

VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 111-6-20 Oscv

Letourneau et al vs. Key Auto Sales, Inc. et al

ENTRY REGARDING MOTION

Title: Motion to Reconsider (Motion: 4)
Filer: Kevin E. Brown
Filed Date: November 17, 2022

The motion is GRANTED IN PART and DENIED IN PART.

Plaintiffs' Motion for reconsideration asks the Court to revisit the underlying issue of damages in this case, particularly the amounts that Plaintiffs have incurred and that are attributable to their injuries in this case. In its previous Entry Order, the Court reviewed these damages and determined that the amounts appeared to be disputed, albeit on largely technical grounds.

The facts in this case are tragic. On May 29, 2016, Defendant Joshua Cole was operating a 1994 Honda Prelude when he lost control and struck a tree. One of his passengers, Esperanza Robles dies as a result of her injuries received in the crash. The other passenger, Amanda Letourneau suffered significant injuries, including the loss of her leg.

In their motion for summary judgment, Plaintiffs submitted the following exhibits: (1) a summary of Ms. Letourneau's medical bills through 2018 (Exhibit 13); (2) an expert medical report projecting future expenses (exhibit 14); and (3) an affidavit from an experience plaintiff's attorney stating that in his expert opinion he would anticipate Ms. Robles' estate recovering more than \$1,000,000 (exhibit 15). Defendants filed a timely objection to these documents as not sufficient under V.R.C.P. 56(c).

Robles Damages

The Court takes up the question of whether Attorney O'Neil's affidavit is sufficient to establish, as a matter of law, that the Estate of Robles is likely to receive a judgment of more than \$1,000,000. Defendant's objection to this affidavit is that it lacks sufficient foundation to be considered dispositive and is a conclusory opinion. As at least one treatise has noted, using such

affidavits are insufficient as a matter of law. C. WRIGHT, A. MILLER, AND M. KANE, 10 B FEDERAL PRACTICE AND PROCEDURE §2738, at n. 29 (4th ed. 2016 & 2022 supp.); see also id. at § 2722, n. 29 (“Affidavits by expert witnesses also may be permitted, although it has been suggested that ‘courts scrutinize expert affidavits rigorously to ensure that the proffered expert input is really helpful to the trier of fact.’”) (citation omitted). While Attorney O’Neil’s opinion carries the weight of his experience and is not insignificant, it cannot become the basis, as a matter of law for a summary judgment determination that the claims of Ms. Robles’s Estate equal or exceed \$1,000,000 for purposes of V.R.C.P. 56(c).

Letourneau Damages

As to Ms. Letourneau’s evidence, Plaintiffs have provided both a summary of Ms. Letourneau’s medical expenses to date as well as an expert report of her future report, which Plaintiffs explain in their motion to reconsider, refer to more substantial pieces of evidence (actual medical bills in the case of Ms. Letourneau’s expenses to date and the expected testimony of Ms. Pettengill to future expenses). Plaintiffs’ motion notes that modern changes to Rule 56 have loosened the requirements of Rule 56(c), which no longer require the strict adoption of an exhibit through a sponsoring affidavit. Rule 56(c)(1) only requires “specific citations to particular parts of materials in the record” V.R.C.P. 56(c)(1). Nevertheless, Rule 56 still requires evidence to be presented in an admissible form. As the 2012 Reporters’ Notes to V.R.C.P. 56 state, “Rules 56(c)(1)(B) and (c)(2) clarify that all asserted facts must be based on **admissible evidence**, a point only partially suggested by former V.R. C.P. 56(e) requiring that affidavits be made on personal knowledge and set forth such facts as would be admissible in evidence.” (emphasis added.)

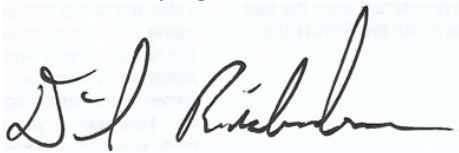
In this case, Ms. Pettengill’s report should be considered under V.R.C.P. 56(c) as evidence of Ms. Letourneau’s damages to date. They are the written findings of a duly disclosed expert witness and contain enough identifying information for the Court to conclude that it would be admissible with the support of Ms. Pettengill’s foundational testimony. The summary of medical records, on the other hand and without further details, are not admissible. Unlike the original medical records, they are not business records under V.R.E. 803(6) as the document appears to have been prepared after the inception of litigation and not kept in the course of regularly conducted business activity. There is no statement or indicia as to their accuracy or other piece of support that would allow the Court to make a determination of their admissibility. Moreover, there was no supplement after their admissibility was challenged. As such, the document, by itself, is not a piece of admissible evidence.

While these bases support the Court's initial decision not to grant summary judgment on the issues raised by Plaintiffs, there is an underlying issue to Plaintiff's motion that has not been sufficiently answered by Defendants, namely that Ms. Letourneau's medical expenses appear to be straightforward and the future expenses grounded in an expert's report, neither of which Defendants have opposed in substance. Defendants are correct that the Courts have traditionally left the determination of contested or unliquidated damages to the jury. See, e.g., *Vincent v. DeVries* 2013 VT 34, ¶¶ 6, 8 (noting that calculating of damages is an issue of fact for the jury). Nevertheless, in the present case, the issues with Ms. Letourneau's damages appears unique. Plaintiff has submitted admissible evidence of future damages and insufficient evidence of past damages. Defendant has opposed both on technical grounds, but it has not indicated a factual dispute. If, in fact, Ms. Letourneau's fixed damages (medical bills) and reasonable future costs are undisputed, it would serve the purpose of summary judgment and the Court's resources to understand this as well as any opposition premised upon a factual dispute.

ORDER

Upon re-examination, the Court finds that this issue of damages warrants greater consideration than the Court was previous able to devote. Under V.R.C.P. 56(e)(1), the Court can give parties an opportunity to properly support or address a fact, and under V.R.C.P. 56(f)(3), the Court can consider summary judgment on its own. Under this authority, the Court will give Plaintiffs 15 days to supplement the record on Ms. Letourneau's damages to date and reasonable anticipated future damages. The Court will then give Defendants 15 days to respond with substantive objections to the issue of Ms. Letourneau's medical damages (past and future)—presuming that Plaintiffs submits admissible evidence. At that time, the Court shall consider this issue and the remaining issues that Plaintiffs seek to address in their motion to reconsider.

Electronically signed on 1/2/2023 6:17 PM pursuant to V.R.E.F. 9(d)

A handwritten signature in black ink, appearing to read "D. Richardson", is written over a light blue rectangular background.

Daniel Richardson
Superior Court Judge