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

TERRI SLAYTON	:	
	:	CIVIL ACTION
	:	
v.	:	
	:	
	:	NO. 04-CV-5632
TULLYTOWN BOROUGH, et al.	:	

MEMORANDUM & ORDER

Presently before the Court is Defendants' Motion In Limine To Limit The Testimony Of Eric Eklund (Doc. No. 23). For the following reasons, Defendants' Motion will be granted in part and denied in part.

I. BACKGROUND

We anticipate that the following testimony will be offered at trial. On November 5, 2003, at approximately 7:10 p.m., Plaintiff Terri Slayton was driving her car on Bordentown Road in Tullytown, Bucks County, Pennsylvania. (Doc. No. 1 ¶ 10.) According to Defendant Officer Dean Johnson, Plaintiff was traveling above the speed limit. (Doc. No. 11 at 1.) Defendant Johnson began to follow Plaintiff south on Main Street. Plaintiff claims that she did not know at this point that the car behind her was a police car. (Doc. No. 1 ¶¶ 12-15.) Near the intersection of Main Street and Manor Avenue, Plaintiff says that she pulled over to the side of the road in order to allow the other vehicle to pass. (Doc. No. 1 ¶ 11.) Johnson believed that Plaintiff was pulling up to her residence and decided to "let her go." (Johnson Dep. at 90.) When Johnson passed by her car, Plaintiff pulled out onto the road behind him, leading Johnson to believe that she was lost. (*Id.* at 91-92.) According to Johnson, he drove up alongside her vehicle in order to provide assistance. (Doc. No. 11 at 1; Johnson Dep. at 92.) As he did so, Plaintiff passed by

him. Johnson thought that this conduct was "very suspicious" and followed her again. (Johnson Dep. at 92.) Plaintiff pulled over a second time in front of the Tullytown Bar and Grill, at which time Plaintiff says she first realized that the car behind her was a police car. (Doc. No. 1 ¶¶ 14-15.) Johnson turned on his alley lights—the bright lights atop the police car—to better observe the interior of Plaintiff's car. According to Johnson, Plaintiff said to him, "You white motherfucker, what's your problem?" (Johnson Dep. at 93-94.) Plaintiff denies that she ever made this statement. (Pl.'s Mem. in Opp., Doc. No. 14 at 17.) Johnson claims that Plaintiff then pulled out onto the road once again and Johnson followed her. Plaintiff claims that Johnson drove past her before she pulled out, and then "jumped" behind her on the road. (Doc. No. 1 ¶ 16; Slayton Dep. at 79.) Plaintiff noticed that Johnson had "bright lights" shining down on her car, but decided to keep driving. (Slayton Dep. at 79-80.) Johnson turned on his vehicle's take-down lights and his PA system and instructed Plaintiff to pull over. (Doc. No. 11 at 2; Johnson Dep. at 95-96.)

Plaintiff eventually stopped at a red light near the intersection of Edgely Road and Route 13, at which time Johnson approached her car with his weapon drawn. (Slayton Dep. at 81-82.) Johnson claims that he intended to arrest Plaintiff at this point. (Dec. 2, 2003 Prelim. Hr'g Tr. at 15.) Johnson ordered Plaintiff to put her window down and, according to Johnson, Plaintiff did not comply. (Doc. No. 11 at 2.) Johnson then ordered Plaintiff to open the car door, at which point Johnson claims that Plaintiff rolled down her window. (*Id*.) When Plaintiff did not open the door, Johnson put his gun away and, according to Plaintiff, attempted to pull Plaintiff from the car through the driver's side window even though Plaintiff still had her seatbelt on. (Doc. No. 1 ¶¶ 22-23.) Johnson claims that he attempted to unlock the car door and that Plaintiff

grabbed his hand and bent his finger backwards. (Doc. No. 11 at 2.) Johnson further states that he responded by grabbing Plaintiff's arm and pulling it out the window to put her into an arm bar so that he could unlock the door. (*Id.*) Officer Eric Eklund, a Bristol Township police officer, arrived on the scene around this time, having heard Johnson's radio call regarding the pursuit of Plaintiff's vehicle. (Eklund Dep. at 13-15.) Eklund said he observed Johnson "trying to pull [Plaintiff] out through the window of the vehicle." (*Id.*) Once her car door was open, Johnson avers that although he instructed Plaintiff to get out of the car, she continued to pull back from him. (Johnson Dep. at 111-13.) Plaintiff says Johnson pulled her hair (Slayton Dep. at 56-57), but Johnson denies this. (Johnson Dep. at 115-16.) Johnson claims that at this point Eklund informed him that Plaintiff still had her seatbelt on. (*Id*. at 111-12.) Eklund says he unbuckled Plaintiff's seatbelt, although Johnson thought that Plaintiff undid it herself. Johnson removed Plaintiff from the vehicle and brought her to the ground. (Doc. No. 1 ¶ 24.) All of the officers state that Plaintiff was screaming and yelling at this point. (Eklund Dep. at 17; Johnson Dep. at 110; Dumas Dep. at 106-08.)

Around this time, Officer Nicholas Dumas, another Tullytown police officer, arrived on the scene having responded to Johnson's call. (Dumas Dep. at 95.) According to Dumas and Johnson, as they attempted to handcuff her, Plaintiff began "flailing" about and trying to hit them. (Dec. 2, 2003 Prelim. Hr'g Tr. at 18-19; Mar. 8, 2004 Waiver Tr. at 28-29; Johnson Dep. at 123; Dumas Dep. at 125-28.) They leaned her against the side of the car and handcuffed her. Plaintiff claims that Johnson threw her against the trunk of the car. (Doc. No. 1 ¶ 26.)

Johnson and Dumas then handcuffed her and escorted her to the patrol car. Plaintiff states that Officer Dumas threatened to pepper-spray her. (*Id.* ¶ 29; Slayton Dep. at 98.)

Defendants claim that Plaintiff kicked both Johnson and Dumas as she was being escorted to the patrol car. (Doc. No. 11 at 2.) During the ride to the police station, Plaintiff attempted to kick the back door of the patrol car. Plaintiff admits she called Johnson "a motherfucker" at this time. (Slayton Dep. at 90-97.) At the police station, Dumas claims that Plaintiff was still yelling and screaming in the patrol car, and he again threatened to spray her. (Mar. 8, 2004 Waiver Tr. at 127; Slayton Dep. at 99.) Plaintiff was charged with disorderly conduct, resisting arrest, fleeing and eluding, simple assault, aggravated assault, and terroristic threats. She was released from Bucks County Prison on November 7, 2003. A bench trial was held before the Honorable Robert J. Mellon on the charges of disorderly conduct, simple assault, and resisting arrest. On March 8, 2004, Plaintiff was acquitted of all charges.

Plaintiff filed her initial Complaint in this matter on December 3, 2004. Defendants then filed the instant Motion to exclude certain portions of Officer Eric Eklund's testimony.

II. DISCUSSION

According to Defendants, portions of Eklund's testimony should be precluded under Federal Rules of Evidence 402 and 403 because this testimony is "speculative, irrelevant, and highly prejudicial." (Doc. No. 23 at 1.) Eklund is a Bristol Township police officer who was on duty the night of the incident. When Eklund heard a call from the Tullytown Borough Police regarding Johnson's pursuit of Plaintiff, he proceeded to the site of the vehicle stop to assist Johnson. (Doc. No. 14 ¶¶ 85-91.) According to Plaintiff, Eklund arrived at the site of the vehicle stop while Johnson was attempting to remove Plaintiff from her vehicle and then assisted both Johnson and Plaintiff. (Doc. No. 25 at 5.) Defendants seek to exclude the following statements by Eklund: (1) that Eklund was concerned Johnson would slam Plaintiff into the

ground (Doc. No. 23 at Ex. A, pp. 21-22); (2) that Johnson was not thinking about the totality of the circumstances regarding the vehicle stop (*id.* at 26-27); (3) that the manner in which the stop was conducted was outrageous (*id.* at 29-30); (4) that Johnson was out of control (*id.* at 34); (5) that Eklund believed Plaintiff would have been pulled through the window had he not been there (*id.* at 47-48); and (6) that Eklund believed Plaintiff may have been injured as a result of Johnson's conduct (*id.* at 53-55.)

Defendants argue that Eklund's statements that Johnson was out of control are inadmissible because Eklund was not with Officer Johnson when Johnson first encountered Plaintiff's vehicle. Defendants refer to Eklund's deposition in which Eklund admitted that he was unaware of the events leading up to the stop and Johnson's interactions with Plaintiff prior to Eklund's arrival. (Doc. No. 23 at 6.) "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602. In addition,

> [a] lay witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid. 701. In order for lay opinion testimony to be "rationally based" on the witness's perceptions, "there must be some logical connection between the subject of the opinion and the matters perceived," and "the quality and quantity of the perception must be sufficient to logically permit the witness to base an opinion thereon." Wright & Miller, *Federal Practice & Procedure* § 6254 (1997).

It appears from Eklund's deposition transcript that his statements that Johnson was out of control are rationally based on Eklund's own observations of Johnson that night. Given his law enforcement background and the fact that he was apparently an eyewitness to at least some of the actions by Johnson and Dumas, pursuant to Rule 701, Eklund may give his lay opinion that Johnson was out of control and that Plaintiff may have been injured as a result of Johnson's actions, so long as a proper foundation for each of these statements is made at trial. *See United States v. Koon*, 34 F.3d 1416, 1430 (9th Cir. 1994), *rev'd in part on other grounds*, 518 U.S. 81 (1996) (police officer's opinion testimony that another officer was "out of control" was "rationally based on his first-hand observations" and "was helpful in determining factual issues central to the case"); *see also* Fed. R. Evid. 701 Advisory Committee Notes (inferences permitted under Rule 701 include evidence of "the manner of conduct" of a person) (quoting *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1196 (3d Cir. 1995)). These statements reflect Eklund's perceptions of Johnson and Plaintiff at the vehicle stop and provide useful insight to the trier of fact as to Johnson's conduct that night. We reject Defendants' contention that Eklund's testimony concerning Johnson's behavior is irrelevant. The crux of this case is whether Defendants Johnson and Dumas used excessive force in violation of Plaintiff's constitutional rights. Thus, testimony such as Eklund's which sheds light on how Johnson acted that night is relevant to determining that issue. *See* Fed. R. Evid. 401; *see also Carter v. Hewitt*, 617 F.2d 961, 966 (3d Cir. 1980) ("The standard of relevance established by the Federal Rules of Evidence is not high . . . .").

However, Eklund may not testify that Johnson's conduct was outrageous. Plaintiff seeks punitive damages in this action. The Supreme Court of Pennsylvania has adopted the guidelines

of § 908 of the Restatement (Second) of Torts. *Feld v. Merriam*, 485 A.2d 742, 747 (1984). Section 908 provides:

> (1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.
>
> (2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

Restatement (Second) of Torts § 908 (1979). "Outrageous conduct" thus has significant meaning in this context. If Eklund were allowed to describe Johnson's behavior as "outrageous," a jury might construe his testimony as an opinion on the ultimate issue of whether punitive damages are warranted. Such opinion testimony would not be appropriate. *See* Wright & Miller § 6255 ("the costs of lay opinion increase and the benefits diminish the closer the opinion approaches the crucial issues in the case" and there exists a risk that such an opinion "may distract jurors from their task of drawing an independent conclusion as to an ultimate issue in the case"). Moreover, we find that the probative value of Eklund's opinion that Johnson's conduct was outrageous is substantially outweighed by its prejudicial effect, rendering this opinion testimony inadmissible pursuant to Rule 403. *See* Fed. R. Evid. 403.

Some statements in Eklund's deposition are not based on Eklund's observations and experiences, and are thus inadmissible. For instance, Eklund's testimony regarding what he thought would have happened to Plaintiff had he not been there is inadmissible because it is mere speculation not based on actual facts. Eklund also testified that he thought that Johnson "was losing his perspective," and "wasn't thinking about the totality of the circumstances." (Doc. No.

23 at Ex. A. pp. 26-27.) To the extent that Eklund is testifying to Johnson's state of mind, such testimony is inadmissible at trial because Johnson's state of mind the night of the incident is beyond the ken of Eklund. *See* Fed. R. Evid. 602. Accordingly, Eklund may not testify at trial, nor may his deposition testimony be offered at trial, regarding what might have happened had Eklund not been at the scene of the vehicle stop and what Johnson's state of mind may have been.

An appropriate Order follows.

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

TERRI SLAYTON	:	
	:	CIVIL ACTION
	:	
v.	:	
	:	
	:	NO. 04-CV-5632
TULLYTOWN BOROUGH, et al.	:	

ORDER

AND NOW, this 7th day of April, 2006, upon consideration of Defendants' Motion In Limine To Limit The Testimony Of Eric Eklund (Doc. No. 23), and Plaintiff's response thereto, it is ORDERED that the Motion is GRANTED in part and DENIED in part, consistent with the attached Memorandum.

IT IS SO ORDERED.

BY THE COURT:

/s R. Barclay Surrick

_____

R. Barclay Surrick, Judge