

2010 WL 8435242 (Mass.App.Ct.) (Appellate Brief)
Appeals Court Of Massachusetts.

ELDER SERVICES OF THE MERRIMACK VALLEY, INC., Appellee,

v.

Dennis BAILLARGEON, Respondent.

No. 2010-P-0751.

November 1, 2010.

On Appeal from Judgment in the Middlesex County Probate and Fail Court

Brief of the Appellee

for the Appellee, **Elder** Services of Merrimack Valley, Inc., By their attorney, [Eric Schutzbank](#), Esquire, BBO # 631276.

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***1 STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

- I. Whether admission into evidence of the testimony and opinions of the Guardian Ad Litem and ESMV's expert witness were proper?
- II. Whether the denial of the Respondent's Motion for Summary Judgment prior to the trial was proper?
- III. Whether the granting of ESMV's Motion for Summary Judgment during the trial was proper?
- IV. Whether the Court below properly rescinded the real estate and rental contracts between the Respondent and Theresa Casey?
- V. Whether the Respondent was afforded due process in this matter.
- VI. Whether Counsel for ESMV committed misconduct during the trial in this matter?
- VII. Whether the Judge **abused** his discretion in denying the Respondent's Motion to Compel Discovery?
- VIII. Whether the Court **abused** its discretion in awarding attorney's fees to ESMV and the **Elder**?

IX. Whether the Court **abused** its discretion in excluding witnesses of the Respondent?

STATEMENT OF THE CASE

Now comes **Elder** Services of Merrimack Valley, Inc., Appellee, (hereinafter “ESMV”) and opposes Dennis Baillargeon’s Appeal (hereinafter “Respondent”) from a Middlesex County Probate and Family Court Judgment dated November 10, 2010.

The underlying case was initiated when ESMV, a designated agency for the provision of **Elder** Services under *2 G. L. c. 19A, §§ 14-20 filed a Petition for Protective Orders on January 28, 2009 naming Mr. Baillargeon as Respondent due to his suspected financial exploitation of Theresa Casey (the **Elder**). Said Petition alleged that the **Elder** had been financially exploited by the Respondent, was at risk for future financial exploitation and lacked capacity to accept or reject protective services. The allegations against the Respondent included buying the **Elder’s** home for substantially less than fair market value and misappropriating her Debit Card.

The Court, in accord with G. L. c. 19A §§ 14 -20, found the **Elder** to lack competency to accept or reject protective services. Various Protective Orders to prevent further financial exploitation. These Orders eventually included the appointment of Attorney Gary Horwitz as Guardian. At trial, ESMV requested protective relief [see pp. 2-3 ESMV’s Trial Memo in Addendum Vol. 12A] seeking a Permanent Guardian and Conservator and a rescission of all contracts between Respondent and the **Elder** because she was mentally incompetent to have entered into any contracts.

Respondent contended the **Elder** was competent and had sufficient “testamentary capacity” to enter into the contracts with him. He asserted that the transfer was for fair market value and that he only used her ATM/Debit Card to assist the **Elder**.

*3 Respondent’s Counsel filed five Motions that were either denied by the Court or in need of substantial revision to be granted. Those Motions were as follows: Motion to Strike GAL Report (No Action as such was not timely); Motion for Medical Records [Allowed only after Court added necessary language requested by ESMV]; Motion for RMV Records (Denied); Motion for Further Investigation (Denied); Motion to Remove Protective Order (Denied); and Motion for Unredacted Records (Denied).

The Respondent, without the knowledge of his attorney, filed three additional Motions shortly before trial. The first two Motions were to compel discovery and for a default judgment relating to discovery issues. Those Motions were denied. The Court did request that counsel for ESMV turn over all documents despite the Respondent’s failure to pay copying costs in compliance with 651 CMR 5.20 and G. L. c. 66A §2. ESMV’s Counsel provided the documents and the Respondent was ordered (over his objection) to sign a statement acknowledging a copying fee owed as previously ordered. The Respondent’s third “Pro Se” Motion was a Motion for Summary Judgment containing Exhibits A-K that was heard and denied on the Morning the first day of trial.

Respondent’s Counsel’s requested that Respondent be permitted to present his Motion for Summary Judgment *Pro Se* because it had been drafted and filed by her client without her participation. It was during this Motion hearing Respondent *4 stated he had been aware the **Elder** had been showing signs of dementia at the time of the transaction. The Judge asked multiple times if that was correct and Respondent repeatedly answered affirmatively. Based on these statements, ESMV moved for Summary Judgment after opposing the Respondent’s Motion on both procedural and factual grounds. The Court deferred ESMV’s Motion and started the trial. ESMV’s Motion in Limine to Exclude many of the twenty-five proposed witnesses was granted because sixteen witnesses had not been included in Respondent’s pretrial memo and others were irrelevant. The Guardian Ad Litem (Dr. Robert Coutu) and Dr. Robert Portney (ESMV’s expert witness) testified and Respondent’s counsel cross examined them. At the conclusion of day one of trial, the Court suggested the parties talk as it would be beneficial to all if a settlement could be reached. The next morning, the Court inquired if any settlement had been reached. There was none, despite a continuing offer to Respondent to keep the property in exchange for granting **Elder** a life estate.¹ The Court proceeded with ESMV’s Motion for Summary Judgment and granted it. The Court also heard Motions for Attorney’s Fees from ESMV and **Elder** and granted those as well.

*5 FACTS

ESMV is a designated agency to receive and investigate reports of **elder abuse** and provide protective services to all **elderly** persons over the age of sixty in the Merrimack Valley. See *M.G.L. c. 19A ss. 14-26* and *651 CMR 5.01 to 5.26*. On or about February 26, 2007, the Protective Service Unit of ESMV received a report concerning possible physical and emotional **abuse** of the **Elder** as well as neglect. After an investigation, the **Elder** was found to be at risk for neglect because she was becoming increasingly confused while driving. The **Elder** accepted assistance with respect to her ability to drive and other related problems due to her increasing confusion at that time. ESMV worked with the **Elder** by arranging for homemaker services. A Protective Services case remained open until August 31, 2007, when the case was closed due to her voluntarily ceasing to drive.

On or about July 9, 2008, ESMV received a new report concerning possible financial exploitation of the **Elder** by the Respondent. It was reported the **Elder** was stating she had sold her home to a gentleman she is living with for \$1.00 and that she did not know where her money was. An investigation by ESMV resulted in a finding supporting financial exploitation of the **Elder** by the Respondent because the **Elder** executed a Quitclaim Deed for her property to the Respondent for \$55,000.00 and a right for her and two of her children (Richard Casey and Kathy *6 Casey) to live there “rent free” for seven years. As the **Elder** appeared to lack capacity at this time to accept or reject protective services, ESMV filed a 19A Petition with the Court and Dr. Robert Coutu was appointed Guardian Ad Litem (GAL) accordingly.

As the **Elder** was paying for utilities and other expenses for the house, it was not actually rent free. The **Elder** was eighty years old when she executed the Quitclaim Deed at issue. Her medical records, as reviewed by the GAL and in evidence at trial, show that she has been cognitively declining since a trauma in 2004 and an apparent stroke in 2005. She appears to have significant memory issues as a result of **dementia** brought upon by either the trauma or the **stroke**. Dr. Robert Portney first saw the **Elder** in December of 2008. He determined that she has been suffering from a mixed type of **Dementia** that has elements of **Alzheimer's Dementia** and non-progressive **Dementia**. Dr. Portney concluded that she did not have the mental capacity to enter into a complex contract in March of 2008.

At the time of the disputed sale, the Town of Dracut assessed the property value at \$266,400.00. The sales price was \$55,000.00 and the **Elder** could live in the house for seven years and would pay the monthly utilities. A market analysis suggested it would have sold at that time for between \$225,000.00 and \$229,000.00. The value of the rental contract was disputed by the *7 parties. The Respondent admitted to the GAL he was aware of the good deal he was getting and the property was worth far more than he was paying for it. The Respondent acknowledged to the GAL that the **Elder** is very confused at times. The GAL also testified that the **Elder** did not remember the details of how she sold her house.

The Respondent claimed the value of the rental contract was \$18,000.00 annually (rent at \$500.00 per person per month for the **Elder** and her two adult children) or \$126,000.00 over the life of the contract. Using the Respondent's figures as to the value of the seven year rental contract, the purchase price would still fall \$86,000.00 short of the assessed value. The GAL used a rental figure of \$1,200.00 by using the valuation determination made by the Lowell Housing Authority for area housing and other house rental listings in the Dracut area. Using this rate, the rental contract would have been worth \$14,400.00 annually or \$108,000.00 total for a shortfall of \$107,000.00.

In December, 2008, one of the **Elder's** daughters, Joyce Casey, discovered a debit card had issued on the **Elder's** account. The **Elder** denied knowing about an ATM/debit card or what one was. An investigation showed that appliances for the home were purchased on the card by the Respondent. Between October 21, 2008 (issue date) and December 29, 2008 (cancellation date), \$3,893.75 was spent on the card. According to the GAL's testimony, the bank reported that the **Elder** had been accompanied by a “young *8 gentleman” believed to be the Respondent when applying for the Debit card. The bank cancelled said card.

At the time of the purchase, Respondent obtained a mortgage for \$100,000.00. He also took a home equity line on the property for \$65,000.00. The result of these loans is minimal equity for the **Elder** unless these mortgages can be voided.

Throughout the litigation, the Respondent failed to comply with Court Orders. He refused to pay a copying fee for produced discovery although ESMV had paid the same fee for copies it received. He constantly refused to negotiate in good faith and turned down a highly favorable offer to dismiss the case in exchange for granting the **Elder** a Life Estate in the property. Unnecessary motions were filed and he drafted and filed three motions without his attorney's knowledge, causing her to seek permission to withdraw less than a month before trial. During his presentation of his Motion for Summary Judgment, he testified he knew the **Elder** showed signs of dementia at the time of the contract and later claimed his statements were a mistake.

His attorney had a full opportunity to cross examine the GAL and Dr. Portney, who were both accepted as expert witnesses by the Court after a proper foundation was laid.

ARGUMENT

I. ADMISSION INTO EVIDENCE OF THE TESTIMONY AND OPINIONS OF THE GAL AND ESMV'S EXPERT WITNESS WERE PROPER.

*9 A. The Testimony of the GAL was Properly Admitted

It is well settled law in Massachusetts that the testimony and report of a GAL appointed by the Court are admissible. See [Jonas v. Jonas](#), 349 Mass. 259 (1965). The Judge has broad discretionary powers to admit the testimony of a GAL so long as the testimony and report are handled in conformity with the established procedures for admitting such. See [Adoption of Georgia](#), 433 Mass. 62 (2000). Judge DiGangi acted well within his discretionary power in permitting the GAL to testify.

The Respondent's contentions that the GAL was unduly influenced by ESMV's protective service workers is without merit and not supported by any facts brought out at trial. The GAL testified as to his qualifications and stated that his employment is to "do Guardian ad litem evaluations, mental fitness evaluations, and essentially those kinds of things" [Vol. 8, p. 54]. Dr. Coutu testified that he has an appointment at Harvard University Medical School in the Department of Psychiatry (Vol. 8 p. 54). He also testified as to the measures he took in this case (Vol. 8 pp. 56 -57, 59 - 61). During cross examination, he responded to Respondent's questioning stating he has been a GAL approximately seventy times and he believed that he complied with all relevant GAL standards (Vol. 8, p. 92). The GAL had more than ample qualifications and his testimony was clearly admissible.

*10 B. The Testimony of Dr. Robert Portney was Properly Admitted.

G.L. c. 190B, § 5-303(b)(11) requires that a medical certificate be signed by a physician, a certified psychiatric nurse clinical specialist, or a licensed psychologist. Unif. Prob. Ct. Prac. XXII. For an expert to be qualified at trial, the Court must consider whether the proffered expert is qualified by knowledge, training, skill, experience, training or education. See [Ed Peters Jewelry Co. V. C & J Jewelry Co.](#), 124 F. 3d 252, 259 (1st Cir. 1997). Probate Court Judges have broad discretion in qualifying expert witnesses. [Adoption of Georgia](#), Supra. Dr. Portney, a graduate of Harvard and Yale, is a Geriatric Neuro-Psychiatrist, has been teaching at Harvard Medical School since 1984 and is an appropriate person to sign a medical certificate (Vol. 8 p. 135). Dr. Portney examined the **Elder** multiple times and signed four medical certificates while the case was pending [Vol. 8. P. 137-148]. The testimony of Dr. Portney regarding his education, background in geriatric neuro-psychiatry, awards, publications and general experience in the field were more than sufficient to qualify him as an expert to testify as to the **Elder's** mental capacity [Vol. 8 pp. 134 - 136].

The Respondent was afforded a full and fair opportunity to cross examine Dr. Portney. As shown in the transcript of said cross examination, it is clear the Respondent was unsuccessful in *11 challenging the testimony and evidence offered by Dr. Portney [Vol. 8, pp. 153 - 180].

The Respondent objects to Dr. Portney's opinion because he claims: "Dr. Portney's opinion points to no facts that the Appellant received information the Ward was believed to be incompetent at the time in question". Page 7, Respondent's Brief. Even if the Court were to assume that was correct, that would be irrelevant as the issue is whether or not the **Elder** had capacity, not what the Respondent knew or did not know. *Sutcliffe v. Heatley*, 232 Mass. 231, 232-233 (1919). The testimony in this case clearly showed that the **Elder** was suffering from dementia at the time of the contracts between her and the Respondent.

II. THE DENIAL OF THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT PRIOR TO THE TRIAL WAS PROPER.

The Standard of Review for Summary Judgment is that the trier of fact must examine the evidence in the light most favorable to the nonmoving party. *Maimonides School v. Cole*, 71 Mass. App. Ct. 240, 249 (2008). A proponent moving for summary judgment must affirmatively demonstrate that the contestant has no reasonable expectation of proving an essential element of the case. *O'Rourke v. Hunter*, 446 Mass. 814, 821 (2006) quoting *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991). In the matter at bar, there was an actual factual issue prior to trial. The Court specifically found that there was evidence the **Elder** was showing signs of possible dementia at the time of the *12 contract at issue [Vol. 8 p. 42]. The Court held that this alone was a factual issue sufficient to deny Respondent's Motion for Summary Judgment [Vo. 8. P. 42]. The Respondent did not present any factual evidence by a medical expert in his Motion for Summary Judgment to justify his assertion that the **Elder** had the capacity to execute the contracts at issue.

The Respondent also failed to comply with the procedural requirements of Massachusetts Rules of Probate Court Procedure 27C by failing to provide a concise Statement of Facts and failing to request a meeting to agree on any Exhibits for the motion(See Vol. 8. P. 37].

III. THE GRANTING OF ESMV'S MOTION FOR SUMMARY JUDGMENT DURING THE TRIAL WAS PROPER.

As stated above, a proponent moving for summary judgment must affirmatively demonstrate that the contestant has no reasonable expectation of proving an essential element of the case. *O'Rourke Supra*. Summary Judgment in a Probate Court proceeding may be granted in accord with the provisions of [Rule 56 of the Mass.R.Civ.P.](#) See Rule 27B Mass.R.P.Ct. [Rule 56 \(a\) of the Mass.R.Civ.P.](#) permits a party to move at any time for Summary Judgment with or without supporting affidavits. [Rule 56\(a\) of the Mass.R.Civ.P.](#) In the case at bar, the Respondent's statements during his own Motion for Summary Judgment created grounds for ESMV to request Summary Judgment [Vol. 8 pp. 29-30]. Once the Respondent stated that the **Elder** was showing signs of dementia *13 when they entered into a contract, there was no longer any factual issue. When combining the Respondent's own statements during the hearing with the testimony of the GAL and Dr. Portney, the only conclusion from the evidence was that the **Elder** was not competent to enter into the contract with the Respondent.

IV. THE COURT PROPERLY RESCINDED THE REAL ESTATE AND RENTAL CONTRACTS BETWEEN THE RESPONDENT AND THERESA CASEY.

A. G. L. c. 19A, § 20 Authorizes the Court to Order Necessary Protective Services for the Benefit of an **Elder who is Lacks the Capacity to Accept or Reject such Services.**

[G. L. c. 19A § 20](#) states that the Court may issue an Order requiring the provision of protective services to an **Elder** being **abused** who lacks capacity to accept or reject such services. [G. L. c. 19A § 20. § 14 of c. 19A](#) includes financial exploitation in its definition of **abuse**. [G. L. c. 19A § 14](#). Protective Services are those services necessary to prevent, eliminate or remedy the effects of any **abuse** of an **elderly** person. *Id.* The Court found that the **Elder** lacked capacity to accept or reject services

(Transcript Vol 3). The Judgment rescinding the contracts was the correct method to remedy the financial exploitation that the Respondent perpetrated.

B. The Court Applied the Correct Standard in Determining That Rescission of the Contracts and Real Estate Transactions Between the Elder and the Respondent Was Required.

Entering into a contract evokes a higher standard of mental capacity than testamentary capacity. *14 *Farnum v. Silvano*, 27 Mass. App. Ct. 536 (1989). Farnum held: “Competence to enter into a contract presupposes something more than a transient surge of lucidity. It involves ... an ability to comprehend the nature and quality of the transaction together with an understanding of its significance and consequences. *Id.* at 538.

The Respondent's position that the Court must use the testamentary capacity standard when examining the actions of the Elder in this matter as opposed to the more demanding test for mental capacity to execute a contract was clearly wrong as a matter of law. See *Krasner v. Berk* 366 Mass 464, 467. (1974). The mental capacity for making a will (testamentary capacity) requires the individual to understand the nature of the act of making a will. *Palmer v. Palmer* 23 Mass. App. Ct. 245, 250 (1986), quoting from *Goddard v. Dupree*, 322 Mass 247 250 (1948). The standard of mental capacity for making a contract requires the party to specifically understand the nature and quality of the transaction and to grasp its significance. See *Sutcliffe v. Heatley*, *infra*. The Restatement of Contracts 2nd as quoted in *Krasner v Berk*, *Supra*, sums up the capacity needed to make a contract: “A person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect... he is unable to understand in a reasonable manner the nature and consequences of the transaction.” *Id.* at 468. In this case, the sale of one's home absolutely falls under the contract *15 standard and it was shown by a preponderance of the evidence that the Elder lacked such capacity.

C. The Evidence Justified Rescission of the Contracts and the Return of the Real Property to the Elder.

The test in cases involving a question of mental capacity is whether the person executing the instrument had sufficient mental capacity to be capable of transacting the business at hand. *Sutcliffe*, *Supra*. An inability to realize the true purport of the matter in hand is equivalent to mental incapacity. *Id.* at 232 -233. When such is established, the contract is voidable. *Id.* at 233. It is well settled law that “It is no defense that the other party acted fairly and without knowledge of the want of mental faculty or of any circumstances which ought to have put him on inquiry.” *Id.* See also *Reed v. Mattapan Deposit & Trust Co.*, 198 Mass. 306 (1908). The evidence at trial proved that this Elder was already exhibiting signs of dementia at the time of the contracts at issue. The GAL testified that it was his opinion it was unlikely that the Elder had the mental capacity to enter into a contract in March of 2008 [Vol. 8 p. 81]. Dr. Portney testified that he examined the Elder on multiple occasions (Vol. 8 p. 137). He formed the opinion that she could not possibly have had the capacity to enter into a contract in March of 2008 and was one hundred percent certain of this [Vol. 8 pp. 148 - 153]. The testimony of these two witnesses justifies the Court's decision.

***16 V. THE RESPONDENT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS WERE NOT VIOLATED.**

The Respondent's claim that his Due Process rights were violated is without merit. Due process requires a meaningful opportunity to present evidence and conduct cross examination. See *C.O. v. M.M.*, 442 Mass. 648 (2004). The Respondent presented his Motion for Summary Judgment. The Respondent's attorney cross examined both the GAL and Dr. Portney. The fact that Respondent's counsel's cross examination failed to elicit evidence or information that was helpful to Respondent's case does not constitute a violation of due process.

VI. THERE WAS NO MISCONDUCT ON THE PART OF COUNSEL FOR ESMV.

That the Respondent disagrees with ESMV's interpretation of the facts does not constitute misconduct or amount to counsel being misleading. Respondent's contention that Attorney Schutzbank mislead the Court when he stated at the Summary Judgment hearing that he had not previously heard the "apparent authority" argument See Page 20 of Respondent's Brief] is not supported by the evidence. The Respondent's own pretrial memo did not raise this issue (See Respondent's Addendum vol. 12A) and stated that the legal issues were the **Elder's** "current testimonial (sic) capacity, as well as the issue of undue influence See Respondent's Addendum vol 12A, page 2. The *17 Court took no issue with ESMV's Counsel's conduct during the proceedings and the facts clearly supported the Judgment.

VII. THE COURT WAS WITHIN ITS DISCRETION IN DENYING ALL MOTIONS TO COMPEL DISCOVERY.

The Court has the inherent power to do what is necessary to secure the administration of justice. *Beit v. Probate & Family Ct. Dept.*, 385 Mass. 854 at 859 (1982). The Respondent's contention that ESMV violated the Court's discovery order is not supported by the evidence. The Respondent submitted two different subpoenas seeking "intake reports" [Vol. 6 p. 13] and investigative reports and services plans [Vol. 6 p. 11]. ESMV informed Respondent's counsel that it was unclear what she was looking for because, although those terms are used in the CMR's, they are no longer actually done in reality [Vol. 6 pp. 11 - 12]. The Court, at a hearing on September 3, 2009, found that while it understood that ESMV's counsel had to protect its client and could not provide what had not been requested by the submitted subpoenas [Vol 6. P. 17], it wanted discovery turned over so that trial could proceed. Respondent's Counsel stated during this hearing that having the records by the end of September was sufficient. Counsel for ESMV subsequently contacted Respondent's attorney to inform her that the documents were ready and that she needed to pay the ordered copying fee for previously produced discovery and these latest documents. (See Vol 7 pp. 5-7). Counsel for Respondent indicated she would talk to her client and *18 advise [Vol. 7 pp. 5-7]. The Court denied the Motions to Compel and for Default Judgment. The Court instructed (without objection) ESMV's counsel to give the documents and the Respondent (who objected) to sign a statement acknowledging the fee (Id.). This was well within the discretion of the Court.

VIII. THE COURT WAS CORRECT IN AWARDING COSTS AND SANCTIONS TO ESMV AND THE ELDER.

The Court was correct in awarding attorney's fees and sanctions against the Respondent. The record shows that the Respondent conducted himself in a manner throughout the proceeding designed to harass ESMV. Throughout the process of litigation, the Respondent failed to comply with Court Orders. He refused to pay a copying fee for produced discovery that was Permitted by *M. G. L. c. 66A § 2* and agreed to by counsel for the parties. He constantly refused to negotiate in good faith and turned down an offer to dismiss the case in exchange for granting the **Elder** a Life Estate in the property.¹ There were five (5) Motions that were entirely unnecessary (see Motion for Attorney's Fees, Supplemental Appendix). Shortly before trial, Respondent filed three Motions Pro Se even though he still had counsel representing him. Those Motions included two Motions to Compel Discovery and a Motion for Summary that were all denied. The Respondent's misconduct continued through the Appellate process when he filed briefs that did not nearly comply with appellate *19 rules and requested relief not appropriate to an appellate proceeding (see page 49 of Respondent's Brief).

IX. THE COURT WAS WITHIN ITS DISCRETION TO EXCLUDE WITNESSES OF THE RESPONDENT.

The definition provided by the Appeals Court in *Lonergan-Gillen v. Gillen*, 57 Mass. App. Ct. 746, 748-749, 785 N.E.2d 1285, 1288-1289 (2003) of judicial discretion is:

"The proper exercise of judicial discretion involves making a circumstantially fair and reasonable choice within a range of permitted options. Discretion 'implies the absence of a hard-and-fast rule' and may, in some settings, encompass taking no action. *Long v. George*, 296 Mass. 574, 578 (1937), quoting from *Paquette v. Fall River*, 278 Mass. 172, 174 (1932). Proper exercise of judicial discretion requires more than avoiding 'arbitrary determination, capricious disposition, or whimsical thinking.' *Davis v. Boston Elev. Ry. Co.*, 235 Mass. 482, 496 (1920). It imports a willingness, upon proper request, to consider all of the lawfully available judicial options. 'Where discretion to grant relief exists, a uniform policy of denying relief is error.'

Berryman v. United States, 378 A.2d 1317, 1320 (D.C. 1977). ‘It is one thing to consider [a] right [to exclude evidence] and exercise it either way, but having been given that right, analogous to discretion, it is the duty of the judge to exercise it, and it is error as a matter of law to *20 refuse to exercise it.’ *Commonwealth v. Edgerly*, 13 Mass. App. Ct. 562, 571 (1982).” (Footnotes omitted.)

In the case at bar, ESMV's Motion in Limine to Exclude many of the twenty-five proposed witnesses was granted on the grounds that sixteen witnesses had not been included in Respondent's pretrial memorandum and others were irrelevant. This is well within the proper exercise of judicial discretion.

CONCLUSION

For the above reasons, this Court should deny the Respondent's Appeal and affirm all aspects of the Judgment of Middlesex County Probate & Family Court.

Date: November 1, 2010

Footnotes

- 1 The terms of the Settlement offer are contained only as to the issue of the granting of the ESMV's and **Elder** Motions for Attorney's Fees at the conclusion of trial.