

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2003-019240

08/16/2004

THE HONORABLE MICHAEL A. YARNELL

CLERK OF THE COURT
M. L. Smith
Deputy

FILED: 08/19/2004

HELEN PAULINE PHELPS, et al.

HERBERT L ELY

v.

ELAN PHARMACEUTICALS INC, et al.

PAMELA TITZER

CRAIG W PHILLIPS
CINDY L PADILLA

TRIAL SETTING

11:00 a.m. In the courtroom.

Time set for oral argument on motion for summary judgment and comprehensive pretrial conference. Counsel, Herbert L. Ely and Cindy L. Padilla, are present for Plaintiffs. Counsel, Craig W. Phillips and Pamela Titzer, are present for Defendants. Perry Goldman is present.

Court Reporter, Clarice M. Reed, is present.

Oral Argument is heard on Plaintiffs' Motion For Summary Judgment as To Breach Of Contract Only, filed June 30, 2004.

IT IS ORDERED taking this matter under advisement.

A comprehensive pretrial conference is conducted. The parties confirm they are within schedule as to the court's prior pretrial scheduling orders. However, the initial private mediation has been delayed due to the selected mediator Christopher Skelly's schedule.

After discussion,

IT IS ORDERED all substantive motions shall and must be filed by **5:00 p.m.,
December 1, 2004.**

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FURTHER ORDERED all discovery must be completed by **5:00 p.m., December 20, 2004.**

THIS IS A TRIAL SETTING ORDER. PLEASE READ CAREFULLY FOR COMPLIANCE.

1. This matter is set for trial to a jury on **February 22, 2005** at **9:30 a.m.** The estimated length of trial is **5 days.**

THIS IS A FIRM TRIAL SETTING. A MOTION TO CONTINUE BASED ON LACK OF PREPARATION WILL ORDINARILY NOT BE GRANTED.

2. A Final Pretrial Management Conference is set for **February 14, 2005 at 3:30 p.m.**

DUTIES PRIOR TO THE FINAL PRETRIAL MANAGEMENT CONFERENCE

3. SETTLEMENT CONFERENCE. IT IS ORDERED the parties shall use their best efforts to conduct an initial private mediation by **September 15, 2004**, or as soon thereafter as may be reasonably accomplished.

4. MOTIONS IN LIMINE. All *Motions in Limine* shall be filed no later than 30 days before the Pretrial Management Conference and such motions must meet the test of State v. Superior Court, 108 Ariz. 396, 397; 499 P.2d 152 (1972): The primary purpose of a *Motion in Limine* is to avoid disclosing to the jury prejudicial matters which may compel a mistrial. See also, Ariz. Rules of Evidence 103(c). A written response to a *Motion in Limine* may be filed no later than ten (10) days thereafter. The Court may rule on *Motions in Limine* without oral argument. No replies shall be filed.

5. JOINT PRETRIAL STATEMENT. Two judicial days **before** the Pretrial Management Conference, counsel shall deliver to the trial judge a copy of the **Joint Pretrial Statement** signed by all counsel.

Deposition Summary: In addition to the information required by Rule 16(d), A.R.C.P., counsel shall at the Pretrial Management Conference provide to the Court copies of any deposition transcripts to be read to the jury. The offering party will highlight the portions to be read, the other side will highlight Rule 106 additions, and any objections for the Court to rule on will be clearly marked in the margin. The parties are encouraged to agree on narrative summaries of deposition testimony, using brief question and answer excerpts only to emphasize very important testimony or to cover areas of testimony that cannot be summarized to the satisfaction of all counsel. No stipulation should be unreasonably refused.

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Final Trial Witnesses: In addition to the information required by Rule 16(d), A.R.C.P., the Joint Pretrial Statement shall include an exhibit titled: **Final Trial Witness List**. This list shall contain the name of each witness a party actually intends to call at trial, the day on which they intend to call each witness and the estimated time needed for direct, cross and re-direct examination.

6. JURY INSTRUCTIONS; VOIR DIRE QUESTIONS. No less than thirty (30) days before the Pretrial Management Conference, counsel shall meet and agree on as many proposed jury instructions as possible. Two judicial days before the Pretrial Management Conference, counsel shall deliver to the trial judge, with their Joint Pretrial Statement, copies of:

- A. Proposed voir dire questions.
- B. A joint set of agreed-upon preliminary and final jury instructions.
- C. Separate sets of requested instructions that have not been agreed upon. Please read Rosen v. Knaub, 175 Ariz. 329; 85 P.2d 381 (1993) and the RAJI Civil 3d Statement of Purpose and Approach before preparing requests for non-RAJI instructions.

Recommended Arizona Jury Instructions (RAJI) need not be typed and may be requested in the following manner: RAJI 3d Standard 1 - Duty of Jurors. Non-RAJI instructions should be typed. Each instruction should cover only one subject.

DUTIES AT PRETRIAL MANAGEMENT CONFERENCE

- 7. At the Pretrial Management Conference, counsel shall be prepared to discuss:
 - A. Time limits in voir dire, opening statements, examination of witnesses and closing arguments.
 - B. Stipulations for the foundation and authenticity of exhibits.
 - C. Preliminary jury instructions, juror notebooks (counsel shall bring any proposed juror notebooks to the conference), mini opening statements and voir dire.
 - D. Agreed-upon deposition summaries and excerpts from deposition transcripts and the editing of any videotaped depositions.

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- E. Use of short-trial or summary jury trial.
- F. Any special scheduling or equipment issues.

8. All exhibits shall be exchanged 30 days before trial. Counsel shall confer regarding exhibits so duplicates are avoided. **At least ten days before trial, counsel or their knowledgeable assistants shall call the division clerk at 602-506-4396 to discuss procedures for marking exhibits.** Original depositions are provided to the clerk for the record and not marked as exhibits.

9. One day's jury fees will be assessed unless the Court is notified of settlement before 2:00 p.m. on the judicial day before the trial. Counsel are reminded to promptly notify the court of any settlement pursuant to Rule 5.1(c), A.R.C.P.

LATER:

Based on this entire record taken most favorably to Defendant Elan, disputed material issues of fact are present as to causation of the claimed contract damages.

A determination as to whether or not the claimed expenses, including full time care for a period of time, are "reasonable medical expenses" is premature on this record. There are a number of definitions of "reasonable medical expense" in relation to such full time care, including, without limitation, the internal revenue definition for chronically ill patients. See generally, IRS Publication 502, Medical and Dental Expenses.

IT IS ORDERED denying Plaintiffs' Motion For Summary Judgment as To Breach Of Contract Only, filed June 30, 2004, without prejudice to the renewal of this motion at the close of discovery.

FURTHER ORDERED, pursuant to Rule 56(d), Rules of Civil Procedure, on this record taken most favorably to Defendants, the court finds the following facts to be without substantial controversy in this action:

1. Elan developed the experimental drug AN-1792.
2. The contract between Plaintiff Helen Pauline Phelps and Elan provides, in part, "[Helen Pauline Phelps] will be reimbursed by the sponsor [Elan] for any reasonable medical expenses that [Helen Pauline Phelps] incurs as a direct result of the study drug and that are not covered by insurance" [hereinafter the "Reimbursement Clause"].
3. The Reimbursement Clause is binding and fully enforceable between Helen Pauline Phelps and Elan.

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4. Pivotal is not a party to the Reimbursement Clause and is not liable for any breach of contract claim related to that clause.

5. Helen Pauline Phelps developed encephalitis as a direct result of the study drug injections.

6. Elan has voluntarily paid hospital and various other medical expenses incurred by Helen Pauline Phelps for the treatment of encephalitis developed as a direct result of the study drug injections.