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**UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA**

**SHAUN M. DUNKIN & SHARLEE
DUNKIN,**

Plaintiffs,

vs.

**DOREL ASIA SRL & WAL-MART
STORES, INC.**

Defendants.



**5:10-cv-00004 JWS
ORDER AND OPINION
[Re: Motion at Docket 44]**

I. MOTION PRESENTED

At docket 44, plaintiffs Shaun and Sharlee Dunkin (“plaintiffs”) move *in limine* for various relief. Defendants Dorel Asia SRL and Wal-Mart Stores, Inc. (“defendants”) respond at docket 55. Plaintiffs’ reply is at docket 55. Oral argument was not requested and would not assist the court.

II. DISCUSSION

Plaintiffs seek an order that several “subjects not be mentioned, referenced, or discussed” by witnesses or counsel.¹ Each subject will be addressed in turn.

¹Doc. 44 at 1.

1 **A. Evidence of Compliance With Industry Standards**

2 Plaintiffs argue that defendants should not be permitted to argue that their duty
3 was limited to compliance with industry standards. The court agrees with plaintiffs that
4 “voluntary ASTM standards or CPSC regulations are controlling as to [a defendant’s]
5 duty of care is wrong as a matter of law.”² However, defendants’ response makes clear
6 that they do not intend to argue otherwise. Evidence of defendants’ compliance with
7 industry standards is permissible.³

8 **B. Evidence of Collateral Source Payments**

9 Plaintiffs argue that defendants should not be permitted to introduce evidence of
10 medical expense payments made by Medicaid.

11 The collateral source rule . . . prohibits the reduction of a plaintiff’s
12 damages when he has received compensation from another source. It
13 also has an evidentiary role, excluding evidence of other compensation on
the theory that such evidence would affect the jury’s judgment unfavorably
to the plaintiff on the issues of liability and damages.⁴

14 Defendants argue that evidence of Medicaid payments is admissible “to show the actual
15 medical expenses that the providers have actually accepted as full and final payment for
16 their services.”⁵ Defendants’ proposed purpose is not different from diminution of
17 plaintiffs’ potential damages, and their argument is foreclosed by the collateral source
18 rule and the order at docket 63.

19 **C. Reference to Sharlee Dunkin’s Criminal History**

20 Plaintiffs argue that evidence of Sharlee Dunkin’s criminal history and encounters
21 with law enforcement—which includes three minor-in-possession charges, three minor-
22 in-consumption charges, and warnings for public drunkenness and indecent

23 _____
24 ²Doc. 44 at 3.

25 ³See *Sturm, Ruger & Co., Inc. v. Day*, 594 P.2d 38, 45 (Alaska 1979).

26 ⁴*Tolan v. ERA Helicopters, Inc.*, 699 P.2d 1265, 1267 (Alaska 1985). Consistent with the
27 collateral source rule, the court has already denied defendants’ motion to exclude evidence of
medical bills in excess of the amounts paid by Medicaid. Doc. 63.

28 ⁵Doc. 55 at 3.

1 exposure—should be excluded pursuant to Rules 404 and 609. Defendants argue that it
2 is premature to consider the issue and that “the court cannot assess how some of these
3 police records might be relevant for cross-examination.”⁶

4 Rule 404(b) states that “[e]vidence of a crime, wrong, or other act is not
5 admissible to prove a person’s character in order to show that on a particular occasion
6 the person acted in accordance with the character.”⁷ The court agrees with plaintiffs
7 that Rule 404(b) bars evidence of Sharlee Dunkin’s criminal history to show that she
8 acted in conformity with any character trait suggested by it. Defendants have not
9 argued that Sharlee Dunkin’s criminal history is relevant to any other end.

10 With respect to impeachment, Rule 609 provides that a witness’s felony
11 convictions “must be admitted, subject to Rule 403, in a civil case in which the witness
12 is not a defendant.”⁸ Any conviction involving dishonesty—regardless of whether the
13 offense is a felony or misdemeanor—similarly must be admitted.⁹ Because Sharlee
14 Dunkin’s convictions are, at most, misdemeanors that do not involve dishonesty, they
15 are inadmissible under Rule 609.

16 **D. Settlement Negotiations**

17 Plaintiffs argue that references to settlement negotiations are impermissible
18 under Rule 408. Defendants do not oppose this aspect of plaintiffs’ motion.

19 **E. Evidence of Defendants’ Insurance**

20 Plaintiffs argue that evidence of defendants’ mode of insurance should be
21 excluded. Defendants do not oppose this aspect of plaintiffs’ motion.

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25 ⁶Doc. 55.

26 ⁷Fed. R. Evid. 404(b).

27 ⁸Fed. R. Evid. 609(a)(1)(A).

28 ⁹Fed. R. Evid. 609(a)(2).

1 **F. Time and Manner of Retention of Plaintiffs’ Counsel**

2 Plaintiffs argue that “[t]he time or manner in which the Dunkins retained counsel
3 is not relevant to any issues to be decided by the jury and should therefore be
4 excluded.”¹⁰ Defendants argue that this issue should be addressed at trial and that it
5 may have relevance to “issues regarding preservation of evidence.”¹¹ Plaintiffs argue in
6 reply that evidence of the timing and manner in which they hired counsel is unfairly
7 prejudicial and should be excluded pursuant to Rule 403. The court concludes that this
8 issue has not been adequately briefed. Defendants do not explain how such evidence
9 would be relevant to “issues regarding preservation of evidence” nor do they explain
10 what those issues are. Plaintiffs do not explain why such evidence would be unfairly
11 prejudicial.

12 **G. Evidence of Plaintiffs’ Fault**

13 Plaintiffs argue that defendants “should not be permitted to introduce any
14 evidence or argument suggesting that the plaintiffs share any fault for Jocelyn’s injury.”¹²
15 Plaintiffs correctly note that “in order to justify submitting to the jury the question of
16 whether [a] plaintiff . . . was negligent, there must be evidence of such negligence.”¹³
17 Specifically, “[t]here must be facts from which one could reasonably infer that such
18 negligence existed.”¹⁴ It is unclear what evidence, precisely, plaintiffs seek to exclude.
19 Defendants are correct that Alaska is a proportional liability state.¹⁵ Consequently,
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22 ¹⁰Doc. 44 at 8.

23 ¹¹Doc. 55 at 4.

24 ¹²Doc. 44 at 9.

25 ¹³*Cummins v. King & Sons*, 453 P.2d 465, 466 (Alaska 1969).

26 ¹⁴*Id.*

27 ¹⁵*See, e.g., Fancyboy v. Alaska Village Elec. Co-op.*, 984 P.2d 1128, 1132–1133 & n.8
28 (Alaska 1999).

1 defendants are not barred from advancing the theory that either or both of the Dunkins
2 were also negligent.

3 **H. Reference to Plaintiffs' Failure to Call Witnesses**

4 Plaintiffs maintain that defendants should not be allowed to “suggest any adverse
5 inference based on the plaintiffs’ alleged failure to call any [particular] witness.”¹⁶
6 Plaintiffs also suggest that Shaun or Sharlee Dunkin may not attend portions of the trial
7 and argue that defendants should not be allowed to remark on their potential non-
8 attendance. Plaintiffs argue that such evidence is irrelevant and unfairly prejudicial.
9 Defendants argue that the issue is premature, and that the jury should be allowed to
10 consider “all of the evidence.”¹⁷ Defendants do not explain how such evidence would be
11 relevant. The court agrees with plaintiff that reference to a party’s absence during trial
12 is irrelevant. Defendants shall refrain from doing so. The court agrees with defendants
13 that it is premature to foreclose any possible comment on or argument about a party’s
14 failure to call a particular witness.

15 **I. Reference to the Present Motion**

16 Plaintiffs argue that defendants should not be allowed to reference the present
17 motion *in limine*. Defendants do not oppose this aspect of plaintiffs’ motion.

18 **III. CONCLUSION**

19 For the reasons above, plaintiffs’ motion *in limine* at docket 44 is **GRANTED** in
20 part and **DENIED** in part as follows:

- 21 1) Evidence of defendants’ compliance with industry standards is permissible.
- 22 2) Evidence of collateral source payments is excluded.
- 23 3) Evidence of Sharlee Dunkin’s criminal history is excluded.
- 24 4) Evidence of settlement negotiations is excluded.
- 25 5) Evidence of defendants’ insurance or self-insurance is excluded.

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27 ¹⁶Doc. 44 at 9.

28 ¹⁷Doc. 55 at 4.

