

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

MICHAEL CONEY, et al., : CIVIL ACTION
Plaintiffs, :
 :
v. :
 :
NPR, INC., :
Defendant. : NO. 03-1324

MEMORANDUM AND ORDER

Before the Court are Defendant's Motion in *Limine* to Preclude Introduction of Any Evidence or Claims of Mental Illness, Depression, or Deterioration of Plaintiffs' Mental Health Attributed to the Alleged Incident of June 15, 2001 (Doc. No. 91); Defendant's Motion to Limit the Number of Plaintiffs' Medical Witnesses (Doc. No. 92); Defendant's Motion in *Limine* to Preclude Reference to the Condition of the SS Humacao Other Than at the Location of the Alleged Incident (Doc. No. 93); Defendant's Motion in *Limine* Re: Captain Joseph Ahlstrom (Doc. No. 94); Defendant's Motion in *Limine* to Preclude Deposition Testimony of Captain James Shinnors (Doc. No. 95); and Defendant's Motion in *Limine* to Preclude Plaintiffs' From Testifying About Alleged Financial Hardship or, in the Alternative, to Permit Impeachment Testimony of Collateral Source Benefits Received (Doc. No. 96); together with plaintiffs' oppositions and defendant's replies to the oppositions to these motions. Upon consideration of these motions and subject to reconsideration as evidence is developed at trial, **THE COURT ENTERS THE FOLLOWING ORDER:**

1. Defendant's Motion in *Limine* to Preclude Introduction of Any Evidence or Claims of Mental Illness, Depression, or Deterioration of Plaintiff, Coney's Mental Health

Attributed to the Alleged Accident of June 15, 2001 (Doc. No. 91) is **DENIED**.

Defendant seeks to preclude plaintiffs from offering any evidence or claim of Michael Coney's ("Coney") alleged deteriorating mental health, asserting that it had not been given proper notice of this claim. Plaintiffs oppose the Motion, alleging that defendant had sufficient notice.

The Court accepts that when one suffers from a significant personal injury there may follow damages of a psychological nature. We are satisfied that defendant has been on fair notice that such damage or injury is reasonably part of plaintiffs' claim in this case. The amended complaint filed May 14, 2003 noted that Coney's injuries "may have triggered Reflexive Sympathetic Dystrophy" ("RSD")¹ and mentioned that Coney suffered from headaches and memory loss. Further, plaintiffs have pointed out that reference to depression has appeared in certain medical reports which were produced during discovery. (See Mr. Smith's September 1, 2006 letter² to the Court and copied to NPR's counsel). Defendant has not challenged this

¹ A diagnosis of RSD should have put defendant on notice of that Coney potentially has a mental condition since there is some debate surrounding the relationship between psychological factors and RSD and in any event a side effect of RSD includes mental depression. See www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=PubMed&list_uids=10628276&dopt=Abstract; www.pain.com/sections/pain_resources/library/abstract.cfm?ID=3525&next_page=1&startrec=1&RecordDisplays=20&Search_phrase=rsd side effect.

² Specifically, Mr. Smith states that Dr. Park's March 12, 2003 report was made a part of the Workers' Compensation record and copied to the Social Security Administration on April 9, 2003. He further states that Mr. Quinn subpoenaed social security records on January 28, 2004, and "Dr. Park's reports should have been included in what they sent in response." More generally, Mr. Smith states that he sent Mr. Quinn copies of all medical records he then had on July 24, 2003 and that on January 16, 2004, he sent Mr. Quinn a number of Dr. Park's records, including the March 12, 2003 report.

contention. These records contain clear references to psychological issues. For example, on December 11, 2002, Dr. Park noted that Coney's past medical history was "significant for depression." In his March 12, 2003 report, Dr. Park discussed a diagnosis by another physician of somatization diaphysis³ and noted that Coney has "anxiety and depression . . . related to his chronic pain" and that untreated chronic pain is likely, according to peer review journals, to result in "a triad of depression, anxiety, and hypersensitivity." Plaintiffs also claim that defense counsel questioned Coney at his deposition about whether he had seen a psychologist or psychiatrist for treatment. Defendant has not contested this assertion. Finally, what has been presented to the Court as agreed upon jury instructions (see Mr. Smith's September 5, 2006, letter, ¶ 2, noting defendant's agreement with plaintiffs' proposed points for charge, and Mr. Mattioni's September 5, 2006 letter, ¶ 2 expressing that counsel had agreed upon points for charge as enumerated in plaintiffs' letter) include a damage instruction which says that the jury may consider "plaintiff's injuries and inconvenience on the normal pursuits and pleasures of life; mental anguish and feelings of economic security caused by disability". (Doc. No. 116, p. 32).

Defendant's Motion is **DENIED**.⁴

³ Somatization refers to the conversion of mental experiences or states into bodily symptoms. DORLANDS ILLUSTRATED MEDICAL DICTIONARY (30th ed. 2003).

⁴ Defendant also asserts that an expert medical opinion is necessary to demonstrate causation. Without accepting or rejecting this proposition, we do not believe it should preclude the kind of evidence plaintiffs seek to offer. See Fed. R. Evid. 701 (court may permit opinion testimony "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony . . . and (c) not based on scientific, technical, or other

2. Defendant's Motion to Limit the Number of Plaintiffs' Medical Witnesses (Doc. No. 92) is **GRANTED** subject to the conditions within.

Defendant asserts in this motion that Plaintiffs should be precluded from calling each of their ten medical witnesses at trial. Defendant asserts that limiting the number of witnesses is essential under Fed. R. Evid. 611(a) to "avoid needless consumption of time", and that the Court is obliged under Fed. R. Evid. 403 to exclude evidence which will waste time, cause undue delay or will be cumulative. See also Fed. R. Civ. P. 16(c)(4). Conversely, plaintiffs contend that the testimony of all these experts is not duplicative, arguing that each performed different medical services for Coney. We find it hard to accept that plaintiffs really expect to call as many as ten expert medical witnesses. Plaintiffs apparently have a high degree of confidence in the sustainability of the jury's attention span. We note that the medical experts appear to fall into four practice specialties--family practice, neurology, orthopedics and pain management. It will be the plaintiffs' burden to demonstrate why more than one witness in each specialty should be permitted. It will be defendant's burden to demonstrate why plaintiffs should not be permitted to call at least one witness in each specialty. With this guidance and subject to the discussion above, the Motion is **GRANTED** subject to the conditions within.

specialized knowledge . . .”).

3. Defendant's Motion in *Limine* to Preclude Reference to the Condition of the SS Humacao Other Than at the Location of the Alleged Incident (Doc. No. 93) is **DENIED.**

Defendant moves in limine to preclude plaintiffs from introducing evidence including the overall condition of the SS Humacao based on the grounds of relevancy and undue prejudice. Plaintiffs assert that the photographs and testimony are relevant because they tend to rebut the surveyor's description that the catwalks and gratings were "completely safe" and that the evidence sought to be precluded is directly probative of the truth of plaintiffs' claims. (Pl. Opp., Doc. No. 103, p. 1). In so far as the "defense deals with the ship's condition on the accident date and measures employed by the ship's crew to make the walking surfaces safe" (Pl. Opp., Doc. No. 103, p. 1), this evidence is relevant and its probative value to plaintiffs is not substantially outweighed by the danger of unfair prejudice to the defendant. Fed. R. Evid. 403. The Motion is **DENIED.** This Order is entered without prejudice to defendant to renew its objections as the evidence is presented at trial and the Court has the opportunity to consider a particular bit of evidence in a specific context.

4. Defendant's Motion in *Limine* Re: Captain Joseph Ahlstrom (Doc. No. 94) is **DENIED IN PART AND GRANTED IN PART.**

Defendant argues that the opinions expressed by Captain Ahlstrom in his report are purely speculative, at variance with the facts, and would not aid the trier

of fact. Plaintiffs oppose the motion as untimely and point out, *inter alia*, that Judge Hutton had ruled on a similar Motion by his Order of November 4, 2004. (Doc. No 46). We agree and will not disturb Judge Hutton's Order. In that Captain Ahlstrom's opinions satisfy Fed. R. Evid. 702 for the reasons set forth in Judge Hutton's Order, he will be permitted to testify as an expert.

Again, we take this opportunity to offer guidance to counsel as to our handling of Captain Ahlstrom's testimony. Specifically, Captain Ahlstrom may testify about the condition of the ship. See Section 3 of this Memorandum and Order. He will not, however, be permitted to testify about legal principles, as they are within the province of the Court. See Paul Morelli Design, Inc. v. Tiffany & Co., 200 F. Supp 2d. 482, 486 (E.D. Pa. 2002) (noting that it is for the Court to instruct the jury on the law). He will not be permitted to testify specifically about the credibility of prospective or actual witnesses. See Griggs v. BIC Corp., 844 F. Supp 190, 201 (M.D. Pa. 1994) *aff'd* 37 F.3d 1486 (3d Cir. 1994). He will, however, be permitted to testify as to the basis of his opinion(s), which may of necessity involve an acceptance or rejection of certain information he may be asked to assume or consider in coming to his opinion(s). To the extent that any explanations involve the rejection of certain evidence for reasons important to him, he will not be restricted either in direct or cross-examination in giving his explanation as to why he may accept or reject this information. Therefore, the Motion is **DENIED** as to the preclusion of Captain Ahlstrom's testimony generally but **GRANTED** as to his

testimony regarding legal principles; and **GRANTED IN PART AND DENIED IN PART** regarding his credibility determinations.

5. Defendant's Motion in *Limine* to Preclude the Deposition Testimony of Captain James Shinnors (Doc. No. 95) is **DENIED** subject to conditions within.

Defendant argues that plaintiffs should be precluded from reading at trial the deposition transcript of Captain Shinnors, taken in a different lawsuit, because such former testimony is excluded where the declarant is available. Fed. R. Evid. 804(b). Plaintiffs oppose this assertion, arguing that because Captain Shinnors was designated as a corporate designee pursuant to Fed. R. Civ. P. 30(b)(6), Fed. R. Civ. P. 32(a)(2) permits the use of the deposition "by an adverse party for any purpose." Finally, defendant's reply to plaintiffs' opposition maintains that the Court should not accept Captain Shinnors' testimony under Fed. R. Evid. 32(a)(2) because he was not identified as a corporate designee in this case. In addition, plaintiffs assert that Captain Shinnors' testimony cannot be offered under Fed. R. Evid. 32(a)(3)(B) because he lives within 100 miles of the place of trial and is therefore subject to service of a subpoena for trial. We believe that the analysis under Fed. R. Evid. 804(b) is quite straightforward in that it applies only to circumstances where the out of court witness is unavailable. Plaintiffs fail to establish this requirement.

What neither party has addressed however, until raised by plaintiffs for the first time during our September 1, 2006 telephone conference, is the admissibility of

this evidence as an admission under Fed. R. Evid. 801(d)(2). Under 801(d)(2), a statement qualifies as an admission of a party-opponent, and is therefore admissible, when, “The statement is offered against a party and is . . . [as may apply to the Shinners evidence] (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment made during the existence of the relationship.” Fed. R. Evid. 801(d)(2)(C)-(D). To the extent that the plaintiffs who proffer the evidence are able to demonstrate that Shinners “was authorized” (subpart C) or was NPR’s agent and the statement was made “during the existence of the relationship” (subpart D), it will be admitted.⁵ Subject to plaintiffs’ ability to establish either of these conditions, the testimony of Captain Shinners shall be admitted and the Motion will be **DENIED** subject to the conditions within.

6. Defendant’s Motion in *Limine* to Preclude Plaintiffs From Testifying About Alleged Financial Hardship or, in the Alternative, to Permit Impeachment Testimony of Collateral Source Benefits Received (Doc. 96) is **RESERVED** subject to development of evidence at trial.

⁵ We observe that plaintiffs’ apparent basis for establishing the authority of Shinners to make this statement comes from the fact that he was a 30(b)(6) designee in another personal injury case against NPR including a different vessel and at a different time. As counsel in this case were counsel in that case, we leave it to them to guide the Court as to whether the scope of the designation can be said to fairly encompass the matter for which the evidence is being offered in this case and therefore having subpart C apply. We further observe that the statement proffered was made on February 18, 2005. Plaintiffs must demonstrate that the witness’ agency relationship with NPR existed on that date for subpart D to apply.

Defendant argues that testimony regarding Coney's financial hardship would be misleading and unfairly prejudicial. Defendant further argues that if such evidence were admitted, defendant should be allowed to impeach such testimony with evidence of collateral source benefits received. Plaintiffs contend that financial hardship cannot be rebutted by evidence of collateral benefits in this case.

As we stated in our Order of August 31, 2006 (Doc. No. 111), we accept that it is the general rule that mention of workers' compensation insurance benefits at trial is not permissible, but evidence of collateral source benefits may be permitted when offered to directly contradict a statement made by a plaintiff in court. Gladden v. Henderson, 385 F.2d 480, 483-484 (3d Cir. 1967); See Murray v. Clark, No. 87-4554, 1998 U.S. Dist. LEXIS 11658, at *3 (E.D. Pa. Oct. 20, 1988). Accordingly, if evidence in plaintiffs' case is offered to show financial hardship and if that evidence could fairly be met by evidence of the receipt of workers' compensation benefits, the Court will give serious consideration to allowing this evidence to come in.

BY THE COURT:

DAVID R. STRAWBRIDGE
United States Magistrate Judge

Date: