Exhibit #4

Judge Toor Rulings on Motion to Compel

Brown v. State, and other Rulings

Judge Mello Ruling on Motions In Limine Brown v State

Including (3) Plaintiff's Barred Claims and Allegations

(a-d)

EXHIBIT # 4
MOTIONS IN LIMINE
MOTION TO COMPEL

VERMONT SUPERIOR COURT
CHITTENDEN UNIT
CIVIL DIVISION

VERMONT SUPERIOR COURT

AUG 17 2016

Chittenden Unit

CHERYL J. BROWN, Plaintiff v. STATE OF VERMONT, Defendant	Docket No. 473-5-15 Cncv

RULING ON MOTION TO COMPEL

This is a negligence action involving a motor vehicle collision. Defendant is the State of Vermont because one of the drivers was a state trooper and, although the complaint does not so state, was apparently on duty when the collision occurred. Plaintiff has filed a motion to compel discovery. Stuart Jay Robinson, Esq. represents Plaintiff Brown; Jon T. Alexander, Esq. represents the State.

Discussion

Brown seeks various categories of documents. The court will address each in turn. Much of the Plaintiff's filings are rambling, irrelevant diatribes that are not helpful to her case. In the future, focusing on the issues at hand would save everyone a lot of time.

It appears that Plaintiff has dropped several of her requests, because she fails to address them in her reply memo. However, for completeness the court will address each issue raised in the original motion.

First, the court denies the request for the trooper's "driving record." Prior driving is irrelevant to whether the driver was negligent in this case, and would not lead to any admissible evidence.

Second, Plaintiff offers no legal basis for any entitlement to the trooper's personnel file. This is a basic fender-bender case.

Third, the court cannot order production of tape recordings that do not exist. The suggestion that there is a cover-up or falsification is unsupported by anything but speculation.

Fourth, Plaintiff asks for "records, logs and notes" of the call from the trooper to VSP Dispatch. The State represents that it has no such records. The court cannot require production of nonexistent records.[1]

Fifth, Plaintiff asks for "records, logs or notes" regarding an "alleged premature power failure, which prevented a retrieval of the records or backup tapes." Motion at 3. The witness says there was a power failure, but not that there would be any written records of such a failure. Nor can the court imagine why there would be. In any case, if there were, it would merely corroborate the claim of a power failure. If there were not, it would mean nothing because there is no evidence presented to the court that every power failure is documented in writing. This is a collateral issue and the court sees no basis to compel the production.

Sixth, the court finds no basis for ordering production of work orders about problems with the power, as there is no evidence that anyone submitted work orders. If depositions turn up a claim that there were such work orders, they may become relevant.

Seventh, Plaintiff asks for contact information for all State employees involved in the case. Apparently she has never made a formal discovery request for such a list. Thus, there is

[1] Plaintiff failed to provide in the motion copies of the specific interrogatories or document requests at issue, along with the State's responses. Thus, it is only from the exhibits the State has provided that the court can tell what was served. From those exhibits it is unclear whether a sworn response stating that certain records do not exist (as opposed to an email from counsel) was ever provided by the State. If not, the State should provide such a sworn response within ten business days.

nothing to enforce here by a motion to compel.[2]

Finally, Plaintiff's request to extend the deadline for discovery (in the event that the balance of the motion was granted) is moot.

The court also notes that in her reply memorandum Plaintiff asks the court to order "that tickets be issued and a full investigation of the Cover-Up" and that the court "Order an Internal Investigation..." Reply at 11-12. The requests are absurd. The court has no authority to issue either order. Plaintiff's counsel is urged to be sure that he has a legal basis for any future claims he asserts in this case or any other court filing. He is also urged to tone down the nastiness about opposing counsel and to treat all opponents with respect and professionalism, as is expected in the courts of Vermont.

Plaintiff's counsel also asks the court to make a finding that he did not violate the Rules of Professional Conduct, and that the State's counsel did so. This is not the forum for any such findings, particularly when the request is merely buried in a reply memo to a discovery motion.

Order

The motion to compel is denied.

Dated at Burlington this 17th day of August, 2016.

Helen M. Toor
Superior Court Judge

[2] The parties disagree over whether Plaintiff or her counsel are entitled to contact State employees directly, without formal depositions or discovery requests being served on counsel for the State. The answer to this question may turn on who the employees are, and whether they "supervise, direct or regularly consult with" the State's counsel. Rule 4.2 of the Vermont Rules of Professional Conduct, cmt [7]. Because there is no way of knowing the answer to that question in advance, counsel for Plaintiff is at risk of being in violation of the rule if he contacts State employee directly. Likewise, because his client is apparently also his paralegal, he is at similar risk if he allows her to make such contacts. Id., cmt [4] ("A lawyer may not make a communication prohibited by this rule *through the acts of another.*") (emphasis added). Once a lawyer has asked opposing counsel not to make contact with employees, the proper route to resolve any ongoing dispute over the issue is to file a motion seeking permission to do so. Id., cmt [6].

STATE OF VERMONT

SUPERIOR COURT
Chittenden Unit

CIVIL DIVISION
Docket No. 473-5-15 Cncv

Brown vs. State of Vermont

DOCUMENT COVER SHEET

Decision on Motion

Vermont Superior Court
Chittenden Civil Division
175 Main Street, PO Box 187
Burlington, Vermont 05401
www.VermontJudiciary.org - Civil (802)863-3467

ENTRY REGARDING MOTION

Brown vs. State of Vermont 473-5-15 Cncv

Title:

Motion to Disqualify,

No. 3

Filed on: June 27, 2016

Filed By: Robinson, Stuart Jay, Attorney for:
Plaintiff Cheryl J. Brown

VERMONT SUPERIOR COURT
AUG 05 2016
Chittenden Unit

Response filed on 07/15/16 by Attorney Alexander
Defendant State of Vermont's Opposition to Plaintiff's Motion to Disqualify Defendant's Medical Expert, Certificate of Service;
Response filed on 07/25/16 by Attorney Robinson
Plf's Response to Def State of VT Oppos. to Plf's Motion to Disqualify Medical Expert;

___ Granted Compliance by_____

X Denied

___ Scheduled for hearing on: _____ at _____;Time Allotted _____

___ Other

1. Parties are entitled to use whoever they want to do an IME.
2. No proof of a recording being made.

Judge 8/3/16 Date

Date copies sent to: 08/05/16 Clerk's Initials CKM

Copies sent to:
Attorney Stuart Jay Robinson for Plaintiff Cheryl J. Brown
Attorney Jon T. Alexander for Defendant State of Vermont It's Agents, Employees and

P.C. Ex.# 12 pg. 258

STATE OF VERMONT

SUPERIOR COURT
Chittenden Unit

CIVIL DIVISION
Docket No. 473-5-15 Cncv

Brown vs. State of Vermont

DOCUMENT COVER SHEET

ORDER

Judge Toor's Order of June 8, 2016

Vermont Superior Court
Chittenden Civil Division
175 Main Street, PO Box 187
Burlington, Vermont 05401
www.VermontJudiciary.org - Civil (802)863-3467

ENTRY REGARDING MOTION

Brown vs. State of Vermont 473-5-15 Cncv

VERMONT SUPERIOR COURT

JUN 0 8 2016

CHITTENDEN UNIT

Title:

Motion Emergency Request for Relief,

No. 2

Filed on: June 3, 2016

Filed By: Robinson, Stuart Jay, Attorney for:
Plaintiff Cheryl J. Brown

Response: NONE

___ Granted Compliance by_____

___ Denied

___ Scheduled for hearing on: _____ at _____;Time Allotted _____

___ Other

The court sees no emergency here. The letter will be treated as a motion and the requisite response and reply time given. In future, when seeking any action by the court, formal motions must be filed, not letters.

Judge Helen M. Toor

/s/ Helen M. Toor
Judge

6/8/16
Date

==========

Date copies sent to: _____ Clerk's Initials _____

Copies sent to:
Attorney Stuart Jay Robinson for Plaintiff Cheryl J. Brown
Attorney Jon T. Alexander for Defendant State of Vermont It's Agents, Employees and

P.C. Ex.# 12 pg. 260

STATE OF VERMONT

SUPERIOR COURT
Chittenden Unit

CIVIL DIVISION
Docket No. 473-5-15 Cncv

Brown vs. State of Vermont

DOCUMENT COVER SHEET

Discovery Order

P.C. Ex.# 12 pg. 261

Form 293

STATE OF VERMONT
COUNTY OF CHITTENDEN, ss.

CHERYL J. BROWN
Plaintiff(s)

v.

STATE OF VERMONT
Defendant(s)

CHITTENDEN Superior Court

Docket No. 473-5-15

SECOND AMENDED
DISCOVERY/ALTERNATE DISPUTE RESOLUTION STIPULATION AND ORDER

The parties to the above-entitled cause stipulate that the Court may order the following ADR and Discovery Schedule:

1. All pretrial motions, except those based on circumstances that arise after the cut-off date or a motion to dismiss for lack of subject matter jurisdiction shall be filed by October 19, 2016 Motions in Limine must be filed by the date of jury Drawing on issues known to counsel at that time.

VERMONT SUPERIOR COURT
JUN 17 2016
Chittenden Unit

2. Third parties shall be brought into the action pursuant to V.R.C.P. 14 no later than December 1, 2015

3. All Written Discovery shall be sent to the opposing party no later than July 2, 2016 Answers thereto shall be sent no later than as required by Rule.

4. Plaintiff shall disclose experts by March 15, 2016 Defendant shall depose those experts, if it chooses to do so by August 19, 2016.

5. Defendant shall disclose experts by June 17, 2016 Plaintiff shall depose those experts, if it chooses to do so by August 19, 2016.

6. Depositions of all witnesses other than expert witnesses shall be scheduled and taken no later than October 19, 2016.

7. All compulsory medical examinations, if required, shall be scheduled and have been conducted by May 15, 2016.

8. The parties shall agree to one of the following ADR procedures as set forth in V.R.C.P. Rule 16.3.

☒ Mediation — James W. Spink, Esq. (Name of Neutral(s), if agreed) (or) ☐ We agree to accept a neutral from list provided by the clerk

☐ Binding Arbitration — _____ (Name of Neutral(s), if agreed) (or) ☐ We agree to accept a neutral from list provided by the clerk

☐ Neutral Evaluation — _____ (Name of Neutral, if agreed) (or) ☐ We agree to accept a neutral from list provided by the clerk

☐ Other Method Proposed Agreement and procedure shall be submitted to the Court for approval.

9. Agreement, if any, concerning the payment of the neutral's fees and expenses shall be submitted with this Stipulation.

10. The Alternate Dispute Resolution Session shall be completed by August 31, ,20 16.
Please specify one of the following options:

☒ A. Case Statements, if appropriate, shall be filed with the neutral by August 26, 2016.
Necessary Discovery shall be completed by August 26, 2016.

☐ B. We agree to accept the assistance of the designated neutral in setting a schedule for completion of the process.

11. Discovery shall be complete and this case ready for trial by October 19, 2016 Estimated Length of Trial: 2 day(s) or ____ hours(s).

Attorney for Defendant	6/10/16 Date	Rabbi [illegible], Esq. Attorney for Plaintiff	6/10/16 Date
Attorney for Defendant	Date	Attorney for Defendant	Date
Attorney for Defendant	Date	Attorney for Defendant	Date

APPROVED AND ORDERED:

Presiding Judge, CHITTENDEN Superior Court — 6/17/16 Date

9/03 SML

Judge Helen M. Toor

P.C. Ex.# 12 pg. 262

Vermont Superior Court
Chittenden Civil Division
175 Main Street, PO Box 187
Burlington, Vermont 05401
www.VermontJudiciary.org - Civil (802)863-3467

ENTRY REGARDING MOTION

Brown vs. State of Vermont 473-5-15 Cncv

Title:

Motion in Limine to Exclude Dr. Backus,

No. 8

Filed on: January 23, 2017

Filed By: Robinson, Stuart Jay, Attorney for:
Plaintiff Cheryl J. Brown

VERMONT SUPERIOR COURT
FILED
MAR 03 2017
CHITTENDEN UNIT

Response filed on 01/25/17 by Attorney Robinson
Plaintiff's Supplemental Affidavit;

___ Granted Compliance by_____

X Denied

___ Scheduled for hearing on: _____ at _____;Time Allotted _____

X Other

. . . . See "Ruling on Motions in Limine". . . . . .

. . . . . .

. . . . . .

. . . . . .

. . . . . .

Judge

3/3/17
Date

Date copies sent to: 3/3/17 Clerk's Initials JKM

Copies sent to:
Attorney Stuart Jay Robinson for Plaintiff Cheryl J. Brown
Attorney Jon T. Alexander for Defendant State of Vermont It's Agents, Employees and
Attorney Bartholomew J. Gengler for party 2 Co-Counsel

P.C. Ex.# 12 pg. 263

Vermont Superior Court
Chittenden Civil Division
175 Main Street, PO Box 187
Burlington, Vermont 05401
www.VermontJudiciary.org - Civil (802)863-3467

ENTRY REGARDING MOTION

Brown vs. State of Vermont 473-5-15 Cncv

Title:

Motion in Limine (Plf's Prior Legal Claims),

No. 9

Filed on: January 24, 2017

Filed By: Robinson, Stuart Jay, Attorney for:
Plaintiff Cheryl J. Brown

VERMONT SUPERIOR COURT
FILED
MAR 03 2017
CHITTENDEN UNIT

Response: NONE

___ Granted Compliance by_____

X Denied

___ Scheduled for hearing on: _____ at _____;Time Allotted _____

X Other

. . . . See "Ruling on Motions in Limine." . . . . . .

. . . . . .

. . . . . .

. . . . . .

. . . . . .

Judge

3/3/17
Date

Date copies sent to: 3/3/17 Clerk's Initials JKM

Copies sent to:
Attorney Stuart Jay Robinson for Plaintiff Cheryl J. Brown
Attorney Jon T. Alexander for Defendant State of Vermont It's Agents, Employees and
Attorney Bartholomew J. Gengler for party 2 Co-Counsel

P.C. Ex.# 12 pg. 264

Vermont Superior Court
Chittenden Civil Division
175 Main Street, PO Box 187
Burlington, Vermont 05401
www.VermontJudiciary.org - Civil (802)863-3467

ENTRY REGARDING MOTION

Brown vs. State of Vermont 473-5-15 Cncv

Title:

Motion in Limine re plf's barred claims,

No. 10

Filed on: January 26, 2017

VERMONT SUPERIOR COURT
FILED
MAR 0 3 2017
CHITTENDEN UNIT

Filed By: Alexander, Jon T., Attorney for:
Defendant State of Vermont It's Agents, Employees and Representa

Response: NONE

X Granted Compliance by_____

___ Denied

___ Scheduled for hearing on: _____ at _____;Time Allotted _____

X Other
See "Ruling on Motions in Limine."

Judge 3/3/17 Date

Date copies sent to: 3/3/17 Clerk's Initials JKM

Copies sent to:
Attorney Stuart Jay Robinson for Plaintiff Cheryl J. Brown
Attorney Jon T. Alexander for Defendant State of Vermont It's Agents, Employees and
Attorney Bartholomew J. Gengler for party 2 Co-Counsel

P.C. Ex.# 12 pg. 265

Vermont Superior Court
Chittenden Civil Division
175 Main Street, PO Box 187
Burlington, Vermont 05401
www.VermontJudiciary.org - Civil (802)863-3467

ENTRY REGARDING MOTION

Brown vs. State of Vermont 473-5-15 Cncv

Title:

Motion in Limine to exclude plf's proffered evi,

No. 11

Filed on: January 26, 2017

Filed By: Alexander, Jon T., Attorney for:
Defendant State of Vermont It's Agents, Employees and Representa

VERMONT SUPERIOR COURT
FILED
MAR 0 3 2017
CHITTENDEN UNIT

Response: NONE

___ Granted Compliance by_____

___ Denied

___ Scheduled for hearing on: _____ at _____;Time Allotted _____

X Other

See "Ruling on Motions in Limine".

Judge 3/3/17 Date

Date copies sent to: 3/3/17 Clerk's Initials KM

Copies sent to:
Attorney Stuart Jay Robinson for Plaintiff Cheryl J. Brown
Attorney Jon T. Alexander for Defendant State of Vermont It's Agents, Employees and
Attorney Bartholomew J. Gengler for party 2 Co-Counsel

P.C. Ex.# 12 pg. 266

VERMONT SUPERIOR COURT
CHITTENDEN UNIT
CIVIL DIVISION

CHERYL J. BROWN, Plaintiff	
v.	Docket No. 473-5-15 Cncv
STATE OF VERMONT, Defendant	

RULING ON MOTIONS IN LIMINE

This negligence action arises from a motor vehicle accident where Plaintiff Cheryl Brown was rear-ended by Vermont State Police Sergeant Matthew Denis. The Defendant is the State of Vermont, presumably pursuant to 12 V.S.A. §§ 5601 and 5602. A jury was drawn on January 26th, and trial is scheduled to begin on March 15th. Now before the court are various motions in limine. Rabbi Stuart Jay Robinson, Esq. represents Brown. Jon T. Alexander, Esq. and Bartholomew Gengler, Esq. represent the State.

Background

In an earlier ruling on a summary judgment motion, the court found the following undisputed facts. On May 16, 2012, Brown was stopped in traffic on Route 15 in Colchester, when she was struck from behind by the vehicle of Vermont State Police Sergeant Matthew Denis. After advising Brown that it was not safe to stay in the road, Denis pulled into a nearby parking lot at the Fanny Allen Hospital, where he stayed until Officer Derrick Kendrew of the Colchester Police arrived. After Officer Kendrew spoke with both Brown and Denis, Brown received a copy of the crash report and Denis's identifying information. She then filed this action in Superior Court.

(1) Plaintiff's Prior Legal Claims and Lawsuits

Brown moves to exclude evidence or argument regarding her prior legal claims and lawsuits. Specifically, she seeks to exclude evidence of a prior motor vehicle accident that occurred on January 26, 2007 where she was also rear-ended. She contends that evidence is irrelevant because it "caused personal injury to a different part of the body." Pl.'s Mot. in Limine at 1.

In fact, the 2007 accident is relevant as to whether Brown's current alleged injuries were actually caused by the 2012 accident with Denis that is the basis of this lawsuit, or whether

they pre-existed the 2012 accident. As a result of the accident with Denis, Brown alleges that she suffers from neck, left arm, and left shoulder pain. Brown testified in deposition that, as a result of the 2007 accident, she suffered back, neck, and shoulder pain. While Brown's treating physician opines that Brown's injuries were caused by the accident with Denis, it is apparent that her opinion is based on Brown's subjective description of her symptoms before and after the 2012 accident. The State is entitled to present evidence about the 2007 accident to explore the possibility that Brown's alleged injuries were caused by an event other than the 2012 accident with Denis. *See generally* Callan v. Hackett, 170 Vt. 609, 609 (2000) ("The ordinary rule in tort law is that the plaintiffs must prove, by a preponderance of the evidence, the extent and nature of their damages. Plaintiffs must further show that such damages are the direct, necessary, and probable result of defendant's negligent act.") (citing Conover v. Baker, 134 Vt. 466, 471 (1976)). Any potential prejudice can be cured with a limiting instruction, if the parties request it. The probative value of the 2007 accident is not substantially outweighed by the potential for unfair prejudice. *See* V.R.E. 403.

Evidence about the 2007 accident is also admissible as evidence of Brown's credibility. The State points to a September 25, 2014 independent medical evaluation conducted by Dr. Katherine Wiebe, where Brown stated that she had not experienced neck, left shoulder, or left shoulder blade pain prior to the 2012 accident, and that she "was in one minor motor vehicle accident 13–14 years ago where she was rear-ended but was not injured and did not need any treatment." Ex. D to Def.'s Opp'n. at 1. That statement clearly contradicts her deposition testimony that the 2007 accident resulted in back, neck, and shoulder injuries. Brown's motion in limine to preclude evidence regarding her prior legal claims and lawsuits is denied.

(2) Dr. Backus and HIPAA Disclosures

Brown seeks to exclude the testimony of the State's expert medical witness, Dr. Verne Backus, who conducted an independent medical evaluation ("IME") of Brown on May 13, 2016.[1] As far as the court can gather, Brown asserts two reasons for her motion to exclude: (1) the State's counsel and Dr. Backus allegedly communicated about her medical information at a time when her medical records release had temporarily lapsed, in violation of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. § 1320d, *et seq.*; and (2) Dr. Backus's failure to remind her that he had previously conducted on IME of her in 2008 for use in another lawsuit constitutes a "conflict of interest" which "precludes objectivity" in the May 13th exam and "taints" his report.

Brown's motion fails for several reasons. First, as the State correctly points out, HIPAA does not create a private right of action. *See, e.g.*, Miller v. Nichols, 586 F.3d 53, 59 (1st Cir. 2009); Thurston v. Pallito, No. 5:13-CV-316, 2015 WL 1097377, at *17 (D. Vt. Jan. 13, 2015); Byrne v. Avery Ctr. for Obstetrics & Gynecology, P.C., 314 Conn. 433, 451 (2014); Espinoza v. Gold Cross Servs., Inc., 234 P.3d 156, 158 (Utah Ct. App. 2010). Second,

[1] This is not Brown's first attempt to exclude Dr. Backus. Last June, she moved to disqualify him on grounds of bias, which the court denied because "[p]arties are entitled to use whoever they want to do an IME." Entry Order (Aug. 5, 2016).

P.C. Ex.# 12 pg. 268

neither the State, the State's counsel, the Vermont Attorney General's Office, nor Dr. Backus (in his role as a consulting physician for litigation purposes, rather than a treatment provider) are subject to HIPAA. *See* 45 C.F.R. §§ 160.102, 160.103 (defining covered entities and "health care provider[s]"); In re Polyurethane Foam Antitrust Litig., No. 1:10 MD 2196, 2015 WL 9491228, at *2 (N.D. Ohio Dec. 30, 2015) (counsel not subject to HIPAA); State Farm Mut. Auto. Ins. Co. v. Kugler, 840 F. Supp. 2d 1323, 1328 (S.D. Fla. 2011) ("Law firms who are not representing covered entities are not regulated under HIPAA."); In re Asbestos Prod. Liab. Litig. (No. VI), 256 F.R.D. 151, 154–55 (E.D. Pa. 2009) (physicians not "health care providers" and not subject to HIPAA "because they were not consulted by the Plaintiffs for physician services, but rather for the purposes of obtaining a diagnosis to be relied upon in initiating . . . personal injury suit").

Third, even assuming that HIPAA applied here, there was no HIPAA violation. Brown provided to the State a HIPAA-compliant medical records release authorization, signed November 4, 2014 and valid for one year. During that one-year period, the State validly obtained copies of relevant medical records from Brown's health care providers. That release expired on November 15, 2015. On May 2, 2016, Brown signed another medical records release authorization which is valid for one year. Brown's Independent Medical Examination with Dr. Backus was conducted on May 13, 2016. Brown apparently argues, with no persuasive legal basis, that the temporary lapse in the medical release authorization somehow nullifies all records that were validly obtained while the authorizations were in effect. She further speculates that the State's contact with Dr. Backus regarding her must have occurred during the lapse. The court rejects Brown's arguments. Notably, the release authorization that she signed provides that "THIS AUTHORIZATION is subject to revocation at any time except to the extent that you have already taken action in reliance on it." Brown twice executed a valid release authorization form, effectively waiving any HIPAA privacy rights. *See generally* Murphy v. Dulay, 768 F.3d 1360, 1374 (11th Cir. 2014) ([W]hen an individual executes a valid HIPAA authorization, he waives all HIPAA protection as to the health information covered by the authorization, including the protections against litigation-related disclosures. Accordingly, no other HIPAA exception for disclosure needs to be satisfied once an individual signs a valid written authorization.") (citation omitted).

Fourth, assuming HIPAA was somehow violated, suppression or exclusion of evidence is not a remedy for a HIPAA violation. *See* Elder-Evins v. Casey, No. C 09-05775 SBA LB, 2012 WL 2577589, at *8 (N.D. Cal. July 3, 2012); State v. Strickling, 164 So. 3d 727, 732 (Fla. Dist. Ct. App. 2015) ("Even where evidence is disclosed by a covered entity in violation of HIPAA standards, suppression of the records is not provided for by HIPAA and is thus not a proper remedy.") (citation omitted); State v. Mubita, 145 Idaho 925, 936 (2008) (assuming violation, "suppression of the evidence is not the proper remedy for a HIPAA violation"); State v. Eichhorst, 879 N.E.2d 1144, 1154 (Ind. Ct. App. 2008) (recognizing that HIPAA contains no suppression remedy); State v. Straehler, 745 N.W.2d 431, 435 (Wis. Ct. App. 2008) ("HIPAA does not provide for suppression of the evidence as a remedy for a HIPAA violation.").

Finally, Dr. Backus's failure to remind Brown that he had previously conducted an IME of her in 2008 for use in another lawsuit for a different defendant does not provide any

basis for excluding his testimony. Brown points to no legal, professional, or ethical duty that Dr. Backus had to remind Brown of that fact. Nor has Brown explained how the prior IME represents bias against her in this case. Moreover, Brown's counsel apparently conceded in an email to the State's counsel that the defendant is entitled to choose its own medical expert under the Rules. Furthermore, Brown offers no persuasive authority to support her contention that Dr. Backus's alleged non-disclosure to the State's counsel that he had previously conducted an IME on Brown (eight years prior) creates a conflict of interest, or how that would require exclusion of his testimony at trial. Brown's motion in limine to exclude the testimony of Dr. Backus is denied.

(3) Plaintiff's Barred Claims and Allegations

The State seeks to preclude Brown from presenting or alluding to any argument, testimony, or other evidence at trial concerning the following:

(a) purported constitutional or civil rights violations in connection with the accident;
(b) any suggestion of a "cover up," conspiracy, suppression, or falsification of evidence, and criminal conduct of any kind in connection with the accident;
(c) any implication that the accident was a "hit and run," that Denis fled or absconded from the scene, or otherwise violated Vermont's hit and run statute, 23 V.S.A. § 1128; and
(d) any allegation that the State or its medical expert Dr. Backus have violated HIPAA or that Dr. Backus has a "conflict of interest" due to a prior independent medical examination he conducted on Brown years earlier in a different lawsuit.

In addition to her negligence claim, Brown's complaint included various constitutional and civil rights claims. Brown argued that the State violated her due process, equal protection, and Common Benefits clause rights when: (1) Sgt. Denis moved his vehicle from Route 15 to the nearby parking lot; (2) Officer Kendrew decided not to ticket or cite Sgt. Denis for purportedly fleeing the scene in criminal violation of 23 V.S.A. § 1128; and (3) neither the Vermont State Police nor other State agencies decided to investigate or discipline Sgt. Denis for his role in the traffic accident. The court granted the State's motion for summary judgment on the constitutional claims, however, concluding that "none of these acts or omissions constitute a federal or Vermont constitutional violation." *See* Ruling on Def.'s Mot. for Partial Summary J. on Pl.'s Constitutional Claims at 1 (Dec. 12, 2016).

Any suggestion or insinuation that the above acts or omissions are constitutional or civil rights violations is irrelevant to the negligence claim. The court directs Brown and her counsel not to make any such suggestion or insinuation, including use of the "alternative phraseology" cited by the State. *See* State's Mot. in Limine re: Pl.'s Barred Claims and Allegations at 2 (e.g., "forbidden double standard," "abuse of his power," "disp[a]rate treatment," "free pass," "knowingly discriminated"). Brown's opposition attempts to relitigate an issue already decided in the court's prior Ruling. As Brown has offered

nothing new in the way of persuasive authority, the court declines her request that it revisit that decision. See Pl.'s Opposition at 2–3.

In the summary judgment filings, Brown also asserted that Denis, responding officers, and the State conspired to engage in a "cover up" with respect to the accident and its aftermath, and further described the officers' actions as an attempt to get away with the "perfect crime" and a "criminal violation." This court noted in an earlier ruling that "the suggestion that there is a cover-up or falsification is unsupported by anything but speculation." Ruling on Mot. to Compel at 2 (Aug. 17, 2016). It appears that any such suggestion is still supported by nothing more than mere speculation, and is entirely irrelevant to the negligence claim. Brown and her counsel are directed not to suggest a cover up, conspiracy, suppression or falsification of facts, or criminal conduct.

Brown has further characterized the accident as a "hit and run" in her previous filings, and has claimed that Denis should have been cited for leaving the scene of the accident or "absconding," in violation of Vermont's hit and run statute. *See* 23 V.S.A. § 1128. The undisputed facts found by the court demonstrate that there was no "hit and run":

> On May 16, 2012, Brown was stopped in traffic on Route 15 in Colchester, when she was struck from behind by the vehicle of Vermont State Police Sergeant Matthew Denis. After advising Brown that it was not safe to stay in the road, Denis pulled into a nearby parking lot at the Fanny Allen Hospital, where he stayed until Officer Derrick Kendrew of the Colchester Police arrived. After Officer Kendrew spoke with both Brown and Denis, Brown received a copy of the crash report and Denis's identifying information. . . . [T]here is no dispute that she obtained such information shortly after the accident.

Ruling on Def.'s Mot. for Partial Summary J. at 1, 3. Moreover, the State is correct that, even if there were non-speculative evidence supporting the "hit and run" contention, it would be irrelevant to establishing the State's negligent breach of duty in striking Brown's vehicle, and enormously prejudicial to the State. Brown and her counsel shall refrain from suggesting or implying that this was a "hit and run," that Denis fled or absconded from the scene, or that there was a violation of 23 V.S.A. § 1128.

The court has denied Brown's motion in limine to exclude Dr. Backus from testifying. *See* supra. Consistent with that, the court also orders Brown and her counsel not to comment at trial about any purported HIPAA violations or "conflict of interest" for Dr. Backus arising from any non-disclosure of the 2008 IME. For the reasons stated above, those contentions are not supported by any legal or factual authority, are irrelevant, and would be highly prejudicial to the State. The State does not object to, nor does the court see any reason to prohibit Brown from questioning Dr. Backus on cross-examination about the 2008 IME. Indeed, Brown is certainly entitled to elicit testimony as to whether Dr. Backus's examination and report following the 2012 accident was somehow influenced or affected by the 2008 examination. But Brown must not suggest or imply that there was a HIPAA violation or conflict of interest, or that Dr. Backus breached some legal,

professional, or ethical obligation to disclose the 2008 IME to Brown at or prior to the 2016 IME.

(4) Lost Past and Future Earning Capacity

The State moves to exclude Brown's proffered evidence of lost past and future earnings due to an allegedly diminished work capacity resulting from injuries she purportedly suffered from the 2012 accident. The State contends that Brown's claimed damages are totally speculative and not limited to a reasonable period of time. The court notes from the outset that there is a distinction between lost wages and lost earning capacity, *see* Deldebbio v. Blanchard, No. 2:06-CV-115, 2008 WL 2581080, at *1–2 (D. Vt. June 26, 2008), and that the subject of this motion seems to be the latter.[2]

The State is incorrect in stating that Brown offers no evidence from a treating physician or expert that she has suffered a permanent injury. Brown in fact submitted a letter from her chiropractor, Dr. Richard Marko, dated August 28, 2015, which states that: "It is my professional opinion at this time that [Brown] has a permanent injury and will need continued supportive care." Pl.'s Ex. 1. However, that evidence alone is insufficient to establish damages in the form of lost earning capacity. "Impairment of future earning capacity does not necessarily result from a permanent injury. A person may have an injury which meets the definition of a permanent injury and still not suffer any loss of future earning capacity." Creel v. Shadley, 266 Or. 494, 500 (1973) (citing Anthes v. Anthes, 258 Iowa 260 (1965); Waymire v. Carter, 366 S.W.2d 74 (Mo. App. 1963); 25 C.J.S. Damages s 40, p. 727 (1966)).

With respect to loss of earning capacity, the Supreme Court has explained:

> Loss of earning capacity is a proper element of damages to the plaintiff. This element of damages, like any other, must be proved, and enough facts must be shown to enable the jury to make an intelligent determination of the extent of his loss. Ordinarily, with an adult, this is to be shown by proof of what the party earned before the injury, and what he has been earning since. But his earnings in one employment are not a suitable basis for determining his earning capacity in another employment at the time of or after the injury.

Trombetta v. Champlain Valley Fruit Co., 117 Vt. 491, 494 (1953) (citations omitted); *see also* Melford v. S. V. Rossi Const. Co., 131 Vt. 219, 223–24 (1973). A plaintiff is not precluded from seeking damages for lost earning capacity merely because the precise amount is difficult to compute or because he or she has not yet acquired an earning capacity. *See* Brueckner v. Norwich Univ., 169 Vt. 118, 128 (1999). But, like recovery for any type of damages, lost wages and earning capacity must be based on admissible evidence and not on undue speculation. *See* Deldebbio v. Blanchard, No. 2:06-CV-115,

[2] Brown apparently intends to present evidence of lost wages due to missed work for doctor's appointments and associated travel time. The State notes that its motion in limine does not address those categories of damages. *See* Def.'s Opp'n at 3 n.2.

2008 WL 2581080, at *1–2 (D. Vt. June 26, 2008); Schnabel v. Nordic Toyota, Inc., 168 Vt. 354, 363 (1998) (quoting Haynes v. Golub Corp., 166 Vt. 228, 238 (1997)) ("when front pay is allowed, the damages must be "limited to a reasonable period of time" and must not be "speculative"); *see generally* My Sister's Place v. City of Burlington, 139 Vt. 602, 612 (1981) ("a tortfeasor is assessed for damages which directly or proximately result from the wrong committed. Consequences which are contingent, speculative, or merely possible are not entitled to consideration in ascertaining the damages.") (quotation omitted).

As observed above, Brown has provided evidence of a permanent injury. Her evidence that the injury has affected her earning capacity consists of her own testimony that she cannot satisfy the physical demands of a radiology technician position because of the 2012 accident. While that is not strong evidence by any means, Brown has in fact worked as a radiology technician in the past, and consequently has personal knowledge of the physical demands of such a position.[3] Whether her testimony constitutes sufficient evidence to prove a permanent injury that has affected her earning potential and whether injuries from the 2012 accident (as opposed to pre-existing injuries) actually caused any impairment in earning capacity are factual matters for the jury to determine. The court has more significant concerns about the valuation of her alleged loss of earning capacity. *See generally* Licudine v. Cedars–Sinai Med. Ctr., 3 Cal. App. 5th 881, 893 (2016) ("As its name suggests, a loss of earning capacity is the difference between what the plaintiff's earning capacity was *before* her injury and what it is *after* the injury.") (citing Rest. 2d Torts, § 924, com. d, p. 525) (emphasis in original).

Brown earned an associate's degree in radiography from Champlain College in 1989. She last worked as a radiology technician in 1997. From 2000 through 2004, she worked for IDX Systems Corporation in a customer support role, testing radiology and billing software. In 2004 she began working for McGregor's Pharmacy in Winooski, where she worked first in a management position, then as an accounts receivable representative. She also began working part-time for Rabbi Stuart Jay Robinson, Esq. (her counsel in this case) as a legal and administrative assistant in 2008, and apparently became full-time there in 2014.

Brown prepared an economic loss summary, where she lists her current actual salary as $38,480 annually, and her "previous" salary as $57,990. She calculates a 30% difference of $19,510 per year. That results in a five year projected loss (from May 16, 2012 through May 16, 2017) of $97,552. Applying that calculation to a retirement age of 68, it appears that Brown seeks approximately $429,000 in past and future loss of earning capacity.

However, Brown provides no evidentiary basis for the $57,990 figure, which she claims was her "previous" salary. From the exhibits presented, it appears her highest annual salary was around $55,000 when she left IDX in 2004. She made around $53,000 from 2005 through 2007, when she was employed in a management role in McGregor's Pharmacy. Her salary dipped to about $33,000 in 2008 after her management position

[3] While Brown admitted in the questionnaire she filled out prior to her Independent Medical Evaluation on May 13, 2016 that neither her doctor nor anyone else had prescribed any work restrictions, *see* Def.'s Ex. D at 7, that could simply be because work restrictions were not necessary for her current job.

was reclassified to a clerical billing position, a reduction which she voluntary accepted over the company's alternative option of a six-week severance pay. Since then, her salary has ranged between $30,000 and $40,000 per year, except for 2013 when it was $49,320. *See* Pl.'s Ex. 6.

Brown apparently bases her "previous" salary on the amount that a radiology technician makes now, but provides nothing other her own speculation to support that amount:

> Q. But do you know what radiology techs make nowadays?
>
> A. Well, I know that the neighborhood, depending if you're a Tech 1 or Tech 2, can range probably from, I would say anywhere[] from $50 thousand to $90 thousand a year.

Def.'s Ex. B (Brown depo.) at 116:11–16. Brown points to no economic expert or other authority demonstrating what she could make as a radiology technician.[4] Moreover, there is no indication that she took steps before or after the accident to re-enter the radiology field, aside from her own testimony that she "thought" about it, and that she "began to read" her 15-year old textbooks at one point in 2011, "thinking" that she would "perhaps take the board exam again." Id. at 114:13–18, 115:7–9, 117:4–10.

Other courts have addressed cases where plaintiffs claim damages for loss of earning capacity based on their intention to change occupations (by starting a new occupation or returning to an old one), and they are split on the issue. *See* Annotation, Admissibility, in Personal Injury or Death Action, of Evidence as to Injured Party's Intention to Enter Occupation Other than that Engaged in at Time of Injury or Death, 23 A.L.R.3d 1189 (Originally published in 1969). "If the cases are to be reconciled at all, the result must be reached on the basis of the court's view of the likelihood that the plaintiff could enter the new occupation and intended to do so, a conclusion which depends upon the steps that have actually been taken to accomplish the change of occupation." 2 Stein on Personal Injury Damages § 6:15 (3d ed. Oct. 2016 update). As one federal district court has stated, "the test is not the age, preinjury occupation, nor the nature of the proposed profession, but rather the sufficiency of the plaintiff's evidence in showing his skill, likelihood of becoming a member of the profession and availability of work in that area." Hoffman v. Sterling Drug, Inc., 374 F. Supp. 850, 861 (M.D. Pa. 1974).

The closest Vermont case on point is Melford v. S. V. Rossi Constr. Co., 131 Vt. 219, 223–24 (1973). The plaintiff there was a professional musician, who had studied music in college and had about ten years of experience in the field. He suffered a traumatic brain injury from an accident, which caused him to lose his sense of rhythm. At trial, he was permitted to testify about his intention to pursue a career as a studio musician as evidence of his lost future earning capacity, and to base his estimated future loss of earnings on what studio musicians earn.

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[4] Brown claims in her opposition memorandum that "[w]ith today's technology [she] shared information regarding salary that was online," and cites generally to the entire deposition, which does not support that contention.

In Deldebbio v. Blanchard, No. 2:06-CV-115, 2008 WL 2581080, at *1–2 (D. Vt. June 26, 2008), the plaintiff intended to testify that, before his accident, he had "formed the intention to obtain a master's degree in computer science and become a software engineer, and that since the accident he has enrolled in a master's degree program which is near completion. Id. at *1. He further intended to testify that "he has looked into consulting in his field, is familiar with the going rate for consultants, and expects to be able to bill a certain number of hours per year at a certain rate." Id. The court permitted plaintiff to testify about his career goals and ambitions before and after the accident, steps taken to fulfill those goals, and delays experienced due to his injuries, in addition to his intent to establish a consulting business and to bill for less than the full amount of time he spends on a task. Id. at *2. However, the court did not permit plaintiff to testify in any further detail about the proposed consulting business, "including any actual amount he intends to bill, either in hours or in dollars." Id. Nor could he testify as to marketplace conditions for that proposed business because he was "not an expert, and as a lay witness his opinions would be based on hearsay and speculation." Id. Notably, the plaintiff in that case had an expert who was permitted to testify about "average earnings of a software engineer over the relevant periods of time and to a present value of those earnings." Id.

In Licudine v. Cedars–Sinai Med. Ctr., 3 Cal. App. 5th 881 (2016), plaintiff, a college senior who had applied to and been accepted by two law schools, sought damages for loss of prospective earning capacity after a negligently performed surgery. Id. at 887–88. The court concluded that plaintiff presented sufficient evidence that she was reasonably certain to suffer some loss of earning capacity due to the permanent nature of her injury. Id. at 899. However, "she did not introduce evidence establishing a reasonable probability that she could have become qualified and fitted to earn a lawyer's salary. Absent from the record is any evidence of her likelihood of graduating from [law school], her likelihood of passing the Bar, or her likelihood of obtaining a job as a lawyer. Plaintiff also adduced no evidence as to what lawyers earn." Id. Plaintiff had asked the trial court to take judicial notice of a print-out from the Bureau of Labor Statistics website indicating the median annual salary for attorneys in 2012, but the court denied that request. Id. at 890 ("the power to judicially notice official government documents did not reach 'the truth of the matter[s]' stated in those documents and that, as a result, the print-out's probative value was substantially outweighed by the danger of confusing the issues and misleading the jury").

"Vague hopes of entering a new occupation do not justify admitting evidence of such hope or an allowance of damages for impairment of earning capacity in the new occupation." 2 Stein on Personal Injury Damages § 6:15 (3d ed. Oct. 2016 update). But the facts here are not so extreme as cases where claims for loss of earning capacity damages have been rejected as unduly speculative. *See, e.g.*, Christou v. Arlington Park-Washington Park Race Tracks Corp., 104 Ill. App. 3d 257, 260 (1982) (bartender-trainee's "ambition to own a restaurant some day" does not justify admitting evidence of average restaurant owner's earnings); Mahfouz v. Xanar, Inc., 646 So. 2d 1152, 1161 (La. Ct. App. 3d Cir. 1994) (hairdresser not entitled to award for future loss of income from cosmetology teaching career, since nothing in record established anything more than idea that he might in future consider teaching); Molbert v. Toepfer, 540 So. 2d 577, 581–82 (La. Ct. App. 3d

Cir. 1989), aff'd, 550 So. 2d 183 (La. 1989) (plaintiff's expert estimated plaintiff's economic loss as a mechanical engineer, but trial court properly reduced amount awarded as plaintiff had not yet earned degree or obtained employment as an engineer); Lippard v. Houdaille Indus., Inc., 715 S.W.2d 491, 494 (Mo. 1986) (plaintiff who was neither architect nor trained to become one could not introduce evidence of desire to become architect); Naveja v. Hillcrest General Hosp., 538 N.Y.S.2d 584, 585 (N.Y. App. Div. 1989) (award of $260,000 to the plaintiff-file clerk was improperly based on assumption that she would have become a medical lab technician, as she had never been employed in that position, had never obtained degree necessary for position, and had dropped out of school after taking courses toward degree more than 10 years earlier.). One case which seems more analogous but offers sparse analysis is Navarro v. South Cent. Bell Tel. Co., 470 So. 2d 983, 987 (La. Ct. App. 1985), where a recently retired plaintiff who was "thinking of returning to the butcher business" was not entitled to damages for lost future wages where his brother-in-law had been trying to get him to work with him as a butcher for sixteen years, without success.

On the other hand, cases which have permitted evidence of a plaintiff's intention to pursue a different occupation generally include more solid evidence than Brown has proffered here. In Blackburn v. Aetna Freight Lines, Inc., 368 F.2d 345 (3d Cir. 1966), for instance, a decedent-truck driver who was formerly a self-employed trucking broker for 14 years was said to have been intending to return to that occupation, although he was employed as a truck driver for the three years immediately prior to the accident. Id. at 348–49. There was evidence that he had frequently expressed that intention, had been looking at trucks and tractors to purchase, and had approached his employer for backing in the enterprise. Id. at 348. The court held that this intention was properly considered in determining the value of his loss of earning capacity. Id. at 348–49. *See also, e.g.*, Duchane v. Johnson, 400 N.E.2d 193, 196–97 (Ind. Ct. App. 1980) (sufficient evidence to support instruction on earning capacity where plaintiff testified that he had wished to enter field of law enforcement and had passed written examination for State Police twice but had been rejected each time after lengthy questioning concerning his injury); Finnie v. Vallee, 620 So. 2d 897, 900–01 (La. Ct. App. 1993) (notwithstanding testimony of hiring agent that it was difficult to join union and would take about eight years before new union member would be guaranteed regular work, court did not err in considering plaintiff's potential earnings as union member since he had worked for at least several weeks as member of shore gang and testified that he was planning to join union and work full-time at that job); Washington v. Am. Cmty. Stores Corp., 196 Neb. 624, 627–31 (1976) (collegiate national champion wrestler who was prime candidate for 1972 United States Olympic team may recover damages for impairment of earning capacity as professional wrestler or coach, although working as adult parole officer at time of injury).

Brown's claims for lost earning capacity damages falls somewhere in the middle of the spectrum of the above-cited cases. Her alleged "intended" occupation is not new to her. She is not attempting to "urge the jury to peg her earning capacity to the salary of a world-class athlete, neuroscientist, or best-selling author just by testifying that is what she wanted to do." Licudine, 3 Cal. App. 5th at 894. She did work as a radiology technician in the past, and has educational and practical training in that field. On the other hand, that was 20 years ago, and Brown has shown virtually no inclination to re-enter the field, aside

from her now claimed "thoughts" of doing so, and her testimony that she started reading her old radiology books once before the accident. Moreover, her education, training, and experience is dated, which is significant in a field which, on her own admission, has likely transformed a great deal with new technology. She would need to engage in substantial self-study and become relicensed. And there is some question as to whether she could meet the physical demands of such a position even before the accident.

However, all of these obstacles to her reentering the radiology field as a radiology technician go to the weight of the evidence, rather than its admissibility. For instance, a licensure requirement is not, by itself, a bar to proving lost earning capacity damages. *See* Hoffman v. Sterling Drug, Inc., 374 F. Supp. 850, 860–61 (M.D. Pa. 1974) ("The notion that licensing or certification is a dispositive characteristic is a specious argument which if adhered to would create a precedent for grossly inequitable results. Nor do we think the grim statistics on the percentage who fail the architecture examination to be dispositive of admissibility. Such material goes only to weight."). The court also observes that expert evidence is not required to prove damages for loss of earning capacity. As the Illinois Supreme Court has stated, "[e]xpert testimony is not necessary to establish loss of future earning ability. The plaintiff may testify that his injuries diminished his capacity to work, and the appearance of [the] plaintiff on the witness stand and his testimony as to the nature of his injuries and their duration is sufficient to take the question of impaired earning capacity to the jury." LaFever v. Kemlite Co., a Div. of Dyrotech Indus., 185 Ill. 2d 380, 406–07 (1998); Corbett v. Seamons, 904 P.2d 229, 232 (Utah Ct. App. 1995) (lost earning capacity must be proved with "reasonable certainty," but not "mathematical certainty").

But Brown must provide some basis to support the salary she alleges she could have made as a radiology technician, other than her own speculation. Seeing as she has not worked in that occupation for 20 years, she cannot testify as to her personal knowledge of that salary. Presumably, she relied on some outside resource or other research to ascertain that amount. If so, she is entitled to argue for lost earning capacity damages to the jury, and the State of course may rebut that evidence and argue that it deserves no weight.[5]

Lastly, the State seeks to exclude any evidence about the alleged collateral effects of Brown's lost earning capacity. In her deposition, Brown testified that her diminished work capacity has impacted other aspects of her life. Those alleged personal and financial difficulties include: (1) the loss of her family's home and move into a smaller home in 2014; (2) ability to help with her daughter's college tuition; (3) ability of her family to go on vacation; and (4) her relationship with her husband. The court agrees with the State that any such testimony or evidence would be irrelevant, unfairly prejudicial, and

[5] The court also clarifies that Brown cannot seek damages for lost earning capacity dating all the way back to the day after the accident. Such a result assumes as true everything which we know is not true. From Brown's own testimony about the licensing requirement for which study is necessary, as well as the minimal steps she took to pursue reentry into the radiology field, it would have been literally impossible for her to start working as a radiology technician on May 17, 2012. Brown is entitled to seek such damages dating back only so far as whatever date by which she is able to convince the jury that she could have been relicensed and employed.

prohibited by V.R.E. 403. *See* State v. Reynolds, 2014 VT 16, ¶ 30, 196 Vt. 113 (quoting State v. Blakeney, 137 Vt. 495, 504 (1979)) ("Counsel must avoid appealing to the prejudice of the jury, and should not 'play on the jury's sympathy or seek to inflame their passions.'"); Duchaine v. Ray, 110 Vt. 313, 321 (1939) (citing Hall v. Fletcher, 100 Vt. 210, 213 (1927)). However, some such testimony may be relevant and permissible as to emotional distress damages, if Brown can proffer that such difficulties were a direct result of her *injuries* sustained from the accident. In other words, evidence of how her *injuries* impacted her life might be relevant and not unfairly prejudicial, but not evidence of how her life would have been different were she making more money in a different profession.[6]

Order

Plaintiff's motion in limine to preclude evidence regarding her prior legal claims and lawsuits is denied.

Plaintiff's motion in limine to exclude the testimony of Dr. Backus is denied.

Defendant's motion in limine to preclude Plaintiff from presenting or alluding to any argument, testimony, or other evidence at trial concerning Plaintiff's "barred claims and allegations," as articulated above, is granted.

Defendant's motion in limine to exclude Plaintiff's proffered evidence of lost past and future earnings due to an allegedly diminished work capacity is granted in part and denied in part, as articulated above.

These are provisional rulings, and the court reserves the right to modify them during trial depending on the evidence actually presented.

Plaintiff submitted late "consolidated" motions in limine on February 14, 2017. Though untimely, the court will have to consider these motions anyway since they will likely arise at trial. Defendant shall inform the court by March 6th whether it opposes the February 14th motions. If it does oppose any of those motions, it shall file a memo by March 10th.

Dated at Burlington this 3rd day of March, 2017.

Robert A. Mello
Superior Court Judge

[6] Additionally, in her opposition memo, Brown asks the court to prohibit the State from implying that "Route 15 is a busy road . . . at rush hour, and so the fact that [she] was on that road at that time of day somehow makes her responsible . . . ." Pl.'s Opp'n at 7. If there is no evidence that Brown was comparatively negligent, then certainly the State cannot argue that she was. However, it is not clear how the fact that Route 15 is a busy road necessarily implies that Brown herself was negligent.

Exhibit #5 Brown v. State Trial Day One 3/15/2017

Excerpts from Transcripts

IN THE VERMONT SUPERIOR COURT
CHITTENDEN COUNTY CIVIL DIVISION

CHERYL J. BROWN, Plaintiff, -against- STATE OF VERMONT, Defendant.	) Case No. 473-5-15 Cncv)) Burlington, Vermont)) March 15, 2017) 10:10 AM)))

TRANSCRIPT OF JURY TRIAL

BEFORE THE HONORABLE ROBERT A. MELLO,
SUPERIOR COURT JUDGE

APPEARANCES:

STUART J. ROBINSON, ESQ.
Attorney for the Plaintiff

JON T. ALEXANDER, ESQ.
BARTHOLOMEW J. GENGLER, ESQ.
Attorneys for the Defendant

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cross-examination. So, they also may not be considering things that are legally not admissible in evidence. So nothing that you learn outside this courtroom is evidence, and it cannot be considered by you in deciding the case.

You may tell others that you are on a jury, and you can tell them that you cannot talk about the trial until it is over. You could also tell them the estimated length of the trial, which is three days. But please don't tell them anything else about the case. Remember that once you tell someone about the case, you cannot control what information they might provide to you in response. If anyone tries to communicate with you about anything concerning the case, or if you overhear anything, please stop the communication immediately and report it to one of the court officers, who will let me know.

If you see or run into the lawyers or anyone connected with the case here in the courthouse or out on the street while the case is on trial, during one of the breaks, for example, you should not have any conversation with them beyond a polite hello.

If you violate the rule about receiving outside information, it could force me to declare a mistrial, which would mean that the trial would have to start all over again before a different jury, and all the parties' work, my work, and your work on this trial would then be wasted. This has

happened in other cases in which jurors did not follow the Judge's instructions, so please help me make sure that doesn't happen in this case.

While the trial is going on, it is possible that there may be news reports about the case, or about the parties involved in the case. If you see any articles in the paper or on the internet or hear any reports about it on the radio or television news, it's your responsibility to turn the page, turn off the news, or leave the room.

As I said about anything else you hear in conversation, if you do hear or see any news reports during the trial about the case, you need to report that to the court officer the next day, so that I can be aware of it. You won't be blamed for such things, but to be fair to the parties, I need to be aware of it.

So, let me just mention something about the kinds of evidence you may be asked to consider in this case. There are, generally speaking, two types of evidence. One is direct evidence, such as the testimony of a person who witnessed an event. The other is circumstantial evidence, which is the proof of a chain of facts pointing to the existence or nonexistence of certain other facts. So I will give you a brief example of both.

Suppose a witness testified that she saw deer in her neighbor's field yesterday. That would be direct evidence

when the case is over, we'll collect your notes and we'll destroy them.

So, we'll now begin by giving the lawyers for each side an opportunity to make an opening statement. These statements are not evidence. Evidence only comes from the witnesses and exhibits. And the statements of the attorneys are not your instructions on the law. Those instructions on the law will come only from me. The idea of opening statements is to present a kind of road map to briefly outline the issues and the evidence from the viewpoint of each side.

Attorney Robinson?

MR. ROBINSON: Thank you.

PLAINTIFF'S OPENING STATEMENT

MR. ROBINSON: Good morning. As you know, I represent Cheryl Brown, the plaintiff in this case, who has brought a lawsuit against Sergeant Denis for a rear-end collision that occurred in Colchester, by Fanny Allen, at or near the intersection of Johnson Avenue and Route 15, in an easterly direction, on May the 16th of 2012. It occurred on her way home from work during rush hour at about 5:00 to 5:10 p.m. And as a result of the accident, there was some property damage to a leased vehicle that she had, and she sustained personal injuries to her left cervical neck area, her left shoulder, and her left arm, that you will be told by one of -- by her medical experts became a permanent injury. Now, it

doesn't mean that she's disabled from work. It means that there are going to be limitations on what she can do, and that she's still undergoing treatment. You will be hearing from Dr. Lucy Miller, who is her primary care physician that coordinated her medical care after she first went to the Emergency Room right after the accident at Fanny Allen, and then began treatment with her chiropractor. And when the relief wasn't there, she then went to her family doctor, which was Dr. Lucy Miller. Dr. Marko has been her family chiropractor also for decades. So, they know Cheryl Miller, they know Cheryl Miller's body.

Let me tell you a little bit about Cheryl Miller. Because this is really about something that you have no control over that changes your life. Cheryl Miller has a family. They are a working family. And she works for me. Before she worked for me, she worked for McGregor's. Before she worked for McGregor's, she was in the radiology field as an x-ray tech. She worked at IDX doing software and other x-ray tech rated duties. She was at UVM. In terms of -- and Champlain College and Family Chiropractors, Dr. Peet's office. So she was at school. That's what she went to school for. I mean, we all go to schools, trying to think where could I go to get my major. And at that time, Champlain College had a two-year x-ray tech course that would get you an associate's degree. It would be an associate's in science. But it would

Brown on May 16th, 2012.

And Matt is in his twenty-eighth year with the Vermont State Police. He lives with his family down in Hinesburg. And Matt's current position with the State Police now and for many years is as the State Police's medical liaison officer with the Office of Chief Medical Examiner for the State of Vermont. So, Matt works out of a basement office in the UVM Medical Center, once known as Fletcher Allen. He's just down the hall from the Emergency Department. And Matt can tell you in more detail about what exactly he does, but in general Matt's duties are to be there and attend autopsies of potential crime victims so he can assist in any potential criminal investigation.

Another part of Matt's duties, unfortunately, but it's an important thing, is to go out into the field to recover the bodies of potential crime victims. And Matt actually has some help in doing that very important work, a partner of sorts. His name is Otto. He is a trained cadaver dog. And Otto, as you will soon learn, plays a role in this accident that we're here about today.

Now, essentially what this case is about, ladies and gentlemen, is about a very, very low-speed collision in which Sergeant Denis's vehicle, what the evidence will show, essentially bumped Ms. Brown's vehicle in heavy stop-and-go traffic on Vermont Route 15 on May 16th, 2012. And that bump,

partial jump-seat in the back. That's where Otto sat. Those windows were the small, triangular clasp windows that you perhaps don't even see anymore, but they're essentially a triangular-shaped pane of glass, and they're secured by the hatch. And to open it, one has to flip the latch up and then push it out, and then the bottom of the pane will be open a few inches.

So, that was an old vehicle, and Sergeant Denis was going out to the fleet facility in Fort Ethan Allen to look at getting a newer truck. And, so, Sergeant Denis is proceeding toward Fort Ethan Allen. He's going eastbound on Vermont Route 15 in the vicinity of passing St. Michael's College campus on the left. He's approaching Fanny Allen Hospital on the right. And for quite some time, he had been following behind a grey or silver Honda CRV, which we now know the evidence will show was being driven by Ms. Brown.

The evidence will show that the traffic at that time of day, about 5:15 on May 16th, 2012, which was a Wednesday, was rather heavy. It was stop-and-go traffic is what the evidence will show. If any of you are familiar with that stretch of Route 15, going along St. Michael's out to Fort Ethan Allen complex, there's quite a number of stoplights. And the number of stoplights meant that the heavy traffic was constantly having to stop and wait, and then roll forward and go again.

So, as Ms. Brown's vehicle and Sergeant Denis's vehicle approach a stoplight near the Fanny Allen Hospital campus, he pulls up behind Ms. Brown and stops and waits, because a few cars had -- there's a red traffic light. And Sergeant Denis had done this several times during his trip while headed out to Fort Ethan Allen. And, so, while Sergeant Denis is waiting for the light to turn green, unfortunately Otto has a problem, and that is -- this started out as a fairly warm day, mid-May 2012. It has gotten into the mid-70s. It was starting to cool down, but the vehicle was getting hot. Because of the long trip and heavy traffic out to Fort Ethan Allen, the trip was taking longer than anybody anticipated. And Otto was getting hot sitting in the backseat, and he was starting to pant. The animal was in clear distress from the heat.

So, what does Sergeant Denis do? While he's stopped behind Cheryl Brown, the evidence will show about five to six feet, and perhaps as much as eight feet from her bumper. So he does -- Sergeant Denis does what he has done many, many times before without incident when he's had a similar issue with Otto and needed to open that rear hatch window. Sergeant Denis, he unbuckles his seatbelt, he turns his body in his seat, he reaches back to unclip that latch and push the window open for Otto. Now, in doing so, in reaching back, he has to turn -- by necessity, has to turn his head backward. So he's

The next thing that Sergeant Denis realizes is that he feels what he will describe as a bump. And as he turns -- and he's already -- he's actually in the process of turning back to face the roadway in front of him. He feels the bump. He's not alarmed because of the -- it was not a horrible collision, but, really a bump. And he realizes that he's actually -- he has collided with Ms. Brown's vehicle.

Now, that is what essentially happened. And, so, you will have to decide whether that accident -- in that accident anyone is unreasonably at fault. You'll be instructed on the legal standard later, but right now what we're talking about what we think the evidence will show.

So, then, the second question is, did this bump, did this very low-speed collision, did it cause any injury to Ms. Brown? And it's our submission that the evidence will show that there was no injury to Ms. Brown caused by this very low-speed accident.

And there are a few very important things that I want you to keep in mind when you're thinking about this question of injury. And the first thing -- and this perhaps the most important thing -- is that Ms. Brown's complaints, her physical complaints, her supposed injuries, are essentially that she has the left side of her neck is sore, and her left shoulder has also been sore. She describes it as sort of a pain radiating from her neck down into her left

All right. So, in the absence of any good reason not to do that, then that's what we'll do.

MR. ROBINSON: Thank you, Your Honor.

THE COURT: All right. But I do want to address a couple of issues.

First of all, it is customary to stand when counsel is questioning a witness.

MR. ROBINSON: Sure.

THE COURT: Sometimes counsel asks me for permission to remain seated when they question if they're sick or injured. But I just wanted to remind you of that.

MR. ROBINSON: Sure. That's fine, Your Honor.

THE COURT: Number one. Number two, you asked the plaintiff just shortly before noon about the accident, a very open-ended question, and then she started going on about the accident. One of the things she said was, this person didn't identify himself. I just wanted to recaution you; we're not going to get into any business about any claims of hit-and-run or absconding from the scene.

MR. ROBINSON: I understand.

THE COURT: So, please make clear to your witness we're not to get into any of that. Okay.

MR. ROBINSON: Yes.

THE COURT: All right. So, any reason why we can't proceed with the jury?

MR. ROBINSON: No.

THE COURT: All right. Let's bring them on out.

(Jury enters at 1:09 p.m.)

COURT OFFICER: All rise, please.

THE COURT: Thank you. Please be seated.

So, ladies and gentlemen, ordinarily when a witness is called to the stand, we finish with that witness before another witness is called. Sometimes, however, it's necessary to suspend with a witness so that another witness who has a limited time schedule or for some other reason can be called out of turn, which is what's going to happen now. So we're going to suspend with the testimony of Ms. Brown, and we're going to call a witness out of turn.

Mr. Robinson?

MR. ROBINSON: If it please the Court, I'd like to call Dr. Lucy Miller to the stand.

LUCY MILLER

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROBINSON:

Q. Dr. Miller, can you tell us about your education?

A. I am a physician, so I graduated from college, four years of college at Harvard University, and then I took two years off to take the prerequisites for medical school, and then I completed four years of medical school at Ms. Sinai

accident.

A. Sure. I started to before, but I'll continue. Do you want me to start from the beginning, or -- okay. I was on the way home from McGregor's Pharmacy in Winooski, traveling easterly towards Essex on Route 15 at 5:00, about 5:10 in the afternoon, rush hour, like it was every day. The same route I traveled every day. I was in stop-and-go traffic. The cars in front of me were stopped, so I was stopped. I was seat-belted. And with no notice, I was rear-ended by the defendant.

Q. And then what happened?

A. I was somewhat surprised and shocked from the actual impact, and I -- it was quite hard. I know that the impact was quite hard; hard enough to jostle me in my seat. I immediately put my four-way flashers on, and the defendant had gotten out of his car, and then I got out of my car.

Q. And then at some point in time did you discover who was driving that vehicle?

A. I did not find out who the defendant was until I was issued the crash report by an officer that did the investigation.

Q. I'm going to show you a document that I'm going to ask you some questions about called the State of Vermont Uniform Crash Report, and ask you to take a look at it.

THE COURT: Marked as exhibit what?

MR. ROBINSON: It's going to be Exhibit 3.

A. That's the crash report that I was issued by Officer Derek Kendrew.

Q. And he was the investigating officer?

A. Yes. There were a few things on the report that I find questionable.

Q. What are they?

A. Well, first of all, I disagree with the speed in which the defendant claims he was traveling when he was distracted by his dog.

Q. Is the dog on the report?

A. No.

Q. Not either on the original report or on the narrative?

A. Not at all. I find that troubling, because -- well, a couple different reasons why. Number one, I was issued the report when it was -- the narrative report later on, but the actual crash report, the officer did not ask for any information from me for the report. It was -- although he did discuss -- they had a conversation --

Q. They, being?

A. The defendant, Sargeant Matthew Denis, and Officer Derek Kendrew.

Q. How are you able to observe that?

A. Well, first of all, I had to follow up the accident,

A. Anger.

Q. And at some point, Officer Kendrew showed up at the scene.

A. I was instructed to pull off, because I wasn't comfortable following someone who was angry with me clearly. I didn't feel safe. He's obviously larger. He's a man, and I'm not as -- I'm a weaker person, so I wasn't going to challenge him. I waited to get instruction, I got instruction, I pulled off. I put my four-way flashers on as instructed. Had to wait a few minutes because the investigating officer apparently was on his way.

Q. Do you recall the sheriff's department that he came from?

A. Colchester Police Department, because it was in Colchester.

Q. And did he give you any instructions?

A. He asked me to follow him, because I could not locate the defendant in the parking lot.

MR. ALEXANDER: Your Honor, may we approach?

THE COURT: Yes.

(Bench conference on the record)

THE COURT: Why are we going into all this? The issue is with the crash and what injuries were sustained. Why is anything about --

MR. ROBINSON: I'm trying to lay a foundation that

Officer Kendrew went to the scene, she observed Kendrew and Denis. She was handed a copy of the police report, and she was never asked her version.

THE COURT: So what's it a relevant to?

MR. ROBINSON: Well, it's relevant to Jon Alexander saying, well, it was a low-impact collision, and that's not the way it happened, according to Cheryl Brown. And it's inaccurate on the report.

THE COURT: Well, she --

MR. ROBINSON: And she never gave her input, and had she been able to give her input, maybe things would have been -- he just handed it to her, that's when he first got (indiscernible).

MR. ALEXANDER: (Indiscernible).

THE COURT: I agree with the defense. So, you need to (indiscernible). If the defense calls the investigating officer to try to establish that he did an investigation, and based on his investigation concludes there was just a little bump, you can cross-examine about all this. But this is -- more than once I felt you were screening, or your client was screening, trying to make, despite my many rulings, an issue of this officer's having moved the car, despite all the traffic, and trying to raise issues of the officer that go far beyond the issues that are relevant in this case.

MR. ROBINSON: My dilemma, and I'm not trying to do

C E R T I F I C A T I O N

I, Donna Waters, the court approved transcriber, do hereby certify the foregoing is a true and correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

April 30, 2017

DONNA WATERS DATE

AAERT Certified Electronic Transcriber CET**D-678

Exhibit # 6 Brown v. State Trial Day Two 3/16/2017

Excerpts from Transcripts

IN THE VERMONT SUPERIOR COURT
CHITTENDEN COUNTY CIVIL DIVISION

CHERYL BROWN, Plaintiff, - against - STATE OF VERMONT, Defendant.	Case No. 473-5-15 Cncv Burlington, Vermont March 16, 2017 8:57 AM

TRANSCRIPT OF JURY TRIAL

BEFORE THE HONORABLE ROBERT A. MELLO,
SUPERIOR COURT JUDGE

APPEARANCES:

STUART JAY ROBINSON, ESQ.
Attorney for the Plaintiff

JON T. ALEXANDER, ESQ.
Attorney for the Defendant

BARTHOLOMEW J. GENGLER, ESQ.
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PROCEEDINGS RECORDED BY ELECTRONIC SOUND RECORDING.
TRANSCRIPT PRODUCED BY TRANSCRIPTION SERVICE.

A. As soon as she came into the parking lot.
Q. Okay. How many photos did you take, if you recall?
A. I think I took a total of three.
Q. Okay. And how did you take the photos?
A. With a cell phone camera.
Q. Okay. Do you still have the cell phone or --
A. No.
Q. Okay. All right. Let me --
MR. ROBINSON: Your Honor, I'm going to object. I'd like to approach.
THE COURT: You can approach. There's nothing to object to yet. There's no pending question, but you --
MR. ROBINSON: Well, before we get into the photographs.
THE COURT: All right. Come on up.
(The following took place at the bench.)
THE COURT: Mr. Robinson?
MR. ROBINSON: (Indiscernible) cell phone until there's a question with regard to (indiscernible) I realize (indiscernible) and you (indiscernible) for that reason (indiscernible) shouldn't be asking for information (indiscernible). Now, I'm going to (indiscernible) that's the impression (indiscernible) subsequent to showing him (indiscernible) impression that my client (indiscernible) I need to know (indiscernible) and I can't (indiscernible)

painted as (indiscernible) impression that (indiscernible).

MR. ALEXANDER: Well, personally, the testimony did not convey that (indiscernible).

MR. ROBINSON: (Indiscernible).

MR. ALEXANDER: (Indiscernible) parking lot. Secondly, he never indicated she did not (indiscernible) said she (indiscernible) suggestion that she (indiscernible) it doesn't go to any issue of the case. It doesn't go to, you know, a defense (indiscernible) or anything, so it's a nonissue.

MR. ROBINSON: Well, so it's a nonissue (indiscernible) the fact that (indiscernible).

MR. ALEXANDER: She did move. That's what he said.

MR. ROBINSON: She moved only when the Colchester (indiscernible) the officer followed (indiscernible).

MR. ALEXANDER: And there's been no suggestion (indiscernible).

MR. ROBINSON: (Indiscernible).

THE COURT: So taking the two issues one at a time on the photographs, I assume you're going to lay the necessary foundation --

MR. ALEXANDER: I will.

THE COURT: -- and if you do, they'll be admitted, and if you don't, they won't. As to this other issue, thank you for raising it because we are concerned about the limine