By Order of the Court, *Judge KENNETH L. GOVENDO*

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IN THE SUPERIOR COURT FOR THE

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

JOHN MATSUMOTO, Plaintiff, vs. RJCL CORPORATION dba RNV CONSTRUCTION and RAYNALDO N. ALFONSO, Defendants.	Civil Action No. 17-0060 **ORDER PARTIALLY GRANTING PLAINTIFF'S MOTION TO EXCLUDE EXPERT TESTIMONY, DEFENDANTS' MOTIONS TO STRIKE EXPERT WITNESSES WHITNEY G. MORGAN AND DORIS J. SHRIVER, AND DEFENDANTS' MOTION FOR SUMMARY JUDGMENT REGARDING PUNITIVE DAMAGES**

INTRODUCTION

On May 14, 2019,[1] this Court conducted a hearing on RJCL Corporation dba RNV Corporation ("RNV") and Reynaldo N. Alfonso's ("Reynaldo," and collectively "Defendants") Motion for Summary Judgment Regarding Punitive Damages. On May 30, it heard John Matsumoto's ("Plaintiff") Motion to Exclude Testimony of Dr. Winthrop Smith[2] and Defendants' Motion to Strike Plaintiff's Expert Witness Whitney G. Morgan. Finally, on June 5, the Court heard Plaintiff's Motion to Exclude Testimony of Dr. Uma Srikumaran and Defendants' Motion to Strike Expert Witness Doris J. Shriver. In each hearing, Bruce Berline was present representing

[1] All dates refer to 2019 unless otherwise noted.
[2] Plaintiff filed one motion to exclude the testimony of two expert witnesses, but the parties agreed to argue about each expert in separate hearings.

Plaintiff, and Thomas E. Clifford was present representing Defendants, but neither Plaintiff nor Defendants appeared with counsel.

BACKGROUND

On August 2, 2016, Plaintiff was in a pickup truck waiting for the red traffic light at the intersection of Isa Drive and Chalan Pale Arnold. At the same time, Reynaldo was driving down Capitol Hill toward the same intersection; he was leaving a jobsite in a boom truck owned by his employer, RNV. As Reynaldo approached the intersection, he misjudged the distance and belatedly applied the brakes. The brakes overheated and temporarily failed, causing Reynaldo and the boom truck to collide with the rear end of Plaintiff's pickup. The front right of Reynaldo's 1996 Kia Rhino struck the left rear of Plaintiff's 2008 Honda Ridgeline.

After the collision, Plaintiff informed the police he did not need an ambulance. RNV's mechanic arrived at the scene, and he inspected the brakes, which he found were working properly. Neither vehicle required a tow, so the police allowed RNV's mechanic and Plaintiff to drive the vehicles. Plaintiff then drove to RNV and to RNV's insurance company, where a representative advised Plaintiff to see a doctor. Plaintiff, however, did not see a doctor until he could see his regular physician.

The next day, Plaintiff met with his physician and reported neck, upper back, and shoulder pain from the accident. Plaintiff obtained x-rays of his cervical spine and right shoulder. The impressions of the x-rays were that neither the cervical spine nor the right shoulder was fractured. Plaintiff received a prescription for Celebrex 200mg and was instructed to return in a couple of days. On August 5, 2016, Plaintiff again reported symptoms to his right shoulder, so he was advised to see an "ortho" if the pain persisted.

Two days later, Plaintiff participated in a local golf tournament where he recorded 98 strokes, a score he usually records. Plaintiff then sued Defendants on February 28, 2017, alleging negligence and seeking punitive damages. The following month, Plaintiff obtained an MRI, which showed full-thickness tear of the supraspinatus tendon, tendinosis and tear of the subscapularis tendon, biceps tenosynovitis and intrasubstance tear, and anterosuperior labral tear. Both parties consulted with various experts to prove their claims, and both parties filed motions to exclude the expert witnesses from testifying. Defendants filed an additional motion seeking summary judgment from Plaintiff's request for punitive damages.

DISCUSSION

Defendants seek to exclude part or all the opinions of trucking safety consultant Whitney G. Morgan ("Morgan") and life care planner Doris J. Shriver ("Shriver"). Whereas Plaintiff seeks to exclude part or all the opinions of orthopedic surgeon Dr. Uma Srikumaran ("Dr. Srikumaran") and biomechanical engineer Dr. Winthrop Smith ("Dr. Smith"). Additionally, Defendants seek summary judgment regarding Plaintiff's request for punitive damages. The Court first discusses the parties' motions to exclude expert witnesses, then it discusses Defendants' Motion for Summary Judgment.

A. MOTIONS TO EXCLUDE EXPERT WITNESSES

Legal Standard

CNMI Rule of Evidence 702 allows a person qualified as an expert by knowledge, skill, experience, training, or education to provide opinion testimony if it will help the trier of fact understand evidence or determine a fact in issue. NMI R. Evid. 702; *Commonwealth v. Xiao*, 2013 MP 12 ¶ 43.

In *Commonwealth v. Crisostomo*, the CNMI Supreme Court adopted the United States Supreme Court's admissibility standard for expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). 2018 MP 5 ¶ 19. Under *Daubert*, expert testimony is admissible under Federal Rule of Evidence 702[3] only if it is relevant and reliable. *Daubert*, 509 U.S. at 579. An expert witness may provide opinion testimony if: 1) the testimony is based upon sufficient facts or data; 2) the testimony is the product of reliable principles and methods; and 3) the expert has reliably applied the principles and methods to the facts of the case. NMI R. Evid. 702.

The trial judge must ensure that an expert's testimony rests on a reliable foundation and is relevant to the task at hand. *Daubert*, 509 U.S. at 597. In *Daubert*, the Court identified four factors that may bear on the analysis: 1) whether a theory or technique can be and has been tested; 2) whether the theory or technique has been subjected to peer review and publication; 3) the known or potential rate of error; and 4) whether the theory is generally accepted in the scientific community. *Murray v. S. Route Maritime SA*, 870 F.3d 915, 922 (9th Cir. 2017) (citing *Daubert*, 509 U.S. at 593-94).

But the Ninth Circuit has stated that "the reliability analysis remains a malleable one tied to the facts of each case" and that the "*Daubert* factors are exemplary, not constraining." *Id.* The Ninth Circuit has also stated that "[i]t is important to remember that the factors are not 'equally applicable (or applicable at all) in every case,' " and that "[a]pplicability 'depend[s] on the nature of the issue, the expert's particular expertise, and the subject of his testimony.' " *Id.* (quoting first *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995), then *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999)).

[3] CNMI Rule of Evidence 702 mirrors Federal Rule of Evidence 702, so this Court refers to federal law for guidance. *Crisostomo*, 2018 MP 5 ¶ 14.

A judge's gatekeeping obligation is not limited to scientific knowledge: A judge may apply his gatekeeping obligations to testimony based on technical or other specialized knowledge. *Kumho Tire Co.*, 526 U.S. at 141. A judge can implement methods he deems appropriate to determine how to test an expert's reliability and whether that expert's relevant testimony is reliable. *Id.* at 152-53. Thus, a judge "may permissibly choose not to examine factors that are not 'reasonable measures of reliability in a particular case.' " *Id.*

The inquiry need not take any particular form, the judge must simply provide the parties the opportunity to explore the proposed testimony's relevance and reliability. 2018 MP 5 ¶ 21 (citing *United States v. Alatorre*, 222 F.3d 1098, 1104-05 (9th Cir. 2000)); *see Millenkamp v. Davisco Foods Int'l, Inc.*, 562 F.3d 971, 979 (9th Cir. 2009) (finding briefing on expert's scientific expertise and proposed testimony prior to trial such that "[t]he district court could properly determine that this information comprised an adequate record from which the court could make its ruling" constituted a proper exercise of its gatekeeping function).

Moreover, the inquiry into admissibility of expert opinion is a "flexible one," where "[s]haky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion." *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2019) (citing *Daubert*, 509 U.S. at 596). Under *Daubert*, a judge is " 'a gatekeeper, not a fact finder.' " *Id.* at 565 (quoting *United States v. Sandoval-Mendoza*, 472 F.3d 645, 654 (9th Cir. 2006)). When an expert meets the threshold established by Rule 702 as explained in *Daubert*, the expert may testify and the jury decides how much weight to give that testimony. *Id.*

I. Defendants' Motion to Strike Expert Witness Whitney G. Morgan

Defendants do not challenge Morgan's credentials or his methodology. Morgan graduated in 1975 from the University of Tennessee, where he earned a Bachelor of Science degree in

Business Administration with a major in Transportation. From 1975 to 1982, Morgan served as a Special Agent for the U.S. Department of Transportation, Federal Highway Administration, Bureau of Motor Carrier Safety (now the Federal Motor Carrier Safety Administration) in Birmingham, Alabama. During that time, Morgan worked with and was trained by an Interstate Commerce Commission Safety Investigator. Morgan also received hundreds of hours of on-the-job training at the U.S. Department of Transportation, Transportation Safety Institute in Oklahoma City, Oklahoma.

Morgan's experience and training include commercial motor vehicle safety, motor carrier safety, motor carrier/vehicle regulatory enforcement, accident investigation and reconstruction, commercial motor vehicle operations, inspection and maintenance, cargo loading and securement, and hazardous materials shipping/transportation. He has performed hundreds of audits of commercial motor carriers/shippers, performed thousands of inspections of commercial motor vehicles and drivers, made more than 100 enforcement cases, and investigated/reconstructed more than 50 commercial motor vehicle accidents and hazardous material incidents. Since 1983, Morgan has been the president of Motor Carrier Safety Consulting, Inc., which provides various safety consulting services to the commercial motor carrier industry and in litigation matters.

Instead of challenging Morgan's expertise or his application, Defendants argue that Morgan should not be allowed to testify because: 1) he relies on Federal Motor Carrier Safety Regulations ("FMCSR") that do not apply in the Commonwealth of the Northern Mariana Islands; 2) the FMCSRs Morgan discusses are not sufficiently causally related to the accident; and 3) Morgan's testimony goes to an ultimate issue or otherwise instructs the jury on how to rule. The Court addresses these concerns next.

Before doing so, the Court notes that the Ninth Circuit recently advised that the best practice may be for courts to at least reference the *Daubert* factors, even where those factors are not relevant to assess the proposed expert's reliability. *Murray*, 870 F.3d at 924. Accordingly, the Court finds the *Daubert* factors irrelevant to evaluate Morgan's opinions, which are not scientific or technical in nature but are based on his experiences in the field of trucking safety. Instead, the Court finds the issues Defendants raise, such as whether Morgan relied on inapplicable FMCSRs, are relevant in this case to determine whether Morgan's opinions are reliable. *See Kumho Tire Co.*, 526 U.S. at 153 ("[W]hether *Daubert*'s specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine.").

i. *Morgan Applies FMCSRs in his Report that Apply in the Commonwealth*

Both parties agree that the CNMI Department of Public Safety adopted various FMCSRs, but Defendants claim the FMCSRs applicable to RNV are limited based upon Commonwealth Administrative Code § 150-50.2-105(g)(2)(ii). The Department of Public Safety ("DPS") adopted by reference the regulations contained in 49 Code of Federal Regulations ("CFR") parts 107, 171-173 inclusive, 178 and 180 (as revised on October 1, 1995). Commonwealth Administrative Code § 150-50.2-101(a). DPS also adopted by reference parts 382, 383, 387, 390-393, 395-397 and part 40 inclusive, and appendices D, E, and G (as revised on February 1, 1996). *Id.*

The FMCSRs were designed to provide minimum safety requirements for motor carriers and to establish a mechanism of inspection to ensure compliance with the law and the regulations. *Id.* § 150-50.2-001. The FMCSRs apply to commercial motor vehicles under Commonwealth Administrative Code § 150-50.2-105(g), which provides:

The definition of "commercial motor vehicle" in 49 CFR includes the term "motor carrier" as defined in 9 CMC § 1102 and is amended to read: "Commercial motor vehicle" means any self-propelled or towed vehicle used on public roads or highways in:

(1) Interstate or inter island commerce to transport passengers or property if the vehicle:

(i) Is designated to transport more than 8 passengers including the driver; or

(ii) Is used in the transportation of hazardous materials of any quantity; or

(iii) Has a gross vehicle weight rating or gross combination weight rating of 10,001 or more pounds.

(2) Intrastate or intra island commerce to transport passengers or property in the vehicle as described in subsection (g)(1) above or:

(i) Is owned or operated by a motor carrier subject to the jurisdiction of the CNMI; or

(ii) If the vehicle is not one described in subsections (g)(1)(i) or (ii) above, the vehicle is subject only to those provisions of 49 CFR 390, 391.51, 392.2, 393.4, 392.5, 392.9, 396.3(b)(2), 2393 and 397.

Defendants argue that because RNV's boom truck does not transport more than eight passengers (g)(1)(i), or hazardous materials (g)(1)(ii), and instead merely weighs over 10,000 pounds (g)(1)(iii), only the limited regulatory provisions apply. Plaintiff disagrees, claiming that subsection (g)(2) makes clear that the regulations apply to intra island vehicles designated to transport more than eight passengers, used in the transportation of hazardous materials of any quantity, or weighing 10,001 or more pounds. The disjunctive "or" in subsection (g)(2), Plaintiff argues, means that any vehicle operated in intra island commerce satisfying the conditions of subsection (g)(1)(i)-(iii) qualifies as a commercial motor vehicle, in addition to the vehicles described in subsection (g)(2)'s two catch-all provisions: (g)(2)(i) and (g)(2)(ii).

Defendants claim that if the Court interprets the regulations the way Plaintiff construes them, all the FMCSRs referenced in § 150-50.2-101 would apply to all vehicles used for intra island commerce under (g)(2) without giving effect to the limitations at (g)(2)(ii). Defendants claim that the intent and plain meaning of the regulation is to limit the applicability of the FMCSRs as set forth in (g)(2)(ii) for vehicles used only for intra island commerce under (g)(2), as opposed to inter island commerce under (g)(1).

Defendants' interpretation is questionable, however, because vehicles used in intra island commerce with weight ratings above 10,000 pounds would have fewer regulations under (g)(2)(ii) than those used to transport heavy loads of hazardous materials or more than eight people, even though those vehicles could also weigh more than 10,000 pounds. In such cases, it is unclear whether vehicles would be subject to the FMCSRs as adopted in Commonwealth Administrative Code § 150-50.2-101(a) or to the more limited regulations under (g)(2)(ii). Perhaps merely designating a vehicle for transporting more than eight people disqualifies it from the more limited regulations under (g)(2)(ii), regardless of whether its gross weight rating exceeds 10,000 pounds.

A basic principle of statutory construction is that language must be given its plain meaning. *Estate of Faisao v. Tenorio*, 4 N. Mar. I. 260, 265 (1995); *Commonwealth v. Hasinto*, 1 N. Mar. I. 377, 382 (1990). Statutory provisions are irreconcilable only where there is a positive repugnancy between them or where they cannot mutually coexist. *Estate of Faisao*, 4 N. Mar. I. at 265. Thus, when interpreting a statute, a court's objective is to ascertain and give effect to the intent of the legislature. *See In re Estate of Rofag*, 2 N. Mar. I. 18, 29 n. 10 (1991).

Here, the Court faces an irreconcilable provision that requires it to look to the legislative intent. Commonwealth Administrative Code § 150-50.2-001 makes clear that the regulations are designed to provide minimum safety requirements for motor carriers. Furthermore, the CNMI Motor Carrier Safety Act of 1996 was established for the purpose of regulating motor carriers on the Commonwealth's highways, because they pose "potentially large safety issues, necessitating a different inspection process from other motor vehicles." P.L. 10-11. With this legislative purpose in mind, the Court finds that the regulations Morgan uses are applicable in the CNMI.

Although DPS's interpretation is not binding on this Court, this Court considers it important because sworn DPS officers enforce the FMCSRs. Commonwealth Administrative Code § 150-

50.2-201. DPS has cited RNV for violating several of the regulations RNV claims do not apply in the CNMI. For example, DPS cited RNV on September 6, 2012 for violating section 393.84 (inadequate floor condition/holes in cabin); 392.9(a) (inoperable left rear side marker lamp); 393.11 (left rear identification lamp lens cover crack); and 396.3(a)(1) (fuel system leak at fuel drainage screw). Yet, these regulations are not included in the more limited regulations Defendants argue are applicable to vehicles that weigh over 10,000 pounds under (g)(2)(ii).

Even if (g)(2)(ii) does limit the regulations for vehicles that weigh over 10,000 pounds, section 392.2, under (g)(2)(ii)'s more limited regulations, imposes a higher standard under the applicable operating rules. Section 392.2 explicitly provides:

> Every commercial motor vehicle must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated. However, *if a regulation of the Federal Motor Carrier Safety Administration imposes a higher standard of care than that law, ordinance or regulation, the Federal Motor Carrier Safety Administration Regulations must be complied with*.

It is clear from section 392.2 that a higher standard of care is preferable. Hence, based on section 392.2 and the legislative intent, the Court finds the FMCSRs Morgan used in his report are applicable and relevant in the CNMI.

ii. *A Causal Connection Exists Between Some FMCSRs and the Accident*

Defendants also argue that apart from Morgan's reliance on inapplicable FMCSRs, there is no substantial causal connection between the alleged violations and the accident. However, Defendants concede that sections 390.11 (motor carrier to require observance of driver regulations) and 391.11 (general qualifications of drivers) may apply in this case.

As noted above, FMCSRs apply in the CNMI, so Morgan may testify about them. But an expert's testimony must help the trier of fact and it must relate to an issue in the case. *G. v. Hawaii*, 703 F. Supp. 2d 1112, 1119 (D. Haw. 2010) (citing *Daubert*, 509 U.S. at 591); *see also*

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United States v. Cantrell, 999 F.2d 1290, 1292 (8th Cir. 1993) (finding that an expert's testimony is not helpful if it does not address a matter essential to the case). Accordingly, Morgan may testify only about FMCSRs regarding motor carrier requirements to observe driver regulations and about the general qualifications of drivers, because those regulations are relevant, reliable, and they will help the jury.

RNV's maintenance and inspection protocols are irrelevant to the accident because it resulted from brake failure and Reynaldo's inability to handle the boom truck. To the extent that Morgan relies on FMCSRs for reporting requirements, record-keeping, inspection, and maintenance, Morgan may not testify about those requirements because Plaintiff did not show how those FMCSRs are causally connected to the accident.

iii. *Limits on Morgan's Testimony Regarding Whether Defendants' Conducts Amounted to "Conscious Disregard"*

Defendants further argue that this Court should prohibit Morgan from testifying about whether Defendants acted with "conscious disregard" or that they breached the standard of care. Plaintiff argues that Morgan should not be limited because Defendants failed to consider NMI R. Evid. 704.

It is well-established that expert testimony concerning an ultimate issue is not per se improper. *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1016 (citing *Mukhtar v. Cal. State Univ., Hayward*, 299 F.3d 1053, 1066 n.10 (9th Cir. 2002)). Indeed, the Commonwealth Rules of Evidence provide that testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue that the trier of fact must decide. NMI R. Evid. 704(a). Nevertheless, "an expert witness cannot give an opinion as to her *legal conclusion*, i.e., an opinion on an ultimate issue of law." *Hangarter*, 373 F.3d at 1016 (citing *Mukhtar*, 299 F.3d at 1066 n.10). "Similarly, instructing the jury as to the applicable law 'is

the distinct and exclusive province' of the court." *Hangarter*, 373 F.3d at 1016 (quoting *United States v. Weitzenhoff*, 35 F.3d 1275, 1287 (9th Cir. 1993)).

Here, Morgan's opinions amount to legal conclusions because he opines on whether Defendants consciously disregarded the law. Morgan concludes that RNV's conduct fell below the standard of care because RNV failed to comply with the applicable safety regulations. He also claims that RNV demonstrated conscious disregard for the safety of the motoring public by allowing Reynaldo to operate a commercial motor vehicle without ensuring that Reynaldo was competent and knowledgeable about the safety regulations. Lastly, Morgan states that Reynaldo's actions demonstrated conscious disregard for the safety of other motorists. But whether Defendants acted with conscious disregard is a legal conclusion determined by the trier of fact. *See Hangarter*, 373 F.3d at 1016 (citing *Mukhtar*, 299 F.3d at 1066 n.10).

Consequently, Morgan may not testify about whether Defendants' actions amounted to conscious disregard. Morgan may, however, provide his opinion about whether Defendants breached the standard of care in accord with the FMCSRs this Court determined above are applicable and relevant, i.e., motor carrier requirements to observe driver regulations and the general qualifications of drivers. In other words, Morgan may testify that it is his opinion that Defendants did not conform with the standards set forth in the FMCSRs, but not that Defendants violated those regulations. The Court, therefore, **PARTIALLY GRANTS** Defendants' Motion to Strike Expert Witness Whitney G. Morgan.

II. Plaintiff's Motion for *Daubert* Hearing to Exclude Expert Testimony of Dr. Winthrop Smith

Dr. Smith earned an aerospace engineering degree from the University of Tennessee and a mechanical engineering degree from Vanderbilt University. He works as an associate at Boster, Kobayashi & Associates, a consulting firm specializing in the technical aspects of accident

reconstruction, failure analysis, highway design and injury causation. He specializes in seat in rear crash safety and injuries, anatomy, biomechanics, and federal regulation from the Society of Automotive Engineers, as well as training in vehicle crash testing.

But Plaintiff does not question Dr. Smith's credentials. Instead, he objects to any testimony of Dr. Smith's regarding whether the forces generated by the accident could not result in Plaintiff's injuries. More specifically, Plaintiff argues: 1) a biomechanical expert may only testify regarding general injury causation principles but not about whether a specific incident caused a particular injury; and 2) even if Dr. Smith is allowed to testify about general injury causation principles, his methodology must be sound.

Dr. Smith's opinions are technical in nature, but the Court does not consider the *Daubert* factors relevant because Dr. Smith's opinions are not based on novel theories or experiments. However, whether Dr. Smith used sound methodology is relevant to determine the reliability of his opinions.

i. *Methodology*

Plaintiff does not directly assert that Dr. Smith's methodology is flawed; instead, he questions the validity of the studies Dr. Smith used in his report. He argues Dr. Smith did not conduct the studies used as comparisons for the report, and that to rely on Dr. Smith's opinions, Defendants must establish that the studies are sound and reliably applied to this case.

Yet, Plaintiff did not challenge the opinions of the report's co-author, Dr. Perez, who provided the accident reconstruction analysis Dr. Smith used in his biomechanical opinion. Instead, Plaintiff cites *Reali v. Mazda Motor of America, Inc.*, 106 F. Supp. 2d 75 (D. Me. 2000) for the proposition that a court may exclude a biomechanical expert from testifying if he or she uses unreliable data.

In *Reali*, the expert used a computer application called Articulated Total Body ("ATB") to understand the forces involved in an accident that caused the plaintiff to suffer from diffuse axonal. *Id.* at 77. ATB uses a data point called Delta V, which is the change in the velocity of one object when struck by another. *Id.* The expert in *Reali* used a Delta V of 12 m.p.h. to run his simulations, but the court concluded the 12 m.p.h. figure was unreliable because the expert derived the 12 m.p.h. figure "in large part from eyeballing accident photographs," and "produced no testimony or record evidence suggesting that this is an acceptable way to determine Delta V." *Id.* at 77-78.

Here, Dr. Perez computed the Delta V as follows:

> Accident reconstruction analysis indicates that assuming the (1) Honda is pushed forward 10 feet (which appears consistent with scene photographs), (2) Honda drag factor ranges from 0.07 to 0.35, and (3) maximum sideswipe length of 32 inches (2.67 feet), the Delta V of the Honda ranges from 3.9 to 8.8 m.p.h. the duration of this 'soft' impact would be in the range of 0.21 to 0.46 seconds and the peak G-force generated by the collision would be 0.78 to 3.8 G's.

Dr. Smith then explained that based on Dr. Perez's calculation, a review of the supplied materials, and biomechanical analysis, his opinion was:

B1. The peak accelerations imparted to the head, neck, shoulders and back of Mr. Matsumoto during this incident range from 0.78 G to 3.8 G. That is, the lower bound G-force of 0.78 G are trivial. The upper bound G-force of 3.8 G are less than the accelerations experienced by Activities of Daily Living.
B2. Testing of human volunteers exposed to accelerations of equal to and greater than the severity of the subject accident has shown that there is No Mechanism of Injury (MOI) for ANY of the claimed injuries for Mr. Matsumoto.
B3. The neck, upper back, right shoulder and right arm/hand injury claimed by Mr. Matsumoto is NOT consistent with the type and severity of the subject accident.
B4. There is NO MOI to the neck, upper back, right shoulder and right arm/hand of Mr. Matsumoto during the subject accident.

Defendants argue that Dr. Smith's opinion at B1 is based on Dr. Perez's computation and Activities of Daily Living ("ADL"), which is used in Mil-Specs for military officers. Dr. Smith based the ADL on papers he referred to as Spine Volume 19, Number 11, which describe activities

of daily living by measuring the accelerations at the center of a head. The Spine Journal is the official journal of the North American Spine Society and it is an international and multidisciplinary journal that publishes original, peer reviewed articles on research and treatment related to the spine and spine care, including basic science and clinical investigations.[4]

Similarly, Defendants argue that Dr. Smith's opinion at B2 is based on a Society of Automotive Engineers technical paper, 2001-01-0899, entitled: *Human Occupant Motion in Rear-End Impacts: Effects of Incremental Increases in Velocity Change*. Society of Automotive Engineers Technical Papers are written and peer reviewed by experts in the automotive, aerospace, and commercial vehicle industries.[5]

Dr. Smith used reliable studies in his opinions because the studies are sound, commonly relied upon, and subjected to peer review. Unlike the expert in *Reali*, Dr. Perez determined the Delta V from more than just an eyeballed estimate based on photographs. During oral arguments, counsel informed this Court that accident reconstruction experts determine the Delta V the way Dr. Perez did. Furthermore, Dr. Smith used peer reviewed studies from published papers or technical works. If Plaintiff believes the studies are inapplicable, he may undermine them during cross examination by questioning, for example, whether the test subjects exposed to various accelerations were in any way like Plaintiff (i.e., same height, weight, age, etc.). Whether such an inquiry undermines the studies during trial does not affect the admissibility of Dr. Smith's testimony here. Therefore, the Court finds that Dr. Smith used reliable studies to produce his report.

ii. <u>*Medical Causation Principles*</u>

[4] About the Journal, THE SPINE JOURNAL, *at* https://www.thespinejournalonline.com/content/aims.
[5] Technical Papers, SAE INTERNATIONAL, *at* https://www.sae.org/publications/technical-papers.

Plaintiff also argues that Dr. Smith may only testify about general injury causation but not specific injury causation. " 'General causation' refers to whether the accident in question is, in the abstract, capable of producing the type of injury suffered." *Etherton v. Owners Ins. Co.*, 35 F. Supp. 3d 1360, 1366 (D. Colo. 2014) (citing *Neiberger v. FedEx Ground Package Sys.*, 566 F.3d 1184, 1190-91 (10th Cir. 2009)). " 'Specific causation' refers to whether a particular accident or substance caused the specific injury at issue." *Id.*

A biomechanical engineer applies the principles in mechanics to the facts of a specific accident to provide information about the forces generated in that accident, explains how the body moves in response to those forces, and thus determines what types of injuries would result from the forces generated. *Smelser v. Norfolk S. Ry.*, 105 F.3d 299, 305 (6th Cir. 1997) (questioned on other grounds). In the context of litigation, therefore, biomechanical engineers are qualified to render an opinion as to the forces generated in a particular accident and "how a hypothetical person's body will respond to those forces, but are not qualified to render medical opinions regarding the precise cause of a specific injury." *Id.* Because "each individual person has his own tolerance level," a biomechanical engineer may "testify only in general terms, i.e., that 'X' forces would generally lead to 'Y' injuries and 'Y' injuries are consistent with those the plaintiff claims to have suffered." *Id.*

In *Morgan v. Girgis*, the defendant wanted to introduce testimony of a biomechanical engineer who was supposed to testify that the accident in question could not generate enough force to cause the injuries of which the plaintiff complained. 2008 U.S. Dist. LEXIS 39780, at *1 (S.D.N.Y. May 16, 2008). The plaintiff wanted to exclude the testimony because the opinion pertained to medical causation, and the expert, as a biomechanical engineer, was not sufficiently qualified to give such an opinion. *Id.* The court concluded:

> [The biomechanical engineer] is clearly qualified to testify about the nature and amount of force generated by the accident in question and the observed effect of that force on a human body in comparable accidents. In doing so he may offer comparisons between that force and the forces to which the human body is subject[ed] [to] during other activities. Such testimony would be relevant, helpful to the jury and within [the biomechanical engineer's] area of expertise. *But because [the biomechanical engineer] is not a medical doctor, he may not testify as to whether the accident caused or contributed to any of plaintiffs* [sic] *injuries.*

Id. at *6 (emphasis added); *see also Bowers v. Norfolk S. Corp.*, 537 F. Supp. 2d 1343, 1377-78 (M.D. Ga. 2007) (finding biomechanical engineer qualified "to testify generally as to the effect of locomotive vibration on the human body and the typical injuries that may occur as a result of locomotive vibration," but not qualified to "offer an opinion as to whether the vibration in Plaintiff's locomotive caused Plaintiff's injuries[, because] [s]uch an opinion requires the identification and diagnosis of a medical condition, which demands the expertise and specialized training of a medical doctor"); *Shires v. King*, No. 2:05-CV-84, 2006 U.S. Dist. LEXIS 98293, at *3 (E.D. Tenn. Aug. 10, 2006) (holding that a biomechanical engineer "clearly should be allowed to testify regarding the forces applied to plaintiff's head by the [accident], and how a hypothetical person's body would re-spond [sic] to that force," but that he could not offer opinions "regarding the precise cause" of the plaintiff's injury).

Based on the case law above, the Court finds that Dr. Smith may provide testimony about general injury causation but not specific injury causation. Dr. Smith's opinion in B1 is not specific injury testimony; instead, it is based on Dr. Perez's accident reconstruction analysis, which Plaintiff did not challenge and this Court found reliable, and the ADL. It is an opinion on general injury causation, and it is therefore admissible. B2 and B3 are also opinions about general injury causation because Dr. Smith states that Plaintiff's injuries are not consistent with the types of injuries found in studies where people were subjected to similar forces. Accordingly, they are

admissible. Dr. Smith opines in B4 that the accident did not cause Plaintiff's injuries, but Dr. Smith is a biomechanical engineer not a medical doctor. Therefore, B4 is inadmissible.

In short, this Court finds that Dr. Smith is qualified to testify regarding the forces generated by the accident, how a hypothetical person's body would respond to those forces, and what types of injuries would typically occur from those forces. But Dr. Smith is not a medical doctor, so he may not testify about whether the accident caused or contributed to any of the injuries Plaintiff claims he suffered from the accident. Accordingly, the Court **PARTIALLY GRANTS** Plaintiff's Motion for *Daubert* Hearing to Exclude Expert Testimony of Dr. Winthrop Smith.

III. Plaintiff's Motion for *Daubert* Hearing to Exclude Expert Testimony of Dr. Uma Srikumaran

Plaintiff objects to any of Dr. Srikumaran's testimony related to his opinion, including: 1) that the accident did not result in serious injury to Plaintiff; 2) that it is impossible to determine with certainty whether the accident caused Plaintiff's rotator cuff tear evident in the MRI; 3) that the evidence suggests the accident was a minor low energy collision within the normal range experienced during activities of daily living; and 4) that Plaintiff's shoulder was in its usual state of health after the accident. Plaintiff argues that Dr. Srikumaran's reasoning is unreliable, unscientific, and inapplicable in this case because he did not examine or speak with Plaintiff, and he did not test the forces of the crash.

Dr. Srikumaran is a nationally prominent orthopedic surgeon who specializes in the shoulder. He evaluates over 2,500 patients per year, most involving imaging review of the shoulder and rotator cuff. He performs 400-500 surgical procedures per year, with 30 to 50 percent of those procedures relating to rotator cuffs. He teaches other physicians how to diagnose and treat rotator cuff tears. And he publishes and presents on rotator cuff injuries, their diagnoses, treatment, and surgery.

1 Dr. Srikumaran is also an assistant professor in the Department of Surgery at Johns
2 Hopkins School of Medicine, and he is the Johns Hopkins Shoulder Fellowship Director. Most of
3 Dr. Srikumaran's teaching, clinical, and other work relate to diagnosis, surgery, and treatment of
4 shoulder conditions. He mainly works on rotator cuff tears, including the evaluation-history
5 taking, physical examination and imaging review, and the appropriate treatment and care of rotator
6 cuff pathology.

7 The *Daubert* factors are not particularly relevant to determine the reliability of Dr.
8 Srikumaran's opinion because his opinion is based largely on his experience, training, education,
9 and his review of medical and scientific literature, not on his scientific experiments. However, his
10 opinion must include some objective medical or scientific basis to which he may apply the facts of
11 this case.

12 Dr. Srikumaran's opinion is as follows:

13 > I do believe to a reasonable degree of medical certainty, based on my experience and training, that the accident in question did not result in serious injury to the claimant. It is impossible to determine with certainty that the accident caused the rotator cuff tear evident on the MRI. In fact, degenerative changes to the shoulder including rotator cuff tears are incredibly common in individuals over the age of 70, even in those without a history of traumatic injuries. Also common are degenerative changes in the cervical spine that can cause pain, weakness, and difficulty with the upper extremities. The claimant previously sought care for these conditions prior to the accident. Further, the evidence suggests the accident was a minor low energy collision with forces within the normal range experienced during activities of daily living. Finally, considering the claimant was able to play golf (a higher energy and demand activity for the shoulder) five days after the injury and complete an entire round with a score consistent with his typical performance suggests his shoulder was in its usual state of health after the accident.

14 Plaintiff accuses Defendants of using Dr. Srikumaran's expertise to imply, without a proper
15 basis or justification, that Plaintiff's injuries were "not serious" and that his shoulder was "not
16 injured" at all after the accident. He maintains that Dr. Srikumaran's stating it is impossible to

determine with certainty whether the accident caused the rotator cuff tear evident on the MRI, sinks his opinion because Dr. Srikumaran's opinion is not the product of absolute certainty. Plaintiff also claims that because Dr. Srikumaran could not determine with certainty whether the injury resulted from the accident and because he stated that the MRI showed a rotator cuff tear, Dr. Srikumaran's statement that Plaintiff's shoulder was "fine" after the accident is an unsupported, inconsistent leap in logic. Lastly, he states that Dr. Srikumaran's blatant contradictions demonstrate that his opinion lacks intellectual rigor, is speculative, and is inadmissible.

Plaintiff cites *General Electric Company v. Joiner*, 522 U.S. 136, 144 (1997) to support his assertion that a court should not allow an expert to testify when there is a large analytical gap between the evidence and the expert's testimony. In *Joiner*, the U.S. Supreme Court affirmed the district court's decision to prevent an expert from testifying. *Id.* at 144. The expert there attempted to show that exposure to PBC caused the plaintiff's lung cancer, relying on animal studies of young mice that developed cancer after being exposed to PBC. *Id.* The district court found the studies so dissimilar to the facts of the case that it disallowed the testimony. *Id.* The *Joiner* Court stated that "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Id.* at 146.

But Plaintiff misapprehends Dr. Srikumaran's conclusion by attributing certitude to his opinion that the accident did not result in serious injury. Dr. Srikumaran clarified in his affidavit that by "serious," he meant that Plaintiff—to a reasonable degree of medical certainty—did not incur the rotator cuff tear, pre-existing degenerative changes or any other serious injuries as a result of the accident. Dr. Srikumaran also explained that the second sentence qualifies the first

because his opinion is based merely on a reasonable degree of medical certainty—not absolute or unqualified certainty. Notably, Plaintiff does not cite any case law supporting his contention that absolute certainty is required to admit medical expert testimony. *Contra Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665, 671 (6th Cir. 2010) ("[r]ule 702, we recognize, does not require anything approaching absolute certainty.").

Instead, Plaintiff cites *Bowers v. Norfolk Southern Corporation* for the proposition that equivocal causation testimony is not relevant evidence because it does not assist the trier of fact. 537 F. Supp. 2d at 1368. There, the court found the following testimony inadmissible:

> Q: Based on the history that he gave you about his railroad accident, do you have an opinion, with a reasonable degree of medical certainty as to what may have exacerbated his symptoms that then led you to opine that surgery was back in the picture?
>
> A: As far as the injury which I *guess* was sitting in a chair on the railroad on the train, it *sounded like* that he -- certainly he *tended* to tie those repeat injuries from sitting in the chair to complaints, said that that's what made his complaints worse. We have no reason not to believe him on that. I think that it, probably, from what we know from his history or at least what he tells us, it *seems* that it may *have* -- these injuries or this injury may have aggravated a preexisting condition. We know he already had the cervical spondylosis from our workup in '98 so it *may* well have aggravated the preexisting problem.

Id. at 1367-68 (emphasis in original). The court concluded that the testimony was not relevant evidence because under Fed. R. Evid. 401 " '[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action *more probable or less probable* than it would be without the evidence." *Id.* at 1368 (quoting Fed. R. Evid. 401). Furthermore, it found that " '[m]ay' is not synonymous with 'probable.' May connotes something merely possible, not probable. 'Probable' means 'likely.' " *Id.* The court further stated: "Plaintiff's counsel obviously understood this important difference because he asked [the question] using the proper terms: 'do you have an opinion, with a *reasonable degree of medical certainty*. . . ?' " *Id.* at 1369.

Although the CNMI Supreme Court has not adopted a specific standard for admitting medical expert testimony, some courts use the "reasonable degree of medical certainty" standard. *See e.g.*, *Neal-Lomax v. Las Vegas Metro. Police Dep't*, 574 F. Supp. 2d 1193, 1198 (D. Nev. 2008) ("[t]o establish causation, a plaintiff must produce medical expert testimony opining to a reasonable degree of medical certainty. . . ."); *Ford-Sholebo v. United States*, 980 F. Supp. 2d 917, 996 (N.D. Ill. 2013) (admitting evidence that was established to a reasonable degree of medical certainty); *O'Conner v. Commonwealth Edison Co.*, 807 F. Supp. 1376, 1402-03 (C.D. Ill. 1992) ("[t]o prove causation, plaintiff must introduce expert testimony to a reasonable degree of medical certainty that his alleged injuries were caused by his radiation exposure."). However, a "doctor's mere statement that the opinion is given to a reasonable degree of medical certainty 'does not make a causation opinion admissible. The "*ipse dixit* of the expert" alone is not sufficient to permit the admission of an opinion.' " *Finn v. Warren Cty.*, 768 F.3d 441, 452 n.1 (6th Cir. 2014) (quoting *Joiner*, 522 U.S. at 146). "The word 'knowledge' [in Rule 702] connotes more than subjective belief or unsupported speculation." *Daubert*, 509 U.S. at 590.

Here, Dr. Srikumaran, unlike the expert in *Joiner*, did not connect his opinion to existing data only by *ipse dixit*. Dr. Srikumaran's opinion is also not equivocal because he believes to a reasonable degree of medical certainty, based on various factors, that Plaintiff did not incur a serious injury from the accident. Dr. Srikumaran based his opinion on degenerative changes to the human shoulder, including rotator cuff tears, which are common in individuals older than 70 years. He also based his opinion on his experience, training, and numerous clinically sound and peer reviewed studies.[6] Dr. Srikumaran used Dr. Perez's computation of the forces generated in the

[6] Tempelhof S. Rupp S, Seil R. Age-related prevalence of rotator cuff tears in asymptomatic shoulders. Journal of Shoulder and Elbow Surgery. 1999 Jul-Aug;8(4):296-9; Milgrom C, Schaffler M. Gilbert S, Van Holsbeeck M. Rotator-cuff changes in asymptomatic adults. The effect of age, hand dominance and gender. The Journal of bone and joint surgery. British volume. 1995 Mar;77(2):296-8; Lehman C, Cuomo F, Kummer FJ, Zuckerman JD. The incidence of

accident, which this Court ruled above is reliable, to assess the severity of the impact and to support his opinion that Plaintiff did not experience a serious injury. Finally, Dr. Srikumaran considered it important that Plaintiff golfed five days after the accident, because he has cared for thousands of athletes, including golfers, and he knows that golfing causes slight irritations or aggravations to the shoulder and its tendons.

Nevertheless, Plaintiff asserts that because the MRI conclusively demonstrates that Plaintiff "suffered" a shoulder injury, Dr. Srikumaran's statement that the evidence suggests the shoulder was fine after the accident is confusing, contradictory, and defies common sense. Yet, Plaintiff disregards the time between the accident, August 2, 2016; the golf tournament, August 7, 2016 (Plaintiff admitted during his deposition that he participated in the golf tournament); and when Plaintiff obtained the MRI on his shoulder, March 11, 2017. Given this timeline, Dr. Srikumaran's two statements are not confusing or contradictory, and they do not defy common sense. More importantly, Dr. Srikumaran's statement about Plaintiff's golfing five days after the accident is not an assessment on the condition of Plaintiff's shoulder. Rather, it is a factor Dr. Srikumaran used to form his opinion—that he believes to a reasonable degree of medical certainty, based on his experience and training, that the accident did not seriously injure Plaintiff because, among other things, Plaintiff golfed five days after the accident (which suggests his shoulder was "in its usual state").

However, not all of Dr. Srikumaran's statements are relevant. Specifically, Dr. Srikumaran's claim that degenerative changes in the cervical spine are also common and can cause pain, weakness, and difficulty with the upper extremities, and his claim that Plaintiff previously

full thickness rotator cuff tears in a large cadaveric population. Bulletin (Hospital for Joint Diseases (New York, NY)). 1995;54(1):30-1; Worland RL, Lee D, Orozco CG, SozaRex F, Keenan J. Correlations of age, acromial morphology, and rotator cuff tear pathology diagnosed by ultrasound in asymptomatic patients. Journal of the Southern Orthopedic Association. 2003;12(1):23-6; and Fehringer EV, Sun J, CanOeveren LS, Keller BK, Matsen III FA. Full-thickness rotator cuff tear prevalence and correlation with function and co-morbidities in patients sixty-five years and older. Journal of shoulder and elbow surgery. 2008 Nov 1;17(6):881-5.

sought care for these conditions prior to the accident. These statements do not help the trier of fact determine whether Plaintiff's rotator cuff tear resulted from the accident. Instead, Dr. Srikumaran appears to mention these facts to substantiate his statement that degenerative changes in the shoulder are common for people older than 70 years. Therefore, these statements are inadmissible.

In sum, the Court finds that Dr. Srikumaran's opinion and supporting statements, excluding those mentioned directly above, are relevant and reliably applied to the facts of this case. Contrary to Plaintiff's assertions, Dr. Srikumaran's statements following his opinion do not contradict it, they merely corroborate it. For the reasons stated above, Dr. Srikumaran's opinion and the statements explaining his reasoning are admissible. Plaintiff can certainly challenge Dr. Srikumaran and his findings during cross examination, but he may not prevent him from testifying. Accordingly, the Court **PARTIALLY GRANTS** Plaintiff's Motion to Exclude Dr. Srikumaran's Testimony.

IV. Defendants' Motion to Strike Expert Witness Doris J. Shriver

Defendants move to strike Shriver as an expert witness because she costs out future medical care for Plaintiff that no licensed medical professional has deemed necessary. Specifically, Defendants argue: 1) Shriver is not qualified to provide medical findings; and 2) her opinions are unreliable because appropriate medical professionals have not recommended the treatments she costs out in her consultation report.

Shriver is an occupational therapist and a certified life care planner. A life care planner prepares a report which projects the treatment, services, and costs of what clients will need in the future, depending on their diagnoses. *See Theatre Management Group, Inc. v. Dalgliesh*, 765 A.2d 986, 992-93 (D.C. App. 2001). To prepare her report, Shriver reviewed Plaintiff's medical records and a questionnaire he completed. Shriver did not meet or talk with Plaintiff; did not verify the

information that Plaintiff provided in the questionnaire; and she did not speak with any of Plaintiff's medical providers.

Shriver then recommended the following:

Service	**Duration**	**Unit Cost**	**Total**
Pre-surgical physical therapy to maintain range of motion and as much strength as possible for modalities for pain	12 sessions to be used as needed—sessions are typically one hour each	CPT 97110 (therapeutic exercises): $35.26*/15-min unit; CPT 97112 (neuromuscular re-education): $36.92*/15-min unit (Avg: $36.09/15-min unit or $144.36/hour)	$1,732.32 One time
Arthroscopic rotator cuff repair (CPT 29827) and biceps tenodesis (CPT 29828)	One time	Surgeon fee: $3,011** + Surgical Assistant (PA): $2,559*** + Anesthesiologist (CPT 01610): $1,298** + Hospital fee: $3,240**** + One-night hospital stay (room & board for private room on Med/Surg ward): $664*****	$10,772.00 One time
And/Or: Full Shoulder Replacement to improve function of complex shoulder injury (CPT 23472)	One time	Surgeon fee: $5,168** + Surgical Assistant (PA): $4,393*** + Anesthesiologist (CPT 01638): $1,533** + Hospital fee: $8,522**** + Three-night hospital stay (room & board for private room on Med/Surg ward): 3 nights x $664/night*****	$20,708 One time
Post-operative PT/OT for range of motion and strengthening	3 times per week for 8 weeks; sessions are typically one hour each	CPT 97110 (therapeutic exercises): $36.26*/15-min unit; CPT 97112 (neuromuscular re-education): $36.92*/15-min unit (Avg: $36.09/15-min unit or $144.36/hour)	$3,464.64 One time
Home Exercise Equipment (Small weights, pulley system, Thera-Band)	One-time budget	$300 One time	$300 One time
Physiatrist to evaluate cervical spine relative to whiplash ➢ Cervical MRI with contrast ➢ EMG right upper extremity ➢ Whiplash follow-up care	1-2 times	CPT 99214: $116* CPT 72141: $1,167***** CPT 95886: $114**	$116 - $232 $491 One time $114 One time $Unable to determine

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Home Care/Home Services

Description	Frequency & Duration	Purpose	Unit Cost	Annual Cost
Personal assistant	2 hours per day 7 days a week for 8 weeks post-surgery; then 4 hours per week for life	Assist with post-surgical self-care; cleaning, shopping, yard work to accommodate impaired strength	$7.05 - $7.25*/hour	$790 - $812 (8 weeks); Then, $1,466.40 - $1,508.00 per year for life
Driver	1 hour per day (M-Sat)	Errands, get the mail	$7.05 - 7.25*/hour	$2,199.50 - $2,262.00 per year for life
Adaptive Equipment	Access to annual budget	Maximize ADL independence	i.e., reachers, rolling kitchen, carts, etc.	$200 per year

Plaintiff opposes striking Shriver as an expert because: 1) medical providers have recommended both arthroscopic surgery and physical therapy; 2) Plaintiff has not tendered Shriver as a medical expert for the purpose of presenting a medical diagnosis or prescribing treatment; and 3) Shriver's testimony regarding shoulder replacement surgery and whiplash may be relevant depending upon Plaintiff's treating physician's testimony at trial.

Shriver's recommendation for pre-surgical therapy, arthroscopic repair, shoulder replacement, and post-operative physical therapy are surgery related expenses. Whereas the home exercise equipment and the physiatrist evaluation are expenses related to whiplash. Yet, Shriver agreed during her deposition that although a medical provider initially recommended arthroscopic rotator cuff repair, the more recent diagnosis was against surgery because of Plaintiff's age. Moreover, Shriver conceded during her deposition that no physician had diagnosed Plaintiff with whiplash, and she also agreed that Plaintiff would need a personal assistant and driver only if he had surgery. Thus, Shriver's consultation report is not based on Plaintiff's current diagnosis.

Shriver is unqualified to offer a medical diagnosis because she is neither a nurse nor a physician. Shriver relied entirely on her own expertise to assess the medical treatments Plaintiff would likely need. When pressed about whether she was qualified to diagnose medical conditions, Shriver stated she probably could diagnose patients but was not allowed because she is unlicensed.

Nevertheless, she conceded that she essentially diagnosed Plaintiff when she concluded that Plaintiff needed shoulder replacement surgery, even though Plaintiff's current diagnosis does not recommend shoulder replacement surgery or that he suffered from whiplash. Notably, Plaintiff stated during his deposition that he does not want surgery.

In *Dan Cristiani Excavating Company v. Money*, the court affirmed the trial court's decision to allow a life care planner to testify because she relied on physicians' recommendations in preparing a life care plan for Money. 941 N.E.2d 1072, 1080 (Ind. Ct. App. 2011). The life care planner also clarified for the jury that she was not " 'trying to testify about what [she] think[s] [Money]'s medical needs will be in the future.' " *Id.* The court concluded that the life care planner's testimony, as limited to her expertise, was not improper. *Id.*

In contrast with the life care planner in *Money*, Shriver stated in her deposition that she diagnosed whiplash and shoulder surgery based on the incident itself and the types of injuries she has seen result from such incidents. In other words, based on her experience but not a medical expert's recommendation. Nevertheless, Plaintiff asks the Court to reserve its ruling on Shriver so he can determine—when his treating physician testifies—whether he will need surgery.

The parties agreed during oral arguments that Shriver's testimony is admissible if, during his testimony, Plaintiff's physician recommends surgery or indicates Plaintiff suffered from whiplash. Thus, Shriver's costs related to surgery and whiplash are inadmissible unless Plaintiff's physician recommends surgery or finds that Plaintiff suffered from whiplash. However, Plaintiff currently undergoes physical therapy, so Shriver's calculation for physical therapy is appropriate. During cross examination, Defendants may question whether Shriver's physical therapy calculation includes extraneous costs for physical therapy resulting from the surgery. Consequently, the Court **PARTIALLY GRANTS** Defendants' Motion to Strike Expert Witness Doris J. Shriver.

B. SUMMARY JUDGMENT

Defendants want to dismiss Plaintiff's claim for punitive damages because the case, they think, lacks evidence of any intentional or reckless disregard for the rights of others. Although they agree that Reynaldo was negligent (and RNV, vicariously), they assert that the Court should grant their Motion for Summary Judgment because there are no material issues of fact regarding punitive damages.

A court must grant a motion for summary judgment if there is no material fact in dispute and the movant is entitled to judgment as a matter of law. NMI R. Civ. P. 56(a). The "moving party bears the 'initial and ultimate' burden of establishing its entitlement to summary judgment." *Santos v. Santos*, 4 N.M.I. 206, 210 (1995). The movant may use pleadings, depositions, affidavits, or other evidence to demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Once the movant meets that burden, the burden shifts to the party opposing the motion. *Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1103 (9th Cir. 2000). The opposing party "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Aplus Co., v. Niizeki Int'l Saipan Co., Ltd.*, 2006 MP 13 ¶ 13 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986)).

A material fact somehow affects the outcome of the case. *Anderson*, 477 U.S. 242, 248 (1986). To demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' " *Matushita Elec. Indus. Co., v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

In judging evidence at the summary judgment stage, the court does not determine credibility or weigh conflicting evidence. *T. W. Elec. v. Pac. Elec. Contractors Ass'n.*, 809 F.2d 626, 630-31 (9th Cir. 1987) (citing *Matushita Elec. Indus. Co., v. Zenith Radio Corp.*, 475 U.S. 574 (1986)). Instead, the court determines whether there is a genuine issue for trial, viewing the evidence in the light most favorable to the opposing party. *Estate of Mendiola v. Mendiola*, 2 N.M.I. 233, 240 (1991).

The CNMI Supreme Court has held that the Restatement (Second) of Torts, § 908 applies to claims for punitive damages. *Santos v. STS Enters.*, 2005 MP 4 ¶ 22. Section 908 provides:

> 1) Punitive damages are damages other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.
> 2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

Restat 2d of Torts, § 908. Punitive damages are not meant to compensate the plaintiff, punitive damages are meant to punish and deter the defendant. Restat 2d of Torts, § 908, comment b. In other words, punitive damages are warranted only for conduct involving some element of outrage. *Id.*

In *Santos v. STS Enterprises*, the CNMI Supreme Court affirmed the trial court's final judgment awarding punitive damages for a collision similar to Plaintiff and Defendants'. 2005 MP 4. Joseph Anthony Rasa was driving a tour bus owned by STS Enterprises when he rear-ended a van Christine E. Santos was driving with her son, Carlos Santos. *Id.* ¶ 3. The court affirmed the trial court's decision to submit the issue of punitive damages to the jury because: 1) Rasa had a history of substance abuse (he also tested positive for marijuana the day after the accident); 2) Rasa continued to operate the bus even though he knew he had a significant drug problem; 3) Rasa

had two previous work-related accidents and multiple speeding violations; and 4) there was sufficient evidence of a causal connection between the substance abuse and the accident. *Id.* ¶ 25-26.

Regarding STS, the court found STS: 1) failed to follow its employee handbook regarding the training, testing, and treatment of its employees and supervisors concerning substance abuse; 2) failed to properly train Rasa in the safety operation of a 32,500 pound commercial tour bus; 3) failed to properly investigate Rasa's driving history prior to employing him as a commercial tour bus operator or to prevent him from operating a commercial tour bus or drug testing him after two previous work-related accidents and a speeding citation; 4) failed to prevent Rasa from operating a commercial tour bus after his direct supervisors knew of his continuing marijuana abuse; and 5) provided Rasa with another tour bus and instructed him to continue his daily route immediately following the accident. *Id.* ¶ 24.

Furthermore, the *Santos* court determined there was a connection between the marijuana use and the accident because Santos's expert witness testified that heavy marijuana use negatively affects a person's ability to concentrate, calculate, remember, and make prudent judgments. *Id.* ¶ 26. The court noted that THC releases slowly from an individual's fat deposits into his system over time and can be present in an individual's bloodstream long after it is last ingested. *Id.* The court also noted that the evidence of Rasa's driving characteristics, as reflected in the record concerning the accident, were consistent with the negative effects of chronic and heavy marijuana use. *Id.* As a result, the court determined that the jury could reasonably conclude that the accident was caused by actions consistent with a person who was unable to operate heavy machinery properly and safely because of chronic and heavy marijuana use. *Id.*

Plaintiff argues that Reynaldo's conduct was outrageous because he lacked training in driving on steep roads or inclines; proper speed control; how to handle brake failure, a tire blowout, and loss of steering; how to maintain proper spacing between his vehicle and other vehicles on the road; the nature of brake fade; use of the hand brake and braking in emergencies; recognizing signs of brake failure; how to drive heavy construction vehicles on CNMI roads; and the various safety systems of the boom truck. He even claims that Reynaldo's lack of training is no different from Rasa's driving under the influence of marijuana, because they both drove while lacking the expected faculties. In other words, Plaintiff thinks Reynaldo acted outrageously because Reynaldo did not know what Plaintiff asserts he should know.

Reynaldo, unlike Rasa, did not act with reckless disregard for the safety of Plaintiff or others. Reynaldo did not have any issues with substance abuse or prior work-related incidents. He was licensed and had the medical certificate necessary to operate the boom truck in the CNMI. Although the training Reynaldo received is now in dispute, Reynaldo had no reason to question its adequacy. For that reason, it is unlikely that Reynaldo's lack of training (or his not knowing he was not well-trained) was outrageous; it does not demonstrate he had an evil motive or reckless indifference to the rights of others. Accordingly, the Court **GRANTS** Defendants' Motion for Summary Judgment as it pertains to Reynaldo.

As for RNV, Plaintiff argues RNV's conduct was outrageous because it did not discipline Reynaldo after the accident, it allowed him to continue to operate its vehicles, and it did not properly train Reynaldo regarding everything related to the operation of the boom truck. RNV disagrees, arguing the factors the *Santos* court found relevant are in sharp contrast to the facts in this case. However, the *Santos* court did not create a set of factors for the trial court to consider when deciding on punitive damages. Instead, the court simply considered the factors in their

totality. *Id.* ¶ 25 ("[t]ogether these factors provide sufficient evidence to satisfy the requirements of the Restatement and to support punitive damages . . . .").

Here, like in *Santos*, the employee's training in operating a commercial vehicle is an important factor to consider when determining whether punitive damages are warranted. RNV hired Reynaldo in 2014 as a building maintenance person, which Reynaldo did for about a year, before moving into construction where he worked as a painter then a mason. Eventually, Reynaldo became a commercial driver for RNV, despite having little experience with driving large commercial vehicles.

RNV allows only eight employees to operate its large commercial vehicles. It requires that its drivers train for three days before they can operate the commercial vehicles. Yet, RNV's project supervisor did not know how many hours Reynaldo was trained. RNV's supervisor did not know whether Reynaldo received any training for driving in mountainous roads, for proper speed control, or for proper spacing between his vehicle and others. RNV expects its drivers to familiarize themselves with the vehicles they operate but does not provide them with manuals. In short, Reynaldo does not know any emergency procedures for driving in mountainous areas, how to use the handbrake, how to recognize brake failure, or how to handle emergency situations—because RNV did not train him for these situations. The Court concludes that a reasonable jury could find that the way RNV trained Reynaldo constitutes reckless indifference to the safety of others.

Lastly, Plaintiff argues that RNV's maintenance and inspection protocols are inadequate. However, whether inspection and maintenance protocols are inadequate is inconsequential for this summary judgment motion because the protocols are not causally connected to the accident. For example, Plaintiff finds it troubling that RNV has not implemented a vehicle safety program, that it

never hired a safety manager, and that RNV employs one mechanic. Yet, the experts in this case believe the accident resulted from temporary brake failure caused by overheating. The only potential causal connection between RNV and the accident is Reynaldo's training. Therefore, the adequacy of RNV's maintenance and inspection protocols is irrelevant as those protocols do not relate to the accident. *See Santos*, 2005 MP ¶ 26 (finding a causal connection between the marijuana use and the accident). Nevertheless, the Court **DENIES** Defendants' Motion for Summary Judgment as it pertains to RNV.

CONCLUSION

For the reasons indicated above, the Court rules as follows:

1. Defendants' Motion to Strike Expert Witness Whitney G. Morgan: **PARTIALLY GRANTED**;
2. Plaintiff's Motion for *Daubert* Hearing to Exclude Expert Testimony of Dr. Winthrop Smith: **PARTIALLY GRANTED**;
3. Plaintiff's Motion for *Daubert* Hearing to Exclude Expert Testimony of Dr. Uma Srikumaran: **PARTIALLY GRANTED**;
4. Defendants' Motion to Strike Expert Witness Doris J. Shriver: **PARTIALLY GRANTED**; and
5. Defendants' Motion for Summary Judgment Regarding Punitive Damages: **PARTIALLY GRANTED**.

/s/ ______________________________

Ordered this _______ day of August 2019.

KENNETH L. GOVENDO
Associate Judge