

2010 WL 3032563 (Ariz.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Arizona.
Pima County

In the Matter of the Estate of Kathleen Y. BROWNLEE, Deceased;
Shirley A. Sanchez, individually, and as Personal Representative, on behalf of the Estate
of Kathleen Y. Brownlee, and on behalf of Kathleen Y. Brownlee's statutory beneficiaries,
Gary Pierce, Thomas Pierce, Sandy Marie Emerson and Charlene Lutjens, Plaintiffs,
v.

Praying Hands Residential Care Home, L.L.C., licensed as Praying Hands Residential Care
Home, L.L.C., dba "Praying Hands," and Betty J. Massengale, James Massengale as husband
and wife; Codac Behavioral Health Services of Pima County, Inc. an Arizona corporation; John
Does II - X; Jane Does I- X; Black Corporations II - X; White Partnerships I - X, Defendants.

No. CV 2008-3497.
May 10, 2010.

Plaintiffs' Response to Defendant Codac's Motion in Limine No. 1

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Plaintiffs.

Honorable Michael Miller.

RE: EXPERT OPINION TESTIMONY ON ULTIMATE ISSUES UNDER THE APSA

(Oral argument requested)

Plaintiffs hereby submit their Response to Defendant CODAC's Motion *in limine* to preclude Plaintiffs' experts from testifying
on the ultimate legal issues related to their claim pursuant to the Adult Protective Services Act (hereinafter "APSA"). Plaintiffs'
Motion is supported by the attached Memorandum of Points and Authorities incorporated herein by this reference and the entire
record in this case.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Traditionally, the function of, and standards for, motions *in limine* is the parties' anticipation of evidentiary problems in advance
of trial. The evidentiary problem contemplated by the Rules is to avoid having disclosed to the jury prejudicial matters that might
result in a mistrial. *State ex rel. Berger v. Superior Court In and For Maricopa County*, 108 Ariz. 396, 499 P.2d 152 (1972)
(emphasis added). *Motions in limine are not, however, to be used except where evidence is clearly shown to be inadmissible.*
Id. Motions *in limine* are not intended to sterilize the trial process or to take the place of objections and rulings made at the time
of trial after the Judge has been given an opportunity to hear the evidence and/or testimony at issue.¹

Before addressing the substance of the instant Motion, Plaintiffs must point out the double-standard being applied here by Defendant CODAC. According to CODAC's expert disclosure statement of Dina Capek MSRN, Ms. Capek "*will testify that there was no **abuse** or neglect of Plaintiffs' Decedent during the period of time that Kathleen Brownlee was a resident at the assisted living facility operated by co-Defendant Praying Hands.*" (See, Defendant CODAC's Expert Disclosure Statement of Dina Capek MSRN, attached as Exhibit A). These are exactly the type of opinions CODAC is attempting to preclude the Plaintiffs from offering in this case.

I. LEGAL ANALYSIS

Plaintiffs submit that [Arizona Rules of Evidence Rule 704](#) expressly permits expert witnesses to testify concerning the ultimate issues of a case -- so long as that testimony is helpful to the jury under Rule 702. In this case, as it pertains to Plaintiffs' ASPA claim, the jury needs help understanding what constitutes **elder abuse** and neglect.

In support of its Motion CODAC)AC points to the fact that the terms "**abuse**" and "neglect" are both defined in the body of the APSA, however, the definitions, in and of themselves are entirely insufficient. Expert testimony is needed to explain the applicable standards, regulations and practices that make up the standard of care and provide meaning to definitions within the Act. This is precisely the purpose of expert testimony. At trial, Plaintiffs' standard of care experts will explain what standards, regulations and practices exist to protect and prevent vulnerable and/or incapacitated persons from **abuse** and neglect. Plaintiffs' experts will also explain how these standards, regulations and practices create a nationwide standard of care in the applicable industry and that the purpose of following the standard of care is to avoid, protect and prevent **elder abuse** and neglect. After explaining the applicable standards Plaintiffs' experts will explain how Defendants violated the applicable standards of care in this case. This approach is admissible.

In its Motion CODAC takes the position that any use by Plaintiffs' experts of the words "**abuse**" or "neglect" should be prohibited by the Court. This position is not supported by the rules of evidence or the relevant case law. According to the leading case on the subject, an expert is allowed to use a "term that has both a lay factual meaning and legal meaning." [Webb v. Omni Block, Inc.](#) 216 Ariz. 349, 353, 166 P.3d 140, 144 (Ariz. 2007); see also [United States v. Levine](#), 180 F.3d 869, 871-72 (7th Cir.1999) (use of the word "forged" has an established lay usage; that the crime is called forgery does not close the subject to inquiry). Here, "**abuse**" or "neglect." When the case law is coupled with the express language of [Rule 704](#) there is no reason why Plaintiffs' experts should be precluded from testifying that Mrs. Brownlee was **abused** or that she was neglected.

CODAC also takes the position that Plaintiffs' experts should be precluded from providing standard of care opinions regarding Defendants' reporting requirements for suspected **abuse** and/or neglect.² Defendants support their position by arguing that the jury in this case can interpret the Arizona reporting statute for themselves and determine whether Defendants' actions in this case fell below the standard of care. Respectfully, Arizona's reporting requirements for suspected **abuse** and neglect are only part of the applicable standard of care and not within the purview of the average juror. Plaintiffs' experts will testify that it is the recognized nationwide standard of care for healthcare providers to report **abuse** and/or neglect. The fact that Arizona has codified this standard does not change the fact that expert testimony is needed to explain the standard of care.

Lastly, in its Motion CODAC attempts to stretch the holding in [Webb v. Omni Block, Inc.](#) in the hope of limiting Plaintiffs' experts' here. 216 Ariz. 349, 166 P.3d 140 (Ariz. 2007). In [Webb](#), the Court ruled that the expert in that case effectively told the jury how they should rule by providing testimony allocating actual percentages of fault to all the parties involved in the case. [Webb](#) at 216 Ariz. 349, 355 (App. 2007). Plaintiffs' experts have done no such thing in this case.

II. CONCLUSION

Pursuant to [Rule 704](#) and the reasons outlined above, Defendants' Motion should be denied in its entirety.

RESPECTFULLY SUBMITTED this 7TH day of May, 2010.

ROUSH, McCRACKEN, GUERRERO, MILLER & ORTEGA

By <<signature>>

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Attorneys for Plaintiffs

ORIGINAL of the foregoing filed with the Clerk of the Court this 7TH day of May, 2010, with a copy for delivery to:

Honorable Michael Miller

PIMA COUNTY SUPERIOR COURT

110 West Congress

Tucson, Arizona 85701

Footnotes

- 1 This introductory paragraph is incorporated by reference in Plaintiffs' Responses to Defendants' Motions in Limine numbers 2 through 9 as well.
- 2 CODAC's staff have admitted that they were required to report suspected **abuse** and neglect. (*See*, Deposition of Dona Lorraine Rivera-Gulko at 68:4-24, attached as Exhibit B). CODAC's staff has also testified that they did not report any **abuse** of Mrs. Brownlee. *Id.*

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