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November 13, 2025

VIA ELECTRONIC FILING & LAWYER SERVICE
Honorable Gregory L. Acquaviva, J.S.C.
Monmouth County Superior Court
71 Monument Park
Freehold, New Jersey 07728
The Honorable Gregory L. Acquaviva, J.S.C.

Re: Pamela Zack g/a/l Christopher Popp v. Viatris Inc. et al.
Docket No.: MON-L-1600-21
Our File No.: 20-39
Transaction ID: *LCV20252855361* and *LCV20252851955*
Currently Returnable: November 21, 2025

Plaintiff's Brief in Opposition Gourmet Kitchen's Motion for Protective Order and Motion to Enforce Litigant's Rights

Dear Judge Acquaviva:

Please accept this brief in connection with the above on behalf of Plaintiff Pamela Zack, Guardian ad Litem for Christopher Popp.

Preliminary Statement

This is a combined negligence and product liability case. In June 2019, at Trump Colts Neck, 28 year old Chris Popp bit into a Chicken Yakatori Satay skewer supplied by Gourmet Kitchen and he had an immediate peanut anaphylactic reaction. His Epipen malfunctioned and he sustained anoxic brain injury. He requires 24 hour care including a ventilator and feeding tube. An addition had to be made on his parents' house, which is the functional equivalent of a hospital room, to accommodate him and his caregivers.

Two defense motions are the subject of this brief. The first is for a protective order as to the defense medical exam where the defense seeks certain conditions on the defense exam. Most of the conditions we have no problem with. The most objectionable condition is that any videotape of the defense medical exam cannot be used in the case, which is the

functional equivalent of no videotape, which is directly counter to *DiFiore v. Pezic*, 254 N.J. 212 (2023).

We have no problem with one person doing the videotaping; that is our standard practice. The camera however cannot be fixed. The videographer has to be free to move around to ensure the important stuff gets captured and so the defense medical expert cannot block the field of view.

We have no problem having a single third party observer, lawyers not being in the exam room, nor providing the defense a copy of the videotape. We also have no problem with the defense request that they only be required to turn over non-privileged discoverable materials created in connection with the exam, and we will do the same.

As to the issue of the blood draw, we are similarly confused as to why judicial intervention is necessary here. In short, although blood testing for allergies has zero relevance to predicting anaphylaxis, we have not unreasonably resisted this. Instead, to minimize continued risk to Christopher, we simply want the blood draw done as part of his routine blood work so he is only pricked once. Chris' mom, Pamela Zack, is a nurse who has treated Chris his whole life and has been named as an expert here. She puts in context the defenses' rather cruel insistence on drawing blood:

Q. Okay, I have some questions. Pam, the defense is pushing to take Chris' blood for purposes, according to the defense, of a specific IgE testing for sesame, tree nuts, shellfish, soy, mustard, pine nut, birch, and apple. You're aware of that?
A. Yes.

Q. And you're a registered nurse, right?
A. Right.

Q. With extensive experience in treating people, right?
A. Right.

Q. And you've been treating Chris at various times throughout his life and after this incident, right?
A. Correct.

Q. In fact, I think you testified that at some points recently you've been taking over his care because of the substandard care provided by the worker's compensation insurance company?

A. Yes.

Q. All right. So based upon your training, knowledge and experience in the field of medicine, and as Chris' mom, what are your thoughts on the legitimacy of the defense pushing to take Chris' blood in order to test for sesame, tree nuts—shellfish, soy, mustard, pine nut, birch and apple?

...

[A.]: First of all, I'm outraged that anybody would want to cause him any more pain. The last time he had his regular blood work done, it took them four sticks — and he writhed in pain — until they got that blood. This test, first of all, reflects nothing, nothing to do with anaphylaxis. It is a RAST test, and all of the items you just listed he has either consumed or been exposed to without event.

Q. And what's been going on with him recently in terms of the change in care, the change in providers, his storming, and your concerns about storming that will occur if the defense actually goes ahead and sends a phlebotomist to take his blood?

A. It puts him at risk for neurostorming. Any stimuli — noxious or gentle stimuli — can throw him into a neurostorm. And it is really the staff, or the staff I had, who would note those subtle changes before he would be in a full-blown storm, as opposed to the last two nights ago where he was dusky gray. I had to take him off the vent, Ambu bag him myself, and actually get on my knees and pray to the Lord that this was not going to be the last moment with him — all because somebody missed an asthma attack. So, no, would I electively subject him to any more pain and suffering? No. I think he's suffered enough — suffered more than anybody ever could know — because he isn't able to express how much he is suffering.

Q. So can you explain in a little more detail — he had a RAST test, I guess when he was—

A. About two years they had to wait after the first episode of anaphylaxis because you can get false readings. Even with that, the doctor told me there were going to be elevated readings that might not be accurate. The result of that test really was only to show us — because Christopher was asthmatic — what were the potential triggers for his asthma. It had nothing to do with his potential for anaphylaxis. His RAST test does not measure that. Your numbers can be high — doesn't mean you're going to be anaphylactic. So those were the guidelines on the things that he could

have a potential for. One of the things that came high was soybean, and soybean was in Enfamil. So the doctor automatically said, "Here's a perfect example — it's saying soybean, but he's been drinking Enfamil formula with no problem."

Q. And how about cheese — is one of the things—
A. Was his favorite meal.

Q. Explain — as a nurse — it came up high?
A. Right. Cheese, cheese mold, cheddar cheese — Christopher lived on cheese. Everything he ate, he put cheese on. Cheese was never a problem for Christopher, yet it came back elevated. Lobster came back elevated; he ate lobster without any problem. Every item that's on there he has consumed at some point in time without event — except for peanuts, and peanut came up high, but not the highest.

(*Exhibit A: Oct. 2, 2025 Deposition of Pamela Zack* at 99-102)(emphasis added)

Q. So if the defense...goes in the room, takes his blood, and he has a storming event similar to what you've seen recently, what will they see? Describe that, what will they see, what will they hear?
A. Initially he starts to get very red, like he's flushed. What a storming is is it's a parasympathetic reaction that forces you and fixates you into fight or flight, meaning your body doesn't ever come out of it unless there's some mechanical, medical way to take you out of it. He will get red, his heart rate will begin to climb, his blood pressure will begin to climb. His neuro system cannot communicate with his cardiovascular system. So his cardiovascular system is trying to get his brain to engage and get himself out of the situation, and he cannot. So he will begin to sweat profusely, and because he does breathe some on his own, he will start to buck the vent. If he bucks the vent, that means he's going to drive up his pH, he's going to drive up his carbon dioxide levels. We can't do blood gases, so I have no way of knowing now whether he's going to be acidotic. If he becomes acidotic, he can die — plain and simple as that. And it's criminal to even take a chance to put him through that unnecessarily. If you're telling me there's a benefit for my son or something else you're going to help us with, then by all means let's have a conversation an honest conversation. But I can tell you if this RAST test was so gosh darn important it was done when he was a year-and-a-half why didn't any of the experts, boy did we have a lot of them, ever want that test repeated?

Because there's nothing to come out of it. It's no way to improve his treatment, it's no way to forecast anything. From there you move on to skin testing, and he would never have been a candidate for skin testing for peanuts.

MR. CLARK: Okay. I don't have any other questions, but defense counsel opened up by expressing their empathy with Pam and Chris. If they really mean that, I would request that they reconsider pushing to take this blood test. You don't have to answer that now, but you can go back and huddle on that. Thank you very much.

(*Id.* at 103-107) Despite all this, and despite us simply wanting the blood draw as part of his routine annual draw so he is not needlessly pricked again, the defense will not agree to anything and instead wants an Order finding their rights have been violated.

Legal Discussion

I. Allowing the Defense Exam to be Videotaped but never Used is the Functional Equivalent of No Videotape and thus Violates *DiFiore v. Pezic*, 254 N.J. 212 (2023)

The Supreme Court in *DiFiore* overturned key points of the Appellate Division decision and allows Plaintiff to have a third party present to observe and/or make an audiovisual recording. The Court expressly "decline[d] to place the burden on the plaintiff to show special reasons why third-party observation or recording should be permitted in each case." *Id.* at 220. Rather, the Court stated the defendant should "move for a protective order under *R.* 4:10-3 seeking to prevent the exam from being recorded, or to prevent a neutral third-party observer from attending." *Ibid.* "Factors including a plaintiff's cognitive limitations, psychological impairments, language barriers, age, and inexperience with the legal system may weigh in favor of allowing unobtrusive recording and the presence of a neutral third-party observer. *Ibid.* (emphasis added) In fact, a close reading of *DiFiore* and the published article, *There is No Such Thing as an IME in New Jersey Injury Litigation*, shows the Court borrowed several of those concepts in its opinion. Clark, G.H. (2022) *There is no such thing as an 'IME' in New Jersey Injury Litigation*, *New Jersey Law Journal.* Available at: https://www.law.com/njlawjournal/2022/08/04/there-is-no-such-thing-as-an-ime-in-new-jersey-injury-litigation/?slreturn=20240719160844 (Accessed: 19 August 2024). There is no legitimate argument that this matter does fit all factors mentioned *supra* and thus Plaintiff has a right to video tape the examination and use it consistent with the Court Rules and Rules of Evidence.

Furthermore, the Supreme Court agreed that "video or audio recording, or a third-party observer...may in some circumstances be vital to preserving evidence of a DME." *Id.* at 232 (emphasis added). The Court found "a defense expert's written report is the only evidence of the

exam. And the report may, of course, include observations and findings...that are inaccurate." *Id.* (internal citations omitted). Despite the Supreme Court recognizing the obvious; that the video is evidence, the defense wants it barred from everything.

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

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

Id. at 233-34 (emphasis added). In fact, in *There is no such thing as an 'IME' in New Jersey Injury Litigation*, the author observed:

> A trial is a search for the truth. Cameras are ubiquitous in 2022. Police have to wear body cams, court proceedings are on the record, and most commercial establishments have surveillance cameras. There is no reason it should be any different when it comes to a litigation event as consequential as a defense medical exam where millions of dollars and the well being of vulnerable people are at stake. Leaving an unsophisticated plaintiff alone with a highly educated and paid medical doctor and simply trusting he will be honest about it all is not realistic and would result in a stark unfairness at trial. Switching the burden to the plaintiff to show the need for an observer and recording is not reflective of the reality of the situation and will cause unnecessary motion practice.

Clark, G.H. (2022) *There is no such thing as an 'IME' in New Jersey Injury Litigation, New Jersey Law Journal.* Available at: https://www.law.com/njlawjournal/2022/08/04

/there-is-no-such-thing-as-an-ime-in-new-jersey-injury-litigation/?slreturn=20240719160844 (Accessed: 19 August 2024)

"It is difficult to imagine, for example, how a third party who silently observes a dental examination could negatively impact the exam . . . [likewise] it is not immediately obvious how an unobtrusive recording device would call the validity of the examination into question in a way that the interpreter would not." *Id.* at 239. While neuropsychologists can raise concerns about the presence of third-parties and unobtrusive recording devices, they "cannot dictate the terms under which DMEs are held[.]" *Id.* at 220, 230, 241 ("As the Appellate Division correctly held, 'the expert assigned to conduct the Rule 4:19 examination "does not have the right to dictate the terms under which the examination shall be held."'") (internal citations omitted) (emphasis added)

Here, Defendants seek to circumvent *DiFiore* and do exactly what the Supreme Court says defense experts are not permitted to do: have their doctor dictate the terms of the DME. Under the factors set forth in *DiFiore*, every factor weighs in favor of having a third-party present for the examination and producing a video to be used as possible future evidence. *Id.* at 220 ("cognitive limitations, psychological impairments, language barriers, age, and inexperience with the legal system").

In addition there are scholarly articles which have addressed this issue:

> there is little research that addresses the effects of third party presence on forensic examinees more specifically . . . Although Section 9 of the Ethical Principles of Psychologists and Code of Conduct (EPPCC; American Psychological Association, 2002) references the general obligations of psychologists engaged in assessment activities, the code does not offer specific guidance to psychologists faced with the prospect of third party observers or facilitators. Similarly, treatment of third party presence during psychological evaluations in the Standards for Educational Testing and Psychological Assessment (American Educational Research Association, American Psychological Association, & National Council on Measurement in Education, 1999) is primarily limited to a discussion of the use of interpreters.
>
> . . . .
>
> Generally, concerns about the presence of third parties during psychological evaluations fall into one of four categories: (a) negative effects on the examinee's responses and participation, (b) interruption of the flow of information from the examinee to the examiner, (c) threats to the validity of conclusions that can be drawn from the evaluation, and (d) threats to the security (and future utility) of psychological assessment techniques and tests. All these concerns are legitimate and should lead examining psychologists to make decisions about the presence of third parties only after serious deliberation. Yet, none of these issues—alone or in

> combination—necessarily outweigh the legal, practical, and clinical reasons for allowing third parties to be present in some cases, nor do they offer a sufficient rationale for a general prohibition on third party presence.
>
> . . . .
>
> Third party participation in psychological evaluations is sometimes necessary, sometimes helpful, and sometimes required by law. Psychologists' deliberations about the presence of third parties should be logical and consistent, protect the security and future utility of psychological assessment instruments, and not unnecessarily compromise the rights of litigants who are undergoing evaluation.

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

Moreover, "[i]t is difficult to imagine, for example, how a third party who silently observes [Dr. Feinberg's] examination could negatively impact the exam." *Id.* The Court also states several factors which the Court is to consider, including Plaintiff's inexperience with the legal system.

Here, Defendant has not met their burden to show why the video evidence of the DME should be barred. There is a massive power imbalance between Dr. Feinberg and Christopher in this matter as Dr. Feinberg has likely been working for years as a defense expert who is compensated to disprove Plaintiff's claim. Christopher is unable to verbally communicate with Dr. Feinberg and cannot speak out for himself should Dr. Feinberg injure or otherwise cause Christopher distress. Dr. Feinberg has likely conducted thousands of exams and likely testified in court dozens or hundreds of times. This is the exact scenario where the Supreme Court envisions a third party and/or recording device being used. *See Id.* at 237-38 ("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 plaintiff's...inexperience with the legal system....."). Furthermore, as the Court points out, it is difficult to imagine how a silent third-party preserving truthful evidence should impact the exam whereas the alternative is subject Plaintiff, a bed-bound non-verbal patient being manipulated or otherwise engaging with a stranger who he did not choose to examine him–the exact scenario the Supreme Court stated as a reason to have a third-party present. Christopher is not going to be able to testify at the time of trial to the inaccuracy of Dr. Feinberg's report from the examination, but the video recording will exist to provide an unbiased and truthful account of what happened.

Finally, as to any possible argument that a videographer or other silent observers have the potential to disrupt an examination, such would be expressly contradictory to the Appellate Division's holding. *See DiFiore v. Pezic*, 472 N.J. Super 100, 130 (App. Div. 2022) ("We take judicial notice that the pervasive use of pocket-sized smart phones as cameras and audio recorders, they can be unobtrusively placed on a tripod with minimal effort").

For such reasons, it is respectfully requested the Court deny Defendant's motion for a protective order or in the alternative grant Plaintiff's proposed protective order attached hereto.

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

The Supreme Court no longer refers to examinations under *R.* 4:19 as "IME" nor "Independent" Medical Exams" but exclusively refers to such examinations as "Defense Medical Exams" or "DMEs." Dr. Feinberg, Defendant's expert, serves the defense law firm rather than being "independent." Every DME is either explicitly, or implicitly filled with bias as the Plaintiff is not the client; the defense law firm is. DME examiners have defense law firms as their clients and reward their examiners handsomely to conduct exams tailored to their clients' needs. Another doctor who routinely conducts DMEs testified in a trial:

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

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

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

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

Q. All right. Well how about the Medina case? Do you remember the Medina case from Essex County, December of 2008 when you were the defense expert and you testified that we had both defendants and maintained that the plaintiff had not sustained the herniation as a result of the accident and that her back pain was a result of degenerative changes/ Do you recall that case?

A. No, sir.

...

Q. Doctor, can you recall one case where you came to the court and testified that actually the disk bulge was related to the accident and that the plaintiff had suffered permanent injury? There's no cases like that. Are there?

A. If there was an annular tear and the patient had physical findings to go along with the mechanical nature of that, I would say it's a permanent injury. But if you are asking me name, date, case, courthouse, I can't tell you that sir.

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

Q. The better ExamWorks serves its clients, the client being people like [Defense counsel]'s law firm and defense law firms, the better you do and your family does. Isn't that right?

A. I don't really understand your question. But you're saying, if the stock goes up, my family does better? Yeah. That's the math. That's correct.

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

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

Q. Dr. Decter testified that when he touched the shoulder, he complained of pain all over the shoulder. Did that actually happen at the exam?

A. No. It did not.

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

...

Q. And Dr. Decter also testified that wherever you touched him on the body, he said, oh, that hurts, pain here, pain there. Did that ever happen at the exam?
A. No it did not.

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

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

...

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

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

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

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

(*Exhibit E: Trial Transcript of Catherine Miksic at 26:13-22; 27:3-14; 27:24-28:13*). There was a clear bias of the DME examiners coloring their testimony to serve their clients which was only able to be rebutted due to a third-party observing the exam. This doctor showed he was willing to alter his testimony, resulting in a censure, while plaintiff needed a third-party, who recorded and

took notes during the exam, to rebut the defense's doctor tailored testimony. This kind of thing happens all the time in defense medical exams and related testimony with numerous paid defense witnesses. A third party nurse to preserve and record the exam is necessary for fundamental fairness as is the use of such a recording.

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

Other doctors who conduct DMEs have testified they do not see such an intrusive nature from the recordings as well. Dr. Carnevale, submitted a certification in the *DiFiore* matter supporting the presence of a third party to observe and video record the exam. Dr. Carnevale has worked with ExamWork, a service which exists to provide DMEs to defense firms, on numerous occasions. He admits in this certification the defense exam is in fact an adversarial proceeding. He also concedes that a recording of the examination is not intrusive, does not interfere with his ability to conduct an examination and is an objective and unbiased tool to fairly and accurately memorialize what happened at the examination so it does not become a "he said" (doctor from, e.g., Yale) vs. "she said" (plaintiff, often low income, uneducated) situation. Dr. Carnevale certified in the *DiFiore* matter:

> 11. I have conducted several forensic examinations where the court has entered **Protective Orders consistent with the Policy Statement to ensure test security and intellectual property where the examination was recorded** by a cell phone or other similar device. In all of those exams, the mere presence of the recording device did not have any effect on subject's or my performance or the validity of the test results and my opinions.
>
> 12. A forensic neuropsychological examination conducted in connection with civil litigation as in this case is **unavoidably and inherently adversarial**. Accordingly, the manner in which the tests are administered by the **examiner can significantly impact the test results and the examiner's interpretation of those results**.
>
> 13. An audio recording **provides objective evidence to preserve exactly how the examination was conducted, the accuracy of the examiner's notes or recollections and the tones of voices**. If a Protective Order is entered

> consistent with the Policy Statement, there would be no violation of any ethics or standards.

(*Exhibit F: Affidavit of George J. Carnevale, Ph. D*). (emphasis added). Given the great evidentiary benefit of having the truth recorded and both the Court and another doctor testifying there is no intrusiveness as to the recording of the exam, Plaintiff has good cause to record the same and utilize it in this litigation should Defendants' expert serve an inaccurate report.

Without the use of the recording of the examination, it becomes a "he said" vs. "cannot speak" at the time of trial. Plaintiff will not be able to take the stand and testify regarding the differences between the examination and report. Evidence should not be a game played between the parties, a recorded evaluation removes these layers of bias and will present to the jury pure, unadulterated evidence which they can use to reach their verdict. Instead of seeking to preserve the truth of the exam, Defendant wishes to obscure the truth from Plaintiff, the Court, and future jury.

Despite arguments from defense, there is a clear unspoken rule between the defense firm and the examiner: if the defense does not like what the examiner's report says, defense firms will find another examiner. Some even say some defense exam companies themselves have been known to make "edits" to the reports. This could be potentially millions of dollars of lost revenue for an examiner if firms stop utilizing the examiner's services. Courts throughout this state have consistently denied defendants' motions for similar protective orders. This is true with both neuropsychological DME's and orthopedic DME's. (*Exhibit G - Prior Neuropsychological Examinations with Third-Party and Prior Orders*),

The law is about truth. The use of a smart-phone by a nurse recording a DME is unobtrusive and can only reveal the truth of what occurred during the examination. These recordings benefit Plaintiff, Defendant, the Court, and jurors as the recording shows what occurred during the exam without having to rely on the memory of parties who may be asked to testify months or years after the exam or may have trouble or inability recalling such events. This is exactly as the Supreme Court held:

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

Difiore, supra, 254 N.J. at 232-33 (internal citations omitted).

It is Defendants' burden to show why preserving the truth should not occur. There is no injustice in ensuring evidence presented to the jury is an unedited account free from bias. With regards to a third party using a smart phone to record the interactions, there is no argument any minimal intrusiveness outweighs the substantial evidentiary nature of providing an indisputable recording of the same. Leaving plaintiffs like Christopher, a non-verbal and bedbound patient unfamiliar with the adversarial litigation process, alone with a highly educated and paid medical doctor and simply trusting the Defendant's doctor will write everything down accurately and testify in an unbiased fashion about it all is not realistic and would result in a stark unfairness at trial. This is highlighted further by the fact Defendant wishes to bar the use of the recording of the examination at the time of trial or deposition–all but admitting they wish to hide key evidence in this matter. *Defense Certification* at 28(g). It is substantially unfair to seek that the video of such an examination could not be used at trial or deposition. Defendants basically seek to say "you can have the video but cannot use it for any of the reasons put forth in *DiFiore*" which is contradictory to the point of the video. Plaintiffs must be allowed to use the video to impeach or otherwise cross-exam Dr. Feinberg as that is the very point of its existence. As such, this portion of the order is essentially seeking "no recording" and therefore it is the Defendant's burden under *DiFiore* to show why such video should not be created. Defendants have not done so for the reasons stated *supra*.

For such reasons, it is respectfully requested the Court deny Defendant's motion for a protective order or in the alternative grant Plaintiff's proposed protective order attached hereto.

III. A Blood Draw will Reveal Nothing Relevant, Chris is at Risk of Repeated Storming, and He's the Only One Whose Rights Have Been Violated

Some background is needed with respect to Gourmet Kitchen's current motion so that the relevant facts can be put into proper context. Defendant Gourmet Kitchen previously filed a motion seeking to have Christopher's blood drawn to perform a Specific IgE/ RAST Test to test for: sesame, tree nuts, shellfish, soy, mustard, pine nut, birch and apple. The Court issued an Order dated September 15, 2025 granting the defendant's motion with the blood draw to take place within 30 days of the order. The Protocol attached to the Order, which was prepared by Gourmet Kitchen, states the blood is to be drawn by *a* professional phlebotomist, nurse etc. It does not say whether it is plaintiff or defendant who chooses the phlebotomist/nurse, just that a medical professional shall conduct the procedure.

When we reached out to Pam, Christopher's Mom and Caretaker, to schedule the blood draw we were advised that Christopher is experiencing neurostorming episodes. "Storming" episodes, also known as paroxysmal sympathetic hyperactivity (PSH), are episodes of sudden, repeated surges in heart rate, blood pressure, and body temperature following a traumatic brain injury (TBI). National Institute of Health, Identification and Management of Paroxysmal Sympathetic Hyperactivity After Traumatic Brain Injury 2020 Feb 25. Some potential external

triggers for neurostorming include: medication changes, body repositioning, environmental stimulation, like loud noises and alarms and self-care activities, including bathing and feeding. *Id.*

Pam fully explained Christopher's storming issues to defense at her second deposition on October 8, 2025 and why she wanted to wait a bit to have his blood drawn as in her medical experience the blood draw could trigger more episodes. After Pam's deposition we reached out to defense counsel and asked if they would agree to wait until he had his next blood draw to minimize the potential severe reaction that could occur. There was a back and forth between counsel with Gourmet Kitchen not willing to compromise and instead they filed this Motion to Enforce Litigant's Rights.

When we received Gourmet Kitchen's Motion we reached out to their counsel again numerous times by phone and email. We made every effort to come to an agreement so that The Court was not burdened with this. On October 29, 2025, in particular we spelled out again what we were proposing:

> We schedule the blood draw within 30 days, we use whatever nurse/ Phlebotomist that Pam chooses to take Chris' blood, the nurse/ Phlebotomist hands your nurse/ medical representative a vial of blood and you go off and get it tested for those specific items listed in the prior order.
>
> This way only one prick and you can get the vial tested in the lab you want.

(*Exhibit I: October 2025 emails regarding blood draw*)

Defense ignored us so we pointed out again by email that the above was exactly what they were seeking and the only compromise was that we would use a phlebotomist/ nurse chosen by Pam. *Id.* In reality though there is no ordered protocol indicating that the phlebotomist/ nurse that would prick Chris would have to be of the defenses' own choosing, so they do not have the right to such a demand. Defense could have put that in their proposed protocol but they did not. We still to this day have never received a phone call or email back from defense regarding this issue.

In short, the blood draw issue is moot. Plaintiff agrees the blood draw be taken within 45 days as part of Chris Popp's annual health exam and blood work at which time, Gourmet Kitchen's licensed medical professional will be present and will be handed a vial of blood to bring to Quest Diagnostics to test for the eight things set forth in the September 15, 2025 Order.

Conclusion

As to the defense medical exam issue, the defense request to limit or block the field of view of the camera should be denied. So too should the defense request to bar any use of it, which is like having no video. We agree to have one person video, a single third party observer,

lawyers not being in the exam room, and to provide the defense a copy of the videotape. We also agree with the defense request that they only be required to turn over non-privileged discoverable materials created in connection with the exam, and we will do the same.

As to the blood draw issue, it is respectfully requested the blood draw be taken within 45 days and as part of Chris Popp's annual health exam and blood work so as to minimize risk to him.

A proposed form of order reflecting the same is enclosed herewith. (*Exhibit: H Proposed Order*)

Respectfully submitted,

By: _____
GERALD H. CLARK
For the Firm

By: _____
STEPHANIE TOLNAI
For the Firm

cc: All Counsel (Via eCourts)