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Court Approval Needed to Tape Exams, Panel Determines

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Ruling in a case where it found "an avalanche of errors," an appellate court concluded that trial judges must give their approval before an independent medical examination of a plaintiff can be videotaped.

And a video recording of an IME must be disclosed to opposing counsel before trial, a unanimous panel of the Appellate Division, Second Department, said in [Bermejo v. New York City Health and Hospital Corp.](#), 23905/09.

The panel addressed an incident in which plaintiff's counsel, Patrick Hackett of the Queens-based Constantinidis & Associates, surreptitiously videotaped the testimony of physician Michael J. Katz and then disclosed the existence of the recording to the jury "in a way that maximized its dramatic effect."

That conduct precipitated a mistrial, the panel noted, and Hackett and his firm were ordered to pay the defense costs. The total and the apportionment between the lawyer and the firm will be determined after a hearing.

[Justice Sheri Roman](#) wrote the Second Department's Nov. 18 decision, which was joined by Justices [William Mastro](#), [Robert Miller](#) and [Joseph Maltese](#).

Roman criticized the "thoroughly intimidating" conduct of Queens Supreme Court [Justice Duane Hart](#) toward Katz. She said Hart accused Katz of lying more than 60 times and threatened to refer him to the Queens District Attorney's Office for perjury—despite the fact that there was no evidence of perjury—and declared that he "would like to put Dr. Katz out of the business of doing" IMEs.

Reversing Hart, the panel said the plaintiff could be re-examined by a different orthopedist of the defense's choosing. It remitted the matter to be heard by a different Supreme Court judge.

The case stemmed from a suit filed by Manuel Bermejo, an employee of J.P. Marble & Tile, who was working on a property owned by Amsterdam & 76th Associates when he fell from a scaffold.

Alleging a violation of Labor Law §240—New York's so-called Scaffold Law—Bermejo was awarded summary judgment against the defendants on the issue of liability.

Prior to the damages trial, Ibex retained Dr. Katz who conducted a IME of Bermejo in May 2011 and again in March 2013. Hackett was present for both IMEs, as was Yury Ramirez, a paralegal for Constantinidis & Associates who served as a Spanish language interpreter.

At trial, Dr. Katz testified during direct examination by Michael Reilly, who is of counsel to the Law Office of Andrea G. Sawyers in Melville and who represented Ibex at the trial level, that his first IME had occurred between 6 p.m. and 6:45 p.m.

Shortly thereafter, Hart halted the examination and told the jury to leave the courtroom because, he explained later, he had seen Ramirez reacting to the doctor's statement.

After the jury returned and the examination of Dr. Katz resumed, he said he was uncertain how long the second examination took, but in answering the judge's question said such an exam usually takes between 10 and 20 minutes.

Hackett then called his paralegal, Ramirez, to the stand. She testified that Dr. Katz's second exam had taken three minutes but did not know how long he had spent examining records.

Hackett then elicited on redirect that a video had been made of the examination.

After Hart excused the jury, Hackett admitted to making the video and said he had not disclosed it to defense counsel.

"We didn't because there's no need to do that, your honor," he said. Hackett said he did not intend to use the video until Katz "lied on the stand" about the length of the IME.

Reilly and Richard Mendelsohn, the attorney for Amsterdam, moved for a mistrial. During hearings on the motion, Mendelsohn argued that a mistrial was necessary due to Hackett's improper recording of the examination.

"And what is the bigger problem?" Hart responded. "Mr. Hackett's recording of your witness lying his whatever off?" The judge later remarked, "nothing beats a witness getting caught lying his whatever off."

Hart encouraged the parties to settle, suggesting that "I cannot sanction Dr. Katz. He is not a party. I can sanction the attorneys that called him up to \$10,000, which is my plan because you called him."

Hart eventually declared a mistrial. However, he did not grant the defense's motion to allow them to name another doctor for retrial, even though Katz had indicated that he wouldn't testify again voluntarily. Hart didn't sanction any of the attorneys.

Unusual Circumstances

On appeal, Roman wrote that other courts have found that there is no express statutory authority for videotaping medical examinations, and that requests to do so have been decided on a case-by-case basis.

She noted that the denial of permission to videotape physical examinations has been upheld by various appellate courts. This case law, she said, indicates that defense counsel is normally entitled to be present, but that "the permission to employ the additional measure of videotaping the examination will be granted only where the plaintiff establishes the existence of special and unusual circumstances."

Contrary to the assertions of plaintiff's counsel, Roman wrote that surreptitiously videotaping an examination without permission from the court or notice to the court or opposing counsel is not an "appropriate tool" or an activity that attorneys should feel free to engage in "all the time."

Likewise, she said, nothing in the law limits the number of examinations to which a party may be subjected, although after a note of issue has been filed, a subsequent examination requires demonstration of "unusual and unanticipated circumstances."

"In the present case, unusual and unanticipated circumstances warranting a new IME abound," Roman wrote. "Foremost among them is Dr. Katz's unavailability to the appellants as a witness, due to his refusal to appear voluntarily, which, in turn, resulted from the Supreme Court's repeated accusation that Katz 'lied' or committed 'perjury' at the first damages trial."

The judge wrote that Hart took "extraordinary efforts" to end Dr. Katz's career in the "medical/legal business."

Those efforts "intensified to the point that it apparently resorted to the unorthodox measure of conditioning the vacatur of a \$10,000 sanction against each of the appellants' attorneys upon their willingness to adopt the court's view that Dr. Katz committed perjury," she said.

But the Second Department said Dr. Katz "did not lie." Rather, he merely testified that he did not know how long his examination had taken and only estimated under the judge's impermissible prodding the customary length of an examination.

Plaintiff's attorneys insisted that the recording showed the examination had lasted only one minute and 56 seconds. But Roman said it could not be determined what happened before Hackett turned his recording device on and what happened when he turned it off.

Hart said in an interview with the Law Journal that he did not regret his conduct in the case. "The judges below are not always wrong," he said.

With respect to Roman's characterization of Hart as being "thoroughly intimidating" toward Katz, he said that Roman was essentially saying that he was being "tough."

"Gee, imagine me being tough on a guy who was lying in open court," Hart said. "What was I thinking?"

Hart said the panel was "absolutely wrong" when it accused him of saying he would drop a plan to sanction the defense attorneys if they admitted that Dr. Katz lied on the stand.

Roman noted that since the judge's condemnation of Katz, other courts have been presented with requests to replace him in conducting IMEs. The issue of videotaping IMEs also has generated several columns in the Law Journal (NYLJ, [Oct. 28, 2013](#); [Nov. 20, 2013](#); [Nov. 27, 2013](#); [June 3, 2014](#); [June 16, 2014](#); [Aug. 26, 2014](#)).

Meanwhile, Katz filed a defamation suit against three attorneys who had written about the case, claiming that his career "was destroyed overnight by an overzealous state court judge" and the attorneys he sued. The case was dismissed ([NYLJ, Jan. 2](#)).

Hart said that defense lawyers had thanked him for his handling of Dr. Katz. "The integrity of our system is based on witnesses coming to court and telling the truth," the judge said.

Andrew Garbarino, who is of counsel to Ruskin Moscou Faltischek, the firm that represented Dr. Katz in the defamation lawsuit, said of the panel's decision, "We are grateful that finally he's gotten some degree of vindication. He was not lying and he did not perjure himself."

Hackett could not be reached for comment. Gus Constantinidis of Constantinidis & Associates, who also appeared for Bermejo at trial, declined to comment on the decision.

Steven Ahmuty, Jr. and Timothy Capowski, partners at Shaub, Ahmuty, Citrin & Spratt, and Tiffany Maio, an associate with the firm, appeared for Ibex on appeal. Deirdre Tracey, a former associate with the firm, also worked on the case.

Joseph Covello, a former Second Department justice who is now a partner with Lynn, Gartner, Dunne & Covello, and Kenneth Gartner, who is also a partner with the firm, represented Bermejo on appeal. The attorneys representing the parties on appeal declined to comment on the decision.

Mendelsohn represented Amsterdam at the trial level and prepared the appellate brief in the case while he was of counsel at London Fischer. He is now of counsel at Malaby & Bradley.

The parties declined to comment. The case was settled for \$2.7 million in March before the Second Department issued its ruling.

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