SUPERIOR COURT
of the
State of Delaware

William L. Witham, Jr.
Resident Judge

Kent County Courthouse
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March 4, 2014

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Re: *Clevon Tilghman, III v. Delaware State University, et al.*
Civil Action No. K10C-10-022 WLW
Letter Order Regarding Exhibits and Plaintiff's Motion *in Limine*

Dear Counsel,

The Court has considered the objections to exhibits submitted by the Plaintiff, State Defendants and Delaware State University (hereinafter "DSU"), as well as the motion *in limine* filed by Plaintiff regarding the 2011 photographs of DSU's campus and the State Defendants' proffered listing of sunset times. I shall first address Plaintiff's motion *in limine*, then proceed to address each of the parties' arguments pertaining to the exhibits. This letter addresses all of the parties' submissions to date. Anything not discussed shall be addressed at trial.

DSU Campus Photographs

Plaintiff's motion *in limine* seeks to exclude the 2011 photographs of DSU's

campus taken by the State Defendants. The State Defendants took the photographs on October 18, 2011 at 6:19 p.m.: exactly three years and one minute past the recorded sunset time on the date when Plaintiff was injured. The State Defendants argue that these photographs are relevant because they tend to impeach the credibility of Plaintiff, who stated during his deposition that it was still light outside when he was walking around campus prior to entering the building where he was bitten on October 18, 2008. Plaintiff argues that the photographs are not relevant, should be excluded under D.R.E. 403 on grounds of confusing the jury, and that expert testimony on the effect of atmospheric conditions on how light it would be after sunset on October 18, 2008 is required.

By Order dated March 26, 2012, this Court denied an identical motion filed by Plaintiff, in which the parties raised nearly identical arguments to the ones raised now.[1] This Court held that the photographs were relevant, with the caveat that extraneous details would need to be cropped out of the photos in order to address Plaintiff's concerns under Rule 403.[2]

The Court will not consider Plaintiff's arguments because of the law of the case doctrine. The doctrine is "designed to prevent relitigation of prior claims and inconsistent judgments."[3] The law of the case is established when "the Court applies a legal principal to an issue based on facts remaining constant over the course of litigation."[4] In order to overcome the law of the case and have the court reconsider the earlier ruling, a party must demonstrate "newly discovered evidence, a change of

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[1] *Tilghman v. Del. State Univ.*, C.A. No. K10C-10-022 WLW, at 7-8 (Del. Super. Mar. 26, 2012).

[2] *Id.* at 7.

[3] *E.I. du Pont de Nemours* & Co. v. Admiral Ins. Co, 711 A.2d 45, 55 (Del. Super. 1995) (citing *Moses v. State Farm Fire & Casualty Ins. Co.*, 1992 WL 179488, at *3 (Del. Super. June 25, 1992)).

[4] *Id.* (citing *Kenton v. Kenton*, 571 A.2d 778, 784 (Del. 1990)).

law, or manifest injustice."[5]

The Court's March 26, 2012 ruling became the law of the case when the Court denied Plaintiff's motion *in limine* and found the photographs to be relevant. Plaintiff now essentially seeks to renew his earlier motion *in limine*, but Plaintiff has failed to demonstrate any reason that would justify the Court's reconsideration of its earlier decision. Indeed, the State Defendants point out that the photographs have been cropped pursuant to the Court's 2012 decision, and Plaintiff notes that the parties are currently working together to craft a limiting instruction regarding the photographs. This Court will not backpedal on its earlier decision simply because Plaintiff continues to disagree with it. Because the law of the case doctrine bars relitigation of this Court's 2012 decision originally denying Plaintiff's motion *in limine*, Plaintiff's current motion *in limine* as to the photographs is DENIED.

Listing of Sunset Times

Plaintiffs' motion *in limine* also seeks to exclude evidence of the sunset times for October 18, 2008. Plaintiff essentially raises the same arguments as he does for the photographs. The State Defendants seek to introduce information from the National Oceanic and Atmospheric Administration on the sunset times for the date of the incident to controvert Plaintiff's deposition testimony that it was still light outside when he was walking around campus shortly before the incident with the K-9. The proffered evidence also includes information on the lack of precipitation for the date in question.

Such evidence has previously been found admissible by the Delaware Supreme Court as evidence of the time of sunset and weather conditions.[6] Further, as with the photographs, the sunset times for October 18, 2008 are relevant to impeaching Plaintiff's credibility. Plaintiff muddles the issue by insisting that atmospheric conditions could have affected the lighting outside even after sunset, and contends

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[5] *Id.* (citations omitted).

[6] *See Walls v. State*, 560 A.2d 1038, 1049 (Del. 1989).

that because of this, expert testimony is needed. Expert testimony is required when it would be helpful to the jury in understanding something that is beyond the knowledge of an average lay juror.[7] However, the average lay juror is well aware that it is typically dark outside after the sun sets. Thus, expert testimony is not required in this case. Plaintiff's motion *in limine* as to the time of sunset on October 18, 2008 is DENIED.

2009 E-mail

The Court shall now address the various evidentiary arguments raised by the parties in regards to various exhibits listed in the Pretrial Stipulation. While some of these issues will need to be resolved at trial, others can be disposed of now.

The State Defendants and DSU challenge one of Plaintiff's exhibits as a subsequent remedial measure. The exhibit in question is an e-mail dated October 2, 2009 sent by Captain Robert C. Hawkins, Jr. (hereinafter "Captain Hawkins") to various Delaware State Police (hereinafter "DSP") personnel. The e-mail describes assignments and schedules for the *2009* DSU homecoming–the same event at which Plaintiff was injured, but one year later. Plaintiff argues that the e-mail would only be used for impeachment purposes, if Captain Hawkins testifies on cross-examination that "it was not feasible to conduct a drug search in the manner described in the e-mail."

D.R.E. 407 excludes evidence of subsequent remedial measures following an injury that, if taken, would have made the injury less likely to occur.[8] Rule 407 provides an exception for evidence of subsequent remedial measures when the evidence is offered for another admissible purpose, including proving "control or

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[7] *See* D.R.E. 702; *Brown v. Dollar Tree Stores, Inc.*, 2009 WL 5177162, at *2 (Del. Super. Dec. 9, 2009).

[8] D.R.E. 407.

feasibility of precautionary measures, *if controverted. . . .*"[9]

Neither control nor feasibility of security measures is being disputed by the State Defendants or DSU. Put simply, none of Rule 407's recognized exceptions are issues in this case. As to Plaintiff's argument regarding impeachment of Captain Hawkins, the e-mail does not describe the manner of drug searches to be conducted–it simply describes when the drug sweeps would begin. Further, the Court fails to see how DSP's security schedule for the 2009 homecoming, one year after the events in question, is relevant to any issue in this case. Thus, the e-mail is not so much indicative of a subsequent remedial measure. It is simply irrelevant. Even if the e-mail could be considered a subsequent remedial measure, none of the recognized exceptions apply. Plaintiff cannot avail himself of these exceptions simply by trying to bring them up on cross-examination when they are otherwise not at issue.

Because the 2009 e-mail is not relevant to any issue in this case, Plaintiff shall be prohibited from admitting or referencing the e-mail at trial.

Photographs of dog bite wounds

The State Defendants and DSU also seek to exclude eight color digital photographs taken of Plaintiff's dog bite wounds. These photos were allegedly taken by Plaintiff's father, and seem to be included in an email from "powergotit@msn.com" dated November 7, 2008. The State Defendants argue that these photos "unintentionally distort the redness in the plaintiff's wound" and contends that they are also unnecessarily cumulative. DSU echoes this argument, and also appears to contend that the photos violate the best evidence rule because they are "copies of pictures embedded in an e-mail [and] are not the original[s] which should have been, but were not, preserved by the Plaintiff."

D.R.E. 1002 requires that a party seeking to prove the contents of a photograph

[9] *Id.* (emphasis added).

provide the original photograph.[10] A duplicate is admissible to the same extent as the original, provided that there is no genuine question as to the authenticity of the original, and it would not be unfair under the circumstances to admit the duplicate in lieu of the original.[11] "Duplicate" is broadly defined as an accurate reproduction of the original.[12] The original photograph is not required if the original has been lost or destroyed through no bad faith on the part of the photograph's proponent, or if the original is not obtainable through available judicial process or procedure.[13]

Plaintiff's injuries were sustained on October 18, 2008–nearly five-and-a-half years prior to the scheduled trial date. It appears that the images contained in the November 7, 2008 e-mail are digital photographs–not hard-copy photos. The authentication issues implicated by these photos–*i.e.*, whether Plaintiff's father took the photos, and whether the "powergotit@msn.com" e-mail address belongs to either the father or to Plaintiff–will need to be resolved at trial. But as to the arguments raised by the State Defendants and DSU, the Court is not convinced at this time that the photographs must be excluded. It is unlikely that any "original" photograph–such as the original file on the device used to take the pictures–still exists five-and-a-half-years after the photos were taken. These photos–again, pending sufficient authentication at trial–are sufficient duplicates under the Delaware Uniform Rules of Evidence. Further, the Court does not find the "redness" referred to by the parties to be such an inaccuracy as to prevent admission of the photos. This issue goes to the quality of the photographs, and it will be for the jury to decide what weight to give the photographs as depictions of Plaintiff's injuries. If Plaintiff seeks to admit all of these photographs, it is very possible that the danger of needless presentation of cumulative evidence would substantially outweigh the photographs' probative

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[10] D.R.E. 1002.

[11] *See* D.R.E. 1003.

[12] D.R.E. 1001(4).

[13] D.R.E. 1004(1)-(2).

value.[14] That, too, would be an issue to determine at the trial.

Because the photographs of Plaintiff's dog bite injuries satisfies the best evidence rule and are relevant evidence of Plaintiff's injuries at the time they were sustained, the photos shall not be excluded at this time.

Photographs of bloody jeans and the jeans themselves

The State Defendants and DSU also oppose the admission of two of Plaintiff's exhibits: several photographs of the blood-stained jeans Plaintiff was wearing when the K-9 bit him and the actual jeans themselves. The State Defendants and DSU do not object to the admission of one or the other, but oppose the admission of both exhibits on the grounds of cumulative evidence under D.R.E. 403, which provides that relevant evidence may still be excluded if its probative value is substantially outweighed by the danger of needless presentation of cumulative evidence.[15]

As with the photographs of Plaintiff's injuries, the Court cannot conclude at this time that the Plaintiff is prohibited from admitting both the photographs and the jeans. Again, five-and-a-half years have passed since the underlying events in this case. Perhaps the jeans have faded, or otherwise changed in appearance during that time. The photographs could potentially aid the jury in depicting the original appearance of the jeans after Plaintiff was injured. However, given that each of the six photographs of the jeans are close-up images, the Court also sees the value in having the jury actually see the jeans themselves as well as the photographs. However, if Plaintiff seeks to admit all six photographs in addition to the jeans, then that may amount to needlessly cumulative evidence. That would depend on how many of the photographs Plaintiff seeks to offer in addition to the jeans; thus, that would be an issue to decide at trial.

Because the jury could benefit from seeing both the jeans and at least some of

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[14] *See* D.R.E. 403.

[15] *Id.*

the photographs of the jeans taken close in time to the date of Plaintiff's injuries, Plaintiff shall not be excluded from offering both kinds of evidence at trial, subject to the restrictions of D.R.E. 403.

K-9 Training Records

The State Defendants seek to exclude a number of training records and reports pertaining to Speed, the DSP K-9 that injured plaintiff on October 18, 2008. By Order dated February 10, 2014, this Court previously ruled that records pertaining to Speed's training in drug detection and apprehension of suspects could be relevant.[16] The Order also prohibited Plaintiff from making any explicit or implicit reference to Speed as an "attack dog."[17]

Two of the challenged records–a canine training log dated July 17, 2004 and a K-9 Annual Proficiency Test dated November 7, 2004, predate the events of October 18, 2008 by four years. However, both of these records specifically involved training with Speed and Corporal Foraker. Additionally, the proficiency test included Speed's training in apprehending an individual in a bathroom stall–much like how Plaintiff was apprehended on October 18, 2008. Despite the remoteness of these records relative to the date of the events in question, the Court finds them to be extremely relevant to Corporal Foraker's handling of and familiarity with Speed and Speed's behavior in situations similar to the events of October 18. They shall be allowed at trial.

The other training records opposed by the State Defendants include: a training record dated January 25, 2007 describing a training session in which Speed bit a decoy; a record dated March 22, 2007 describing Speed's training, while wearing a muzzle, to locate a decoy; a document dated March 20, 2008 describing a training session involving a vehicle stop of a decoy; a document dated March 21, 2008

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[16] *Tilghman v. Del. State. Univ.*, C.A. No. K10C-10-022 WLW at 7-8 (Del. Super. Feb. 10, 2014).

[17] *Id.* at 4, 8.

describing Speed's apprehension training; a record dated May 15, 2008 describing Speed's bite of a training decoy; a document dated May 15, 2008 describing another training drill involving a bite decoy; and a document dated July 16, 2008 describing Speed's training in tracking and searching a building.

All of these records fall squarely within the permissible relevant purposes noted by this Court in its February 14 Order. Speed's training in searches and apprehensions involving bites and "no-bite" apprehensions is relevant to Corporal Foraker's handling and supervision of Speed during the drug detection sweep on October 18, 2008. The State Defendants argue that it would be improper for Plaintiff to argue that Speed had a dangerous propensity or was known as a bad dog. That is not what Plaintiff seeks to prove. Accordingly, Plaintiff shall be permitted to present these records at trial.

The Defendants will be permitted to draft a limiting instruction cautioning the jury not to consider these records of evidence that Speed was trained to be an attack dog, subject to the approval of all the parties. The State Defendants have also indicated that if the Court admits this evidence, the State Defendants will seek to "admit at trial all of the other pages of training sheets that show K-9 Speed's performance and proper training." These records would be relevant based on the Court's February 14 Order as well as by the above reasoning. However, to the extent that the State Defendants seek to admit "all" of the records, that could amount to needlessly cumulative evidence under D.R.E. 403. Thus, the admission of any training records by the State Defendants would be an issue to determine at trial.

The exhibits mentioned in this letter shall be admissible at trial. The admissibility of all other records shall be determined at trial.

Other opposed exhibits

By letter dated February 20, 2014, the State Defendants opposed a DSP report by Corporal Joseph Gardner and an unidentified explosive detection search report. Plaintiff has subsequently stated that he will not be seeking to admit either of these exhibits at trial, rendering this issue moot.

The State Defendants and DSU also oppose the admission of photographs of the present condition of Plaintiff's leg and photographs of the K-9, Speed. The deadline for production of these exhibits has already passed. Plaintiff's counsel indicates that efforts to locate photos of Speed have been unsuccessful. Should Plaintiff's counsel procure these photos they may attempt to introduce them at trial, subject to any objection by Defendants. As for photos of Plaintiff's scarring, Plaintiff's counsel shall be allowed to photograph Plaintiff's scarring and attempt to introduce it at trial, provided that Plaintiff first provides the photo to Defendants' counsel. However, the Court notes that should Plaintiff not introduce evidence of the current scarring of his leg via photographs, Plaintiff shall be permitted to display his leg to the jury. The Court does not believe this would in any way diminish the decorum of the courtroom, contrary to Plaintiff's assertions.

The State Defendants also oppose DSU's proposed exhibit of a Dover Post newspaper article. This exhibit is not relevant to any claim or issue in the case, and shall be excluded at trial.

By letter dated February 26, 2014, Plaintiff describes six of DSU's proposed exhibits. None of these appear to be actual objections but simply note issues that would be resolved at trial; *e.g.*, the deposition of James Overton would only be admissible if he was unavailable, or the DSP Police Report from the date of the incident would only be used for purposes of refreshing recollection. The Court finds no need to address any of these issues at this time.

Plaintiff also opposes the "special investigator's report" of Brian Daly (hereinafter "Daly"), which includes a chart of text messages and phone calls from Plaintiff's cell phone. The State Defendants are offering Daly as an expert in the field of cell phone records. Plaintiff notes that this same information is already found in other exhibits that Plaintiff does not object to (such as the actual phone records), and Plaintiff argues that this report is an inadmissible expert report. The State Defendants respond that they only seek to admit the portion of Daly's report that includes a chart of phone calls and text messages between Plaintiff and his girlfriend, to show a timeline of communication on October 18, 2008. Such visual aids have been found

to be admissible when the information contained in the aids is substantially correct.[18] Accordingly, the State Defendants are prohibited from admitting the entirety of Daly's report, but may attempt to introduce the portion of his report consisting of a chronological chart as a visual aid, *if* it would be relevant to do so. The Court currently struggles to see the relevancy of the timeline of Plaintiff's communication with his girlfriend on the date in question to any issue in this case. Perhaps such information would be relevant for impeachment purposes. If this, or any other relevant purpose, is established at trial, the State Defendants may then seek to admit the chart.

Both Plaintiff and DSU oppose photographs offered by the other party that depict the bathroom where Plaintiff was bitten. DSU objects to Plaintiff's photos because the stall doors are open rather than closed in the photo, and thus are not an accurate depiction of the condition of the bathroom at the time of the incident. The Court rejects this argument, because the photos are still relevant and any prejudicial effect resulting from the doors being open does not substantially outweigh the photo's probative value under D.R.E. 403. Plaintiff's photographs are admissible. DSU can point out that the doors were closed at the time of the incident at trial. Plaintiff objects to DSU's photos to the extent that they depict areas other than the bathroom. Those objections shall be resolved at trial, as it depends on which photos DSU seeks to admit.

Finally, Plaintiff objects to several of the State Defendants' exhibits on grounds that various information within these exhibits should be redacted. Specifically, Plaintiff requests that the Defendants redact the word "charge(s)" and reference to "Resisting Arrest" and "Criminal Trespass 2nd" in the DSU property receipt form, and reference to those same charges in the DSP Troop #3 custody log. References to a party's criminal charges in a civil proceeding have been found to be inadmissible.[19] The State Defendants argue that the charges are relevant to Plaintiff's

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[18] *Hickman v. Parag*, 167 A.2d 225, 230 (Del. 1961).

[19] *See Bierczynski v. Rogers*, 239 A.2d 218, 222 (Del. 1968) (holding that mere bringing of criminal charges was inadmissible in civil action).

intentional infliction of emotional distress claim, which alleges that Corporal Foraker threatened Plaintiff with incarceration if Plaintiff did not waive all medical treatment. The Court rejects this argument, because the actual charges still are not relevant in any way to any such alleged threats. The State Defendants and DSU are ordered to redact this information from the documents specified in Plaintiff's February 26 letter.

Summary

Plaintiff's motion to exclude the 2011 photographs of DSU's campus and the sunset times listing is DENIED.

The 2009 DSP email offered by Plaintiff shall be excluded at trial.

Plaintiff's photographs of his dog bite wounds and the jeans he was wearing when bitten, as well the jeans themselves, shall be admissible at trial.

Speed's training records objected to by the State defendants shall be admissible at trial. The admissibility of any other records shall be determined at trial.

Photographs of Plaintiff's current scarring and of Speed shall be permitted at trial, provided that Plaintiff first provides these photos to the State Defendants and DSU. In lieu of photographs of Plaintiff's scarring, Plaintiff shall be permitted to display the scarring on his leg in the courtroom before the jury.

DSU's offered exhibit of the Dover Post article shall be excluded from trial.

Daly's expert report shall be inadmissible at trial, but the chart contained within the report pertaining to Plaintiff's communications with his girlfriend shall be allowed, provided that the relevancy of those communications to any issue in the case is first established.

References to Plaintiff's criminal charges are inadmissible at trial, and shall be redacted from the exhibits offered by the State Defendants and DSU.

The Court wishes to point out to counsel that all of the above is limited by this decision and documents to be introduced must otherwise be authenticated properly before introduction.

The remaining issues shall be subject to the Court's reasoning described *supra* and shall be resolved at trial.

IT IS SO ORDERED.

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

WLW/dmh