Motions in Limine

General Directions

Motions in Limine are motions filed before trial. “Limine” is Latin for “threshold,” so these motions are usually brought on the threshold of trial, only a few days before trial when it’s pretty clear what the other side plans to do. They are usually directed at evidence, but they could also be directed at legal theories or arguments. Like other parts of litigation, they are directed at the legal merits of the case but could have their most powerful impact on negotiations. If you can prevent the debt collector from putting on certain of its evidence, it may give up without your needing to go to the trial at all, so motions in limine can be very significant.

And there’s another reason for pro se parties to use motions in limine. As a pro se party in a system run by lawyers and judges, it can be hard to get listened to. Judges may or may not mean to pay more attention to lawyers, but they themselves WERE lawyers, their friends are lawyers, and lawyers are the ones they see day in and day out. They naturally pay more attention to them for just those reasons. And then there’s the fact that lawyers understand the system and are trained in it. They can do dumb things, of course, but usually they don’t. A lot of pro se parties don’t really know what they’re doing, and you have to overcome all of that. Trials move very quickly, and the judge will be watching the clock very carefully. Will everything you say get heard? Not at trial.

But you have a much better chance to get heard at a hearing on a motion to exclude. That will be your chance to make an impression on the judge, explain some of the legal concepts behind the case, and make your arguments regarding evidence. All of these things are absolutely vital to your chances of success.

Not Motions for Summary Judgment

Motions in limine are not motions for summary judgment. That is, you could argue in a motion in limine that the other side should not be able to introduce certain evidence or make certain arguments, but a motion in limine is not the place to ask for a ruling on the entire case in your favor. For that you need a motion for summary judgment, and this comes much earlier in the process. If you DID make a motion for summary judgment, your motion in limine will make many of the same points again: debt cases usually turn on the admissibility of evidence, after all. And even if you lost your motion for summary judgment, that is definitely not an argument against a motion in limine – it’s a second chance to address the issues that will decide your case, a second chance to make the judge see it your way in a slightly different context.

Timing

While you could bring a motion in limine fairly early in a case, the court will likely not rule on it before

the eve of trial. And either the court will order, or your local rules may provide, a date before which motions in limine must be brought. In other words, there's going to be a deadline by which these things must be filed. You need to know that deadline and abide by it. Most typically what happens is the court wants lists of witnesses and exhibits a week or two before trial, followed by a (final) pretrial conference. You would write your motions in limine in time to be heard at that final pretrial conference, after the lists of witnesses and exhibits have been submitted. That would normally be your last chance to submit a motion in limine, but you could do it sooner. In any event, you need to know the rules.

Work on Motion in Limine

In a typical trial involving other things besides debt law, the few days you would have after the pretrial submissions before the motion in limine was due would be tough. In a debt case, it's different. That's because in a debt case everything about their case is predictable, even if you don't know for sure what they've got.

Where the person suing you is a debt collector, you know that the debt collector's case depends on getting some bills that it did not create into evidence. You should know (from discovery) exactly what those bills are and where they came from long before trial. And you also need to know how they plan to get them into evidence.

There are two ways to authenticate business records: an affidavit swearing to all the things required by the business records exception to the rule against hearsay for your state; or a witness who will do that at trial. If it is by affidavit, your court may have a rule requiring them to provide you special notice of the fact in advance of trial. You must know this rule for your court. The whole case is going to boil down to whether they can get the statements into evidence, and you must stop them from doing so if at all possible.

Two Special Caveats

There are two possibilities you must be aware of. In some jurisdictions, if a party submits evidence thirty days (or some amount of time) before trials, you MUST object or it will be presumptively admissible. If your jurisdiction is like that, you need to know it (it will be in the local rules or rules of civil procedure). Failure to take appropriate action will probably lead to losing the case. On the positive side, if your jurisdiction has rules regarding notice of intent to use an affidavit instead of live testimony, you should know that – the debt collectors often forget this one, and failure to provide that notice will likely mean they can't use their affidavits, which is often decisive. In Arizona, for example, a party must both provide this notice AND make the witness available for service of a subpoena within 150 miles of court so that you can require the witness to appear at trial. Know this rule and use it to your advantage.

Motions to Exclude Hearsay Evidence

As we have said, most debt collector cases rely on hearsay: on the evidence of bills created outside of court to prove the existence and amount of the debt in question. This is the focus of the motion in limine this product helps you to create. We also include some motions by someone else – unknown to

us – who posted the motion on the internet. We made a few changes to that, but the idea was to show you more than one example of how these things are actually created and what they look like. You may need to only a motion similar to the one we did in the samples. But you may have some other motion, and hence it makes sense to show you other possibilities.

REMEMBER, know when your motion is due. Do all the discovery necessary to know what they have. And know what your court wants and requires either by local rule or specific order in your case.

A Note about Criminal Records

In debt cases, the attorney rarely does enough work to find out whether you have a criminal record or not. On the other hand, they might ask the question just to be sure at trial. If you have a minor drug conviction or any kind of violent crime, I would suggest that a motion to exclude would be a good idea. If you have something more serious involving honesty, it's a tougher question. Legally speaking, if you have a conviction for lying, cheating or stealing, it could be relevant and admissible. But there are limits to what they can ask, and limits to what you can explain. Mentioning such a crime in a motion to exclude is dangerous, as it alerts the lawyer to do some research. If you have this issue you have to figure out in advance whether you will answer truthfully or whether there's some way to deflect the question without answering it.

The Motion

If the person suing you is a debt buyer, the company must try to put records into evidence that it did not create.

Affidavit from Original Creditor

If it has an affidavit (written, sworn statement) by the original creditor, and has shown it to you, you should have done a deposition if possible, but there are alternative ways of finding out, to some extent, what the person making the affidavit (the "affiant") knows. If you are only finding out about an affidavit from the original creditor at trial, and you asked for it in discovery, you should object to any evidence along those lines because the company did not disclose the witness or give you a chance to ask about the affiant or affidavit. This is huge, because without some knowledge in advance of weaknesses in the affiant, you won't be able to stop the affidavit from getting into evidence.

Live Testimony from Original Creditor

We might repeat in this section what we said above about the affidavit from original creditor. But there's a slight difference. If it's live testimony, you can ask the same questions you would have asked at a deposition and hope you get good answers. You really have nothing to lose.

There's an old saying that you should "never ask a question at trial when you don't know what the answer will and must be." That's because a smart witness will know what you're trying to do and take opportunities to say things that hurt your case. But in debt cases it's different. First, if you can't do something to knock out the testimony, you will lose the case, so you might as well ask questions you don't know the answers to. The other thing is that the procedure is so standardized that the witness will probably rely on it being okay – so there's a better chance the witness will be straightforward and truthful about things like what she really looked at and what she really knows, and that will help you attack the evidence.

Still, you are far better off having done the back-up work so you know what the testimony will be. For purposes of bringing a motion in limine, you obviously have to have done this back-up work so that you can make arguments before trial.

Testimony from Debt Collector, Either Live or by Affidavit

In the vast majority of cases, the debt collector does not bother to get an affidavit from the original creditor. Instead, they plan to use either a live witness from the debt collector's company, or (more often) an affidavit from a witness from the debt collector. Their argument will be that they, the debt collectors, kept records according to the business records exception, and therefore the records should come in.

This is the situation we will address in the sample motion. Just remember that if you have an original creditor's affidavit you will apply the same techniques to attacking the witness's actual knowledge. Remember also, in using this sample, you cannot simply cut and paste. The cases cited will in all likelihood not be from your jurisdiction – and they may not even be real, since this is an illustration and not a form for you to use.

Sample Motion in Limine

Heartless Debt Buyer

Plaintiff

v.

Joe Blow

Defendant

Defendant's Motion in Limine to Exclude Inadmissible Evidence

Comes now defendant, Joe Blow, and requests that this court exclude from any consideration all testimony, and all records, allegedly showing a debt by Joe Blow to Credit Card Company. Specifically,

defendant requests a ruling that Leslie Liar, a witness proposed by plaintiff, an employee of plaintiff with no special, personal knowledge of the record keeping of Credit Card Company, cannot testify regarding the content or authenticity of any records produced by Credit Card Company. Further, defendant requests an order prohibiting any testimony by any witness employed by Credit Card Company because no such witness has previously been identified.

Introduction

In discovery and in its pretrial disclosures, plaintiff has shown an intention to introduce testimony by Leslie Liar as to the existence and amount of debt allegedly owed at one time to Credit Card Company, a third-party unrelated to this action. It also apparently plans to introduce supposed credit card statements (hereinafter, "Statements") it claims were created by Credit Card Company.

Plaintiff has not made any disclosure of affidavits created by Credit Card Company or put any witnesses on its list of witnesses indicating any special knowledge of the record keeping of Credit Card Company. Likewise, it has not made any other evidence regarding the alleged debts available to defendant. Accordingly, the statements it has identified are incompetent and inadmissible as hearsay. Moreover, Leslie Liar, a witness with no direct personal knowledge of any matters before this court, should not be permitted to testify as to the content of any such alleged records. Even if the records themselves were admissible, her testimony as to their content would not be.

Plaintiff has not disclosed in responses to discovery, and does not include in its list of proposed witnesses, any witness other than Leslie Liar. Defendant accordingly requests that this Court issue an order prohibiting the sudden production of any witness allegedly employed by Credit Card Company or any statement or affidavit by any such person.

Defendant further requests an order prohibiting any person from testifying to the accuracy or legitimacy of any records allegedly created by Credit Card Company regarding defendant and assigned (allegedly) by Credit Card Company to plaintiff because the Assignment Contract by which all debts allegedly owned and sold to plaintiff specifically disavows any guarantee of accuracy of any such records. If Credit Card Company, with knowledge of its own record keeping, refuses to guarantee their accuracy, then no employee of plaintiff – with no knowledge of Credit Card Company's record-keeping – could legitimately swear to their accuracy.

Finally, defendant was convicted in 2002 for possession of marijuana and received a suspended sentence. Defendant requests that plaintiff not be permitted to inquire into this conviction as any probative value would be far outweighed by the likelihood of unfair prejudice.

I. Background

Plaintiff filed this suit on a debt allegedly owed by defendant to Credit Card Company. It alleges it purchased the debt pursuant to the Assignment Contract, Exh. _. It further alleges that it received various documentary evidence of the debt from Credit Card Company, although it has provided in response to discovery only two alleged "statements" relating to the account. See, Exh. _, _. It is unclear

who, exactly, created these statements, as the Assignment Contract provides that "electronic records will be provided in digital form." See, Assignment Contract, Part I, Para. __. Thus it would appear that these "statements" were not created at any time prior to the transfer, nor in fact by Credit Card Company.

In discovery, defendant requested "all records relating to the debt alleged in this petition." See, Requests for Production No. __, attached as Exh. _. Further, she asked plaintiff to "identify all persons with any knowledge of the alleged debt, including how it was generated, by whom, and under what terms and conditions. See, Interrogatory __, attached as Exh. _. In response, plaintiff provided only the alleged statements in Exhibits _ and _, and identified only Leslie Liar. In response to interrogatory __, regarding the basis for alleged knowledge, plaintiff stated that Leslie Liar was an employee of plaintiff and identified no information showing any particular knowledge of Credit Card Company's book keeping or accounting.

The records produced by plaintiff in its Motion for Summary Judgment, denied by this court on ____, revealed no further information, and at no time since has plaintiff shown any basis for first-hand knowledge of any of the records upon which it apparently intends to rely. In her affidavit in support of Plaintiff's Motion for Summary Judgment, Liar attempted to testify as to the amount owed, stating that, "based upon my review of the records, defendant owes $xx and that no previous payments have not been recorded." Plaintiff has not provided any such records showing amount or history, however, either in its Motion for Summary Judgment or at any time during discovery in response to interrogatories or requests for production.

II. Argument

<u>Plaintiff's Alleged Evidence of Debt, Amount of Debt, Statements, and All other Aspects of the Debts Allegedly Owed in its Petition Are Hearsay and Inadmissible under Any Exception</u>

The Credit Card Statements are Hearsay and Not Admissible.

Hearsay is an out of court statement used as proof of what the statement says, and it is prohibited by the rules of evidence. *Cal. Evidence Code Sec. 1200(a)*. Business records, whose only use at trial is to prove some fact allegedly shown by the records, are plainly within this definition of hearsay. *See, e.g., Pacific Gas & E. Co. v. GW Thomas Drayage etc. Co., 69 Cal. 2d 33, 43 – (CA 1968)* (invoices are hearsay for purposes of showing work done, price, or reasonableness). Accordingly, they must be excluded unless they fall within some exception to the rule against hearsay. Judging by the affidavit of Leslie Liar, plaintiff intends to attempt to invoke the business records exception to the rule against hearsay, and the court should reject that attempt.

<u>The Business Records Exception</u>

In California [in every state – but you will need to find a case for your state], the business records exception to the rule against hearsay provides that business records, if properly authenticated, may be used as evidence. The party seeking to authenticate records must show

(a) The writing was made in the regular course of a business;

(b) The writing was made at or near the time of the act, condition, or event;

(c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and

(d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

Garibay v. Hemmat, 74 Cal. Rptr. 3d 715, 720 (Cal: Court of Appeal, 2nd Appellate Dist., 3rd Div. 2 2008).

A qualified witness testifies under penalty of perjury and based on direct personal knowledge. *See, e.g., College Hospital Inc. v. Superior Court, 8 Cal 4th 704, 720 (Cal: Supreme Court 1994), Cal. Evid. Code Sec. 702 (a)* (the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter). An affidavit must affirmatively demonstrate the basis of personal knowledge to be accepted as evidence. *See, id.*

Leslie Liar's Affidavit

Leslie Liar testifies that she is an "employee of Heartless" and "authorized to testify" in the manner she does. She further states:

> ….
>
> 4. According to the account records transferred to Account Assignee from Account Seller and maintained in the ordinary course of business by Account Assignee, there was due and payable from Consumer, Joe ("Debtor") to the Account Seller the sum of $7728.03 with respect to account number 000000000000000000 as of 12/31/09 with there being no known un-credited payments, counterclaims or offsets against the said debt as of the date of the sale.

The Court will note that this affidavit makes no attempt to authenticate any business records at all. It does not testify that the statements were made at any particular time, much less at or near the time of the occurrence supposedly memorialized. It does not state who made the records or what that person's duties might be. It does not testify in any way as to the manner in which those records were kept while at Credit Card Company. And it offers no other evidence of legitimacy or accuracy.

Thus the records themselves are inadmissible hearsay on the record.

Leslie Liar Cannot Authenticate the Alleged Credit Card Statements

Even if Leslie Liar's testimony included authenticating factual assertions, she could not authenticate the records plaintiff seeks to introduce into evidence. Liar is an employee of Heartless Debt Collector, Inc. In her affidavit she notes no personal experience regarding the manner in which Credit Card Collector creates or maintains its records.

Moreover, defendant followed up her initial discovery with questions specifically targeted to Leslie Liar's experience with Credit Card Company:

> Identify all personal experience of Leslie Liar with Credit Card Company and its record making and keeping, and describe any courses, seminars, training, or other information Liar received from Credit Card Company regarding the practices and policies of record-keeping.
>
> *See Exhibit __, Attached, question __.*

Debt Collector admitted in its responses that Leslie Liar has no direct knowledge of Debt Collector's record-keeping. *See Exhibit __, Attached, Response to question __*. Writings must be authenticated before they are received into evidence or before secondary evidence of their contents may be received. (Evid. Code, § 1401.) Authentication means either the introduction of evidence sufficient to sustain a finding that the writing is what the proponent claims it is, or "the establishment of such facts by any other means provided by law" (e.g., by stipulation or admissions). (Evid. Code, § 1400).

Liar could not testify based upon personal knowledge about records keeping by Credit Card Company and is accordingly prohibited from authenticating them. Cal. Evid. Code Sec. 702(a), *Midland Funding, LLC v. Romero, 5 Cal.App.5th Supp. 1, 10, 210 Cal.Rptr.3d 659 (2016)*. Thus Plaintiff could not use Liar's live personal testimony to authenticate the alleged credit cards and remedy the faults of her affidavit. It has identified no other person who could testify.

It further appears that the records are not, in any event, records made at or near the time of the occurrence, nor for ordinary business purposes. It appears that the actual documents plaintiff seeks to present as evidence were created by it, rather than Credit Card Company, and specifically for the purposes of litigation rather than ordinary business purposes. ***See, A v. B, 17 Cal. 4th 222,224 (Cal. App. 3d 2011)*** (documents created for purposes of litigation are not created in the ordinary course of business). To all appearances, the documents plaintiff wishes to introduce were created quite recently. The records they supposedly memorialize are not in evidence and could not get into evidence because no one from plaintiff can testify from personal knowledge about their creation or storage.

<u>Liar Also Cannot Testify to the Content of Any Alleged Records of Plaintiff's Supposed Debt</u>

Liar's affidavit impermissibly seeks to testify about the content of the records she fails to, and could not, authenticate. The court should prohibit any testimony of this nature from her at trial.

As the court will note, Liar's affidavit claims that, according to records Heartless received from Credit Card Company, defendant owes _____. As defendant has shown, the records themselves are inadmissible hearsay, and Liar's testimony regarding them would be "hearsay upon hearsay." Any such evidence must be excluded.

When a records keeper successfully authenticates business records, it is the business records themselves that are admissible. A records keeper with no personal knowledge of those records should not be permitted to testify as to their content. See, Cal. Evid. Code Sec. 702(a) (requiring personal knowledge of matters testified about).

At this point it seems appropriate to point out what actually has happened in this case.

- Credit Card Company sold Heartless a large number of allegedly overdue credit card accounts.
- As part of that transaction, Credit Card Company was to provide electronic records to Heartless.
- Credit Card Company itself, in the Assignment Contract, refuses to guarantee the debts or records of any account.
- Heartless made new documents using the electronic reports given it by Credit Card Company, whether these forms resemble anything actually created by Credit Card Company is unknown and, on the record, unknowable.
- Leslie Liar swears to the accuracy of the records – having no special insight, knowledge or experience of these records at all. Her attempted testimony exceeds what the alleged actual creator of the records would testify to based on actual knowledge.
- Leslie Liar further testifies to the contents of the alleged records instead of providing them to the court.

See, Exhibit C, Assignment Contract of Heartless and Credit Card Company, Attached.

The Rules of Evidence require much more than this, and neither the exhibits themselves, nor Liar's testimony about them, should be admitted.

Plaintiff has dressed up Ms. Liar's testimony to make the inattentive think that the business records exception *would* apply to these made-up records. It speaks of them as "business records" and speaks of maintaining them "in the ordinary course of business." However, the business records exception requires testimony about the timing of the creation of the records, about the duties of the persons creating those records, and about the method of maintaining them. Liar's testimony does none of these things.

No Other Witness Should be Allowed to Testify for Plaintiff

Plaintiff has indicated no plans to introduce testimony by any witness other than Leslie Liar. If it attempts to do so now, it should not be permitted to do so.

The court in ***Thoren v. Johnston & Washer, 29 Cal. App. 3d 270 (Cal App. 2nd Dist. 1972)*** discussed the purposes of discovery and the necessity of honest disclosure of witnesses:

> One of the principal purposes of civil discovery is to do away with "the sporting theory of litigation — namely, surprise at the trial." (*Chronicle Pub. Co.* v. *Superior Court,* 54 Cal.2d 548, 561 [7 Cal. Rptr. 109, 354 P.2d 637].) The purpose is accomplished by giving "greater assistance to the parties in ascertaining the truth and in checking and preventing perjury," and by providing "an effective means of detecting and exposing false, fraudulent and sham claims and defenses." (*Greyhound Corp.* v. *Superior Court,* 56 Cal.2d 355, 376 [15 Cal. Rptr. 90, 364 P.2d 266].)

The *Thoren* court held that withholding the name of a witness deprives his adversary of that information by a willfully false response, and subjects the adversary to unfair surprise at trial. He deprives his adversary of the opportunity of preparation which could disclose whether the witness will tell the truth

and whether a claim based upon the witness' testimony is a sham, false, or fraudulent. (citing *Luque* v. *McLean,* 8 Cal.3d 136, 147 [104 Cal. Rptr. 443, 501 P.2d 1163].)

The court noted that, "Where necessary to accomplish the purposes of civil discovery, responses to interrogatories are binding upon the party responding." *Id.*

Plaintiff has been asked to identify all witnesses with any knowledge relating to plaintiff's claim and has not identified any. It should now be prohibited from producing any such witnesses. To permit it to do so would unfairly subject defendant to surprise and deprive defendant of the opportunity for preparation. This is particularly true in view of defendant's use of the bill of particulars [only for Californians and Virginians]. Plaintiff has identified no witness in response to defendant's request for a bill of particulars or in response to his discovery. Permitting it to use an unidentified witness now would turn that statute and the discovery process on its head and be an abuse of discretion.

Examination Regarding Defendant's Misdemeanor Conviction Should be Prevented

As noted above, defendant was convicted many years of a misdemeanor charge of possession of marijuana. Evidence of such a conviction would have negligible probative value that would be far outweighed by the possibility of prejudice. It must be excluded.

At the time of conviction, defendant was a teenager, and the country was already in the process of decriminalizing marijuana possession. In California, possession of marijuana for recreational purposes is currently legal under state law. Although it remains illegal under federal law, the law is widely unenforced as a matter of policy. Nevertheless, there are some who could be prejudiced by the knowledge of defendant's criminal record. A twenty-year old conviction on a minor drug offense has no probative value regarding truth-telling, and thus the only use of such information would be the hope of exciting a prejudice. The court should not allow this to occur.

[See, in particular, the second of the sample motions in limine regarding exclusion of a record of arrest for disorderly conduct if you have this issue.]

Conclusion

Wherefore, for all the reasons provided, plaintiff should be prevented from using testimony by Leslie Liar as to account information on the alleged account generated before Heartless owned the account. Her affidavits should likewise be excluded from evidence, and no surprise witnesses should be allowed to present any such evidence.

Respectfully submitted

__ ___ _____

Joe Consumer

Address

[Certificate of Service]

[plus exhibits]

Other Sample Motions

These motions have been edited to remove names of parties, but the law firms are left in, as it was their work product.

IN THE CIRCUIT COURT FOR BALTIMORE COUNTY, MARYLAND

C. Jones - Plaintiff

v.

M. Smith - Defendant

CASE NO.: 0_-C-0_-____

MOTION IN LIMINE TO EXCLUDE TESTIMONY REGARDING

THE PROPERTY DAMAGE TO THE VEHICLES

Plaintiff, by and through her attorneys, Ronald V. Miller, Jr., Laura G. Zois, and Miller and Zois, LLC, requests that this Court preclude evidence of the photographs of the vehicles involved in the subject accident because expert testimony is required to correlate the property damage and Plaintiff's alleged injuries. In further support, Plaintiff states as follows:

I. Relevant Facts

This is a personal injury case involving an auto accident. During the course of discovery, the Defendant has produced copies of photographs of the Defendant's vehicle and the Plaintiff's vehicle (Exhibit A). Plaintiff does not, however, deny that there was minimal damage to the rear of her vehicle or even that this was a relatively low impact collision. Defendant claims that there was no property damage at all to her vehicle. It is anticipated that Defendant will attempt to introduce into evidence the extent of property damage sustained by both vehicles in this accident as well as a description by the Defendant as to the level of the impact between the vehicles.

II. Law [Note: After this motion was drafted, the Maryland Court of Appeals specifically addressed this issue in 2005 in Mason v. Lynch.]

Expert testimony is required "when the subject of the inference is so particularly related to some science or profession" that it is beyond the knowledge of the average layman. Hartford Accident and Indemnity Co. vs. Scarlett Harbor Associates Limited Partnership , 109 Md. App. 217, 257 (1996), aff'd on other grounds , 346 Md. 122 (1997) (citing Virgil vs. Kash 'N' Karry Service Corp. , 61 Md. App. 23, 31 (1984), cert. denied, 302 Md. 681 (1985). If the evidence on an issue is such that it would require the jurors to engage in nothing more than "sheer speculation," the issue may not be submitted to the jury. See DeSua vs. Yokim , 137 Md. App. 138 (2001) (quoting appellee's brief).

If photos and or testimony of damage are to be permissible, the Defendant must provide expert testimony to the link between the two because it creates a "complicated medical question" and without such testimony, it creates an invitation to speculation. A complicated medical question occurs when one or more of the following are present: (1) significant passage of time; (2) the impact of the initial injury on one part of the body and trauma in some remote part; (3) the absence of any medical testimony and (4) a cause and effect relationship that is not part of common lay experience. S.B Thomas, Inc. v. Thompson, 114 Md. App. 357, 382 (1977).

In Davis v. Maute, 770 A.2d. 36 (Del. 2001), the Supreme Court of Delaware held that: (1) as a general rule, a party in a personal injury case may not directly argue that the seriousness of personal injuries from a car accident correlates to the extent of the damage to the cars, unless the party can produce competent expert testimony of the issue; (2) counsel may not argue by implication what counsel could not argue indirectly," i.e., may not characterize the accident as a fender-bender or otherwise downplay the seriousness of the accident; and (3) the court erred in admitting the photographs of the Plaintiff's car without a specific instruction limiting the jury's use of the photographs. Id . at 38-41.

III. Legal Argument

The issue of whether there exists a correlation between a small amount of property damage and the likelihood of the plaintiff's injury does not simply constitute a complicated scientific question. Rather, it constitutes a mixture of several complicated scientific questions: (1) How much force was necessary to produce the amount of damage to the plaintiff's car; (2) How is that force transmitted through the car, and how much force was thereby exerted on the plaintiff; and (3) What is the minimum, threshold force that is necessary to cause Plaintiff's herniated disc?

A. How much force was necessary?

This issue involves such matters as the strength of metal and rubber, the construction of a bumper, the materials that are used to construct a bumper (and, importantly, the interior of a bumper), how a bumper acts during a collision, and the construction and materials of the side walls of a car. It involves

issues of engineering, physics, design, and chemistry. Moreover, the force that would produce a given amount of damage varies from vehicle to vehicle.

B. How is that force transmitted through the car?

The issue of the amount of force is one issue and there is another issue as to how much force was inflicted on the Plaintiff in the accident. This question, in turn, involves how force and energy are transmitted though rubber, metal, and fabric, dissipated though the transmission, and applied to a human body at the opposite end of the car from the impact. The issue clearly involves issues of physics and engineering. A lay jury cannot look at an amount of property damage and conclude how much force was exerted on the plaintiff. Moreover, there is also the scientific issue of whether the lack of substantial damage to the bumper indicates that the plaintiff was subjected to a greater amount of force than that to which the plaintiff would have been subjected if there were substantial damage.

The issue is whether the rear part of the car had been crushed or warped, force and energy would have been absorbed in the crushing or warping, or because the rear part of the car was not bent, all of the energy of the impact was transmitted through the car and onto the plaintiff's body.

C. What is the minimum, threshold force that is necessary to produce an injury to the plaintiff?

Finally, but most importantly, there is the question of what is the minimum, threshold force that is necessary to produce an injury to the human body -- or, more precisely, the specific injuries claimed to have been suffered by the plaintiff. The human body is one of the most complicated contraptions in the universe. Nobel Prizes have been won for explorations as what causes human injuries and maladies. The concept of the causation on an injury is quintessentially a matter of expert testimony. The mechanics of a body's movement in a collision, and the effects on the spine, ligaments, muscles, tendons, and blood vessels is also a matter of expert testimony. The issue involves questions of medicine and biomechanical engineering. This point particularly applies to the defense's anticipated argument while holding up a photo of the property damage, and ask the jury, "Does anyone here believe that any person could possibly have been injured in this accident?"

IV . Conclusion

The issue of whether there is a correlation between the amount of property damage and the likelihood of injury would be a good subject for a Ph.D. dissertation. The study would involve studies of a large number of actual cases, along with assistance from physicists and engineers who would analyze the construction of the vehicle and calculate the amount of force produced by the collision and transmitted on the plaintiff. But a lay juror does not have the tools to translate amount or degree of property damage to Plaintiff's injuries. A juror cannot look at a photograph, speculate as to how much force was caused by the collision, speculate as to how the force was transmitted through the car, speculate as to how a human body behaves during a collision of the type involved in the case, and speculate as to what causes an injury and what is the minimum force needed to cause that injury.

WHEREFORE, the Plaintiff respectfully requests that this Honorable Court:

A. Instruct all parties, counsel and witnesses expected to testify that no person is to refer to, interrogate, or attempt to convey or suggest to the jury, directly or indirectly:

1. The amount of force between the two vehicles;

2. The speed of the striking vehicle;

3. The amount of damage or lack thereof to either vehicle;

4. Any correlation between the force of the impact and the Plaintiff's injuries;

5. [any] photographs of either vehicle at the trial of this matter.

Respectfully submitted,

MILLER & ZOIS, LLC

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Laura G. Zois

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7310 Ritchie Highway

Glen Burnie, Maryland 21061

(xxx)xxx-xxxx

(xxx)xxx-xxxx (Fax)

Attorneys for the Plaintiff

Certificate of Service

I hereby certify that a copy of the foregoing Motion in Limine to Exclude Testimony Regarding the Property Damage to the Vehicles was sent via U.S. Mail, first-class, postage prepaid, to defendant’s attorney, this ____ day of _____.

IN THE CIRCUIT COURT FOR BALTIMORE COUNTY, MARYLAND

O R D E R

Upon consideration of the Plaintiff's Motion in Limine to Exclude Testimony Regarding the Property Damage to the Vehicles; it is this _____ day of _____, 2004, by the Circuit Court for Baltimore County, Maryland , it is hereby

ORDERED, that the Plaintiff's Motion is GRANTED; and it is further

ORDERED, that Defendant be precluded from referring to, interrogating, or attempting to convey or suggest to the jury, directly or indirectly:

1. The amount of force between the two vehicles;

2. The speed of the striking vehicle;

3. The amount of damage or lack thereof to either vehicle;

4. Any correlation between the force of the impact and the Plaintiff's injuries; and is

5. precluded from introducing any photographs of either vehicle at the trial of this matter.

So Ordered: _____

JUDGE Joseph Smith [a fictional name, court not named here]

IN THE CIRCUIT COURT FOR BALTIMORE COUNTY, MARYLAND

C. Jones - Plaintiff

v.

M. Smith - Defendant

CASE NO.: _____

MOTION IN LIMINE TO EXCLUDE EVIDENCE

RELATING TO PLAINTIFF'S ARREST

Plaintiff, by and through her attorneys, Ronald V. Miller, Laura G. Zois, and Miller & Zois, LLC, requests that this Court preclude testimony and evidence regarding Plaintiff's arrest in October, 2000. In further support, Plaintiff states as follows:

I. Facts

The Defendant has identified Officer M. Standup as a potential witness in this case. In October of 2000, after attending her high school reunion, the vehicle in which defendant was a passenger was pulled over. Defendant was cited for disorderly conduct and resisting arrest. (See Statement of Charges attached as Exhibit A.) On May 9, 2001, she pled guilty to disorderly conduct. Judge _____ struck the guilty verdict and granted her probation before judgment with no probationary period.

Defense counsel has indicated intention to proffer that Plaintiff's physical ability to resist arrest has bearing on her claim for damages and injuries in this case. Defendant may seek to argue that the incident aggravated her herniated disc, or in the alternative, the incident is evidence of her physical abilities following the accident. But the allegations in the police report are not inconsistent with plaintiff’s injuries or her testimony and there are no medical records to indicate that this incident aggravated Plaintiff's injuries.

II. Law

Evidence, to be admissible, must be both relevant and material. Lai v. Sagel , 373 Md. 306, 319 (2003). Evidence is material if it tends to establish a proposition that has legal significance to the litigation; it is relevant if it is sufficiently probative of a proposition that, if established, would have legal significance to the litigation. Id .

Even if relevant, under Maryland Rule 5-402, a trial court may exclude otherwise relevant evidence 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."

III. Argument

A. The Evidence is Not Relevant

The evidence being offered by the Defendant is not relevant to the issues in this case. Plaintiff does not contend would be unable to resist arrest as set forth by the Statement of Charges. She does not contend that she is an invalid unable to perform the activities alleged. Rather, it is her contention that she cannot engage in such activities without pain. In fact, Plaintiff's testimony will be that she does many strenuous things raising three small children that she continues to perform, albeit in pain of varying severity.

B. Even If Relevant, the Prejudice Outweighs the Evidence's Probative Value .

Even assuming, arguendo , that there is some modicum of relevancy to this evidence, its probative value is outweighed by its prejudicial effect. The prejudicial effect of evidence of Plaintiff's arrest is obvious and is likely to sway and confuse the jurors. As set forth above, if there is any relevancy to this evidence, it is marginal because it does not contradict Plaintiff's evidence. Defendant is essentially seeking to admit an elephant on the back of a mouse. She should not be permitted to do so because this evidence would unfairly prejudice the real issues the jury should consider at trial.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court preclude Defendant's counsel from referring to, interrogating, or attempt to convey or suggest to the jury that the Plaintiff was arrested and involved in a struggle with a police officer. Further, should Defendant believe that this evidence is legitimate impeachment evidence, Defendant should be required to notify the Court of its intend to use such evidence as impeachment.

Respectfully submitted,

[Signature Block, proposed order, and certificate of service deleted]