

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
BUSINESS AND CONSUMER COURT
LOCATION: PORTLAND
DOCKET NO. BCD-CV-16-15

DUDLEY TRUCKING CO.,)
)
 Plaintiffs,)
)
 v.)
)
 BISSON TRANSPORTATION, INC.)
)
 Defendant.)

COMBINED ORDER ON
MOTIONS IN LIMINE

The Court heard oral argument on Plaintiff’s five motions *in limine* and Defendant’s four motions *in limine* on February 6, 2018 in Portland, Maine. Plaintiff Dudley Trucking Co. (“Dudley”) was represented by Jeffrey Bennett, Esq. and Melissa Donahue, Esq. Stephen Seagal, Esq. appeared for Defendant Bisson Transportation, Inc. (“Bisson”). The Court imposed an expedited deadline to respond to the motions and Dudley and Bisson filed written oppositions to all motions with the Court on February 5, 2018. The Court ruled on the motions from the bench during the hearing and now issues this written Order consistent with those rulings.

STANDARD OF REVIEW

The grant of a motion *in limine* is reviewed for an abuse of discretion. *Fitzgerald v. City of Bangor*, 1999 ME 50, ¶ 10, 726 A.2d 1253.

DISCUSSION

I. **PLAINTIFF’S MOTIONS IN LIMINE**

A. **Plaintiff’s First Motion in Limine**

On July 9, 2014, the parties executed a “Transportation Agreement” with an attached “Exhibit” containing certain origins, destinations, miles, and dollar amounts. (Amended Joint Final

Pretrial Statement, Stipulated Fact A.) Dudley’s first motion *in limine* sought to preclude Bisson from referring to the exhibit attached to the Transportation Agreement as a “flat rate sheet” on the grounds that this appellation would confuse or mislead the jury. *See* Me. R. Evid. 403.

The Court **denies** Plaintiff’s First Motion *in Limine*. The Court rules that Dudley’s concerns with Bisson’s label for the contract exhibit can be properly dealt with in cross-examination, or in argument.

A. Plaintiff’s Second Motion *in Limine* and Defendant’s Motion *in Limine* to Exclude Any Evidence That John Katzianer Stated to Dudley Trucking That Bisson Would Pay Dudley Trucking Eighty Percent of the “Gross Line Haul” or “Line Haul”

The Court heard argument on these two motions in tandem, and discusses both here, because both motions deal with certain out-of-court statements of Mr. John Katzianer, a Bisson employee and expected witness at trial. Dudley asks the Court to make a pretrial ruling that Mr. Katzianer had the authority to bind and act on Bisson’s behalf; Bisson asks the Court for an order prohibiting Dudley from introducing any evidence at trial that Mr. Katzianer stated to Dudley that Bisson would pay Dudley eighty percent of the gross line haul in the grounds that it is hearsay.

These motions are two sides of the same coin, and both are premature. Whether Mr. Katzianer was an agent of Bisson and the scope of any agency relationship is a question of fact for the jury to decide. *See Cty. Forest Prods. v. Green Mt. Agency, Inc.*, 2000 ME 161, ¶ 21, 758 A.2d 59. Whether Mr. Katzianer’s statements to Dudley are hearsay turns, in part, on whether those statements were made within the scope of Mr. Katzianer’s agency relationship with Bisson. *See* M.R. Evid. 801(d)(2)(D). Trial evidence will be required to resolve these issues.

The Court thus **denies** Plaintiff’s Second Motion *in Limine* and Defendant’s Motion *in Limine* to Exclude Any Evidence That John Katzianer Stated to Dudley Trucking That Bisson Would Pay Dudley Trucking Eighty Percent of the “Gross Line Haul” or “Line Haul.”

B. Plaintiff's Third Motion in Limine

Plaintiff's Third Motion *in Limine* asks the Court to exclude evidence and argument that the Transportation Agreement is the same form Bisson uses with all of its independent contractors on the grounds that this evidence is irrelevant. *See* M.R. Evid. 401. *See also* M.R. Evid. 402-403. Bisson responds that the evidence is relevant to resolving the ambiguity in the Transportation Agreement and as evidence of Bisson's routine practice. *See* M.R. Evid. 406(a).

The Court agrees with Dudley that the focus of this trial should be on Bisson's contractual relationship with Dudley, and not any of its other independent contractors. Allowing Bisson to introduce evidence of its agreements with other independent contractors would expand the trial beyond the relevant issue; *i.e.*, what these two parties agreed to. The Court therefore **grants** Plaintiff's Third Motion *in Limine*.

C. Plaintiff's Fourth Motion in Limine

Plaintiff's Fourth Motion *in Limine* likewise asks the Court to exclude evidence of Bisson's agreements with other independent contractors; specifically, its agreements with interstate (as compared with intrastate) haulers. Dudley again cites M.R. Evid. 401-403 as the basis for its motion; Bisson again argues that the evidence is relevant to resolving the ambiguity in the Transportation Agreement and as evidence of Bisson's routine practice. *See* M.R. Evid. 406(a).

The ambiguity in this contract essentially boils down to two (potentially inconsistent) provisions regarding Dudley's remuneration for specific hauls or runs. Bisson argues that Dudley's motion would leave it unable to explain why this potential inconsistency is in a contract that Bisson itself drafted: specifically, that intrastate and interstate independent contractors are paid differently by Bisson.

The Court **grants** Plaintiff's Fourth Motion *in Limine* **in part** and **denies** the motion **in part**. As in Part I.B. of this Order, *supra*, the Court rules that Bisson may not introduce evidence of its general practices or its specific arrangements with interstate or other intrastate independent contractors. M.R. Evid. 401-402. However, Bisson may suggest that interstate and intrastate independent contractors are paid differently as an explanation for the potential inconsistency in the Transportation Agreement. This evidence can be tested through cross-examination and its weight can be argued to the jury.

D. Plaintiff's Fifth Motion *in Limine*

Plaintiff's Fifth Motion *in Limine* requests that this Court preclude Bisson from presenting three witnesses at trial who were listed on the Amended Joint Final Pretrial Statement filed with the Court on January 4, 2018. The thrust of Dudley's motion is that Bisson's addition of these three witnesses to the Amended Joint Final Pretrial Statement may be a discovery violation, and in any event prejudices Dudley because it has not had an opportunity to depose these witnesses. *See* M.R. Evid. 26 (a)-(b); 135 (a)-(b). Bisson responds that its naming of these three witnesses is not a violation because it is timely under the Court's scheduling order pertaining to the deadline for the filing of the joint pretrial statement. Bisson further suggests that Dudley has been on notice that these three witnesses were privy to facts germane to this litigation because their names came up in deposition.

At oral argument, the Court inquired of Bisson as to the relevance of these witnesses' expected testimony. Bisson indicated that these witnesses will testify as to the circumstances surrounding the early termination of Dudley's contract without notice, and that such evidence will be relevant to determining whether Dudley's breached the Transportation Agreement thereby excusing Bisson's termination of the contract without notice.

The Court **denies** Plaintiff's Fifth Motion *in Limine* because Bisson's listing of the witnesses in the Amended Joint Final Pretrial Statement was timely under the Court's scheduling order. However, the Court **orders** Bisson that it may not address these witnesses or their expected testimony in its opening statement. Dudley will have an opportunity to *voir dire* these witnesses outside the presence of the jury in order for the Court to properly determine whether their testimony is admissible or should be excluded as unduly prejudicial or improper character evidence. *See* M.R. Evid. 403, 404.

II. DEFENDANT'S MOTIONS IN LIMINE

A. Defendant's Motion in Limine to Exclude Any Evidence That John Katzianer Stated to Dudley Trucking That Bisson Would Pay Dudley Trucking Eighty Percent of the "Gross Line Haul" or "Line Haul"

See Part I.B. of this Order, *supra*.

B. Defendant's Motion in Limine to Exclude Evidence or Argument in Support of Claim for Punitive Damages

Although there was no formal motion to withdraw this motion, the parties tended to agree at oral argument that Dudley should be afforded the opportunity to present its evidence relating to whether Bisson is liable for an award of punitive damages. Bisson nonetheless maintains that based on what has been alleged and what has been unearthed in discovery Dudley will be unable to satisfy the heightened burden a plaintiff must prove in order to be entitled to an award of punitive damages. *See Tuttle v. Raymond*, 494 A.2d 1353, 1361-62 (Me. 1985).

The Court thus defers judgment on this motion pending the close of evidence in this case. At that time, Bisson may renew its motion and the Court will determine as a matter of law whether Dudley has met its burden to prove by clear and convincing evidence that Bisson acted with malice before allowing Dudley to argue punitive damages to the jury. *St. Francis De Sales Fed. Credit Union v. Sun Ins. Co. of N.Y.*, 2002 ME 127, ¶ 17, 818 A.2d 995 (citing *Tuttle*, 494 A.2d at 1354).

The Court **orders** Dudley to refrain from addressing the issue of punitive damages in its opening statement or at any other point in the trial pending final decision of this motion.

C. Defendant's Motion *in Limine* Regarding "Gross Line Haul" and Damages

Bisson's motion *in limine* regarding "gross line haul" and damages asks this Court for an order (1) precluding Dudley from stating in its opening or arguing at trial that \$258.00 constituted the "gross line haul;" (2) holding Dudley to its proof with respect to its alleged damages based on each haul performed; and (3) holding Dudley to its proof with respect to its alleged lost profits as a result of termination and requiring Dudley to present credible evidence of its alleged net lost profits. As to (1), Bisson argues that this number is speculative. The remaining two requests are based on Bisson's concern that Dudley will attempt to inflate its damages in its opening statement to the jury.

At oral argument, Dudley claimed that it has a good faith basis for its determination that \$258.00 represents the "gross line haul" for the run in question, and knows it to be accurate to a reasonable certainty based on an insurance claim referenced in a Bisson email. However, Dudley agreed to not reference any amounts certain it would be requesting in an award for damages in its opening.

The Court **grants** Defendant's Motion *in Limine* Regarding "Gross Line Haul" and Damages **in part** and **denies** the motion **in part**. Dudley may not reference any specific amounts it will be requesting in damages or the value of the "gross line haul" in its opening statement. At the close of evidence, Bisson may renew its motion on the grounds that Dudley has failed to meet its burden of proof on the issue of damages as to the compensation and termination provisions of the Termination Agreement. The Court will then determine what Dudley will be permitted to argue to the jury regarding its damages, which will be limited to its net losses.

D. Defendant’s Motion *in Limine* to Require Plaintiff to Produce Certain Documents or Things to Defendant Before Trial That It Intends To Use at Trial as Impeachment and/or Rebuttal Evidence

Bisson’s final motion *in limine* asks the Court for an order requiring Dudley to produce certain documents or things to Bisson before trial that it intends to use at trial as impeachment or rebuttal evidence. This “document or thing” is referenced in the Amended Joint Final Pretrial Statement filed with the Court on January 4, 2018. Dudley claims that they are under no obligation to share the “item” because Bisson never requested it during discovery, it will not use the item in its case in chief, and that it will be used for impeachment only if appropriate.

At oral argument, Dudley suggested that in the event it wishes to use the “item” before the jury, the Court could hold a *voir dire* hearing outside the presence of the jury for the Court to determine whether the item really is impeachment evidence or instead should have been identified as part of the case in chief. Bisson agreed to this approach but did not formally withdraw its motion.

The Court thus defers judgment on this motion. The Court declines to order Dudley to share this “item” with Bisson prior to trial, but rules that Bisson is entitled to a *voir dire* hearing to determine whether the item may properly be used for impeachment prior to Dudley’s use of the item in the presence of the jury.

CONCLUSION

Based on the foregoing it is hereby ORDERED:

1. Plaintiff’s First Motion *in Limine* is DENIED.
2. Plaintiff’s Second Motion *in Limine* is DENIED.
3. Plaintiff’s Third Motion *in Limine* is GRANTED.
4. Plaintiff’s Fourth Motion *in Limine* is GRANTED IN PART AND DENIED IN PART. Defendant Bisson may not introduce evidence of its general practices or its specific arrangements with interstate or other intrastate independent contractors. Defendant Bisson

may suggest that interstate and intrastate independent contractors are paid differently as an explanation for the potential inconsistency in the Transportation Agreement.

5. Plaintiff's Fifth Motion *in Limine* is DENIED.
6. Defendant's Motion *in Limine* to Exclude Any Evidence That John Katzianer Stated to Dudley Trucking That Bisson Would Pay Dudley Trucking Eighty Percent of the "Gross Line Haul" or "Line Haul" is DENIED.
7. The Court defers judgment on Defendant's Motion *in Limine* to Exclude Evidence or Argument in Support of Claim for Punitive Damages. The Court ORDERS Dudley to refrain from addressing the issue of punitive damages in its opening statement or at any other point in the trial pending final decision of this motion.
8. Defendant's Motion *in Limine* Regarding "Gross Line Haul" and Damages is GRANTED IN PART AND DENIED IN PART. Dudley may not reference any specific amounts it will be requesting in damages or the value of the "gross line haul" in its opening statement. At the close of evidence, Bisson may renew its motion and the Court will then determine what Dudley will be permitted to argue to the jury regarding its damages, which will be limited to its net losses.
9. The Court defers judgment on Defendant's Motion *in Limine* to Require Plaintiff to Produce Certain Documents or Things to Defendant Before Trial That It Intends To Use at Trial as Impeachment and/or Rebuttal Evidence.

The Clerk is requested to enter this Order on the docket for this case by incorporating it by reference pursuant to M.R. Civ. P. 79(a).

Dated: February 6, 2018

/s
Richard Mulhern
Judge, Business & Consumer Court