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Harold Bialsky D.C.,M.A.,C.R.C.,C.L.C.P.,C.B.I.S.

Vocational Counseling, Life Care Planning, Chiropractic Medicine, Brain Injuries

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Overall Challenges Outcome Analysis(9)

Trial Level Challenges

Cases	Methodology	Qualification	Relevance	Procedural	Outcome
Shriki v. New York City Tr. Auth.				●	✗
Owens v. NCAA	●	●			✓
Reynoso v. Levine	●				✓
Reichmann v. Whirlpool Corp. & Kitchenaid, Inc.		●			✓
Bonilla v. 504 Woodward, LLC	●	●			?
G.S. v. Labcorp				●	✓
Larson v. Bros. of the Christian Schs. of Manhattan College					✓
Rivera v. Home Depot U.S.A. Inc.	●				✗
Meade v. Harpt	●				✓

Shriki v. New York City Tr. Auth.

Supreme Court of New York, Queens County

November 28, 2023, Decided

INDEX NO. 701154/2018

Reporter
2023 N.Y. Misc. LEXIS 36529 *; 2023 NY Slip Op 34663(U) **

[1]** SHIMONA SHRIKI, Plaintiff, - v - NEW YORK CITY TRANSIT AUTHORITY, EMPIRE PARATRANSIT CORP., and KEITH PATTERSON, Defendants.

Core Terms

Defendants', argues, photographs, Records, motion in limine, lost earnings, affirmation, scientific, offering, reliable, damages, biomechanical, collision, scientific community, loss of earnings, bumper, bill of particulars, testifying, witnesses, clinical, injuries, velocity, repair, crash, general acceptance, expert opinion, further order, brain injury, lay witness, white paper

Judges: **[*1]** PRESENT: HON. PHILLIP HOM, J.S.C.

Opinion by: PHILLIP HOM

Opinion

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 241, 242, 243, 244, 245, 246, 247, 248, 249, 311, 312, 313, 314, 323, 324 were read on this motion in limine to/for PRECLUDE.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 315, 316, 317, 318, 319, 320, 321 were read on this motion in limine to/for JUDICIAL NOTICE & PRECLUDE.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 322 were read on this motion in limine to/for PRECLUDE.

Upon the foregoing documents, it is ordered that these motions in limine by Plaintiff for, among other things, to preclude, and this motion in limine by Defendants to preclude, are determined as follows:

On January 24, 2018, Plaintiff Shimona Shriki ("Plaintiff") commenced this action against Defendants New **[*2]** York City Transit Authority, Empire Paratransit Corp., and Keith Patterson ("Patterson") (collectively "Defendants") to recover for personal injuries allegedly sustained on March 27, 2017, as the result of a motor vehicle collision. Plaintiff and Defendants made these motions in limine ahead of a bench trial scheduled to begin on November 30, 2023. On November 17, 2023, this Court heard oral arguments.

Seq. No. 5: Preclude or Limit Defendants' Expert Testimony

Plaintiff moves to preclude Defendants' proposed biomechanical and biomedical engineer expert, Ernest Chiodo, M.D., J.D., M.S., M.B.A., C.I.H. ("Dr. Chiodo") from testifying at trial, or alternatively, limiting Dr. Chiodo's testimony and precluding him from proffering any testimony **[**2]** regarding injury causation, including that the forces to which Plaintiff was exposed to in the subject collision were insufficient to cause her injuries (EF Doc 241).

In support, Plaintiff submits an attorney affirmation (EF Doc 242), the transcript of the examination before trial ("EBT") of Patterson (EF Doc 243), photos identified during Patterson's EBT (EF Doc 244), the EBT transcript of Denny Reyes ("Reyes"), Patterson's supervisor (EF Doc 245), **[*3]** Defendants' expert exchange of Dr. Chiodo, coupled with Dr. Chiodo's report, dated May 11, 2023 (EF Doc 246), reports of defense independent medical examinations ("IMEs")

(EF Doc 247), reports of no-fault insurance carrier IMEs (EF Doc 248), and a copy of an abstract of the article referred to by Dr. Chiodo (EF Doc 249).

Plaintiff argues that Dr. Chiodo based his opinion solely upon review of photographs depicting the property damages to the vehicles involved in the accident. Plaintiff further argues that Dr. Chiodo's opinion is not based upon facts in the record, because he completely disregarded the EBT testimony of Patterson and Reyes. Plaintiff claims that Patterson and Reyes testified that there was structural damage to Defendants' front bumper as a result of the collision, and that Dr. Chiodo disregarded same. Plaintiff further argues that Dr. Chiodo's opinion should be precluded under *Clemente v Blumenberg (183 Misc 2d 923, 705 N.Y.S.2d 792 [Sup Ct, Richmond County 1999]*).

In opposition, Defendants submit an attorney affirmation (EF Doc 311), and an affirmation of Dr. Chiodo (EF Doc 312), coupled with his *Federal Rule 26* Testimony list (EF Doc 313) and a copy of a decision in the case *Guthrie v Hochstetler*, issued by the United States District Court, N.D., Indiana, South **[*4]** Bend Division, which denied a plaintiff's motion to preclude Dr. Chiodo's testimony (EF Doc 314).

Defendants argue that Patterson's EBT testimony did not establish that he inspected the front of his vehicle before the accident. Regardless, Defendants argue that Dr. Chiodo opined that the physical evidence shows that the damage to Defendants' bumper could not have been caused by the crash. Defendants also highlight that Patterson testified that, based upon the damage to the bumper, it was an "extremely minor collision." Defendants argue that Reyes' EBT testimony regarding any damage to Defendants' front bumper is insufficient to render Dr. Chiodo's opinion invalid, as Reyes did not witness the accident and there is no testimony that Reyes inspected Defendants' vehicle prior to the crash. Additionally, during Reyes' EBT, defense counsel objected to the questions related to the damage and causation of same, as a proper foundation was not laid as to his ability to make such determinations. Nevertheless, Reyes testified that the damage to the front bumper of Defendants' vehicle was minor. Defendants contend that, in essence, Dr. Chiodo is not bound by nonobjective testimony in forming his **[*5]** opinions when such testimony is inconsistent with the objective evidence. Defendants further argue that Plaintiff improperly relies upon *Clemente* for several reasons, and that this case is distinguishable from same.

In reply, Plaintiff submits an attorney affirmation (EF Doc 323) and a report prepared by Reyes (EF Doc 324).

Plaintiff argues that Dr. Chiodo's opinions are based upon a methodology that does not meet the *Frye* standard of admissibility; however, "[a]bsent a novel or experimental scientific theory, a *Frye* hearing is generally unwarranted" (*People v Brooks, 31 NY3d 939, 941, 73 N.Y.S.3d 110, 96 N.E.3d 206 [2018]*). **[**3]** "General acceptance can be demonstrated through scientific or legal writing, judicial opinions, or expert opinions other than that of the proffered expert" (*Dovberg v Laubach, 154 AD3d 810, 813, 63 N.Y.S.3d 417 [2d Dept 2017]*). In 2020, the Appellate Division, Second Department held "that biomechanical engineering is a scientific theory accepted in the field" (*Guerra v Ditta, 185 AD3d 667, 668, 127 N.Y.S.3d 148 [2d Dept 2020]*). Thus, there is no need for a *Frye* hearing.

Nonetheless, while Plaintiff does not mention *Parker v Mobil Oil Corp.*, it appears that he is arguing that Dr. Chiodo fails to lay a proper foundation for his findings under *Parker (7 NY3d 434, 857 N.E.2d 1114, 824 N.Y.S.2d 584 [2006]*).

In *Parker*, the Court of Appeals held that "[t]he *Frye* inquiry is separate and distinct from the admissibility question applied to all evidence—whether **[*6]** there is a proper foundation—to determine whether the accepted methods were appropriately employed in a particular case" (*Parker, 7 NY3d at 447*). "'The focus moves from the general reliability concerns of *Frye* to the specific reliability of the procedures followed to generate the evidence proffered and whether they establish a foundation for the reception of the evidence at trial'" (*id.*, quoting *People v Wesley, 83 NY2d 417, 429, 633 N.E.2d 451, 611 N.Y.S.2d 97 [1994]*). This analysis is necessary because "[a]s with any other type of expert evidence, we recognize the danger in allowing unreliable or speculative information (or 'junk science') to go before the jury with the weight of an impressively credentialed expert behind it. But, it is similarly inappropriate to set an insurmountable standard that would effectively deprive [a party] of their day in court. It is necessary to find a balance between these two extremes" (*Parker, 7 NY3d at 447*).

In his report, Dr. Chiodo affirmed that, in formulating his conclusions, he reviewed, among others, the following documents:

- Exhibit color photograph of Infinity Q50 AWD with New Jersey license plate number N49 GVW.

• PD photos (Geico).
• Color photographs of vehicles on scene.

• Plaintiff's Expert Exchange of Dr. Greenwald which states, inter alia, the following: **[*7]** "***Upon impact, her head started to go toward the windshield but was then pulled back suddenly and hit her head on the seat rest. No loss of consciousness***."
• Plaintiff's Expert Exchange of Dr. Lipton.
• Plaintiff's Life Care Plan dated April 26, 2021.
• Supplemental Verified Bill of Particulars.
• Expert Exchange of Harold Bialsky dated April 26, 2021.
• Notice of Motion Returnable December 3, 2019.
• Affirmation in Support with a claim of traumatic injuries to cervical spine as well as a concussion.
• Notice of Claim.

• Transcript of Plaintiff's *50-h* hearing on December 6, 2017.
• Plaintiff's Verified Bill of Particulars.
• Transcript of Plaintiff's EBT on October 8, 2018.

• *CPLR 3101(d)* Response of Stuart Sproinger M.D.

[4]** • *CPLR 3101(d)* Response of Chandra M. Sharma M.D.

• *CPLR 3101(d)* Response of Scott B. Berger M.D.
• Affirmation by Brian D. Greenwald M.D.
• Report dated December 23, 2019 by Brian D. Greenwald M.D.

• Notice of Intention to Introduce Radiographic Images Pursuant to *CPLR 4532-a*.
• Plaintiff's Mount Sinai Hospital records.
• Plaintiff's Records from Armin M. Tehrany M.D. and Manhattan Orthopaedic Care
• MRI report from Mount Sinai.
• Plaintiff's Records from Catherine Watson D.O. and SUNY College of Optometry.

• Plaintiff's 2003 radiology **[*8]** records.
• Plaintiff's Dr. Gold medical records of 11-9-2016.
• GEICO IME reports.
• Records from Mount Sinai Medical Center.
• Medical records from Mount Sinai Hospital.
• Medical records from Herbert S. Lempel M.D. and Mount Sinai Medical Associates.
• Plaintiff's Records from Dr. Golden.
• Plaintiff's Records from Jesse Weinberger M.D.
• Plaintiff's Records from Brian D. Greenwald M.D. and JFK Johnson Rehabilitation Institute.
• Plaintiff's Records from Montefiore.

In his biomechanical analysis, Dr. Chiodo reviewed the transcript of Plaintiff's *50-h* hearing (EF Doc 20), the transcript of Plaintiff's EBT (EF Doc 41), Bill of Particulars and medical records for her injuries and Doctors' assessment of various injuries. Using these reports of Plaintiff's injuries, Dr. Chiodo compares the inertial forces in the subject incident to the published literature referenced (EF Doc 246). Dr. Chiodo reviewed the color photographs of the motor vehicles after the collision, which he stated is the accepted method for determining velocity change and cited to a relevant peer review article.

Using his incident analysis and biomechanical injury analysis, Dr. Chiodo made several conclusions, including that the appearances **[*9]** of the respective vehicles involved after the collision are consistent with a barrier equivalent of collisions of five (5) miles per hour or less. Additionally, Dr. Chiodo opined that, given the shape and the location of the indentation in the front bumper of Defendants' Ford Econoline 450, said damage is consistent with an unrelated previous collision with a metal post or some other similar object. Dr. Chiodo found that such damage could not have been caused in the collision, given that "[t]here is minimal if any apparent damage to the rear of [...] Plaintiff's Infinity [Q50 AWD]." Dr. Chiodo, who is medical doctor licensed in New York, further concludes that there was no causal or aggravation related link between Plaintiff's injuries and the subject crash.

Plaintiff argues that *Clemente*, a nonbinding decision from a trial court, precludes Dr. Chiodo's testimony. Defendants point out that *Clemente* was decided in 1999, when "[t]here were no reported court decisions on the use of biomechanical or biomedical engineers in New York courts" (*Clemente, 183 Misc 2d at 934*). In *Clemente*, the court (Maltese, J.) held that "[u]sing **[**5]** repair costs and photographs as a method for calculating the change in velocity of two vehicles at impact is not **[*10]** a generally accepted method in any relevant field of engineering or under the laws of physics. [...] The engineer acknowledged that this was a method that he developed which has not been scientifically tested. Indeed, the engineer, when questioned by this court whether there was any literature supporting this method of calculating change in velocity, claimed there was none" (*id. at 934*). The court also found several other problems with the expert's proposed testimony.

This Court notes that, while the court in *Clemente* mentioned photographs, the expert's proposed testimony relied heavily upon the repair bills of the vehicles, which were compared to "a chart entitled 'Bumper Performance Repair Costs, 5 mph Crash Tests'" (*id. at 925*). The biomechanical engineer in *Clemente* opined that the plaintiff's repair bill was "close enough to the $882 average cost of repair [...] when its rear is driven into a flat barrier at five miles per hour" (*id. at 926*). Furthermore, "[t]he engineer concluded that since the repair bill was almost identical to the chart (within 2.5%), therefore the change in velocity from the plaintiff's SUV, after being struck in the rear by the defendant's van, was five miles per hour" (*id.*). Unlike in *Clemente*, Dr. Chiodo did **[*11]** not compare repair costs to a chart to determine the change in velocity.

Notably, more recent caselaw suggests that a biomechanical engineer may form an opinion based upon photographs, provided same are in the record. In *Pascocello v Jibone*, the plaintiffs moved "to preclude the testimony of defendants' biomechanical engineer Dr. Kevin Toosi at trial to the extent that his opinion is based on certain photographic evidence" (*161 AD3d 516, 516, 73 N.Y.S.3d 434 [1st Dept 2018]*). The Appellate Division, First Department held that "[a]n expert's opinion 'must be based on facts in the record or personally known to the witness' [citations omitted], and in the absence of such record support, an expert's opinion is without probative force [citation omitted]. Here, Supreme Court properly precluded Dr. Toosi from offering an opinion based on photographs for which no proper foundation has been established" (*Pascocello, 161 AD3d at 516*). The holding in *Pascocello* suggests that the biomechanical engineer's opinion was precluded, as it was based upon certain photographs not in the record. While *Pascocello* is a First Department case, various Appellate Division, Second Department cases have quoted and cited to same when determining whether an expert's opinion sufficiently relates **[*12]** to existing facts or data.

Here, Dr. Chiodo forms his opinion on velocity change based upon photographs of the vehicles after the accident and at the scene of the accident. Here, unlike in *Pascocello*, the photographs relied upon by Dr. Chiodo are part of the record (EF Doc 23), as Patterson laid the proper foundation for same in an affidavit (EF Doc 21), and Plaintiff testified to same in her *50-h* hearing (EF Doc 20). Notably, Plaintiff testified that her rear bumper had "[s]ome scratches" as a result of the crash. Moreover, the abstract of the article Dr. Chiodo cites to states that "[f]or everyday practice, photographs of the damage to cars involved in a rear-end impact are essential to determine this velocity change."

Balancing the danger of allowing unreliable or speculative information to go before the factfinder and not setting an insurmountable standard for Defendants, the Court finds that Dr. Chiodo's report, which describes the methods, data, and published authority used in formulating his conclusions, sets a proper foundation for his findings. Defendants provide sufficient evidence that Dr. Chiodo has testified in a similar manner with the same methodology in several other courts **[*13]** **[**6]** throughout the country. Furthermore, Defendants provide sufficient evidence that Dr. Chiodo's methodology is generally accepted among the scientific community.

The Court rejects Plaintiff's argument that Dr. Chiodo must accept testimony as fact, when objective evidence and scientific theories show that such testimony is incredible. The Court notes that in *Clemente*, the court found that the defendant's version of events incredible, as it was contrary to the Newtonian theory of physics testified to by the defendant's expert engineer (*183 Misc 2d at 926*).

As such, Plaintiff's motion in limine to preclude Dr. Chiodo from testifying at trial or limiting Dr. Chiodo's testimony is denied.

Seq. No. 6: Judicial Notice

Plaintiff moves for the Court, (1) to take judicial notice of the reliability and general acceptance of diffusion tensor imaging ("DTI") within both the medical and scientific communities; and (2) to preclude defense experts, including Scott Berger, M.D. ("Dr. Berger"), from proffering testimony during the trial regarding a lack of general acceptance of DTI and denying that the science of DTI is reliable and generally accepted within the medical and scientific communities. On June 28, 2021, Plaintiff moved **[*14]** for the same relief as the within motion (Seq. No. 4, EF Doc 155); however, Plaintiff's motion was withdrawn with leave to renew at time of trial (EF Doc 227).

In support, Plaintiff submits an attorney affirmation (EF Doc 251), a memorandum of law (EF Doc 252), letter to defense counsel regarding the within motion (EF Doc 254), a PRISMA checklist (EF Doc 256), and various decisions and orders, as well as *Frye* hearing transcripts in other cases from other courts.

Plaintiff argues that DTI is generally accepted for clinical use within the fields of neuroradiology and brain injury medicine; that there are guidelines for the clinical use of DTI; and that DTI is used clinically throughout the United States to assist patients with traumatic brain injury. Plaintiff also argues that the DTI is admissible pursuant to an Appellate Division, First Department case, *LaMasa v Bachman (56 AD3d 340, 869 N.Y.S.2d 17 [1st Dept 2008]*). Plaintiff argues that *LaMasa* is the established law in New York, as there are no decisions to the contrary issued by another appellate department or the Court of Appeals.

In opposition, Defendants submit an attorney affirmation (EF Doc 315), and an affirmation of Dr. Berger (EF Doc 316), coupled with several peer-reviewed studies he refers **[*15]** to (EF Doc 317-321).

Defendants argue that Plaintiff is mischaracterizing DTI as being synonymous with the quantitative analysis of DTI images ("QDTI"). Additionally, Defendants argue that Plaintiff conflates DTI's acceptance as a tool for diagnosing moderate and major brain injuries, with its disputed acceptance as a tool for diagnosing mild brain injuries. *Frye* requires scientific evidence to be generally accepted within the scientific community in order to be admissible in court.

[7]** Defendants also argue that since *LaMasa* was decided, in 2014, the so-called "white paper" was written on behalf of the American College of Radiology Head Injury Institute, which was supported and endorsed by members of the scientific/clinical medical community. Defendants cite to a trial court case, i.e., *Brouard v Convery*, which precluded DTI based upon, in part, the "white paper" (*59 Misc 3d 233, 236-37, 70 N.Y.S.3d 820 [Sup Ct, Suffolk County 2018]*). The "white paper" provided, in relevant part, the following: "Overall, at the time of writing this article, there is insufficient evidence supporting the routine clinical use of advanced neuroimaging [including, among others, DTI] for diagnosis and/or prognostication at the individual patient level" (EF Doc 205). The court (Hudson, **[*16]** J.) in *Brouard* held that, based upon the "white paper," "DTI [did] not (at the time of this writing) have a general acceptance to be used as the standard in clinical/medical treatment of individual patients who are being treated for TBIs" (*59 Misc 3d at 237*).

In reply, Plaintiff submits, among other things, an attorney affirmation (EF Doc 325), and Bon Secours Community Hospital MRI/DTI reports performed for clinical purposes (EF Doc 329).

Plaintiff argues that, among other things, while there is a quantitative analysis of the data, the science is referred to as QDTI. Additionally, Plaintiff argues that the "white paper" is not a peer-reviewed scientific study, and that Dr. Berger would not be addressing the "white paper." Plaintiff argues that *LaMasa* is still good law, despite *Brouard*.

With respect to expert testimony, the "'general acceptance' requirement, also known as the Frye test, governs the admissibility of expert testimony in New York. It asks 'whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally' [citation omitted]. Although unanimity is not required, the proponent must show 'consensus in the scientific community **[*17]** as to (the methodology's) reliability'" (*Sean R. v BMW of N. Am., LLC, 26 NY3d 801, 809, 28 N.Y.S.3d 656, 48 N.E.3d 937 [2016]*). As stated above, "[g]eneral acceptance can be demonstrated through scientific or legal writing, judicial opinions, or expert opinions other than that of the proffered expert" (*Dovberg, 154 AD3d at 813*). The burden is on the proponent to demonstrate the generally accepted reliability of the proffered testimony (*see Sean R., 26 NY3d at 812*).

While there is no Appellate Division, Second Department case regarding the admissibility of DTI, in *LaMasa*, the First Department affirmed a judgment in a matter in which DTI was admitted into evidence for a jury to consider(*56 AD3d at 340-41*). There the Court held, in relevant part, the following: "On the issue of foundational support for expert opinion, while some of plaintiffs' experts relied on new technology or methodologies, the same experts also opined based on well-established and recognized diagnostic tools, and we find that they provided reliable causation opinions" (*LaMasa, 56 AD3d at 341*).

Here, it is undisputed that the trial courts within the Second Department have been split regarding the admissibility of expert testimony about DTI. As mentioned above, in *Brouard*, the Supreme Court, Suffolk County precluded such testimony (*59 Misc 3d at 237*). However, in *Lee v Troge*, the Supreme Court, Dutchess County **[*18]** held that "diffusion tensor imaging is a reliable and accepted diagnostic tool within the scientific and medical communities. MRI with DTI is one appropriate test that can be used in identifying abnormality in the brain for the purpose of **[**8]** conducting a differential diagnosis of a traumatic brain injury" (*74 Misc 3d 1213[A], 160 N.Y.S.3d 579, 2022 NY*

Slip Op 50119[U] [Sup Ct, Dutchess County 2022]).

The Court further notes the case that was decided in the United States District Court for the Southern District of New York, i.e., Tardif v City of New York, (2022 US Dist LEXIS 108618, *18, 2022 WL 2195332, *6 [SDNY 2022]). There, the Court held that expert testimony based upon MRI with DTI is admissible (*id.*). The Court noted that judges in at least 12 judicial districts have held that the use of MRI with DTI to diagnose brain injury to be reliable, helpful and admissible (*id.*). In reaching its finding, the Court referred to an article that reviewed 100 published articles on the use of DTI in relation to TBI (*id.*). The Court found that said article showed that DTI has been tested and subject to substantial amounts of peer review and publication (*id.*). The Court also noted the U.S. Food and Drug Administration has approved DTI (*id.*). Regardless, this Court finds that, by submitting judicial opinions, Plaintiff demonstrated that MRI with DTI is generally accepted within **[*19]** the medical and scientific communities.

Accordingly, the Court takes judicial notice that MRI with DTI is a reliable and generally accepted diagnostic tool within the scientific and medical communities. Plaintiff's motion in limine is granted, and defense experts, including Dr. Berger, are precluded from testifying regarding the lack of general acceptance of DTI or that DTI is unreliable and generally not accepted in the medical and scientific communities.

Seq. No. 7: Preclude Evidence of Lost Wages Related to Lost Opportunities

Defendants move for an order, (1) precluding Plaintiff from offering any evidence or testimony (lay or expert) regarding an alleged claim for lost earnings related to lost professional opportunities including Plaintiff's inability to take a position as a Vice Principal; (2) precluding Plaintiff from calling the following individuals as damages witnesses: Alan Plummer, Daniela Gonzalez, Lauren Scheff, Jennifer Sohnen, Ellen Grebstein, and Tamar Smith as Plaintiff failed to previously disclose these individuals as witnesses in accordance with the Preliminary Conference Order dated April 19, 2018; and (3) precluding Plaintiff's economic experts, Harold Bialsky, who **[*20]** is a vocational rehabilitation specialist, and Michael J. Vernarelli, who is a forensic economist, from testifying; or, in the alternative, (4) setting this matter down for a *Frye* hearing and permitting Defendants an opportunity to retain similar experts including an examination with a Vocational Rehabilitation expert to refute Plaintiff's expert witness opinions.

In support, Defendants submit, among other things, an attorney's affirmation (EF Doc 274), Plaintiff's bill of particulars (EF Doc 286), Plaintiff's supplemental bill of particulars dated August 10, 2020 (EF Doc 275), an e-mail with Plaintiff's counsel (EF Doc 277), and an entire copy of e-mail correspondence with Plaintiff's counsel (EF Doc 283).

Defendants argue that, while Plaintiff's bill of particulars asserts that she sustained a "loss of earnings: approximately $1,800.00," there is no claim that her loss of earnings is continuing nor is there a claim for loss of future earnings, loss of professional opportunity or diminished earning capacity. During her 50-h hearing, Plaintiff testified that she only missed one week of work as a result of the crash. Additionally, during Plaintiff's EBT, she testified that, after the accident, **[*21]** she continued to work the same hours and in the same position as a guidance counselor. Plaintiff **[**9]** further testified that she received a raise since her accident. Plaintiff testified to turning down a dance class that she had worked before, and a job as a part-time professor of one class; however, she did not testify that she was unable to take a position as a Vice Principal or that she had any related economic damages. Defendants further argue that Plaintiff never served a supplemental bill of particulars to itemize any of special damages related to the purported loss of the Vice Principal position, and those activities are not alleged or accounted for in Plaintiff's expert witness exchanges.

During oral arguments, Plaintiff's attorney clarified that Plaintiff told him that a retiring Vice Principal told Plaintiff that she would recommend her for the position; however, Plaintiff said something along the lines of the following: "No, thanks. I cannot handle it."

Defendants further argue that Plaintiff did not timely serve expert disclosures of Harold Bialsky and Michael J. Vernarelli or disclose the identities of six (6) damages witnesses who are friends, co-workers, and Plaintiff's mother. **[*22]**

In opposition, Plaintiff argues that Defendants knew that the expert disclosure of Harold Bialsky was exchanged, via e-mail, on April 26, 2021 (EF Doc 289). Moreover, Plaintiff refers to several documents prepared by Brian D. Greenwald, M.D. ("Dr. Greenwald") indicating that Plaintiff's "symptoms are likely to have a significant detrimental impact on her ability to engage in daily activities in the same manner that she was accustomed

to prior to her accident" (EF Doc 64). Dr. Greenwald's notes also indicate that Plaintiff *self-reported* having difficulty reading and was unable to take an exam for work (EF Doc 64, 65).

Plaintiff further argues that the damages witnesses, which include co-workers and friends of Plaintiff, should not be precluded as disclosure typically includes just witnesses regarding liability. Additionally, Plaintiff argues that the lay witnesses would testify as to their personal observations of and interactions with Plaintiff and compare her current functioning with her abilities prior to the crash.

In reply, Defendants further argue that Plaintiff never mentioned the opportunity to apply as a Vice Principal and merely previously disclosed generalized conclusions that **[*23]** she will be limited in her opportunities for professional advancement (EF Doc 322).

During oral arguments, Defendants' counsel asserted that he never received the e-mail with Plaintiff's alleged previous disclosures. Defendants' counsel further asserted that even if he did receive the e-mail, such method of service was improper under *CPLR 2103*.

Lost Wages Potential

Plaintiff argues that she could have earned more money as a Vice Principal despite never applying for the job, never sitting for the certification examination for said job, and merely allegedly being told by the outgoing Vice Principal that she recommend her for the position.

"Claims for lost earnings 'must be ascertainable with a reasonable degree of certainty and may not be based on conjecture'" (*Glaser v County of Orange, 54 AD3d 997, 998, 864 N.Y.S.2d 557 [2d Dept 2008]*, **[**10]** quoting *Bailey v Jamaica Buses Co., 210 AD2d 192, 192, 620 N.Y.S.2d 257 [2d Dept 1994]*; *see Schiller v New York City Tr. Auth., 300 AD2d 296, 296-97, 750 N.Y.S.2d 774 [2d Dept 2002]*; *Davis v City of New York, 264 AD2d 379, 379-80, 693 N.Y.S.2d 230 [2d Dept 1999]*). A lost earnings assessment is focused on, in part, "the plaintiff's earning capacity both before and after the accident" (*Harris v City of New York, 2 AD3d 782, 784, 770 N.Y.S.2d 380 [2d Dept 2003]*, *quoting Clanton v Agoglitta, 206 AD2d 497, 499, 615 N.Y.S.2d 68 [2d Dept 1994]*). Similarly, claims for "loss of future earnings or earning capacity must be established with reasonable certainty" (*Davis, 264 AD2d at 380*).

"A party may serve a supplemental bill of particulars with respect to claims of continuing special damages and disabilities without leave of court at any time, but not less **[*24]** than thirty days prior to trial. Provided however that no new cause of action may be alleged or new injury claimed and that the other party shall upon seven days' notice, be entitled to newly exercise any and all rights of discovery but only with respect to such continuing special damages and disabilities." (*CPLR 3043 [b]*).

The Court finds that Plaintiff's alleged claim for lost earnings related to lost professional opportunities, including a Vice Principal position, is too speculative to be considered. According to her own EBT testimony, Plaintiff never took the certification exam for a Vice Principal position nor requested any accommodations to take said exam. Even if Plaintiff did take the exam, there is no guarantee that she would have passed the exam and/or obtained the position of Vice Principal. Any calculations regarding same would be based on the following assumptions: (1) that Plaintiff would have passed the certification exam; (2) that she would have applied for the position; (3) that she would have been offered an interview; and (4) that she would have been offered the position of Vice Principal. As such, Plaintiff's claims for lost earnings due to lost employment opportunities and/or **[*25]** loss of earning capacity are not ascertainable with a reasonable degree of certainty.

Furthermore, Plaintiff never amended nor supplemented her bill of particulars to add this category of special damages, i.e., loss earnings due to lost employment opportunities and/or loss of earning capacity. Moreover, Plaintiff is precluded from offering continuing and/or future loss of earnings, given her testimony and her failure to allege same in her bill of particulars.

Accordingly, Defendants' motion to is granted to the extent that Plaintiff is precluded from offering any testimony regarding claims of lost earnings and/or lost earning capacity related to lost professional opportunities from her alleged inability to take a position as a Vice Principal and is precluded from offering any testimony from her economic experts, Harold Bialsky and Michael J. Vernarelli regarding the alleged lost Vice Principal opportunity, and any loss earnings arising therefrom. Said experts are also precluded from testifying to any continuing and/or future loss of earnings.

The branch of Defendants' motion in limine to preclude Plaintiff from calling lay witnesses Alan Plummer,

Daniela Gonzalez, Lauren Scheff, Jennifer **[*26]** Sohnen, Ellen Grebstein, and Tamar Smith as damages witnesses is granted to the extent that these lay witnesses are precluded from testifying about Plaintiff's alleged lost opportunities, including, the opportunity to become a Vice Principal. The lay witnesses are also precluded from offering any testimony outside of their personal observations of Plaintiff's behavior before and after the accident.

[11]** In accordance with the foregoing, it is hereby **ORDERED** that Plaintiff's motion in limine (Seq. No. 5) to preclude Dr. Chiodo is denied; and it is further

ORDERED that Plaintiff's motion in limine (Seq. No. 6) for judicial notice and to preclude Defendants from arguing that DTI is unreliable is granted; and it is further

ORDERED that Defendants' motion in limine (Seq. No. 7) to preclude Plaintiff from offering any evidence regarding an alleged claim for lost earnings related to lost professional opportunities and to preclude Plaintiff's damages witnesses is granted in part and denied in part; and it is further

ORDERED that Plaintiff is precluded from offering any testimony regarding claims lost earnings and/or lost earning capacity related to lost professional opportunities from her alleged **[*27]** inability to take a position as a Vice Principal and is precluded from offering any testimony from her economic experts, Harold Bialsky and Michael J. Vernarelli regarding the alleged lost Vice Principal opportunity, and any loss earnings and/or loss of earning capacity arising therefrom. Said experts are also precluded from testifying to any continuing and/or future loss of earnings; and it is further

ORDERED that Plaintiff's lay witnesses are precluded from offering any testimony regarding claims lost earnings and/or lost earning capacity related to lost professional opportunities. The lay witnesses are also precluded from offering any testimony outside of their personal observations of Plaintiff's behavior before and after the accident; and it is further

ORDERED that any requested relief and/or remaining contentions not expressly addressed herein have nonetheless been considered and are hereby expressly rejected; and it is further

ORDERED that Defendants shall serve, via NYSCEF, a copy of this Order with Notice of Entry upon Plaintiff within five (5) days from the date of entry. This constitutes the Decision and Order of this Court.

Dated: November 28, 2023

/s/ Phillip Hom

PHILLIP HOM, [*28] J.S.C.

Owens v. NCAA

United States District Court for the Northern District of Illinois, Eastern Division

July 27, 2022, Decided; July 27, 2022, Filed

No. 11 C 6356

Reporter
2022 U.S. Dist. LEXIS 133354 *; 2022 WL 2967479

DEREK OWENS and KYLE SOLOMON, Plaintiffs, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant.

Core Terms

concussion, Plaintiffs', sports, methodology, vocational, athletes, reliable, medical record, opine, expert testimony, life care, calculating, counseling, rehabilitation, clinical, best practices, estimates, discount, injuries, evaluations, factors, drugs, prescribed, symptoms, brain injury, side effect, disabilities, projection, cognitive, diagnosed

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For Shelby Williams, Spencer Trautmann, Ryan Parks, Brice Sheeder, Jessica Miller, individually and on behalf of all others similarly situated, Shavaughne Desecki, Ursula Kunhardt, Natalie Kay Harada, Dache Williams, Peter Dykstra, Anna Bartz, Rachel Dianne Harada, Adam Walker, Plaintiffs: Steve W. Berman, Hagens Berman Sobol Shapiro LLP, Seattle, WA.

For National Collegiate Athletic Association, Defendant: Dean A. Dickie, LaKeisha Marsh, LEAD ATTORNEYS, Eric J Gribbin, Jamel Anthony **[*2]** Greer, Akerman LLP, Chicago, IL; Mark Steven Mester, LEAD ATTORNEY, Latham & Watkins LLP, Chicago, IL; Naim Shakir Surgeon, LEAD ATTORNEY, Akerman Llp, Three Brickell City Centre, Miami, FL; Sean M. Berkowitz, LEAD ATTORNEY, Johanna Margaret Spellman, Latham & Watkins LLP (IL), Chicago, IL; Christian Word, PRO HAC VICE, Latham & Watkins LLP, Washington, DC.

For Frank Moore, Anthony Nichols, Intervenor Plaintiffs: Jay Edelson, LEAD ATTORNEY, Edelson PC, Chicago, IL; Steven Lezell Woodrow, LEAD ATTORNEY, Woodrow & Peluso, LLC, Denver, CO.

Judges: JOHN Z. LEE, United States District Judge.

Opinion by: JOHN Z. LEE

Opinion

MEMORANDUM OPINION AND ORDER

In personal injury litigation, the parties often rely on expert witnesses. This is especially so when specialized knowledge is necessary to establish or refute whether a particular defendant breached a reasonable standard of care, causing compensable injuries.

The two plaintiffs in this case, Derek Owens and Kyle Solomon, played collegiate sports and suffered numerous concussions while doing so. They have offered a number of experts to support their contention that Defendant, the National Collegiate Athletic Association ("NCAA"), negligently failed to adopt and implement adequate **[*3]** concussion policies during their school years and that the two suffered and will continue to suffer injury as a result.

In response, the NCAA has presented its own rebuttal

experts. And each party now seeks to exclude, in whole or in part, the opinions offered by the opposing side's experts. For the reasons provided below, these motions are granted in part and denied in part.

I. Legal Standard

Federal Rule of Evidence 702 and the Supreme Court's decision in Daubert govern the admissibility of expert testimony. United States v. Parra, 402 F.3d 752, 758 (7th Cir. 2005) (citing Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)). Rule 702 allows the admission of opinion testimony by a witness, who possesses the requisite "knowledge, skill, experience, training, or education," to assist the trier of fact to "understand the evidence or . . . determine a fact in issue." FED. R. EVID. 702. Such a witness is permitted to testify when (1) the testimony is "based on sufficient facts or data," (2) the testimony is "the product of reliable principles and methods," and (3) the witness has "reliably applied the principles and methods to the facts of the case." *Id.* In short, the proffered expert must be qualified, and the testimony must be reliable and relevant to the issues in the case. The Supreme Court in Daubert and its progeny instructed the district court to act as **[*4]** the evidentiary gatekeeper, ensuring that Rule 702's requirements of reliability and relevance are satisfied before permitting an expert witness to offer opinion testimony at trial. *See* 509 U.S. at 589; *see also* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147-49, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999).

In considering whether to admit expert testimony, district courts typically employ a three-part framework that inquires whether: (1) the expert is qualified by knowledge, skill, experience, training, or education; (2) the reasoning or methodology underlying the expert's testimony is reliable; and (3) the expert's testimony will assist the trier of fact in understanding the evidence or determining a factual issue. *See* FED. R. EVID. 702; Bielskis v. Louisville Ladder, Inc., 663 F.3d 887, 893-94 (7th Cir. 2011). The proponent of an expert witness bears the burden of demonstrating that the expert's testimony would satisfy the Daubert standard by a preponderance of the evidence. Lewis v. CITGO Petroleum Corp., 561 F.3d 698, 705 (7th Cir. 2009). And district courts have broad discretion in making this evidentiary determination. Lapsley v. Xtek, Inc., 689 F.3d 802, 810 (7th Cir. 2012).

Additionally, while "[a]n opinion is not objectionable just because it embraces an ultimate issue," FED. R. EVID. 704, expert opinions that "merely tell the jury what result to reach" are inadmissible (largely, because they are unhelpful), *id.* at 1972 advisory committee note. Moreover, "Rule 704 . . . does not provide that witnesses' opinions as to the legal implications **[*5]** of conduct are admissible." United States v. Baskes, 649 F.2d 471, 479 (7th Cir. 1980); *see also* Haley v. Gross, 86 F.3d 630, 645 (7th Cir. 1996) (suggesting that it would be "improper[ ]" for an expert witness to "tell[ ] the jury why the defendants' conduct was illegal" or "testify regarding the dictates of [the] law"). Accordingly, "expert testimony as to legal conclusions that will determine the outcome of the case is inadmissible." Good Shepherd Manor Found., Inc. v. City of Momence, 323 F.3d 557, 564 (7th Cir. 2003); United States v. Sinclair, 74 F.3d 753, 757 n.1 (7th Cir. 1996).

II. Analysis

A. NCAA's Motions to Exclude Opinions of Plaintiffs' Experts

The NCAA moves to exclude the opinion testimony offered by Dr. Robert Cantu; Dr. Tanya Rutherford Owen; Dr. Ralph Scott; Harold Bialsky; and Kristin Kucsma. Each is addressed in turn.

1. Dr. Robert Cantu

Dr. Robert Cantu is the Medical Director and Director of Clinical Research for the Dr. Robert Cantu Concussion Center, as well as the Director of Sports Medicine and Chief of Neurosurgery at Emerson Hospital in Concord, Massachusetts. He also serves as, among other things, the Clinical Professor of Neurology and Neurosurgery and Co-Founder of the Center for the Study of Traumatic Encephalopathy at Boston University School of Medicine; Medical Director of the National Center for Catastrophic Sports Injury Research in Chapel Hill, North Carolina; Senior Advisor to the National Football **[*6]** League's Head, Neck, and Spine Committee; Member/Co-Chair of the Equipment and Rules Committee of the National Football League Players Association Health and Safety Committee; Co-Director of the Neurologic Sports Injury Center at Brigham and Women's Hospital, in Boston, Massachusetts; and a member of the NCAA Concussion Safety Advisory Group.

A prolific writer, Dr. Cantu has authored over 489 scientific publications, including thirty-four books on neurology and sports medicine, as well as book chapters, peer-reviewed papers, and educational videos. Additionally, he has worked for a number of peer-reviewed journals, serving as an associate editor of *Medicine and Science in Sports and Exercise* and *Exercise and Sports Science Review*; an editorial board member of *The Physician and Sportsmedicine*, *Clinical Journal of Sports Medicine*, and *Journal of Athletic Training*; and the section head for the Sports Medicine Section of *Neurosurgery*.

Dr. Robert Cantu has offered four opinions in support of Plaintiffs' claims. First, he describes the consensus best practices for managing concussions at an institutional level in amateur sports during the relevant time period. Second, he opines that the NCAA **[*7]** failed to adopt those practices or require its member schools to do so. Third, he states that the NCAA's response to the concussions that Owens and Solomon incurred while playing college sports was not consistent with the consensus best practices. Fourth, he assesses the historic, current, and future medical conditions of Owens and Solomon and opines that it is more likely than not that their medical conditions resulted from the NCAA's failure to adopt or require member schools to adopt the consensus best practices.

a. Duty and Breach of Duty of Care

As an initial matter, the NCAA argues that, because the existence of a duty is a question of law, Dr. Cantu may not offer legal conclusions about whether the NCAA owed Plaintiffs a duty of care because it would not be helpful to a jury. But, for the most part, Dr. Cantu simply observes that the NCAA has recognized its responsibility to safeguard the health of student-athletes in its constitution and other publications.

For example, Dr. Cantu states that, under its constitution, the NCAA conducts its athletic programs in a manner "designed to protect and enhance the physical and educational well-being of student athletes." Def.'s Ex. 19, Cantu **[*8]** Report Owens ¶ 92, ECF No. 442.[1] Additionally, he notes that the constitution provides that NCAA member schools have a responsibility to "protect the health of, and provide a safe environment for" student-athletes. *Id.* The constitution also states that the NCAA is responsible for ensuring that sports programs conform with the constitution and bylaws and enforcing member schools' compliance with their obligations. *Id.* ¶ 91. Dr. Cantu certainly is free to consider the NCAA's own documents in formulating his opinions, and quoting from these documents, and offering an opinion as to the NCAA's duty of care are two entirely different things.

In certain instances, however, Dr. Cantu does use the words "duty" and "duty of care."[2] Because these

[1] The NCAA also contends that Dr. Cantu is not qualified to provide opinions on the NCAA's constitution, rules, and regulations. But Dr. Cantu is not offering any opinions as to their accuracy or sufficiency. Rather, he merely considered such materials when assessing whether the NCAA followed the best consensus practices as they related to the concussions Owens and Solomon suffered. *See, e.g.*, Cantu Report Owens ¶¶ 90, 95, 102, 144, 147, 173, 179, 263; Def.'s Ex. 18, Cantu Report Solomon ¶¶ 90, 95, 102, 144, 147, 172, 178, 257, ECF No. 441. And, based on his knowledge, skill, experience, training, and education regarding the management of sports-related concussions, Dr. Cantu is well qualified to offer his opinions. Indeed, the NCAA itself has relied on six of Dr. Cantu's publications on concussion management in its 2011 NCAA Sports Medicine Handbook. Pls.' Ex. Kurowski Decl. Ex. 3, 2011-12 NCAA SPORTS MEDICINE HANDBOOK 7, ECF No. 399-3. In addition, he has been a member of the NCAA's Sport Science Institute Concussion Safety Advisory Group for many years. *Id.*, Ex. 4, Cantu CV at 3, 39, 41, 49, 84, ECF No. 399-4. To the extent that the NCAA wishes to cross-examine Dr. Cantu about his knowledge of NCAA governance, it may do so. But such an inquiry goes to the weight, not the admissibility, of his opinions. *See, e.g.*., Def.'s Ex. Marsh Decl., Ex. 42, *Onyshko* Tr. at 1080:5-1081:3, ECF No 450 (cross-examining Dr. Cantu regarding his knowledge of how the NCAA works).

[2] He states, for example: (1) "In my opinion, based upon review of documents, the NCAA has acknowledged internally that it has violated its duty of care owed to its student-athletes participating in NCAA athletics," Cantu Reports Owens & Solomon ¶ 33; (2) "The particular provisions I have in mind in assessing if the NCAA met its duty of care are set forth below," *id.* ¶ 90; (3) "The NCAA has consistently recognized its duty to provide a safe environment for student-athletes," *id.* ¶ 95; (4) "In assessing its duty of care," *id.* ¶ 147; (5) "its duty of care should take into account that," *id.* ¶ 23b; (6) "of the legal standard of care," *id.* ¶ 100; (7) "and their duty of care to Derek Owens," Cantu Report Owens ¶ 34; (8) "and their duty of care to Kyle Solomon," Cantu Report Solomon ¶ 34; (9) "its duty of care and," Cantu Report Owens ¶ 173, Cantu Report Solomon ¶ 172; (10) "of its duty of care and," Cantu Report Owens ¶ 179, Cantu Report Solomon ¶ 178; (11) "their duty of care and," Cantu Report Owens ¶¶ 34-35, 263, Cantu Report Solomon ¶¶ 34-35, 257; and (12) "and contrary to the NCAA's duty of care," Cantu Report Solomon ¶ 206.

statements regarding the NCAA's compliance (or noncompliance) with its duty are legal conclusions, these sentences or sentence fragments are stricken from Dr. Cantu's expert reports and barred from his testimony. *See* Good Shepherd Manor Found., 323 F.3d at 564 (affirming the district court's preclusion of an expert's testimony on purely legal matters); Baumann v. Am. Fam. Mut. Ins. Co., 836 F. Supp. 2d 1196, 1202 (D. Colo. 2011) (barring expert testimony about an insurer "phrased in terms of . . . legal duties or obligations"); Scottsdale Ins. Co. v. City of Waukegan, 689 F. Supp. 2d 1018, 1023 (N.D. Ill. 2010) (excluding expert **[*9]** testimony interpreting the language of an insurance contract, as well as "opinions offer[ing] conclusions about [an insurer's] duties under the law"); *see also* Essex Ins. Co. v. Structural Shop, Ltd., No. 15 C 2806, 2017 U.S. Dist. LEXIS 77490, 2017 WL 2224879, at *2-4 (N.D. Ill. May 22, 2017) (granting motion to bar defendant's expert from testifying as to plaintiff's legal duties).

The NCAA also objects to Dr. Cantu's opinion that the NCAA breached its duty of care. But, other than the statements noted above, Dr. Cantu's remaining opinions primarily state that the NCAA failed to follow consensus best practices for concussion management during the time that Plaintiffs played collegiate sports. And, generally speaking, that subject is fair game for expert testimony. *See* Shadday v. Omni Hotels Mgmt. Corp., 477 F.3d 511, 514 (7th Cir. 2007) (analyzing a negligence claim and doubting that the question of reasonableness of defendant's conduct could be answered without the aid of expert testimony regarding industry standards, among other things); Essex Ins., 2017 U.S. Dist. LEXIS 77490, 2017 WL 2224879, at *2 (permitting an expert to "to testify that, in light of customs, practices, and standards in the insurance industry, Essex failed to issue a reservation of rights, file a declaratory action, or both, in a timely manner.").

In one instance, however, Dr. Cantu does opine that the NCAA did not exercise, or require its member **[*10]** institutions to exercise, "ordinary and reasonable care" with regard to Owens and Solomon. *See* Cantu Reports Owens & Solomon ¶ 144 (last full sentence). To the extent this expression is equivalent to "consensus best practices," it is fine. Otherwise, it too is a statement of law and inadmissible. *See* United States v. Duncan, 42 F.3d 97, 102 (2d Cir. 1994) (stating that an expert may not act "outside of his limited role of providing the groundwork in the form of an opinion to enable the jury to make its own informed determination."); Essex Ins., 2017 U.S. Dist. LEXIS 77490, 2017 WL 2224879, at *3 (holding that defendant's expert "cannot testify as to Essex's legal duties or opine that Essex violated these duties"); Dowe v. Nat'l R.R. Passenger Corp., No. 01 C 5808, 2004 U.S. Dist. LEXIS 7233, 2004 WL 887410, at *1 (N.D. Ill. Apr. 26, 2004) ("[A] bare conclusion that particular conduct is 'reasonable' or 'unreasonable' likely would not be particularly helpful to the jury[.]"). As such, this opinion will not aid the jury, and it is stricken.

b. Consensus Best Practices

Next, the NCAA seeks to bar Dr. Cantu's opinions as to what constituted consensus best practices for concussion management during the relevant time. The NCAA first contends that best consensus practices are merely aspirational. Based on Dr. Cantu's knowledge of these practices and his experience in advising numerous organizations regarding concussion management **[*11]** (including the NCAA and the National Football League ("NFL"), among others), he is well qualified to opine about what concussion management standards were recommended at the time, as well as the standards that had been adopted by various sports leagues and institutions. If the NCAA wishes to explore the extent to which certain standards in fact were recommended and/or implemented, it may do so on cross examination. The NCAA also may attempt to show that a particular practice was inordinately demanding and unreasonable given the circumstances (and, thus, could not form a "best consensus" practice). But, again, such concerns go to the weight of Dr. Cantu's testimony, not its admissibility.

Next, the NCAA contends that expert testimony establishing consensus best practices are applicable only to the medical community, not institutions like the NCAA. And, to be sure, Plaintiffs Owens and Solomon

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Likewise, to the extent that Dr. Cantu refers to the NCAA's "obligations" or "promises" with regard to the health of student-athletes, these statements also constitute statements of law and, therefore, are stricken. *See* Cantu Report Owens & Solomon ¶ 90 ("I reviewed the NCAA"s concussion management in the context of the obligations it undertook in these documents."); *id.* ¶ 94 ("the NCAA Constitution promises that"); *id.* ¶ 97 ("The NCAA promises its athletes a safe environment"); Cantu Report Owens ¶ 173, Cantu Report Solomon ¶ 172 ("meet its obligation to"). That said, Dr. Cantu may cite and quote verbatim the NCAA's own statements as support for the proposition that the NCAA has acknowledged its concern for student-athletes' safety and has made those statements to the public.

have not brought medical malpractice claims. But this misses the point of Dr. Cantu's testimony. His goal is to show that well-known international and domestic sports organizations, like the NCAA, had recognized and promulgated standards on how concussions should be addressed and that the NCAA ignored **[*12]** them.

According to Dr. Cantu, the consensus best practices emanated from a symposium in Vienna organized by a number of international sports organizations, including the International Olympic Committee ("IOC"), the International Ice Hockey Federation ("IIHF"), and the Federation Internationale de Football Association ("FIFA"). Def.'s Ex. 16, Cantu Dep. Solomon, at 106:4-107:6, ECF No. 440. The objective of the conference was to provide recommendations to improve the safety and health of athletes who suffered concussive injuries. *Id.* at 107:11-20. To this end, the symposium tasked a group of experts, called the Concussion in Sport Group ("CISG"), to create a working document for preventing concussions, educating athletes, managing and treating concussions, and rehabilitating athletes after concussions, whether at the recreational, collegiate, or professional level. *Id.* at 108:6-12.

After the Vienna meeting in 2001, the CISG also met in Prague in 2004, in Zurich in 2008, and again in Zurich in 2012. Cantu Reports Owens & Solomon ¶¶ 106, 126-36. After each meeting, the group published consensus statements and return-to-play protocols. *Id.*

Dr. Cantu also points to other sources reflecting **[*13]** certain consensus best practices. For example, the NFL implemented return-to-play policies in 2007, *id.* ¶¶ 121-25, and adopted even stricter standards in 2009. *Id.* ¶¶ 137-40.

These statements and policies were created under the auspices of the IOC, IIHF, FIFA, and the NFL, none of which are strictly medical providers. What is more, to the extent that the NCAA formulated guidelines for sports medicine care and protection of student athletes' health and safety, *see generally, e.g.*, 2011-12 NCAA SPORTS MEDICINE HANDBOOK, it is required to have done so with ordinary and reasonable care.

Dr. Cantu's testimony about whether and when sports organizations adopted the consensus best practices (and what they were) will help the jury in determining key issues in this case. *See, e.g.*, *Getty Petroleum Mktg., Inc. v. Cap. Terminal Co., 391 F.3d 312, 326 (1st Cir. 2004)* (Lipez, J., concurring) (stating that, although "voluntary standards do not irrefutably establish the standard of care in a negligence case[,] . . . . they constitute one more piece of evidence upon which the jury could decide whether the defendant acted as a reasonably prudent person in the circumstances of the case."); *Michaels v. Mr. Heater, Inc., 411 F. Supp. 2d 992, 997 (W.D. Wis. 2006)* ("Salzenstein's testimony regarding defendant Mr. Heater's failure to comply with voluntary industry **[*14]** standards is admissible, although certainly not conclusive evidence of negligence."). Accordingly, the NCAA's motion to bar Dr. Cantu's opinions on this ground is denied.

c. Causation

The NCAA also takes issue with Dr. Cantu's opinions that the NCAA caused Plaintiffs' injuries. First, the NCAA argues that there is no reliable scientific connection between, on the one hand, NCAA's purported failure to implement the best consensus concussion remediation policies and, on the other, Owens' post-concussion syndrome ("PCS") or Solomon's concussion treatment. In retort, Plaintiffs point to Dr. Cantu's fifty years of medical expertise as a neurologist and his myriad scientific publications—including thirty-four books on neurology and sports medicine. They observe that he is a leading spokesperson on concussion management and has an expansive knowledge of pertinent medical studies relating to concussions. In addition, he has reviewed Plaintiffs' medical records and has performed numerous evaluations of Plaintiffs themselves. A brief review of his opinions here is helpful.

Dr. Cantu explains that concussions most commonly result in the "rapid onset of cognitive impairment that is self-limited and **[*15]** spontaneously resolves." Cantu Reports Owens & Solomon ¶ 39. He describes the metabolic changes to the brain following a concussion. *Id.* ¶¶ 45-48. He also cites numerous peer-reviewed studies that suggest that concussions or a combination of concussions and subconcussive hits (impacts that do not produce any concussion symptoms) may lead to conditions such as second impact syndrome, PCS, and chronic traumatic encephalopathy. *Id.* ¶¶ 52-65. Based on his specialized expertise, knowledge, and experience, Dr. Cantu opines that returning to play before full recovery places athletes at risk of persistent and permanent injury. *Id.*

Additionally, Dr. Cantu states that proper concussion management is necessary to determine whether cognitive impairment after a concussion has resolved. Cantu Report Owens ¶¶ 169-72; Cantu Report Solomon

¶¶ 168-71. This includes: (1) a structured concussion protocol; (2) catastrophic injury risk education; (3) baseline neuropsychological testing; (4) return-to-play criteria supervised by experienced medical personnel; and (5) incident-specific documentation regarding concussion management. *See* Cantu Report Owens ¶¶ 32, 36, 172, 265; Cantu Report Solomon ¶¶ 32, 36, **[*16]** 171, 197, 259.

In his view, during the relevant timeframes for Owens and Solomon, the NCAA did not formulate guidelines that included any of these concussion management protocols and its failure to do so caused Plaintiffs' persistent injuries. Cantu Report Owens ¶¶ 34, 185-95; Cantu Report Solomon ¶¶ 34, 184-94.

Finally, Dr. Cantu evaluated Plaintiffs' medical records, performed neurologic examinations of Plaintiffs on multiple occasions, and diagnosed them with PCS. Cantu Report Owens ¶¶ 196-264; Cantu Report Solomon ¶¶ 195-258. He notes that Owens has exhibited cognitive, behavioral, and mood deficits, Cantu Report Owens ¶ 264, and Solomon has exhibited deficits in cognitive testing, eye tracking, and balance. Cantu Report Solomon ¶ 258. Because their symptoms have persisted for over eight years, Dr. Cantu concludes that, more likely than not, they are permanent. Cantu Report Owens ¶ 265; Cantu Report Solomon ¶ 259.

Rather than raising reliability concerns, Dr. Cantu's application of his expertise in his examination of Plaintiffs and their medical histories to arrive at a scientific medical opinion is precisely the type of methodology that a physician should employ. *See, e.g.*, *Hall v. Flannery, 840 F.3d 922, 928 (7th Cir. 2016)* (holding **[*17]** that, in light of a pediatric neurosurgeon's twenty-five years of medical experience and article publications, his methodology of reviewing plaintiffs' medical records, progress notes, and deposition transcripts was sufficiently reliable).

The NCAA next contends that Dr. Cantu's causation opinion must fail because he did not perform a differential diagnosis to assess whether Plaintiffs' symptoms could be caused by something other than PCS. But, here too, an expert's "failure . . . to rule out all possible causes of an injury goes to the weight, rather than the admissibility, of the opinion." *Taylor v. Union Pac. R.R. Co., No. 09-cv-123-GPM, 2010 U.S. Dist. LEXIS 96802, 2010 WL 3724283, at *7 (S.D. Ill. Sept. 16, 2010)*; *see Best v. Lowe's Home Ctrs., Inc., 563 F.3d 171, 182 (6th Cir. 2009)* (same); *Kudabeck v. Kroger Co., 338 F.3d 856, 861-62 (8th Cir. 2003)* (same); *Heller v. Shaw Indus., Inc., 167 F.3d 146, 157 (3d Cir. 1999)* (same).

And, in any event, Dr. Cantu considered and dismissed certain other causes of Plaintiffs' ailments based on their medical records. *See* Cantu Report Owens ¶ 238 (brain tumor); Def.'s Ex. Marsh Decl., Ex. 17, Cantu Dep. Owens at 82:21-83:1 (brain tumor), ECF No. 441; *id.* at 28:21-23 (ADD); *see also* Cantu Report Solomon ¶¶ 238-40, 243, 245 (substance abuse); *id.* ¶ 195 (ADHD); *id.* ¶¶ 195, 224-25 (non-collegiate concussion history). Given this, the NCAA's argument that the absence of differential diagnoses undercuts Dr. Cantu's causation opinions goes to their weight, **[*18]** not their admissibility.[3]

Next, according to the NCAA, Dr. Cantu cannot opine with a reasonable medical degree of certainty that a particular individual, like Solomon, will develop dementia by a certain age. But this is not what Dr. Cantu does. *See* Cantu Dep. Solomon at 294:18-295:15. Rather, based on four different studies, his review of Plaintiffs' medical records, and his examination of both Plaintiffs, Dr. Cantu asserts that a person with persistent neurological symptoms following multiple traumatic brain injuries, like Plaintiffs, is at a heightened risk of developing dementia earlier compared to someone with no brain injury. *Id.* at 294:11-17; Cantu Report Owen ¶¶ 268-69 (citing, among others, studies showing that "a brain injury shortens the time for when the dementia threshold would be achieved" and depicting the synergistic and additive effects of age and traumatic brain injury compared to aging alone); Cantu Report Solomon ¶¶ 262-63 (same).

Put another way, Dr. Cantu states that, as a result of Plaintiffs' concussion-related injuries, each is "at risk for further worsening of his cognitive impairments most likely to the point of dementia as he ages" and "an earlier onset **[*19]** . . . than would be experienced without his history of multiple concussions and prolonged post-concussion syndrome." Cantu Report Owens ¶ 267; Cantu Report Solomon ¶ 261. Dr. Cantu's methodology in reaching his conclusion passes muster under *Daubert*. *See, e.g.*, *Booth v. Kit, Inc., No. CIV. 06-1219 JP/KBM, 2009 U.S. Dist. LEXIS 119072, 2009 WL*

[3] Dr. Tanya Rutherford Owen relied on Dr. Cantu's evaluations and conclusions, and, therefore, the NCAA's arguments as to Dr. Cantu apply equally to Dr. Owen. *See Gopalratnam v. Hewlett-Packard Co., 877 F.3d 771, 789 (7th Cir. 2017)* (an expert may rely on the conclusions of another expert if the conclusions are themselves reliable).

4263574, at *4 (D.N.M. Mar. 9, 2009) (denying a motion to preclude a neurologist from opining as to a heightened risk of early onset dementia, when neurologist based his opinions on extensive literature and medical evaluations).

Lastly, the NCAA argues that the Court should preclude Dr. Cantu's testimony that he is unable to rule out whether Owens or Solomon will develop chronic traumatic encephalopathy ("CTE") in the future. This objection is well-taken. Dr. Cantu concedes that a clinician cannot confirm or rule out a CTE diagnosis in a living individual using current technology. Cantu Report Owens ¶ 270; Cantu Report Solomon ¶ 264. And Dr. Cantu has diagnosed both Plaintiffs with persistent PCS, not CTE. Accordingly, the Court finds that Dr. Cantu's opinion that he cannot "rule out" CTE in the future would not be helpful to the jury in any way. *See, e.g.*, Krik v. Crane Co., 76 F. Supp. 3d 747, 752-53 (N.D. Ill. 2014) ("The primary basis for the 'Any Exposure' theory seems to be that Krik's experts cannot rule out that a single **[*20]** dose of asbestos causes injury. . . . This is not an acceptable approach for a causation expert to take."). Moreover, whatever probative value it would have had would be substantially outweighed by the prejudice such testimony would have upon the NCAA and likely would confuse the jury into believing that Plaintiffs are likely to get CTE in the future. Accordingly, the Court bars Dr. Cantu from opining that he cannot rule out that either Plaintiff will eventually develop CTE.

The NCAA's motion to bar the testimony of Dr. Cantu is granted in part and denied in part as described above.

2. Dr. Tanya Owen

Plaintiff Owens has retained Dr. Owen as a vocational rehabilitation expert. Dr. Owen received a Ph.D. in Rehabilitation from the University of Arkansas and a Master of Science in Counseling Psychology from the University of Southern Mississippi. She also has taught doctoral and masters candidates in rehabilitation counseling in health professions.

Dr. Owen is a certified life care planner, disability management specialist, and rehabilitation counselor. She has published dozens of articles on topics related to life care plans and has received numerous awards from international professional **[*21]** organizations for her work in life care planning and rehabilitation. For almost thirty years, Dr. Owen has developed life care plans for individuals with injuries, conducted vocational and wage-earning capacity evaluations, and performed short-and long-term care needs projections. Based on her experience and knowledge, she has provided in-court testimony more than two dozen times.

Dr. Owen has developed a life care plan for Owens. It includes a vocational evaluation, projected annual loss of earnings, and projected medical costs. As part of her analysis, Dr. Owen concludes that Owens's vocational outlook has been impacted by his delayed labor market entry. She also projects an annual loss of earnings based on his PCS, as diagnosed by Dr. Cantu. In addition, she asserts that it is more likely than not that Owens will exit the labor market sooner than he would have, had he not been disabled. Lastly, she opines that Owens is likely to incur ongoing medical costs due to his PCS and provides projected costs.

The NCAA advances several arguments to bar Dr. Owen's opinions. First, it contends that she lacks specialized medical knowledge and experience regarding individuals with PCS. But vocational **[*22]** experts need not have medical knowledge for the type of opinions that Dr. Owen offers; they may rely on medical records and medical expert reports. *See* Momeni-Kuric v. Metro. Prop. & Cas. Ins. Co., No. 3:18-CV-00197-RGJ, 2019 U.S. Dist. LEXIS 125794, 2019 WL 3416677, at *3 (W.D. Ky. July 29, 2019) ("[V]ocational experts often rely on medical expert opinions in opining on an individual's employment opportunities.").

Here, Dr. Owen bases her opinions on Owens's medical records and vocational test results, Dr. Cantu's opinions regarding his persistent cognitive limitations, her evaluation of Owens's after multiple interviews, and her extensive experience in life care planning and rehabilitation for individuals with disabilities, including those with brain injuries. These are precisely the kinds of data upon which experts like Dr. Owen may rely. *See, e.g.*, Deperrodil v. Bozovic Marine, Inc., 842 F.3d 352, 362 (5th Cir. 2016) (discussing medical history, interviews, work history, earnings record, treating physician's assessment); Stevens v. Bangor & Aroostook R.R. Co., 97 F.3d 594, 600 (1st Cir. 1996) (discussing medical records, work history, interview, review of jobs in area); Corrigan v. Methodist Hosp., 234 F. Supp. 2d 494, 500 (E.D. Pa. 2002) ("Moreover, we also find Ms. Patterson's testimony to be well within her ken as a rehabilitation expert/consultant who was charged with the development of a life care plan for the plaintiff. We cannot find that she diagnosed or otherwise **[*23]** identified a disease afflicting the plaintiff

from her symptoms; it rather appears that she reviewed [plaintiff's] medical and treatment history . . . ."), *aff'd*, *107 F. App'x 269 (3d Cir. 2004)*.

Next, the NCAA challenges the reliability of Dr. Owen's methodology on various grounds: (1) she did not vet Dr. Cantu's qualifications; (2) she did not examine each and every one of Owens's medical records; and (3) she disregarded or miscategorized certain relevant factors. However, based upon the record, the Court finds that such issues go to the weight of Dr. Owen's testimony, not its admissibility. *Manpower, Inc. v. Ins. Co. of Pa., 732 F.3d 796, 808 (7th Cir. 2013)* ("The reliability of data and assumptions used in applying a methodology is tested by the adversarial process and determined by the jury . . . .").

The NCAA also takes aim at Dr. Owen's projection that Owens will exit the labor market at age forty-nine. In developing this projection, Dr. Owen relies on Owens's medical records and vocational test results, Dr. Cantu's opinions regarding Owens's persistent cognitive limitations, and her evaluation of Owens in light of her training. She also considered Dr. Cantu's opinion that Owens is at a heightened risk for worsening cognitive impairments and early onset of dementia, as well **[*24]** as a 2006 peer-reviewed study concluding that disabled subjects showed a fifty percent decline in employment in their forties. *See* Cantu Report Owens ¶ 267; Def.'s Ex. 3, Owen Report at 11, ECF No. 438 (citing Judith M. Mitchell et al., *The Effects of Aging on Employment of People With and Without Disabilities*, 49 REHAB. COUNSELING BULL. 157 (2006)).[4] This is sufficient to satisfy the requirements of *Rule 702*.

For these reasons, the NCAA's motion to bar Dr. Owen's testimony is denied.

3. Dr. Ralph Scott

Owens retained Dr. Ralph Scott as a forensic economist to calculate his lost earning capacity. Dr. Scott has a Ph.D. in economics from Tulane University and has been an economics professor at Hendrix College in Arkansas for over forty years.

[4] The NCAA also asserts that Dr. Owen's reliance on this study is misplaced because it is unclear whether any of the subjects suffered from PCS. But whether any of the disabilities discussed in the study are meaningfully different from PCS goes to the weight of her testimony.

The NCAA does not question Dr. Scott's qualifications, but takes umbrage with his methodology. According to the NCAA, Dr. Scott's testimony should be barred because his conclusions are based on Dr. Owen's expert report and its conclusion that Owens suffered a three-year delay in entering the labor market. Dr. Scott also considered Dr. Owen's opinion that Owens has experienced and will continue to experience the pay-gap between what male college graduates with **[*25]** disabilities earn as compared to those without disabilities. However, "as a general matter, there is nothing objectionable about an expert relying upon the work [of] a colleague." *Gopalratnam, 877 F.3d at 789*. And a motion to bar an economist's opinion solely because it relies on another expert's admissible opinion generally raises an issue of the testimony's weight. *See, e.g.*, *Brown v. Smith & Wesson Corp., No. 4:08-CV-04065, 2011 U.S. Dist. LEXIS 172012, 2011 WL 13233194, at *3 (W.D. Ark. Feb. 28, 2011)* (denying a motion to bar Dr. Ralph Scott's testimony because he relied on the admissible opinions of a vocational expert).

The NCAA also contends that Dr. Scott's methodology in calculating Owens's lost earning capacity is unreliable because it is based on national statistics for the average earnings of males with a bachelor's degree published in United States Census Bureau ("U.S. Census") surveys. Instead, the NCAA argues, Dr. Scott also should have considered geographic and other individual-specific information when arriving at his calculations. Given the general soundness of his methodology, however, Dr. Scott's decision to use national averages versus more particularized data also goes to weight. *See Africano v. Atrium Med. Corp., 561 F. Supp. 3d 772, 778 (N.D. Ill. 2021)* ("That [an expert] did not consider . . . all possible factors . . . goes to the weight and not the admissibility of his testimony.") **[*26]** (internal quotation marks and citation omitted).

Next, the NCAA faults Dr. Scott for failing to consider Owens's work history. But, according to Owens, he suffered from cognitive disabilities starting in college before he entered the work force and before he was able to develop a significant work history. Given Owens's theory of damages, the NCAA's argument that Dr. Scott should have considered Owens's work history is insufficient to prohibit his testimony at trial. *See Earl v. Bouchard Transp. Co., 735 F. Supp. 1167, 1172 (E.D.N.Y. 1990)* ("Earning capacity is determined by what a plaintiff could have earned even if he or she never worked to that capacity in the past.") (internal quotation marks omitted); *Scanlan v. Sunbeam Prods., Inc., No. 3:12-CV-9-S, 2015 U.S. Dist. LEXIS 177741,*

2015 WL 10711206, at *22 (W.D. Ky. Sept. 1, 2015)* (holding that *Rule 702* and Daubert do not preclude reliance on statistical databases or demand "unrealistic specificity" where the plaintiffs "suffered injury prior to beginning their work life, such as students").

Finally, in the NCAA's view, Dr. Scott has not identified a reliable methodology for selecting the appropriate discount factors when calculating the present value of future expenses Owens will incur as a result of his injuries. Dr. Scott explains that his objective was "to project corresponding future expenses over Owens's lifetime and then to discount **[*27]** future costs into present value terms." Def.'s Ex. 38, Scott Report ("Scott Report") at 1, ECF No. 448. He used a real discount factor of 1.0% for medical components of the life care plan and 2.5% for non-medical cost computations. *Id.* at 2. He calculated these discount factors based on the fact that inflation and interest rates automatically move together with investments in inflation-indexed bonds. *Id.* As a result, in Dr. Scott's view, "it is the differential between interest and inflation that is important." *Id.*; *see Doca v. Marina Mercante Nicaraguense, S.A., 634 F.2d 30, 37 (2d Cir. 1980)* ("[T]here is a fairly constant relationship between interest and inflation rates, so that it is more reasonable to make a prediction about the relationship of both rates than about the level of interest rates alone."). To the extent that the NCAA disagrees with this approach, it may subject Dr. Scott to vigorous cross-examination at trial. *See Vanskike v. ACF Indus., Inc., 665 F.2d 188, 211-12 (8th Cir. 1981)* ("Assumptions such as those [an] economist ma[kes that include a discount factor] go to the weight of the evidence and not its admissibility.").

For the reasons explained, the NCAA's motion to bar Dr. Scott's testimony is denied.

4. Harold Bialsky

Bialsky is a certified life care planner, rehabilitation counselor, and brain injury **[*28]** specialist. He has worked as a vocational evaluator and life care planner for twenty-six years. Solomon retained Bialsky to provide a vocational evaluation and life care plan and to estimate his future medical costs and loss of earning capacity.

Bialsky has a master's degree in rehabilitation counseling from New York University, a doctorate in chiropractic from Los Angeles College of Chiropractic, and a bachelor's degree in life sciences from Bloomfield College in New Jersey. Furthermore, he has co-written a chapter in a book on rehabilitation and neurology, *see* MICHAEL P. BARNES & HARRIET RADERMACHER, COMMUNITY REHABILITATION IN NEUROLOGY (2003), and has provided in-court expert testimony approximately seventy-five times since 2014.

In arriving at his opinions, Bialsky has considered Dr. Cantu's report, Solomon's medical records from 2005 to 2018, and multiple interviews with Solomon. As Bialsky puts it, he relied on Solomon's history, physical injuries, diagnostic testing, and evaluations, as well as his own experience, knowledge, and skill in providing vocational evaluations and life care plans.

The NCAA first asserts that Bialsky is not qualified because he is not a medical doctor. **[*29]** But Bialsky is not providing a medical opinion. Instead, he relies on Dr. Cantu's diagnosis and his opinion that Solomon's cognitive, behavioral, and emotional deficits are likely to be permanent. Bialsky also factors in Dr. Cantu's conclusion that Solomon's cognitive impairments will likely worsen to the point that he will require daily living assistance. As noted above, an expert can rely upon the opinions of other disclosed experts when conducting their own analysis.

The NCAA also believes that Bialsky must be an economist in order to calculate Solomon's loss of earning capacity. But numerous courts have allowed vocational evaluators without formal economic training to provide opinions on lost earning capacity. *See, e.g.*, *Zhao v. United States, 963 F.3d 692, 697 (7th Cir. 2020)* ("Mrs. Zhao's vocational expert . . . provided a number of estimates of S.'s lost earning capacity based on different levels of education he might attain."); *Michalesko v. Office Max, No. 4:04cv2479, 2006 U.S. Dist. LEXIS 97290, 2006 WL 5186520, at *3 (M.D. Pa. Aug. 15, 2006)* (finding that although vocational counselor "lack[ed] qualifications as a forensic economist . . . [or] an economic expert," his experience as a vocational specialist permitted him to testify "in the area[] of calculating annual earning capacity").[5]

[5] The Court finds the cases cited by the NCAA unpersuasive, either because the expert at issue was an economist, not a vocational evaluator, or because the plaintiff's damages theory was based on lost earnings, rather than the less demanding theory of lost earning capacity. *Cf. Stacy v. PPC Transp. Co., No. 4:11-CV-4018, 2013 U.S. Dist. LEXIS 196023, 2013 WL 12171870, at *3 (W.D. Ark. Feb. 19, 2013)* (stating that lost earning capacity does not require the same specificity or detail as does proof of loss of future wages because proof of specific

Next, the NCAA argues that Bialsky's methodology is unreliable **[*30]** because he did not examine each and every one of Solomon's medical records. But the NCAA fails to point out any particular medical record that it thinks would have made a difference. And to the extent it can point to any, the NCAA may raise it on cross-examination.

Furthermore, the NCAA contends that, in reaching his conclusions, Bialsky improperly ignores the impact that Solomon's drug and alcohol addiction would have on his vocational future. But Bialsky indicates that he reviewed medical records that specifically addressed Solomon's substance abuse. *See* Bialsky Report at 12-13, 14, 17-19, 23-24. And given Bialsky's extensive knowledge and experience in creating life care plans for individuals, including those who may have struggled with addiction, the NCAA may cross-examine him regarding his consideration of such issues.

The NCAA also questions the reliability of Bialsky's assumption that Solomon will exit the work force and require some level of daily living assistance at age fifty. This is based on Dr. Cantu's opinion that Solomon is at a heightened risk of developing early onset dementia. Because Bialsky's assumption is largely premised upon Dr. Cantu's medical opinion and because **[*31]** Bialsky is a vocational evaluator with specializing experience with individuals with brain injuries, the Court finds that this too goes to the weight, rather than the admissibility of Bialsky's opinions.

Lastly, the NCAA asserts as unreliable Bialsky's projections regarding the educational level that Solomon would achieve but for his injuries. Bialsky first cites to peer-reviewed articles for the proposition that the number of years of schooling completed by parents is the most important factor influencing the number of years of schooling completed by a child. Bialsky Report at 28 (first citing Faizal Sharma, *Predicting the Adult Earning Capacity of Minors*, ECONOMICA (Mar. 20, 1997), https://economica.ca/predicting-the-adult-earning-capacity-of-minors/, and then citing Robert Haveman & Barbara Wolfe, *The Determinants of Children's Attainments: A Review of Methods and Findings*, 33 J. ECON. LIT. 1829 (1995)). Then, he observes that Solomon's parents obtained multiple master's degrees and a doctorate degree to estimate the educational qualifications that Solomon himself would have achieved. The Court finds that this methodology is sufficiently reliable under Rule 702 for presentment to a jury. **[*32]** *See, e.g.*, Zhao, 963 F.3d at 697 (considering vocational expert's estimates of "lost earning capacity based on different levels of education he might attain.").

As discussed above, the Court finds that Bialsky's opinions will assist the jury in its determinations, and the NCAA's motion to exclude Bialsky's testimony is denied.

5. Kristin Kucsma

Kristin Kucsma is a forensic economist, who has an ABD and master's degree in economics from Rutgers University and a bachelor's degree in economics from Seton Hall University. She has worked as a forensic economist for sixteen years. Prior to that, she taught economics at Drew University, Seton Hall University, Saint Peter's College, and Rutgers. Kucsma has published several articles in peer-reviewed journals on subjects relating to forensic economics. Solomon retained Kucsma to estimate the present value of his lost earning capacity, fringe benefits, lifetime adjusted earnings, and the cost of lifetime care.

The NCAA first faults Kucsma for relying upon the opinions of Dr. Cantu and Bialsky as part of conducting her own analysis. Because the Court has found those opinions reliable, however, this argument fails.

Additionally, the NCAA argues that Kucsma's methodologies **[*33]** for arriving at three critical factors in her analysis—a 4.8% multiplier for fringe benefits, 3.9% multiplier for wage growth, and a 4% discount factor—were unreliable.[6] As for the first, Kucsma states that she based the 4.8% multiplier on U.S. Department of Labor statistics detailing average employer contributions to retirement and savings plans. Def.'s Ex. 30, Kucsma Report at 8, ECF No. 444. The Court finds this methodology sufficiently reliable, and to the extent that the NCAA wishes to argue that she should have examined more local statistics, it can raise this at trial.[7]

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pecuniary loss is not indispensable to recover for lost earning capacity).

[6] The NCAA takes issue with Kucsma's estimate of an increase of 5% of gross earnings for job maintenance. But Kucsma estimates a 5% *reduction* for job maintenance. The Court assumes that the NCAA does not take issue with a reduction.

[7] The NCAA cites Joffe v. King & Spalding LLP, No. 17-CV-3392 (VEC), 2019 U.S. Dist. LEXIS 163671, 2019 WL 4673554, at *7-8 (S.D.N.Y. Sept. 24, 2019), where a district

Next, Kucsma arrived at a 3.9% multiplier for wage growth by reviewing data published by the U.S. Department of Labor and determining how much wages had increased in past years. She compared those figures with the Department's Occupational Employment Statistics across all occupations, including sales-related positions. According to Kucsma, in her professional opinion, the best way to predict future wage growth is to rely on historical data and statistics concerning all occupations." Def.'s Ex. 31, Kucsma Dep. at 270:14-17, ECF No. 445. For its part, the NCAA believes that she should have limited her review **[*34]** to sales-related positions and/or the solar panel industry, in which Solomon worked. But, again, questions such as this go to her testimony's weight, not admissibility.

As for Kucsma's estimate of a 4% discount rate to calculate present value, she relied on historical yields and current spot rates on high-grade, fixed-income, tax-exempt, and inflation-indexed municipal bonds, as well as financial market trends. *See id.* at 320:12-22; Kucsma Report at 15. As Solomon points out, even NCAA's expert, Dubravka Tosic, has indicated that these are factors that she would consider when evaluating a discount rate. *See* Pls.' Ex. 2, Tosic Dep. at 142:21-143:18, ECF No. 400. And, contrary to the NCAA's arguments otherwise, Kucsma is entitled to rely on her extensive experience and knowledge as an economist in calculating discount rates without citing any particular treatise. Her opinion regarding the appropriate discount rate, as well as her estimates of fringe benefits and earnings growth, will assist the jury in its determination of any damages.

The NCAA also contends that Kucsma's report relies on outdated data. Like each and every expert report in this case, Kucsma's report states that she relied **[*35]** on the information available to her when drafting her report. And she states that if the case goes to trial, she will update her calculations based on current information regarding Solomon's earnings. Kucsma Dep. at 230:5-10. Accordingly, this is not a reason for precluding her opinions at this time.

court precluded Kucsma from valuing fringe benefits using the same national average of all employer contributions, but the Court finds the case distinguishable. In *Joffe*, the plaintiff was a practicing attorney at a large law firm, whereas here Solomon alleges he was injured prior to entering the work force. Because it is unclear where in the United States Solomon would have worked or what career or profession he would have been able to obtain but for his PCS, the Court finds that Kucsma's reliance upon a national average is sufficiently reliable for trial.

Finally, Kucsma's analysis provides three distinct projection of damages based on whether Solomon would have obtained a bachelor's degree, master's degree, or doctorate degree. However, at various points in her report, she describes her conclusions as a "range of loss." Because such phrasing inaccurately describes Kucsma's opinions, she will be prohibited from referring to her calculations as a "range" or any similar wording.

For these reasons, the NCAA's motion as to Dr. Kucsma is denied, except as to the characterization of her damages calculations as a "range."

B. Plaintiffs' Motions to Strike Opinions of the NCAA's Rebuttal Experts

Owens and Solomon move to bar the NCAA's expert, Christopher Stankovich. In addition, Owens separately moves to strike the testimony of Dr. David Lewin, and Solomon separately moves to strike the testimony of Dr. Brent Morgan.

1. Dr. Christopher Stankovich

Dr. **[*36]** Stankovich has a Ph.D. in clinical counseling and counseling psychology, a master's degree in clinical counseling education, and a bachelor's degree in psychology and sociology. His doctoral dissertation examined the sport retirement transition of elite-level athletes, and he co-authored a book on the subject. For over twenty-five years, Dr. Stankovich has provided clinical counseling to student-athletes and has taught psychology, counseling, sport management and business classes to undergraduate and graduate students. He has authored four other books on sports psychology of high school and college athletes, and has written articles regarding high school athletics in various magazines. The NCAA has offered him as a rebuttal witness.[8]

Plaintiffs challenge a number of Dr. Stankovich's opinions. First, they contend that, because he does not

[8] Generally speaking, Dr. Stankovich provides three opinions: (1) a reasonable person in the position of Owens and Solomon would have a basic understanding of the risks and dangers of brain injuries in competitive college contact sports; (2) Owens and Solomon followed a normative life pattern consistent with the retirement of an elite-level athlete; (3) Owens and Solomon were not treated therapeutically using commonly accepted interventions and strategies after they retired from sports.

have any medical training or expertise, he is unqualified to offer any opinion as to whether concussions Plaintiffs suffered during college caused their current injuries. For example, Dr. Stankovich states that "[t]here is much more evidence and support for psychosocial factors impacting [Plaintiffs'] post-retirement distress than head injuries." And, **[*37]** to Owens in particular, he opines that "Owens had a brain tumor, further complicating any cause-effect relationship between concussions and post-sport retirement distress." Pls.' Mot. Strike Test. Christopher Stankovich, Ph.D., Ex. A, Stankovich Report Owens ("Stankovich Report Owens") at 18, ECF No. 357-1; *id.*, Ex. B, Stankovich Report Solomon ("Stankovich Report Solomon") at 20, ECF No. 357-1.

For its part, the NCAA points out that Dr. Stankovich has reviewed the depositions, deposition exhibits, and expert reports in this case and has applied his extensive expertise in assisting collegiate athletes transition to post-college life. What is more, Dr. Stankovich cites a peer-reviewed article to support his methodology of relying on such materials to become familiar with an individual's psychological distress, treatment options, and clinical evaluations. Thus, the Court finds that Dr. Stankovich is qualified to opine that there is evidence that Plaintiffs' post-retirement stress and other psychosocial factors have contributed to their cognitive limitations.

At the same time, the Court finds that Dr. Stankovich lacks the medical training and experience necessary to testify as to the degree **[*38]** to which those factors caused or contributed to Plaintiffs' current ailments relative to Plaintiffs' prior head traumas. His lack of medical training also precludes him from testifying as to what impact, if any, Owens's tumor "complicat[ed] any cause-effect relationship between concussions and post-sport retirement distress."

In addition to these opinions, Plaintiff anticipate that Dr. Stankovich will testify that "serious questions surround the [pharmaceutical] drug therapies that [Plaintiffs] experienced, and the side effects." Stankovich Report Owens at 19; Stankovich Report Solomon at 21. The NCAA denies that he will offer such testimony, but his expert reports suggest otherwise. For example, in his report discussing Owens, Dr. Stankovich states:

> Owens was prescribed various drugs to treat his mood state, attention, and anxiety. Drugs prescribed and used include Cymbalta and Zoloft. While these drugs are commonly prescribed, concerned critics worry about the established, serious FDA warnings of side-and/or interaction-effects that, ironically, can exacerbate problems—or even create new problems (be it from side-and/or interaction-effects with other drugs).

Stankovich Report at 18; **[*39]** *see, e.g.*, Def.'s Ex. 66, Stankovich Dep. at 61:15-17 (stating that he listed Plaintiffs' prescribed drugs), ECF No. 453, *id.* at 115:12-16 (discussing psychotropic medications and side effects); 116:13-16 (same); 178:10-180:1 (same); 182:23-186:15 (intimating that he cannot rule out that Plaintiffs' symptoms were side effects of the drugs they were prescribed); 236:12-242:6 (addressing Solomon's prescribed drugs and side effects).

Dr. Stankovich is not qualified to offer these opinions. As Plaintiffs point out, Dr. Stankovich is a clinical psychologist, not a medically licensed prescriber or someone who has studied the side effects of the specific prescription drugs he identifies. Furthermore, Plaintiffs correctly state that Dr. Stankovich cites a single website, http://clinical pharmacology.com, in support of this opinion, and he does not explain how his experience or expertise allowed him to arrive that these opinions. *See* Stankovich Report Owens at 44; Stankovich Report Solomon at 46; *see also* Stankovich Dep. at 186:4-11 (admitting that he is not a prescriber and that he is speculating about the side effect potential of Cymbalta and Zoloft). As a result, Dr. Stankovich may not state **[*40]** or suggest that Plaintiffs' symptoms may have been caused by a side effect of the drugs they were prescribed. *See e.g.*, *Krik, 76 F. Supp. 3d at 752-53* ("The primary basis for the 'Any Exposure' theory seems to be that Krik's experts cannot rule out that a single dose of asbestos causes injury. . . . This is not an acceptable approach for a causation expert to take.").

That said, as a clinical psychologist, Dr. Stankovich is qualified to opine that, in his experience counseling collegiate athletes, it is more difficult for a clinical psychologist to evaluate an individual and determine the causes of their mental and emotional distress, if that person is taking the types of drugs discussed above due to their side effects.

The NCAA also offers Dr. Stankovitch to testify that "student athletes should have been aware of the potential risks of playing college contact sports for many years." Stankovich Report Owens at 18; Stankovich Report Solomon at 20. According to the NCAA, Dr. Stankovich is able to provide such testimony, based upon his twenty-five years of experience in counseling student-athletes who have played contact sports and his review of Plaintiffs' medical records.

After reviewing the record, the Court finds **[*41]** that Dr. Stankovich is qualified to testify that, of the many college athletes he has counseled over the years, many were aware of the potential risks of playing college sports. His twenty-five years of experience counseling collegiate athletes and helping them deal with the aftermath of college sports provides him an adequate basis for this opinion. However, he may not testify as to what a hypothetical college athlete (including Plaintiffs here) "should have known." Dr. Stankovich's professional experience does not imbue him with the ability to make what amounts to a "reasonableness" determination, and he will be prohibited from doing so.

Finally, to the extent that the NCAA would like the jury to conclude that, because Dr. Stankovich's clients were aware of concussion risks, Plaintiffs too must have been aware of such risks, the NCAA can ask the jury to make such an inference, but Dr. Stankovich will not be permitted to make that inference for them.

For these reasons, Plaintiffs' motion to bar Dr. Stankovich's testimony is granted in part and denied in part.

2. Dr. David Lewin

Dr. Lewin has a Ph.D. in management with a specialization in human resources management and employment relations, **[*42]** a master's degree in business administration with a specialization in accounting, and a bachelor's degree in accounting. He is a professor emeritus of management, human resources, and organizational behavior at the UCLA Anderson Graduate School of Management. Prior to joining UCLA, Dr. Lewin was a professor, director of the Ph.D. program, director of the Human Resources Research Center, and faculty director of the Senior Executive Program at Columbia University Graduate School of Business. He has published over thirty books, over forty chapters of books, and over seventy professional journal articles on wage determination, labor relations, and human resource management. He is a member of the board of directors of the National Academy of Human Resources and has provided in-court expert testimony on over sixty occasions.

The NCAA has retained him to rebut the testimony of Owens's expert, Dr. Scott. "The proper function of rebuttal evidence is to contradict, impeach or defuse the impact of the evidence offered by an adverse party." *United States v. Grintjes, 237 F.3d 876, 879 (7th Cir. 2001)* (internal quotation marks omitted). A rebuttal expert "is not required to provide an alternative calculation of damages when challenging the reliability of **[*43]** the opinions offered by an opposing expert." *Alexander v. Take-Two Interactive Software, Inc., No. 18-CV-966-SMY, 2020 U.S. Dist. LEXIS 177131, 2020 WL 5750033, at *3 (S.D. Ill. Sept. 26, 2020)*.

Dr. Lewin takes issue with Dr. Scott's: (1) reliance on Dr. Owen's opinions as to Owens's life care plan and lost earning capacity, (2) assumptions regarding Owens's past work and future economic loss; (3) assumptions when estimating lost fringe benefits; (4) methodology in selecting discount rates; and (5) failure to consider any offset in the event that Owens may be employed in the future. Owens objects, arguing that Dr. Lewin has never served as an expert witness in a personal injury case. But, given the limited nature of Dr. Lewin's rebuttal opinions, the Court finds that he is qualified to offer them.

Next, Owens contends that Dr. Lewin does not provide a reliable methodology to conclude that Dr. Scott's estimates of economic loss are invalid. But Dr. Lewin describes the bases for his critiques of Dr. Scott. For example, he highlights Dr. Scott's failure to conduct an independent analysis of past or future economic loss, relying solely on Dr. Owen's assumptions. In addition, Dr. Lewin opines that Dr. Scott erred by not asking Owens whether he would have sought a part-time job, full-time job, or no job at all after he graduated college. **[*44]** Dr. Lewin also takes issue with Dr. Scott's failure to tie his estimated percentage of fringe benefits to the type of job or jobs that Owens might have in the future. Lastly, Dr. Lewin states that Dr. Scott ignored other rates of return, such as the 7.0% average annual net rate of return between 1950 and 2009, or the 11.66% average annual net rate of return between 1987 and 2016, on the Standard & Poor's 500 stock portfolio. Use of such rates would have resulted in far lower estimates of economic losses. Because the Court is satisfied that Dr. Lewin has provided a reliable methodology for these opinions, Plaintiffs' motion to strike Dr. Lewin's rebuttal testimony is denied.

3. Dr. Brent Morgan

This brings us to the final expert at issue. Dr. Brent Morgan has a medical degree from Ohio State University and is licensed by the medical board for the State of Georgia. He is also board certified in emergency medicine and medical toxicology. Dr.

Morgan has been a professor at the Emory School of Medicine in the Department of Emergency Medicine for nine years and has taught medical students for over twenty-five years. He has served as an attending physician and medical director at various health **[*45]** care facilities in or near Atlanta. Dr. Morgan is presented as a rebuttal expert to challenge Dr. Cantu.

Specifically, Dr. Morgan opines that Solomon has suffered from substance abuse disorder and post-traumatic stress disorder ("PTSD") since prior to his attending college. In Dr. Morgan's view, Dr. Cantu failed to consider the full impact of Solomon's PTSD when arriving at his conclusions.

Solomon focuses on Dr. Morgan's statements regarding whether Solomon suffered from PTSD and argues that Dr. Morgan is not qualified to offer them. Dr. Morgan's opinions about Solomon's PTSD are solely based on comments by Solomon and his mother in his medical records. Pl.'s Mot. Strike Test. Brent W. Morgan, M.D. ("Pl.'s Mot. Morgan"), Ex. A, Morgan Report at 5, ECF No. 366. Dr. Morgan then compares Solomon's self-described symptoms to symptoms of PTSD, citing the Mayo Clinic's website and two articles in support. *Id.* at 4-5, 11.

Dr. Morgan admits, however, that he has never diagnosed a patient with PTSD; he refers patients to psychiatrists for a PTSD diagnosis. *Id.* at Ex. B, Morgan Dep. ("Morgan Dep.") at 124:15-22, ECF No. 366-1. Nor does he recall ever teaching medical students about PTSD, *id.* at **[*46]** 43:15-18, or provide any support for the notion that a physician can rely entirely upon comments made by a patient or relative in medical records for diagnosing PTSD. Dr. Morgan also concedes that he lacks any knowledge or understanding of the relationship between PTSD and traumatic brain injuries. *Id.* at 117:16-23.

Given Dr. Morgan's lack of knowledge about PTSD and his dearth of experience in diagnosing patients with PTSD, the Court finds that he is not qualified to opine as to whether Solomon suffered from PTSD or whether Solomon's cognitive, behavioral, and emotional functioning were impacted by PTSD.[9] Accordingly, the Court grants Solomon's motion to bar Dr. Morgan's opinions on PTSD.

III. Conclusion

For the reasons provided, the NCAA's motions to preclude certain testimony of Dr. Robert Cantu and Kristin Kucsma are granted in part and denied in part, and its motions to bar the opinions of Dr. Tanya Rutherford Owen, Dr. Ralph Scott, and Harold Bialsky are denied. Plaintiffs' joint motion to strike certain testimony of Dr. Christopher Stankovich is granted in part and denied in part, Owens's motion to strike the testimony of Dr. David Lewin is denied, and Solomon's motion to strike **[*47]** certain testimony of Dr. Brent Morgan is granted.

IT IS SO ORDERED.

ENTERED: 7/27/22

/s/ John Z. Lee

JOHN Z. LEE

United States District Judge

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[9] Dr. Morgan has taught residents at bedside and in an opioid clinic that PTSD is a potential risk factor for developing substance abuse disorder. *Id.* at 48:16-23. As such, he is qualified to offer this limited opinion. But because the Court bars Dr. Morgan's opinion that Solomon suffered from PTSD, and because the NCAA does not assert that it will establish Solomon's diagnosis by any other means, this limited opinion is irrelevant.

Reynoso v. Levine

United States District Court for the Southern District of New York

July 27, 2021, Decided; July 27, 2021, Filed

19 Civ. 151 (LGS)

Reporter
2021 U.S. Dist. LEXIS 247767 *

ELBA REYNOSO, Plaintiff, -against- BARRY LEVINE et al., Defendants.

Subsequent History: Dismissed by, Without prejudice *Reynoso v. Levine, 2021 U.S. Dist. LEXIS 243509 (S.D.N.Y., Dec. 21, 2021)*

Core Terms

opposes, reasons, lost earnings, police report, guilty plea, ticket, immigration status, further order, medical bill, jury trial, outstanding, prejudicial, disclosure, discovery, motions, parties, traffic

Counsel: **[*1]** For Elba Reynoso, Plaintiff: Richard M. Winograd, Ginarte, O'dwyer, Gonzalez & Winograd, LLP, New York, NY; Steven R. Payne, NYC Law Department, Office of the Corporation Counsel (NYC), New York, NY.

For Federal Express Corporation, Barry Levine, Defendants: Jennifer Huang, KMA Zuckert LLC, New York, NY; Anthony William Eckert, III, Kaplan, Massamillo & Andrews, L.L.C., New York, NY.

Judges: LORNA G. SCHOFIELD, UNITED STATES DISTRICT JUDGE.

Opinion by: LORNA G. SCHOFIELD

Opinion

ORDER

LORNA G. SCHOFIELD, District Judge:

WHEREAS, on November 4, 2020, the parties filed motions *in limine* in anticipation of trial. The motions are resolved as follows:

Defendants seek to preclude the testimony of New York City Police Officer Christopher McDermott as to how the accident occurred based on Federal Rules of Evidence ("FRE") 401, *402*, *602* and *802*. Plaintiff opposes. The motion is GRANTED for substantially the reasons argued by Defendants, but Officer McDermott may testify to the admissible statements in the police report and his observations upon arriving at the scene.

Defendants seek to preclude the police report of the accident at issue from being introduced as evidence based on *FRE 401*, *402*, *602* and *802*. Plaintiff opposes. The motion is GRANTED IN PART **[*2]** and DENIED IN PART. The diagram attached to the police report is excluded as prejudicial, but the remainder of the report is admissible for substantially the reasons argued by Plaintiff.[1]

Defendants seek to preclude introduction of Defendant Levine's guilty plea to a traffic violation based on *FRE 401*, *402*, *403*, *602* and *602*. Plaintiff opposes. The motion is GRANTED IN PART and DENIED IN PART. The details of the charge on the ticket are precluded as prejudicial, but the plea and the description of the rule on the ticket are admissible for substantially the reasons argued by Plaintiff. Defendant Levine may explain why he pleaded guilty rather than contesting the charge.

Defendants seek to preclude Plaintiff's life care expert, Harold Bialsky, from providing expert testimony based on *FRE 402* and *702*. Plaintiff opposes. Defendants' motion is DENIED for substantially the reasons argued by Plaintiff. Bialsky's testimony is admissible to show the

[1] Police reports are admissible under the business records exception but third-party statements in those reports require a hearsay exception. *See* *Petschauer v. United States, No. 13 Civ. 6335, 2016 U.S. Dist. LEXIS 41141, 2016 WL 1271035, at *4 (E.D.N.Y. Mar. 29, 2016)* (citing *Parsons v. Honeywell, Inc., 929 F.2d 901, 907 (2d Cir. 1991)*).

potential costs of future medical treatment, but Plaintiff must separately meet her burden of convincing the jury that the need for the surgery, treatment and the procedures included in Bialsky's report is not speculative.

Defendants seek to preclude Plaintiff from offering **[*3]** any evidence or testimony regarding outstanding medical bills or liens as special damages due to a late disclosure. Plaintiff opposes. The motion is DENIED for substantially the reasons argued by Plaintiff. Defendant may conduct additional discovery limited to this issue, if necessary.

Defendants seek to preclude Plaintiff from offering evidence or testimony regarding future lost earnings. Plaintiff opposes. The motion is DENIED for substantially the reasons argued by Plaintiff, but (1) any such evidence must be consistent with Plaintiff's evidence concerning her ability to work and (2) evidence assuming she is totally unable to work is precluded.

Plaintiff seeks to preclude testimony or evidence relating to her immigration status based on *FRE 401*, 402, 403. Defendant opposes if evidence of Plaintiff's lost earnings is permitted. The motion is DENIED, but such evidence or argument is admissible solely on the issue of future lost earnings substantially for the reasons argued by Defendants. In sum, it is

ORDERED that Defendants' motion to preclude testimony of Officer McDermott as to how the accident occurred is GRANTED; Defendants' motion to preclude the police report is GRANTED IN PART and DENIED **[*4]** IN PART; Defendants' motion to preclude Defendant Levine's guilty plea and the traffic ticket is GRANTED IN PART and DENIED IN PART; Defendants' motion to preclude the expert report and testimony of Bialsky is DENIED; Defendants' motion to preclude the second supplemental disclosure is DENIED; Defendants' motion to preclude evidence of future lost earnings is DENIED; and Plaintiff's motion to preclude evidence relating to her immigration status is DENIED. It is further

ORDERED that the parties shall complete all discovery in relation to Plaintiff's outstanding medical bills by **August 27, 2021**. It is further

ORDERED that the jury trial scheduled for September 27, 2021, at 9:45 a.m., is adjourned to **October 18, 2021, at 9:45 a.m.**, subject to the need for, and availability of, suitable courtrooms for jury trials. The final pre-trial conference will be set closer to the trial date.

The Clerk of Court is respectfully directed to close the motions at Dkt. Nos. 42, 44, 45, 46, 47 and 48.

Dated: July 27, 2021

New York, New York

/s/ Lorna G. Schofield

LORNA G. SCHOFIELD

UNITED STATES DISTRICT JUDGE

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Reichmann v. Whirlpool Corp. & Kitchenaid, Inc.

United States District Court for the Eastern District of New York

March 9, 2021, Decided; March 9, 2021, Filed

CV 16-5151 (AYS)

Reporter
2021 U.S. Dist. LEXIS 269394 *

RIVKA REICHMANN, Plaintiff, -against- WHIRLPOOL CORPORATION and KITCHENAID, INC., Defendants.

Prior History: *Reichman v. Whirlpool Corp., 2019 U.S. Dist. LEXIS 200413, 2019 WL 6134011 (E.D.N.Y., Nov. 19, 2019)*

Core Terms

expert testimony, reliable, life care, vocational, rehabilitation, principles

Counsel: **[*1]** For KITCHENAID INC., Defendant: Brian Kenneth Cifuentes, Leader & Berkon LLP, New York, NY; Carolyn Isaac, PRO HAC VICE, Michael Best & Friedrich LLP, Chicago, IL; Glen A. Silverstein, Leader & Berkon LLP, New York, NY; Michael Bess, PRO HAC VICE, Michael Best & Friedrich LLP, Chicago, IL; Robert W. Foster Jr., PRO HAC VICE, Nelson Mullins Riley & Scarborough L.L.P., Columbia, SC.

For Rivka Reichmann, Plaintiff: Gabriel Posner, LEAD ATTORNEY, Posner Law PLLC, White Plains, NY; Kenneth B. Goldblatt, Goldblatt & Associates P.C., Mohegan Lake, NY.

For Whirlpool Corporation, Defendant: Brian Kenneth Cifuentes, Leader & Berkon LLP, New York, NY; Carolyn Isaac, PRO HAC VICE, Michael Best & Friedrich LLP, Chicago, IL; Glen A. Silverstein, Leader & Berkon LLP, New York, NY; Michael Bess, PRO HAC VICE, Michael Best & Friedrich LLP, Chicago, IL; Paul E Benson, LEAD ATTORNEY, PRO HAC VICE, Michael Best & Friedrich LLP, Milwaukee, WI; Robert W. Foster Jr., PRO HAC VICE, Nelson Mullins Riley & Scarborough L.L.P., Columbia, SC; Sarah T. Eibling, Nelson Mullins Riley & Scarborough LLP, Columbia, SC.

Judges: Anne Y. Shields, United States Magistrate Judge.

Opinion by: Anne Y. Shields

Opinion

ORDER

SHIELDS, Magistrate Judge:

Defendants **[*2]** move this Court to exclude the opinions and testimony of Dr. Harold Bialsky, Plaintiff Rivka Reichmann's life care planner and vocational expert.

For the reasons set forth below, the Court denies Defendants' motion to preclude the opinions and testimony of Dr. Harold Bialsky.

ANALYSIS

I. A. Legal Principles

Federal Rule of Evidence 702 permits testimony by an expert witness "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." "Experts may testify on questions of fact as well as mixed questions of fact and law, including mixed questions that embrace the ultimate issue to be decided by the factfinder. *Fiataruolo v. United States, 8 F.3d 930, 941 (2d Cir. 1993)*; see *Fed. R. Evid. 704*.

The proponent of the expert testimony has the burden of establishing, by a preponderance of the evidence, that the testimony is competent, relevant, and reliable. See *Daubert v. Merrell Dow Pharm., Inc, 509 U.S. 579, 592-93, 592 n.10 (1993)*. To determine whether a proposed expert's testimony is admissible under *Rule 702*, the Court must therefore examine: (1) the proposed expert's qualifications; (2) whether the proposed testimony is

relevant, that is, whether it would be helpful to the factfinder; (3) whether the proposed testimony is based on reliable data and methodologies. Id.

An expert's testimony **[*3]** is relevant if it fits the issues to be resolved in the case and is directed to matters within the witness's scientific, technical, or specialized knowledge. *Fed. R. Evid. 704*. "[E]xpert testimony that usurp[s] either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying that law to the facts before it, by definition does not aid the jury in making a decision." *Nimely v. City of N.Y., 414 F.3d 381, 397 (2d Cir. 2005)* (second alteration in original) (internal quotation marks and citation omitted); see *Hygh v. Jacobs, 961 F.2d 359, 363 (2d Cir. 1992)*.

For example, this means that an expert in an antitrust case cannot testify to whether a party's conduct was "anticompetitive" or "unlawful" under the Sherman Act, but can, for example, testify about factors that would tend to show anticompetitive conduct in a market and describe why, in the expert's opinion, those factors are present in case at hand. See *U.S. Info. Sys., Inc. v. Int'l Bhd. of Elec. Workers Local Union No. 3, 313 F. Supp. 2d 213, 240-41 (S.D.N.Y. 2004)*. An expert could also hypothesize that if certain conduct did occur, economists would expect the market to react in a particular way. Id.

When evaluating the reliability of an expert's testimony, the Court should consider whether the testimony is "grounded in sufficient facts or data" and is "the product of reliable principles and methods," and whether the witness **[*4]** "has applied the principles and methods reliably to the facts of the case." See *Wills v. Amerada Hess Corp., 379 F.3d 32, 48 (2d Cir. 2004)* (internal quotation marks omitted) (quoting *Fed. R. Evid. 702*). The Court "must focus on the principles and methodology employed by the expert, without regard to the conclusions the expert has reached or the district court's belief as to the correctness of those conclusions." *Amorgianos v. Nat'l R.R. Passenger Corp., 303 F.3d 256, 266 (2d Cir. 2002)*; see *Daubert, 509 U.S. at 593-95*. A district court has broad discretion in deciding whether an expert's testimony is reliable under Daubert. *Kumho Tire Co. v. Carmichael 526 U.S. 137, 152, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)*.

The Second Circuit has endorsed an especially broad standard for the admissibility of expert testimony. See *Boucher v. U.S. Suzuki Motor Corp., 73 F.3d 18, 21 (2d Cir. 1996)*. Under this liberal standard,

> expert testimony should be excluded if it is speculative or conjectural, or if it is based on assumptions that are so unrealistic and contradictory as to suggest bad faith or to be in essence an apples and oranges comparison, [but] other contentions that the assumptions are unfounded go to the weight, not the admissibility, of the testimony.

Id. at 21 (internal quotation marks and citations omitted); see also *Amorgianos, 303 F.3d at 267*. Expert testimony on "soft sciences" like economics is less likely to be excluded "because these disciplines require the use of professional judgment," and "challenges may ultimately be viewed as matters **[*5]** in which reasonable experts may differ." *In re Air Cargo Shipping Servs. Antitrust Litig., No. 06-MD-1175, 2014 WL 7882100, at *8 (E.D.N.Y. Oct. 15, 2014)* (internal quotation marks omitted).

B. The Motion to Exclude is Denied

Defendants move the Court to exclude Dr. Bialsky's testimony, arguing that (1) Dr. Bialsky's opinions exceed his scope of practice; (2) Dr. Bialsky's opinions are not the product of reliable principles and methods; and (3) Dr. Bialsky attempts to replace his judgment for that of the jury. See generally, Defs.' Br., Docket Entry ("DE") [72].

First, while it is true that Dr. Bialsky was a chiropractor for 14 years prior to becoming a life care planner and a vocational evaluator, his prior vocation has no bearing on his current ability to render expert opinions in this case. Dr. Bialsky holds a master's degree from NYU in Rehabilitation Counseling, as well as many board certifications as a rehabilitation counselor and a life care planner. See Affidavit of Harold Bialsky ("Bialsky Aff.") ¶ 2, DE [79]. Dr. Bialsky also has over 10 years of experience as a vocational rehabilitation counselor with survivors of traumatic brain injury. Id. ¶ 3. Clearly, Dr. Bialsky has an established presence in the traumatic brain-injury field.

Next, Defendants assert that Dr. Bialsky rendered his own **[*6]** medical opinions regarding the necessity for future care and that his recommendations within the life care plan lack a medical basis. Dr. Bialsky's plan as well as his testimony during the Daubert Hearing held on February 16, 2021, make clear that the contents of the life care plan are based upon opinions rendered by Dr. Brian Greenwald ("Dr. Greenwald"), a rehabilitation psychiatrist who is board-certified in brain injury medicine and is the Medical director of the Brain Injury

Rehabilitation Program at JFK Johnson Medical Center in New Jersey, and Dr. Amy Rosenbaum ("Dr. Rosenbaum"), a neuropsychologist. The opinions relied on by Dr. Bialsky are contained within their respective expert reports.

Defendants further challenge Dr. Bialsky's opinions regarding Plaintiffs vocational impairments, arguing that Dr. Bialsky failed to identify the methodology he used in reaching his opinions and that he made assumptions about Plaintiffs vocational capacity, based, in part, on opinions rendered by medical and psychological specialists. For example, Defendants object to Dr. Bialsky's conclusion that Plaintiff can only work "part-time," arguing that he is not qualified to make such a conclusion. **[*7]** While Defendants have highlighted some important areas of inquiry, these challenges are precisely the type that should be undertaken during a thorough cross-examination. However, to be clear, to the extent that Dr. Bialsky intends to testify regarding the frequency and duration of future treatment, medication, and/or the meaning of "part-time" work, there must first be a medical foundation established.

Finally, Defendants argue that Dr. Bialsky failed to directly consult with Plaintiff's treating physicians when forming his recommendations. Similarly, Defendants challenge the source of Dr. Bialsky's costs of reimbursements for associated care. As established during the Daubert Hearing, while some in the profession may prefer to interpret the standards set in the Consensus and Majority Statements Derived from Life Care Planning Summits to prefer such direct consultation with treating physicians and multiple sources to be utilized for research regarding cost reimbursements for associated care, this is not required by the consensus statements. The weaknesses Defendants identify are not the kind of deep-seated methodological flaws that can preclude an expert's testimony.

Accordingly, Defendants **[*8]** have failed to convince the Court that any flaws in Dr. Bialsky's analysis cannot be adequately explored through cross-examination. See In re Vitamin C Antitrust Litig., No. 05-CV-0453, 2012 WL 6675117, at *5 (E.D.N.Y. Dec. 21, 2012). "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert, 509 U.S. at 596*. Dr. Bialsky's testimony is admissible under *Rule 702*.

CONCLUSION

For the foregoing reasons this Court denies Defendants' motion to preclude the opinions and testimony of Dr. Harold Bialsky. However, to the extent that Dr. Bialsky intends to testify regarding the frequency and duration of future treatment, medication, and/or the meaning of "part-time" work, there must first be a medical foundation established.

Dated: Central Islip, New York

March 9, 2021

So Ordered

/s/ Anne Y. Shields

Anne Y. Shields

United States Magistrate Judge

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Bonilla v. 504 Woodward, LLC

Supreme Court of New York, Queens County

September 2, 2020, Decided; September 2, 2020, Filed

Index No: 708250/20

Reporter
2020 N.Y. Misc. LEXIS 25565 *

ESTEBAN BONILLA, Plaintiff, v. 504 Woodward, LLC, Defendant.504 WOODWARD LLC, Third-Party, Plaintiff, v. DA SILVA CONSTRUCT6ION, INC. Third-Party, Defendant.

Prior History: Bonilla v. 504 Woodward, LLC, 68 Misc. 3d 1217(A), 130 N.Y.S.3d 271, 2020 N.Y. Misc. LEXIS 5095 (Sept. 2, 2020)

Core Terms

third-party, opines, brain injury, summary judgment, cross motion, pain, grave injury, injuries, common-law, permanent, memory, cognitive, impairment, headaches, records, cause of action, disability, alleges, spine, mild, indemnification, concentration, employable, indicates, cervical, symptoms, neck, bill of particulars, reasonable degree, supplemental bill

Judges: **[*1]** HONORABLE ALLAN B. WEISS, Judge.

Opinion by: ALLAN B. WEISS

Opinion

Short Form Order

The following papers read on this motion by third-party defendant Da Silva Construction, Inc. (Da Silva) pursuant to CPLR 3212 for summary judgment dismissing the third-party claims for common-law indemnity and contribution asserted by defendant/third-party plaintiff 504 Woodward LLC (504 Woodward) against third-party defendant Da Silva; this cross motion by plaintiff pursuant to CPLR 3212 for summary judgment on his causes of action for violation of Labor Law §§ 240(1) and 241(6) asserted against defendant 504 Woodward in the complaint; and this cross motion by defendant/third-party plaintiff 504 Woodward for summary judgment dismissing the causes of action asserted against it in the complaint based upon violation of Labor Law § 200 and common-law negligence.

Papers Numbered

Notice of Motion - Affidavits - Exhibits EF Doc. #4-#20

Notices of Cross Motion - Affidavits - Exhibits EF Doc. #21-#32, #46-#63, #75-#76

Answering Affidavits - Exhibits EF Doc. #33- #45, #64-#74, #77-#87, #88-#98

Reply Affidavits EF Doc.#99-#120

Upon the foregoing papers it is ordered that the motion and cross motions are determined as follows:

Plaintiff commenced this action on August 26, 2015 seeking to recover **[*2]** damages for personal injuries he allegedly sustained on July 16, 2015, during the course of his first day on the job at a construction/demolition site, located at 504 Woodward Avenue, in Ridgewood, New York. Plaintiff alleges that he was assigned to remove debris from a building and bring it outside to put it in a truck, parked at the curb. He allegedly climbed a ladder leaning against the truck to put some debris, which he carried in a bucket, into the truck. According to plaintiff, as he descended the ladder with the empty bucket, he was caused to fall onto the sidewalk when the ladder moved sideways. Plaintiff named 504 Woodward, as the alleged owner of the property where the accident occurred, as defendant, asserting claims based upon violations of Labor Law §§ 200, 240(1) and 241(6), as well as common-law negligence, and defendant 504 Woodward served an answer. Subsequently, defendant 504 Woodward commenced a third-party action against third-party defendant Da Silva for contractual indemnification and beach of contract to procure insurance. Third-party plaintiff 504 Woodward thereafter amended the third-party complaint, adding causes of action against third-party defendant Da Silva for common-law indemnification **[*3]** and contribution. Third-party

defendant Da Silva served an answer to the amended third-party complaint, asserting various affirmative defenses, including a fifth affirmative defense that the third-party action against it is barred by *Workers' Compensation Law §§ 11* and *29(6)* and the " 'grave injury' rule."

Third-party defendant Da Silva Construction, Inc. (Da Silva) moves pursuant to *CPLR 3212* for summary judgment dismissing the third-party claims for common-law indemnity and contribution asserted against it by third-party plaintiff 504 Woodward. Plaintiff opposes the motion, and cross moves pursuant to *CPLR 3212* for summary judgment on the issue of liability on his causes of action to recover damages for violations of *Labor Law § § 240(1)* and *241 (6)* asserted against defendant 504 Woodward in the complaint. Third-party defendant Da Silva and defendant/third-party plaintiff 504 Woodward oppose the cross motion by plaintiff. Defendant/third-party plaintiff 504 Woodward cross moves pursuant to *CPLR 3212* for summary judgment dismissing the causes of action asserted against it in the complaint based upon common-law negligence and *Labor Law § 200*. Defendant/third-party plaintiff 504 Woodward has not appeared in relation to the cross motion by third-party defendant Da Silva. Plaintiff **[*4]** opposes the cross motion by defendant/third-party plaintiff 504 Woodward.

A motion for summary judgment may be made by any party to an action after the joinder of issue (*CPLR 3212[a]*). The court may set a date after which no such motion may be made, provided that the date is no earlier than 30 days after the filing of the note of issue *(id).* In this case, the preliminary conference order dated February 16, 2016, the court directed that any motion for summary judgment be made no later than 120 days after the filing of the note of issue, "but under no circumstances beyond 120 days of the filing of the [n]ote of [i]ssue absent further order of the court." By so-order stipulation dated February 27, 2019, plaintiff was directed to file a note of issue and certificate of readiness on or before July 31, 2019. Plaintiff timely filed the note of issue on July 26, 2019.

Third-party defendant Da Silva moved for summary judgment on November 22, 2019, and therefore it is timely. The cross motions by plaintiff and defendant/third-party plaintiff 504 Woodward, however, are untimely.[1] Neither plaintiff nor defendant 504 Woodward have sought leave to file a late motion for summary judgment, or proffered an excuse **[*5]** for their late filings *(see CPLR 3212[a]*; *Brill v City of New York, 2 NY3d 648, 652, 814 N.E.2d 431, 781 N.Y.S.2d 261 [2004]*).

An untimely cross motion may be entertained where a timely motion for summary judgment has been made on nearly identical grounds *(see* CPLR 3 212 [a]; *Vitale v Astoria Energy II, LLC, 138 AD3d 981, 30 N.Y.S.3d 213 [2d Dept 2016]*; *Wernicki v Knipper, 119 AD3d 775, 989 N.Y.S.2d 318 [2d Dept 2014]*; *Whitehead v City of New York, 79 AD3d 858, 860, 913 N.Y.S.2d 697 [2d Dept 2010]*). The untimely cross motions by plaintiff and by defendant/third-party plaintiff 504 Woodward are improper vehicles to seek affirmative relief against 504 Woodward and plaintiff respectively, since third-party defendant Da Silva is the moving party *(see CPLR 2215*; *Terio v Spodek, 25 AD3d 781, 785, 809 N.Y.S.2d 145 [2d Dept 2006]*; *Mango v Long Is. Jewish-Hillside Med Or., 123 AD2d 843, 844, 507 N.Y.S.2d 456 [2d Dept 1986]*). Although a technical defect of this nature may be disregarded where there is no prejudice and the opposing parties have had ample opportunity to be heard on the merits of the relief sought *(see CPLR 2001*; *Daramboukas v Samlidis, 84 AD3d 719, 721, 922 N.Y.S.2d 207 [2d Dept 2011]*), the untimely cross motions by plaintiff and defendant/third-party plaintiff 504 Woodward are not on the nearly identical grounds as is the timely motion by third-party defendant Da Silva. The motion by third-party defendant Da Silva for summary judgment dismissing the third-party claims for common-law indemnity and contribution asserted by defendant/third-party plaintiff 504 Woodward against it, is predicated upon Da Silva's assertion that plaintiff did not suffer a "grave injury" within the meaning of the *Workers' Compensation Law §11*. Plaintiff's cross motion, on the other hand, seeks **[*6]** summary judgment against defendant 504 Woodward on his

[1] Plaintiff and defendant/third-party defendant 504 Woodward did not cross move for summary judgment until June 24, 2020 and July 1, 2020, respectively. Even taking into account that the filing of papers was suspended by Administrative Order of the Chief Administrative Judge of the New York State Courts (AO/78/20), due to the emergency circumstances caused by the COVID-19 virus outbreak, such order did not take effect until March 22, 2020. By that date, the court-ordered deadline for making a summary judgment motion had passed almost four months earlier. As a consequence, the temporary moratorium on court filings pursuant to AO/78/20, cannot explain the reason for the untimeliness of the making of the respective cross motions for summary judgment by plaintiff and defendant/third-party plaintiff 504 Woodward, let alone serve as good cause for the delay *(see CPLR 3212[a]*).

causes of action for violation of Labor Law §§ 240(1) and 241(6), based upon his claim that 504 Woodward is absolutely liable for its failure to provide him with a proper safety device to prevent his fall, insofar as the ladder was inadequately secured. At the same time, the cross motion by defendant/third-party plaintiff 504 Woodward rests on the factual assertion that it did not exercise supervisory control over the work, and therefore is entitled to summary judgment dismissing the causes of action asserted against it based upon violation of the Labor Law § 200 and common-law negligence *(see* Sheng Hai Tong v K&K 7619, Inc., 144 AD3d 887, 890, 41 N.Y.S.3d 266 [2d Dept 2016]; *see also* Paredes v 1668 Realty Assocs., LLC, 110 AD3d 700, 702 [2d Dept 2013]).

Accordingly, the cross motion by plaintiff for summary judgment against defendant 504 Woodward on the issues of liability for violations of Labor Law §§ 240(1) and 241(6), and the cross motion by defendant/third-party plaintiff 504 Woodward for summary judgment dismissing the causes of action asserted against it in the complaint based upon violation of Labor Law § 200 and common-law negligence are denied.

With respect to the motion by third-party defendant Da Silva for summary judgment dismissing third-party plaintiff 504 Woodward's claims for common-law indemnification and contribution,[2] it is well established **[*7]** that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact," *(Alvarez v Prospect Hosp.,* 68NY2d320,324 [1986]; WinegradvNew York Univ. Med. Or., 64 NY2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 [1985]; Zuckerman v City of New York, 49 NY2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]). If the proponent succeeds, the burden shifts to the party opposing the motion, which then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of its position *(see* Zuckerman, 49 NY2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595).

Third-party defendant Da Silva contends that it is entitled to summary judgment dismissal of the causes of action for common-law indemnification and contribution asserted against it in the third-party complaint based upon the affirmative defense of the exclusivity of Workers' Compensation Law §11.

Claims for common law indemnification and contribution are statutorily barred against an employer in the absence of a grave injury *(see* Fleming v Graham, 10 NY3d 296, 886 N.E.2d 769, 857 N.Y.S.2d 8 [2008]; Grech v HRC Corp., 150 AD3d 829, 54 N.Y.S.3d 433 [2d Dept 2017]; *see also* Ironshore Indem., Inc. v W&W Glass, LLC, 151 AD3d 511, 58 N.Y.S.3d 10 [1st Dept 2017]; Keita v City of New York, 129 AD3d 409, 11 N.Y.S.3d 20 [1st Dept 2015]).

Workers' Compensation Law § 11 describes a "grave injury" as:

"only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent **[*8]** deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability"

(Workers' Compensation Law § 11). A brain injury results in "permanent total disability" constituting a grave injury under Workers' Compensation Law § 11 when the evidence establishes that the injured worker is no longer employable "[i]n any capacity" *(*Rubeis v Aqua Club, Inc., 3 NY3d 408,413[2004]).

The "proponent of a motion for summary judgment seeking to dismiss a third-party action for want of a grave injury is ... obligated to prove, prima facie that the plaintiff did not sustain a grave injury" *(*Fitzpatrick v Chase Manhattan Bank, 285 AD2d 487, 488, 728 N.Y.S.2d 484 [2d Dept 2001]). Parties seeking to disprove the existence of a grave injury to the brain must submit evidence that the injured work is "no longer employable in any capacity" *(*Rubies, 3 NY3d 408,413; *see* Grech v HRC Corp., 150 AD3d 829, 54 N.Y.S.3d 433; Purcell v Visiting Nurses Found. Inc., 127 AD3d 572, 8 N.Y.S.3d 279 [1st Dept 2015]; Bush v Mechanicville Warehouse Corp., 79 AD3d 1327, 912 N.Y.S.2d 768 [3d Dept 2010]).

Third-party defendant Da Silva asserts the injuries allegedly sustained by plaintiff do not qualify as a grave

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[2] Third-party defendant Da Silva does not seek dismissal of the contractual indemnity or breach of contract claims asserted against it in the third-party complaint, nor dismissal of plaintiff's lost earnings claim *(see* Reply Affirmation of Steven R. Goldstein, Esq., dated July 31, 2020, EF Doc. #115).

injury within the meaning of *section 11 of the Workers' Compensation Law*, and hence it, as plaintiffs employer, cannot be held liable for common-law indemnification or contribution under that section. In support of its motion, third-party defendant Da Silva offers, among other things, the affidavit of its counsel, copies of the pleadings, **[*9]** bills of particulars and transcripts of plaintiff's deposition testimony, affidavits/reports of Joseph Pessalano, a vocational rehabilitation specialist and David Masur, Ph.D., a clinical neuropsychologist, affirmed independent medical examination reports of Andrew N. Bazos, M.D. and Edward Torriello, M.D.[3], orthopedic surgeons, and Howard Reiser, M.D., a neurologist, and affirmed report of David M. Erlanger, Ph.D.[4], a clinical neuropsychologist.

It is undisputed that plaintiff was an employee of third-party defendant Da Silva at the time of the accident, and was injured in the course of his employment *(see* deposition transcript, EF Doc. #19). To the extent, however, plaintiff alleges in his complaint, initial bill of particulars dated January 19, 2016, supplemental bill of particulars dated June 28, 2016,[5] and "fourth"[6] supplemental bill of particulars dated October 13, 2016, that he sustained injuries to his ribs, cervical, lumbar and thoracic spine, and shoulders *(see* bill of particulars, fourth supplemental bill of particulars), none of these alleged injuries rise to the level of "grave injuries" within the meaning of *Workers Compensation Law §11*. To the extent plaintiff also alleges he sustained injuries **[*10]** to his limbs, and blood vessels/supply, ligaments, tendons, surrounding tissue and soft tissue, plaintiff makes no claim that these injuries caused him to suffer a permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, or total and permanent blindness or total and permanent deafness. Thus, the claimed injuries to his limbs and blood vessels/supply, ligaments, tendons, surrounding tissue and soft tissue, likewise cannot be classified as "grave injuries" within the meaning of *section 11 of the Workers Compensation Law*.

Plaintiff also alleges injuries to his nervous system, and more specifically, brain injuries. Plaintiff, however, makes no claim that such alleged brain injuries have resulted in paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness. Rather, plaintiff alleges in his complaint that he has suffered "severe and extreme mental shock, anguish and psychic injuries" (complaint ¶35), and in his initial bill of particulars dated January 19, 2016, he alleged he sustained "[h]igh posterior right parietal soft tissue swelling, and "[h]eadaches" as brain injuries. In the supplemental bill of particulars **[*11]** dated June 28, 2016, plaintiff supplemented his allegations of brain injuries to include:

"traumatic brain injury in the nature of a cerebral concussion consisting of diffuse axonal injury and associated axonal shearing injuries. These injuries manifest themselves in headaches, impairments in short term memory and concentration, impairments in ability to focus attention for sustained periods of time, difficulty with word finding and memory as associated with speech, difficult in organizational abilities, headaches, dizziness, nausea and vestibular impairments both while ambulating and in motion, cognitive and physical fatigue, sensitivity to bright light (photophobia) and noise (phonophobia), impairments in appetite and sleep patterns.

- post-concussion syndrome

- neuropsychological deficits."

In the Fourth Supplemental Bill of Particulars *(see* EF Doc. #12), plaintiff further alleges that he has sustained a brain injury causing him to have "[d]iffculty with tasks requiring sustained attention, concentration and memory." Plaintiff additionally alleges that his brain injuries and "their natural sequelae" are permanent, "except those of a temporary or superficial nature" (Plaintiff's Supplemental **[*12]** Bill of Particulars, EF Doc. # 12).

Third-party defendant Da Silva contends that plaintiff's alleged brain injuries have not caused plaintiff to be "no longer employable in any capacity" *(Rubeis, 3 NY3d 408, 413, 821 N.E.2d 530, 788 N.Y.S.2d 292*) and thus do not constitute grave injuries within the meaning of *Workers Compensation Law §11*.

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[3] Dr. Torriello and Dr. David M. Erlanger, Ph.D., are experts who were retained by third-party plaintiff 504 Woodward. Again, third-party plaintiff 504 Woodward does not appear in opposition to the motion by third-party defendant Da Silva.

[4] *see supra* n 3.

[5] Annexed to plaintiff's supplemental bill of particulars are various items, including reports of Mehrdad Golzad, M.D., his treating neurologist, which are unsworn and not affirmed, and an unsworn report of Avraham Schweiger, Ph.D.

[6] No copy of a "third" supplemental bill of particulars has been presented to the court.

Dr. Torriello's affirmed medical report describes the results of a physical examination performed on December 29, 2016, prior to plaintiff's neck surgery, relative to his spine, chest, shoulders, elbows, wrists and hands. Dr. Torriello opines that plaintiff "reveals evidence of a resolved cervical strain, resolved low back strain, resolved thoracic strain and resolved right 8th rib fracture" and "no objective evidence of continued disability... [or] shoulder injury. Dr. Torriello also opines plaintiff "is able to return to work and normal daily living activities without restriction," and does not require any further orthopedic care." However, because the report does not address any alleged brain/head inj ury sustained by plaintiff, such opinion regarding plaintiff's capability to return to work is not entitled to any weight relative to whether such claimed injury is a grave one.

To the extent third-party defendant Da Silva relies upon **[*13]** the affirmed medical report dated September 18, 2019 of Dr. Bazos, the majority of the report relates to soft tissue injuries to plaintiff's spine and shoulder, rib fractures, and degenerative changes of the spine, and surgery performed on plaintiff's cervical spine. The report also addresses the alleged brain injury, insofar as Dr. Bazos opines that during the examination, plaintiff "was a perfect historian... alert and oriented," answered questions "thoroughly and quickly," and remembered "all the details of the accident" which "correlate with the medical records." Dr. Bazos also opines that plaintiff's mental status during the examination was "excellent" and "there is absolutely no indication of any central nervous system problem" or "objective evidence of any ongoing pathology." Dr. Bazos further opines plaintiff "requires no additional medical treatment in this case and is left with no accident related disability," and "is capable of performing all levels of work."

In his affirmed medical report dated July 31, 2019, Dr. Reiser indicates that plaintiff presented to his office on that date for an independent neurological examination and evaluation with a translator present.[7] According **[*14]** to Dr. Reiser, in preparing the report, he reviewed plaintiff's medical records, including neurological records from Dr. Golzad, and hospital records, EEG, MRI and other imaging reports, reports of independent evaluations, and plaintiff's deposition transcript. Dr. Reiser states plaintiff had a history of head injury with loss of consciousness on July 16, 2015, and cervical myelopathy, and received treatment primarily for cervical and lumbosacral spine involvement, ultimately resulting in surgery by Dr. Merola. Dr. Reiser also states that plaintiff reported he continues to experience pain in his posterior neck, back and right lower extremity, as well as dizziness, but made no report of any cognitive symptom. Dr. Reiser opines the neurological examination did not reveal evidence of radiculopathy or myelopathy "at any level." According to Dr. Reiser, his evaluation of plaintiff through the translator did not suggest a cognitive issue, but rather such issue is based primarily on the records of Dr. (Mehrdad) Golzad. Dr. Reiser noted, however, that improvement over time was documented in the neuropsychological reports, and plaintiff apparently had traveled to his office independently, taking **[*15]** a taxi cab on his own. Dr. Reiser opined that an independent neuropsychological evaluation of plaintiff would be appropriate, but he (Reiser) saw "nothing that would suggest an ongoing cognitive disorder that would limit plaintiff's ability to work and have a productive life."

Mr. Pessalano states in his affidavit, which incorporates his report dated August 29, 2019, that his opinions are based upon his review of the complaint, bills of particulars, plaintiff's medical and Workers' Compensation records, medical and psychological reports,[8] and plaintiff's deposition testimony, and his

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[7] Contrary to plaintiff's assertion, the report of Dr. Reiser is in admissible form. To the extent plaintiff objects to its consideration by the court in the absence of an affidavit from Carolina Tovar, who acted as a Spanish-English interpreter during plaintiff's evaluation by Reiser, third-party defendant Da Silva has supplied an affidavit of Tovar *(see* EF Doc. #119). In her affidavit, Ms. Tovar sets forth her qualifications as a Spanish-English interpreter, and states that she accurately, faithfully and completely interpreted Dr. Reiser's questions from English into Spanish and plaintiff's answers from Spanish into English during the independent medical examination of plaintiff by Dr. Reiser. She also states she reviewed page 5 of the Reiser medical report, and indicates that those portions of the report whereby Dr. Reiser describes plaintiff's translated responses are true and accurate.

[8] Plaintiff objects to Mr. Pessalano's reliance on the medical reports, including the reports of the experts of third-party plaintiff 504 Woodward, in rendering his opinion. It is well established that opinion evidence is permitted so long as it is predicated upon: (1) facts in the record or personally known to the witness or personal knowledge of the facts upon which the opinion rests, or (2) out-of-court material of the kind accepted in the profession as a reliable basis for forming a professional *opinion (see Hambschv New York City Transit Authority,* 63 NY2d723 [1984; *Wagman v Bradshaw, 292 AD2d 84, 739 N.Y.S.2d 421 [2d Dept 2002]*). Mr. Pessalano obtained personal knowledge of the facts by conducting an in-person

vocational assessment interview and evaluation of plaintiff on August 6, 2019. Mr. Pessalano indicates plaintiff reported he suffers continuously from right hip discomfort, "radiating down throughout his right lower extremity," back discomfort and decreased cervical range of motion, but did not offer complaints relative to concentration, attention or memory deficits. Mr. Pessalano also indicates plaintiff reported he is able to walk or stand comfortably stand for 30 minutes continuously, and can sit comfortably for 30 to 45 minutes continuously and "lift up to 15 lbs." Mr. Pessalano set forth plaintiff's **[*16]** educational and vocational history and opines that within a reasonable degree of professional certainty, and taking into account plaintiff's injuries as a result of the accident, plaintiff "can perform the essential functions of occupational titles classified as sedentary or light, according to the Department of Labor Exertional Guidelines."[9]

Dr. Masur states in his affidavit dated October 28, 2019, he interviewed and performed testing on plaintiff on August 9, 2019 and reviewed those records referenced in his report (incorporated into his affidavit), and that his opinions, conclusions and findings are within a reasonable degree of professional certainty. Dr. Masur states that plaintiff's overall performance on tests of nonverbal functioning was within the deficient range (first percentile), but that plaintiff produced a neurocognitive performance which demonstrated "generally intact spatial skills, intact visual memory and attention capacity within normal limits." Dr. Masur opines that at most, plaintiff sustained a mild head injury which symptoms of such an injury can include temporary difficulties with memory and concentration but typically resolve within 6 months after **[*17]** such an injury. Dr. Masur further opines that plaintiff's persistent cognitive impairment in relation to memory and concentration, following a mild head injury four years earlier, "is not within the realm of neuropsychological probability." Dr. Masur also opines that to a reasonable degree of neuropsychological probability, there is no evidence of neurologically-based cognitive impairment of plaintiff which can be causally related to the accident of July 16, 2015. Dr. Masur further opines that from "a cognitive point of view, [plaintiff] is capable of gainful employment, and [plaintiff's] prognosis for continued performance at his optimal level of cognitive functioning is excellent."

Contrary to plaintiff's assertion, Dr. Masur explains the basis for his opinion that plaintiff is employable notwithstanding the finding of deficient nonverbal functioning. Dr. Masur indicates that plaintiff's borderline deficient performances on the tests are the result of his slowness in performing the specific tasks, but that such slow performance "does not refer to plaintiff's overall intellectual capacity."[10] To the extent plaintiff claims that Dr. Masur's opinion regarding the possibility of persistence **[*18]** of cognitive impairment of memory and concentration for four years, following a mild head injury is without a basis, third-party defendant Da Silva offers an additional affidavit of Dr. Masur dated July 9, 2020, wherein Dr. Masur cites two textbooks to support this opinion *(see* paragraph 17, EF Doc. #117).

With respect to the report of Dr. Erlanger, plaintiff objects to its consideration on the ground it is not in admissible form *(see* CPLR 2106; *Pascucci v Wilke, 60 AD3d 486, 873 N.Y.S.2d 910 [1st Dept 2009]*; *Quality Psychological Services, P.C. vNew York Cent. Mut. Fire Ins. Co., 38 Misc 3d 134[A]* [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2013]). Third-party defendant Da

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interview and evaluation of plaintiff, and reviewed the transcript of the deposition testimony of plaintiff. To the extent Mr. Pessalano also reviewed medical reports, plaintiff has failed to cite to any statute or case law precedent which prohibits an expert from reviewing other experts' reports when reaching his or her conclusions. It is notable that plaintiff's own vocational expert, Dr. Harold Bialsky, states in his affidavit/report that in relation to the rendering of his opinion, he reviewed medical reports and the report of Joseph Pessalano.

[9] According to Mr. Pessalano, in reaching such conclusion, he reviewed all the job titles, eliminating those he determined were inappropriate for plaintiff due to plaintiff's lack of talent, skill or "interest pattern" fitting with plaintiff's background, and included a list of representative job'titles he deemed appropriate for plaintiff, i.e.:

"ASSEMBLER & FABRICATOR

BUILDING CLEANING WORKER

COUNTER CLERK

ETCHER & ENGRAVER

FURNITURE FINISHER

HOUSEKEEPING WORKER

JANITOR & CLEANER

LOCKER ROOM ATTENDANT

OPTICAL GOODS WORKER

PRODUCTION INSPECTOR & TESTER."

[10] *see also* affidavit of Dr. Masur dated July 9, 2020 (EF Doc. #117).

Silva, however, has remedied this procedural error by submitting such report in its reply papers in affidavit form *(see* EF Doc. #118). Because plaintiff has not been prejudiced by the technical defect in opposing the motion, the sworn version of the report of Dr. Erlanger shall be considered by the court *(see Berkman Bottger & Rodd, LLP v Moriarty, 58 AD3d 539, 871 N.Y.S.2d 135 [1st Dept 2009]*).

Dr. Erlanger states he interviewed and performed testing on plaintiff on January 9, 2017, and prepared his report after reviewing the records and reports listed in his report. Dr. Erlanger indicates that according to hospital records, plaintiff struck his head and experienced loss of consciousness and dizziness as a result of the accident, but that a CT (scan) and later MRI identified no evidence of acute **[*19]** hemorrhage. Dr. Erlanger states that on various specific tests regarding general intellectual functioning, executive functioning, attention and processing, semantic fluency, memory, visuopatial/constructional skills, plaintiff's scores were ranked in the impaired range, and opines that with regards to the test for mood assessment, plaintiffs score was indicative of mild to moderate symptoms of depression and psychological distress. Dr. Erlanger further opines that with respect to the test regarding somatic perceptions, plaintiff's score was indicative of "exaggerated, varied somatic symptoms of somatic distress." Dr. Erlanger additionally opines that plaintiff obtained numerous scores during the neuropsychological evaluation beyond reference ranges associated with his history of illness and injury. According to Dr. Erlanger, plaintiff performed (1) poorly on numerous procedures that would not be expected to be affected by plaintiff's history of illness and injury, (2) relatively well on ones that would be expected to reveal sensitivity to such a history, and (3) very poorly in comparison to plaintiff "prior assessment."[11] He opines that plaintiff reported somatic and pain symptoms in **[*20]** excess of reports by individuals diagnosed with chronic pain syndrome, and reported normal activities of daily living and an ability to travel independently. Dr. Erlanger opines that within a reasonable degree of professional certainty, plaintiff sustained a mild concussion as a result of the accident, and that mild concussions may result in mild cognitive symptoms which typically resolve within a few hours or days. Dr. Erlanger additionally opines that plaintiff's reports of symptoms of more severe depression and somatic distress are "subject to skepticism."

[11] It is unclear to which prior assessment Dr. Erlanger refers.

Third-party defendant Da Silva has established prima facie that plaintiff's alleged brain injuries do not constitute a grave injury within the meaning of *Workers' Compensation Law § 11 (see Grech v HRC Corp., 150 AD3d 829, 54 N.Y.S.3d 433*; *Purcell v Visiting Nurses Found. Inc., 127 AD3d 572,574*; *Friedv Always Green, LLC, 77 AD3d 788,790 [2d Dept 2010]*). In particular, third-party defendant Da Silva has made a prima facie showing that plaintiff is employable in a sedentary or light capacity through the report of Mr. Pessalano, as supported by the reports of its experts, Dr. Bazos, Dr. Reiser and Dr. Masur, the report of third-party plaintiff's expert, Dr. Erlanger, and plaintiff's own deposition testimony.

In opposition, plaintiff submits, among other things, the affirmation of his counsel, an affidavit of his expert, **[*21]** Harold Bialsky, D.C., M.A., C.R.C., C.L.C.P., a doctor of chiropractic, with a masters degree in rehabilitation counseling, and copies of his deposition transcript, and an affirmed report of Mehrdad Golzad, M.D., plaintiff's treating neurologist.

Dr. Bialsky states that he conducted an in-person interview with plaintiff on October 14, 2019, with the assistance of an interpreter who was fluent in Spanish and English, and reviewed the bills of particulars, and various operative reports, medical and hospital records, notes and reports set forth in his affidavit, including that of Joseph Pessalano. Dr. Bialsky notes that plaintiff reported he left school in his native country of El Salvador in the 10th grade, and did factory or construction work there, before coming to the United States where he worked sorting recyclables, and later worked in construction. Dr. Bialsky also notes plaintiff underwent a multi-level cervical spine fushion surgery on July 12, 2017, and plaintiff reported he suffers from headaches, memory impairment, neck pain and low back pain with concomitant, radiating, right lower extremity pain. Dr. Bialsky states that plaintiff reported the headaches are variable in intensity, **[*22]** strong at times, and sometimes present with intermittent bouts of vision disturbance. In addition, Dr. Bialsky states that plaintiff reported he has difficulty with his memory, e.g. in recalling what he has read, or remembering the items for which he was shopping. Dr. Bialsky further states that plaintiff reported his neck pain is constant, but exacerbated when he makes arcing motions or due to changes in weather. Dr. Bialsky additionally states plaintiff reported that his low back pain is also constant and exacerbated by walking, prolonged sitting and standing, and the right lower extremity pain initiates bouts of diminished balance. According to Dr. Bialsky,

plaintiff also reported that he has difficulty bending and attaining an upright position from his bed, and wears a back brace when out in the community for an extended period of time. Dr. Bialsky states that plaintiff reported the combination of neck and back pain awakens him two or three nights per week, leaving him awake for the rest of the evening. Dr. Bialsky opines that within a reasonable degree of vocational probability, plaintiff is unable "to perform any kind of employment whatsoever" given his lack of abilities, computer **[*23]** skills and experience relative to a "desk" job, and his inability to perform manual labor. Dr. Bialsky also opines that plaintiff is not a candidate for a desk job, the typical alternative solution for employment after a person suffers a permanent injury. Dr. Bialsky further opines that "[p]ersons in pain are distracted" and "unable to offer full function and performance at work." Dr. Bialsky concludes it is unreasonable to expect that, within a reasonable degree of vocational probability, plaintiff will be considered a "qualified individual" by any prospective employer, and hence, plaintiff is "incapable of any employment."

Dr. Bialsky, however, does not specifically address the conclusion reached by Mr. Pessalano, i.e. that plaintiff is capable of doing sedentary jobs, other than desk jobs, or light jobs, e.g. manual jobs which require less significant amounts of physical exertion than construction or demolition.

Dr. Golzad indicates that he examined plaintiff on June 2, 2020, and plaintiff reported occasional mild headaches, dizziness, mood changes, and memory and cognitive dysfunction, for which he achieves "adequate relief with current medications as prescribed by pain management." **[*24]** Dr. Golzad opines that plaintiff was bradyphrenic, alert, oriented and followed commands, but had difficulties with visuospatial and executive function, sustained attention, concentration, memory and recall. In his report, Dr. Golzad sets forth certain lab data, and the interpretation by Dr. Hussman, of a brain MRI performed on May 20, 2020. According to Dr. Golzad, plaintiff scored a "22/30" on the Montreal Cognitive Assessment, a "7" on the GAD-7 inventory, and a "5" on the PHQ inventory, and plaintiff's headache disability index was "88% consistent with complete disability due to cephalgia." Dr. Golzad indicates the interpretation of the MRI showed, among other things "[s]tatistically significant derangement of major metabolite ratios within the centrum semiovale most compatible with traumatic brain injury" and [i]nternal development of significant atrophy within the right globus pallidus and left middle temporal gyrus may be due to early degenerative disorder or progressive post-traumatic brain injury" for which "[c]lincal correlation is needed." Dr. Golzad opines that plaintiff suffers from traumatic brain injury, with post concussion syndrome. Dr. Golzad notes plaintiff has not **[*25]** returned to work since the date of the accident, and opines that "because of [the] severity of [plaintiff's] headaches and a disability index of 88%, [plaintiff] remains totally impaired."

Although Dr. Golzad opines plaintiff remains "totally impaired," due to headaches and a headache disability index of 88%, he does not specifically state that plaintiff is no longer employable in any capacity, or is totally disabled as a result of his claimed brain injuries *(see Rubeis, 3 NY3d, 408, 413, 821 N.E.2d 530, 788 N.Y.S.2d 292*; *Sotarriba v 346 West 17th Street, LLC, 179 AD3d 599, 118 N.Y.S.3d 90 [2d Dept 2020]*; *Grech v HRC Corp., 150 AD3d 829, 54 N.Y.S.3d 433*; *cf. Deschaine v Tricon Const., LLC, 2020 N.Y. Misc. LEXIS 661, 2020 WL 646254 [Sup Ct, New York County, Edmead, J., February 10, 2020]*; *Yong Jung v Argus Realty 202 LLC, 2020 N.Y. Misc. LEXIS 339, 2020 WL 433661 [Sup Ct, New York County, Edmead, J., January 27, 2020]*). To the extent Dr. Golzad asserts plaintiff suffers from neck and back pain, Dr. Golzad does not link the pain to a brain injury sustained by plaintiff, as opposed to pain caused as a result of neck, shoulder or spine injuries sustained by plaintiff. Furthermore, the evidence that plaintiff suffers from various brain conditions, including persistent headaches, depression, post-concussion syndrome, and traumatic brain injury is insufficient to create a triable issue of fact as to whether plaintiff is not employable in any capacity as a result of his claimed brain injury *(see Purcell v Visiting Nurses Foundation Inc., 127 AD3d 572, 8 N.Y.S.3d 279 [1st Dept 2015]*; *Aramburu v Midtown W. B, LLC, 126 AD3d 498, 6 N.Y.S.3d 227 [1st Dept 2015]*; *Anton v West Manor Constr. Corp., 100 AD3d 523, 524, 954 N.Y.S.2d 76 [1st Dept 2012]*).

Under such circumstances, plaintiff has failed to raise a triable issue of fact as to whether he sustained a qualifying grave injury **[*26]** as defined in *section 11 of the Workers' Compensation Law*. Accordingly, the motion by third-party defendant Da Silva for summary judgment dismissing the third-party claims based upon common-law indemnification and contribution asserted against it in the third-party complaint is granted.

Dated: September 2, 2020

/s/ Allan B. Weiss

J.S.C.

End of Document

G.S. v. Labcorp

United States District Court for the District of New Jersey

June 19, 2019, Decided; June 19, 2019, Filed

Civil Action No. 16-2235 (BRM)

Reporter
2019 U.S. Dist. LEXIS 102986 *; 2019 WL 13401899

G.S., et.al., Plaintiffs, v. Labcorp, et.als., Defendants.

Core Terms

Addendum, deposition, group home, organizations, life care, disclosure, deadlines, appears, additional research, factual information, expert report, questioned, harmless, untimely, bolster, enhance, parties

Counsel: **[*1]** For E. S., infants by their guardians ad litem, Michelle Stern and David Stern, MICHELLE STERN, individually, DAVID STERN, individually, Plaintiffs: ROBERT G. HICKS, LEAD ATTORNEY, JAVERBAUM WURGAFT HICKS KAHN WIKSTROM & SININS, FREEHOLD, NJ.

For LABCORP, LABORATORY CORPORATION OF AMERICA, Defendants: CHRISTOPHER ANDREW ROJAO, DAVID J. COONER, LEAD ATTORNEYS, MCCARTER & ENGLISH, LLP, NEWARK, NJ.

Judges: DOUGLAS E. ARPERT, United States Magistrate Judge.

Opinion by: DOUGLAS E. ARPERT

Opinion

MEMORANDUM ORDER

Before the Court is Defendant Laboratory Corporation of America's application to strike the "Addendum Report" authored by Plaintiffs' Life Care Planning Expert, Dr. Harold Bialsky which was served on April 29, 2019. ECF No. 45. Plaintiffs have opposed Defendant's application. ECF No. 45 at Tab 3 and No. 47. Defendant's application was the subject of discussion during a status conference with counsel on May 31, 2019 during which the parties agreed to submit this dispute to the Court informally rather than by formal motion.

In short, Defendant contends that the Addendum Report is untimely, "fundamentally unfair and improper", and "[n]either plaintiffs nor Dr. Bialsky have provided any justification for the service **[*2]** of this late report." ECF no 45 at Tab 2. Defendant describes the Addendum Report as "an after-the-fact effort by Dr. Bialsky to rehabilitate his testimony and bolster his opinions post-deposition." *Id.* Accordingly, Defendant seeks an order striking the Addendum Report.

In response, Plaintiffs maintain the Addendum Report "is simply a response by Plaintiffs' expert to certain questions posed to him during his deposition". ECF No. 47. Further, Plaintiffs argue, the Addendum Report "should not be regarded as adding new, substantive opinions which serve to surprise or prejudice Defendants"; "[t]he information supplied in [the] Addendum Report does not alter, supplement or enhance [Dr. Bialsky's] deposition"; and, "to the extent that Mr. Bialsky's addendum constitutes a technical violation, if any, of *Rule 26* it should be regarded as 'harmless' under *Rule 37*." *Id.*

Pursuant to the operative Case Management Order in this case [ECF No. 31], Plaintiffs' expert reports were to be served by June 15, 2018. Plaintiffs served Dr. Bialsky's initial report, dated May 8, 2018, on June 15, 2018. Dr. Bialsky's deposition was conducted on March 27, 2019. During his deposition, Dr. Bialsky was questioned about his knowledge **[*3]** of organizations that operate group homes which accept private payment rather than strictly payment through entitlement programs such as Medicaid. For example:

> Q. Do you know how many of these organizations on these 14 pages have group homes that would be appropriate for someone with Fragile X?
> A. I am not aware.
> Q. Have you ever had any communications with any of these organizations concerning the placement of a person with Fragile X into a group home that they may run or manage?

A. Not as it relates to this particular life care plan. Attachment to ECF No. 47 at page 43, lines 10-21.

The Addendum Report was served on April 29, 2019, approximately 30 days after Dr. Bialsky's deposition. According to the Addendum Report, following the deposition, Dr. Bialsky "conducted additional research with regard to Group Home charges." ECF No. 44 at Tab 1. Specifically, it appears Dr. Bialsky contacted 5 of the organizations about which he was asked during his deposition to determine which do and which do not accept private reimbursement. The Addendum Report also contains additional factual information concerning the payment arrangements and billing structures of two of those organizations as well as **[*4]** the statement that one organization "is not considered a viable option for this Life Care Plan." *Id.*

Notably, the Addendum Report does not seek merely to correct an inadvertent error or omission. *See* Fed. R. Civ. P. 26(e)(2) (extending to experts a party's duty to supplement a disclosure if "in some material respect the disclosure or response is incomplete or incorrect.") Rather, on its face the report reflects that the expert conducted additional research and gathered new factual information not contained in his original report, and the report appears to include at least one conclusion as to the suitability of one group home for consideration in the Life Care Plan. Contrary to Plaintiffs' contention that the Addendum Report does not "alter, supplement or enhance" the expert's deposition testimony, the report appears to be an attempt to bolster the expert's original opinion — nine months after the deadline to serve expert reports expired. As Defendant correctly observes, permitting the report "runs the risk of never-ending additional fact discovery." ECF No. 45 at Tab2.

Rule 26(a) governs the disclosure of expert testimony. Rule 37(c)(1) provides, in part, "[i]f a party fails to provide information or identify a witness as required **[*5]** by Rule 26(a) ..., the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or harmless." Further, deadlines in a Case Management Order may be modified only upon showing of good cause. Fed. R. Civ. P. 16(f). While, as noted above, supplementation is required under certain circumstances, "Rule 26 does not give parties the right to freely supplement, especially after court-imposed deadlines." Hartle v. FirstEnergy Generation Corp., 7 F. Supp. 3d 510, 517 (W.D. Pa. 2014).

In this case, the burden is on Plaintiffs to demonstrate that the timing of their service of the Addendum Report was consistent with the Federal Rules of Civil Procedure. Simply put, Plaintiffs have not met this burden. For the reasons above, the Court finds the Addendum Report to be an untimely and improper supplement to the report of Dr. Bialsky. Consequently,

IT IS on this 19th day of June 2019

ORDERED that the Addendum Report is STRICKEN.

/s/ Douglas E. Arpert

DOUGLAS E. ARPERT

United States Magistrate Judge

Larson v. Bros. of the Christian Schs. of Manhattan College

Superior Court of New Jersey, Law Division, Bergen County

March 5, 2019, Filed

Docket No.: BER L-5044-17

Reporter
2019 N.J. Super. Unpub. LEXIS 6988 *

ALFRED JOSEPH LARSON and SUSAN LARSON, husband and wife, Plaintiff(s), v. THE BROTHERS OF THE CHRISTIAN SCHOOLS OF MANHATTAN COLLEGE, INC., dba MANHATTAN COLLEGE, MANHATTAN COLLEGE, MICHAEL BRAMUCCI, ABC CORPS, 1-10 (fictitious corporations responsible for damages suffered by plaintiffs, names presently unknown) and JOHN DOES 1-10 (fictitious persons responsible for the damages suffered by plaintiffs, names presently unknown), Defendant(s).

Core Terms

vocational expert, life care, reconsideration, reconsideration motion, incorrect, interview

Counsel: [*1] For The Brothers of the Christian Schools of Manhattan College, inc., d/b/a Manhattan College and Michael Bramucci, Defendants: The Hartford (H00000022, sequence 1), c/o LAW OFFICES OF LINDA S. BAUMANN, Matthew Mahoney, ID# 009071998, East Windsor, NJ.

Judges: ROBERT C. WILSON, J.S.C.

Opinion by: ROBERT C. WILSON

Opinion

ORDER

THIS MATTER having been opened to the Court by the Law Offices of Linda S. Baumann (Matthew Mahoney, Esq., on the application), attorneys for Defendants, The Brothers of the Christian Schools of Manhattan College, Inc., d/b/a Manhattan College and Michael Bramucci, seeking an Order for Reconsideration of the Court's January 11, 2019 Order; and good cause having been shown;

IT IS on this 5th day of March, 2019,

ORDERED that a copy of the within Order be served upon parties and counsel of record who do not receive an electronic filing within 7 days of the date hereof.

/s/ ROBERT C. WILSON

ROBERT C. WILSON, J.S.C.

Papers Considered:

__ Motion

__ Certification

__ Opposition

ALFRED JOSEPH LARSON v. THE BROTHERS OF THE CHRISTIAN

SCHOOLS OF MANHATTAN COLLEGE, INC., et al.

DOCKET NO. BER-L-5044-17

RIDER TO ORDER DATED MARCH 5, 2019

THIS MATTER has come before the Court by way of a motion filed by defendants The **[*2]** Brothers of the Christian Schools of Manhattan College, Inc., and Michael Bramucci (collectively, "Defendants") seeking reconsideration of the following orders of the Court: (1) a January 11, 2019 Order denying Defendants' motion to compel plaintiff Alfred Joseph Larson ("Plaintiff") to appear for an examination with Defendants' vocational and life care planning experts, or in the alternative, barring the report and testimony of Plaintiff's life care and vocational expert and economic expert, and (2) a December 18, 2018 Order permitting Plaintiff's life care and vocational expert and economic expert from testifying at trial (collectively, the "Orders"). For the reasons set forth below, Defendant's motion is hereby **DENIED**.

Reconsideration motions are governed by *R 4:49-2*, which provides "the motion shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or to which it has erred." Such motions are "within the sound discretion of the Court, to be exercised in the interest of justice." *Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996)* (citing *D'Atria v. D'Atria. 242 N.J. Super. 392, 401 (Ch. Div. 1990)*). The motion will be granted only if the Court is satisfied that the judgment was based **[*3]** upon plainly incorrect reasoning, that the Court failed to consider material evidence, or that the Court should consider new information under the circumstances. *Town of Phillipsburg v. Block. 380 N.J. Super. 159 (App. Div. 2005)*; *Cummings. 295 N.J. Super, at 384*. Further, "a litigant should not seek reconsideration merely because of dissatisfaction with a decision of the Court." *D'Atria, 242 N.J. Super, at 401*. "Reconsideration cannot be used to expand the record or reargue a motion." *Capital Fin. Co. of Delaware Valley, Inc. v. Asterbadi, 398 N.J. Super. 299, 310 (App. Div. 2008)*.

The policy justifications underlying the Court's rules governing motions for reconsideration provide that "motion practice must come to an end at some point, and if repetitive bites at the apple are allowed, the core will swiftly sour." *Id. at 402*.

Reconsideration should be utilized only for those cases which fall into that narrow corridor in which either 1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence [...] Alternatively, if a litigant wishes to bring new or additional information to the Court's attention which it could not have provided on the first application, the Court should, in the interest of justice (and in the exercise of sound discretion), consider the **[*4]** evidence.

Cummings, 295 N.J. Super, at 384 (internal citations omitted).

This matter arises from an automobile accident involving Plaintiff and Defendants, Plaintiff allegedly suffered physical and psychological injuries as a result of this accident. On December 18, 2018, the Court entered an order denying Defendants' motion to bar the report and testimony of Plaintiff's life care and vocational expert, Harold Bialsky, and economic expert, Sobel Tinari Economics. On January 11, 2019, the Court entered an order denying Defendants' motion to compel Plaintiff to appear for an examination by Defendants' life care and vocational expert. Defendants now move for reconsideration of both Orders.

Defendants' motion for reconsideration fails because Defendants merely reassert the same argument contained in their initial brief that was considered and rejected by the Court. Defendants do not cite additional case law or facts that would support reconsideration, nor do they cite binding precedent to support their claim that the Court's January 11, 2019 Order is palpably incorrect.

In addition to Defendants' failure to meet the high standard imposed by the Supreme Court for reconsideration, the substance of Defendants' argument is also **[*5]** incorrect. Defendants argue that Plaintiff should be compelled to appear for an interview by Defendants' vocational expert, and cite to R. 4:19 in support of this argument. The Rule states the following:

In an action in which a claim is asserted by a party for personal injuries or in which the mental or physical condition of a party is in controversy, the adverse party may require the party whose physical or mental condition is in controversy to submit to a physical or mental examination by a medical or other expert by serving upon that party a notice stating with specificity when, where, and by whom the examination will be conducted and advising, to the extent practicable, as to the nature of the examination and any proposed tests.

R.4:19.

R. 4:19 is explicit that Defendants cannot compel Plaintiff to appear for an interview and examination unless it involves a mental or physical examination. Nowhere in Defendants' moving papers or notice for said examination have they explained how the proposed examination by their vocational expert is a mental or physical examination.

Defendants also argue that the Court's January 11, 2019 Order should be vacated as it is unfair and prejudices Defendants. They argue **[*6]** that preventing the life care and vocational expert from interviewing Plaintiff would be unfair and against the interests of justice, and therefore, R. 4:19 should be relaxed. However, Defendants have already conducted Plaintiff's deposition and had every opportunity to question Plaintiff as to any information necessary to draft a life plan. Defendants have also had access to other written discovery, as well as independent medical

examinations, where Defendants had the opportunity to ascertain Plaintiff's limitations and needs as it relates to life care planning going forward.

The facts in this matter are distinguishable from those present in Kellam v. Feliciano, a case on which Defendants rely on in support of this argument. *376 N.J. Super. 580, 590*. In Kellam, the unfairness arose from the fact that the defendant had no other way to obtain discovery as to the plaintiffs underlying medical condition without additional discovery. Id. As is made clear above, Defendants had several other opportunities to obtain discovery as to Plaintiff's underlying medical condition for purposes related to life care planning.

Defendants also cite to case law in support of their argument that the Judge committed an abuse of discretion **[*7]** in entering the January 11, 2019 Order. Defendants point to *Milne v. Goldenberg* and *Flagg* v. Essex Cty. Prosecutor to support their claim that the Court's denial of Defendants' application to permit an interview or exam by Defendants' life care planner and vocational experts to interview the Plaintiff was manifest error and explicably departed from the established court rules. *Milne v. Goldenberg, 428 N.J. Super. 184, 197 (App. Div. 2012)*; *Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002)*. However, these cases have nothing to do with an "in effect" deposition by a vocational expert chosen by defense counsel. Defendants have also been given a right to provide an expert report.

Furthermore, Defendants' motion for reconsideration of the Court's December 18, 2018 Order is denied, as it is time barred. Motions for reconsideration must be filed within twenty days of the date of service of the Order upon all parties. *R. 4:49-2*.

As set forth above, Defendants fail to present any new evidence, information, or arguments in their motion for reconsideration to meet the requisite standard for reconsideration. Nothing in Defendants' motion for reconsideration supports a finding that the Court reached its decision upon a palpably incorrect or irrational basis. Defendants' moving papers also lack any new, material evidence that the Court **[*8]** should consider. Defendants solely attempt to reargue their prior motion because they were dissatisfied with the previous outcome. Thus, for the reasons stated above, Defendants' motion for reconsideration is **DENIED**.

Rivera v. Home Depot U.S.A. Inc.

United States District Court for the Southern District of New York

April 3, 2018, Decided; April 3, 2018, Filed

16-cv-7552 (KBF)

Reporter
2018 U.S. Dist. LEXIS 56856 *; 2018 WL 1635026

DANIEL RIVERA, Plaintiff, -v- HOME DEPOT U.S.A. INC., Defendant and Third-Party Plaintiff, -v- BRYAN'S HOME IMPROVEMENT CORP., Third-Party Defendant.

Subsequent History: Appeal terminated, 05/30/2019

Prior History: *Rivera v. Home Depot U.S.A., Inc., 2018 U.S. Dist. LEXIS 31659, 2018 WL 1115160 (S.D.N.Y., Feb. 27, 2018)*

Core Terms

Costs, damages, Surgical, surgery, economic damages, summary judgment, summary judgment motion, nonmoving party, remaining issue, material fact, moving party, speculation, contradict, genuine, grave

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For Home Depot U.S.A. Inc., ThirdParty Plaintiff: Henry Claude Dieudonne, JR, Rafter and Associates, New York, NY; Laurie Paula Beatus, Durkin & Durkin, New York, NY; Arturo Martin Boutin, D'Amato & Lynch, New York, NY.

For Bryan's Home Improvement Corp., ThirdParty Defendant: Robert Joseph Pfuhler, LEAD ATTORNEY, John Patrick Connors, Jr, Connors & Connors, P.C., Staten Island, NY.

Judges: KATHERINE B. FORREST, United States District Judge.

Opinion by: KATHERINE B. FORREST

Opinion

OPINION & ORDER

KATHERINE B. FORREST, District Judge:

Currently pending before the Court is plaintiff's motion for summary judgment on the issue of economic **[*2]** damages. (ECF No. 104.) For the reasons stated below, that motion is GRANTED in part and DENIED in part.

I. BACKGROUND

A. The Incident

For purposes of the pending motion, the Court assumes the parties' familiarity with the facts underlying this action.[1] In short, plaintiff Daniel Rivera ("Rivera" or "plaintiff") was gravely injured on August 22, 2015 when he was electrocuted after falling from a ladder at a construction site in Yonkers, New York. Home Depot U.S.A. Inc. ("Home Depot") was the general contractor at the construction site, and Bryan's Home Improvement Corp. ("BHIC") was the subcontractor and plaintiff's direct employer.

B. Litigation History

The Court also assumes the parties' familiarity with the history of this litigation and the Court's various rulings thus far. As relevant to the pending motion, those rulings include the following:

- On February 27, 2018, the Court denied BHIC's

[1] The Court refers the reader to its previous Opinion & Order at ECF No. 70 for further explanation.

motion for summary judgment on the issue of "grave injury," concluding that BHIC had failed to demonstrate that Rivera did not suffer a "grave injury" as a matter of law. (ECF No. 69.)

• On February 28, 2018, the Court granted plaintiffs partial motion for summary judgment, concluding that Home Depot **[*3]** had violated *N.Y. Lab. Law §§ 240(1)* and *241(6)*. (ECF No. 70.)

• During an in-person conference held March 2, 2018, and for the reasons set forth on the record, the Court granted Home Depot's oral motion on the issue of "grave injury," concluding that Rivera had suffered a "grave injury" pursuant to *N.Y. Workers' Comp. Law § 11*. (ECF No. 74.)
• During an in-person conference held March 6, 2018, and for the reasons set forth on the record, the Court granted Home Depot's motion for contractual and common-law indemnification. (ECF No. 79.) In doing so, the Court noted that "the only remaining issue in this action is the quantum of damages that plaintiff is entitled to recover."
• On March 8, 2018, the Court denied BHIC's motion for reconsideration of its March 6, 2018 decision regarding common-law indemnification.[2] (ECF No. 82.)

As a result of these rulings, it has been established that BHIC is liable for the provable economic and non-economic damages resulting from plaintiffs injury. On March 16, 2018, the parties attended a settlement conference before Magistrate Judge Ona T. Wang, but were unable to reach a resolution on the issue of damages. (ECF No. 97.) Subsequently, on March 20, 2018, this Court set a trial date of April 9, 2018. (ECF No. **[*4]** 99.)

C. Claimed Economic Damages

On March 23, 2018, in accordance with a briefing schedule established by the Court, plaintiff moved for summary judgment on the issue of economic damages. (ECF No. 104.) BHIC opposed that motion on March 30, 2018. (ECF No. 111.)

Plaintiff relies principally on two expert reports in support of his motion for summary judgment: (1) Dr. Harold Bialsky's "Life Care Plan/Vocational Assessment" dated November 8, 2017 (the "Bialsky Report") (ECF No. 104-3 at pp. 17-51); and (2) Dr. Ronald E. Missun's "Medical Care Cost Summary" dated November 15, 2017 (the "Missun Report") (ECF No. 104-5 at pp. 6-20.) It is undisputed that both experts were properly disclosed and both reports were exchanged within the designated discovery window.

Dr. Bialsky, relying on (1) a review of certain medical records, reports, procedures, and evaluations, (2) an in-person interview, (3) recommendations made by one of Rivera's treating physicians (Dr. Jose Colon), and (4) his own experience and expertise, created a comprehensive Life Care Plan "designed to meet the needs of Daniel Rivera through his Life Expectancy" of 79 years of age.[3] (See generally Bialsky Report.) In sum, Dr. Bialsky **[*5]** concluded that Rivera's future medical and related costs (the "Life Care Costs") would fall between $5,941,518.93 and $7,078,306.21.[4] (Id. at 20.) Those costs[5] are broken down as follows:

• Home care (home health aide) - $3,066,000 to $3,942,000;

• Routine medical costs (e.g., pain management needs) - $2,210,400;
• Prescription medications - $60,212.29 to $72,577.01;
• Physical therapy - $338,400.00 to $451,200.00;
• Wheelchair and related items (including a wheelchair accessible van) - $240,483.12 to

[2] The Court also vacated a portion of its February 28, 2018 decision holding that Home Depot had violated *12 NYCRR § 23-1.13(b)(3)* in order "to avoid unnecessary confusion." (ECF No. 82 at 3-4.) The Court's decision to vacate that narrow portion of its previous decision did not affect the ultimate conclusion that Home Depot violated *N.Y. Lab. Law § 241(6)*.

[3] The life expectancy used by Dr. Bialsky was derived from the 2014 version of the United States Life Tables contained in Vol. 66, No. 4 of the National Vital Statistics Reports.

[4] The actual listed recommendation in Dr. Bialsky's report is $5,941,528.61 to $7,078,296.53. However, that recommendation appears to contain a basic arithmetic error. Specifically, Dr. Bialsky appears to have inadvertently included the high-end estimated charge for the "Hand Held Shower" in the low-end aggregate recommendation, and the low-end estimated charge for same in the high-end recommendation. The Court relies on the itemized cost estimates provided by Dr. Bialsky, not the miscalculated aggregate recommendation.

[5] In many cases (e.g., for the home health aide and other goods/services), Dr. Bialsky provided a low-end and high-end estimate based on different providers/manufacturers. Further, in some cases (e.g., for one medication and physical therapy), Dr. Bialsky provided low-end and high-end estimates based on different frequencies.

$372,255.20; and
• Mobility aids, home furnishings, and aids for independent living - $26,023.52 to $29,874.00.

Dr. Bialsky also provided an estimate of costs for potential future surgical interventions (the "Surgical Costs") totaling $713,776. (Id. at 22-30.) The Surgical Costs are contained in an entirely separate section of the Bialsky Report from the aforementioned Life Care Plan, and are broken down as follows:
• Cervical fusion surgery - $269,596.00
• Lumbar fusion surgery - $318,639.00; and
• Left knee replacement surgery - $125,541.00.

Finally, Dr. Bialsky concluded that "within a reasonable degree of vocational probability, Mr. Rivera has sustained a total loss of earnings from the time of the August **[*6]** 22, 2015 incident, and over the remainder of his work life expectancy." (Id. at 35.) Dr. Bialsky did not provide an estimate of damages for the loss of Rivera's expected earnings. Adding together the Life Care Costs and the Surgical Costs, Dr. Bialsky's report provides an economic damage range of $5,941,518.93 to $7,792,082.21.

Using Dr. Bialsky's figures[6] Dr. Missun calculated the present value of Rivera's future medical and related needs as either $6,593,495.00 (excluding Surgical Costs) or $7,307,271 (including Surgical Costs). (See Missun Report at 8-20.) As such, the excess present value of the Surgical Costs is $713,776.00.

II. LEGAL PRINCIPLES

A. Summary Judgment Standard

Summary judgment may be granted when a movant shows, based on admissible evidence in the record, "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. The moving party bears the burden of demonstrating "the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. A fact is considered "material" when its resolution "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. Further, a dispute is considered "genuine" when "the evidence is such that a reasonable **[*7]** jury could return a verdict for the nonmoving party." Id.

In reviewing a motion for summary judgment, the Court construes all evidence in the light most favorable to the nonmoving party, and draws all inferences and resolves all ambiguities in its favor. *Dickerson v. Napolitano, 604 F.3d 732, 740 (2d Cir. 2010)*. The Court's role is to determine whether there are any triable issues of material fact, not to weigh the evidence or resolve any factual disputes. *Anderson, 477 U.S. at 248-49*.

That said, the nonmoving party must actually offer "concrete evidence from which a reasonable juror could return a verdict in [its] favor." *Id. at 256*; see also *Scott v. Harris, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)* (holding that "[w]hen the moving party has carried its burden under *Rule 56(c)*, its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." (quoting *Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*).) It is insufficient for the nonmoving party to "merely assert[] that the jury might, and legally could, disbelieve" certain evidence and/or testimony introduced by the moving party. *Id. at 256-57* (holding that although the moving party bears the burden, the nonmoving party "is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict."); see also *Fed. R. Civ. P. 56(e)*.

B. Damages

Under New York law, it is well established that economic damages **[*8]** (such as future medical expenses) must be established with "reasonable certainty." See, e.g., *Huff v. Rodriguez, 45 A.D.3d 1430, 1433, 846 N.Y.S.2d 841 (4th Dep't 2007)*; *Pouso v. City of New York, 22 A.D.3d 395, 397, 804 N.Y.S.2d 24 (1st Dep't 2005)*; *Tassone v. Mid-Valley Oil Co., Inc., 5 A.D.3d 931, 932, 773 N.Y.S.2d 744 (3d Dep't 2004)*. This standard "does not require mathematical accuracy or absolute certainty or exactness, but only that the loss or damage be capable of ascertainment with reasonable certainty." *Reichman v. Warehouse One. Inc., 173 A.D.2d 250, 252, 569 N.Y.S.2d 452 (1st Dep't 1991)*; see also *E.W. Bruno Co. v. Friedberg, 28 A.D.2d 91, 94, 281 N.Y.S.2d 504 (1st Dep't 1967)*.

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[6] As previously noted, Dr. Bialsky provided a low-end and high-end estimate for certain expected costs (thereby producing a range). In such cases, Dr. Missun used the average of the two estimates in calculating present value. Accordingly, Dr. Missun's figures are not technically a "range," but rather two distinct projections with the only difference being inclusion of Surgical Costs. As discussed infra, BHIC has not challenged Dr. Missun's methodology or sought to preclude the Missun Report.

Pursuant to this standard, "an award for future medical expenses may not be based upon mere speculation." *Faas v. State, 249 A.D.2d 731, 732, 672 N.Y.S.2d 145 (3d Dep't 1998)*; see also *Fiederlein v. N.Y. City Health & Hosp. Corp., 56 N.Y.2d 573, 574, 435 N.E.2d 398, 450 N.Y.S.2d 181 (N.Y. 1982)* ("Mere conjecture, surmise or speculation is not enough to sustain a claim for damages.") With regards to damages for future surgeries, New York courts have shown a clear disinclination to award damages when the actual need for surgery is unknown or indefinite. See, e.g., *Hernandez v. New York City Transit Auth., 52 A.D.3d 367, 369, 860 N.Y.S.2d 75 (1st Dep't 2008)* (holding that jury's award of $30,000 for ankle operation within five years was speculative when plaintiff's witness did not say plaintiff needed such surgery in that timeframe); *Stylianou v. Calabrese, 297 A.D.2d 798, 799, 748 N.Y.S.2d 36 (2d Dep't 2002)* (setting aside award of damages for future surgery where "plaintiff's physician failed to state a basis" for his opinion that plaintiff would require such surgery); *Faas, 249 A.D.2d at 732* (affirming lower court's decision not to award damages for future shoulder surgery when claimant's orthopedic surgeon "failed to offer a definite opinion with regard to the **[*9]** need for surgery").

III. DISCUSSION

Rivera argues, in sum, that because BHIC has failed to introduce any affirmative evidence to refute, contradict, or undermine the Bialsky or Missun reports, he is entitled to summary judgment as to all claimed economic damages (e.g., the Life Care Costs and Surgical Costs). (See Pl.'s Mem. of Law, ECF No. 104-1 at 7 ("Plaintiff has provided this Court with a concrete, admissible and quantifiable roadmap as to the specific economic damages suffered sufficient to establish a prima facie case of economic damages of $7,307,271.00.").) Put another way, Rivera argues that there is no genuine dispute of material fact as to any of the damages reflected in the Bialsky or Missun reports.

BHIC, in a less than two-page opposition (lacking any citations to the record), has advanced two primary arguments: (1) the Bialsky Report is not supported by sufficient medical evidence; and (2) in any event, the quantum of economic damages must be decided by a jury. (See generally BHIC Mem. of Law, ECF No. 111.) But for the following reasons, BHIC's argument is unavailing.

First, BHIC has not moved to exclude the Bialsky or Missun reports under *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*.[7] Thus, despite BHIC's repeated **[*10]** protestation that the Bialsky Report is not supported by sufficient medical evidence, there is no basis for this Court to exclude the Bialsky Report (or the Missun Report) for purposes of the pending motion for summary judgment. It is not immediately clear to the Court why BHIC chose not to challenge the Bialsky or Missun reports (instead focusing significant attention on excluding evidence of quantitative electroencephalography[8]), but that is the reality of the situation. Both reports are effectively uncontested for purposes of the present motion.

Similarly, BHIC's motion to strike the affidavits of Dr. Bialsky, Dr. Jose Colon, Dr. Paul Ratzker, or Dr. Missun is entirely unhelpful to its case. (See ECF Nos. 108, 111-1.) The Court need not and does not rely on any of those affidavits—which were signed after the expert discovery period closed and submitted in connection with plaintiff's motion for summary judgment—to conclude that the Bialsky and Missun reports are admissible and uncontested. And it makes no difference that the Bialsky Report cites recommendations made by Dr. Colon, who was never disclosed as an expert. (See ECF No. 111-1 at 2.) Dr. Colon was one of Rivera's **[*11]** treating physicians, and the Court has considered him as a percipient witness in this case, his most recent affidavit (which the Court has ignored in ruling on this motion) notwithstanding.

Second, and most importantly, BHIC has introduced absolutely no affirmative evidence to contradict any of plaintiff's expert recommendations or calculations. See *Anderson, 477 U.S. at 256* (holding that on summary judgment, the nonmoving party must offer "concrete evidence from which a reasonable juror could return a verdict in [its] favor.") Furthermore, though BHIC argues that "[t]he jury should be permitted to hear the testimony

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[7] BHIC makes passing note of its apparent belief that Bialsky's opinions regarding future medical needs are "outside his areas of expertise." (BHIC Mem. of Law at 1.) But BHIC has chosen not to actually challenge the Bialsky Report or its contents on summary judgment. The Court will not construe the conclusory half-sentence contained in BHIC's opposition memorandum as a legitimate Daubert motion.

[8] BHIC has challenged the findings of Dr. Richard J. McAlister and Dr. Omowunmi Osinubi. (ECF No. 107-5.) Neither of those findings are referenced in the Bialsky Report, nor do they appear to have been considered by Dr. Bialsky in fashioning the relevant Life Care Plan. (See Bialsky Report at 3-4.)

of the plaintiff and plaintiff's experts and weigh their demeanor and credibility and evaluate the evidence," BHIC has failed to proffer even one potential trial argument (or cross-examination strategy) that tends to contradict plaintiff's claimed damages.[9] It is not the Court's job to guess at what BHIC might argue at trial, or to fashion potential lines of cross-examination out of whole cloth (and speculate as to their effectiveness) just to help BHIC defeat summary judgment. And even if the Court did so, that would not change the fact that on summary judgment, a nonmoving party may not "merely **[*12]** assert[] that the jury might, and legally could, disbelieve" certain evidence and/or testimony introduced by the moving party. *Anderson, 477 U.S. at 256-57*.

If BHIC has specific reasons why any of plaintiff's claimed future expenses are inapplicable or unreasonable, it should have presented those arguments to the Court on summary judgment. But it has not, and the Court is left with a situation in which BHIC has: (1) failed to produce any expert or fact evidence tending to contradict plaintiff's claimed damages; and (2) failed to provide even a preview as to any colorable argument that might be raised at trial or on cross-examination. There is simply no basis for the Court to find a "genuine dispute as to any material fact" sufficient to defeat summary judgment as to plaintiff's asserted Life Care Costs. Accordingly, plaintiff's motion for summary judgment as to the Life Care Costs (in the amount of $6,593,495.00) must be GRANTED.

Plaintiff's asserted Surgical Costs, however, require special consideration. As previously noted, an award of future medical expenses cannot be based on conjecture, surmise, or speculation. See *Fiederlein, 56 N.Y.2d at 574*. Even though BHIC has done nothing to contradict plaintiff's need for cervical fusion, lumbar **[*13]** fusion, or left knee replacement, plaintiff has also not done enough to demonstrate his affirmative need for such surgeries. Here, the Surgical Costs calculated by Dr. Bialsky are contained outside his designated Life Care Plan, and nowhere in his report does Dr. Bialsky actually state Rivera is likely to need such surgeries (the Life Care Plan, in contrast, was specifically "designed to meet the needs of Daniel Rivera through his Life Expectancy"). Further, Rivera has not directed the Court to any other expert report stating that such surgeries are medically necessary or likely to occur. Accordingly, Rivera's motion for summary judgment as to the Surgical Costs (in the excess amount of $713,776.00) must be DENIED.

The way that this case has been litigated by BHIC is, quite frankly, mystifying. Many, if not all, of the Court's adverse rulings thus far could have been avoided had BHIC actually engaged in expert discovery, properly moved to exclude plaintiff's damages experts, or made a more serious effort to oppose plaintiff's various dispositive motions (particularly this one). But despite the large amount of liability it now faces, BHIC has made the strategic decision to do none of **[*14]** those things.

IV. CONCLUSION

For the reasons stated above, the Court GRANTS plaintiff's motion for summary judgment at ECF No. 104 in the amount of **$6,593,495.00**. The Court DENIES plaintiff's motion for summary judgment as to the excess Surgical Costs (in the amount of $713,776.00).

As a consequence of this Opinion & Order, the only remaining issues in this case are: (1) whether plaintiff is entitled to recover economic damages for the potential surgical interventions; and (2) the quantum of "pain and suffering" damages that plaintiff is entitled to recover. On March 30, 2018, the parties submitted a Joint Pretrial Order ("JPTO") requesting a total of "[s]ix to seven (6-7) days" for trial. (See ECF No. 113.) That exceeds the amount of time the Court has available for a trial commencing as currently scheduled on April 9, 2018.

Given that the remaining issues in this case are relatively narrow, and given that in any event they must be tried before a jury, the Court believes this action can and should proceed expeditiously before Magistrate Judge Ona T. Wang. Accordingly, the parties are directed to inform the Court whether they consent to this Court referring trial on all remaining issues **[*15]** to Magistrate Judge Wang at or before the final pretrial conference ("FPTC") currently scheduled for **Wednesday, March 4, 2018 at 1:00 p.m**. The Court would also refer decision on the pending motions in limine at ECF Nos. 106 and 107.

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[9] In his affidavit dated March 30, 2018, Michael P. De Carlo argues in a conclusory fashion that "[t]here is no medical evidence in the record to support" plaintiff's claimed medical and related needs. But that, of course, is incorrect. The Bialsky Report, which specifically references thirty-six separate medical records, concluded that Rivera was likely to incur the cited medical costs over the course of his life. BHIC has done absolutely nothing to contradict any of the recommendations made in the Bialsky Report (or any other report introduced by plaintiff).

If the parties do not agree to proceed before Magistrate Judge Wang, they are directed to appear for the currently scheduled FPTC and should be prepared to discuss revised estimates of time for witness testimony on the remaining issues.

The Clerk of Court is directed to close the motions at ECF Nos. 104 and 108.

SO ORDERED.

Dated: New York, New York

April 3, 2018

/s/ Katherine B. Forrest

KATHERINE B. FORREST

United States District Judge

Meade v. Harpt

United States District Court for the District of Kansas

July 27, 2004, Decided; July 28, 2004, Filed

Case No. 02-1417-JTM

Reporter
2004 U.S. Dist. LEXIS 35244 *; 2004 WL 7346162

KARIN L. MEADE, Individually and by and through her spouse and attorney-in-fact PETER J. MEADE, Plaintiff, vs. DANIEL HARPT, M.D., et al., Defendants.

Subsequent History: Reconsideration denied by *Meade v. Harpt, 2004 U.S. Dist. LEXIS 35245 (D. Kan., Sept. 20, 2004)*

Core Terms

studies, fault

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For David Rzeszutko, MD, Defendant: Janet M. Simpson, Lawrence J. Logback, LEAD ATTORNEYS, Simpson, Logback, Lynch, Norris, PA - OP, Overland Park, KS USA.

For Olathe Medical Center, Inc., Defendant: Tamara L. Niles, LEAD ATTORNEY, Law Office of Tamara L Niles, Highlands Ranch, CO USA; Todd A. Scharnhorst, LEAD ATTORNEY, Scharnhorst **[*2]** Ast Kennard Griffin, PC, Kansas City, MO USA.

Judges: J. THOMAS MARTEN, JUDGE.

Opinion by: J. THOMAS MARTEN

Opinion

MEMORANDUM AND ORDER

Four motions are currently before the court. The plaintiff seeks summary judgment on the issue of comparative fault as to the actions of Doctors Harpt, Nitzel, and Dr. Zwibelman in delaying administration of Heparin.[1] Second, defendant Olathe Medical Center (OMC) has submitted three motions in limine.

Comparative Fault

The procedural history of the issue of comparative fault is set forth in the court's prior order (Dkt. No. 242), and that history is adopted herein. To briefly summarize, after plaintiff's experts altered their opinions on the fault of Nitzel, Harpt, and Zweibelman in delaying administration of the Heparin, and in the face of summary judgment motions by those parties, the court required the remaining defendants to identify any evidence they might possess which would cause that issue to remain alive in this action.

In response to the plaintiff's motion, Dr. Rzeszutko and Dr. Zwibelman have filed a pleading indicating that they have no intention of comparing the fault of Dr. Nitzel, Dr.

[1] By its order of June 29, 2004, (Dkt. No. 242) the court construed plaintiff's Response (Dkt. No. 225) as an independent motion for summary judgment on the issue of comparative fault, and required the parties to brief the issue in that light.

Harpt, and Dr. Zwibelman for the delay in using Heparin — but do intend to use the expert **[*3]** reports of Drs. Easton, Caplan, and Smith for impeachment purposes. Meade has no objection to this position. Defendant OMC, however, responded by arguing that the testimony of plaintiff's expert Dr. Edward Lang creates a triable issue as to the delay in using Heparin. At one point in his deposition, Lang agrees with the (subsequently retracted) opinion of Dr. Caplan regarding causation. However, the plaintiff has stated that she will not call Dr. Lang to testify at trial. Without Lang's testimony, Dr. Lang's report is mere hearsay. OMC is therefore left with mere recitation of Lang's deposition testimony. Lang's testimony itself (Lang dep. at 66) simply cross-references the now-withdrawn reports of other experts. Lang's deposition testimony is thus so circumscribed and lacking in foundation that the court cannot find any basis for using it to support a claim of comparative fault. Accordingly — with the understanding that the cited reports may be used for impeachment purposes, the court will grant plaintiff's motion.

Heparin versus Lovenox

Defendant OMC has moved to exclude evidence relating to the change in medication from Heparin to Lovenox. In conjunction with her response to OMC's **[*4]** motion, Meade has filed a *Daubert* motion which seeks to exclude defendant's expert testimony on the effectiveness of Lovenox. All motions will be denied.[2] The relative effectiveness of Heparin versus Lovenox will be presented to the trier of fact.

The facts before the court suggest that plaintiff Meade suffered from vertebral artery dissection (VAD), a condition which creates a risk of blood clotting, which in turn may lead to a dangerous stroke. Persons suffering from VAD are commonly treated with anti-coagulants to prevent such clotting. Plaintiff here suggests that the defendants departed from a standard of care when they switched her treatment from the medication Heparin to Lovenox. Defendant OMC's motion is grounded on the argument that there are no studies to show that Lovenox is less effective than Lovenox. Indeed, according to OMC, there are no studies to show that either Heparin or Lovenox are effective in this context.

Lovenox is a form of Heparin, but contains mostly that medication's low molecular weight molecules. Lovenox is also known as Low Molecular Weight Heparin or LMWH.

The jury will determine whether the decision to change from Heparin to Lovenox represents **[*5]** a departure from the relevant standard of care. It is correct that there are no studies comparing the relative effectiveness of Heparin versus Lovenox. But there is evidence before the court detailing the difficulty of conducting such studies. More importantly, in the absence of such studies, it must be recognized that Heparin has been heavily favored as the drug of choice in standard medical practice. Dr. Zwibelman reported that when he searched for alternate treatments, he "[c]ould not find any treatment other than Heparin." Experience in combination with other factors may supply a foundation for expert testimony. *Cohen v. Lockwood, 2004 U.S. Dist. LEXIS 5989, *4 (D. Kan. 2004)*. Here, there is a general consensus in the medical community that Heparin is the drug of choice for treatment of VAD. (Def. Exh. 3, Dep. of Dr. Caplan, p. 161; Dep. of Dr. Easton, p. 106). There are currently no FDA-approved indications for use of Lovenox for acute CNS ischemia, infarct, thrombotic, or thromboembolic events. The weight of experience and the anecdotal and historical preference has been to support applications of Heparin. On the other hand, there remains an absences of studies demonstrating the relative effectiveness of the two drugs. The court finds that **[*6]** neither party has demonstrated any foundational error in the evidence to be presented to the jury. The jury may consider the issue and the evidence; the motions relating to the issue are denied.

Bialsky Testimony

OMC seeks to exclude the testmony of Harold Bialsky, the plaintiff's lifecare planner. OMC stressses that Bialsky's review of the evidence was minimal and selective. Bialsky is is a Certified Rehabilitational Specialist, a Certified Lifecare Planner, and an unlicensed chiropractor.

The court finds that OMC's argument that Bialsky's testimony must be excluded in its entirety is too broad. For example, it contends that Bialsky "did not get these [his lifecare] recommendations from her health care

[2] In addition to the reasons stated above, plaintiff's *Daubert* motion is untimely. Contrary to the suggestion in plaintiff's brief (Dkt. No. 259, at 23), the court's generosity in prior extensions of time is not justification in itself for abandoning all restraints prior to the approaching trial. Plaintiff did not independently seek extension of the relevant deadline prior to the date that deadline lapsed. The court independently denies plaintiff's *Daubert* motion as untimely.

providers or other medical professionals (SOF 22)," (Dkt. No. 248, at 11). The cited fact, however, only establishes the much more narrow point that Bialsky assumed Meade would stay at her current level of medication, and that he did not independently "confirm this with any of her health care providers." (Id., at 5, ¶ 22).

In each instance cited by OMC, the court finds that Bialsky's testimony is premised on the independent testimony of health care professionals, or is a reasonable inference from **[*7]** such testimony, the inference being reasonably supported within Bialsky's area of expertise. This is not a case, such as those cited by OMC, in which an unqualified lifecare planner is using his plan as a Trojan horse for sneaking independent medical opinions into the view of the jury.

This is not to say, of course, that Bialsky's testimony is reliable or must be accepted by the jury at face value. But OMC must attack that testimony by means of cross examination rather than exclusions.

The Rebuttal Experts

OMC seeks exclusion of the testimony by three experts: Dr. Roger Bick, Dr. Van Halbach, and Dr. A.J. Marengo-Roe, as well as a potential fourth, as yet unnamed expert. The court will permit the use of testimony from Bick, Van Halbach and Marengo-Roe as rebuttal experts. The proffered testimony appears to be soundly rebuttal in nature — directed at contradicting the opinion of the defense expert Dr. Stein that there is no difference between Heparin and Lovenox, and the argument that the quadriplegia was not caused by the medicine switch, but by an extension of Meade's VAD. The cited experts also specialize in areas (hematology, interventional radiology) beyond the three stroke neurologists **[*8]** who formed the first group of plaintiff experts. Neither, after reviewing the chronology of the relevant deadlines and agreed extensions, can the court find any basis for concluding that the naming of the three aforementioned experts violates any time bar imposed by the law or by this court.

IT IS ACCORDINGLY ORDERED this 27th day of July, 2004, that the plaintiff's Motion for Summary Judgment (Dkt. No. 225) is hereby granted as provided herein. The in limine motions of the defendant OMC (Dkt. Nos. 235, 247, 250) are denied. Plaintiff's Motion for Extension of Time to File Response (Dkt. No. 260) is granted. Plaintiff's *Daubert* Motion to Strike (Dkt. No. 266) is denied.

/s/ J. Thomas Marten

J. THOMAS MARTEN, JUDGE