

2014 WL 655103 (Del.Ch.) (Trial Motion, Memorandum and Affidavit)
Chancery Court of Delaware.

Elaine MACK, Plaintiff,
v.
Beverly MACK, Defendant.

No. 4240-VCN.
February 13, 2014.

Plaintiff's Opposition to Defendant's Motion in Limine to Exclude Expert Testimony of Lester Johnson

Community Legal Aid Society, Inc., Emily A. Farley, Esquire Bar ID # 3912, [Anthony J. De Marco](#), Esquire, Admitted under DE Rule 55, D.C. Bar. #962803, 840 Walker Road, Dover, DE 19904, 302-674-8500, Attorneys for Plaintiff.

COMES NOW, Plaintiff, Elaine Mack, by and through her attorney, Emily A. Farley of Community Legal Aid Society, Inc. who hereby opposes and responds to Defendant's Motion *in limine* to Exclude Expert Testimony of Lester Johnson as follows:

Defendant's motion *in limine* misstates the facts of this case and the relevant rules of evidence. As a preliminary matter, Defendant's motion *in limine* inappropriately attempts to narrow the scope of this case when it states that “the sole issue (as it relates to the joint bank accounts) relates to what the ‘understanding’ was between the parties *when the joint account was formed.*” Def. Mot. ¹ at ¶ 3 (emphasis added). Although the “understanding” of the parties at the time the account was formed is certainly relevant, so is the nature of the “understanding” in the three decades between the formation and the events that precipitated this case. Even assuming, *arguendo*, that Defendant's characterization is correct, the parties actions between 1979 and 2006 regarding the joint accounts would still be relevant, as it would be circumstantial evidence of the parties' “understanding” at the time the account was created. Relevant evidence “means evidence having *any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” [D.R.E. 401](#) (emphasis added).

Having improperly narrowed the issue, Defendant's motion then improperly sets forth the rules on expert witnesses. It states that “[the] issue ... is purely a factual issue that does not require any expert testimony.” Def. Mot. at ¶ 5. This misstates the rule for expert witnesses, which states that experts may testify “in the form of an opinion or otherwise” when their particular knowledge will “assist the trier of fact to understand the evidence or to determine a *fact in issue.*” [D.R.E. 702](#) (emphasis added).

Here, the fact in issue is the nature of the joint accounts. Mr. Johnson, based on his years of experience and his examination of the relevant bank records, will testify as to his expert opinion on this *factual* issue. Specifically, Mr. Johnson analyzed more than ten years of bank records and summarized them into a report. Because this will be helpful to the trier of fact in understanding the nature and history of the joint bank accounts, it is admissible. See [D.R.E. 702](#); [United States v. Perez](#), 280 F.3d 318, 341 (3d Cir. 2002) (quoting [F.R.E. 704](#), advisory committee note) (“The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact.”). It is irrelevant whether Mr. Johnson has “any personal knowledge ... as to any ‘understanding’ between the parties at the time.” Def. Mot. at I 6. Experts testifying as to their opinions are not limited to testifying to their personal perceptions. See [D.R.E. 701](#) (stating that witnesses not testifying as experts are limited to testimony based on personal perceptions).

Because Mr. Johnson will testify as to his opinion on a *factual* issue, Defendant's arguments about *legal* opinions are irrelevant. The fact that Mr. Johnson's opinion goes to the “ultimate” factual issue in the case does not affect its admissibility. [D.R.E. 703](#).

Although Defendant did not question Mr. Johnson's credentials as an expert, they bear repeating here.² Mr. Johnson is a Special Investigator in the **Elder** Exploitation Unit of the Department of Justice, State of Delaware. He has held this position for more than fourteen years. His duties are to investigate allegations of fraud upon or financial and other **abuse** of senior citizens in the state. His training and experience are more than sufficient to qualify him as an expert under **D.R.E. 702** for the purposes of analyzing and summarizing the bank records in this case.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court deny Defendant's Motion to Exclude the Expert Testimony of Lester Johnson.

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Dated: February 10, 2014

Footnotes

- 1 Defendant's motion to exclude the expert testimony of Lester Johnson, efiled Feb. 4, 2014.
- 2 Mr. Johnson's credentials are restated from his affidavit that was submitted as part of Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment dated March 8, 2013.