Vermont Superior Court
Filed 08/30/23
Lamoille Unit

VERMONT SUPERIOR COURT
Lamoille Unit
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CIVIL DIVISION
Case No. 97-5-17 Lecv

DeLeon vs. Stowe Motel, LLC d/b/a

ENTRY REGARDING MOTION

Title: Motion to Clarify Causation Instruction Necessary to Cure Prejudice Caused by Spoliation of Evidence (Motion: 13)
Filer: Stefan Ricci
Filed Date: July 17, 2023

The motion is DENIED.

Plaintiff's motion while couched in terms of clarification, is effectively a motion to reconsider and expand the Court's October 18, 2019 decision finding that Plaintiff was entitled to limited relief under V.R.C.P. 37(f) for Defendant's failure to preserve the bicycle from which Plaintiff fell, which Plaintiff

In the 2019 decision, the Court considered whether to include an instruction regarding the elements of causation or negligence. After some deliberation, the Court rejected such a remedy. It wrote:

> It is a bridge too far, and too speculative for the court to specify as a matter of law that bicycle #12 was exactly deficient in ways that dovetail with Plaintiff's expert's liability and/or causation theories, and/or Plaintiff's own recollection of the mechanics of the incident. But a determination that the bicycle was in generally poor, or substandard condition due to outside storage and exposure to the elements, and requiring that judicially-adjudicated fact to be the law of the case, will substantially cure the overall burden to prove all of her the prejudice while still leaving claim.

Decision and Entry Order, *DeLeon v. Stowe Motel, LLC*, Dckt. No. 97-5-17 Lecv, at 6 (Vt. Sup.Ct. Oct. 18, 2019) (Pearson, J.).

Two years later, Defendant challenged Plaintiff's expert witness through a motion in limine based on the lack of certainty in the expert's opinion. Decision on Motion, *DeLeon v. Stowe Motel, LLC*, Dckt. No. 9705017 Lecv (Feb. 17, 2021) (Teachout, J.). Plaintiff's challenged expert, Richard

Thomas, had been retained by Plaintiff prior to the Court's 2019 decision and is expressly referenced by the Court in that earlier decision. See Decision and Entry Order, *DeLeon v. Stowe Motel*, LLC, Dckt. No. 97-5-17 Lecv, at 5 (Oct. 18, 2019). In 2021, the Court found that while Plaintiff's expert had offered opinions on five different areas concerning the bicycle and bicycle maintenance, his opinions on the last two areas, which were most relevant to the issue of causation, were outside his ability and opinion. Decision on Motion, *DeLeon v. Stowe Motel, LLC*, Dckt. No. 9705017 Lecv, at 2–3 (Feb. 17, 2021). The Court wrote:

> On the basis of his extensive experience, Mr. Thomas has the knowledge and experience to testify as to the first three items: the maintenance and care needed to make bicycles offered to the public reasonably safe, the mechanical consequences of lack of maintenance on operation, and the specific defects that are more likely than not to occur in the absence of regular maintenance. He is an expert in the field of the maintenance and repair of bicycles. That does not automatically mean that he is qualified to give opinion testimony on any question presented to him in relation to an incident involving a bicycle.

Id. at 2. The Court also noted that Mr. Thomas could not testify as to the cause of the crash because "while he is an expert in bicycle repair and maintenance, he is not an expert in accident reconstruction." Id. at 3.

Now, two and a half years later after the exclusion of his testimony, Plaintiff lays the failure of Mr. Thomas' testimony at the foot of Defendant's spoliation and seeks to enlarge the curative instruction to the element of causation. Plaintiff argues that her expert could not come to a conclusion on causation because he could not examine the bicycle, but that if the bicycle had been preserved, he would have been able to examine it and come to a conclusion.

As this Court has previously noted, the remedy of an adverse inference from spoliation is limited. Decision and Entry Order, *DeLeon v. Stowe Motel, LLC*, Dckt. No. 97-5-17 Lecv, at 5 (Oct. 18, 2019). In adopting this remedy, the Court must narrowly tailor the inference under V.R.C.P. 37(f) to an extent that is "no greater than necessary to cure the prejudice," and simply "to restore] the prejudiced party to the same position that it would been in absent the discovery violation by [the] opposing party." *Kronisch v. United States*, 150 F.3d 112, 126 (2nd Cir. 1998). While the Court does have broad discretion, it "should impose the least harsh sanction that can provide an adequate remedy." *Hawley v. Mphasis Corp.*, 302 F.R.D. 37, 46 (S.D. N.Y. 2014) (quoting *Pension Comm. of*

Univ. of Montreal Pension Plan v. Banc of Am. Sec., 685 F.Supp.2d 456, 469 (S.D.N.Y.2010), abrogated by *Chin v. Port Auth. of New York & New Jersey*, 685 F.3d 135 (2d Cir.2012)).

Plaintiff's argument is that the present instruction is not an "adequate remedy" because "but for" the spoliation Mr. Thomas would have been able to examine the bicycle and make a determination regarding causation. This may, in fact, be true, but it does not necessarily mean that Plaintiff is entitled to an expanded spoliation instruction. The remedy under V.R.C.P. 37(f) is not intended to be punitive or dispositive on a particular issue. It is meant to shift the burden in the least harsh manner possible to effectively put a part in a position where it would have been but for the destruction of the evidence. The Court's instruction effectively lifts the burden from Plaintiff of showing that Defendant breached its duty of care by failing to store and maintain the bicycle in a safe or standard condition.

The issue of causation is different. Causation requires a Plaintiff to link a Defendant's duty of care and breach of that duty of care with specific facts that tie it to the injury suffered. Much of this evidence remains available to Plaintiff. She and other witnesses can testify to the nature of the incident, what they heard and saw, what she felt, and other details that would indicate a specific chain of events that either arose from operator error, environmental conditions, mechanical defects, or some combination thereof. This is primarily the realm of accident reconstruction—it is a forensic process.

Based on this, the Court declines to extend its prior Rule 37(f) remedy to the realm of causation for the following reasons.

First, an instruction on both breach and causation would effectively result in a directed verdict. This is improper where there is contradictory evidence about the cause of the incident and where Plaintiff would normally bear the burden of proof. Plaintiff is not devoid of proof of causation and an instruction that took this out of the hands of the jury would be improper.

Second, Plaintiff has not established that proof of causation is impossible without the bicycle. She has only shown that it is impossible for <u>this</u> witness to opinion on causation without the bicycle. Again, this is a witness who does not specialize or have experience in accident reconstruction and forensic work. Without a showing of greater impossibility, the Court does not

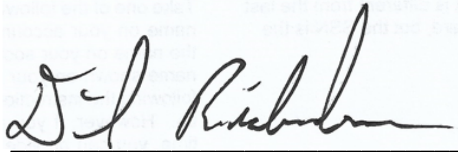
understand a compelling reason to extend its prior reasoning and tip the balance in this matter further.

Third, it is not apparent why, after several motions and more than two and a half years after the determination of the motion in limine concerning Mr. Thomas' causation opinions, this issue is rising just before trial. Given the fact that Plaintiff retained Mr. Thomas and knew of his opinion prior to the Court's 2019 decision imposing the Rule 37(f) remedy, this last-minute push to expand the Rule 37(f) remedy appears untimely.

For these reasons, the Court declines to adopt the clarification and expansion of the Rule 37(f) remedial instructions that Plaintiff has proposed.

Plaintiff's Motion is **Denied.**

Electronically signed on 8/30/2023 12:07 PM pursuant to V.R.E.F. 9(d)



Daniel Richardson
Superior Court Judge