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

TRACEY RIDOLFI,	:	**Civil No. 1:15-CV-859**
	:	
Plaintiff	:	**(Magistrate Judge Carlson)**
	:	
v.	:	
	:	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	:	
	:	
Defendant	:	

MEMORANDUM ORDER

I. Factual Background

This is an insurance dispute between Tracey Ridolfi and her insurer, State Farm Mutual Automobile Insurance Company, relating to claims concerning State Farm's alleged refusal to provide underinsured motorist (UIM) coverage to Ridolfi. Currently the sole remaining claim in this lawsuit is Ridolfi's allegation that State Farm's conduct constitutes a breach of this insurance contract, this court having previously dismissed Ridolfi's claim that State Farm violated Pennsylvania's bad faith statute, 42 Pa. Cons. Stat. Ann. § 8371, by: (1) misstating the scope of its coverage; (2) insisting upon a sworn statement from its insured; (3) unreasonably delaying its investigation of this claim and requiring the production of multiple sets of medical records; and (4) failing to keep Ridolfi fully informed in writing on the

progress of her claim.

This case is set for trial on August 7, 2017. In anticipation of trial State Farm has filed a series of motions *in limine*. Three of these motions *in limine* appear to reflect a common legal and factual theme in that they seek to preclude Ridolfi from presenting evidence relating to claims as to which it is alleged that she either failed to make discovery disclosures, or actually disclaimed in the course of discovery. For example, State Farm seeks to preclude Ridolfi from presenting wage loss evidence, (Doc. 61), arguing in part that: "Plaintiff indicated numerous times that she is not presenting a claim for lost wages or potential future lost earnings, as she was unemployed at the time of the accident, and did not decide to work until February 2012, nearly four years after the subject accident. Additionally, Plaintiff has presented no documentary evidence of a claim for lost wages to date." (Doc. 66, p. 3.) Likewise State Farm seeks to preclude Ridolfi from presenting evidence pertaining to future medical expenses because of an alleged failure to provide discovery on these matter, (Doc. 63), asserting that: "Plaintiff has not undergone treatment since February 2014 for the alleged injuries at issue. Further, Plaintiffs own expert did not opine that Plaintiff needed future medical treatment and did not provide any approximation of future medical costs. Plaintiff has provided no documentary evidence that she will need future medical treatment for her alleged injuries at issue." (Doc. 64, p.3.) Finally, State Farm

moves to preclude testimony regarding a nerve conduction study allegedly undertaken by Ridolfi at some point in time (Doc. 62), contending that:

> Throughout her third party deposition, Plaintiff never mentioned undergoing an EMG/nerve conduction test. In addition, Plaintiff never mentioned undergoing an EMG/nerve conduction test in her Statement Under Oath either. *See a true and correct copy of Plaintiff's Statement Under Oath attached hereto as Exhibit A.*The first time an EMG was brought to Defendant's attention was in Plaintiffs Expert Report by Dr. Andrew Collier. The report states "She states she did have a positive EMG on the right." *See a true and correct copy of Plaintiff's Expert Report attached hereto as Exhibit B, at page* 2. Despite this allegation, Plaintiff has never provided any records substantiating this alleged positive EMG result. Moreover, in Plaintiffs expert report, Dr. Collier states that Plaintiff had a normal EMG performed in 1998 after her first motor vehicle accident. *See Exhibit B at page* 3. Once again, Plaintiff has not provided any records substantiating that Plaintiff underwent an EMG/nerve conduction study in 1998.
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> (Doc. 65, p.2.)

Thus, in each instance we construe the defendant's motion *in limine* to rest upon an alleged failure to make timely and complete discovery. For her part Ridolfi has responded to the these motions, albeit in a fashion which is not fully responsive to the defendant's objection that it has not been provided with discovery on these elements of the plaintiff's claims.(Docs. 86-88.) Instead, Ridolfi has focused her argument primarily on questions of the evidentiary relevance of this proof.

Further complicating our assessment of these motions is a certain lack of legal clarity and factual precision regarding the nature of the discovery propounded, and

the information provided by Ridolfi in the course of discovery. Thus, the parties have made assertions regarding discovery that, on occasion, cannot be fully reconciled, but have not directed us to any evidence which would enable us to make a fully-informed evaluation of these factual assertions.

Given these facts, for the reasons set forth below, we will GRANT these motions *in limine,* (Docs. 61, 62, and 63), in part and prescribe a procedure for fulsome offers of proof which must be made by counsel out of the presence of the jury before any of this evidence is offered or admitted at trial.

II. Discussion

The Court is vested with broad inherent authority to manage its cases, which carries with it the discretion and authority to rule on motions *in limine* prior to trial. *See Luce v. United States*, 469 U.S. 38, 41 n.4 (1984); *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 260 (3d Cir. 1983), *rev'd on other grounds sub nom.*, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (the court exercises its discretion to rule *in limine* on evidentiary issues "in appropriate cases"). Courts may exercise this discretion in order to ensure that juries are not exposed to unfairly prejudicial, confusing or irrelevant evidence. *United States v. Romano*, 849 F.2d 812, 815 (3d Cir. 1988). Courts may also do so in order to "narrow the evidentiary issues for trial and to eliminate unnecessary trial interruptions."

Bradley v. Pittsburgh Bd. of Educ., 913 F.2d 1064, 1069 (3d Cir. 1990) (citation omitted). However, courts should be careful before doing so.

Typically there are two primary bases for motions *in limine*. First, such motions are filed when it is alleged that evidence is going to be offered which is improper under the Federal Rules of Evidence. In considering motions *in limine* which call upon the Court to engage in preliminary evidentiary rulings under Rule 403 of the Federal Rules of Evidence, we begin by recognizing that these "evidentiary rulings [on motions *in limine*] are subject to the trial judge's discretion and are therefore reviewed only for abuse of discretion ... Additionally, application of the balancing test under Federal Rule of Evidence 403 will not be disturbed unless it is 'arbitrary and irrational.' " *Abrams v. Lightolier Inc.* 50 F.3d 1204, 1213 (3d Cir.1995) (citations omitted); *see Bernardsville Bd. of Educ. v. J.H.,* 42 F.3d 149, 161 (3d Cir.1994) (reviewing *in limine* rulings for abuse of discretion). Yet, while these decisions regarding the exclusion of evidence rest in the sound discretion of the district court, and will not be disturbed absent an abuse of that discretion, the exercise of that discretion is guided by certain basic principles.

One of the key guiding principles is reflected in the philosophy which shapes the rules of evidence. The Federal Rules of Evidence can aptly be characterized as evidentiary rules of inclusion, which are designed to broadly permit fact-finders to

consider pertinent factual information while searching for the truth. The inclusionary quality of the rules, is embodied in three cardinal concepts. The first of these concepts is Rule 401's definition of relevant evidence. Rule 401 defines what is relevant in an expansive fashion, stating:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable *197 or less probable than it would be without the evidence.

Fed. R. Evid. 401.

Adopting this view of relevance it has been held that: "Under [Rule] 401, evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' [Therefore] 'It follows that evidence is irrelevant only when it has no tendency to prove the fact. Thus the rule, while giving judges great freedom to admit evidence, diminishes substantially their authority to exclude evidence as irrelevant.' " *Frank v. County of Hudson*, 924 F. Supp. 620, 626 (D.N.J.1996) *citing Spain v. Gallegos*, 26 F.3d 439, 452 (3d Cir.1994) (quotations omitted).

This quality of inclusion embraced by the Federal Rules of Evidence is further buttressed by Rule 402, which generally defines the admissibility of relevant

evidence in sweeping terms, providing that:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Fed. R. Evid. 402.

Thus, Rule 402 expressly provides that all "[r]elevant evidence will be admissible unless the rules of evidence provide to the contrary." *United States v. Sriyuth*, 98 F.3d 739, 745 (3d Cir.1996) (citations omitted). These principles favoring inclusion of evidence are, however, subject to some reasonable limitations. Thus, Rule 403, provides grounds for exclusion of some potentially irrelevant but highly prejudicial evidence, stating that:

> Although 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 .

By permitting the exclusion of relevant evidence only when its probative value is "substantially outweighed" by other prejudicial factors, Rule 403 underscores the principle that, while evidentiary rulings rest in the sound discretion of the court, that discretion should consistently be exercised in a fashion which

favors the admission of relevant proof unless the relevance of that proof is substantially outweighed by some other factors which caution against admission.

The second principal basis for a motion *in limine* seeking to preclude evidence arises from discovery failures. As we construe it, it is this legal grounds for exclusion which is implicated in these three motions *in limine*. These alleged discovery failures provide potential grounds for exclusion of evidence pursuant to Rule 37(c) (1) which provides that "[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or harmless." Fed. R. Civ. P. 37(c)(1). The rule is, by its terms mandatory. *Newman v. GHS Osteopathic, Inc., Parkview Hosp. Div.*, 60 F.3d 153, 156 (3d Cir. 1995) ("Rule 37 is written in mandatory terms, and is designed to provide a strong inducement for disclosure of Rule 26(a) material."); *see also Finley v. Marathon Oil Co.*, 75 F.3d 1225, 1230 (7th Cir. 1996) ("The sanction of exclusion is thus automatic and mandatory unless the party to be sanctioned can show that is violation of Rule 26(a) was either justified or harmless."). Under Rule 37 "[t]he non-producing party shoulders the burden of proving substantial justification for its conduct or that the failure to produce was harmless." *Tolerico v. Home Depot,* 205 F.R.D. 169, 175 (M.D.Pa.2002).

The Third Circuit has not directly addressed the "substantial justification" standard. *See Grider v. Keystone Health Plan Central, Inc.,* 580 F.3d 119, 140 n. 23 (3d Cir.2009). However, district courts in this circuit have defined "substantial justification" as "justification to a degree that could satisfy a reasonable person that parties could differ as to whether the party was required to comply with this disclosure request." *Tolerico,* 205 F.R.D. at 175. As this suggests, the burden of proving that failure to disclose was substantially justified rests with the party who failed to disclose. *See Klatch-Maynard v. Sugarloaf Twp.*, No. 3:06-CV-0845, 2011 WL 2006424, at *5 (M.D. Pa. May 23, 2011) (finding that burden unsatisfied, and finding "Plaintiffs' flagrant disregard to the Court's discovery order, the prejudice to the Defendants, and the need for an orderly trial process in this protracted litigation weigh in favor of excluding" the evidence that had not been produced).

When a plaintiff does not satisfy this burden of proving substantial justification or harmlessness, the Court is vested with discretion to exclude the evidence that was never previously disclosed during pre-trial litigation pursuant to Rule 37(c)(1). *Klatch-Maynard,* 2011 WL 2006424, at *3. In determining whether evidence should be excluded due to a party's failure to comply with its discovery obligations, courts are enjoined to consider the following factors: (1) the prejudice

or surprise of the party against whom the evidence would be used; (2) the ability of that party to cure the prejudice; (3) the extent to which waiver of the rule against allowing the use of undisclosed evidence would disrupt the orderly and efficient trial of the case; and (4) bad faith or willfulness in failing to comply with the court's orders. *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894, 904-05 (3d Cir. 1977), overruled on other grounds, *Goodman v. Lukens Steel Co.*, 777 F.2d 113 (3d Cir.1985). The Court should also consider the importance of the excluded testimony. *Konstantopoulous v. Westvaco Corp.*, 112 F.3d 710, 719 (3d Cir. 1997).

Given the current state of the record before us, we cannot reach any definitive conclusions regarding whether there have been discovery shortcomings in this case which would warrant exclusion of undisclosed evidence. In particular we note that the parties have made assertions regarding discovery that, on occasion, cannot be fully reconciled, but have not directed us to any evidence which would enable us to evaluate these factual assertions. Nonetheless, we do not believe that this litigation can proceed forward in a haphazard fashion without further clarity on these issues. Therefore, we will GRANT these motions *in limine*, in part, and prescribe a procedure for the reasoned resolution of these questions concerning the admissibility of these categories of evidence.

On this score, prior to the introduction of any of this evidence, the parties shall provide an offer of proof to the court. This offer of proof will be bifurcated in the following fashion:

First, it will be the responsibility of the defendant to identify discovery demands propounded in the case which called for the disclosure of this disputed evidence, or point to discovery responses from the plaintiff which denied or disclaimed the existence of this evidence.

Second, upon the presentation of this information by the defendant, the plaintiff may either: (1) demonstrate that the evidence was disclosed; or (2) prove substantial justification for its conduct or that the failure to produce was harmless.

Third, as part of this offer of proof both parties should also be prepared to address the following factors which govern the admissibility of this evidence: (1) the prejudice or surprise of the party against whom the evidence would be used; (2) the ability of that party to cure the prejudice; (3) the extent to which waiver of the rule against allowing the use of undisclosed evidence would disrupt the orderly and efficient trial of the case; and (4) considerations of bad faith or willfulness.

An appropriate order follows.

III. Order

For the forgoing reasons, IT IS ORDERED that the defendant's motions *in limine* (Docs. 61, 62, and 63) are GRANTED, in part, and prior to the introduction of any of this evidence of lost earnings, future medical expenses, or nerve conduction studies, the parties shall provide an offer of proof to the court in the following fashion:

First, it will be the responsibility of the defendant to identify discovery demands propounded in the case which called for the disclosure of this disputed evidence, or point to discovery responses from the plaintiff which denied or disclaimed the existence of this evidence.

Second, upon the presentation of this information by the defendant, the plaintiff may either: (1) demonstrate that the evidence was disclosed; or (2) prove substantial justification for its conduct or that the failure to produce was harmless.

Third, as part of this offer of proof both parties should also be prepared to address the following factors which govern the admissibility of this evidence: (1) the prejudice or surprise of the party against whom the evidence would be used; (2) the ability of that party to cure the prejudice; (3) the extent to which waiver of the rule against allowing the use of undisclosed evidence would disrupt the orderly and efficient trial of the case; and (4) considerations of bad faith or willfulness.

/s/ Martin C. Carlson
Martin C. Carlson
United States Magistrate Judge

Dated: July 27, 2017