

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SYLVIA A. WELLS, ET AL * CIVIL ACTION
VERSUS * NUMBER: 07-9488
THE CITY OF NEW ORLEANS, ET AL * SECT. S, MAG. 2

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**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO
RECONSIDER COURT'S RULING GRANTING THE DEFENDANTS'
MOTION IN LIMINE TO EXCLUDE RULE 404(b) AND 608(b) EVIDENCE
OR IN THE ALTERNATIVE MOTION TO BIFURCATE THE TRIAL**

This Court should reconsider its ruling on the Defendants' Motion in Limine because evidence regarding defendant Villavaso's involvement in the events on the Danziger Bridge is crucially relevant to the plaintiffs' state-law claim that the City of New Orleans was negligent in hiring, retaining, and supervising Villavaso in December 2006, when the events at issue in this case occurred. It is also necessary for the plaintiffs' claim for punitive damages. Given the centrality of this evidence to these claims, the Court's recent ruling on the defendant's Motion in Limine unfairly restricts the plaintiffs' ability to present their case. Furthermore, there are in general less restrictive alternatives to granting the defendants' Motion that would ameliorate any concerns regarding unfair prejudice that might result from introduction of the Danziger evidence. Plaintiffs submit that the Court should reconsider its recent ruling in light of these alternatives and fashion

some compromise between the unfettered use of the highly relevant Danziger evidence and its exclusion from trial of this case.

Law and Argument

First and foremost, the plaintiffs feel compelled to note that whatever prejudicial effect the Danziger evidence has, it is a circumstance of the defendants' own making. It is thus hard to see how this prejudice could be "unfair" under Rule 403. The plaintiffs did not force defendant Villavaso to shoot innocent civilians on the bridge in September 2005, and they did not encourage him to join a conspiracy to cover up the true facts of the shooting. Nor did the plaintiffs have any part in the City's decision to keep Villavaso on active street patrol while he was under investigation for first-degree murder by State authorities in December 2006. It is worth considering the reality of that for a moment: At a time when the State of Louisiana was on the cusp of accusing this man of murdering multiple civilians while acting in the course and scope of his employment as a police officer, the City did absolutely nothing to prevent him from killing again. In fact, his superiors gave him a gun, a baton, and a badge and sent him back out on the streets with no apparent regard for the consequences.

The Court's recent ruling on the defendants' Motion in Limine effectively rewards this bad behavior by permitting the defendants to pretend like it didn't happen. Indeed, the Court's ruling seems to suggest that the Danziger evidence must be excluded simply because it is so egregious and puts the defendants' actions in such a bad light. But

that is a strange outcome—Why should defendants who do really bad things get the benefit of having evidence excluded simply because it would be so bad for their side?

Here, the Danziger evidence is crucial to the plaintiffs' claim that the City was negligent for permitting Villavaso to continue acting as a regular police officer when he was under investigation for murdering civilians. The Court's ruling on the Motion in Limine guts this claim by preventing the plaintiffs from explaining to the jury why the City was negligent in not firing Villavaso or, at the very least, assigning him to desk duty while the State charges were pending. Indeed, it is hard to see how the plaintiffs can prove this claim at all without the Danziger evidence. The evidence is likewise crucial to the plaintiffs' claim for punitive damages, which requires proof that Villavaso or others acted intentionally and maliciously.

The Danziger evidence is thus similar to proof that a defendant has previously been convicted of a crime in a prosecution for unlawful possession of a weapon under 18 U.S.C. § 922(g). Although such evidence usually would be excluded unless the defendant testified at trial, in a § 922(g) prosecution this highly prejudicial evidence is permitted because it is essential to the government's case. The U.S. Supreme Court discussed this dynamic in *Old Chief v. United States*, 519 U.S. 172 (1997). In that case, the Court cautioned district courts to consider the necessity of the proffered evidence to a party's case as well as any evidentiary alternatives before making Rule 403 decisions. Where evidence is crucial to a claim at issue, its evidentiary value is, correspondingly, much higher, and it should not generally be excluded:

[W]hat counts as the Rule 403 “probative value” of an item of evidence . . . may be calculated by comparing evidentiary alternatives. . . . The Notes to Rule 403 [state] that when a court considers “whether to exclude on grounds of unfair prejudice,” the “availability of other means of proof may . . . be an appropriate factor.” . . . Thus the notes leave no question that when Rule 403 confers discretion by providing that evidence “may” be excluded, the discretionary judgment may be informed not only by assessing an evidentiary item’s twin tendencies, but by placing the result of that assessment alongside similar assessments of evidentiary alternatives.

Old Chief v. United States, 519 U.S. 172, 184-185 (U.S. 1997). *See also Wright & K. Graham, Federal Practice and Procedure* § 5250, pp. 546-547 (1978) (“The probative worth of any particular bit of evidence is obviously affected by the scarcity or abundance of other evidence on the same point”).

The Danziger evidence in this case is highly and perhaps uniquely relevant to the plaintiffs’ negligent hiring and retention claim. Because there is simply no other available evidence to prove this claim, the Danziger evidence should be admitted despite its admittedly prejudicial effect (which the defendants brought on themselves).

There are also several alternatives to exclusion that, speaking more generally, could address the Court’s concerns regarding the prejudicial effect of the Danziger evidence without the harsh remedy of total exclusion. The Court could, for example, instruct the jury on the limited purposes for which the evidence is being introduced. These instructions could be propounded both at the time of the evidence’s introduction and during normal jury instructions. Alternatively, the Court could bifurcate the plaintiffs’ negligent retention and punitive damages claim so that evidence relating to these issues is put before the jury after it has made a decision on individual liability.

Given these alternatives to total exclusion, the Court's recent decision on the Motion in Limine seems to unnecessarily restrict the plaintiffs' ability to present their case. The plaintiffs also believe the decision works an injustice: If the ruling stands unmodified, then defendant Villavaso will be permitted to take the stand and try to convince the jury of his credibility without the plaintiffs being able to cross-examine him under Rule 608(b) regarding the lies he told in Danziger. Again, this holding seems to reward a defendant for having told really bad lies about particularly egregious acts. Precluding cross-examination on Danziger is thus palpably unfair to the plaintiffs and provides the defendants an undeserved windfall.

Conclusion

For these reasons, and those explained in the plaintiffs' Opposition to Defendants' Motion in Limine, the plaintiffs respectfully request this Court to reconsider and modify its holding on the defendants' Motion in Limine.

Respectfully submitted;

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2010 August 11, 2010 I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all parties.

s/Gary W. Bizal
GARY W. BIZAL