

VERMONT SUPERIOR COURT
Chittenden Unit
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CIVIL DIVISION
Case No. 21-CV-00323

**Nancy Kelley, et al v. Franklin County Rehab Center, LLC d/b/a Franklin County
Rehabilitation Center and d/b/a Franklin County Rehabilitation & Adult Care
Center, et al**

ENTRY REGARDING MOTION

Title: Motion in Limine re: Delay in Care (Motion: 34)
Filer: Kaveh S. Shahi
Filed Date: May 15, 2026

The motion is GRANTED IN PART and DENIED IN PART.

Defendant Franklin County Rehabilitative Center has filed an omnibus motion in limine addressing 11 different issues for which Defendant seeks to exclude potential evidence or testimony in anticipation of the upcoming jury trial in this matter. Plaintiffs Nancy Kelley and the Estate of Bruce Kelley have filed an opposition and sur-reply to approximately six of the eleven issues. While the Court interprets the lack of opposition to certain issues as a waiver of any opposition, the Court has, nonetheless conducted an independent review to determine if the issue is ripe and appropriate for a motion in limine. The Court will address each issue in turn.

Standard of Review

A motion in limine is addressed to specific evidence and evidentiary issues. It is a useful device to limit evidentiary issues and assist the flow of trial. *State v. Dubois*, 150 Vt. 600, 602 (1988). They are, however, surgical devices meant for limited precision, rather than broadsides aimed at the opposing party's case. *Id.* (quoting the Iowa Supreme Court's observation that such motions are to be used as rifles and not shotguns). Such motions are directed to the broad discretion of the trial court, which must look to whether such evidence could, within the conceivable circumstances of the upcoming trial, be admissible. *Id.* A motion in limine is often directed toward excluding evidence, but it can be used to confirm the admissibility of evidence. See, e.g., *State v. Menize*, 2023 VT 48, ¶ 6.

To the extent that the Court denies a motion in limine, it is a preliminary ruling, and it does not mean that the evidence is admissible. *State v. Koveos*, 169 Vt. 62, 69 (1999). Regardless of a denial to exclude or a grant of a motion to allow, the parties still have the obligation to lay the foundation for any evidentiary offer and to seek its admission at trial. In this respect, the motion in limine serves to both short-circuit the objection process and to allow the parties slightly more time to articulate the reasons for and against admission with the ability to cite case law and construct argument.

Legal Analysis of Defendant's Eleven Issues

Evidence of Delayed Care

Defendant's first issue in its motion seeks to exclude testimony of delayed care by the FCRC nurses. As with Dr. Marco's motion in limine, the Court **Grants** this portion of the motion **in part**. In light of the Court's August 17, 2025 decision on the parties' motions for summary judgment, the Court has ruled that Plaintiffs have not supplied through discovery sufficient evidence to demonstrate "but for" causation for their claims that Dr. Marco and FCRC, through its staff, worsened or contributed to Mr. Kelley's injuries by not performing neurological testing or sending Mr. Kelley to a hospital after the hooyer lift¹ incident around 4pm on the date of his admission on March 2, 2018 and the decision between 6 and 7 am on March 3, 2018 to return him to the hospital for other issues. Based on this lack of causation evidence, Plaintiffs cannot proceed with their claim against FCRC to the extent that it is premised on the post-hoyer lift actions or inactions. To this extent, any testimony regarding any duty or breach during this time lacks relevance and will be more prejudicial than probative. V.R.E. 401, 402, 403. For these reasons, the Court will **Grant** FCRC's Motion to the extent that it seeks to preclude testimony on any duty or breach of said duty concerning the actions of FCRC's employees in the time after the hooyer lift incident. Such restriction does not prevent Plaintiffs from introducing testimony or

¹ Defendant FCRC points out that the Court and the parties have used the term "hooyer lift," "hooyer chair," and "hooyer lift chair" interchangeably during the various motions and decisions. Defendants suggest that use of the word "chair" is a misnomer as the device is not a chair in the traditional sense, but rather a series of straps attached to a device that is intended to raise and lower individuals from beds, chairs, and other places when the individual is unable to stand or walk. While this distinction does not alter or affect the Court's prior decisions, the point is a good one. The Court agrees that the term "hooyer lift" is a more precise and accurate description of the device and will use this term going forward in the matter and will encourage the parties to adopt the same to avoid misconceptions as the case moves to the jury phase.

evidence about the actual chain of events as they occurred to provide the jury with a narrative of events.

Evidence of Paraplegia

Defendant FCRC's second and third issues in their motion seek to exclude any testimony or evidence regarding Mr. Kelley's resulting paraplegia on a variety of bases. The first basis focuses on the weaknesses in Plaintiffs' direct claims against FCRC concerning the hoist lift. FCRC argues that there is a fundamental disconnect between the alleged breaches cited by Kristin Husher in her expert opinion and the theories of causation articulated by Dr. Rachlin and Dr. Trammer. FCRC notes that Ms. Husher's testimony does not link the breaches with the type of injury, a subdural hematoma, that Mr. Kelley suffered.

This is, in several ways, a replay of FCRC's earlier arguments for summary judgment. FCRC contends that there is nothing in Ms. Husher's testimony that links the alleged breaches with the type of injury that Mr. Kelley suffered. FCRC, then notes that Dr. Rachlin and Dr. Trammer's testimony on causation focuses on the pain that Mr. Kelley reported and does not connect to Husher's opinion on the alleged breach of the duty of care. As the Court has noted in its prior decisions, this is a pronounced weakness to Plaintiffs' case, but it is not fatal as it is sufficient to create a dispute of fact for which FCRC can, through its own testimony and cross-examination of Plaintiffs' witnesses, demonstrate to the jury.

The twist in Defendant's argument is to suggest that the weaknesses of Plaintiffs' case creates a fatal mismatch that should require the exclusion of evidence of Mr. Kelley's paraplegia because it has not been established to flow from the alleged breaches and because it will inflame the jury.

Neither point is compelling within the motion in limine context. Plaintiffs are free to put on evidence of each and every element of their claim, and FCRC is free to poke at the gaps and holes that may exist in such testimony, but the Court is not in a position to exclude evidence of certain elements due to the weakness of other elements. This is particularly important in the present case where the complexity of the claim requires multiple experts to unwind the chain of events and distinguish between factors such as causation and correlation. While the result may be disjointed, it does not trigger the exclusion of evidence of what injuries were incurred.

In the alternative FCRC argues that the severe nature of the injury will be inflammatory to a jury and may cause them to either speculate or indulge in sympathy to make up for the technical limitations of the evidence. While this is a concern in nearly every case involving a catastrophic injury, the cure is an instruction directing the jury to apply Plaintiffs' burden of proof, to not engage in speculation, and to not apply sympathy. Nothing in Defendant's filing suggests that such instructions would be insufficient.

In the alternative, FCRC also argues for the exclusion of Mr. Kelley's paraplegia because the injury was not a foreseeable injury resulting from FCRC's alleged breach. To this, FCRC cites both expert testimony and the difficulty in diagnosing Mr. Kelley's injury. Put briefly FCRC argues if the true nature of Mr. Kelley's injuries were so difficult to discover and if the injuries themselves normally required a substantial trauma, how could a minimally trained LNA have possibly been expected to be aware and foresee this injury. This framing, however, draws the question of duty too narrowly. In her expert testimony Ms. Husher cites several points where an LNA had a duty to treat any vulnerable patient, like Mr. Kelley, with a gentler hand than Nurse Apley is alleged to have done. In this respect, the question is whether Nurse Apley, the FCRC nurse who did the hoist lift, had a duty to care for Mr. Kelley and put him into the hoist lift in a reasonable safe manner. Plaintiffs contend that Nurse Apley breached this duty, and the testimony of Dr. Trammer, and to a lesser extent, Dr. Rachlin ties this incident to Mr. Kelley's subsequent paraplegia.² As Plaintiffs note in their opposition, Nurse Apley did not have to foresee that the hoist lift would lead to Mr. Kelley's specific injury but only foresee that a breach of her duty could lead to an injury to Mr. Kelley. Such foreseeability is reasonable in this context. As such, the Court does not find a basis under this framing to exclude Plaintiffs' evidence of Mr. Kelley's resulting paraplegia for lack of foreseeability.

For these reasons, FCRC's motion to exclude evidence of Mr. Kelley's paraplegia is **Denied.**

² The issue of causation is further clouded by the fact that Plaintiffs do not have to show that the hoist lift incident was the sole cause of Mr. Kelley's injuries but a substantially contributing part of the injury. See *Choiniere v. Sulikowski*, 126 Vt. 274, 278 (1967).

Evidence of the Cause of Mr. Kelley's Death

The fourth issue raised by Defendant FCRC seeks to exclude evidence or argument suggesting that Mr. Kelley's death was related to his injuries or paraplegia. The record before the Court indicates no evidence or expert opinion that Mr. Kelley's death was related to Mr. Kelley's paraplegia or the incidents at issue in this case. Plaintiffs have not opposed this portion of Defendant's motion or sought to augment their discovery disclosures to connect Mr. Kelley's passing to the injuries at issue in his case.

Based on this lack of information or discovery, the Court agrees that there is no evidence to support such a connection. Furthermore, there is a likelihood of unfair prejudicial inferences if it is suggested or insinuated that Mr. Kelley's passing was related to his injuries. Therefore, the parties shall not present evidence or argument suggesting that Mr. Kelley's cause of death was related to his injuries at issue in this case. To ensure no confusion on this issue, the parties may enter Mr. Kelley's death certificate into evidence. They may acknowledge his passing, and they may reference the time of his passing, but they shall not make any express or implied statement to suggest that his passing was from his paraplegia or injuries alleged to have been sustained in this case. V.R.E. 403. This portion of the motion is **Granted**.

Evidence of Life Care Plan and Costs

The fifth issue in FCRC's motion concerns evidence prepared by April Pettengill to show the life plan and associated costs associated with Mr. Kelley's long-term care based on a future life expectancy. The report has several sections. Some simply list prior expenses and capture Mr. Kelley's condition at the time of the report (August 1, 2024). These portions of the report, presuming a proper evidentiary foundation is laid, continue to be relevant because they provide a review of Mr. Kelley's expenses and his condition from the date of the incident until the date of the report. These past costs remain relevant to the present action. 14 V.S.A. § 1492; *Clymer v. Webster*, 156 Vt. 614, 622–23 (1991). Again, this presumes that a proper foundation can be laid for Ms. Pettengill's report, observations, and opinion. Such a report and testimony, however, must be limited to what the Kelleys actually incurred as expenses and not projections of what they might have installed or needed but did not install.

The other portions of the report contain life-expectancy calculations, expected future needs, and projected costs. Given that Mr. Kelley passed approximately a year after the report, these sections are no longer relevant and should be removed and excluded as they are not relevant to the remaining damage issues given that they address future damages that did not come to pass (including, but not limited to on-going home care, on-going medical care, architectural changes, and home renovations). V.R.E. 401.

Based on these limitations, Defendant's motion is **Granted in part and Denied in Part**. Pages 8 through 19 of Plaintiffs' exhibit 8 may not be presented to the jury, and Plaintiffs are directed to prepare a revised version of the Pettengill narrative report to remove all references to future needs, future expenses, and life expectancy if Plaintiffs intend to use the Pettengill report and testimony.

Evidence of Payments to Ms. Kelley for Care Provided

The sixth issue raised by FCRC concerns payments made to Nancy Kelley for her husband's care described in the Pettengill report. FCRC's objection to this testimony is three-fold.

First, it contends that the evidence, to the extent it is admissible, is best admitted through direct testimony. The Court finds this objection without merit as Pettengill may testify about her review of the Kelleys' expenses to date as part of her role as a duly disclosed expert witness on Plaintiffs' damages. To this extent, Plaintiffs will still need to lay a foundation and demonstrate Pettengill's ability to testify about Plaintiffs' medical expenses to date and opine on their nature. V.R.E. 702. As such, the Court is not prepared at this time to categorically exclude Pettengill's testimony about the Kelleys' expenses prior to Mr. Kelley's passing.

Second, Defendant objects to Pettengill testify about how Ms. Kelley was employed to care for Mr. Kelley. Defendants seek a limitation on this evidence since such testimony cannot constitute the damages for a loss of consortium claim. *Hay v. Med. Ctr. Hosp. of Vermont*, 145 Vt. 533, 537 (1985). The Court agrees with FCRC that any services that Ms. Kelley provided that fall under the category of medical care or personal care cannot constitute damages under a loss of consortium claim. In this respect, however, the costs of Ms. Kelley's services represent

damages that Bruce Kelley incurred and that his estate may bring. 14 V.S.A. § 1492. As such, they can be introduced to show what the Estate is entitled to recover.

Third, FCRC seeks to block evidence of these expenses on the basis that they have been reimbursed by co-defendant University of Vermont Medical Center (UVMMC) as part of the settlement agreement between the Kelleys and UVMMC. This argument, however, ignores the collateral source rule, in which Vermont Courts have long held that a defendant cannot escape liability for an expense incurred by the victim of their negligence simply because a third-party has paid it. *Hall v. Miller*, 143 Vt. 135, 142 (1983). In this case, FCRC claims that UVMMC has, through its settlement, reimbursed the Department of Veterans Affairs that paid Ms. Kelley to provide services to Mr. Kelley, making both the VA and the Kelleys' whole. FCRC argues that if the Kelleys can argue for these reimbursed damages, then they can seek to increase their damages and have the potential for a double recovery. The Vermont Supreme Court has addressed precisely this concern in *Hall*. *Id.*

Moreover, the damages at issue in this trial represent the universe of damages that the Kelleys could pursue against FCRC as the alleged joint tortfeasor that caused or significantly contributed to Mr. Kelley's injuries. In this respect, however, FCRC is entitled to have a set-off at the end of the trial where UVMMC's settlement amounts are deducted from any jury verdict, which would include any payments to Ms. Kelley. *Slayton v. Ford Motor Co.*, 140 Vt. 27, 31 (1981) (establishing the "court rule" for set-off calculations that instructs the trial court to keep the details of any settlement with joint tortfeasors from the jury and has the Court apply the setoff to any verdict rendered). Therefore, any set-off that has occurred through UVMMC's settlement for Ms. Kelley's services will be included in any set-off calculations following a verdict. See *id.*

For these reasons, FCRC's sixth issue is **Granted** to exclude Pettengill's report as evidence of any loss of consortium claims, but it is **Denied** at this time as to the general admissibility of evidence of what Ms. Kelley was actually paid for actual service that she provided to Mr. Kelley that qualify as the type of home care/health care services that he required after his injuries.

Evidence of Medical Expenses Covered by the VA

FCRC's seventh issue seeks to exclude any evidence of medical expenses paid for by the VA because the UVMMC settlement contains language discharging the VA lien. This runs into the same problem as the last matter. Under *Slayton*, the Vermont Supreme Court endorsed a set-off rule that allows a plaintiff to seek full damages against a defendant but then allows the Defendant to use any settlement amounts to offset the judgment. *Slayton*, 140 Vt. at 31. This method can cut two ways. A Defendant that goes to trial and obtains either a defendant's verdict or a lower judgment can end up in a better financial situation than the settling party, but the opposite can also be true where a defendant settles for a much smaller amount than a verdict sustains. When read in conjunction with the direction offered by *Hall*, however, the Court finds that the "court rule" is to permit Plaintiffs to present evidence of their damages reasonably and logically flowing from the injuries proximately caused by a defendant's breach of the duty of care. Only after such a verdict is rendered can the parties parse through offsets and whether such claims or damages have effectively been discharged.³

For these reasons, Defendant's Motion on this issue is **Denied**.

Admission of UVMMC's Settlement Agreement

FCRC's eighth issue seeks a preliminary ruling deeming the UVMMC Settlement Agreement admissible to cross-examine and impeach any UVMMC witnesses. To this end, FCRC makes two compelling points that there is some level of cooperation between Plaintiffs and UVMMC tied to a mutual financial interest in Plaintiffs obtaining some type of monetary verdict against FCRC, and that UVMMC's witnesses have become key witnesses for Plaintiffs.

Under *Quirion v. Forcier*, 161 Vt. 15, 20 (1993), the Vermont Supreme Court has noted that settlement agreements can be admitted into evidence to show witness bias. In this case, the substantial question is whether UVMMC's employees or agents will be testifying for Plaintiffs.

³ This last issue seems to lie at the heart of FCRC's briefing on this issue. Basically, FCRC claims that UVMMC structured settlement provisions that effectively discharged the VA lien in exchange for the settlement amounts. While it is not known at this point if this release was for the full VA lien amount or a percentage, FCRC asserts that it should have the benefit of such a release of lien. The problem is that such piecemeal reckoning of damages runs contrary to the Vermont Supreme Court's precedent where offsets do not become relevant until the verdict is rendered, and then they are considered and applied to the actual amounts. The Court finds no basis in the current facts to depart from this framework, and any application of the settlement amounts and/or discharges shall become relevant in the post-judgment process after and if a verdict is rendered to Plaintiffs for some damage amount.

If they do, then *Quirion* allows the introduction of the settlement agreement as impeachment and cross examination material. Nevertheless, the Court will not fully grant FCRC's motion because as *Quirion* makes clear, the admissibility of the settlement agreement is governed by V.R.E. 408. *Quirion*, 161 Vt. at 19. The Court will have to measure the testimony received when FCRC seeks to admit the settlement agreement and determine whether it would be "unfair and prejudicial to exclude such information." *Id.* ("When failure to disclose the settlement to the jury has unfair and prejudicial results, 'admission of sufficient evidence to alleviate that prejudice is within the sound discretion of the trial judge.'") (quoting V.R.E. 408). The Court finds that this standard makes a definitive ruling on the admissibility of the settlement agreement improper until the time when admission is sought, and the Court can determine if such unfairness or prejudice exists.

Therefore, FCRC's eighth issue is **Deferred at this time**, but it may be addressed when appropriate at trial.

Exclude Hoyer Demo and Testimony

The ninth issue in FCRC's motion seeks to exclude an undisclosed hoyer lift demonstration that was not disclosed previously in discovery, and which involves a different hoyer lift device and undisclosed testimony from an UVMHC employee. FCRC seeks to exclude this demonstrative testimony on two grounds. First, it argues that such a demonstration is likely to be prejudicial as it involves a machine and a witness that were not a part of the actual incident involving Mr. Kelley. Second, FCRC contends that it would be improper at this late hour to introduce testimony and exhibits that have not been disclosed during discovery and effectively leave FCRC to scramble at the last minute to determine the nature of the testimony and new exhibit.

Plaintiffs have not opposed this portion of FCRC's motion and have waived any opposition to this issue. See *Pharmacists Mut. Ins. Co. v. Myer*, 2010 VT 10, ¶ 18, 187 Vt. 323, 325 ("failure to oppose the motion effectively waived the claims").

Given these considerations, the Court agrees with FCRC. The introduction of a demonstrative exhibit and explanatory testimony at this late hour is outside the scope of discovery, and it would be prejudicial to present such evidence without giving FCRC an

opportunity to conduct discovery. At this late point in the case, it would not be fair to introduce new evidence without good cause. Here there is no reason that Plaintiffs could not have supplemented their disclosures and given FCRC earlier notice of their intent to present this new demonstrative exhibit and testimony.

For these reasons, Defendant FCRC's motion on its ninth issue is **Granted**.

Exclusion of Other Damages

For its tenth issue, FCRC seeks to exclude Plaintiffs' costs estimates of \$200,000 to modify their camp in Georgia, Vermont. FCRC notes that such modifications were not made, and the costs are not relevant because with Mr. Kelley's passing, they are no longer needed. Plaintiffs have not opposed this issue, and the Court agrees that such expenses that were not actually incurred should be excluded from any evidence or testimony of damages as both irrelevant and prejudicial. V.R.E. 401, 403.

Defendant FCRC's motion for their tenth issue is **Granted**.

Exclusion of Any Evidence that FCRC Has Liability Insurance

Finally, FCRC seeks a ruling to exclude any evidence or testimony that FCRC has liability insurances. Such insurance is not admissible under V.R.E. 411. Plaintiffs do not oppose this portion of the motion, and it is **Granted**.

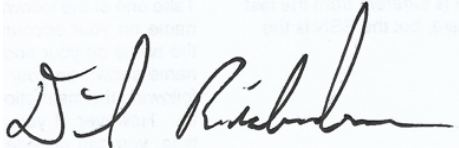
ORDER

Based on the foregoing, Defendant FCRC's Motion in Limine is **Granted in part and Denied in part** as follows:

1. Any evidence concerning an alleged duty of care or breach of care for the period at FCRC on March 2, 2018 following the hoier lift until his transfer on the morning of March 3, 2018 is excluded as it may pertain to either FCRC, its staff, or Dr. Marco.
2. Any evidence or argument suggesting that Mr. Kelley's cause of death was a result of the injuries alleged in this case including the paraplegia is excluded, and the parties may admit Mr. Kelley's Death Certificate for the purpose of showing that Mr. Kelley passed away from kidney disease unrelated to his injuries.

3. Plaintiffs shall not submit the portions of Ms. Pettengill's life care plan or seek to adduce testimony from her on any life expectancy calculations, any estimated future costs or damages that the Plaintiffs might have incurred if Mr. Kelley had lived, and any testimony apart from her evaluation of Mr. Kelley's condition and actual expenses from the date of his injury to the date of her report.
4. While the Court has not ruled on the admission of the Settlement Agreement between Plaintiffs and UVMMC, Defendants may seek to use the Settlement Agreement for cross-examination or impeachment purposes consistent with this order, V.R.E. 408, and the reasoning in *Quirion v. Forcier*, 161 Vt. 15, 20 (1993). This, in turn, will depend on whether Plaintiffs use testimony from UVMMC witnesses and whether the circumstances require the admission of the Agreement to avoid unfairness or prejudicial results.
5. The use of UVMMC's hoist lift demonstration at trial and associated witness testimony is excluded as such exhibits and testimony have not been disclosed.
6. Evidence of any damages not disclosed in discovery is excluded.
7. Any evidence of the cost of modifying the Kelley's Georgia Camp that was not actually performed is excluded.
8. Pursuant to V.R.E. 411, Plaintiffs shall not put forward any evidence or argument concerning Defendants' liability insurance.

Electronically signed on 8/13/2026 3:47 AM 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