

Jenack v Goshen Operations LLC
2025 NY Slip Op 35582(U)
February 25, 2025
Supreme Court, Orange County
Docket Number: Index No. EF008129-2018
Judge: Craig Stephen Brown
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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WILLIAM JENACK, as Administrator of the Estate of
MARY RICE and WILLIAM RAMLOW, as Administrator
of the Estate of ADELINE RAMLOW, individually and
on behalf of all others similarly situated,

Plaintiffs,

**DECISION & ORDER
AFTER HEARING**

- against -

Index No. EF008129-2018

GOSHEN OPERATIONS LLC d/b/a SAPPHIRE
NURSING AND REHAB AT GOSHEN, RICHARD
PLATSCHEK, ESTHER FARKOVITS, MACHLA
AMRAMCZYK and ROBERT SHUCK,

Defendants.
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CRAIG STEPHEN BROWN, A.J.S.C.

On December 13, 2024 a *Frye* hearing was held before the undersigned to determine whether two of the plaintiffs' witnesses - Ernest C. Tosh and Dr. Charlene Harrington - would be permitted to provide expert testimony at the trial of this action.

Appearing for the plaintiffs were Andrew Finkelstein, Esq. and Jeremiah Freiperson, Esq. Appearing for the defendants were Caitlin Robin, Esq. and Angela Thompson-Tinsley, Esq. Two witnesses testified at the hearing and various documents were admitted into evidence. In addition, the Court received correspondence from Caitlin Robin, Esq. dated December 3, 2024, January 6, 2025, and January 17, 2025 and correspondence from John D. Sardesai-Grant, Esq. dated January 13, 2025.

The first witness to testify was Ernest C. Tosh. Mr. Tosh is an attorney licensed in multiple states whose practice focuses on skilled nursing facilities litigation. Mr. Tosh has a company called Full Financials that analyzes staffing data of skilled nursing facilities using

data from the Centers for Medicare and Medicaid Services ("CMS"). Mr. Tosh testified that he has had two *Daubert* hearings - one in Jacksonville, Florida and one in Oakley California - with respect to the same methodologies utilized in the instant matter. After conclusion of the *Daubert* hearings, both courts accepted Mr. Tosh's methodologies and information (*Frye Hearing Transcript of Ernest C. Tosh*, pages 7-8). Further, Mr. Tosh testified that he applied the same methodologies and software programs that were approved in the *Daubert* hearings to the instant matter (*Frye Hearing Transcript of Ernest C. Tosh*, pages 8-9). In addition, Mr. Tosh testified that the calculations utilized by him involved "literally elementary school math. Just you [sic] have to do it thousands of times, which is why we run computer programs" (*Frye Hearing Transcript of Ernest C. Tosh*, page 9).

The second witness to testify was Dr. Charlene Harrington. Dr. Harrington testified that she is a nursing home staffing expert and has served as an expert for the U.S. Department of Justice and has been involved as an expert in over 60 nursing home litigation cases (*Frye Hearing Transcript of Dr. Charlene Harrington*, pages 38-39). Dr. Harrington further testified that she has been a Professor of Nursing and Geriatrics since 1980 at the University of California, San Francisco and has conducted many studies of staffing and nursing homes (*Frye Hearing Transcript of Dr. Charlene Harrington*, page 40). In addition, Dr. Harrington indicated that she has published over 250 peer reviewed articles, many of which were on nursing home staffing, and has served as a consultant to the U.S. government on many advisory committees. One of the advisory committees on which Dr. Harrington served was the advisory committee for the CMS Five Star Nursing Homes Compare website from 2008 until 2022 (*Frye Hearing Transcript of Dr. Charlene Harrington*, pages 40-41). The following colloquy ensued between plaintiffs' counsel and Dr. Harrington:

Q. The methodologies ... that were developed by the government and/or in those peer reviewed studies, did you apply these same methodologies to the work you performed in this case?

A. Yes, I did.

Q. Did you do anything in the work that you performed in this case that was novel?

A. No. We also applied a second research study to our recommendations, and that was a study that was peer reviewed by Professor Schnelle at Vanderbilt University and his colleagues. And that study was a simulation model of how much time it takes for certified nursing assistants to complete basic activities of daily living. And so this time study updated what the government had done, because the government only looked at the actual time that was spent, and this study made sure that it included enough time so that there was not an omitted care. So these two studies were used in the methodology that I applied here ...

Q. Okay. So as it relates to the CMS studies and your application of your methodologies in this case, was it consistent in everything that you did?

A. Yes, it was.

Q. And when you applied the Schnelle peer reviewed methodologies, did you apply those methodologies in this case consistent with all that which is outlined in the Schnelle peer reviewed article?

A. Yes.

(*Frye Hearing Transcript of Dr. Charlene Harrington*, pages 43-45).

“Under the *Frye* standard, expert testimony is admissible only if a scientific ‘principle or procedure has “gained general acceptance” in its specified field’” (*People v. Brooks*, 31 NY3d 939, 941 [2018] citing *People v. Wesley*, 83 NY2d 417, 422 [1994] and quoting *Frye v. United States*, 293 F 1013, 1014 [DC Cir 1923]). “The process is meant to assess ‘whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally’” (*Wesley*, 83 NY2d at 422). Absent a novel or experimental scientific theory, a *Frye* hearing is generally unwarranted” (*People v. Brooks*, 31 NY3d 939, 941 [2018]). In the matter *sub judice*, the plaintiffs’ witnesses Ernest C. Tosh and Dr. Charlene Harrington have utilized accepted methodologies that, “when properly performed, generate results accepted as reliable with the scientific community generally”

(*People v. Brooks*, 31 NY3d 939, 941 quoting *People v. Wesley*, 83 NY2d 417, 422). The opinions of the plaintiffs' two experts meet the standards set forth in *Frye*. Accordingly, the defendants' application to preclude the plaintiffs' expert witnesses' testimony at trial must be denied.

This matter is scheduled for jury selection on April 17, 2025 at 9:30 A.M.

The foregoing constitutes the decision and order of this Court.

So ordered.

Dated: February 25, 2025
Goshen, New York


HON. CRAIG STEPHEN BROWN
Acting Supreme Court Justice

To: FINKELSTEIN, BLANKINSHIP,
FREI-PEARSON & GARBER, LLP
Attorneys for Plaintiffs
One North Broadway, Suite 900
White Plains, New York 10601

CAITLIN ROBIN & ASSOCIATES
Attorneys for Defendants
30 Broad Street, Suite 702
New York, New York 10004