

Newvine v Barzee

2023 NY Slip Op 33863(U)

September 14, 2023

Supreme Court, Onondaga County

Docket Number: Index No. 000472/2021

Judge: Danielle M. Fogel

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At a Term of the Supreme Court, held in and for the County of Onondaga, at 401 Montgomery Street, Syracuse, New York 13202 on September 14, 2023.

PRESIDING: HON. DANIELLE M. FOGEL
JUSTICE OF THE SUPREME COURT

MITCHELL J. NEWVINE,

Plaintiff,

v.

JEFFERY J. BARZEE,

Defendant.

DECISION AND ORDER

Index No. 000472/2021

This action arises out of a motor vehicle accident that occurred on July 18, 2019 at 7:00 p.m. At the time of the collision, plaintiff was riding a motorized bike and defendant was operating a 2009 Chevrolet pick-up truck. The mechanics of the accident are disputed, but plaintiff's bike came into contact with the rear passenger side of the defendant's truck in the collision. This matter is scheduled for trial on the issue of liability only commencing September 18, 2023.

Before this court is plaintiff's motion in limine to exclude certain evidence and testimony. Specifically, plaintiff seeks an order (1) precluding evidence and testimony regarding the Police Accident Report; (2) precluding evidence and testimony regarding plaintiff's arrest for DWI and violations issued after the collision; (3) precluding evidence and testimony from plaintiff's medical records; (4) precluding improper character evidence of plaintiff's alcohol/drug use in unrelated incidents; (5) precluding testimony of defendant's expert witness Michael G. Holland, M.D.; (6) precluding evidence or testimony that plaintiff did not have a driver's license; (7) precluding

evidence or testimony that defendant was not issued a traffic ticket as a result of the subject collision. In opposition, defendant has indicated he does not intend to offer evidence with regard to items 1-2, 4, and 6-7 unless plaintiff opens the door to this evidence. Accordingly, plaintiff's motion with regard to these items is denied as moot.

The two aspects of the motion that defendant specifically opposes are for the preclusion of evidence and testimony from plaintiff's medical records and the preclusion of defendant's toxicology expert, Michael G. Holland, M.D.

With regard to plaintiff's medical records, plaintiff moves to preclude any mention of plaintiff's intoxication, results of the plaintiff's breathalyzer test, the cause of the collision, and the plaintiff's speed at the time of the impact. Plaintiff's position is that these statements in the records constitute inadmissible hearsay, they are not germane to plaintiff's treatment, are prejudicial, and should not be admitted. In opposition, defendant argues these references in the medical records are germane to plaintiff's treatment and plaintiff's level of intoxication is relevant.

Generally, the court agrees that plaintiff's level of intoxication and resulting level of impairment at the time of the collision is relevant for the determination of liability. While plaintiff admits he was intoxicated, his level of impairment and whether that caused or contributed to the accident is relevant to liability and still at issue here. With respect to the specific referenced portions of the plaintiff's medical record, "[i]t is well settled that an entry in a hospital record comes within the statutory business records rule only if it is relevant to diagnosis or treatment of the patient's ailment. The history portion of the hospital record as it relates to acts and occurrences not relevant to diagnosis or treatment of the patient are *[sic]* inadmissible." (*Passino v DeRosa*, 199 AD2d 1017 [4th Dept 1993] (internal citations and quotations omitted)).

Here, it is clear that the BAC results are admissible as proof of intoxication. (*See Rodriguez v Triborough Bridge and Tunnel Auth.*, 276 AD2d 769 [2d Dept 2000]). Without proper foundation for the reliability of the breathalyzer test, however, this notation should be redacted from the records. (*See People v Garneau*, 120 AD2d 112 [4th Dept 1986]). References to the precise manner in which the accident occurred, since this is an issue to be determined by the jury and cannot be attributed to plaintiff as an admission, should be redacted. (*See Passino v DeRosa*, 199 AD2d 1017 [4th Dept 1993]; *Gunn v City of New York*, 104 AD2d 848 [2d Dept 1984]). Reference to plaintiff's health history of alcohol abuse similarly should be excluded. (*See Musaid v Mercy Hosp. of Buffalo*, 249 AD2d 958 [4th Dept 1998]).

References to the speed of the collision, however, are directly attributable to the plaintiff and constitute a party admission and are admissible to the extent they are inconsistent with plaintiff's testimony at the time of trial. (*See Upstate Records*, Dkt. No. 63, p. 30). Additionally, reference to the patient being intoxicated or inebriated to the extent they reflect observations of plaintiff's treatment providers are relevant and germane to the patient's medical treatment and are generally admissible. (*See Campbell v Manhattan and Bronx Surface Tr. Operating Auth.*, 81 AD2d 529 [1st Dept 1981]). Any reference to inebriation or intoxication that cannot be attributed to the plaintiff himself or to an observation of a provider should be redacted from the records.

Plaintiff also seeks to preclude the testimony of defendant's expert toxicologist regarding plaintiff's blood alcohol levels or intoxication at the time of the accident as unreliable. The court agrees that Dr. Holland should not be permitted to testify on any ultimate issue in the case, but with the proper foundation, he is qualified to offer relevant testimony regarding plaintiff's level of intoxication and impairment at the time of the collision. (*See Adamy v Ziriakus*, 231 AD2d 80 [4th Dept 1997], affd., 92 NY2d 396 [1998]). The objections raised by plaintiff are proper for cross-


examination. Without specific testimony before the court, however, this motion is simply premature. Accordingly, this portion of plaintiff's motion *in limine* is denied as premature, and plaintiff's objections are preserved and may be raised at the time Dr. Holland's testimony is proffered.

Based on the foregoing, it is hereby

ORDERED that plaintiff's Motion is **DENIED** in part and **GRANTED** in part as set forth in the above decision.

Dated: September 14, 2023

ENTER



Honorable Danielle M. Fogel
Justice of the Supreme Court

PAPERS CONSIDERED:

1. Notice of Motion dated August 21, 2023 (Dkt. No. 59)
2. Affirmation in Support of Plaintiff's Motion *in Limine* by John P. Wegerski, Esq. dated August 21, 2023 with Exhibits A-E (Dkt. Nos. 60-65)
3. Affidavit in Opposition by Keith D. Miller, Esq. sworn to September 6, 2023 (Dkt. No. 66)
4. Reply Affirmation by John P. Wegerski, Esq. dated September 11, 2023 (Dkt. No. 67)