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**UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA**

Blane Barry,)	
)	
Plaintiff,)	2:15-cv-004 JWS
)	
vs.)	ORDER AND OPINION
)	
Shell Oil Company, et al.,)	[Re: Motion at docket 142]
)	
Defendants.)	
)	

I. MOTION PRESENTED

At docket 142 plaintiff Blane Barry (“Barry”) filed a motion asking the court to exclude certain evidence. Barry supported the motion with a memorandum filed at docket 143. Defendant Arctia Offshore, Ltd, (“Arctia”) responded at docket 145. Defendants Shell Oil Company and Shell Offshore, Inc. (jointly “Shell”) responded at docket 147. Defendant Safety Management Systems, LLC (“SMS”) responded at docket 149 by adopting the arguments and authorities advanced by Arctia and Shell. Barry did not file a reply.

Oral argument was not requested and would not be of assistance to the court. The motion is ripe for decision.

II. BACKGROUND

Barry claims to have suffered a personal injury while working as a rigger employed by EPS Cargo Handlers (“EPS”), a subcontractor working aboard the M/V NORDICA. The vessel is an ice-breaker owned by Arctia and supplied to Shell Offshore, Inc. (“Shell Offshore”) pursuant to a Master Time Charter. Shell Offshore entered a contract with SMS to provide a safety representative aboard the NORDICA.

1 Barry's complaint alleges that he suffered serious back and neck injuries while
2 lifting a cable aboard the vessel in August of 2012. Barry seeks damages for lost
3 earnings, lost earning capacity, past and future medical expenses, physical and
4 emotional pain, and the loss of enjoyment of life. The court earlier denied SMS' motion
5 for summary judgment concluding that there were unresolved factual issues concerning
6 the duty and responsibility of SMS' safety representative Joshua Wyatt and concerning
7 the duty and responsibilities of SMS in its relationship with Shell Offshore.

8 III. DISCUSSION

9 This court agrees with the Mississippi district court which wrote: "The purpose of
10 *motions in limine* is not to re-iterate matters which are set forth elsewhere in the Rules
11 of Civil Procedure or Rules of Evidence, but, rather, to identify specific issues which are
12 likely to arise at trial, and which, due to their complexity or potentially prejudicial nature,
13 are best addressed in the context of a *motion in limine*."¹ A party making a motion *in*
14 *limine* has the burden of showing that specific evidence is inadmissible.²

15 With the preceding principles in mind, the court turns to consideration of Barry's
16 motion. Barry's remarkably broad requests seek to exclude evidence falling into
17 nineteen categories. The first category is evidence of settlement negotiations including
18 settlement offers made by Barry. Such evidence is excluded by operation of Fed. R.
19 Evid. 408.³ Unsurprisingly, no defendant contends that such evidence is admissible.
20 The court will exclude such evidence, but notes that this request was unnecessary.

21 The second category consists of evidence relating to Barry's receipt of benefits
22 from health insurance, disability insurance and the like. The well-known collateral
23 source rule forecloses introduction of such evidence to limit or reduce a defendant's
24 liability to pay damages. Defendants do not argue otherwise, but Arctia points out that
25 evidence of collateral payments might, in appropriate circumstances, be admitted for

26 ¹*Magette v. BL Dev, Corp.*, 2011WL 2134578, at *4 (N.D. Miss. May 27, 2011).

27 ²*Ashike v. Mullen Crane and Transp. Inc.*, 2014 WL 3640735, at * 6 (D. Utah July 23,
28 2014); *Asbury v. MNT, Inc.*, 2013 WL 12143046 (D. N.M. Dec. 19, 2013).

³The exceptions identified in subsection (b) of the rule are inapplicable here.

1 other purposes such as to show malingering⁴ or to refute a claim of destitution. Shell
2 argues that inquiry might be appropriate to test Barry's credibility as it relates to the
3 interplay between his maintenance payments and his disability benefits. Such an
4 inquiry likely would not survive Rule 403 analysis. The court will apply the collateral
5 source rule at trial. This does not foreclose a defendant making application to introduce
6 some evidence of collateral sources if the defendant can establish outside the jury's
7 presence that the evidence should be allowed for a specific purpose other than
8 reducing damages to be paid by a defendant. If evidence were admitted for such a
9 purpose, it would require an appropriate limiting instruction to be sure the jury would not
10 use the evidence to reduce a defendant's damages liability.

11 Barry's third and fourth categories overlap. Each concerns testimony by persons
12 not timely identified pursuant to Fed. R. Civ. P. 26 and in responses to Barry's
13 discovery requests. Defendants do not address this topic. Suffice it to say that this
14 court always insists that any witness who is to testify at trial must, among other things,
15 have been timely identified.

16 Categories five and six seek exclusion of documents or tangible things not timely
17 produced or disclosed pursuant to Fed. R. Civ. P. 26 or during the discovery process.
18 All that need be said is that this court does not admit such evidence.

19 Categories seven, eight, and nine address exclusion of expert testimony from
20 persons not disclosed to Barry as experts or who offer testimony falling outside the
21 opinions disclosed to him. The court will enforce the applicable rules by excluding
22 testimony whose introduction would contravene the rules.

23 The tenth category embraces any reference to crimes committed by "Plaintiff or
24 his expert witnesses, relatives, agents, employees, attorneys or representatives."⁵
25 Evidence of a crime or other bad act demonstrating a witness' character traits may not
26 be admitted to show that on any given occasion the witness acted in accordance with

27 ⁴*Maharaj v. Cal. Bank & Trust*, 288 F.R.D. 458, 461 (E.D. Cal. 2013).

28 ⁵Doc. 143 at p. 4.

1 such character traits.⁶ However, subject to a Rule 403 evaluation, evidence of all
2 felony convictions and misdemeanor convictions of crimes having an element of
3 dishonesty or false statement must be admitted when offered to attack the character of
4 a witness for truthfulness.⁷ Barry has not presented evidence with respect to any of his
5 criminal convictions which would allow the court to perform an analysis under Rule 403.
6 The analysis cannot be performed in a vacuum; Barry will have to make specific
7 Rule 403 objections at trial with respect to evidence offered as to any conviction.

8 The eleventh category represents by far the broadest request for exclusion of
9 evidence this court has seen in more than 25 years on the bench. Barry's blunderbuss
10 request fails to identify specific issues in a factual context which would allow proper
11 analysis. This request is necessarily denied, but without prejudice to specific and
12 precise objections which Barry may raise at trial. It may be added that defendants are
13 likely to seek to introduce evidence of Barry's use of illicit drugs, evidence which might
14 survive an objection from Barry. Before making an objection to such evidence, Barry's
15 counsel should carefully consider the discussion of this topic in Shell's response.⁸

16 The twelfth category concerns evidence relating to Barry's past and current
17 domestic situation. Again, Barry fails to provide a factual context sufficient to allow
18 analysis determining which specific evidence might be excluded. This request must be
19 denied, but without prejudice to properly focused objections which might be raised at
20 trial.

21 The thirteenth category relates to evidence showing Barry failed to report income
22 or file income tax returns with the Internal Revenue Service. Barry argues that such
23 evidence is irrelevant and should be excluded under Rule 403 or 404. The request
24 lacks merit. Barry claims loss of income and income earning capacity. His prior
25 earnings history is relevant, and prior income tax returns or their absence provides one
26 basis for gauging earning capacity. The probative value of this evidence is substantial,

25 ⁶Fed. R. Evid. 404.

26 ⁷Fed. R. Evid. 609.

27 ⁸Doc. 147 at pp. 6-8.

1 and it is not substantially outweighed by the danger of unfair prejudice to Barry.
2 Exclusion based on Rule 403 is not appropriate. Rule 404 is inapposite: The evidence
3 would be offered as proof relevant to his earning capacity, not his character.

4 Category fourteen relates to evidence showing how the outcome in this litigation
5 might affect insurance premiums. Such evidence is outside the scope of relevant
6 evidence defined by Rule 401. If presented, it would be excluded. This category is
7 premised on an unrealistic assumption about the conduct of competent defense
8 counsel. It does not warrant a motion *in limine*.

9 Category fifteen relates to argument implying that defendants' conduct must be
10 the sole cause of Barry's damages in order for defendants to be liable. Such argument
11 is inconsistent with the law, and would not be permitted at trial. This issue is another
12 that does not warrant a motion *in limine*.

13 Category sixteen relates to any argument that courts are overburdened because
14 of too many lawsuits. Unsurprisingly, defendants do not respond. No competent
15 defense lawyer would make such an argument. Were an incompetent lawyer to do so,
16 this court would prohibit it. This category does not warrant a motion *in limine*.

17 Category seventeen concerns references to the ability of people in general to
18 make up claims to litigate and that Barry's own claims are "frivolous" or "without merit."⁹
19 This category is too broad. A contention that people in general make up lawsuits is
20 irrelevant and would be excluded. A contention that Barry's claims lack merit is clearly
21 proper. Indeed, the very purpose of the trial will be to determine if his claims have
22 merit.

23 Category 18 relates to surveillance of Barry which was not disclosed in
24 discovery. Defendants do not respond. In any event, the court will exclude references
25 to surveillance which should have been, but was not, disclosed in discovery.

26 Category nineteen is really a request that the court order the parties to approach
27 the bench for a side-bar before offering any evidence that might be subject to objection.
28 Suffice it to say that this court almost never permits traditional side-bars. Instead, this

⁹Doc. 143 at p. 6.

1 court requires the parties to confer about any evidence which might require a side-bar
2 and raise the matter with the court in the morning prior to the time the jury is expected
3 to be in the courtroom, during either the mid-morning or mid-afternoon recess, during
4 the lunch recess, or after the jury has left for the day. This approach conserves the
5 jurors' time and eliminates the possibility of juror speculation about what is going on in
6 side-bars.

7 **IV. CONCLUSION**

8 The motion at docket 142 is granted in part and denied in part consistent with the
9 preceding discussion.

10 DATED this 22nd day of May 2018.

11 /s/ JOHN W. SEDWICK
12 SENIOR JUDGE, UNITED STATES DISTRICT COURT
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