



Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
August 18, 2020

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

* * * * *

In re:) Case No.: BK-S-19-17870-MKN
) Chapter 11
JONATHAN R. SORELLE, M.D., PLLC,)
) **LEAD CASE**
 Affects this Debtor.)

_____) **Jointly Administered with:**
In re:) Case No.: BK-S-19-17871-MKN
) Chapter 11
The Minimally Invasive Hand Institute, LLC,)
)
 Affects this Debtor.)

_____)
In re:) Case No.: BK-S-19-17872-MKN
) Chapter 11
Jonathan R. Sorelle,)
) Date: August 12, 2020
 Affects this Debtor.) Time: 9:30 a.m.

**ORDER ON DEBTORS' MOTION TO ESTIMATE CLAIM OF
KIRK SCHOEB (CLAIM NO. 6) PURSUANT TO 11 U.S.C. § 502(c)¹**

¹ In this Order, all references to "ECF No." are to the numbers assigned to the documents filed in Case No. 19-17870. Documents filed in Case Nos. 19-17871 and 19-17872 have similar identifiers. All references to "AECF" are to the documents filed in the relevant adversary proceeding. All references to "Section" are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to "FRCP" are to the Federal Rules of Civil Procedure. All references to "FRE" are to the Federal Rules of Evidence. All references to "NRS" are to the Nevada Revised Statutes.

1 On August 12, 2020, the court heard the Debtors' Motion to Estimate Claim of Kirk
2 Schoeb (Claim No. 6) Pursuant to 11 U.S.C. § 502(c) ("Motion"), brought by Jonathan R.
3 Sorelle, M.D., PLLC ("PLLC"), The Minimally Invasive Hand Institute, LLC ("Institute"), and
4 Jonathan R. Sorelle ("Dr. Sorelle," and together with PLLC and Institute, "Debtors"). The
5 appearances of counsel were noted on the record. After arguments were presented, the matter
6 was taken under submission.

7 **BACKGROUND²**

8 On December 12, 2019, Debtors commenced three separate Chapter 11 proceedings.
9 Orders were entered on December 20, 2019, directing joint administration, but not substantive
10 consolidation, of all three proceedings. Notices were issued in each proceeding setting a
11 deadline of April 15, 2020, for proofs of claim to be filed by non-governmental entities, and June
12 9, 2020, for proofs of claim to be filed by governmental entities. Debtors had an exclusive
13 period of 120 days, i.e., until April 10, 2020, to file proposed Chapter 11 plans of reorganization.
14 11 U.S.C. §1121(b).

15 On January 21, 2020, an order was entered providing, *inter alia*, for the appointment of a
16 patient care ombudsman in the PLLC and Institute proceedings pursuant to 11 U.S.C. § 333.
17 (ECF No. 179).

18 On January 21, 2020, Dr. Sorelle filed his unsecured creditor Schedule "E/F" listing Kirk
19 Schoeb ("Schoeb") as having a contingent, unliquidated and disputed claim in the amount of
20 \$0.00. (Dr. Sorelle ECF No. 29).

21 On January 27, 2020, the Institute filed its unsecured creditor Schedule "E/F" listing
22 Schoeb as having a contingent, unliquidated and disputed claim in the amount of \$0.00.
23 (Institute ECF No. 27).

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26 ² Pursuant to FRE 201(b), the court takes judicial notice of all materials appearing on the
27 dockets in the above-captioned bankruptcy cases, claims registers, and any related adversary
28 proceedings. See U.S. v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980); see also Bank of Am., N.A.
v. CD-04, Inc. (In re Owner Mgmt.Serv., LLC Trustee Corps.), 530 B.R. 711, 717 (Bankr. C.D.
Cal. 2015)("The Court may consider the records in this case, the underlying bankruptcy case and
public records.").

1 On January 27, 2020, PLLC filed its unsecured creditor Schedule “E/F” listing Schoeb as
2 having a contingent, unliquidated and disputed claim in the amount of \$0.00. (PLLC ECF No.
3 196).

4 On February 3, 2020, Susan N. Goodman was appointed as the patient care ombudsman
5 (“PCO”). (ECF No. 207).

6 On March 16, 2020, Schoeb filed a complaint in this bankruptcy court commencing
7 Adversary Proceeding No. 20-01039 (“Adversary Proceeding”) against Dr. Sorelle and the
8 Institute (“Adversary Complaint”). (AECF No. 1). Schoeb alleges that he timely filed a medical
9 malpractice action against Dr. Sorelle and the Institute prior to Debtors’ commencement of the
10 Chapter 11 proceedings. Schoeb alleges that his claim arising from the medical malpractice of
11 Dr. Sorelle and the Institute is nondischargeable under Section 523(a)(6).

12 On April 14, 2020, Schoeb filed a common proof of claim in the amount of \$1 million
13 (“POC”) in all three Chapter 11 cases. The basis for each claim is identified as being “Medical
14 malpractice and punitive damages” evidenced by Exhibit 1 attached to the proof of claim. That
15 exhibit consists of a copy of a Complaint and Jury Demand (“State Complaint”) commencing
16 civil Case No. A-18-767277-C in the Eighth Judicial District Court, Clark County, Nevada
17 (“State Court”). The State Complaint names Dr. Sorelle and the Institute as defendants, and is
18 framed as one claim for relief: medical malpractice and negligence. The prayer of the State
19 Complaint seeks general damages, special damages, reasonable attorney’s fees and costs, and
20 interest at the statutory rate. No amounts are specified under either general damages or special
21 damages, and no punitive damages are requested in the prayer of the State Complaint.

22 On June 23, 2020, an order was entered approving a settlement among the Debtors and
23 creditor Stephen Rohrbacher (“Rohrbacher”) with respect to a judgment Rohrbacher obtained in
24 State Court against all three Debtors (“Rohrbacher Settlement”).³ (ECF No. 444). The

25 ³ On February 11, 2020, Rohrbacher filed a proof of claim in the amount of
26 \$7,463,712.79 based on a judgment entered by the State Court on December 18, 2019
27 (“Rohrbacher POC”). Attachments to that claim include a copy of a Punitive Damages Special
28 Verdict Form in which the jury awarded \$3 million in punitive damages against Dr. Sorelle, and
\$5 million against PLLC and the Institute. Also attached is a copy of a Special Verdict Form
that includes the jury’s specific finding that Rohrbacher had proven by clear and convincing

1 settlement requires, *inter alia*, various monthly installment payments to be made commencing
2 January 1, 2021.

3 On June 30, 2020, an order was entered denying the Debtors' motion under FRCP
4 12(b)(6) to dismiss the Adversary Complaint for failure to state a claim for which relief may be
5 granted under Section 523(a)(6) ("12(b)(6) Order"). (AECF No. 14).

6 On July 20, 2020, the PCO filed her third interim report indicating, *inter alia*, as follows:
7 "Debtors patient care services do not appear to be negatively impacted from the bankruptcy
8 process, with no concerns elicited under the 11 U.S.C. § 333 standards. Debtors continue with
9 COVID-19 response efforts, while resuming office visits and outpatient procedures. The hope is
10 that business resumption remains uninterrupted from any further COVID-19 impacts, and
11 Debtors emerge from bankruptcy during the next reporting cycle . . ." (ECF No. 461).⁴

12 On July 21, 2020, Debtors file a joint proposed Chapter 11 plan of reorganization
13 ("Plan") along with a proposed disclosure statement ("Disclosure Statement"). (ECF Nos. 462
14 and 463).⁵ A hearing to approve the sufficiency of the Disclosure Statement was noticed for
15 August 26, 2020. (ECF No. 465).

16 On July 22, 2020, Debtors filed the instant Motion under Section 502(c) seeking to
17 estimate the value of the Schoeb claim for purposes of voting on acceptance or rejection of the
18 proposed Plan and its implementation. Debtors request that under Section 502(c), the value of
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22 evidence that "Dr. Sorelle committed fraud (i.e., intentional misrepresentation, concealment, or
23 nondisclosure) while in a fiduciary capacity." (Emphasis added). The Special Verdict Form also
24 includes the jury's finding that "punitive damages should be assessed against Defendants Dr.
25 Sorelle, M.D., Jonathan R. Sorelle, M.D., PLLC, and/or The Minimally Invasive Hand Institute,
26 LLC, for the sake of example and/or punishment."

27 ⁴ On the same date, each of the Debtors filed monthly operating reports for the period
28 ending June 30, 2020. (ECF Nos. 458, 459, and 460).

⁵ The Disclosure Statement describes, *inter alia*, the schedule of monthly and periodic
payments to be made under the Rohrbacher Settlement commencing January 1, 2021. See
Disclosure Statement at Art. III, page 16.

1 Schoeb's claim under NRS 41A.035 be estimated at \$350,000 for voting and confirmation
2 purposes.

3 On July 22, 2020, Schoeb filed a proposed scheduling order in the Adversary Proceeding.
4 (AECF No. 17).

5 On July 23, 2020, an order was entered approving the parties' stipulation permitting, inter
6 alia, Schoeb to amend his Adversary Complaint to join the medical malpractice and negligence
7 claim asserted in the State Complaint. (AECF No. 19).⁶

8 On July 23, 2020, Schoeb filed an amended Adversary Complaint styled as a "First
9 Amended Complaint for Medical Malpractice and Nondischargeability." (AECF No. 22).⁷
10 Paragraphs 8 through 19 of the Amended Adversary Complaint are largely identical⁸ to the
11 allegations of Paragraphs 8 through 19 of the original Adversary Complaint. The Amended
12 Adversary Complaint then asserts two separate claims for relief: "Medical Malpractice and
13 Negligence," and "Claim for nondischargeability under 11 U.S.C. § 523(a)(6)." The prayer of
14 the Amended Adversary Complaint then repeats the relief sought in the State Complaint and
15 adds a prayer for "punitive damages pursuant to NRS 42.005"⁹ as well as "an Order declaring
16 Defendants' debt to Plaintiff nondischargeable . . ."

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18 ⁶ At a status hearing held on July 23, 2020, a further status hearing was scheduled in the
19 Adversary Proceeding for September 10, 2020.

20 ⁷ Paragraph 2 of the Amended Adversary Complaint alleges that the action is a "core
21 proceeding pursuant to 28 U.S.C. §157." This does not appear to be correct. 28 U.S.C. §
22 157(b)(5) provides that the "district court shall order that personal injury tort and wrongful death
23 claims shall be tried in the district court in which the bankruptcy case is pending, or in the
24 district court in the district in which the claim arose, as determined by the district court in which
25 the bankruptcy case is pending." Schoeb asserts a personal injury tort claim that on its face must
26 be tried in the United States District Court, unlike a claim to determine dischargeability of debt
27 that clearly is a core matter under 28 U.S.C. §157(b)(2)(I).

28 ⁸ Paragraph 10 of the Amended Adversary Complaint contains a new allegation: "Dr.
Sorelle had performed over twenty (20) surgeries that day before performing surgery on
Plaintiff."

⁹ Under this provision, "where it is proven by clear and convincing evidence that the
defendant has been guilty of oppression, fraud or malice, express or implied, the plaintiff, in

1 On July 27, 2020, an order shortening time was entered allowing the instant Motion to be
2 heard on August 12, 2020. (ECF No. 484).

3 On August 6, 2020, Schoeb filed a response to the Motion. (ECF No. 489).

4 On August 10, 2020, Debtors filed a reply in support of the Motion. (ECF No. 490).

5 **DISCUSSION**

6 Section 502 provides in pertinent part that a claim “proof of which is filed under section
7 501 of this title, is deemed allowed, unless a party in interest . . . objects.” 11 U.S.C. § 502(a).
8 Section 502(c) provides, in pertinent part, that there “shall be estimated for purpose of allowance
9 under this section . . . any contingent or unliquidated claim, the fixing or liquidation of which, as
10 the case may be, would unduly delay the administration of the case . . .” 11 U.S.C. § 502(c)(1).

11 In this instance, there is no dispute that Schoeb’s claim is not contingent because all of
12 the events on which it is based occurred years before the Chapter 11 cases were filed, i.e., a
13 surgical procedure that took place in November 2016. See Amended Adversary Complaint at ¶
14 10. There also is no dispute that the claim is unliquidated because neither liability nor the
15 amount of the alleged damages has been adjudicated. Thus, there is no dispute that Schoeb’s
16 claim is unliquidated within the meaning of Section 502(c).

17 By its express terms, estimation of a claim under Section 502(c) is permitted only if
18 resolution through the claim objection process would “unduly delay” the administration of the
19 bankruptcy case. In this instance, the Chapter 11 proceedings were commenced by the Debtors
20 on December 12, 2019, the Chapter 11 plan exclusivity period has elapsed, the bar dates for non-
21 governmental and governmental creditors to file proofs of claim have passed, a settlement has
22 been reached with the creditor holding the largest liquidated, general unsecured claim
23 (Rohrbacher), and a proposed plan of reorganization for all three Debtors has been filed.
24 Debtors generally intend to implement their proposed Chapter 11 plan through continued
25 operations of the medical practice and surgery business. See Disclosure Statement at Art. II, C.

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28 addition to compensatory damages, may recover damages for the sake of example and by way of
punishing the defendant.” Nev.Rev.Stat. 42.005(1) (emphasis added).

1 The proposed Plan provides for treatment of Schoeb's claim,¹⁰ as well as all other unsecured
2 claims against the bankruptcy estates, and also provides a mechanism for estimating any claims
3 if required. See Plan at Art. III, B, §§ 6, 7, 8, 9, 10 and 11; Art. VII, A, B, §§ 1 and 2; Art. VIII,
4 A, §§ 1, 2, 3, 4 and 5; Art. I, B, § 20. The Debtors' monthly operating reports are current and
5 the PCO's most recent report is favorable to the Debtors' continued operations. Under these
6 circumstances, the court concludes that the delay attendant with resolving the expected objection
7 to the Schoeb claim is undue.

8 Having concluded that an estimation of Schoeb's claim is warranted under Section
9 502(c), the court has considered the POC executed on behalf of Schoeb, the allegations of the
10 State Complaint, the proposed treatment of the claim under the Plan, and the written and oral
11 representations of counsel. Based on those considerations, the court further concludes that the
12 Debtors' proposed estimate of \$350,000 is an appropriate value. Several reasons lead to this
13 conclusion.

14 First, the estimate is requested by the Debtors only for voting and confirmation purposes.
15 There is no request that a distribution under the Plan be limited or allowed in the estimated
16 amount. As previously indicated in note 10, supra, Debtors represent that if they are
17 unsuccessful in defending the Schoeb claim, the allowed amount, with interest, will be paid in
18 equal quarterly installments over a five-year period.¹¹

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¹⁰ It is not entirely clear why Schoeb would oppose the Debtors' continued operations
21 through their proposed Plan. The Disclosure Statement specifies as follows: "Class 8 shall be the
22 Schoeb Claim. The Schoeb Claim is currently disputed and unliquidated. In the event the
23 Debtors are unsuccessful in defending the Schoeb Claim, the Holder of the Schoeb Claim shall
24 be paid in 20 equal quarterly installments of the Allowed Claim, with interest at the Federal Rate,
25 starting on the date the Class 8 Claim is Allowed by a Final Order. The Debtors estimate the
26 Allowed Class 8 Claim cannot exceed \$350,000.00 in accordance with Nevada law, and will be
27 paid in full over five (5) years from the date it becomes an Allowed Claim." Disclosure
28 Statement at Art. III, page 17 (emphasis added).

26 ¹¹ The "absolute priority rule" that applies to non-accepting unsecured creditor classes in
27 non-individual Chapter 11 cases also applies in individual Chapter 11 proceedings. See Zachary
28 v. Cal. Bank & Trust (In re Zachary), 811 F.3d 1191, 1196-1199 (9th Cir. 2016). By providing
in Class 8 for payment of Schoeb's non-priority unsecured claim in full, with interest, the
proposed Plan apparently complies with Section 1129(b)(2)(B)(i) in the event Class 8 rejects the

1 Second, Chapter 41A of the Nevada Revised Statutes governs civil actions for
2 professional negligence. NRS 41A.035 specifically provides that “In an action for injury or
3 death against a provider of health care based upon professional negligence, the injured plaintiff
4 may recover noneconomic damages, but the amount of noneconomic damages awarded in such
5 an action must not exceed \$350,000, regardless of the number of plaintiffs, defendants or
6 theories upon which liability may be based.” NEV.REV.STAT. 41A.035 (emphasis added).
7 Additionally, NRS 41A.045 provides, in pertinent part, that “In an action for injury or death
8 against a provider of health care based upon professional negligence, each defendant is liable to
9 the plaintiff for economic damages and noneconomic damages severally only, and not jointly, for
10 that portion of the judgment which represents the percentage of negligence attributable to that
11 defendant.” NEV.REV.STAT. 41A.045(1) (emphasis added). The POC submitted by Schoeb
12 attaches only a copy of the State Complaint that includes a prayer for general damages and
13 special damages but does not allege any specific amounts. Thus, Schoeb has not alleged a
14 particular amount of general or noneconomic damages, nor has he alleged a particular amount of
15 special or economic damages. Moreover, the State Complaint does not specify a percentage of
16 damages that would be attributable to the professional negligence of any particular defendant.

17 Third, nothing in the State Complaint alleges any misconduct other than professional
18 negligence. The State Complaint also does not seek punitive damages even though the POC
19 submitted by Schoeb seeks punitive damages based solely on the State Complaint. Additionally,
20 the prayer of the Amended Adversary Complaint now includes a request for punitive damages
21 under NRS 42.005. But even a cursory reading of that statute, see note 9, supra, reflects that it
22 authorizes an award of exemplary or punitive damages only upon a finding of “oppression, fraud
23 or malice, express or implied.” Indeed, Rohrbacher was awarded punitive damages against the
24 Debtors upon a specific jury finding that Dr. Sorelle committed fraud while acting in a fiduciary
25 capacity. See note 3, supra. At the hearing on the instant Motion, Schoeb asserted through
26 counsel that punitive damages are available under Nevada law upon proof of mere negligence.

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28 Plan. As a consequence, the Debtors apparently would not need to meet the absolute priority
rule encompassed by Section 1129(b)(2)(B)(ii) in order to cramdown treatment of the claim.

1 Fortunately, this assertion appears to be contradicted by the very Nevada statute that Schoeb now
2 cites in his Amended Adversary Complaint.¹²

3 Fourth, the Adversary Proceeding brought by Schoeb seeks to determine that his claim is
4 nondischargeable as a willful and malicious injury under Section 523(a)(6). The nineteen
5 exceptions to dischargeability under Section 523(a) apply only to individual debtors, e.g., Dr.
6 Sorelle, and would not apply to non-individual debtors, e.g., PLLC and the Institute. See 11
7 U.S.C. §523(a) (“A discharge under section 727, 1141... of this title does not discharge an
8 individual from any debt...”).¹³ But even the willful and malicious injury exception for
9 individuals under Section 523(a)(6) cannot be based on a finding of mere negligence or even
10 reckless conduct. See 12(b)(6) Order at 5:5-6, citing Kawaauhau v. Geiger, 523 U.S. 57, 64
11 (1998). Just as Schoeb’s suggestion that proof of negligence would be sufficient to obtain
12 punitive damages under Nevada law is incorrect, it also would be incorrect to suggest that proof
13 of negligence would be sufficient to establish that Schoeb’s claim against Dr. Sorelle is
14 nondischargeable under Section 523(a)(6).

15 Finally, the prima facie validity ordinarily afforded to a proof of claim, see
16 FED.R.BANKR.P. 3001(f), is of little significance. In this case, the POC submitted by Schoeb is
17 executed solely by his legal counsel. The sole basis for the POC is identified as being the State
18 Complaint attached as an exhibit to the POC. The State Complaint is prepared by the same legal
19 counsel who signed the POC. The State Complaint is signed only by the same counsel and is not
20 verified by Schoeb. The State Complaint therefore contains only assertions by Schoeb’s counsel,

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22 ¹² Punitive or exemplary damages are designed to punish and deter egregious conduct. If
23 such damages were available for mere negligence, then even innocent mistakes would expose a
24 defendant to liability exceeding compensation for actual injuries. It is not clear whether any
25 business involving the exercise of professional judgment, e.g., physicians, accountants, and yes,
even attorneys, could obtain affordable liability insurance coverage without limitations similar to
those set forth in NRS 42.005.

26 ¹³ While it is true that an individual Chapter 11 debtor generally obtains a discharge upon
27 completion of payments under a confirmed plan of reorganization, see 11 U.S.C. §
1141(d)(5)(A), non-individual Chapter 11 debtors generally obtain a discharge upon
28 confirmation of a plan of reorganization. See 11 U.S.C. §1141(d)(1). Thus, different dates of
discharge might arise in jointly administered Chapter 11 cases.

1 an individual who does not have personal knowledge of the facts alleged in the complaint.
2 Under these circumstances, the POC filed on behalf of Schoeb is entitled to little, if any,
3 evidentiary value.

4 For these reasons, the court concludes that Schoeb has an unliquidated claim for which
5 estimation is appropriate to avoid undue delay in these Chapter 11 proceedings. For the purpose
6 of voting and plan confirmation only, the relief requested by the Debtors under Section 502(c)
7 will be granted.

8 **IT IS THEREFORE ORDERED** that the Debtors' Motion to Estimate Claim of Kirk
9 Schoeb (Claim No. 6) Pursuant to 11 U.S.C. § 502(c), Docket No. 466, be, and the same hereby
10 is, **GRANTED**.

11 **IT IS FURTHER ORDERED** that the value of the non-priority, unsecured claim of
12 Kirk Schoeb is estimated in the amount of \$350,000, for voting and confirmation of the proposed
13 plan of reorganization submitted by the Debtors in the above-captioned Chapter 11 proceedings.

14
15 Copies sent via CM/ECF ELECTRONIC FILING

16 Copies sent via BNC to:
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