

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

DAVID R. WHARTON,

Plaintiff,

v.

MICHAEL A. PRESLIN,

Defendant.

Case No. 2:07-cv-1258

JUDGE GREGORY L. FROST

Magistrate Judge Mark R. Abel

OPINION AND ORDER

This matter is before the Court for consideration of the motions *in limine*, which were filed as objections (Docs. # 32, 33), brought by Plaintiff, David R. Wharton, and Defendant, Michael A. Preslin. For the reasons set forth below, the Court **GRANTS IN PART** and **DENIES IN PART** the motions *in limine*.

I. Discussion

A. Applicable Standard

Courts have previously noted that the nature and essence of a motion *in limine* are well settled. A motion *in limine* is an essential tool available to the trial judge to ensure the diligent and equitable management of the trial proceedings. *See Jonasson v. Lutheran Child & Family Servs.*, 115 F.3d 436, 440 (7th Cir. 1997). A ruling on a motion *in limine* is “no more than a preliminary, or advisory, opinion that falls entirely within the discretion of the district court, and the district court may change its ruling where sufficient facts have developed that warrant the change.” *United States v. Yannott*, 42 F.3d 999, 1007 (6th Cir. 1994). A court has the power to exclude evidence *in limine* only when evidence is clearly inadmissible on all potential grounds. *Cf. Luce v. United States*, 469 U.S. 38, 41 n.4 (1984) (federal district courts have authority to make *in limine* rulings pursuant to their authority to manage trials). Unless evidence meets this high standard, evidentiary rulings should be deferred until trial so that questions of foundation, relevancy, and potential prejudice may be resolved in the proper context. A court will entertain

objections on individual proffers as they arise at trial, even though the proffer falls within the scope of a denied motion *in limine*. See *United States v. Connelly*, 874 F.2d 412, 416 (7th Cir. 1989) (citing *Luce*, 469 U.S. at 41)). Courts are generally reluctant to grant broad exclusions of evidence *in limine* because “a court is almost always better situated during the actual trial to assess the value and utility of evidence.” *Weimer v. Honda of Am. MFG., Inc.*, No. 2:06-cv-844, 2008 WL 4346786, at *1 (S.D. Ohio Sept. 18, 2008) (citing *Koch v. Koch Indus., Inc.*, 2 F. Supp. 2d 1385, 1388 (D. Kan. 1998)). Therefore, the sagacious use of the motion *in limine* not only defines the focus of later trial proceedings, but also permits the parties to focus their preparation on matters that will be considered by the jury. See *Jonasson*, 115 F.3d at 440. Cognizant of this standard, the Court shall address each of Defendant’s and Plaintiff’s categories of evidence to be excluded.

B. Analysis

The Ohio Tort Reform Act provides that tort actions that involve a claim for punitive damages shall be bifurcated. Ohio Rev. Code § 2315.21(B)(1)(a). Under this statute, the initial stage of the trial relates only to evidence of liability and compensatory damages; the second stage relates to whether a plaintiff is entitled to punitive or exemplary damages. As a preliminary matter, the claim for punitive damages against Defendant has been bifurcated pursuant to § 2315.21. Accordingly, the trial in this matter will proceed in two separate stages.

1. Documents from Belmont County Court

Defendant seeks to preclude Plaintiff from introducing any and all documents from Defendant’s criminal prosecution, many of which apparently contain Defendant’s level of intoxication. Defendant contends that such documents are not relevant on the issue of Plaintiff’s compensatory damages and should be inadmissible in the initial stage of the trial. The Court agrees.

Federal Rule of Evidence 403 provides that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice,

confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Fed. R. Evid. 403. This power is extraordinary and must be exercised sparingly. However, the trial court is given discretion in balancing the potential risk of prejudice or delay against the evidentiary value of the evidence. *See United States v. Maga*, No. 3:08-CR-166, 2009 WL 1607739, at *6 (S.D. Ohio June 9, 2009).

The Court exercises its discretion here in determining the danger of unfair prejudice against Defendant. Defendant is not contesting liability for the accident (Doc. # 32, at 1), and documentation of Defendant’s criminal prosecution could be prejudicial to Defendant and may confuse the jury, creating the risk that the jury would rest its decision on an improper basis. Namely, the jury may improperly award compensatory damages on the basis of Defendant’s criminal prosecution. However, Plaintiff may be permitted to introduce the evidence in the punitive damages stage of the trial. Because any documentation referencing charges of which Defendant was not found guilty would not be relevant, could mislead the jury, and could cause the jury to rest its decision on an improper basis during the compensatory damages stage of trial, the Court **GRANTS** this aspect of Defendant’s motion *in limine*.

2. Stock Video Footage

Defendant further seeks to preclude Plaintiff from introducing commentary accompanying stock video footage of the accident scene and accident-damaged vehicles obtained from a local television station (WTRC Channel 7- Wheeling, WV/Steubenville, OH) that covered the accident. Defendant avers that any commentary and/or reference to Defendant’s liability or intoxication is not relevant and is not admissible. Moreover, Defendant takes the position that such commentary would not be admissible in the punitive damages stage of the trial as the commentary would not be based on personal knowledge of the commentator and would be unduly prejudicial. Federal Rule of Evidence 602 states that “[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. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony." "Personal knowledge" has been defined as "knowledge of factual truth which does not depend on outside information or hearsay." *Smith v. Petkovich*, 562 F. Supp. 2d 912, 936 (N.D. Ohio 2008). Hearsay is defined as "a statement other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). Any commentary accompanying the video footage could raise numerous hearsay objections, and moreover may confuse or mislead the jury. Because the footage does contain relevant images of the amount of damage to the vehicles, the Court will permit the video to be introduced at trial, assuming all other evidentiary requirements are met. However, the Court orders that the soundtrack be omitted from the video, thereby excluding any prejudicial commentary from the jury. The Court therefore **GRANTS** this aspect of Defendant's motion *in limine* and orders the video footage be shown without a soundtrack.

3. Life Expectancy Chart

Defendant seeks to preclude Plaintiff from introducing a life expectancy chart unless Plaintiff produces an expert who will testify that Plaintiff sustained permanent injuries in the accident. Defendant concedes that with such expert testimony, the chart is relevant and admissible in the initial compensatory stage of the trial. The Court agrees that without an expert to testify that Plaintiff sustained permanent injuries in the accident involved with this case, the chart is inadmissible. In *Smith v. United States Department of Veteran's Affairs*, for example, an expert was needed for calculating damages for future care in conjunction with a plaintiff's reduced life expectancy, which was complicated by a defendant's negligence. *See Smith*, 865 F. Supp. 433, 441 (N.D. Ohio 1994). Similarly, Plaintiff must provide an expert to show that he did in fact suffer from permanent injuries affecting his life expectancy or presenting an ongoing effect on his quality of life. The Court therefore **GRANTS** this aspect of Defendant's motion *in limine* unless Plaintiff utilizes the requisite expert.

4. Plaintiff's Medical Records and/or Reports

Defendant seeks to preclude Plaintiff from introducing portions of medical records and/or reports that state that Plaintiff was struck by a drunk driver. The Court agrees that such information could be prejudicial to Defendant and may mislead the jury during the initial compensatory damages stage of the trial. Such information would interfere with the purpose of bifurcating tort actions, which does not permit evidence relating solely to punitive damages until the second stage of the trial. Those portions of the medical records and/or reports indicating that Plaintiff was struck by a drunk driver and that may inform the issue of punitive damages will therefore not be permitted during the initial compensatory damages stage of the trial. However, the remaining portions of the medical records and/or reports indicating the nature of Plaintiff's injury or injuries would be relevant during the compensatory stage of the trial and will therefore be admissible. The Court orders redaction of any portion of the medical records and/or reports indicating that Plaintiff was struck by a drunk driver so as to alleviate any confusion or prejudice. The Court therefore **GRANTS** this aspect of Defendant's motion *in limine*.

5. Ohio Traffic Crash Report

Defendant seeks to preclude Plaintiff from introducing the Ohio Traffic Crash Report associated with this incident. Because Defendant is not contesting liability, the Ohio Traffic Crash Report is not admissible in the initial stage of the trial and should be excluded so as not to confuse or mislead the jury, unless any portion of the report informs the issue of compensatory damages, a determination that the Court is unable to make at this juncture without review of the report. Defendant does not contest admission in the punitive damages stage of the trial. The Court therefore **DENIES** this aspect of Defendant's motion *in limine*.

6. Patrons and Personnel of Polish National Alliance (aka Polish American Pub)

Plaintiff seeks to preclude Defendant from introducing as witnesses the patrons and/or personnel of Polish National Alliance. (Doc. # 33.) Plaintiff asserts that the identities of these individuals have not have been disclosed pursuant to Federal Rule of Civil Procedure 26(a)(1) or

otherwise through the channels of discovery. Rule 26(a)(1) requires a party to provide the names, addresses, and telephone numbers, if known, of individuals likely to have discoverable information and to identify the subject matter of the information. Fed. R. Civ. P. 26(a)(1)(A). Other discovery rules require similar disclosure. Plaintiff is therefore correct that if Defendant wishes to introduce testimony from patrons and/or personnel of Polish National Alliance, Defendant must have provided the names of those persons he wishes to present, so as to give Plaintiff an opportunity to prepare in advance of trial.

Plaintiff also object to these unnamed witnesses on the basis of relevancy, with the exception that Plaintiff is not objecting to any knowledge of any alcohol consumption by Defendant. Because liability is not contested by Defendant, the testimony of such patrons and/or personnel of this establishment is likely to be irrelevant under Federal Rules of Evidence 401, 402, and 403. Without any proffer of the substance of the testimony, the Court cannot deem such on-its-face inapplicable evidence applicable and admissible. The designation of patrons and/or personnel presented is too vague for this Court to be any more specific. The Court therefore **GRANTS** this aspect of Plaintiff's motion *in limine*.

7. Rina Barker

Questioning relevance, Plaintiff next seeks to prevent Defendant from calling Plaintiff's ex-girlfriend, Rina Barker, as a witness should the need arise. Absent some indication of the purpose for calling this witness, the Court cannot opine on any potential relevant grounds or the lack thereof for eliciting testimony from Barker. The Court therefore declines to preclude such testimony based on speculation and will, if necessary, revisit this issue as with all the issues contained herein in light of any proffers that may arise. *See Luce*, 469 U.S. at 41 (holding that motions *in limine* decisions are subject to change upon the unfolding of the case, as proffers of testimony arise). The Court therefore **DENIES** this aspect of Plaintiff's motion *in limine*.

8. Employees of Wharton's Auto Shop

Again raising relevance questions, Plaintiff seeks to prevent Defendant from eliciting

testimony from employees of Wharton's Auto Shop ("Wharton's"), namely, Jim Fields, Greg Porter, and/or other employees of Wharton's. (Doc. # 33.) The Court does not presume to know the reasoning for Defendant calling employees of Wharton's, but can foresee potentially relevant grounds during the initial compensatory damages stage of the trial for calling employees of this establishment. For example, the actual damages incurred in the cost of auto repair may be relevant in determining compensatory damages. Also, if the employees' testimony can in some way relate to Plaintiff's injuries, then such testimony could be relevant. Therefore, the Court **DENIES** this aspect of Plaintiff's motion *in limine*.

9. Medical records and/or reports not related to accident

Plaintiff further seeks to preclude Defendant from introducing medical records and/or reports on the basis that this material may encompass records unrelated to Plaintiff's accident-related treatment or conditions. The Court notes that medical records and/or reports often contain sensitive information that may unduly beleaguer a person, and such information should not be used to badger him or her. However, it is not beyond this Court's imagination that information may be contained in medical records and/or reports not related to the accident involved in this case that would be relevant to determining compensatory damages. Further, Plaintiff objects that the medical records and/or reports have not been authenticated. (Doc. # 33, at 2.) Federal Rule of Evidence 901 states that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901(a). The medical records and/or reports may be authenticated upon presentation at trial. Therefore, the Court will not prematurely rule on the admissibility of the medical records or reports.

Plaintiff also raises a hearsay objection to the medical records or reports are hearsay. Federal Rule of Evidence 802 states that "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." Fed. R. Evid. 802. The Sixth Circuit has articulated in *Norton v. Coyler* that

“medical records can qualify for the business record exception to the rule against hearsay.” *Norton*, 828 F.2d 384, 386-87 (6th Cir. 1987). The business record exception is outlined in Federal Rule of Evidence 803(6). Rule 803(6) states that a business record is a memorandum, report, or record, made at or near the time involved by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, or record. Fed. R. Evid. 803(6). Further, this foundation shall be shown by the custodian or other qualified witness, or as provided for by Rule 902(11), Rule 902(12), or statutory certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. Fed. R. Evid. 803(6). The term “business” as used in Rule 803(6) “includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.” *Id.* Therefore, the Court will allow evidence of medical records and/or reports not related to the accident provided that such records are relevant and that a proper foundation is laid, cautioning the parties that any such medical record and/or report produced must not unduly torment the party against whom it is offered. Any issues regarding hearsay will be resolved on a report-by-report basis at trial, as this Court cannot endorse admission or preclusion in a vacuum. The Court **DENIES** this aspect of Plaintiff’s motion *in limine*.

10. Defendant’s Net Worth

Plaintiff seeks to preclude Defendant from introducing documentation of Defendant’s net worth at the time of the accident. Plaintiff specifically objects to Defendant’s designation of documentation of Defendant’s net worth on the grounds that such disclosure is insufficient, vague, and uncertain. Federal Rule of Civil Procedure 26(a)(1) provides that “parties make initial disclosures, unless otherwise ordered by the court, providing specified information, including the name of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses.” Fed. R. Civ. Pro. 26(a)(1)(A)(i). If Defendant

wishes to present evidence of his net worth, Defendant must pursuant to Rule 26(a)(1) and other discovery rules have provided Plaintiff with a copy of, and the description or location of, the documentation of his net worth so that Plaintiff can have an opportunity to prepare adequately for trial. Plaintiff's objection does not state that nondisclosure occurred, but only asserts that "it is uncertain exactly what materials the defendant intends to introduce in this regard" and that the documents "*may* not have been disclosed." (Doc. # 33, at 3 (emphasis added).) The Court will not exclude broad categories of evidence in a vacuum without context. Moreover, contrary to Plaintiff's claim that such documentation is irrelevant, Defendant's net worth may be taken into account when deciding punitive damages. *See State Farm Mut. Auto Ins. v. Campbell*, 538 U.S. 408, 428 (2003).

Plaintiff further objects that the documentation of Defendant's net worth has not been authenticated. Federal Rule of Evidence 901 states that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901(a). The documentation of Defendant's net worth may be authenticated upon its presentation at trial, where it can be identified and authenticated. Plaintiff also objects that the documentation of Defendant's net worth is hearsay. Rule 802 states that "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." Fed. R. Evid. 802. Provided that Defendant disclosed the documentation upon which he seeks to rely, presents the Court with proper documentation, and provides the proper foundation for admission of Defendant's net worth falling within a hearsay exception.

Given the foregoing, the Court will not prematurely rule on the admissibility of documentation of Defendant's net worth. Because the Court is unacquainted with any documentation of Defendant's net worth, the Court will refrain from denying admission of evidence such documentation at present. Therefore, the Court **DENIES** this aspect of Plaintiff's

motion *in limine*.

11. Any and all undisclosed witnesses and exhibits previously known to Defendant

In apparent catch-all objections, Plaintiff further seeks to preclude Defendant from utilizing any and all witnesses and exhibits previously known by Defendant but which were not disclosed pursuant to Federal Rule of Civil Procedure 26(a)(1) or otherwise through the channels of discovery. This Court is aware of the need to closely adhere to Rule 26(a)(1) and strenuously follow the channels of discovery; however, the Court will not at this time entertain a blanket exclusion of any and all undisclosed witnesses or exhibits previously known by Defendant when it is unclear whether any such evidence even exists. The Court declines to make a theoretical ruling on hypothetical evidence with which it is unacquainted and therefore **DENIES** this aspect of Plaintiff's motion *in limine*.

II. Conclusion

For the reasons discussed herein, the Court **GRANTS IN PART** and **DENIES IN PART** the motions *in limine*. (Docs. # 32, 33.) As with all *in limine* decisions, these rulings are subject to modification should the facts or circumstances at trial differ from that which has been presented in the pre-trial motion and memoranda.

IT IS SO ORDERED.

/s/ Gregory L. Frost
GREGORY L. FROST
UNITED STATES DISTRICT JUDGE