

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

C. LAMONT SMITH,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	CIVIL ACTION
IMG WORLDWIDE, INC. and	:	NO. 03-4887
THOMAS J. CONDON,	:	
	:	
Defendants.	:	

ORDER AND MEMORANDUM

ORDER

AND NOW, this 9th day of November, 2006, upon consideration of the Plaintiff's Motion in Limine Seeking the Admission of: (1) Evidence of Prior Statements Made by Defendant Condon Concerning Plaintiff, and (2) Expert Testimony (Doc. No. 46, filed Aug. 31, 2006); and the Response with Attachments of Defendants Thomas J. Condon and IMG Worldwide, Inc. to Plaintiff's Motion in Limine as to Prior Statements and Expert Testimony (Doc. No. 49, filed Sep. 28, 2006), **IT IS ORDERED** that, on the present state of the record, and for the reasons set forth in the attached Memorandum, the Plaintiff's Motion in Limine is **DENIED**.

MEMORANDUM

I. BACKGROUND

On June 24, 2003, plaintiff C. Lamont Smith filed an action against Thomas J. Condon ("Condon") and Condon's employer, IMG Worldwide, Inc. ("IMG") in the Court of Common Pleas of Philadelphia County. Defendants removed the case to this Court on August 26, 2003

based on diversity of citizenship jurisdiction under 28 U.S.C. § 1332. In the Complaint, plaintiff asserted claims of defamation and interference with prospective contractual relations that allegedly arose out of competition between plaintiff and Condon to represent highly-touted college football players prior to their entry into the National Football League (“NFL”) draft.

On June 7, 2006, this Court granted summary judgment in favor of defendants with respect to all but one defamation claim. Smith v. IMG Worldwide, Inc., 437 F.Supp.2d 297, 312 (E.D. Pa. 2006). The only remaining defamation claim pertains to statements made by Condon to Charles Sanders (“Sanders”), an advisor to Antonio Bryant, an NFL athlete. Id.

Presently before the Court is Plaintiff’s Motion in Limine Seeking the Admission of: (1) Evidence of Prior Statements Made by Defendant Condon Concerning Plaintiff; and (2) Expert Testimony. For the reasons set forth below, plaintiff’s motion is denied in its entirety.

II. FACTS

The facts of this case are set forth in two previous opinions. Id.; Smith v. IMG Worldwide, Inc., 360 F. Supp. 2d 681 (E.D. Pa. 2005). Accordingly, only those facts necessary to the instant motion are recited in this Memorandum.

Plaintiff and Condon are professional sports agents. Plaintiff founded All Pro Sports and Entertainment, Inc. (“All Pro”) in 1987. Smith Dep. at 11-12, Pl. Condon is the President of IMG Football, which is a division of IMG. Condon Biography. Plaintiff alleged that a recent decline in his representation of high-end players is directly attributable to Condon’s repeated defamatory statements to prospective professional players that plaintiff uses the “race card” in contract negotiations with NFL clubs. See Compl. ¶¶ 13, 16, 19. In the Complaint, plaintiff specifically pointed to the recruitment of three players – Kenyatta Walker (“Walker”), Antonio

Bryant (“Bryant”), and Larry Johnson, Jr. (“Johnson”) – during which Condon allegedly made his “race card” remarks. Id. Condon denied having any conversations with prospective professional football players about plaintiff or plaintiff’s relationships with NFL general managers. Condon Dep. at 72-73. Although the only remaining defamation claim pertains to comments allegedly made to Sanders, plaintiff now seeks admission of evidence pertaining to comments made to Walker.

Additionally, plaintiff seeks admission of the expert testimony of two professional sports agents who have extensive experience in NFL negotiations and athlete representation. Expert Report of William Strickland (“Strickland Report”); Expert Report of Rick Smith (“Smith Report”). The Smith Report describes, inter alia, the highly competitive nature of the NFL sports agency industry, and the Strickland Report describes, inter alia, racial imbalance in the NFL sports agency industry. Id. Both reports opine that an agent who has a reputation of playing the “race card” in negotiations with NFL teams will be at competitive disadvantage. Id.

A. Alleged Prior Statements to Walker

In November and December 2000, plaintiff and Condon were competing for a contract to represent Walker, an offensive lineman at the University of Florida and a prospective professional football player. Anderson Dep. at 21-22; Walker Dep. at 32-33. Plaintiff asserted that, in the course of the competition to sign Walker, Condon told Walker that plaintiff alienated general managers of NFL clubs because he “plays the race card in negotiating contracts.” Compl. ¶ 13. Plaintiff testified at his deposition that the alleged defamation involving Walker was communicated to him in a telephone conversation with Walker one day after Condon spoke with Walker. Smith Dep. at 25-26. According to plaintiff, Walker said that:

he had been advised that general managers did not like dealing with me because I played the race card in negotiations. . . . [Walker said] that Tom Condon had advised him . . . that [he] better be careful with dealing with me because I play the race card.

Id. at 26:2-4, 8-10. Additionally, Kenneth Anderson, a former employee of plaintiff's company, and Peter Schaffer, plaintiff's law and business partner, testified that Walker told them that Condon told Walker that he should not sign with the plaintiff because the plaintiff "play[s] the race card." Anderson Dep. at 25-26; Schaffer Dep. at 24-26. Walker has no memory of anyone at IMG, including Condon, making comments to him about plaintiff playing the "race card." Walker Dep. at 32-33, 41.

B. Alleged Statements Supporting Plaintiff's Remaining Defamation Claim

In January 2002, plaintiff and Condon were competing for a contract to represent Bryant, a highly-skilled wide receiver from the University of Pittsburgh and a prospective professional football player. Smith Dep at 37; Sanders Dep. at 47. Plaintiff alleges that, during a meeting with Bryant and Sanders in January 2002, Condon said that "Bryant needed to be careful about retaining [plaintiff] as his agent because plaintiff . . . 'plays the race card' in his negotiations with NFL clubs." Compl. ¶ 16. While recruiting Bryant, Condon visited Sanders's home in Pittsburgh in January 2002. Sanders Dep. at 35-36; Singletary Dep. at 27. Sanders, who advised Bryant in choosing an agent, testified that Condon commented on plaintiff's use of race in contract negotiations during that meeting. Sanders Dep. at 45. According to Sanders, Condon said:

'Hey, you know something else you got to be careful of with Lamont is he plays the race card and a lot of the general manager[s] are getting tired of that. I know the [general manager] at Tennessee is tired of it, and, you know, that's not a good thing.'

Id. at 45: 11-16. Although plaintiff alleges that the comments were made to Bryant and Sanders,

Sanders testified that Bryant was not present when Condon made these remarks. Sanders further testified that he did not “specifically” relay Condon’s remarks to Bryant, but that Condon’s remarks “fed into how [he] presented” race issues to Bryant and Bryant’s high school coach. Id. at 48-49. Sanders Dep. at 47. According to Sanders, when he heard Condon’s remarks, he kept them to himself and did not repeat them to anyone until he mentioned them to plaintiff at the Cowboys’ training facility in July 2002. Id. Eventually, Bryant signed with plaintiff and was selected in the second round of the 2002 NFL Draft by the Dallas Cowboys. Schaffer Dep. at 14; Bradley Report at 6.

II. DISCUSSION

A. Evidence of Prior Statements Made by Defendant Condon

Plaintiff seeks admission of evidence that Condon made statements to Walker that are similar to the statements that Condon allegedly made to Sanders. Specifically, plaintiff proposes to introduce his own testimony and testimony by Kenneth Anderson and Peter Schaffer that Walker relayed to them that Condon told Walker that plaintiff uses the “race card” in negotiating with NFL teams. The Court concludes that plaintiff does not proffer the alleged prior statements for a relevant and proper purpose. Thus, the evidence is inadmissible under Federal Rule of Evidence 404(b).¹

1. Legal Standard

¹ Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice . . . of the general nature of any such evidence it intends to introduce at trial.

Fed. R. of Evid. 404(b).

In general, all relevant evidence is admissible. Fed. R. Evid. 402. Under Federal Rule of Evidence 404(b), however, evidence of other wrongs or acts to prove a person acted in conformity therewith is inadmissible. The Third Circuit has stated that Rule 404(b) is a rule of “inclusion,” not “exclusion.” United States v. Givan, 320 F.3d 452, 460 (3d Cir. 2003). “As such, admission of ‘other acts’ evidence is favored if it is ‘relevant for any other purpose than to show a mere propensity or disposition on the part of the defendant’” United States v. Law, 2005 WL 3464449, at *2 (E.D. Pa. Dec. 16, 2005) (citing Givan, 320 F.3d at 460). Rule 404(b) specifically permits evidence of other acts when used only to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident” Fed. R. Evid. 404(b). Nevertheless, “a party cannot justify admission of Rule 404(b) evidence merely by reciting in conclusory terms that the evidence is admissible under that rule.” Becker v. ARCO Chemical Co., 207 F.3d 176, 207 (3d Cir. 2000). The proponent of Rule 404(b) evidence must articulate how such evidence is properly relevant. United States v. Sampson, 980 F.2d 883, 887 (3d Cir. 1992). For evidence of other wrongs or acts to be admissible,

- (1) the evidence must have a proper purpose under Rule 404(b);
- (2) it must be relevant under Rule 402;
- (3) its probative value must outweigh its prejudicial effect under Rule 403; and
- (4) the court must charge the jury to consider the evidence only for the limited purpose for which it is admitted.

United States v. Console, 13 F.3d 641, 659 (3d Cir. 1993).

2. Analysis

In J & R Ice Cream Corp. v. California Smoothie Licensing Corp., 31 F.3d 1259, 1268 (3d Cir. 1994), an analogous case in which a franchisee alleged misrepresentation against a

franchisor, the Third Circuit held that evidence of similar misrepresentations by the defendant to former franchisees was improperly admitted for the purpose of showing conformity therewith. In that case, the court stressed that none of the proffered proper purposes of the Rule 404(b) evidence were relevant to an ultimate issue in the case. Id.

In this case, plaintiff all but concedes that the relevance of the prior statements pertains to whether Condon acted in conformity with the prior statements when he allegedly defamed plaintiff to Sanders. According to plaintiff, the evidence is relevant because “the jury is more likely to accurately resolve the question of what was said in the conversation between Condon and Sanders if it hears evidence of substantially similar statements Condon made about plaintiff on a prior occasion to Walker.” Pl. Mot. at 4. Notwithstanding that statement, plaintiff later states that the proffered evidence is admissible to show absence of mistake or identity, not to show action in conformity with the prior statements. Specifically, plaintiff asserts that, because there is a “dispute over whether Condon made the defamatory statements to Sanders[,] . . . evidence of ‘other’ statements . . . is admissible not to show Condon as someone who had a general propensity for making questionable statements but, instead, to demonstrate the absence of mistake or accident regarding whether the statement were made, as alleged by Sanders.” Id. at 6. Plaintiff further argues that the prior statements are admissible to establish the identity of Condon as the speaker to Sanders, and to establish a pattern of defamation of plaintiff by Sanders.

Plaintiff has misconstrued “absence of mistake.” Where intent or willfulness is an issue in a case, Rule 404(b) evidence is admissible to show whether a defendant’s actions were the result of mistake. See U.S. v. Ringwalt, 213 F.Supp.2d 499, 509 (E.D. Pa. 2002) (holding that “in light of the defendant’s theory that the inaccuracies in [tax] returns were the result of mistake

. . . the tax returns from the earlier years were probative on the issues of common scheme or plan as well as willfulness”). Plaintiff does not argue that absence of mistake pertains to intent or willfulness, presumably because they are not issues in this case, but rather that the alleged prior statements by Condon are important to establish that “Sanders’ version of the conversation between Sanders and Condon” was not “mistaken” or a “deliberate fabricat[ion].” Pl. Mot. at 6. In other words, plaintiff argues that the alleged prior statements to Walker should be admitted to confirm Sanders’ account of plaintiff’s defamation allegation. Despite plaintiff’s rephrasing, the alleged prior statements to Walker confirm Sanders’ account only to the extent that they evince that Condon acted in conformity therewith in making the alleged statements to Sanders.²

Plaintiff’s reference to “identity” is similarly inapt. “One proper purpose for admitting Rule 404(b) evidence is to prove identity by showing that prior incidents were sufficiently similar to the current incident to ‘ earmark them as the handiwork of the same actor, and thus constitute signature evidence of identity.’” United States v. Donte Island, 2004 WL 1169992, at *2 (E.D. Pa. Apr. 30, 2004). As in Becker, 207 F.3d at 199, the identity exception is inapplicable here because the parties dispute “whether the alleged act . . . even occurred, not whether [the defendant], as opposed to some other person or entity, committed it.”

Finally, plaintiff’s passing reference to Condon’s alleged pattern of defamatory behavior, which fails to articulate any theory as to how such evidence is relevant, is unavailing.³ Evidence

² “[W]hen a proponent of Rule 404(b) evidence contends that it is both relevant and admissible for a proper purpose, the proponent must clearly articulate how that evidence fits into a chain of logical inferences, no link of which may be the inference that the defendant has the propensity to commit the crime charged.” Becker, 207 F.3d at 191 (3d Cir. 2000) (citations omitted).

³See Sampson, 980 F.2d at 887 (noting that “the proponent of Rule 404(b) evidence must articulate how such evidence is properly relevant”).

of pattern may be admitted to establish the identity of a party or to show a common plan, for example. See J & R Ice Cream, 31 F.3d at 1268-69 (noting that “[w]ith the possible exception of prosecutions for conspiracy, plan or design is not an element of the offense; therefore, evidence that shows a plan must be relevant to some ultimate issue in the case”). Plaintiff does not assert any proper purpose for admitting pattern evidence. Rather, plaintiff’s argument on relevance leads the Court to conclude that the evidence of the prior statements to Walker are offered to establish that Condon acted in conformity therewith.

Simply because a proponent of other acts evidence invokes the proper uses of such evidence does not “magically transform inadmissible evidence into admissible evidence.” United States v. Morley, 199 F.3d 129, 133 (3d Cir.1999). Plaintiff’s proffered Rule 404(b) evidence is thus not admissible to establish absence of mistake, identity, or pattern.

B. Expert Testimony

Plaintiff seeks admission of expert testimony of William Strickland and Rick Smith, sports agents who have extensive experience in NFL negotiations and athlete representation. Strickland Report; Smith Report. Strickland is purportedly one of the pioneer African-American sports agents. Pl. Mot. at 14. Detailing racial imbalance in the NFL sports agency industry, the Strickland Report asserts that succeeding in the industry is especially difficult for black agents. The Strickland Report concludes that a black agent who has a reputation in the league of improperly injecting race into negotiations will be at competitive disadvantage because players will seek representation elsewhere. Detailing the highly competitive nature of the NFL sports agency industry, the Smith Report asserts that an agent’s reputation is critical because the stakes are very high. The Smith Report concludes that an agent with a reputation in the league of

offending general managers by playing the “race card” will be at competitive disadvantage.

Because the testimony of Strickland and Smith is not relevant, it is inadmissible under Federal Rule of Evidence 702.

1. Legal Standard

Federal Rule of Evidence 702 allows testimony by experts only if it “will assist the trier of fact to understand the evidence or determine a fact in issue” As explained in Daubert v. Merrell Dow Pharmaceuticals, 113 S.Ct. 2786, 2795 (1993), “[t]his condition goes primarily to relevance.” “Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful.” L&M Beverage Co. v. Guinness Import Co., 1996 WL 368327, at *3-4 (E.D. Pa. June 24, 1996).

2. Analysis

Plaintiff contends that the testimony of the experts is relevant to the likely impact of Condon’s statement on plaintiff’s professional reputation and to plaintiff’s mental anguish and personal humiliation. Pl. Mot. at 10, 15. The Court need not reach the question of whether the proffered expert testimony of Strickland and Smith is reliable under Federal Rule of Evidence 702 because the testimony is not relevant.⁴

First, the proffered expert testimony is not relevant to plaintiff’s alleged mental anguish and personal humiliation. Plaintiff concedes that the expert reports “focus on damage to Plaintiff’s reputation” Pl. Mot. At 14. In fact, the Strickland and Smith Reports do not discuss mental anguish or personal humiliation at all. See Strickland Report; Smith Report.

⁴ See L&M Beverage, 1996 WL 368327, at *3-4 (holding that the “proposed testimony . . . is not relevant to facts at issue in this case” “without addressing [defendant’s] many criticisms of [the expert’s] qualifications and . . . methodology”).

Secondly, the proffered expert testimony is not relevant to impact on professional reputation or standing. On the present state of the record, Sanders alone heard the alleged defamatory remarks, and Sanders did not repeat the alleged remarks to anyone but plaintiff. See Sanders Dep. at 47. The Court previously ruled that, even though Bryant signed with plaintiff, there was “evidence of reputational harm, because Condon’s alleged remarks affected Sanders’s opinion of plaintiff, namely plaintiff’s ability to effectively represent Bryant in contract negotiations with NFL clubs.” Smith v. IMG Worldwide, Inc., 437 F.Supp.2d 297, 309 (E.D. Pa. 2006). Nevertheless, if the alleged remarks were never repeated, expert testimony on the harm to plaintiff’s professional reputation in the league at large cannot possibly be relevant. The comments may have “fed into how [Sanders] presented” race issues to Bryant and Bryant’s high school coach, but this alone does not implicate plaintiff’s reputation in the league at large, particularly in view of the fact that Bryant signed with plaintiff. See id.

IV. CONCLUSION

For the foregoing reasons, the Plaintiff’s Motion in Limine Seeking the Admission of: (1) Evidence of Prior Statements Made by Defendant Condon Concerning Plaintiff, and (2) Expert Testimony is denied in its entirety.

BY THE COURT:

/s/ Honorable Jan E. DuBois
JAN E. DUBOIS, J.