FILED
SAN MATEO COUNTY
MAY 11 2021
Clerk of the Superior Court
By _____ DEPUTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

[redacted]ER, an individual; and [redacted]
[redacted]RODR[redacted]Z, an individual,

Plaintiffs,

v.

[redacted]STONE, [redacted]STONE-TRS, [redacted]S, and DOES 1-100, Inclusive,

Defendants,

Case No. [redacted]

TENTATIVE RULINGS ON MOTIONS IN LIMINE

Date: May 17, 2021
Time: 2:00 p.m.
Dep't: 4
Judge: Hon. Nancy L. Fineman

With the parties' agreement and request, the Court is issuing tentative rulings in advance of setting a trial date. These rulings are tentative and can be changed any time before or during trial. *Scott v. C.R. Bard, Inc.* (2014) 231 Cal.App.4th 763, 784;*Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 659, 669-671.

PLAINTIFF'S MOTIONS IN LIMINE

Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 17

Plaintiff seeks to preclude Defendants from introducing evidence regarding: inferences he was abused by a priest; his use of alcohol, marijuana and the drug Propranolol; his attorneys' potential ownership interest in a company that provided medical services to Plaintiff; and other medical conditions. Based upon the information provided by the parties, the Court is unable to rule on the motions without further information.

The Court starts with the basic evidentiary principles. No evidence is admissible except relevant evidence. Evidence Code § 350. Relevant evidence means "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." *Id.* § 210. Even relevant evidence may be excluded "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." *Id.* § 352.

"One of the elements of a fair trial is the right to offer relevant and competent evidence on a material issue. Subject to such obvious qualifications as the court's power to restrict cumulative and rebuttal evidence, and to exclude unduly prejudicial matter, denial of this fundamental right is almost always considered reversible error." 3 Witkin, *Cal. Evid.* 5th Presentation § 3 (2020) (citations and reference to other sections omitted). There is no exception for unpleasant subject matter. *Id.* However, evidence is excluded when the inference is remote or conjectural. *Id.* at § 155 citing *Savarese v. State*

Farm Mut. Auto. Ins. Co. (1957) 150 Cal.App.2d 518, 520 ("Of course, the building of inference upon inference may often result in a progressive weakening of logical sequence, and lead to an ultimate conclusion which is untenable on the basis of the facts proven. When an ultimate inference is thus remote from the evidence, it should be rejected.").

Evidence can either be direct or circumstantial, with both having the same effect. CACI 202. "The general test of relevancy of indirect evidence is whether it tends logically, naturally, and by reasonable inference to prove or disprove a material issue." 1 Witkin, *Cal. Evid.* 5th Circum Evid § 26 (2020) quoting *People v. Jones* (1954) 42 Cal.2d 219, 222, 266.

A court must disallow cross-examination of a witness that lacks a good faith basis, invites unsupported speculation and exposes the jury to inadmissible hearsay. *People v. Lomax* (2010) 49 Cal.4th 530, 580 (Supreme Court rejected defendant's claim that his cross-examination was curtailed finding "the trial court properly prevented counsel from asking questions that lacked a good faith basis and invited jury speculation on claims that would not be given any evidentiary support"); *People v. Lillard* (1963) 219 Cal.App.2d 368, 379 ("These 'did you known that' questions designed not to obtain information or test adverse testimony but to afford cross-examining counsel a device by which his own unsworn statements can reach the ears of the jury and be accepted by them as proof have been repeatedly condemned."); 3 Witkin, *Cal. Evid.* 5th Presentation § 186 (2020) ("A question that in its statement assumes the existence of certain facts that are actually in issue and not proved or admitted may be excluded."); *Cal. Civ. Ctrm. Hbook. & Desktop Ref.* § 32:20 (2021 ed.).

Therefore, as a preliminary matter, Defendants are to make an offer of proof regarding the evidence that they will elicit regarding each of the subject matters of these Motion in Limine to allow the Court to make a ruling that the Defendants have a good faith basis for asking the questions. Defendants need to demonstrate not only the underlying fact, but for the issues of causation or damages, the opinion testimony which will be adduced demonstrating that if the fact occurred, it would be a contributing factor

to Plaintiff's fall and/or damages. A possible cause is insufficient to establish causation. *Waller v. FAC US LLC* (2020) 48 Cal.App.5th 888. "A possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action. This is the outer limit of inference upon which an issue may be submitted to the jury." *Id.* at 895 quoting *Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 403.

For Motion in Limine No. 3, the Court assumes that the evidence would be to demonstrate bias of the health care provider.

For Motion in Limine No. 4, the Court assumes that if the proper foundation is laid, the statements initially made by Plaintiff regarding his alcohol consumption would come into evidence as a party admission, which statements Plaintiff would then testify were incorrect based upon his refreshed memory. The Court has no evidence about the timing of the 2-3 drinks the night of the incident, the alcohol content of those drinks, and whether that amount of alcohol in his system at the time of the fall could have contributed to the fall. Thus, the causation is the issue for the Court.

Motion in Limine No. 7 is too broad for the Court to make a meaningful ruling. The parties are to meet-and-confer regarding these issues so that the disputed issues can be brought to the Court.

The Court does not understand the facts underlying Motion in Limine No. 9 and needs further clarification as well as the offer of proof.

For Motion in Limine No. 17, Defendants need to explain to the Court through the testimony attached to its opposition or provide other evidence by an expert to link bradycardic as a potential cause of the fall.

Once Defendants have made these offers of proof, then the Court will be in a position to rule on the relevance and Evidence Code § 352 issues. The case law demonstrates that the admission of these types of evidence is case specific. See e.g. *Hernandez v. County of Los Angeles* (2014) 226 Cal.App.4th 1599, 1614-15 (appellate court reversed admission of plaintiff's decedent's use of marijuana because

none of defendant's experts could say that decedent's use of marijuana was a substantial factor in causing his death, contributed to the initial accident or caused him to take any other action); *Winfred D. v. Michelin North America, Inc.* (2008) 165 Cal.App.4th 1011, 1026-27 (Court of Appeal reversed admission of plaintiff's extramarital affair because the proffered reasons of credibility, support, extent of plaintiff's injury was not as serious as claimed did not support the admission of the evidence although such evidence may be admissible when it goes to a substantive issue); *Morales v. Superior Court* (1979) 99 Cal.App.3d 283, 288 (extramarital sexual conduct relevant to loss of consortium claim); *Wineinger v. Bear Brand Ranch* (1988) 204 Cal.App.3d 1003, 1007 abrogated on other grounds by *Ornelas v. Randolph* (1993) 4 Cal.4th 1095 (evidence of passenger's intoxication irrelevant)

Motion in Limine No. 10

GRANTED. Any probative value "is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Evidence Code § 352. The Court see little, if any relevance of the nickname that Plaintiff used for his psychiatrist. Defendants fail to offer any explanation how this nickname is relevant to any issue in the case or the credibility of any witness.

Motion in Limine No. 11

DENIED. As long as there is the proper foundation for the term, the term "narcissism" or a variant of the term may be used. Defendants shall provide an offer of proof that they are medical terms used by medical professionals to describe Plaintiff's condition. Plaintiff may request a limiting instruction if he wishes to instruct the jury that they are only to consider the terms to mean what the medical experts describe. The parties are to meet-and-confer regarding any requested limiting instruction.

Motion in Limine No. 12

The parties state that they are in basic agreement, but wish to discuss the motion to clarify some

specifics. The Court follows *Easterby v. Clark* (2009) 171 Cal.App.4th 772, 780; *Jones v. Moore* (2000) 80 Cal.App.4th 557; *Kennemur v. State of California* (1982) 133 Cal.App.3d 907 and their progeny in ruling on motions regarding work experts performed after their depositions.

Motion in Limine No. 13

The parties are in general agreement that settlement discussions and information only produced during mediation are not admissible. Evidence Code § 1119, 1152, 1152. The parties should meet-and-confer to see if there really are any disputes. The Court notes that if an expert provided the same deposition testimony as in a report, it would seem that the confidentiality was waived. Expert reports generally are not admitted into evidence, however.

Motion in Limine 14

The parties state that they are in general agreement, but wish to discuss the motion with the Court to clarify some specifics.

Motion in Limine No. 15

Defendants wish to present oral argument in opposition to this motion so the Court will rule after argument is complete.

Motion in Limine No 16

Plaintiff seeks to exclude the testimony of J[redacted]s, M.D. on the subject of Plaintiff's alleged malingering, secondary gain or underperformance on neuropsychological testing and Defendants represent that they will not question [redacted]s on these issues. Accordingly, the motion is MOOT. The Court though is concerned is there is a disconnect in the testimony that [redacted]n, PhD will offer and what Defendants believe might "open the door" to [redacted] testifying on these matters. Therefore, the parties are to meet-and-confer regarding this testimony to make sure that there are no surprises at trial and to minimize any possible time that this issue will take time away from jury time.

Motion in Limine No. 18

Plaintiff challenges both the qualifications and foundation of the opinions of [redacted], Ph.D., Defendants' human factors expert.

First, Plaintiff's challenge [redacted]'s qualifications because [redacted] has no expertise in bicycle safety and is not even a regular cyclist. Plaintiff's MIL No. 18 at 4. Defendants contend that [redacted] is an expert in human factors and point to his CV, including his Ph.D. in cognitive neuroscience and a B.S. in biopsychology, his work as a professor of psychology, he qualification as an expert in the field of human factors (the Court does not see any cases listed), and his work with [redacted] (with whom the Court has a little familiarity). The Court does not have sufficient information to make a determination regarding [redacted]'s qualifications, perhaps because the Court is unfamiliar with this type of testimony and the type of expert who can provide these types of opinions. The Court does not believe that the fact that [redacted] is not an expert in bicycles automatically precludes him from being an expert as long as Defendants establish a sufficient foundation for his expertise on this subject. See *LAOSD Asbestos Cases* (2020) 44 Cal.App.5th 475, 486 (geologist had adequate foundation to be expert in mineralogy because he had a doctorate degree in geology, was a member of the Mineralogical Society of America and the Mineralogical Association of Canada, and had years of experience analyzing talc and asbestos, both minerals); *Grafilo v. Soorani* (2019) 41 Cal.App.5th 497, 510 (general practitioner rather than specialist may be sufficient if expert has competency on the topic about which the person is asked to make his statement.); but see *Lowery v. Kindred Healthcare Operating, Inc.* (2020) 49 Cal.App.5th 119, 125, review denied (July 29, 2020) (finding expert was not qualified to give testimony on related subject). In this case, it appears that Defendants want [redacted] to testify about reaction times and where Plaintiff should have been on the road. There is insufficient evidence in the record for the Court to make this determination. The parties should meet-and-confer prior to the May 17 hearing on how they wish to provide additional evidence to the Court.

Second, Plaintiff challenges the foundation for these opinions because (1) [redacted] did not know how far the door opened and (2) [redacted] did not have any materials to support his opinion that Plaintiff should have been riding to the left of the sharrows in the center of the lane.

Defendant responds to the issue as to the car door opening by stating that [redacted] has personal knowledge because he has seen the door and the car citing pages 26-37 of his deposition. The Court has read pages 26-37 and did not see any reference to [redacted] seeing the door and car. If there is a specific pin cite to the testimony, Defendants should provide it. Instead, the testimony is that [redacted] is estimating that the car door opened 1 to 2 ½ inches is based on his personal experience and observations rather than testing or scientific data, Deposition at 27:18-28:7, he does not know how far the door opens in his Step One, *id.* at 28:10-11, and he does not know how far the door cracked open, *id.* at 30:5-9. There is no reference to any testimony by the driver or any other person regarding how far the car door opened. Based upon [redacted]'s testimony, his testimony lacks any foundation and is speculative. *Johnson & Johnson Talcum Powder Cases* (2019) 37 Cal. App. 5th 292, 314 (not substantial evidence when an expert bases his or her conclusion on factors that are speculative, remote or conjectural, or on assumptions not supported by the record); *Sanchez v. Kern Emergency Medical Transportation Corp.* (2017) 8 Cal.App.5th 146, 155 (when an expert's opinion is purely conclusory because it is unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value because an expert opinion is worth no more than the reasons upon which it rests); *Solis v. Southern Cal. Rapid Transit Dist.* (1980) 105 Cal.App.3d 382 (barring accident reconstructionist's testimony that had no foundation and is speculative). Thus, the Court, based upon the evidence presented, GRANTS the motion precluding this testimony.

As to the testimony regarding where Plaintiff should have been in the roadway, Plaintiff contends that there is no material to support [redacted]'s opinion. Plaintiff's MIL No. 18 at 10. Defendants refer to [redacted]'s testimony relying on the testimony of [redacted] (the other rider). [redacted]'s testimony is not

provided. Nor is the foundation of "his experience, training and education as a human factors expert," Defendants' opposition to MIL No. 18 at 5, such that the Court can determine if there is a foundation for [redacted]'s opinion. Based upon the facts presented, the Court GRANTS the motion and precludes this testimony. *Lowery v. Kindred Healthcare Operating, Inc.* (2020) 49 Cal.App.5th 119, 124, review denied (July 29, 2020) (expert must provide basis for opinion).

If there is further evidence that Defendants can introduce to support the opinions, they should have an opportunity to present such evidence and it should be presented at the May 17 hearing.

Plaintiff's Request for Judicial Notice

The Court is unsure if Plaintiff is requesting that the Court take judicial notice of these documents for pretrial purposes or to be admitted into evidence at trial for the jury to take into the jury room. The Court does not believe that the 2016 and 2017 DMV Handbooks, Exhibit 1, are proper subjects for judicial notice for the reasons set forth by Defendants. As to Exhibits 2 and 3, Vehicle Code §§ 26709 and 22517, which requests are unopposed, the Court will take judicial notice of them, but questions whether they should go into the jury room.

DEFENDANTS' MOTIONS IN LIMINE

Motion in Limine No. 1

GRANTED and it is reciprocal. The parties have reached a stipulation on this motion.

Motion in Limine No. 2

MOOT. Plaintiff waives past medical issues. The Court questions whether there are any *Howell* issues regarding future medical expenses.

Motion in Limine No. 3

GRANTED and it is reciprocal. The parties have reached a stipulation on this motion.

Motion in Limine No. 4

GRANTED and reciprocal. The parties have reached a stipulation on this motion.

Motion in Limine No. 5

GRANTED by stipulation. Except for the parties, witnesses are excluded from the courtroom until excused. The parties are to prepare an order on the motions in limines, which specifically informs witnesses the prohibited areas of testimony in sufficient detail that they understand the prohibited areas of testimony in clear and concise language. The order shall also instruct witnesses not to talk to anyone at the courthouse except court personnel, the attorneys or parties. The jury may be in the same location as the witnesses during breaks.

Motion in Limine No. 6

The parties are in agreement, but want to discuss some specifics with the Court.

Motion in Limine No. 7 and 8

The Court allows proper visual aids in opening, closing and to illustrate testimony. See Cotchett & Fineman, *Persuasive Opening Statements and Closing Arguments*, Chapter 2 (CEB 2019). The Court requires that the visuals be exchanged prior to trial. It does not appear to the Court that the parties have had substantial meet-and-confer about the demonstratives identified in Defendants Motion in Limine No. 8. At this point, the Court does not have sufficient information or time to review each of, for example, [redacted], M.D.'s 281 power point slides or Dr. [redacted] M.D.'s 8 minute 17 second videotape. Therefore, the parties are to meet-and-confer regarding all visual aids. If there is disagreement, the parties are to prepare a binder with the entire presentation included and the disputed parts tagged. Behind each disputed part, the objecting party is to explain with particularity and case cites, if relevant, why the part is objectionable. Immediately, behind that, the party seeking to admit the evidence is to explain with particularity, why the part should be allowed to be shown to the jury.

The Court refers the parties to the requirements set forth in *People v. Caro* (2019) 7 Cal.5th 463, 508-510, as modified on denial of reh'g (Sept. 11, 2019), cert. denied sub nom; *People v. Duenas* (2012) 55 Cal.4th 1, 20-25. The parties should also consider the time that the demonstratives will take to present

to the jury. While the Court will provide sufficient time for the parties to present their cases, the Court must also be cognizant of the need for the parties to try their cases as efficiently as possible because of the Court's limited resources and the backlog which has occurred during the approximately 18-month period where civil jury trials have been prohibited. The Court will discuss time limits with the parties at the appropriate time. See *People v. ConAgra Grocery Products Co.* (2017) 17 Cal.App.5th 51, 148-151. The Court will not expedite proceedings in the interest of efficiency at the expense of affording the parties a meaningful opportunity to be heard, but believe that the parties often can shorten their presentations and still present all relevant evidence and argument.

Motion in Limine No. 9

Defendants seek to limit Plaintiff's use of medical articles. Plaintiff agrees that he will not use them in direct examination. However, he wishes to use them in cross-examination citing to Evidence Code § 721(b)(3). To the extent that the requirements of Evidence Code § 721 are met, the parties may cross-examine concerning articles. See Simons, *California Evidence Manual* § 4:34 (2020). The parties are cautioned through that *People v. Sanchez* (2016) 63 Cal.4th 665 applies to cross-examination. *People v. Malik* (2017) 16 Cal.App.5th 587, 598.

Motion in Limine No. 10

Defendants seek to preclude "cumulative experts." The Court does have the power to exclude cumulative experts. "The court may, at any time before or during the trial of an action, limit the number of expert witnesses to be called by any party." Evidence Code, § 723; *Horn v. General Motors Corp.* (1976) 17 Cal.3d 359, 371 (trial court did not abuse its discretion in precluding defendants from calling fifth expert when they failed to show how the additional evidence was not cumulative and evidence was truly cumulative).

While the Court has the discretion to preclude cumulative evidence that a party wishes to present regarding an element of a cause of action, *Belfiore-Braman v. Rotenberg* (2018) 25 Cal.App.5th 234,

248-250, the Court may not impose overly restrictive limitations on the introduction of evidence that limit a party from fully and fairly setting forth the theory of the case. *Monroy v. City of Los Angeles* (2008) 164 Cal.App.4th 248, 266-267. The number of witnesses a party wishes to call is not determinative. *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 663 disapproved of on other grounds by *Coito v. Superior Court* (2012) 54 Cal.4th 480 ("It is also asserted that the testimony of eight doctors was unnecessarily cumulative. The assertion is without merit. Each doctor called by the plaintiffs testified in substantial part to different aspects of the medical care that had been provided from the time of the accident to time of trial. That testimony, too, was highly relevant on the issue of damages.") The Court should not preclude experts when they have different emphasis or focus. *Monroy* at 266-267. The testimony of someone who is testifying based upon personal observation may be different than a retained expert. *McGee v. Cessna Aircraft Co.* (1983) 139 Cal.App.3d 179, 192 (expert "was an independent observer and not subject to the same challenge against objectivity").

The Court needs more information before it can enter a meaningful order on what evidence is allowed and what evidence if any, is precluded as cumulative; general motions without adequate support are not sufficient. *Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 670. The information provided by the parties does not provide the Court with sufficient information to determine if Plaintiff's experts are cumulative. Therefore, the parties are to meet-and-confer to reach agreements if possible and, if not, file a joint motion with the Court that discusses each expert and opinion which defendant seeks to exclude. Plaintiff's response is to demonstrate facts showing that the testimony is not cumulative. The reasonable time limits that the Court may place on the trial presentation may alleviate some of Defendants' issues.

Motion in Limine No. 11

GRANTED and reciprocal. The parties have entered into a stipulation.

Motion in Limine No. 12

Defendants seek to exclude evidence that the driver, [redacted], was parking in a non-parking zone at the time of the accident. Plaintiffs contend that the evidence is relevant because (1) defense expert [redacted] testified that [redacted] parking in the no parking zone was a major factor in causing the accident; and (2) the evidence demonstrates that [redacted] was inattentive because she did not see the sign.

First, the Court does not read [redacted]'s testimony to mean that [redacted]' parking where there was a no parking sign was a major factor that caused the accident, but that, as he testified, "Had she not been parked there at that time, it would not have occurred of course." The accident would have occurred whether or not there was the no parking sign. There is no testimony provided to the Court that the area of the roadway was dangerous or any other evidence explaining why parking was prohibited at this spot. This is not a negligence per se case.

Second, Plaintiff lists 8 other facts showing alleged inattentiveness. Plaintiff's Opposition to MIL No. 12 at 4-5. Thus, this additional factor is cumulative and unduly time consuming because Defendants would want to refute the point.

There is some probative value to the evidence, the Court in exercising its discretion after weighing all the factors, concludes that the probative value is substantially outweighed by undue prejudice, confusing the jury, and the undue consumption of time. It, therefore, grants the motion. Based upon the totality of the circumstances, the Court finds that the jury might give undue and prejudicial weight to the fact that [redacted]s parked in a no parking area.

Motion in Limine 13

[redacted]

[redacted]

The Parties' Overview Arguments and the *Kelly* Test

Defendant seeks to preclude Plaintiff from introducing any evidence or mentioning DTI-MRI testing or imaging or the results of tests performed on Plaintiff. Defendant argues that DTI-MRI is a "recognized tool for research but has been deemed not to be reliable for use in individual patients with suspected traumatic brain injury – the very type of injury Plaintiff is attempting to prove via DTI-MRI imaging." Defendants' Motion in Limine No. 13 at 2. Plaintiff argues that DTI-MRI has been in use since 1994, the Food and Drug Administration approved DTI-MRI for marketing in 2001 and courts have overwhelming rejected Defendants' arguments. Plaintiff's Opposition at 2. If the DTI-MRI evidence is used in conjunction with other medically accepted evidence which supports the diagnosis, *Ruppel v. Kucanin* (N.D. Ind., June 20, 2011, No. 3:08 CV 591) 2011 WL 2470621, the Court confirms the substance of the articles it requests Plaintiff provide, and Plaintiff supplies the foundation for the 10 expert declarations, the motion is DENIED.

Defendants correctly rely on *Sargon* that "the trial court acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or speculative." *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 771–772 relying on Evidence Code §§ 801(b) and 802; *id.* at 770. Plaintiff explains that: "Expert testimony deduced from novel scientific principles may be admissible if the proponent of the evidence makes a 'preliminary showing of general acceptance of the new technique in the relevant scientific community.'" Plaintiff's

Opposition at 4 quoting *People v. Kelly* (1976) 17 Cal.3d 24[1] The burden to establish the *Kelly* factors is on the proponent of the evidence. *Id.* at 612. As Justice Mark Simons explains, Plaintiff must establish:

> • The reliability of the method must be established, usually by expert testimony;
>
> • The witness furnishing such testimony must be properly qualified as an expert to give an opinion on the subject; and
>
> • The proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case.[2]

Simons *California Evidence Manual* § 4:27 (2021). "'General acceptance'" under *Kelly* means a consensus drawn from a typical cross-section of the relevant, qualified scientific community. *People v. Leahy* (1994) 8 Cal.4th 587, 612. "With respect to the first prong of this test, reliability means that the technique must be sufficiently established to have gained general acceptance in the particular field in which it belongs. In determining whether there has been general acceptance, the goal is not to decide the actual reliability of the new technique, but simply to determine whether the technique is generally accepted in the relevant scientific community. Courts must consider the quality, as well as quantity, of the evidence supporting or opposing a new scientific technique. Mere numerical majority support or opposition by persons minimally qualified to state an authoritative opinion is of little value." *People v. Morganti* (1996) 43 Cal.App.4th 643, 656 (internal citations, quotations and brackets omitted).

The Court Applies the *Kelly* Test to DTI-MRI

"*Kelly* applies only to that limited class of expert testimony which is based, in whole or in part, on a technique, process, or theory which is *new* to science and, even more so, to the law." *People v. Cowan* (2010) 50 Cal.4th 401, 470 (emphasis in original; internal quotations and citations omitted). The parties appear to agree that the *Kelly* standard applies to the DTI-MRI testing. Therefore, the Court assumes that

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[1] *Kelly* is still the controlling law in California. *Sargon*, 55 Cal.4th at 772, n. 6.

[2] Defendants have not challenged this third prong, that the correct scientific procedures were not used in this case.

(continued . . .)

it must apply the *Kelly/Sargon* analysis. Since Plaintiff does not argue to the contrary, the Court also assumes that the DTI-MRI is not an improvement of the MRI, which would make the *Kelly* analysis unnecessary. *People v. Cordova* (2015) 62 Cal.4th 104, 128.[3]

If a California appellate court has approved the scientific method, then the Court does not need to conduct a *Kelly* hearing. *Kelly*, 17 Cal.3d at 32. The Court may look at decisions from other jurisdictions and relevant scientific literature in determining whether a technique is generally accepted. *Kelly* at 35; *People v. Allen* (1999) 72 Cal.App.4th 1093, 1099.

The Court should review the scientific literature and may rely solely on the scientific literature to conclude that there is no generally accepted scientific consensus about the reliability of the new technique at that time. *Kelly*, 17 Cal.3d at 35 ("Such writings may be considered by courts in evaluating the reliability of new scientific methodology"); *In re Jordan R.* (2012) 205 Cal.App.4th 111, 128 citing *Leahy*, 8 Cal.4th at 611; *Shirley*, 31 Cal.3d at ("if a fair overview of the literature discloses there is significant public opposition to the technique as unreliable, the court may rely on the literature alone to conclude there is no general consensus at the present time"). *People v. Morganti* (1996) 43 Cal.App.4th 643, 665 ("As our Supreme Court has recently confirmed, *Kelly* does not demand absolute unanimity of views in the scientific community. If a fair overview of the literature discloses that scientists significant either in number or expertise publicly oppose the technique as unreliable, the court may safely conclude there is no such consensus at the present time." (citations, internal quotations, brackets omitted)).

A court may also rely on disinterested experts regarding the technique's general acceptance in the relevant community. *In re Jordan R.* (2012) 205 Cal.App.4th 111, 130 citing authorities. "A witness qualifying as an expert is *disinterested* if he is not 'so personally invested in establishing the technique's

[3] Neither party has cited to a case finding that diagnostic medical imaging is admissible. However, the Supreme Court has analyzed the qualifications concerning MRIs suggesting that testimony regarding MRIs is permissible. *People v. Pearson* (2013) 56 Cal.4th 393, 445.

acceptance that he might not be objective about disagreements within the relevant scientific community.'" *Id.* (emphasis in original) quoting *People v. Brown* (1985) 40 Cal.3d 512, at 530. The expert does not have to be totally disinterest; "a certain degree of "interest must be tolerated if scientists familiar with the theory and practice of a new technique are to testify at all." *People v. Morganti* (1996) 43 Cal.App.4th 643, 667.

The Evidence Submitted by the Parties

Defendants' Evidence

In support of their motion, Defendants submit six exhibits: (1) portions of a publication from the American College of Radiologists; (2) a law review article; (3) 3 pages from a Veteran's Affairs and Department of Defense publication; (4) a statement by the Radiological Society of North American; (5) portions of plaintiff's expert radiologist [redacted], M.D. deposition; and (6) portions of plaintiff's expert neurologist [redacted], M.D deposition.

Plaintiff's Evidence

In support of his motion, Plaintiff submits: (1) Declaration of [redacted], M.D., Plaintiff's expert radiologist, which attaches as exhibits his CV, a 2013 article entitled, "A Decade of DTI in Traumatic Brain Injury: 10 Years and 100 Articles Later" and a 2014 article entitled "Clarifying the Robust Foundation for and Appropriate Use of DTI in mTBI Patients;" and (2) an attorney declaration that includes portions of the deposition of [redacted], M.D., Defendants' neuroradiologist, portions of the deposition of [redacted], M.D., Plaintiff's neurologist, portions of deposition of [redacted], M.D., Plaintiff's physiatrist; 27 state and federal orders across the nation allowing DTI-MRI testimony and 10 declarations of physicians who confirm DTI-MRI is reliable and useful. The Court notes that Plaintiff fails to provide any analysis or highlighting of these orders and declarations. The Court cautions Plaintiff's counsel that in the future they should not depend on the trial court having the time to spend as much time as this Court was able to during a Pandemic staycation to review the

materials. Instead, it is incumbent upon the attorneys to provide the information to the Court in a well-organized and analytical manner rather than simply providing the underlying material to the Court.

Court's Analysis

Case Law

There has been no California appellate authority that has ruled on the admissibility of DTI-MRI. None of Plaintiff's attached orders, save one, are from an appellate court[4]—they are all out-of-state or federal trial court orders. Plaintiff does not discuss or attach any of the cases where courts have denied the admissibility of DTI-MRI. Defendants only citation to other court's ruling is through the University of Cincinnati Law Review article published in 2018. The articles appear to only list cases where the courts have admitted the DTI-MRI evidence. Andrew M. Lehmkuhl II, Diffusion Tensor Imaging: Failing Daubert & Fed. R. Evid. 702 in Traumatic Brain Injury Litigation, 87 *U. Cin. L. Rev.* 279,283 (2018) at 298, n. 150, 151. In affirming a death sentence, the Ohio Supreme Court referred to three brain scans, including "an MRI diffusion tensor imaging ("DTI") scan", but there is no affirmation of the use of the test. *State v. Kirkland* (2020) 160 Ohio St.3d 389, 417, reconsideration denied (2020) 160 Ohio St.3d 1421 (case found through Court's research; not cited by the parties). In the Court's Westlaw research, there are only three California trial court cases on DTI-MRI, all in the motion in limine context, but none of orders contain a substantive ruling. *Rivera v. PCH Beach Resort, LLC*, (Aug. 6, 2019 Cal. Super.) 2019 WL 8438465, at *1 ("MIL13 to exclude evidence of diffusion tensor imaging (DTI) studies is reserved as E.C. 402 hearing is required.")[5]; *Camacho v. Brentwood Holdings Partners LLC* (Cal.Super. Feb. 1, 2018) 2018 WL 3304510, at *2 ("Defendant's #16 to Exclude Evidence of Non

[4] The appellate court opinion is not designated for publication. *LeBoeuf v. B&K Contractors, Inc.* (4th Cir. May 27, 2009) 2009 La.App. Unpub. Lexis 324; 2009 WL 8688909.

[5] This case went to jury verdict. *Rivera v. PCH Beach Resort, LLC* (Cal.Super. Aug. 5, 2019) 2019 WL 8438461, at *1 (judgment).

Disclosed Medical Doctor, Aaron Filler, M.D., and any reference to His Undisclosed DTI MRI of the Brain is RESERVED."); *Morales v. Harris* (Cal.Super. Oct. 18, 2018) 2018 WL 7077590, at *2 (Motion in Limine No. 15 For Order to Conduct a Hearing Out of the Presence of the Jury to Determine the Admissibility of the DTI MRI and Opinions and Findings Relative Thereto - Denied.").

In most of the orders submitted by Plaintiff, the courts do not analyze the scientific articles supporting the reliability of DTI-MRI. An exception is " *Ruppel v. Kucanin* (N.D. Ind., June 20, 2011, No. 3:08 CV 591) 2011 WL 2470621.

The cases cited by the parties are several years old. The Court's research finds that more recent cases further demonstrate that motion to exclude the DTI-MRI has been denied or the DTI-MRI evidence has been considered without objection. See e.g. *Kim v. Stewart* (S.D.N.Y., Mar. 23, 2021, No. 18 CIV. 2500 (SLC)) 2021 WL 1105564, at *2 (summary judgment motion where plaintiff introduced doctor's review of MRI diffusion tensor imaging study which indicated injury); *Woods v. Saul* (S.D.N.Y., Mar. 5, 2021, No. 1:19-CV-0336S(SN)) 2021 WL 848722, at *6 (Social Security Commission decision refers to MRI and diffusion tensor imaging of the brain showing no acute intracranial abnormality and had unremarkable DTI maps but recommendation for additional testing for a possible traumatic brain injury); *Lance Meadors v. D'Agostino* (M.D. La., Oct. 29, 2020, No. CV 18-01007-BAJ-EWD) 2020 WL 6342637, at *4 (denying defendant's motion to exclude DTI on the basis on unreliability); *Shuchun Li v. Harper* (Ohio Com.Pl. Aug. 17, 2020) 2020 WL 9256903 (denying motion to exclude DTI testimony); *Johnson-Borman v. Taylor* (Ind.Super. Feb. 26, 2020) 2020 WL 4034902, at *1 (motion to exclude results of diffusion tensor imaging denied).

The Court's research has only found one case where DTI-MRI was found unreliable and excluded. *Malone v. Taylor* (Tenn.Cir.Ct. 2019) 2019 WL 6456250, at *3–5.[6]

[6] The Court used its best efforts to discover cases where courts exclude the testimony based on unreliability, but may have missed cases.

While the trial court orders are helpful to this Court, they are not precedential authority and this Court does not read *Kelly* and its progeny as allowing this Court to rely on these trial court decisions. Simons *California Evidence Manual* § 4:29 (2020) ("no hearing need be held if another trial court has already admitted such evidence and that decision has been affirmed on appeal by a published decision."). Thus, to comply with *Kelly*, the Court must conduct its own analysis rather than rely on other court's rulings.

Articles

Defendants' Articles

Defendants attach portions of two articles to an attorney declaration, a law review article and a criteria analysis.

While the law review article, Exhibit 2 to the Declaration of [redacted], provides criticism of the case law, there is no identifying information about the author, he does not appear to be a medical expert, and there is no underlying expert analysis of the DTI-MRI testing.

Exhibit 1 to the Declaration of [redacted] is the American College of Radiology ACR Appropriateness Criteria, date of original review 1996, date of last review 2015. Defendants state it states the use and limitation of DTI-MRI imaging. However, there is no explanation on how to interpret the chart, no support for the conclusions and no information about the American College of Radiology.

Defendants submit as Exhibit 3 to the Declaration of [redacted] two pages of a 133-page Veteran Administration Practice Guideline. The article is attached to an attorney declaration and there are no facts, principles or methodologies supporting the conclusions. The article, apparently from 2016, refers to significant methodological problems with DTI studies as well as control problems and that the DTI findings have not been linked to clinical presentations or outcomes. However, Defendants have provided no analysis from the article for the Court to analyze the reasonableness of these statements. Another part of the military apparently holds a different view. "[T]he United States Army

Telemedicine and Advanced Technology Research Command ("TATRC") sponsored a 'Diffusion MRI TBI Roadmap Development Workshop' at which it was acknowledged: "DTI has detected abnormalities associated with brain trauma at several single centers.' It was also stated that 'the workshop seeks to identify and remove barriers to rapid translation of advanced diffusion MRI technology for TBI ... in order to expedite getting the benefits of diffusion MRI to reach those who need it most, especially injured soldiers and veterans.'" *Ruppel v. Kucanin* (N.D. Ind., June 20, 2011, No. 3:08 CV 591) 2011 WL 2470621, at *7 (citing plaintiff's expert).[7]

Defendants also submit as Exhibit 4 to the Declaration of [redacted] a statement as by the Radiological Society of North America dated April 15, 2017 that provides: "At present, there is insufficient evidence supporting the routine clinical use of these advanced neuroimaging techniques for diagnosis and/or prognostication at the individual patient level." (emphasis in original). Once again, there are no facts, principles or methodologies supporting this conclusion and Defendants provide no information about this Radiological Society.

The Court concludes from Defendants' submission that some experts do not believe that DTI-MRI is reliable in clinical settings, but finds that these experts constitute significant amount of public opposition in light of the articles discussed below.

Plaintiff's Articles

Attached to Plaintiff's expert [redacted]'s declaration are two articles. This Court agrees that the "A Decade of DTI" article is a literature review and noted the same problems that the court in *Malone v. Taylor* (Tenn.Cir.Ct. 2019) 2019 WL 6456250 discussed. However, the Court's review of the expert opinions presented in this case and the explanation of the scientific literature rebut the criticisms.

[7] This order was one attached to Plaintiff's motion. The Court cites the Westlaw cite.

The article discusses the number of peer-reviewed articles supporting the reliability of DTI-MRI, but there are no facts, principles or methodologies supporting the conclusions. Peer review is the chief way to demonstrate scientifically valid principles. *Metabolife Intern., Inc. v. Wornick* (9th Cir. 2001) 264 F.3d 832, 841 (applying *Daubert* standard). Many of the courts in the orders Plaintiff submits rely on the "A Decade of DTI article". See e.g. *Marsh v. Celebrity Cruises* at 7; *White v. Deere & Company* at 6. Defendants provide no information about whether any of their authorities have been peer reviewed.

Plaintiff's articles also do not provide the basis for the conclusions reached or provide any information about the qualifications of the authors.

However, the orders Plaintiff provided and their expert declarations analyze the underlying articles and other factors demonstrating reliability. Therefore, the Court turns to those authorities.

Articles Cited in Cases and Expert Opinions

As a preliminary matter, the Court finds significant that the Food and Drug Administration has approved use of DTI-MRI.[8]

> [I]in 2001, the Food and Drug Administration ("FDA") approved the product "Diffusion Tensor Imaging Option for MRI" for marketing as a Class II Special Control device. (Pl.'s Exh. 8, DE # 57–8.) Ruppel, citing to 21 U.S.C. § 360c(a)(3)(A), states that the FDA tested the software for safety and effectiveness before granting marketing permission. (DE # 57 at 21.) The letter from the FDA does not say this specifically. However, 21 U.S.C. § 360c(a)(3)(A) provides that approved Special Control devices are determined to be effective:
>
> on the basis of well-controlled investigations, including 1 or more clinical investigations where appropriate, by experts qualified by training and experience to evaluate the effectiveness of the device, from which investigations it can fairly and responsibly be concluded by qualified experts that the device will have the effect it purports or is represented to have under the conditions of use prescribed, recommended, or suggested in the labeling of the device.
>
> So although the FDA letter itself does not address the effectiveness of DTI, but its approval for marketing by the FDA indicates that its effectiveness was determined pursuant to 21 U.S.C. § 360c(a)(3)(A). In fact, other courts that have found DTI to be a reliable method have noted that it is "FDA approved, peer reviewed and approved, and a commercially marketed modality which has been in clinical use for the evaluation of suspected head traumas including

[8] See *Geffcken v. D'Andrea* (2006) 137 Cal.App.4th 1298, 1310 (the procedure had not been evaluated or approved by the Food and Drug Administration).

mild traumatic brain injury." *Hammar v. Sentinel Ins. Co., Ltd.*, No. 08–019984 at *2 (Fla.Cir.Ct.2010).

Ruppel v. Kucanin (N.D. Ind., June 20, 2011, No. 3:08 CV 591) 2011 WL 2470621, at *7

It is reported that there are specific peer-reviewed articles showing that DTI on the effectiveness of DTI, thus refuting one of the criticisms of the reliability of DTI. *Ruppel v. Kucanin* (N.D. Ind., June 20, 2011, No. 3:08 CV 591) 2011 WL 2470621, at *9 citing Michael Lipton, Diffusion–Tensor Imaging Implicates Prefrontal Axonal Injury in Executive Function Impairment Following Very Mild Traumatic Brain Injury, *Radiology*, Sept. 2009, Vol. 252: No. 3 and Calvin Lo, Diffusion Tensor Imaging Abnormalities in Patients with Mild Traumatic Brain Injury and Neurocognitive Impairment, Comput Assist TOmogr, March/April 2009, Vol. 33, No. 2; *Marsh v. Celebrity Cruises, Inc.* (S.D. Fla., Dec. 15, 2017, No. 1:17-CV-21097-UU) 2017 WL 6987718, at *4 & n. 3 (citing the same articles); Declaration of Joseph C. Wu ¶¶ 10-12, 16 citing Miles et al. 2008, Inglese, M. et al. (2005) "Diffuse axonal injury in mild traumatic brain injury: a diffusion tensor imaging study, 103 *J. of Neurosurgery* 298-303 (Aug. 2005), Abraham, A., "Admissibility of Diffusion Tensor Imaging;" "Mild Traumatic Brain Injury Assessment with Diffusion Tensor Imaging (DTI) and Positron Emission Tomography (PET_ scan finding and Neuropsychological Tests of Cognition and Attention" (peer reviewed presentation by Wu); Erin David Bigler Declaration ¶¶ 8, 12 citing Aoki et al, Diffusion tensor imaging studies of mild traumatic brain injury: a meta-analysis, *J. Neurol Neurosurg Psychiatry* 2021 Sep; 83(9); 870-6, Hellyer et al. Individual prediction of white matter injury following traumatic brain injury Ann Neurol 2012 Nov 29 doi 10.1002/ana.23834; Bozzali et al. white matter integrity assessed by diffusion tensor tractography in a patient with a larger tumor mass but minimal clinical and neuropsychological deficits Functional Neurology, 2012, Oct.-Dec; 27(4); 239-246. Bigler also states that the National Institute of Health and the Department of Defense sponsor the use of DTI and that the webpage of the Defense and Veterans Brain Injury Center outlines the use of DTI in the evaluation of mTBI, www.dvbic.org, but the Court could not find the website. *Id.* at ¶9. William W. Orrison, Jr. M.D. lists numerous articles and studies

showing that there is a known potential error rate and the existence and maintenance of standards controlling DTI. Declaration of [redacted]. M.D. ¶13. He also discusses the public guidelines for operation and interpretation of DTI and peer-review medical literature with a single subject citing to Krishna, Giordano, et al. and Gold, MM, Lipton, ML, Neurological Picture: Diffusion Tractography of axonal degeneration following shear injury, J. Neurol Neurosurg, 2008; 79:1374-75. Id. ¶15-16.

There are articles cited with different conclusions. Some of the cases also refer to a November 2014 article by Wintermark *et al.* that finds DTI to be suitable only for research but not routine clinical use at the individual patient level. See White v. Deer & Company (submitted by Plaintiff) at 6.[9]

The Court was unable to find these documents online and requests that Plaintiff provide them to the Court (and opposing counsel) so that the Court can review the articles. If there are any of the 112 articles identified in the "A Decade of DTI" that any party wants the Court to review, those articles shall be provided. However, the conclusion that the Court draws from commentary about these articles is that the consensus of the scientific community is that DTI-MRI is reliable in a clinical setting.

Experts

Defendants provide no expert declarations. They attach portions of depositions from two of Plaintiff's experts. The Court does not agree with the characterization of the testimony provided by Defendants.

Plaintiff provides portions of deposition excerpts from this case, including three of his experts and a defense neuroradiologist expert, [redacted], M.D. who testified that he has used MRI DTI for

[9] See M. Wintermark et al., American College of Radiology Head Injury Institute, Imaging Evidence and Recommendations for Traumatic Brain Injury: Advanced Neuro- and Neurovascular Imaging Techniques, in 36 Am. J. Neuroradiology El (2015), https://pdfs.semanticscholar.org/a951/cafdf3b64d005cf27da048c8b80ab7baa34e.pdf, published on behalf of the American College of Radiology Head Injury Institute cited by *Malone v. Taylor* (Tenn.Cir.Ct. 2019) 2019 WL 6456250.

over 15 years in 40 different clinical trials and that it can be useful when used in the appropriate fashion Declaration of [redacted], Exhibit A at 48-49.

Plaintiff's expert [redacted] represents that he along with well recognized centers "utilize the same methodology used by myself is discerning the damage to white matter, and its probable cause from neuroimaging. Among others, the University of California, San Francisco,[10] Cedars Sinai in California, the Brooke Army Medical Center, Harvard Medical School, University of Cincinnati, Duke University Medical Center utilize DTI-MRI sequence, *in conjunction with other sequences* to routinely determine white matter damage in patients with traumatic brain injury at the individual level, clinically." [redacted] Declaration in Support of Plaintiff's Opposition to Defendants' MIL No. 13 ¶¶12 (emphasis in original). The fact that DTI-MRI is used to treat patients clinically is not necessarily evidence that DTI-MRI is reliable. See e.g. *Leahy* at 605–606 (Horizontal gaze nystagmus (HGN) used by police for 30 years; case law and scientific articles different views; remanded for *Kelly* hearing);[11] *In re Jordan R.* (2012) 205 Cal.App.4th 111 (significant controversy within the relevant scientific community about the reliability of polygraph test results).

Plaintiffs also provide 10 expert declarations although the exhibits are not attached. None of them have been submitted under penalty of perjury under California law although one ([redacted]) was executed in California. None of them have case captions; thus, it is unclear the purpose of the declaration. Plaintiff is to provide further foundation for these declarations.

One of the experts is Randell Benson, appears to be a leading authority on DTI-MRI. One court in analyzing a declaration submitted by him stated:

> In his affidavit, Dr. Benson discusses some of the testing that he has conducted "to demonstrate the clinical validity and reliability of DTI in TBI" as part of his work with the U.S. Army

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[10] Defendants' deposition excerpt from [redacted], states UCSF does not read DTI-MRI for clinical uses.

[11] The use of HGN was later approved in *People v. Joehnk* (1995) 35 Cal.App.4th 1488, 1504-5 based upon three experts who testified that HGN was accepted in the relevant scientific community.

> Telemedicine and Advanced Technology Research Command at a "Diffusion MRI TBI Roadmap Development Workshop." Docket No. 116-1 at 11-12, ¶ 18. As part of his research for his presentation at that workshop, Dr. Benson found "excellent correlation between DTI and injury severity" and "repeatability of DTI for a single mTBI case scanned in two different cities." *Id.* Dr. Benson also notes that "[o]ther speakers presented data showing the correlations of DTI with neurocognitive outcome and experience using DTI on Iraq war veterans." *Id.* Dr. Benson states the known rate of error for DTI analysis is .4%, Docket No. 116-1 at 14, ¶ 28; however, he provides no support for this rate.

White v. Deere & Company (D. Colo., Feb. 8, 2016, No. 13-CV-02173-PAB-NYW) 2016 WL 462960, at *3. This court thus concluded: "The publications and workshops cited by Dr. Benson support the conclusion that DTI has been subjected to peer review and is generally accepted in the medical community as a tool for detecting TBI" even though there was not a known error rate. *Id.* at *4.

[redacted] in his affidavit discusses his work studying brain injuries in former National Football League players, including testifying before the United States House Judiciary Committee (January 4, 2010). Affidavit of Randall Benson, M.D. ¶2. He discusses a seminal peer-reviewed paper he published with E. Mark Haacke, Ph.D. *Id.* ¶4. Benson cites to over ten specific articles showing the reliability of DTI testing. *Id.* ¶42.

Andrew Walker, a board-certified neuroradiologist declares that the DTI-MRI "is FDA approved, recognized and recommended as a useful MRI technique by the American College of Radiology (ACR), American Society of Functional Neuroradiology (ASFNR), the Defense Centers of Excellence (DCOE), and by the United States Air Force Surgeon General's Center for Excellence in Medical Multimedia (CEMM). DTI is one of the core MRI techniques used to evaluate TBI at NICoE, the Department Of Defense's elite brain injury institute at Walter Reed National Medical Center." Declaration of Andrew T. Walker, M.D. ¶3. Walker states that there is long-standing recognition of the clinical usefulness of DTI in the evaluation of TBI and standards in place for its use. *Id.* at ¶8.

Based upon these experts who have significant experience in the DTI-MRI field and work at well-respected medical centers, there is significant evidence that DTI-MRI is accepted in the scientific community. There is nothing in the testimony that suggests that they are interested, *i.e.*, have a financial

interest in promoting DTI-MRI.

The Court Concludes that DTI-MRI Meets the Kelly Criteria

Based upon the rulings of other courts, substantially all of whom have found DTI-MRI testing admissible, the consensus of the scientific literature and the disinterested experts, this Court after conducting its own review and analysis finds (subject to the confirmation set forth previously) that Plaintiff has met his burden in showing that DTI-MRI satisfies the *Kelly/Sargon* criteria and should be admitted into evidence. The case law, while not precedent, provides overriding support for the admission of the DTI-MRI. There is no question, as Defendants' exhibits demonstrate, that there is not unanimity in the scientific community about the reliability of DTI-MRI in a clinical setting. Unanimity, however, is not required—only consensus. *People v. Leahy* (1994) 8 Cal.4th 587, 612. Further, all studies have limitations and flaws, which should be taken into account, but the court should take into account the body of studies as a whole. *Cooper v. Takeda Pharmaceuticals America, Inc.* (2015) 239 Cal.App.4th 555, 589.

In this case, there is significant peer-reviewed scientific literature that supports the reliability of DTI-MRI. All the expert testimony submitted to this Court opine that DTI-MRI is reliable in a clinical setting. These declarants all have sufficient training to express these opinions and most provide significant foundation for their opinions, including specific examples from their practice and reliance on the literature. While our Supreme Court in *Kelly* and *Sargon* make the trial court the gatekeeper for expert opinion, the trial court does not resolve scientific controversies, but conducts a circumscribed inquiry to determine "whether the matter relied on can provide a reasonable basis for the opinion or whether that opinion is based on a leap of logic or conjecture." *Cooper v. Takeda Pharmaceuticals America, Inc.* (2015) 239 Cal.App.4th 555, 590.

Motion in Limine 14

If Defendants are just concerned over the use of the term "nanny" as implying wealth, then the

parties are to meet-and-confer to see if they can agree on another terms, such as babysitter being used. The Court does not find Defendants' request unreasonable. However, if the motion is seeking more than simply the name by which [redacted] is referred, the Court needs to understand how the parties intend to present their cases.

Motion in Limine No. 15

Defendants seek to exclude the testimony of Plaintiff's life care planner expert, [redacted] ("Albee"), as inherently unreliable and based on inadmissible hearsay. Defendants' MIL No. 15 at 1. In some ways, Defendants' motion is too general to allow for the Court to rule because it only refers to certain examples. An insufficient particularized motion does not preserve an appeal on all issues. *David v. Hernandez* (2017) 13.Cal.App.5th 692. Accordingly, the Court's ruling is limited to the issues raised by Defendants.

Preliminary, the Court notes that Defendants do not challenge [redacted]'s qualifications to be an expert and express opinions.

The Supreme Court in *People v. Sanchez* (2016) 63 Cal.4th 665 provides a useful roadmap for trial courts regarding the type of hearsay on which an expert may rely and relate to a jury. Case specific hearsay is not allowed; instead the facts must be introduced into evidence or there must be a hearsay exception (e.g. a properly authenticated business record). *Id.* at 686. An expert may still rely and relate non-case specific hearsay. Justice Carol Corrigan, the author of the opinion, provides specific examples of case specific and non-case specific hearsay. *Id.* at 677

In this case, it appears Defendants object to both case specific and non-case specific hearsay.

Defendants state that "[redacted] did not come up with the medical needs. She did not decide what therapy Plaintiff would require. [redacted] did not suggest the medications included in the plan. She simply costed out what others told her to." Defendants MIL No. 15 at 2. To the extent that [redacted] relies on any other these facts to support her opinion, then they are case specific and the foundation must

be established by independent evidence. Hopefully, the parties will stipulate to some of these underlying facts or trial management will allow [redacted] to testify after the underlying information has already been admitted into evidence. If not, Defendants will have to make a timely objection and Plaintiffs will need to make an offer of proof to show that the evidence will come in. The Court expects the parties to meet-and-confer so that as many of these issues as possible can be worked out prior to jury selection and if not, outside the presence of the jury.

Defendants' primary objection appears to be the cost numbers that [redacted] utilized. Based upon Defendants' motion and Plaintiff's opposition, it appears that most of her costs are based upon "one single data source, 'Fair Health Benchmark' which is apparently a collective of information from some a billions data-points." In fact Fair Heal purports to contain some 29 billion billed procedures nationwide, from 2002 to the present." Defendants' MIL No. 15 at 4. Plaintiff confirms most of this information, including submitting an affidavit (not submitted under penalty of perjury under the laws of California) from the Director of Data Management, Eric Okurowski, of Fair Health Benchmark explaining the database. [redacted] also relied on certain information that she received from a bill from another patient and discussions she had with others not involved with Plaintiff's care about costs. All of this testimony is non-case specific hearsay because none of it is specific to Plaintiff's case. "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." *Sanchez*, 63 Cal.4th at 676. These costs would apply to anyone and not just plaintiff. Plaintiff cites to *People v. Mooring* (2017) 15 Cal.App.5th 928, which held that the prosecution's criminalist could rely on a website called Ident-A-Drug to identify the drug in defendant's possession. Another Court of Appeal reached a contrary conclusion in *People v. Stamps* (2016) 3 Cal.App.5th 988. The Supreme Court recently resolved this split of opinion, in a case which originated in the San Mateo Superior Court, affirming an expert's ability to use the Ident-A-Drug website. *People v. Veamatahau* (2020) 9 Cal.5th 16. Chief Justice Cantil-Sakauye explains:

> Simply because the Ident-A-Drug web site served as the basis for the expert's ultimate opinion does not make information from the site case-specific. The expert's opinion that the seized pills were prescription opioids was not hearsay and not otherwise objectionable. (§ 805 ["Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact"].) Information from the Ident-A-Drug database — that pills matching a certain description contain opioids — was hearsay but not case-specific. It is no more case-specific than if an expert divulged the equation — into which she entered the length of the skid marks she measured at the scene of the accident — to come to the conclusion that a defendant was traveling at the speed of 100 miles per hour before the crash.

Veamatahau, 9 Cal.5th at 31 citing Sanchez, 63 Cal.4th at 677; see also *Collins v. Navistar, Inc.* (2013) 214 Cal.App.4th 1486, 1515–16 (expert could rely and relate federal traffic safety databases as basis for opinions regarding risk of injury to a truck driver as a result of a thrown or falling object; expert "testified the databases were accurate, and commonly used and relied upon by traffic safety experts and statisticians"); Evidence Code § 1340 (allowing compilations).

Accordingly, as long as all the sources upon which [redacted] relies are the type upon which experts in the field rely,[12] [redacted] may rely and relate the cost numbers. "To reiterate, the relevant hearsay analysis under *Sanchez* is whether the expert is relating general or case-specific out-of-court statements. The focus of the inquiry is on the information conveyed by the expert's testimony, not how the expert came to learn of such information. Thus, regardless of whether an expert testified to certain facts based on composite knowledge 'acquired from sources too numerous to distinguish and quantify' or if the expert simply looked up the facts in a specific reference as part of his or her duties in a particular case, the facts remain the same. The background or case-specific character of the information does not change because of the source from which an expert acquired his or her knowledge. *Veamatahau*, 9 Cal.5th at 30.

Defendants then argue that [redacted]'s testimony is speculative and also should be excluded under Evidence Code § 352. They provide no specific evidence to support these objections. As long there is a

[12] The foundation for this testimony, must be that it is the type reasonably relied upon by professionals in the field rather than a channel to admit the opinion of a non-testifying evidence. *Stephen v. Ford Motor Co.* (2005) 134 Cal.App.4th 1363, 1375.

proper foundation for the evidence and the case specific evidence is admitted at trial, her testimony is not speculative and, the Court in exercising its discretion after weighing all the factors, finds the probative value substantially outweighs any undue prejudice, confusing the jury and/or undue consumption of time.

Motion in Limine No. 16

Defendants objects to the qualifications and foundation of Plaintiff's expert, [redacted], M.D., a neurologist and biomedical engineer and thus seek to preclude his testimony. This motion is similar to Plaintiff's Motion in Limine No. 18 regarding [redacted], Ph.D. For the same reasons as set forth in the Court's analysis of Plaintiff's Motion in Limine No. 18, the Court cannot tell from the evidence presented if [redacted] is qualified to testify. The parties should meet-and-confer prior to the May 17 hearing on how they wish to provide additional evidence to the Court.

Additionally, it is not clear to the Court the totality of Defendants' challenge to [redacted]'s testimony. Therefore, Plaintiff shall prepare a step-by-step chart of [redacted]'s testimony with the opinion he is providing in one column, the evidence upon which he relies in another column. If Defendants object to any of these steps, they are to put their objection in a third column and explain the exact nature of their objection and supporting evidence. In that way, the Court will be able to make sure that each opinion in the chain of his testimony has adequate support. If the parties are unable to prepare the chart by the May 17, 2021, they should provide a date at the hearing when the chart will be submitted.

Defendants' Request for Judicial Notice

See Court's discussion regarding Plaintiff's request.

Dated: May 10, 2021

NANCY L. BINEMAN
Judge of the Superior Court