At a term of the Supreme Court held in and for the County of Wyoming, at the Courthouse in Warsaw, New York, on the 1st day of December, 2022.

PRESENT: HONORABLE MICHAEL M. MOHUN
Acting Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT: COUNTY OF WYOMING

HELENE F. VANEPPS and
JAMES J. VANEPPS, Her Husband

Plaintiffs,

v.

DECISION AND ORDER
Index No. 49171

DAVID D. MANCUSO d/b/a
MANCUSO COUNTRY AUTO and d/b/a
MANCUSO LIMOUSINES & BUSES OF WNY and
JOSHUA D. WAHL,
Defendants.

By notice of motion dated November 15, 2022, the defendants request an order precluding the plaintiff from offering expert testimony. (The Court notes that by notice of cross-motion dated November 21, 2022, the plaintiffs requested an order precluding the defendants from offering expert testimony to the extent that such testimony might be based on photographs not disclosed to the plaintiffs during discovery. It is the Court's understanding that the cross-motion has been withdrawn upon the representation that the proposed expert testimony to be offered by the defendants will not be based on undisclosed photos.)

NOW, upon reading the pleadings of the parties, and on reading and filing the notice of motion to preclude, supported by the affirmation of Cory J. Weber, Esq., attorney for the defendants, dated November 15, 2022, together with the annexed exhibits; the affidavit in opposition to the motion to preclude (and in support of the withdrawn cross-motion to preclude) of Carrie L. Smith, Esq., attorney for the plaintiffs, sworn to on November 21, 2022, together with the annexed exhibits and accompanied by the memorandum of law in opposition dated November 20, 2022, with annexed exhibit; the reply affirmation of Cory J. Weber, Esq., dated November 21, 2022; and after hearing Cory J. Weber, Esq., in support of the motion to preclude and Carrie L. Smith, Esq., in opposition thereto, due deliberation having been had, the following decision is rendered.

In their motion, the defendants urge the Court to preclude from testifying at the trial the three experts identified in the plaintiff's October 31, 2022, disclosure letter pursuant to CPLR §3101(d)(1). The plaintiffs intend to elicit expert testimony from Frank Ciccarella, Plaintiff James VanEpps, and Sheriff's Deputy Kyle Krzezmien. Defense counsel contends that an order precluding the testimonies of all three is warranted because of the insufficiency of the plaintiffs' expert

disclosure. The Court disagrees. Although the defense alleges that the disclosure letter is deficient in a number of ways, the Court nonetheless finds that it does provide adequate notice to the defense of the subject matters upon which the three proposed experts hope to give testimony, their credentials, and the expert opinions and conclusions they each will be expected to offer to aid the jury. Accordingly, the Court declines to order preclusion on the ground that the disclosure letter is insufficient.

The Court will, however, preclude expert testimony from Plaintiff James VanEpps on a different ground. As plaintiff, he is an inherently interested witness. As such his opinions regarding matters relating to the defendants' liability will have reduced probative value. In addition, without deciding whether the credentials and experience disclosed for Mr. VanEpps would be sufficient to qualify him as an expert with relevant testimony to give in this case, the Court observes that the expert disclosure does not indicate that Mr. VanEpps' expertise is unique. It seems evident that the opinion testimony that the plaintiffs hoped to elicit from Mr. VanEpps can be more profitably elicited from another, independent expert who, unlike Mr. VanEpps, has no interest in the outcome of the litigation. Of course, Mr. VanEpps will be permitted to testify as a fact witness.

With respect to Mr. Ciccarella and Deputy Krzezmien, the Court will reserve decision until trial on their qualifications and the relevance of their testimony. Needless to say, the purpose of expert testimony is to aid the jury in understanding technical or professional matters with which they cannot be expected to be acquainted. These technical matters become relevant to the case only to the extent that they are needed to equip the jury with information necessary to determine the facts at issue in the case. On matters with regard to which the jurors need no technical information in order to judge the facts, expert testimony is unnecessary and irrelevant.

By way of guidance, and to aid the lawyers in framing the issues at trial, the Court adds the following remarks. The plaintiffs' expert disclosure indicates that Mr. Ciccarella will opine "that the presence of a deer in or around the roadway does not present an emergency to a trained commercial vehicle operator." Defendants' counsel objects to such testimony on the ground that it involves an "ultimate issue" in the case – namely, the issue of the application of the 'emergency doctrine' to this case. The defendants' have raised the 'emergency doctrine' as an affirmative defense. Whether the doctrine applies is a question of fact that the jury must decide. The Court is not persuaded that the jurors have any need of expert testimony on this point. Expert testimony about the training customarily provided to commercial drivers may be relevant and admissible in support of the plaintiffs' claim of negligence premised on inadequate training, but at this point, the Court is not inclined to allow Mr. Ciccarella to deliver to the jury his opinion that a deer in the roadway cannot "present an emergency" to a properly trained commercial driver. This opinion usurps the function of the jury with respect to the emergency doctrine because it amounts to the assertion that the doctrine is inapplicable to cases where "a trained commercial operator" encounters a deer. In the Court's estimation, the jury is capable of determining for itself whether the emergency doctrine applies to the facts of this case without the need of Mr. Ciccarella's opinion on the ultimate question.

Similarly, the Court is dubious of the relevance of Mr. Ciccarella's expected testimony "that the drivers of a commercial vehicle should expect the unexpected." Such a turn of phrase possibly may be used to good effect in the standard training given to commercial drivers, but as a proposition it is a contradiction in terms. To the extent it conveys any information at all, it is clearly not a technical matter "beyond the ken" of the jury. Moreover, the Court notes that the emergency doctrine applies "where a person is faced with a sudden condition, which could not have been reasonably anticipated, provided that the person did not cause or contribute to the emergency by (his, her) own negligence" (PJI 2.14 [emphasis added]). The testimony that a trained commercial

driver is required to "expect the unexpected" is objectionable if it is offered to invite the jury to conclude that nothing can constitute a sudden, unexpected emergency for such a driver. Conversely, if such testimony relates solely to the customary training given to commercial drivers, it arguably may be relevant and admissible in support of the inadequate training claim. As noted, the Court prefers to rule on such issues during the trial when it will be in a better position to judge the relevance of the offered evidence.

Also, the Court notes that the defense has objected to Mr. Ciccarella being permitted to testify regarding standards, rules and/or regulations on the ground that the specific rules in question were not disclosed to the defense in the plaintiffs' expert disclosure – nor were they pleaded in the plaintiffs' Bill of Particulars. In the disclosure letter, plaintiffs' counsel merely states that Mr. Ciccarella will testify about "ANSI and FMCSA standards governing the transport industry." The Court tends to agree with the defense that more specific disclosure of the particular standards to which Mr. Ciccarella will refer is necessary to prevent surprise and prejudice to the defense.

Lastly, the Court previously dismissed the plaintiffs' claim in the complaint alleging negligence arising from the then asserted lack of seatbelts in the limo bus. In its decision upon the defendants' summary judgment motion, the Court observed that the defendants had presented evidence that seatbelts were, in fact, provided. It went on to rule that "the defendants were not under a duty to provide a seatbelt to the plaintiff, and therefore they cannot be held liable upon a claim premised upon the alleged failure to provide one." The Court notes that the plaintiffs' August 1, 2017, Bill of Particulars alleged that the defendants were negligent in "failing to provide appropriate safety equipment, lap belt, harness or lap belt/ harness combination." In upholding the Court's dismissal of the claim, the Fourth Department stated that the plaintiffs had also abandoned the claim by failing to raise it on their appeal of this Court's decision. The Court views it as the law of the case that any claim of negligence premised on the provision of safety equipment to the passengers has been removed from the litigation. Mr. Ciccarella, however, is expected to testify that commercial drivers by training have responsibilities with regard to safety equipment. This testimony arguably may have some relevance to the plaintiffs' claim of negligence founded upon inadequate training of the driver. The Court intends to avoid, however, a resurrection of dismissed and abandoned seatbelt claim. Moreover, the Court notes that Vehicle and Traffic Law §1229-C(8) states that "[n]on-compliance with the provisions of this section [relating to seatbelts] shall not be admissible as evidence in any civil action in a court of law in regard to the issue of liability but may be introduced into evidence in mitigation of damages provided the party introducing said evidence has pleaded such non-compliance as an affirmative defense."

NOW, THEREFORE, it is hereby

ORDERED that defendants' motion is granted to the extent that the plaintiffs shall not be permitted to elicit expert testimony from plaintiff James VanEpps; and it is further

ORDERED that the defendant's motion to preclude is otherwise denied as explained in this decision..

Dated: December 1, 2022

GRANTED
DEC - 1 2022
CHIEF CLERK
WYOMING COUNTY SUPREME COURT

MICHAEL M. MOHUN
Acting Supreme Court Justice