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SUPERIOR COURT
OF GUAM

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CLERK OF COURT

BY: for

IN THE SUPERIOR COURT OF GUAM

VERONICA L.G. PATAO and JOHNNIE
L. PATAO,

Plaintiffs,

vs.

SOUTH PACIFIC PETROLEUM
CORPORATION,

Defendant.

CIVIL CASE NO. CV0379-23

DECISION AND ORDER

*Re: Defendant's Motion for Physical
Examination*

On May 29, 2024, the Court heard Defendant South Pacific Petroleum Corporation's ("SPPC") Motion for Physical Examination ("Motion"). Attorney Deborah Fisher represented Plaintiffs Veronica L.G. Patao and Johnnie L. Patao (collectively, "Plaintiffs"), while Attorney Mitchell Thompson represented SPPC. After reviewing the arguments, briefs, and applicable law, the Court **GRANTS** SPPC's Motion.

BACKGROUND

Plaintiffs filed their Complaint on June 23, 2023, alleging that Plaintiff Veronica suffered severe burns on her inner thighs and genitalia due to the negligence of SPPC employees, who allegedly improperly packaged two cups of dangerously hot arrozcaldo.

1 On March 13, 2024, SPPC filed the Motion under Guam Rules of Civil Procedure
2 (“GRCP”) Rule 35, requesting the Court to order Plaintiff Veronica to undergo a physical
3 examination by Dr. Friedrich Bieling at Dr. Shieh’s Clinic to assess the severity of her burns.

4 Plaintiffs filed an Opposition to the Motion on April 10, 2024. They did not oppose
5 SPPC’s procedural right to request a medical examination under GRCP 35 or the relevance of
6 Plaintiff Veronica’s medical condition to the case. However, they requested a female medical
7 professional conduct the examination due to trauma Plaintiff Veronica alleges she experienced
8 in her childhood.

9 SPPC filed its Reply on April 23, 2024, arguing that Plaintiffs did not present a valid
10 objection to Dr. Bieling performing the examination. SPPC asserted that Dr. Bieling is
11 qualified to perform the examination, that Plaintiffs had not sufficiently demonstrated that
12 Plaintiff Veronica’s trauma was so severe that she could not be examined by a male physician,
13 and that Plaintiffs had not provided the name of any female health provider who could perform
14 the examination.

15 After the hearing, the Court gave the parties until June 12, 2024, to find an alternative
16 expert. Receiving no response, the Court took the matter under advisement on June 13, 2024.

17 DISCUSSION

18 **I. Motion for Physical Exam**

19 Pursuant to GRCP Rule 35:

20 (a) Order for Examination. When the mental or physical condition
21 (including the blood group) of a party ... is in controversy, the
22 court in which the action is pending may order the party to submit
23 to a physical or mental examination by a suitably licensed or
24 certified examiner or to produce for examination the person in the
party’s custody or legal control. The order may be made only on
motion for good cause shown and upon notice to the person to be
examined and to all parties and shall specify the time, place,

1 manner, conditions, and scope of the examination and the person
2 or persons by whom it is to be made.

3 (b) Report of Examiner

4 (1) If requested by the party against whom an order is made
5 under Rule 35(a) or the person examined, the party causing the
6 examination to be made shall deliver to the requesting party a copy
7 of the detailed written report of the examiner setting out the
8 examiner's findings, including results of all tests made, diagnoses
9 and conclusions, together with like reports of all earlier
10 examinations of the same condition. After delivery the party
11 causing the examination shall be entitled upon request to receive
12 from the party against whom the order is made a like report of any
13 examination, previously or thereafter made, of the same condition,
14 unless, in the case of a report of examination of a person not a
15 party, the party shows that the party is unable to obtain it. The
16 court on motion may make an order against a party requiring
17 delivery of a report on such terms as are just, and if an examiner
18 fails or refuses to make a report the court may exclude the
19 examiner's testimony if offered at trial.

20 (2) By requesting and obtaining a report of the examination
21 so ordered or by taking the deposition of the examiner, the party
22 examined waives any privilege the party may have in that action or
23 any other involving the same controversy, regarding the testimony
24 of every other person who has examined or may thereafter examine
the party in respect of the same mental or physical condition.

Guam R. Civ. P. 35(a), (b).

16 While the Guam Supreme Court has not ruled on issues surrounding GRCP 35 at this
17 time, the Supreme Court has held that, "because the [GRCP] are generally derived from ... the
18 Federal Rules of Civil Procedure ("FRCP"), federal decisions that construe the federal
19 counterparts to the [GRCP] are persuasive authority." *Government of Guam v. O'Keefe on*
20 *behalf of Heirs of Torres Estate*, 2018 Guam 4 ¶ 9. Accordingly, the U.S. Supreme Court has
21 held that FRCP 35 "requires discriminating application by the trial judge, who must decide, as
22 an initial matter in every case, whether the party requesting a mental or physical examination
23 has adequately demonstrated the existence of the Rule's requirements" that:

1 1. The physical condition to be examined has been placed in controversy; and that

2 2. The movant has shown good cause for the examination.

3 *Schlagenhauf v. Holder*, 379 U.S. 104, 117-120 (1964).

4 The U.S. Supreme Court has further held that when a plaintiff in a negligence suit
5 asserts injury, as here, the plaintiff “places that ... injury clearly in controversy and provides
6 the defendant with good cause for an examination to determine the existence and extent of such
7 asserted injury.” *Id.*, at 119. The Plaintiffs expressly state that they do not challenge SPPC’s
8 procedural right to request a medical examination under GRCP 35. Thus, the Court finds as an
9 initial matter that the injury is in controversy and that SPPC has shown good cause for an
10 examination. The only issue in dispute, therefore, is whether to grant SPPC’s request as-is or to
11 apply the parameters requested by Plaintiffs.

12 **II. Whether the Court should order that Dr. Bieling conduct the examination.**

13 SPPC specifically moves for the examination to be performed by Dr. Bieling. In
14 determining whether to order Dr. Bieling to conduct the examination, the Court takes into
15 consideration the following: (1) Dr. Bieling is a board-certified OB/GYN who has been
16 practicing on Guam for more than seventeen (17) years; (2) the scope of the examination will
17 be a physical examination of Plaintiff Veronica’s inner thigh and genitalia, including functional
18 testing and inquiry into related medical matters appurtenant to the examination; and (3) the
19 examination is expected to take less than one hour.

20 Plaintiffs first argue that SPPC’s right to compel a physical examination does not
21 extend to an absolute right to determine that the examination be performed by a physician of
22 SPPC’s choice. *Opp.*, at 2 (citing *Stinchcomb v. U.S.*, 132 F.R.D. 29, 30 (1990) (finding that a
23 movant has no absolute right to an examination by a physician of their choice, and that the trial
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1 court may require a showing of “medical acceptance and safety”, and may weigh the need for a
2 procedure against the pain and safety risks associated with it)). Plaintiffs similarly cite *Liechty*
3 *v. Terrill Trucking Co.* for the proposition that, even when the trial court finds that selection of
4 the examining physician is initially a prerogative of the moving party, the selection may
5 become subject to the court’s intervention if the parties cannot agree and if such intervention is
6 necessary to address the examinee’s safety and comfort concerns. 53 F.R.D 590, 591 (E.D.
7 Tenn. 1971).

8 Finally, Plaintiffs cite to *Gale v. Nat’l Transp. Co.*, in which that court denied that
9 plaintiff’s request for a female physician because said plaintiff provided no facts to
10 demonstrate a preference for female physicians and because the physician who had been
11 treating her in connection to the injuries alleged in the plaintiff’s complaint were male. 7
12 F.R.D. 237, 238 (S.D.N.Y. 1946). Plaintiffs argue that, unlike the facts in *Gale*, despite the fact
13 that Plaintiff Veronica was seen by male medical staff after her injury, her request for a female
14 physician is substantiated by her documented and psychological medical history. Plaintiffs’
15 sole evidence for this is Plaintiff Veronica’s deposition statements, found in Razzano Decl.,
16 Exs. A-D (April 10, 2024). As part of the filing, Plaintiffs also submitted several pages from
17 the websites of female OB/GYNs to demonstrate that alternative female physicians were
18 available to conduct the examination. Razzano Decl., 11-16 (April 10, 2024).

19 In its Reply, SPPC argues that Plaintiffs have presented no valid objection to Dr.
20 Bieling performing the examination. SPPC asserts that Dr. Bieling’s gender is not a valid basis
21 to object, and that other courts have rejected similar objections to having a male provider
22 perform the examination of a female plaintiff. Specifically, SPPC cites to *Pierce v. Aveanna*
23 *Healthcare, LLC*, 2023 WL 2754660 (W.D. Tex. 2023), *Shadix-Marasco v. Austin Regional*
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1 *Clinic, P.A.*, 2011 WL 2011483 (W.D. Tex. 2011), and *Gale*, 7 F.R.D. 237 (S.D.N.Y. 1946).

2 SPPC further asserts that Plaintiff Veronica's deposition testimony was improperly
3 attached to her counsel's declaration, and that counsel cannot properly authenticate an excerpt
4 from a deposition transcript even if counsel was present at the deposition. (citing *Orr v. Bank*
5 *of America NT & SA*, 285 F.3d 764, 774 (9th Cir. 2002). SPPC argues that, even if the
6 testimony were admissible, it does not establish a valid objection to a male physician because
7 Plaintiffs offer no medical or psychological records to demonstrate that Plaintiff Veronica was
8 so traumatized that she could not be examined by a male physician, because Plaintiffs allegedly
9 admit that she has been previously treated by male providers without apparent issue. (citing
10 *Opp.* at 3), and because no psychiatrist, psychologist, or other medical professional has
11 produced a statement to corroborate Plaintiffs' claim that her well-being would suffer from a
12 male physician conducting the examination.

13 Finally, SPPC argues that Plaintiffs have provided no alternative provider, but have
14 merely printed out the websites of clinics with female OB/GYNs. SPPC asserts that its counsel
15 contacted one of the clinics, *Sagua Mañagu*, to see if any of their female physicians would be
16 willing to conduct the examination and that the clinic did not reply. (citing *Thompson Decl.*,
17 *Ex. C* (April 23, 2024)). SPPC argues that, until Plaintiffs put forward the name of a physician
18 willing to perform the examination, the Court should reject Plaintiffs' objection to *Bieling*.

19 At the hearing on May 29, 2024, Plaintiffs additionally cited *Pettinato v. EQR-*
20 *Rivertower, LLC.*, 182 N.Y.S.3d 46, to support their case, stating that while *Gale* was a 1946
21 New York case, *Pettinato* was a 2023 New York case relevant to this issue. Plaintiffs
22 specifically read from *Pettinato*: "We are indeed mindful that the manner in which a pelvic
23 exam is performed may be embarrassing and even humiliating. Indeed, to alleviate plaintiff's
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1 apprehensions we mandate that the procedure be conducted by a female doctor to be chosen by
2 defendants.” 182 N.Y.S.3d at 53. On the same day, Plaintiffs filed a Notice of Supplemental
3 Authority with a copy of the case in full. On May 31, 2024, SPPC filed its Response to
4 Plaintiffs’ Supplemental Authority, noting that the *Pettinato* court also held that “[a]
5 conjectural assertion that a medical exam might trigger an unsubstantiated PTSD condition is
6 not sufficient to warrant limiting the scope of an otherwise appropriate [independent medical
7 examination comprised of a comprehensive gynecological examination].” *Id.* at 52.
8 Ultimately, however, the Court does not find *Pettinato* persuasive to this case. First, as the
9 dissent in that case notes, “[t]he gender of the examining doctor [was] not at issue but the
10 intrusive procedure itself.” *Id.*, at 60, n.2 (Singh, J., dissenting in part). Second, while *Pettinato*
11 is indeed a 2023 New York decision, it is, unlike *Gale*, issued from a New York state court, not
12 a New York federal district court. Thus, the Court will not take *Pettinato* under consideration
13 for the purposes of construing GRCP Rule 35.

14 “The manner and conditions of a court-ordered medical examination, as well as the
15 designation of the person or persons to conduct such an examination, are vested in the sound
16 discretion of the trial court.” *Sanden v. Mayo Clinic*, 495 F.2d 221, 225 (8th Cir. 1974)
17 (construing the scope of the federal trial court’s authority under FRCP 35).

18 Ultimately, the Court, in exercising its discretion, determines the manner and
19 conditions of the examination. This exercise of discretion requires the Court to consider the
20 reasonableness and fairness of the unique facts of the case in relation to the needs of the parties
21 under the presented circumstances. In this case, the Court weighs the difficulties and
22 discomfort posed by Plaintiff Veronica’s asserted past traumatic history against SPPC’s need
23 to defend against the claims at the core of this litigation. If other options were available to
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1 mitigate this competing interest, the Court would certainly consider them, and in fact has
2 allowed the parties to attempt to develop other options.

3 Plaintiffs stated at the hearing that they would be willing to stipulate to Dr. Mariana
4 Cook-Huynh of Sagua Mañagu conducting the examination if SPPC would agree to it, but
5 there does not seem to have been any progress made toward securing her services or any other
6 female physician's services, and it was not established at the hearing that any other female
7 OB/GYN is available to perform the examination. Because Plaintiffs do not seem to have
8 secured a qualified female physician to conduct the examination, even after having been given
9 the opportunity to designate and confirm another physician, the Court has no current
10 alternative. Accordingly, the Court in its exercise of its discretion finds that Dr. Bieling is
11 appropriate and in fact the only option for the examination.

12 **III. Plaintiff Veronica's Character**

13 In its Reply, SPPC further challenges the truthfulness of Plaintiff Veronica's objections
14 to the examination and assails Plaintiff Veronica's character for truthfulness based upon a prior
15 conviction for theft and a judicial determination that she forged documents in relation to that
16 theft, and upon other legal proceedings involving Plaintiff Veronica. Generally, SPCC attempts
17 to challenge the credibility of her objections based upon this narrow class of character evidence
18 governed by Guam Rules of Evidence 608 and 609.

19 However, this argument is not properly before the Court and involves evidence that is
20 the subject of a motion scheduled to be heard. For the purposes of this motion, the evidence is
21 not relevant for the Court's consideration, since the Plaintiffs do not challenge SPPC's
22 procedural right to the examination and the Court has herein determined that there are no other
23 options available than the examination as arranged by SPPC.

CONCLUSION

There being no objection from Plaintiffs to the right to an exam, and there being no alternative physician to conduct said exam, the Court **ORDERS** the examination of Plaintiff Veronica L.G. Patao by Dr. Bieling, to take place at Dr. Shieh's clinic in Tamuning, Guam, no more than thirty (30) days from the issuance of this Order.

IT IS SO ORDERED SEP 06 2024.



HONORABLE ARTHUR R. BARCINAS
Judge, Superior Court of Guam

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