

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

CESARE BRUNI,	)	
	)	CASE NO. ST-16-CV-639
Plaintiff,	)	
	)	Cite as 2019 VI Super 111
vs.	)	
	)	
ROSH ALGER and PICHON CHARTERS, LLC,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION

¶1. Pending before the Court are three final pretrial motions, Defendants' April 2, 2019, Comprehensive Motion *in Limine*,¹ Defendants' April 25, 2019, Motion for Protective Order Precluding Use of Videotaped Deposition at Trial,² and Defendants' July 5, 2019, Motion to Reconsider.^{3 4} For the following reasons, the Comprehensive Motion *in Limine* will be granted in part and denied in part, Motion for Protective Order will be denied, and the Motion for Reconsideration will be denied.

ANALYSIS

Motion *in Limine*

A. Alger's prior DUI convictions.

¶2. Defendant's Motion *in Limine* first seeks to bar Plaintiff from introducing evidence or argument regarding Alger's 1995 and 2008 citations for driving under the influence in

¹ Bruni opposed the Comprehensive Motion *in Limine* on April 29, 2019, and Alger and Pichon replied on May 14, 2019.

² Plaintiff's Opposition was filed on April 29, 2019, Defendants filed their Reply on May 13, 2019, and Plaintiff sought leave to file a sur-response on May 15, 2019.

³ Bruni's Opposition was filed on July 29, 2019, and Defendants have not filed a Reply.

⁴ The Court issued a Memorandum Opinion and Order granting Defendants' Motion for Judgment on the Pleadings and permitted Plaintiff to file a Second Amended Complaint on June 26, 2019, and orally decided Plaintiff's March 7, 2019, Motion to Bar Rana Raven from Giving Any Evidence or Testifying at the Trial of This Matter and March 25, 2019, Motion for Protective Order Barring the Deposition of Rana Raven from Going Forward during a telephonic pretrial conference conducted on July 17, 2019.

California. Alger and Pichon assert that Plaintiff's expert will use this evidence to improperly suggest Alger acted in conformity with this character trait in violation of Virgin Islands Rule of Evidence 404(b).

¶3. Indicating that the Court must balance the probative value of the evidence against the potential for substantial prejudice, Bruni responds that Alger's "routine practice of drinking" is admissible under Rule 406 of the Virgin Islands Rules of Evidence to prove Alger acted in accordance with a habit. Because Bruni also has a claim for punitive damages, he asserts the DUI evidence is admissible to demonstrate the reprehensibility of Alger's conduct. Finally, Bruni asserts the evidence of DUI convictions is admissible under Rule 607 to impeach Alger's "testimony that he does not drink alcohol to excess."

¶4. Alger and Pichon reply that, in order to be admissible habit evidence under Rule 406, the evidence must establish "a degree of specificity and frequency of uniform response that ensures more than a mere tendency to act in a given manner, but rather, conduct that is semi-automatic in nature."⁵ Regarding the purported use of the evidence in the punitive damages stage, Defendants argue that *State Farm Mut. Auto. Ins. v. Campbell*,⁶ cited by Plaintiff, requires the showing of a nexus between the evidence and the specific harm suffered by the Plaintiff for its admissibility. And, they suggest the evidence would be improper impeachment, actually meant only to prejudice Defendants.

¶5. Applying Rule 406, the Court cannot conclude that two discreet DUI convictions in 24 years, occurring 13 years apart, the most recent of which was 11 years ago, establish that Alger had a habit or routine of drinking to excess, let alone would have a tendency to demonstrate that "on a particular occasion [Alger]...acted in accordance with the habit or

⁵ Citing *York Int'l Corp. v. Liberty Mut. Ins. Co.*, 140 F.Supp.3d 357, 362-64 (M.D.Pa. 2015).

⁶ 538 U.S. 408, 422 (2003).

routine practice”. The convictions cannot be admitted under the habit provision. It appears that neither of the DUI citations was issued for an accident or incident in which any person was injured, and those incidents certainly have no demonstrable connection to the harm of which Bruni complains. Thus, the Court also cannot find the prior DUI tickets have a tendency to demonstrate reprehensibility or reckless disregard of Plaintiff’s rights so as to support a claim for punitive damages. Further, the Court concludes that the convictions are not available for impeachment of Alger, unless he specifically denies that he has ever drunk to excess, since both are more than ten years old and are for misdemeanors that do not involve a dishonest or false statement or moral turpitude to satisfy Rule 609. Moreover, the unfairly prejudicial impact of the evidence, and its tendency to incite the jury to base its verdict on an improper reason, is not substantially outweighed by any probative value the convictions may carry. Thus, at this stage of the proceedings, the Court determines that Alger’s prior driving under the influence convictions are not admissible as evidence of the matters suggested by Bruni, except that the convictions may be used to impeach Alger if he testifies that he has never drunk to excess.

B. Alexander Leonard, M.D., and Giorgio Prestipino.

¶6. Next, Defendants ask the Court to prohibit testimony from Giorgio Prestipino and Dr. Alexander Leonard, who Defendants claim were not disclosed until their names appeared in the Joint Final Pretrial Order in violation of Rule 26 of the Virgin Islands Rules of Civil Procedure.

¶7. Bruni counters that Dr. Leonard is a non-retained treating physician at Comprehensive Orthopedic Global whose medical records were timely produced in Bruni’s initial voluntary disclosures, and that Dr. James Nelson testified about his reliance on Dr. Leonard’s records. Plaintiff suggests that Dr. Leonard’s testimony will be limited

to facts and opinions formed during treatment and that no expert report is required. Bruni alleges that Prestipino, described as “Plaintiff’s friend”, was “referenced in Plaintiff’s deposition” as the person who gave him the money for his first hip surgery in Italy. Plaintiff apparently concedes that the disclosure of Prestipino was untimely, but asserts that Defendants will suffer no prejudice and that exclusion of these witnesses would be an extreme sanction.

¶8. In their Reply, Defendants reiterate that the disclosure of Dr. Leonard was insufficient, but aver that, if the disclosure violation is found to be harmless and the testimony is allowed, Dr. Leonard’s should be limited to describing the treatment provided on the single occasion on which he actually saw Bruni. Since Plaintiff apparently concedes that Prestipino was not timely disclosed, Bruni asserts Prestipino’s exclusion is required.

¶9. The evidence suggests that Bruni was seen by Dr. George A. Flowers on February 29, 2016, and March 29, 2019, and not by Dr. Leonard. Thus, testimony concerning those visits should come from Dr. Flowers rather than Dr. Leonard. But, since the records regarding treatment by Dr. Leonard were provided in Plaintiff’s initial disclosures, the Court finds the untimely formal disclosure of Dr. Leonard is not unduly prejudicial and that, as a non-retained treating physician, Dr. Leonard may testify to his examination, treatment, and related opinions (other than causation) occurring on May 13, 2019, without a formal report under Rule 26(a)(2)(C) of the Virgin Islands Rules of Civil Procedure.

¶10. Regarding Prestipino, Plaintiff has not demonstrated a need for his testimony nor provided the Court with sufficient information regarding the nature of his testimony to enable the Court to conclude his testimony is “critical” as discussed in *Davis v. Varlack*.⁷ Opposing counsel was surprised by the listing of Prestipino in the Joint Final Pretrial Order,

⁷ 59 V.I. 229, 237 (V.I. 2015).

and Defendants cannot cure that surprise and any resulting prejudice since the witness does not reside in the Virgin Islands and the deposition deadline has long passed. While the Court does not have sufficient information to gauge the likelihood of disruption at trial if Prestipino testifies or to conclude that Bruni has demonstrated bad faith or willfulness, on balance of all these factors, exclusion appears appropriate. Given Prestipino's late formal disclosure, given that the sole notice of his testimony prior to the Joint Final Pretrial Order was a brief reference made during Plaintiff's deposition identifying Prestipino as the friend who gave Bruni money for his first hip surgery in Italy, given the limited relevance of those facts, given that the reference does not suggest that Prestipino would testify at trial or is a critical witness, and given that the arguments presented by counsel for Plaintiff did not disclose any other matters upon which Prestipino will testify (such as observation of Bruni's injuries or direct information about the occurrence), the Court agrees that Prestipino's testimony should be excluded. Plaintiff himself can testify that he borrowed the money for the operation from Prestipino and paid it back, the sole subject matter of Prestipino's testimony that has been suggested to the Court by Bruni.

C. Declarations of Eugenio, Montecchia, Gentile, and Gatti.

¶11. Alger and Pichon also seek to bar the introduction of the declarations of Rocco Eugenio, Massimiliano Montecchia, Aurello Gentile, and Sabatino Gatti as inadmissible hearsay. In response, Bruni indicates he does not intend to introduce those declarations at trial and concedes the declarations are inadmissible hearsay. Thus, this portion of the Motion *in Limine* will be denied as moot.

D. Economic damages.

¶12. Defendants contend that Plaintiff must be barred from introducing evidence or argument regarding past or future economic damages, claiming Bruni's request for

“\$10,000 to \$15,000” in lost income is entirely speculative in the absence of corroboration and that expert testimony is required. Bruni counters that expert testimony is not required as to past lost wages and that Plaintiff’s testimony alone is sufficient to prove this aspect of his damages. Plaintiff also indicates that Dr. Nelson will offer expert testimony regarding Bruni’s “decreased capabilities to perform work,” but also argues that a lay witness may express opinion testimony on matters within the “realm of common experience,” without revealing the applicability of that concept to these facts. Regarding future medical expenses, Bruni concedes that expert testimony is required, and posits that he will present the testimony of Dr. Nelson regarding his decreased earning capacity to support that portion of this damages.

¶13. In their Reply, Alger and Pichon contend that Bruni will offer no concrete support for his speculative estimate of lost income other than his tax returns, which demonstrate that his income actually increased in the year he claims to have suffered his injuries, inviting the jury to speculate regarding his past damages. Similarly, they assert there is no evidence that Bruni will lose income in the future.

¶14. Defendants are correct that Plaintiff must provide a logical evidentiary basis for calculating or rationally estimating his lost income. But the Court is reluctant to deprive Plaintiff of an opportunity to do so prior to trial. While Bruni may testify concerning his own lost income, in order to have the jury actually consider an award he must objectively support that testimony and demonstrate a rational basis for his own estimates. But, Defendants are free to impeach Bruni with his tax returns and argue a lack of rational basis for an award to the jury.

¶15. Additionally, since Nelson is not a retained expert, if he intends to provide testimony regarding loss of earning capacity, he may do so, but only if Plaintiff has

provided a disclosure of the subject matter upon which he is expected to testify as well as a summary of the facts and opinions to which he is expected to testify, as required by Rule 26(a)(2)(C) of the Virgin Islands Rules of Civil Procedure. Of course, Defendants may demonstrate on cross-examination that Nelson's testimony actually supports their view of the evidence.

E. Unrelated medical treatment.

¶16. Alleging that Bruni is attempting to claim damages for injuries unrelated to the incident in question, Alger and Pichon specifically seek to exclude evidence regarding charges for a May 3, 2017, visit to Dr. James Nelson which concerned treatment for high blood pressure and sleep studies, and follow up visits on July 26, 2017, August 14, 2017, and August 31, 2017, citing Nelson's testimony that he did not treat Bruni for back pain until November 2019. Plaintiff responds that he will not seek damages for matters unrelated to the incident at issue, but claims that Dr. Nelson's billing is based on pertinent medical complaints. Claiming Defendants mischaracterize the correlation between the sleep study and Plaintiff's injuries, Bruni asserts Nelson will establish that Bruni's weight gain as a result of inactivity engendered by the boating incident, which also contributed to his sleep apnea.

¶17. Defendants' Reply indicates that, although Bruni made reference to a compression fracture in his back, Bruni's May 3, 2017, visit to Dr. Nelson resulted in treatment only for high blood pressure. Bruni continues that Dr. Nelson testified the purpose of the July 26, 2017, visit was to give Bruni his blood pressure testing results and to conduct an EKG, not for treatment of his back or hip. On the August 14, 2017, visit, Nelson conducted a sleep study and did not receive complaints of back, neck, or shoulder pain. Finally, on August 31, 2017, Bruni posits that Dr. Nelson provided no treatment for Bruni's back, neck, or hip.

¶18. Bruni may not introduce billing for visits to Dr. Nelson that did not involve diagnosis of or treatment for the injuries resulting from the incident that forms the basis for this suit. However, whether Plaintiff made specific reference to a particular injury at a particular visit is not, of itself, determinative of whether billing for the visit is properly considered in arriving at a damages calculation. If Dr. Nelson testifies that procedures he conducted or ordered were a part of or necessary for his diagnosis or treatment, the billing for those charges is admissible, subject to the impeaching facts Alger and Pichon have outlined.

F. Liability Insurance.

¶19. Relying upon Rules 403 and 411 of the Virgin Islands Rules of Evidence, Defendants submit that Bruni must be prohibited from presenting evidence that Defendants have liability insurance. In contradiction, Bruni claims the evidence is admissible for impeachment and to establish bias, prejudice, agency, ownership, or control. Plaintiff indicates he will use the evidence to impeach Alger's contention that the insurance policy prohibits operation of the vessel by anyone other than Alger or his business partner. In their Reply, Alger and Pichon do not address the specific use Bruni suggests forms the basis for admission of evidence of insurance coverage, but contend that its use is prohibited "under any circumstances."

¶20. Rule 411 of the Virgin Islands Rules of Evidence is clear – evidence that a person was insured is not admissible to prove the person acted negligently or wrongfully, but may be admitted in limited circumstances to prove the witness' bias or prejudice, or to prove agency, ownership, or control. Because it does not appear that the insurance will be used to demonstrate bias or prejudice, or to prove agency, ownership, or control of the vessel,

which appear undisputed, Plaintiff may not refer to or introduce evidence of Defendants' liability insurance coverage.

¶21. On the other hand, if Alger opens the door by making reference to a provision of an insurance policy as forming the basis for prohibiting operation of the vessel by someone other than himself, he is subject to impeachment by specific terms of the policy that may contradict his representation.

G. Coast Guard records.

¶22. Finally, Alger and Pichon claim that 46 U.S.C. § 6803 prohibits introduction of any evidence received from the United States Coast Guard. Plaintiff asserts that he will not present any records of the Coast Guard's investigation, but will introduce Alger's Auxiliary Boating Court Certificate of Completion to establish that "Pichon" is not registered. Since Defendants raise no objection to use of that document in their Reply, it appears this portion of the Motion *in Limine* should also be denied as moot.

Motion for Protective Order

¶23. Defendants ask the Court to preclude the use of videotaped trial depositions of eyewitnesses Aurelio Gentile and Massimiliano Montecchia, who reside in Italy, claiming the depositions were scheduled without proper notice.

¶24. The depositions were occasioned by the presence of Gentile and Montecchia on St. Thomas for a trial date that had been continued. On April 24, 2019, Plaintiff's counsel's office contacted Defendants' counsel's office to inquire whether Defendants wished to depose Gentile and Montecchia, and the two offices then proceeded to discuss potential dates and times during the following two days for the discovery depositions. Defendants claim that Bruni then unilaterally scheduled a trial deposition to be taken by Plaintiff on April 26, 2019, and, that, after receiving notice of the trial deposition, Defendants noticed

discovery depositions of the witnesses earlier on the same day. Defendants assert that Plaintiff's counsel then refused to permit the discovery depositions, after which Defendants indicated they could not participate in the trial depositions. Alger and Pichon claim Plaintiff's counsel subsequently changed her mind and agreed to permit the discovery depositions, but later indicated Defendants would have to limit the depositions to one-half hour each and would be responsible for procuring their own court reporter and interpreter, leading Alger and Pichon to file this motion. Relying on the requirement of Rule 30(b)(1) Virgin Islands Rules of Civil Procedure that depositions be conducted upon reasonable written notice, Defendants assert that Plaintiff's limitation of the discovery depositions to thirty minutes in duration and notice to Defendants' counsel the afternoon before the depositions that Alger and Pichon would be responsible for providing a court reporter and interpreter for the discovery depositions were unreasonable demands, justifying their cancellation of the discovery depositions and failure to attend the trial depositions.

¶25. Brunι's counsel responds that she learned for the first time on April 24, 2019, that the witnesses were on St. Thomas and that she immediately caused Defendants' counsel's office to be notified of her desire to take a trial deposition, obtaining a representation of defense counsel's availability and agreement to attend. She claims she agreed to discovery depositions because defense counsel represented the depositions would take no more than 30 minutes. Plaintiff then amended the trial deposition notices to begin 30 minutes after Defendants' discovery depositions and provided Defendants with the name and contact information of the court reporter and interpreter. Plaintiff represents that Defendants had already made arrangements for a court reporter to take the discovery depositions, but cancelled those arrangements before receiving Plaintiff's email reminding them of the need to arrange the court reporter and interpreter. Plaintiff also asserts that his counsel, the court

reporter Plaintiff arranged, and the witnesses appeared at the time of the discovery depositions, but Defendant's counsel did not appear and did not respond to Plaintiff's counsel's contemporaneous calls inquiring into his absence.

¶26. Plaintiff also contends that Defendants did not attempt to depose the witnesses during the discovery period set out in the Scheduling Order, had adequate notice of the witnesses' availability, and changed their position as a matter of trial strategy rather than lack of notice.

¶27. In their Reply, Alger and Pichon contend that, regardless of the representation of Plaintiff's counsel that she did not learn of the availability of the witnesses until the 24, Plaintiff himself knew they would be present well before their arrival. Defendants reiterate their claim that the insufficient notice prevented proper preparation, and then assert, for the first time, that they did not have an adequate opportunity to examine or challenge the competency of the translator, whom they claim attended the depositions by telephone. Defendants also contend that they did not file their notices of the discovery depositions because Plaintiff objected and that their failure to participate was precipitated by Plaintiff's intransigence regarding the time limitation of the discovery depositions.

¶28. Defendants have not demonstrated that Bruni communicated to Plaintiff's counsel prior to April 24, 2019, that the witnesses would be on St. Thomas on the cancelled trial date. Defendants noticed the discovery depositions of both eyewitnesses and represented in an email on April 25, 2019, that each would take approximately 30 minutes. But, an hour and a half later, after Plaintiff's counsel indicated that the discovery depositions would be limited to one-half hour and moved the time of the trial depositions one-half hour to permit the discovery depositions, Defendants indicated they did not agree to go forward

with the trial depositions. Plaintiff then confirmed that the trial depositions would go forward and proceeded with them when Defendant did not appear.

¶29. While preparations for these depositions were clearly rushed, the Court cannot conclude that Defendants lacked an adequate opportunity to conduct discovery depositions or had inadequate notice of the trial depositions in order to prepare for them. The email chain between counsel's offices demonstrates that Defendants were the source of the suggestion that the discovery depositions would take one-half hour each and that Defendants in fact prepared notices of the discovery depositions and emailed them to Plaintiff's counsel but chose not to file the notices when Defendants' counsel determined not to attend the trial depositions. The Court finds that Defendant voluntarily chose not to attend the trial depositions and concludes that exclusion of the deposition testimony of these eyewitnesses would be an extreme sanction, unduly prejudicial to Plaintiff. Consequently, the Motion for Protective Order is denied.

Motion to Reconsider

¶30. Alger and Pichon ask the Court to reconsider its Order permitting Plaintiff to file a Second Amended Complaint to add a count for gross negligence, contending that Bruni's Second Amended Complaint must be stricken for Bruni's failure to comply with Rule 15-1 of the Virgin Islands Rules of Civil Procedure. Defendant's sole ground for this relief is their indication that Plaintiff failed to "attach a complete and properly signed copy of the proposed amended pleading specifically delineating the changes or additions." In the absence of that proposed document, Defendants claim Plaintiff's Motion to Amend was not properly before the Court when it considered the Motion for Judgment on the Pleadings.

¶31. Bruni responds that Alger and Pichon had a full and fair opportunity to raise that issue in their reply brief but failed to do so despite Plaintiff spending three pages in its

Opposition to their Motion for Judgment on the Pleadings addressing the need for leave to amend should the Court grant Defendants' Motion. Citing numerous cases, Plaintiff claims Defendants have waived this issue and point out that Defendants have failed to demonstrate prejudice, undue delay, or futility.

¶32. Rule 6-4 of the Virgin Islands Rules of Civil Procedure permits the Court to reconsider an order upon motion filed within 14 days after its entry on the grounds of (1) an intervening change in controlling law; (2) the availability of new evidence; (3) the need to correct clear error; or (4) the court's failure to address an issue specifically raised prior to the court's ruling.

¶33. Because Defendants make no reference to an intervening change in controlling law, the availability of new evidence, or the Court's failure to address an issue specifically raised prior to the Court's ruling, the Court will determine only whether there exists a need to correct clear error.

¶34. In granting Bruni leave to file a Second Amended Complaint in its Memorandum Opinion, the Court specifically found that there was no evidence of undue delay, futility, or prejudice to Defendants. The Second Amended Complaint consists of only 60 brief, single sentence paragraphs. Eighteen of those paragraphs fall under Count III (Gross Negligence), and those contain specific factual contentions in support of the claim, several of which focus on Alger's alleged excessive consumption of alcohol, which has been the consistent basis for Bruni's contentions since the onset of this litigation.

¶35. The Second Amended Complaint specifically indicates: "Defendants' behavior rose to the level of gross negligence when Alger repeatedly refused to return to St. Thomas before dark and then sped up the vessel on rough seas and refused to stop after injuring

Plaintiff⁸ and “Alger refused to return to St. Thomas at a reasonable time and eventually decided to return during rough seas and at dark while driving drunk, injuring Plaintiff and refusing to stop for the night.”⁹ Those contentions succinctly and clearly demonstrate the basis for Bruni’s gross negligence claim, and the Court fails to see how a “redlined” version of the proposed Second Amended Complaint would have been necessary to indicate to Defendants what facts Bruni relied upon for that claim. Those facts were discussed fully in the briefing of the Motion for Judgment on the Pleadings and addressed by the Court in its ruling.

¶36. Defendants had a chance to raise this discreet issue in their Reply regarding the Motion for Judgment, but failed to give the Court the opportunity to address the issue prior to its ruling. Plaintiff’s Second Amended Complaint was timely filed, and his request for leave to amend was made prior to the Court’s ruling on the Motion for Judgment. That the Court granted leave to amend in its Memorandum Opinion and Order demonstrates that the Court did not consider amendment to be futile. Against this background, the Court can discern no prejudice that befell Alger and Pichon as a result of Bruni’s technical non-compliance with Rule 15-4. The Motion for Reconsideration is denied.

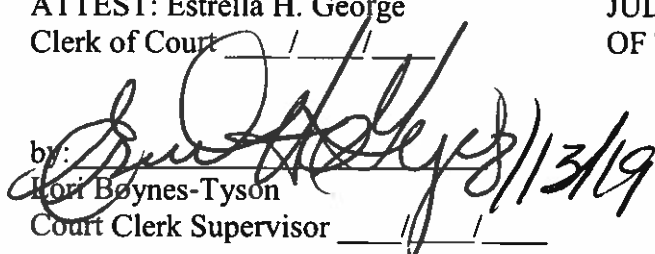
¶37. An Order consistent with this Opinion shall issue.

Dated: August 9, 2019.

ATTEST: Estrella H. George
Clerk of Court


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

by:


Lori Boynes-Tyson
Court Clerk Supervisor

⁸ Paragraph 58.

⁹ Paragraph 59.