

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HOSSEIN TAVAKOLI, et al.,

Plaintiff,

v.

ALLSTATE PROPERTY AND
CASUALTY INSURANCE COMPANY,

Defendant.

CASE NO. C11-1587RAJ

ORDER

I. INTRODUCTION

This matter comes before the court on the parties' motions in limine. Dkt. ## 67, 69. The court GRANTS both motions in part and DENIES both motions in part. As the court's local rules require, Plaintiffs Hossein Tavakoli and Pourandok Shahnian and Defendant Allstate Property and Casualty Insurance Company ("Allstate") each filed a single motion in limine. Local Rules W.D. Wash. LCR 7(d)(4). Each motion is divided into several parts, which the court addresses below.

This case follows Mr. Tavakoli's October 2007 car accident. Plaintiffs assert causes of action invoking the uninsured motorist ("UIM") coverage of their Allstate insurance policy, as well as causes of action based on Allstate's handling of their insurance claim. The court addressed these causes of action in a December 21, 2012 order resolving the parties' summary judgment motions. Dkt. # 63. The court will not repeat the factual summary or analysis from that order except as necessary. Among other

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1 things, that order separated the trial of Plaintiffs' claims into a first phase devoted solely
2 to assessing their damages arising from the accident and a second phase to determine
3 whether Allstate is liable for any damages arising from its claims handling.

4 **II. PLAINTIFF'S MOTION IN LIMINE**

5 **Part One**

6 Plaintiffs ask the court to prohibit William Partin, an accountant, from testifying at
7 trial. Mr. Partin intends to offer expert testimony to rebut the testimony of John
8 Fontaine, a vocational rehabilitation expert who will testify on Mr. Tavakoli's behalf
9 regarding his loss of future income as a result of the accident.

10 Plaintiffs' first objection is a reprise of objections that the court put to rest in an
11 order addressing the parties' first motions to exclude witnesses. That order (Dkt. # 64)
12 explained that both parties conducted discovery and issued expert reports well after the
13 deadlines the court imposed and that both parties were to blame for the late disclosures.
14 As was the case in that order, there is no need to parse who is responsible for each late
15 disclosure. Unless a party can point to prejudice arising from the late disclosure, the
16 court will not exclude it. There is no prejudice arising from the timing of the disclosure
17 of Mr. Partin's testimony.

18 Mr. Fontaine will offer testimony about Mr. Tavakoli's loss of wage-earning
19 capacity by comparing his wage-earning capacity before the accident and after. As
20 everyone recognizes, Mr. Tavakoli's *capacity* to earn wages is at best a part of an
21 assessment of his past or future lost wages. The extent to which would be able to fulfill
22 his earning potential matters as well. Mr. Partin intends to offer testimony that Mr.
23 Tavakoli would not have fulfilled that potential. Among other things, he will opine that
24 Mr. Tavakoli never met his earning potential before the accident, and that health
25 problems unrelated to the accident will prevent him from meeting his earning potential in
26 the future. This is appropriate rebuttal testimony. Mr. Partin is qualified to assess how

1 different assumptions about Mr. Tavakoli's maximization of his earning capacity will
2 affect the calculations of his lost earnings. To the extent those assumptions depend on
3 medical evidence or vocational evidence that is outside his field of expertise, he may still
4 rely on that evidence. Mr. Partin may not, however, offer his own opinions or
5 assessments about occupations for which Mr. Tavakoli is or is not qualified. Mr. Partin is
6 an accountant, not a vocational specialist. He may not opine, for example, about what
7 level of restaurant service work Mr. Tavakoli is qualified for. He also may not opine
8 about whether Mr. Tavakoli is currently qualified to work as a realtor.

9 **Part Two**

10 Plaintiffs want to prevent Allstate from offering evidence, during the first phase of
11 trial, that Mr. Tavakoli hired a lawyer just days after the October 2007 accident. They
12 contend that evidence is irrelevant. Allstate contends, however, that Mr. Tavakoli's
13 medical treatment and other actions in the aftermath of the accident were driven by a
14 desire to maximize his recovery in a lawsuit.

15 Allstate may offer evidence about Mr. Tavakoli's decision to hire a lawyer. And,
16 to the extent it has *admissible* evidence, it may develop the theory that he sought
17 unnecessary medical treatment or took other steps because of the possibility of litigation.
18 The court cautions Allstate, however, that it may not inquire into Mr. Tavakoli's
19 communications with his counsel. The court will not prohibit Allstate from offering
20 evidence about Mr. Tavakoli's hiring of counsel, but it may, on proper objection, limit
21 such evidence if Allstate chooses to belabor it.

22 **Part Three**

23 The court has already ruled that Allstate did not violate the law during the time
24 between the 2007 accident and Plaintiffs' attorney's first demand letter in December
25 2010. Now Plaintiffs ask the court to exclude (from phase two of the trial) all evidence
26 relating to claims handling during that period.

1 The court denies this request. It will be impossible for the jury to understand
2 Allstate's claims handling after December 2010 without at least a basic understanding of
3 what had happened over the more than three years prior to December 2010. For example,
4 Plaintiffs intend to argue that Allstate's investigation was unreasonably delayed. In light
5 of that argument, the jury will likely be curious as to why Allstate did little for more than
6 three years after the accident. Allstate is entitled to present evidence that it did little
7 because Plaintiffs' attorney refused to provide information and repeatedly told Allstate to
8 wait for a demand letter. Although the court may limit evidence regarding pre-
9 December-2010 claims handling if either party spends too much time presenting it, it will
10 not bar the evidence.

11 **Part Four**

12 Plaintiffs hope to introduce evidence about their contractual relationship with
13 Allstate during the first phase of the trial. That will be unnecessary. The court will
14 inform the jury before trial begins that Allstate is a defendant in this action because
15 Plaintiffs' claim relies on their UIM coverage, and that in a UIM claim the insurance
16 company stands in the place of the uninsured motorist. The court will tell the jury that
17 Allstate concedes liability for the accident, but disputes the amount of damages. The jury
18 does not need to know anything else about the contractual relationship between the
19 parties to reach a verdict in phase one. In particular, Plaintiffs may not attempt to argue
20 that a lawsuit is the "only way" to resolve disputes over UIM coverage.

21 **Part Five**

22 Plaintiffs demand that the jury decide whether or not to treble any damages it
23 awards based on the Insurance Fair Conduct Act ("IFCA"). In another case, the court
24 recently ruled that the Seventh Amendment requires the jury in federal court to decide
25 whether to enhance IFCA damages in accordance with RCW § 48.30.015(2), even though
26 the Washington legislature intended that the trial court decide whether to enhance

1 damages. *F.C. Bloxom Co. v. Fireman's Fund Ins. Co.*, No. C10-1603RAJ, 2012 U.S.
2 Dist. LEXIS 170543, at *17 (W.D. Wash. Nov. 30, 2012). Plaintiffs want the court to
3 reach the same conclusion in this case. Allstate opposes the request, preferring that the
4 court decide whether to enhance IFCA damages.

5 Although the court is likely to follow its prior order, Allstate has raised at least one
6 argument that the court did not consider in that prior order. Accordingly, the court
7 reserves ruling on whether it or the jury will resolve the enhanced damages issue.
8 Nonetheless, the court will take the jury's verdict on enhanced damages. If the court
9 ultimately adopts Allstate's view that the court should decide enhanced damages, it will
10 treat the jury's verdict as advisory. *See* Fed. R. Civ. P. 39(c).

11 **III. DEFENDANT'S MOTION IN LIMINE**

12 **Part One**

13 Allstate asks the court to exclude evidence related to Ms. Shahnian's loss of
14 consortium claim from phase two of the trial. The court denies that request, but may
15 limit testimony on that issue if it becomes repetitive.

16 The jury will have decided whether Ms. Shahnian is entitled to loss of consortium
17 damages during phase one of the trial. There are at least two issues in the second phase,
18 however, to which those damages might again be relevant. The first is Plaintiff's
19 contention that Allstate broke the law by refusing to make a partial payment of damages
20 that were not reasonably in dispute. The second issue is related: Plaintiffs intend to argue
21 that they suffered additional damages because Allstate's failure to pay left them unable to
22 afford medical care and unable to keep Mr. Tavakoli's restaurant business open.

23 Plaintiffs may refer to their phase one damages as necessary to make the
24 arguments the court has just identified. Plaintiffs will have already presented all evidence
25 regarding those damages in phase one. The only evidence regarding those issues that
26 ought to arise in phase two is evidence that some portion of those damages were

1 undisputed, and evidence that Allstate knew or should have known that Plaintiffs were
2 suffering additional damages because of Allstate's failure to make a partial payment.

3 The court's ruling that Allstate did not violate the law prior to December 2010
4 applies here as well. Plaintiffs may not argue that they suffered extracontractual damages
5 prior to December 2010.

6 **Part Two**

7 Allstate requests that the court exclude evidence of the effect of the accident on
8 the restaurant that Mr. Tavakoli helped operate. It appears that, at the time of the
9 accident, Mr. Tavakoli was a member of a limited liability company that operated a small
10 restaurant called "Saffron Kabobs." Mr. Tavakoli also worked at the restaurant. The
11 record is murky, but it appears that the LLC had members other than Mr. Tavakoli. Mr.
12 Tavakoli intends to present evidence that because of his injuries, he could not work
13 enough at the restaurant, the restaurant became less profitable, and it ultimately closed.

14 The limited liability company is not a party to this action, and Mr. Tavakoli cannot
15 recover the company's lost profits. He can, however, present evidence that he received
16 or expected to receive all or a portion of the company's profits in the form of wages or
17 other compensation. To that extent, evidence of the company's financial performance is
18 relevant, and the court will not exclude it.

19 The court also denies Allstate's request to exclude testimony from the company's
20 accountant, Hamid Sharif. Mr. Sharif may provide testimony within his personal
21 knowledge about the company's finances. He also may testify about Mr. Tavakoli's
22 injuries and their effect on the business, as long as he has personal knowledge on those
23 topics.

24 **Part Three**

25 Allstate contends that Mr. Tavakoli did not disclose evidence describing his wage
26 history after Saffron Kabobs closed in March 2011, and thus should not be permitted to

1 offer such evidence to support his claim for lost wages and future loss of wages. Allstate
2 claims that Mr. Tavakoli provided only a generic response to an interrogatory requesting
3 information on his lost income claim and did not provide documents about his post-
4 March-2011 income in response to a request for production.

5 Allstate's description of the discovery Mr. Tavakoli provided is at best
6 inexcusably forgetful and at worst an effort to mislead the court. Mr. Tavakoli provided
7 the discovery responses that Allstate cited in July of 2012. Allstate neglects to mention
8 that it deposed Mr. Tavakoli at the end of July and he described his post-March-2011
9 employment, wages, and financial status in considerable detail. Allstate further neglects
10 to mention that Mr. Tavakoli updated his initial disclosures in August to reflect his most
11 recent employment. And as a final omission, Allstate does not reveal that Mr. Tavakoli
12 provided all of his tax returns from 2005 through 2011. Allstate has no basis for its claim
13 that Mr. Tavakoli did not adequately disclose evidence about his income and financial
14 status after March 2011.

15 The court also denies Allstate's request to exclude Mr. Fontaine's testimony. He
16 has the expertise to assess (in reliance on medical evidence and other evidence pertaining
17 to Mr. Tavakoli's physical and mental capabilities) what occupations Mr. Tavakoli is
18 qualified for and will be qualified for. He also has the expertise to assess his earning
19 capacity. The court has already explained that Mr. Tavakoli's earning capacity is only
20 part of the assessment of his lost past and future wages, but it is nonetheless relevant.
21 The court will not exclude it.

22 **Part Four**

23 Allstate argues that its conduct after Plaintiffs filed this lawsuit in August 2011 is
24 not relevant to Plaintiffs' extracontractual claims. The court disagrees. In a case like this
25 one, where the insured's claim remains open, the insured's decision to sue its insurer does
26 not cut off the insurer's obligations to adjust the claim. The litigation itself will impose

1 new demands on the insurer, and if there were a conflict between the demands of
2 litigation and the insurer's duty to adjust the claim, the court might have to decide how to
3 resolve it.¹ Allstate has not identified any specific conflict in its motion.

4 **Part Five**

5 Allstate already filed a separate motion asking the court to limit the testimony of
6 Robert Dietz, who intends to offer expert testimony on Plaintiff's behalf regarding the
7 insurance industry. The court issued a separate ruling on that motion. In part five of its
8 motion in limine, Allstate asks the court to limit his testimony further. The court declines
9 to consider a second motion on the topic. The court reiterates its prior ruling.

10 **Part Six**

11 Allstate asks for a blanket ruling excluding evidence that purports to explain
12 Allstate's legal obligations. The court cannot grant that request. During the second
13 phase of the trial, it is likely that some witnesses will testify as to their understanding of
14 what the law requires of Allstate. That is likely unavoidable. If necessary, the court will
15 give the jury a limiting instruction during trial that the court will instruct them as to
16 Allstate's legal obligations at the conclusion of trial, and that the court's instructions will
17 govern over any conflicting evidence. If either party wishes to avoid an in-trial limiting
18 instruction, they should not elicit testimony from witnesses as to their understanding of
19 the law.

23 ¹ For example, the court in *Stegall v. Hartford Underwriters Ins. Co.*, No. C08-688MJP, 2009
24 U.S. Dist. LEXIS 2690, *3-7 (W.D. Wash. Jan. 7, 2009) addressed whether Washington
25 insurance regulations requiring prompt responses to inquiries from insureds applied to an
26 insured's counsel's inquiry to the insurer's counsel during litigation. In that case, the insurer had
27 already paid its insured and closed its file before the insured sued. *Id.* at *2-3. The *Stegall* court
28 had no occasion to consider a case like this one, where the insurer has neither made a payment
nor informed its insured that it has concluded its adjustment of the claim. The court does not
interpret *Stegall* to impose a broad rule that an insurer cannot be liable for unlawful claims
handling after its insured sues.

1 **Part Seven**

2 The court denies Allstate’s request to prevent Dr. Richard Seroussi from testifying
3 regarding the psychiatric impact of Mr. Tavakoli’s injuries or testifying about his brain
4 injuries. Dr. Seroussi is neither a psychiatrist nor a neurologist, but his experience in the
5 field of psychiatry touches on both disciplines. If his opinions go beyond his expertise,
6 Allstate can illustrate as much in cross-examination. The court observes that Allstate has
7 already indicated that it intends to have its expert orthopedist testify regarding the
8 psychiatric aspects of Mr. Tavakoli’s claimed injuries, putting Allstate in a poor position
9 to complain that one of Mr. Tavakoli’s medical witnesses may testify as to matters
10 somewhat outside the core of his specialty.

11 **Part Eight**

12 The court grants Allstate’s request to exclude evidence of other claims, lawsuits,
13 or the like. The jury will decide the second phase of this case based solely on Allstate’s
14 conduct with respect to Plaintiffs’ claims.

15 **Part Nine**

16 The court grants Allstate’s request to prohibit Plaintiffs’ from offering evidence of
17 Allstate’s relative wealth, or their relative poverty, as a reason to enhance damages.
18 Allstate’s wealth is not relevant at all, and Plaintiffs’ wealth is relevant only to the extent
19 it bears on their inability to pay for medical care or other issues that are germane to their
20 claims for compensatory damages.

21 The court does not, however, prohibit Plaintiffs from arguing that the jury should
22 enhance any IFCA damages it awards in order to punish Allstate. So long as that
23 argument relates solely to Allstate’s conduct toward Plaintiffs, the court will not prohibit
24 it.

25 **Part Ten**

26 The court grants Allstate’s request to exclude any evidence or argument related to
27 Allstate’s decision to designate certain documents as “confidential” during discovery.

1 Those decisions relate solely to Allstate's litigation conduct, and are not relevant to any
2 of Plaintiffs' claims.

3 **IV. CONCLUSION**

4 For the reasons stated above, the court GRANTS in part and DENIES in part the
5 parties' motions in limine. Dkt. ## 67, 69.

6 DATED this 15th day of January, 2013.

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11 The Honorable Richard A. Jones
12 United States District Court Judge
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