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May 30, 2024

**VIA ELECTRONIC FILING & LAWYERS SERVICE**
Essex County Superior Courthouse
470 Dr. Martin Luther King Jr. Blvd
Newark, NJ 07102
**Attn: The Honorable Cynthia D. Santomauro, J.S.C.**

**Re: Do Nascimento v. K Johnson Enterprises, et als.**
**Docket No.: ESX-L-8976-20**
**Our File No.: 19-34**

***Plaintiff's Opposition to Defendant IMC Constructions's Motion to Compel Plaintiff, Sebastio Rocha Do Nacimento, to Submit to Neuropsychological Testing Without the Presence of a Third Party***

Dear Judge Santomauro:

We represent Plaintiff Sebastiao Roccha Do Nascimento in the above referenced matter. Please accept the following letter brief in lieu of more formal opposition to Defendant IMC Constructions's Motion to Compel Plaintiff, Sebastio Rocha Do Nacimento, to Submit to Neuropsychological Testing Without the Presence of a Third Party.

## FACTS AND PROCEDURAL HISTORY

Plaintiff Sebastiao Rocha Do Nascimento was caused to suffer severe and permanent injuries as a result of a scaffolding collapse which occurred on June 5, 2019. Sebastiao was one of four workers who fell approximately thirty feet to the ground, sustaining severe injuries to his lower extremities as well as his brain. Mr. Do Nascimento, who was in his 40's at the time of the fall, sustained comminuted, displaced fractures to his right ankle, heel and foot as well as an intracranial hemorrhage to his frontal lobe. He has not worked since his fall.

Mr. Do Nascimento underwent multiple orthopedic surgeries and has ongoing cognitive issues including headaches, memory impairment, impaired attention, difficulty controlling his emotions and is prone to seizures and twice as likely to suffer from Parkinson's and/or Alzheimer's disease as a result of the traumatic brain injury sustained to his right frontal lobe. (*Defendant's Exhibit B - Dr. Brian Greenwald Narrative Report*)

On March 19, 2024 Defendant IMC noticed a defense medical examination with a neuropsychologist, Dr. Kenneth Kutner for April 17, 2024. On April 2, 2024 our office sent correspondence via electronic mail to IMC's counsel advising:

> Please be advised, that Plaintiff reserves the right to audio tape and/or video tape the complete examination including questioning by the doctor and/or his staff. Plaintiff further reserves the right to have a third person accompany [him] to the examination. This person may also record the exam by audio and/or note taking, however the person will in no way obstruct, interfere, or participate in the examination.
>
> As you are undoubtedly aware, the New Jersey Supreme Court unanimously upheld Plaintiff's right to have a third party attend and make a recording of the defense medical examination. The Court further recognized the importance that a third party observer has in preserving evidence of a DME. *DiFiore v. Pezic*, 2023 N.J. LEXIS 647, at *6-7, 20 (June 15, 2023). Moreover, the Supreme Court overturned the Appellate Division and found that it is defendant's burden to show why third-party observation or recording should not be permitted as "that best comports with the realities of DMEs and the text of *Rules* 4:19 and 4:10-3. It also ensures fairness in our civil justice system." *DiFiore v. Pezic*, 2023 N.J. LEXIS 647, at *6-7, 20 (June 15, 2023).

(*Exhibit A - April 17, 2024 Letter to IMC*) (emphasis added)

Defendants did not object to the terms of this letter and on April 17, 2024 our client and a third-party observer appeared for the examination ready to proceed.

Dr. Kutner conducted an interview with Mr. Do Nascimento with a third-party nurse, a second doctor from Dr. Kutner's office and an interpreter present. When it came to the neuropsychological testing portion of the examination, Dr. Kutner advised our third-party observer they were not allowed to be present and/or make an audio visual recording of the examination. Our office reiterated what was stated in our April 2, 2024 letter, Dr. Kutner would not let the third-party observe and/or make an audio visual recording and the examination was ended.

IMC's counsel thereafter contacted our office asking if we would agree to the exam concluding without a third-party present. We advised we would not, but would take in to consideration a protective order if the doctor's concern was the proprietary information regarding his specific test order being disseminated. Counsel advised the doctor's concern was a third party's presence and this application followed.

## LEGAL DISCUSSION

### I. The Supreme Court's Decision in *DiFiore v. Pezic*, 254 N.J. 212 (2023)

Plaintiff, a non-English speaking laborer with a brain injury and cognitive limitations, should not be compelled to attend a neuropsychological examination with a doctor hired and paid for by the defense without a third-party observer present. This type of power imbalance and need for full transparency at these inherently adversarial examinations is exactly why the Supreme Court issued their ruling in *DiFiore v. Pezic*, 254 N.J. 212 (2023). The application should be denied.

The Supreme Court in *DiFiore* overturned key points of the Appellate Division decision and allows Plaintiff to have a third party present to observe and/or make an audiovisual recording. The Court expressly "decline[d] to place the burden on the plaintiff to show special reasons why third-party observation or recording should be permitted in each case." *Id.* at 220. Rather, the Court stated defendant should "move for a protective order under *R.* 4:10-3 seeking to prevent the exam from being recorded, or to prevent a neutral third-party observer from attending." *Ibid.* "Factors including a plaintiff's cognitive limitations, psychological impairments, language barriers, age, and inexperience with the legal system may weigh in favor of allowing unobtrusive recording and the presence of a neutral third-party observer. *Ibid.* (emphasis added)

Furthermore, the Supreme Court agreed that "video or audio recording, or a third-party observer . . . may in some circumstances be vital to preserving evidence of a DME." *Id.* at 232(emphasis added). The Court found "a defense expert's written report is the only evidence of the exam. And the report may, of course, include observations and findings . . . that are inaccurate." *Id.* (internal citations omitted).

The Supreme Court held fairness of the civil justice system should place the burden on defendants to show why a third party should not be present as well given the dangers of a DME:

> We conclude that placing the burden on defendants to show why a neutral third-party observer or an unobtrusive recording should not be permitted in a particular case best comports with the realities of DMEs and the text of *R.* 4:19 and *R.*. 4:10-3. It also ensures fairness in our civil justice system.
>
> A DME is a compelled medical examination. It is very different from a plaintiff's examination by her own treating physician or any doctor of her choosing. Whereas a plaintiff can choose to see a new doctor if she is uncomfortable with her treating physician or with a doctor suggested by her attorney, a DME can involve a plaintiff being physically touched without her consent or asked extraordinarily personal questions about her mental health without her consent.
>
> A DME is also unique in our adversarial system. It is the only instance in which a defense expert may conduct discovery on a plaintiff without plaintiff's counsel present . . . a DME reflects a profound power imbalance between the plaintiff and a medical professional with long experience in the examination of patients and participation in Court proceedings.

*Id.* at 233-34 (emphasis added).

"It is difficult to imagine, for example, how a third party who silently observes a dental examination could negatively impact the exam . . . [likewise] it is not immediately obvious how an unobtrusive recording device would call the validity of the examination into question in a way that the interpreter would not." *Id* at 239. While neuropsychologists can raise concerns about the presence of third-parties and unobtrusive recording devices, they "cannot dictate the terms under which DMEs are held[.]" *Id.* at 220, 230, 241 ("As the Appellate Division correctly held, 'the expert assigned to

conduct the Rule 4:19 examination "does not have the right to dictate the terms under which the examination shall be held.'") (internal citations omitted) (emphasis added)

Here, Defendant seeks to circumvent *DiFiore* and do exactly what the Supreme Court says defense experts are not permitted to do: have their doctor dictate the terms of the DME. Under the factors set forth in *DiFiore,* every factor with the exception of possibly "age" weighs in favor of having a third-party present for the examination. *Id.* at 220 ("cognitive limitations, psychological impairments, language barriers, age, and inexperience with the legal system") Indeed, Mr. Do Nascimento suffered a traumatic brain injury that has left him with cognitive limitations and psychological impairments. Mr. Do Nascimento's primary language is Portugese and this is his only personal injury law suit.

Dr. Kutner, conversely, has a Ph.D., is a board certified neuropsychologist and has testified for many years for the defense. While Dr. Kutner laments in his certification it is "against the standards of care" in his profession to perform neuropsychological testing in the presence of a third-party, Dr. Kutner fails to recognize he is not a treating doctor and is not administering "care" for Mr. Do Nascimento. Instead, he has been hired by the Defense who have an interest directly adverse to Mr. Do Nascimento to perform a forensic evaluation. While Defendant attaches an article from the Oxford University Press to bolster their claim a third-party should not be permitted, the statement is belied by other scholarly articles on the same issue:

> there is little research that addresses the effects of third party presence on forensic examinees more specifically . . . Although Section 9 of the Ethical Principles of Psychologists and Code of Conduct (EPPCC; American Psychological Association, 2002) references the general obligations of psychologists engaged in assessment activities, the code does not offer specific guidance to psychologists faced with the prospect of third party observers or facilitators. Similarly, treatment of third party presence during psychological evaluations in the Standards for Educational Testing and Psychological Assessment (American Educational Research Association, American Psychological Association, & National Council on Measurement in Education, 1999) is primarily limited to a discussion of the use of interpreters.
>
> . . . .
>
> Generally, concerns about the presence of third parties during psychological evaluations fall into one of four categories: (a) negative effects on the examinee's responses and participation, (b) interruption of the flow of information from the examinee to the examiner, (c) threats to the validity of conclusions that can be drawn from the evaluation, and (d) threats to the security (and future utility) of psychological assessment techniques and tests. All these concerns are legitimate and should lead examining psychologists to make decisions about the presence of third parties only after serious deliberation. Yet, none of these issues—alone or in combination—necessarily outweigh the legal, practical, and clinical reasons for allowing third parties to be present in some cases, nor do they offer a sufficient rationale for a general prohibition on third party presence.
>
> . . . .

> Third party participation in psychological evaluations is sometimes necessary, sometimes helpful, and sometimes required by law. Psychologists' deliberations about the presence of third parties should be logical and consistent, protect the security and future utility of psychological assessment instruments, and not unnecessarily compromise the rights of litigants who are undergoing evaluation.

(*Exhibit B* - Otto, Randy & Krauss, Daniel. (2009). *Contemplating the Presence of Third Party Observers and Facilitators in Psychological Evaluations*. Assessment.)

Moreover, each and every neuropsychological case we have had in recent memory, we have sent a third-party observer, almost always without issue. In fact, at one of the last neuropsychological examinations scheduled by a defendant in another case, the defense neuropsychologist not only had no issue with the third-party observer's presence at the examination, he actually encouraged it and asked to be photographed with the client both during and after the examination. If there is an objection and a motion for a protective order is filed, we have prevailed on the issue. This is true with both neuropsychological DME's and orthopedic DME's. (*Exhibit C - Prior Neuropsychological Examinations with Third-Party and Prior Orders*) *Ibid.*

Tellingly, other examiners have certified they do not see such an intrusive nature from the third-party presence and recordings as well. Dr. Carnevale, a neuropsychologist like Dr. Kutner, submitted a certification in the *DiFiore* matter endorsing the presence of a third party to observe and video record the exam. He admits in this certification the defense exam is in fact an adversarial proceeding. He also concedes that a recording of the examination is not intrusive, does not interfere with his ability to conduct an examination and is an objective and unbiased tool to fairly and accurately memorialize what happened at the examination so it does not become a "he said" (doctor from, e.g., Yale) vs. "she said" (plaintiff, often low income, uneducated) situation. Dr. Carnevale certified in the *DiFiore* matter:

> 11. I have conducted several forensic examinations where the court has entered Protective Orders consistent with the Policy Statement to ensure test security and intellectual property where the examination was recorded by a cell phone or other similar device. In all of those exams, the mere presence of the recording device did not have any effect on subject's or my performance or the validity of the test results and my opinions.
>
> 12. A forensic neuropsychological examination conducted in connection with civil litigation as in this case is unavoidably and inherently adversarial. Accordingly, the manner in which the tests are administered by the examiner can significantly impact the test results and the examiner's interpretation of those results.
>
> 13. An audio recording provides objective evidence to preserve exactly how the examination was conducted, the accuracy of the examiner's notes or recollections and the tones of voices. If a Protective Order is entered consistent with the Policy Statement, there would be no violation of any ethics or standards.

(*Exhibit D- Affidavit of George J. Carnevale, Ph. D.* (emphasis added)). Given the great evidentiary

benefit of having the truth recorded and both the Court and another doctor testifying there is no intrusiveness as to the recording of the exam.

The examination Dr. Kutner has been hired by the defense to perform is not for purposes of treatment or care. The examination is an adversarial proceeding and the only check on the validity of the examination is the presence of a third-party observer and/or audio-visual recording of the examination. Without this check, the doctor could read three words to the Plaintiff, ask him to read those three words back, the Plaintiff could only recall one word and the doctor could write in his report, "Plaintiff recalled all three words" and there would be no check on this statement. The unobtrusive presence of a third-party observer (all the more incredible given there will be an interpreter present no matter what) and/or audio-visual recording of the examination would serve to preserve what this entire system of litigation is about: the truth. Defendant's application should be denied.

**B. There Is No Such Thing as an "Independent" Medical Examination in Injury Litigation**

The Supreme Court no longer refers to examination under *R.* 4:19 as IME nor "Independent" Medical Exams but exclusively refers to such examinations as Defense Medical Exams or "DMEs". Dr. Kutner, and other examiners serve defense law firms rather than being "independent." Every DME is either explicitly, or implicitly filled with bias as the Plaintiff is not the client; the defense law firm is. Dr. Kutner and these examiners are employed by defense law firms and these firms reward examiners handsomely to conduct exams tailored to their clients' needs. A similar examiner testified in a trial:

> Q. So your client is, essentially, [Defense counsel] and [Defense counsel]'s office, right?
> A. Yes, sir.
> ...
> Q. Okay. Isn't it true that you have personally made over $2,036,000 a year in 2008 and 2009 doing exams on behalf of clients like [Defense counsel] and his office? Isn't that true?
> A. Yes. ...So that's the way it is. That's the facts.

(*Exhibit E - Trial Transcript of Fernandes v. DAR Construction, February 2, 2011* at 25:15-17; 34:9-16). Further testimony revealed that this examiner doctor and his wife had more than a $23 million interest in ExamWorks stock as of 2011, a company which serves defense law firms to conduct DMEs. *Id.* at 35:18-38:6. These examiners, like Dr. Kutner, are clearly not independent third parties, but persons with an interest to the tunes of millions of dollars to serve their clients: defense law firms.

Many of these examiners testify numerous times and either will be unable to recall their testimony or will repeat similar testimony where they find time and again a plaintiff did not suffer a permanent injury:

> Q. Do you recall the case in February of 2007 when you were the defense medical expert and you testified that the plaintiff had no permanent injury? Do you recall that testimony?
> A. Without having the report in front of me the case you're talking about, sir, I

have no specific recollection.

Q. All right. Well how about the *Medina* case? Do you remember the *Medina* case from Essex County, December of 2008 when you were the defense expert and you testified that we had both defendants and maintained that the plaintiff had not sustained the herniation as a result of the accident and that her back pain was a result of degenerative changes/ Do you recall that case?
A. No, sir.
...
Q. Doctor, can you recall one case where you came to the court and testified that actually the disk bulge was related to the accident and that the plaintiff had suffered permanent injury? There's no cases like that. Are there?
A. If there was an annular tear and the patient had physical findings to go along with the mechanical nature of that, I would say it's a permanent injury. But if you are asking me name, date, case, courthouse, I can't tell you that sir.

*Id.* at 43:2-44:8; 47:10-19. For an examiner who, at the time, was testifying nearly two dozen times a year to not be able to produce a single case name in which a permanent injury was found is telling of the bias of defense exams and the examiners who conduct DMEs. In an examiner's own words at trial:

Q. The better ExamWorks serves its clients, the client being people like [Defense counsel]'s law firm and defense law firms, the better you do and your family does. Isn't that right?
A. I don't really understand your question. But you're saying, if the stock goes up, my family does better? Yeah. That's the math. That's correct.

*Id.* at 47:23-48:4. This examiner also testified about a censure imposed on him related to a defense medical exam and related testimony that was incorrect. (*Exhibit F - Deposition Transcript of Dr. Decter on March 1, 2017* at 119:4-16; 119:25-122:3). The examiner was censured for putting his defense law firm clients ahead of his ethical obligations as stated in the censure materials.

In the same matter where the examiner was deposed, at the time of trial, a third-party nurse was called to testify as to her observations during the plaintiff's DME:

Q. Dr. Decter testified that when he touched the shoulder, he complained of pain all over the shoulder. Did that actually happen at the exam?
A. No. It did not.

Q. Describe what happened at the exam. Where did he touch the shoulder and what actually happened on that?
A. He touched it right on his deltoid area, and that's where it hurt. It wasn't all over. He specifically said the proximal area.
...

Q. And Dr. Decter also testified that wherever you touched him on the body, he

said, oh, that hurts, pain here, pain there. Did that ever happen at the exam?
A. No it did not.

Q. Okay. And did [plaintiff] ever complain of pain all over his body, diffuse pain?
A. No. He did not.

Q. You saw the–how about when he did the walking test, where he walked on his tip toes, then his heels. Was pain noted there?
A. Yes. It was.

...

Q. Dr. Decter testified when he did the lower back test, that he had no pain radiating to his feet and no difference in feel to his feet. Can you describe how that was different from what you saw?
A. It–he had more feeling in his left foot and leg area than he did in the right foot and leg area.

Q. And how do you know that?
A. He expressed that, [plaintiff].

Q. Okay. And, also when he did the heel to toe test, when you walk on the heel and walk on the toe, did he complain of pain anywhere else in his body?
A. His back?

Q. Okay. How about his buttocks?
A. When he walked, yes, he complained of buttock pain.

(*Exhibit G - Trial Transcript of Catherine Miksic* at 26:13-22; 27:3-14; 27:24-28:13). There was a clear bias of DME doctors coloring their testimony to serve their clients which was only able to be rebutted due to a third-party observing the exam. This doctor showed he was willing to alter his testimony, resulting in a censure, while plaintiff needed a third-party, who recorded and took notes during the exam, to rebut the defense's doctor tailored testimony. This kind of thing happens all the time in defense medical exams and related testimony with numerous paid defense witnesses. A third party nurse to preserve and record the exam is necessary for fundamental fairness.

Again, these examiners, are there to serve their clients: defense firms. As such, it is necessary for Plaintiff to be able to have an observer record the exam to eliminate this inherent unfairness. When doctors have hundreds of thousands or millions of dollars on the line each year connected to keeping defense law firms happy, there is no way in which these doctors could every truly be "independent."

Evidence should not be a game played between the parties, a recorded evaluation removes the layers of bias and will present to the jury pure, unadulterate evidence which they can use to reach their verdict. Anything less than such a recording would be seeking to obscure the truth from the jury. The use of a smart-phone by a nurse recording a DME is unobtrusive and can only reveal the truth of what occurred during the examination. These recordings benefit Plaintiff, Defendant, the Court, and jurors

as the recording shows what occurred during the exam without having to rely on the memory of parties who may be asked to testify months or years after the exam or may have trouble or inability recalling such events. This is exactly as the Supreme Court held:

> Trial courts should consider both audio and video recording, as the value of both in resolving a dispute as to what occurred during a DME "could be significant". We likewise concur that smart phones can unobtrusively be used to record a DME with "minimal effort." Especially in the age of virtual meetings, both audio and video recording seem easy to accomplish and not unduly disruptive.

*Difiore*, *supra*, 254 N.J. at 232-33 (internal citations omitted). It is the burden of Defendants to show why a neutral third-party observer should not be permitted and preserving of the truth should not occur. There is no injustice in ensuring evidence presented to the jury is an unedited account free from bias. With regards to a nurse using a smart phone to record the interactions, there is no argument any minimal intrusiveness outweighs the substantial evidentiary nature of providing an indisputable recording of same. Leaving plaintiffs like Sebastio Rocha Do Nascimento, an immigrant worker with a severe traumatic brain injury, unfamiliar with the adversarial litigation process, alone with a highly educated and paid medical doctor and simply trusting the Defendant's doctor will write everything down accurately and testify in an unbiased fashion about it all is not realistic and would result in a stark unfairness at trial. Defendant has not met their burden of excluding a third-party observer and audio-visual recording of the examination.

## CONCLUSION

For the above reasons, it is respectfully requested Defendant IMC Constructions's Motion to Compel Plaintiff, Sebastio Rocha Do Nacimento, to Submit to Neuropsychological Testing Without the Presence of a Third Party be denied.

Respectfully,

**MARK W. MORRIS**
For the Firm

MWM:bhs
cc: Civil Motions Clerk (Via Electronic Filing)
All Counsel (Via Electronic Filing)
Opp Motion to Bar 3rd Party at DME.wpd