2012 WL 8170765 (Ariz.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Arizona.
Pima County

Ernest H. BLACKBURN, Personal Representative of the Estate of Billie Jo Blackburn, on behalf of the Estate of Billie Jo Blackburn, Plaintiff,

v.

ENSIGN SABINO, L.L.C., a Nevada limited libility company doing business as Sabino Canyon Rehabilitation and Care Center; Bandera Healthcare, Inc. California corporation; the Ensign Group, Inc., a Delaware corporation; Ensign Facility Services, Inc., a Nevada corporation; Christine Jones, Administrator; Cornestone Hospital of Southeast Arizona, L.L.C., a Delaware limited liability company; Cs Healthcare Arizona, L.L.C., a Delaware limited liability company; Cornerstone Healthcare Group Holding, Inc., a Delaware corporation, Christine Hansen, Chief Executive Officer/Administrator and John Does 1-250;, Defendants.

No. C20101401.
June 29, 2012.

(Oral Argument Requested)
(Court Reporter Requested)

Plaintiff's Response to Cornerstone Defendants' Motion to Preclude Certain Testimony of J. Black, Rn, Ph.D.

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(Assigned to Hon. Scott Rash).

Plaintiff hereby responds to, and opposes, the Cornerstone Defendants' motion to preclude certain opinions of Plaintiffs expert, Joyce Black, RN, Ph.D. Dr. Black is qualified to offer expert opinions with respect to all matters on which she has been disclosed to testify, including regarding nutrition, nursing administration (including staffing), CNAs, failure to follow physician orders, and the

I. FACTUAL BACKGROUND.

On April 17, 2008, Billie Jo Blackburn was discharged from Tucson Medical Center and admitted to Cornerstone Hospital for continued nursing services and rehabilitation. During her admission to Cornerstone Hospital, Mrs. Blackburn suffered from physical and mental impairments that rendered her unable to protect herself from the **abuse**, neglect and exploitation of others. As such throughout her admission to Cornerstone Hospital, Mrs. Blackburn was a vulnerable adult as defined by A.R.S. § 46-451 (A)(10). PSOF ¶¶ 4, 6, 7. [1]

Mrs. Blackburn was 68 years old and had a history of hypertension, peripheral vascular disease and chronic obstructive pulmonary disease. Mrs. Blackburn was unable to ambulate and was non verbal. She was noted to be dependent upon the facility staff for all of her activities of daily living She was able to consume small amounts of food orally but received nutrition primarily through percutaneous endoscopic gastrostomy (PEG) tube. Upon admission, Mrs. Blackburn was also noted to have a Stage II pressure sore (1.7cm x 1.5cm) to her coccyx PSOF ¶¶1 5, 10.

Thus, throughout her admission to Cornerstone Hospital, the nursing staff was well aware of Mrs. Blackburn's risk for the development and worsening of pressure sores. Nursing staff was also aware of Mrs. Blackburn's presenting medical conditions, as well as her compromised physical state They knew or should have known that Mrs. Blackburn was dependent on the nursing staff for he's activities of daily living as well as for her overall health, safety and well-being. Accordingly's Cornerstone Hospital had the duty to provide adequate and appropriate nursing services to Mrs Blackburn, including relating to pressure sores. PSOF ¶¶8, 75, 84, 85. Nevertheless, Defendants failed to comply with their duties and obligations and, as a result, by the time Mrs. Blackburn was discharged from Cornerstone Hospital just two short months later, on July 2, 2008, the coccyx pressure sore had become a horrific Stage IV pressure sore (with possible osteomyelitis) that measured 6 cm x 9.4 cm x 1.7 cm (depth). Cornerstone's own chief clinical officer admitted that this was significant wound, PSOF ¶¶11, 89, 90.

In order to prevent the worsening of the pressure, Defendants had to provide Mrs. Blackburn with a number of interventions. For example, basic nursing care interventions such as, at a minimum, urning and repositioning a patient such as Mrs. Blackburn every two hours must be done to provide appropriate pressure relief. Based on the numerous omissions that were found in Cornerston, Hospital's records, this intervention was not consistently provided to Mrs. Blackburn. Rather, it appears that Mrs. Blackburn was turned and repositioned only a handful of times. In fact, Mrs. Blackburn's daughter testified that nine times out of ten, the family would have to go find someone and then wait for them to come to turn Mrs. Blackburn. Mrs. Blackburn's husband became so frustrated and concerned with the lack of turning and repositioning provided to his wife that, later uring her admission, he made a schedule so the family could see exactly when things were being one. PSOF ¶¶ 16, 126-143.

The nursing staff at Cornerstone Hospital also failed to consistently follow physicians' orders with respect to treatments for the pressure ulcer to Mrs. Blackburn coccyx. For instance, on April 17, 2008, Mrs. Blackburn's physician ordered that duoder's be applied to her sacrum every Monday, Thursday and PRN (as needed). On April 28, 2008, Mrs. Blackburn physician ordered that xerofoam be applied to her pressure ulcer with the dressing changed daily. However, there are multiple instances where the nursing staff failed to comply with the treatment orders and by April 29, 2008, the wound was 6.5 centimeters by 5.5 centimeters. PSOF ¶¶ 97- 112.

To make matters worse, the wound care nurse, Rachel Robitaille, was on vacation approximately two weeks during May, 2008. While Ms. Robitaille or the management of Cornerstone should have made plans for wound care coverage during her time away from the facility, it appears that was not done. As a result, during this time period, Defendants provided little, if any, wound care to Mrs. Blackburn. No dressing change is documented for May 1, 2, or 4, 2008 per physician's order dated April 28, 2008 for xerofoam change daily. Mrs. Blackburn is also not documented to have received wound care treatment or dressing change on May 7, 2008. PSOF ¶¶ 113 - 119.

1 On May 8, 2008, there was a new physician's order for Accuzyme to sacrum, decubitus, BI means twice per day. Dr. Schilling expected the nursing staff caring for the patient to carr the May 2008 order and apply Accuzyme twice per day to Mrs. Blackburn's wound. However, again failed to follow through with ordered care and treatment. There is no dressing change documented in Mrs. Blackburn's clinical chart for the a.m. shift on May 11, 2008 per physican order dated May 8, 2008 for Accuzyme to sacrum, decubitus, BID. And on May 12, 2008, Blackburn's wound had clearly progressed. The wound measured 8 cm x 9 cm; there was a modera amount of exudates; there was a foul odor; and the wound bed was black and yellow. This pattern not providing physician ordered treatments (as well as failing to keep her physician advised of the wound's deterioration) continued throughout Mrs. Blackburn's admission which obviously had extreme consequences for her. PSOF ¶¶ 120- 125.

As stated, by the time Mrs. Blackburn was discharged from Cornerstone Hospital, on July 2, 2008, this wound had become a large, gruesome Stage IV pressure sore (with possible osteomyelitis) The deterioration and worsening of the pressure sore to Billie Jo Blackburn's coccyx was the result of the multiple failures on the part of Cornerstone, including but not limited to: failing to properly assess and track the wound, failing to provide appropriate turning and repositioning for pressure relief, and failing to adequately follow physicians' orders with respect to wound treatments. [2] PSOF ¶¶ 11, 12 13,15,16,91,94,138,143.

Furthermore, nutrition and hydration play a very important role in the prevention and treatment of pressure ulcers. However, the staff at Cornerstone Hospital failed to ensure that Mrs. Blackburn received adequate nutrition. Such failures are evidenced by various laboratory reports indicating that she suffered from low albumin and total protein. The nurses failed to advise the dietitian that Mrs Blackburn was not receiving nutrition because her feeding tube was shut off when she was in her wheelchair. Defendants also never documented granulation tissue for Mrs. Blackburn which will only occur in patients who have adequate nutrition and adequate offloading. PSOF ¶¶ 144 - 148 Defendants' failure to provide Mrs. Blackburn with adequate nutrition negatively impacted her health and wellbeing.

II. PLAINTIFF'S EXPERT, JOYCE BLACK, RN, Ph.D.

Joyce Black, RN, Ph.D. is an advanced-degreed nurse and eminent authority on wounds and wound care. She is overwhelmingly qualified to render all of the opinions about which she has been disclosed to testify. In order to qualify as an expert, she does not need to have visited Cornerstone Hospital, worked as a nurse in Arizona, or taught nursing programs in Arizona. *See Bogard GMC Co. v. Henley*, 2 Ariz. App. 223, 225, 407 P.2d 412, 414 (1965) (citations omitted) (and expert's personal observation of the facts is not required). Dr. Black's stellar qualifications include: an Associates degree in nursing; Bachelors degree in nursing; Masters degree in medical surgical clinical nurse specialist; Ph.D. in nursing, in connection with which her dissertation focused on ulcer healing (Exhibit 1, Deposition of Joyce Black, RN, Ph.D. at pp. 25:22 - 29:8); (Exhibit 2, Affidavit of Joyce Black, RN, Ph.D. at 1¶ 1). Dr. Black is a certified wound care nurse. (Exhibit 1, Deposition of Joyce Black, RN, Ph.D. at p. 49:24 - 50:16). Dr. Black has trained nursing students, hospital staff, nursing home staff, as well as presented lectures to state nursing home inspectors on the care and treatment of wounds. (Exhibit 2, Affidavit of Joyce Black, RN, Ph.D. at I¶ 1); (Exhibit 1, Deposition of Joyce Black, RN, Ph.D. at p. 51:3-16). Dr. Black is an associate professor in the College of Nursing at the University of Nebraska Medical Center which includes Clarkson Hospital and University Hospital. She teaches the senior nursing students in critical care; she teaches physical therapy student pathophysiology; and she has eight to twelve graduate students engaged in various pressure ulce research projects. This teaching encompasses clinical teaching which includes bedside nursing. (Exhibit 1, Deposition of Joyce Black, RN, Ph.D. at pp. 37:22-38:18; 42:21-25; 43:16-44:16; 47:22 - 48:10; 48:21 - 49:16). Dr. Black also teaches wound care in the earlier courses. (Exhibit 1. Deposition of Joyce Black, RN, Ph.D. at p.49:10-16).

Dr. Black is the co-chair of education for the National Pressure Ulcer Advisory Panel, as well as the primary investigator in a randomized control trial of mist therapy for a deep tissue injury versus standard of care. She has also conducted other research projects including on intertriginous dermatitis which is skinfold breakdown. Dr. Black is a research consultant for Methodist Hospital. In addition Dr. Black teaches pressure ulcer prevention and treatment at various facilities, in connection with which she works with the wound care group, as well as gives presentations for entire hospitals and reviews the facilities' policies and procedures. (Exhibit 1, Deposition of Joyce Black, RN, Ph.D. at pp. 38:19 -40:4 51:2; 51:3-16; 120:8-24). She is also on the skin and wound team for the University of Nebraska Medical Center which reviews every case of acquired pressure ulcers in the hospital. (Exhibit 1, Deposition of Joyce Black, RN, Ph.D. at pp. 40:19 - 41:12; 44:17 - 45:2). In addition, Dr. Black is the editor of a medical surgical textbook. (Exhibit 1, Deposition of Joyce Black, RN, Ph,D. at pp. 59:1-23; 60:10-18). Dr. Black has conducted studies and authored numerous articles related to wounds and wound care. (Exhibit 1, Deposition of Joyce Black, RN, Ph.D. at pp. 130:17 131:1; 133:3-22; 138:138:1-21); (Exhibit 2, Curriculum Vitae attached to Dr. Black's Affidavit).

Dr. Black has trained certified nursing assistants (CNAs). (Exhibit I, Deposition of Joyce Black, RN, Ph.D. at pp. 78:8 - 79:10). Dr. Black also has a number of credits in nutrition and he doctoral dissertation included looking at nutritional aspects that would cause wounds not to heal (Exhibit 1, Deposition of Joyce Black, RN, Ph.D. at p. 79:14-21). Dr. Black has also served as charge nurse. (Exhibit 1, Deposition of Joyce Black, RN, Ph.D. at p. 80:4-6). Indeed, Defendants' own wound expert, Elizabeth Hiltabidel, RN, testified that she has met Dr. Black at several conferences where she (Dr. Black) has presented. Nurse Hiltabidel also candidly acknowledged that 5 Dr. Black is “well-known” in the wound and wound care community. (Exhibit 4, Deposition of Elizabeth Hiltabidel, RN at pp. 14:20 - 15:3). In addition, Dr. Black has previously qualified as expert and testified in Maricopa County Superior Court in other APSA cases. (Exhibit 5, 8/16/06 Trial Minute Entry in *Frieh v. Life Care Centers of America, Inc.*, CV2003-023180).

III. LAW AND ARGUMENT

A. The Arizona Adult Protective Services Act ("APSA") is a Statutory Cause of Action Distinct From the Medical Malpractice Act ("MMA"), Enacted for its Own Particular and which is not Limited by other Provisions of Law, and, Therefore, is Not Subject to the Precepts of MMA, Including to Limit the Testimony of Plaintiff's Expert, Joyce Black, RN, PH.D

A.R.S. § 12-2604 does not apply to this matter because Plaintiff's action does not include a medical malpractice claim. Rather, the instant case is brought pursuant to the Arizona Adult Protective Services Act (APSA), A.R.S. § 46-451 et seq. Plaintiff filed a one count complaint alleging **abuse**/neglect/exploitation pursuant to APSA, A.R.S. § 46-455. The complaint does not include a medical negligence claim. Similarly, Plaintiff's disclosure statements do not include a claim pursuant to Arizona's medical malpractice statute. In the absence of a claim pursuant to the Medical Malpractice Act, A.R.S. § 12-2604 does not apply and cannot provide a basis to preclude opinions of Dr. Black.

Section 46-455 of APSA is entitled "Permitting life or health of an incapacitated or vulnerable adult to be endangered by neglect; violation; classification; civil remedy; definition." Section A refers to "a person who has been employed to provide care." *Id.* Section B permits the filing of an action in superior court "against any person or enterprise that has been employed to provide care..." *Id.* Section O states: "A civil action authorized by this section is remedial and not punitive and does **not limit and is not limited by any other civil remedy or criminal action or any other provision of the law.** Civil remedies provided under this title are supplemental and not mutually exclusive." *Id.* (emphasis added). Thus, the MMA rules and statutes Defendant seeks to apply to this APSA matter are not applicable.

In *Denton v. Superior Court, 190* Ariz. 152, 157, 945 P.2d 1283 (1997), the Court held that Arizona's survival statute (A.R.S. section 14-477), does not apply to APSA claims. In reaching this conclusion, the Court noted Section O (then listed as M) prohibited the limitation of APSA by any other provision of law. 190 Ariz, at 156, 945 P.2d at 1287. While *Denton* involved the applicability of the survival statute to APSA, the Court's logic follows for the applicability of MMA as well. The legislature enacted APSA out of concern for **elder abuse** due to Arizona's substantial **elderly** population. Id. Given the intent of the legislature, Defendants may not rely on MMA in an effort to disqualify an otherwise qualified expert.

In *Estate of McGill v. Albrecht*, 203 Ariz. 525, 57 P.3d 384 (2002), the Arizona Supreme Court granted review by special action of a matter involving an action against two doctors and the behavioral health facilities and service providers by the estate of a sixty-four year old woman who died of cardiac arrest due to neurotoxicity and other causes. Plaintiffs brought both MMA and APSA claims against the doctors and the service providers. The trial court granted the defendants' motion for summary judgment and dismissed the APSA claims, leaving only the MMA claims for trial. The Supreme Court in *McGill* held that the plaintiffs could proceed to trial on the APSA claim. The Court's reasoning is instructive here. First, the Court observed that APSA, adopted in 1989, created a statutory civil cause of action with the legislative purpose of protecting Arizona's **elderly** population. *Estate of McGill,* 203 Ariz, at 528, 57 P.3d at 387. Citing Denton v. Superior Court, the McGill Court observed that the statute was intended to increase the remedies available to and for **elderly** or vulnerable people harmed by their caregivers. *Id.*

Similar to the instant case, *McGill* involved a vulnerable adult placed in the care of the defendants. As a result of the relationship between caregiver and caretaker, the plaintiffs alleged that Mrs. McGill was negligently medicated and that this negligence, constituting **abuse** and neglect as those terms are defined in APSA, resulted in her death. Here, Mrs. Blackburn was a dependent and vulnerable adult who required assistance with her activities of daily living. Defendants undertook responsibility for her care. Unlike the *McGill* case, however, Plaintiffs here did not also bring a claim under MMA.

The fact that Defendants are licensed health care providers is not pertinent regarding the applicability of A.R.S. § 12-2604. As stated, APSA was designed to protect vulnerable and **elderly** adults from neglect and **abuse** by their care custodians. More often than not, these care custodia's were providing, or promised to provide, some level of nursing or medical care to those in their care. If MMA governs the ability of vulnerable adults to proceed against care custodians in situatio's where any medical

care or nursing care was provided, virtually no APSA action will survive. As the *McGill* court pointed out, if MMA were the exclusive remedy in a situation such as the instant case, the great majority of caregivers to the incapacitated would be immune from APSA actions and PSA would be a toothless tiger." 203 Ariz. at 530, 57 P.3d at 389.

Other jurisdictions agree that where the foundation of the action is **elder** or vulnerable adult **abuse**, the procedural requirements for professional negligence causes of action give way to the procedural requirements for that state's **elder** and vulnerable adult protection statutes. *Country Villa Claremont Health Care Ctr. v. Superior Court*, 120 Cal. App. 4th 426, 15 Cal. Rptr. 3d 315 (2004) (procedural statute for punitive damages claim in professional negligence against health care provider did not apply to this action); *Integrated Health Care Servs., Inc. v. Lang-Redway*, 840 So.2d 974 (Fla. 2003) (complaint that nursing home violated its statutory duty to provide adequate and appropriate health care to resident did not plead a medical malpractice cause of action against a healthcare provider, and thus Plaintiff was not required to comply with statutory pre-suit requirements for filing a medical malpractice action.).

Having established that this matter is not a medical malpractice action, A.R.S. § 12-2604 regarding qualifications of experts in medical malpractice actions does not, and cannot, apply to this APSA action. A.R.S. § 12-2604 is entitled, "Expert witness qualifications; **medical malpractice actions.**" (emphasis added). Section A of A.R.S. § 12-2604 begins "[i]n an action alleging medical malpractice..." (emphasis added). In construing statutes, the court's "primary goal is to discern and give effect to the legislature's intent." *State v. Ponsart*, 224 Ariz. 518, 520, 233 P.3d 631, 633 (Ct. App. Div. 2, 2010) (citation omitted). The most compelling evidence of legislative intent is the language the legislature chose to use in the statute because it is "the best and most reliable index of a statute's meaning." *See Bentley v. Building Our Future*, 217 Ariz. 265, 270, 172 P.3d 860, 865 (Ct. App. 2008) (citations omitted). Language which is clear and unequivocal "is determinative of [a] statute's construction..." *State v. Ponsart*, 224 Ariz, at 520, 233 P.3d at 633. Thus, if the statutory language is unambiguous, it is applied without resorting to other methods of statutory interpretation." *Id. See also Backus v. State*, 220 Ariz. 101, 104 ¶ 11, 203 P.3d 499, 502 (2009) ("the best and most reliable index of a statute's meaning is its language and, when the language is clear and unequivocal, it is determinative of the statute's construction."); *Canon Sch. Dist. No. 50 v. W.E.S. Constr, Co.*, 177 Ariz. 526, 529, 869 P.2d 500, 503 (1994); ("Where the [statutory] language is plain and unambiguous, courts must generally follow the text as written."); *Porter v. Spader*, 225 Ariz. 424, 426-27, 239 P,3d 743, 745-46 (Ct. App. 2010) ("the most compelling evidence of the legislature's intent is the language it has chosen to use in the statute.").

With respect to A.R.S. § 12-2604, our legislature used the very specific and unambiguous term "medical malpractice actions". If the legislature had intended to include claims brought under APSA, it would have, and indeed should have, stated as much. Instead, the legislature limited A.R.S. § 12-2604 to medical malpractice actions. For instance, the legislature could have stated that A.R.S. § 12-2604 is applicable in an action alleging medical malpractice **or in any other action against a licensed health care provider.** Instead of doing so, the legislature specifically restricted A.R.S. § 12-2604 to medical malpractice actions only. This clear and unequivocal language of the statute is determinative. *See State v. Ponsart*, 224 Ariz. at 520, 233 P.3d at 633.

Finally, the Arizona Supreme Court case of Seisinger v. Siebel, 220 Ariz. 85, 203 P.3d 483 (2009) removes any doubt that A.R.S. § 12-2604 is strictly limited to medical malpractice cases. The Seisinger Court, in ultimately concluding that A.R.S. § 12-2604 does not violate the separation of powers doctrine but is not retroactive, noted:
Thus,as the court of appeals noted, § 12-2604 (A) "precludes a witness who is otherwise qualified under Rule 702 from testifying **in a medical malpractice case** unless he or she meets the additional criteria set forth in the statute, *Seisinger*, 219 Ariz. at 167 ¶ 13, 195 P.3d at 204.

Seisinger, 220 Ariz. at 90, 203 P.3d at 488 (emphasis added). In noting the "obvious intent of the statute" the Supreme Court stated:
It It is designed to limit which physicians are qualified to express expert opinions. *See Minutes of Meeting: Hearing on S.B. 1036 Before the H. Comm. On Health*, 47th Leg., Reg. Sess. (Ariz. Mar. 23, 2005) (statement of Sen. Robert Cannell, co-sponsor of measure containing § 12-2604(A), that "physicians do not want retired physicians to testify against them").

Seisinger 220 Ariz. at 90, 203 P.3d at 488. The Court went on to state in a footnote:
A co-sponsor of the bill that contained § 12-2604(A) stated that his goal was "to improve the **malpractice climate in our state,**" encourage physicians to practice here, and lower **medical malpractice rates.** *Minutes of Meeting: Hearing on S.B. 1036 Before the H. Comm. On Health,* 47th Leg., 1st Reg. Sess. (Ariz. Mar. 23, 2005 (statement of Sen. Robert Cannell).

Seisinger, 220 Ariz. at 92 n.2, 203 P.3d at 490 n.2 (emphasis added).

Indeed, the *Seisinger* Court's analysis of A.R.S. § 12-2604 is stated primarily in the "medical malpractice" context. *See, e.g.*, 220 Ariz. at 87, 203 P.3d at 485 ("When the defendant in a medical **malpractice action** is a specialist, § 12-2604(A) requires an expert witness on the standard of care to have devoted a majority of his professional time in the year preceding the incident at issue to active clinical practice or teaching in the same specialty." [emphasis added]); 220 Ariz. at 95, 203 P.3d at 493 ("The statute thus did not merely alter court procedures, but rather changed the substantive law as to what a plaintiff must prove in **medical malpractice actions.**" [emphasis added]); 220 Ariz. at 96 203 P.3d at 494 ("We therefore conclude that insofar as § 12-2604(A) specifies the kind of expert testimony necessary to establish **medical malpractice,** it is substantive in nature and does not offend the separation of powers doctrine." [emphasis added]). *Seisinger v. Siebel,* including the legislative history cited therein, confirms that A.R.S. § 12-2604 applies solely to medical malpractice cases (and, thus, not to this APSA case).

In sum, APSA covers persons and enterprises, including licensed healthcare providers, in their role as care custodians for the **elderly** and vulnerable population. The holdings in *Denton* and *McGill* establish that APSA is not subsumed by MMA. Pursuant to *Seisinger*, A.R.S. § 12-2604 applies in medical malpractice cases only. Because Plaintiffs brought the instant action pursuant to APSA and not MMA, the rules and statutes governing MMA actions, including A.R.S. § 12-2604 regarding expert qualifications, do not apply to this matter. As such, A.R.S. § 12-2604 cannot serve to preclude certain of Dr. Black's opinions.

B. Dr. Black's is Nevertheless Oualified Under A.R.S. 12-2604.

Even if Dr. Black was required to satisfy the requirements of A.R.S. § 12-2604 in order to render expert opinions against Defendants, she is qualified to do so. A.R.S. § 12-2604 provides, in pertinent part, that in order to qualify as a standard of care expert in a medical malpractice action, the person, in the year immediately preceding the incident at issue, must have spent a majority of his of her professional time engaged in either or both of the following: "A. The active clinical practice of the same health profession as the defendant... . B. The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession as the defendant. A.R.S. § 12-2604(A)(2)(a) & (b). Dr. Black testified that in 2007 and 2008, the majority of her professional time was spent either in the practice of clinical nursing or in teaching nursing. (Exhibit 1, Deposition of Joyce Black, RN, Ph.D at pp. 60:2-9; 166:4-11). Her education credentials, experience and current employment as described above meet the requirements of A.R.S. § 12-2604 and more than qualify her to render opinions regarding the issues on which she has been disclosed to testify.

Defendant's criticisms of Dr. Black's opinions relating to staffing go merely to her credibility and not the admissibility of her opinions. See Defendants' Motion at p. 6. In the first place, in clinical teaching, Dr. Black is involved in staffing. (Exhibit 1, Deposition of Joyce Black, RN, Ph.D. pp. 101:12 103:12). Secondly, experts may base their opinions on facts or data in a case of which the expert has been made aware. Rule 703, Ariz. R. Evid. Such facts include those testified to by other 1 witnesses. *Bogard GMC. v. Henley, supra* 2 Ariz. App. at 225, 407 P.2d at 414 (citations omitted). Here, the facts on which Dr. Black relied in forming her staffing opinions include the testimony of Defendants' own employees (which constitute party admissions, see Rule 801, Ariz. R. Evid.), as well as DHS surveys which include employee interviews.

Staff voiced concerns that more people were needed to do the job and that it was difficult to complete all of their tasks given the workload. Staff also believed it was difficult to provide the care they wanted. In fact, staff brought their concerns to the

attention of CEO Christine Hansen and chief clinical officer Robin Nandin. Ms. Nandin addressed the matter with Ms. Hansen who, in turn, raised it with the corporate office. PSOF ¶¶ 166 - 188. Obviously the issue was not resolved because inadequate staffing was a factor in the decision of some nurses to resign which, in turn, only compounded the problem. Moreover, a number of the leadership members at the Tucson facility left during the first year or two of Cornerstone's ownership. PSOF ¶¶ 49, 189, 199. Still, Cornerstone Healthcare Group did not put a hold on new admissions as evidenced by the fact that the facility went from 21 residents to 32 residents between April 17 and May 1, 2008, PSOF ¶¶ 201, 202.

. The Department of Health Services confirmed staffing problems at Cornerstone. A Decembe 19, 2008 survey concluded that the chief clinical officer failed to provide the number of necessar nursing personnel to provide nursing care to the patients on multiple days in July as evidenced b patients not being fed, medications not being administered timely, wound care treatments not bei done, and call lights not being responded to in a timely manner. Four nurses who were interviewe acknowledged that nurses had been assigned six or seven patients in the past and that it was difficult to provide all patients' needs when there were so many patients assigned with high acuity levels. Eight o ten patients expressed concerns with slow response to call lights, especially on the evening shift and one patient and his wife stated they waited 45 minutes for someone to respond. Two forme Cornerstone Hospital employees stated that assignments were heavy on the 100 unit and frequently the nurses were unable to complete all the nursing tasks assigned. DHS determined that the hospital's quality management program failed to evaluate the patients' quality of care in wound care, call light response time, and sufficient staffing to meet patient needs. PSOF ¶¶ 38, 50. Dr. Black relied o this evidence, which formed the bases of her opinions. (Exhibit 1, Deposition of Joyce Black, RN Ph.D. at pp. 100:21 - 101:8; 168:8-14). This evidence properly forms the bases of Dr. Black's staffin opinions.

With respect to hospital CEOs, the parties have stipulated to the dismiss of CEO Christin Hansen and, thus, Defendants' arguments in this regard are moot. *See* Defendants' Motion at p. 6 Regarding directors of nursing, see Defendants' Motion at pp. 4, 6, the duties and responsibilities of such individuals (known at Cornerstone Hospital as a chief clinical or nursing officer) include, among other duties, the overall management and supervisory responsibility for the nursing department. PSOF ¶ 72. As an actively employed nurse and nursing instructor (with advanced degrees), Dr. Black satisfies the requirements for testifying against Defendants' nursing officer.

adition, Dr. Black, as a nurse, is entitled to render opinions regarding CNAs. Se Defendants' Motion at pp. 4, 6. (Exhibit 1, Deposition of Joyce Black, RN, Ph.D at pp. 60:2-9; 78:8 79:10; 166:4-11). The duties of a nurse include all aspects of nursing care such as assessments; medication administration, patient care, wound dressing changes, taking report from the outgoing nurse; visiting the patient and introducing oneself; determining whether the patient is to receive antibiotics and whether the patient will be going to physical therapy or having wound care. PSOF ¶ 65. Nurses also supervise and monitor CNAs. Moreover, while CNAs provide activities of daily living including turning and repositioning patients, the ultimate responsibility lies with the nurse. PSOF ¶¶ 59, 63. In addition to having trained CNAs (Exhibit 1, Deposition of Joyce Black, RN, Ph.D at pp. 78:8 - 79:10), Dr. Black, as a nurse, would be in a supervisory role over CNAs and, therefore, is qualified to render opinions regarding CNAs.

As for nutritionists and/or dieticians, see Defendants' Motion at pp. 4, 6, Dr. Black's opinions regarding Defendants' negligence related to nutrition are from a nursing perspective. For instance, Dr. Black testified that nurse never notified the dietitian that Mrs. Blackburn was not receiving nutrition via the feeding tube when she was in a chair: “When she was up in the chair for all those hours, the tube feeding was shut off. And the nures never notified the dietitian....The nurses should have told the dietitian that the nutrition she thinks is going in is not going in because the patient's in the chair. That never happened.that's really, to me, the biggest nursing failure related to nutritional standard of care is that one.” PSOF ¶¶ 147,148; (Exhibit 1, Deposition of Joyce Black, RN, Ph.D. at pp. 154:19 - 155:20); (Exhibit 3, Plaintiffs Third Supplemental Disclosure of Expert Witnesses and Opinions). Dr. Black's opinions in this regard are appropriate.

With respect to “the propriety of the orders given by physicians”, see Defendants' Motion at p. Dr. Black's opinions relate to nursing staffs failure to follow physician's orders. The standard of care for nursing staff requires that they follow physician's orders, including with respect to wound car treatments. PSOF ¶ 103. Plaintiff has outlined numerous instances where Defendants'

staff failed to follow physician's orders, particularly related to wound care and dressing changes, Defendants also failed to provide Mrs. Blackburn with a physician-ordered roho cushion and failed to notify her 12 physician about the deterioration of her sacral wound PSOF ¶¶ 98 - 125, 142, 143; (Exhibit 3, Plaintiff's Third Supplemental Disclosure of Expert Witnesses and Opinions). Dr. Black's opinions regarding the failure of Defendants' staff to follow physician orders are within her realm of nursing expertise and appropriate.

C. Dr. Black is Qualified Under Rule 702 Ariz. R. Evid. to Offer Expert Opinions

Dr. Black is qualified to provide expert testimony under Rule 702, Ariz. R. Evid. Courts are to take a flexible approach in deciding motions based on Rule 702 and should play only a limited gate-keeping role related to excluding expert testimony, *United States v. H& R Block, Inc.*, 831 F. Supp. 2d. 27, 30 (D.D.C. 2011). Nor is Rule 702 as restrictive as A.R.S. § 12-2604(A):

> ,other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify

Rule 702, Ariz. R. Evid. (emphasis added). The Arizona Supreme Court in *Seisinger v. Siebel* contrasted the requirements of A.R.S. § 12-2604(A) with the more relaxed requirements of Rule 702.

But, particularly when the standard of care has not materially changed during the period after a physician left active practice or teaching, a trial judge might also well conclude that the witness remains qualified through knowledge, skill, experience, training, or education“ to assist the jury through expert testimony. As to such a witness, the statute automatically produces a different result than the Rule might produce.

220 Ariz. at 90, 203 P.3d at 488 (emphasis added). Thus, Rule 702 does not even require that the expert be actively engaged in the area of expertise on which his or her opinions are offered.

Moreover, Rule 702 is not necessarily about the witness' title or pedigree. In fact, an expert may be qualified to provide opinions based on his or her factual experience or careful study.” *Baroldy v. Ortho Pharmaceutical Corp.*, 157 Ariz. 574, 587-88, 760 P.2d 574, 587-88 (App. 1988). Moreover the expert does not have to have the best possible qualifications, nor the highest degree of skill of knowledge... *Pincock v. Dupnik*, 146 Ariz. 91, 95, 703 P.2d 1240, 1244 (App. 1985) (citations omitted). And, “t]he degree of qualification goes to the weight given the testimony, not its admissibility.” *Seisinger v. Siebel*, 220 Ariz, at 90, 203 P.3d at 488 (citations omitted). Dr. Black satisfies the requirements of Rule 702.

Also, contrary to Defendants' assertions, Dr. Black is permitted to rely on, and refer to, allegations and violations of the Arizona Administrative Code and the results of State surv Plaintiff is not attempting to use the regulations to create a private cause of action. *See* Defendant 3 Motion at p. 7. Rather, Arizona allows the introduction of expert testimony regarding regulations and a defendant's violation thereof, In *Wendland v. Adobe Air Inc.*, 223 Ariz. 199, 221 P.3d 390 (Ct. App. 2009), Wendland sued Adobe Air for injuries he sustained after falling into an open pit at construction site maintained by Adobe Air. Adobe argued that expert testimony regarding its violation of applicable OSHA standards was improperly admitted as evidence of breach. Rejecting this argument, the court found that the jury could consider Adobe's knowledge and violation of applicable OSHA regulations as one of many factors relevant to deciding whether Adobe Air had notice of the unreasonably dangerous conditions at its site and whether it used reasonable care to prevent injury. Accordingly, the court found no **abuse** of discretion in permitting expert testimony on the issue of OSHA compliance relating to the open pits. *See also Edwards v. Manorcare, Inc.*, 2006 WL 625540 (D. Ariz, 2006) (Defendants' motion in limine denied where plaintiffs' expert anticipated to offe testimony to explain the applicable state and federal standards and regulations for nursing home care“); *Dooley v. Pannell*, 338 F. Supp.2d 962, 966 (E.D. Ark. 2004) (expert permitted to testify regarding her familiarity with the regulations which would show the degree of skill and learning used by nursing homes in Forrest City or a similar locality”).

As for the surveys, this evidence is, contrary to Defendants' assertion, relevant, probative of the issues surrounding the care provided to Mrs. Black, admissible, and do not constitute character assassination. [3] *See* Defendants' Motion at p. 8. The Texas Court of Appeals addressed the admissibility of surveys in *Auld v. Horizon/CMS Healthcare Corp.*, 985 S.W.2d 216 (Tex. Ct. App 1999), *aff'd in part & rev 'd & remanded in part*, 34 S.W.3d 887 (Tex. 2000). There, Martha Hary, an **elderly** woman with a number of medical conditions, was a resident at the defendants' facility from December 1994 to August, 1995, during which time she developed pressure sores, some of which deteriorated to Stage IV. The Court affirmed the trial court's admission of state inspection reports for the time period of September 1, 1994 to December 31, 1995 (4 months after Ms. Hary's residency).

Moreover, evidence of a defendant's subjective knowledge of the peril his conduct creates is admissible to prove gross negligence, which was an issue at this trial. The information contained in [the surveys] confirms the nursing home's knowledge of the conditions in the home that adversely affected [the resident's] care and showed that the state did bring those conditions to the home's knowledge in a timely manner with regard to [the resident's] stay at the home.

985 S.W.2d at 227. Similarly in Advocat, Inc. v. Sauer, 353 Ark. 29, 111 S.W.3d 346 (2003), the Arkansas Supreme Court held that OLTC records (equivalent to DHS records) were relevant:

> We believe that the surveys completed by the OLTC in January 1997 and May were relevant to the instant case. The Sauer Estate put on substantial evidence of ways in which Mrs. Sauer suffered while a resident at Rich Mountain, much of which centered on inadequate staff and nursing care available to Mrs. Sauer. Any evidence having a tendency to make these allegations more or less probable would be relevant. Clearly, the OLTC's findings that Rich Mountain was not meeting OLTC's requirements regarding adequate nursing staff were relevant as to whether the Sauer Estate's allegations of lack of patient care were

353 Ark. at 59, 111 S.W.3d at 363. The court further stated:

> Each OLTC survey notified appellants of examples of the manner in which Rich Mountain failed to meet the needs of its patients due to inadequate staffing. Whether the patients at Rich Mountain suffered from inadequate nurse staffing pertaining to personal hygiene, feeding, and treatment would certainly have a bearing on whether the allegations made by the Sauer Estate about the lack of quality care afforded to Mrs. Sauer were more or less probable. Moreover, the surveys are probative of the fact that the appellants were on notice of dangerous conditions in the nursing home due to understaffing...

353 Ark. at 60, 111 S.W.3d at 364 (internal citations omitted). See also *Rose Care, Inc. v. Ross*, 91 Ark. App. 187, 208, 209 S.W.3d 393, 406 (2005) (resident was not timely turned and repositioned survey showed evidence of such failures and reflected facility's notice thereof); *Montgomery Health Care Facility, Inc. v. Ballard*, 565 So.2d 221 (Ala. 1990) (evidence of deficiencies related to the management of the facility relevant and admissible); *Flint City Nursing Home, Inc, v. Depreast*, 40, So.2d 356, 361 (Ala. 1981) (12 out of 16 deficiencies in nursing home state survey were admissible for the purpose of showing notice to the nursing home of dangerous conditions existing at the nursing home and inadequate policies and procedures relative to the care and well-being of the residents.") Thus, Dr. Black's reliance on the regulations and surveys in forming her opinions is appropriate.

IV. CONCLUSION

Since Plaintiff has not pled a medical malpractice action, Dr. Black is not required to meet the requirements of A.R.S. § 12-2604 in order to offer standard of care opinions against Defendants Regardless, Dr. Black is, in fact, qualified under the statute. Furthermore, Dr. Black is qualified to provide expert opinions pursuant to Rule 702, Ariz. R. Evid. Accordingly, the court should deny the Cornerstone Defendants' motion to preclude certain of Dr. Black's opinions.

Dated: June *28,* 2012.

WILKES & MCHUGH PA.

By:

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Footnotes

1 “PSOF” refers to Plaintiff's previously filed statement of facts in support of his response to the Cornerstone Defendants' summary judgment motion.

2 Importantly, Mrs. Blackburn did have the recuperative abilities to completely heal the Stage IV wound. Thus, while there would be challenges to Mrs. Blackburn's coccyx wound healing, she ultimately did heal with appropriate care at home so those challenges were overcome. PSOF ¶¶ 95, 96. 4

3 While the surveys are, indeed admissible, the facts or data on which an expert relies in forming opinions need not necessarily be admissible. Rule 703, Ariz. R. Evid.; United States v. H & R Block, Inc., 831 F. Supp.2d at 30. 14

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