

SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

ISHMAEL TODMAN, JR., and ALANI HENNEMAN	)	
TODMAN,	)	
	)	CASE NO. ST-16-CV-158
Plaintiffs,	)	
	)	Cite as 2019 VI Super U121
vs.	)	
	)	
GARY A. HICKS,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

¶1. Through a Memorandum Opinion and Order entered April 23, 2019, the Court reserved ruling on Defendant Hicks' April 2, 2019 Motion *in Limine* to Exclude Plaintiffs' Exhibits and Witnesses Not Disclosed Pursuant to V.I.R. Civ. P. 26(a)(3) because the motion made only general allegations and did not specifically identify particular items of evidence or witnesses Plaintiff intended to offer. Hicks now asks that the Court address that motion in light of Hicks' April 12, 2019, Motion *in Limine* to Exclude Witnesses Not Disclosed Pursuant to V.I.R. Civ. P. 26(a)(1)(A)(i) and 26(e) and Objections to Plaintiff's Exhibit List Pursuant to V.I.R. Civ. P. 26(a)(3)(B), which the Court did not consider in its original ruling.

¶2. Hicks' April 12, 2019, Motion *in Limine* to Exclude Witnesses Not Disclosed Pursuant to V.I.R. Civ. P. 26(a)(1)(A)(i) and 26(e) contends that Robin Ellett, MD, George Adam Flowers, MD, Ashley Pitman, DPT, Kimberly Harter, PT, Stephan Prada, MD, and Adrien Austin, were not identified in Plaintiff's initial disclosures.

¶3. At the time of the Motion, Hicks was able to represent that Ellett, Flowers, Pitman, Harter, and Prada are "some of Plaintiff's treating physicians" and to indicate that they

were identified along with other treatment providers in Ishmael Todman's medical records. Hicks was obviously aware of the identity and likely subject matter of the potential testimony of these medical providers, and it is certainly reasonable to assume that Plaintiff would call treating physicians to establish his injuries. Since the trial of this case was continued after the motion was filed, Hicks has also had an additional four and one-half months in which to depose those medical providers or investigate their likely testimony. Because Hicks has shown no prejudice regarding medical providers, has had the opportunity to cure any "surprise" for almost five months, has not demonstrated trial disruption, bad faith, or willfulness on the part of Plaintiff's counsel, and because the importance of evidence from treating medical professionals to Plaintiff's case is substantial, this portion of Hicks' *Motion in Limine* is denied.

¶4. In contrast, Hicks claims that Adrien Austin "has never been mentioned in the case in any respect." The Court reserves ruling on this portion of the Motion until Plaintiff makes a proffer regarding the anticipated testimony of the Austin and explains the failure to disclose the witness.

¶5. Regarding Plaintiffs' Exhibit List, Hicks raises numerous objections.

¶6. Exhibit 1. First, Hicks objects to "irrelevant parts" of Hicks' own affidavit. Because it may contain impeaching information and admissions against Hicks' interests, that document may be used on cross-examination of Hicks, and, depending on the testimony, admission of the document may not be necessary. However, portions of the affidavit concerning claims that have been dismissed should be redacted if the exhibit is offered in evidence. The Court reserves ruling with regard to "financial information" until it has an opportunity to review the affidavit itself.

¶7. Exhibit 5. Hicks' objection to the use of Deft's response to Plaintiffs' request for admissions is sustained, since Deft is no longer a party to this action.

¶8. Exhibits 13 and 14. Because the Complaint and Amended Complaint contain hearsay and make allegations against parties that have been dismissed, Hicks' objection to their use is sustained.

¶9. Exhibits 15-79, 80-85, 86-140, 144. Hicks' hearsay objections to Ishmael Todman's medical records and bills are overruled, as any statements made by Todman attributing his injuries to the accident were for the purpose of seeking medical treatment and are subject to cross-examination. In the absence of a stipulation regarding authenticity, regarding which the Court expects the parties to pursue in good faith, Todman will need to properly qualify a custodian of records to present these documents.

¶10. Exhibits 145-147, 148, 153. The Court reserves ruling on these exhibits regarding Avis car rental, Troy Roper Trucking, and the Caribbean Chiropractic Patient Ledger until the Court can examine them at trial to determine their contents and anticipated use.

¶11. Hicks also asks the Court to decide those portions of Hicks' one-page Motion *in Limine* to Exclude Evidence of Past Lost Income, Future Lost Income, and Future Loss of Earning Capacity, Gross Negligence, Intentional Infliction of Emotional Distress, and Punitive Damages¹ that purported to summarily incorporate arguments raised by then Defendant Deft, Inc., in its June 29, 2018, motion for partial summary judgment "at page 7-8." There, Deft moved for summary judgment on claims for past lost earnings, loss of earning capacity, and future loss of earnings.

¹ The Court has already issued an Opinion granting summary judgment regarding Plaintiffs' claims for gross negligence, intentional infliction of emotional distress, and punitive damages.

¶12. First, Deft asserted that Ishmael Todman testified at page 87 of his deposition that he was not claiming past lost income. Page 87, lines 2 through 14 reads:

Q. So are you making a claim for lost income in the past?

A. Not that I know of.

Mr. Stutzman: And we can ask Attorney Caines. Are you guys formally waiving any lost income claim, past?

Mr. Caines: It's not in our pleading, lost income, so –

Mr. Stutzman: Okay.

Mr. Caines: - 'cause he didn't lose any income, so I wouldn't –

Mr. Stutzman: Okay. Just making sure.

Mr. Caines: Yes.

¶13. It thus appears that this portion of the motion is moot, since Ishmael Todman is not asserting a claim for past lost income.

¶14. Relying on Plaintiff's response to Deft's Interrogatory No. 20, Deft also asserted that Plaintiff is not claiming any loss of earning capacity. However, Todman's response to Deft's Interrogatory No. 20 is ambiguous:

INTERROGATORY NO. 20:

If you are claiming any loss of earning capacity as a result of the alleged occurrence, please state the total amount of earning which you lost as a result of your absence, and the nature of your employment immediately prior to the alleged occurrence, indicating you job title, classification or position, and the last day you worked prior to the accident.

RESPONSE:

I am not claiming lost earning capacity. I am concern that my future earning capacity may be compromised by my back injury. [sic]

¶15. And, while Deft concedes that Todman's counsel indicated at Todman's deposition that Todman would be making a claim for "future loss of income capacity," Deft the argues that there is no evidence upon which such a claim could be based since,

No doctor has told Plaintiff that he will not be able to work in the future. No doctor has ever told Plaintiff that he will lose income in the future. Plaintiff has never seen any type of expert who has told him that he will have a loss of future income or earning capacity. In fact, to date, over four years since the April 2, 2014, accident, Plaintiff has not lost any wages and was at all times gainfully employed until he voluntarily resigned from his \$65,000 per year job in January of 2018 for political and/or personal reasons.

None of the relevant documents/evidence to prove any type of future loss of wages and/or earning capacity, including, but not limited to, medical records/reports, employment records, tax records, wage verifications, vocational rehabilitation reports, and/or expert reports of any type whatsoever, have been produced in this matter that concern and/or support any future loss of earnings and/or future loss of earning capacity claims. The time for producing expert reports in this case has expired, and to date, not have been so produced.

¶16. Plaintiff did not respond to that part of Deft's Motion for Partial Summary Judgment.

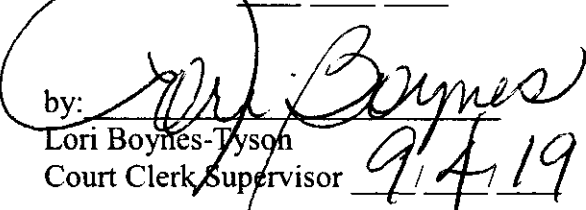
¶17. While it appears from Ishmael Todman's response to Interrogatory No. 20 that Plaintiffs may be conflating the concepts of loss of future earnings and loss of future earning capacity, regardless, Plaintiff must still present foundational evidence upon which to base and calculate a claim for the latter. While the Court still reserves ruling because Plaintiff has not had an adequate opportunity to respond to Hicks' most recent request for a ruling, the Court will not permit a claim for loss of future earning capacity to go to the jury in the absence of sufficient evidence to support the claim.

¶18. Thus, the Motion *in Limine* to Exclude Evidence of Past Lost Income, Future Lost Income, and Future Loss of Earning Capacity, Gross Negligence, Intentional Infliction of Emotional Distress, and Punitive Damages is granted in part and denied in part.

¶19. An Order consistent with this Opinion shall issue.

Dated: September 3, 2019.

ATTEST: Estrella H. George
Clerk of Court

by: 
Lori Boynes-Tyson
Court Clerk Supervisor 9/4/19



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