

***Randy's Trucking v. S.C.***  
**2023 DJDAR 4589**

The trial court can order the production of raw data and audio recordings by the defendants' neuropsychologist and transfer raw data and audio recordings of the examination to the plaintiffs' attorney subject to the transmission protective order.

**FACTS/PROCEDURE**

Angela Buttram and Devon Robbins, a school bus passenger ("plaintiffs"), sued Blaine Fields, the tractor-trailer driver, and his employer, Randy's Trucking, Inc. ("defendants"), alleging personal injuries and emotional distress from a motor vehicle accident in which a tractor-trailer rear-ended Buttram's school bus. During discovery, Buttram claimed she suffered a severe traumatic brain injury due to the accident, and her associated symptoms prevented her from returning to work. Based on Buttram's claim that she suffered a traumatic brain injury, the defendants sought to have Buttram submit to a mental examination by their neuropsychologist. However, the parties could not agree on the ground rules for the examination. Plaintiff's counsel refused to stipulate to the examination unless the examining neuropsychologist provided them with all testing materials, raw test data, and an audio recording.

The defendants requested the trial court limit transmission of raw test data and test materials, copyrighted publications, or documents containing proprietary information to only a licensed psychologist or neuropsychologist. Instead, the trial court granted the motion to compel the mental examination of a tort claimant alleging traumatic brain injury but ordered the production of raw data and audio recordings of psychological examination by the defendants' neuropsychologist and transferred them to the claimant's counsel. In other words, the trial court denied the defendant's request to limit materials to only a licensed psychologist or neuropsychologist. However, the defendant's neuropsychologist ("Dr. Tara Victor") recused herself, stating she could not comply with the transmission order because doing so would compromise the security of the tests and cause her to violate her professional and ethical duties. Consequently, two other neuropsychologists the defendants contacted stated they also could not comply with the transmission order and that "no licensed neuropsychologist could comply with the order as written." So, the defendants moved for reconsideration of the transmission order, which the trial court denied.

Defendants filed a petition for writ of mandate in the appellate court to challenge the transmission order and the denial of their motion for reconsideration, arguing that the trial court abused its discretion. Defendants request the appellate court to direct the trial court to either modify the transmission order to require the transmission of the raw data and audio recording to the plaintiffs' retained psychologist or neuropsychologist rather than the plaintiffs' attorney or to vacate the order denying the motion for reconsideration and enter a new order granting the motion.

**HOLDING/DISCUSSION**

The appellate court denied the writ of mandamus relief, holding that the trial court had the discretion to order the production of raw data and audio recordings of psychological testing to the claimant's counsel.

The defendants argue that the trial court erred in ordering the examining neuropsychologist to transfer the raw data and audio recording to anyone but another licensed psychologist or neuropsychologist because the statute governing mental examinations does not authorize the examinee to request such materials from the examining party. Additionally, psychologists would not agree to perform a mental exam if they must break their contractual obligation with test vendors to maintain the confidentiality of test materials and violate the clear ethical standards they must comply with in their medical fields. Therefore, the defendants assert that such disclosure would cause Dr. Victor to violate her ethical and professional duties as a licensed neuropsychologist, and the raw data and examination questions were of no use to plaintiffs' counsel other than to utilize it improperly to corrupt the process by preparing future clients using the copyrighted questions.

In opposing the motion, the plaintiff's counsel offered to sign a protective order making the data available for use only in this case and only for review by the counsel's team and experts, with the data to be destroyed at the conclusion of the case. Furthermore, plaintiffs assert they have a right to an audio recording of the examination, including cognitive testing materials, because they had a right to ensure that the examiner does not overstep their bounds during the examination. Since the plaintiff's counsel cannot be present, transferring raw data and full audio recording is the only way to protect that right. Plaintiffs rely on Carpenter v. Superior Court (2006) 141 Cal.App.4th 249 [45 Cal.Rptr.3d 821], but that case did not decide whether the examiner's ethical and professional obligations precluded disclosing the test questions and the examinee's answers to the examinee.

However, the appellate court recognized that the trial court has the discretion to order the disclosure of such materials even if no statute authorizes it. The court reasoned under Code Civ. Pro., § 2032.610, such an order is not required; however, the materials were needed to cross-examine the defense's expert witnesses effectively,<sup>1</sup> and a protective order addressed concerns about test security and professional integrity. Based on the record, the trial court reasonably could find that plaintiffs had a legitimate need for the raw data and audio recording, and the concerns about maintaining test security would be satisfied with a protective order because Dr. Victor did not state that those obligations would be violated if a protective order were issued. Therefore, the appellate court found no abuse of discretion and denied the writ of relief.

Nevertheless, the defendants urge the appellate court to create a bright-line rule limiting the transmission of neuropsychological and psychological testing materials, raw test data, and audio recordings of examinations to licensed neuropsychologists or psychologists. However, the court believes the Legislature needs to codify the expert-to-expert limitation advocated by defendants. The court recognizes concerns that a protective order is insufficient to protect test security and that no neuropsychological or psychological expert will comply with such an order.

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<sup>1</sup> (Evid. Code, § 721, subd. (a)) and (Code Civ. Proc., § 2032.530, §§ 1085, subd. (a), 1086).