IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

RUSSELL L. EBERSOLE,
d/b/a ABERDEEN ACRES PET
CARE CENTER

Plaintiff,

v. CIVIL ACTION NO. 1: 12cv26

BRIDGET KLINE-PERRY, ET AL,

Defendants.
_____/

REPLY TO PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S RULE 60 MOTION

Comes now the defendant, Bridget Kline-Perry, by counsel, pursuant to Fed. R. Civ. P. 60, and in reply to plaintiff's Brief in Opposition to Defendant's Rule 60(b) Motion (docket No. 117), states the following:

I. No defects regarding the April 11, 2012 subpoena have been raised by those who were served with it, and the court ought not allow itself to be distracted by the irrelevant arguments raised on that point:

Much of the plaintiff's opposition seeks to raise questions about the validity or existence of the subpoena served by the defense on April 11, 2012. Prior to filing the brief in opposition, plaintiff's counsel wrote threatening sanctions under Rule 11 because the copy of the subpoena previously filed as an exhibit in support of the rule 60 motion did not show a completed affidavit of service. Defense counsel requested a copy from the private process server who served the subpoena, and provided that to plaintiff's counsel both by email and mail on April 18, 2013. Nevertheless at page Id. No. 1712, plaintiff's counsel continues to suggest that there is a question

whether a subpoena was served. A copy of the subpoena and affidavit received is attached as Exhibit A, and to the extent there is any question about service of the subpoena, defendant respectfully requests an opportunity for an evidentiary hearing at which the process server might be called to confirm the statements in the attached affidavit.

In addition to questioning service of the subpoena, plaintiff argues that the entity served with the subpoena is not a proper legal entity, and that the respondent may have had the right to exercise a claim of privilege under Rule 45(d)(2). These objections are irrelevant because no objection was raised by the Frederick County Sheriff or anyone else, and no claim of privilege has ever been asserted. The subpoena was served and responded to without any assertion of privilege or other objection, and defendant had no reason to believe that responsive materials existed that were not produced. Plaintiff's other arguments with respect to the subpoena itself are simply without merit, for example arguing at page Id. No. 1716 that a subpoena specifically requesting "videos,""does not clearly request copies of all videos seized as evidence pursuant to a search warrant."

II. The standard to be applied is the Rule 60 standard stated in Dowell v. State Farm, and not the Rule 59 standard stated in Attard Indus. Inc.:

Plaintiff's statement of the law and the standard to be applied in this case is incorrect. Plaintiff relies on Attard Indus., Inc. v. U.S. Fire Ins. Co., 2010 WL 4670704 (E.D. Va., Nov. 9, 2010) for the proposition that a movant under Rule 60 is required to show that the verdict was "against the clear weight of the evidence . . . based upon evidence that was false, or will result in a miscarriage of justice." Page Id. No. 1713. The standard cited by the plaintiff is wrong, because Attard Industries did not address a Rule 60 motion, it addressed motions filed under Rules 50 and

59. Rule 60 is referenced nowhere in the opinion cited by the plaintiff, and there is no discussion of the standards to be applied, because Rule 60 was not at issue in that case. The standards to be applied in this case are those stated in Dowell v. State Farm, 993 F.2d 46 (4th Cir. 1993) and Square Construction Company v. WMATA, 657 F.2d 68, 71 (4th Cir., 1981), cited in defendant's opening brief.

The standard is of significance in this case, because plaintiff's arguments would import the inapplicable "against the clear weight of the evidence" standard into this argument. This approach is inappropriate, because a motion under Rule 60(b) does not ask the court to evaluate the propriety of the jury's verdict, and does not require the court to take the evidence in the light most favorable to the non-moving party, as under the motions at issue in Attard Industries. The Rule 60(b) motion at issue in this case asks whether both sides had a fair trial in light of evidence that was not presented to the jury, because it was not available, or whether both sides had a fair trial in light of misconduct by one of the parties. Dowell and Square Construction make clear that there is no heightened bar to be cleared when evaluating a Rule 60(b) motion.

Although it does not appear to have directly ruled on the issue, the 4th Circuit has cited with approval a ruling by the 1st Circuit explaining that the test under Rule 60(b)(2) is whether the newly discovered evidence is "of such a material and controlling nature as [would] probably [have] changed the outcome." Schultz v. Butcher, 24 F.3d 626, 631 (4th Cir., 1994). The primary focus of the evaluation is therefore whether the evidence is relevant to a claim or defense, and if so whether the judgment ought to stand in light of the evidence having been omitted from the original trial. Square Construction makes clear that it is not required that the evidence be of such import that it would have completely changed the outcome (i.e. resulted in a

defense verdict instead of a judgment for the plaintiff), and that it is sufficient if it would have simply affected the amount of the damages. Three videos of the plaintiff abusing dogs is of such import that it would probably have changed the outcome of the verdict in this action.

III. There is no improper purpose in filing the motion:

The mere fact that a motion to vacate a judgment is filed at or around the time of pending proceedings to collect the same judgment is not sufficient to establish or even suggest that the motion was filed for an improper purpose. To hold otherwise would permit a party to vitiate Rule 60 simply by commencing enforcement proceedings. The matters at issue in the pending cases in Loudoun County are not before the Court, the undersigned counsel are not involved in those matters, and the merits of the parties' claims in those actions are of no relevance to the consideration of the Rule 60 motion at issue in this case. Plaintiff's belief that this motion is intended to delay the proceedings in the Loudoun County Cases is incorrect. Defendant proposed setting this case for hearing on May 3, and due to plaintiff's objection to that early date it has been delayed until May 17. It is the undersigned's understanding that there are no matters scheduled in Loudoun County in May, and that none are scheduled until June 7, 2013, more than two weeks after the scheduled hearing in this case. It is difficult to see how this motion will delay the Loudoun County action at all.

IV. The videos are new evidence, and bear on the issue whether considered under Rule 60(b)(2) or (b)(3):

The plaintiff argues that the videos are not "new evidence" because in his view they are not evidence at all. Specifically he argues that they are not evidence because he is seen in them "allegedly" doing things that reflect badly on him, and that fact violates the rule on character

evidence, in his view. Courts overwhelmingly agree that the prohibition on character evidence does not apply when character is an issue in the case, as in this defamation action. See, Schafer v. Time Inc., 142 F.3d 1361, 1370-73 (11th Cir. 1998). The point is nicely illustrated by one of the issues in this case: the plaintiff complained that the defendant described him as a con artist or con man. How is she to defend herself if the rules proscribe her from introducing any evidence that might suggest he has acted dishonestly at one time or another?

Furthermore, the argument ignores the plaintiff's own testimony, and the role of the evidence in impeachment. He testified at trial as to his training techniques, the role of the videos in his business, and the limited circumstances in which he might use force on an animal. That testimony, much of which is quoted in the defendant's opening brief, is contradicted by the video evidence now in defendant's possession. The mere fact that the videos reflect badly on the plaintiff does not render them inadmissible, and they would have been admissible under either Rule 405(b) or as impeachment evidence, if they had been available at trial.

V. The videos are evidence of misconduct under Rule 60(b)(3):

The plaintiff denies having a copy of his trial testimony, and yet is able to represent to the court that the defendant has merely "mischaracterized his testimony." To the contrary, the defendant's opening brief quotes directly from the trial transcript where indicated and does not mischaracterize his testimony.

The standard under Rule 60(b)(3) is clear and convincing evidence. The videos alone, even apart from the veterinary record of the Parvo test, are strong evidence of misconduct when taken in conjunction with his trial testimony. The crafted sales pitch delivered to the jury in this case by the plaintiff at every possible opportunity, is entirely inconsistent with what he refers to

as his "alleged" conduct in the videos.[1]

Furthermore, it is not disputed that plaintiff was served with a discovery request for "Complete copies of all customer boarding and/or training files including, but not limited to, intake forms, pet medical instruction forms, pet medical waivers, contracts, agreements and other documents pertaining to the services provided." The testimony of the defense witnesses was that videos were usually prepared for each dog at the end of a period of training, before the animals were returned to their owners. The plaintiff discussed the videos extensively, and never contradicted that testimony, instead agreeing at points that each animal had a "graduation video." In particular he testified at length about his confrontation with "Achilles" during a graduation exercise. Nevertheless, no videos were produced to the defendant prior to the close of discovery. Practically nothing else was produced in response to that request. No copies of records of client names or contact information, no contracts, no agreements, no medical records, were ever produced. A handful of videos of no relevance were produced shortly after the close of discovery, and then a large number of others were produced for the first time at trial. Plaintiff was surely aware of the existence of the videos now in defendant's possession, and it strains credulity to conclude that plaintiff could have truthfully and accurately testified to the jury about when each and every video he suddenly produced at trial was made without reference to other records and videos that were never produced to the defendant, as well as the specific details of every aspect

[1] His misleading and inaccurate testimony about dog training were not the only inaccurate elements of his sworn testimony. It is striking to review his testimony about how every one of his creditors was "paid a hundred percent" during his bankruptcy, in light of the enormous amounts still owed to the federal government arising from his wire fraud convictions. Compare Trial Transcript, Day 1, at 158; with the facts stated in Judge Brinkema's opinion of December 12, 2012 (1:03-cr-112, Document 272 Page Id. 180-181).

of training each dog. See, e.g., Trial Transcript, Day 2, pages 444-446; 446-448.

Finally, the conduct observed in the videos, specifically the signal to the camera operator to stop filming just prior to plaintiff commencing to abuse the animal, is strongly suggestive of an intent and pattern of destruction of evidence by the plaintiff in this case. Clear and convincing evidence is defined as that which creates in the fact finder's mind a "firm belief or conviction" that the issue has been proved. It is certainly a heightened standard of proof (applicable only the motion made under Rule 60(b)(2)), but it is not proof beyond a reasonable doubt, and defendant respectfully submits that the nature of the conduct on the videos and the circumstances of their discovery does provide clear and convincing evidence of misconduct by the plaintiff in the course of this matter. Whether or not they meet the standard under Rule 60(b)(3), they are newly discovered evidence that satisfies the standard under Rule 60(b)(2), and either way are sufficient to vacate the judgment.

WHEREFORE, for the foregoing reasons, and for the reasons stated in the previously filed memorandum of law, the defendant, Bridget Kline-Perry, by counsel, moves for entry of an order vacating the judgment in this case, and for such other relief as may be appropriate. In the alternative, defendant requests that the Court take the motion under advisement and grant leave to depose appropriate representatives of the Frederick County Sheriff's office to establish why the videos at issue were not properly produced to the defendant in response to the subpoena.

BRIDGET KLINE-PERRY
By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of May, 2013, I will electronically file the foregoing with the clerk of court using the CM/ECF system, which will send notification of such filing to the following:

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