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United States District Court,
W.D. Washington,
at Seattle.

James R. Hausman, Plaintiff,
v.
Holland America Line-USA, et al., Defendants.

CASE NO. 13cv00937 BJR
|
Signed 08/21/2015

Attorneys and Law Firms

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MEMORANDUM OPINION & ORDER

BARBARA J. ROTHSTEIN, UNITED STATES DISTRICT JUDGE

GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION IN LIMINE; GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION IN LIMINE; GRANTING IN PART DEFENDANTS' MOTION TO BIFURCATE

***1** This matter is before the Court upon consideration of the parties' respective motions in limine, as well as Defendants' motion to bifurcate trial. The general background of this case has been recently discussed in previous motions, and will not be repeated here. Any additional background will be discussed as necessary.

I. Defendants' Motion in Limine

A. Reference to HAL's installation or adjustment of doors

Defendants move to prohibit Plaintiff from making any references to the jury that "HAL either installed or adjusted the doors or the sensor settings after Centraltecnica installed and set them [on December 22, 2010]." Defs.' Mot. at 10. Defendants argue that there is no proof that HAL either installed or adjusted the door at issue. *Id.* In response, Plaintiff states that he "does not intend to speculate that HAL made any particular adjustment to these doors." Pl.'s Opp'n at 6. Instead, Plaintiff plans to show that "HAL had the ability to direct its subcontractor how to install the door and set sensor levels and other adjustable controls and that HAL had exclusive control over these doors for at least eleven months before the door struck [Plaintiff]." *Id.*

Given Plaintiff's response, there does not seem to be any disagreement on this matter. Accordingly, the Court denies as moot Defendants' motion as to the reference that HAL either installed or adjusted the doors any time between December 22, 2010 (when Centraltecnica installed them) and November 26, 2011 (the date of Plaintiff's incident).

B. Medical Causation

"Medical testimony used to show causation must be sufficient to establish that the injury-producing situation 'probably' or 'more likely than not' caused the subsequent condition, rather than that the accident or injury 'might have,' 'could have,' or 'possibly did' cause the subsequent condition." *Ely v. Dick*, 2015 U.S. Dist. LEXIS 56989, 7–8 (W.D.Wash. Apr. 30, 2015) (internal quotations and citation omitted).

1. Dr. Palma Wideman's Statement

Defendants move to exclude any reference or speculation with respect to medical causation that is based on "mere possibility" instead of probability. Defs.' Mot. at 11. Specifically, Defendants point to a statement made by Plaintiff's attorney when drafting the stipulated facts for the pretrial statement: "Ship's physician, Dr. Palma Wideman, diagnosed [Plaintiff] with possibility post-concussive syndrome on November 30, 2011." *Id.* at 12–13.

Plaintiff agrees that any medical opinion evidence must adhere to the "more-probably-than-not" standard. Plaintiff points to the ship records to support that Dr. Palma Wideman's statement was in fact that Plaintiff suffered from "probable" post-concussion syndrome. Plaintiff explains that

he mistakenly said "possible" in the stipulated facts instead of "probable." Pl.'s Opp'n at 10.

The Court has reviewed the handwritten medical records taken onboard the MS Amsterdam and they indeed assess Plaintiff with "probable past concussive syndrome," which is confirmed by Dr. Wideman's deposition. Pl.'s Opp'n, Ex. 8; Ex. 10. Therefore, the Court finds that Dr. Wideman's statement passes muster under the "more-probably-than-not" standard.

2. Dr. Zec's and Dr. Breen's Statements Regarding Possible Concussion

***2** Additionally, Defendants argues that Plaintiff has "submitted various reports to try to prove he suffered a brain injury," but claim that these are not based on a "more-probable-than-not" standard. [1] *Id.* at 13. Specifically, Defendants points to statements by one of Plaintiff's treating physician, Dr. Ronald F. Zec, and a neuropsychologist, Dr. Alan R. Breen. *Id.*

Plaintiff assures the Court that any medical expert called by Plaintiff to testify will state their causation opinions to a reasonable degree of medical certainty. Plaintiff also points to the expert depositions to support that these medical opinions abide by the "more-probably-than-not" standard. Pl.'s Opp'n at 10–11. With respect to Dr. Zec and Dr. Breen, Plaintiff notes that these are Defendants' witnesses, not his witnesses. Plaintiff argues that any opinions raised by Dr. Zec and Dr. Breen regarding the possibility of a concussion can be elicited during cross-examination, as they go to the credibility and veracity of their testimony. *Id.* at 11. The Court agrees with Plaintiff that any statement regarding the *possibility* of a concussion may be elicited by Plaintiff upon cross-examination, if indeed Defendants' direct examination opens the door to the topic. Plaintiff would not be relying on Dr. Zec or Dr. Breen's opinions to demonstrate that he more likely than not suffered a concussion as a result of the incident with the doors. Instead, he is trying to attack Dr. Zec and Dr. Breen's testimony, and, as he states it, test "the limits of their opinions" before the jury. *Merriman v. Toothaker*, 9 Wn.App. 810, 815 (Wash.Ct.App.1973) (stating that "the fact that [the doctor] acknowledged on cross-examination that the question was "iffy" may affect the weight of the testimony").

Accordingly, Defendants' motion which apparently seeks to limit Plaintiff's cross-examination of these two doctors is denied.

C. Plaintiff's Expert Witness, Dr. Michael Freeman

Plaintiff offers the expert testimony of Dr. Michael Freeman to rebut the opinions of Defendants' expert witnesses, especially Dr. Irving Scher. [2] Defendants ask the Court to exclude any testimony from Dr. Freeman under Federal Rule of Civil Procedure 403 because they believe he has "credibility issues" and "inaccurate[ly] claim[s] to have a biomechanical engineering background." *Id.*; Defs.' Mot. at 13–14. Defendants argue that Dr. Freeman's "views have been rejected by courts at least a dozen times," and that he lacks credibility since he "willfully and knowingly" created a fictitious report in 1986 while he was a student at Western State Chiropractic College.

Plaintiff responds by noting that Defendants' motion is late since this Court's ordered that any motions that aim to limit or exclude expert testimony be filed by March 31, 2014. Moreover, Plaintiff argues that Dr. Freeman has been allowed to testify in many cases, and that those cases where his testimony was rejected represents an "extremely miniscule percentage." Pl.'s Opp'n at 12. Plaintiff asks, in his own motion in limine, that the Court prohibit Defendants from offering any prior orders or transcripts from those cases were Dr. Freeman's testimony was rejected. Pl.'s Mot. in Limine at 4. Furthermore, Plaintiff moves to prohibit Defendants from mentioning the 1986 incident at Western State Chiropractic College because Plaintiff argues that it is irrelevant and happened almost 30 years ago. *Id.* at 2–4. Plaintiff also argues that questioning regarding Dr. Freeman's academic discipline as a result of this 1986 incident is improper under Federal Rule of Evidence 608(b). *Id.*

***3** Clearly, other courts have had issues with accepting Dr. Freeman's expert testimony in the past. However, in those cases, those courts had the benefit of a Daubert hearing or at least thorough briefing regarding the methodology and analysis implemented by Dr. Freeman. In contrast, Defendants have not objected to Dr. Freeman's methodology or the facts and data he relies on to reach his conclusions, whatever those conclusions may be. Instead, Defendants argue that Dr. Freeman's credibility is so questionable that the Court should strike him under Rule 403.

In assessing whether Dr. Freeman's testimony is so fraught with credibility issues to render him inadmissible expert, the Court cannot and will not consider those Daubert decisions made by other courts since those decisions were reached after an opportunity to review Dr. Freeman's methodology and analysis in those particular cases, an opportunity which this Court has not had. Similarly, Defendants shall not be permitted to raise these previous court decisions before the jury, as they are irrelevant to Dr. Freeman's credibility in this case. [3]

With respect to the fact that, as a student, Dr. Freeman falsely took credit for patients that he had not seen, the Court finds that this goes to his credibility and is proper impeachment evidence. *See* Fed.R.Evid. 608(a) (explaining that extrinsic evidence is normally notn admissible "to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness" but that "the court may, on cross-examination, allow them to be inquired into if they are probative of the [witness's] character for truthfulness or untruthfulness"). That said, Plaintiff correctly notes that any disciplinary action which was taken by the school, namely, the fact that Dr. Freeman was suspended for a term, is prohibited extrinsic evidence and will not be allowed. *See* Advisory Committee Notes on 2003 Amendment ("Rule 608(b) prohibits counsel from mentioning that a witness was suspended or disciplined for the conduct that is the subject of impeachment, when that conduct is offered only to prove the character of the witness."). Accordingly, with respect to the testimony of Dr. Freeman, Defendants' motion is denied and Plaintiff's motion is granted in part and denied in part.

Defendants also take issue with the fact that Dr. Freeman has not produced "postsecondary education" transcripts. Plaintiff responds that Dr. Freeman does not have all of his transcripts in his possession, and therefore has not produced them. However, Plaintiff notes that Dr. Freeman has produced to Defendants his transcript from the Western State Chiropractic College. The Court orders that the Plaintiff secure from Dr. Freeman and turn over all of his post-secondary transcripts prior to the pretrial conference. The Court expects that any expert who plans to testify will willfully turn over his educational transcripts, as they are part of his qualifications. FRCP 26(a)(2)(B)(iv). Whether or not Dr. Freeman has physical possession of the transcript does not negate the fact that he can readily obtain these transcripts and should do so immediately.

D. Cumulative Damages Witnesses

Plaintiff has identified ten potential lay witnesses that are his employees, friends, and family members and will testify as to Plaintiff's damages. [4] *See* Proposed Joint Pretrial Order at 13–17. Plaintiff notes that it is his burden to prove his damages, and argues that these witnesses each "provides a unique perspective and describes the damage to different relationships." Proposed Joint Pretrial Order at 10.

***4** Defendants ask that the Court limit Plaintiff's damages witnesses. First, Defendants ask that these witnesses not be allowed to testify as to his character. Next, Defendants argue that the number of lay witnesses is excessive. Defs.' Mot. at 15–16. Defendants maintain that these damage witnesses, which purportedly are Plaintiff's family and friends, are really being introduced "to solicit an emotional response [from] the jury." *Id*. at 16.

The Court agrees that Plaintiffs' lay witness list, at least as currently represented, is excessive and most likely cumulative. For instance, four of Plaintiff's witnesses are Defendants' employees at The Gold Center and presumably would be testifying to similar observations. Plaintiff is forewarned that the Court will exercise its power under Rule 403 to limit these witnesses. At the very most, the Court will allow four of these lay damages witnesses, [5] unless Plaintiff can persuade the Court at the Pretrial Conference why any more are crucial to proving Plaintiff's case. Moreover, the Court expects that the testimony of these witnesses will stay within the confines of the damages issue and not stray into discussing Plaintiff's character. [6]

Accordingly, Defendants' motion as to the damages witnesses is granted.

II. Plaintiff's Motion in Limine

A. DTI Brain Imaging

According to Plaintiff, diffusion tensor imaging or DTI "is a new type of brain imag[ing] that seeks to identify diffuse axonal injury in the brain by looking at 'a shadow of the watery movement in the brain.' " Pl.'s Mot. at 6. Plaintiff states that he never underwent a DTI study because "his treating doctors have not asked him to do so," and "because it is still a research tool and is not considered diagnostic." *Id.* Plaintiff is concerned that Defendants intend to raise the lack of a DTI study to imply that Plaintiff does not have a brain

injury. *Id*. Plaintiff asks that the Court preemptively strike any questioning regarding the DTI study because, he argues, it is irrelevant.

Defendants first argue that Plaintiff's motion should be construed as an untimely Daubert motion. Next, Defendants insist that the lack of DTI imaging is relevant as it "could show damage that other testing does not reveal." Defs.' Opp'n at 9. Defendants argue that the failure to have a DTI study calls into question whether or not Plaintiff suffered any permanent brain injury as a result of the incident.

As an initial matter, the Court is not persuaded that a Daubert motion was required here. Although the methodology involved with DTI imaging is clearly an issue, Plaintiff does seek to have his expert testify as to DTI imaging or even preclude Defendants' witness from such testimony. In fact, Defendants have not proffered any witness that will discuss DTI imaging. Therefore, it is understandable that Plaintiff has not raised this issue in the context of a Daubert motion. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993) ("Faced with a *proffer of expert scientific testimony*, then, the trial judge must determine at the outset, ... whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue". (emphasis added)).

***5** Instead, it appears that Plaintiff's motion aims to prohibit Defendants from raising the topic of DTI imaging while cross-examining Plaintiff's own experts. However, the Court does not find that prohibiting such cross-examination would be appropriate. If such technology exists to diagnose brain injuries, that is certainly relevant and the jury may find it helpful. On the other hand, if a DTI study is not required to diagnose a brain injury, as Plaintiff claims, then Plaintiff's own experts will have the opportunity to explain that distinction to the jury.[7] From the Court's view, the relevance of DTI imaging remains largely a factual matter to be presented to the jury through expert testimony. Any other ruling would require the Court itself to make a decision as to the role of DTI imaging with brain injuries, but the Court declines to make such a ruling given that the parties have ill-prepared the Court for such an important task.

B. Dr. Breen's Opinions regarding Dr. Glisky's Report

Defendants intend to offer the expert testimony of Dr. Alan Breen at trial. Dr. Breen, a neuropsychologist, is expected to testify as to "his independent medical examination of Plaintiff, his findings, review of medical records and Plaintiff's medical condition." Proposed Joint Pretrial Statement at 18.

Plaintiff moves to exclude "any undisclosed opinions" by Dr. Breen and "specifically any opinions that pertain to or attempt to rebut the opinions disclosed by Martha Glisky, Ph.D. Pl.'s Mot. at 6". Plaintiff argues that Defendants were required to produce all of Dr. Breen's opinions in her expert report, and this report did not include any of these opinions, nor has Dr. Breen provided a rebuttal report. Plaintiff suspects that Dr. Breen will attempt to rebut Dr. Glisky's opinions because, on March 24, 2015, he requested the raw data from Dr. Glisky's tests. *Id.* at 7. Plaintiff concludes that the Court should exclude such untimely testimony pursuant to Federal Rule of Civil Procedure 37(c)(1).

Defendants insist that Plaintiff's motion is premature. Defendants assure the Court that any "supplemental" opinions by Dr. Breen will be provided to the Plaintiff. Defendants also argue that they are entitled to inquire of Dr. Breen as to Dr. Glinsky's testimony. Defs.' Opp'n at 10.

Pursuant to Federal Rule of Civil Procedure 37(c)(1),

> If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:
>
> (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
>
> (B) may inform the jury of the party's failure; and
>
> (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

Under Rule 26(a), parties are required to disclose their expert's reports, which must contain "all opinions the witness will express and the basis and reasons for them." FRCP 26(a)(2)(B)(i). Expert testimony that is "intended solely to contradict or rebut evidence on the same subject matter identified" by an opposing party's expert is due "within 30 days after the other party's disclosure."

At this point in the litigation, Defendants certainly know (and likely have known for some time) whether Dr. Breen intends to offer rebuttal opinions as to Dr. Glisky's anticipated testimony. Plaintiff disclosed Dr. Glisky's report on September 17, 2014. Any rebuttal opinion by Dr. Breen regarding Dr. Glisky's report was due no later than October 2014. Defendants have not attempted to explain why Dr. Breen's rebuttal opinions could not be timely disclosed. As such, Dr. Breen will not be allowed to provide any opinions that are not contained in his report, including any opinions that rebut the testimony by Dr. Glisky. Plaintiff's motion as to this issue is granted.

C. HAL's General Safety Record

***6** Lastly, Plaintiff moves to preclude Defendants from "offering evidence or otherwise discussing its safety record on matters unrelated to automatic doors." Pl.'s Mot. at 8. Plaintiff argues that such evidence on the general safety record of HAL is irrelevant, misleading to the jury, and improper character evidence. *Id.*

Defendants argue that the general safety record is relevant to refute Plaintiff's "other door" evidence, and the testimony of Captain Joseph Derie as to "general safe ship operations and maritime standards for responding to accidents." Defs.' Opp'n at 11. Defendants insist that such evidence is necessary to "present a balanced view of HAL's record." *Id.* at 11–12.

The Court agrees that HAL's general safety record is irrelevant. The Court has already ruled that "other doors" evidence is admissible. Therefore, HAL's safety record with respect to the automatic doors on its cruise ships will be allowed. However, this does not mean that Plaintiff can elicit testimony attacking HAL's general safety record or general safety protocols. In the event that Plaintiff attempts to do so, the Court will allow Defendants to present their evidence of HAL's general safety record.

III. Defendants' Motion to Bifurcate

Defendants ask that the Court "bifurcate the trial so as to have issues related to punitive damages tried after liability is either found or not found." Defs.' Proposed Order, Mot. to Bifurcate Trial at 1. In response, Plaintiff states that he "does not oppose bifurcating the trial so that liability issues and compensatory damages are tried in the first phase and the proper amount of punitive damages is tried, if necessary, in a second phase." Pl.'s Opp'n at 1.

"Rule 42(b) authorizes district courts to bifurcate a trial for any one of the following reasons: (1) convenience, (2) to avoid prejudice, or (3) to expedite and economize". *Boone v. Los Angeles*, 522 Fed. Appx. 402, 403 (9th Cir.Cal.2013) (quoting Fed.R.Civ.P. 42(b)). The Court agrees with the parties that bifurcation is proper for all of these reasons, but especially to avoid prejudice to Defendants.

However, the Court agrees that issues involving Defendants' liability overlap with whether or not a jury may award Plaintiff punitive damages. Punitive damages are only appropriate if a plaintiff can show wanton, willful, or outrageous conduct. *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 409 (2009). Whether the jury finds such conduct is an issue that will be addressed in the first phase of trial.

Therefore, the first phase of trial will encompass all issues pertaining to the Defendants' level of culpability, if any. The Court anticipates that the first phase of trial can be conducted with the use of jury instructions and special verdict forms, avoiding any reference to the phrase "punitive damages." Accordingly, Defendants' motion to bifurcate is granted in part and denied in part.

IV. Conclusion

For the foregoing reasons, the Court hereby **ORDERS** as follows:

(1) Defendants' motion in limine is granted in part and denied in part;

(2) Plaintiff's motion in limine in granted in part and denied in part; and

(3) Defendants' motion to bifurcate is granted in part and denied in part.

SO ORDERED.

All Citations

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Footnotes

1 Defendants also argue that these reports are not authenticated. The Court trusts that Plaintiff will properly authenticate such documents prior to or, if necessary, at trial. At this point, the Court declines to strike these medical reports due to authentication issues.

2 "Dr. Scher is an engineer who specializes in biomechanics, accident reconstruction, and design analysis of medical devices." Proposed Pretrial Order at 18.

3 The Court will consider allowing any evidence that shows Dr. Freeman lied under oath. Such evidence should first be proffered to the Court during the pretrial conference, at which point the Court will decide on its admissibility.

4 Plaintiff claims he will be calling ten witnesses, but that this number may change before trial. The Pretrial Order reflects more than ten damage witnesses, but more if one counts Plaintiff's wife and three of Defendants' employees which Plaintiff will also be calling to testify as to damages.

5 The four allowed witnesses do not include Plaintiff, Plaintiff's wife, or any of Defendants' employees.

6 Of course, changes in Plaintiff's person may be relevant to his injuries/damages and this will be allowed. But, again, the Court will exercise its power under Rule 403 if such testimony is more about Plaintiff's good character and less about proving his damages.

7 Indeed, in Dr. Stimac's deposition, he states that this does not "specifically allow one to diagnose diffuse axonal injury, but [it can be] supportive when [there are] other findings that could indicate a diffuse brain injury." Dkt. 110, Dep. of Gary Stimac at 43:12–14. Moreover, Dr. Stimac explained that the outcome of a DTI study is not going to change the course of treatment for a person when his or her doctors are "already convinced that the person has a head injury." *Id.* at 44:22–45:4.

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