

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

FRANCIS EDWARD,

PLAINTIFF,

SX-11-CV-202

v.

ACTION FOR DAMAGES

**GENOA, INC.; KEN BROWN; and
GENERAL ENGINEERING CORPORATION
(GEC),**

JURY TRIAL DEMANDED

DEFENDANTS.

ORDER

THIS MATTER was before the Court for review *sua sponte*.

On February 24, 2017, the Supreme Court of the Virgin Islands (hereinafter “Supreme Court”) entered an opinion on August 1, 2017, whereby the Supreme Court affirmed in part and reversed in part this Court’s interlocutory orders, and remanded this matter for further proceedings consistent with the Supreme Court’s opinion.

A. The Virgin Islands Workers’ Compensation Act Immunity

In its opinion, the Supreme Court “affirm[ed] the portion of the Superior Court’s January 23, 2017 opinion holding that the presence of immunity under the [Virgin Islands Workers’ Compensation Act] does not deprive a court of subject-matter jurisdiction, but reverse[d] the portion of the same opinion which held the [Virgin Islands Workers’ Compensation Act] is not a waivable defense.” *Edward v. GEC, LLC*, No. 2017-0025, 2017 V.I. Supreme LEXIS 46, at *17 (V.I. Aug. 1, 2017). The Supreme Court noted in its opinion that it “has emphasized that affirmative defenses are all those which must be proven by the defendant, and that affirmative

defenses are waived unless pled in an answer” and cited to *Pedro v. Ranger Am. Of the V.I., Inc.*, 63 V.I. 511, 519 (V.I. 2015) and *Maduro v. Am. Airlines, Inc.*, S. Ct. Civ. No. 2007-029, 2008 V.I.U. Supreme LEXIS 24, at *8-9 (V.I. Feb. 28, 2008) (unpublished) (collecting cases). *Edward*, 2017 V.I. Supreme LEXIS 46, at *16-17. In fact, the Supreme Court further noted in its opinion that while the Virgin Islands Rules of Civil Procedure,¹ which went into effect on March 31, 2017, should not apply retroactively to a previously-pending action, the Supreme Court made it clear that “Rule 8(c)(1) of the Virgin Islands Rules of Civil Procedure simply restates existing law, since an employer’s status as an insured employer must be proven, *see* [Title] 24 V.I.C. § 273(d), and [the Supreme] Court has established that affirmative defenses are all those defenses which must be proven by the defendant.” *Edward*, 2017 V.I. Supreme LEXIS 46, at *17, fn 5. As such, the Court finds that Defendant GEC has waived its Virgin Islands Workers’ Compensation Act immunity defense by failing to plead its status as an insured employer in its answer.

B. Substitution of Expert Witness

In its opinion, the Supreme Court affirmed “the portion of the January 5, 2017 order and January 23, 2017 opinion in which the Superior Court concluded that it possessed the power to permit such a substitution [of a new expert for Doc Mitchell, Plaintiff Francis Edward’s original expert].” *Id.*, at *20. However, the Supreme Court reversed “the portions of the January 23, 2017 opinion in which the Superior Court denied [Plaintiff Francis] Edward’s motion to substitute based solely on its findings with respect to [Doc] Mitchell’s qualifications and methodology.” *Id.*, at *25. In fact, the Supreme Court made it clear that “the Superior Court need only look to the

¹ Virgin Islands Rule of Civil Procedure 8(c)(1) lists “workers’ compensation bar” as an affirmative defense.

qualifications and methodology of the substitute expert—provided, of course, that a challenge under *Daubert* has not already been waived.” *Id.*, at *26.

Here, as the Supreme Court noted:

...the record reflects that Defendant GEC did not take any step to exclude Doc Mitchell’s testimony on *Daubert* grounds—even though it was aware of him since October 31, 2013—until almost a month before the scheduled trial date, and then only after [Plaintiff Francis] Edward already filed his motion to substitute [Doc] Mitchell with [Terrance] Fischer, at which point [Defendant] GEC was aware that [Doc] Mitchell could not testify due to health issues. Even then, [Defendant] GEC never challenged [Doc] Mitchell or [Terrance] Fischer’s educational background or other qualifications to testify⁷... *Id.*, at *21.

⁷ Although [Defendant] GEC included in its motion in limine a section titled “The Witness Must Be An Expert,” [Defendant] GEC nevertheless acknowledged that “[Doc] Mitchell and [Terrance] Fischer may appear to be in a position (sic) of the requisite degrees to allow them to testify,” and instead challenged the admission of the expert opinion on grounds that it “is biased and insubstantial because they have established no factual nor scientific basis to justify any conclusions in this case.”

As the Supreme Court pointed out, Defendant GEC never directly challenged Terrance Fischer’s educational background or other qualifications to testify. *Id.* Thus, similar to the Supreme Court’s finding that Defendant GEC waived its challenge as to Doc Mitchell’s qualification as an expert witness, the Court also finds that Defendant GEC waived its challenge as to Terrance Fischer’s qualification as an expert witness.² *See Id.* (“issues related to the qualification of expert

² Even assuming *arguendo* that Defendant GEC timely challenged Terrance Fischer’s qualifications to testify, the Court concludes that Terrance Fischer has a sufficient background to qualify as a liability expert in this matter. *See Virgin Islands Waste Management Auth. v. Bovoni Investments, LLC*, 61 V.I. 355, 369 (V.I. 2014) (the qualification requirement is interpreted liberally). At the *Daubert* hearing, Terrance Fischer testified that: (1) he is a forensic engineer specializing in accident reconstruction (*Daubert* Hr’g Tr. 32:22-23, January 19, 2017); (2) he has been a forensic engineer for approximately 22 years (*Id.* 33:2-3); (3) his background is in biomechanics and in human factors engineering, as well as motor vehicle accident investigation (*Id.* 33:6-8); (4) he has a bachelor’s degree in human factors engineering and systems engineering and a master’s degree in human factor engineering and biomechanical trauma (*Id.* 33:11-14); (5) he has taken course work in accident reconstruction, accident investigation, Occupational Safety and Health Administration regulations, and slip/trip/fall and other work-related injuries (*Id.* 33:14-18); and (6) he is certified in human factors engineering and accident reconstruction (*Id.* 33:19-22). As such, the Court finds that Terrance Fischer satisfies the qualification standard under *Daubert*/Federal Rule of Evidence 702.

witnesses—including the need to conduct a *Daubert* inquiry—are subject to waiver if not timely asserted by the opposing party”); *see also V.I. Waste Mgmt. Auth.*, 61 V.I. at 370-71; *Molloy v. Reyes*, 61 V.I. 163, 183 (V.I. 2014).

Additionally, the Supreme Court pointed out that “it appears that [Defendant] GEC sought to exclude [Terrance] Fischer’s expert testimony on grounds that [Terrance] Fischer is unable to adequately testify solely to the four corners of [Doc] Mitchell’s report, when [Plaintiff Francis] Edward self-limited [Terrance] Fischer’s testimony in such a manner to avoid prejudice to [Defendant] GEC from the substitution occurring one month prior to trial—a trial which [Defendant] GEC subsequently moved to have continued to a later date” and noted that “on remand, the Superior Court may consider whether the circumstances that led to [Plaintiff Francis] Edward self-limiting [Terrance] Fischer’s testimony only to [Doc] Mitchell’s conclusions may have changed.”³ *Edward*, 2017 V.I. Supreme LEXIS 46, at *25, fn 9. While it is true that Defendant GEC filed a motion to continue the trial date just four days prior to the scheduled trial date, the Court does not believe that Defendant GEC manufactured a situation which it can “attempt to have it both ways.” Defendant GEC requested to continue the trial date due to an unforeseeable and unexpected event—namely, its lead counsel was being treated for a serious medical condition.

On August 10, 2017, this matter came before the Court for a status conference. At the status conference, the Court raised the issue of whether the circumstances that led to Plaintiff Francis Edward to self-limit Terrance Fischer’s testimony only to Doc Mitchell’s conclusions have changed and ordered parties to submit briefs. On August 17, 2017, Plaintiff Francis Edward filed

³ The Supreme Court compared the circumstances herein with *Najawicz v. People*, 58 V.I. 315, 337-38 (V.I. 2013) (party cannot benefit by manufacturing a situation in which it can “attempt to have it both ways”).

a notice advising the Court that Terrance Fischer “will testify in keeping with his *Daubert* testimony that the Rules and Regulations violated by [Defendant] GEC, LLC are OSHA⁴ standards section[s] 1910 and 1926, which reference and incorporate the OSHA standard that it is an industry standard not to lift items over 51 pounds without assistance.” In support of his notice, Plaintiff Francis Edward attached a copy of the transcript from the January 19, 2017 *Daubert* hearing and a copy of the Ergonomic Guidelines for Manual Material Handling published in 2007 by the California Department of Industrial Relations (hereinafter “Manual”). On August 23, 2017, Defendant GEC filed its response whereby Defendant GEC indicated that it does not object to Terrance Fischer making references to OSHA standards sections 1910 and 1926, but it objects to Terrance Fischer making references to the Manual. Defendant GEC argued that the Manual has “no relevance what-so-ever with this matter” and “[a]ny and all contents therein are only persuasive and more importantly applicable only in California not the U.S. Virgin Islands.” On August 24, 2017, Plaintiff Francis Edward filed a response whereby he agreed that Terrance Fischer will not introduce the Manual itself, but noted that “the guidelines in the [M]anual evidence the industry standards in America and are not limited to California.” However, Plaintiff Francis Edward indicated that Terrance Fischer will “testify to his reliance on those standards as an example as to how OSHA and NIOSH⁵ have been accepted and enforced and...Defendant [GEC] is free to cross examine him as to whether they apply to the Virgin Islands and why he contends that they do.”

The Occupational Safety and Health Act of 1970 (hereinafter “Act”) created OSHA to ensure safe working conditions by setting and enforcing standards. See <https://www.osha.gov>.

⁴ OSHA stands for the “Occupational Safety and Health Administration.”

⁵ NIOSH stands for the “National Institute for Occupational Safety and Health.”

The Act permits a state to have its own OSHA program as long as it meets all of the federal requirements. *Id.* In 1973, California established its own comprehensive OSHA program—called Cal/OSHA—and is administered by the California Department of Industrial Relations. <http://www.dir.ca.gov/dosh/dosh1.html>. Here, the Manual is published by the California Department of Industrial Relations, which recognized, *inter alia*, Cal/OSHA and NIOSH as partners responsible for the development and co-publishing of the Manual. (Plaintiff’s Notice, Exhibit 2: Ergonomic Guidelines for Manual Material Handling, p. 4 (2007)) While the Manual was neither mentioned by Doc Mitchell in his report nor by Terrance Fischer at the *Daubert* hearing, the first page of Doc Mitchell’s report stated that “[t]he safety of workers/personnel working in any trade performing any type of duty in the United States is covered under [OSHA] and the U.S. Department of Health and Human Services, Public Health Services, Center for Disease Control and Prevention and [NIOSH].” As such, the Court will permit Terrance Fischer to reference the Manual in the very limited context that Plaintiff requested—namely, to reference the Manual as “an example as to how OSHA and NIOSH have been accepted and enforced.” Defendant GEC will have the opportunity during cross-examination to question Terrance Fischer about the enforcement and applicability of the Manual in the U.S. Virgin Islands. Accordingly, it is hereby:

ORDERED that the Virgin Islands Workers’ Compensation Act immunity defense is **DEEMED WAIVED** as to Defendant GEC. It is further:

ORDERED that the Court’s January 23, 2017 order denying Plaintiff Francis Edward’s motion to substitute liability expert, filed on July 26, 2016, is **VACATED**. It is further:

ORDERED that the Court's January 23, 2017 order granting Defendant GEC, LLC's motion in limine to exclude the expert testimony of Doc Mitchell and Terrance Fischer, filed on August 29, 2016, is **VACATED**. It is further:

ORDERED that Plaintiff Francis Edward's motion to substitute liability expert, filed on July 26, 2016, is **GRANTED**. Terrance Fischer shall substitute Doc Mitchell as Plaintiff Francis Edward's liability expert. It is further:

ORDERED that Defendant GEC, LLC's motion in limine to exclude the expert testimony of Doc Mitchell and Terrance Fischer, filed on August 29, 2016, is **DENIED**. Plaintiff Francis Edward is permitted to call Terrance Fischer to testify as his liability expert at trial and tender Doc Mitchell's expert report into evidence. It is further:

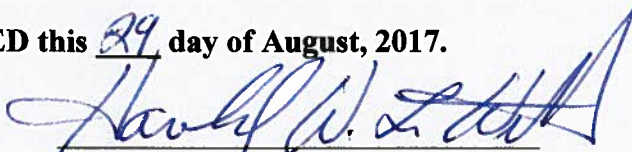
ORDERED that Terrance Fischer's testimony shall be limited to the subject matter and theories already espoused by Doc Mitchell. However, Terrance Fischer is permitted to: (1) reference OSHA standards sections 1910 and 1926; and (2) reference the Manual in a very limited context—namely, to reference the Manual “as an example as to how OSHA and NIOSH have been accepted and enforced.” **And** it is further:

ORDERED that Terrance Fischer shall not introduce the Manual into evidence.

DONE and so ORDERED this 29 day of August, 2017.

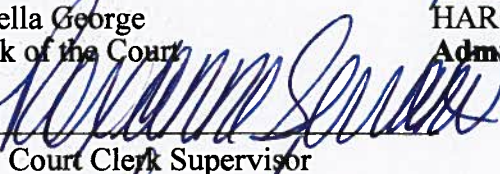
ATTEST:

Estrella George
Clerk of the Court



HAROLD W. L. WILLOCKS
Administrative Judge of the Superior Court

By:


Court Clerk Supervisor

Dated:

8/29/17