

United States Court of Appeals for the Federal Circuit

IN RE COMPLAINT NO. 23-90015

Before MOORE, *Chief Judge*, PROST and TARANTO, *Circuit Judges*.

PER CURIAM.

ORDER

On September 25, 2024, Judge Newman filed a Motion for Reconsideration of the Judicial Council's Order of September 6, 2024 (Motion). Judge Newman attached a report dated September 17, 2024 prepared by Dr. Aaron G. Filler (Filler Report) which, according to Judge Newman, "*conclusively* establishes that Judge Newman does not suffer from any mental disability that impairs her ability to fulfill the duties of her office." Mot. at 3 (emphasis added). On September 30, 2024, the Judicial Council referred the motion to this Committee for its consideration.

I. Expert Reports

The Filler Report makes a number of claims about methods for diagnosing cognitive impairment and, in particular, about the use of particular imaging studies in making such a diagnosis. To aid the Committee in its consideration of the Filler Report, the Committee retained three experts to review the report and provide opinions on the assertions made in it. The Committee received reports from Dr. James M. Noble, Professor of Neurology at Columbia University Irving Medical Center (Exhibit A), Dr.

Jonathan DeRight, a clinical and forensic neuropsychologist, (Exhibit B), and Dr. Jason Johnson, Associate Professor of Radiology and BioMedical Imaging and Chief of Neuroradiology at Yale University (Exhibit C). These reports detail significant concerns about the Filler Report and the reports of Dr. Ted Rothstein and Dr. Regina Carney, on which Dr. Filler relied.

A. Dr. Noble's Expert Report

Dr. Noble is a Professor of Neurology at Columbia University Irving Medical Center, appointed in the Taub Institute for Research on Alzheimer's Disease and the Aging Brain, and Clinical Core Leader and Co-Director of the National Institute on Aging. Dr. Noble's report summarizes: "There are major problems, errors, and/or oversights, in each of the evaluations of Drs. Rothstein, Carney, and Filler." Noble at 5. Dr. Noble concludes: "In my professional opinion, based on the information that is available, in the standard of practice it cannot be said that [Judge Newman's] cognition is normal. A diagnostic workup including neuropsychological testing should have been recommended." *Id.* at 22.

1. Problems with Filler Report

According to Dr. Noble, Dr. Filler's evaluation has "major errors." *Id.* at 10.

a. A CT Perfusion scan is not a substitute for neuropsychological testing.

Dr. Noble explains that, in contrast to the assertions in the Filler Report, "[n]o brain imagining, including a CT Perfusion, can serve as a substitute for a comprehensive clinical assessment of cognitive impairment which includes a thorough history, standard examinations, and neuropsychological testing." *Id.* at 12. "CT Perfusion can only demonstrate that a region of the brain is effectively

receiving blood. And even an area of the brain effectively receiving blood can still be dysfunctional.” *Id.* at 13. In addition, “CT perfusion is not part of any guidelines for use in evaluations of cognitive aging disorders such as MCI [mild cognitive impairment] or dementia, or for Alzheimer’s disease or related dementias.” *Id.* at 16–17. Dr. Noble provided his opinion that, “[i]n my own experience as a specialist in dementia for many years, the approach Dr. Filler took is simply neither a standard nor acceptable clinical diagnostic approach in the field.” *Id.* at 13.

b. Dr. Filler mislabeled the parts of Judge Newman’s brain.

Dr. Noble also identifies a more specific error in Dr. Filler’s reliance on the CT Perfusion scan. Dr. Filler labeled one image from the scan with two arrows pointing to spots which he says show “High Focal Blood Flow” in the left and right “Hippocampal Region[s].” Filler at 1. According to Dr. Filler, this is significant because “a very high rate of effective perfusion of the hippocampal region” corresponds to “high capability for integrative thought, memory and structured creative professional expression.” Filler at 13. Dr. Noble explains, however, that the spot on the scan labeled by Dr. Filler is *not* the hippocampus:

“[T]he hippocampus/hippocampal regions are several centimeters away from the area highlighted by Dr. Filler. It is anatomically not possible for the hippocampus to be where he says it is, and is not even visible on the image he shows.”

Id. at 17.

c. Dr. Filler’s interview of Judge Newman was subjective and non-standard.

Dr. Noble explains that Dr. Filler’s interview with Judge Newman was a “subjective,” “non-standard approach” “not generally established or accepted in the field as a reasonable substitute for standard neuropsychological testing.” *Id.* at 11.

2. Problems with Rothstein Report

Dr. Noble opines that Dr. Rothstein’s reliance on Judge Newman’s self-reporting and failure to consider collateral source information about Judge Newman’s behavior “is a major flaw and substantially undermines any conclusion he could draw.” Noble at 5. In addition, while Dr. Rothstein relied on a Montreal Cognitive Assessment (“MoCA”) that he administered, Dr. Noble explains that the “MoCA was incorrectly scored.” *Id.* Judge Newman’s score should have been reported as 21/25, and that score, “when placed in context for expected performance for her age (95yr), education (25yr), and sex (female) combined places her at approximately the 16th percentile for all peers.” *Id.* at 5–6. Dr. Noble explains the memory portion of Judge Newman’s MoCA results (in which she could recall only one of five words after several minutes) “represents a major concern and indicates the need for further evaluation.” *Id.* at 9. Indeed, “[t]he most common finding in MCI [mild cognitive impairment] and early Alzheimer’s disease is exactly this pattern—forgetting what was just learned.” *Id.*

3. Problems with Carney Report

Dr. Noble opines that Dr. Carney’s 11-minute screening test taken together with Dr. Rothstein’s MoCA and the affidavits from court staff “should at the very least have prompted a recommendation for further evaluation of

Judge Newman such as comprehensive neuropsychological testing.” *Id.* at 10.

4. Neuropsychological testing is needed.

“Cognitive screening examinations, most of which take just minutes to complete, are no substitute for hours-long comprehensive neuropsychological testing.” *Id.* at 10. Dr. Noble concludes “Neuropsychological testing would also be the best tool to inform the likelihood that she would be able to perform her job as a judge.” *Id.* at 21.

B. Dr. DeRight’s Expert Report

Dr. DeRight is a clinical psychologist, diplomate (i.e., Board Certified) in the specialty of Clinical Neuropsychology from the American Board of Professional Psychology, a clinical supervisor for clinical psychology at George Washington University, an approved forensic examiner for competency to stand trial and mental sanity evaluations, a qualified Baseline Assessment Program provider for the NFL Concussion settlement Program, and an approved evaluator for the NCAA Concussion Medical Benefits Settlement Program.

Dr. DeRight, like Dr. Noble, identified problems with the evaluations conducted by Dr. Filler, Dr. Rothstein, and Dr. Carney. His report details his conclusion that Dr. Filler’s “opinion was not based on standard, reliable, and accepted methods to diagnose cognitive impairment,” his “examination did not address all possible causes of cognitive impairment,” and his “conclusion that no further testing is needed was premature and did not give proper weight to obvious signs of possible impairment.” DeRight at 1.

1. Problems with Filler Report

Dr. DeRight explains, “[t]here are standard and accepted methods to assess for cognitive impairment, and

simply administering a Perfusion CT scan is not one of them.” *Id.* at 5. “Perfusion CT is not sensitive enough to elucidate the presence of cognitive problems on its own.” *Id.* at 8. “The diagnostic criteria for major or mild neurocognitive disorder (i.e., ‘dementia’) in the DSM-5-TR involve neuropsychological testing or another qualified assessment (which would not be brain scan by itself).” *Id.* at 11. “Neuropsychological assessment is the cornerstone of measuring cognitive abilities and is the expected avenue for exploring potential cognitive deficits as they relate to a potential workplace problem.” *Id.* at 13.

Dr. DeRight also explains that Judge Newman has medical conditions and takes medications that have a high risk of associated cognitive impairment, and Dr. Filler’s examination failed to address other possible causes of cognitive impairment. *Id.* at 1, 19–20.

In Dr. DeRight’s view, “Dr. Filler’s opinion about Judge Newman’s abilities based on a comparison of her activity during his oral arguments in front of her in 2019 and 2022 and his interview of her in 2024 is highly subjective, unscientific, and unreliable.” *Id.* at 3. It is not “an objective cognitive test,” “not a scientifically validated way to measure cognitive abilities” and “is not in line with guidelines in the field for assessing mild cognitive impairment or dementia.” *Id.* at 6.

2. Problems with Rothstein and Carney Reports

Dr. DeRight explains that Dr. Rothstein’s “brief cognitive screening measure,” *id.* at 24, (the MoCA) was only “partially administered,” *id.* at 26. “Such simple assessments of cognitive functions are not sufficient to assess a phenomenon as complex as decision-making and need to be completed by complementary neuropsychological assessment exploring the different skills involved in decision making ability.” *Id.* at 26 (quoting T. Tannou et al., *Added*

value of functional neuroimaging to assess decision-making capacity of older adults with neurocognitive disorders: protocol for a prospective, monocentric, single-arm study (IMAGISION), BMJ OPEN, 11(9), e053549 (2021)). According to Dr. DeRight, Dr. Rothstein’s testing indicated that “Judge Newman exhibited significant problems with memory recall,” *id.* at 27, and Dr. DeRight opined that the results provided “evidence of memory problems that indicate the need for further testing,” *id.* at 28.

“Dr. Rothstein’s conclusions did not match his findings. He administered part of a cognitive screening measure, and the part that was administered indicated significant memory concerns.”

Id. at 28.

Dr. DeRight also points out flaws in Dr. Carney’s evaluation. He explains that the Modified Mini-Mental Status Exam (3-MS) administered by Dr. Carney is “a screening measure” that “is not appropriate for definitive and comprehensive exploration of cognitive difficulties in a fitness for duty exam.” *Id.* at 29. He concludes: “Dr. Carney’s examination of Judge Newman did not include comprehensive and reliable cognitive tests appropriate for Judge Newman’s educational attainment, and Dr. Carney’s conclusion is based on insufficient and incomplete information.” *Id.* at 30.

C. Dr. Johnson’s Expert Report

Dr. Johnson is a board-certified diagnostic radiologist with a certificate of added qualification in neuroradiology following a fellowship in diagnostic neuroradiology at Massachusetts General Hospital/Harvard Medical School. He is currently an Associate Professor of Radiology and

Biomedical Imaging at Yale University and the Chief of Neuroradiology.

Dr. Johnson identifies errors in Dr. Filler's report. Like Dr. Noble, he explains that Dr. Filler mislabeled images of Judge Newman's brain. Dr. Filler provided an image with arrows labeling "High Focal Blood Flow" in the left and right "Hippocampal Region[s]." Dr. Johnson explains that "what Dr. Filler has designated with his arrows are not the hippocampi." Johnson at 2. Instead, the image used by Dr. Filler "is an image of a slice of the brain at a position higher (closer to the top of the head) than the level of the hippocampi." *Id.* Dr. Johnson goes on to explain that the red areas in the image marked by Dr. Filler "do not reflect blood flow to the hippocampi," and in fact "elevated relative cerebral blood flow to this degree would be pathologic if observed in the hippocampus." *Id.*

Dr. Johnson also "disagree[s] with Dr. Filler's assertion that a Perfusion CT examination can be utilized to rule out apparent cognitive dysfunction." *Id.* at 4. In his professional opinion, "[t]he use of Perfusion CT to exclude cognitive dysfunction is not considered as a reasonable standard of care in clinical practice." *Id.* at 5. In his opinion, the likelihood that Judge Newman "has a cognitive dysfunction should be considered unchanged by this examination." *Id.*

* * *

The Committee directs Judge Newman to provide any written response to these expert reports no later than 9:00 a.m. on April 8, 2025. The Committee believes that a written response will be sufficient for the Committee's consideration of the points presented by Judge Newman's Motion. To the extent Judge Newman believes that additional process preceding that written response is warranted, the Committee directs Judge Newman to make a submission to the Committee specifying and justifying any requests for

such additional process. That submission is due by 9:00 a.m. on February 20, 2025.

II. Medical Records

The Committee previously ordered Judge Newman to produce all medical records reviewed by Dr. Filler. *See* Oct. 21, 2024 Order at 8. Dr. Filler concluded that “none of Judge Newman’s medical conditions revealed by her records are ultimately contributory or relevant to her current mental state, and none suggest cognitive decline or neurological deficits.” Filler at 18. He summarized Judge Newman’s doctor visits and hospitalizations over a three-and-a-half-year period and provided a “Problem List as of August 22, 2024,” which includes 20 medical problems. *Id.* at 22–23.

Dr. Filler concluded that thousands of pages of Judge Newman’s medical records detailing serious medical conditions are not “relevant to her current mental state, and none suggest cognitive decline or neurological deficits.” Filler at 18. At the same time, however, he relied on the assessment in one of those medical records: “The overall current assessment of her One Medical Group providers as of 7/31/2024 is: ‘Able to carry on normal activity; minor signs or symptoms of disease.’” *Id.* at 24 (omitting Dr. Filler’s bolding and underline). The Committee continues to believe that, to properly evaluate the reliability of Dr. Filler’s opinions, which are explicitly based on her medical records, the Committee must have access to all of the medical records Dr. Filler reviewed.¹

¹ As just one example, the medical record stating “minor signs or symptoms of disease” and “able to carry on normal activity” does not identify what disease(s) this doctor was evaluating and what normal activities were contemplated.

The expert reports of Dr. Noble and Dr. DeRight reinforce the need for the medical records. They both explain that Judge Newman’s medical conditions and certain medications prescribed for her could cause or contribute to cognitive impairment. Noble at 19 (“Dr. Filler did not focus on several important medical problems, each of which could contribute to cognitive impairment” and “[s]everal medications in her history have known cognitive side effects”); DeRight at 19–20 (several of Judge Newman’s medical conditions are “associated with high-risk cognitive impairment”). To assess the impact these conditions have on cognitive capacity and to test Dr. Filler’s categorical rejection of these medical conditions as potential contributors to cognitive impairment, the Committee must be able to review the same records reviewed by Dr. Filler. *Cf.* Noble at 19 (“Because these records were not provided directly for my review, I am unable to determine further if these may be contributing factors.”).²

The Committee’s conclusion that it should have access to records considered and quoted by a proffered expert should not be surprising. As the Committee has explained, no decision-making body, including this Committee, can

² There appears to be inconsistency in Judge Newman’s self-report of her medical conditions to her different experts, which may be clarified by the records. *Compare* Filler at 18 (“Judge Newman denied . . . fainting episodes, and records do not reveal any such episodes”) *with* Carney at 4 (“[Judge Newman] recalled a single event of syncope in April of 2023”); *cf.* DeRight at 17 (quoting scientific literature: “In a fitness for duty evaluation, the employee’s self-report should not be taken at face value, and the evaluator ‘should consider all sources of information, and identify or obtain additional data from others or from the documents.’”).

accept a proffered expert opinion without taking steps to evaluate the reliability of that opinion. It is well established that courts play a vital role in assessing whether an expert's proffered opinion is reliable and sufficiently well-grounded even to be admitted into evidence, much less to be ultimately credited. See FED. R. CIV. P. 26(a)(2)(B); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993) (“[U]nder the [Federal] Rules [of Evidence] the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.”).

Federal Rule of Civil Procedure 26(a)(2)(B) requires that an expert report must contain “the facts or data considered by the witness in forming [the proffered opinions].” Fed. R. Civ. P. 26(a)(2)(B)(ii). “[T]he intention is that ‘facts or data’ be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients. The disclosure obligation extends to any facts or data ‘considered’ by the expert in forming the opinions to be expressed, not only those relied upon by the expert.” FED. R. CIV. P. 26(a)(2)(B) Advisory Comm. Notes (2010).

“[T]he prevailing interpretation of the rule came to be that counsel should expect that any written or tangible data provided to testifying experts will have to be disclosed.”

8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2031.1 (3d ed. 2010).

As the Supreme Court has made clear:

[I]n federal court . . . an expert witness must produce all data she has considered in reaching her conclusions.

Biestek v. Berryhill, 587 U.S. 97, 104 (2019).³

Although the Federal Rules of Civil Procedure do not apply to this proceeding, the Committee believes that the principles above provide a familiar and common-sense approach for the Committee to fulfill its duty in evaluating an expert report submitted to it. Judge Newman chose to provide the medical records to her expert, Dr. Filler, who reviewed them, reached conclusions based on them, summarized them, and at times quoted from them in his report. She asks this Committee to accept his opinion. She cannot now shield these records from the Committee.⁴ For these reasons, Judge Newman’s proposal to preclude the Committee from reviewing the medical records is not acceptable. Dec. 2, 2024 Resp. at 16–17.

The Committee again orders Judge Newman to produce all medical records reviewed by Dr. Filler.

³ See also, e.g., *In re Pioneer Hi-Bred Int’l, Inc.*, 238 F.3d 1370, 1375 (Fed. Cir. 2001) (“[Rule 26] proceeds on the assumption that fundamental fairness requires disclosure of all information supplied to a testifying expert in connection with his testimony.”); *Reg’l Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 717 (6th Cir. 2006) (“Rule 26 creates a bright-line rule mandating disclosure of all documents . . . given to testifying experts.”).

⁴ Contrary to Judge Newman’s assertion, the Committee is not “an opposing party.” Dec. 2, 2024 Resp. at 15. The Committee is the investigative body charged with the sad task of “determin[ing] the full scope of the potential . . . disability” and providing a recommendation to the Judicial Council. Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules) Rule 13(a).

III. Public Release of Materials

Throughout these proceedings, Judge Newman has demanded that all filings be made public.⁵ The Committee would have preferred to maintain the confidentiality of the proceedings to spare Judge Newman a public vetting of her mental capacity. Nevertheless, Judge Newman has insisted on public disclosure. In response, consistent with maintaining the integrity of the proceedings, the Chief Judge, with the agreement of the Committee, has acquiesced in releasing materials to the public in batches and has indicated an intent to continue to do so. *See* July 8, 2024 Order; Dec. 3, 2024 Order.

Now, consistent with Rule 23(b)(7) and Rule 23(b)(8), the Chief Judge, with the agreement of the Committee, unseals and makes public—with only limited redactions⁶—all filings and orders subsequent to the Judicial Council’s September 6, 2024 Order. These materials, including this

⁵ *See, e.g.*, June 28, 2024 Ltr at 1; June 12, 2024 Ltr (“sunlight is the best disinfectant;” Judge Newman “wishes to have all actions taken against her made public to the maximum extent possible”); Sept. 13, 2023 Ltr at 2 (“the public has a right to access Judge Newman’s response in a timely fashion and form its own conclusions”); *see also* Dec. 2, 2024 Br. at 2 n.1; Mot. at 2 n.1; Aug. 14, 2024 Br. at 2 n.1; July 8, 2024 Ltr. at 1; May 29, 2024 Ltr. at 1; Sept. 19, 2023 Ltr. at 1 n.1; Aug. 21, 2023 Br. at 1 n.1; July 12, 2023 Ltr. at 1 n.1; July 5, 2023 Ltr. at 1 n.1; June 15, 2023 Ltr. at 1; May 25, 2023 Ltr. at 3 n.6; May 9, 2023 Ltr. at 3.

⁶ The notes from Dr. Filler’s interview of Judge Newman and additional images from the CT perfusion scan have not been unsealed because they include medical records Judge Newman may object to having released.

order and its attachments responding to Judge Newman’s motion, are being released pursuant to Judge Newman’s express written request that any response to her motion be made public. Mot. at 2 n.1 (“Pursuant to Rule 23(b)(7). . . Judge Newman requests and consents to the release of this filing and *the Committee’s and Council’s response thereto.*” (emphasis added)).⁷

Other than the redaction of witness names, all redactions in these documents either were requested by Judge Newman (in documents she submitted) or have been applied by the Committee consistent with protecting the material Judge Newman herself redacted.

Although the Committee has acquiesced in these redactions for purposes of releasing materials today, the Committee believes there is a substantial question whether the redactions applied by Judge Newman are justified or whether further disclosures should be required under Rule 23(b)(8) “in the interest of assuring the public that the judiciary is acting effectively and expeditiously in addressing the relevant complaint proceeding.” Rule 23(b)(8). The problem is that the selective redactions Judge Newman has applied to the Filler Report present a one-sided and

⁷ This request is consistent with Judge Newman’s practice throughout these proceedings of requesting in advance public release of any response to her filings. *See, e.g.*, May 29, 2024 Ltr. at 1 (Judge Newman request “public release of . . . *any Order or other communication issued in response thereto.*”); Aug. 13, 2023 Ltr. at 2 n.1 (“Judge Newman consents (subject to necessary redactions) to the public release of the present letter and *any Order or other communication issued in response thereto.*”); July 12, 2023 Ltr. at 1 n.1 (“As with all other submissions to the Special Committee . . . we respectfully request . . . the public release of *any Order or other response to the present submission.*”).

arguably distorted account of Dr. Filler’s summary of Judge Newman’s medical records. Judge Newman generally chose not to redact entries that presented normal results. *See, e.g.*, Filler at 21 (“Myocardial perfusion scan . . . Normal”). She redacted other entries that, if not redacted, might present a different overall picture.⁸ Experts have opined that some of the redacted medical conditions and redacted medications may be related to cognitive impairment.⁹ Noble at 19; DeRight at 19–20.

The redaction of this material from the Filler Report (and from the expert reports released today)¹⁰ results in a one-sided public disclosure of Judge Newman’s relevant medical history that may lead to public misunderstanding of information relevant to the Committee’s task.

⁸ On December 2, 2024, Judge Newman provided the Committee with a redacted version of our October 21, 2024 order and asked for public release of that version. Today we release that version, in which Judge Newman permitted release of the following: “Dr. Filler reports a number of diagnosed health problems as of November 2022 affecting multiple organs (kidney, lung and heart),” Oct. 21, 2024 Order at 7 n.2. We will go no further in characterizing the redacted material than Judge Newman has at this time expressly permitted.

⁹ As Judge Newman explained, she did not provide Dr. Filler with medical records that she deemed irrelevant, such as those from her ophthalmologist. Nov. 22, 2024 Newman Decl.

¹⁰ The expert reports of Dr. Noble, Dr. DeRight, and Dr. Johnson have been redacted consistent with Judge Newman’s redactions in the Filler Report.

Given that concern, and consistent with Judge Newman's repeated demands that all relevant material be made public, the Committee orders Judge Newman to respond no later than 9:00 a.m. on February 20, 2025 to address whether the redacted material (except for witness names) may be unsealed.

IT IS ORDERED THAT:

- (1) To the extent Judge Newman believes that any additional process beyond a written response from her is warranted, she must submit her views in writing no later than 9:00 a.m. on February 20, 2025, as described above;
- (2) Judge Newman must produce all medical records reviewed by Dr. Filler no later than 9:00 a.m. February 20, 2025;
- (3) Judge Newman's response regarding the Committee's request to unseal the redacted materials (except for witness names) in this matter is due no later than 9:00 a.m. on February 20, 2025; and,
- (4) Judge Newman's written response to the Committee regarding the attached exhibits and their relevance to the pending Motion is due no later than 9:00 a.m. on April 8, 2025.

SO ORDERED: February 7, 2025.