

STATE OF NEW HAMPSHIRE

COÖS, SS.

JULY 2022

State of New Hampshire

v.

Volodymyr Zhukovskyy

214-2019-CR-78

**STATE'S OBJECTION TO DEFENSE MOTION *IN LIMINE* RE: TIMING OF
WILLIAM HOWERTON'S INVOLVEMENT**

NOW COMES the State of New Hampshire, by and through the Offices of the Coös County Attorney and the Attorney General, and objects in part to the defendant's Motion in Limine Re: Timing of William Howerton's Involvement. In support thereof, the State submits the following:

1. The defendant has filed a motion *in limine* seeking an order excluding any and all testimony or argument related to the timing of William Howerton's involvement in this matter. Mr. Howerton has been retained by the defendant in the field of crash reconstruction.

2. As this Court is aware, the parties learned on the eve of the final pretrial conference in November, 2021, that the defendant's previous expert on crash reconstruction, Stephen Benanti, may have made misleading statements during his deposition. As a result, the defendant chose not to use Mr. Benanti as an expert witness, and sought a continuance in order to retain a new crash reconstruction expert. The defendant retained Mr. Howerton in January of 2022.

3. The defendant argues that evidence and argument regarding the delay in retaining Mr. Howerton are not relevant under Rule 401. The defendant also argues that the probative value of

such evidence and argument would be substantially outweighed by the danger of misleading the jury and confusing the issues, under Rule 403.

4. The State does not intend to introduce any evidence of the circumstances leading to Mr. Benanti's departure from this case, and Mr. Howerton's subsequent hiring. Specifically, the State will not ask Mr. Howerton what date he was retained by the defendant, the date of his report, or if he is aware of the circumstances leading to his hiring. The State objects, however, to the extent that the defendant's motion would restrict the State's ability to offer limited evidence regarding when Mr. Howerton inspected physical evidence, and the fact that he did not visit the scene of the crash.

5. Mr. Howerton did not conduct his inspection of the motorcycles belonging to Albert Mazza and Joshua Morin in this case until February 11, 2022, approximately two and a half years after the incident. This gap in time is relevant where Mr. Howerton's opinion relies heavily on the physical characteristics and condition of the evidence at the time of his inspection, and there was a significant gap in time between the crash and his inspection during which the condition of the evidence could have deteriorated or changed. Mr. Howerton took hundreds of photographs of the motorcycles and truck during his inspection, and his deposition testimony relied heavily on a number of these photographs. It would be misleading for the defendant to present any evidence of these photographs, or any opinions relying on the content of these photographs while concealing the date that they were taken, which was over two years after the crash.

6. Defense counsel, during depositions of members of the Crash Labs, experts for the State, pointed to photographs taken by Mr. Howerton during his inspection as evidence that undercuts their expert opinions. The motorcycles were moved using chains and a large bulldozer

to facilitate Mr. Howerton's inspection, and it is possible that the passage of time, and/or the process of moving the motorcycles for his inspection could have affected the integrity of the evidence. There is also clearly evidence of rust and other imperfections that is visible on parts of the motorcycles in photographs that Mr. Howerton has relied upon in reaching his opinion; to avoid confusion, the State must be able to provide context so the jury does not mistakenly conclude that the rust was in fact a result of the crash.

7. Mr. Howerton also failed to visit the scene of the crash at all. Evidence of what material Mr. Howerton reviewed to form his opinion, and what material he did not review, is highly relevant considering he will testify as an expert. The State will not question Mr. Howerton about why he did not visit the scene, but will instead only elicit that he did not do so.

8. This evidence is relevant under Rules 401 and 403. The introduction of this evidence would not confuse the issues, mislead the jury, or lead to any unfair prejudice against the defendant. Nor would the introduction of this evidence give rise to any misleading impression about the timing or circumstances of Mr. Howerton's retention. Should the defendant request a limiting instruction to ensure that the jury will not draw any improper inferences from the date that Mr. Howerton conducted his inspection, the State would work with the defendant to craft an acceptable instruction.

WHEREFORE, the State of New Hampshire respectfully requests that this Honorable Court:

- (A) Deny the defendant's motion to the extent it prevents the State from introducing evidence that Mr. Howerton conducted his inspection of the truck and motorcycles on February 11, 2022, and that he did not inspect the scene of the accident; and
- (B) Grant such further relief as may be deemed just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

July 22, 2022

/s/ John G. McCormick
John G. McCormick, Esq.
Coos County Attorney
NH Bar #16183
Office of the Coos County Attorney
55 School St. Suite 141
Lancaster, NH 03584
(603)788-5559

/s/ Scott D. Chase
Scott D. Chase, Esq.
Assistant Attorney General
NH Bar #268772
Office of the Attorney General
Criminal Justice Bureau
33 Capitol Street
Concord, NH 03301-6397

/s/ Joshua L. Speicher
Joshua L. Speicher, Esq.
Assistant Attorney General
NH Bar #273020
Office of the Attorney General
Criminal Justice Bureau
33 Capitol Street
Concord, NH 03301-6397

CERTIFICATE OF SERVICE

I certify that this pleading has been provided to counsel of record, through the Superior Court's electronic filing system.

/s/ Joshua L. Speicher
Joshua L. Speicher