

Client Alert **Product Liability Law**

New Jersey Appellate Division Holds that Plaintiffs Bear the Burden of Establishing Special Conditions Justifying the Presence of Third Parties or Recording Devices at Defense Medical Examinations

In product liability and other personal injury cases where the plaintiff's physical or mental condition is at issue, the defense typically seeks to have the plaintiff examined by a defense medical expert in order to evaluate plaintiff's alleged injuries. Under New Jersey Court Rule 4:19, a defendant may require the plaintiff to undergo a physical or mental defense medical examination ("DME") with an expert of the defendant's choosing. Aside from some procedural and timing requirements, Rule 4:19 does not dictate how the DME should be conducted. Disputes often arise regarding whether the plaintiff may be accompanied by a third party at the DME, or allow the DME to be recorded by audio and/or visual means. Some plaintiffs' counsel seek to impose these requirements because of alleged concerns that their clients, especially those with cognitive and psychological limitations, will not be in a position to rebut the examiner's version of what was said or occurred during the DME. Defendants and their examiners, on the other hand, typically resist the presence of a third party or recording device because it may distract the plaintiff and/or the examiner, or otherwise interfere with the DME. Because the applicable rule is silent on how DMEs should proceed, it has been left to the courts to address these disputes.

In a published opinion, *DiFiore v. Pezic*, 2022 N.J. Super. LEXIS 58 (N.J. App. Div. Apr. 4, 2022), the New Jersey Appellate Division revisited whether injured plaintiffs are allowed to bring a third party or a recording device to a DME. Prior to *DiFiore*, the Appellate Division had not addressed this issue since deciding *B.D. v. Carley*, 307 N.J. Super. 259 (App. Div. 1998) twenty-four years ago. In *Carley*, the Appellate Division acknowledged that having a third party at the examination could create a distraction, but held that plaintiff, over defense objections, could use an unobtrusive recording device during the DME. *Id.* at 262. In reaching its decision, the *Carley* court noted that there was no *per se* prohibition on third parties or recording devices at DMEs.

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In *DiFiore*, the Appellate Division revisited this issue in three unrelated personal injury cases – *DiFiore v. Pezic*, *Remache-Robalino v. Boulos*, and *DeLeon v. The Achilles Foot and Ankle Group*. In all three cases, the plaintiffs had cognitive limitations, psychological impairments, or language barriers, and plaintiffs’ counsel, over defense objections, requested that their clients be accompanied by a third party and/or be permitted to record the DME by audio or visual means. In all three cases, the trial courts issued different rulings on how the DME should proceed. In *DiFiore*, the trial court precluded plaintiff from bringing a third party or recording the DME by video, but allowed her to make an audio recording of the DME. In *Remache-Robalino*, the trial court denied plaintiff’s request to record the DME by audio means. Lastly, in *DeLeon*, the trial court denied plaintiff’s request to have a third party at the DME and issued an order requiring plaintiff’s DME to proceed unmonitored and unrecorded. All three decisions were appealed and consolidated by the Appellate Division.

On appeal, Plaintiffs, joined by *amicus curiae* New Jersey Association for Justice, argued that plaintiffs should be allowed to bring unobtrusive third parties or recording devices to DMEs unless the defendant presented special reasons barring their use. The defendants, joined by *amici* New Jersey Defense Association and the Office of the Attorney General, argued that the presence of third parties or recording devices would have a detrimental impact on DMEs, including reducing the number of practitioners willing to conduct them. Specifically, the defendants noted that a 2016 policy statement of the American Board of Professional Neuropsychology (“ABN”), which is also endorsed by the NJ State Board of Psychological Examiners, disfavors the presence of third parties and recording devices at DMEs, and urges practitioners to refuse such measures unless required by a statute or court order.

In addressing the issue, the Appellate Division noted that the presence of third parties or recording devices at DMEs present competing concerns. Given the significance of DMEs to resolving and adjudicating personal injury claims, the court pointed out the importance of preserving evidence related to the DME, including what the plaintiff may have said to the examiner and what the examiner may have observed during the examination. In most cases, the court noted that the plaintiff would ordinarily be in a position to refute the examiner’s account of what was said or occurred at the DME. However, in cases where the plaintiff has cognitive impairments, psychological difficulties, or language barriers, the court noted that a third party or recording device may be the best method of preserving such evidence. On the other hand, the court observed that the ABN policy statement identified numerous drawbacks to third-party observations of DMEs. For example, the presence of a third party or recording device could distract the examiner or the examinee, skew the results, or negatively impact the DME. Although the ABN’s policy statement discouraged the presence of third parties and recording devices during examinations, it did not prohibit their use if the examiner took proper note of their presence and made attempts to reduce their potential impact. Lastly, the court pointed out that Rule 4:19 is silent on these issues and suggested that the NJ Supreme Court Committee responsible for revising the court rules consider adopting guidelines.

In the absence of changes to Rule 4:19, the court adopted several rulings on the presence of third parties and recording devices at DMEs:

1. There is no *per se* entitlement to or prohibition on the presence of third parties or recording devices at DMEs. Any disagreements over the use of such devices must be evaluated by the trial court on a case-by-case basis, based on an evaluation of the competing advantages and disadvantages tailored to the particular case.
2. When there is an objection, the burden is on plaintiffs to establish that “special conditions” justify the presence of a third party or recording device at the DME in a particular case.
3. Given technological advances, the use of video recording devices that is fixed and captures audio and video should be considered.
4. Parties should enter into confidentiality orders to alleviate any concerns raised by examiners that recording the DME might reveal proprietary information.
5. In the event a third party is permitted to attend the DME, the trial court should impose reasonable restrictions against the third party interacting with the plaintiff or otherwise interfering with the examination.
6. If a foreign language or sign language interpreter is required for the DME, a neutral interpreter should be agreed upon or selected by the trial court.

The Appellate Division remanded all three cases back to the trial court to re-evaluate their holdings in light of these guidelines.

What Does This Case Mean?

By placing the burden on plaintiffs to establish special conditions that warrant the presence of third parties and recording devices, the court’s decision makes clear that the use of such measures is the exception rather than the rule. We expect that the presence of third parties and recording devices at DMEs will be limited to circumstances where the plaintiff is very young or very old, or where he or she has significant cognitive impairments, psychological problems, or language barriers that warrant the use of such measures. We will continue to keep you apprised of further developments in this important area.

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