2015 WL 6735548 (Pa.Com.Pl.) (Trial Order)
Court of Common Pleas of Pennsylvania.
Clarion County

Shawn J. SLIKER, Plaintiff,
v.
NATIONAL FEEDING SYSTEMS, INC., and Todd E. Beichner, Individually,
and t/d/b/a Scenic Ridge Farms, and Valesco Manufacturing, Inc., Defendants.

No. 282 CD 2010.
October 19, 2015.

Opinion and Order of Court

James G. Arner, Judge.

***1** Arner, P.J.
October 19, 2015

Plaintiff Shawn J. Sliker has presented Motions in Limine (MILs) to Preclude Evidence Contesting Successor Status; Preclude Product Defendants from Arguing a Warning Would Not Have Been Heeded; Preclude Evidence of Alleged "Bad Acts"; Preclude Product Defendants from Presenting Evidence of Negligence and Affirmative Defenses of Assumption of Risk and Product Misuse/Recklessness; and Preclude Defendants from Presenting Evidence of Alleged Compliance with Industry Standards, while Defendants National Feeding Systems, Inc. and Valesco Manufacturing, Inc. (Product Liability Defendants) have presented MILs to Exclude Cumulative Photographic Evidence; Exclude Reports and Curricula Vitae of Expert Witnesses; Exclude Insurance Coverage; Exclude Evidence of Medical Expenses Charged; Exclude Evidence of Plaintiff's Future Medical Expense Projections; Exclude Evidence of Subsequent Remedial Measures; and Exclude Evidence of Post-Sale Observations and Claimed Duties.

Oral argument was held regarding all parties' MILs on October 12, 2015. This court denied Plaintiff's MIL seeking to preclude Defendants from presenting evidence contesting their status as successors for the purposes of the product fine exception in its Order of October 13, 2015, and the court will now address the remaining MILs presented by all parties.

I. Plaintiff's Motion in Limine to Preclude Product Defendants from Arguing a Warning Would Not Have Been Heeded

Plaintiff asserts that "[u]nder longstanding Pennsylvania law, the plaintiff in a strict liability action is entitled to a rebuttable presumption that he would have heeded an adequate warning if one had been given," citing *Coward v. Owens-Corning Fiberglas Corp.*, 729 A.2d 614 (Pa. Super. Ct. 1999). Accordingly, Plaintiff argues that Product Liability Defendants should be precluded from presenting any evidence, such as expert testimony, which would serve to rebut such a presumption. In response, Product Liability Defendants counter that the rebuttable presumption elaborated in *Coward* has been subsequently limited to the facts of that case, specifically workplace exposure to asbestos.

Leaving aside the fact that if the heeding presumption were to apply in this case, its rebuttable nature necessarily would entitle Product Liability Defendants to present evidence with which to rebut the presumption, the authorities cited by Product Liability Defendants clearly support the limitation of the heeding presumption rule and its inapplicability to

this case. *See Moroney v. Gen. Motors Corp.*, 850 A.2d 629, 634 f. 3 (Pa. Super. Ct. 2004) ("This so-called 'heeding presumption' has been authorized in Pennsylvania only in cases involving workplace exposure to asbestos."); *Viguers v. Philip Morris USA, Inc.*, 837 A.2d 534, 537 (Pa. Super. Ct. 2003) ("[T]his so-called 'heeding presumption' has been authorized in Pennsylvania only in cases involving workplace exposure to asbestos."). Because this is not a case involving workplace exposure to asbestos, the heeding presumption does not apply, and Plaintiff's motion to preclude product defendants from arguing a warning would not have been heeded is denied.

II. Plaintiff's Motion in Limine to Preclude Evidence of Alleged "Bad Acts"

***2** In his next motion, Plaintiff argues that evidence of certain enumerated "bad acts," specifically allegations that Plaintiff's parental or visitation rights respecting his son were terminated, allegations that Plaintiff abused a child, and allegations that Plaintiff has abused drugs and alcohol, should be precluded as irrelevant and unfairly prejudicial. Product Liability Defendants effectively do not contest the irrelevance of the allegations concerning Plaintiff's parental or visitation rights and allegations concerning child abuse, although they contend that evidence of "rampant" drug and alcohol use may be relevant to Plaintiff's life span and resulting future damages pursuant to the Superior Court decision of *Kraus v. Taylor*, 710 A.2d 1142 (Pa. Super. Ct. 1998).

Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence, and if the fact is of consequence in determining the action. Pa.R.E. 401. The court may exclude relevant evidence if its probative value is outweighed by a danger of unfair prejudice. Pa.R.E. 403. "Evidence of a party's drug use is clearly highly prejudicial." *Bolden v. SEPTA*, 44 Pa. D. & C.4th 397, 401 (Com. PI. 2000) (citation omitted). "When [actuarial] tables are submitted in a personal injury case, the jury must be permitted to consider individual characteristics [including drug and alcohol abuse] that impact on the injured party's life expectancy." *Kraus*, 710 A.2d at 1144 (citation omitted).

Product Liability Defendants have presented no evidence, whether derived from expert analysis or otherwise, regarding the extent and severity of Plaintiff's drug and alcohol abuse, or whether such abuse has made it more probable that his life expectancy will be shortened from the 77 years of age propounded by Plaintiff's expert. Although this fact is of consequence in determining future damages for Plaintiff's permanent injuries pursuant to Pa.R.E. 401 and *Kraus*, the probative value of this heretofore vague and undefined evidence of drug and alcohol abuse is, without more, outweighed by the danger of unfair prejudice attendant to such inflammatory evidence. Moreover, Product Liability Defendants have presented no evidence that Plaintiff's alleged drug and alcohol abuse have not already been taken into account in Plaintiff's expert analysis of his lifespan; if this were the case, evidence of drug and alcohol abuse would serve no probative value, or, if any, it would be clearly outweighed by risk of unfair prejudice.

Despite the possible relevance of chronic drug and alcohol use to life expectancy and the *Kraus* court's assertion that, at least in that case, the trial court did not abuse its discretion in finding that the probative effect of such evidence was not outweighed by the risk of unfair prejudice, unquestioning adherence the holding in *Kraus* may result, in some circumstances, in a trial pervasively and unfairly prejudiced against the plaintiff due to past drug or alcohol use. *See Bolden*, 44 Pa. D. & C.4th. Therefore, Plaintiff's motion is granted, and no evidence of allegations that Plaintiff's parental or visitation rights respecting his son were terminated, allegations that Plaintiff abused a child, or allegations that Plaintiff abused drugs or alcohol will be admissible, unless additional evidence supporting the relevance and probative value of this evidence as opposed to its unfairly prejudicial impact is also presented to the court.

Product Liability Defendants have also responded to this MIL by advocating for the admission of evidence concerning Plaintiff allegedly instigating a physical confrontation which led to termination of his employment with Brookville Wood Products, which he began subsequent to his amputation injury. Product Liability Defendants intend to present this evidence in order to rebut anticipated testimony that Plaintiff desires to return to the workforce, but is unable to do so because of his injury.

***3** Because Plaintiff did not move to preclude this evidence as one of the enumerated "bad acts," the court need not rule on its admissibility at this juncture. Such evidence will be subject to the customary Pa.R.E. 401 and Pa.R.E. 403 analyses in the event Product Liability Defendants wish to present it and in the context of additional evidence presented at trial (i.e., whether Plaintiff indeed claims that he is unable to work, and whether Plaintiff's testimony may be rebutted with evidence of employment with Brookville Wood Products without mention of the circumstances leading to his termination).

III. Plaintiff's Motion in Limine to Preclude Product Defendants from Presenting Evidence of Negligence and Affirmative Defenses of Assumption of Risk and Product Misuse/Recklessness

Because this motion presents related but distinct evidentiary issues concerning negligence, assumption of risk as an affirmative defense to products liability, and product misuse or Plaintiff's recklessness as an affirmative defense to products liability, the court will address each of these issues seriatim.

a. Evidence of Negligence

Regarding evidence of negligence, Plaintiff asserts that "product defendants should be precluded from arguing or presenting evidence that either Mr. Sliker's or Mr. Beichner's conduct was negligent or contributed to causing plaintiff's losses" because "[u]nder well-established Pennsylvania law, which was approved by *Tincher*, comparative negligence is not a defense to a strict liability action, and the product supplier's duty to supply a safe product is non-delegable," citing *Reott v. Asia Trend*, 55 A.3d 1088 (Pa. 2012).

i. Collateral Products Liability Issues After *Tincher*

The Pennsylvania Supreme Court's recent decision of *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014) has engendered considerable confusion among products liability litigants, as evidenced by both Plaintiff's and Products Liability Defendants' citations to the case in support of several of the arguments presented in the MILs before the court. *Tincher* presented a thorough recitation of the history of products liability law in Pennsylvania, as well as arguments regarding rejection of the Restatement (Second) of Torts § 402A standard of products liability in favor of the Restatement (Third) of Torts standard, which had been specifically debated by products liability litigants (and the dissenting opinions of several Pennsylvania Supreme Court justices) in preceding years. *See Berrier v. Simplicity Mfg., Inc.*, 563 F.3d 38, 40 (3d Cir. 2009); *Phillips v. Cricket Lighters*, 841 A.2d 1000, 1012 (Pa. 2003) (Saylor, J., dissenting); *Bugosh v. I.U. North Am., Inc.*, 942 A.2d 897, 1228 (Pa. 2008) (Saylor J., dissenting, joined by Castille, C.J.). These considerations led the Supreme Court to overrule the legal formulation of defective products defined by *Azzarello v. Black Bros. Co.*, 391 A.2d 1020 (Pa. 1978), adopt alternative tests of consumer expectation and risk-utility (influenced by Restatement (Third) principles) to allow the factfinder to determine whether a product is in a defective condition, and decline to adopt the Restatement (Third) formulation of products liability law wholesale.

Although the disavowal of *Azzarello* has necessarily created significant uncertainty as to the continued viability of products liability rules of law related to that case's definition of product defect, it is important to consider that *Azzarello* was overruled only "to the extent that the pronouncements in *Azzarello* are in tension with the principles articulated in [*Tincher*]" which were primarily concerned with the issues outlined *supra* rather than collateral evidentiary matters. *Tincher*, 104 A.3d at 376. *See id.* at 410 ("This Opinion does not purport to either approve or disapprove prior decisional law, or available alternatives suggested by commentators or the Restatements, relating to foundational or subsidiary considerations and consequences of our explicit holdings.... The common law regarding these related considerations should develop within the proper factual contexts against the background of targeted advocacy."); *id.* at 409 ("[T]he availability of negligence-derived defenses … [is] outside the scope of the facts of this dispute."); *id.* at 345, fn. 4 ("Omega Flex notes that this approach has the collateral effect of rendering laws, regulations, and industry standards irrelevant

to the risk-utility inquiry, with deleterious and unpredictable consequences for plaintiffs and defendants. Omega Flex does not develop this assertion and, as a result, we do not address it in any detail."). As such, the starting point for any *post-Tincher* evidentiary analysis is an examination of the principles articulated in that opinion as relevant to the factual context of this case.

***4** "[I]n Pennsylvania, the cause of action in strict products liability requires proof, in the alternative, either of the ordinary consumer's expectations or of the risk-utility of a product." *Id.* at 401. The consumer expectation test states that "the product is in a defective condition if the danger is unknowable and unacceptable to the average or ordinary consumer," while the risk-utility standard states that "a product is in a defective condition if a reasonable person would conclude that the probability and seriousness of harm caused by the product outweigh the burden or costs of taking precautions." *Id.* at 387, 389 (citations and internal quotations omitted). "The risk-utility test offers courts an opportunity to analyze *post hoc* whether a manufacturer's conduct in manufacturing or designing a product was reasonable, which obviously reflects the negligence roots of strict liability." *Id.* at 389 (citations omitted). Factors which, depending on the factual context of each case, may be relevant to the manufacturer's risk-utility calculus in manufacturing or designing a product include:
(1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.

(2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury,

(3) The availability of a substitute product which would meet the same need and not be as unsafe.

(4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.

(5) The user's ability to avoid danger by the exercise of care in the use of the product.

(6) The user's anticipated awareness of the dangers inherent in the product and their availability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Id. at 389-90.

ii. Application to Evidence of Negligence

Evidence of negligence may be relevant to the factfinder's application of the risk-utility standard, because the user's ability to avoid danger by the exercise of care in the use of the product will logically factor into a reasonable manufacturer's conduct. Although Plaintiff contends that the conduct of a user "remains irrelevant and prejudicial as to plaintiffs strict liability claims" after *Tincher*, such conduct compared to conduct reasonably anticipated by a manufacturer permissibly "reflects the negligence roots of strict liability." Knee-jerk rejection of legal concepts remotely related to negligence in products liability actions, even where such concepts clearly and explicitly relate to *Tincher's* newly articulated risk-utility standard for assessing whether a product is defective, was clearly discouraged by *Tincher's* extensive explication of the overlapping concepts of strict liability and negligence. *See id.* at 371 (describing "**negligence-derived** risk-utility balancing in design defect litigation") (citing *Phillips*, 841 A.2d at 1015-16) (emphasis added); *id.* ("[I]n design cases the character of the product and the conduct of the manufacturer are largely inseparable.") (quoting *Phillips*, 841 A.2d at 1015-16); *id.* at 401 ("[T]he theory of strict liability as it evolved **overlaps in effect with the theories of negligence** and breach of warranty.") (emphasis altered).

Although evidence of negligence of course does not constitute a complete defense comparable to contributory negligence, it may be relevant to the risk-utility standard articulated in *Tincher* and is therefore admissible for that purpose, subject to Pa.R.E. 401 and Rule 403 analyses. Furthermore, although unacknowledged by Plaintiff, evidence of negligence was also admissible pre-*Tincher* if relevant to causation. *Clark v. Bil-Jax, Inc.*, 763 A.2d 920, 923 (Pa. Super. Ct. 2000) (evidence of negligence "is permissible even in strict liability actions … [if] it is shown that the accident was solely the result of the user's conduct and not related in any way with the alleged defect in the product.") (internal quotations omitted). The court will not preclude evidence of negligence if relevant for this purpose or for the purpose of determining whether the product was defective under the risk-utility test.

b. Assumption of Risk

***5** Plaintiff also argues that Product Liability Defendants should be precluded from presenting evidence supporting the affirmative defense of assumption of the risk, because Plaintiff did not ever think, before the accident, that his foot could get caught in the moving augers if he went into the silo while the silo unloader was moving. In support, Plaintiff cites his own deposition testimony stating, in response to the question, "Did you ever think before the accident that perhaps, if you went up there with the unloader moving, that your foot could be caught in the augers?" "No. I didn't think of that." If Plaintiff did not consciously understand the specific danger posed by the product's defect, Plaintiff argues, he could not have assumed the risk of that danger. Product Liability Defendants respond with additional citations to the deposition of Plaintiff, wherein he admits that he knew the exposed spinning auger blades which caused his injury were dangerous.

Assumption of the risk is a defense to an action in strict liability "[i]f the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it ...." *Reott v. Asia Trend, Inc.*, 55 A.3d 1088, 1096 (citing Restatement (Second) of Torts § 402A, cmt. n). "Assumption of the risk requires a factual analysis of the plaintiff's subjective understanding of the risks involved." *McKenzie v. Dematic Corp.*, No. CIV.A. 3:12-250, 2015 WL 3866633, at *4 (W.D. Pa. June 23, 2015) (citations omitted). The defense of assumption of the risk requires proof "that the risk was voluntarily undertaken in addition to being known." *Jara v. Rexworks Inc.*, 718 A.2d 788, 795 (Pa. Super. Ct. 1998)

Plaintiff, by moving for the preclusion of any evidence tending to support the assumption of risk defense, effectively argues for this court's summary ruling as a matter of law that Product Liability Defendants cannot present sufficient evidence of this affirmative defense, and therefore all attempts to do so should be barred. Clearly, the parties contest the extent to which Plaintiff subjectively understood the risks involved in his use of the product, as well as whether his use of the product, despite whatever awareness he had, was unreasonable. As such, the court will not preclude Product Liability Defendants from at least attempting to raise this affirmative defense.

Plaintiff additionally posits, in his Reply to Product Liability Defendants' Response to this MIL, that *Jara* provides an independent basis for barring Defendants from presenting evidence of assumption of the risk. In *Jara*, the plaintiff was an employee of a concrete batch plant, whose duties included cleaning and preventative maintenance on a conveyor belt manufactured by the defendant. *Jara*, 718 A.2d, at 790. The court in *Jara* found that the plaintiff could not have voluntarily assumed the risk of performing maintenance on the allegedly defective conveyor belt because "[a]n employee who is required to use certain equipment in the course of his employment and who uses that equipment as directed by the employer has no choice in encountering a risk inherent in that equipment." *Id.* at 795.

In *Jara*, it was apparently uncontested that the plaintiff was injured in the course of his employment duties. In this case, it is not clear that Plaintiff was even an informal, "under the table" employee of Mr. Beichner. Product Liability Defendants dispute whether Plaintiff was paid anything by Mr. Beichner, and whether he was required by any agreement to undertake any duties at the farm. Plaintiff is asserting a negligence claim against Mr. Beichner, despite the fact that if he was injured in the course of his employment duties, such a claim would be barred by the Workers' Compensation Act.

Although Plaintiff could argue, and the jury could find, that Plaintiff could not have assumed the risk due to the nature of his duties as farmhand to Mr. Beichner, the court will not preclude Product Liability Defendants from presenting evidence that Plaintiff voluntarily assumed the risk of using the silo unloader despite its exposed auger blades because he was not obligated to do so by any employment duties.

c. Product Misuse/Recklessness

***6** Finally, Plaintiff moves for the preclusion of any evidence in support of the affirmative defense of product misuse, or recklessness, because Plaintiff's injury would not have occurred if the defect (consisting of the lack of permanently affixed guards over the augers) had been cured, even if Plaintiff misused the silo unloader or was reckless. Product misuse and recklessness are interchangeable concepts, proof of which by the defendant in a products liability action constitutes an affirmative defense to liability. *See Reott*, 55 A.3d. "To establish misuse of the product, the defendant must show that the use was unforeseeable or outrageous. Highly reckless conduct is akin to evidence of misuse and requires the defendant to prove that the use was so extraordinary and unforeseeable as to constitute a superseding cause." *Id.* at 1096.

The court has discerned, based on the various representations of the parties, that Plaintiff's actions prior to the injury in question may have consisted of kicking the silo unloader frame, kicking the auger blades, jumping on the silo unloader, and/or riding the unloader around the silo. Because Plaintiff's actions present a genuine issue of material fact to be decided by the jury, the court cannot preclude Products Liability Defendants from presenting evidence that any of these actions constituted unforeseeable or outrageous use. The admissibility of such evidence will depend on the exact evidence presented, the evidentiary context in which it is presented, and the application of Pa.R.E. 401 and Pa.R.E. 403.

Therefore, Plaintiff's motion in limine to preclude product defendants from presenting evidence of negligence and affirmative defenses of assumption of risk and product misuse/recklessness is denied in its entirety.

IV, Plaintiff's Motion in Limine to Preclude Defendants from Presenting Evidence of Alleged Compliance with Industry Standards

Plaintiff asserts that "[u]nder well-established Pennsylvania law, which was approved by *Tincher*, the manufacturer's reasonableness in designing a product as it did is irrelevant to the issues being addressed by the jury when assessing the defectiveness of the product," citing *Lewis v. Coffing Hoist Div., Duff-Norton Co.*, 528 A.2d 590 (Pa. 1987). Product Liability Defendants, also citing *Tincher*, respond that after that decision, compliance with industry standards is relevant to the reasonableness of manufacturer conduct inherent in the alternative consumer expectation/risk-utility test.

Preliminarily, this motion was transmitted by Plaintiff to the court on September 30, 2015, nine days after the deadline for the filing of all motions set by this court's April 14, 2015 Order. As such, the court may deny this motion as untimely without addressing the merits. However, since Products Liability Defendants submitted a response to the untimely motion before the date set for argument without challenging its validity or asserting prejudice in having to respond to it, the court will decide this MIL on the merits in the interest of expediency and reducing lengthy argument at trial.

Rather than expound at length upon repetitive considerations relevant to post-*Tincher* evidentiary matters, the court will refer the parties to section III.a.i. of this Opinion, *supra.* In addition to those principles outlined above and with particular relevance to the issue of the admissibility of industry standards, the *Tincher* court also discussed the derivation of *Lewis*, stating that *Lewis's* proposition that proof of industry standards was irrelevant to an action in strict liability was "in harmony with the *Azzarello* decision" "because 'due care' has no bearing upon liability in a strict liability case." *Tincher*, 104 A.3d, at 368. The Court in *Lewis* explicitly identified its holding as "correct" and "compelling" "under [its] decision in *Azzarello* ...." *Lewis*, 528 A.2d, at 594.

***7** Although it did not explicitly overrule *Lewis*, the *Tincher* court did overrule *Azzarelio* "to the extent [its] pronouncements … are in tension with the principles articulated in this Opinion," *Tincher*, 104 A.3d, at 376, and, as stated above, declared that "[t]he risk-utility test offers courts an opportunity to analyze *post hoc* whether a manufacturer's conduct in manufacturing or designing a product was reasonable, which obviously reflects the negligence roots of strict liability." *Id.* at 389 (citations omitted). Notably, the *Lewis* court precluded evidence of industry standards because it would "go to the reasonableness of the appellant's conduct in making its design choice ...." *Lewis*, 528 A.2d, at 594. A dissenting opinion in *Lewis* "opined that industry standards are written by specialized individuals with knowledge of product design superior to that of courts and, as a result, evidence of such standards is relevant to the question of defect," and "that evidence of industry standards was admissible although not necessarily highly probative." *Tincher*, 104 A.3d, at 369.

The *Lewis* majority's reasoning, based on *Azzarello* and the then-impermissible comingling of negligence and strict liability concepts, conflicts with *Tincher's* pronouncement that a manufacturer's conduct and reasonableness is relevant to the determination of product defect, for the precise reasons elaborated by the *Lewis* dissent. Whether a product comports with industry standards is particularly relevant to factor (2) of those enumerated above, specifically "The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury." As aptly explained by the *Lewis* dissent, industry standards may make the likelihood that a manufacturer acted reasonably more probable by showing that those actions were endorsed by "specialized individuals with knowledge of product design superior to that of courts."

As with evidence of negligence, such evidence of compliance with industry standards would not be dispositive of Plaintiff's product liability action by acting as a complete defense, or even "necessarily" be "highly probative." However, without affirmative authority from *Tincher* or any other post-*Tincher* precedential decision barring such evidence as a matter of law, the principles of *Tincher* counsel in favor its admissibility, subject to Pa.R.E. 401 and Pa.R.E. 403 analyses. Therefore, Plaintiff's motion in limine to preclude defendants from presenting evidence of alleged compliance with industry standards is denied.

V. Product Liability Defendants' Omnibus Motions in Limine

a. Motion in Limine to Exclude Cumulative Photographic Evidence

In support of this motion, Product Liability Defendants argue that "Plaintiff will seek to offer into evidence twenty photographs depicting the below-the-knee amputation injury he sustained as a result of his April 24, 2008 accident," and that these photographs are unduly cumulative and unfairly prejudicial. Plaintiff denies that any photographs presented will be cumulative, and that each photograph shown will have probative value that is not outweighed by any danger of unfair prejudice.

At this juncture, there is no way for the court to determine whether these twenty photographs will in fact be so cumulative or prejudicial as to outweigh their probative value, particularly where Plaintiff denies, as he did at oral argument on this MIL, that he will be showing twenty photographs at all. Therefore, each photograph will be subject to Pa.R.E. 401 and 403 analyses as it is presented and in the context of the other photographs presented at trial, and Product Liability Defendants' motion to generally bar Plaintiff from presenting "repitious photographs depicting the same or substantially similar conditions" is denied.

b. Motion in Limine to Exclude Reports and Curricula Vitae of Expert Witnesses

Product Liability Defendants also move to preclude the curricula vitae and reports of Plaintiff's expert witnesses because these documents would be cumulative of the experts' testimony and constitute inadmissible hearsay. Plaintiff denies that he will present these curricula vitae and expert reports as evidence at trial.

***8** Because this MIL is effectively uncontested, it is granted.

c. Motion in Limine to Exclude Insurance Coverage

Additionally, Product Liability Defendants move to preclude evidence of either Defendant's general liability insurance coverage, which would cover Plaintiff's claims against them, as irrelevant and prejudicial. Plaintiff denies that he will present evidence of insurance coverage at trial.

Because this MIL is effectively uncontested, it is granted.

VI. Product Liability Defendants' Motions in Limine Regarding Medical Expense Evidentiary Issues

a. Motion in Limine to Exclude Evidence of Medical Expenses Charged

Product Liability Defendants also assert that Plaintiff should be precluded from offering into evidence the billing statements issued by his healthcare providers. Citing *Moorhead v. Crozer Chester Med. Ctr.*, 765 A.2d 786 (Pa. 2001), Product Liability Defendants argue that Plaintiff may only claim and present evidence of the amounts paid to and accepted by his healthcare providers in satisfaction of the amounts the providers charged in treating the Plaintiff. Plaintiff "agrees that the amount recoverable for past medical expenses is the amount actually paid by plaintiff's healthcare coverage and accepted by the care providers," and states that "plaintiff will not be presenting his medical bills or other evidence of the amount charged."

In *Moorhead*, the Pennsylvania Supreme Court held that the amount paid and accepted by a health care provider as payment in full for medical services was the amount plaintiff was entitled to recover as compensatory medical damages. *Moorhead v. Crozer Chester Med. Ctr.*, 765 A.2d 786, 789 (Pa. 2001) (abrogated on other grounds by *Northbrook Life Ins. Co. v. Com.*, 949 A.2d 333 (Pa. 2008)). Because Plaintiff does not contest the applicability of this rule to Plaintiff's past medical expenses, Product Liability Defendants' motion in limine to exclude evidence of medical expenses charged is granted.

b. Motion in Limine to Exclude Evidence of Plaintiff's Future Medical Expense Projections

Product Liability Defendants additionally argue that *Moorhead* precludes the introduction of any evidence related to future medical expenses, or, if such evidence is admissible, that the expenses must be limited to what Medicare will pay for Plaintiff's future medical care. Plaintiff responds that although he is a Medicare recipient due to a medical condition unrelated to this case, evidence of estimated future Medicare payments is irrelevant and violative of the collateral source rule. Plaintiff also points out that Product Liability Defendants cite no legal authority for their position aside from *Moorhead*, which they do not deny. The Plaintiff's expert report objected to by Products Liability Defendants was prepared by Debbe Marcinko, RN, BSN, and contains a Medical Cost Projection Report based on the cost of estimated necessary medical services, rather than the Medicare fee schedule which Medicare-accepting health providers are compelled by law to follow.

"Judges should be vigilant, in personal injury trespass cases, to keep out of the trial all references to benefits collaterally received by the plaintiff." *Boudwin v. Yellow Cab Co.*, 188 A.2d 259, 260 (Pa. 1963). "[I]t would be entirely improper, in a personal injury case, for the defendant to show that the plaintiff was … **obtaining assistance from the government as a war veteran or in any other capacity**." *Id.* (emphasis added). "[T]he fact that an injured party has received compensation from a source other than the wrongdoer is without relevancy in a suit brought by the injured party against the wrongdoer to

recover damages," and, in fact, the introduction of such a fact is "prejudicial - and incorrigible - error ...." *Denardo v. Carneval*, 444 A.2d 135, 141 (Pa. Super. Ct. 1982) (internal citations omitted).

***9** Based on these iterations of the collateral source rule, Products Liability Defendants cannot limit Plaintiff's estimation of future medical expenses based on his receipt of benefits under the Medicare program. Such benefits are without relevancy to the question of Plaintiff's right to reimbursement for future medical expenses incurred as a result of the Product Liability Defendants' wrongdoing. In fact, any mention of Plaintiff's status as a Medicare recipient, including for purposes of impeachment of Plaintiff's expert on future medical expenses, would appear to constitute reversible error and grounds for mistrial under *Denardo.*

The rationale of *Moorhead* does not bear the application of its holding Product Liability Defendants seek here. In that case, the contested medical expenses had already been incurred and paid in full by the reduced amount which the plaintiff's claim for compensatory damages was limited to. The rationale of *Moorhead* explicitly contrasts a hypothetical situation where "a plaintiff will continue to incur expenses for medical services," in which case "it is appropriate for the factfinder to determine the amount of damages which will compensate the plaintiff for those expenses that are reasonably necessary to be incurred," with the situation in that case, where the exact amount of past expenses had already been established, those expenses had been satisfied, and "there is no longer any issue as to the amount of expenses for which the plaintiff will be liable." *Moorhead*, 765 A.2d, at 789 (internal quotations omitted).

Although Plaintiff concedes that his compensation for past medical expenses is limited to those which have been established, satisfied, and are no longer in issue, as discussed in Section VI.a., *supra*, the expenses contained in the Medical Cost Projection Report cannot be limited on the same basis because Plaintiff will continue to incur these expenses for medical services. Therefore, the factfinder will determine the amount of damages which will compensate Plaintiff for expenses reasonably necessary to be incurred, after determining the weight to be given to the expert's medical expense projections in light of her testimony at trial under direct and cross examination. Such cross examination, however, must not violate the collateral source rule's admonition against allowing evidence of Plaintiff's status as a Medicare beneficiary, reference to which the Pennsylvania Supreme Court has explicitly warned courts to be "vigilant" against. Therefore, Product Liability Defendants' motion in limine to exclude evidence of plaintiff's future medical expense projections is denied.

VII. Product Liability Defendants' Motions in Limine Regarding Product-Related Evidentiary Issues

a. Motion in Limine to Exclude Evidence of Subsequent Remedial Measures

Product Liability Defendants also move for the preclusion of evidence of subsequent design changes made to the silo unloader at issue in this case if offered to demonstrate defect, citing Pa.R.E. 407 and *Duchess v. Langston Corp.*, 769 A.2d 1131 (Pa. 2001). Conceding that evidence of "auger shielding design changes" is admissible to establish feasibility, if contested, Product Liability Defendants insist that this evidence is inadmissible because they are not contesting the feasibility of these design changes. Plaintiff argues that Product Liability Defendants are indeed contesting feasibility through expert testimony that the application of such design changes to the unloader in question would have been impractical, and that Plaintiff is entitled to impeach this expert testimony through introduction of subsequent remedial measure evidence.

***10** Pa.R.E. 407, concerning subsequent remedial measures, prohibits the admission of measures taken by a party that would have made an earlier injury or harm less likely to occur, if offered to prove negligence, culpable conduct, a defect in a product or its design, or a need for a warning or instruction. The court may admit this evidence if offered for another purpose, such as impeachment, or, if disputed, the feasibility of precautionary measures. Pa.R.E. 407. Where a defendant manufacturer essentially asserts that an alternative design "could not practically be done," feasibility is placed in issue,

and the plaintiff is permitted to establish the feasibility of the alternate design under the feasibility exception to Rule 407, *Duchess v. Langston Corp.*, 769 A.2d 1131, 1150 (Pa. 2001).

If the feasibility, defined as unable to be "practically" done, of the "auger shielding design changes" referred to in Products Liability Defendants' MIL is uncontested, evidence of these design changes is inadmissible under Pa.R.E. 407. To permit Plaintiff to introduce evidence of subsequent design changes solely to prove culpability would undermine the rationale of Pa.R.E. 407, which is to avoid punishment of and therefore incentivize safety improvements by precluding evidence of such improvements in order to establish liability. However, Product Liability Defendants cannot have it both ways: they cannot defend the lack of design features in the 1977 model, which Plaintiff asserts rendered the silo unloader defective, on the basis that such features would have been impractical, if the same parties subsequently found the same features practical enough to implement.

Product Liability Defendants protest the admission of later silo unloader models on the basis that later models incorporating the fixed shields Plaintiff advocates also incorporated other design changes to compensate for the inability to easily remove the shields, including "tenting" of the shields. The fact remains, however, that if a given design attribute, such as fixed shields, is disparaged as impractical by Product Liability Defendants' expert testimony, preclusion of Plaintiff's rebuttal concerning the existence of fixed-shield silo unloaders would amount to allowing the defendants to use Pa.R.E. 407 as both a shield and a sword with which to poke holes in Plaintiff's case. Should Products Liability Defendants wish to discredit Plaintiff's introduction of the fixed shield model with further evidence that fixed shields required additional design features in order to be practically implemented, they are of course free to do so, and the jury will have all information necessary to determine the weight to be accorded to the evidence. Should Products Liability Defendants wish to preserve their Pa.R.E. 407 shield against the introduction of later silo unloader model features, they need only refrain from contesting the infeasibility or practicality of those features.

If Products Liability Defendants do contest the feasibility of design features such as fixed shields which were subsequently implemented, only then may Plaintiff present evidence of those subsequently adopted design features, subject to Pa.R.E. 401 and Pa.R.E. 403. In such an event, an effective limiting instruction will be given to emphasize that the evidence is admissible only to impeach or prove feasibility, as the case may be. *See Duchess*, 769 A.2d, at 1147. Therefore, Product Liability Defendants' motion in limine to exclude evidence of subsequent remedial measures is granted under the condition that they do not, as stated in their MIL, contest feasibility.

b. Motion in Limine to Exclude Evidence of Post-Sale Observations and Claimed Duties

***11** Finally, Product Liability Defendants move for exclusion of evidence concerning observations of Craig Robertson and his father that Model 224 silo unloaders identical to the model at issue in this case were being operated by their owners without auger shielding in place. It is undisputed that these observations occurred subsequent to the sale of the Model 224 silo unloader at issue, and that Product Liability Defendants had no post-sale duty to recall after observing other silo unloaders operating without shields. Plaintiff argues that such observations are relevant and admissible for the purpose of proving that the arguably defective removeability of the auger shields established by the observations was a factual cause of Plaintiff's injuries.

Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence, and the fact is of consequence in determining the action. Pa.R.E. 401. Evidence that is not relevant is not admissible. Pa.R.E. 402. The court may exclude relevant evidence if its probative value is outweighed by a danger of confusing the issues, misleading the jury, wasting time, or needlessly presenting cumulative evidence. Pa.R.E. 403.

Evidence of observations subsequent to the sale of the silo unloader in question are simply irrelevant to that product's design or whether that design caused Plaintiff's injuries. Contrary to Plaintiff's assertions, the post-1977 observations do not themselves make it more or less likely that the 1977 silo unloader was defective. The observations of other

silo unloaders operating without fixed shields are not probative of whether similar operation caused Plaintiff's injuries, whether Product Liability Defendants had notice as to this practice prior to the design of the 1977 silo unloader such that it should have been altered based on those observations, or whether the silo unloader was capable of operating without shields. [1] Because the post-sale observations in question are irrelevant to causation, Product Liability Defendants' motion in limine to exclude evidence of post-sale observations and claimed duties is granted.

Hence, the following Order:

ORDER OF COURT

AND NOW, October 19, 2015, upon consideration of all parties' Motions in Limine, it is hereby **ORDERED** that Plaintiff's Motion in Limine to Preclude Evidence of Alleged "Bad Acts," Product Liability Defendants' Motion in Limine to Exclude Reports and Curricula Vitae of Expert Witnesses, Product Liability Defendants' Motion in Limine to Exclude Insurance Coverage, Product Liability Defendants' Motion in Limine to Exclude Evidence of Medical Expenses Charged, Product Liability Defendants' Motion in Limine to Exclude Evidence of Subsequent Remedial Measures, and Product Liability Defendants' Motion in Limine to Exclude Evidence of Post-Sale Observations and Claimed Duties are GRANTED, and Plaintiff's Motion in Limine to Preclude Product Defendants from Arguing a Warning Would Not Have Been Heeded, Plaintiff's Motion in Limine to Preclude Product Defendants from Presenting Evidence of Negligence and Affirmative Defenses of Assumption of Risk and Product Misuse/Recklessness, Plaintiff's Motion in Limine to Preclude Defendants from Presenting Evidence of Alleged Compliance with Industry Standards, Product Liability Defendants' Motion in Limine to Exclude Cumulative Photographic Evidence, and Product Liability Defendants' Motion in Limine to Exclude Evidence of Plaintiff's Future Medical Expense Projections are DENIED.

***12 BY THE COURT:**

<<signature>>

JAMES G. ARNER, P.J.

Footnotes

1 This last proposition may also be proven through evidence of the operation of the silo unloader at issue in this case, with considerably less danger of confusing the issues, misleading the jury, wasting time, or needlessly presenting cumulative evidence.