Aitcheson v Lowe
2014 NY Slip Op 33880(U)
May 19, 2014
Supreme Court, Dutchess County
Docket Number: 3992/11
Judge: Maria G. Rosa

DMG

SUPREME COURT - STATE OF NEW YORK
DUTCHESS COUNTY

Present:

Hon. MARIA G. ROSA

Justice.

_____x

CHARLES AITCHESON and EVARISTA AITCHESON,

Plaintiffs,

DECISION AND ORDER

-against-

Index No: 3992/11

WILLIAM LOWE and TOWN OF DOVER,

Defendants.

_____x

The following papers were read and considered in adjudicating the motions before the court.

NOTICE OF MOTION *IN LIMINE* DATED APRIL 7, 2014
AFFIRMATION IN SUPPORT
NOTICE OF MOTION *IN LIMINE* DATED APRIL 9, 2014
AFFIRMATION IN SUPPORT
EXHIBITS A&B

NOTICE OF MOTION
AFFIRMATION IN SUPPORT
EXHIBITS A-I

NOTICE OF MOTION *IN LIMINE* DATED APRIL 17, 2014
AFFIRMATION IN SUPPORT
EXHIBIT A

NOTICE OF CROSS-MOTION
AFFIRMATION IN SUPPORT
EXHIBITS A-J

NOTICE OF CROSS-MOTION
AFFIRMATION IN SUPPORT
EXHIBITS A-W
AFFIRMATION IN OPPOSITION
EXHIBITS A&B

AFFIRMATION IN OPPOSITION
EXHIBITS A-E
REPLY AFFIRMATION
EXHIBIT A
REPLY AFFIRMATION & AFFIRMATION IN OPPOSITION
EXHIBITS A-H
AFFIRMATION IN SUPPORT OF MOTION *IN LIMINE*
AFFIRMATION IN REPLY
EXHIBITS A&B

The above listed motions *in limine* seek various forms of relief set forth in an order of this court dated May 6, 2014. These motions were all fully submitted as of May 5, 2014. With respect to the applications, the court rules as follows:

Plaintiffs' motion to preclude evidence of plaintiff Charles Aitcheson's history of alcohol use and/or nonprescription drug use.

Plaintiff ("Charles Aitcheson") commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident. There is no evidence in the record that plaintiff was under the influence of alcohol or drugs at the time of the accident. At his deposition he testified that he was a recovering alcoholic and had used marijuana in the past. In a civil action, the court has broad discretion in deciding whether to allow impeachment of a witness with prior criminal acts or other factors that could bear on his credibility. See Morgan v. National City Bank, 32 AD3d 1264, 1265 (4th Dept. 2006).

The court finds any probative value of plaintiff's past alcohol and marijuana use is far outweighed by its prejudicial impact. As plaintiff testified he had not used such substances in many years, the probative value of such evidence on plaintiff's veracity is minimal. The American Medical Association recognizes alcoholism as a disease. A medical impairment is not probative of credibility. In addition, the mere fact that plaintiff may have broken the law by using marijuana in the past lacks a sufficient bearing on his veracity to outweigh the prejudicial impact of such evidence. While defendants asserts that such evidence is relevant to plaintiffs' damage claims, they have failed to notice any expert opinion that plaintiff's prior substance abuse will impact his projected life and future work expectancies. Thus, any consideration of these factors by the jury in determining these damages categories would be entirely speculative. Nor does the court find the evidence *per se* relevant to plaintiff Evarista Aitcheson's loss of consortium claim. However, defendants are free to renew the application should she offer testimony that opens the door to the introduction of such evidence. Finally, plaintiff denies any prior history of cocaine use, and the mere entry in a medical record about such use does not provide a sufficient foundation for the introduction of such evidence. Accordingly, the defendants may not introduce evidence of plaintiff's alleged cocaine use. Wherefore, it is hereby

ORDERED that defendants shall not be permitted to introduce evidence of plaintiff's prior substance abuse. The court will defer until trial ruling on the redaction of any medical records admitted into evidence.

Plaintiffs' motion to preclude expert testimony of John McManus, P.E.

Defendants served CPLR §3101(d) expert notice of their intention to call John McManus as an engineering expert in accident reconstruction. Plaintiffs move to preclude him from testifying alleging the disclosure fails to comply with the requirements of CPLR §3101(d). They claim that the expert opinion is based on an insufficient foundation, relies on improper speculation and assumptions and that there is no showing that his opinion is based on methodology generally accepted in the engineering community. CPLR §3101(d)(1)(i) provides, in relevant part, "each party shall identify each person whom the party expects to call as an expert witness at trial and disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify. . . and a summary of grounds for each expert's opinion." The purpose of this statute is to expedite the resolution of personal injury claims and to reduce litigation costs by encouraging full disclosure of expert opinion testimony. See Busse v. Clark Equipment Co., 182 AD2d 525 (1st Dept. 1992).

Defendants' expert disclosure states that Mr. McManus will base his opinion upon his inspection of the defendant's dump truck, a review and inspection of photographs of plaintiff's pickup truck, site inspections of the accident location, and a review of the pleadings, discovery, medical records, deposition testimony and police accident report. Based on such review, it is anticipated that Mr. McManus will testify that defendant's vehicle was at a complete stop when it was clipped in the rear by the plaintiff's vehicle. The disclosure further states his anticipated testimony about how the accident transpired and refutes the version of the accident proffered by plaintiffs' expert. The court finds that such disclosure adequately fulfills the intent of the statute. It provides in reasonable detail the subject matter on which Mr. McManus will testify, his opinion, the facts underlying that opinion and the grounds for such opinion. While the disclosure does not delineate the precise methodology that Mr. McManus used to reach such opinions, it adequately details the basis for his opinions to enlighten plaintiffs to an appreciable degree about the content of his anticipated testimony. Contrary to plaintiffs' assertions, defendants were not required to detail the exact methodology used in formulating each of the accident reconstructionist's opinions. The mere fact that plaintiffs disclosed such information in their expert disclosures does not impose such a requirement on the defendants. Nor is a Frye hearing warranted. (Frye v. U.S., 293 F.1013). An engineer offering an expert opinion on how an accident occurred based on his review of the vehicles involved in the accident, the accident site and other records in the case does not involve a novel scientific theory or methodology warranting a Frye hearing. To the extent that plaintiffs seek to challenge defendants' expert's opinion and the methodologies used to form such opinions, they will have the opportunity to consult with their own expert and cross-examine Mr. McManus at trial. Wherefore, it is hereby

ORDERED that plaintiffs' motion to preclude Mr. McManus from offering expert testimony is denied.

Defendants' motion to preclude admission of evidence of prior bad acts/criminal history of William Lowe

Defendants move to preclude evidence at trial of a 1990 or 1991 incident in which defendant Lowe was arrested after breaking into a garage, and his 1992 burglary conviction. Based on the age of the incident and conviction, defendant Lowe's age at the time and the fact that both incidents stemmed from a prior alcohol problem that has been addressed, the prejudicial impact of such evidence far outweighs any probative value as to defendant Lowe's veracity. See People v. Brown, 201 AD2d 576 (2nd Dept. 1994). While CPLR §4513 allows for impeachment of witness with a prior criminal conviction, this court retains discretion in permitting the use of a prior conviction to impeach credibility. See Acunto v. Conklin, 260 AD2d 787 (3rd Dept. 1999); Tripp v. Williams, 39 Misc2d 318 (NY Supp. 2013).The incidents from over 20 years ago are simply not relevant to the credibility of Mr. Lowe's account of how a two car accident occurred. Wherefore, it is hereby

ORDERED that defendants' motion to preclude evidence of Mr. Lowe's prior arrest and criminal conviction is granted.

Defendants' motion for sanctions for spoilation.

Defendants move for sanctions based on plaintiffs' failure to preserve the 1998 Ford-F150 pickup plaintiff owned and was driving at the time of the accident. Plaintiff testified at a deposition on February 16, 2011 that he was still in possession of the vehicle. Defendants then and there made a formal demand that he maintain and preserve it, and memorialized the demand in a letter to plaintiffs' counsel dated March 2, 2011. In a responsive letter dated March 30, 2011, plaintiffs' counsel stated that the plaintiff had informed them that he no longer possessed the vehicle and that it had been destroyed. Defendants now move for sanctions alleging that the willful destruction of the vehicle was in bad faith and is prejudicial. In opposition, plaintiffs assert that defendants failed to express an interest in inspecting the vehicle for six months after the accident and thus have waived any spoilation claim. They further assert defendants fail to establish prejudice. Finally, they claim that the destruction was not willful because plaintiff sold the vehicle to a junkyard after his landlord would not allow him to keep it at his apartment complex.

The determination of spoilation sanctions is within the broad discretion of the court. See Holland v. W.M. Realty Mgt., Inc., 64 AD3d 627 (2nd Dept. 2009). However, "[w]hen a party alters, loses or destroys key evidence before it can be examined by the other party's expert, the court should dismiss the pleadings of the party responsible for the spoilation, or, at the very least, preclude that party from offering evidence as to the destroyed product." Squitiere v. City of New York, 248 AD2d 201, 2012 (1st Dept. 1998). The destruction of evidence need not be willful or in bad faith for the court to impose a sanction as the law concerning spoilation has been extended to the nonintentional

destruction of evidence. See Kirkland v. New York City Hous. Auth., 236 AD2d 170, 173 (1st Dept. 1997).

The court rejects plaintiffs' claim that the destruction of the vehicle was not willful. Five months after the accident plaintiff testified that he still had the vehicle. Defendants promptly gave oral and written notice of an intention to conduct an inspection. Plaintiff then sold the vehicle shortly after the preservation requests were made. While plaintiffs claim they were forced to get rid of the vehicle and that it was available for defendants to inspect even after its removal from plaintiffs' apartment building, plaintiffs' letter clearly states that the vehicle had been destroyed. Based on the temporal proximity of the preservation request and the sale of the vehicle and the fact that plaintiffs' expert relied on an inspection of the vehicle to form an expert opinion as to how the motor vehicle accident occurred, sanctions for spoilation are warranted. Contrary to plaintiffs' assertions, defendants were not required to inspect the vehicle in any specified time frame as they had yet to retain an expert. The court further rejects plaintiffs' claims that because defendants' expert was able to formulate an opinion about how the accident occurred by viewing photographs of plaintiffs' vehicle, defendants have failed to establish prejudice from the destruction of the vehicle. Defendants stated their intention to have an expert inspect the vehicle and plaintiffs' conduct has deprived them of this opportunity.

Based on the foregoing and the lack of concrete proof establishing the serious allegation that the destruction was done with the intent to deprive defendants of an ability to defend the action, a negative inference charge along with preclusion is appropriate. Therefore, it is

ORDERED that defendants will be entitled to a negative inference charge as set forth in PJI 1:77.1 based on the destruction of the vehicle. Moreover, the plaintiffs will be precluded at trial from presenting any expert testimony that incorporates an inspection of the vehicle as a basis for forming an opinion as to how the accident occurred. See Yi Min Ren v. Professional Steam-Cleaning, Inc., 271 AD2d 602 (2nd Dept. 2000). This sanction is necessary as a matter of "elementary fairness." See Jones v. General Motors Corp., 287 AD2d 757, 760 (3rd Dept. 2001).

Plaintiffs' motion to preclude expert testimony of New York State Troopers.

Plaintiffs move to preclude the defendants from calling State Troopers Talia Duke and/or Keri Pfister as expert witnesses. On April 9, 2014 defendants served a supplemental CPLR §3101(d) expert disclosure reserving the right to call the Troopers as expert/fact witnesses. The disclosure states that the Troopers are anticipated to testify as to the conditions of the accident scene, the damage and condition of the involved vehicles, road markings, statements of the involved parties and the cause of the subject accident. The application is granted to the extent that the Troopers shall be precluded from offering any expert testimony as to the cause of the subject accident. Such preclusion shall not extend to the Troopers testifying as fact witnesses as to their observations of the accident scene. While defendants claim the Troopers are qualified to testify as to the cause of the accident because such subject matter lies within "the ordinary expertise of a police officer who routinely responds to motor vehicle accidents," there is nothing in the record demonstrating the

expertise of these Troopers. There is no evidence as to how long they have been performing this function, the number of accidents they have responded to and/or what, if any, training they have received in accident reconstruction. Wherefore, it is hereby

ORDERED that plaintiffs' motion to preclude the New York State Trooper Duke and Pfister from testifying is granted to the extent that they shall not be permitted to offer opinion testimony as to the cause of the motor vehicle accident.

Defendants' motion to preclude computer-generated demonstrative evidence.

Whether a videotape or computer-generated animation should be viewed by a jury depends on the facts and circumstances of each case and lies within the sound discretion of this court. A computer-generated animation is admissible for the limited purpose of illustrating an expert's opinion as to the cause of an accident but may not be considered by a jury itself in determining what actually caused the accident. See Kane v. Triborough Bridge & Tunnel Auth., 8 AD3d 239, 242 (2nd Dept. 2004). This case involves a two car accident. Plaintiffs allege that the defendants' vehicle was on the side of the road and pulled out in front of the plaintiff's vehicle. The defendants allege that the town vehicle was stopped at an intersection and was hit in the rear by the plaintiff's vehicle. The computer-generated images plaintiffs seek to introduce depicts plaintiff's version of the accident in which the town vehicle is on the side of the road prior to the accident. Based on the fairly straightforward nature of the accident and the conflicting versions of how it occurred, admission of the computer-generated animation does not appear necessary and would likely unfairly prejudice the defendants. While the court could offer an instruction to the jury as to the limited purpose it could consider any animation and/or video, there lies an inherent danger that the viewing of the video or animation could be viewed by the jury as evidence of how the accident actually occurred. Based on the foregoing, it is

ORDERED that defendants' motion to preclude evidence of a computer-generated version of how the accident occurred is granted.

Defendants' motion to dismiss the action pursuant to CPLR §3126(3).

Defendants contend that the court should dismiss the action based on plaintiffs' failure to disclose fact witnesses to "yaw" marks at the accident site in conjunction with the destruction of plaintiff's vehicle. Defendants assert that plaintiffs failed to disclose their liability expert, Gregory Witte, as a fact witness to the alleged yaw marks on the road. Plaintiffs retained Mr. Witte shortly after the accident to investigate the accident scene and provide an opinion as to the cause of the accident. Apparently, Mr. Witte took photographs of the accident scene. Plaintiffs disclosed such photographs during the course of discovery. In February 2014 plaintiffs sent defendants an expert disclosure noticing an intent to call Mr. Witte as an accident reconstruction expert. The disclosure states that either he or his agent inspected the accident scene on September 14, 2010 and conducted a forensic survey of the area.

Plaintiffs were not required to disclose Mr. Witte as a fact witness. Plaintiffs retained him as an expert for the purpose of prosecuting this action. The mere fact that in that capacity he inspected the accident scene does not make him a fact witness. Plaintiffs' expert inspected the scene for purposes of litigation and thus his report and observations were not discoverable as they were prepared in anticipation of litigation. See generally Landmark Ins. Co. v. Beaurivage Restaurant, Inc., 121 AD2d 98 (2nd Dept. 1986). Moreover, plaintiffs disclosed the photographs taken of the accident scene during the course of discovery. As plaintiffs point out, defendants were free to conduct their own investigation of the accident scene. Accordingly, defendants have failed to demonstrate a basis for sanctions based on a failure to disclose information as to observations of yaw marks on the roadway. Accordingly, it is hereby

ORDERED that defendants' motion for sanctions under CPLR §3126 for an alleged failure to produce discovery of yaw mark evidence is denied.

Defendants' motion to preclude expert testimony.

Defendants move to preclude the expert testimony of Mr. Witte and Engineer Nicholas Bellizi. Defendants assert that their opinions on how the accident occurred is based almost exclusively upon the existence of yaw marks on the roadway, but their conclusion that the marks observed two weeks after the accident derived from the accident is speculative. Thus, defendants assert that plaintiffs lack an adequate foundation for offering such expert testimony.

The proffered expert opinions are based, in part, on photographs of tire marks taken two weeks after the motor vehicle accident. The use of such photographs by accident reconstructionist experts in formulating an opinion as to the cause of the accident is permissible. The validity of their opinions and whether or not the marks upon which they rely in formulating such opinions were caused by the accident is an issue to be determined by the jury. Based on the qualifications of the experts and the relatively short period that elapsed between the accident and the taking of the photographs, the proffered opinion evidence has an adequate foundation to be presented to the trier of fact. The court further rejects defendants' claim that "basic fairness" requires preclusion of the expert testimony. Defendants do not dispute plaintiffs' assertion that they were provided with the photographs of the accident site upon which the experts are relying. Moreover, plaintiffs were not required to disclose their expert witnesses in response to defendants' demand for disclosure for the identities of witnesses with knowledge of the underlying accident. As noted, defendants were free to conduct their own investigation of the accident scene and cannot now claim prejudice and surprise by plaintiffs' expert disclosures revealing an investigation of the accident scene shortly after the accident. Wherefore, it is hereby

ORDERED that defendants' motion to preclude the expert testimony of Mr. Witte and Mr. Bellizi is denied.

Defendants' motion to preclude fact witnesses.

Defendants move to preclude plaintiffs from calling Larissa Malarchuk, Christina Bleakley, Joy Cialini and Maria Pogact as fact witnesses. On March 27, 2014 plaintiffs served a supplemental response to defendants' demands for witness information naming these individuals as possible fact witnesses. Defendants claim that the post-note of issue disclosure was untimely and that preclusion is warranted. Plaintiffs state that defendants were informed on March 31, 2014 that the named witnesses were 911 workers and EMS responders, and that he obtained the names of these witnesses in the course of preparing for trial. Plaintiffs further state that the identities of these witnesses was a matter of public record and also ascertainable from medical records previously disclosed. Based on the foregoing and plaintiffs' representation that they only intend to call these witnesses to offer testimony relating to damages and not liability, defendants' motion is denied. Defendants are free to seek out these non-party witnesses and obtain statements or conduct whatever investigation they deem necessary. As both parties had equal access to identifying these individuals, there is no basis to preclude the testimony of the first responders as to their observations relating to any alleged injuries sustained. Based on the recent disclosure, however, plaintiffs will not be permitted to call such witnesses in the liability portion of the trial. Wherefore, it is hereby

ORDERED that defendants' motion to preclude the testimony of the aforesaid witnesses is granted to the extent that they may not be called as liability witnesses and denied to the extent that they may, if necessary, testify at the damages portion of the trial.

Defendants' motion to preclude evidence as to claims for custom prosthetic equipment.

Defendants move to preclude plaintiffs from calling prosthetics witnesses Michael Rayer, alleging that his proffered testimony constitutes a new category of damages not previously asserted. Plaintiffs' bill of particulars dated August 17, 2011 alleges special damages ascertainable to date and continuing for prosthetics in the amount of approximately $11,611.19. On February 4, 2014, plaintiffs served an expert disclosure for Certified Prosthetist Michael Rayer projecting plaintiff's life costs for prosthetics to be $1,094,392.00. Most of this cost is attributable to electrically powered transradial myoelectric prosthesis. Defendants assert that the claim for this type of prosthetic is an entirely new category of special damages that was not previously pled and may not be raised for the first time under CPLR §3043(b) or in a CPLR §3101(d) expert response.

It is well established that a party may not add a wholly new category of special damages under CPLR §3043(b) under the guise of merely updating allegations of special damages previously asserted. See Pearce v. Booth Mem. Hosp., 152 AD2d 553 (2nd Dept. 1989). Here, plaintiffs have not added an entirely new category of damages. The allegations set forth in the expert disclosure merely amplify the damage claim for prosthetics made in the bill of particulars. While the amount is significantly greater than the amount allegedly asserted, plaintiffs noticed their intention to seek damages for the future cost of prosthetics. They have now noticed an intention to seek costs for more extensive and expensive prosthetics. This does not sufficiently change the nature of their damage

claim to require leave of court prior to supplementing the previously asserted special damages claim. Thus, it is hereby

ORDERED that defendants' motion to preclude evidence of the future damages for myoelectric prosthetics is denied.

Defendants' motion to preclude expert testimony of Dr. Siedenberg and Dr. Kinkaid.

Defendants further seek to preclude plaintiffs from offering expert testimony on the costs of future "life care expenses." Plaintiffs' economist, Dr. Siedenberg, incorporating the findings of vocational rehabilitationist Dr. Kinkaid, estimates future "life care expenses-homecare option" costs of $2,610,690.00. Such expenses are based on inflation, present calculations for physician follow-up care, therapeutic evaluation, medications, prosthetics, aid for independent living and home health care and maintenance. As set forth above, a party is barred from including a new claim or category of damages in a supplemental bill of particulars under CPLR §3043 or an expert report. See Aversa v. Taubes, 194 AD2d 580 (2nd Dept. 1993). Plaintiffs' verified bill of particulars and two supplemental bills of particular fail to assert a claim for life care expenses. The newly asserted claim for life care expenses constitutes a new category of special damages not previously asserted. The court rejects plaintiffs' claim that this damage claim is merely a supplement of previously asserted damage claims. The assertion that plaintiff Evarista Aitcheson sustained derivative damages based on a deprivation of the "usual services performed by the plaintiff" does not amount to a damage claim for future life care expenses as set forth in the expert reports of Dr. Siedenberg and Dr. Kinkaid. As these damage claims were not previously asserted, they may not be raised for the first time in an expert disclosure. Based on the foregoing, it is hereby

ORDERED that defendants' motion is granted to the extent that plaintiffs shall be precluded at trial from offering evidence of future life care expenses.

This constitutes the decision and order of the court.

The parties are reminded that jury selection is scheduled to commence on May 30, 2014 at 9:30 a.m.

Dated: May 19, 2014
Poughkeepsie, New York

ENTER:

MARIA G. ROSA, J.S.C