NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2826-20
A-0367-21
A-1331-21

KATHLEEN DIFIORE,

Plaintiff-Appellant,

v.

TOMO PEZIC, PEZO, INC., GREAT AMERICAN ASSURANCE CO., CHUBB, and ARTHUR J. GALLAGHER & CO., & BOLLINGER, INC.,

Defendants,
and

DRISS ELHAMDOUCHI, ROUTE 94 LIMOUSINE, INC., and 201 TAXICAB, LLC,

Defendants-Respondents,

DORA DELEON,

Plaintiff-Appellant,

v.

THE ACHILLES FOOT AND ANKLE GROUP, FRANKLIN

APPROVED FOR PUBLICATION

May 3, 2022

APPELLATE DIVISION

N. LEVINSON, and EILEEN F. LEVINSON,

Defendants-Respondents.

JORGE REMACHE-ROBALINO,

Plaintiff-Appellant,

v.

NADER BOULOS, M.D., LANI MENDELSON, M.D., and ST. JOSEPH'S REGIONAL MEDICAL CENTER,

Defendants-Respondents.

Argued April 4, 2022 – Decided May 3, 2022

Before Judges Sabatino, Mayer and Bishop-Thompson.

On appeal from interlocutory orders from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-0123-19, and Hudson County, Docket Nos. L-2412-20, and L-1929-19.

Nicholas T. Delaney argued the cause for appellant Kathleen DiFiore (Law Office of Katherine G. Houghton, attorneys; Nicholas T. Delaney, on the briefs).

Cynthia A. Satter argued the cause for respondents Driss Elhamdouchi, Route 94 Limousine, Inc., and 201 Taxicab, LLC (Blick Law LLC, attorneys; Mark S. Hochman, on the briefs).

Timothy J. Foley argued the cause for appellant Dora Deleon (Foley & Foley and Greenberg & Walden, LLC, attorneys; Timothy J. Foley, Marvin R. Walden, Jr., and Sherry L. Foley, of counsel and on the briefs).

Monique D. Moreira argued the cause for respondents Franklin N. Levinson and Eileen F. Levinson (Law Office of Moreira & Moreira, PC, attorneys; Monique D. Moreira, on the briefs).

Christina Vassiliou Harvey argued the cause for appellant Jorge Remache-Robalino (Lomurro, Munson, Comer, Brown & Schottland, LLC, attorneys; Christina Vassiliou Harvey and Jonathan H. Lomurro, of counsel and on the briefs.).

Charles E. Murray, III argued the cause for respondents Nader Boulos, M.D., Lani Mendelson, M.D., and St. Joseph's Regional Medical Center (Farkas & Donohue, LLC, attorneys; Charles E. Murray, III, of counsel and on the briefs).

Steven Flanzman, Deputy Attorney General, argued the cause for amicus curiae the State Board of Medical Examiners and the State Board of Psychological Examiners (Matthew J. Platkin, Acting Attorney General, attorney; Donna Arons, Assistant Attorney General, of counsel; Carmen A. Rodriguez, Deputy Attorney General, on the briefs).

Michelle M. O'Brien argued the cause for amicus curiae New Jersey Defense Association (Flanagan Barone O'Brien, attorneys; Michelle M. O'Brien, of counsel and on the brief; Zachary Q. De Leon, on the briefs).

James S. Lynch argued the cause for amicus curiae New Jersey Association for Justice (Lynch, Lynch, Held &

Rosenberg, PC, attorneys; Joseph M. Cerra, on the briefs).

The opinion of the court was delivered by

SABATINO, P.J.A.D.

These three appeals in separate personal injury cases[1] pose related but distinct questions involving the application of Rule 4:19. The appeals concern when, if ever, a plaintiff with alleged cognitive limitations, psychological impairments, or language barriers can be accompanied by a third party to a defense medical examination ("DME"), or require that the examination be video or audio recorded in order to preserve objective evidence of what occurred during the examination.

The three cases before us specifically involve two neuropsychological DMEs and one orthopedic DME, in which the respective plaintiffs requested the trial court, over objection, to allow such third-party presence or recording, or both measures. The trial judges issued varying decisions on the requests.

As part of our task, we have been asked by the parties and the amici to consider revisiting and updating this court's opinion from twenty-four years ago in B.D. v. Carley, 307 N.J. Super. 259 (App. Div. 1998) (authorizing the

[1] For purposes of this common opinion, we consolidate the appeals, which were calendared and argued concurrently.

"unobtrusive" audio recording of a neuropsychological DME of a plaintiff who claimed in her civil action that she was suffering emotional distress). Notably, the opinion in Carley[2] did not resolve whether video, as opposed to audio, recording can be allowed. Nor did Carley clearly adjudicate when third parties may, if ever, be allowed to attend DMEs.

The parties raise legitimate competing concerns about the proper administration of DMEs in cases in which the plaintiff allegedly is cognitively or psychologically impaired, or may have other challenges with observation or communication. Plaintiffs worry that examiners hired by the defense might not accurately describe what occurred at the exam, and, because of plaintiffs' limitations, they might not be capable of effectively rebutting the examiners' versions of the sessions in their expert reports and trial testimony.

On the other hand, defendants are concerned that the presence of a third party or a recording device within the exam room might distract the plaintiff or otherwise interfere with the DME. In support of that point, defendants in the two neuropsychology DME cases, joined by amicus Attorney General, cite to a

[2] For ease of identification, without initials and consistent with some of the parties' submissions, we refer to the opinion as Carley.

2016 Policy Statement[3] of the American Board of Professional Neuropsychology ("ABN"). The Policy Statement disfavors the third-party observation and recording of DMEs and urges practitioners to refuse such conditions except where required by law.

Having considered these contentions, and in the absence of more specific guidance within the present text of Rule 4:19, we adopt the following holdings.

First, a disagreement over whether to permit third-party observation or recording of a DME shall be evaluated by trial judges on a case-by-case basis, with no absolute prohibitions or entitlements.

Second, despite contrary language in Carley, it shall be the plaintiff's burden henceforth to justify to the court that third-party presence or recording, or both, is appropriate in a particular case.

Third, given advances in technology since 1998, the range of options should include video recording, using a fixed camera that captures the actions and words of both the examiner and the plaintiff.

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[3] Alan Lewandowski, W. John Baker, Brad Sewick, John Knippa, Bradley Axelrod & Robert J. McCaffrey, Policy Statement of the American Board of Professional Neuropsychology Regarding Third Party Observation and the Recording of Psychological Test Administration in Neuropsychological Evaluations, 23 Applied Neuropsychology: Adult, no. 6, 2016, at 391 ("Policy Statement").

Fourth, to the extent that examiners hired by the defense are concerned that a third-party observer or a recording might reveal alleged proprietary information about the content and sequence of the exam, the parties shall cooperate to enter into a protective order, so that such information is solely used for the purposes of the case and not otherwise divulged.

Fifth, if the court permits a third party to attend the DME, it shall impose reasonable conditions to prevent the observer from interacting with the plaintiff or otherwise interfering with the exam.

Sixth, if a foreign or sign language interpreter is needed for the exam (as is the case in two of the appeals before us) the examiner shall utilize a neutral interpreter agreed upon by the parties or, if such agreement is not attained, an interpreter selected by the court.

The three cases are accordingly remanded for the trial court to reconsider the conditions of the DME, consistent with the guidance expressed in this opinion.

I.

Rule 4:19 governs the terms under which defendants in civil actions can arrange to have a qualified medical or health care professional examine the condition of a plaintiff alleging bodily or mental health injury caused by the

defendants. Where a personal injury claim is asserted or where the mental or physical condition of a party is otherwise at issue, "the adverse party may require the party whose physical or mental condition is in controversy to submit to a physical or mental examination by a medical or other expert[.]" R. 4:19. The Rule specifies that the adverse party must serve a notice that such an examination has been requested, and that the notice must include "with specificity when, where, and by whom the examination will be conducted and advising, to the extent practicable, as to the nature of the examination and any proposed tests." Ibid.

The Rule empowers the trial court to "either compel the discovery or dismiss the pleading of a party who fails to submit to the examination, to timely move for a protective order, or to reschedule the date of and submit to the examination within a reasonable time" pursuant to separate enforcement provisions within Rule 4:23-5. Ibid.

A party's demand for a Rule 4:19 medical examination can be resisted, however, if "it can be shown that its probative value will be substantially outweighed by the mental and physical distress it is likely to cause[,]" as evaluated at the trial court's discretion. Pressler & Verniero, Current N.J. Court

Rules, cmt. 3 on R. 4:19 (2022) (citing Duprey v. Wager, 186 N.J. Super. 81, 86-87 (Law Div. 1982)).

The Rule was substantially amended in 2000 to alter the process for arranging DMEs. Before that time, the Rule required the defense to apply for a court order, obtainable "for good cause shown," if the plaintiff refused to submit to a DME. R. 4:19 (1994). If the application was granted, the court's order was to "specify the time, place, manner, conditions, and scope of the examination and the . . . persons by whom it is to be made." Ibid.

By contrast, as noted above, the post-2000 version[4] of the Rule instructs the defendant to specify, by a notice to the plaintiff, "when, where, and by whom the examination will be conducted and advising, to the extent practicable, as to the nature of the examination and any proposed tests." R. 4:19.

Under the current Rule, plaintiffs have limited leeway to evade the examination. Specifically, their enumerated options are: (i) noncompliance (subject to possible sanctions), (ii) moving for a protective order, or (iii) rescheduling the date of the examination "within a reasonable time following the originally scheduled date." R. 4:19.

[4] The Rule was further amended in 2002 in minor ways not pertinent here.

Hence, a plaintiff's refusal to undergo a DME does not, under the current Rule, trigger the necessity of a court order bolstered by a defendant's good cause showing to compel it, as it did under the pre-2000 version. Unless a plaintiff applies for a protective order, the court's discretion now comes into play only where a plaintiff is in noncompliance with a defendant's Rule 4:19 demand. R. 4:19 ("The court may, on motion pursuant to R. 4:23-5, either compel the discovery or dismiss the pleading of a party who fails to submit to the examination, to timely move for a protective order, or to reschedule the date" of the exam within a reasonable timeframe) (emphasis added). It is only where a defendant wishes to request a "reexamination" by its expert without plaintiff's consent that the defendant needs a court order to require plaintiff's attendance. Ibid.

Rule 4:19 has not been revised since it was amended twenty years ago in 2002. Importantly for these appeals, the text of the Rule says nothing about the allowable conditions of such a physical or mental examination. In particular, the Rule does not address whether the exam may be recorded, or whether an examinee may be permitted to bring a medical proxy or counsel into the examination room. See Wellmann v. Road Runner Sports, Inc., 458 N.J. Super. 373, 376 (Law Div. 2018) ("[Rule 4:19] is silent as to . . . whether the scheduled

medical examinations may be recorded."). Carley is the only published appellate opinion in this State that confronts this particular question, doing so in the context of mental examinations ordered under Rule 4:19.

The 1998 Opinion in B.D. v. Carley

In Carley, this court reversed and remanded the trial court's order granting a defendant's motion to bar the plaintiff from making an audio recording of her DME by a psychologist. The trial court had relied on Stoughton v. B.P.O.E. No. 2151, 281 N.J. Super. 605 (Law Div. 1995), which held that a plaintiff's counsel could not be present during a psychological examination, and that no recording could be made of it. The opinion in Carley does not discuss the standard of review applied to the trial court's ruling, as this court's analysis and holding—ultimately reversing the trial court's order—were founded on entirely legal grounds without reference to the trial court's findings of fact.

Addressing Stoughton, this court in Carley found that the Law Division judge in that case had misapplied other jurisdictions' opinions concerning discovery-related medical examinations. As described in Carley, those opinions had erroneously conflated the effect of "the presence of a tape recorder" with that of "a third party," ruling they would have "the same influence on the

patient's responses either consciously or subconsciously." Carley, 307 N.J. Super. at 261 (quoting Stoughton, 281 N.J. Super. at 611).

Carley overruled Stoughton "insofar as [Stoughton] generally limits without special reasons[] the presence of counsel or a representative at physical examinations (other than psychological or psychiatric examinations) and also limits the use of recording devices at psychiatric or psychological examinations." Id. at 262. We further observed in Carley that "the defense psychologist does not have the right to dictate the terms under which the examination shall be held." Ibid. Given the evidentiary rather than curative nature of the evaluation, "[p]laintiff's right to preserve evidence of the nature of the examination . . . outweigh[s] the examiner's preference that there be no recording device.[]" Ibid.

With respect to third-party attendance at a DME, our opinion in Carley acknowledged that "in a psychological or psychiatric examination[,] the presence of counsel could be distracting." Ibid. However, Carley stopped short of definitively foreclosing the possibility that an examinee's counsel or other third party may be admitted into the examination room in certain circumstances. The plaintiff's only request in Carley had been to use an audio recording device;

therefore, we did not in that case resolve the propriety of the presence of a third party or counsel. Ibid.

The dicta in Carley referring to third party observers has produced some confusion about its significance. For instance, the commentary to Rule 4:19 in the Gann treatise summarizes Carley's holding as follows:

> When a plaintiff is examined for the defense by a psychiatrist or psychologist, he or she is entitled to have the examination recorded by an unobtrusive recording device. . . . To the extent Stoughton . . . suggested that neither recording nor presence of counsel was permissible at a psychiatric or psychological examination, it was overruled by [Carley].
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> [Pressler & Verniero, Current N.J. Court Rules, cmt. 4 on R. 4:19 (2022) (emphasis added).]

Indeed, the parties and amici before us generally appear to agree that Carley has spawned a degree of uncertainty, and that its application and interpretation by trial judges is uneven. Accordingly, they beseech us to clarify and update the applicable law, and, in some respects, revise it.

Briglia v. Exxon

One year before this court's opinion in Carley, a Law Division judge addressed the presence of either third parties or a recording device in a physical, rather than mental, examination under Rule 4:19. See Briglia v. Exxon Co., U.S., 310 N.J. Super. 498 (Law Div. 1997). In Briglia, the Law Division held

that the examined party has the burden of showing "special circumstances" warranting an attorney's presence at or recording of a physical exam under Rule 4:19. Id. at 506; see also Pressler & Verniero, Current N.J. Court Rules, cmt. 4 on R. 4:19 (2022).

Given the conflicting language in Briglia (a physical DME case) and Carley (a mental DME case), the proper burden shifting framework with regard to prohibiting or permitting a representative or recording device at a physical DME has been somewhat unclear. See, e.g., Wellmann, 458 N.J. Super. at 379-80 (noting the discrepancy between the approaches taken in Briglia and Carley, and declining to determine the proper burden allocation; instead the court ruled that a seven-year-old examinee could be accompanied at a DME by his parents, and that the exam could be recorded, as defendants failed to persuade the court as to why either condition should be disallowed).

II.

With this backdrop, we briefly describe the circumstances of the three cases before us, and the trial courts' divergent rulings.

A. DiFiore (A-2826-20)

Kathleen DiFiore, a woman in her early seventies with several pre-existing medical conditions, was a passenger in a taxicab when it collided with

a van. DiFiore brought a personal injury lawsuit against the cab company and the cab driver. As part of her claims, DiFiore alleged the accident has caused her to suffer cognitive losses as well as physical injuries.

DiFiore's medical history notably includes diagnoses of brain and breast cancer, chemotherapy treatment, hypertension, metastatic disease, and seizures. In a report issued about three weeks after the accident, a physician at the Kessler Institute for Rehabilitation ("Kessler Institute") found that DiFiore sustained "a positive loss of consciousness and multiple injuries" during the car accident, including a "cerebral concussion." The physician further noted abnormalities on a CT scan of DiFiore consistent with "treated metastatic disease or current metastasis."

A year after the motor vehicle accident, a neurologist issued an assessment that concluded DiFiore suffers from memory loss, specifically "early stages of dementia superimposed on [a] history of breast cancer with metastatic disease to the brain[.]" The neurologist also noted it is "possible [DiFiore] has concomitant underlying dementia."

A later assessment at the Kessler Institute in December 2018 identified multiple injuries to DiFiore directly caused by the car accident, including—aside from a concussion—multiple fractures of the cervix, sternum, and ribs. It was

also noted that DiFiore at that time was "still on chemotherapy every 3 weeks" and still taking seizure medication. That assessment further noted that DiFiore "was unable to provide any detail regarding the injury, and had difficulty going through past medical history."

David Greifinger, M.D. performed an orthopedic DME on DiFiore. DiFiore attended that exam with her friend, former colleague, and medical proxy, Susan Harper Lloyd, along with a "legal nurse consultant." Dr. Greifinger found that, in addition to fractures and other physical injuries DiFiore sustained following the accident, she "required cognitive and speech therapy" at the Kessler Institute while recovering. Dr. Greifinger noted that he is "aware . . . she has had memory issues . . . [and] some preexisting brain dysfunction, the extent of which is not entirely clear[.]" To that effect, he recommended an "independent neurologic/neurosurgical assessment."

Following up on that recommendation, two of the defendants—Driss Elhamdouchi, the taxicab driver, and Route 94 Limousine, Inc., the taxicab proprietor—provided notice to DiFiore of their requested neuropsychological[5]

[5] "Neuropsychology" is concerned with the integration of psychological observations of behavior and the mind with neurological observations of the brain and nervous system. Neuropsychology, MERRIAM-WEBSTER'S

exam under Rule 4:19 with Dr. Keith Benoff, a psychologist, in November 2020. A note from defendants' lawyer to Dr. Benoff advised him that DiFiore would be accompanied by a "medical power of attorney/proxy[,]" her friend Lloyd, intended to "audio record the examination, and have a nurse practitioner observe it."

The first scheduled exam with Dr. Benoff was thwarted for a number of contested reasons. The parties disagreed over the conditions of the exam, including DiFiore's demand that it be attended by both her medical proxy and a nurse practitioner, and that it be recorded. Motion practice ensued to resolve the disagreement.

Defendants submit that DiFiore's characterization of her cognitive condition does not correlate to what they contend was her demonstrated ability

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DICTIONARY, http://www.merriamwebster.com/dictionary/neuropsychology (last visited Dec. 7, 2021).

"[N]europsychological evaluation[s] involve[] an interview and the administration of tests . . . typically pencil and paper type tests[.]" Neuropsychological Evaluation FAQ, Univ. of North Carolina School of Medicine, https://www.med.unc.edu/neurology/divisions/movement-disorders/npsycheval/ (last visited Dec. 7, 2021). "[These] tests are standardized … [and] [a]n individual's scores … are interpreted by comparing their score to that of healthy individuals of a similar demographic background[.]" Ibid. "[T]he areas addressed in an individual's evaluation are determined by the referral question . . . patient's complaints and symptoms, and observations made during interview and test administration." Ibid. (emphasis added).

to address questions without the need of memory aids or the interjections of a third party during her lengthy deposition (which ran over six hours) and during the physical DME by Dr. Greifinger. They assert that, despite her counsel's allegations that her memory is so poor, "she was even able to recount meeting Ronald Reagan and Mother Theresa years ago."

The parties' submissions to the motion judge largely focused upon the interactions between DiFiore's medical proxy, Lloyd, and Dr. Benoff's office administrator, Judy Perrone.

According to Perrone, during her intake of DiFiore, Lloyd told her "she was going to answer all questions on behalf of [DiFiore] because [DiFiore] does not remember anything." After consulting Dr. Benoff, Perrone explained that DiFiore would have to answer questions herself, shortly after which Lloyd left the doctor's office with DiFiore.

Lloyd, in turn, certified that she and DiFiore were not allowed into Dr. Benoff's office together by his staff, and that—without Lloyd having expressed anything regarding her role as a medical proxy—Dr. Benoff's staff insisted that DiFiore could only be admitted alone. Lloyd further insisted she "never told anyone that [she] would answer all questions asked by the doctor[,]" and that such a statement "would never come out of [her] mouth." Instead, Lloyd

certified that, without "interfer[ing]" or "influenc[ing]" DiFiore or the examination, she would offer help only if an examiner needs an answer and DiFiore's memory falters.

In his own certification, Dr. Benoff explained why he did not want Lloyd to interfere during the examination:

> In order to conduct a proper neuropsychological examination of a patient, it is necessary for [him] to evaluate multiple aspects of a patient's cognitive abilities, including concentration, language skills, and their ability to answer questions. The only way to accurately assess a patient is for the patient to answer questions, not a representative. Having the patient answer questions is standard practice during a neuropsychological examination. . . . it is necessary for the patient to answer questions on their own behalf.
>
> [(Emphasis added).]

Dr. Benoff asserted he would be "prevented" from "fairly and accurately assessing a patient from a neuropsychological perspective if a representative is permitted to answer[] questions on [the patient's] behalf[.]" However, Dr. Benoff did not state that the presence of a third party in the examination room would prevent him from being able to properly assess a patient, either categorically or in this case. Further, Dr. Benoff made no statement within his certification about the use of recording devices of any kind.

After hearing from both parties, the motion judge issued an oral opinion on January 29, 2021 barring third parties from attending DiFiore's DME with Dr. Benoff. The judge permitted only an audio—not a video—recording device to be used in the room. The judge specifically found that a video recording device, unlike the audio recording device permitted in Carley, would be "obtrusive." He further noted that Carley permits neither a video recording of the DME, nor a representative or counsel to be present during the exam.

Subsequently, DiFiore moved for leave to appeal, which we granted.

B. Remache-Robalino (A-1331-21)

Jorge Remache-Robalino, a native Spanish speaker in his mid-fifties, was injured when a metal fragment penetrated his right eye at work. He sought treatment with defendants—two treating doctors and their employer, St. Joseph's Medical Center—who failed to discover the fragment. Allegedly due to this failure, Remache-Robalino went blind in his right eye. He alleges that his condition resulted in depression, anxiety, and impaired concentration.

Remache-Robalino filed a medical malpractice complaint against defendants. Like DiFiore, Remache-Robalino claimed that defendants' conduct caused him to sustain, among other harms, permanent psychological injuries.

In August 2021, defendants sent Remache-Robalino a notice to attend a neuropsychological DME. Remache-Robalino agreed to attend the exam, on the condition that he be allowed to make an audio recording of the session, as authorized by Carley. Among other things, plaintiff was concerned about his language barrier, as his bilingual attorney had spotted mistakes by the interpreter at plaintiff's deposition.

Defendants moved to compel the examination without any monitoring or recording. Their motion included a certification by their chosen neuropsychologist, Dr. Joel Morgan, who stated that he would not perform the examination if it had to be recorded. According to Dr. Morgan, "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."

The trial judge granted defendants' motion to compel an unrecorded neuropsychological DME over Remache-Robalino's objections. The judge was especially persuaded by defendants' argument that allowing Remache-Robalino to record a DME conducted by an expert of defendants' choosing would cause an evidentiary asymmetry. Defendants asserted, as was then echoed by the trial court, that Remache-Robalino had already undergone examinations by other

experts[6] without giving the defense notice of those exams or allowing them to have a representative attend or have the exams recorded.

Remache-Robalino moved for reconsideration, arguing he has an entitlement under Carley to use an unobtrusive audio recording device at the DME. This time, the judge granted Remache-Robalino's request, finding that the earlier examinations "were not generated by DMEs[,]" and therefore not undertaken for discovery purposes. The trial court's ensuing order urged the parties to "enter into a confidentiality order to protect the DME physician's concerns" with regard to the presence of an audio recording device.

Defendants moved for reconsideration of the order permitting Remache-Robalino to use an audio recording device at the DME. They emphasized the reservations voiced by Dr. Morgan, who certified it was against his professional custom to record such examinations, and that the presence of the recording device can taint the results.

In a third ruling, the motion judge then granted defendants' motion for reconsideration, thereby retracting Remache-Robalino's permission to bring an audio recording device into the DME. On reflection, the judge concluded that

[6] As stated in his brief, medical experts who had previously examined Remache-Robalino were his treating psychiatrist and a physician who evaluated him for a permanency rating in his worker's compensation claim.

Carley does not entitle Remache-Robalino to an audio recording. The judge reasoned it would be unfair if defendants were deprived their choice of neuropsychologist merely because the doctor was "following his [professional] association's recommendations not to audio tape because of the potential[] of invalidating the integrity of the process[.]"

Plaintiff had expressed to the judge concerns that defendants will select experts who similarly refuse to perform recorded DMEs in future cases. Responding to those concerns, the judge assured that "the judiciary will address" any problematic pattern of defendants strategically choosing neuropsychological examiners whose professional customs are opposed to audio recordings.

Lastly, the judge found that the presence of an interpreter chosen by the defendants does not constitute a waiver of defendants' arguments against the presence of additional third parties or recording devices, and is not inconsistent with those positions.

Having lost the third motion round, Remache-Robalino moved once again for reconsideration. This time, he presented an opposing certification by another clinical neuropsychologist, George Carnevale, Ph.D., who offered a more flexible perspective about the professional concerns involved in recording such

DMEs. Dr. Carnevale asserted that an audio recording would not necessarily taint the results of a neuropsychological exam. He also stated that a protective order would effectively allay any concerns with the copying of test material or intellectual property.

In a concise order, the judge summarily denied Remache-Robalino's final motion as "merely express[ing] disagreement with the Court's decision."

This emergent interlocutory appeal by Remache-Robalino ensued. We granted leave to appeal and combined this case with the other two cases.

C. Deleon (A-0367-21)

The third appeal before us, Deleon, concerns an orthopedic DME rather than a neuropsychological DME. In this case, plaintiff Dora Deleon, a non-native English speaker in her early seventies, contends she fell on the sidewalk in front of defendants' commercial property in May 2019 due to a hazardous condition. As a result of the fall, Deleon alleges she suffered severe injuries to her cervical and lumbar spines and to both knees. Deleon has several pre-existing conditions, including diabetes, hypertension, kidney disease, and problems with blood circulation. She filed a personal injury action against the owner of the property and a commercial tenant.

Defense counsel notified Deleon that they had arranged for her to attend a Rule 4:19 orthopedic DME.[7] Thirteen days before the DME's scheduled date, Deleon's counsel notified the defense that she intended to be accompanied at the DME by a nurse practitioner. The nurse practitioner would be assigned from a company that, according to a certification from its principal and owner, has provided nurse practitioners to attend DMEs on "thousands" of such occasions.

Defendants objected to the nurse practitioner's attendance at the DME. They asserted such third-party attendees are not allowed under New Jersey case law, and further contended that Deleon had shown no "special circumstances" justifying the presence of a nurse practitioner. They moved to compel an unrecorded and unaccompanied DME. Deleon opposed the motion, arguing she needed to be accompanied by the nurse practitioner for evidence preservation

[7] "Orthopedics," alternatively spelled "orthopaedics," is defined as "[t]he branch of medicine that treats injuries or disorders of the skeletal system and associated muscles, joints, and ligaments." Orthopedics, Webster's II New College Dictionary (2d ed. 1999).

The purpose of an orthopedic examination—which falls under "physical" Rule 4:19 DMEs—is "to glean the necessary information from medical history and physical examination to establish an accurate working diagnosis. The three components of the examination [typically] include: (1) comprehensive medical history including past history, postinjury recollection of complaints, and treatment; (2) a detailed physical examination; and (3) diagnostic studies[.]" Stephen G. Brown, M.D. & Steven Pitt, The Claim Adjuster's Automobile Liability Handbook, § 11:6 (2021).

purposes. Deleon did not, however, request a recording device in addition or as an alternative to the nurse practitioner.

The motion judge[8] issued an order granting defendants' motion to compel the DME of Deleon, and further ordered that the examination be "unmonitored and unrecorded." No hearing was held on the matter. The order stated that "[u]pon review of the case law and the facts . . . the court does [not] find any justification to allow the Plaintiff to be accompanied by a nurse practitioner during the independent medical exam." The order did not elaborate on why it specified the DME could not be recorded.

Deleon moved for leave to appeal, which this court granted. As noted, her appeal was scheduled in combination with the other two cases.

D. The Amici

The court has had the benefit of the participation of three amici in these appeals. Two of the amici—the New Jersey Association for Justice ("NJAJ") and the New Jersey Defense Association ("NJDA") initially moved for and were granted leave to participate in the Deleon appeal. Thereafter they were also permitted to present arguments relating to the DiFiore and Remache-Robalino

[8] The same judge coincidentally later ruled on the DME issues in Remache-Robalino.

cases. The third amicus, the Office of the Attorney General, accepted this court's invitation to appear and comment on the 2016 Policy Statement of the ABN and address the professional responsibility implications of the Policy Statement for regulated practitioners in this State who perform psychological or neuropsychological DMEs.

NJAJ advocates that we reaffirm the outcome in Carley concerning audio recordings and expand that precedent to allow trial courts to authorize the presence of third-party nurse practitioners or other unobtrusive observers at both mental and physical DMEs. NJAJ also supports the use of video recordings in appropriate cases, subject to defendants satisfying their putative burden that "special reasons" exist to bar either recording or third-party admittance.

NJDA argues that the ruling in Carley should be reconsidered in light of more recent professional literature highlighting concerns about the detrimental impact of third-party attendance at and the recording of neuropsychological examinations. They point to the 2016 Policy Statement as providing compelling reasons to disallow conditions that may adversely affect the integrity of the exams. NJDA opposes expanding Carley to third-party attendance by observers such as nurse practitioners, and also expresses reservations about both audio and video recordings.

In his own amicus brief and oral argument, the Attorney General advises that the State Board of Psychological Examiners ("BPE") endorses the ABN's 2016 Policy Statement, although it has yet to enact a regulation addressing the subject.[9] The Attorney General further submits that the BPE reserves the right to impose discipline on practitioners who violate professional standards of care by conducting examinations with inappropriate conditions. The Attorney General respectfully acknowledges that the Judiciary has the constitutional authority[10] to specify the conditions of pretrial discovery under Rule 4:19 and the other Rules of Court, but predicts that the availability of examiners willing to allow third-party attendance and recordings of DMEs may, as a practical matter, diminish in light of the Policy Statement and the BPE's endorsement of it.

III.

[9] We were advised at oral argument that the Board of Medical Examiners, which regulates psychiatrists or other physicians who may perform DMEs, did not take a position on the issues.

[10] See N.J. Const. art. VI, § 11, ¶ 3 ("The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts."); see also Winberry v. Salisbury, 5 N.J. 240, 255 (1950) (recognizing and enforcing the Judiciary's paramount constitutional authority to enact rules governing such matters within the court system).

As we noted in our introduction, several competing concerns are presented by the issues of recording and third-party attendance at a DME. We begin our analysis with a recognition that both sides of the debate tend to overstate the nature of a defense examination under Rule 4:19.

The DME is not, as plaintiffs tend to portray it, an adversarial proceeding inevitably designed to disprove claims of injury and trap plaintiffs into admitting or showing their claims are exaggerated or fabricated. The examiner is not a lawyer conducting a cross-examination. The exam is a professional assessment that must adhere to the standards of the examiner's profession.

Nor is the DME, as defendants tend to portray it, always a purely objective exercise unaffected by any conscious or subconscious biases of the examiner. The examiners tend to be hired repeatedly by insurance companies and defense firms, with the expectation the examiners will assist the defense, if needed, as witnesses at trial. The examiners often are more skeptical about findings of causation and permanency than examiners who are engaged by plaintiffs' counsel. Nevertheless, as noted, they are expected to adhere to their professional standards and their duties of candor to the court.

If an examiner has unfairly or incorrectly opined about a plaintiff's condition, plaintiff's counsel are well equipped to counter those opinions

through cross-examination, impeachment evidence, and the testimony of a competing expert witness. That is how the system works. Fact-finders benefit from the insights such dueling experts can provide.

Indisputably, the DME is an important part of the civil litigation process in personal injury cases, both in the pretrial stage and at trial. Cases are evaluated for settlement based in part on the opinions set forth in the experts' reports. The integrity and accuracy of the experts' respective examinations can play a critical role in assessing injury and damages flowing from an accident.

This leads us to underscore, as was briefly discussed in Carley,[11] the potential utility of evidence preservation relating to the DME. Often the examiner's written report is the only documentation of the session. At times the examiner may include observations and findings in the report that are inaccurate, whether through misperception, mistake, or a mere typographical error in transcribing the report.

Ordinarily, the examinee may be very capable of correcting or rebutting the inaccuracy through a certification or testimony asserting that the examiner was wrong. For instance, the examiner's report may say that the plaintiff was

[11] Specifically, Carley mentions "[p]laintiff's right to preserve evidence of the nature of the examination, the accuracy of the examiner's notes or recollections, the tones of voice and the like[.]" 307 N.J. Super. at 262.

able to extend her forearm "x degrees" during the exam and plaintiff may counter, from her own recollection of the exam, that her range of motion was only "y degrees." Or the examiner's report may say that the plaintiff expressed no pain with a certain movement, or showed no problem in lifting a certain weight, or had no difficulty in identifying the name of the Vice President, while the plaintiff may attest that these observations were untrue. In such routine scenarios, we may be able to depend on the plaintiff to refute the examiner's account of what occurred at the DME.

In other situations, however, as allegedly is the case with the three plaintiffs before us, the plaintiff may lack the capacity to rebut effectively the accuracy of the examiner's observations. DiFiore's counsel argues she has substantiated memory impairments and cognitive issues that could impede her ability to recall and testify with precision about what took place during the exam. As for both Deleon and Remache-Robalino, they are non-native English speakers who might not be able, even with the aid of an interpreter, to comprehend fully what the examiner said during the exam, or to communicate reliably a different version of the events. We also note Remache-Robalino contends he has problems with concentration.

In addition, the stress and anxiety of the exam itself with an unfamiliar doctor or other professional may also diminish the ability of some plaintiffs to absorb and recall what occurred at the DME. The point is that we cannot always depend on the examinee to be a reliable witness to rebut or correct errors in the report or the examiner's testimony. To be sure, the plaintiffs' own experts may offer competing overall opinions about the nature and causes of their injuries, but those experts cannot fully refute what occurred at DMEs they did not witness. A recording or a third-party observer might furnish such evidence.

Apart from this potential evidential need, there may well be at times a legitimate need for a plaintiff, due to infirmity, age, or other special traits, to have another person accompany the plaintiff to a DME. For example, defendants and the amicus NJDA do not dispute that a young child may appropriately be accompanied by a parent or guardian at a DME. Similarly, an elderly plaintiff who has difficulty walking or speaking may legitimately need to have a relative or an aide in the examination room. Moreover, the presence of an interpreter at the DME when the examinee is not fluent in English and the examiner does not speak the examinee's own language(s) is also well accepted.

The certifications submitted by defendants and the publications they cite generally do not question that, in some situations, at least one additional person

(e.g., parent, aide, interpreter) is needed in the examination room to facilitate the DME session. The controversy before us centers on whether the plaintiff should be able to designate a third party to attend the exam in less clear-cut situations, or have the session recorded, or both.

The ABN Policy Statement

In the specific context of a neuropsychological exam, as in DiFiore and Remache-Robalino, the ABN[12] has weighed in with its 2016 Policy Statement we have mentioned and now will discuss in more detail. Although not presently codified in a New Jersey regulation, the Policy Statement is the main professional publication cited to us.

The Policy Statement, which appeared in the publication Applied Psychology: Adult, begins by identifying numerous drawbacks to third-party observation of psychological exams. The article then sets forth "General Principles" for practitioners and highlights relevant parts of the American Psychological Association's Ethics Code. Policy Statement at 392-95. The General Principles are mostly familiar precepts, such as "do no harm." Id. at

[12] According to the ABN's website, its mission is "to promote and assess the competence of psychiatrists and neurologists to provide high quality patient care by[,]" among other things, "[e]stablishing standards and requirements for initial and continuing certification[.]" Am. Bd. of Psychiatry and Neurology, Inc., https://www.abpn.com/about/mission-and-history/ (last visited Apr. 22, 2022).

392. One General Principle of particular interest here, titled "Justice," reads in part: "[p]sychologists recognize that fairness and justice entitle all persons to access to and benefit from the contributions of psychology and to equal quality in the processes, procedures, and services being conducted by psychologists." Ibid.

While the General Principles are broad guidelines, the Ethics Code "offers specific standards that represent obligations to which psychologists are bound, and consequently form the basis for ethical violations and consequently the basis for sanctions." Id. at 391. "Ethical Standard 2: Competence" reads: "[p]sychologists' work is based upon established scientific and professional knowledge of the discipline." Id. at 393. The authors interpret that standard as requiring that testing be conducted "in a distraction-free environment." Ibid. The authors contend that having a third-party present in an examination room, or allowing the examinee to be conscious of the presence of a camera or audio recorder, could cause such a distraction.

"Ethical Standard 9: Assessment," which is perhaps most relevant here, states: "[p]sychologists base the[ir] opinions . . . on information and techniques sufficient to substantiate their findings." Ibid. As advocated by the defense in these cases, part of the rationale for not allowing observed or recorded DMEs is

that either condition might skew the results and make the DME an ineffective assessment.

When the tools at their disposal are insufficient, psychologists are not necessarily barred from performing an exam under Standard 9. Rather, the Standard continues: "[w]hen, despite reasonable efforts, [sufficient] examination is not practical, psychologists document the efforts they made and the result of those efforts, clarify the probable impact of their limited information on the reliability and validity of their opinions, and appropriately limit the nature and extent of their conclusions or recommendations." Id. at 394. Less than an ideally controlled examination environment is tolerable under this standard if the psychologist makes a note of the additional variables present during the examination.

Standard 9 similarly speaks to the reliability of assessment methods. Psychologists are to use standardized research techniques. The authors add: "[w]hen an exception exists, it is incumbent on the neuropsychologist to provide a rationale or need that supports altering standardization in the report." Ibid. The authors then provide a long list of acceptable exceptions—circumstances in which a third-party assistant or observer is appropriate—including but not limited to when young children are the test subjects, when the subject has a

serious brain injury, when an elderly person is unwilling to proceed without a family member present, or when a medical student is observing for training purposes. Id. at 395-96. In each case, a psychologist is ethically obligated to document the deviation from the standard practice of one-on-one examination, but they are not barred from performing the modified exam. Id. at 396.

The authors of the Policy Statement recommend that psychologists try to convince judges and lawyers not to proceed with recorded or observed DMEs, but "[i]f attempts to educate those involved fail and counsel insists, or the court directs to proceed with [a recorded or observed DME], the neuropsychologist can consider removing himself/herself from the assessment." Ibid. (emphasis added). The Policy Statement seems to permit psychologists to back out of DMEs in these situations rather than mandate that they do so.

The authors conclude the Policy Statement with a recommendation rather than a requirement:

> [I]t is the position of the American Board of Professional Neuropsychology that it is incumbent on neuropsychologists to minimize variables that might influence or distort the accuracy and validity of neuropsychological assessment. Therefore, it is the recommendation of the American Board of Professional Neuropsychology that neuropsychologists should resist requests for [third-party observation] and educate the referral sources as to the ethical and clinical implications.

[Id. at 397 (emphasis added).]

Although psychologists must "minimize variables," the ABN does not demand that they eliminate all variables presented by third parties.

Critically for our analysis, the Policy Statement does acknowledge a court's authority to require third-party presence or recording as a condition of a neuropsychological examination: "[n]europsychologists should therefore not engage in, endorse, abet, or conduct assessments complicated by [third-party observation] or recording of any kind other than under the order of a court after all reasonable alternatives have been exhausted." Ibid. (emphasis added). In instances when a "neuropsychologist is compelled by the court to evaluate with a [third-party observer] because of existing state statutes or if the neuropsychologist is placed in a situation whereby withdrawing will bring clear and substantial harm to the examinee, the manner in which test validity and clinical findings are affected and may be compromised should [be] explicitly documented." Id. at 396.

Notably, the Policy Statement is almost exclusively focused on third-party attendance at examinations, and provides little discussion about the alleged detriments of audio or video recording, aside from a general concern with the

dissemination of test material and possible consequent intellectual property issues.

Some examiners object to the recording of a DME due to the capacity of a recording device to distract the examinee, or skew their responses because the examinee may be, as it were, "performing for an audience." This phenomenon has also been described as the "social facilitation" effect.[13]

Plaintiffs and the NJAJ contend the Policy Statement and the certifications of defendants' experts overstate the alleged harms of third-party presence and recordings. They also urge that, even if such disadvantages exist, they are readily outweighed by the evidential and functional benefits of the examinee having a third party or a recording device in the room.

Other Jurisdictions

[13] Social facilitation refers to the ameliorative effect of third parties—either as audience members or collaborators—on one's ability to perform certain tasks. Saul McLeod, Social Facilitation, Simply Psychology (June 24, 2020), https://www.simplypsychology.org/Social-Facilitation.html; see also Bruce H. Stern, Neuropsychology & Traumatic Brain Injury, Trial, Oct. 2015, at 48 (acknowledging the effect of social facilitation during a recorded neuropsychological evaluation).

Although it is not binding on us, the federal majority position[14] on these issues has been described as follows:

> Presence of a third party at examination. [Fed.R.Civ.P.] 35 does not mention whether an attorney or other third party may be present during the examination. Most courts follow a presumption that attorneys and other third parties are not allowed to attend because of the potential that their presence may affect the results. But the court may allow a third party to be present if there are special or unusual circumstances.
>
> . . .
>
> Requests to record examination. [Fed.R.Civ.P.] 35 is also silent regarding whether examinations may be recorded. Some courts apply the same standard applicable to requests for the presence of a third party. Other courts require a less rigorous showing under the view that a recording is less intrusive than the presence of a third party.
>
> [Gensler & Mulligan, Rule 35.]

[14] It bears noting that Rule 4:19's federal analog, Fed.R.Civ.P. 35, is distinguishable in certain significant ways from our State's current Rule. Fed.R.Civ.P. 35 provides that: "[f]or good cause, a federal court may order a party or a person in a party's custody or legal control to submit to a physical or mental examination if the party's or person's mental or physical condition is in controversy. The trial court has broad discretion whether to order the examination and to regulate the time, place, manner, and conditions of it." S. Gensler & L. Mulligan, Federal Rules of Civil Procedure, Rules and Commentary, Rule 35 (2022) (emphasis added). Fed.R.Civ.P. 35 thus closely tracks Rule 4:19 as drafted prior to its 2000 amendments. See Little v. McIntyre, 289 N.J. Super. 75, 79 (App. Div. 1996) ("R[ule] 4:19 is the state analog to and is substantially identical to Fed.R.Civ.P. 35.").

See also Flack v. Nutribullet, L.L.C., 333 F.R.D. 508, 517-18 (C.D. Cal. 2019) (distilling the "majority rule adopted by the federal courts" applying Fed.R.Civ.P. 35 as a presumption toward excluding third-party observers and recording devices from medical or psychiatric evaluations, absent plaintiffs sustaining their burden to show a compelling reason to admit either, to be analyzed on a case-by-case basis).

State courts across several jurisdictions with court rules analogous to Rule 4:19 have also authorized third-party observation or recording of DMEs on a case-by-case basis, placing the burden on plaintiffs to show the need for such special conditions. See, e.g., Lyft, Inc. v. Eighth Jud. Dist. Ct. in & for Cty. of Clark, 501 P.3d 994, 1000 (Nev. 2021); Schaumann-Beltran v. Gemmete, 966 N.W.2d 172, 180 (Mich. Ct. App. 2020); In re Soc'y of Our Lady of Most Holy Trinity, 622 S.W.3d 1, 15 (Tex. App. 2019).

III.

Having considered these arguments and counterpoints, we proceed to provide some guidance for the bench and bar. We do so with the belief that our opinion in Carley from more than two decades ago should be updated and revised in some respects. We undertake that task with the benefit of the

professional literature and the amici advocacy that was not provided to the court in Carley.

Ideally, the governing factors and procedures might be best developed by a Supreme Court Committee of stakeholders. As we noted, Rule 4:19 has not been revised in over twenty years.[15] As part of such a process, the Committee might also review whether any comparable discovery rule or guidelines should be adopted to the recording or third-party attendance at examinations by non-treating doctors arranged by plaintiffs' counsel, a subject which is beyond the scope of the present appeals. In any event, in the absence of a revised Rule, we set forth the following holdings, which we repeat from our Introduction:

First, a disagreement over whether to permit third-party observation or recording of a DME shall be evaluated by trial judges on a case-by-case basis, with no absolute prohibitions or entitlements. There are simply too many permutations of circumstances for this court to impose inflexible rules that could fairly apply in all instances. The trial court must balance the competing advantages and disadvantages tailored to the particular case. We also discern no reason to favor or disfavor third-party presence or recording for

[15] We note the Civil Practice Committee in 2000 declined to recommend any changes to Rule 4:19 and instead advised that the issues develop through case law. See 2000 Sup. Ct. Civ. Prac. Comm. Rep. 97.

neuropsychological (or any other "mental") DMEs as opposed to other specialties. See also Smolko v. Unimark Lowboy Trans., L.L.C., 327 F.R.D. 59, 62 (M.D. Pa. 2018) ("[N]umerous cases have extended this principle, barring third party observers from medical examinations, to physical examinations as well[.] . . . [T]he distinction between physical and psychiatric examinations urged by the plaintiff has not been embraced by the [federal] courts.").

We reaffirm Carley's holding that 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." 307 N.J. Super. at 262. If the expert does not wish to proceed with the exam on conditions that a court has imposed, the examiner can withdraw from the assignment. We will not speculate about whether the positions of a licensing board or the Attorney General concerning their enforcement of standards of care will necessarily dry up the pool of experts who are willing to perform DMEs on terms set forth in discovery orders issued by the court. If such a consequence ensues, it can be addressed in the future.

Second, despite contrary language in Carley, we hold that, going forward, it shall be the plaintiff's burden to justify to the court that third-party presence or recording, or both, is appropriate for a DME in a particular case, absent consent to those conditions. On reflection, we agree with the court's opinion in

Briglia that the burden should be placed on the plaintiff, rather than the defense, to justify special conditions such as third-party observation or recording. Placing the onus on the plaintiff is consistent with the 2000 revisions to Rule 4:19 that more affirmatively granted defendants the right to obtain a DME. We are also persuaded by the analysis adopted by several other state and federal jurisdictions that have come to similar determinations.

Third, given advances in technology since 1998, the range of options should include video recording, using a fixed camera that captures the actions and words of both the examiner and the plaintiff. We take judicial notice that with the pervasive use of pocket-sized smart phones as cameras and audio recorders, they can be unobtrusively placed on a tripod with minimal effort. Trial judges may take this into account when weighing the parties' positions. The evidential value of the recording to prove or disprove what occurred during the exam, in the event of a dispute, could be significant.

Fourth, to the extent that examiners hired by the defense are concerned that a third-party observer or a recording might reveal alleged proprietary information about the content of the exam, the parties shall cooperate to enter into a protective order, so that such information is solely used for the purposes of the case and not otherwise divulged. Counsel on these appeals appear to

accept this proposition. Of course, if the case is tried, the evidence of what occurred at the DME will be presented in an open courtroom. R. 1:2-1.

Fifth, if the court permits a third party to attend the DME, it shall impose reasonable conditions to prevent the observer from interacting with the plaintiff or otherwise interfering with the exam. Here again, counsel appear to agree.

Sixth, if a foreign or sign language interpreter is needed for the exam the examiner shall utilize a neutral interpreter agreed upon by the parties or, if such agreement is not attained, an interpreter selected by the court. Again, counsel appear to favor this standard procedure.

IV.

Having adopted the above gloss on Rule 4:19, we remand all three cases for the respective trial courts to reconsider their rulings, with the guidance we have respectfully provided. We do not retain jurisdiction.