

VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 21-CV-03028

Denise Bartley, et al v. Rural Community Transportation, et al

ENTRY REGARDING MOTION

Title: Motion In Limine and for Sanctions to Exclude Expert Evidence (Motion 8)
Motion to Reconsider Order Granting Protective Order (Motion 10)
Filer: Stephanie M. Greenlees
Filed Date: August 13, 2024; September 12, 2024

Currently before the court are plaintiffs' motion in limine and for sanctions to exclude defendants' expert evidence and plaintiffs' motion to reconsider the court's order granting defendants a protective order to permit untimely filing of their responses to plaintiffs' requests for admission. As set forth below, the court grants in part the motion to exclude and denies the motion to reconsider.

Motion In Limine

Plaintiffs have moved for an order (i) excluding expert testimony from Vermont State Police Troopers Paul Pennoyer and Joshua Mikkola, who have not been disclosed as experts, and (ii) excluding Pennoyer, Mikkola, and defendants' accident reconstruction expert Bruce McNally from offering legal opinions.

First, plaintiffs seek to exclude Pennoyer and Mikkola from offering expert opinion testimony. There is no dispute that defendants did not disclose Pennoyer and Mikkola as expert witnesses and that the deadline for doing so has now passed. Accordingly, plaintiff's motion is granted insofar as it seeks to exclude Pennoyer and Mikkola from testifying as expert witnesses under Rule 702 of the Vermont Rules of Evidence.¹

There is also no dispute that Pennoyer and Mikkola, who investigated the crash scene, may properly testify as fact witnesses under Rule 701. Accordingly, they may testify regarding their "opinions or inferences which are (a) rationally based on [their] perception[s], (b) helpful to a clear understanding of [their] testimony or the determination

¹ The court does not consider this a "sanction" as defendants are not offering Pennoyer and Mikkola as experts.

of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.” V.R.E. 701.

The parties, however, disagree where permissible opinion and inference testimony under Rule 701 ends and where “scientific, technical, or other specialized knowledge within the scope of Rule 702” begins. This subsection of the Vermont Rule was added in 2004 to mirror a 2000 amendment to Rule 701 of the Federal Rules of Evidence. The Second Circuit has explained that the federal amendment was added:

. . . to prevent a party from conflating expert and lay opinion testimony thereby conferring an aura of expertise on a witness without satisfying the reliability standard for expert testimony set forth in Rule 702 and the pre-trial disclosure requirements [A] court must focus on the reasoning process by which a witness reached his proffered opinion. If the opinion rests in any way upon scientific, technical, or other specialized knowledge, its admissibility must be determined by reference to Rule 702, not Rule 701.

United States v. Garcia, 413 F.3d 201, 215 (2d Cir. 2005) (quotations omitted). Courts applying the federal rule have accordingly excluded a police officer testifying as a lay witness from offering an opinion, the reasoning process for which was based, “in whole or in part, on his specialized training and experience.” *Id.* at 216 (precluding officer from opining that defendant was a “partner” in drug trafficking operation); *Leon v. TransAm Trucking, Inc.*, No. 18-CV-9755 (LJL), 2020 WL 728785, at *3 (S.D.N.Y. Feb. 13, 2020) (precluding officer from opining that driver was the “apparent contributing cause” of accident); *Nichols v. Johnson*, No. 00 C 7785, 2002 WL 826482, at *5 (N.D. Ill. May 1, 2002) (“[I]n applying the training and experience that he has as a police officer to reach an opinion, Officer Derrick is applying ‘scientific, technical or other specialized knowledge’ that is beyond the ken of ordinary lay people. . . . However, Officer Derrick has not been disclosed as an expert witness, and thus it is too late for defendant to seek to offer his opinion testimony under Rule 702.” (quoting F.R.E. 701(c)); Weinstein’s Federal Evidence 701.03[1] (“[A] lay opinion must be the product of reasoning processes familiar to the average person in everyday life.”).

The court finds the federal caselaw persuasive. Accordingly, Pennoyer and Mikkola are precluded from offering opinions reached based on their specialized training and experience as police officers. This includes offering opinions, based on their crash scene investigation, as to how fast the vehicles were driving at the time of the crash, which vehicle caused the crash, and who was at fault. The troopers may nonetheless testify as to their observations at the crash scene and the investigatory steps that they performed.

Second, plaintiffs seek to exclude defendant’s witnesses from offering legal conclusions. *See generally In re K.S.*, 2021 VT 51, ¶ 31, 215 Vt. 205 (“As a general rule, a witness may not give his opinion on questions of law, for the determination of such

questions is exclusively within the province of the court.” (quotation omitted). *But see* V.R.E. 704 (“Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.”).

The parties’ witnesses may not tell the jury how to resolve the legal issues in this case. As the Vermont Supreme Court has explained, testimony on legal conclusions is “not permitted” nor are “questions which would merely allow the witness to tell the jury what result to reach.” *Riess v. A.O. Smith Corp.*, 150 Vt. 527, 531, 556 A.2d 68, 71 (1988) (quoting *Owens v. Kerr–McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983)); *see also Flickinger v. Toys R Us-Delaware, Inc.*, 492 F. App’x 217, 224 (3d Cir. 2012) (district court properly excluded expert testimony using the legal phrases “exclusive control,” “dangerous condition,” “substantial cause,” and “negligence,” because these “phrases are legal terms of art that courts commonly hold cannot be the subject of expert testimony.” (citing Weinstein’s Federal Evidence § 704.04[1])).

Plaintiffs’ current motion is filed in anticipation of plaintiffs refiling their motion for summary judgment. The discussion above is intended to provide guidance to the parties for how the court will view these evidentiary issues moving forward. At this stage, however, the court declines to perform a line edit of defendants’ expert report, or their previously filed statement of additional undisputed affirmative facts. Of course, when seeking and opposing summary judgment, the parties must support their positions with admissible evidence, and the court may need to revisit these issues at that time if disputes about admissibility remain. *See* V.R.C.P. 56(c).

Motion to Reconsider

Plaintiffs also request that the court reconsider its August 30, 2024 entry granting defendants’ motion for a protective order and allowing defendant to submit their responses to plaintiffs’ requests for admission seven days late. The decision whether to permit a party to submit late responses to requests to admit—and effectively withdraw or amend a prior default admission pursuant to Rule 36(b)—is a matter of discretion. *See Commodity Futures Trading Comm’n v. Int’l Fin. Servs. (New York), Inc.*, 323 F. Supp. 2d 482, 510 (S.D.N.Y. 2004) (applying analogous federal rule). The court finds no abuse of discretion here where the delay was minimal, deeming plaintiffs’ requests admitted would inhibit reaching the merits of the claims, and plaintiffs have not been prejudiced by defendants’ delay. The court was not, as plaintiffs argue, required to review every single request for admission and individually rule on whether defendants should be permitted to submit a late response to each request. *See* V.R.C.P. 1 (The Rules of Civil Procedure “shall be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action.”).

Order

Plaintiffs' motion in limine and for sanctions to exclude expert evidence is GRANTED IN PART.

Plaintiffs' motion to reconsider and alter or amend order granting defendant's motion for protective order is DENIED.

Plaintiffs shall refile their partial motion for summary judgment within 15 days from the date this order is filed by the clerk.

Electronically signed on: 10/11/2024 pursuant to V.R.E.F. 9(d)



Benjamin D. Battles
Superior Court Judge