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Observers should be excluded from neuropsychological exams

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Trial judges are in a better position than members of the General Assembly to manage discovery in any given case, particularly with regard to cases involving alleged traumatic brain injury in which neuropsychological testing is sought by the defense.

Despite that, and in the face of established scientific objections to the practice of having such testing observed and Supreme Court Rule 215 that vests the trial court with the authority to set the conditions of such an examination, 735 ILCS 5/2-1003(d) attempts to require the presence of counsel "or such other person as the plaintiff may wish" to be present for the testing.

We will begin where we should always begin on matters of this kind: the Illinois Constitution. As a matter of state constitutional separation of powers, it is the courts that are vested with the judicial power under Art. VI, Sec. 1.

As stated by the Illinois Supreme Court in *Best v. Taylor Machine Works*, 179 Ill.2d 367, 443-444 (1997), in reviewing a version of Section 2-1003 that granted defendants expansive discovery regarding the medical history of the plaintiff "[e]valuating the relevance of discovery requests and limiting such requests to prevent abuse or harassment are, we believe, uniquely judicial functions. … We believe that section 2-1003(a) impermissibly interferes with the inherently judicial authority to manage the orderly discovery of information relevant to specific cases. Therefore, the statute violates the separation of powers clause of the Illinois Constitution."

Though predating the portion struck down by the court in *Best*, subsection (d) of 2-1003 violates the same principle and is, therefore, likely unconstitutional.

This is especially so because the Supreme Court has crafted Supreme Court Rule 215 that vests the authority in the trial court to regulate such exams by allowing it to "order such party to submit to a physical or mental examination by a licensed professional in a discipline related to the physical or mental condition involved[] … [and] [t]he order shall fix the time, place, *conditions*, and scope of the examination." (Emphasis added.) Those conditions should include who may observe or record the exam or whether observation or recording is appropriate at all. The General Assembly's mandate of observation or recording violates the power vested in the courts.

While in most situations having an observer or recording the examination will not interfere with the examination, that is not the case with regard to neuropsychological testing. In a policy statement of the American Board of Professional Neuropsychology regarding third-party observation and the recording of psychological test administration in neuropsychological evaluations in the journal Applied

Neuropsychological: Adult, 2016, Vol. 23, No. 6, 391-398, it concluded "[r]equests for TPO [third-party observation] frequently create an ethical dilemma for neuropsychologists as any observation or recording of neuropsychological tests or their administration has the potential to influence and compromise the behavior of both the examinee and the administrator, threatens the validity of the data obtained under these conditions by, and consequently limits normative comparisons, clinical conclusions, opinions, interpretations, and recommendations."

Heisenberg's uncertainty principle tells us that the act of observing quantum particles affects the particles being observed. So, too, is the case with observing or recording neuropsychological testing as it should come as no surprise to anyone that people's behavior changes when they know they are being filmed or recorded.

That change applies to the examiner as much as to the subject of the examination.

As a result, not disclosing the observation or recording to the subject does not cure the problem because the examiner will be aware.

In addition to concerns over test result validity created by third-party observers, there is the issue of test security which board certified clinical neuropsychologists of the American Board of Clinical Neuropsychology have articulated as "the rights of the publishers of the test materials not to have their work rendered useless by the potential public release of questions and answers of psychological and neuropsychological tests."

Neuropsychological tests are calibrated to detect malingering and symptoms of brain injury, and disclosure of the testing procedures can be used to prepare subjects and skew the results. The sequelae of traumatic brain injury are difficult enough to identify and assess without having the very tests used to ascertain those conditions compromised.

The purpose of discovery is to ascertain the truth while protecting against undue harassment and intrusion. Trial courts balance these concerns every day.

In assessing conditions of neuropsychological exams, the courts should be unconstrained by Section 2-1003(d) that improperly limits their authority in a way that the Supreme Court Rules do not. Sufficient protections exist in Supreme Court Rule 215 and observation of neuropsychological testing that will render the test to be conducted questionable at best, or meaningless at worst, is contrary to the purposes of discovery.
