Counsel for Plaintiff has refused to permit Plaintiff to appear for a physical examination as permitted by Rule 35.

Defendant further requests costs and fees be awarded for the costs of having to bring this motion by virtue of Plaintiff's willful refusal to consent and appear for a physical examination as permitted by Rule 35.

This motion may be based on such memoranda in support or affidavits which may be served on counsel for the Plaintiff prior to the date of the hearing on this motion.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE, L.L.C.

s/ Brett H. Bayne

Brett H. Bayne, Bar No.: 100018

Post Office Box 12519, Capitol Station

Meridian, 1320 Main Street, 10<sup>th</sup> Floor (29201)

Columbia, South Carolina 29211-2519

(803) 779-2300

ATTORNEYS FOR DEFENDANT

July 5, 2018

# EXHIBIT B

Bronda Perry  
PLAINTIFF(S)

Randall Hedges et al  
DEFENDANT(S)

**DISPOSITION TYPE (CHECK ONE)**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (*CHECK REASON*):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  
 Other
- ACTION STRICKEN (*CHECK REASON*):**  Rule 40(j), SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (*CHECK APPLICABLE BOX*):**  
 Affirmed;  Reversed;  Remanded;  
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:**  See attached order (formal order to follow)  Statement of Judgment by the Court:

Defendant's motion for a physical examination under Rule 35, SCRPC is Granted. It appears that there is a genuine controversy regarding damages for loss of income and good cause exists to conduct a functional capacity evaluation. Defendant shall present the names of 2-3 physicians who can conduct the examination. The parties shall agree to select one. If the parties are unable to agree then the names should be submitted to the court to select one. The examination shall occur within 45 days. The parties shall request a status conference with the Chief Administrative Judge to modify the scheduling order if necessary.

**ORDER INFORMATION**

This order  ends  does not end the case.

See Page 2 for additional information.

**For Clerk of Court Office Use Only**

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 08/13/2018 .

Randall Hedges  
Benjamin Davis McCoy

**NAMES OF TRADITIONAL FILERS SERVED BY MAIL**

**Court Reporter:**

**E-Filing Note:** The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCF.

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Lexington Common Pleas

**Case Caption:** Bronda Perry VS Randall Hedges , defendant, et al

**Case Number:** 2017CP3201551

**Type:** Order/Electronic Form 4

IT IS SO ORDERED!

s/ Alison Renee Lee

# EXHIBIT C

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF LEXINGTON )

IN THE COURT OF COMMON PLEAS

BRONDA PERRY, )  
 )  
 )  
Plaintiff, )  
 )  
 )  
vs. )  
 )  
RANDALL HEDGES, )  
 )  
 )  
Defendant. )  
 )  
 )

Civil Action No. 2017-CP-32-01551

**NOTICE OF MOTION AND  
MOTION TO COMPEL PHYSICAL  
EXAM**

TO: BRONDA PERRY AND JARED WILLIAMS, ATTORNEY FOR PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that the Defendant, by and through the undersigned attorneys, will move before the Presiding Judge, ten (10) days after the service of this Notice, or at such time as counsel is scheduled to be heard, for an Order pursuant to Rule 35 and 37 of the South Carolina Rules of Civil Procedure compelling the Plaintiff to appear for a physical examination previously ordered by this Court. Defendant requests reasonable attorney's fees and costs for bringing this motion. Defendant's counsel affirms that by email of 9/24/18, 10/5/18, and 10/8/18, counsel for Plaintiff was contacted in a good faith effort to resolve this motion.

Respectfully submitted,

McANGUS GOUDELICK & COURIE, L.L.C.

s/ Brett H. Bayne

Brett H. Bayne, Bar No.: 100018

J. Andrew Delaney, Bar No.: 72863

Post Office Box 12519, Capitol Station

Meridian, 1320 Main Street, 10<sup>th</sup> Floor (29201)

Columbia, South Carolina 29211-2519

(803) 779-2300

ATTORNEYS FOR DEFENDANT

October 15, 2018

# EXHIBIT D

Bronda Perry  
PLAINTIFF(S)

Randall Hedges et al  
DEFENDANT(S)

**DISPOSITION TYPE (CHECK ONE)**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  
 Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:**  See attached order (formal order to follow)  Statement of Judgment by the Court:

A hearing on Defendant's Motion to Compel Physical Exam was held on November 12, 2018. Subsequent to the hearing, the court held a telephone conference with the parties to further discuss the matter. Based on the documents on file and the upcoming trial, the court DENIES Defendant's Motion to Compel.

**ORDER INFORMATION**

This order  ends  does not end the case.  See Page 2 for additional information.

**For Clerk of Court Office Use Only**

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 11/25/2018 .

Randall Hedges for Randall Hedges  
Randall Hedges for Randall Hedges

**NAMES OF TRADITIONAL FILERS SERVED BY MAIL**

**Court Reporter:**

**E-Filing Note:** The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCF.

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Lexington Common Pleas

**Case Caption:** Bronda Perry VS Randall Hedges , defendant, et al

**Case Number:** 2017CP3201551

**Type:** Order/Electronic Form 4

So Ordered

s/Walton J. McLeod, 2765

**JARED C. WILLIAMS**  
**ATTORNEY AT LAW**

P.O. Box 403  
Mt. Pleasant, SC 29465  
(843) 991-6528

December 20, 2018

**Via First-class Mail**

South Carolina Court of Appeals  
Clerk of Court  
Attn: Jennifer Abbott Kitchings  
P.O. Box 11629  
Columbia, SC 29211

**RECEIVED**

DEC 21 2018

SC Court of Appeals

**Re: Bronda Perry vs. Randall Hedges (2017-CP-32-01551)**

Dear Ms. Kitchings:

Enclosed, please find the original and six (6) copies of Respondent's Motion to Dismiss And Expedited Review in the above-referenced case. It is Respondent's position that this appeal was filed to intentionally delay trial that was set for December 17, 2018. As such, we would request an expedited review of this motion in hopes of avoiding further delay.

Sincerely,



Jared C. Williams  
[jcwilliams@charlestonlaw.edu](mailto:jcwilliams@charlestonlaw.edu)

Enclosures: As stated