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IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

CAIYUN MU, **Plaintiff,** **vs.** **HYOUN MIN OH,** **Defendant.**	**CIVIL ACTION NO. 11-0352** **ORDER SUSTAINING DEFENDANT'S OBJECTION TO ADMISSION OF DEFENDANT'S PRIOR TRAFFIC CITATIONS**

I. INTRODUCTION

THIS MATTER came before the Court during the jury trial on April 23, 2013 at 4:00 p.m. in Courtroom 202A. Caiyun Mu ("Plaintiff") was represented by Victorino DLG. Torres, Esq. Hyoun Min Oh ("Defendant") was represented by Mark A. Scoggins, Esq.

Plaintiff produced Defendant as a hostile witness on direct examination,[1] wherein, Plaintiff inquired into Defendant's driving habits. Defendant testified she normally does not speed. In order to impeach Defendant by contradiction, Plaintiff attempted to question Defendant about her seven prior traffic citations. Defense counsel timely objected based on Rules 401, 402 and 404(b). The Court took the matter under advisement.

On April 24, 2013, the Court orally sustained Defendant's objection, and indicated it would issue a written ruling. The following represents the Court's analysis in reaching its decision to sustain Defendant's objection.

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[1] Shortly after Plaintiff commenced her direct-examination of Defendant, the Court declared Defendant a "hostile witness" for purposes of allowing Plaintiff to ask leading questions.

II. DISCUSSION

Immediately upon calling Defendant as a hostile witness, Plaintiff began to impeach Defendant. The Court called a sidebar and expressed concern about this unorthodox method of impeachment. Although it is not expressly prohibited,[2] it is disfavored by the rules of evidence, particularly in terms of impeachment with the use of extrinsic evidence or specific instances of conduct. *See* NMI R. Evid. 609(a) ("For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record ***during cross-examination***.") (emphasis added); NMI. R. Evid. 608(a) ("Specific instances of the conduct of a witness . . . may [] in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into ***on cross-examination*** of the witness.") (emphasis added); NMI R. Evid. 405(a) ("***On cross-examination***, inquiry is allowable into relevant specific instances of conduct.") (emphasis added).

The rules of evidence limit certain character and impeachment evidence to cross-examination to protect witnesses from being tricked into impeaching themselves. *See* 4-607 Weinstein's Federal Evidence § 607.06[b][iii] ("The distinction between direct and cross-examination recognizes that opposing counsel may manipulate questions on cross-examination to trap an unwary witness into making statements that he or she might not otherwise make."). If a witness makes a voluntary statement during a "friendly" direct-examination, thereby opening the door to that line of questioning, the opposing party should have wide latitude in exploring such statements and introducing impeachment evidence where appropriate. However, there are risks of manipulation and coercion when an adverse party sets the witness up for impeachment not based on any prior statements given by the witness. Many jurisdictions have adopted certain rules that permit impeachment by contradiction to be made ***only*** on cross-examination concerning statements first given on direct-examination. *Id*. (discussing the "collateral matter rule").

[2] "The Federal Rules of Evidence are silent on the subject of impeachment by contradiction." 4-607 Weinstein's Federal Evidence § 607.06[b][ii] (2013). Similarly, the CNMI Rules of Evidence, patterned after the federal rules, are silent on impeachment by contradiction.

Similar to the case at bar, a defendant initiated a line of questioning that inquired into the plaintiff's careful driving habits on cross-examination. *Grannenmann v. Salley*, 99 S.E.2d 338, 339 (Ga. Ct. App. 1957). Then, the defendant sought to impeach the plaintiff with evidence of another car accident in which the plaintiff was involved. *Id*. The court of appeals affirmed the trial court's exclusion of such evidence. *Id*. The court rejected defendant's reliance on a prior case that reached the opposite ruling because in the prior case, "the plaintiff, on *direct* examination testified that she was always a careful driver, and on cross-examination she restated that she was always a careful driver." *Id*. (emphasis in original) (discussing *Atkinson v. Atchison, Topeka & Santa Fe Ry. Co*., 197 Fed. 2d 244, 246 (10th Cir. 1952)). Here, the instant case is similarly distinguishable from *Atkinson* because Defendant never testified about her driving habits before Plaintiff questioned her about them. It was clearly a calculated approach by Plaintiff to try to introduce evidence of Defendant's prior traffic citations that are otherwise inadmissible.

With this backdrop of Plaintiff's "impeachment scheme," the Court analyzes and applies NMI Rules of Evidence 402, 403 and 404(b) to the evidence of Defendant's prior traffic citations sought to be admitted by Plaintiff for impeachment purposes. Rule 402 excludes all evidence that is not relevant. Plaintiff argues that Defendant's prior traffic citations of "speeding" and "driving on the right side of the highway" are relevant to contradict Defendant's testimony that she does not normally speed.[3] The precise testimony eliciting Plaintiff's proffer of impeachment evidence is as follows:

> Q: Is it your testimony that you are a prudent driver?
> A: I didn't say it that way.
> Q; You said that you err on the side of slowing down?
> A: I am just trying to explain my driving habits. I am not saying I am a good driver or a bad driver. I am just trying to explain my habits of driving.
> Q: And you said your driving habit is to err on the side of slowing down?

[3] Plaintiff originally believed that Defendant testified she was a "responsible driver," which is why Plaintiff sought to introduce Defendant's traffic citation for "driving on the right side of the highway." However, after listening to the recorded transcript, Plaintiff discovered Defendant did not testify she was a "responsible driver." Plaintiff properly informed the Court and corrected her mistaken belief.

A: The meaning is that I don't really speed.
Q: Isn't it true ma'am that you have been cited over seven citations in the past?

(Trial Transcript at 3:57:00 p.m. – 3:58:22 p.m.)

Defendant clearly testified that her driving habit is to drive within the speed limits. Therefore, relevant impeachment evidence would have to show that her driving habit is to exceed the speed limits. "[Habit] describes one's regular response to a repeated specific situation." Fed. R. Evid. 406, Notes of Advisory Committee on Rules (2013). Regardless of how broadly one applies the definition of "habit" to one's driving habit, evidence of one traffic citation for speeding, dating back nine years ago, is insufficient to show a driving habit of exceeding the speed limits. Defendant's prior speeding citation does not contradict her testimony; consequently, such evidence is not relevant for impeachment.

Notwithstanding Rule 402, Defendant's prior traffic citations are also barred by Rules 403 and 404(b) because of the serious danger of unfair prejudice that the jury may interpret the evidence as showing that Defendant acted in conformity with her prior act of speeding. Rule 404(b) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." Although Plaintiff proffered the evidence only for impeachment purposes, it appears that Plaintiff's true intent is to portray Defendant as a reckless driver, which is prohibited by Rule 404(b).[4] Regardless of Plaintiff's intentions, Rule 403 excludes the evidence because the probative value of a single speeding citation issued nine years ago is substantially outweighed by the danger of unfair prejudice outlined in Rule 404(b).

Courts are wary to admit evidence of prior traffic citations or accidents in a negligent automobile accident case. *See, e.g., Travis v. Southern Pacific Co*., 210 Cal. App. 2d 410, 420 (Cal. Ct. App. 1962) ("There can be no question but that as a general rule evidence of prior traffic citations is not admissible to prove that on the particular occasion in question the driver receiving such prior citations was negligent."); *Healan v. Powell*, 87 S.E.2d 332, 335 (Ga. Ct.

[4] Plaintiff's method and substance of questioning Defendant suggests that she was trying to get Defendant to say she was a prudent driver in order to ascertain a valid purpose for introducing evidence of her prior traffic citations.

App. 1955) ("In actions arising out of automobile collisions, the issue is the negligence or non-negligence of the operator at the time and place of the event, and each such transaction is to be ascertained by its own circumstances and not by the reputation or character of the parties."). If Defendant had testified that she has ***never*** driven over the speed limit, then perhaps the ruling would be different. However, Defendant's testimony here that her "driving habit" is to "[not] normally speed" falls well short of warranting admission of her single, remote speeding citation for impeachment.

III. CONCLUSION

For the foregoing reasons, Defendant's objection is hereby SUSTAINED.

IT IS SO ORDERED this 29th day of April, 2013.

/s/
ROBERT C. NARAJA, Presiding Judge