

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

NICHOLAS MAXSON
Plaintiff

CIVIL ACTION NO. 15 - 189

v.

JUSTIN WEAVER
Defendant

MOTION IN LIMINE

OPINION AND ORDER

This is a personal injury case arising from a pedestrian being struck by a motor vehicle on April 3, 2014 at the intersection of Hepburn Street and Little League Boulevard. Presently before the Court is a motion in limine filed on March 31, 2017 by Plaintiff. In that motion, Plaintiff seeks to preclude evidence as to (1) the point of impact and (2) criminal convictions that do not involve dishonesty. The Court held argument on April 10, 2017. The Court provides the following discussion in support of its rulings.

Initially, this Court notes that the admission and exclusion of evidence is within the sound discretion of the trial court. Jacobs v. Chatwani, 922 A.2d 950, 960 (Pa.Super. 2007), *quoting*, Freed v. Geisinger Med. Ctr., 2006 PA Super 274, 910 A.2d 68, 72 (Pa. Super. 2006)(citations and quotation marks omitted). “All relevant evidence is admissible, except as otherwise provided by law. Evidence that is not relevant is not admissible.” Pa.R.E. 402. Evidence is relevant if it has “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. “The court may exclude relevant evidence if its probative value is outweighed by a danger of ... unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. Pa.R.E. 403. Unfair prejudice results when the evidence suggests decision on an improper basis or diverts the jury's

attention away from its duty of weighing the evidence impartially. Pa.R.E. 403 (comment); see, Commonwealth v. Hitcho, 123 A.3d 731, 767 (Pa. 2015).

In his first part of the motion, Plaintiff seeks to preclude testimony, evidence or argument that the point of impact occurred on the east side of the street without expert testimony because it would be too speculative.¹ The Superior Court has addressed the admissibility of point of impact testimony by non-experts. In McKee v. Evans, 380 Pa. Super. 120, 128-29, 551 A.2d 260, 264 (Pa. Super. 1988), the Superior Court concluded that, while a non-expert police officer cannot offer an opinion as to *causation*, testimony about the point of impact based upon debris at the scene and/or witness accounts is admissible as lay opinion testimony. (emphasis added) In that case, the Superior Court specifically held “that the testimony proffered by [the non-expert police officer] regarding point of impact was properly admissible as lay opinion.” McKee, *supra*, 551 A.2d at 264.

In the present case, Police Officer Brian J. McGee and Defendant Justin Weaver have provided deposition testimony that the point of impact occurred on the east side of the intersection. Officer McGee’s does not opine as to causation of the accident. Instead, Officer McGee testified that the point of impact occurred on the eastern side of Hepburn Street as opposed to the western side. Deposition of Officer McGee, dated May 13, 2016, at 16: 7-11. Officer McGee further testified that this testimony was “a guesstimate based off of the final resting place of Mr. Maxon and the final resting place of his vehicle, Mr. Weaver’s vehicle.” *Id.*, at 19: 10-15. Officer McGee’s point of impact testimony was based upon physical evidence at the scene, that is, the position of the pedestrian and vehicle. Similar point of impact testimony

¹ At argument, Plaintiff’s counsel clarified that, despite the reference to crosswalk in the motion, Plaintiff to preclude evidence that the point of impact was on the east side of the intersection. There does not appear to be evidence as to whether the impact occurred inside or outside the crosswalk.

was permitted as admissible lay opinion in McKee. While Officer McGee characterized this as a “guesstimate,” he based his point of impact testimony upon physical evidence at the scene.²

Justin Weaver’s testimony is based upon a first-hand recollection and is not lay opinion or speculative. In his deposition, Justin Weaver testified that the accident occurred “on the east side of the intersection of Hepburn and Little League Boulevard.” Deposition of Justin Weaver, dated November 4, 2015, at 12:1-4. Weaver testified that he traveled “eastbound on Little League Boulevard[,] ...approached the intersection, the light was green.” Id. at 15:18-20. Weaver “continued through the intersection” and as he “was exiting the intersection, on the ... east side, .. contact was made with [his] car.” Id. at 15:20-24; 15:1. While Weaver could not be certain precisely where impact occurred, such as whether it was inside or outside the crosswalk, Weaver unequivocally testified it was on the east side of the intersection. Id. at 16:9-10; 17:14-16, 18:3; 28:8-9. The Court concludes this testimony is an eye-witness account of the point of impact and admissible.

In the second part of his motion, Plaintiff seeks to preclude testimony, evidence, or argument regarding criminal convictions not involving dishonesty or false statements. Evidence of prior criminal convictions of *crimen falsi* within the past ten years is per se admissible for impeachment purposes. Pa.R.E. 609; Russell v. Hubicz, 425 Pa. Super. 120, 133, 624 A.2d 175, 182 (Pa. Super. 1993)(formally adopting “Randall rule in cases involving the impeachment of witnesses in civil actions.”) Convictions not involving crimes of dishonesty or false statements generally would not be relevant and Defense Counsel has not offered any theory as to relevancy.

² The Court notes that the failure to use “magic words” does not automatically render an expert’s opinion speculative when the substance of the testimony establishes the opinion is properly based. See, e.g., Commonwealth v. Spatz, 562 Pa. 498, 537, 756 A.2d 1139, 1160 (Pa. 2000) Stimmler v. Chestnut Hill Hosp., 602 Pa. 539, 555, 981 A.2d 145, 155 (Pa. 2009). Similarly, Officer McGee’s use of the word “guesstimate” should not automatically render the testimony speculative when the substance of the testimony establishes that it was based upon the physical evidence as was permitted in McKee, *supra*.

Moreover, evidence of such convictions would generally be outweighed by the potential for prejudice.

ORDER

AND NOW, this 11th day of **April, 2017**, for the foregoing reasons, it is ORDERED and DIRECTED as follows.

1. The motion to preclude testimony, evidence or argument that the point of impact occurred in the east crosswalk or on the east side of the street is GRANTED in part and DENIED in part.
 - a. The motion is DENIED as to testimony, evidence or argument that the point of impact occurred on the east side of the intersection and such evidence is admissible.
 - b. The motion is GRANTED as to testimony, evidence or argument as to where the point of impact occurred in relation to the crosswalk. No competent evidence was presented as to whether the point of impact occurred inside or outside the crosswalk and therefor such evidence is inadmissible as speculative.
2. The motion to preclude testimony, evidence or argument as criminal convictions that do not involve dishonesty or false statements is GRANTED; evidence of criminal convictions that do not involve dishonesty or false statements is not relevant, inadmissible and is excluded.

BY THE COURT,

April 11, 2017
Date

Richard A. Gray, J.

c: Amy R. Boring, Esquire (for Plaintiff)
Thomas P. Clark, Esquire (for Defendant)
Hubshman, Flood, Bullock & Dorn, 2200 Stafford Ave., Ste 500
Scranton, PA 18404-3690