IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

CLEVON TILGHMAN, III	:	
	:	
Plaintiff,	:	C.A. No. K10C-10-022 WLW
	:	
v.	:	
	:	
DELAWARE STATE UNIVERSITY, a governmental corporate entity; CORPORAL ERIK FORAKER, individually and in his official capacity; THE STATE OF DELAWARE, a governmental entity; THE DEPARTMENT OF SAFETY AND HOMELAND SECURITY OF THE STATE OF DELAWARE, an agency of the State of Delaware; THE DIVISION OF THE STATE POLICE, a division of the Department of Safety and Homeland Security of the State of Delaware; a SECOND DELAWARE STATE POLICE TROOPER, JOHN DOE, individually and in his official capacity; CORPORAL JEFFREY WHITMARSH, individually and in his official capacity,	:	
	:	
Defendants.	:	

Submitted: January 30, 2014
Decided: February 10, 2014

ORDER

Upon State Defendants' Motion in Limine.
Granted.

William D. Fletcher, Jr., Esquire and Noel E. Primos, Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware; attorneys for Plaintiff.

Michael W. Arrington, Esquire of Parkowski Guerke & Swayze, P.A., Wilmington, Delaware; attorney for Defendant Delaware State University.

Michael F. McTaggart, Esquire, Department of Justice, Wilmington, Delaware; attorney for Defendants Corporal Erik Foraker, The State of Delaware, the Department of Safety and Homeland Security of the State of Delaware, the Division of the State Police, and Corporal Jeffrey Whitmarsh.

WITHAM, R.J.

INTRODUCTION

Before the Court is the State Defendants' motion *in limine*, which actually seeks to exclude two different kinds of evidence, and Plaintiff's response.

The Plaintiff needs to be reminded that a courtesy copy of any motion *in limine*–and responses thereto–needs to be sent to the Court, and if not, this Court will not consider the filings and rule accordingly.

BACKGROUND

Plaintiff has sued Delaware State University (hereinafter "DSU"), Corporal Erik Foraker (hereinafter "Corporal Foraker"), the State of Delaware, the Department of Safety and Homeland Security of the State of Delaware, and the Division of the State Police (collectively "the State Defendants") in connection with injuries sustained by Plaintiff at DSU's Homecoming on October 18, 2008. Specifically, Plaintiff was bitten by "Speed," a K-9 unit handled by Corporal Foraker, while Corporal Foraker was conducting a K-9 sweep of the Memorial Hall bathroom on DSU's campus. Many of the claims Plaintiff asserted against DSU and the State Defendants were dismissed when this Court partially granted the Defendants' motion for summary judgment on August 15, 2012. Plaintiff's surviving claims include his gross negligence claim against the State Defendants for his injuries sustained from Speed's bite.

The State Defendants have filed a motion in *limine* seeking to exclude two different kinds of evidence. First, the State Defendants move to exclude any reference to the K-9 Speed as a trained "attack dog." Second, the State Defendants move to exclude training and usage records pertaining to Speed.

DISCUSSION

Reference to Speed as an "attack dog"

The State Defendants argue that any such reference to Speed as an "attack dog" is improper, unfairly prejudicial, and inflammatory. Plaintiff responds that he has no intention of using the phrase "attack dog" at trial, yet he opposes any attempt to limit Plaintiff's ability to refer to the fact that Speed "was trained to apprehend and/or attack individuals." The Superior Court has held that it is improper for an attorney to "use inflammatory language designed to appeal to the juror's passions and prejudices."[1]

Use of the phrase "attack dog" certainly qualifies as inflammatory language designed to appeal to the jurors' passions and prejudice. Use of the phrase should be prohibited. Further, Plaintiff's response regarding his intent to refer to Speed's training to "attack individuals" seems to merely be a method of implying that Speed was an attack dog without actually uttering the phrase. Whether Plaintiff calls Speed an attack dog or argues that Speed was trained to attack individuals, both methods are clearly inflammatory and improper. Plaintiff could easily say that Speed was trained to "apprehend" individuals rather than attack individuals.

The State Defendants' motion *in limine* is **GRANTED** as to any reference to Speed as an "attack dog." Plaintiff is prohibited from using the phrase "attack dog," referring to Speed's training to attack individuals, or otherwise implying that Speed was an attack dog. Put simply, Plaintiff is prohibited from using the word "attack"

[1] *Bounds v. Delmarva Power & Light Co.*, 2004 WL 343982, at *6 (Del. Super. 2004).

at all at trial.

Training records and usage reports pertaining to Speed

The State Defendants next move to prohibit Plaintiff from introducing various records and reports pertaining to Speed's K-9 training and prior apprehensions. Plaintiff responds that the training and usage records are relevant because: (1) they show that Speed was primarily trained and used to apprehend individuals; (2) they show that Speed was trained to apprehend individuals "without bite" and while wearing a muzzle; (3) they show that Speed was specifically trained in how to apprehend an individual in a bathroom stall; (4) they show that Speed, unlike other K-9s, was not trained in detection of explosives.[2]. Plaintiff further argues, *inter alia*, that these records go to whether Corporal Foraker was grossly negligent in using Speed in a way to apprehend Plaintiff without biting, as Speed was trained to do.

However, as the State Defendants point out, these records and reports are voluminous. These records and reports refer to other K-9 dogs besides Speed. Many of the usage reports refer to arrests which involved Speed that are completely unrelated to this case. Finally, the evidence proffered by Plaintiff includes training reports for Speed that were made *after* the incident at DSU on October 18, 2008.

In his response, Plaintiff states that he "has no intention of using all of the training and usage records. . .but only selected records relevant to Plaintiff's claims." Plaintiff also states that he has "no intention of offering into evidence records dated after the incident in question. . .unless said records deal with the incident in

[2] Plaintiff argues this is relevant because there is evidence to show that the State was supposed to provide K-9 units for purposes of explosive detection, not drug detection.

question." Besides these vague responses, there is no indication as to where these selected or relevant records can be found, or identified properly.

D.R.E. 403 provides that 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."[3] This rule allows the Court to exclude evidence that "will confuse the jury which may falsely rely on collateral issues, and. . .will result in undue delay.[4]

As presented, the training records and usage reports would likely cause undue delay if admitted, and that danger of undue delay and confusion of the issues substantially outweighs any probative value contained in the 270-page document. Plaintiff has made no effort to single out or provide the relevant portions of the records, which currently contain records for training that occurred *after* the incident in question, and also contain records of dogs besides Speed. This would leave the jury to sift through information that may be wholly irrelevant. Plaintiff also fails to explain how training records for Speed for training that occurred after the incident at DSU would be relevant to his claims. Based on how needlessly cumbersome and voluminous the records are, that alone may be enough to exclude them.

As for what is actually relevant in the records: all of Plaintiff's stated purposes for admitting the training records are relevant in some way, but the degree of that

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[3] D.R.E. 403.

[4] *Rothermel v. Consolidated Rail Corp.*, 1998 WL 110010, at *3 (Del. Super. Jan. 21, 1998).

relevance is questionable. For example, the parties appear to dispute whether Delaware State Police brought K-9 units onto DSU's campus to only search for drugs, or only search for explosives. If the latter, then whether Speed was only trained in drug detection and not explosives detection would be relevant. But this would require what would essentially be mini-trials on (1) the purpose of Delaware State Police's presence at DSU and (2) the extent, if any, of Speed's explosives training. That ultimately has very little to do with whether Corporal Foraker was grossly negligent in his handling of Speed. Because the explosives training issue will likely just confuse the jury, and the risk of confusion of the issues substantially outweighs the probative value of this evidence, any evidence pertaining to Speed's explosives training should be excluded under D.R.E. 403.

The same is true for the usage reports. The records proffered by Plaintiff contain numerous usage reports of other arrests and apprehensions in which the police utilized Speed. Plaintiff points out only several of these in his response: a 2004 arrest in which Speed apprehended an individual in the back of a pick-up truck without biting him; another 2004 arrest in which Speed was used to apprehend mental patients; a 2005 arrest in which Speed detected the suspect's odor and cornered him under a vehicle; and 2007 and 2008 arrests in which Speed was used to apprehend suspects without biting them. The danger of confusion of the issues, as well as undue delay, waste of time, and needless presentation of cumulative evidence, is even greater with this evidence. As the State Defendants correctly argue, presentation of these reports would likely lead to mini-trials about each incident. While some of these may be slightly relevant to Speed's ability to apprehend individuals without

biting them, Speed's training reports to that effect could easily be used to establish that point with far less confusion. Presentation of these incidents would just needlessly prolong the trial, have very little probative value, and thus the usage reports should also be excluded pursuant to D.R.E. 403.

Finally, Speed's training reports regarding Speed's training to apprehend individuals without biting them, and training to apprehend individuals in a bathroom stall, may be relevant. Specifically, these could be used to establish that Corporal Foraker was grossly negligent in utilizing Speed's training to apprehend Plaintiff without bite, or in a similarly safer manner. However, training records for dogs other than Speed, and that occurred after the incident in question, would not be relevant. Additionally, the manner in which Plaintiff is currently offering the records–contained within the 270-page-record along with mostly irrelevant information–should not be allowed due to dangers of undue delay and confusion of the issues.

The State Defendants' motion to exclude the training records and reports is **GRANTED** pursuant to D.R.E. 403, with the caveat that Plaintiff may attempt to reintroduce Speed's relevant training records as described above, in a far more organized and less cumbersome format. Any records of Speed's explosives training and usage reports of prior incidents involving Speed are excluded under D.R.E. 403.

CONCLUSION

The State Defendants' motion *in limine* is **GRANTED.** Plaintiff is prohibited from explicitly or implicitly referring to Speed as an attach dog. Plaintiff's exhibit containing the numerous training records and usage reports is excluded. Plaintiff may

reintroduce an exhibit containing Speed's training records, so long as (1) the records pertain to Speed's training in drug detection or apprehension of individuals "with bite" and "without bite" and (2) the training records predate the October 18, 2008 incident at DSU. Plaintiff is prohibited from introducing the following: (1) any records or reports pertaining to Speed's training (or lack thereof) in explosives detection; (2) any records or reports pertaining to police K-9s other than Speed; (3) any usage reports pertaining to arrests or apprehensions unrelated to the 2008 incident at DSU; and (4) any records or reports dated *after* October 18, 2008.

The Court expects that the parties will meet to discuss which records may be introduced at trial at a mutually agreeable time. Any disputes as to what records are excluded will be resolved at the calendar conference.

IT IS SO ORDERED.

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

WLW/dmh