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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TERRI ADAMS,
Plaintiff,
v.
CITY OF HAYWARD, et al.,
Defendants.

Case No. 14-cv-05482-KAW

**ORDER FOLLOWING PRETRIAL
CONFERENCE**

The Court held a pretrial conference in this case on January 24, 2017. This order memorializes the Court's rulings, issued from the bench, on motions in limine and other matters before the Court.

A. Motions in Limine

i. Plaintiff's Motion in Limine No. 1 (Exclusion of Character Evidence)

Plaintiff moves to preclude Defendants from presenting improper character evidence. First, Plaintiff seeks the preclusion of "extrinsic evidence that [Plaintiff] has engaged in disruptive behavior that could be construed as criminal of sorts," used for the purpose of impeaching Plaintiff's character for truthfulness. (Dkt. No. 131 at 2.) Second, Plaintiff seeks to preclude alleged bad acts not related to truthfulness if such evidence is introduced for the purpose of impeaching Plaintiff's character. (Id. at 3.) Finally, Plaintiff seeks to preclude "irrelevant" evidence of Plaintiff's character, specifically her criminal history that includes arrests for shoplifting and simple assault, as well as a 2014 arrest where Plaintiff allegedly broke one of the windows of a neighbor's car with a frying pan and chased a minor. (Id. at 4.)

Federal Rule of Evidence 608 prohibits the use of extrinsic evidence, other than a criminal conviction, "to prove specific instances of a witness's conduct in order to attack or support the

1 witness's character for truthfulness." See also *United States v. Bosley*, 615 F.2d 1274, 1276 (9th
2 Cir. 1980) ("Fed.R.Evid. 608(b) provides that specific instances of conduct of a witness not
3 resulting in a criminal conviction may not be proved by extrinsic evidence solely for the purpose
4 of attacking the credibility of the witness"). While the Court may allow such instances to be
5 inquired into on cross-examination, extrinsic evidence still may not be used to impeach the
6 witness's character for truthfulness. *Id.* at 1276-77.

7 Here, Defendants do not oppose the preclusion of Plaintiff's criminal history prior to the
8 November 30, 2013 incident, unless necessary for impeachment to any evidence presented by
9 Plaintiff. (Dkt. No. 133 at 3.) The Court will therefore exclude evidence of Plaintiff's criminal
10 history prior to November 30, 2013, unless Plaintiff opens the door to such evidence. "[T]he
11 concept of impeachment by contradiction permits courts to admit extrinsic evidence that specific
12 testimony is false, because contradicted by other evidence." *United States v. Castillo*, 181 F.3d
13 1129, 1132 (9th Cir. 1999). The Ninth Circuit has held that such impeachment by contradiction is
14 not governed by Rule 608, but by Rule 607, and that Rule 607 "allows the admission of extrinsic
15 evidence to impeach specific errors or falsehoods in a witness's testimony on direct examination."
16 *United States v. Antonakeas*, 225 F.3d 714, 724 (9th Cir. 2001); see also *Castillo*, 181 F.3d at
17 1132. In permitting such evidence, the Ninth Circuit explained:

18 Direct-examination testimony containing a broad disclaimer of
19 misconduct sometimes can open the door for extrinsic evidence to
20 contradict even though the contradictory evidence is otherwise
21 inadmissible under Rules 404 and 608(b) and is, thus, collateral.
22 This approach has been justified on the grounds that the witness
23 should not be permitted to engage in perjury, mislead the trier of
24 fact, and then shield himself from impeachment by asserting the
25 collateral-fact doctrine.

26 *Castillo*, 181 F.3d at 1132-33 (internal quotation omitted).

27 With respect to incidents following November 30, 2013, it appears there are two events at
28 issue: (1) a January 18, 2014 investigation into a broken window, in which Plaintiff's neighbor
accused Plaintiff of breaking a window, and (2) a February 2, 2014 arrest where Plaintiff allegedly
broke Plaintiff's neighbor's bedroom window and vehicle windshield with a frying pan, chased
Plaintiff's neighbor's son while trying to hit him with the frying pan, and may have tried to jump

1 on a couch when the police arrived.¹ Defendants do not explain the relevance of the first incident,
2 and agreed at the pre-trial conference that the related exhibit could be excluded. With respect to
3 the second incident, Defendants argue that it disproves Plaintiff's claims that she suffered injuries
4 as a result of the November 30, 2013 incident, as the second incident involved Plaintiff running
5 and swinging heavy objects. (Dkt. No. 133 at 3.) Defendants further contend that such evidence
6 is necessary in light of Plaintiff refusing to produce discovery going to her damages, thus
7 preventing Defendants from having other evidence to counter her damages claims. (Id. at 3-4.)

8 The Court finds that the evidence of the February 2, 2014 arrest is relevant to Plaintiff's
9 damages. Relevant evidence is any evidence that has any tendency to make a fact that is of
10 consequence to determination of the action more or less probable than it would be without the
11 evidence. Fed. R. Evid. 401. Here, a significant issue is whether Plaintiff was actually damaged
12 by Defendants on November 30, 2013. The February 2, 2014 arrest would contradict claims that
13 Plaintiff was injured, as it involved Plaintiff committing actions that were likely not possible if she
14 had suffered the extent of injuries she claims from November 30, 2013. The January 18, 2014
15 investigation, however, lacks relevance because it was based solely on the neighbor's accusation,
16 and makes no apparent showing regarding Plaintiff's physical abilities.

17 The Court finds, however, that the relevance of this evidence is outweighed by the risk of
18 unfair prejudice. The Court has discretion "to exclude relevant evidence if its probative value is
19 substantially outweighed by danger of . . . unfair prejudice, confusing the issues, misleading the
20 jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid.
21 403. Here, there is a significant risk of prejudice that the jury would use the arrest for purposes
22 other than determining whether Plaintiff was injured on November 30, 2013, such as believing
23 Plaintiff is not credible because she has bad or violent character. While this evidence is relevant to
24 showing that Plaintiff was not injured on November 30, 2013, other evidence exists to show lack
25 of injury, including the January 2, 2014 medical records that Defendants argued at the pre-trial
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27 ¹ According to the police report, Plaintiff either jumped onto a couch or the front door opening
28 knocked her onto the couch. (Exh. 17 at 5.) Thus, it is not clear that Plaintiff did in fact jump
onto a couch, as Defendants suggest in their papers. (See Dkt. No. 133 at 3.)

1 conference show that Plaintiff had no injuries, as well as Angela Casas's testimony that there were
2 no injuries to Ms. Adams's hands. (See Dkt. No. 132 at 5.) Further, as discussed below, the Court
3 is excluding the majority of Plaintiff's damages (including those related to medical expenses).
4 Because the probative value is limited and outweighed by the risk of unfair prejudice, the Court
5 will exclude evidence of the February 2, 2014 arrest.

6 Defendants also seek to present evidence that Plaintiff's "bipolar condition may have
7 confused her perception of the events," through testimony by Dr. Stephen Raffle. (Dkt. No. 133 at
8 4.) Defendants intend to present evidence showing that Plaintiff was in a manic or depressed state
9 in the time surrounding the November 30, 2013 incident. (Id.) At the pretrial conference,
10 Defendants explained that such evidence includes their expert watching the video of Plaintiff and
11 responding to a hypothetical about whether Plaintiff was in a manic or depressed state, as well as
12 Plaintiff's own deposition testimony that she was depressed on November 30, 2013. Plaintiff
13 objected to this evidence.

14 The Court finds that there is inadequate evidence that Plaintiff was in a manic or depressed
15 state on November 30, 2013. First, it is not clear that an expert could make an accurate diagnosis
16 of manic or depressed state by watching a video. While Defendants provided the Court with a
17 copy of the American Academy of Psychiatry and the Law's Practice Guideline, the Court did not
18 find any statement that an accurate diagnosis could be made simply by watching a video.² At
19 most, the Practice Guideline notes that collateral information for an expert review may include
20 written records and recordings, but focuses primarily on interviews conducted with the subject.
21 Second, even if an expert could make an accurate diagnosis by watching a video, it is not clear that
22 this applies to the instant case, particularly when Defendants stated at the pretrial conference that
23 Dr. Raffle has not yet viewed the relevant videos. Thus, there is no showing that Dr. Raffle could
24 in fact make any diagnosis by watching video of Plaintiff in this case, let alone a credible one.
25 Indeed, it is unclear how defense counsel could proffer that the expert will find that Plaintiff was

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27 ² The Court notes that Defendants only provided this 50-page report at the pretrial conference, and
28 could not provide a specific pincite. It is not the Court's role to review extended exhibits to
determine which portions the parties rely on. Nevertheless, the Court reviewed Section 5
referenced by defense counsel at the pretrial conference.

1 in a depressive state at the time of the incident when no such opinion from the expert has been
2 provided. Finally, as to Plaintiff's deposition testimony that she was depressed, Plaintiff is not a
3 medical expert and it is not clear that her statement that she was "depressed" would mean she was
4 having a major depressive episode. Thus, even if Dr. Raffle could generally testify as to
5 symptoms that can be attributed to a person diagnosed as bipolar and who is in a manic or
6 depressed state, his testimony has no relevance to the instant case where Defendants cannot
7 provide credible, reliable evidence that Plaintiff was in a manic or major depressive episode.
8 Further, assuming such testimony and evidence was relevant, it is outweighed by the significant
9 prejudicial risk that a jury may believe Plaintiff is not credible simply because of her bipolar
10 disorder. Given the minimal relevance and significant prejudicial risk, the Court will exclude
11 evidence that Plaintiff's bipolar condition may have confused her perception of the events,
12 including the testimony of Dr. Raffle.

13 The Court therefore GRANTS Plaintiff's motion to exclude extrinsic evidence of Plaintiff's
14 criminal acts prior to November 30, 2013 (unless Plaintiff opens the door to such evidence), the
15 January 18, 2014 incident, the February 1, 2014 arrest, and evidence that Plaintiff's bipolar
16 condition may have confused her perception of the events.

17 **ii. Defendants' Motion in Limine No. 1 (Exclude Opinion Testimony by**
18 **Plaintiff)**

19 Defendants move to exclude Plaintiff from offering a lay opinion on issues of law,
20 including whether Defendants lacked a legal justification to use force against her and whether
21 Defendant Mills's take-down of Plaintiff constitutes "excessive force" or was "objectively
22 unreasonable." (Dkt. No. 121 at 1-2.)

23 The Court GRANTS Defendants' motion. As an initial matter, Plaintiff did not file an
24 opposition and is therefore deemed to consent to the granting of this motion. (Judge Westmore's
25 Standing Order ¶ 22 ("The failure of the opposing party to file a memorandum of points and
26 authorities in opposition to any motion shall constitute consent to the granting of the motion").)
27 Further, the issues of legal justification and excessive force "are factual determinations properly
28 within the jury's province." *Seals v. Mitchell*, No. CV 04-3764 NJV, 2011 WL 1399245, at *13

1 (N.D. Cal. Apr. 13, 2011). Thus, while Plaintiff may testify about what happened to her, she may
2 not offer an opinion as to whether Defendants lacked a legal justification or if their actions
3 constituted excessive force.

4 **iii. Defendants' Motion in Limine No. 2 (Exclude Evidence of Prior Complaints
5 and Lawsuits)**

6 Defendants move to exclude evidence of complaints, allegations of misconduct,
7 investigations into alleged misconduct, and civil lawsuits involving Defendants and the City of
8 Hayward. (Dkt. No. 121 at 5.)

9 The Court GRANTS Defendants' motion. Again, Plaintiff did not file an opposition and is
10 therefore deemed to consent to the granting of this motion. Further, to the extent that a complaint
11 is introduced for the truth of the matter contained therein, a hearsay issue will likely arise.

12 **iv. Defendants' Motion in Limine No. 3 (Bifurcation of Trial)**

13 Defendants move to bifurcate the trial into two stages: (1) officer liability, and (2)
14 damages. (Dkt. No. 121 at 8.) Defendants contend that bifurcation will further judicial economy
15 because to establish damages, Plaintiff will need to call many witnesses, including family
16 members and a possible economist. (Id. at 10.) Defendants also contend that bifurcation will
17 improve presentation of evidence in the event Plaintiff presents economic testimony. (Id. at 11.)

18 The Court DENIES Defendants' motion. Although Plaintiff did not oppose the motion, the
19 Court finds that judicial economy will not be served by bifurcation. Specifically, Defendants'
20 concern about Plaintiff calling many witnesses to support her damages claim is negated by the fact
21 that Plaintiff apparently intends to call only one witness: herself. (See Dkt. No. 128 at 3.) As
22 discussed below and at the pretrial conference, this requires the exclusion of almost all of
23 Plaintiff's alleged damages. Additionally, Plaintiff will not be permitted to call any witnesses
24 other than those listed in the parties' joint pre-trial statement, which did not include any of the
25 witnesses that Defendants are concerned about. (See Dkt. No. 132 at 4-6; Dkt. No. 99 at 6 ("No
26 party shall be permitted to call any witness or offer any exhibit in its case in chief that is not
27 disclosed in its pretrial statement))

28 **v. Defendants' Motion in Limine No. 4 (Exclusion of Witnesses and Evidence
Not Disclosed to Defendants)**

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Defendants move to exclude witnesses and evidence not disclosed or otherwise made known to Defendants. (Dkt. No. 121 at 11-12.)

The Court GRANTS Defendants' motion. First, Plaintiff did not oppose the motion, and is therefore deemed to consent to the granting of the motion. Second, Rule 26(a) requires that a party provide "the name and, if known, the address and telephone number of each individual likely to have discoverable information," as well as "a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses" "Rule 37(c)(1) gives teeth to these requirements by forbidding the use at trial of any information required to be disclosed by Rule 26(a) that is not properly disclosed." *Hoffman v. Constr. Protective Servs., Inc.*, 541 F.3d 1175, 1179 (9th Cir. 2008) (internal quotation omitted). "Under Rule 37, exclusion of evidence not disclosed is appropriate unless the failure to disclose was substantially justified or harmless." *Id.* "In determining whether this sanction should be imposed, the burden is on the party facing the sanction . . . to demonstrate that the failure to comply with Rule 26(a) is substantially justified or harmless." *Torres v. City of L.A.*, 548 F.3d 1197, 1213 (9th Cir. 2008). As Plaintiff has failed to explain why her failure to comply with Rule 26(a) is substantially justified or harmless, exclusion of witnesses and evidence not properly disclosed is warranted.

vi. Defendants' Motion in Limine No. 5 (Exclusion of Evidence of Past Instances of Police Misconduct)

Defendants move to exclude evidence or references to prior instances of police brutality, such as the Rodney King case, as well as to the Black Lives Matter movement. (Dkt. No. 121 at 14.)

The Court GRANTS Defendants' motion. Again, Plaintiff did not oppose the motion, and is therefore deemed to consent to the granting of the motion. Further, there is no showing that any such evidence or references would be relevant to the instant case, whereas there is potential undue prejudice if a jury finds against Defendants based on actions wholly unrelated to the November 30, 2013 event.

1 **vii. Defendants' Motion in Limine No. 6 (Exclusion of Evidence Concerning Loss**
2 **of Income or Economic Opportunity)**

3 Defendants move to exclude evidence of Plaintiffs' alleged loss of income or economic
4 opportunity. (Dkt. No. 121 at 16.) Defendants argue that such evidence will be speculative, and
5 that Plaintiff has also withheld documentation of the economic losses she suffered.

6 The Court GRANTS Defendants' motion. Plaintiff did not oppose the motion, and is
7 therefore deemed to consent to the granting of the motion. Additionally, Plaintiff's failure to
8 produce such evidence is grounds for exclusion.

9 **viii. Defendants' Motion in Limine No. 7 (Terminating Sanctions)**

10 Defendants move for terminating sanctions for Plaintiff's failure to produce documents,
11 including color photos of her injury and documents relating to loss of income and wages. (Dkt.
12 No. 121 at 18.) Plaintiff also failed to produce documents relating to a domestic dispute that
13 occurred shortly after November 30, 2013, which Defendants believe may have been the cause of
14 her thumb injury. (Id. at 19.)

15 Although Plaintiff did not file an opposition to Defendants' motion, the Court DENIES
16 Defendants' motion for terminating sanctions. Defendants rely on Federal Rule of Civil Procedure
17 37(e), which concerns the failure to preserve electronically stored information. It is not clear,
18 however, that all of the evidence sought was in fact electronically stored information. Further,
19 Rule 37(e) applies only if a party failed to take reasonable steps to **preserve** the electronically
20 stored information; here, Defendants make no showing that Plaintiff failed to preserve the
21 evidence, rather than simply refusing to hand over the evidence. See *Ortiz v. Kelly*, 404 Fed.
22 Appx. 140, 141 (9th Cir. 2010) (finding that the district court did not abuse its discretion by
23 refusing to draw a negative inference and impose sanctions for alleged spoliation of evidence
24 where no showing of spoliation was made); see also Dkt. No. 121 at 18-19.

25 More importantly, Rule 37(e) only permits that upon a finding of prejudice, the Court
26 "may order measures no greater than necessary to cure the problem." (Emphasis added).
27 Defendants, however, do not explain why terminating sanctions are necessary to cure the problem.
28 This is particularly the case where the Court has already excluded Plaintiff's documents relating to
 loss of income and wages for failure to produce the documents.

1 While the Court agrees that some sanctions may have been appropriate, in light of
2 Plaintiff's repeated failure to provide photographs of her thumb injury, Defendants cite no
3 authority for the Court to do impose such sanctions now.³ Rule 37(b)(2) does not apply as
4 Defendants never sought a Court order requiring the production of documents, and the Court has
5 found no record that it ever ordered such.⁴ As discussed above, Rule 37(e) does not apply because
6 while the photographs sought are electronic, there is no showing by Defendants that the
7 photographs have been destroyed or lost. At best, the Court can and will exclude any evidence
8 that was not disclosed in the pretrial statement, including the photographs of Plaintiff's thumb
9 injury. Again, Defendants will have Ms. Casas's testimony regarding the lack of injury to
10 Plaintiff's thumb.

11 **B. Evidentiary Rulings**

12 **i. Damages**

13 In its January 20, 2017 tentative rulings, the Court ordered Plaintiff to be prepared to
14 explain why the damages listed by Plaintiff were recoverable, what evidence Plaintiff had that
15 such damages resulted from the events at issue in this suit, and what evidence Plaintiff had in
16 support of the amounts sought. (Dkt. No. 134 at 3.) With respect to the medical expenses,
17 Plaintiff admitted at the hearing that she had no evidence beyond her own testimony to show
18 causation.⁵ Plaintiff, however, is not permitted to testify to causation, as she is not a doctor or
19 medical expert. See *Martinez v. Allison*, 1:11-cv-1749-RRB, 2015 U.S. Dist. LEXIS 54887, at *4-

21 _____
22 ³ Defendants filed a "Supplemental Brief" following the pre-trial conference. (Dkt. No. 137.)
23 Defendants did not seek leave to file this brief, and it is stricken. Moreover, the brief does not
24 change the Court's analysis, and to the extent they suggest that Plaintiff admitted on the record at
25 the pre-trial conference to spoliation of the photos, the Court disagrees; at most, Plaintiff stated the
26 photos were in the cloud.

27 ⁴ The Court observes that Defendants could have filed a joint discovery letter on this issue,
28 pursuant to the Court's standing order. Defendants state that they sought production of the
documents in May 2015, and had requested the documents from Plaintiff in May 2016. (Dkt. No.
121 at 19.) Defendants then apparently failed to seek the documents until January 5, 2017, long
after non-expert discovery closed. (Id.) Defendants provide no explanation for why they did not
file a joint discovery letter.

⁵ Additionally, Plaintiff appears to have not provided documentation of many of her expenses to
Defendants.

1 5 (finding that the plaintiff could testify as to the injuries he contended he suffered as a result of
2 the defendant's alleged conduct, but that as a lay person he could not testify to the causation of his
3 injuries). Because Plaintiff cannot show causation, Plaintiff may not seek to recover any of her
4 medical expenses, and may not present such damages at trial.

5 As to the August 2015 transportation expenses and relocation costs, Plaintiff explained at
6 the hearing that these expenses arose from events that occurred after the November 30, 2013
7 events at issue in this case, i.e., subsequent actions allegedly taken by the City of Hayward.
8 Because they are not a part of this lawsuit, Plaintiff cannot recover such expenses in this case.
9 Accordingly, Plaintiff may not present such damages at trial.

10 Finally, as discussed above, Plaintiff may not seek to recover loss of income because
11 Plaintiff failed to produce documentation of her economic losses to Defendants. Thus, any
12 evidence of loss of income is excluded.

13 **ii. Exhibits**

14 The Court finds that the following exhibits shall be excluded:

15 a. Exhibit 1: December 16, 2014 Complaint

16 Defendants argued that they want to use the original complaint for the purposes of
17 credibility, to show that Plaintiff repeatedly claimed a version of events that Defendants contend
18 did not occur. As discussed above, Defendants already have evidence to challenge Plaintiff's
19 version of the story. The Court will exclude the complaint for this purpose; because this
20 complaint is not the operative complaint, and Defendants' use of it is cumulative. The Court will
21 not allow different versions of the complaint to make Defendants' case generally. The Court
22 observes Defendants could use Plaintiffs' deposition testimony or the operative complaint for
23 impeachment purposes.

24 b. Exhibit 2: December 16, 2014 Civil Cover Sheet

25 Defendants admit inclusion of this exhibit was a mistake. Accordingly, the Court excludes
26 this exhibit.

27 c. Exhibit 3: May 20, 2014 Second Chance Anger Management Classes Log

28 Defendants argued that the exhibit should be included because it shows Plaintiff's income

1 was about \$5,000-\$8,000, and that she therefore may have brought the instant lawsuit due to her
2 low income. Plaintiffs object that the exhibit is prejudicial because it shows Plaintiff attending an
3 anger management class. The Court finds that the exhibit does not show Plaintiff's intent in
4 bringing the lawsuit, and has little (if any) probative value. By contrast, the prejudicial effect is
5 significant in making a jury believe Plaintiff has bad character by attending an anger management
6 class. Accordingly, the Court excludes this exhibit.

7 d. Exhibits 17, 19, 20, 21, 22: February 1, 2014 Arrest

8 As discussed with respect to Plaintiff's motion in limine, the Court finds that the February
9 1, 2014 arrest's probative value of showing that Plaintiff was not injured is significantly
10 outweighed by the risk of prejudice by making Plaintiff appear to have bad character.
11 Accordingly, the Court excludes these exhibits.

12 e. Exhibit 18: January 18, 2014 Police Summary Report

13 Defendants withdraw this exhibit, as no one witnessed the complained of events.
14 Accordingly, the Court excludes this exhibit.

15 **iii. Discovery and Deposition Designations**

16 The Court reiterates that Defendants should limit the deposition designations to what will
17 be relevant to this case, and to have the deposition properly indexed so as to save time during trial.


18 **C. Juror Questionnaire**

19 At the pretrial conference, the parties agreed to allow the Court to use its typical juror
20 questionnaire.

21 IT IS SO ORDERED.

22 Dated: January 27, 2017

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KANDIS A. WESTMORE
United States Magistrate Judge