SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

VELMA SAMUEL,	)	
Plaintiff,	)	
vs.	)	**CASE NO. ST-12-CV-457**
UNITED CORPORATION d/b/a PLAZA EXTRA,	)	
Defendant.	)	

MEMORANDUM OPINION

Pending before the Court is Plaintiff's motion to certify for interlocutory appeal an Order denying Plaintiff's motion for an evidentiary ruling. For the following reasons, Plaintiff's motion to certify will be denied.

FACTUAL AND PROCEDURAL HISTORY

On March 3, 2014, Plaintiff filed a motion for a spoliation inference. In a May 21, 2014, Opinion concerning the motion, the Court indicated that Plaintiff had the burden to establish that (1) the evidence in question was within the defending party's control; (2) that there has been actual suppression or withholding of the evidence; (3) the evidence destroyed or withheld was relevant to the claims or defenses; and (4) it was reasonably foreseeable that the evidence would later be discoverable. In applying Supreme Court of the Virgin Islands precedent to this case,[1] this Court concluded that Plaintiff failed to demonstrate that Defendant intentionally or fraudulently

[1] *Bright v. United Corp.*, 50 V.I. 215, 225-26 (V.I. 2008).

suppressed or withheld evidence and denied Plaintiff's motion. On June 9, 2014, Plaintiff filed the pending motion to certify.

ANALYSIS

Plaintiff's motion for an interlocutory appeal is brought under Virgin Islands Supreme Court Rule 6(a)[2] and section 33(c) of Title 4 of the Virgin Islands Code. 4 V.I.C. § 33(c) provides that:

> Whenever the Superior Court judge, in making a civil action or order not otherwise appealable under this section, is of the opinion that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of litigation, the judge shall so state in the order.[3]

The Supreme Court of the Virgin Islands has determined that 4 V.I.C. § 33(c) is identical to 28 U.S.C. § 1292(b) and that both statutes "assign consideration of civil interlocutory appeals to the discretion or opinion of the trial judge."[4] As a result, under both statutes, "without the trial judge's favorable opinion and discretion, a civil interlocutory appeal cannot ensue."[5]

The legislative history of 28 U.S.C. § 1292(b) indicates that Congress intended section 1292(b) to be "sparingly applied" and used "only in exceptional cases."[6] Several courts interpreting 28 U.S.C. § 1292(b) have determined that a "controlling question of law" is one that

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[2] Plaintiff's request that the Court amend its May 21, 2014, Order in accordance with V.I.S. Ct. R. 6(a) is misplaced. "There first must exist an order pursuant to [T]itle 4, section 33 of the Virgin Islands Code, before Rule 6 of the Virgin Islands Supreme Court Rules can apply." See *In re Le Blanc*, 49 V.I. 508, 522, 2008 V.I. Supreme LEXIS 17, 24, 2008 WL 2625225 (VI. 2008).

[3] *In re Le Blanc*, 49 V.I. 508, 522, 2008 V.I. Supreme LEXIS 17, 24, 2008 WL 2625225 (VI. 2008) (citing 4 V.I.C. § Section 33(c)).

[4] *In re Le Blanc*, 49 V.I. 508, 522-523, 2008 V.I. Supreme LEXIS 17, 24-25, 2008 WL 2625225 (VI. 2008).

[5] *Id.*

[6] *Mullen v. Norfolk S. Ry. Co.*, NO. 13-6348, 2014 U.S. Dist. LEXIS 78647, at *2-3 (E.D. Pa. June 9, 2014); see also *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (U.S. 1978).

involves a "pure"[7] question of law or "abstract legal issues"[8] and not a court's application of established legal standards to facts of a case.[9] In addition, "matters such as pretrial rulings on the admissibility of evidence and matters entrusted to the [trial] court's discretion are not ordinarily certifiable."[10] [11]

Plaintiff has not meet her burden to show that this case involves an exceptional circumstance that warrants certification. Plaintiff has failed to show that her appeal involves a controlling question of law. Plaintiff's interlocutory appeal is not a pure question of law that the Supreme Court "could decide quickly and cleanly without having to study the record."[12] Instead, Plaintiff cites extensively to the record in her motion to certify rearguing the points she made in her motion for a spoliation inference. Plaintiff has also failed to meet her burden to show that there is substantial ground for difference of opinion between this Court and the Supreme Court. Rather, the Court applied Supreme Court of the Virgin Islands precedent to the facts of this case. Most importantly, the motion to certify involves an evidentiary matter that was within the Court's discretion to rule upon. As a result, Plaintiff's motion will be denied.

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[7] *Ahrenholz v. Board of Trustees*, 219 F.3d 674, 676-77 (7th Cir. 2000).

[8] *Id.*

[9] *Premick v. Dick's Sporting Goods, Inc.*, 2007 U.S. District LEXIS 11813, at *2 (W.D. Pa. Feb. 20, 2007).

[10] Pratt, 19 Moore's Federal Practice –Civil § 203.31 (LEXIS 2014).

[11] Applying local rules of statutory interpretation, the Court finds that 4 V.I.C. § 33(c) should be construed in the same way 28 U.S.C. § 1292(b) has been construed by the federal courts.

[12] *Ahrenholz v. Board of Trustees*, 219 F.3d 674, 677, 2000 U.S. App. LEXIS 17244, 6, 16 I.E.R. Cas. (BNA) 971 (7th Cir. Ill. 2000).

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

VELMA SAMUEL,	)	
Plaintiff,	)	**CASE NO. ST-12-CV-457**
v.	)	
	)	**ACTION FOR DAMAGES**
UNITED CORPORATION d/b/a PLAZA EXTRA,	)	
	)	**JURY TRIAL**
Defendant.	)	**DEMANDED**

MEMORANDUM OPINION

Before the Court is Defendant United Corporation's April 22, 2014, renewed motion to disqualify Lee J. Rohn and Associates, LLC, as counsel for Plaintiff Velma Samuel. The Court denied Defendant's original motion to disqualify Rohn's firm without prejudice on March 25, 2013, because Defendant had "not yet demonstrated that a potential conflict exist[ed]" between Plaintiff's counsel and Defendant.[1]

Because the Hamed family does not have an ownership interest in United Corporation; because Defendant claims that it is Attorney Rohn's representation of the Hamed family in a matter involving Plaza Extra that creates a conflict; and because the Plaza Extra partnership and the Hameds are not parties in this matter, the Court finds that there is no basis for disqualification.

RELEVANT FACTUAL AND PROCEDURAL HISTORY

Rohn filed a Complaint on behalf of Plaintiff, who asserts she was injured when she fell in Defendant's grocery store on August 16, 2012, on St. Thomas. Waheed Hamed, a manager of

[1] March 25, 2013, Opinion, p. 5.

Defendant's St. Thomas grocery store,[2] interviewed Plaintiff after her fall and took her statement regarding the incident.

Although the case is captioned "United Corporation d/b/a Plaza Extra," the party of interest is United Corporation, an entity owned by Fathi Yusef and members of his immediate family. United Corporation rents property to the Plaza Extra partnership for one of Plaza Extra's St. Croix locations. Waheed Hamed's father, Mohammed Hamed, and Fathi Yusef have a 50/50 partnership in Plaza Extra.

Rohn represents Waheed Hamed and his family before Superior Court Judge Julio Brady in a dispute against Fathi Yusuf regarding the internal operations of the grocery store chain and the accounting for its profits.[3]

STANDARD OF REVIEW –
CONCURRENT CONFLICT OF INTEREST, REPRESENTATION

Pursuant to the Virgin Islands Rules of Professional Conduct,[4] a lawyer may not represent a client "if the representation involves a concurrent conflict of interest."[5] A concurrent conflict of interest exists if:

> (1) the representation of one client will be directly adverse to another client; or
> (2) there is a significant risk that the representation of one or clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.[6]

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[2] There are three Plaza Extra grocery stores in the United States Virgin Islands: two (2) on St. Croix and one (1) on St. Thomas.
[3] Case No. SX-12-CV-370.
[4] Supreme Court Rule 211 established the Virgin Islands Rules of Professional Conduct by order dated December 23, 2013, and effective on February 1, 2014. "[T]o the extent applicable, the accompanying or related ABA Interpretive Guidelines, Comments and Committee Comments… govern the conduct of members of the Bar of this Territory." V.I.S.CT.R. 203. While "any conduct that occurred prior to the February 1, 2014, effective date shall be analyzed under the ethical rules that were in effect at the time of the conduct in question," V.I.S.CT.R. 203, because counsel's conduct is ongoing to this date, any conflicts will be analyzed under the new rules.
[5] V.I.S.CT.R. 211.1.7(a).
[6] V.I.S.CT.R. 211.1.7(a).

However, a lawyer may represent a client despite the existence of a conflict of interest if:

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> (2) the representation is not prohibited by law;
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> (4) each affected client gives informed consent, confirmed in writing.[7]

In most circumstances, "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any of them practicing alone would be prohibited from doing so [because of a concurrent conflict of interest]".[8]

"A lawyer shall not use information relating to representation of the client to the disadvantage of the client unless the client gives informed consent,"[9] and "[w]hile lawyers are association in a firm, [the prohibition against using this information to the disadvantage of the client] applies to any and all [of the lawyers of the firm]."[10]

DISCUSSION

Defendant argues that Attorney Rohn had an "unwaivable conflict of interest" because "the Plaintiff… is suing… Plaza Extra" and stating that Rohn represented "Mohammed Hamed, the one-half owner of [Plaza Extra]," in a separate matter. However, Plaintiff concedes that she and her counsel are actually suing United Corporation, a separate entity from Plaza Extra.[11] Despite its designation in the caption as a "d/b/a" of United Corporation, Plaza Extra is not a

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[7] V.I.S.CT.R. 211.1.7(b).
[8] V.I.S.CT.R. 211.1.10(a). For exceptions and parameters, see the entire rule.
[9] V.I.S.CT.R. 211.1.8(b).
[10] V.I.S.CT.R. 211.1.8(k).
[11] "Rohn has never represented either Defendant 'United Corporation' or the separate partnership entity claimed to be 'Plaza Extra'". Plaintiff's Opposition to Renewed Motion to Disqualify, p. 2. There is only one defendant in this matter.

second defendant in this matter. United Corporation does not contest its ownership interest in the property leased to Plaza Extra on St. Thomas.

The Court must determine whether there is a concurrent conflict of interest in Attorney Rohn's representation of the Plaintiff in this matter and her representation of the Hamed family – which has a half ownership interest in the Plaza Extra partnership and which includes Waheed Hamed, a manager for Plaza Extra – in the other, unrelated matter. Because the party of interest here is United Corporation and not Plaza Extra, and because the Hameds do not have a stake in United Corporation, the Court finds that there is not a concurrent conflict of interest since Rohn is not alleged to have represented United Corporation's interest at any time.

A conflict is "consentable" and subject to waiver when the lawyer involved can properly ask for such consent and can properly provide representation on the basis of the client's consent.[12] The Court finds that the interests of the parties can be adequately protected when one matter involves the dissolution of a partnership and the other matter involves an alleged liability for a slip-and-fall, and the affected parties may consent to such representation.[13] Thus, even if Plaza Extra were a defendant in this matter, Velma Samuels, Mohammed Hamed, and Waheed Hamed gave informed consent, confirmed in writing, to Rohn's representation in January of 2013.[14] While the Court strongly encourages parties to acquire informed consent of each

[12] ABA Comments to Rule 1.7, cmt. 14 ("Ordinarily, clients may consent to representation notwithstanding a conflict. However… some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client").

[13] Id. at cmt. 15 ("Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus… representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation").

[14] Velma Samuel's January 8, 2013, Consent to Conflict of Interest; Mohammed Hamed's January 9, 2013, Affidavit; Waheed Hamed's January 7, 2013, Affidavits (there are two (2)). Other Hamed family members also consented to the representation: Mufeed Hamed's January 7, 2013, Affidavit and Shawn Hamed's January 7, 2013, Affidavit.

affected client at the time of or before a complaint is filed, the Court finds that the consent of the parties represented by Rohn was obtained far enough before litigation to temper the Court's concerns regarding timeliness of the consent. Therefore, the Court finds that even if there was a conflict of interest, the affected parties consented to the conflict.

CONCLUSION

The Court concludes that there is no conflict of interest. Consequently Defendant's renewed motion to disqualify is denied. An appropriate Order is issued simultaneously herewith.

Dated: March 2, 2015

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

Attest: Estrella H. George
Acting Clerk of the Court ___/___/_____

by: ______________
Lori Boynes-Tyson
Court Clerk Supervisor 3 / 2 / 15

SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

VELMA SAMUEL,	)	
Plaintiff,	)	
vs.	)	**CASE NO. ST-12-CV-457**
UNITED CORPORATION d/b/a PLAZA EXTRA,	)	
Defendant.	)	

MEMORANDUM OPINION

Pending before the Court are several motions submitted by Defendant. For the following reasons, Defendant's motions will be granted and denied consistent with this Opinion.

ANALYSIS

A) Motion to Exclude Evidence and Prohibit Damages Caused by Defendant's Expert

On May 2, 2014, Plaintiff's counsel wrote a letter to Defendant's counsel informing him that Plaintiff was maltreated by Defendant's expert during the expert's examination of Plaintiff in Florida.[1] Plaintiff's counsel indicated that she would be requesting damages at trial for this outrageous treatment.[2] Defendant now moves to exclude any evidence that Plaintiff may raise at trial concerning the examination in Florida.

Plaintiff has failed to establish how the incident in Florida involving a nonparty is relevant to her claims against Defendant. As a result, the Court will grant the motion and Plaintiff is

[1] Exhibit A to Defendant's motion, at page 2
[2] *Id.*

prohibited from referring to or providing evidence concerning Defendant's expert's treatment of Plaintiff and from seeking damages therefore in this action.

B) Motion to Exclude the Speculative Testimony of Plaintiff's Witness Valmy Gonzales

Defendant moves to exclude Valmy Gonzales' testimony that the floor where Plaintiff fell was "shiny as if it was wet."[3] Defendant asserts that Gonzales' testimony is speculative and should be excluded under Federal Rule of Evidence 701.

Federal Rule of Evidence 701 establishes that the testimony of a lay witness is "limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge ..."

The Court finds that the cases Defendant cites are inapposite because they do not involve Federal Rule of Evidence 701. Instead, the cases involve situations where a court entered summary judgment in favor of the defense because the plaintiff failed to raise a genuine issue of material fact. Given that the standard for entering summary judgment and the standard for excluding evidence under Federal Rule of Evidence 701 are sufficiently distinct, the Court finds that Defendant has not met its burden to show that Gonzales' testimony concerning his perception of the condition of the floor where Plaintiff fell should be excluded. As a result, Defendant's motion will be denied.

C) Defendant's Omnibus Motion

(1) Unopposed Motions

[3] Gonzales deposition, at page 13.

Several of the issues Defendant has raised have not been objected to by Plaintiff. Plaintiff has not objected to (1) Defendant's motion to exclude voir dire questions regarding the jurors' ability to award a specific amount of damages; (2) Defendant's motion to exclude any reference to or evidence, testimony or argument suggesting that jurors put themselves in Plaintiff's place, or in Plaintiff's shoes, or referring to Plaintiff as a victim; (3) Defendant's motion to exclude any reference to or evidence, testimony or argument concerning personal beliefs or opinions of Plaintiff's counsel; (4) Defendant's motion to exclude any reference to or evidence, testimony or argument arising out of the litigation between the partners of Plaza Extra and/or any impact that such will have on the community at large; (5) Defendant's motion to exclude non-party witnesses during trial so that they cannot hear the testimony of other witnesses; (6) Defendant's motion to exclude settlement discussions; and (7) Defendant's motion to exclude references to motions in limine or the Court's rulings thereon. As a result, Defendant's motions will be granted.

(2) Motions to Exclude Undisclosed Witnesses and Evidence and Inflammatory Evidence

Defendant also moves to exclude undisclosed witnesses, other than solely for impeachment; undisclosed evidence, other than solely for impeachment; and inflammatory language or evidence. A court should deny a motion in limine when it is vague, ambiguous, and fails to establish a basis for excluding the specific evidence.[4] Defendant has not identified any specific witness or evidence that has been undisclosed or any language or evidence that is inflammatory. As a result, the Court will deny these motions, but Defendant is free to raise these issues at trial.

~~*(3) Motion to Exclude Evidence or Argument Concerning Plaintiff's Pain and Suffering*~~

[4] *National Union Fire Ins. Co. v. L.E. Myers Co. Group*, 937 F. Supp. 276, 286 (S.D.N.Y. 1996).

Defendant moves to exclude any evidence or argument suggesting any amount of money as compensation for pain and suffering or from using lost future earnings as a comparator for any claim of pain and suffering. Defendant relies on a non-Virgin Islands Third Circuit case in which the Court found that the trial court had committed reversible error by permitting a party to suggest a specific dollar amount for pain and suffering.[5] The Third Circuit determined that "references ... to a minimum dollar amount that plaintiff should be awarded for his pain and suffering could ... irrationally inflate[] the damages award."[6]

Plaintiff argues that the Third Circuit case is not binding and that this Court should follow precedent from the Second and Seventh Circuits holding that this issue is a matter of the trial court's discretion and that admission does not constitute reversible error.[7]

The Court notes that Plaintiff's vocational expert has been excluded from testifying in this case and Plaintiff has not presented any other admissible evidence concerning Plaintiff's lost future earnings. In addition, the Court notes that even under the less restrictive Second/Seventh Circuit rule, this Court has the discretion whether to exclude references to specific amounts for pain and suffering. And, while the Third Circuit's case may not be binding, the Court finds the Third Circuit's reasoning is persuasive. References to specific amounts for pain and suffering does not "appeal to the rational instincts of a jury" and instead "'import[s] into the trial elements of sheer speculation on a matter which by universal understanding is not susceptible to evaluation on any ... basis.'"[8] As a result, Defendant's motion to exclude will be granted.

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[5] See *Waldorf v. Shuta*, 896 F.2d 723, 744, 1990 U.S. App. LEXIS 1527, 67-68 (3d Cir. N.J. 1990).
[6] *Id.*
[7] See *Lightfoot v. Union Carbide Corp*, 110 F.3d 898 (2d Cir. 1997) and *Evoy v. CRST Van expedited, Inc.*, 430 F. Supp. 2d 775 (N.D. Ill. 2006).
[8] *Id.*, (citing and quoting *Botta v. Brunner*, 26 N.J. 82, 100, 138 A.2d 713, 723 (1958)).

(4) Motion to Exclude Reference to Discovery Disputes

Defendant correctly indicates that discovery disputes are inappropriate topics for jury consideration.[9] Any references to the parties' discovery disputes would be irrelevant to the claims of this case, would be highly prejudicial, and would have limited probative value.[10] As a result, Plaintiff is prohibited from discussing the discovery disputes under any circumstance.

(5) Motion to Exclude References to Dollar Amount of Damages and Any Appeal to Bias Or Prejudice Against Defendant

Defendant has clarified that it is only moving to exclude Plaintiff from referring to any specific dollar amount for Plaintiff's pain and suffering.[11] As a result, Defendant merely repeats its arguments in section (C)(3) of this opinion, and Defendant's motion will be granted for the same reasons the Court gave in section (C)(3).

Defendant also moves to prohibit Plaintiff from making appeals to bias or prejudice against Defendant. Any appeals to bias or prejudice against Defendant would be irrelevant to the claims of this case, would be highly prejudicial, and would have limited probative value. As a result, the Court will grant Defendant's motion.

(6) Motion to Exclude References or Evidence Concerning Defendant's or Affiliated Entity's Financial Condition

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[9] See, e.g., *N.H. Ball Bearings, Inc. v. Jackson*, 969 A.2d 351, 361, 2009 N.H. LEXIS 29, 20, 29 I.E.R. Cas. (BNA) 375 (N.H. 2009) ("discovery is generally within the province and discretion of the trial judge, not the jury").
[10] Fed. R. Evidence 401 and 403.
[11] See Defendant's reply to Plaintiff's opposition to Defendant's omnibus motion, at page 3.

Defendant correctly indicates that references or evidence concerning Defendant's financial condition is highly prejudicial and has limited probative value.[12] As a result, Plaintiff is prohibited from discussing Defendant's financial condition under any circumstance.

(7) Motion to Exclude Evidence of Liability Coverage

Defendant correctly indicates that references or evidence concerning Defendant's liability insurance coverage is highly prejudicial and has limited probative value.[13] As a result, Plaintiff is prohibited from discussing Defendant's liability insurance coverage under any circumstance.

D) Defendant's Motion to Exclude Testimony of Elizabeth Lawrence Regarding Plaintiff's Pain

Defendant moves to exclude testimony by Plaintiff's neighbor Elizabeth Lawrence regarding Plaintiff's pain. During her testimony, Lawrence made certain observations about Plaintiff's pain and drew an analogy to her own injuries. Plaintiff has acknowledged that Lawrence's testimony concerning her own injuries is irrelevant and Plaintiff does not intend to introduce this testimony at trial.[14] As a result, Defendant's motion to exclude Lawrence's testimony concerning her own injuries will be granted.

Concerning Lawrence's observations about Plaintiff's pain, the Court notes that the testimony of a lay witness is "limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge …"[15]

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[12] See Federal Rule of Evidence 403.
[13] See Federal Rule of Evidence 403.
[14] Plaintiff's opposition to Defendant's motion to exclude Lawrence's testimony.
[15] Federal Rule of Evidence 701.

Here, it is permissible for Lawrence, as a lay witness, to testify about her observations of Plaintiff's demeanor. As a result, Defendant's motion will be granted in part and denied in part.

An Order consistent with this Opinion shall follow.

Dated: March 2, 2015

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

ATTEST: Estrella George
Acting Clerk of Court __/__/__

by:

Lori Boynes-Tyson
Court Clerk Supervisor 3/2/15