FILED, Clerk of the Appellate Division, April 19, 2024, **A-001248-23**, **AMENDED**

JORGE REMACHE-ROBALINO;

Plaintiff,

vs.

NADER BOULOS, M.D.; LANI MENDELSON, M.D.; ST. JOSEPH'S REGIONAL MEDICAL CENTER; JOHN DOES 1-10 (fictitious names); JANE DOES 11-20 (fictitious names); ABC COMPANIES 1-10 (fictitious names);

Defendants.

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION
Docket No.: A-1248-23T4

CIVIL ACTION

Following remand from the NEW JERSEY SUPREME COURT and on grant of leave to appeal from SUPERIOR COURT OF NEW JERSEY, LAW DIVISION HUDSON COUNTY,
DOCKET NO.: HUD-L-1929-19

Sat Below: Hon. Joseph A. Turula, P.J.Cv.

BRIEF IN SUPPORT OF INTERLOCUTORY APPEAL

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PRELIMINARY STATEMENT

Plaintiff Jorge Remache-Robalino ("Remache") files this brief in support of his interlocutory appeal from the trial court's grant of a protective order prohibiting the audio recording of a neuropsychological defense medical exam ("DME") in this medical malpractice matter. The New Jersey Supreme Court remanded this matter for the trial court to determine whether Defendants have good cause to restrict the recording of the examination of a non-English speaker whose exam will be conducted with an interpreter, and whose cognitive, mental health, and memory issues are critical issues in the litigation. But the trial court did not fulfill the mandate of the remand.

Here, the trial court summarily decided the issue without oral argument or any evaluation of the factors that the Supreme Court required be considered in hearing these motions. As a result, the trial court's failure to consider the factors renders the decision so wide off the mark that this Court should summarily reverse and deny Defendants a protective order. Defendants did not meet the good cause burden to show why his selected examiner's requirement that the exam not be recorded outweighs the needs to counteract the power imbalance between a hired expert and Plaintiff, who is partially blind, speaks only Spanish, and whose cognition, memory, and anxiety are elements of damages in the case. The neuropsychologist's only basis for refusing the recording is a 2016 Policy

Statement of the American Board of Neuropsychologists ("ABN"), but as pointed out by the Supreme Court, that policy statement is not being followed when the neuropsychologist conducts the examination in the presence of a third-party interpreter as will occur here. The trial court failed to address this inherent dichotomy, nor why the examiner's self-imposed restriction not to record the examination outweighs Remache's need to preserve evidence given his cognitive deficiency, impaired memory, and need to have the examination translated.

Defendants are seeking an exam of the most private part of Remache – his psychological condition. The exam should be recorded because it is the only means that Remache has to preserve what is said, how it is said, and the length of the exam. Because of Remache's psychological injury, which includes noted deficits in his memory and concentration, he is limited in combatting inconsistencies between the actual exam and the neuropsychologist's report and testimony. Because of the adversarial nature of the exam, Remache should be permitted to record the exam due to his deficits in concentration and memory, and his inability to communicate in English.

COMBINED STATEMENT OF FACTS & PROCEDURAL HISTORY[1]

Remache was working as a laborer when a fragment of metal shot into his right eye. (Pa106.) Remache sought treatment with Defendants, who failed to discover the metal shard in Remache's eye. (Id.) Unfortunately, because of the medical error and delay in discovering the metal shard, Remache went blind in his right eye. (Id.) Remache subsequently developed depression, anxiety, and impaired concentration. (Pa106; Pca7; Pca10.)

Plaintiff filed his Complaint alleging medical malpractice against Defendants on May 14, 2019. (Pa2.) In response to Defendants' notice of a neuropsychological examination of Plaintiff, Plaintiff's counsel advised that Plaintiff will be tape recording the examination. (Pa107.) Defendants moved to compel the defense neuropsychological examination of Plaintiff without recording. (Pa107.) Defendants' counsel argued that Dr. Morgan will not perform the IME if it is recorded. (Pa107.) Counsel explained, Dr. Morgan does not permit recordings of his examinations, because the disruption potentially invalidates the integrity of the process, the testing and results and violates the

[1] Due to the intertwined nature of the relevant facts with the procedural history, we have combined them. The term "Pa" refers to Plaintiff's Appendix filed in support of appeal. The term "Pca" refers to Plaintiff's Confidential Appendix filed in support of appeal. The term "Dmb" refers to Defendants Dr. Nader Boulos, Dr. Lani Mendelson, and St. Joseph's Regional Medical Center's brief in opposition to Plaintiff's Motion for Leave to Appeal filed on December 21, 2023.

security of the tests themselves such that the global reliability of the tests may be damaged. (Pa14; Pa33.) Dr. Morgan certified that the test cannot be recorded because "the experience of being observed and/or recorded can artificially alter an individual's task performance and affect the reliability and validity of test scores." (Pa35 at ¶ 14.)

The trial court granted the motion prohibiting Plaintiff from audio recording the examination. (Pa31.) In B.D. v. Carley, 307 N.J. Super. 259, 262 (App. Div. 1998), the court never suggested any prerequisites to recording a psychological DME. But here the trial court created a prerequisite finding plaintiff had an unfair advantage because his evaluations were not recorded: "one side cannot have an advantage of recording while the other cannot. The Court might rule differently if the plaintiff's experts were treating him." (Pa31.) Plaintiff moved for reconsideration disagreeing with both the reasoning and the trial court's factual findings. (Pa39.) Importantly, Plaintiff pointed out that his psychiatrist, Jorge Quintana, M.D., treated Remache for his psychological injury and was not just an examiner. (Pca10.) Additionally, Jared Tosk, M.D., evaluated Remache for a permanency rating in his worker's compensation claim. (Pca2.)

As part of this reconsideration, Remache argued that Defendants' Spanish interpreter at the deposition was not accurate, which was only revealed because

Remache's counsel was fluent in Spanish. (Pa145-46 at 74:11 to 75:10.) For instance, in discussing Remache's inability to do household chores, he attempted to explain why his wife did not help around the house. (Pa145 at 74:11 to 23.) The interpreter translated, "My wife helps me out. She somewhat helps me. She – she's a homemaker. She helps and cares for the elderly." (Pa145 at 74:21 to 23.) Remache's counsel then clarified the improper translation of "homemaker" by stating "[s]he's a home aide," to which the translator admitted the error. (Pa145-46 at 74:21 to 75:6.)

The trial court granted reconsideration to permit recording subject to a confidentiality order because "plaintiff's prior reports were not generated by IMEs." (Pa74-75). Defendants then moved for reconsideration of the reconsideration providing another certification from Dr. Morgan, who refused to conduct the examination if it were recorded. (Pa74.) The trial court granted reconsideration finding that Carley did not apply because audio recording the exam would preclude Dr. Morgan who was "following his association's recommendations not to audio tape because of the potentially of invalidating the integrity of the process." (Pa74-75.) The court noted that "Defendant's argument is simply they will not have the ability to choose their expert if the Order remains," given Dr. Morgan will not permit the recording of the examination or otherwise examine the party pursuant to a confidentiality order. (Pa75.)

The trial court noted it "does not have any indication the defense bar has now determine (sic) to circumvent Carley, by only hiring neuropsychologists who do not permit audio recordings." (Pa75.) In making this finding, the trial court overlooked evidence that, like the psychologist in Carley, Dr. Morgan is a licensed psychologist. (Pa34, Pa141.) The American Board of Clinical Neuropsychology is a member board of the American Board of Professional Psychology. Website, American Board of Clinical Neuropsychology, https://theabcn.org/ (last accessed Apr. 14, 2024); see also Pa166, n.1.

In fact, Dr. Morgan's only licensure within the State of New Jersey is as a licensed psychologist, which means the trial court erred as a matter of law in not applying the then-binding authority from Carley. Website, New Jersey Division of Consumer Affairs, License Information, available at https://newjersey.mylicense.com/verification/Details.aspx?result=9157d18b-4ebc-445a-98e9-f951441692d4 (last accessed Apr. 14, 2024). Contrary to Dr. Morgan's own CV listing his licensure as a psychologist, he certified to the trial court that he is "a licensed neuropsychologist," which is "not psychology." (Cp. Pa251 to Pa33 at ¶¶ 1-2.) Even the literature from his own Board, the American Board of Professional Psychology acknowledges that neuropsychology is a subset of psychology. Website, American Board of Clinical Neuropsychology, https://theabcn.org/ (last accessed Apr. 14, 2024).

Without addressing the fact that the defendant was choosing the interpreter and not otherwise permitting a means to verify the accuracy of the interpretation, the trial court found the presence of an interpreter is not inconsistent with Defendant's position because the interpreter "is necessary so plaintiff can be understood." (Pa76.)

Plaintiff moved for reconsideration. The trial court denied Remache's motion. (Pa78.) The Appellate Division then granted leave to appeal and consolidated the matter with two other matters where the recording or third-party observation of DMEs was at issue. DiFiore v. Pezic, 472 N.J. Super. 100 (App. Div. 2022), aff'd as mod., 254 N.J. 212 (2023). First, in the DiFiore matter (A-2826-20), a woman in her early seventies with several preexisting medical conditions alleging cognitive and orthopedic injuries sought audio recording and the presence of the plaintiff's friend as well as a nurse practitioner. Id. at 111-12. Second, in the Deleon matter (A-0367-21), a non-native English speaker in her early seventies, who alleged severe injuries to her cervical and lumbar spine and knees, sought to attend the examination accompanied by a nurse practitioner. Id. at 118.

The Appellate Division issued a precedential opinion that created a split of published authority with Carley. Id. at 130. As a result, the Supreme Court granted leave to appeal the three consolidated matters for the limited purpose of

whether a DME may be recorded or have a third-party observer. DiFiore, 254 N.J. at 219.

Largely relying on this Court's precedential opinion, the Supreme Court held "[a] video or audio recording, or a third-party observer . . . may in some circumstances be vital to preserving evidence of a DME." DiFiore, 254 N.J. at 232 (citing DiFiore, 472 N.J. Super. at 122-23.) The Court explained that the defense medical report might include inaccurate observations and findings. Id. (citing DiFiore, 472 N.J. Super. at 122). The Court found for "plaintiffs with cognitive limitations, psychological impairments, or language barriers," the plaintiff may be unable to "refute the examiner's account of what occurred at the DME." Id. at 232 (quoting DiFiore, 472 N.J. at 122). The Court added that even for those without limitations, "'the stress and anxiety of the exam itself with an unfamiliar doctor or other professional may' diminish a person's ability to 'absorb and recall what occurred at [a] DME.'" Id. at 232 (quoting DiFiore, 472 N.J. Super. at 123).

The Court held the trial court shall consider the recording or third-party observation of a DME case-by-case. Id. at 232. It next 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.'" Id. (quoting DiFiore, 472 N.J. Super. at 130). The Court added that "smart phones can

unobtrusively be used to record a DME with 'minimal effort'" and would "not [be] unduly disruptive." Id. The Court also explained that parties could enter into a protective order to prevent "the dissemination of proprietary information about the exam." Id. at 233 (quoting DiFiore, 472 N.J. Super. at 131). The Court added that there should be reasonable conditions placed on third-party observers so they do not disrupt the exam, and that parties should attempt to agree on a neutral interpreter. Id. at 233.

The Court disagreed with this Court as to the party that bears the burden for restricting or permitting recording, holding "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 Rules 4:19 and 4:10-3." Id. at 233. The reason for the holding was not only the plain language of the Rules, but also to ensure "fairness in our civil justice system." Id. at 233. The Court noted the DME in a part of the adversarial process where a party is "asked extraordinarily personal questions about [his] mental health without [his] consent." Id. at 233-34. The Court explained, "especially for plaintiffs with alleged cognitive limitations, psychological impairments, or language barriers, 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. The Court noted if there is a dispute about what occurred at trial, there is a "power imbalance" between the witness who has testified hundreds of times and the plaintiff with a cognitive disability or a language barrier. Id.

In requiring the defendant to show good cause as to why to limit a recording or third-party observation, the Court explained "trial courts must balance both the need for an accurate record and the imbalance of power between a medical professional and a patient against any valid concerns regarding the expert's ability to conduct an accurate assessment of the patient's condition with a recording or third-party observer." Id. at 238. The Court further held, "[t]he plaintiff's age, ability to communicate, cognitive limitations, psychological impairments, inexperience with the legal system, and language barriers are all relevant to this determination; other factors may be as well." Id. at 238. The Court further noted that as to the instant Remache matter, "for a person with limited English proficiency who will already be accompanied by an interpreter, despite the trial court's holding regarding Remache-Robalino, 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 238-39.

Finally, the Court addressed concerns over the 2016 ABN Policy Statement. The Court found one of the neuropsychologists, Dr. Benoff, in the DiFiore matter would conduct the examination with a third-party observer or a recording. Id. at 240. The Court noted that the Policy Statement permits third-party observation, such as when required by court order. Id. at 240-41. The Court further held "with all due respect to professional associations, they do not set the court rules of this state." Id. at 241. The Court further cited to this Court's prior precedent, holding "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.'" Id. at 241 (quoting DiFiore, 472 N.J. Super. at 130 (quoting B.D. v. Carley, 307 N.J. Super. 259, 262 (App. Div. 1998)).

Upon remand, Defendant moved for a protective order. Yet the trial court considered none of the factors outlined by the Supreme Court: plaintiff's age, language barriers, cognitive limitations, psychological limitations, or other reasons to permit recording. (Pa150.) Instead, the trial court summarily found its original decision made without the precedent of either this Court or the Supreme Court was correct because Defendant should be able to select the examiner of his choosing, and in this case, Dr. Morgan would not conduct the exam if it was recorded: "this Court finds that it's (sic) prior order found that good cause existed to prohibit the use of recording devices and observers, as it

would deprive the Defendants' right to utilize the Expert of their choosing." (Pa150.)

But that is not a valid basis for prohibiting the recording when Remache does not speak English, has had issues with the interpreter's translation being incorrect here, has severe cognitive limitations, has severe psychological limitations, and the basis for restricting the recording is the ABN Policy statement that would also limit an interpreter but an interpreter will be present at Remache's examination. Each of these factors weigh in favor of permitting the recording, but the trial court choose to give the examiner's dictation of the exam's terms weight over these factors, even though the Supreme Court noted an examiner is not permitted to dictate the terms of the exam. Cf. Pa150 with DiFiore, 254 N.J. at 241 (quoting DiFiore, 472 N.J. Super. at 130 (quoting Carley, 307 N.J. Super. at 262).

Remache sought leave to appeal, which this Court granted. This merits brief now follows in support of appeal.

POINT ONE

The Trial Court Abused Its Discretion in Failing to Consider the Factors Required by the Court on the Prior Appeal. (Pa150.)

The trial court abused its discretion by failing to consider the Supreme Court's direction where it remanded the case for the trial court to consider

whether the exam should be recorded due to Remache's language barrier, cognitive limitations, and psychological deficits. DiFiore, 254 N.J. at 241. The trial court further erred because Defendants provided no additional reasoning to address the Court's concern that "for a person with limited English proficiency who will already be accompanied by an interpreter, despite the trial court's holding regarding Remache-Robalino, 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." DiFiore, 254 N.J. at 239.

The very reason for the DME under Rule 4:19 is so that the defense can assess Remache's cognitive limitations. Id. at 233-34. In fact, plaintiff's own psychiatric examiner, Dr. Tosk, found Remache's "concentration was moderately impaired and short-term memory was mildly impaired." (Pca4.) Dr. Tosk opined that because of the medical malpractice, plaintiff presents "with significant psychiatric impairment," including posttraumatic stress disorder, major depression, and moderate anxious distress. (Pca7.)

The trial court abused its discretion in failing to apply the factors set forth by the Supreme Court in considering whether to grant a protective order under R. 4:10-3. (Pa150.) The only concerns that Defendants raised in the renewed motion for a protective order stating "the concerns that weigh against recording are the same reason that supported this Court's well-reasoned opinion back on

November 19, 2021." (Pa19 at ¶ 29.) But Defendants cited no basis to outweigh the need to preserve evidence through an unobtrusive recording when Dr. Morgan is permitting the exam to be attended by a third-party observer – the interpreter. (Pa13-19, Pa42-46.) As Justice Wainer Apter wrote, "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." DiFiore, 254 N.J. at 239. Neither Defendants, nor Dr. Morgan, nor the trial court have provided any reasoning for barring Remache from recording the exam when the sole basis for not permitting the recording is the ABN Policy Statement, which states the any third party, including an interpreter, is a deviation from the Policy. (Pa244); Alan Lewandowski, et al., ABN Policy Statement, 23 Applied Neuropsych. 391 (2016), available at https://www.tandfonline.com/doi/pdf/10.1080/23279095.2016.1176366 (last accessed Apr. 19, 2024); but see Randy K. Otto & Daniel A. Krauss, Contemplating the Presence of Third Party Observers and Facilitators in Psychological Evaluations, 16 Assessment 362 (Dec. 2009) (finding the position that third party presence invalidates the test data to be "puzzling" and "inconsistent") at Pa204. If the interpreter can be present, then the exam can be recorded.

This Court should reverse and permit recording because the trial court abused its discretion and permitted Dr. Morgan to violate the Court's prescription that the examiner "does not have the right to dictate the terms under which the examination shall be held." Id. at 241 (quoting DiFiore v. Pezic, 472 N.J. Super. 100, 130 (App. Div. 2022) (quoting B.D. v. Carley, 307 N.J. Super. 259, 262 (App. Div. 1998)).

New Jersey only recognizes a Board of Psychology. N.J.S.A. 45:14B-1, *et seq*. Under New Jersey law, the scope of practice for a licensed psychologist includes "administration or interpretation of psychological tests and devices . . . and assessments in connection with legal proceedings." N.J.A.C. 13:42-1.1(a)(1). The practice expressly encompasses neuropsychology. N.J.A.C. 13:42-1.1(a)(3).

New Jersey has adopted no regulation that sets the standard of care to preclude recording of a psychological exam. In terms of setting a standard of care for administering psychological testing, the regulation only vaguely states: "(g) A licensee shall administer or supervise the administration of all testing materials on premises and consistent with accepted standards of practice." N.J.A.C. 13:42-10.5(g)(emphasis added).

The American Psychological Association has adopted a Code of Ethics entitled Ethical Principles of Psychologists and Code of Conduct. Website, APA

Ethical Principles of Psychologists, available at https://www.apa.org/ethics/code/ethics-code-2017.pdf (last accessed April 19, 2024). This Code is intended to create an ethical code for psychologists, including those engaging in "conducting assessments." Id. at p. 2. Like New Jersey's own regulations, this Code of Ethics similarly does not preclude recording. Id. at p. 7 at ¶ 4.03. In fact, it permits recording with consent. Id.

Moreover, it requires the psychologist to recognize a person's right to "self-determination," and the need for "special safeguards . . . to protect the rights and welfare of persons . . . whose vulnerabilities impair autonomous decision making." Id. at p.4 at Principle E. Thus, a person like Remache who is being compelled to submit to a psychological exam should have his wishes to make a record of that exam respected. Neither a private psychologist hired by Defendants, nor a professional group that is not recognized as a regulatory body in New Jersey, should be able to dictate that Remache cannot make his own decision for documenting the content of ***his own*** exam. See DiFiore, 254 N.J. at 241 (quotations omitted).

In 2021, New Jersey entered into the Psychology Interjurisdictional Compact Act. N.J.S.A. 45:14B-49. The Psychology Interjurisdictional Compact (PSYPACT) is an interstate compact designed to facilitate the practice of telepsychology and the temporary in-person, face-to-face practice of psychology

across state boundaries. Website, PsyPact, https://psypact.site-ym.com/page/About (last accessed April 19, 2024). By entering into this compact to aid psychologists who practice telepsychology, New Jersey recognizes the Association of State and Provincial Psychology Boards ("ASPPB") as the "membership organization . . . responsible for the licensure and registration of psychologists throughout the United States and Canada." N.J.S.A. 45:14B-49 at II.

This entity, the ASPPB, has established guidelines which include: "The psychologist shall ensure that observation or electronic recording of a client occurs only with the informed written consent of the client." ASPPB Code of Conduct (January 2018), p. 9 of 12 at ¶11, available at https://cdn.ymaws.com/www.asppb.net/resource/resmgr/guidelines/code_of_conduct_2020_.pdf (last accessed April 19, 2024). New Jersey's statute adopted pursuant to the compact, a "client" includes any "recipient of psychological services, whether psychological services are delivered in the context of healthcare, corporate, supervision, or consulting services." N.J.S.A. 45:14B-49 at II. The Code of Conduct for the ASPPB provides: "PROTECTION OF INTEGRITY OF ASSESSMENT PROCEDURES. The psychologist shall not reproduce or describe in publications, lectures, presentations or any other public disclosures any psychological tests or other assessment measures or devices in

ways that might compromise their security or violate their copyright." Id. at page 11 at ¶ 4. This guideline provides another way to address the concerns addressed in the policy paper on which Defendants rely here to bar recording or third-party observation. Rather than barring the recording or third-party observation outright, the same concerns may be addressed through a confidentiality order. Id.

Defendants further improperly relied on a non-precedential, federal case out of New York when our Court in this very matter stated: "Our current Rules 4:19 and 4:10-3 are markedly different from the federal rules." DiFiore, 254 N.J. at 236-37; see Pa19 at ¶ 30. There is simply no basis to summarily deny Remache the right to record his examination when all the factors the Court identified *in this matter* favor recording the exam.

First, Mr. Remache does not speak English. (Pa168.) This factor supports recording the exam for two reasons: first, in order to verify that the translator properly translates the exam; second, because Dr. Morgan's only basis for prohibiting the limitation is the ABN Policy Statement that states it is a deviation from the Statement to permit *any* third-party observation, even an interpreter. (Pa244); Lewandowski, 23 Applied Neuropsych. 396, 397. As Justice Wainer Apter noted, there is no difference between letting the interpreter observe and translate and permitting an unobtrusive recording. DiFiore, 254 N.J. at 239.

Next, the very reason for the examination is to assess Remache's cognitive limitations, including his forgetfulness and impaired memory. (Pca4-5.) Obviously, at trial, the defendant-examiner would be more believable as to what occurred at the examination than Remache because Remache's memory and understanding are at issue. The recording would capture the evidence necessary as to what occurs at the examination.

Third, Remache is also being examined for his anxiety. (Pca5.) The Supreme Court and this Court have noted that even those without anxiety are likely to be affected by the "the stress and anxiety" of the exam itself. DiFiore, 254 N.J. at 232 (quoting DiFiore, 472 N.J. Super. at 123). But Remache will be affected even more by anxiety that could affect his ability to recall what occurs at the examination. Again, without a recording, a jury is unlikely to believe Remache's version of what occurred at the examination over Dr. Morgan's account. The unobtrusive audio recording resolves this power imbalance. See DiFiore, 254 N.J. at 234.

Because the trial court did not weigh any of these factors, this Court should reverse the denial of the protective order. The trial court's decision was "so wide [of] the mark that a manifest injustice [has] resulted," requiring intervention from this Court. See DiFiore, 254 N.J. at 228 (quoting Rowe v. Bell & Gossett Co. 239 N.J. 531, 551-52 (2019) (alteration in original) (quoting

Green v. N.J. Mfrs. Inc. Co., 160 N.J. 480, 492 (1992)). The Supreme Court remanded for consideration and weighing of factors and required Defendant to bear the burden to show good cause why the recording should be barred. DiFiore, 254 N.J. at 242. Without any citation of the relevant factors and relying on factors the Court said were invalid—such as the examiner's dictation of the terms of the exam, the trial court entered a protective order. (Pa150.)

This Court should require compliance with the Supreme Court's decision. If the trial court's decision stands, then a cognitively impaired, mentally incapacitated person with a language barrier will be deprived of the evidence to preserve what occurs during the examination. This was not the intent of the Supreme Court's decision *in this matter*. DiFiore, 254 N.J. at 241-42.

In opposition to Plaintiff's motion seeking leave to appeal, Defendants demonstrated a lack of understanding of Plaintiff's argument. (See Dmb12.) Defendants argued that Plaintiff's request "is nothing more than sheer harassment contrary to Gensollen v. Pareja, 416 N.J. Super. 585, 591 (App. Div. 2010), and not designed for any reasonable end." (Dmb12.) But both the Appellate Division and Supreme Court here noted recording served a reasonable end to preserve evidence. See DiFiore, 254 N.J. at 239; DiFiore, 472 N.J. Super. 122-23. Defendants did not meet their burden required by the Court because Dr. Morgan's self-imposed decision to forgo the exam if it is recorded when Plaintiff

demonstrated a need for recording where 1) Plaintiff is cognitively impaired – so he will be unable to remember the exam, 2) he does not speak English – so there is a chance that the exam will be literally lost in translation; and 3) Plaintiff has severe anxiety that this Court previously noted may affect the ability to recall the exam, DiFiore, 472 N.J. Super. at 123. Dr. Morgan's preference to withdraw if the exam is recorded constitutes his own personal preference and not that of his organization because as the Appellate Division recognized under the Policy Statement, "psychologists are not necessarily barred from performing an exam under Standard 9." DiFiore, 472 N.J. Super. 125 (citing ABN 2016 Policy Statement).

Moreover, Defendant's citation to Gensollen supports Plaintiff's position to permit recording rather than Defendant's demand to preclude it. In Gensollen, 416 N.J. Super. at 587, 592, a party was denied additional proofs that would require an expert physician to provide proofs specifically setting forth the percentage of his forensic work devoted to defendants when the doctor had already testified that over 95% of his work was for the defense. Because the discovery was exchanged, further discovery would only harass the doctor, and thus the Appellate Division found a protective order was an appropriate remedy. Id. at 592-93.

Here, Defendants have not established entitlement to a protective order because Defendants seek to preclude Plaintiff from preserving relevant evidence that would document what occurs in the exam when Plaintiff cannot do so due to his cognitive impairment, anxiety, and language barrier. Plaintiff has established good cause to record even though Defendants bear the burden to show good cause why the exam should not be recorded. Defendants failed to meet that burden that the Supreme Court imposed, and therefore, the trial court's grant of the protective order should be reversed and leave for Plaintiff to record the exam be granted.

CONCLUSION

Plaintiff Jorge Remache was the victim of medical malpractice. In order to prove his claim, he is willing to submit to a psychological examination with the expert of Defendants' choosing. His only request is for a recording to preserve evidence. Remache will be unable to remember everything that happens or is said during the examination. Further, he cannot communicate in his native tongue with the examiner. The recording is created with an unobstrusive machine that will provide both sides with objective evidence of what took place during the examination.

There is no justification to prevent the recording. A neuropsychologist should not offer his personal opinions to block evidence that would essentially

make irrefutable that expert's opinions and the facts on which he relies. The trial court needed to weigh these factors in deciding whether to permit the recording; it failed to do so.

This Court should find that the trial court abused its discretion in granting a protective order without considering the effect of Remache's language barrier, cognitive and memory deficits, and psychological impairments upon his ability to preserve evidence of the DME. Dr. Morgan should not be permitted to dictate the terms of the exam when he is not following his own citation of neuropsychological policies that state even an interpreter constitutes a third-party observer. To remediate the power imbalance between Dr. Morgan and the cognitively impaired, anxious, and non-English speaking Remache, this Court should permit recording of the examination.

Respectfully submitted,

LOMURRO, MUNSON, LLC
Attorneys for Plaintiff-Appellant,
Jorge Remache

By:
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CHRISTINA VASSILIOU HARVEY

Dated: April 19, 2024

FILED, Clerk of the Appellate Division, May 20, 2024, **A-001248-23**, AMENDED

JORGE REMACHE-ROBALINO, Plaintiff, vs. NADER BOULOS, M.D.; LANI MENDELSON, M.D.; ST. JOSEPH'S REGIONAL MEDICAL CENTER; JOHN DOES 1-10 (fictitious names) JANE DOES 11-20 (fictitious names); ABC COMPANIES 1-10 (fictitious names), Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: AM-00035-20 SUPERIOR COURT OF NEW JERSEY LAW DIVISION: HUDSON COUNTY DOCKET NO.: HUD-L-1929-19 Sat Below: Hon. Joseph A. Turula, J.S.C. Civil Action

BRIEF & APPENDIX ON BEHALF OF DEFENDANTS-RESPONDENTS IN OPPOSITION TO PLAINTIFF'S INTERLOCUTORY APPEAL

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PRELIMINARY STATEMENT

The lower court properly refused Plaintiff's demand that Defendant's expert compromise his professional standards permitting Plaintiff to record proprietary neuropsychological testing contrary to published professional standards. In 2021, after extensive briefing and argument over the course of several motions, Judge Joseph A. Turula, P.J.Cv. properly determined:

> Defendants, because of Dr. Morgan following his association's recommendations not to audio tape because of the potentiality of invalidating the integrity of the process, is precluded from being an expert. That is unfair.

Pa75.

After the Appellate Division and the New Jersey Supreme Court upheld the lower court's discretion to impose such conditions, Judge Turula's opinion remained the same. Nothing submitted on behalf of the Plaintiffs in support of the pending appeal contradicts the sound basis Judge Turula identified for his finding of good cause to prohibit Plaintiff from recording his Rule 4:19 examination. Counsel argues that the use of recording devices in a neuropsychological exam does not technically violate the published Code of Ethics, but fails to refute the fact that it is contrary to good (or even standard) practice in the field. Defendants are entitled to a Rule 4:19 examination that is performed under conditions consistent with good practice. This fact alone justifies Judge Turula's order prohibiting recording. Plaintiffs' arguments have all been fully briefed, argued, considered,

and properly rejected multiple times by multiple courts. Further scrutiny by this Court is unnecessary and Plaintiffs' refusal to accept the lower Court's Order is unreasonable given the procedural history of this case. This simple discovery dispute has now been the focus of five (5) separate motions, three (3) related appeals and one (1) Supreme Court hearing. There is absolutely no justification for Plaintiffs' claim that Judge Turula failed to consider any of the factors discussed by the New Jersey Supreme Court on this issue. Plaintiffs' counsel raised and thoroughly briefed each of those factors. The fact that Judge Turula ruled against the Plaintiff does not in any way indicate that he failed to read their submissions. He clearly did so and found that the equities balanced in favor of the Defense. Accordingly, his well-reasoned decision should be sustained.

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COMBINED STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

The New Jersey Supreme Court concluded unequivocally that the trial court had broad discretion to impose or prohibit conditions on a Rule 4:19 examination. Pa156. The lower court properly considered the particular facts of this case and concluded that Plaintiff could not justify his demand to record defense expert Dr. Joel Morgan's neuropsychological evaluation, a suggestion that is anathema to the medical field of neuropsychology in general and to Defendants' expert, Dr. Morgan, specifically. Pa149.

This is a medical malpractice case where Plaintiff claims, *inter alias*, that he suffered neuropsychological impairment as one component of alleged injury. Pa1. Defendants denied all allegations contained in Plaintiff's complaint by way of Answer filed on July 16, 2019. Pa5. Plaintiff chose to place his neuro-cognitive condition at issue in his attempt to maximize potential financial reward. In support of his claims for neuropsychologic damages, Plaintiff was evaluated by multiple Plaintiffs' experts without ever giving Defendants notice of the evaluations let alone an opportunity to record same. Pa21-26. In response, Defendants requested that Plaintiff submit to a neuropsychologic evaluation with a highly esteemed

[1] Due to the intertwined nature of the relevant facts with the procedural history, we have combined them. The term "Pa" refers to Plaintiff's Appendix filed in support of appeal. The term "Pca" refers to Plaintiff's Confidential Appendix filed in support of appeal. The term "Dmb" refers to Defendants Dr. Nader Boulos, Dr. Lani Mendelson, and St. Joseph's Regional Medical Center's brief in opposition to Plaintiff's Motion for Leave to Appeal filed on December 21, 2023. The term "Da" refers to Defendants Dr. Nader Boulos, Dr. Lani Mendelson, and St. Joseph's Regional Medical Center's Appendix filed in support of the Opposition to the Appeal.

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expert in the field, Dr. Joel Morgan. Plaintiff's counsel demanded that the defense IME be recorded and requested that Defendants provide an interpreter. Pa27. Plaintiff's counsel demanded that Defendants' neuropsychological medical examination with Dr. Joel Morgan be held to a different standard than their own experts. Plaintiff insisted that he would not appear for his DME unless he could record it. Pa27. Extensive motion practice ensued.

Far from a simple matter of personal preference, Dr. Morgan explained that recording is inconsistent with good neuropsychologic practice; he explained in detail his scientific justification for the position and even provided examples of professional literature that support his position. Pa32, Pa41, Pa47, Pa61, & Da39.

Professional literature supporting Defendants' position was submitted to the court for consideration and as corroboration of the convictions voiced by Dr. Morgan. The Policy Statement of the American Board of Professional Neuropsychology regarding third-party observation and the recording of psychological test administration in neuropsychological evaluations ("Policy") provides an in-depth discussion on the issues which arise from an ethical, testing, assessment, security, and expert witness perspective, concluding that TPOs have the potential to influence and compromise both a patient's or administrator's behavior thereby invalidating the data collected, along with conclusions, interpretations, and results. Pa49. The Update on Third Party Observers in

Neuropsychological Evaluation: An Interorganizational Position Paper ("Update") observes that the National Academy of Neuropsychology (NAN), the American Academy of Clinical Neuropsychology (AACN), and the American College of Professional Neuropsychology (ACPN) are united in opposing the presence of TPOs during neuro-psychological examinations. Pa61.

On September 24, 2021, Judge Turula granted Defendants' motion compelling Plaintiff to submit to his DME without the use of a recording device; the Court found that, as Plaintiff's experts had conducted examinations of Plaintiff without ever even alerting Defendants, further allowing Plaintiff to record Defendants' IME would exacerbate this unfairness as that opportunity would not be reciprocal. Pa29. Plaintiff filed a motion for reconsideration which was granted on October 22, 2021. Pa38. However, given that Dr. Morgan had vociferously argued that his professional standards prohibited the proposed recording, the Court directed the parties to attempt to draft a confidentiality order that would allay Dr. Morgan's concerns. If the matter could not be resolved, the parties were invited to file further motions. Pa72. The proposal did not satisfy the professional prohibition against recording. Accordingly, Defendants filed a Motion to Reconsider the Court's October 22, 2021, Order based on Dr. Morgan's demurral and citations to published professional ethical standards.

On November 19, 2021, Judge Turula granted Defendant's Motion to

Reconsider ordering, again, that Plaintiff must submit to DMEs for this litigation without the use of recording devices or TPOs. Judge Turula found, *inter-alias*:

> This is the third motion between the parties addressing the issue of whether a recording can be made while Plaintiff is undergoing an independent medical evaluation (hereinafter "IME"), evaluation by Defendant's neuropsychologist, Dr. Morgan.
>
> . . . .
>
> Here, Carley does not apply. Defendants, because of Dr. Morgan following his association's recommendations not to audio tape because of the potential invalidating the integrity of the process, is precluded from being an expert. That is unfair.

Pa72.

Plaintiff filed a third (3rd) motion to reconsider which was summarily denied by Order dated December 17, 2021. Pa77. This final motion was apparently filed for the express purpose of padding the record with a certification from a non-board-certified psychologist whose sense of professional ethics was flexible enough to permit him to perform DMEs with recording devices contrary to the recommendations of the governing bodies for his professed (although uncertified) field of practice. Dr. Morgan, to the contrary, as one would expect from any board-certified practitioner in the field of Neuropsychology, adheres to the recommendations of his field of specialty and the literature supports his position. Pa32, Pa47 & Da39.

Plaintiff's motion for leave to appeal was granted. This matter was consolidated with two (2) other matters where the issue of defense medical exams was also at issue. The Attorney General's Office (AG), as representative of the Board of Psychological Examiners (BPE), was invited to file a brief and appendix. They did so, establishing categorically that a psychological examination performed in the presence of a TPO or a recording device is inconsistent with good psychological practice. Da1. The AG endorsed the literature produced by Defendant's Counsel as establishing standards of care. The AG averred that a psychologist who permits the presence of TPO or recording is doing so contrary to the standards of practice even if the court has ordered same:

> Given its regulatory framework, as well as the consensus among professional organizations as evinced through the literature cited above, should a case come before it, the BPE could find that the observing or recording of evaluations and administration of neuropsychological tests, in certain circumstances, violate practice standards and adversely affect the results of the tests such that licensed psychologists should not agree to such conditions.

Da11-12.

After oral argument, Judge Sabatino authored the opinion on behalf of the unanimous Appellate Division panel and distilled six (6) discrete holdings therefrom, addressing not only the issues concerning the presence of a third-party observer and/or recording device, but also the presence of an interpreter:

> There shall be no judicially imposed entitlements or prohibitions with respect to TPO or recordings of R.4:19 examinations;
>
> It shall be the Plaintiff's burden to justify any insistence on a TPO or recording of R.4:19 examinations if same is not permitted by the examiner or consented by defense counsel;
>
> Potential recording devices may include a fixed camera;
>
> In cases where Plaintiff's satisfy the burden of justifying the presence of a TPO or recording, the Parties shall execute a protective order so that any information is solely used for purposes of the case and not otherwise divulged;
>
> If a TPO is permitted to attend a R.4:19 examination, the court shall impose reasonable conditions to prevent interaction or interference with the exam;
>
> In cases where an interpreter is needed, if the parties cannot agree on an interpreter, one shall be appointed by the court.

DiFiore V. Tomo Pezic, Pezo, Inc., 472 N.J. Super. 100, 106 – 7 (App. Div. 2022).

These issues were then appealed to the New Jersey Supreme Court. On June 15, 2023, the New Jersey Supreme Court entered its Order and Opinion establishing a clear rubric for the parameters of a Rule 4:19 exam. Pa156. That rubric is entirely consistent with the actual procedural history of this case. The Supreme Court made several discrete rulings, upholding the Appellate Court on every point except the application of the burden:

> We affirm the Appellate Division's core holding that trial

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> courts determine on a case-by-case basis what conditions, if any, to place on a DME -- including who may attend and whether it may be recorded -- with no absolute prohibitions or entitlements.
>
> . . . .
>
> We depart from the Appellate Division only in that we decline to place the burden on the Plaintiff to show special reasons why third-party observation or recording should be permitted in each case. Instead, once the Defendant issues notice to the Plaintiff of a *Rule* 4:19 exam, the Plaintiff should inform the Defendant if they seek to bring a neutral observer or unobtrusively record the examination. If the Defendant objects, the two sides should meet and confer to attempt to reach agreement. If agreement is impossible, the Defendant may move for a protective order under *Rule* 4:10-3 seeking to prevent the exam from being recorded, or to prevent a neutral third-party observer from attending. 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. Although defense neuropsychologists cannot dictate the terms under which DMEs are held, they can raise concerns that may weigh against recording or third-party observation in particular instances.

DiFiore v. Pezic, 254 N.J. 212, 219 – 20 (2023). Plaintiff's counsel, in the instant appeal, repeatedly refers to the fact that English is not the Plaintiff's native language. However, both the Appellate Division and the New Jersey Supreme Court address this issue, indicating that if the parties cannot agree on a neutral interpreter, that the Court may appoint one. Indeed, it was Plaintiff's counsel who initially requested that Defendants provide the interpreter. Pa28 Moreover, the

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single perceived inaccuracy in the translation of deposition testimony repeatedly cited by counsel is a.) equivocal at best, and b.) no less common than any number of similar inaccuracies that can occur in transcription regardless of a language barrier. In an hours long deposition, it is certainly not uncommon for there to be some disagreement between litigants as to a word or two here or there. The need for an interpreter does not alleviate the concerns about TPO or recording devices.

Following the Supreme Court's decision, in the case at bar, Defendants re-issued a notice for a Rule 4:19 exam. Da36. As before, despite the fact that Judge Turula's 2021 ruling followed the same rubric endorsed by the New Jersey Supreme Court, Plaintiff's counsel still insisted that Plaintiff would record the examination. Da38. The parties met and conferred without success. Defendants filed a motion for a protective order. In opposition, *inter alias*, Plaintiff's counsel produced an Order in an unrelated case as evidence that another trial court judge ordered that a neuropsychologic examination be performed with a recording device. However, as Dr. Morgan certified:

> 1. As I explained in previous certifications submitted to this Court, as Board-Certified Neuropsychologist, I firmly believe that the administration of neuropsychologic testing must be done in strict compliance with the conditions under which said testing was calibrated.
> 2. This includes the absence of third-party observers and/or recording devices.
> 3. In the Costlow v. Oppenheimer case, I was forced to bow out of the litigation after the Court ordered that

any neuropsychologic testing would be recorded.

4. For the same reasons, if this Court were to deny Defendants' motion for a protective order barring recording devices, I will have no choice but to bow out of these proceedings as well.
5. I am unwilling to compromise my professional standards in such a manner.

Da39. Judge Turula disregarded Plaintiffs' reference to the Essex Vicinage decision as having no precedential value. Pa149.

On December 1, 2023, Judge Turula issued his order and opinion, having considered these same issues half of dozen times over the course of three (3) years and, again, concluded:

> Pursuant to R. 4:10-3, this court grants the Defendants' motion for a protective Order requiring the Plaintiff to submit to their IMEs without the use of a recording device or third-party observers, for the same reasons it compelled the Plaintiff to attend an IME without recording devices in its November 19, 2021 Order. While that prior decision preceded Difiore v. Pezic, 254 N.J. 212, 238 (2023), this Court finds that its prior order found that good cause existed to prohibit the use of recording devices and observers, as it would deprive the Defendants' right to utilize the Expert of their choosing. That reasoning is still sound.

Pa149. Contrary to Plaintiffs' counsel's representations, Judge Turula clearly considered each of the factors discussed by the New Jersey Supreme Court, as each was thoroughly briefed by Plaintiff's counsel in opposition to Defendant's motion and each was set forth in the written Supreme Court opinion that was specifically cited by Judge Turula in the above Order and Opinion. Moreover, Dr. Morgan's

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adherence to the highest standards of practice should not be cavalierly discarded as "personal preference." Defendants are entitled to a R.4:19 neuropsychological examination because plaintiff placed his neuropsychological condition at issue. Defendant should be entitled to have that examination performed by a psychologist who practices in a manner consistent with the highest standards of practice.

Judge Turula agreed that the concerns that weigh against recording now are the same reasons that supported Judge Turula's well-reasoned opinion back in 2021. In both of his decisions, delivered after extensive briefing and multiple arguments, Judge Turula, contrary to Plaintiffs' counsel's assertions, fully considered the issues, including the fact that an interpreter was required, and concluded that there was good cause to prohibit recording of Defendants' Rule 4:19 examination. Pa149. Plaintiff's counsel's suggestion that Judge Turula failed to consider the factors discussed in the Supreme Court opinion is unwarranted speculation. They are simply dissatisfied with his conclusion. The Supreme Court unequivocally upheld the trial court's discretion on this issue. Judge Turula's decision should be upheld.

LEGAL ARGUMENT

POINT I

THE LOWER COURT'S RULING SHOULD STAND UNDISTURBED AS THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION, RENDERED A WELL JUSTIFIED OPINION AND NO INJUSTICE WILL OCCUR AS A RESULT THEREOF.

Plaintiffs' counsel misstates the law, suggesting that Plaintiff has a "right to record" a Defense I.M.E.. To the contrary, the New Jersey Supreme Court upheld the trial court's sound discretion to determine whether, on a case-by-case basis, a Plaintiff may record the examination. Where, as here, a Defendant demonstrates good cause for preventing the recording, the trial court should not hesitate to grant a Rule 4:10-3 protective order. DiFiore, *supra,* 254 N.J. at 238. In the case at bar, Judge Turula found good cause for preventing recording, reasoning that to do otherwise would be to deprive Defendants' right to utilize the expert of their choosing. He concluded that to do so would not be fair. Pa149.

No injustice, let alone grave damage, will result from the order permitting the Defendants' IME to proceed in the ordinary course of practice consistent with the standards of neuropsychology.

It is well settled that the Appellate Division will defer to a trial court's disposition of a discovery matter unless it has abused its discretion or its determination is based upon a mistaken understanding of the applicable law.

Rivers v. LSC Partnership, 378 N.J. Super. 68, 80 (App. Div.), certif. denied. 185 N.J. 296 (2005) (citation omitted). Several cases have held "judicial discretion connotes conscientious judgment, not arbitrary action; it takes into account the law and the particular circumstances of the case before the court." U.S. Bank National Association v. Williams, 415 N.J. Super. 358, 365 (App. Div. 2010) (quoting Higgins v. Polk, 14 N.J. 490, 493 (1954); Devito v. Sheeran, 165 N.J. 167, 198 (2000)). Such determinations should not be overturned unless the trial court "palpably abused its discretion, that is, its finding was so wide of the mark that a manifest denial of justice resulted." Ibid. (quoting Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 492 (1999)).

The New Jersey Supreme Court firmly endorsed the trial Court's broad discretion to enter this order: "We leave to the competent hands of the trial courts how to address the Policy Statement if a particular neuropsychologist raises it in a particular case. " DiFiore, *supra*, 254 N.J. at 241.

The New Jersey Supreme Court endorsed the exact procedures undertaken by the Defendants herein:

> We therefore hold that if a Plaintiff seeks to bring a neutral third-party observer to a Rule 4:19 exam, or to audio or video record the exam, Plaintiff's counsel should notify Defendant. If defense counsel opposes the third-party observation or recording, the parties should meet and confer in an effort to reach agreement. Failing an

> agreement, Defendant can move for a protective order under Rule 4:10-3 to bar the observation or recording.
>
> The trial court must then decide what to permit or forbid with no absolute prohibitions or entitlements.

Id. at 238. Rule 4:10-3 provides:

> On motion by a party or by the person from whom discovery is sought, the court, for good cause shown or by stipulation of the parties, may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including, but not limited to, one or more of the following:
>
> a) That the discovery not be had;
> b) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;
> c) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
> d) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
> e) That the discovery be conducted with no one present except persons designated by the court

Id.

In this case, Defendants demonstrated "good cause" as advocated by the New Jersey Supreme Court for imposition of this protective order, for the same reasons articulated in his 2021 Order and Opinion:

> Defendants, because of Dr. Morgan following his association's recommendations not to audio tape because of the potential invalidating the integrity of the process,

> is precluded from being an expert. That is unfair.

Pa72.

As Dr. Morgan explained in his multiple certifications, the validity of the practice of neuropsychological testing is threatened by Plaintiff's proposed recording thereof. As set forth previously and as elaborated by Dr. Morgan in his certifications:

> a.) The field of neuropsychology admonishes its members to refuse to perform an IME if a recording device is to be employed; and
> b.) Dr. Morgan adheres to this admonition and will not perform an IME if Plaintiff plans to record it based upon ethical, integrity and validity implications; and
> c.) Allowing a subject to record a neuropsychological evaluation could invalidate the test results.

Pa 32, Pa 41, & Da39.

Furthermore, even with a confidentiality order, allowing recording of testing that is proprietary (not the intellectual property of the expert himself) would create a Pandora's Box scenario. As a practical matter, despite the best of intentions, any proposed confidentiality order would very likely prove ineffectual in maintaining the strict confidentiality of the proprietary testing utilized by neuropsychologists like Dr. Morgan. The recording would certainly be shared with Plaintiffs' own experts and would be referenced in expert reports, depositions and ultimately in open court. These are public records. Under the circumstances, the ability to maintain strict confidentiality would be neigh impossible. Dr. Morgan's concerns,

as discussed by himself and in the publications previously provided, inter alias, establish "good cause" for preventing such a recording. As Dr. Morgan set forth in his certification:

> 4. Good and accepted practice prohibits neuropsychologists from conducting neuro-psychological testing that is being recorded.
> 5. I am aware of no exception to this general prohibition for protective orders.
> 6. I am not personally or professionally willing to compromise the integrity of the field of neuropsychology by conducting tests under these conditions.

Pa 42.

The AG, on behalf of the BPE, adopted the recommendations contained in the same literature identified by Dr. Morgan including the Policy and the Update. Da1. The Policy discusses ethical standards that advise neuropsychology practitioners not to "engage in, endorse, or conduct assessments complicated by TPO or recordings of any kind." Pa47. The language concerning a possible protective order is mentioned only as last resort in "the very rare exception that the psychologist is compelled" to submit to TPO. Pa47. The ABN recommends, instead, that neuropsychologists, faced with a TPO request (including audio recording device) simply decline participation:

> It is recognized that often in forensic situations psychological ethics and the adversarial nature of the legal system may not coincide. If directed by the court to proceed with TPO, the psychologist should remove himself/herself from the assessment.

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Pa56. Plaintiffs' counsel asserts that the 2016 ABN Policy Statement (endorsed by both Dr. Morgan and the New Jersey Board of Psychology Examiners) does not "prohibit" recording. However, counsel cannot refute the fact that allowing a recording device is contrary to good practice. Defendants should not be forced to choose between obtaining a second-rate evaluation or foregoing any neuropsychologic evaluation at all:

> On occasion, an attorney for an examinee, or their proxy, may demand TPO for their client, citing the potential for malfeasance on the part of the neuropsychologist. It is our position that such a claim is inappropriate given that it is contrary to best practices in the field of neuropsychology, and rather than safeguarding the testing process, may actually introduce error in the test data gathered.

Pa66.

APA Ethical standards of Competence and Assessment (2017) are likewise in conflict with the presence of TPO. These include standards, 9.01 and 9.02 (Basis and Use of Assessments), 9.06 (Interpreting Assessment Results), and 9.11 (Test Security), which advise adherence to standardization procedures, reporting limitations to interpretation validity, and maintaining test security. Pa247.

Notably, Dr. Morgan actually withdrew as an expert in another case when faced with this dilemma. Da39. Indeed, the Ethical Principles and Code of Conduct (cited by Plaintiffs' counsel) revised their standards to remove language that

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suggested that it might be acceptable for a psychologist to perform an assessment under sub-optimal conditions even if ordered to do so by a Court. Pa247.

Another publication, the Update on Third Party Observers in Neuropsychological Evaluation: An Interorganizational Position Paper ("Update") observes that the National Academy of Neuropsychology (NAN), the American Academy of Clinical Neuropsychology (AACN), and the American College of Professional Neuropsychology (ACPN) are united in opposing the presence of TPOs during neuro-psychological examinations. Pa61. In this Update, the authors reiterate the support and importance of the Policy from 2016 stating:

> The presence of third-party observation is opposed because, most fundamentally, it introduces concerns about reliability and validity of test procedures and results(i.e., the presence of a TPO will negatively affect the accuracy and utility of the neuropsychological assessment). TPO introduce extraneous factors that deviate from the assessment procedures' intended use. Specifically, TPO departs from standardized administration procedures because it creates observer effects which are known to affect human performance and test validity. Observer effects, such as distraction of attention of an examinee, are not taken into account in collection of normative data, which may result in inaccurate conclusions pertaining to the extent and severity of abnormal findings. Replacing in-person observation with camera recording or remote observation does not eliminate these issues (Constantinou, Ashendorf, & McCaffrey, 2005). TPO and recording of evaluations conflict with requirements for test security, published ethical principles, and standards of conduct in the field that are designed to protect the public, examinees, and the profession as a whole.

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Pa63.

The Update further highlights how TPOs interference can impact the entire exam and results derived therefrom:

> TPO can affect the cognitive functions most often assessed in forensic or medicolegal settings and may impact interpretation and comparison of test results. Consequently, testing conducted in the presence of a TPO is not consistent with best practices in clinical neuropsychology, may interfere with obtaining accurate data in a neuropsychological examination, and therefore jeopardizes the accuracy of decisions and judgments made by the trier of fact when based on these data.

Pa65.

As reflected in this choice to revise their written standards, the existence of a Court Order does not change professional standards of practice. Bad practice is bad practice – full stop.

As stated above and in similar detail in Dr. Morgan's certifications and in the submissions by the Attorney General on behalf of the BPE, not only are there insurmountable issues with testing validity and security if a recording is allowed, but these practical impediments coupled with the ethical challenges facing Dr. Morgan will force Dr. Morgan and any similarly conscientious experts to bow out of litigated matters if the Court orders a recording device be permitted during his IME of the Plaintiff.

By demanding that the process be recorded, Plaintiff's counsel seeks to neuter the Defendants' ability to assess objectively a Plaintiff's neuropsychologic

claims. Notably, neuropsychological evaluations utilize objective embedded "validity" scales that alert the practitioner when a subject is attempting to influence the results. The effectiveness of the validity scale relies on the fact that the subject cannot be prepared to cheat the test.

Plaintiff's counsel's insistence on recording is part of a concerted industry-wide effort to evade the effectiveness of neuro-psychological examinations knowing that many of the best practitioners, like Dr. Morgan, will refuse to perform an examination under such conditions. This phenomenon is well recognized in professional literature:

> Demands for TPO in the context of medicolegal or forensic settings have become a tactic designed to limit the ability of the consulting neuropsychologist to perform assessment and provide information to the trier of fact.

Pa62.

Plaintiffs' counsel referenced an unrelated Essex County Law Division discovery motion order in opposition to Defendants' motion for protective order. In that case, Judge Stephen L. Petrillo, J.S.C., apparently ordered that Plaintiff could record Dr. Joel Morgan's neuropsychological examination. Da39. That order is informative for several reasons. After obtaining an that order, over Defendants' objection, requiring that any examination be performed under sub-optimal conditions, the Plaintiffs' attorney intended to utilize the very basis for Defendants' objection as cross-examination fodder. The Defendants argued,

therein (apparently based on the literature and Dr. Morgan's own professional convictions), that the results of tests performed under such conditions would inherently have less validity than testing done under optimal conditions (without a recording device or TPO). Judge Petrillo apparently ruled that such concerns were outweighed by whatever equitable factors were raised by Plaintiffs' counsel. Then, having forced Defendants' expert to conduct his evaluation in a manner contrary to good practice, the Plaintiff's attorney fully intended to skewer the expert's results as being invalid for the very reasons raised by Defendants' counsel. Ultimately, in that case, Dr. Morgan wisely chose the better part of valor and simply refused to further participate in the litigation. Da39. That is precisely what will happen in this case if the Plaintiff is permitted to force Defendants' chosen expert to conduct his examination under suboptimal conditions. Dr. Morgan will predictably refuse. Defendants herein would be forced to choose between foregoing a neuropsychologic examination altogether or obtaining a second-rate examination. If the latter route is chosen, we can expect that witness to be confronted with the same literature cited by Dr. Morgan as support for his conviction that it is contrary to good practice to perform an evaluation whose results would be inherently less than 100% valid. As Judge Turula concluded, to do so would be unfair. Pa149.

Given a fair analysis, the degree of prejudice imposed by denying the Defendants the right to conduct a neuropsychological evaluation outweighs the

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potential prejudice of barring recording devices from the test. Judge Turula properly concluded that the balance of equities favors the defendants' request to compel this IME without recording.

Finally, the presence of an interpreter is a recognized necessary exception to the professional standards prohibiting the presence of TPO during neuropsychological evaluation. Pa47. Plaintiff's preoccupation with the presence of an interpreter is a straw-man argument. Indeed, the New Jersey Supreme Court considered this factor and endorsed a method for the appointment of a neutral method for interpretation to allay plaintiff's feigned concerns. DiFiore, *supra* 254 N.J. at 220. Notably, it was plaintiff's counsel himself who initially requested that Dr. Morgan provide an interpreter. Pa27. Unlike the proposed recording, the use of interpreters is considered a necessary exception to the general prohibition against the presence of TPOs and is discussed specifically in the neuropsychology literature:

> An interpreter may be required when assessment cannot be completed in the patient's preferred language. In these instances, TPO facilitates data collection when assessment could not otherwise proceed.

Pa64.

The New Jersey Supreme Court found:

> With regard to prongs five and six, we concur that reasonable conditions should be imposed on third-party observers to ensure they do not interfere with exams and

> that, where needed, a neutral foreign- or sign-language interpreter shall be agreed on by the parties or, failing agreement, selected by the court.

Id at 233.

The use of a neutral interpreter in this case is both necessary and unavoidable.

The proposed use of a recording device is **un-**necessary and completely avoidable.

Judge Turula considered this factor and exercised the discretion recognized by the New Jersey Supreme Court, determining:

> The Court is not persuaded the presence of an interpreter constitutes a waiver or is inconsistent with Defendant's position. The presence of an interpreter is necessary so Plaintiff can be understood. The interpreter is not taking notes and will not be there as an observer. There is no waiver on the part of Dr. Morgan of his concerns because a Plaintiff needs the use of an interpreter.

Pa72.

For all the reasons set forth herein above, the lower court's order and opinion should stand undisturbed and without the need for further attenuation.

CONCLUSION

For all the above reasons, the trial court order should be upheld and affirmed in all respects.

Respectfully submitted,

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Dated: May 20, 2024

FILED, Clerk of the Appellate Division, June 03, 2024, **A-001248-23**

JORGE REMACHE-ROBALINO; Plaintiff, vs. NADER BOULOS, M.D.; LANI MENDELSON, M.D.; ST. JOSEPH'S REGIONAL MEDICAL CENTER; JOHN DOES 1-10 (fictitious names); JANE DOES 11-20 (fictitious names); ABC COMPANIES 1-10 (fictitious names); Defendants.	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION Docket No.: A-1248-23T4 CIVIL ACTION Following remand from the NEW JERSEY SUPREME COURT and on grant of leave to appeal from SUPERIOR COURT OF NEW JERSEY, LAW DIVISION HUDSON COUNTY, DOCKET NO.: HUD-L-1929-19 Sat Below: Hon. Joseph A. Turula, P.J.Cv.

REPLY BRIEF IN FURTHER SUPPORT OF INTERLOCUTORY APPEAL

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LEGAL ARGUMENT

POINT ONE

The Trial Court Abused Its Discretion in Entering a Protective Order Because Defendants Did Not Show Good Cause to Deny Recording of Plaintiff's Defense Medical Examination ("DME"). (Pa149-50.[1])

This matter should be reversed because Defendants failed to meet the burden to show good cause to restrict the recording of the "inherently adversarial" defense medical examination. See DiFiore v. Pezic, 254 N.J. 212, 233-34 (2023). Because Plaintiff has substantial cognitive limitations, memory issues, anxiety issues, and a language barrier, he should be entitled to record his neuropsychological exam.

The Supreme Court noted, "Even for people without such limitations, impairments, or barriers, the Appellate Division correctly recognized that 'the stress and anxiety of the exam itself with an unfamiliar doctor or other professional may' diminish a person's ability to 'absorb and recall what occurred at [a] DME.'" Id. at 232 (quoting DiFiore v. Pezic, 472 N.J. Super. 100, 123 (App. Div. 2022)). The Supreme Court noted that

> especially for plaintiffs with alleged cognitive limitations, psychological impairments, or language barriers, a DME reflects a profound power imbalance between the plaintiff and a medical professional with

[1] The term "Pa" refers to Plaintiff-Appellant Jorge Remache-Robalino's Appendix in Support of Appeal; the term "Db" refers to Defendants-Respondent's Brief in Opposition to Plaintiff-Appellant's Interlocutory Appeal.

> long experience in the examination of patients and participation in court proceedings. Just as "[a]t trial, if there is a dispute as to what happened in the examinations, the likelihood of a seven-year-old's testimony adequately countering the testimony of an expert witness[ ] ... , who has testified hundreds of times, may be low," the same is often true for plaintiffs with cognitive disabilities or language barriers, and for many other plaintiffs.

DiFiore, 254 N.J. at 234 (quoting Wellmann ex rel. Wellmann v. Rd. Runner Sports, Inc., 458 N.J. Super. 373 (Law Div. 2018)).

Within this framework that the Supreme Court established in this case, the trial court never addressed this issue raised by the Supreme Court:

> for a person with limited English proficiency who will already be accompanied by an interpreter, despite the trial court's holding regarding Remache-Robalino, 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.

In opposition to Plaintiff's appeal, Defendants' argument relies on a premise that the New Jersey Supreme Court rejected—that a neuropsychologist can dictate the terms of the examination. (Db7.) Defendants also rely on the Attorney General's position that the Supreme Court likewise rejected. Compare Db7 with DiFiore, 254 N.J. at 241.

Defendants argue without any citation to the record or proof that "Judge Turula clearly considered each of the factors discussed by the New Jersey

Supreme Court, as each was thoroughly briefed by Plaintiff's counsel in opposition to Defendant's motion and each was set forth in the written Supreme Court opinion that was specifically cited by Judge Turula in the above Order and Opinion." (Db11.) Just because Plaintiff cited the Supreme Court's decision to the trial court does not mean the trial judge considered it, particularly when the trial court failed to address the Supreme Court's question how "how an unobtrusive recording device would call the validity of the examination into question in a way that the interpreter would not." DiFiore, 254 N.J. at 239.

Defendants argue that "Defendant should be entitled to have that examination performed by a psychologist who practices in a manner consistent with the highest standards of practice" (Db12), without addressing the Supreme Court's recognition that "the 2016 [American Board of Neuropsychology ("ABN")] Policy Statement likewise does not prohibit neuropsychologists from abiding by court orders to allow neutral third-party observation or recording." Id. at 241.

The Supreme Court remanded for an evaluation of the facts of this case, and not for an analysis of Dr. Morgan's preference that the exam not be recorded due to his following the ABN Policy Statement. Id. The Supreme Court explicitly stated that neuropsychologists and professional associations cannot

dictate the terms of an exam; neither can the Attorney General; nor can the State Board of Psychologists. Id. at 240-42.

Defendants argue: “No injustice, let alone grave damage, will result from the order permitting the Defendants' IME to proceed in the ordinary course of practice consistent with the standards of neuropsychology,” (Db13,) but Defendants did not establish recording the exam would be inconsistent with the standards of psychology. See DiFiore, 254 N.J. at 240 (noting “that Dr. Benoff, one of the neuropsychologists in this case, did not oppose the presence of a neutral third-party observer or a recording at DiFiore's DME” and Attorney General’s concession that the Board of Psychology never adopted a regulation as to the ABN Policy Statement). As the Supreme Court noted in this case, Dr. Benoff, a neuropsychologist, permitted recording. Id. at 240. In addition, the Board of Psychological Examiners has no regulation precluding the recording of the exam. Id. at 241. Finally, the Supreme Court recognized that even the ABN Policy statement, which provides the support for Dr. Morgan’s refusal to conduct an exam if it is recorded, permits recording in certain circumstances, such as by court order. Id.

The only basis that Defendants cite to demonstrate good cause as required by R. 4:10-3 to restrict the exam from being recorded is “Dr. Morgan following his association's recommendations not to audio tape because of the potential

invalidating the integrity of the process." (Db15-16.) But the trial court abused its discretion is that the Supreme Court already concluded that it was not a valid basis to solely rely on the professional association's dictation of rules for a forensic exam. Id. at 241-42.

The trial court in concluding that Dr. Morgan's dictation of the terms of the exam never weighed the factors required by the Supreme Court: whether the examiner can accurately assess the plaintiff's condition with a recording, "plaintiff's age, ability to communicate, cognitive limitations, psychological impairments, inexperience with the legal system, and language barriers; [and] . . . other factors may be as well." Id. at 238. Because the trial court did not weigh any of these factors, and focused only upon the one factor that the Supreme Court said was not presumptively valid – the terms dictated by a professional association, the trial court's decision was so "wide off the mark" that it constituted an abuse of discretion. See DiFiore, 254 N.J. at 228 (quoting Rowe v. Bell & Gossett Co., 239 N.J. 531, 551-52 (2019) (alteration in original) (quoting Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 492 (1999)).

Defendants argue that even if there is a confidentiality order limiting the access to the recording, the recording would be a "public record." (Db16.) Defendants' unsubstantiated claim is directly contradicted by Court Rule 1:38-11(b) that permits the sealing of the document from public access. The

neuropsychologist's concerns for confidentiality of the exam are addressed through the protective order. DiFiore, 254 N.J. at 233. Even the literature that the neuropsychologist relies on includes the entry of a protective order to address these concerns. Id. at 241.

Defendants' position demonstrates a potential motivation for Defendants' preventing the recording – to make the defense expert's conclusions irrefutable. (Db16.) If there is no recording, then what is actually said is not a part of the record. Here, it would mean a cognitively impaired non-English speaker with a limited education, poor memory, and anxiety issues, would be the only witness to refute what a board-certified psychologist claims.

Nor did Defendants present anything to explain how recording the exam would affect the results in a manner different from the third-party observation of an interpreter that must occur in this case. Because Defendants had the burden and failed to meet it, the trial court abused its discretion in precluding the recording by a Plaintiff with cognitive limitations, memory impairments, anxiety issues, and a language- barrier. As a result, the remedy should be reversal.

CONCLUSION

Plaintiff Jorge Remache-Robalino seeks reversal of the protective Order that barred him from recording his defense medical examination. Due to

Plaintiff's cognitive limitations, language barrier, and memory impairments, the recording is necessary to preserve evidence. Defendants did not show how the recording would cause any additional impact to the validity of the examination any greater than having an interpreter present as noted by the Supreme Court. Furthermore, the trial court addressed none of the factors that the Supreme Court instructed it to do in this case, including "ability to communicate, cognitive limitations, psychological impairments, inexperience with the legal system, and language barriers." Accordingly, the trial court's decision is so "wide off the mark" that it must be reversed.

Respectfully submitted,
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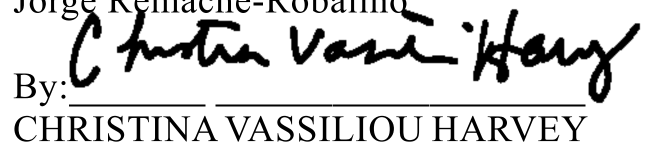

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CHRISTINA VASSILIOU HARVEY

Dated June 3, 2024