IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

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| BETTY BAKER, | : | |
| Plaintiff, | : | C.A. No. K14C-06-013 WLW |
| | : | |
| v. | : | |
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| EDMUND A. GOLDSBOROUGH | : | |
| and EDWARD J. GOLDSBOROUGH, SR. | : | |
| and STATE FARM MUTUAL AUTO | : | |
| MOBILE INSURANCE COMPANY, a | : | |
| foreign corporation, | : | |
| Defendants. | : | |

Submitted: October 19, 2015
Decided: October 26, 2015

**ORDER**

Upon Defendant State Farm Mutual Automobile Insurance Company's Motion in Limine to Suppress Vehicle Photographs. *Granted.*
Upon Defendant Goldsborough's Motion in Limine to Suppress Defendant's Driving Record. *Granted.*

William D. Fletcher, Jr., Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware; attorney for Plaintiff.

Brian T. McNelis, Esquire of Young & McNelis, Dover, Delaware; attorney for Defendants Edmund A. Goldsborough and Edward J. Goldsborough, Sr.

Colin M. Shalk, Esquire and Catherine M. Cramer, Esquire of Casarino Christman Shalk Ransom & Doss, P.A., Wilmington, Delaware; attorneys for Defendant State Farm Mutual Automobile Insurance Company.

WITHAM, R.J.

This combined motion places two issues before the Court. The first issue is whether a motion in limine to suppress evidence of Defendant Edmund A. Goldsborough's ("Goldsborough") previous Driving Under the Influence ("DUI") convictions and other motor vehicle violations (collectively, his "driving record") should be granted. The second issue is whether a motion to suppress photographs depicting damage to the vehicles involved in the current action should be granted.

## I. FACTS AND PROCEDURAL HISTORY

Plaintiff Betty Baker ("Baker") was involved in an auto accident with Goldsborough on September 26, 2013. The collision occurred at the intersection of State Routes 12 and 15. The intersection is controlled by flashing red lights and stop signs for all travel lanes. Edward J. Goldsborough, Sr. was the owner of the vehicle involved in the accident. Baker proceeded into the intersection after coming to a complete stop, and was struck by Goldsborough after he failed to stop before continuing into the intersection. Goldsborough was subsequently adjudged guilty of Vehicular Assault in the First Degree and Driving a Vehicle Under the Influence of Alcohol and/or Drugs. Baker filed her complaint on June 9, 2014, and filed amended complaints on September 22, 2014, October 16, 2014, and on June 11, 2015. Although liability is not contested, Baker alleges that the Goldsboroughs were reckless in causing her injuries.

## II. DISCUSSION

### *Admission of Goldsborough's Driving Record Would Violate D.R.E. 404(b)*

Baker contends Goldsborough's driving record is being offered as evidence to

support Baker's entitlement to an award of punitive damages based on Goldsborough's reckless conduct. Baker also offers the evidence to establish Edward J. Goldsborough, Sr.'s knowledge of his son's driving record as a basis for proving negligent or reckless entrustment. The Goldsboroughs contend that admitting the driving record would constitute the use of evidence of other crimes, wrongs, or acts to show action in conformity therewith and would therefore violate Delaware Uniform Rule of Evidence ("D.R.E.") 404(b).

D.R.E. Rule 404(b) "formalized the general rule forbidding introduction of character evidence solely to prove that the defendant acted in conformity therewith on the occasion in question."[1] The rule consists of two elements. The first element proscribes propensity evidence. The second element cites purposes for which evidence of other acts, crimes, or wrongs may be used.[2] For purposes of this rule, character evidence refers to the defendant's disposition or propensity to commit certain crimes, wrongs or acts.[3] D.R.E. Rule 404(b) is applicable to civil cases as well as criminal cases.[4]

In *Getz v. State*, the Supreme Court of Delaware commented on the inherent unfairness of the indiscriminate use of prior bad acts and the possibility of a jury

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[1] *Getz v. State*, 538 A.2d 726, 730 (Del. 1988) (citing *Dutton v. State*, 452 A.2d 127, 145 (Del. 1982)).

[2] *Id.*

[3] *Getz*, 538 A.2d at 730 (citing E. Imwinkelried, *Uncharged Misconduct Evidence*, § 2:18, at 48 (1984)).

[4] *Mercedes-Benz of N. Am. Inc. v. Norman Gershman's Things to Wear*, 596 A.2d 1358, 1365 (Del. 1991).

using the cumulative effects of these acts in assessing a defendant's guilt.[5] The Court then set forth the following guidelines governing the admission of such evidence:

> (1) The evidence of other crimes must be material to an issue or ultimate fact in dispute in the case. If the State (the plaintiff in this case) elects to present such evidence in its case-in-chief it must demonstrate the existence, or reasonable anticipation, of such a material issue.
> (2) The evidence of other crimes must be introduced for a purpose sanctioned by Rule 404(b) or any other purpose not inconsistent with the basic prohibition against evidence of bad character or criminal disposition.
> (3) The other crimes must be proved by evidence which is "plain, clear and conclusive." *Renzi v. State*, Del. Supr., 320 A.2d 711, 712 (1974).
> (4) The other crimes must not be too remote in time from the charged offense.
> (5) The Court must balance the probative value of such evidence against its unfairly prejudicial effect, as required by D.R.E. 403.
> (6) Because such evidence is admitted for a limited purpose, the jury should be instructed concerning the purpose for its admission as required by D.R.E. 105.[6]

Like D.R.E. Rule 404(b), the *Getz* guidelines are also applicable to civil cases.[7] Although the guidelines "were developed for criminal proceedings and specifically related to 'other crimes,' they have analogous application to the admissibility of 'other wrongs or acts' in civil cases, including tort actions and claims of discrimination, fraud or misrepresentations."[8]

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[5] *Id.* at 734.

[6] *Getz*, 538 A.2d at 734.

[7] *Mercedes-Benz*, 596 A.2d at 1365.

[8] *Id.*

In *E.I. DuPont de Nemours and Co. v. Pressman*, the plaintiff sought to introduce the testimony of coworkers stating that a supervisor had previously retaliated against other employees.[9] Counsel for the plaintiff argued the evidence would show the *character* and nature of the supervisor's managerial abilities, and would further show the supervisor's "*propensity* to do exactly what he did in this case."[10] The Superior Court's ruling to exclude this testimony because it would be unduly prejudicial was upheld by the Supreme Court of Delaware. In upholding the decision, the Court wrote that "[t]he trial judge correctly noted that D.R.E. 404(b) prohibits precisely such evidence."[11]

Baker claims to offer Goldsborough's past driving record not as proof of character, but as evidence to support Baker's entitlement to punitive damages. She relies on *Jardel Co., Inc. v. Hughes*[12] for the proposition that punitive damages serve to punish a wrongdoer and to deter him and others like him from committing similar acts in the future. Baker contends that she is entitled to have the jury consider Goldsborough's previous offenses in order to formulate a proper punishment. Despite Baker's argument that past offenses are not being offered to prove character, a jury may use this evidence for such a purpose and thus unfairly prejudice Goldsborough. Baker cites Goldsborough's two previous DUI convictions, and then states "the jury is entitled to know this was not the first occasion that Mr.

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[9] *E.I. DuPont de Nemours and Co. v. Pressman*, 679 A.2d 436, 448 (Del. 1996).

[10] *Id.*

[11] *Id.*

[12] *Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 528, 529 (Del. 1997).

Goldsborough acted in such a reckless manner but rather, the third."[13] This evidence of previous DUIs is similar to the evidence of previous retaliations offered in *Pressman*. This offer of evidence by Baker implies that because Goldsborough acted in a reckless manner on two previous occasions, he must have acted in a reckless manner on this occasion. Like the evidence of previous retaliations in *Pressmen*, this evidence of prior DUIs is precisely the type of evidence that D.R.E. 404(b) prohibits unless the evidence falls into one of the limited exceptions.

Baker also provides a list of seven driving violations which includes DUIs, speeding tickets, and driving without a license as evidence that Goldsborough's father had negligently entrusted a motor vehicle to an incompetent and dangerous operator. This list of violations is also like the propensity evidence excluded in *Pressman*. Although counsel for Baker states this is not being offered to show character, it does show both character and propensity.

Because Goldsborough's driving record is evidence of a type that may lead a jury to believe that his actions in this case were in conformity with prior violations and thus subject to the limitations set forth in D.R.E. 404(b), its admission must be governed by the guidelines set forth in *Getz*. Under the first element of a *Getz* analysis, evidence of Goldsborough's other violations is not material to the ultimate facts in this case, which are whether Goldsborough acted in a reckless manner and whether his father was aware of his son's driving record and thus negligently entrusted his vehicle to Goldsborough. This element favors suppressing the driving record.

[13] October 19, 2015 letter to Court (No. 58037435).

Under the second *Getz* element, evidence is not being offered to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident, and therefore does not fall under any of the exceptions to the prohibition against evidence of bad character or criminal disposition. Baker states the evidence is being introduced to show her entitlement to punitive damages and to show Goldsborough's father negligently entrusted his vehicle to Goldsborough. Because the evidence is not being used for a recognized exception, this element favors suppression.

Under the third *Getz* element, Baker offers copies of Goldsborough's North Carolina and Delaware driving records, but no proof of Blood Alcohol Content levels or other particular facts in each offense. The driving records are not conclusive proof of prior convictions and Goldsborough would thus be afforded the opportunity to challenge each of the listed offenses. However, if the driving records are an accurate record of Goldsborough's past violations, Baker would be able to show plain, clear, and conclusive evidence of Goldsborough's past conduct. This element marginally favors allowing the driving records into evidence.

Under the fourth *Getz* element, many of the violations are too remote from the current incident to be considered relevant. The overwhelming majority of the violations occurred more than ten years ago with some dating back more than twenty years. One misdemeanor DUI offense occurred more than fifteen years ago. The most current DUI offense that predates the accident is a misdemeanor DUI that occurred more than three and a half years ago in March 2012. This element therefore favors suppression.

The fifth *Getz* element requires the Court to perform a D.R.E. 403 analysis.[14] This requires the Court to decide whether the driving record must be excluded because "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence."[15] Goldsborough's list of driving offenses is extensive. He has committed numerous speeding violations, a careless driving violation, two DUI offenses, and has had his license revoked. The admission of such an extensive list of prior offenses would prove to be an unfair prejudice to Goldsborough and would mislead a jury. In addition, defense challenges to such an extensive list of violations could cause an undue delay. Therefore, this element also favors suppression.

Because four of the five listed elements favor suppression of Goldsborough's driving record, Goldsborough's motion to suppress this evidence will be granted, and therefore the limiting instruction in the sixth *Getz* element in not required.

*The Admission of Post-Accident Photographs of the Vehicles Would Violate the Prohibition in Davis Against Correlating Degree of Damage to Seriousness of Injury.*

Baker also seeks to introduce post-accident photographs of the vehicles to

[14] D.R.E. 403 states "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence."

[15] D.R.E. 403.

support her claim that Goldsborough acted in a reckless manner. Defendant State Farm Mutual Automobile Insurance Co. ("State Farm") contends the photographs will not prove recklessness, but they may imply a correlation between the severity of the impact and the severity of the injuries, and should therefore be suppressed.

A party to a personal injury case may not argue a correlation between the seriousness of personal injuries and the damage to a car without producing a competent expert on the issue.[16] This rule prohibits "the argument or suggestion that a plaintiff's injuries are serious because the accident caused severe damage to the plaintiff's car, absent expert testimony on the linkage."[17] Although photographs depicting the extent of the damage to a vehicle are not per se inadmissible, their admissibility "must turn on whether the risk that the jury will draw an improper inference from the photographs substantially outweighs the probative value of the photographs under Delaware Uniform Rule of Evidence (D.R.E.) Rule 403."[18]

In *Davis v. Maute*, the Supreme Court of Delaware noted that, as a general rule, "a party in a personal injury case may not directly argue that the seriousness of the personal injuries from a car accident correlates to the extent of the damage to the cars, unless the party can produce competent expert testimony on the issue."[19] The Court further noted that jurors may use their common sense in reaching a verdict, but "they may not make unguided empirical assumptions on issues that are outside the common

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[16] *Davis v. Maute*, 770 A.2d 36, 40 (Del. 2001).

[17] *Id.* at 40 n.4.

[18] *Davis*, 770 A.2d at 41.

[19] *Id.* at 40.

knowledge of laymen."[20] In *Davis*, the defendant offered photographs into evidence to prove the vehicle had made a right turn, but no expert testimony was offered regarding damage. The plaintiff's pre-trial motion in limine to exclude the photographs was denied. The trial court allowed photographs of the plaintiff's vehicle to show the plaintiff had turned right, but warned counsel that the photographs were relevant only to prove the turn, and any attempt to draw any other inference would be inappropriate. The Court found reversible error because, despite advising counsel not to use the photographs for an inappropriate purpose, the trial court failed to issue specific instructions limiting the jury's use of the photographs.

In *Eskin v. Carden*, the Supreme Court of Delaware clarified their holding in *Davis*, noting *Davis* had "been misinterpreted as a bar to the admission of photographs without expert testimony."[21] The Court stated that "*Davis* should be limited to its facts, recognizing that there may be many helpful purposes for admitting photographs" where supporting expert testimony is not required.[22] In *State Farm Mutual Automobile Insurance Co. v. Enrique*, the Supreme Court of Delaware upheld a trial court ruling that photographs were relevant to show the plaintiff had injured her knees in the accident. The Court approved the trial court's limiting instruction stating the photographs were to be used only as evidence that the plaintiff's knees were injured on the dashboard, and not as a correlation for determining the severity of injury.[23] In

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[20] *Id.* at 41 n.9 (citing *Mazda Motor Corp. v. Lindahl*, 706 A.2d 526, 533 (Del. Super. 1998)).

[21] *Eskin v. Carden*, 842 A.2d 1222, 1233 (Del. 2004).

[22] *Id.* at 1233

[23] *State Farm Mut. Auto. Ins. Co. v. Enrique*, 2010 WL 3448534, at *3 (Del. Sept. 3, 2010).

*Clark v. State*, a DART bus driver filed a workers' compensation claim after the mirror of a passing school bus struck the DART bus he was driving.[24] The driver claimed he felt a "slight jerk" at the time of the collision, causing him to turn quickly to the left, and injuring his back. His employer offered digital video taken inside the bus before, during, and after the accident to show no "slight jerk" had taken place. The Supreme Court of Delaware upheld the use of the video "to rebut Claimant's testimony about a jerking sensation and to show that an industrial accident did not occur."[25]

In the case at bar, Baker seeks to introduce photographs to support her claim that Goldsborough acted in a reckless manner. She relies on two cases, *Enrique* and *Clark*, in her contention that the photographs are admissible. Both cases are distinguishable from this case. In *Enrique*, the plaintiff claimed a knee injury and used the photographs to show that her knees hit the dashboard in the accident. In *Clark*, the video was allowed to show the jerking sensation and that the industrial accident had not occurred. Unlike these proofs of specific injury or lack of an accident, Baker seeks to prove a level of negligence. Because Baker is not seeking to prove a specific fact, but rather is trying to prove a level of negligence, her reliance on *Enrique* and *Clark* is ineffective.

Moreover, this Court fails to see how the photographs of the vehicles in this case will be helpful in proving recklessness. A simply negligent action can cause as much damage to a vehicle as a reckless action. Baker contends that the photographs

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[24] *Clark v. State*, 2006 WL 454508, at *1 (Del. Feb 24, 2006).

[25] *Id.* at *2.

provide evidence of Goldsborough's recklessness because they show he continued to drive into an intersection with a flashing red light and stop sign and caused a violent collision. Although the photographs may prove a collision, they cannot be used to show a correlation between damage to the vehicles and a level of negligence without expert testimony .

Albeit *Davis* does not act as a complete bar to the introduction of photographs, it does require expert testimony when jurors are asked to make assumptions on issues outside the common knowledge of laymen. Just as testimony showing a correlation between automobile damage and the severity of injuries is outside the common knowledge of laymen, so too is testimony showing a correlation between automobile damage and recklessness. In this case, Baker is trying to correlate a level of negligence to the severity of damage to the automobiles, a correlation that holds that serious damage must infer recklessness as opposed to simple negligence. Allowing these photographs into evidence will impact the jury in the manner proscribed by *Davis*. The prejudicial effects of the photographs Baker seeks to introduce into evidence far outweighs their probative value.

## III. CONCLUSION

It is the order of this Court that Defendant Goldsborough's motion to suppress the Defendant's driving record is **GRANTED**, and evidence related to Goldsborough's previous DUI offenses and motor vehicle violations, including his North Carolina and Delaware driving records, and related court dockets, is therefore excluded. However, convictions for offenses charged as a result of the accident at issue in this case are relevant, and are not excluded. Evidence of Goldsborough's

convictions for Vehicular Assault in the First Degree, criminal action number IK13-10-0843, and Driving a Vehicle While Under the Influence of Alcohol and/or Drugs, criminal action number IK13-10-0846, are admissible.

It is also the order of this Court that Defendant State Farm's motion to suppress post-accident photographs of the vehicles is **GRANTED.** Note, however, that the Court believes there is a fine distinction between the admissibility or inadmissibility of photographs without expert testimony. The Court understands that the inadmissibility of Plaintiff's photograph(s) is subject to change should circumstances arise during trial that would render the photograph(s) being used for a proper purpose not proscribed by *Davis v. Maute.*

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh