

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
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***Re: Alan H. Paikin and Susan F. Paikin, Individually and as the
Personal Representatives of the Estate of Danielle R. Paikin v.
Vigilant Insurance Company
C.A. No. N12C-03-121 RRC***

Submitted: September 6, 2013
Decided: October 1, 2013

On Plaintiffs' Motion in Limine to Limit Expert Testimony.
DENIED.

Dear Counsel:

I. INTRODUCTION

In this wrongful death and survival action stemming from a motor vehicle accident, Plaintiffs seek by a motion in limine to limit the testimony of Defendant's expert witness and forensic toxicologist Nicholas T. Lappas, Ph.D. ("Dr. Lappas") regarding decedent Danielle Paikin's ("Danielle") potential alcohol related impairment during and immediately after the crash that led to her death. This is an

underinsured motorist claim brought by Danielle’s parents, Alan and Susan Paikin (“Plaintiffs”), against Vigilant Insurance Company (“Vigilant”). Plaintiffs, conceding that this evidence has some relevance, nevertheless argue that under D.R.E. 403 any probative value such evidence might have is substantially outweighed by the potential prejudice that would result if heard by the jury.

Defendant contends that Dr. Lappas’ testimony is relevant and probative to establish whether or not Danielle experienced conscious pain and suffering in the moments before her death, in that, Defendant argues, this evidence is highly relevant as to an important element of Plaintiffs’ survival claim and a factor to be considered when assessing damages.

The Court concludes that this aspect of Dr. Lappas’ testimony is relevant and highly probative, and is not substantially outweighed by the danger of unfair prejudice or confusion of the issues. Therefore, Plaintiffs’ motion to limit the testimony of Dr. Lappas regarding Danielle is **DENIED**.

II. FACTUAL AND PROCEDURAL HISTORY

Plaintiffs’ motion arises from a motor vehicle collision that occurred in Maryland on May 6, 2010 which resulted in the injury and subsequent death of their 21 year old daughter, Danielle. The vehicle in which Danielle was a front seat passenger was hit first by a vehicle driven by William Turner (“Turner”). A second collision quickly followed when Cory Kuczynski (“Kuczynski”) crashed into the disabled vehicle with Danielle still inside. There was roughly one minute between the first and the second impact.¹ One of Plaintiffs’ experts has opined that Danielle died as a result of the second impact.² Danielle’s post-mortem blood ethanol concentration was 0.24% and, in the opinion of Dr. Lappas, “consistent with significant ethanol induced adverse effects including ... drowsiness or unconsciousness.”³

Plaintiffs’ underinsured motorist claim against Vigilant seeks to recover underinsured motorist benefits relating to the accident for survival and wrongful death. Plaintiffs’ other uninsured motorist insurer, The Travelers Home and Marine Insurance Company (“Travelers”), has been dismissed from the case.⁴ A first wrongful death and survival action filed in Maryland including Turner and Kuczynski as parties was resolved out of court.

Other unrelated aspects of Plaintiffs’ motion were granted during oral argument on all motions in limine that resulted in the preclusion of the Defendant

¹Ex. A to Pls.’ Identification of Tr. Experts at 17; Ex. H to Def.’s Identification of Tr. Experts at 2.

² Ex. H to Def.’s Identification of Tr. Experts at 3.

³ Ex. E to Def.’s Identification of Tr. Experts.

⁴ *Paikin v. The Travelers Home & Marine Ins. Co.*, C.A. No. N12C-03-121 (Del. Super. Jan. 30, 2013) (ORDER).

calling three of Plaintiffs' retained consulting, non-testifying experts at trial.⁵ As to the instant issue, during oral argument, both parties agreed that the intoxication levels in Dr. Lappas' report of other parties to the accident were irrelevant and immaterial,⁶ but the Court deferred ruling on the only remaining issue from all motions in limine, namely, whether Defendant should be precluded from introducing evidence of 1) Danielle's consumption of alcohol on the day of the collision or 2) any impairment relating to her consumption of alcohol at the time of the collision.

III. THE PARTIES' CONTENTIONS

A. Plaintiffs' Contentions

Plaintiffs contend that expert testimony regarding Danielle's alcohol consumption and possible resulting impairments should be excluded under D.R.E. 403 and assert that any probative value that the evidence may have in determining Danielle's injuries and damages will be substantially outweighed by the prejudice that would result if the jury hears her post-mortem blood ethanol concentration. They argue that the probative value of the evidence is marginal because of the extremely short length of time between the two accidents. The level of alcohol in her system was extremely high and Plaintiffs contend that some level of blame will be unfairly assigned to her due to that fact. Plaintiffs argue that any potential limiting instruction will likely be ineffective.

In addition, Plaintiffs argued in their reply for the first time that the decedent's impairment or unconsciousness would need to be established to a "reasonable degree of medical probability" and, in that connection, asserted that Dr. Lappas' opinion that her level was "consistent" with a level of impairment that can

⁵ *Paikin v. The Travelers Home & Marine Ins. Co.*, C.A. No. N12C-03-121 (Del. Super. Sep. 6, 2013) (Bench Ruling Granting In Part Plaintiffs' Motion in Limine Precluding Testimony from Three Experts and Limiting the Testimony of Another). Three motions in limine, including the present motion, were argued at oral argument on September 6, 2013. Plaintiffs' Motion for Partial Summary Judgment was GRANTED because there was no genuine dispute of material fact regarding the proximate cause of the accident. *Paikin v. The Travelers Home & Marine Ins. Co.*, C.A. No. N12C-03-121 (Del. Super. Sep. 6, 2013) (Bench Ruling Granting Plaintiffs' Motion for Partial Summary Judgment). Defendant's Motion to preclude Plaintiffs from Asserting Positions and/or Opinions Contrary to Those They Asserted in the "Maryland Action" was DENIED because Defendant will be able to impeach witnesses on cross-examination. *Paikin v. The Travelers Home & Marine Ins. Co.*, C.A. No. N12C-03-121 (Del. Super. Sep. 6, 2013) (Bench Ruling Denying Defendant's Motion in Limine to Preclude Plaintiffs from Asserting Positions and/or Opinions Contrary to Those They Asserted in the "Maryland Action").

⁶ *Paikin v. The Travelers Home & Marine Ins. Co.*, C.A. No. N12C-03-121 (Del. Super. Sep. 6, 2013) (Bench Ruling Granting Plaintiffs' Motion in Limine Precluding Testimony from Three Experts and Limiting the Testimony of Another).

cause “drowsiness or unconsciousness” fails to meet that evidentiary threshold for admissibility.

B. Defendant’s Contentions

Vigilant contends that the evidence regarding Danielle’s consumption of alcohol on the day of the collision or any impairment relating to such are relevant and probative as to the issue of whether or to what extent she suffered conscious pain and suffering in the approximately one minute prior to her death. Vigilant argues that Danielle’s “drowsiness or unconsciousness” is highly probative of the establishment of Plaintiffs’ survival claim for pain and suffering and assessment of damages. Vigilant asserts there is little prejudice and represent that it will not suggest to the jury during the trial that Danielle is to blame for her injuries, and that the important probative value of this evidence is not “substantially outweighed” by considerations of prejudice.

IV. DISCUSSION

D.R.E. 403 states “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice,⁷ confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.”⁸ D.R.E. 403 mirrors Federal Rule of Evidence 403. When interpreting rules of evidence, Delaware courts have historically looked for federal guidance due to their similarity.⁹

When balancing the probative value of the evidence and the prejudicial concerns raised by Rule 403, “[t]he language of the Rule tilts toward the admission of evidence in close cases.”¹⁰ Excluding evidence under F.R.E. 403 has been held to be an “extraordinary measure” that should be “used sparingly.”¹¹

This issue is somewhat of a close case. Danielle’s suffering lasted for about a minute between the first and second impacts. Her post-mortem blood ethanol concentration was not a proximate cause of the accident. However, Plaintiffs

⁷ Unfair prejudice is defined as “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” Advisory Committee’s Note, Fed. R. Evid. 403.

⁸ D.R.E. 403.

⁹ See *Del. Acceptance Corp. v. Swain*, 2012 WL 1066357, at *4 (Del. Super. Mar. 9, 2012).

¹⁰ *State v. Monroe*, 2010 WL 1960123, at *24 n.161 (Del. Super. May 14, 2010) (quoting 29 Am. Jur. 2d *Evidence* §423 (2008)) (probative value of prior, uncharged robbery allegedly committed by Defendant as evidence of motive not “substantially outweighed” by potential prejudice), *aff’d*, 28 A.3d 418 (Del. 2011). See also *United States v. Dennis*, 625 F.2d 782, 797 (8th Cir. 1980) (“In weighing the probative value of evidence against the dangers and considerations enumerated in Rule 403, the general rule is that the balance should be struck in favor of admission.”).

¹¹ *United States v. Meester*, 762 F.2d 867, 875 (11th Cir. 1985), *cert. denied*, 474 U.S. 1024 (1985).

acknowledge the relevance of the post-mortem blood ethanol concentration and whether or not she was conscious, or the extent to which she was conscious, during that minute does have at least some probative value.

The Court concludes that the admitted prejudicial nature of Danielle's post-mortem blood ethanol concentration does not substantially outweigh the probative value of the testimony. Also, there should be minimal risk of confusion by the jury that Danielle had any responsibility for her injuries because of her post-mortem blood ethanol concentration. Upon any application of the Plaintiffs, the Court will give an appropriate cautionary limiting instruction.¹²

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion in Limine to Limit Expert Testimony is **DENIED**.

IT IS SO ORDERED.

Richard R. Cooch, R.J.

oc: Prothonotary

¹² Plaintiffs' additional argument that any evidence of Danielle's potential unconsciousness or impairment due to alcohol fails to meet the evidentiary threshold for admissibility was raised for the first time in their reply brief and the Court finds it to be waived, it not having been raised in their initial motion. See *Mateson Chem. Corp. v. Barton*, 2008 WL 142510, at *1 n.5 (Del. Super. Jan. 15, 2008) (citing *Thompson v. State*, 2006 WL 2096440 (Del. Super. July 27, 2006), *aff'd*, 919 A.2d 562 (Del. Super. Feb. 27, 2007)).