RICHARD SIMON and SANDRA, SIMON, h/w	:	IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA
Plaintiffs	:	
	:	
vs.	:	NO. 03-01,015
	:	
	:	
	:	
FORKLIFTS, INC.,	:	
Defendant	:	MOTION IN LIMINE

Date: December 8, 2004

OPINION and ORDER

Before the Court for determination is the final issue raised in Plaintiffs Richard and Sandra Simon's (hereafter "Simons") Motion in Limine filed September 14, 2004. In the Motion, Simons sought to preclude Defendant Forklifts, Inc. (hereafter "Forklifts") from introducing at trial testimony concerning an opinion in the investigation report of Shop Vac's safety manager, Harry Vinton (hereafter "Vinton"), the statement in EMT Elisa McKee's report attributed to Richard Simon, and testimony concerning Vinton's conversations with Simons' counsel, Stewart L. Cohen (hereafter "Cohen").[1] In an Order filed September 22, 2004, this Court granted the Motion in two respects.

Since Forklifts did not object, the Court ordered that testimony concerning the opinion in Vinton's investigation report and the statement attributed to Richard Simon in EMT Elisa McKee's report were excluded from evidence at trial. With regard to that Order, the Court needs to make a correction. The September 22, 2004 Order states, "… the statement

[1] " 'A motion *in limine* is a procedure for obtaining a ruling on the admissibility of evidence prior to or during trial, but before the evidence has been offered.'" ***Delopolo v. Nemetz***, 710 A.2d, 94 (Pa. Super. 1998) (quoting ***Meridian Oil & Gas Enters, Inc. v. Penn Central Corp.***, 614 A.2d 246, 250 (Pa. Super. 1992), *app. denied*, 627 A.2d 180 (Pa. 1993)), *app. denied*, 1999 Pa. LEXIS 706.

attributed to Plaintiff Richard Simon and EMT Elisa McKee's report are excluded from evidence at trial." The Order should read "… the statement attributed to Plaintiff Richard Simon in EMT Elisa McKee's report are excluded from evidence at trial." The Motion in Limine sought preclusion of the statement, not the entire report.

The Court deferred deciding the issue concerning Vinton's conversations with Simons' counsel. The Court gave Forklifts two weeks from the date of the Order to submit a brief on the issue. Forklifts filed a brief on October 5, 2004. Simons filed a response to the brief on October 11, 2004.

In his deposition, Vinton testified that when an accident occurs at Shop Vac it is the safety manager's responsibility to conduct an investigation. Deposition of Harry Vinton, 34 (May 20, 2004). Vinton did begin an investigation of the accident involving Plaintiff Richard Simon, but he did not complete it. According to Vinton, he was told to stop the investigation by Simons' counsel, Cohen. Id. at 35. Vinton testified that sometime after the accident, Cohen told him in person not to proceed with the investigation because it would taint the evidence. Ibid. At the time, Vinton assumed that Cohen was Shop Vac's attorney.

In his deposition, Vinton was also asked whether he told representatives of Forklifts that he could not talk to them about the accident. Vinton testified that it was possible, but he could not remember. Deposition of Harry Vinton, 67 (May 20, 2004). Vinton testified that he does not recall whether Cohen specifically instructed him not to talk to anyone from Forklifts about the accident, but that was the impression he got from Cohen. Ibid.

Simons want to preclude Forklifts from introducing at trial evidence regarding the alleged instruction from Cohen to Vinton to stop the investigation and not to speak with

anyone from Forklifts regarding the accident. Simons argue that this evidence is irrelevant to any of the issues in the case and is unfairly prejudicial to them. Therefore, the issue before the Court is the relevancy of this evidence.

The admissibility of evidence is within the sound discretion of the trial court. ***Commonwealth v. Bryson***, 2004 Pa. Super. 405; ***Delpopolo***, 710 A.2d at 94. The relevancy of evidence is a threshold requirement to its admissibility. ***Commonwealth v. Eubanks***, 512 A.2d 619, 623 (Pa. 1986); ***Sprague v. Walter***, 656 A.2d 890, 907 (Pa. Super. 1995), *app. denied*, 670 A.2d 142 (Pa. 1996). Relevant evidence is admissible, but irrelevant evidence is inadmissible. Pa.R.E. 402. Relevant evidence is "… evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Pa.R.E. 401.

Determining the relevancy of evidence is a two-step analysis. ***Commonwealth v. Stewart***, 336 A.2d 282, 285 (Pa. 1975). The court must look at the evidence's materiality and its probative value. " 'Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial.'" ***Kearns v. DeHaas***, 546 A.2d 1226, 1233 (Pa. Super. 1988) (quoting ***Commonwealth v. McNeeley***, 534 A.2d 778, 779 (Pa. Super. 1987)), *app. denied*, 559 A.2d 527 (Pa. 1989). " 'Probative value, on the other hand, deals with the tendancy [sic] of the evidence to establish the proposition that it is offered to prove.'" ***Ibid***.

"However, relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice." ***Mahan v Am-Gard, Inc.***, 841 A.2d 1052, 1057

(Pa. Super. 2002), *app. denied*, 858 A.2d 110 (Pa. 2004); *see also*, Pa.R.E. 403. Evidence is not unfairly prejudicial simply if it is unfavorable to a party. ***Hutchison v. Luddy,*** 763 A.2d 826, 847 (Pa. Super. 2000), *app. denied*, 788 A.2d 377 (Pa. 2001). Evidence is unfairly prejudicial if it has "… an undue tendency to suggest a decision on an improper basis." ***Mahan***, 841 A.2d at 1057.

The first basis on which Forklifts argues that the testimony concerning the instruction to stop the investigation is relevant is to demonstrate Richard Simon's consciousness of guilt. In this civil matter, it would be better termed a consciousness of comparative negligence. The comparative negligence of Simon is material to the issues in the case. Simon has asserted a negligence claim against Forklifts. Under the Comparative Negligence Act, Simon's cause of action could be barred if the jury determined that his negligence was greater then Forklifts' or, if the jury does not, the amount of damages that Simon would receive could be proportionately reduced by the percentage of his negligence attributed to causing the accident. 42 Pa.C.S.A. §7102(a). Therefore, evidence demonstrating Simon's consciousness of his negligence would be material in determining whether he was comparatively negligent.

Forklifts' theory is that the instruction to cease the investigation would have come after Vinton's investigation report was prepared. The report contained an opinion that the accident was caused by Richard Simon's improper use of the forklift. Forklifts contends the timing creates an inference that Vinton was told in order to stop the investigation to prevent him from further developing evidence that could establish Richard Simon's negligence in causing the accident.

Initially, the Court must note that the mere fact that the opinion in Vinton's investigation report has been declared inadmissible does not end the inquiry in this matter. "Evidence that is inadmissible for one purpose is not inadmissible for all purposes." ***Coffey v. Minwax, Co.***, 764 A.2d 616, 621 (Pa. Super. 2000). By the Order of September 22, 2004, the Court has declared the opinion inadmissible as substantive evidence that Simon used the forklift improperly. However, Forklifts would not be offering the opinion and evidence related to the investigation that gave rise to the opinion as substantive evidence concerning Simon's use of the forklift. Such evidence could be offered for the purpose of showing the effect it had on Simon. That is, upon learning of the report, Simon would be concerned about others discovering his role in causing the accident that injured him, and therefore, would take the necessary actions to prevent that from occurring. In this regard, whether or not Vinton was correct that Simon used the forklift improperly is of no consequence. The import of the proffered evidence is not the accuracy of what was said or written, but how Simon reacted, which could be considered as evidence of his fault in causing the accident. Therefore, the testimony is being offered for a different purpose then the one that was declared inadmissible.

A logical argument can be advanced to support the proposition that the testimony regarding the instruction by Cohen to stop the investigation demonstrates Simon's consciousness of comparative negligence. However, a logical argument can also be advanced to support a proposition that the evidence demonstrates a less deceptive purpose on the part of Simons' counsel. For instance, the instruction could have been given in an attempt to preserve the evidence in order to determine what actually happened. This is in fact what Vinton testified as the reason Cohen gave when he requested the investigation be halted. Deposition of Harry

Vinton, 35 (May 20, 2004). The Court is not making a determination as to what the purpose behind the instruction was, as resolving issues of credibility and fact is the province of the fact finder, but only notes this to demonstrate that the probative value of this evidence is not all that strong.

On the other hand, the prejudicial effect of the evidence is very strong. Placing this evidence before the jury would create the possibility that the jury would base their determination of liability on an improper basis, namely the asserted surreptitious conduct of Simons' counsel. The allure of some "kind of clandestine lawyer thing going on," as Vinton put it, might be too much for jurors to resist. They could easily be distracted from the real and substantive evidence, in the form of testimony from witnesses and experts that could or could not establish Simon's contributory negligence. Therefore, assuming *arguendo* that the actions of counsel can be imputed to Simon, the Court nevertheless finds the evidence to be inadmissible to show Simon's consciousness of comparative negligence. In making this determination, the Court must balance the weight of the probative value against the prejudicial effect. Here, the probative value of the testimony regarding the instruction by Cohen to stop the investigation is outweighed by the unfair prejudice created by the evidence.

The second reason advanced by Forklifts as to why the testimony regarding the instruction to stop the investigation and the instruction not to talk to anyone from Forklifts is relevant is to show Vinton and Shop Vac's bias in favor of Simons. "Pennsylvania courts have consistently held that evidence of bias is relevant to impeach the credibility of a witness." ***Commonwealth v. Rouse***, 782 A.2d 1041, 1045 (Pa. Super. 2001). " '[P]roof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically

been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony.'" ***Ibid***. (quoting ***Commonwealth v. Abu-Jamal***, 555 A.2d 845, 853 (Pa. 1989)). However, impeachment evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice. ***Ibid***; *see also*, Pa.R.E. 403. "The United States Supreme Court has defined bias as 'the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party.'" ***Ibid***. (quoting ***United States v. Abel***, 469 U.S. 45, 52 (1984)).

Forklifts asserts that the evidence regarding the instruction to stop the investigation and not talk to anyone from Forklifts demonstrates bias on the part of Vinton and Shop Vac. Forklifts contends that Vinton, and thereby Shop Vac, readily capitulated to Cohen's commands even though Cohen had no authority to force him to do so. Forklifts argues that this demonstrates a bias in the form of a desire by Vinton to hamper Forklifts from receiving necessary details about the accident.

This relevancy argument suffers from the same fatal flaw that the consciousness of comparative negligence argument did – the probative value is outweighed by the unfair prejudice. Again, assuming *arguendo* that the actions of counsel can be imputed to Simons, the evidence does have some probative value to support Forklifts' theory. If Cohen had no way to force Vinton and Shop Vac's compliance, then why would they acquiesce to his demands if they where not on his side? Another explanation, however, is that Vinton listened to Cohen out of more selfish motives. If Vinton believed that Cohen was Shop Vac's attorney, it would behoove him to toe the company line and heed the instructions of the company's attorney or

risk being fired for his insolence. Again, the reasonableness of other explanations for the conduct lessens the weight given to the probative value of this evidence.

As with the consciousness of comparative negligence argument, the unfair prejudice that would be created by this evidence is great. This evidence would place the alleged conduct of Simons' counsel before the jury. The truth determining process would be clouded by speculative notions of backroom deals made between Simons' attorney and Vinton (and Shop Vac). It would be impermissible to permit this evidence to be placed before the jury and enable them to go on such flights of fancy. Therefore, the evidence regarding the instruction to stop the investigation and not talk to anyone from Forklifts is unfairly prejudicial and inadmissible.

Forklifts' final contention is that the evidence should be admissible because the conduct of Simons' attorney constitutes a violation of the Pennsylvania Rules of Professional Conduct, and is a sufficient basis to allow the evidence to be presented to the jury. Whether the conduct of Simons' attorney violated the Rules of Professional Conduct is not an issue before the fact finder in this case, and this is not an appropriate forum to address that issue. If a violation has occurred, Forklifts can pursue a course of action to hold offending counsel accountable through the available disciplinary procedures without damaging the apparently innocent client – Simons -- who are not accused of any misdeed.

In conclusion, Forklifts has failed to demonstrate that the probative value of the evidence regarding the alleged conduct of Simons' counsel is not outweighed by the unfair prejudice it creates. Therefore, it is inadmissible.

Accordingly, the Motion in Limine is granted.

O R D E R

Plaintiffs Richard and Sandra Simon's Motion in Limine filed September 14, 2004 is GRANTED. Forklifts, Inc. is precluded from introducing evidence related to any conversations or instructions from Plaintiffs' counsel, Stewart L. Cohen, to Harry Vinton directing him to stop his investigation of the accident and to refrain from talking to anyone from Forklifts, Inc. regarding the accident.

BY THE COURT:

William S. Kieser, Judge

cc: Stewart L. Cohen, Esquire and
Joel S. Rosen, Esquire
Kessler, Cohen & Roth; Two Penn Center Plaza, Suite 1705
Philadelphia, PA 19102
Bret J. Southard, Esquire
Judges
Christian J. Kalaus, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)