IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re: WATTS COORDINATED PRETRIAL PROCEEDINGS	)	Master Docket Case No. 19-CV-01717
	)	Judge Franklin U. Valderrama
	)	Magistrate Judge Sheila M. Finnegan

THIS DOCUMENT RELATES TO

Ben Baker and Clarissa Glenn v. City of Chicago, et al., Case No. 16-CV-8940

DEFENDANTS' JOINT REPLY TO PLAINTIFF'S RESPONSE TO MOTION FOR RULE 35 EXAMINATION OF PLAINTIFF CLARISSA GLENN AND FOR A LIMITED EXTENSION OF EXPERT DISCOVERY

Defendants Alvin Jones, Miguel Cabrales, Douglas Nichols, Jr., Manuel Leano, Brian Bolton, Kenneth Young, Jr., Elsworth Smith, Jr., Robert Gonzalez, by their counsel, Hale & Monico, LLC, Defendants City of Chicago, Philip Cline, Debra Kirby, and Karen Rowan by and through its counsel Burns Noland, LLP, Defendant Kallatt Mohammed, by and through his counsel Mohan Groble Scolaro, P.C., and Defendant Ronald Watts, by and through his counsel Johnson & Bell, LLP (collectively "Defendants"), hereby reply to Plaintiff's Response to Defendants' motion for an examination of Plaintiff Clarissa Glenn ("Glenn") pursuant to Federal Rule of Civil Procedure 35 ("Rule 35"). In support, Defendants state as follows:

INTRODUCTION

As set forth in Defendants' Joint Motion for Rule 35 Examination of Plaintiff Clarissa Glenn and for a Limited Extension of Expert Discovery ("Motion"), and confirmed by Glenn's counsel in her Response in Opposition to Defendants' Motion for Rule 35 Examination ("Response"), "Ms. Glenn's mental health is in controversy." Dkt. 733, at 2. Thus, this Court, in its broad discretion, is solely being asked to consider whether Defendants have shown "good

cause" for a Rule 35 examination. As demonstrated in Defendants' Motion, a Rule 35 examination is necessary in light Glenn's belated January 2024 disclosure of mental health records and disclosure of Shairee Lackey during the expert discovery phase. Glenn's Response fails to rebut the good cause shown by Defendants for Glenn's Rule 35 examination, therefore Defendants' Motion should be granted.

ARGUMENT

I. Defendants' Request is Timely.

As set forth in Defendants' Motion, Glenn's expert disclosure under Rule 26(a)(2) of Shairee Lackey, LCPC, the individual who diagnosed Glenn with Post-Traumatic Stress Disorder ("PTSD"), prompted Defendants' issuance of a Rule 35 examination notice. This notice was made just nine days after Ms. Lackey was disclosed as an expert witness, within the time period allotted for expert discovery.

Glenn does not contend the nine-day time period from when Ms. Lackey was disclosed to Defendants' issuance of a Rule 35 examination notice was dilatory. Instead, Glenn asserts that any Rule 35 examination should have taken place during fact discovery. But this does not defeat Defendants' Motion, as courts routinely allow for Rule 35 examinations after the close of fact discovery. *Does 1-5 v. City of Chicago*, 2019 WL 2076260, at *1 (N.D. Ill. May 10, 2019) ("It is not uncommon for a district court to order a Rule 35 examination after the close of fact discovery."); *Aguilar v. City of Chicago, et al.,* 18-CV07098, Dkt. 204 (N.D. Ill. 2024) (Appenteng, M.J.) (allowing a Rule 35 examination after the close of fact discovery, noting that courts routinely allow the same, after plaintiff disclosed an expert and expert report after the close of fact discovery and during expert discovery). Glenn's disclosure of Ms. Lackey, who "is expected to testify concerning her clinical observations, diagnoses, and treatment of Ms. Glenn,

including the diagnosis that Ms. Glenn suffers from PTSD as a result of the wrongdoing at issue in this case," was not made until the expert discovery phase of this litigation. Prior to this expert disclosure, it was unclear to Defendants how Glenn would proceed with respect to her mental health and any attendant damages. Plaintiffs' position requiring Defendants to proactively seek Rule 35 examinations and expend the costs of such examinations, before it is clear how Glenn intends to proceed with her case and damages allegations, shifts the burden of proof on Defendants to disprove Glenn's mental health allegations.

Indeed, this case demonstrates why requiring Defendants to undertake such a preemptive procedure, on the timeline Glenn suggests, would be wasteful and not worthwhile. Glenn generally asserts (at 1) that Defendants "offer no explanation why they waited nearly eight years to request the [Rule 35] exam." But Glenn was not diagnosed with PTSD until June 6, 2022—nearly 6 years after she filed her complaint—and Glenn did not disclose this diagnosis until January 2024, after the close of fact discovery. Defendants were not aware that Glenn would seek to introduce with expert testimony at trial this diagnosis, along with "clinical observations, diagnoses, and treatment of Ms. Glenn," until she disclosed Ms. Lackey. Moreover, a preemptive Rule 35 exam on the timeline Glenn suggests fails to account for any change in mental health Glenn may have experienced, especially in light of the fact that she disavowed seeking or attaining any mental health treatment prior to her treatment with Ms. Lackey in June of 2022. When Glenn showed her intent to offer expert testimony regarding her mental health diagnosis through the disclosure of Ms. Lackey, the timing for a Rule 35 exam became ripe, and Defendants issued their notice nine days later.

Glenn's reliance on *Miksis v. Howard* does not support denial of Defendants' Motion. In *Miksis*, the Seventh Circuit held that the district court did not abuse its discretion in denying the

defendants' requested Rule 35 examination in a personal injury case because "Defendants knew from day one that plaintiff's medical condition was an issue," but the defendants were not diligent in pursuing the Rule 35 examination. 106 F.3d 754, 758-59 (7th Cir. 1997). Specifically, in *Miksis*, the plaintiff sued a truck driver and others after he was struck by the truck, "hurl[ed]… to the ground," and " sustained severe injuries, including brain damage and the loss of control of both legs." *Id.* at 756. In holding the district court did not abuse its discretion, the Seventh Circuit recognized that "a prediction of high medical costs for the remainder of plaintiff's life—was clearly foreseeable from the nature of plaintiff's injuries. Plaintiff suffered brain damage causing permanent physical and cognitive impairments." *Id.* at 758.

As an initial matter and contrary to Glenn's assertion (at 3), "*Miksis* does not . . . establish a bright-line rule requiring that requests for Rule 35 examinations must always be brought before the close of fact discovery." *Walti v. Toys R Us*, 2011 WL 3876907, at *4 (N.D. Ill. Aug. 31, 2011); *see also Haymer v. Countrywide Bank, FSB*, 2013 WL 657662, at *3 (N.D. Ill. Feb. 22, 2013) (Finnegan, M.J.) (same). Moreover, because *Miksis* was a personal injury case, it was entirely foreseeable that an expert would testify regarding the plaintiff's expected life-long medical expenses. *Walti*, at *5; *Haymer*, at *3. As explained above, Glenn's expert disclosure of Ms. Lackey necessitated Defendants' notice of a Rule 35 examination, which was made only nine days later. Defendants have therefore shown diligence in pursuing a Rule 35 examination of Glenn.

II. Good Cause Exists for a Rule 35 Examination.

Plaintiffs' disclosure of Ms. Lackey was the first indication Defendants received that Glenn would seek to introduce her diagnosis of PTSD by way of expert testimony. *See Haymer*, 2013 WL 657662, at *4 (allowing Rule 35 exam because "Plaintiff has disclosed [a treating physician] as an expert witness who will testify about her mental state, and [the defendant] should have an

opportunity to rebut that evidence."); *see also Walti*, 2011 WL 3876907, at 3 (good cause shown for Rule 35 mental exam because "the defendant has the right to challenge" the plaintiff's experts' evaluations). Before this disclosure, Glenn's only evidence regarding her mental health was lay testimony from herself and her brother, Bryan Glenn, who has no specialized training to discuss mental health issues and would presumably only be allowed to testify as to his own observations of his sister without reference to medical terminology let alone diagnoses. The landscape surrounding her mental health allegations dramatically changed with the expert disclosure of Ms. Lackey, a witness not even previously mentioned by Glenn in her deposition or prior discovery responses. Contrary to Plaintiff's argument, Defendants have demonstrated good cause for a Rule 35 examination of Glenn.

In response to Defendants' effort to seek discovery to which they are entitled, Glenn proposed to simply withdraw her disclosure of Ms. Lackey and Glenn's medical records. Glenn's "proposal" to withdraw the disclosure of Ms. Lackey does not obviate the need for a Rule 35 examination. Importantly, Glenn is not withdrawing her claim for mental health and/or emotional damages. Although Glenn asserts that she will withdraw the expert disclosure of Ms. Lackey and related medical records if Defendants agree to withdraw their Rule 35 examination notice, doing so would leave Defendants with no meaningful way to challenge Glenn's mental health testimony on cross-examination at trial. The proposal seemingly would ignore evidence and place Defendants in a Catch-22: they cannot challenge at trial Ms. Glenn's testimony regarding her mental health by pointing to a lack of treatment or diagnosis (because Defendants are now aware of Ms. Lackey, even if her disclosure is withdrawn), nor can they challenge the diagnosis or methods leading to Glenn's diagnosis without a Rule 35 examination. Glenn would then have the unfair advantage to testify at trial as to her symptoms comprising PTSD and her lack of emotional well-being without

important cross-examination on these subjects. Simply put, Glenn's withdrawal of Ms. Lackey cannot "unring the bell": the disclosure of Ms. Lackey and Glenn's PTSD is now part of the record and Defendants should be allowed to explore Glenn's mental health (including her PTSD diagnosis, her symptoms, and the origins of her PTSD) by way of a Rule 35 examination. To hold otherwise would deprive Defendants of meaningful discovery and possible evidence undercutting Glenn's claims at trial. *See Does 1-5*, 2019 WL 2076260, at *2 ("Defendant is not required to only rely on the data and observations made by Plaintiffs' expert witness. Defendant is entitled to a reasonable opportunity to test those conclusions by using standardized or peer-reviewed psychological examinations."). No case supports Glenn position, and Glenn's attempt to insulate from inquiry her anticipated trial testimony regarding her mental health by opposing a Rule 35 examination and disclosing but then withdrawing her treating mental health professional and associated records should be rejected.

Notably, the severity of Glenn's alleged mental trauma at the hands of Defendants was not fully known until 1) her belated January 2024 disclosure of medical records and 2) expert disclosure of her therapist Ms. Lackey. Even if the expert disclosure of Ms. Lackey is removed, Glenn will still nevertheless be testifying to her symptoms which, without a Rule 35 examination, Defendants will be unable to challenge. A Rule 35 examination of Glenn is necessary for Defendants to defend against Glenn's mental health claims. Moreover, it is true that Glenn was tearful during the course of her three volumes of depositions in this matter.[1] All present could agree that Glenn's mental health has noticeably declined over time; however, what is at issue is the origin of that decline. While Glenn asserts that it is solely due to the Defendants' actions, there

[1] Notably, Defendants had to seek this Court's intervention for Volume II of her deposition, and Volume III took place by agreement of the parties after Plaintiffs failed to supplement their discovery responses and to produce mental health records; thus, the one-hour Volume III deposition was a product of Plaintiffs' creation.

is ample evidence that other factors in Glenn's life may be at play. Because Glenn has inserted her mental health into controversy at the expert discovery phase, Defendants are entitled to examine her regarding those other factors, and fully explore whether her PTSD diagnosis and corresponding symptoms are, in fact, the result of Defendants' actions, or something else. Good cause therefore exists for Defendants' requested Rule 35 examination of Glenn. [2]

III. The Parameters of Glenn's Examination are Reasonable.

Glenn's Response does not argue Defendants failed to specify the "time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it," as required by Rule 35(a)(2)(B). Therefore, Defendants have satisfied these requirements, and Glenn only disputes the length of time for the examination. However, Defendants have demonstrated the necessity of each parameter identified, which is supported by Dr. Klipfel's declaration. *See* Dkt. 725-8.

Defendants attempted to confer with Glenn's attorneys regarding the parameters of the Rule 35 examination and, as noted in Defendants' Motion (at 6), agreed to shorten the length of the examination from ten hours to eight hours. Glenn fails to acknowledge this concession. Instead, Glenn merely asserts that length of the examination should be "shorten[ed]," but she does not explain why or propose an alternative length of time for the examination. Nor does she rebut the declaration of Dr. Klipfel, who sets forth the length of time necessary to complete her testing, the areas of testing, and the potential tests to be used. Glenn's unsupported, non-medical assertion that

[2] Glenn further contends that modifying the expert discovery schedule to allow for a Rule 35 examination has "real consequences" because *Daubert* deadlines "will be affected." Defendants are mindful of this Court's deadlines. However, any minor alteration in the *Daubert* briefing schedule is a result of Glenn's disclosure of Ms. Lackey and Glenn's subsequent opposition to Defendant's notice of Rule 35 examination, which was issued on April 10, 2024.

certain testing is unnecessary (*i.e.* "cognitive testing") does not supplant Dr. Klipfel's medical judgment.

Glenn asserts she "has been deposed for 15 hours in this matter" and "there is no good cause, in these circumstances, for Defendants to be able to engage in another lengthy and traumatic round of questioning around these events…" But Defendants would not be engaging in a "traumatic round of questioning"; Dr. Klipfel, a licensed psychologist who specializes in treating and assessing individuals who have undergone trauma, would be performing a medical examination pursuant to Rule 35. *See Hart v. Roundy's Supermarkets, Inc.*, 2011 WL 3687622, at *2-3 (E.D. Wis. Aug. 23, 2011) (recognizing the Rule 35 examiner is " a well-trained, well-educated and licensed neuropsychologist who is bound by medical ethics rules" and "there is no evidence that before the court that [the Rule 35 examiner's] examination will be overreaching in manner, scope or duration"). Moreover, Glenn's assertion (at 7) that a Rule 35 examination could be avoided by merely providing Dr. Klipfel with video of Glenn's deposition is totally without merit. Playing video footage from a deposition is simply no substitute for a Rule 35 examination. Glenn was not even asserting that she was suffering from PTSD at volumes I or II of her deposition, nor had she disclosed that she had sought mental health treatment. More importantly, Defendants' attorneys are not licensed psychiatrists or psychologists. They therefore do not (and did not) possess the education, experience, or skill required to perform a mental health examination via a deposition under Rule 30. See *Jump v. Montgomery Cnty.*, 2015 WL 9701166, at *1 (C.D. Ill. Sept. 30, 2015) ("a Rule 35 examination is a medical examination, not an adversarial process"). Accordingly, Defendants have established good cause for the Rule 35 examination and for a limited extension of the expert discovery schedule to allow for the examination and for Dr. Klipfel to author a report regarding the examination.

CONCLUSION

The parties agree that Glenn's mental health is in controversy. To properly explore Glenn's mental health, Defendants issued a notice of Rule 35 examination nine days after Glenn disclosed her expert, Ms. Lackey, who diagnosed her with PTSD. Good cause therefore exists for a Rule 35 examination of Glenn in order to allow for Defendants to rebut the expert disclosures and mental health trauma Glenn has newly injected into this case.

WHEREFORE, Defendants respectfully request this Court order Plaintiff Clarissa Glenn to submit to a Rule 35 examination, performed by defense expert Dr. Kristen Klipfel, for no more than 8 hours on a date and time mutually agreeable to the parties; to extend expert discovery on a limited basis to allow Dr. Klipfel to perform the examination and author a report, to be submitted to the parties no later than 3 weeks after the agreed examination date; and for any other relief this Court deems proper and just.

Dated: May 29, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on **May 29, 2024**, I electronically filed **Defendants' Joint Reply to Plaintiff's Response to Motion for Rule 35 Examination of Plaintiff Clarissa Glenn and for A Limited Extension of Expert Discovery** with the Clerk of the Court using the ECF system, which sent electronic notification of the filing on the same day to counsel of record.

/s/ Kelly M. Olivier