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 GEC, LLC,	**JURY TRIAL DEMANDED**
DEFENDANTS.	

MEMORANDUM OPINION

THIS MATTER comes before the Court on Plaintiff Francis Edward's (hereinafter "Plaintiff") motion for reconsideration, filed on October 13, 2016 (hereinafter "Motion for Reconsideration"). On November 23, 2016, Defendant GEC, LLC's (hereinafter "GEC") filed an opposition.

BACKGROUND[1]

On October 4, 2016, the Court entered three separate orders—to wit: (1) denying Plaintiff's motion to substitute liability expert, filed on July 26, 2016 (hereinafter "October 4, 2016 Order #1); (2) granting in part Defendant GEC's motion in limine re: special damages and punitive damages, filed on August 29, 2016, and striking Plaintiff's punitive damages (hereinafter "October 4, 2016 Order #2); and (3) ordering Plaintiff to provide proof that Danny Archibald, David Kolsburn, Agnes Renee, Nicholson Renee, Jen Mathurin, John Edward, Dr. Linda Jackson, Dr. Lex Lenard, and Dr. Sheldon Williams were properly disclosed pursuant to Federal Rule of Civil Procedure 26 (hereinafter "October 4, 2016 Order #3).

[1] This memorandum opinion recites the factual background only to the extent necessary to explain the present issues and the bases of the Court's decision.

On October 13, 2016, Plaintiff filed this instant Motion for Reconsideration.

STANDARD OF REVIEW

Local Rule of Civil Procedure 7.3[2] (hereinafter, "Local Rule 7.3") provides that "[a] party may file a motion asking the Court to reconsider its order or decision … based on (1) intervening change in controlling law; (2) availability of new evidence, or; (3) the need to correct clear error or prevent manifest injustice." Typically, under Local Rule 7.3, motions for reconsideration must be filed within fourteen days of the entry of the order or decision from which the party seeks relief. LRCi 7.3 ("Such motion shall be filed within fourteen (14) days after the entry of the

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[2] Although Plaintiff indicated that this instant Motion was filed pursuant to Local Rule of Civil Procedure 7.3 (hereinafter "Local Rule 7.3"), Plaintiff failed to provide any explanation—other than that it is applicable via Superior Court Rule 7—why the rule of another court should apply to a proceeding in the Superior Court. Plaintiff acknowledged that, in *Vanterpool v. Government of the Virgin Islands*, 63 V.I. 563, 576 (V.I. 2015), the Supreme Court of the Virgin Islands (hereinafter "Supreme Court") cautioned that "the Local Rules of the District Court should represent rules of last resort rather than first resort and should be invoked only when a thorough review of applicable Virgin Islands statutes, Superior Court rules, and precedents from [the Supreme] Court reveals the absence of any other [applicable] procedure." Plaintiff indicated that he "has been unable to locate any other rule of the Superior Court or Virgin Islands statute that governs motions seeking reconsideration of a prior order over a discovery dispute." Thus, Plaintiff concluded that Local Rule 7.3 is applicable in this instance since it "appears to be the only source of guidance on the subject matter." However, Plaintiff never explained why the application of Local Rule 7.3 in this instance is not a "mechanistic and uncritical reliance" of the Local Rules of District Court. *See Vanterpool,* 63 V.I. at 582 ("the Superior Court should not have reflexively and mechanistically applied District Court Rule 56.1 through Superior Court Rule 7, but instead should have independently determined whether the rule served a valid purpose when applied to the Superior Court rather than to the District Court").

Although the Supreme Court has previously adjudicated appeals related to Local Rule 7.3 (formerly Local Rule 7.4), *see e.g., Brunn v. Dowdye*, 59 V.I. 899 (V.I. 2013) ("the Government's motion-which sought reconsideration of a non-final judgment-could only have arisen under Local Rule of Civil Procedure 7.3"); *Worldwide Flight Services v. Gov't of the Virgin Islands,* 51 V.I. 105 (V.I. 2009); *In re Infant Sherman*, 49 V.I. 452 (V.I. 2008), the Supreme Court has yet to decisively recognize the applicability of Local Rule 7.3 in this jurisdiction *post-Vanterpool.* Thus, there are currently no applicable Virgin Islands statutes, Superior Court rules, or Supreme Court precedents *post-Vanterpool* that are directly on point.

Local Rule 7.3 provides that "[a] party may file a motion asking the Court to reconsider its order or decision … within fourteen (14) days after the entry of the order … unless the time is extended by the Court." Judges and attorneys in the Superior Court have relied on the provisions of Local Rule 7.3 (formerly Local Rule 7.4) in the past when dealing with motions for reconsideration of orders or decisions that do not constitute final judgments. *See e.g.*, *Shillingford v. Virgin Islands Port Authority*, SX-97-CV-652, 2006 V.I. LEXIS 41 (Super. Ct. Sept. 8, 2006); *Cyprian v. Butcher*, 53 V.I. 224 (Super. Ct. May 17, 2010); *Bertrand v. Cordiner Enters., Inc.*, 55 V.I. 267, 2011 V.I. LEXIS 64 (Super. Ct. June 24, 2011). The Court believes it is good practice to continue applying Local Rule 7.3 to maintain consistency and avoid confusions in the Superior Court with regard to motions for reconsideration for non-final judgments. Furthermore, given that there are precedents from the Supreme Court regarding Local Rule 7.3, the Court will use the standard of review set forth in said precedents. Thus, applying Local Rule 7.3 here is not a "mechanistic and uncritical reliance" of the Local Rules of Civil Procedure.

order or decision unless the time is extended by the Court. Extensions will only be granted for good cause shown.").

The Supreme Court of the Virgin Islands (hereinafter, "Supreme Court") made it clear in *In re Infant Sherman*, 49 V.I. at 457, that a motion for reconsideration "is not a second bite of the apple but is intended to focus the parties on the original pleadings as the 'main event,' and to prevent parties from filing a second motion with the hindsight of the court's analysis covering issues that should have been raised in the first set of motions." The Supreme Court also stated that a motion for reconsideration "is not a vehicle for registering disagreement with the court's initial decision, for rearguing matters already addressed by the court, or for raising arguments that could have been raised before but were not. *Id.*, 49 V.I. at 457-58; *Worldwide Flight Services*, 51 V.I. at 110 (citation omitted).

DISCUSSION

The Court will address each contested order separately in turn.

A. October 4, 2016 Order #1 - Order denying Plaintiff's motion to substitute liability expert, filed on July 26, 2016.

In his Motion for Reconsideration, Plaintiff pointed out that the Court did not consider Plaintiff's opposition, filed on September 1, 2016, when the Court made its ruling as to Plaintiff's motion to substitute liability expert, filed on July 26, 2016. Thus, Plaintiff argued that reconsideration of the Court's October 4, 2016 Order #1 denying Plaintiff's motion to substitute liability expert "is necessary…to correct manifest errors of law and fact." In its opposition, Defendant GEC argued that Plaintiff's sole basis for moving for reconsideration—namely, that the Court did not review—is groundless because the Court did take into consideration of Plaintiff's opposition when the Court made its ruling.

The Court must clarify at the outset that the Court's October 4, 2016 Order #1 only adjudicated Plaintiff's motion to substitute liability expert, filed on July 26, 2016, and Plaintiff's motion to allow Terrance Fischer to testify via videoconferencing, filed on August 26, 2016. Unlike what Plaintiff implied in his Motion for Reconsideration, the Court did not adjudicated Defendant GEC's motion in limine and response to supplemental motion to substitute liability expert, filed on August 29, 2016, in its October 4, 2016 Order #1. Ergo, the Court did not need to consider Plaintiff's opposition to Defendant GEC's motion in limine and response to supplemental motion to substitute liability expert when the Court ruled on Plaintiff's motion to substitute liability expert.

The Court is aware that references were made to "Def's Mot." throughout the October 4, 2016 Order #1. "Def's Mot." presumably referred to Defendant GEC's motion in limine and response to supplemental motion to substitute liability expert, which was filed in response to Plaintiff's supplemental motion to substitute liability expert, filed on August 25, 2016.[3] Thus, regardless of the fact that the Court referred to "Def's Mot.," which also functioned as a response to Plaintiff's supplemental motion to substitute liability expert, the Court still did not need to consider Plaintiff's opposition to Defendant GEC's motion in limine and response to supplemental motion to substitute liability expert.

However, upon review of the file, it has come to the Court's attention that Defendant GEC did not attach Doc Mitchell's expert report in its entirety with its motion in limine and response to supplemental motion to substitute liability expert. Defendant GEC only attached five out of thirty-

[3] On August 22, 2016, the Court entered an order ordering: (1) Plaintiff to file a supplemental brief outlining the legal basis for his motion to substitute liability expert; and (2) Defendant GEC to file a response to Plaintiff's supplemental brief.

three pages of Doc Mitchell's expert report.[4] Thus, the Court's prior finding that Doc Mitchell's methodology underlying his expert report is unreliable was based on an incomplete picture. The Court has now reviewed Doc Mitchell's expert report in its entirety. According to page 1 of Doc Mitchell's expert report, which was not included by Defendant GEC with its motion in limine and response to supplemental motion to substitute liability expert, Doc Mitchell reviewed, *inter alia*, "numerous Federal safety standards which included OSHA, Public Health Services, Center for Disease Control and Prevention and the National Institute for Occupational Safety and Health" in preparation for his expert report. Thus, the Court should not have concluded that the methodology underlying Doc Mitchell's expert report to be unreliable without the benefit of page 1. *See e.g., Antilles School, Inc. v. Lembach*, 64 V.I. 400, 422-25 (V.I. 2016) (The Supreme Court concluded that the expert's conclusion was based on reliable principles where the expert came to the conclusion in her expert report based on her knowledge of the International Building Code, the National Fire Protection Life Safety Code, the Occupational Safety and Health Administration regulations, the National Safety Council Accident Prevention Manual, and the Encyclopedia of Occupational Health and Safety. The Supreme Court stated that "[i]t is well established that industry standards are relevant, admissible evidence in ordinary negligence cases, since they are probative of the standard of care."). Accordingly, Plaintiff is entitled to reconsideration of the Court's October 4, 2016 Order #1 denying its motion to substitute liability expert to "correct clear error or prevent manifest injustice."

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[4] According to its motion in limine and response to supplemental motion to substitute liability expert, Defendant GEC noted that: "[a]lthough the report appears to be an extensive document having being identified by plaintiff as FE000667 to FE000700 the report itself is only 5 short pages long. Page 8 through 12. (Exhibit 1)."

Given that parties are in dispute with regard to Doc Mitchell's expert report, the Court will conduct an evidentiary hearing to inquire into the factual underpinnings of the expert's conclusions to determine whether the methodology he used to reach his conclusions is reliable. *See Samuel v. United Corporation*, 64 V.I. 512, 526 (V.I. 2016) ("This hearing requirement applies with equal force to disputes regarding expert testimony, since trial courts are required to apply a reliability analysis to an expert's opinion; that opinion is reliable if it is based on the methods and procedures of science rather than on subjective belief or unsupported speculation.") (internal quotation marks and citation omitted).

In its motion in limine and response to supplemental motion to substitute liability expert, Defendant GEC indicated that it opposed the substitution of Terrance Fischer for Doc Mitchell as Plaintiff's liability expert on two bases: (1) the substitution did not comply with Federal Rule of Civil Procedure 26(a)(2)(D)'s deadline for disclosure of expert testimony and Plaintiff failed to explain any excusable neglect or good cause for the untimeliness; and (2) Terrance Fischer and Doc Mitchell do not qualify as experts and the methodology underlying Doc Mitchell's expert report is unreliable. As to Defendant GEC's second basis, any concerns regarding the qualifications of Terrance Fischer and Doc Mitchell as experts can be raised and addressed at the evidentiary hearing to be scheduled. As to Defendant GEC's first basis, while it is true that the substitution did not comply with Federal Rule of Civil Procedure 26(a)(2)(D)'s deadline for disclosure of expert testimony as to the original trial date, September 6, 2016,[5] Plaintiff's new

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[5] Federal Rule of Civil Procedure 26(a)(2)(D) provides:

> *(D) Time to Disclose Expert Testimony.* A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:
>
> (i) at least 90 days before the date set for trial or for the case to be ready for trial; or

expert will not introduce any new opinions or theories. Plaintiff indicated in his supplemental motion to substitute liability expert that "[t]he opinions of [Doc] Mitchell have been accepted and adopted by [Terrance] Fischer and [Terrance] Fischer will limit the scope of his testimony to conclusions which are contained in [Doc] Mitchell's prior report." Terrance Fischer himself also indicated in a statement dated August 15, 2016, that he has "reviewed the file materials in this matter and the report of Doc Mitchell dated October 30, 2013 and adopt his opinions." Thus, the Court does not find the adoption of Doc Mitchell's expert report by Terrance Fischer to be prejudicial to Defendant GEC who has been in possession of Doc Mitchell's expert report since October 31, 2013 and therefore, already know or should know the substance thereof. *See e.g. Park v. Cas Enters., Inc*, 2009 U.S. Dist. LEXIS 108160 (S.D. Cal. 2015) (permitting the plaintiff to substitute a new damages expert, but requiring the new expert to "adopt the initial and rebuttal expert reports in their entirety"); *Roberts ex rel. Johnson v. Galen of Va., Inc.*, 325 F.3d 776, 784 (6th Cir. 2003) (finding no error in district court requiring that the substitute expert to not deviate from the prior expert's conclusions). Moreover, the Court finds "serious health problems" of Doc Mitchell support a finding of good cause for substitution at this late stage of litigation. Furthermore, the scheduled trial date for this matter has since been continued from September 6, 2016 to January 23, 2016. With this new trial date, Plaintiff's substitution is in compliance with Federal Rule of Civil Procedure 26(a)(2)(D).

Accordingly, if after the evidentiary hearing, the Court finds that Terrance Fischer and Doc Mitchell both qualify as experts and the methodology underlying Doc Mitchell's expert

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(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

report is reliable, the Court will grant Plaintiff's motion to substitute liability expert and permit Plaintiff to substitute Terrance Fischer for Doc Mitchell as Plaintiff's liability expert. Terrance Fischer is limited, however, to the subject matter and theories already espoused by Doc Mitchell and may not espouse any other opinions or theories not found in Doc Mitchell's expert report.

B. October 4, 2016 Order #2 - Order granting in part Defendant GEC's motion in limine re: special damages and punitive damages, filed on August 29, 2016 and striking Plaintiff's punitive damages.

In his Motion, Plaintiff pointed out that the Court did not consider Plaintiff's opposition, filed on September 1, 2016, when the Court made its ruling as to Defendant GEC's motion in limine re: special damages and punitive damages or in the alternative to dismiss, filed on August 29, 2016. Thus, Plaintiff argued that reconsideration of the Court's October 4, 2016 Order #2 striking Plaintiff's punitive damages "is necessary...to correct manifest errors of law and fact." In its opposition, Defendant argued that Plaintiff "essentially rehashes the argument previously presented in its opposition." Defendant GEC pointed out that the problem with Plaintiff requesting punitive damages is that "punitive damages were not pleaded in this case."

Plaintiff is correct that the Court inadvertently neglected to consider Plaintiff's opposition when the Court entered its order on October 4, 2016.[6] Thus, it cannot be said that Plaintiff is rehashing arguments previously presented in his opposition. Nevertheless, the Court's failure to address Plaintiff's opposition does not perpetrate clear error or manifest injustice that necessitates reconsideration of this Court's October 4, 2016 Order #2 striking Plaintiff's punitive damages because the fact of the matter is that Plaintiff never included his request for punitive damages in

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[6] The Court noted in its October 4, 2016 Order #2 that "[Plaintiff] did not file a response."

his pleadings.[7] As such, Plaintiff failed to give Defendant GEC sufficient notice as to the nature of the unusual damages claimed and it is unfair to surprise Defendant GEC on the eve of trial.[8] *See e.g., Myers,* 50 V.I. at 291 ("The purpose of Rule 9(g) is to give the defending parties sufficient notice as to the nature of the unusual damages claimed in order to avoid surprise at trial."). Permitting Plaintiff to belatedly add his request for punitive damages at this late stage of the litigation would promote gamesmanship in pleading practices where a plaintiff could simply remain silent in his/her pleadings as to the relief demanded and wait until right before trial to surprise the defendant with a demand for punitive damages. Accordingly, there is no need to reconsider the Court's October 4, 2016 Order #2.

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[7] Plaintiff's complaint and first amended complaint requested for "damages as they may appear and for pre and post judgment interest and for costs and fees and for such other relief as this Court deems fair and just."

[8] As the Court noted in its October 4, 2016 Order #2, punitive damages must be pled with particularity pursuant to Federal Rule of Civil Procedure. Federal Rule of Civil Procedure 9(g) provides: "If an item of special damage is claimed, it must be specifically stated." Rule 9(g) would be applicable to the Superior Court via Superior Court Rule 7. However, as noted above, the Supreme Court cautioned in *Vanterpool* that "the Federal Rules of Civil Procedure…should represent rules of last resort rather than first resort and should be invoked only when a thorough review of applicable Virgin Islands statutes, Superior Court rules, and precedents from [the Supreme] Court reveals the absence of any other [applicable] procedure." 63 V.I. at 576. Although the Supreme Court has previously applied Rule 9(g), *see e.g., Myers v. Derr*, 50 V.I. 282 (V.I. 2008) (applying Federal Rule of Civil Procedure 9(g) in the absence of a local rule to the contrary in the Superior Court), the Supreme Court has yet to decisively recognize the applicability of Rule 9(g) in this jurisdiction post-*Vanterpool*. Thus, there are currently no applicable Virgin Islands statutes, Superior Court rules, or Supreme Court precedents post-*Vanterpool* that are directly on point.

As the Supreme Court explained in *Myers*, that special damages are defined as "damages that are unusual for the type of claim in question." 50 V.I. at 291. The Supreme Court further explained that "[t]he purpose of Rule 9(g) is to give the defending parties sufficient notice as to the nature of the unusual damages claimed in order to avoid surprise at trial." *Id.* The Court believes it is good practice to continue applying Rule 9(g) in the Superior Court with regard to the pleading requirements for special damages to maintain consistency in the Superior Court and avoid surprises at trial. Furthermore, given that there are precedents from the Supreme Court regarding Rule 9(g), the Court will use the standard of review set forth in said precedents. Thus, applying Rule 9(g) here is not a "mechanistic and uncritical reliance" of the Federal Rules of Civil Procedure.

C. October 4, 2016 Order #3 - Order ordering Plaintiff to provide proof that Danny Archibald, David Kolsburn, Agnes Renee, Nicholson Renee, Jen Mathurin, John Edward, Dr. Linda Jackson, Dr. Lex Lenard, and Dr. Sheldon Williams were properly disclosed pursuant to Federal Rule of Civil Procedure 26.

In his Motion, Plaintiff pointed out that the Court did not consider Plaintiff's opposition, filed on September 1, 2016, when the Court made its ruling as to Defendant GEC's motion in limine re: witnesses and responses to written discovery, filed on August 29, 2016. In its opposition, Defendant GEC did not address Plaintiff's request for reconsideration but instead, made arguments to Plaintiff's opposition, filed on September 1, 2016.

Plaintiff is correct that the Court inadvertently neglected to consider Plaintiff's opposition when the Court entered its order on October 4, 2016.[9] However, the Court's order did not grant Defendant GEC's motion in limine, but rather, the Court ordered Plaintiff to provide proof that Danny Archibald, David Kolsburn, Agnes Renee, Nicholson Renee, Jen Mathurin, John Edward, Dr. Linda Jackson, Dr. Lex Lenard, and Dr. Sheldon Williams were properly disclosed pursuant to Federal Rule of Civil Procedure 26. In other words, the Court did not rule on Defendant GEC's motion in limine as Plaintiff alleged. As such, there is no need to reconsider the Court's October 4, 2016 Order #3 ordering Plaintiff to provide proof of disclosure for the aforementioned witnesses.[10]

[9] The Court noted in its October 4, 2016 Order #3 that "[Plaintiff] did not file a response."

[10] To date, Plaintiff has not filed a response in compliance with the Court's October 4, 2016 Order #3. However, given that Plaintiff's opposition, filed on September 1, 2016, sufficiently addressed the Court's concern with regard to the disclosure of the aforementioned witnesses—Danny Archibald, David Kolsburn, Agnes Renee, Nicholson Renee, Jen Mathurin, John Edward, Dr. Linda Jackson, Dr. Lex Lenard, and Dr. Sheldon Williams, the Court will rule on Defendant GEC's motion in limine re witnesses and response to written discovery in a separate memorandum opinion and order.

CONCLUSION

For the reasons stated above, the Court will grant in part and deny in part Defendant GEC's motion for reconsideration of the three orders the Court entered on October 4, 2016. An order consistent with this memorandum opinion will follow.

DONE and so ORDERED this 5 day of January, 2017.

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

ATTEST:
Estrella H. George
Acting Clerk of the Court

By:
Court Clerk Supervisor

Dated: 1/5/17