Superior Court
of the
State of Delaware

Jan R. Jurden
Judge

New Castle County Courthouse
500 North King Street, Suite 10400
Wilmington, Delaware 19801-3733
Telephone (302) 255-0665

Beverly L. Bove, Esquire
Law Office of Beverly L. Bove
1020 West 18th Street, P.O. Box 1607
Wilmington, Delaware, 19802

Colin M. Shalk, Esquire,
Casarino, Christman, Shalk,
Ransom & Doss
405 N. King Street, Suite 300
P.O. Box 1276
Wilmington, Delaware, 19899

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RE: Michael Walters v. State Farm Mutual Automobile Insurance Company
C.A. No. N12C-01-019 JRJ

Upon Plaintiff's Motion in Limine to Preclude the Defense from Introducing Any Evidence Regarding Taxes or Personal Injury Protection Coverage: **GRANTED**

Dear Counsel:

Before the Court is Plaintiff's Motion in Limine to Preclude the Defense from Introducing Any Evidence Regarding Taxes or Personal Injury Protection Coverage. For the reasons set forth below, the motion is **GRANTED**.

I. BACKGROUND

This underinsured motorist ("UIM") case arises from an automobile accident that occurred in January, 2011. According to Plaintiff Michael Walters ("Walters"), he sustained a lumbar disc herniation and severe nerve compression in

the accident. Claiming that his injuries rendered him disabled from work, Walters sought lost wages under his State Farm Personal Injury Protection ("PIP") policy. In support of his PIP lost wage claim, Walters, a member of Plumbers and Pipefitters Local 74, submitted a letter from Local 74's Business Agent in April 2011 that stated:

> This letter is to verify that Michael Walters . . . is a member in good standing of the Plumbers and Pipefitters Local 74 and has been since November 11, 1980. Mr. Walters is not directly employed by Local Union 74; however he is referred to contractors working in our jurisdiction for employment.
>
> Currently, the employment rate is 100% for our membership. The base rate of pay for our union journeymen is $31.86 per hour. The full benefit package is presently $69.13. We are not qualified to compute his potential earnings for lost wages and benefits.[1]

After receiving this letter, State Farm paid Walters over $63,000 in PIP lost wages for the period from January 1, 2011, (the date of the accident) until early September, 2011.[2] On September 23, 2011, Plaintiff's counsel advised State Farm that the tortfeasor's liability carrier had tendered the policy limit of $25,000 and Walters had been "totally disabled from work" from January 1, 2011 until September 1, 2011, resulting in lost wages totaling $94,016.80.[3]

[1] Response to Plaintiff's Motion in Limine at Ex. A, *Walters v. State Farm Mut. Auto. Ins. Co.*, No. N12C-01-019 JRJ (Del. Super. Nov. 20, 2012) (Trans. ID 47871358) [hereinafter Response].
[2] *Id.* at ¶ 1.
[3] *Id.* at ¶ 2, Ex. B.

Walters filed the instant UIM suit in January 2012. In Walter's sworn interrogatory answers in this UIM case dated July 2, 2012, he alleged a lost wage claim of $95,980.09.[4] In response to a request for production asking Walters for his W2's and tax returns for two years before the collision to the present, he responded:

> See enclosed Federal Income Tax Returns for 2009 and 2010. Please also see copies of pay stubs from Bechtel Corporate Construction Company and Stone & Webster Construction Services, LLC representing proof of income for the months of September 2011 through April 2012.[5]

The 2009 and 2010 tax returns were signed and dated July 2, 2012, the same day they were produced in discovery in this case. There were no W2's or 1099 Forms attached to Walters' response to the request for production. The 2009 tax return indicates wages of $23,350.00. The 2010 tax return indicates wages of $12,067.00.

At Walter's July 25, 2012 deposition, State Farm questioned him about his lost wage claim. When shown a copy of the 2009 return he produced in response to the request for production and asked whether he filed a tax return for 2009, Walters testified he had "not yet" filed the 2009 return. He admitted that he signed the 2009 return on July 2, 2012. When asked why he had not filed the 2009 return

[4] *Id.* at Ex. C (Answer to Interrogatory no. 32).
[5] *Id.* at ¶ 4, Ex. D (Response to Request for Production no. 2).

by April 2010, he responded, "I just didn't do it."[6] When asked when he intended to file his 2009 tax return, he answered, "[w]hen I get to it. I really hadn't thought about it that much."[7] When questioned about the 2010 tax return he produced in discovery, Walters testified that he signed it on July 2, 2012 but had not filed it.[8] His reason for failing to file was the same: "I just hadn't done it."[9] Walters testified he did not file tax returns for 2007 or 2008.[10] Walters also testified that he had not worked from January 2010 to mid-Fall of 2010 and was out of work from mid-December 2010 up until January 1, 2011(the auto accident at issue occurred on January 1, 2011).[11]

After his deposition, Walters withdrew his claim for lost wages in this case. Now Walters seeks to prohibit State Farm "from mentioning or introducing any evidence regarding taxes or personal injury protection coverage . . . ."[12] According to Walters, any mention of taxes or his PIP lost wage claim "would be especially damaging," "unduly prejudicial," and lacking probative value.[13] In opposition, State Farm argues that Walters "misrepresented to State Farm what he made, . . . made demands for loss of income that he didn't have and . . . provided fake tax

[6] *Id.* at Ex. F pgs. 25-26 (Walters – Direct).
[7] *Id.* at 26.
[8] *Id.* at 28.
[9] *Id.* at 29.
[10] *Id.*
[11] *See id.* at 30.
[12] Motion in Limine to Preclude the Defense from Introducing Any Evidence Regarding Taxes or Personal Injury Protection Coverage, *Walters v. State Farm Mut. Auto. Ins. Co.*, No. N12C-01-019 JRJ (Del. Super. Nov. 9, 2012) (Trans. ID. 47658599). Plaintiff argues this evidence is inadmissible under D.R.E. 401, 402, 403 and 404.
[13] *Id.* at ¶ 5.

returns [in discovery in this case] . . . ."[14] State Farm maintains that Plaintiff's conduct with regard to his lost wage claim, including his failure to file tax returns and his misleading answer to interrogatory and response to request for production regarding his 2009 and 2010 tax returns, go to the heart of his credibility, are not unfairly prejudicial, and State Farm should therefore be allowed to cross examine him on this issue at trial.[15]

Following oral argument, the Court requested supplemental briefing on DRE 404(b) and the *Getz* and *Deshields* factors.[16]

Under DRE 404(b), evidence of other crimes, wrongs, or bad acts are not admissible to prove the character of a person in order to show he acted in conformity therewith. Such evidence may, however, be admissible for other purposes, such as intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Pursuant to *Getz*, the Court must consider the following six factors when deciding whether to admit evidence under DRE 404(b):

(1) The evidence must be material to the issue or ultimate fact in dispute;

(2) The "evidence must be introduced for a purpose sanctioned by 404(b)" or some other non-propensity purpose;

(3) The evidence providing the prior bad act must be [plain], clear, and conclusive;

(4) The bad act must not be too remote in time from the charged offense;

[14] Response at ¶ 10.
[15] *See id.*
[16] *Getz v. State*, 538 A.2d 726 (Del. 1988), *Deshields v. State*, 706 A.2d 502 (Del. 1998).

(5) The probative value of the evidence must not be outweighed by the danger of unfair prejudice;

(6) The Court must give the jury a limiting instruction.[17]

(1) The Evidence Must be Material to the Issue or Ultimate Fact in Dispute

While the evidence State Farm seeks to introduce is material to the issue of Walters' credibility, it is not material to the issues of fact in dispute in this UIM case, particularly since Walters has withdrawn his lost wage claim in this case.

(2) The Evidence Must be Introduced for a Purpose Sanctioned by 404(b) or Some Other Non-Propensity Purpose

State Farm argues the disputed evidence is admissible because it goes to motive, knowledge, and absence of mistake or accident.[18] According to State Farm, "[t]he motive in this case was to create a false claim for lost earnings in this case."[19] Assuming, *arguendo* that is so, the fact is that Walters has abandoned his lost wage claim and thus, his motive, knowledge, or absence of mistake with regard to his prosecution of a lost wage claim are no longer relevant.

(3) The Evidence of the Prior Bad Act Must be Plain, Clear and Conclusive

Walters admitted that he did not file the 2009 and 2010 federal tax returns he attached to his response to the request for production. When asked why he

[17] *Riggs Nat'l Bank v. Boyd*, 2000 WL 303308 at *8-9 (Del. Super. Feb. 23, 2000). As the Court in *Riggs* noted, although these six factors, commonly referred to as the "*Getz*" factors, (*Getz v. State*, 538 A.2d 726 (Del. 1988)), were specifically developed for criminal proceedings, they "have analogous application to the admissibility of other wrongs or acts in civil cases." *Id.* at *8.
[18] *See* Letter from C. Shalk, Esq., at 2, *Walters v. State Farm Mut. Auto. Ins. Co.*, No. N12C-01-019 JRJ (Del. Super. Feb. 4, 2013) (Trans. ID 49274352).
[19] *Id.*

prepared the 2009 and 2010 tax returns Walters testified, "you wanted . . . [them]."[20] Walters supplied the 2009 and 2010 federal tax returns under circumstances State Farm alleges he knew or should have known would lead State Farm to reasonably believe they had been filed with the Internal Revenue Service. The evidence that Walters failed to file federal tax returns for 2009 and 2010 is plain, clear and conclusive, but, although it is a close call, the Court cannot go so far as to hold that the evidence that he provided the tax returns in discovery knowing (or should having known) State Farm would believe they had been timely filed, and sought and received lost wages from his PIP coverage to which he was not entitled, is plain, clear and conclusive.

(4) The Bad Act Must Not Be Too Remote in Time

The acts Walters seeks to exclude occurred over several months after the January 2011 collision. The acts in question are not too remote in time.[21]

(5) The Probative Value of the Evidence Must Not Be Outweighed by the Danger of Unfair Prejudice

Probative value is concerned with the tendency of the evidence to establish the proposition that it is offered to prove.[22] The probative value of the disputed evidence is high. It goes to the heart of Plaintiff's credibility, and a party's

[20] *See* Response at ¶ 10.
[21] *See* Response at ¶ 12 ("Everything that the plaintiff seeks to eliminate is current right through . . . November 2012. What has happened is not remote in time but is inextricably intertwined in the law suit because the plaintiff made this issue to be inextricably intertwined.").
[22] *Getz*, 538 A.2d at 731.

credibility is always relevant. Undoubtedly, Walters will offer testimony at trial about his subjective symptoms, e.g., the nature, severity and duration of his pain, his physical limitations, and the impact of his injuries on his life. The fact that Walters has now withdrawn his lost wage claim does not make the disputed evidence non-probative or less probative, because it bears directly on Walters' credibility. However, the relationship of "the offered evidence to the ultimate fact or issue is the key to admissibility," must be examined.[23]

In determining the probative or prejudicial nature of the evidence, the Court utilizes a balancing test of nine factors outlined in *Deshields*.[24] These factors are to be examined individually, with their collective weight pointing towards inclusion or exclusion of the evidence. The Court looks to these factors in the following order of analysis. First, the extent to which the point to be proved is disputed. Here, the tax evidence is no longer disputed, because it is not material to any claim in the case. Second, the adequacy of proof of the prior conduct. The proof of the prior conduct is adequate, but is no longer relevant to a material issue in dispute. Third, the probative force of the evidence. The evidence itself is probative as to Walters' credibility, but not to any material issue or claim in dispute. Fourth, the proponent's need for the evidence. State Farm wants the evidence to impugn Walter's credibility. It does not need the evidence to defend

[23] *Getz*, 538 A.2d at 731.
[24] *Deshields*, 706 A.2d at 506-7, citing Graham C. Lilly, *An Introduction to the Law of Evidence* § 5.15, at 177-78 (3d 3d. 1996).

against the lost wage claim because Plaintiff is no longer asserting that claim. Fifth, the availability of less prejudicial proof. There really is no less prejudicial proof in this set of circumstances—it is what it is. Sixth, the inflammatory or prejudicial effect of the evidence. The evidence would have a highly inflammatory and prejudicial effect, and as explained below, there is a strong likelihood it will confuse the jury. Seventh, the similarity of the prior wrong to the charged offense. Because the lost wage claim has been withdrawn, there is no similarity between the prior wrong and the "charged offense." Eighth, the effectiveness of limiting instructions. It is possible limiting instructions might be effective, but the Court is concerned that the jury would be confused by the inclusion of evidence about the PIP lost wage claim and Plaintiff's tax returns given that this is a UIM case and Plaintiff is not seeking lost wages *in this case*. Ninth and last, the extent to which prior act evidence would prolong the proceedings. This evidence would substantially prolong the proceedings by necessitating a trial within a trial.

Because Walters has withdrawn his lost wage claim in this case, the inclusion of evidence about his lost wage claim no longer relates to the ultimate fact or issue in dispute. Because this evidence relates to an issue not contested in

the present litigation, its inclusion would greatly increase the danger of unfair prejudice and juror confusion.[25]

(6) The Court Must Give the Jury a Limiting Instruction

After considering the above factors, the Court is not satisfied that the disputed evidence is admissible under 404(b). Therefore, there is no need for a limiting instruction.

II. CONCLUSION

For the reasons stated above, the Court finds the evidence related to Plaintiff's taxes and PIP lost wage claim is in inadmissible pursuant to Delaware Rules of Evidence 401-404. Consequently, Plaintiff's Motion in Limine is **GRANTED**.

IT IS SO ORDERED.

Jan R. Jurden, Judge

[25] Evidence that is tenuously relevant to the case but may incline jurors to assign greater weight to the evidence than it deserves is excludable. *English v. District of Columbia*, 643 F.3d 297 (D.C. Cir. July 1, 2011). In *English*, the Court was concerned that the inclusion of marginally relevant evidence to the ultimate issue "would cause 'big time' confusion of the issues, and preventing such confusion would require the admission of the conclusions to be 'hedged about with jury instructions' and necessitate a 'trial within a trial' about the disputed evidence." The admission of the past due tax returns into evidence, although relevant to credibility, may ultimately confuse the jury as to the issue of the case and result not only in a trial within a trial and complicated limiting instructions, but also unfair prejudice to Walters that outweighs the probative value of the evidence.