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May 13, 2015

Honorable Peter F. Bariso, Jr., A.J.S.C.
Superior Court of New Jersey
Hudson County Courthouse
595 Newark Avenue
Jersey City, NJ 07305

Re: *Ferguson et al. v. JONAH et al.*

Docket No. L-5473-12

Opposition to Plaintiffs' Motion to Bar Testimony of Yossi Lakier and Randy Dodge

Dear Judge Bariso:

Together with our co-counsel, this firm represents Defendants in this matter. On May 6, 2015, less than a month before trial, Plaintiffs prematurely moved to exclude rebuttal witnesses identified by Defendants. Through this letter brief, we respectfully request that the Court deny Plaintiffs' motion to exclude Defendants' rebuttal witnesses, Yossi Lakier and Randy Dodge.

Initially, Plaintiffs' motion to exclude Defendants' rebuttal witnesses is premature. Of course, Defendants will not know whether they will call these witnesses until after they hear Plaintiffs' experts' trial testimony. At that time, if necessary, Defendants will make a proffer of the rebuttal testimony, and this Court will presumably exercise its discretion as to whether it will allow that testimony to be admitted into evidence. This Court may or may not request briefing, but now is not the time. Plaintiffs are seeking yet another advisory opinion.

In the event the Court elects to consider Plaintiffs' motion to exclude at this time, however, Defendants offer the following opposition.

The fact-witness discovery deadline in this case was April 18, 2014. Plaintiffs then produced their expert witness reports on July 11, 2014. Dr. Janja Lalich opined, among other things, that Defendants engage in unconscionable commercial practices because their practices comport with her theories of “coercive influence” and “bounded choice.” (Lalich Report, ¶¶ 10, 19, 21, 22.)

Dr. Lee Beckstead opined, among other things, that regardless of whether any particular therapeutic modality is scientific, mainstream, or otherwise acceptable, it becomes harmful and dangerous when used with the premise that homosexuality is alterable, and the likelihood of harm is overwhelmingly likely. (Beckstead Dep., Oct. 3, 2014, 316:23-317:14, 319:10-320:7.)

Defendants could not reasonably have anticipated that a claim for violation of the Consumer Fraud Act, or the basic facts of this case, would lead Plaintiffs to retain an expert to opine that Defendants used cult-like practices, or that the therapeutic methods it recommends are *per se* harmful. Consequently, after this Court overruled Defendants’ motions to preclude or limit Plaintiffs’ experts’ testimony, Defendants began searching for rebuttal witnesses to counter Dr. Lalich’s opinion concerning the alleged coercive nature of Defendants’ program, and Dr. Beckstead’s opinion about the inevitability of harm. Defendants located, among other potential rebuttal witnesses, Yossi Lakier and Randy Dodge, in late April 2015. Importantly, neither witness is a “success-story” witness. Lakier worked with JONAH and Dodge worked with PCC, but they both now identify as gay. Their testimony will be limited to explaining how their respective experiences with JONAH and PCC are inconsistent with Dr. Lalich’s and Dr. Beckstead’s opinions.

“[T]he trial court has a wide range of discretion regarding the admissibility of proffered

rebuttal evidence.” *Weiss v. Goldfarb*, 295 N.J. Super. 212, 225 (App.Div. 1996). However, it is improper to exclude a rebuttal witness when he “is prepared to offer non-repetitive, substantive testimony that directly attacks the value of defendants’ expert testimony.” *Casino Reinvestment Development Authority v. Lustgarten*, 332 N.J. Super. 472, 496-498 (App.Div. 2000). The primary issue for consideration is actual surprise, and the remedy is simply to address any prejudice resulting from that surprise. *See Mori v. Secaucus Town*, 17 N.J. Tax 96 (App.Div. 1997).

“It is well-established that a lay witness may give his opinion in matters of common knowledge and observation.” *State v. LaBrutto*, 114 N.J. 187, 197 (1989) (citing Biunno, *Current N.J. Rules of Evidence, Comment 2 to Evid.R. 56*). “The first requirement . . . is that a lay witness must have actual knowledge, acquired through his or her senses, of the matter to which he or she testifies.” *Id.* (citing *Current N.J. Rules of Evidence, supra, Comment 1 to Evid.R. 56; Evid.R. 1(14)* (“perceive” means to acquire knowledge through one’s own senses); *see also* N.J.R.E. § 701. “The second requirement . . . is that the opinion of the lay witness must help the trier of fact to understand the witness’ testimony or determine a fact in issue.” *Id.*

Thus, lay opinion is admissible if it is rationally based on the witness’ personal perception, and will be helpful to an understanding of the witness’s testimony or the case in general. This is true even in situations where expert testimony could also be offered on the same issue. *See id.* 199-201. (It is not the case “that only a police officer who is qualified as an accident reconstruction expert can give his opinion of the point of impact” even though “there may be some cases in which determining the point of impact of a collision will involve such

complicated technical and scientific evidence that only a qualified reconstruction expert could rationally form an opinion about the point of impact.”)

Plaintiffs first argue that “a fact witness who testifies that the JONAH program does not use coercive influence would be improperly crossing into the realm of expert testimony.” This is not a basis for excluding Defendants’ rebuttal witness, however, because when the subject matter of lay and expert opinion overlap, a lay witness can testify, if the requirements for lay opinion testimony are met.¹

Here, Dr. Lalich’s opinion that the Defendants’ program is coercive is based on application of her theories to her understanding of the facts of that program. Lakier and Dodge should be allowed to offer rebuttal testimony as to whether they or others experienced Defendants’ program as manipulative or coercive. While this testimony would overlap in part with Dr. Lalich’s opinions – i.e., as to JONAH’s program in particular, not as to her expert opinion regarding coercive influences and bounded choices in general – it would arise from these witnesses’ own perceptions and observations and would assist the trier of fact with this issue. Similarly, while the testimony of these rebuttal witnesses would overlap in part with Dr. Beckstead’s opinions – i.e., as to whether they or others experienced harm from participating in JONAH’s program, not as to the effects of psychological treatment methods in general – it would be based on their own perceptions and would assist the trier of fact with this issue. Therefore,

¹ In the Supplemental Summary of Witness Testimony cited by Plaintiffs in their letter brief, Defendants state that “Randy Dodge will rebut the testimony of . . . all three of the Plaintiffs’ experts, if they testify that the practices of the Defendants and PCC are coercive and harmful .” Plaintiffs do not make any arguments for why Dodge should be precluded from rebutting Dr. Beckstead. Moreover, because there is no basis to exclude Defendants’ rebuttal witnesses, they should also be permitted to rebut Dr. Bernstein’s testimony if able to do so.

rebuttal testimony by Lakier and Dodge should be allowed.

Plaintiffs also argue that Defendants' rebuttal witnesses "do not add anything to the testimony that Defendants' nine success story witnesses will offer (not to mention the Defendants themselves, as well as Elaine Berk, Rich Wyler, and Thaddeus Heffner)." In fact, testimony by Lakier and Dodge would not be cumulative because their current situations differ profoundly from the success story witnesses.

Unlike the success story witnesses, Lakier and Dodge both identify as gay even after working with either JONAH or PCC. Given that Dr. Lalich will testify that people who are subjected to coercive influence often are not aware that they are being manipulated, they are uniquely situated to rebut Dr. Lalich's opinions about the supposedly coercive nature of the Defendants' methods. They can testify that during their time with JONAH and PCC, they never experienced their identity being systematically broken down and remolded to fit the preferred image (of a heterosexual); there was no tightly regulated set of beliefs or behaviors; and Defendants never presented to them that changing their sexual orientation was the only solution to their unwanted same sex attraction or "the only path to salvation." Lakier's and Dodge's respective decisions to identify as gay, and still promote JONAH and PCC, are relevant evidence to rebut Dr. Lalich's opinion that Defendants' methods are coercive, and Dr. Beckstead's opinion that they are harmful to gay people, and this evidence should be admitted.

Additionally, Dr. Beckstead denied at his deposition that psychodrama is used at the "Male Survivor" experiential weekends which he facilitates. (Beckstead Dep., Oct. 3, 2014, 583:4-15.) Unlike any other witnesses in this case, Defendants' rebuttal witness Randy Dodge

has actually attended Male Survivors and can testify that psychodrama was, in fact, utilized at this experiential weekend with him. Defendants did not learn that Dodge could rebut Dr. Beckstead's contrary testimony until April 29, 2015 – one week before Plaintiffs filed this motion to exclude. Dodge should be permitted to testify that Dr. Beckstead facilitates weekends at which psychodrama is used. He should also be able to testify concerning any other similarities between processes used by Defendants that Dr. Lalich criticizes and the processes used at the Male Survivors weekend that Dr. Beckstead facilitates.

Respectfully submitted,

MESSINA LAW FIRM

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MPL/hs
cc: Bruce Greenberg Esq.