

Court of Common Pleas



Lebanon County
Fifty-second Judicial District
400 South Eighth Street
Lebanon, PA 17042
(717) 228-4433

PRESIDENT JUDGE
JOHN C. TYLWALK

ASSOCIATE JUDGES
SAMUEL A. KLINE
BRADFORD H. CHARLES
CHARLES T. JONES, JR.

SENIOR JUDGE
ROBERT J. EBY

August 4, 2021

District & County Reporter System
c/o The Legal Intelligencer
American Lawyer Media
1617 JFK Blvd. – Suite 1750
Philadelphia, PA 19103

Dear Sir or Madam:

Attached is the Opinion I have authored in the case of ***Espinosa, et al. v. Luthercare, et al, 2019-02130***. This opinion may be of interest to you because it addresses the issue of witness mask-wearing brought to light by the COVID-19 pandemic.

Thank you for your attention regarding the above.

Very truly yours,

BRADFORD H. CHARLES, J.
BHC/pmd

Enclosure

IN THE COURT OF COMMON PLEAS OF LEBANON COUNTY,
PENNSYLVANIA

CIVIL ACTION – LAW

REBECCA ESPINOSA, Individually :
And as Administrator of the Estate of :
Margaret Lutz, deceased, :
Plaintiff :

No. 2019-02130

v.

LUTHERCARE, ET AL :
SPANG CREST, ET AL :
MUSADDIQ N. NAZEERI, M.D., ET AL :
Defendants :

ORDER OF COURT

AND NOW, this 28th day of July, 2021, in accordance with the attached Opinion, the Plaintiff's Motion to Compel the unmasked deposition of Dr. Musaddiq Nazeeri is GRANTED. Dr. Nazeeri is to appear for a deposition at a date and time selected by the Plaintiff. During the deposition, Dr. Nazeeri will not be permitted to wear a mask, but he will be able to be deposed while sitting in a room without anyone else present.

BY THE COURT:

BIMCU J.

cc: Justin Bernstein, Esquire// 334 W Front St., Media PA 19063
Andrew Foulkrod, Esquire// 1011 Mumma Rd., Ste. 201, Lemoyne
PA 17042
Court Administration *order only*

IN THE COURT OF COMMON PLEAS OF LEBANON COUNTY,
PENNSYLVANIA

CIVIL ACTION – LAW

REBECCA ESPINOSA, Individually :
And as Administrator of the Estate of :
Margaret Lutz, deceased, : No. 2019-02130
Plaintiff :
v. :
LUTHERCARE, ET AL :
SPANG CREST, ET AL :
MUSADDIQ N. NAZEERI, M.D., ET AL :
Defendants :

APPEARANCES:

Justin Bernstein, Esq.
SCHUSTER

FOR PLAINTIFFS

Karen Minehan, Esq.
MARSHALL DENNEHY

FOR LUTHERCARE/SPANGCREST
(Not participating in argument)

Andrew Foulkrod, Esq.
CIPRIANI & WERNER

FOR Musaddiq N. NAZEERI, M.D.

OPINION BY CHARLES, J. JULY 28, 2021

Can a witness demand to be masked during testimony? If so, does the “right” to wear a mask extend even when the lawyers are willing to conduct questioning via video conference while the witness is alone in a camera-surveilled room? We respond to these questions seriatim with “it is unlikely” and “absolutely not.” Because of these conclusions, we will

order that Dr. Musaddiq Nazeeri, (hereafter "NAZEERI") provide unmasked videotaped testimony in the above-referenced case.

I. FACTS AND PROCEDURAL HISTORY

This is a medical professional negligence action that was filed by Plaintiff on December 5, 2019. Named Defendants were NAZEERI and Luthercare/Spang Crest Nursing Facility (hereafter "SPANG CREST"). According to the Complaint, NAZEERI was a physician working as an employee or independent contractor for SPANG CREST during 2018.

According to the Complaint, Margaret Lutz (hereafter "LUTZ"), was admitted to SPANG CREST on January 19, 2018 suffering from cellulitis, breathing difficulties and acute coughing. The Complaint alleges that in early February, LUTZ developed a fever and stated that she did not feel well. Medications were prescribed. Very little improvement was noted. Moreover, LUTZ' blood sugar was found to be elevated. X-rays were obtained on February 12, 2018. The Complaint alleges that the x-rays, and all of the above information, was provided to NAZEERI.

According to Plaintiff, LUTZ' condition continued to decline. On February 14, 2018, LUTZ was transferred to the WellSpan Good Samaritan Hospital, where she was diagnosed with respiratory distress, pneumonia and sepsis. LUTZ died at the Good Samaritan Hospital on March 1, 2018.

Plaintiff's Complaint charges both SPANG CREST and NAZEERI with negligence. According to the Complaint, the death of LUTZ was caused by the failure of NAZEERI and/or SPANG CREST to properly evaluate and treat LUTZ while she was in SPANG CREST's facility.

The above-referenced matter is now proceeding through the discovery phase of litigation. Approximately one year ago, Plaintiff served a Notice of Deposition on NAZEERI for August 25, 2020. All parties agreed that NAZEERI should undertake a videotape deposition. On August 25, 2020, the deposition began as scheduled with NAZEERI and his counsel participating from NAZEERI's home. NAZEERI's counsel indicated that his client would not be removing his mask due to COVID-19 concerns. Plaintiff objected and requested that NAZEERI participate without any facial covering. An impasse developed. Eventually, Plaintiff decided to adjourn the deposition and re-schedule.

Negotiations commenced regarding the process by which NAZEERI's deposition should occur. Ultimately, Plaintiff agreed that NAZEERI could participate in a videotape deposition where he would be located alone in a room. NAZEERI continued to insist that his face be covered with a mask. Therefore, even this accommodation was not satisfactory.

On October 5, 2020, Plaintiff filed a Motion to Compel NAZEERI to appear for a videotape deposition and testify without wearing a mask. NAZEER opposes this motion. Both parties have filed briefs. For reasons that follow, we will grant Plaintiff's Motion to Compel.

II. DISCUSSION

In our system of justice, factfinders perform a special role; they have the difficult and weighty responsibility to determine truth. And in performing this function, finders of fact do not always have unassailable corroborating evidence upon which to rely. In fact, sometimes fact finders have little more than their visceral instinct as they determine credibility. As fact finders undertake a quest for the truth, one of the important tools in their toolbox is the demeanor of a witness. Pennsylvania's Superior Court aptly described how this tool can be so powerful:

[The factfinder] possesses an advantage not granted to [appellate courts]. He sees the parties and their witnesses face to face and observes their appearance and demeanor as they testify. We are restricted to the cold type of the record from which temperament and personality have been subtracted. Yet the demeanor of witnesses is the very touchstone of credibility; in the absence of reactions produced by other applicable tests, the appearance and demeanor of witnesses are the litmus by which the presence of truth is revealed. They are trifles light as air, imponderables, but for all that they are luminous integrants which ineluctably enter into the calculation by which trustworthiness is appraised. The spontaneous gesture, the lifting of an eyebrow, the shrug of the shoulders, the intonation of the voice, the flash of the eye, **the facial expression**, -these are a few of the vital and influential indicia of credibility which the [factfinder] observes and by which he is guided. The mental and psychological impact of these inarticulate expressions experienced by a [factfinder] form the basis for a conclusion which . . . 'will depend upon a judgment or intuition more subtle than can be objectively demonstrated.' Frequently they speak more eloquently and possess greater significance than the verbal utterance which they accompany, yet they cannot be reproduced upon the record submitted to the reviewing court.

Smith v. Smith, 43 A.2d 371, 583–84 (Pa. Super. Ct. 1945) (emphasis added) (citations omitted).

It is the duty of this Court to preserve assessment of demeanor as a tool to be used in determining credibility. We will not shirk this duty absent compelling exigent circumstances. NAZEERI argues that the COVID-19 pandemic constitutes an emergency that affords him with the “right” to wear a mask whenever and wherever he chooses. We disagree.

Without question, the COVID-19 pandemic has changed business as usual in the courts. Throughout the pandemic, this Court has employed robust COVID prevention measures in an effort to minimize the risk of infection to everyone involved in the process. For example, we have positioned parties and jurors six (6) feet apart, we have required most trial participants to wear masks, we have erected plastic and Plexiglas shields at strategic locations in the courtroom and our Court Attendants have liberally used disinfectant. Thus far, the protective measures we have used have been successful; no juror, lawyer or witness has complained that he/she contracted COVID because of participation in a trial.

As robust as our COVID precautions have been, from the outset of the pandemic we have never permitted a witness to wear a mask while testifying. It has always been the belief of this Court that fact finders should be able to see witnesses as they testify. Sometimes, facial expressions that accompany verbal testimony are of critical importance in assessing whether somebody is unsure, or perhaps even lying. Therefore, we have

required that witnesses provide testimony unmasked.¹

The wearing of masks in judicial proceedings has triggered a rapidly evolving body of decisional precedent. In *Commonwealth v. Delmonico*, 251 A.3d 829 (Pa. Super. 2021), our Superior Court declared that jurors can be required to wear masks. In *Nautica Entertainment v. Allied Debt*, 2020 WL 10356124 (D.C.Wyo, 2020), the court approved a process that required witnesses to appear in person and without masks given required social distancing and disinfectant. In *U.S. v. Tagliaferro*, 2021 WL 1225990 (S.D.N.Y. 2021), the Court stated:

“The witness at Tagliaferro’s trial will remain unmasked and completely visible to both him and the jury. Accordingly, the jury will be able to adequately assess credibility, and the witness, in turn, will be impressed with the gravity of the proceedings at which they testify.”

In a case very close to the one at hand, a plaintiff wanted to conduct a videotape deposition of a doctor. The doctor insisted on being masked. The plaintiff wanted the doctor to wear a Plexiglas shield through which his face was visible. The court described the issue before it as “novel” and triggered by a “once-in-a-century pandemic.” Although the court did not employ lengthy legal analysis, it did grant the plaintiff’s request that the doctor be required to wear a transparent mask during the deposition. See, *Tucker v. Princeton Community Hospital Association*, 2021 WL 864768 (S.D.W.Va. 2021).

¹ However, to afford witnesses with protection, we have positioned them behind Plexiglas shields.

All of the above cases emphasize the discretion that a trial judge possesses in determining how to manage court proceedings. In Pennsylvania, as it relates to proceedings such as depositions, trial judges have broad discretion to manage the discovery and issue appropriate orders as necessary. See, Pa.R.C.P 4001(a); *Kuntz v. Firth*, 264 A.2d 432, 433 (Pa. Super. 1970).

In this case, the Plaintiff has agreed to allow NAZEERI to testify while sitting in a room by himself. The Plaintiff is willing to set up an unmanned camera in a small conference area. The camera operator and both lawyers will be located outside of the room where NAZEERI will be testifying. This process not only facilitates social distancing, it provides NAZEERI with **complete social isolation**. We cannot perceive of any better COVID protection than the one offered by the Plaintiff.

In the opinion of this Court, NAZEERI's request to remain masked given the opportunity for social isolation is unreasonable. NAZEERI's risk of contracting COVID-19 while sitting alone in a disinfected room is virtually nonexistent. NAZEERI's objection to this process borders on nonsensical.

It is not the intent of this Court to depreciate the seriousness of the COVID-19 pandemic, nor do we advocate ignoring its existence. However, when a process is available, facilitated by technology, that will reduce the risk of infection to an almost *de minimus* level, such a process should be preferred over one that obscures a witness' facial expressions during testimony. We will therefore direct that NAZEERI testify at a videotaped

deposition while unmasked and in an isolated environment as proposed by the Plaintiff. An Order to effectuate this decision will be entered today's date.

