At a Motion Term of the Supreme Court of the State of New York, held in and for the County of Onondaga, at 401 Montgomery Street, Syracuse, New York, on June 9th, 2021.

Present: Hon. Gerard J. Neri, J.S.C.

STATE OF NEW YORK
SUPREME COURT ONONDAGA COUNTY

DECISION and ORDER

ERIC BARKER,

Plaintiff,

Index No: 2015EF2865

-against-

UNION CORRUGATING COMPANY and LOWE'S HOME CENTERS, LLC,

Defendants.

On May 27, 2021, Plaintiff filed a motion to strike Defendants' affirmative defenses pursuant to CPLR §§3124 and 3211(b) and a motion in limine precluding cumulative testimony and prejudicial evidence (*see* Notice of Motion, NYSCEF Doc. No. 262). Plaintiff seeks an order striking affirmative defenses asserted by Defendant Union Corrugating Company ("Union"), including the Second, Fifth, Sixth, Seventh, Eighth, Nineth, Tenth, and Eleventh Affirmative Defenses. Plaintiff seeks an order striking affirmative defenses asserted by Defendant Lowe's Home Centers, LLC ("Lowes"), including the Fourth, Fifth, Sixth, Seventh, and Eighth Affirmative Defenses. Plaintiff further seeks to preluding the testimony of Dr. Parker on matters contain in the expert disclosure of Dr. Capicotto, or alternatively prelcuding the testimony of Dr. Capicotto. Plaintiff further seeks an order precluding Defendants, Defendants' counsel, and Defendants' witnesses from mentioning, referring to, or attempting to convey to the jury in any manner, any and all evidence, references to evident, testimony, or argument relating to i) Plaintiff's conduct contributing to his fall from the roof; ii) irrelevant affirmative defenses;

iii) indoctrination on the Labor Law §240; iv) Plaintiff's ex-wife's financial status; v) photographs of a boat; vi) terms of Plaintiff's Divorce Agreement; vii) income tax implications on loss of future earnings; viii) Dr. Parker's absence at trial; ix) collateral sources of payment; x) failure to claim earning from mowing; xi) Plaintiff's political affiliation; and xii)applying and arguing an improper legal standard.

Plaintiff seeks an order of the Court precluding the introduction of evidence or argument regarding Plaintiff contributing to his falling from the roof. Plaintiff alleges that as the Appellate Division has already found Defendants in violation of Labor Law §240(1), the issue of liability has been determined and is conclusive (Affirmation, NYSCEF Doc. No. 263, ¶8). Plaintiff asserts that once liability has been determined under Labor Law §240(1), absolute liability is unavoidable "regardless of the injured worker's own negligence in contributing to his accident (Bland v. Manocherian, 66 N.Y.2d 452, 459 [1985], *citing* Zimmer v. Chemung County Performing Arts, 65 N.Y.2d 513, 521-522 [1985]). Plaintiff cites a portion of his medical chart which states Plaintiff "stepped back and fell off the side of the building" (Affirmation, NYSCEF Doc. No. 263, ¶11). Plaintiff asks that this and other similar evidence be precluded.

In light of the Fourth Department's decision assessing Defendants' liability, Plaintiff asks that certain portions of the pleadings, including certain affirmative defenses, be stricken.

Plaintiff further requests an order precluding questioning potential jurors during voir dire regarding their attitudes on matters of law. "It is well established that it is not the province of counsel to question prospective jurors concerning their attitudes on matters of law" (People v. Martinez, 298 A.D.2d 897, 899 [Fourth Dept. 2002]). Plaintiff expresses concerns of jury nullification should Defense counsel question jurors on their attitudes on Labor Law §240. Plaintiff seeks an order precluding questioning jurors on their attitudes towards the law.

Plaintiff further seeks an order precluding evidence of Plaintiff's ex-wife's financial status. Plaintiff asserts his Ex-Wife's financial records are irrelevant to the case at bar (*see* Hirsch v. Sentry Ins., 208 A.D. 680, 680-681 [Second Dept. 1994]). Plaintiff argues "even if the evidence is proximately relevant, it may be rejected if its probative value is outweighed by the danger that its admission would prolong the trial to an unreasonable extent without any corresponding advantage; or would confuse the main issue and mislead the jury; or unfairly surprise a party; or create substantial danger of undue prejudice to one of the parties" (People v. Davis, 43 N.Y.2d 17, 27 [1977]).

Plaintiff seeks exclusion of photographs of a certain boat. Plaintiff argues that it demanded copies of photographs Defendants had in their possession of a certain boat Plaintiff and his ex-wife owned. Plaintiff asserts this evidence was never tendered. On May 21, 2021, Defendants served their Notice to Admit and one of the photographs is of the boat (*see* Affirmation, NYSCEF Doc. No. 263, ¶26). Plaintiffs ask that the photo (*see* NYSCEF Doc. No. 269) be precluded as Defendants failed to timely tender it and further, its prejudicial value is more than its probative value as a jury may take away from the photo that Plaintiff is "rich" (*see* Affirmation, NYSCEF Doc. No. 263, ¶27). Plaintiff acknowledges Defendant may cross-examine Defendant about activities involving the boat, however, Plaintiff simply desires to preclude the admission of any photos of the boat.

Plaintiff seeks to preclude the admission of the terms of Barkers' divorce. Plaintiff asserts that any evidence regarding any spousal support Plaintiff received is prejudicial and has no relevance.

Plaintiff seeks to preclude evidence and testimony regarding any tax implications on loss of future earnings (*see* Johnson v. Manhattan & Bronx Surface Transit Operating Auth., 71 N.Y.2d 198, 203-06 [1998]).

Plaintiff seeks to preclude any mention of Plaintiff's treating physician Dr. Parker's absence at trial. Plaintiff's counsel asserts he has attempted to secure Dr. Parker's cooperation, however, Dr. Parker has not responded to Plaintiff's counsel. Plaintiff assert it is Defendants who now have Dr. Parker under their control for purposes of the trial, and that a missing witness charge is inappropriate. Plaintiff further argues Dr. Parker's testimony would now be duplicative in light of the fact that Plaintiff has secured another expert.

Plaintiff asserts evidence of collateral sources of payment must be precluded (*see* Wooten v. State of New York, 302 A.D.2d 70, 73 [Fourth Dept. 2002]). Plaintiff proffers that evidence would only confuse a jury.

Plaintiff seeks to preclude any evidence relating to Plaintiff's admission that he failed to file income taxes on "some meager earning cutting grass for a friend" (*see* Attorney Affirmation, NYSCEF Doc. No. 263, ¶42). Plaintiff argues the prejudicial effect would outweigh any legitimate use as an attack on Plaintiff's credibility.

Plaintiff seeks to preclude cumulative testimony. Specifically, Plaintiff asserts that if Defendants call Plaintiff's treating physician Dr. Parker, Defendants must be precluded from calling on the testimony or report of Defendants' expert Dr. Capicotto.

Plaintiff seeks to preclude any photos of Plaintiff wearing a President Trump baseball cap as the political persuasion of Plaintiff is irrelevant and President Trump is a polarizing figure.

Plaintiff seeks to preclude Defendants from arguing "a wholly erroneous, improper and misleading legal standard for the measure of Plaintiff's loss of earning capacity" (*see* Attorney

Affirmation, NYSCEF Doc. No. 263, ¶51). "It is axiomatic that loss of earnings must be established with reasonable certainty . . . and the initial burden of proving lost wages is on the [plaintiff]' . . . Recovery for lost earning capacity is not limited to a plaintiff's actual earnings before the accident, however, and the assessment of damages may instead be based upon future probabilities" (Shubbuck v. Conners, 72 A.D.3d 1554 [Fourth Dept. 2010], *aff'd as modified and remanded*, 15 N.Y.3d 871 [2010]). Plaintiff seeks to preclude Defendant from arguing loss of future wages must be based on Plaintiff's time of "under-employment".

Plaintiff seeks to preclude Defendants from arguing Plaintiff failed to mitigate his losses. Plaintiff relies on its demand to Lowes to substantiate its claim that Plaintiff failed to mitigate (NYSCEF Doc. No. 270). Plaintiff asserts Lowes did not provide any evidence to support this claim (NYSCEF Doc. No. 271). Accordingly, Plaintiff seeks to strike Lowe's Fourth Affirmative Defense.

Defendants oppose, in part, the relief sought by Plaintiff. While Defendants concede that the Appellate Division's decision renders moot some of Defendants' affirmative defenses, they nonetheless argue Plaintiff's motion is an improper summary judgment motion. "[A] motion in limine is an inappropriate substitute for a motion for summary judgment" (Ofman v. Ginsberg, 89 A.D.3d 908, 909 [Second Dept. 2011]; *see also* Scalp & Blade, Inc. v. Advest, Inc., 309 A.D.2d 219, 224 [Fourth Dept. 2003]). Defendants argue the appropriate time to address Plaintiff's concerns on this point is at trial, if and when the need arises (*see* Speed v. Avis Rent-A-Car, 172 A.D.2d 267, 268 [First Dept. 1991], "a decision regarding the admissibility of evidence… is more properly made at trial when its relevance, or lack of relevance, may be determined in context"). Defendant opposes Plaintiff's motion to strike affirmative defenses.

Defendants similarly argue that a decision regarding the admissibility to evidence relating to the cause of the incident should be left until after Plaintiff testifies. Defendants state they should be free to rebut any characterization Plaintiff may offer, thus opening the door to the issue. Defendants rely on Speed, *supra*, and urge the Court to reserve judgment on the issue until the appropriate time at trial.

Defendants do not oppose the relief sought regarding "indoctrinating" the jury, however, would simply ask that any order on the matter be made reciprocal, *i.e.*, that Plaintiff be similarly precluded.

Defendants have a good faith expectation that Plaintiff will introduce proof of his marriage to a high-income earner as an evidentiary bases to explain away the conflict between his earning history and his alleged lost wages. Defendants argue that if Plaintiff does enter evidence of his marriage into evidence, Defendants should not be precluded from "reframing the earning picture by using precisely the same evidence of [Plaintiff's former spouse]'s income and whether the divorce would, in fact, have inspired Plaintiff's return to welding" (*see* Defendant's Affirmation in Opposition, NYSCEF Doc. No. 300, ¶21). Defendants argue Plaintiff is in control of whether the ex-spouse tax records come into evidence based upon whether Plaintiff will argue his "long dormant" welding career is the basis of his lost wages, or on the W-2's pre-accident (*ibid*, ¶24). Defendants believe the issue is best resolved at time of trial (Speed, *supra*).

Defendants assert references to Plaintiff's boat are relevant in that it demonstrates Plaintiff's ability to enjoy a certain quality of life. Defendants states: "The fact that Plaintiff bought a large fishing boat – which must be maneuvered in and out of the water – is a strong indication he can and does, in fact, engage in some serious fishing" (*see* Defendant's Affirmation in Opposition, NYSCEF Doc. No. 300, ¶26). Defendants concede they would not use references

to Plaintiff's boat "as a proxy for Plaintiff's financial status" (*ibid*, ¶28). Defendants specifically state they "intend to limit any ***discussion*** of Plaintiff's boat to the issue of lost enjoyment of life" (*ibid*, ***emphasis added***).

Defendants assert they should be able to proffer evidence of Plaintiff's spousal support in light of anticipated medical evidence that Plaintiff was able to return to work sooner than he did. Defendants assert the receipt of spousal support was an incentive for Plaintiff to remain out of work longer than medically necessary and is therefore relevant to the question of damages.

Defendants state that Plaintiff's motion regarding a reduction for income tax is moot.

Defendants argue for a missing witness charge regarding Plaintiff's treating physician, Dr. Parker. "The proponent initially must demonstrate only three things via a prompt request for the charge: (1) 'that there is an uncalled witness believed to be knowledgeable about a material issue pending in the case,' (2) 'that such witness can be expected to testify favorably to the opposing party,' and (3) 'that such party has failed to call' the witness to testify" (People v. Smith, 33 N.Y.3d 454, 458–59 [2019], *citing* People v. Gonzalez, 68 N.Y.2d 424, 427 [1986]). Defendants assert they have met the burden

Defendants assert the collateral source evidence issue raised by Plaintiff is moot.

Defendants assert they should be allowed to attack Plaintiff's credibility vis-à-vis Plaintiff's failure to file income tax on certain earnings. Defendants further proffer that the earnings at issue are central to the lost earnings claims.

Defendants assert Dr. Parker and Dr. Capicotto will not present cumulative testimony. Defendants assert that courts have implicitly sanctioned both the treating doctor's testimony along with that of an expert (*see e.g.*, Martin v. Lattimore Road Surgicenter, Inc., 281 A.D.2d

866 [Fourth Dept. 2001]). Defendant argues it is entitled to call both Dr. Parker and Dr. Capicotto.

Defendants assert it is entitled to enter photos that Plaintiff has placed in the public sphere. Specifically, the photos purportedly showing Plaintiff's political beliefs, even if in the background of a photo, should be admissible. Defendants further argue it is unknown whether such purported biases will work for or against him in a trial.

Defendant notes that Plaintiff bears the burden of proving his gap in employment. Defendant asserts that pre-accident income is determined by tax records (Subbuck v. Conners, 15 N.Y.3d 871 [2010]). Defendants concede that Kirschhoffer v. Van Dyke (173 A.D.2d 7 [Third Dept. 1991]) stands for the proposition that there are other means available for proving pre-accident income (*see* Attorney Affirmation, NYSCEF Doc. No. 300, ¶52). However, Defendants assert proof of income must be documented by tax documents (*see* Jeffries v. 3520 Broadway Mgmt. Co., 36 A.D.3d 421, 422 [First Dept. 2007]).

Defendants assert that Plaintiff waived any ability to require Defendants to particularize the mitigation claims when Plaintiff failed to timely move for same (*see* Hess v. Wessendorf, 102 A.D.2d 926, 927 [Third Dept. 1984]). Defendants further assert that Plaintiff filed his note of issue without addressing the mitigations claims he now says needs further evidence to support. Defendants assert they are entitled to explore the issue.

Plaintiff replied and reiterated his arguments (NYSCEF Doc. No. 302). Plaintiff amplified his arguments concerning Dr. Parker (*ibid*, ¶21 *et seq.*). Plaintiff's counsel sent numerous letters to Dr. Parker attempting to initiate communication with Dr. Parker for purposes of this action, advising the Court on September 14, 2020 of Dr. Parker's lack of response, and an e-mail exchange with an individual employed by Syracuse Orthopedic Specialists where Dr.

Parker maintains his practice (*see* Letters, NYSCEF Doc. Nos. 303-307). The record does not indicate any responses from Dr. Parker. Plaintiff urges the Court grant his motion.

Discussion:

Plaintiff seeks an order precluding evidence or argument regarding Plaintiff contributing to his falling from the roof. The Court agrees with Defendants that it is premature to address this matter now. "[A] decision regarding the admissibility of evidence… is more properly made at trial when its relevance, or lack of relevance, may be determined in context" (Speed v. Avis Rent-A-Car, 172 A.D.2d 267, 268 1991). Plaintiff's motion is denied in this regard.

Plaintiff seeks to strike certain affirmative defenses made by Defendants. The Court views this as a backdoor attempt at a summary judgment motion (*see* CPLR §3212). "[A] motion in limine is an inappropriate substitute for a motion for summary judgment" (Ofman v. Ginsberg, 89 A.D.3d 908, 909 [Second Dept. 2011]; *see also* Scalp & Blade, Inc. v. Advest, Inc., 309 A.D.2d 219, 224 [Fourth Dept. 2003]). Plaintiff's motion to strike affirmative defenses is denied.

Plaintiff seeks an order precluding voir dire on the jury on their attitudes concerning the law. "It is well established that it is not the province of counsel to question prospective jurors concerning their attitudes on matters of law" (People v. Martinez, 298 A.D.2d 897, 899 [Fourth Dept. 2002]). Defendants do not oppose the relief sought in this portion of the motion, only that the order be consistent between the Parties. Plaintiff's motion is granted in this regard and is applicable to all Parties.

Plaintiff seeks an order of preclusion preventing evidence of Plaintiff's former spouse's financial status. The Court agrees with Defendants that it is premature to address this matter now. "[A] decision regarding the admissibility of evidence… is more properly made at trial

when its relevance, or lack of relevance, may be determined in context" (Speed v. Avis Rent-A-Car, 172 A.D.2d 267, 268 1991). Plaintiff's motion is denied in this regard.

Plaintiff seeks exclusion of photos of his fishing boat. The Court notes that the Defendants specifically state they "intend to limit any ***discussion*** of Plaintiff's boat to the issue of lost enjoyment of life" (*see* Defendant's Affirmation in Opposition, NYSCEF Doc. No. 300, ¶26, ***emphasis added***). Defendants further conceded that they would not utilize the fishing boat as evidence of Plaintiff's financial status. Plaintiff's motion to preclude photographs of the fishing boat will be determined at the time of trial. Further, Plaintiff's motion to preclude other evidence of the value of the boat is granted.

Plaintiff seeks to preclude terms of Barkers' divorce from being entered as evidence. The Court agrees with Defendants that it is premature to address this matter now. "[A] decision regarding the admissibility of evidence… is more properly made at trial when its relevance, or lack of relevance, may be determined in context" (Speed v. Avis Rent-A-Car, 172 A.D.2d 267, 268 1991). Plaintiff's motion is denied in this regard.

Plaintiff seeks to preclude cross-examination of Plaintiff's expert on tax implications on loss of future earnings. Defendant asserts this portion of the motion is moot. To the extent necessary, the Court grants the relief sought.

Plaintiff seeks to preclude references to Dr. Parker's potential absence at trial. This issue is intertwined with Plaintiff's request to preclude Dr. Parker from appearing as a defense witness as being cumulative. The Court finds that a missing witness charge is not called for as Dr. Parker is seemingly not in Plaintiff's control. Further, Dr. Parker's testimony as Plaintiff's treating doctor would not be cumulative for either Party, even with each Party's expert. The Court is granting Plaintiff's motion to preclude references to Dr. Parker's absence from

Plaintiff's case in chief, and is further denying Plaintiff's motion to preclude Dr. Parker from appearing as a witness.

Plaintiff seeks to preclude Defendant from entering evidence of collateral sources of payment. Defendants state they will not be introducing evidence of collateral sources of payment and therefore the motion in this part is moot. To the extent necessary, Plaintiff's motion in this part is granted.

Plaintiff seeks to preclude evidence or testimony regarding Plaintiff's failure to file income taxes related to earnings from lawn mowing. Plaintiff asserts the probative value is outweighed by its prejudice. Defendants argue they are entitled to attack Plaintiff's credibility on this issue. "[I]n all cases the trial court retains broad discretion to weigh the probative value of evidence of prior bad acts against the possibility that it "would confuse the main issue and mislead the jury ... or create substantial danger of undue prejudice to one of the parties" (People v. Smith, 27 N.Y.3d 652, 660 [2016], *citing* People v. Corby, 6 N.Y.3d 231, 234-235 [2005]). Central to Plaintiff's claims are loss of income and the allegations concerning Plaintiff's failure to pay income taxes on certain income are directly related to this claim. The potential prejudice does not outweigh the probative value. Plaintiff's motion is denied in this part.

Plaintiff seeks to preclude certain photos illustrating Plaintiff's political persuasion. Defendants assert it is Plaintiff who willingly injected these photos into the public sphere. Plaintiff's political leaning bear no regard to the claims raised in this matter. The Court finds their potential for prejudice outweigh any probative value Defendants could possibly seek from them. The Court would revisit this decision if the need arises, such as Plaintiff's denial of "ownership" of the Facebook account. Plaintiff's motion is granted in this part.

Plaintiff seeks the preclusion of certain legal arguments sought to be made by Defendant concerning Plaintiff's loss of income claim. In light of the Court's previous rulings concerning pre-accident income, including but not limited to the Plaintiff's divorce and spousal support, the Court is declining to rule on the Plaintiff's motion to preclude certain legal arguments on pre-accident income. The burden of proof on Plaintiff's claim for loss of income is on Plaintiff. Only once Plaintiff has entered proof will the Court be in a position to determine the boundaries of Defendants' potential arguments.

Plaintiff seeks an order precluding Defendants from arguing mitigation. For the reasons cited above concerning other affirmative defenses, the Court denies the relief Plaintiff seeks in this part.

NOW, THEREFORE, upon reading and filing the papers with respect to the Motion, and due deliberation having been had thereon, it is hereby

ORDERED, that Plaintiff's motion to exclude evidence or argument regarding Plaintiff contributing to his falling from the roof is denied at this time without prejudice; and it is further

ORDERED, that Plaintiff's motion to strike and exclude pleadings is denied; and it is further

ORDERED, that Plaintiff's motion to preclude voir dire on the jury on their attitudes concerning the law is granted as it applies to all Parties; and it is further

ORDERED, that Plaintiff's motion to preclude evidence of Plaintiff's former spouse's financial status is denied at this time and without prejudice; and it is further

ORDERED, that Plaintiff's motion to preclude photographs of Plaintiff's boat is denied in part at this time and without prejudice, and is granted in part to preclude Defendants from referencing the value of the boat; and it is further

ORDERED, that Plaintiff's motion to preclude admission of the terms of Barker's divorce is denied at this time without prejudice; and it is further

ORDERED, that Plaintiff's motion to preclude cross-examination of Plaintiff's expert economists on tax implications on loss of future earnings is conceded by Defendants as moot, therefore to the extent necessary the motion in this part is granted; and it is further

ORDERED, that Plaintiff's motion to preclude Defendants from making references to Dr. Parker's absence from Plaintiff's case in chief is moot as the Parties have agreed to have Dr. Parker testify, but to the extent necessary, the motion in this part is granted as precluding any "absent witness charge" for Dr. Parker; and it is further

ORDERED, that Plaintiff's motion to preclude evidence of Plaintiff's collateral sources is conceded by Defendants as moot, therefore to the extent necessary the motion in this part is granted; and it is further

ORDERED, that Plaintiff's motion to preclude evidence of Plaintiff's failure to file income taxes on certain earnings is denied; and it is further

ORDERED, that Plaintiff's motion to preclude photographs identifying Plaintiff's political affiliation is granted, unless and until Defendants demonstrate relevance such as the need to identify "ownership" of a certain Facebook page; and it is further

ORDERED, that Plaintiff's motion to preclude any arguments regarding Plaintiff's loss of income is denied at this time without prejudice; and it is further

ORDERED, that Plaintiff's motion to preclude evidence or arguments regarding Plaintiff's failure to mitigate is denied.

Dated: June 9, 2021

HON. GERARD J. NERI, J.S.C.

ENTER.