IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

YLONDA WOULARD **PLAINTIFF**

V. **CIVIL ACTION NO. 1:17-cv-00231-HSO-JCG**

GREENWOOD MOTOR LINES, INC.
d/b/a R+L CARRIERS; and
CURTIS HARRIS, JR. **DEFENDANTS**

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL

The Court should order a new trial because Plaintiff subjected Defendants to an unfair trial by repeatedly arguing about and eliciting evidence (1) this Court had excluded, or (2) which was otherwise patently inadmissible and unduly prejudicial. Plaintiff's misconduct is all the more damning when viewed in the dark shadow cast by her repeated perjury and intentionally deceitful, pre-suit suppression of her material medical history.

A new trial is justified when a party undertakes a systematic scheme to interject wholly inflammatory and patently inadmissible accusations, allegations, and evidence into a case. The Court should grant judgment to Defendants as a matter of law, but if it does not, it should at least order a new trial.

FACTS AND PROCEDURAL HISTORY

On the eve of trial, as the parties conducted expert depositions, Plaintiff ambushed Defendants with a new trial strategy centered on the unduly prejudicial (and false) theme that Defendants deliberately destroyed evidence and were hiding facts helpful to Plaintiff. Around the same time, she revealed her intent to call the responding officer Travis Harkins, despite never

disclosing him as a witness (fact or expert) and despite his complete (and self-confessed) lack of qualifications in the field of accident reconstruction.

In response, Defendants filed motions *in limine* to exclude, *inter alia*, (1) any arguments that Defendants spoliated evidence, (2) any reference to the fact that Defendants would not have a corporative representative present at trial, and (3) testimony from Officer Harkins.

The Court granted each of these motions, holding: (1) "Plaintiff has never formally raised spoliation . . . Nor has Plaintiff proffered any evidence from which the Court could make a threshold determination as to the foundation for any adverse inference . . .") [Dkt. No. 92] at 9; (2) "[T]o comment on a corporate representative's failure to attend trial, . . . may improperly inflame the jury by suggesting that the corporate defendant does not care about the case or an ailing plaintiff. . . . the absence of a corporate representative . . . is not relevant . . . [and] the probative value . . . would be substantially outweighed by the dangers of unfair prejudice, confusing the issues, misleading the jury, and wasting time. . . . any evidence or argument regarding the absence of a corporate representative . . . will not be permitted at trial, including during *voir dire*." *Id.* at 10; and (3) "Officer Harkins will only be permitted to testify consistent with the Mississippi Uniform Crash Report, to the extent said testimony comports with the Federal Rules of Evidence." [Dkt. No. 95] at 1. The Court's orders could not have been more clear—Plaintiff could elicit testimony regarding the non-expert, admissible information in Harkins' report, but otherwise these three topics were off-limits.

Despite this clarity, Plaintiff violated the Court's orders repeatedly and brazenly, with the first violation occurring before the jury was even seated, and the second occurring less than five minutes into opening statement. Plaintiff also violated rulings that the Court issued during the course of trial, and in general held the Court's rulings and the Federal Rules of Evidence in

contempt. Plaintiff's approach was improper, undermines the integrity of the judicial system, and subjected Defendants to an unfair trial. Accordingly, Defendants were forced to object repeatedly in front of the jury, the cumulative effect of which became prejudicial to Defendants, and were forced to move for a mistrial on several different occasions.

First, Plaintiff repeatedly referenced spoliation, beginning in opening statement when she stated "we don't have the brake or computer data from the tractor-trailer. It wasn't downloaded or at least we don't have it that would have shown the exact speeds he was going and if he braked or how hard he braked. We don't have any of that information". Exhibit 1, February 12, 2019 Transcript at 88. Defendants objected, and the Court sustained the objection. Later, following up on that poisonous seed, she elicited testimony from her accident reconstructionist Brett Alexander that Defendants destroyed evidence—Alexander testified "the tractor-trailer was moved. No data was collected from it after the accident. So we really had nothing --". Exhibit 2, February 13, 2019 Transcript at 33. Plaintiff also suggested that Defendants had tampered with her car, asking Defendants' expert Allen Powers who had "pulled out" the taillight from her vehicle and saying that someone had "messed with it". Exhibit 3, February 14, 2019 Transcript at 204.

Second, Plaintiff repeatedly referenced and interjected Officer Harkins' irrelevant, unfounded, and unreliable personal opinions (pseudo-expert conclusions and findings) regarding who he thought was at "fault." She did so in the most prejudicial way possible, by asking the first trial witness, Defendant Curtis Harris, whether he was "aware of the police report findings in terms of who was at fault in the wreck". Exhibit 1, February 12, 2019 Transcript at 153. Defendants objected, *id.*, but the jury had already heard the question, and as Defendants explained then, the implication was obvious—the officer determined that Harris was at fault. *Id.*

at 158 ("counsel opposite has definitely implanted in the minds of the jury that within Exhibit P1, there is some type of the finding that would be adverse to the position and interest of Mr. Harris. . . . [otherwise], the question would not have been asked."). Even more disturbingly, Plaintiff asked the question minutes after misrepresenting to the Court that she would approach the bench before exploring the issue. *Id.* at 150 (stating, in response to an objection to a similar question, "I don't think I need to approach just yet. I will save that for a minute."). Plaintiff next referenced the inadmissible opinions with Harkins himself, by having Harkins reference "my investigation" after broadly asking him about "any other observations" he made. *Id.* at 182. The Court cut off Harkins' answer, but the damage was done—the jury was again left with the clear impression that Harkins had made findings adverse to Defendants. And, again, Plaintiff asked the question only after misrepresenting that she would "not ask for any opinions about fault or any substance regarding the cause of his report" and would "just . . . talk to his factual knowledge." *Id.* at pg. 171.

Plaintiff also attempted to backdoor evidence regarding information not included in Harkins' report. Specifically, during her testimony, Plaintiff testified regarding Officer Harkins' alleged location just prior to the incident. Defendant promptly objected and yet again moved for a mistrial, as the information had been excluded by the Court's pre-trial order. Exhibit 3, February 14, 2019 Transcript at 49-54. The Court admonished Plaintiff for yet again attempting to disrespect its rulings, but did not grant the motion for mistrial. *Id.*

Third, the first three times that Plaintiff stood in front of the jury, she referenced Defendants' decision to not have a corporate representative present at trial. In *voir dire*, she told the venire that she intended to call the corporate representative. Exhibit 1, February 12, 2019 Transcript at 38. Thereafter, the Court again instructed Plaintiff to refrain from referencing the

corporate representative, "so we don't have a situation where you call someone in front of the jury, there is no one here, . . . and it accomplishes the same thing. . . .don't bring it up in front of the jury." *Id.* at 44. Nevertheless, Plaintiff referenced Defendants' corporate representative (1) during opening statement, stating that "Ylonda had conversations with their corporate rep, talked to them on the phone, discussed what happened", *id.* at 91, and (2) asked Curtis Harris questions about the "company guy that came out" to the scene. *Id.* at 167.

Plaintiff's goal in referring to the corporate representative was three-fold: (1) highlight that the representative was not present at trial, (2) imply that the representative had previously conceded responsibility for the accident, and (3) suggest that the representative tampered with evidence. Plaintiff even admitted (perhaps inadvertently) these improper motives, (1) stating in a bench conference, "I'm going to ask for the corporate rep. . . . I would love to have the theatrics of it . . ." Exhibit 1, February 12, 2019 Transcript at 185, (2) stating in another bench conference that Defendants "paid the property damage claim. They told us they were going to take care of this. What are we doing? Every time you try to hide the truth it's problem",[1] and (3) by engaging in the improper questioning of Defendants' expert Allen Powers mentioned above. Exhibit 3, February 14, 2019 Transcript at 204.

Finally, Plaintiff suggested in front of the jury that Defendants' expert Daniel Melcher had withheld evidence because he did not attach certain videos and screen shots to his report, even though Plaintiff knew the accusation was false since Melcher willingly produced the information to Plaintiff at his deposition. Plaintiff attempted to show the video in opening statement, but the Court instructed Plaintiff that she could introduce the video only through a proper sponsor. Ignoring this ruling, Plaintiff then attempted to introduce the video during

[1] Plaintiff conceded that it was improper to explore the topic in front of the jury, and she was smart enough to not reference the topic directly. Instead, she back-doored it.

Harris' cross-examination, stating (1) "this is a defense exhibit", (2) showing it "will speed things up", (3) "their expert, Daniel Melcher, [h]e took this video", and (4) "I'm just trying to speed it up . . . Are they objecting?". Exhibit 1, February 12, 2019 Transcript at 138. Plaintiff thus suggested that Defendants were hiding their own expert's work, and were needlessly prolonging the trial—even though Plaintiff knew the accusation was false, because she had the information and the specific exhibits before trial.

Further, when Melcher testified, Plaintiff showed him a screenshot and said "Somebody messed up. This was not in your report, was it?", "why did you hide it [a certain video] from us?", and "I just figured this out at trial. I would have never learned it . . .". Exhibit 4, February 15, 2019 Transcript at 30. The Court strongly admonished Plaintiff, stating "If you didn't figure it out until now, that's not Mr. Melcher's fault. Do you understand that? . . . Now move on." *Id.* Plaintiff still ignored the Court's order, arguing in closing that Melcher had unfairly manipulated his videos to make them "look a certain way", and "He knows he's being recorded and he knows he's going 50 miles an hour, and he hid it in his reports. I've had to become a detective." *Id.* at 135-136. Again, contrary to Plaintiff's accusation, she had the materials before trial, and to suggest otherwise was prejudicial to Melcher and to the Defendants. Further, the Court granted Defendants' motion *in limine* to exclude references to discovery disputes, [Dkt. No. 92], a ruling the Court reaffirmed over and over again during the course of trial.

In summary, Plaintiff repeatedly violated the Court's orders regarding (1) alleged spoliation, (2) Officer Harkins' conclusions, (3) Defendants' corporate representative's presence, and (4) false and baseless suggestions that Melcher hid evidence. Even more troubling, Plaintiff often elicited the inadmissible evidence just after promising not to. Plaintiff thus subjected Defendants to an unfair trail by presenting a false picture of a Janus-faced company unwilling to

accept responsibility for an incident that it knew was its driver's fault. Lest there be any doubt about that, Plaintiff drove the point home in opening statement and in closing argument. Exhibit 1, February 12, 2019 Transcript at 93 ("952 days later, two years, seven months, nine days after we had the discussions with the company, after the driver talked to the police officer, after they did discovery responses, after the driver's deposition, after my client's deposition, they didn't say anything about taillights, anything. And then on June 14th, 2018, the expert opinion comes along, and they've got a new defense."); Exhibit 4, February 15, 2019 Transcript at 106 ("I would suggest to you that some people will never, ever accept responsibility."), 109 ("Now, we talked at length about how long it took for them to come up with that defense, . . ."), 110 ("it's not intellectually honest").

The Court frequently expressed concerns about Plaintiff's misconduct and admonished Plaintiff to cease—an admonition she violated just as often. A sampling of the Court's comments follows:

- Regarding Plaintiff's references to spoliation, the Court stated Plaintiff was "leaving some improper inference in the jury's mind that would only be appropriate if there had been some spoliation" Exhibit 1, February 12, 2019 Transcript at 90, and "there comes a point where this kind of stuff gets to be so cumulative that it becomes a problem". Exhibit 2, February 13, 2019 Transcript at 38.

- As to Plaintiff's improper arguments that someone had altered her vehicle, the Court stated "there's been no evidence whatsoever about what may have happened there, and I'm going to caution counsel again, argument must be confined to the evidence . . ." Exhibit 4, February 15, 2019 Transcript at 88.

- When Plaintiff asked Harris about Harkins' findings, the Court effectively summarized Defendants' concern "that question being posed, was Mr. Harris ever made aware of the police report findings, plants in their [jurors'] minds the question or suggestion . . . that there was a finding of fault against Mr. Harris . . . " Exhibit 1, February 12, 2019 Transcript at 164. Further, the Court subsequently stated that the question was improper and never should have been asked. Exhibit 2, February 13, 2019 Transcript at 22-23 ("So the Court finds that to the extent that was an improper question, **and it was**, . . .") (emphasis added).

- When Plaintiff attempted to testify regarding Harkins' location prior to the incident, the Court repeatedly stated that Plaintiff was trying to backdoor the Court's ruling on Harkins. Exhibit 3, February 14, 2019 Transcript at 49-54.

- Regarding Defendants' corporate representative, the Court stated: "That would be essentially calling attention to the fact that they don't have someone here, which is what they moved in limine on and which I granted." Exhibit 1, February 12, 2019 Transcript at 188.

- As stated above, the Court admonished Plaintiff regarding blaming Melcher concerning his videos. At a subsequent bench conference, the Court further explained, "The way to do that, if there's an issue like that, you raise it with the Court and counsel outside the presence of the jury, not by accusing the witness on the stand in front of the jury of doing something improper . . . that's not the way you do it. It's not proper." Exhibit 4, February 15, 2019 Transcript at 54. Of course, Plaintiff made no such attempt outside the jury's presence because there was no valid basis for the argument.

- Just prior to closing, the Court correctly noted that "if you do something objectionable, they have to object and then we have to stop it. I think **there's been far too much of** that in this trial any way." *Id.* at 88.

Plaintiff's violations of the Court's orders and the Rules of Evidence allowed her to interject unduly prejudicial accusations, allegations, and falsehoods into the case and cast Defendants in such a false light that they could not possibly receive a fair trial. The cumulative and undue prejudice that Plaintiff's actions caused is borne out by the verdict. The Court should not tolerate Plaintiff's disrespect for its rulings, the Rules of Evidence, and the judicial process. A new trial is warranted, so that the Defendants can have a fair trial devoid of antics that (1) violate the Court's ruling and disrespect its authority, (2) ignore the merits, (3) cast Defendants in a false light, and (4) improperly inflame the passion of the jury.

ARGUMENT

Plaintiff repeatedly elicited inadmissible evidence at trial in an inappropriate, but successful, effort to unduly prejudice the jury against Defendants. As explained above, Plaintiff repeatedly violated the Court's orders excluding (1) alleged spoliation, (2) Officer Harkins'

expert-type opinions, (3) Defendants' corporate representative, and (4) allegations of supposed misconduct by Defendants' expert Daniel Melcher.

The Fifth Circuit has held that improper admission of even one piece of evidence supports a new trial. *Reddin v. Robinson Prop. Group Ltd. P'ship*, 239 F. 3d 756, 758-59 (5th Cir. 2001); *Brown v. Miller*, 631 F.3d 408, 412 (5th Cir. 1980) (reversing award of punitive damages due to admission of one document). Here, there are many instances of improper evidence and/or arguments, not just one. In *Reddin*, the plaintiff introduced evidence that the defendant put up "warning signs and tape around the area of his fall", and plaintiff's counsel "argued in closing that if nothing was wrong with the floor, 'why did they rope it off?'" 239 F. 3d at 759. The Fifth Circuit held that these topics plainly related to inadmissible subsequent remedial measures, justifying a new trial. Importantly, the plaintiff's strategy in *Reddin* was to use inadmissible evidence to suggest that Defendants were improperly trying to avoid responsibility. That is precisely what Plaintiff did in this case.

Plaintiff's repeated suggestions and arguments that Defendants and their expert Melcher were hiding and/or had destroyed evidence were "particularly likely to cause harm because its very purpose is to nudge or tilt the jury." *Teal v. Jones*, 222 So. 3d 1052, (Miss. Ct. App. 2017), citing *Wal–Mart Stores Inc. v. Johnson*, 106 S.W.3d 718, 724 (Tex. 2003); *see also Lively v. Blackwell*, 51 S.W.3d 637 (Tex.App-Tyler 2001) ("In the context of a trial, there are few, if any, more inflammatory accusations than that one party destroyed evidence.") (emphasis added). In *Teal*, the trial court gave an improper spoliation instruction, despite the fact that the defendant presented only "limited **evidence** . . . on this issue at trial," meaning "the extent and seriousness of Marci's alleged wrongdoing was largely left to the jury's imagination." *Id.* (emphasis added). As a result, the Court of Appeals remanded for a new trial. *Id. Teal*'s reasoning is persuasive,

and the Court should reach the same result here. Plaintiff, without a claim for spoliation, without any evidence of spoliation, but with an order in hand forbidding her from referencing spoliation, repeatedly poisoned the jury with improper inferences that Defendants destroyed or concealed evidence, thus leaving the jury to imagine what exactly Defendants destroyed or concealed. The Court's pre-trial admonition reverberates: Plaintiff had no "evidence from which the Court could make a threshold determination as to" spoliation—yet Plaintiff planted the poisonous seed with the jury anyway.

With respect to improper references to Harkins' opinions, an analogous situation occurred in neighboring Jackson County, and it resulted in a mistrial. During the cross-examination of the plaintiff's expert, defense counsel referenced a local officer's speed calculations. The trial court granted a mistrial based on the questions (a decision the Mississippi Supreme Court declined to re-visit on interlocutory appeal), and its reasoning is apt here. It held that because the officer was not properly disclosed as an expert, "his testimony would never have come in except in the manner in which it did, which was a backdoor series of questions asked on cross-examination of the expert witness for the plaintiffs. . . ." Exhibit 5, *Miller v. Ford Motor Co*, Cause No. 2013-00, 262, Trial Transcript at 843. The Court reasoned that the jury would be particularly persuaded by "a person associated with local law enforcement", and stated that the "opinion . . . would never have been admitted, [and] I don't know that bell can be un-rung." *Id.* at 844. That is almost exactly what happened here, except for the fact that, unlike in *Miller*, this Court held prior to trial that the evidence could not come in.

Here, Plaintiff back-doored an expert conclusion of fault against Defendant Harris made by a local officer who (1) she did not disclose as an expert (and in fact did not disclose as a witness at all) and (2) is not an accident reconstructionist. And she did this despite, and in

violation of, the Court having already ruled that "[t]he record is beyond dispute that Plaintiff failed to properly disclose Officer Harkins [as a fact witness] in accordance with Rule 26(a)" and that Harkins could not give such testimony or inference to the jury. [Dkt. No. 95]. If it was "beyond dispute" that Plaintiff did not properly disclose Harkins as a fact witness, it was also "beyond dispute" that Plaintiff did not properly disclose him as an expert witness. Nevertheless, Plaintiff launched straight into Harkins' unqualified opinions through Defendant Harris in a transparent attempt to catch Defendants by surprise and to taint the jury against Harris.

The Second Circuit has ordered a new trial when one party used improper methods to attack its opponent's credibility, as Plaintiff did here when she repeatedly attacked Defendants for allegedly hiding the truth and destroying evidence. *Nimely v. City of New York*, 414 F. 3d 381 (2nd Cir 2005). *Nimely* reversed a jury verdict because the trial court improperly allowed inadmissible testimony that police officers were more likely than the general population to tell the truth. In *Nimely*, as in this case, "witness credibility was the central issue". *Id.* at 400. Plaintiff, knowing this full well, used the litany of aforementioned inadmissible evidence to suggest that Defendants (1) were not credible, and (2) had manufactured a false narrative in an attempt to avoid liability. Again, Plaintiff hammered these themes in her closing.

The impropriety of Plaintiff's conduct is substantially compounded by the fact that she repeatedly referenced these topics after the Court had already excluded them. Motions *in limine* exist for the precise purpose of preventing what happened here—to prevent a jury from hearing unduly prejudicial comments and information before a party can object. *E.g.*, *Whittley v. City of Meridian*, 530 So. 2d 1341 (Miss. 1988) ("The primary purpose of a pre-trial motion in limine is to exclude from trial evidence highly prejudicial to the movant. . . .This eliminates the danger that the evidence will be introduced under the guise of a question propounded to a witness. . .

.[and] the prejudicial impact that a submission of improper evidence may have upon the jury. Once a pretrial motion to exclude by virtue of an order in limine has been granted, the moving party has a binding court order instructing opposing counsel to make no reference to the excluded evidence within the hearing of the jury."); *see also Stubblefield v. Suzuki Motor Corp.*, 2018 WL 4610895 at *1 (S. D. Miss. Sept. 25, 2018) "The purpose of a motion in limine is to allow the trial court to rule in advance of trial on the admissibility and relevance of certain forecasted evidence"). Ignoring this clear, black-letter law, Plaintiff behaved as if the Court's orders and the Rules of Evidence were meaningless.

The Court should not tolerate, and for the sake of the judicial system as a whole, cannot tolerate, such flippant disregard for its orders. Whether viewed individually or through their cumulative impact, the repeated instances of Plaintiff's trial misconduct deprived Defendants of a fair trial. Based upon the undue prejudice alone to Defendants, a new trial is warranted. Further, the fact that Plaintiff evidenced a pre-meditated intentional scheme to defy this Court's orders by interjecting patently inadmissible and unduly prejudicial accusations, along with false narratives and arguments, independently calls for a new trial. In the interest of justice and the integrity of the judicial system, this Court should order a new trial.

CONCLUSION

Plaintiff's trial strategy was premised upon using patently inadmissible evidence to ring the bell that cannot be unrung. Like a law unto herself, she showed no regard for this Court's rulings or the Federal Rules of Evidence. There is no doubt that the things Plaintiff unfairly interjected into the case were unduly prejudicial. Prior to trial, Defendants requested and were granted *in limine* orders that (1) excluded spoliation-type arguments and evidence, (2) excluded references to Defendants choosing to not bring a corporate designee to trial, and (3) limited the

responding officer Travis Harkins to the facts in his report. Plaintiff repeatedly violated these orders, so that she could improperly argue in closing that by simply defending themselves, Defendants were trying to avoid responsibility for an accident that was clearly their fault. Under these circumstances, the Defendants were not given a fair trial, and the Court should order a new trial if it does not render judgment in Defendants' favor due to Plaintiff's repeated and deliberate false witness.

This the 19th day of March, 2019.

Respectfully submitted,

GREENWOOD MOTOR LINES, INC.
D/B/A R+L CARRIERS and CURTIS HARRIS

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing with the Court's electronic filing system which forwarded a copy to all counsel of record.

This the 19th day of March , 2019.

s/ D. Sterling Kidd
D. STERLING KIDD