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(SPACE BELOW FOR FILING STAMP ONLY)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

KIRSTEN MACY-HALBERT,

Plaintiff,

vs.

HYUNG RYUL SHIN, Individual; and DOES 1-10, Inclusive,

Defendants.

CASE NO. BC469602
[Assigned to Hon. Samantha P. Jessner, Dept. 93]

(Complaint Filed: 9/15/11)

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION *IN LIMINE* NO. 4 TO EXCLUDE TRACTOGRAPHY; DECLARATION OF MOLLY M. McKIBBEN AND EXHIBITS

[Filed concurrently with Plaintiff's Objections to Evidence Offered by Defendant In Support of Defendant's Motion *In Limine* No. 4; [Proposed] Order on Plaintiff's Objections to Evidence Offered by Defendant In Support of Defendant's Motion *In Limine* No. 4; Declaration of Monte S. Buchsbaum and Exhibits]

FSC: September 3, 2013
Trial: September 10, 2013

TO THE HONORABLE COURT AND ALL PARTIES:

Plaintiff hereby submits the following opposition to Defendant's Motion *in Limine* No. 4. This Opposition is based on the following:

1. Tractography based on diffuse tensor imaging (DTI) in 3 Tesla magnetic resonance imaging (3T MRI) is scientifically valid, generally accepted in the scientific/medical community, and is used by researchers and clinicians through the United States.

2. The tractography in the 3T MRI is not an attempt to "demonstrate" the existence of Plaintiff's brain injury; rather, as explained below, it is confirmatory of that diagnosis as made by many others, including Defendant's own retained neurologist.

3. There are numerous peer reviewed articles supporting the use of tractography based on DTI to diagnose and treat traumatic brain injuries.

4. Courts throughout the country have admitted evidence of DTI at trial in many cases. Defendant has not cited a single case wherein tractography based on DTI was excluded from trial from anywhere in the country, let alone in California.

5. Defendant provides no actual evidence supporting their argument that tractography based on DTI is unreliable. Defendant rests his Motion on the declarations of his retained neurologist and neuroradiologist, neither of whom is an expert in 3T MRI, tractography, or diffuse tensor imaging. These declarations are not evidence and should be stricken from the record as lacking foundation.

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This Opposition is made and based on the accompanying Memorandum of Points and Authorities, the Declaration of Molly M. McKibben and attached Exhibits, on all records and pleadings on file with this Court, any evidence of which the Court may take judicial notice prior to or at the hearing of this matter, and any other oral and documentary evidence as may be presented at the hearing of Defendant's Motion.

DATED: August 19, 2013

GREENE BROILLET & WHEELER, LLP

Geoffrey S. Wells
Molly M. McKibben
Attorneys for Plaintiff

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On September 2, 2011, Plaintiff Kirsten Macy-Halbert was walking with a friend, lawfully attempting to cross Rokeby Avenue at its intersection with Rowena Street within the pedestrian crosswalk when she was hit by a Mercedes E350 driven by Defendant Hyung Ryul Shin, who was driving northbound on Rowena Street attempting to make a left turn onto Rokeby Avenue. The impact from Defendant's vehicle caused Plaintiff to sustain severe and permanent injury, including a traumatic brain injury.

After she was struck by Defendant, Plaintiff saw several doctors, including a neurologist, neuropsychologist, and neuroradiologist. Plaintiff underwent various tests, including neuropsychological testing and a 3 Tesla magnetic resonance scan ("3T MRI"). This 3T MRI contains tractography modeled on diffusion tensor imaging ("DTI") of Plaintiff's brain. The tractography of the 3T MRI performed on Plaintiff demonstrates thinning of the white matter in her brain, which is consistent with a traumatic brain injury. Plaintiff's diagnosis of traumatic brain injury has been confirmed not only by all of Plaintiff's treating doctors and expert witnesses, but also by Defendant's own designated neurologist.

Defendant has brought the instant motion *in limine* to exclude testimony referring to the tractography results from the 3T MRI performed on Plaintiff's brain. As explained further below, tractography based on DTI is scientifically valid, and is used by researchers and clinicians through the United States. The tractography in the 3T MRI is not an attempt to "demonstrate" the existence of Plaintiff's injury; rather, as explained below, it is confirmatory of that diagnosis as made by many others. There are numerous peer reviewed articles supporting the use of tractography based on DTI to diagnose and treat traumatic brain injuries.

Defendant cannot cite a single case wherein tractography has been excluded from trial. Moreover, the only evidence Defendant cites in support of his motion are declarations of his two retained experts, one of which is not a radiology expert, and neither of which is an expert in 3T MRIs. *See* Plaintiff's Objections to Evidence Offered By Defendant In Support of Motion in Limine No. 4.

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Because the tractography in the 3T MRI done of Plaintiff's brain and Plaintiff's experts' utilization of that study is sufficiently reliable and relevant, Defendant's motion must be denied.

II. PLAINTIFF'S MEDICAL RECORDS AMPLY DEMONSTRATE THAT SHE HAS SUSTAINED A TRAUMATIC BRAIN INJURY FROM THE SEPTEMBER 2, 2011 INCIDENT.

After being struck by Defendant's vehicle, Plaintiff was treated by multiple doctors. Plaintiff was seen by Dr. Hyman Gross, M.D., a neurologist, soon after the incident. Dr. Gross met with Plaintiff and her husband, and reviewed Plaintiff's emergency room and radiological studies records post-incident. Dr. Gross ordered a 3T MRI of Plaintiff's brain. *See* Deposition of Dr. Hyman Gross at 7:6-9:3, attached as Exhibit 1. The 3T MRI results were "abnormal" and demonstrated "dropout of fibers in the...body of the corpus collosum." *Id.* Dr. Gross diagnosed Plaintiff with a traumatic brain injury. *Id.* at 7:6-9:3.

Plaintiff was also seen by neuropsychologist Dr. Jeffrey Schaeffer., M.D., Ph.D. Dr. Schaeffer examined Plaintiff's medical history, including records from Dr. Hamid Mir, the orthopedist she saw immediately after the incident. Dr. Mir's diagnoses included high energy auto-versus-pedestrian accident, headaches, and a post-concussional disorder, which Dr. Schaeffer testified is synonymous with a mild traumatic brain injury. *See* Deposition of Dr. Jeffrey Schaeffer at 12:18-14:4, attached as Exhibit 2. Dr. Schaeffer diagnosed Plaintiff with a grade two level mild traumatic brain injury. *Id.* at 60:24-61:8.

Plaintiff's medical records, including the 3T MRI, were reviewed by Dr. Monte S. Buchsbaum, M.D. Dr. Buchsbaum also performed a PET Scan on Plaintiff. Dr. Buchsbaum is an expert in brain imaging and neuroscience who has been actively involved in diffusion tensor imaging since 1998. *See* Declaration of Dr. Monte S. Buchsbaum, M.D., at ¶ 2. After reviewing the 3T MRI, Dr. Buchsbaum concluded that the "DTI was found to show a slight drop off in the corticospinal tract in the corona radiata in the posterior frontal and parietal region. There are slightly diminished FA numbers in the corpus callosum. These borderline low-level FA numbers are consistent with some drop off in the density of the fiber tracts seen on the tractography images of the posterior frontal area. The values of 0.39 in the front portion of the corpus callosum (genu)

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are low, and lower than many published values including those from my laboratory. This, combined with Kirsten Macy-Halbert's medical history, clinical signs, and symptoms, provide a scientific basis to conclude to a reasonable degree of medical probability that the damage shown on the DTI is axonal disruption caused by the September 2, 2011 incident." *Id.* at ¶¶ 9-10.

Defendant's retained neurologist Dr. Cynthia Chabay examined Plaintiff and reviewed her medical records. Dr. Chabay agrees that Plaintiff has sustained a traumatic brain injury. *See* Deposition of Dr. Cynthia Chabay at 11:17-12:12, 13:17-22, attached as Exhibit 3.

III. TRACTOGRAPHY BASED ON DIFFUSION TENSOR IMAGING HELPS CLINICIANS DIAGNOSE TRAUMATIC BRAIN INJURIES.

The tools that are used to evaluate whether someone has a traumatic brain injury and how severe it is include clinical examination, brain scans, medical history, psychiatric history, and neuropsychological testing. *See* Declaration of Dr. Monte S. Buchsbaum, M.D., at ¶ 3. Tractography based on DTI alone cannot diagnose brain injury. *Id.* at ¶ 4. Rather, DTI can locate abnormalities that can suggest or be consistent with a particular etiology, but in and of itself, DTI is not diagnostic. *Id.* By locating white matter damage in the brain consistent with a traumatic brain injury, DTI findings provide a tool upon which a clinician may support a diagnosis of a traumatic brain injury. *Id.* As a large majority of mild traumatic brain injury is not detectable on computed tomography (CT) scans or standard magnetic resonance (MR) scans, a major drive behind the development of DTI software was to detect white matter abnormalities. *Id.* at ¶ 5.

DTI is a sequence of a magnetic resonance examination that examines the microstructure of the white matter (axons) of the brain. *Id.* at ¶ 6. Tractography is a 3D modeling technique used to model neural tracts using data collected by DTI. *Id.* DTI works by measuring the distribution of water through portions of the brain. *Id.* at ¶ 6(a). DTI is based upon the known physics of the flow of water. *Id.* at ¶ 6(b). In an open and unobstructed space, water molecules will diffuse equally in all directions in a manner called an isotropic distribution. *Id.* If, however, there are barriers to flow (such as those found in the white matter of the brain), water will move unequally in all directions, called anisotropic distribution. *Id.* The axons are parallel fibers connecting nerve

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cells in many areas of the brain. *Id.* Water in between the axons tends to diffuse in a single direction. *Id.* Water distribution in healthy, intact white matter tends to be anisotropic, that is in a single direction. *Id.* at ¶ 6(c). But as white matter is damaged, torn, or the outer membranes are broken down, water tends to diffuse in a more isotropic distribution. *Id.*.

DTI divides the brain into thousands of voxels. *Id.* at ¶ 6(d). Voxels are like pixels of a digital camera, except they are three dimensional. *Id.* DTI measures the direction of water diffusion through each voxel in the brain and provides a score between 0 and 1. *Id.* The score is referred to as FA (fractional anisotropy). *Id.* A lower score means that the distribution is more isotropic (equal in all directions), and a higher score means the distribution is more anisotropic (close to a straight line). *Id.* If a DTI score is low, the patient is significantly more likely to have a traumatic brain injury. *Id.* A typical brain injury involves diffuse axonal injury which is the result of shear-strain deformation of the brain tissue with the disruption of axonal membranes and cytoskeletal network. *Id.* at ¶ 6(e). This axonal shearing in the white matter, which causes isotropic distribution of water through each voxel in the brain, leads to a disruption in brain function. *Id.* DTI may detect microskeletal injury implicated in diffuse axonal injuries linked to persistent symptoms in patients following mild traumatic brain injuries. *Id.*

IV. TRACTOGRAPHY BASED ON DIFFUSION TENSOR IMAGING IS SCIENTIFICALLY VALID, AND IS GENERALLY ACCEPTED AND USED BY THE SCIENTIFIC COMMUNITY.

1. Tractography Based on Diffusion Tensor Imaging Is A Generally Accepted Scientific Technique And Has Been Admitted By Courts All Over the Country.

Tractography based on DTI has gained general acceptance in the identification and treatment of mild traumatic brain injuries. *See* Declaration of Dr. Monte S. Buchsbaum at ¶ 8. DTI is an FDA-approved technique, is reimbursable by insurance companies, and is in clinical use through the United States. *Id.* at 7. There are papers which support the use of DTI to diagnose traumatic brain injury in individual subjects. *Id.* at 8.

This is hardly the first case where a plaintiff sought to introduce DTI findings in a brain injury case and where DTI was found to be reliable and generally accepted by the

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scientific/medical community. It is important to note that Defendant has not cited a single case wherein tractography based on DTI was excluded from trial from anywhere in the country, let alone in California. In *Lamasa v. Bachman*, 869 N.Y. S.3d 17 (App. Div. 2008), the Supreme Court, Appellate Division considered whether a trial court properly admitted evidence of a mild traumatic brain injury that had been obtained through DTI. 2008 N.Y. App. Div. LEXIS 8686; 2008 NY Slip Op 9162, attached as Exhibit 4. The trial court had held that DTI evidence was properly admitted because it could not be characterized as novel science and that the defendant's concerns went to the weight of the evidence, not its admissibility. The court reasoned that "plaintiff's experts, relying on objective medical tests, testified to brain damage and other injuries that they attributed to trauma, and the conflicting medical evidence and opinions of defendant's experts concerning the permanence and significance of plaintiff's injuries simply raised issues of fact for the jury." In denying defendant's motion for relief, the lower court explained that:

> DTI is an imaging technique used to study the random motion of hydrogen atoms within water molecules in biological tissue (e.g., brain white matter) and spatially map this diffusion of water molecules, *in vivo*. DTI provides anatomical information about tissue structure and composition. Changes in these tissue properties can often be correlated with processes that occur, among other causes, as a result of disease and trauma.

Lamasa v. Bachman, 8 Misc. 3d 1001(A) at **3 (2005), FN3; 2005 N.Y. Misc. LEXIS 1164; 2005 NY Slip Op 50882(U), attached as Exhibit 5. The lower court further held that, as to the issues of causation and the precise physical injuries the plaintiff suffered as a result of the collision, "the parties had numerous expert witnesses testifying and considering the conflicting testimony of the parties' respective expert witnesses, the jury was not required to accept one expert's position over that of another, but was entitled to accept or reject either expert's position in whole or in part." *Id.* at **8. On appeal, the Appellate Division affirmed the trial court's admission of the challenged expert testimony.

There have been many other cases where courts have found that DTI has been sufficiently tested, peer reviewed, lacks a high error rate, and is generally accepted in the scientific community. *See Booth v. Kit*, 81 Fed. R. Evd. Serv. (Callaghan) 1, 2009 U.S. Dist. LEXIS 125754; *LeBoeuf v. B & K Contractors, Inc.* 10 So. 3d 897 (Ct. App. La. 2009), 2009 La. App.

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Unpub. LEXIS 324; *Whilden v. Kline*, District Court, Jefferson County, Colorado Case No. 08CV4210 (May 10, 2010), collectively attached as Exhibit 6. Simply put, tractography based on DTI is generally accepted by the medical/scientific community, and has been admitted at trial by courts throughout the country.

2. Defendant Proffers No Actual Evidence For His Argument That Tractography Based on Diffusion Tensor Imaging Is Unreliable.

Defendant provides absolutely no actual evidence supporting his conclusory statements that tractography is unreliable. Defendant proffers no articles disproving the general acceptance of tractography in the medical community. He provides no studies that indicate that tractography based on DTI is not generally accepted. Instead, Defendant relies only upon the declarations of his retained neurologist, Dr. Cynthia Chabay, and retained neuroradiologist, Dr. Stephen L.G. Rothman. Dr. Chabay is a neurologist and is not trained in radiology, let alone 3T MRIs. *See* Declaration of Dr. Cynthia Chabay at ¶ 1; *see also* Plaintiff's Objections to Evidence Offered By Defendant In Support of Motion in Limine No. 4, Objection No. 4. Dr. Chabay only states that she agrees with Dr. Rothman. *See* Declaration of Dr. Cynthia Chabay at ¶ 4; *see also* Plaintiff's Objections to Evidence Offered By Defendant In Support of Motion in Limine No. 4, Objection No. 4. Dr. Chabay admitted in her deposition that she is not an expert in 3T MRI. *See* Exhibit 4, Deposition of Cynthia Chabay at 14:23-15:19.

Dr. Rothman admitted under oath that he is not an expert in 3T MRI. *See* Deposition of Dr. Stephen L.G. Rothman, M.D., at 10:7-24, attached as Exhibit 7; *see also* Plaintiff's Objections to Evidence Offered By Defendant In Support of Motion in Limine No. 4, Objection Nos. 1-3. Dr. Rothman admitted under oath that he is not an expert in diffuse tensor imaging. *See* Exhibit 7, Deposition of Dr. Stephen L.G. Rothman, M.D., at 10:7-24; *see also* Plaintiff's Objections to Evidence Offered By Defendant In Support of Motion in Limine No. 4, Objection Nos. 1-3. Dr. Rothman admitted under oath that he is not an expert in tractography. *See* Exhibit 7, Deposition of Dr. Stephen L.G. Rothman, M.D., at 10:7-24; *see also* Plaintiff's Objections to Evidence Offered By Defendant In Support of Motion in Limine No. 4, Objection Nos. 1-3. Dr. Rothman

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admitted that he doesn't "do tractography as part of my clinical practice" and he "cannot tell" if the 3T MRI take of Plaintiff's brain "are or are not correct." *See* Exhibit 7, Deposition of Dr. Stephen L.G. Rothman, M.D., at 9:4-18. Dr. Rothman has authored no publications related to 3T MRI or tractography. *See* Exhibit 7, Deposition of Dr. Stephen L.G. Rothman, M.D., at 26: 7-9. Dr. Rothman admitted it has been at least a year since he reviewed literature related to tractography and DTI. *See* Exhibit 7, Deposition of Dr. Stephen L.G. Rothman, M.D., at 31:2-9. These declarations are not evidence and the information contained therein simply improper expert opinion that should be struck from the record. *See* Plaintiff's Objections to Evidence Offered By Defendant In Support of Motion in Limine No. 4.

Moreover, neither Dr. Rothman nor Dr. Chabay state that tractography is not generally accepted within the scientific community – Dr. Chabay does not even address the issue in her declaration, and Dr. Rothman simply states that "the pictures from tracts *have not been adequately defined* in the medical/scientific community." *See* Declaration of Dr. Rothman at ¶ 7 (emphasis added). This is clearly a statement based on Dr. Rothman's own baseless opinion and not based on any evidence – and it is an opinion of a doctor who is **not** an expert in 3T MRI. *See* Plaintiff's Objections to Evidence Offered By Defendant In Support of Motion in Limine No. 4.

Defendant is seeking to have evidence of tractography excluded from trial for the simple reason that it hurts his case. A large majority of mild traumatic brain injuries are not detectable on CT scans or standard MRIs; Defendant is seeking to exclude a scan which has the ability to detect such an injury. Defendant is asking this Court to disregard the overwhelming consensus of the medical community and preclude evidence of DTI because it is a tool used for diagnosis as opposed to a biomarker capable of exclusive diagnosis. Plaintiff's experts are using DTI as one of many tools to diagnose traumatic brain injury. This is exactly how the overwhelming majority of medical diagnoses are made: by taking all the information together and drawing a conclusion. The tractography based on DTI done on Plaintiff's brain cannot, by itself, determine that Plaintiff has a brain injury caused by Defendant running her over with his car. However, Plaintiff's records show no prior brain injury symptoms, her neuropsychological test results indicate a traumatic brain injury, she has experienced a drop in performance at both her jobs, and she has ongoing

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symptoms indicative of a traumatic brain injury and abnormalities detected by DTI in the same areas. It is when all of this evidence is viewed together that four doctors – including Defendant's own neurologist – diagnosed Plaintiff with a mild traumatic brain injury. Thus, Defendant's argument that the tractography based on DTI cannot by itself relate the brain damage found in Plaintiff to the incident with Defendant is irrelevant because the tractography is not being used by itself to do so. As such, Defendant's Motion should be denied.

V. TESTIMONY REGARDING THE TRACTOGRAPHY IN PLAINTIFF'S 3T MRI IS HIGHLY RELEVANT EVIDENCE THAT MUST BE ADMITTED.

Defendant pithily cites case law regarding the admissibility of irrelevant evidence and its danger of confusing and misleading the jury, and then provides absolutely no argument as to why evidence of tractography based on DTI done of Plaintiff's brain would confuse or mislead the jury in this case. In fact, the opposite is true. Testimony regarding the tractography by Plaintiff's experts will aid the jury in understanding Plaintiff's injury. As explained above, the tractography based on DTI taken of Plaintiff's brain is one piece of the puzzle that Plaintiff's doctors (and Defendant's own neurologist) have relied upon in diagnosing her with a traumatic brain injury. Moreover, any objection Defendant has to the tractography goes to the weight of the evidence, and not its admissibility. *See People v. Cooper* (1991) 53 Cal. 3d 771, 814 ("Once the court acts within its discretion and finds the witness qualified, as it did in this case, the weight to be given the testimony is for the jury to decide."). Evidence of tractography is highly relevant to demonstrate that Plaintiff has sustained a traumatic brain injury, and Defendant has provided no evidence or even argument that evidence of tractography will confuse or mislead the jury. As such, Defendant's Motion should be denied.

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VI. CONCLUSION

For the foregoing reasons, Defendant's Motion should be denied in its entirety.

DATED: August 19, 2013

GREENE BROILLET & WHEELER, LLP

Geoffrey S. Wells
Molly M. McKibben
Attorneys for Plaintiff

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DECLARATION OF MOLLY M. McKIBBEN

I, MOLLY M. McKIBBEN, declare and say that:

I am an attorney at law licensed to practice before all of the courts of the State of California, and am a member of the law firm of Greene Broillet & Wheeler, LLP, attorneys of record for Plaintiff Kirsten Macy-Halbert. As such, I have personal knowledge of the facts surrounding the present action and all facts herein stated. If called as a witness, I could testify competently to the following:

1. This declaration is made in support of Plaintiffs' Opposition to Defendant's Motion in Limine No. 4.

2. Attached hereto as Exhibit "1" is a true and correct copy of the pertinent portions of the deposition of Dr. Hyman Gross, M.D.

3. Attached hereto as Exhibit "2" is a true and correct copy of the pertinent portions of the deposition of Dr. Jeffrey Schaeffer, M.D., Ph.D.

4. Attached hereto as Exhibit "3" is a true and correct copy of the pertinent portions of the deposition of Dr. Cynthia Chabay.

5. Attached hereto as Exhibit "4" is a true and correct copy of the case of *Lamasa v. Bachman*, 869 N.Y. S.3d 17 (App. Div. 2008); 2008 N.Y. App. Div. LEXIS 8686; 2008 NY Slip Op 9162.

6. Attached hereto as Exhibit "5" is a true and correct copy of the case of *Lamasa v. Bachman*, 8 Misc. 3d 1001(A) at **3 (2005), FN3; 2005 N.Y. Misc. LEXIS 1164; 2005 NY Slip Op 50882(U).

7. Attached hereto as Exhibit "6" are true and correct copies of the following cases: *Booth v. Kit*, 81 Fed. R. Evd. Serv. (Callaghan) 1, 2009 U.S. Dist. LEXIS 125754; *LeBoeuf v. B & K Contractors, Inc.* 10 So. 3d 897 (Ct. App. La. 2009), 2009 La. App. Unpub. LEXIS 324; *Whilden v. Kline*, District Court, Jefferson County, Colorado Case No. 08CV4210 (May 10, 2010).

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8. Attached hereto as Exhibit "7" is a true and correct copy of the pertinent portions of the transcript of the deposition of Dr. Stephen L.G. Rothman, M.D.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 19 day of August, 2013, at Santa Monica, California.

MOLLY M. McKIBBEN
Declarant

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CERTIFIED ORIGINAL

KRISTEN MACY-HALBERT,

Plaintiff,

vs.

Case No.

HYUNG RYUL SHIN, INDIVIDUAL; and DOES 1-10, INCLUSIVE,

BC 469602

Defendants.

DEPOSITION OF HYMAN GROSS, M.D.

WEDNESDAY, FEBRUARY 6, 2013

1:08 P.M.

2021 SANTA MONICA BOULEVARD, SUITE 320E

SANTA MONICA, CALIFORNIA

REPORTED BY:

Susan B. Sautman

CSR No. 4770

EXHIBIT 1

A. I interviewed the husband. I summarized that interview in the report.

Q. So that's included in the four to five hours?

A. Yes.

Q. In the -- in your report you recommended -- you made some recommendations and among them were I think it was a 3-T kind of test.

A. Yes.

Q. Forgive me. I don't have the full designation of it. What is the full designation?

A. Three tesla magnetic resonance imaging scan of the brain with diffusion tensor imaging.

Q. In lay terms, what does that mean?

A. It's a high resolution brain scan using magnetic resonance that enables you to see fine structural detail of the brain.

Q. Has that been done?

A. Yes.

Q. When was that done?

A. Yesterday.

Q. Do you have the results yet?

A. Yes.

Q. What are the results?

A. It's abnormal. It shows dropout of fibers

in the corpus -- in the body of the corpus collosum, and to my inspection -- I don't have the official report. I spoke to the neuroradiologist.

I also believe there is a mild atrophy of the hippocampus, more prominent on the right than the left.

Q. Are you able to connect up any of her symptoms with this specific abnormal test?

A. Yes.

Q. Could you do that for us, please.

A. She has multiple symptoms. She's had a traumatic brain injury. One of the most common features that you see when you have fiber dropout or injury to the brain is something called slow processing speed.

She clearly has slow processing speed on multiple psychometric tests that were done. Slow processing speed is exactly that. It takes longer to accomplish the same thing you did in the past because you have less brain structure to process the information, so thinking is slowed down, the ability to handle multiple pieces of information simultaneously is impaired, so it's multitasking problems.

Those abilities are impaired, so that's one

general correlation you see and it's one of the most prevalent abnormalities you see in a traumatic brain injury is decreased processing speed.

I did tests that show this but also a neuropsychologist by the name of Jeffrey Schaeffer did three days of testing in August 2012, and I don't have any official report. What I do have is this tabulated psychometric test which I can interpret very easily for you, and it also shows significant slowing and processing speed.

Let me see if I can get that in front of you because I think the numbers show that. I'm sorry. Here it is. It's right in front of me.

For example, on the Wechsler Adult Intelligence Scale --

Q. This is a neuro --

A. -- psychologist.

Q. What is the title of the document you're reading from?

A. Neuropsychological Data Summary Sheet Appendix. Kisten (sic) Halbert, dates of evaluation, August 17, 2012 to August 22, 2012.

MR. WELLS: Can I make a suggestion? You're going a little fast for me and I guarantee you're going a little fast for her. It's your

SUPERIOR COURT OF THE STATE OF CALIFORNIA
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Plaintiff,
vs.
HYUNG RYUL SHIN, INDIVIDUAL; and DOES 1-10, INCLUSIVE,
Defendants.

Case No.
BC 469602

DEPOSITION OF JEFFREY SCHAEFFER, Ph.D.
TUESDAY, FEBRUARY 12, 2013
11:30 A.M.

8635 WEST THIRD STREET, SUITE 1080W
LOS ANGELES, CALIFORNIA

REPORTED BY:
Susan B. Sautman
CSR No. 4770

EXHIBIT 2

Q. We have the upright MRI of the left shoulder, and you have highlighted various parts of that.

Was there any particular significance to you regarding the MRI of the left shoulder?

A. I don't remember what I highlighted. I would have to look at it.

Q. Why don't you take a look at it.

A. The MRI of the left shoulder was reportedly normal. Looks like the MRI of the cervical spine found some abnormalities, disk protrusions in particular at C3 through C7, and that was it.

Q. I think I actually handed you two collections of documents.

A. I think you did.

Q. For the sake of efficiency that was actually a good thing.

Then we have Dr. Mir's report with various highlights. Date of report was September 22, 2011. Date of exam was the day before.

Any particular significance to you regarding the highlights in that report?

A. Well, there was a listing of her complaints including headaches, neck pain with stiffness, left shoulder pain, low back and bilateral knee pain,

also right ankle pain, and there was also a bit of medical history there including hypothyroidism and a cervical bone biopsy.

At that point the patient was taking medication for pain and for sleep which includes Vicodin which is hydrocodone and Ambien, zolpidem at that point. His diagnoses included a high energy auto versus pedestrian accident, headaches and a post-concussional disorder which is synonymous with mild traumatic brain injury.

Cervical spine musculoligamentous sprain and strain with a muscle spasm. Left shoulder pain weakness, rule out rotator cuff tear. Lumbar spine musculoligamentous strain and strain. Bilateral knee sprain and right ankle sprain.

So that was what I had highlighted.

Q. As far as Dr. Mir's conclusion about -- you read it. I just have to find it now. I think it was post-concussion.

Do you agree with him at least as far as that part of his diagnosis?

A. Yes.

Q. Do you know what he based his diagnosis that she was having headaches post-concussion?

A. He took a history from the patient.

Q. Does her past illness of hypothyroidism play any part in her condition as far as you're concerned?

A. No.

Q. Now, we have Dr. Gross' report. I would hand this to you but I am afraid you would go like Dr. Gross and talk for the next hour without any questions, so let me sort of break it down.

There is no highlighting on the first page. I think it's the only report that he authored from September 27, 2011.

You highlighted beginning on page two:

"She did not recall hearing any breaks with her next recollection was hearing the sound of her head hitting a portion of the car. She cannot recall what happened next but does recall finding herself waking up lying on her right side looking under the car. She felt confused and dazed and at first was unable to hear. She described her vision as tunneled down with a subsequent visual field expanding."

This means her vision went pinpoint and

here. Why?

A. Because sometimes I refer to more articles that I have if I need them but I don't know -- I didn't think that we really needed more documents to explain things than we did, so I didn't go in to all of those.

Q. You handed me Table 63-5 and it says, "Virginia Neurological Institute Grading Scale for Athletic Mild Head Injury." There is actually two tables on it. There's 63-4 also.

What is the significance of this?

A. The significance is I'm often asked about how it is that mild traumatic brain injury is evaluated by level of severity and there is actually published criteria.

(Exhibit L was marked for identification.)

BY THE WITNESS:

A. So as part of an educational resource I like to make some materials available of how one rates the levels of severity of mild traumatic brain injury.

BY MR. DEFFEBACH:

Q. If it's possible to do, so where in these tables would the patient that we have been talking

about fall?

A. This patient probably would be a grade two level mild traumatic brain injury by most criteria because she has post-traumatic amnesia, a possible loss of consciousness, altered mental status, according to the paramedic report, and she has had persistent cognitive deficits for a period of over a year anyway.

So that would be roughly level two on this particular scale. However, we must keep in mind that the initial rating of severity may not correlate with the degree of disability or long-term impairment which has to be rated given the particulars of the individual, their situation, level of education, general intelligence, persistence of symptoms and also their vocation.

So in a patient like this the implications are more like moderate, if not severe in some areas having to do with creative skills, but having said that the patient is fully independent in general life skills function, meaning they can get up, perform activities of daily living, they can drive a car, go to the bank, handle their money, and they're able to work on a full-time basis even with the deficits that I have described.

E-Transcript of the Testimony of
Cynthia Chabay, M.D.

Date: March 18, 2013
Volume: I

Case: Macy-Halbert v. Shin

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EXHIBIT 3

Q Okay. And the examination that you conducted, was that a neurological consult?

A That's correct.

Q And how much time did you spend with her on that?

A I don't remember exactly, but I would estimate an hour and a half.

Q Did you speak with anyone else other than her?

A No.

Q For example, did you speak with her husband at all?

A No, I did not.

Q Have you spoken with any of her co-workers or friends, anyone that might have been able to add some additional information for you?

A No.

Q And did you conclude, based on your review of the records and your examination of Miss Macy-Halbert, that she had suffered from closed head traumatic brain injury?

A I felt that she had suffered a closed head injury that was clearly demonstrated by the residual abrasion scar. I felt that any evidence of traumatic brain injury would have been mild.

Q So is it your opinion that she is suffering

from mild traumatic brain injury?

A It's difficult to differentiate traumatic brain injury from post concussion only because I did not find significant evidence of cognitive deficits.

And on the neuropsychological testing, there was some evidence of some possible amplification in her findings, so it's difficult to know how much of her cognitive deficits are actually related to the head injury versus perhaps some psychogenic component.

I did feel that it was appropriate for her to have developed symptoms of cephalgia or headaches as a result of the head injury that she sustained.

Q Did she complain of having memory loss when you met with her?

A Yes, she did.

Q Were you able to confirm that, in fact, she did have memory loss at that time?

A Again, when I tested her short-term memory, she recalled two out of three objects rather than three. I would have expected her to recall three, but it was easily triggered with a list at which point she was able to recall all three.

Q So does that mean -- is it your opinion as you sit here now that she does not suffer from short-term memory loss?

A Again, it's difficult for me to say because in my particular test, of course, that does require her cooperation and her honesty in what she recalls and what she remembers.

The neuropsychological testing should be a more definitive way of determining that, and there was some question of perhaps amplification of test results.

Q But you're relying on the testing that was done by Dr. Schaeffer?

A That's correct.

Q And you reviewed Dr. Schaeffer's deposition in this case?

A I did.

Q And Dr. Schaeffer testified under oath that she's suffering from short-term memory loss, didn't he?

A I believe he did.

Q And he also testified it's his opinion she's suffering from mild traumatic brain injury?

A I believe he did.

Q Okay. Do you have any reason to dispute that?

A I think mild would be appropriate. I think that would be appropriate.

Q So would you agree that she does have mild traumatic brain injury?

A Based on a review of his information, but I

wanted to clarify why it was difficult for me to do it based on my examination findings.

Q I understand. But you were able to get additional information from the testing done by Dr. Schaeffer, and that would help you formulate that diagnosis; true?

A I think so, yes.

Q And, by the way, your background in neurology, are you a certified behavioral neurologist?

A The American boards do not include that particular certification as one of the main boards that provide certification.

I am board certified by the American Board of Psychiatry and Neurology which is one of the accepted boards.

Q Okay. But you are not board certified in behavioral -- certified behavioral neurology; is that true?

A Again, I'm not familiar with that specific --

Q It's a subspecialty. Have you ever heard of that board before?

A I have not.

Q Okay. I'm going to call it the 3T MRI. Do you understand what I mean when I say the 3T MRI?

A Yes.

Q Is that the right terminology to use for that diagnostic entity?

A It can be.

Q Are you familiar with the 3T MRI?

A Yes.

Q Have you had patients where you have referred to have a 3T MRI?

A Very rarely.

Q But you have?

A I have.

Q Okay. And were you able to actually read the 3T MRI in this case?

A I looked at it. It's not something that I would call myself an expert in, so I would definitely defer to a neuroradiologist.

Q Okay. So as far as any opinions on what is reflected on the 3T MRI, you would defer to a neuroradiologist on that; is that true?

A That's true.

Q Do you think that the mild traumatic brain injury suffered by the plaintiff in this case, Kirsten Macy-Halbert, do you think that has impacted her ability to work as an artist?

A What she's told me is that she has continued working, but it does take her longer.

Salvatore LaMasa et al., Respondents, v John K. Bachman, Appellant.

4608, 129996/93

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

56 A.D.3d 340*; *869 N.Y.S.2d 17*; *2008 N.Y. App. Div. LEXIS 8686*; *2008 NY Slip Op 9162

November 20, 2008, Decided
November 20, 2008, Entered

PRIOR HISTORY: *Lamasa v Bachman, 2007 NY App Div LEXIS 9134 (N.Y. App. Div. 1st Dep't, July 26, 2007)*

HEADNOTES

Motor Vehicles--Collision.--Court correctly directed verdict in plaintiffs' favor; defendant saw plaintiff's car stopped at red light, braked hard and shifted to low gear, but his truck skidded on wet roadway and hit rear of plaintiff's car; rear-end collision with stationary vehicle created prima facie case of negligence, and wet roadway did not suffice as nonnegligent explanation for defendant's failure to maintain safe distance.

Witnesses--Expert Witness

COUNSEL: [***1] Conway, Farrell, Curtin & Kelly, P.C., New York (Jonathan T. Uejio of counsel), for appellant.

Flomenhaft & Cannata, LLP, New York (Benedene Cannata of counsel), for respondents.

JUDGES: Lippman, P.J., Mazzarelli, Buckley, McGuire, DeGrasse, JJ.

OPINION

[*340] [**17] Judgment, Supreme Court, New York County (Martin Shulman, J.), entered August [**18] 11, 2006, after a jury trial, in favor of plaintiffs and against defendant in the total amount of $ 2,774,460, unanimously affirmed, without costs.

On the issue of fault, the trial court correctly directed a verdict in plaintiffs' favor based on defendant's own testimony that he saw the injured plaintiff's car stopped at a red light, braked hard and shifted to low gear, but his pick-up truck skidded on the wet roadway and hit the rear of plaintiff's car. A rear-end collision with a stationary vehicle creates a prima facie case of negligence requiring a judgment in favor of the stationary vehicle unless defendant proffers a nonnegligent explanation for the failure to maintain a safe distance (*Mitchell v Gonzalez, 269 AD2d 250, 251, 703 NYS2d 124 [2000]*). A wet roadway is not such an explanation. A driver is expected to drive at a sufficiently safe speed and to maintain enough distance between [***2] himself and cars ahead of him so as to avoid collisions with stopped vehicles, taking into account weather and road conditions (*id.*). On the issue of serious injury, plaintiffs' experts, relying on objective medical tests, testified to brain damage and other injuries that they attributed to trauma, and the conflicting medical evidence and opinions of defendant's experts concerning the permanence and significance of plaintiff's injuries simply raised issues of fact for the jury (*see Noble v Ackerman, 252 AD2d 392, 395, 675 NYS2d 86 [1998]*). Concerning defendant's motion to preclude expert testimony, with respect to the nonproduction of raw data produced in tests conducted by the experts, defendant fails to show either prejudice or willful and contumacious conduct. With respect to the experts whose designations were made shortly before trial, *CPLR 3101 (d) (1) (i)* [*341] does not require a party to retain an expert at any particular time, and the court allowed defendant appropriate additional disclosure. With respect to the discrepancies between the trial testimony of some of plaintiffs' experts and their reports, defendant did not show a willful attempt to deceive or prejudice, and such discrepancies,

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which [***3] defendant was free to raise on cross-examination, go only to the weight, not the admissibility, of the testimony (*see Hageman v Jacobson, 202 AD2d 160, 161, 608 NYS2d 180 [1994]*; *Dollas v Grace & Co., 225 AD2d 319, 321, 639 NYS2d 323 [1996])*. 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 (*see Parker v Mobil Oil Corp., 7 NY3d 434, 447, 857 NE2d 1114, 824 NYS2d 584 [2006])*. We have considered defendant's other arguments and find them unavailing. Concur--Lippman, P.J., Mazzarelli, Buckley, McGuire and DeGrasse, JJ.

[**1] **Salvatore Lamasa and Ana G. Lamasa, Plaintiffs, v. John K. Bachman, Defendant.**

129996/93

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

8 Misc. 3d 1001(A); 2005 NY Slip Op 50882(U); 2005 N.Y. Misc. LEXIS 1164

April 13, 2005, Decided

NOTICE: [***1] THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

SUBSEQUENT HISTORY: Subsequent appeal at *Lamasa v. Bachman, 2007 N.Y. App. Div. LEXIS 9134 (N.Y. App. Div. 1st Dep't, July 26, 2007)*

DISPOSITION: For the foregoing reasons, this Court grants the unopposed branch of defendant's post-verdict motion reducing the award for past medical expenses from $ 40,768 to $ 25,000. In all other respects, the remaining branches of defendant's motion and plaintiffs' cross-motion are respectively denied. Plaintiffs shall submit a proposed money judgment, on notice, for signature consistent with this Court's Decision and Order.

HEADNOTES

[*1001A] Verdict--Setting Verdict Aside. Civil Practice Law and Rules--§ 4404 (a) (Posttrial motion for judgment and new trial).

JUDGES: Martin Shulman, J.S.C.

OPINION BY: Martin Shulman

OPINION

Martin Shulman, J.

Defendant, John K. Bachman ("defendant" or "Bachman"), moves for an order seeking the following relief in relation to a jury verdict rendered on June 7, 2004 [1]:

1) dismissing the complaint; 2) setting aside the jury verdict as against the weight of the evidence (*CPLR § 4404[a]*); 3) alternatively, seeking remittitur; 4) seeking defense costs and fees as against the plaintiffs, Salvatore LaMasa and Ana G. LaMasa (where appropriate: "plaintiff", "Salvatore" or "plaintiffs") [***2] in connection with plaintiffs' counsel's "withdrawal of his proffer of PET and QEEG evidence following the ruling of the Court precluding said evidence during the trial and for costs in connection with plaintiff's egregious discovery abuses." Plaintiffs oppose the motion and cross-move for additur.

The motion and cross-motion are consolidated for disposition.

1 Normally, a motion to challenge a jury verdict pursuant to *CPLR § 4404(a)* is governed by the 15-day time limit of *CPLR § 4405*. This Court permitted the parties to stipulate to extend their time to present written arguments. *See*, "(*CPLR 2004*; see, 4 Weinstein-Korn-Miller, *NY Civ. Prac para. 4405.05*)..." *Brown v. Two Exchange Plaza Partners, 146 A.D.2d 129, 539 N.Y.S.2d 889 (1st Dept.,1989).*

Salvatore initiated what had become a protracted action against the defendant in November, 1993 for injuries he purportedly sustained as the [***3] driver of the stationary, front vehicle Bachman rear-ended during the early morning hours of November 25, 1992 at the intersection of Delancey and Clinton Streets just prior to entering the Williamsburg Bridge (the "Collision"). After being marked off the calendar at least three times, this matter was restored to the trial calendar and thereafter transferred to the New York County Civil Court on November 10, 1999 (see, *CPLR § 325[d]*). After languishing for four years, the parties appeared at several pre-trial

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[**2] conferences and the case was eventually referred to the Supervising Judge of that court. [2]

> 2 Due to the confusing procedural posture of the case and an inordinate number of complex *in limine* motions/issues as well as the potential value of the case (based upon a prima facie showing), the parties' counsel concurred that the matter should be re-transferred to the Supreme Court and this Court agreed to preside over the jury trial.

Jury selection began on May 4, 2004 and the [***4] trial ended on June 7, 2004. As noted on the Jury Verdict Sheet (Exhibit A to Bachman Motion), five out of the six members of the jury reached an agreement and preliminarily reported that defendant's negligence in causing the rear-end collision was a substantial factor in causing Salvatore's injuries. The same five members of the jury further reported that as a result of the Collision, plaintiff suffered a serious injury under the No-Fault Law, *Insurance Law § 5102(d)* (see, Jury Question Nos.: 1A-1C). Salvatore was then awarded the following damages:

a) Past pain and suffering§§§§§§§§§§?	$ 240,000
b) Future pain and suffering§§§§§§§§§.	$ 400,000 (over 20 years)
c) Past Lost Earnings§§§§§§§§§§§..	$ 460,713
d) Future lost earnings§§§§§§§§§§§§	$ 774,892 (over 13 years)
e) Past medical expenses§§§§§§§§§§?..	$ 40, 768
f) Future Medical expenses§§§§§§§§§§?	$ 95,040 (over 20 years)
g) Past loss of medical insurance§§§§§§..	$ 38,985
h) Future loss of medical insurance§§§§§§	$ 95,840 (over 13 years)
i) Future loss of social security§§§§§§..	$ 122,273 (over 7 years)

[***5]

The jury also awarded Salvatore's spouse, Ana La-Masa, $ 250,000 for past loss of services (on her derivative claim for loss of consortium) and awarded an identical sum for future loss of services (the latter to cover a period of 20 years).

It should be readily apparent that both parties had a full and fair opportunity to argue and brief the court (where necessary) and make their record, *inter alia*, concerning their respective *in limine* motions, evidentiary issues and procedural and substantive trial issues (e.g., the proper jury charges, verdict interrogatories, etc.). While this Court granted Bachman's counsel leave to make this post-verdict motion, nonetheless, to avoid any redundancy, this Court expressed an unwillingness to entertain any application addressing the liability issues and/or the varied evidentiary rulings made prior to and during the jury trial. However, this Court stated it would consider whether the jury awards were excessive and unreasonable (*CPLR § 5501[c]*). Still, defendant took advantage of his right to move under *CPLR § 4404(a)* and "re-argued" almost every one his overruled objections and denied [***6] motions duly made on the record during the course of the trial and duly preserved for a potential appeal.In its post-verdict motion, defendant's counsel argues that: Salvatore's proof of injuries never met the statutory threshold to constitute a serious injury (i.e., no loss of consciousness and no complaints of pain and/or other physical or cognitive disabilities at the time of the Collision made to the police or his late brother-in-law, no loss of ambulation, no emergency room or hospital admission at the time of the Collision, no initial complaints of headaches, depression and/or anxiety at or close in time to the Collision, a normal neurological examination seven weeks post-Collision, [**3] no evidence of either temporary or permanent traumatic brain injury ("TBI") at or close in time to the Collision and no objective findings of injuries to Salvatore's neck and back); plaintiff's proof was insufficient to show a causal connection between the Collision and Salvatore's alleged injuries (*viz.*, all of plaintiff's experts failed to opine on causation and any and all purported positive findings of TBI, post-traumatic stress disorder ["PTSD"] and neck and back injuries were reported [***7] years after the collision by medical experts retained by plaintiffs' counsel solely for trial); and plaintiffs' discovery abuses warranted the extreme sanction of dismissal of the plaintiffs' complaint.

Defendant's post-verdict motion further took issue with various court rulings he deemed erroneous such as permitting plaintiff's expert neuroradiologist, Dr. Michael Lipton, to testify with respect to an innovative MRI modality utilizing Diffusion Tensor Imaging ("DTI") [3] as this modality is not generally accepted in the field of radiology or neuroradiology to diagnose TBI or diffuse

axonal injury; precluding defendant's expert neurologist from testifying concerning Evoked Potential testing [4] which plaintiff argued was not addressed in defendant's expert witness disclosure notice; granting plaintiff a directed verdict on the issue of negligence; overruling certain objections to references about insurance made by various plaintiffs' witnesses; denying defendant's request for a missing witness charge with respect to various witnesses such as Dr. Wiseman (pain management specialist who treated Salvatore), Dr Leo J. Shea III (psychologist who treated Salvatore) and Mariusz Ziejewski, [***8] Ph.D. (accident reconstruction engineer); granting plaintiffs' counsel's application to modify certain no-fault interrogatories on the verdict sheet to eliminate the phrase, "as a result of the accident" but otherwise accurately reciting the text of these no-fault questions in accordance with PJI 2:88E, 2:88F and 2:88G; and granting plaintiffs' counsel application to amend certain damages questions on the verdict sheet after completion of instructions to the jury to include a claim for loss of past and future medical insurance and future loss of social security benefits (or payments) and furnishing the jury with a supplementary charge with respect thereto.

3 DTI is an imaging technique used to study the random motion of hydrogen atoms within water molecules in biological tissue (e.g., brain white matter) and spatially map this diffusion of water molecules, *in vivo*. DTI provides anatomical information about tissue structure and composition. Changes in these tissue properties can often be correlated with processes that occur, among other causes, as a result of disease and trauma.

4 Evoked Potentials sometimes called evoked responses are tests that record the brain's responses to sound, touch and light. These tests help to evaluate a number of neurological conditions.

[***9] After the foregoing challenges, Bachman's motion then raises the issue of remittitur urging the court to either set aside or reduce the jury awards for past lost earnings ($ 460,713) and [**4] future lost earnings ($ 774,892) [5], reduce the jury award for past medical expenses from $ 40,780 to $ 25,000, set aside the jury award for past and future medical insurance as being duplicative, set aside the jury award for future loss of social security retirement benefits as being totally speculative or alternatively reduce the $ 122,273 award to $ 80,700 and reduce the jury awards for loss of past and future services to Ana LaMasa from $ 500,000 to $ 50,000.

5 Specifically, defendant contends that Salvatore's pre-accident employment history reflects a patchwork of short-term jobs, that plaintiff's most recent employment before the accident at Ogden Allied was only for two and a half years, that Salvatore intended to leave Ogden Allied to become a Con Edison meter reader rendering plaintiff's expert economist's projections and calculations uncertain and speculative, that the calculation of the past and future lost earnings on an annualized basis erroneously utilized an increase rate of 3.5 rather than the union contract increase rate, that the economist failed to consider plaintiff's pre-accident health condition (i.e., scoliosis and degenerative disc disease), that the jury ignored testimonial evidence proffered by Dr. Remling, Salvatore's treating chiropractor, to the effect that plaintiff could return to work at a less demanding job or seek part time work, and that plaintiff's expert recognized that the rate of increase for future lost earnings could have been 3.5 rather than 4.5 justifying a reduction of this award by approximately $ 50,000 or $ 60,000.

[***10] Finally, due to plaintiff's purportedly frivolous efforts to seek the admission of QEEG [6] and PET scan [7] evidence, Bachman should be awarded attorney's fees pursuant to *22 NYCRR § 130-1.1* as well as defense expert witness expenses totaling approximately $ 50,000.

6 EEG is the recording of electrical patterns at the scalp's surface showing cortical electrical activity or brain waves. This recording is called an electroencephalograph, commonly referred to as an EEG. As a diagnostic tool, Quantitative EEG or QEEG provides a digital recording of the EEG which is apparently utilized to perform a comparative analysis of many EEG tracings of a patient suffering from brain disease or trauma against a normative data base of EEG tracings.

7 Positron Emission Tomography ("PET") is a medical imaging technique which scans a body's chemistry and function to detect cancer, Alzheimer's and other medical conditions.

Plaintiff's cross-motion seeks additur and through the following arguments [***11] tells a different story:

Testimonial and documentary evidence presented before the jury preponderated in favor of Salvatore establishing that he suffered serious injury (*Insurance Law § 5102*) including, but not limited to, neck and back injury, TBI [8], post-traumatic stress disorder ("PTSD"[9]) and a non-permanent, [**5] medically determined injury, *viz.*, non-performance of customary and daily activities for 90 of 180 days after the Collision. Each of these conditions standing alone, plaintiffs argue, would satisfy the statutory serious injury threshold;

Unrefuted testimonial and documentary evidence presented before the jury established that as a result of the Collision, Salvatore suffered, and continues to suffer, from panic disorder, severe depression accompanied by suicidal ideation and bouts of violence, electrical dysfunction of the brain, epilepsy, chronic severe headaches, sleep cycle disorder/insomnia [10];

Defendant unnecessarily reiterates his objections to the many discovery issues fully argued and briefed prior to and during the trial, which the court ruled upon on the record [11] and requires no serious rebuttal. Moreover, defendant [***12] conveniently overlooked his counsel's own discovery "abuses" during the course of the trial;

References to the word, "insurance", during the testimony of some of plaintiffs' witnesses were benign in context and non-prejudicial as most of the references to insurance were made in [**6] the context of discussing the payment of plaintiff's medical bills and did not warrant a mistrial;

This Court correctly granted plaintiffs a directed verdict on the issue of negligence, correctly denied defendant's request for a missing witness charge, vis-a-vis, Drs. Weissman,, Shea and Ziejewski; correctly permitted the semantic changes to the no-fault interrogatories eliminating the introductory phrase, "as a result of the accident", while retaining the text of each question in accordance with the PJI. After determining if plaintiff suffered a serious injury by responding affirmatively to the three no-fault questions, the jury properly determined the issue of causation by answering Question No.2, namely, "Was the collision involving the plaintiff and defendant a substantial factor in causing any of the injuries alleged by plaintiff?" (Exhibit A to Bachman Motion at p. 2)

Contrary to defendant's [***13] confusing assertions, the jury awards for past and future medical insurance costs were not duplicative of the awards for medical expenses, but rather awards for loss of income, that is to say, the replacement costs of heath insurance Salvatore ostensibly would have to purchase in lieu of free union health care coverage he would have otherwise received had he continued working at Ogden Allied (Exhibit B-4 to Bachman Motion; Leiken trial transcript at pp. 24-30) [12];

Dr. Leiken similarly projected the loss of social security retirement benefits as an additional component of lost income to be $ 170,000 (see, Exhibit B-4 to Bachman motion at pp. 26-30) and the jury further reduced this sum to $ 122,273 over a seven year period. Defendant's counsel blurs this item of income loss with Bachman's right to pursue adjustments of the judgment at a post-verdict collateral source hearing;

Without proffering any economist to refute Dr. Leiken's assumptions, calculations and projections on behalf of plaintiffs, defendant's challenges to the past and future lost earnings awards rest on a selective and skewed analysis of the testimony, expert and other [13], thus, the jury awards were fair [***14] and reasonable;

[**7] Plaintiffs agree that the past medical expense award should be reduced from $ 40,768 to $ 25,000 based upon the evidence of record; and

The aggregate award of $ 500,000 to Ana LaMasa for loss of services was fair and reasonable based upon her credible testimony (Mrs. LaMasa had to replace Salvatore as the head of the household raising their two sons and constantly had to care for her husband since the Collision and must continue to do so for the rest of his life).

8 Plaintiffs contend that treating specialists Dr. Lewis Weiner (Salvatore's treating neurologist), Dr. Steven Stein (neuropsychologist), Dr, Daniel Kuhn (Salvatore's treating psychiatrist) and Dr. Joshua Greenspan (pain management specialist), Dr. Rachel Yehuda . (neuroendocrinologist/psychologist) and experts Dr. Nils Varney (neuropsychologist) and Dr. Lipton jointly and severally opined that LaMasa suffered TBI as a result of the Collision. Their findings, impressions and conclusions, counsel argues, were based on hundreds of clinical examinations performed and duly reported, treatment regimens (i.e, series of drug treatments administered for over 12 years, all proven unsuccessful), medically accepted batteries of neuropsychological tests, MRI and/or DTI studies (the latter imaging studies revealed anatomical damage such as frontal lobe, hippocampus and para hippocampal atrophy and hemocitarin residue [from internal bleeding] consistent with frontal lobe injury).

[***15]

9 Plaintiffs similarly contend that the severity of Salvatore's PTSD defies text book analysis. Salvatore's counsel, drawing from Dr. Yehuda's testimony, starkly captures a singular feature of what this specialist diagnosed as one her worse cases of this disorder: "As a result of the immense psychological barriers inflicted by his PTSD, LaMasa remains psychologically frozen in time. He really has no present or future, since his PTSD holds him captive in a perpetual state of fear and terror, stuck in the moments surrounding the [Collision]. . . " (Flomenhaft Aff. In support of Cross-Motion at P37 paraphrasing from the Yehuda trial transcript at pp.16 and 42-45).

10 Studies done at Mt. Sinai Medical Center Sleep Laboratory revealed "abysmally abnormal

qualities in Salvatore's sleep cycles and sleep oxygenation." (Flomenhaft Aff. in support of Cross-Motion at P32).

11 To illustrate, plaintiff's counsel acknowledged defendant's understandable concern about the "eleventh hour" proffer of Grahme Fisher, an accident reconstruction specialist. Exercising its discretion to ameliorate any perceived prejudice and surprise, this Court afforded defendant's counsel ample opportunity to depose Mr. Fisher during the course of the trial and obtain all relevant data he relied upon to not only conduct effective cross-examination, but also to furnish an appropriate defense to the effect that the Collision was low-impact in nature and incapable of causing the mixed bag of injuries Salvatore claims to have suffered therefrom. In this context, plaintiffs' counsel retorted that the court ruling precluding defendant's neurologist from testifying about Evoked Potentials testing was proper because the relevant *CPLR § 3101(d)* notice made no mention of this subject for testimony.

[***16]

12 In explaining his calculation of this loss, the expert economist determined an annualized cost of health insurance for an individual to be $ 5000 from 1995 (after the Collision, Salvatore's union continued to provide him with health insurance coverage for a few years) through age 65 and factored in an annual 6 increase thereto for a total cost of $ 134, 796 (past medical insurance cost of $ 38,985 and future medical insurance cost of $ 95,840).

13 Counsel contends it was reasonable for Dr. Leiken to assume that LaMasa would have remained at Ogden Allied, because the Con Edison position, if taken, would have been in addition to his porter work at New York University. Counsel further argues that LaMasa's work history reflected plaintiff's ongoing desire to work regularly, that no part time work was available after the Collision and that even assuming some incremental improvement of his neck and back through chiropractic treatment, LaMasa still suffered from TBI and its concomitant psychiatric problems rendering him disabled from the time of the Collision.

Counsel's cross-motion further [***17] addressed the mean-spirited nature of defendant requesting costs referable to the potential proffer of testimony concerning QEEG and PET testing performed on Salvatore finding said request to be without merit as a matter of law.

Finally, plaintiffs seek additur to increase the total awards for past and future pain and suffering from $ 640,000 to an appropriate seven-figure number. Counsel finds support from appellate case law involving similarly situated plaintiffs who suffered from TBI and PTSD. (Flomenhaft Aff. in support of Cross-Motion at pp. 34-41).

In reply, defendant's counsel factually distinguishes the case law plaintiffs rely upon for additur, reiterates her objection to the trial testimony of Salvatore's treating specialists questioning the value of their testimony due to purported gaps in time and in treatment (i.e., Dr. Greenspan did not see Salvatore until eleven years after the Collision, etc), and reiterates defendant's position as to the lack of record evidence of causation and serious injury. For ease of reference, defendant's counsel prepared a chart as part of his "wherefore" relief. Bachman therefore seeks an order vacating the jury award *in toto* and granting [***18] a new trial or, alternatively, reducing plaintiff's total lost earnings award to $ 60,000, reducing plaintiff's past medical expenses award to $ 25,000, reducing plaintiff's total past and future loss of medical insurance costs award to $ 0, reducing plaintiff's future loss of social security benefits award to $ 80,700 and reducing Ana LaMasa's total loss of services award to $ 50,000.

Discussion

Preliminarily, this Court grants the unopposed branch of defendant's motion reducing the past medical expense award from $ 40,768 to $ 25,000.

Having otherwise carefully reviewed the relevant portions of the trial transcript furnished by the parties, this Court finds the jury verdict is supported by sufficient evidence as a matter of law. Stated differently, the verdict is not utterly irrational and there was sufficient evidence to raise issues of fact (i.e., causation and serious injury) for the jury to resolve. *Garricks v. City of New York, 1 N.Y.3d 22, 801 N.E.2d 372, 769 N.Y.S.2d 152 (2003)*. Further, there were valid lines of reasoning and permissible inferences for the jury to draw upon that would lead these rational jurors to reach their conclusions based upon the testimonial [***19] and other admitted evidence presented at trial and decide the triable issue of whether Salvatore suffered serious injury causally related to the Collision. *Cohen v. Hallmark Cards, Inc., 45 N.Y.2d 493, 382 N.E.2d 1145, 410 N.Y.S.2d 282 (1978)*. This ample trial record does not justify a judgment notwithstanding the verdict dismissing the complaint without re-submission of the action to another jury.

Having found sufficient evidence in the trial record to support the verdict, this Court must then inquire as to whether the conflicting medical and other expert testimonial evidence presented by the parties and which resulted in "a verdict for the plaintiffs. . . so preponderated

in favor of the defendant that [the verdict] could not have been reached on any [**8] fair interpretation of the evidence. . . " *Moffat v. Moffatt, 86 A.D.2d 864, 447 N.Y.S.2d 313 (2nd Dept., 1982)* and quoted with approval with bracketed matter added in *Lolik et al., v. Big V Supermarkets, Inc., 86 N.Y.2d 744, 655 N.E.2d 163, 631 N.Y.S.2d 122 (1995)*. In conducting a factual inquiry of the trial record, this Court further finds no basis to set aside the verdict as against the weight of the evidence [***20] and direct a new trial.

The facts of the Collision are essentially undisputed, i.e., a rear-end collision of a stationary vehicle waiting for a light change which occurred on a wet roadway. And the issue of Bachman's negligence was resolved as a matter of law in favor of Salvatore when this Court granted plaintiffs' application for a directed verdict on the question of negligence.

This Court digresses to discuss the merits of that branch of Bachman's post-verdict motion rearguing his opposition to plaintiffs' application for a directed verdict on this issue. Bachman again makes reference to a pre-trial decision and order of the Hon. Joan A. Madden issued January 13, 1998 (Exhibit C to Bachman Motion) which denied plaintiffs' motion for summary judgment finding defendant's purported negligence to be a triable issue of fact. For reasons fully stated on the record at the close of the entire case and prior to summations, this Court made it clear that Justice Madden's decision and order did not mandate that the jury decide the issue of Bachman's negligence. It must be emphasized that "[a] denial of a motion for summary judgment is not necessarily *res judicata* or the law of the case [***21] that there is an issue of fact in the case that will be established at trial. . ." *Sackman-Gilliland Corporation v. Senator Holding Corp., 43 A.D.2d 948, 351 N.Y.S.2d 733 (2nd Dept., 1974)*. Further, the "proof offered to defeat a motion for summary judgment does not meet the standard of proof required to resolve an issue of fact at trial. . ." *Cushman & Wakefield, Inc., v. 214 East 49th Street Corp., 218 A.D.2d 464, 468, 639 N.Y.S.2d 1012, 1015 (1st Dept., 1996)*. Bachman's testimony and other supporting evidence in his defense neither included any non-negligent explanation for the Collision nor rebutted the presumption of negligence under all of the circumstances underlying the Collision. Defendant's excuse that the roadway was wet preventing him from stopping sufficiently in time to avoid the impact was wholly unavailing. *Mitchell v. Gonzalez, 269 A.D.2d 250, 703 N.Y.S2d 124 (1st Dept., 2000)*. Thus, plaintiffs were not foreclosed from obtaining a directed verdict on the issue of negligence. See, *Gubala v. Gee, 302 A.D.2d 911, 754 N.Y.S.2d 504 (4th Dept., 2003)*.

As to the issues of causation and the precise physical [***22] injuries Salvatore suffered from as a result of the Collision, the parties had numerous expert witnesses testifying and "in considering the conflicting testimony fo the parties' respective expert witnesses, the jury was not required to accept one expert's testimony over that of another, but was entitled to accept or reject either expert's position in whole or in part. . ." *Mejia v. JMM Audubon, Inc., 1 A.D.3d 261, 767 N.Y.S.2d 427 (1st Dept., 2003)*. To reiterate, the verdict as to the Collision being a substantial factor in causing Salvatore "serious injury" as defined under the *Insurance Law § 5102 (d)* was not against the weight of the evidence and will not be disturbed. [14] [**9]

> 14 In answering Question # 2 on the verdict sheet (Exhibit A to Bachman Motion), the jury deliberated on the precise issue of causation and the wording of the question made it clear that it had to determine whether the Collision was a substantial factor in causing *any* of Salvatore's injuries. The Jury's answers to Questions # # 1A, 1B and 1C determined the no-fault threshold issue of whether Salvatore's injuries constituted a "serious injury". This Court does not find that the deletion of the phrase, "as a result of the accident", from these three threshold questions prejudiced defendant in any way or ran afoul of the applicable "serious injury" PJI charges underlying these jury questions. In short, the jury squarely disposed of the separate and discrete issues of causation and serious injury under the no-fault statute.

[***23] Defendant's disguised reargument of certain *in limine* motions this Court denied and which defendant perceives, if granted, would have otherwise either resulted in a judgment of dismissal notwithstanding the verdict or its vacatur and a directive to conduct a new jury trial is without merit.

As to defendant's charge of discovery abuses [15], it is essentially admitted that raw EEG epochs contained in the treatment records of Dr. Kuhn were belatedly turned over and similar records of Dr. Weiner were purportedly destroyed in the ordinary course of that physician's business. Yet, this Court ruled that Dr. Weiner could not testify about any alleged objective findings of TBI noted on such EEG data. As noted in the trial transcript, defendant was able to have an expert witness, Dr. Marc Nuwer, testify concerning Dr. Kuhn's data at trial, who offered a contrary interpretation of such data and, for that matter, a contrary opinion concerning the collision not being a competent producing cause of Salvatore's deteriorating physical condition. Defendant's motion stridently argues about the severe prejudice in belatedly receiving the respective *CPLR § 3101(d)* notices [***24] and reports/data of plaintiff's experts in the fields of neuropsy-

chology (Nils Varney, Ph.D.), sleep medicine (Dr. Stasia Wieber) and accident reconstruction/engineering (Grahme Fisher, P.E.).

15 Defendant claims plaintiff failed to produce and/or timely produce raw EEG data from certain treating physicians and laboratories, failed to produce neuropsychological testing records from psychologists and untimely served expert witness notices reflecting changes in the theory of Salvatore's case (i.e., mild TBI changed to "moderate to severe" TBI and a low speed collision changed to a moderate to high speed collision).

Nonetheless, this Court afforded defendant sufficient time and opportunity prior to, and during, the trial to review such notices, reports and data and consult with and produce their own expert witnesses in these respective fields for purposes of mounting an appropriate defense; all borne out by the extensive trial record. Moreover, this Court issued rulings which tailored certain of the plaintiffs' [***25] expert witnesses' testimony after considering certain defense arguments. [16]

Counsel has also reargued certain adverse rulings concerning the merits of [**10] defendant's *in limine* motions to preclude due to plaintiffs' failure to timely turn over and/or not turn over records of Dr. Leo J. Shea (neuropsychologist-treatment records), Dr. Charles Wetli (pathologist), Dr. Kenneth Alper (neurologist - QEEG records),

Dr. Monte Buchsbaum (psychiatry - PET scan data). Neither the potential testimony of these witnesses nor their records, reports and data were proffered during the course of the trial based on this Court's rulings and/or other considerations. Revisiting these issues again appears to be pointless. All of defendant's remaining challenges to this Court's rulings on the admission of evidence and/or at the formal charge conference are without merit and require no additional discussion. [17]

16 In written communications to this Court after the motion and cross-motion became *sub judice*, Plaintiff's counsel urged this Court to resolve an issue concerning the unanticipated costs plaintiffs incurred in obtaining the printout of raw data EEG data of Salvatore taken at the New York University School of Medicine, Department of Psychiatry as well as Dr. Wieber's raw sleep study data collected at Mt. Sinai School of Medicine which were ordered to be produced and turned over to defendant prior to and during the course of the trial. Consistent with this Court's discussions with respective counsel on this matter, this Court directs that these costs incurred in this data production should be shared by the parties.

[***26]

17 However, one example should suffice. The mere mention of the word, "insurance", during the course of testimony and the context of how insurance was discussed was not prejudicial to defendant. No testimony was elicited which publicly noted that Bachman had liability insurance and the resources to satisfy any potential judgment. In this vein, this well-educated jury evidently could not have lost sight of the fact that Bachman was represented by two prominent law firms from New York *and* Washington D.C. with no less than three attorneys at the defense table each day of trial. Since Bachman was a retired airline pilot, the jury had ample reason to speculate where the source of funds for the enormous defense costs of this lengthy trial was coming from even if no witness ever mentioned the word insurance.

In continuing the requisite analysis as to the correctness of the verdict, *CPLR § 5501(c)* states, in relevant part:

In reviewing a money judgment in an action in which an itemized verdict is required in which it is contended that the award is . . . inadequate [***27] and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is . . . inadequate if it deviates materially from what would be reasonable compensation.

Trial courts may also apply this material deviation standard in overturning jury awards but should exercise its discretion sparingly in doing so. *Shurgan v. Tedesco, 179 A.D.2d 805, 578 N.Y.S.2d 658 (2nd Dept., 1992)*; *Prunty v. YMCA of Lockport, 206 A.D.2d 911, 616 N.Y.S.2d 117 (4th Dept., 1994)*; see also, *Donlon v. City of New York, 284 A.D.2d 13, 727 N.Y.S.2d 94 (1st Dept., 2001)* (implicitly approving the application of this standard at the trial level). For guidance, a trial court will typically turn to prior verdicts approved in similar cases, but must undertake this review and analysis with caution not to rigidly adhere to precedents (because fact patterns and injuries in cases are never identical) and/or substitute the court's judgment for that of the jurors whose primary function is to assess damages. *Po Yee So v. Wing Tat Realty, Inc., 259 A.D.2d 373, 374, 687 N.Y.S.2d 99, 101 (1st Dept., 1999)*. [***28]

With the exception of the conceded reduction for past medical expenses, this Court finds that the jury were able to assess the severity of Salvatore's physical injuries, his physical and mental disorders, his historic and current

treatment therefor and his poor prognosis. Accordingly, the pain and suffering and medical expenses awards did not deviate materially from what would be reasonable compensation under the circumstances. *Barrowman v. Niagara Mohawk Power Corp., 252 A.D.2d 946, 675* [**11] *N.Y.S.2d 734 (4th Dept., 1998)*. Thus, the branches of Bachman's post-verdict motion for remittitur and plaintiffs' cross-motion for additur as to these awards are respectively denied.

Plaintiffs' expert's *per se* calculations of Salvatore's past loss of earnings ($ 460,713) and future loss of earnings ($ 774,892) were essentially unchallenged. Plaintiff had sufficient job continuity as a porter for Dr. Leiken to properly rely on Salvatore's 1992 annualized salary of $ 32,380 and it was perfectly reasonable for this economist to utilize a conservative rate of interest of 3.5% set by the U.S. Department of Labor to calculate annual salary increases (after 25 years, [***29] the U.S. Department of Labor set an increase rate of 4.5% which Dr. Leiken utilized for the year 2005 and going forward) to compute these losses. Bachman submitted no evidence of negotiated union contracts covering Salvotore's job title which contained annual salary increases which were lower than the percentage increases Dr. Leiken relied upon for his calculations. All of defendant's challenges to the loss of earnings awards are meritless and unsupported by trial evidence (e.g., Salvatore would have left his job as a porter to become a full-time Con Edison meter reader, etc.). In short, the expert's reliance on certain facts as well as certain fair and reasonable assumptions and his calculations based thereon are fully supported by the extensive trial record. *Diaz v. West 197th Street Realty Corp., 290 A.D.2d 310, 736 N.Y.S.2d 361 (1st Dept., 2002)*.

Concerning the jury's awards to Ana LaMasa for loss of services, the trial record amply established that since the Collision in 1992 and during the ensuing years, Salvatore's physical and mental condition precipitously declined and Ms. LaMasa was forced to assume his familial duties in addition to her own and to provide [***30] for her family's financial welfare. The jury has had the opportunity to assess her trial testimony and the corroborating testimony of her children as to the diminished quality of her life with Salvatore. And as borne out by expert testimony, Ana LaMasa must continue to spend the rest of her life providing "24/7" care to a spouse with, *inter alia*, severe psychiatric/psychological disorders, a role which renders her a "captive [to] her marital responsibilities. . ." (Flomenhaft Aff. in support of Cross-Motion at P94). Therefore, the $ 500,000 total award to Ana LaMasa for loss of services similarly does not deviate from what would be reasonable compensation under her circumstances. *Cf., Dooknah v. Thompson, 249 A.D.2d 260, 670 N.Y.S.2d 919 (2nd Dept., 1998)*.

In addition, the cost of medical insurance is a component of lost income and in Salvatore's case constituted a "soft dollar" benefit he had been receiving under his union contract and potentially would have been receiving had he continued working as a porter until age 65. The costs for obtaining medical insurance coverage and unreimbursed medical expenses are clearly not one and the same (see, *Schlachet v. Schlachet, 176 A.D.2d 198, 574 N.Y.S.2d 320 [1st Dept., 1991]*). [***31] Accordingly, the expert's calculation of medical insurance costs were fair and reasonable and the jury awards based thereon do not constitute a double recovery for past and future medical expenses.

As noted earlier, Bachman took issue with this Court's somewhat novel ruling to amend the verdict sheet to add two additional categories of damages for past and future loss of medical insurance and future loss of social security benefits as components of lost earnings/income. Plaintiffs' counsel's request for this change was [**12] made immediately after summations and completion of the jury charge and just prior to deliberations. While conceding this amendment was unorthodox, nonetheless, Bachman has failed to show how the amendment to the verdict sheet prejudiced defendant's substantive and due process rights. First, defendant did not proffer his own expert economist to take issue with any of Dr. Leiken's testimony and particularly the calculations of these components of lost income. Second, defendant's counsel's closing argument did not even address any deficiencies, vis-a-vis, Dr. Leiken's trial testimony including his calculation of the past and future loss of earnings [***32] and their sub-categories. It cannot be said that Bachman's counsel relied on the pre-amendment version of the jury verdict sheet to structure his summation and therefore had been prejudiced by the inclusion of these new sub-categories of loss of earning damages on the verdict sheet ultimately introduced to, and considered by, the jury with additional jury instructions. Finally, defendant has neither shown that this verdict sheet amendment violated any trial rule or procedure nor constituted an abuse of this Court's discretion. [18]

> 18 Unlike the sub-category of loss of medical insurance, defendant's counsel apparently recognized some merit to the jury award for loss of social security benefits when, in the alternative, counsel requested the court to reduce this award from $ 122,273 to $ 80,700. (Murphy Aff. at P 98 annexed to Bachman Motion).

To conclude this discussion, it is necessary to address defendant's requests for costs and attorneys' fees in mounting a vigorous defense opposing the potential admissibility [***33] of expert testimony about QEEG and PET scan studies plaintiff was relying upon to cor-

roborate Salvatore's TBI caused by the Collision. While this Court ruled that the QEEG and PET scan studies did not meet the *Frye* standard to warrant their admission and granted Bachman's *in limine* motions to preclude such testimony with respect thereto, plaintiffs' counsel's trial strategy to proffer such data as evidence of TBI in low to moderate impact collisions was not beyond the pale and certainly not frivolous. Nor can QEEG and PET data be viewed as junk science. In addition, counsel's withdrawal of certain expert witnesses who would otherwise have testified utilizing QEEG and PET studies was directly due to this Court's bench colloquy and rulings on the record. Parenthetically, defendant's counsel overlooks the fact that this Court conducted a *Frye* inquiry relying on dueling expert affidavits and respective supporting scientific literature as well as dueling affirmations and memoranda of law; all without the need for either party to incur the exorbitant cost of producing experts for a formal *Frye* hearing. While this Court concluded expert testimony relying on these tests did [***34] not meet the *Frye* standard at this time; still, these tests and related research are "works in progress" as to their potential, broad-based applications in the diagnosis and treatment of disease. Thus, there is simply no legal/factual basis to invoke any

22 NYCRR § 130-1.1 sanction against plaintiffs and their counsel for attempting to proffer evidence of Salvatore's TBI utilizing QEEG and PET studies to support their case.

For the foregoing reasons, this Court grants the unopposed branch of defendant's post-verdict motion reducing the award for past medical expenses from $ 40,768 to $ 25,000. In all other respects, the remaining branches of defendant's [**13] motion and plaintiffs' cross-motion are respectively denied. Plaintiffs shall submit a proposed money judgment, on notice, for signature consistent with this Court's Decision and Order.

DATED: New York, New York

April 13, 2005

HON. MARTIN SHULMAN, J.S.C.

BLAYNE L. BOOTH, LORI K. BOOTH, ALEXANDRA R. BOOTH, and Plaintiffs, v. KIT, INC., a New Mexico corporation, SURENDRA B. SHARMA, TNJ CONSTRUCTION, a general partnership of Tusharkumar A. Patel and Jayesh A. Patel, AQUATIC POOLS, INC., a New Mexico corporation, GRAHAM MECHANICAL, a general partnership of Shannon Graham and Cheyene Graham, MIDSOUTH CONSTR., INC., a New Mexico corporation, A&K MECHANICAL CONTRACTORS, LLC, a New Mexico Limited Liability Company, Defendants.

Civ. No. 06-1219 JP/KBM

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

2009 U.S. Dist. LEXIS 125754*; *81 Fed. R. Evid. Serv. (Callaghan) 1

March 23, 2009, Decided

PRIOR HISTORY: *Booth v. Kit, Inc., 2009 U.S. Dist. LEXIS 117486 (D.N.M., Mar. 23, 2009)*

COUNSEL: [*1] For Blayne L Booth, Lori K Booth, Alexandra R Booth, Jacob A Booth, Plaintiffs: Alfred L. Green, Jr., LEAD ATTORNEY, Butt Thornton & Baehr PC, Albuquerque, NM; Dick A Blenden, LEAD ATTORNEY, Blenden Law Firm, P.A., Carlsbad, NM; Gary Lee Shockey, LEAD ATTORNEY, Gary L. Shockey, P.C., Jackson, WY; J Nicholas Murdock, LEAD ATTORNEY, Murdock Law Firm LLC, Laramie, WY; Robert P Schuster, LEAD ATTORNEY, Robert P Schuster PC, Jackson, WY.

For Kit, Inc., a New Mexico Corporation, Surendra B Sharma, Defendants, Cross Claimants: H Brook Laskey, Kirk R. Allen, LEAD ATTORNEYS, Miller Stratvert P.A., Albuquerque, NM; Paul Koller, LEAD ATTORNEY, Rodey Dickason Sloan Akin & Robb PA, Albuquerque, NM.

For TNJ Construction, LLC, TNJ Construction and Management, Defendants: Lawrence H. Hill, M Clea Gutterson, LEAD ATTORNEYS, Civerolo, Gralow, Hill & Curtis, PA, Albuquerque, NM.

For Aquatic Pools, Inc., Defendant, Cross Claimant: Eric M Brittain, Jeffrey S Alley, LEAD ATTORNEYS, Windle, Hood, Alley, Norton, Brittain & Jay LLP, El Paso, TX.

For Midsouth Const., Inc., Defendant, Cross Defendant: John A. Bannerman, LEAD ATTORNEY, Bannerman & Johnson, P.A., Albuquerque, NM.

For Graham Mechanical, Inc., Graham [*2] Mechanical, a general partnership of Shannon Graham and Cheyene Graham, Defendants, Cross Defendants: Aaron Randall Kugler, Daniel W. Lewis, LEAD ATTORNEYS, Allen, Shepherd, Lewis, Syra & Chapman, PA, Albuquerque, NM.

For Davis Meyer, Garcia, & Cobb, Miscellaneous: Carl Barry Crutchfield, LEAD ATTORNEY, Templeman and Crutchfield, Lovington, NM.

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For Surendra B Sharma, Cross Defendant: H Brook Laskey, Kirk R. Allen, LEAD ATTORNEYS, Miller

EXHIBIT 6

Stratvert P.A., Albuquerque, NM; Paul Koller, LEAD ATTORNEY, Rodey Dickason Sloan Akin & Robb PA, Albuquerque, NM.

JUDGES: James A. Parker, UNITED STATES SENIOR DISTRICT JUDGE.

OPINION BY: James A. Parker

OPINION

MEMORANDUM OPINION AND ORDER DENYING JOINT MOTION TO STRIKE, LIMIT OR EXCLUDE TESTIMONY OF DR. WILLIAM W. ORRISON, JR., MD

On March 9, 2009, Defendants TNJ Construction and Management ("TNJ"), KIT, Inc. [*3] ("KIT") and Surendra Sharma ("Sharma") (together, "Defendants") filed their Joint Motion *In Limine* To Exclude The Opinion Testimony Of Plaintiffs' Expert William W. Orrison, Jr., M.D. (Doc. No. 358) (the "Motion") and Memorandum In Support of the Motion (Doc. No. 359). On March 19, 2009, Plaintiffs filed their Response to the Motion ("Response") (Doc. No. 385). Neither side requests a hearing on the Motion; Defendants did not ask for a hearing in the Motion, itself, or in the supporting Memorandum, and Plaintiffs did not request a hearing in their Response. [1] Having reviewed the Motion, the arguments and the law, the Court has determined that a hearing is not necessary and will deny the Motion. [2]

1 If the Court misunderstood, and the parties do want a *Daubert* hearing, they may contact the office of District Judge James O. Browning, the judge presiding at the trial, to schedule a *Daubert* hearing on the Motion as requested by Judge Browning in his Minute Order entered on March 23, 2009 (Doc. No. 388).

2 In their Response, Plaintiffs ask that the Court award them costs and attorneys' fees incurred in connection with responding to the Motion as a sanction arguing that the Motion is frivolous [*4] and that Defendants misrepresent certain facts such as the results of Dr. Orrison's MRI study on a party to another lawsuit filed in connection with the same carbon monoxide incident. (Resp. at 12.) Plaintiffs do not cite the rule or statute upon which their request for sanctions is based. The Court assumes that the request is based on an alleged violation of *Fed. R. Civ. P. 11. Rule 11(c)(2)* states that a motion for sanctions "must be made separately from any other motion and must describe the specific conduct that allegedly violates *Rule 11(b)*." Also, a motion for sanctions must be served as provided in *Rule 5*, and "it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets." *Fed. R. Civ. P. 11(c)(2)*. The record contains no suggestions that any of these conditions have been met, and the Court, therefore, declines to entertain Plaintiffs' request for sanctions.

Background

This lawsuit stems from an incident in July 2005 in which Plaintiffs, Blayne and Lori Booth, their five year old daughter Alexandra and their 18 month old [*5] son Jacob were exposed to carbon monoxide gas while guests at the AmerHost Inn & Suites ("Motel") in Ruidoso Downs, New Mexico. Plaintiffs allege that the carbon monoxide gas leaked from a poorly constructed or repaired exhaust venting system related to the Motel's pool heating equipment. Defendant KIT owns the Motel, and Defendant Sharma is the president of KIT. Defendant TNJ was the general contractor for the construction of the Motel. In February 2008, Plaintiffs designated as an expert witness Dr. William W. Orrison, Jr., M.D., a board certified neuroradiologist who practices at the Nevada Imaging Center. Dr. Orrison will provide expert opinion testimony on findings he made after performing Magnetic Resonance Imaging (MRI) studies on Lori, Alexandra and Jacob Booth. In Dr. Orrison's opinion, Lori, Alexandra and Jacob sustained brain injuries caused by the exposure to carbon monoxide.

On June 27, 2006, Dr. Orrison performed 3.0T MRI studies on Lori and Alexandra Booth. On July 12, 2006, Dr. Orrison performed a 3.0T MRI study on Jacob Booth. Dr. Orrison has reviewed approximately 100,000 MRI studies in his career, out of which 150-200 involved persons exposed to carbon monoxide. (Mot. [*6] Ex. B, Orrison Dep. 27:17-20, 39:9-10.)

In the Motion, Defendants argue that Dr. Orrison's testimony is unreliable, has not been subject to peer review, could be erroneous and should not be permitted under the guidelines of *Fed. R. Evid. 702*, *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)* and *Kumho Tire Co. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)*.

Rule 702 and *Daubert* Analysis

The admission of expert testimony is governed by *Federal Rule of Evidence 702*. *Rule 702* provides:

> [i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to de-

> termine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, 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 witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702. Under *Rule 702* and *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)* the Court performs an important "gatekeeping role in assessing scientific evidence." [*7] *Hollander v. Sandoz Pharmaceuticals Corp., 289 F.3d 1193, 1203-04 (10th Cir. 2002)* (citations omitted) (upholding determination that plaintiffs' expert testimony was not sufficiently reliable regarding role of drug Parlodel in causing intracerebral hemorrhage).

In determining whether to admit expert opinion evidence, the Court performs a two-step analysis. *Ralston v. Smith & Nephew Richards, Inc., 275 F.3d 965, 969 (10th Cir. 2001)*. First, the Court has to determine whether the expert is qualified by "knowledge, skill, experience, training, or education" to render an opinion. *Fed. R. Evid. 702*. Second, the Court determines whether the proffered evidence is both "reliable" and "relevant." *Hollander, 289 F.3d at 1204* (citing *Daubert, 509 U.S. at 589*). Reliability is determined by assessing "whether **the reasoning or methodology** underlying the testimony is scientifically valid." *Id.* (citing *Daubert, 509 U.S. at 592-93*) (emphasis added). Relevance depends upon "whether [that] reasoning or methodology properly can be applied to the facts in issue." *Id.* (citing *Daubert, 509 U.S. at 593*). The Court expects the jury will be instructed that it may give as much or as little weight to expert opinions [*8] as the jurors think those opinions deserve.

1. Dr. Orrison's Qualifications

Defendants do not directly attack Dr. Orrison's qualifications, but Defendants assert that Dr. Orrison does not have sufficient experience evaluating MRI scans of patients exposed to carbon monoxide to render opinions in this case. Dr. Orrison testified that out of 100,000 patients he has seen over the course of his 27-year career, 150 to 200 of them were carbon monoxide exposed patients. (Mot. Ex. B, Orrison Dep. 26:20-27:12.) Defendants point to Dr. Orrison's admission that he uses a check list when reviewing MRIs of persons with carbon monoxide exposure, and his admission that he, like all other radiologists, has made mistakes and has changed his opinion in the past after another neuroradiologist gave a conflicting opinion. Defendants have failed to convince the Court that Dr. Orrison is unqualified to give an opinion about evaluations and interpretations of MRIs performed on persons who experienced exposure to carbon monoxide. Dr. Orrison is a neuroradiologist with experience examining the MRI's of carbon monoxide-exposed patients and admitted to using a checklist because this type of evaluation is very complex [*9] and the list is extensive. Dr. Orrison reviewed Lori's, Alexandra's and Jacob's medical histories, performed a PET scan and an MRI scan on Lori and Alexandra, performed an MRI scan and a Diffusion Tensor Imaging (DTI) study on Jacob, and cited several sources of medical literature in support of his opinions.

2. Dr. Orrison's Reading Not Tested

Defendants argue that despite Dr. Orrison's admissions that readings of MRI scans are subjective, that no two human brains are identical, and that there is a range of "normal" in terms of brain physiology, Dr. Orrison did not attempt to confirm the accuracy of his conclusions either by using a computer program available to verify his readings or by comparing these scans to either healthy patients or patients that were exposed to carbon monoxide. Any weakness in the readings due to lack of confirmation goes to the weight of Dr. Orrison's opinion not its admissibility. Defendants have failed to show that Dr. Orrison's methodology is so suspect as to be wholly unreliable. *See Goebel v. Denver and Rio Grande Western R. Co., 346 F.3d 987, 991 (10th Cir. 2003)* (focusing on an expert's methodology rather than the conclusions it generates).

3. Dr. Orrison's [*10] Lack of Peer Review

Defendants argue that Dr. Orrison's opinion that all three Plaintiffs suffered brain damage from carbon monoxide exposure was not confirmed by submission to a blind study or by submission for a "second opinion." Defendants also argue that Dr. Orrison has no peer reviewed publications on the subject of carbon monoxide induced brain damage other than one article that he co-authored that appeared in the *Acta Neurologica Scandinavica*. Again, these perceived weaknesses in Dr. Orrison's opinions can be brought out on cross examination, but are insufficient to exclude the opinions. *Daubert, 509 U.S. at 596* (stating that vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking admissible opinion evidence).

4. Dr. Orrison's Rate of Error

Defendants argue that Dr. Orrison admits that he has made mistakes in reading MRI scans in the past and admits that two neuroradiologists may read a scan and in-

terpret the scans differently. Defendants also assert that Dr. Orrison's opinions are unreliable because they are inconsistent. Defendants use as an example Dr. Orrison's findings [*11] that both Lori and Alexandra Booth suffered "cerebral atrophy." Dr. Orrison's description of their cerebral atrophy is virtually identical in both reports, but Dr. Orrison concludes that Lori suffered "mild" cerebral atrophy while Alexandra Booth suffered "diffuse" cerebral atrophy. Defendants argue that this unexplained difference in conclusions will confuse the jury and thus justifies the exclusion of Dr. Orrison's opinions. Defendants may proffer a qualified expert to point out this alleged inconsistency or develop the inconsistency through cross examination, but the Court will not exclude the opinion on that basis. *See Goebel, 346 F.3d at 991* (stating that no court is in a position to declare or even to know with any degree of certainty whether otherwise admissible expert testimony is, in fact, correct).

5. Dr. Orrison's Methodology Is Not Generally Accepted

Defendants finally argue that Dr. Orrison's conclusions that all three Plaintiffs have abnormal MRI scans should be excluded because it is statistically suspect. Defendants cite a study of 73 carbon monoxide exposed patients in which only 12% were found to have abnormal MRI scans. Plaintiffs respond that this incident involved [*12] a large amount of carbon monoxide exposure, and thus it is not surprising that three of the Plaintiffs suffered brain damage. Defendants further argue that in the companion case filed in state court in New Mexico, Dr. Orrison determined that all 13 of those plaintiffs suffered brain damage from carbon monoxide exposure. Plaintiffs argue that Defendants have misrepresented the facts of that lawsuit. According to Plaintiffs, Dr. Orrison's opinions based on MRI studies, contain different findings for each plaintiff in that lawsuit, and that Dr. Orrison determined that one plaintiff did not have an identifiable brain abnormality. Again, any perceived weakness in Dr. Orrison's conclusions may be attacked on cross examination or by contradictory opinions by one or more other qualified experts.

THEREFORE IT IS ORDERED that the Motion (Doc. No. 358) is denied (subject to the parties' ability to request a *Daubert* hearing as mentioned in footnote 1).

/s/ James A. Parker

UNITED STATES SENIOR DISTRICT JUDGE

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MELISSA LEBOEUF VERSUS B & K CONTRACTORS, INC., GEMINI INSURANCE COMPANY AND DELGADO COMMUNITY COLLEGE CONSOLIDATED WITH: DAVID K. BROOME VERSUS EDWARD PORTE, B & K CONTRACTORS, INC. AND GEMINI INSURANCE COMPANY

NO. 2008-CA-1351 CONSOLIDATED WITH: NO. 2008-CA-1352

COURT OF APPEAL OF LOUISIANA, FOURTH CIRCUIT

2008 1351 (La.App. 4 Cir. 05/27/09); *10 So. 3d 897*; *2009 La. App. Unpub. LEXIS 324*

May 27, 2009, Decided

NOTICE: NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE LOUISIANA RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE SOUTHERN REPORTER.

SUBSEQUENT HISTORY: Writ denied by *Leboeuf v. B & K Contrs., Inc., 18 So. 3d 126, 2009 La. LEXIS 2822 (La., 2009)*
Decision reached on appeal by *Leboeuf v. B & K Contrs., Inc., 2009 La. App. Unpub. LEXIS 672 (La.App. 4 Cir., Nov. 12, 2009)*

PRIOR HISTORY: [*1]
APPEAL FROM CIVIL DISTRICT COURT, ORLEANS PARISH. NOS. 2004-12740 C/W 2004-12746, DIVISION "B-15". Honorable Rosemary Ledet, Judge.

DISPOSITION: AFFIRMED.

COUNSEL: Randolph C. Slone, Slidell, LA, COUNSEL FOR PLAINTIFF/APPELLEE, DAVID BROOME.

Samuel J. Accardo, Jr., ACCARDO LAW FIRM, L.L.C., LaPlace, LA, COUNSEL FOR PLAINTIFF/APPELLEE, MELISSA LEBOUEF.

Sidney W. Degan III, Travis L. Bourgeois, Brian E. Sevin, DEGAN BLANCHARD & NASH, New Orleans, LA, COUNSEL FOR DEFENDANTS/APPELLANTS, B & K CONTRACTORS, INC. AND GEMINI INSURANCE COMPANY.

JUDGES: Court composed of Judge Patricia Rivet Murray, Judge James F. McKay, III, Judge Edwin A. Lombard. MCKAY, J., CONCURS IN THE RESULT.

OPINION BY: Patricia Rivet Murray

OPINION

[Pg 1] This is a personal injury suit. The plaintiffs, David Broome and Melissa LeBoeuf, filed this suit seeking to recover for the personal injuries they sustained as a result of being struck by a ladder that an employee of the defendant, B & K Contractors, Inc. ("B&K"), hurled over a fence. The trial court granted partial summary judgment on the issue of the liability of the defendants, B&K and its insurer, Gemini Insurance Company ("Gemini"). Following a trial on the issue of damages, the trial court rendered judgment awarding [*2] damages of $ 761,860.94 to Mr. Broome and $ 133,027.74 to Ms. LeBoeuf. From that judgment, B&K and Gemini appeal. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On September 4, 2003, Mr. Broome and Ms. LeBoeuf, who were classmates, were working together on a project in an herb garden at Delgado Community College, City Park Campus. Without warning, Edward Porte, an employee of B&K, tossed a large aluminum ladder over the brick fence located adjacent to the herb garden

in which they were working. The ladder struck Mr. Broome on the head and Ms. LeBoeuf in the neck area. As a result of the impact, both of them fell to the ground and sustained injuries. Mr. Broome had a cut on the head and was [Pg 2] bleeding. Ms. LeBoeuf instructed him not to move and went to get help. When she returned in about two or three minutes, Mr. Broome had not moved. Ms. LeBoeuf, a teacher, and another student assisted Mr. Broome from the ground into a classroom. After reporting the accident to the campus police, Ms. LeBoeuf drove Mr. Broome to the Ochsner emergency room. Both Mr. Broome and Ms. Leboeuf were treated for their injuries and released that day.

On September 2, 2004, Ms. LeBoeuf [*3] filed suit against B&K, Gemini, and Delgado Community College ("Delgado"). On that same date, Mr. Broome filed suit against Mr. Porte, B&K, and Gemini. On May 9, 2007, the trial court consolidated the two suits. Following a hearing, the trial court in January 2008 rendered a partial summary judgment in favor of Mr. Broome and Ms. LeBoeuf as to liability.

In June 2008, a two-day bench trial was held on the issue of damages--the nature and degree of the injuries sustained by Mr. Broome and Ms. LeBoeuf. On the morning of trial, Ms. LeBoeuf dismissed her claims against Delgado.

In July 2008, the trial court rendered judgment in favor of Mr. Broome and Ms. LeBoeuf and against B&K and Gemini. [1] As to Mr. Broome, the trial court awarded total damages of $ 761,860.94, which it itemized as follows: $ 400,000 general damages, $ 100,000 loss of enjoyment of life, $ 20,160.94 past medical expenses, and $ 241,700 future medical expenses. As to Ms. Leboeuf, the trial court awarded total damages of $ 133,027.74, which it itemized as $ 125,000 general damages and $ 8,027.74 past medical expenses. The trial court denied the motion for new trial filed by B&K and Gemini. From this judgment, B&K and [Pg [*4] 3] Gemini appeal contending that the damage awards are excessive. Mr. Broome answered the appeal contending that the damage awards were inadequate and that the trial court erred in failing to award him future loss wages and dimunition of wage-earning capacity.

1 Although Mr. Broome's petition names Mr. Porte (B&K's employee who threw the ladder) as a defendant, the trial court's judgment does not impose liability on Mr. Porte. Mr. Porte is not a party to this appeal.

DISCUSSION

A plaintiff in a personal injury case has the burden of proving by a preponderance of the evidence that the accident more probably than not caused the claimed disabling condition. *Jones v. Peyton Place, Inc., 95-0574, pp. 12-13 (La. App. 4 Cir. 5/22/96), 675 So.2d 754, 763.* The plaintiff satisfies this burden if expert medical and lay testimony is presented establishing that it was more probable than not that the claimed condition was caused by the accident. *Id.* Whether the accident caused the plaintiff's injuries is a factual question, which should not be reversed on appeal absent manifest error. *See American Motorist Ins. Co. v. American Rent-All, Inc., 579 So.2d 429, 433 (La. 1991).* Credibility determinations, [*5] including evaluating expert witness testimony, are for the trier of fact. *Sportsman Store of Lake Charles, Inc. v. Sonitrol Security Systems of Calcasieu, Inc., 99-0201, p. 6 (La. 10/19/99), 748 So.2d 417, 421.* Such credibility determinations are factual findings governed by the well-settled manifest error standard of review. Under the manifest error rule, a "reviewing court must give great weight to factual conclusions of the trier of fact; where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable." *Canter v. Koehring Co., 283 So.2d 716, 724 (La. 1973).*

[Pg 4] When, as here, the trier of fact (in this case, the judge) has made a general damage award and the parties are contending that award is excessive (B&K and Gemini) or inadequate (Mr. Broome), the "much discretion" standard applies. *Youn v. Maritime Overseas Corp., 623 So.2d 1257 (La. 1993).* The rationale behind the application of the much discretion standard is that "awards of general damages, at least as to the amount awarded for injuries [*6] proved to have been caused by the tort, cannot be calculated with mathematical certainty." *Guillory v. Insurance Co. of North America, 96-1084, p. 1 (La. 4/8/97), 692 So.2d 1029, 1036* (Lemmon, J., concurring)(citing *Viator v. Gilbert, 253 La. 81,216 So.2d 821 (1968)).* This rationale is codified in both *La. C.C. art. 1999*, which provides that "[w]hen damages are insusceptible of precise measurement, much discretion shall be left to the court for the reasonable assessment of these damages," and *La.C.C. art. 2324.1*, which provides that "[i]n the assessment of damages in cases of offenses, quasi offenses, and quasi contracts, much discretion must be left to the judge or jury."

A reviewing court's initial inquiry is whether the particular effects of the particular injuries on the particular plaintiff are such that there has been an abuse of the "much discretion" vested in the trier of fact. *Youn, 623 So.2d at 1260*; *Cone v. National Emergency Services, Inc., 99-0934, p. 8 (La. 10/29/99), 747 So.2d 1085, 1089* (citing *Youn, supra*, and noting that the abuse of discretion standard is difficult to express and necessarily is

"non-specific"). Because "[r]easonable persons frequently disagree about [*7] the measure of general damages in a particular case," a reviewing court may disturb a general damage award on appeal only when "the award is, in either direction, beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff under the [Pg 5] particular circumstances." *Youn, 623 So.2d at 1261.* In sum, the jurisprudential theme that has emerged is that "the discretion vested in the trier of fact is 'great,' and even vast, so that an appellate court should rarely disturb an award of general damages." *Id.*

Although the parties invite us to resort to a consideration of awards for generically similar injuries and contend that the awards in this case are disproportionate to such prior awards, the jurisprudence is settled that a "resort to prior awards is only appropriate after an appellate court has concluded that an 'abuse of discretion' has occurred." *Cone, supra; Reck v. Stevens, 373 So.2d 498, 501 (La. 1979).* Because we find no abuse of discretion, a comparison of prior awards is inappropriate. Instead, we focus our analysis of the effects of the particular injuries on the particular plaintiffs under the particular circumstances [*8] of this case. We divide our analysis into the following three sections: (1) Defendants' Appeal: Mr. Broome's Damages; (2) Mr. Broome's Appeal: His Damages; and (3) Defendants' Appeal: Ms. LeBoeuf's Damages.

(1) Defendants' Appeal: Mr. Broome's Damages

At trial, Mr. Broome called the following seven witnesses: (i) Dr. Morteza Shamsnia, a neurologist; (ii) Dr. Gerard Gianoli, a neurotologist; (iii) Dr. Susan Andrews, a neuropsychologist; (iv) Shael Wolfson, an economist; (v) Ms. LeBoeuf; (vi) Jessica Guntner, Mr. Broome's girlfriend; and (vii) Mr. Broome. B&K and Gemini called the following two witnesses: Dr. Donald Adams, the independent medical examiner ("IME") and a neurologist; and Dr. Kevin Bianchini, a clinical psychologist and neuropsychologist. The testimony of these witnesses is summarized below.

Dr. Morteza Shamsnia

[Pg 6] On September 9, 2003, Dr. Shamsnia, who was qualified by the trial court as an expert in neurology, first saw Mr. Broome. Mr. Broome provided a history of a head trauma five days earlier as a result of being struck on the head by a ladder while at a local college. Mr. Broome reported that he lost consciousness and fell to the ground. Mr. Broome further reported [*9] that he did not recall what happened to him until he was in the car on his way to the hospital. Mr. Broome complained of headaches in the temporal area, which occurred every day since the accident with some nausea. He also complained of difficulty sleeping and focusing in his classes since the accident. He reported that his school performance had dropped. Mr. Broome denied any other significant associated symptoms. Dr. Shamsnia found that Mr. Broome had a head trauma in that he had a cut of more than an inch, which required three or four stitches.

Dr. Shamsnia's initial impressions were post-concussion syndrome with post-traumatic headaches and sleep dysfunction or central sleep disorder. Dr. Shamsnia restricted Mr. Broome by instructing him to stay off of school for two weeks. (Dr. Shamsnia acknowledged that this was the only restriction that his records reflected he ever placed on Mr. Broome.) Based on Mr. Broome's complaints, Dr. Shamsia ordered diagnostic testing: a MRI of the brain, an EEG or brain wave, and sleep studies. He also instructed Mr. Broome to return for a follow-up evaluation in two weeks.

On September 15, 2003, the MRI was done; it was normal. On October 9, 2003, the [*10] EEG was done; it was normal. On October 18, 2003, the sleep study (polysomnogram) was done; as noted below, it was abnormal.

On November 17, 2003, Dr. Shamsnia saw Mr. Broome for a second time. On this visit, Dr. Shamsnia reviewed the abnormal results of the sleep study, which [Pg 7] reflected that Mr. Broome had periodic limb movements and early rapid eye movement (REM), which indicated that his sleep structures were impaired. Dr. Shamsnia testified that these sleep abnormalities probably were related to Mr. Broome being struck in the head with the ladder. He also noted that Mr. Broome continued to have difficulty sleeping and that his other symptoms were essentially unchanged. Dr. Shamsnia prescribed Klonopin, a sleep medication, and instructed Mr. Broome to return for a follow-up evaluation in eight weeks.

On March 22, 2004, Dr. Shamsnia saw Mr. Broome a third time. Mr. Broome reported that his headaches had decreased in frequency, but he complained of dizziness and vertigo with head movements and intermittent ringing in his ears. Dr. Shamsnia testified that it was not unusual for Mr. Broome to complain for the first time six months post-head trauma of vertigo. He noted that Mr. Broome [*11] had signs of ear problems on the initial visit at which he complained of dizziness and that subsequently Mr. Broome had dizziness plus other symptoms--vertigo or ringing in his ears. Dr. Shamsnia testified that "whatever happened in his ear was getting worse." For this reason, Dr. Shamsnia referred Mr. Broome to Dr. Gianoli for a neuropathology evaluation after his head trauma. Dr. Shamsnia prescribed Tylenol No. 3 for the headaches and instructed Mr. Broome to

see him for a follow up evaluation after he had completed his consultation with Dr. Gianoli.

On September 8, 2004, six months later, Dr. Shamsnia saw Mr. Broome for a fourth time. On this visit, Mr. Broome's symptoms had improved, and Dr. Shamsnia characterized him as "essentially neurologically asymptomatic." By "neurologically asymptomatic," Dr. Shamsnia explained he meant that Mr. Broome did not have "much symptoms." He noted, however, that symptoms fluctuate. Dr. Shamsnia also noted that Mr. Broome had seen Dr. Gianoli for his [Pg 8] ringing in the ear. [2] On that visit, Dr. Shamsnia discharged Mr. Broome from his clinic and instructed him to return as needed.

> 2 As discussed elsewhere, Dr. Gianoli saw Mr. Broome on two occasions: [*12] June 10, 2004, and February 27, 2008.

Two months later, on November 24, 2004, Mr. Broome returned to Dr. Shamsnia. On this fifth visit, Mr. Broome complained of increased headaches, which were occurring about three times per week, and ringing in his ears. After reviewing Mr. Broome's diagnostic testing, Dr. Shamsnia referred Mr. Broome back to his regular work and instructed him to return for a follow up evaluation in eight weeks.

On July 26, 2006, almost two years later, Dr. Shamsnia saw Mr. Broome for a sixth time. [3] On this visit, Mr. Broome complained of increased headaches, which were occurring about two days per week. Mr. Broome's other symptoms were unchanged. Mr. Broome reported that he had been taking Ibuprofen and Tylenol # 3. Dr. Shamsnia prescribed Topamax (a seizure medication that the FDA has approved for use in treating migraine headaches) and provided Mr. Broome with samples of other medicines (Imitrex and Zomig). Mr. Broome was instructed to return for a follow up evaluation in eight weeks.

> 3 As noted elsewhere in this opinion, this two year gap in treatment can be attributed, at least in part, to Hurricane Katrina, which struck the New Orleans area on August 29, 2005.

On [*13] June 6, 2007, Dr. Shamsnia, without actually seeing Mr. Broome, prepared a narrative report in which he stated that "[i]n the last few years, the patient has been asymptomatic with medications." Continuing, he stated:

> The patient's diagnosis is first concussion syndrome with posttraumatic headaches, as well as abnormal sleep including periodic limb movement disorders and abnormal sleep deficiencies since the head trauma.
>
> [Pg 9] Based on the patient's history of the head trauma, his symptoms and his findings are causally related to his accident of 09/04/2003. I am not aware of the other workup that this patient had. He will be required to be under the care of a physician for treatment of his symptoms especially in regard to his headaches, and if he continues to have intermittent ringing in his ears and vertigo, he will need to have a neurootology [(sic)] evaluation. He has not reached maximum medical improvement. His condition has become chronic, and will require treatment on a regular basis. He will need approximately an every two or three month follow-up visit with medication treatment including prevention, as well as pain medications for treatment of his headaches. It is difficult [*14] to assess the future medical bills, but his treatment for chronic headaches and the medications that he needs will be approximately $ 2,000.00 to $ 3,000.00 a year, and he may require further diagnostic workup including a new high-resolution MRI of the brain with 3.0 tesla resolution for a better evaluation of his head injury.

Dr. Shamsnia explained that he characterized Mr. Broome's condition as chronic because "on and off when [he] had seen him, [Mr. Broome] was symptomatic. That is what chronic condition means."

On July 16, 2007, Dr. Shamsnia saw Mr. Broome for the seventh time. On this visit, Mr. Broome reported that the migraine headaches were well-controlled with the current medical therapy, including Topamax. He further reported that he was having episodes of headaches about three times per week; however, the episodes were not severe and were of a shorter duration. He still further reported that he was continuing to have episodes of vertigo with intermittent buzzing sensation in the left ear. The vertigo episodes were about sixty seconds each and were occurring about three times per week. At this time, Dr. Shamsnia continued the current medication therapy. Dr. Shamsnia also scheduled [*15] a repeat MRI of the brain and instructed Mr. Broome to follow up in three months or when the studies had been completed.

[Pg 10] On August 16, 2007, Mr. Broome had a high resolution 3.0 Telsa MRI of the brain at the Nevada Imaging Centers in Las Vegas, Nevada. [4] According to the

report by Dr. William Orrison of Nevada Imaging Centers, Mr. Broome's MRI reflected three findings consistent with post-traumatic changes: (i) moderate bilateral hippocampal atrophy, (ii) dilated perivascular (Virchow-Robin) spaces, and (iii) decrease in corpus callosum fiber tracks. Dr. Shamsnia characterized this MRI as objective evidence of traumatic brain injury. Dr. Shamsnia pointed out that the hippocampus is located in the temporal lobe of the brain and is responsible for regulating emotional response. He testified that atrophy of the hippocampus will affect Mr. Broome's ability to retain and process information as he ages. He further testified that due to the head trauma Mr. Broome will be more susceptible to memory and emotional problems as he ages. His ability to deal with the daily stress of life and to adapt into his environment will diminish faster than others his same age that do not have this [*16] problem.

> 4 Dr. Shamsnia explained that the reason he referred Mr. Broome to the Nevada Imaging Centers for the MRI was because "Nevada is in the forefront of the head injuries because of the boxing . . . and Nevada apparently is one of the centers that has been a pioneer in this area." Dr. Shamsnia further noted that he had been using Nevada Imaging Centers for years because he gets a comprehensive, detailed report from them.

On December 3, 2007, Dr. Shamsnia saw Mr. Broome for the eighth time. On this visit, Mr. Broome complained of migraine headaches, tinnitus, and vertigo. His migraine headaches were occurring at least three times per week. Dr. Shamsnia noted that Mr. Broome indicated that "things are improving." He further noted that the neuropsychological tests had been completed by Dr. Andrews in October 2007. The neuropsychologist's findings, which are discussed elsewhere, indicated that Mr. Broome should be encouraged to continue to be mentally active and should be able to continue in his present occupation. On this visit, Dr. [Pg 11] Shamsnia continued Mr. Broome on Topamax and added Axert as a "rescue medication." Mr. Broome was instructed to follow up in three months.

On March [*17] 12, 2008, Dr. Shamsnia saw Mr. Broome for the last time before trial. At this time, Mr. Broome reported that his symptoms were improving and that his migraine headaches were well-controlled with Topamax. Mr. Broome further reported that "he has not had any migraines as long as he takes his medications, although if he happens to forget, the Axert medication is helping as a rescue medication." Dr. Shamsnia refilled Mr. Broome's medication and instructed him to follow up in three months.

Although Dr. Shamsnia hesitated to testify that Mr. Broome would be required to take medication for life, he testified that Mr. Broome would be required to take it for "an indefinite period of time." Dr. Shamsnia testified that the particular medication he was prescribing for Mr. Broome's headaches was expensive: the Topamax cost between $ 297.99 and $ 345.95 for a month supply, and the Axert cost between $ 133.96 to $ 163.95 for a supply of six pills ($ 22.32 to $ 27.32 per pill).

Dr. Shamsnia testified that the symptoms Mr. Broome periodically reported to him were consistent with the diagnosis of traumatic brain injury. According to Dr. Shamsnia, the most probable cause of Mr. Broome's traumatic brain [*18] injury was being struck in the head with the ladder in 2003. Characterizing Mr. Broome's conditions as permanent, Dr. Shamsnia testified:

> I think it's permanent because he had the MRI done four years after his brain injury. We give now a year or two for him to recover. And people do recover. Clinically, he has recovered. He has improved. Treated with medications, he improved. But, these new technologies allow us to look at the brain that we couldn't do it before and say what it is now. . . . So he has brain damage because of this. And I think he has reached what we call MMI, maximum medical improvement.

[Pg 12] Dr. Shamsnia further added that Mr. Broome's symptoms may "wax and wane, but they just don't go away."

Dr. Shamsnia testified that he saw no evidence of any exaggerating or malingering on Mr. Broome's part. He further testified that he never had the feeling that Mr. Broome was lying or exaggerating or having symptoms that were inconsistent with what happened to him. Finally, he testified that Mr. Broome's symptoms and the fact he had a brain injury were verified by, among other things, the 2007 MRI and the neuropsychological testing.

Dr. Gerald Gianoli

Dr. Gianoli was qualified by [*19] the trial court as an expert in neurotology, a subspecialty of the ear, nose, and throat that deals specifically with the ear and the inner ear and skull-based disorders. On June 10, 2004, Dr. Gianoli first saw Mr. Broome, who was referred to him by Dr. Shamsnia. Dr. Gianoli testified that Mr. Broome related to him that he had suffered a head injury after a ladder fell on his head resulting in a loss of consciousness for a couple of minutes and a laceration of his scalp. Mr. Broome's complaints were dizziness, tinnitus, and headaches. Mr. Broome indicated that the dizziness

was much more severe during the first two months after the accident and had improved considerably since then, but he still had symptoms of dizziness. [5] At that time, Mr. Broome's dizzy spells were lasting about ten seconds per episode and were occurring about once per week. These episodes were sometimes associated with nausea and tylism, which is that sort of excess salivation one gets before throwing up.

> 5 Dr. Gianoli explained that dizziness is a nonspecific term that can mean many different things ranging from lightheadedness to headaches. In contrast, he explained that vertigo is a medical term with a specific [*20] meaning: "it's hallucination of motion. More specifically, it usually means a rotary type motion, feel like things are spinning or moving or you're moving or spinning."

[Pg 13] Mr. Broome related that the activities that exacerbated his symptoms were fast head movements, coughing, straining, using inversion boots, and running. He also related that especially during the first two months after the accident almost any head movement would bring on the symptoms. Mr. Broome reported some fluctuation of hearing and a fullness or pressure feeling in his ears. Dr. Gianoli testified that he did not make any specific recommendations to Mr. Broome with regard to physical activities; however, he generally tells patients who present with vertigo or dizziness to use extreme caution when engaging in certain activities. He also testified that he probably told Mr. Broome to stop using inversion boots.

Based on a series of diagnostic tests that he conducted, Dr. Gianoli's initial impressions were as follows: "[Mr. Broome] had a mild vestibular disturbance that was perhaps on the left side with associated benign positional vertigo that is for the most part compensated and resolved. He also has a suggestion [*21] of cochlear dysfunction on the left side as noted by the Otoacoustic emissions. This could objectively corroborate the symptom of tinnitus." Dr. Gianoli noted that the treatment for benign positional vertigo is generally canalith repositioning--a non-invasive office procedure that is highly effective (90-95% of patients). For patients who do not respond to this procedure, a surgical procedure was noted to be an option, but required four to six weeks of postoperative rehabilitation. As to the tinnitus, Dr. Gianoli noted that "the tinnitus is likely a permanent sequelae of this injury and treatment for this is often unsuccessful." He noted that treatment options that were available for tinnitus include pharmacologic therapy, tinnitus retraining therapy, and masking devices.

[Pg 14] On March 6, 2008, Dr. Gianoli saw Mr. Broome for a repeat evaluation. [6] At that time, Mr. Broome related that he still had tinnitus and dizziness, but that it "waxes and wanes, at times it is more severe and other times less noticeable." He described the tinnitus as intermittent, high-pitched, and non-pulsatile, but varying in intensity. As to the dizziness, he described a rotary type sensation that occurs [*22] for seconds per episode. He stated that the episodes were occurring multiple times per day. These episodes were associated with nausea and exacerbated by lying down and movement, especially fast movement. He also reported a constant unsteadiness. He indicated that he was having one to two migraines per month and that he was taking Topamax which seemed to help the headaches.

> 6 Although scheduled for a follow-up visit with Dr. Gianoli in September 2005, Mr. Broome was not available for this appointment because had had moved out of state in late August 2005 due to Hurricane Katrina.

Summarizing his findings from the second evaluation, Dr. Gianoli stated:

> Mr. Broome has findings of an inner ear abnormality consistent with left labyrinthine fistula and benign paroxysmal positional vertigo. This is more probable than not caused by the accident in which the ladder struck his head. The patient's subjective symptoms correlate very well with the objective findings on testing and the patient showed no evidence of symptom magnification or non-physiologic responses on testing.

Dr. Gianoli noted that treatment options include medical therapy and surgery. [7] However, he acknowledged that he had neither [*23] provided any treatment nor recommended surgery for Mr. Broome.

> 7 At this time, Dr. Gianoli recommended a CT scan of the temporal bones to rule out superior semicircular canal dehiscense. That CT scan was normal.

Dr. Gianoli testified that Mr. Broome passed all the malingering tests and opined that the blow to Mr. Broome's head was the cause of the ear-related symptoms he was experiencing. Insofar as the several other head injuries in the [Pg 15] past noted in Dr. Gianoli's report, [8] Dr. Gianoli testified that those incidents were in the far distant past and that Mr. Broome was completely asymptomatic from that point until the ladder incident. Dr. Gianoli testified that the fact Mr. Broome had no problems until years later when he was hit by the ladder

made it unlikely that any of the prior head traumas had any relevance to his current condition.

> 8 These incidents involved being struck by a bat at age eight, by a bottle at age twenty, by a brick, and running into a car. None of these prior incidents involved loss of consciousness. Dr. Bianchini also noted in his report that Mr. Broome gave a history of head injury as a child with no loss of consciousness: "He was hit in the head a few times [*24] while paying with his brothers. One time he was on a bicycle and his brother pushed him and his head hit the back of a vehicle; he got a knot on his head."

Dr. Susan Andrews

Dr. Andrews, who the trial court qualified as an expert in clinical neuropsychology, testified that she saw Mr. Broome on referral from Dr. Shamsnia to conduct a neuropsychological evaluation. On October 16 and 18, 2007, Dr. Andrews' office performed the evaluation. Dr. Andrews noted that Mr. Broome's complaints at the time of the evaluation included migraine headaches (about twice per week), difficulty sleeping since the accident, and vertigo and tinnitus in his left ear. He also reported memory difficulties at school. He elaborated that when the accident occurred he was enrolled at Delgado taking horticulture. Since the accident, he reported that he had significant difficulty memorizing and recalling new information in the more difficult classes and that he had quit school.

Dr. Andrews testified that her neuropsychological evaluation showed evidence of a traumatic brain injury. Of the twenty-three tests she administered, Mr. Broome's test results were abnormal on thirteen. Mr. Broome scored lower than predicted [*25] on five measures: (i) general intellectual functioning, (ii) measures of attention and executive functioning, (iii) motor functions, (iv) language functions, and (v) perceptual functions. Mr. Broome had some difficulties with his [Pg 16] ability to learn new information and with his executive functioning in certain areas. He had right hand motor weakness related to his left side of his brain. He had difficulties with attention and concentration. His naming was mildly impaired on the Boston naming test.

Dr. Andrews testified that in her opinion it was more probable than not that Mr. Broome's performance on the tests was related to the 2003 head trauma he suffered as a result of being struck in the head with a ladder. She stated that she had not seen any indication that before being struck with the ladder Mr. Broome had any brain injury. She indicated that the test results reflected residual difficulties related to the 2003 head trauma. Dr. Andrews commented that "[b]asically, they were mild findings that demonstrated four years later that the left side of the brain primarily had been damaged."

As to the Minnesota Multiphasic Personality Inventory ("MMPI")(a social-emotional functioning [*26] test), Dr. Andrews testified that it reflected Mr. Broome had a large number of physical complaints, which included headaches that had continued for a number of years and inner ear dysfunction. He was not particularly depressed. Dr. Andrew testified that her clinical impression was that Mr. Broome had a cognitive disorder, not otherwise specified, which is a general diagnosis that is used for cognitive deficits that are secondary to some kind of brain dysfunction, but not necessarily related to drugs or related to other physical kinds of problems. Dr. Andrews found no basis to support Dr. Bianchini's diagnosis of an adjustment disorder. She testified that Mr. Broome had made a good adjustment to his injuries [Pg 17] and to the residual deficits that he had. She found it significant that he was working and going on with his life.

Dr. Andrews stated in her report that Mr. Broome "appears excessively preoccupied with bodily concerns and may be inclined to somatization, e.g., expressing physical health problems as a result of psychological difficulties." She explained that Mr. Broome had a high score on the somatization scale because he tends to focus on the large number of physical complaints [*27] that he has. Nonetheless, Dr. Andrews testified that a diagnosis of somatization was not appropriate given that Mr. Broome actually had physical injuries.

Dr. Andrews reported that Mr. Broome's test results were consistent with the results of the 2007 MRI and the location of Mr. Broome's scalp laceration. She noted that one of the results of the 2007 MRI was a decrease in corpus callosum fiber tracks connecting the two sides of the brain consistent with post-traumatic change. She explained that this referred to a decrease in fiber tracks anteriorly and posteriorly on the left in a coupe-contre-coup pattern. Dr. Andrews further explained that coupe-contre-coup is French for a strike and against the strike or a hit against the hit. It refers to the mechanism of the injury. "[T]he brain is hit on one side and it bounces against the opposite side causing, from a variety of different sources, injury on both sides of the brain." Dr. Andrews testified that her findings based on neuropsychological test results were consistent with the coupe-contre-coup type of injury that Mr. Broome sustained in that the testing revealed some deficits on both sides of the brain.

In terms of memory difficulties, [*28] Dr. Andrews testified that Mr. Broome tested in the normal range. She noted in her report that "[c]ontrary to subjective complaints of memory difficulties, Mr. Broome's current

memory abilities are [Pg 18] average and consistent with current intellectual functioning." Explaining this statement, Dr. Andrews testified that "[p]eople who have cognitive difficulties of various types, because they are not schooled in neuropsychology, often just kind of lump them together as memory complaints." Insofar as Mr. Broome's report that he was having more difficulty in school, Dr. Andrews testified that based on Mr. Broome's Delgado records it would be hard to document any decline.

On cross-examination, Dr. Andrews testified that she agreed there was no way for a "brain injury" to become neurologically asymptomatic and then symptomatic again several years later, but she added that "headaches are a different issue."

On all of the testing for exaggerating or malingering, Dr. Andrews testified that Mr. Broome scored one hundred percent. She agreed that this indicated that he was being truthful and candid in communicating his symptoms. Dr. Andrews testified that from a brain injury standpoint she would [*29] consider Mr. Broome's condition to be mild. She noted in her report that Mr. Broome had significantly improved in function since the accident, which was over four years before this evaluation. She opined that from a neuropsychological standpoint, Mr. Broome was capable of continuing in his present occupation. She further opined that Mr. Broome did not need any type of rehabilitation given that he has continued to work, which she characterized as a "very solid form of rehabilitation." Indeed, she found it to his credit that he is working. She did not recommend any restrictions on him in terms of work. Nonetheless, she testified that as Mr. Broome gets older, he will have a greater risk for developing dementia-type syndromes earlier.

Shael Wolfson

[Pg 19] Mr. Wolfson, who was qualified as an expert economist, testified that he was provided with a letter from Dr. Gianoli outlining certain future medical and prescription costs and asked to prepare present value estimates for these costs over Mr. Broome's life expectancy. Based on Mr. Broome's life expectancy of 44.4 years and a 4.5% annual increase in the cost of prescription drugs, Mr. Wolfson calculated the present value of future prescription [*30] medication costs for the two medications Mr. Broome was taking to be $ 5,651 per year and $ 223,736 total. [9] Mr. Wolfson also calculated Dr. Gianoli's follow up costs for office visits and audio testing to be $ 225 a year and $ 8,041 for his life expectancy in present value terms assuming a four percent increase in the fees associated with providing these services.

9 As noted earlier, Dr. Shamsnia testified that at the time of trial Topamax cost between $ 297.99 and $ 345.95 for a month supply, and Axert costs between $ 133.96 to $ 163.95 for a supply of six Axert ($ 22.32 to $ 27.32 per pill).

Melissa LeBoeuf

Ms. LeBoeuf, the other plaintiff in this matter, testified that at the time of the accident she and her classmate, Mr. Broome, were bent over in the herb garden at Delgado observing a honey bee when an object hit them and knocked them to the ground. She described it as a shock. She testified that they initially did not know what the object was or where it came from. Ms. LeBoeuf described Mr. Broome immediately after the accident as lying on the ground with a large cut on his head that was bleeding; he was glassy eyed, and dazed. She testified that "[i]t was obvious -- he was not [*31] all there." He had no recollection of what had happened. On cross-examination, Ms. LeBoeuf acknowledged that she could not say for sure that Mr. Broome lost consciousness; nor, assuming he lost consciousness could she give an estimate of how long it lasted.

[Pg 20] At trial, Ms. LeBoeuf identified pictures of the large aluminum ladder that was thrown over the fence and the laceration on Mr. Broome's head. Ms. LeBoeuf testified that before the accident Mr. Broome was in good physical shape, very active, and enjoyed being outside. He liked physical activities such as skateboarding. She further testified that before the accident she never heard Mr. Broome complain of headaches or ringing in his ears. She stated that when Mr. Broome returned to school after the accident he complained about headaches, and due to the headaches he would have to get up and leave class.

Jessica Guntner

Ms. Guntner, Mr. Broome's girlfriend, testified that she lived with Mr. Broome and their two children, ages two and one. (The children bear Mr. Broome's name.) She knew Mr. Broome for about one year before the accident; they started living together shortly before the accident occurred. Ms. Guntner was working when [*32] the accident occurred, and Mr. Broome called her to inform her that he had been hurt. She first saw him when she arrived home from work that night. She described him as having a big gash on his head with stitches and a patch over it. He was not moving around much, and he was nauseous and sleepy. She testified that she was afraid to let him go to sleep that night because of his head injury. According to Ms. Guntner, Mr. Broome was unable to return to school or to work for the next couple of weeks, and she had to drive him to his doctor's appointments.

Ms. Guntner testified that Mr. Broome has been taking Topamax on a daily basis since it was prescribed to him and that he also takes Axert, which is for bad headaches, about three times per week. She testified that she has picked up his [Pg 21] prescription medications several times, and she identified a receipt for Axert for $ 1,339.59.

Ms. Guntner testified that she has noted the following changes in Mr. Broome's behavior since the accident: He often complains of headaches. He gets dizzy and nauseous when he overexerts himself such as when he plays with their little boy. (The dizziness is followed by a headache.) He forgets things that [*33] she has just told him and that he is definitely a "lot more flighty." He kicks in his sleep as if he is fighting in his dreams.

Ms. Guntner characterized Mr. Broome as a very active person before the accident. The hobbies he previously engaged in included working out at the gym, jujitsu, wrestling, and landscaping. As to landscaping, she elaborated that he enjoyed putting koi ponds together, building retention walls, and working in the yard. Before the accident, Mr. Broome never sat around and watched television. Since the accident, when Mr. Broome comes home from work he wants to sit around. She stated that he has tried to go back to the gym, but he comes home sick with a migraine and has to miss work. Before the accident he did not miss work on a regular basis. She noted that Mr. Broome has gained weight (about four pants sizes) since the accident, which depresses him.

Ms. Guntner testified that when they moved to North Carolina after Hurricane Katrina Mr. Broome did not seek medical attention because they had a baby and ran out of money. Although she acknowledged that Mr. Broome was tasered by the police on May 17, 2007, Ms. Guntner testified that Mr. Broome's [Pg 22] complaints did [*34] not change after the taser incident. [10] Rather, she testified that his condition consistently has stayed the same since the 2003 accident.

> 10 Mr. Broome testified that the taser incident occurred when he and Ms. Guntner were having a domestic dispute, and Ms. Guntner called the police. Ms. Gunter acknowledged that Mr. Broome was charged with disturbing the peace, battery of a police officer, and resisting arrest. Mr. Broome testified that he has never been convicted of a felony.

David Broome

Mr. Broome, who was thirty-two at the time of trial and twenty-seven at the time of the accident, confirmed Ms. Guntner's testimony that they live together with their two young children. At the time of trial, Mr. Broome was employed full time as a lead greensman for a union; his job consists of supervising the building of sets for movies. He characterized himself as an average student. He obtained a General Equivalency Diploma ("GED"). When the accident occurred, in September 2003, he was enrolled at Delgado in horticulture. He testified that he subsequently quit school without obtaining a degree from Delgado.

Mr. Broome corroborated Ms. LeBouef's testimony that at the time of the accident they were [*35] working together in an herb garden at Delgado. The next thing he recalled was being driven by Ms. LeBouef to the hospital and asking her what happened. He recalled neither the accident nor the visit to the Ochsner emergency room. On cross examination, Mr. Broome disputed the accuracy of the Ochsner emergency room records insofar as those records indicated that he denied a loss of consciousness. He testified when he got home that night he felt dizzy and that Ms. Guntner took care of him after the accident.

Mr. Broome indicated that his primary problem following the accident was painful headaches. Dr. Shamsnia was the first doctor he saw following the emergency room visit. Dr. Shamsnia told him that he had migraine headaches. A [Pg 23] few months later, he also developed ringing in the ear, tinnitus. Mr. Broome described the tinnitus as a hit and miss symptom, which occurred sometimes once per week, but then it stopped for a few weeks. Mr. Broome also indicated that he had a short-term memory problem. Ms. Guntner would catch him slipping and forgetting things that she just told him five minute earlier. He testified that the doctor's testimony that the testing revealed he has a traumatic [*36] brain injury made him scared for his family.

At the time of trial, Mr. Broome testified he was still being treated by Dr. Shamsnia and Dr. Gianoli. Mr. Broome testified that he was taking two medications for his headaches: Topamax and Axert. Mr. Broome estimated that he has to take an Axert about once or twice a week. Mr. Broome identified his medical expenses, which totaled $ 20,160.94.

Mr. Broome denied having any prior medical problems. He testified that the prior head injuries that he reported to Dr. Gianoli were incidents in which he was "just rough housing with his older brother." On those prior occasions, he was not knocked out, did not receive medical treatment, and did not experience any subsequent headaches or ringing in the ears. Mr. Broome also denied any head injury as a result of the taser incident; rather, he testified that when he was tasered he landed on his butt.

Addressing the gaps in treatment, Mr. Broome attributed a large gap to Hurricane Katrina. During that period, he had no medical insurance, and his priority was getting a job and paying his bills not reconnecting with his doctors. He acknowledged that the gap from September 2004 to August 2005 was not related [*37] to Hurricane Katrina.

[Pg 24] Before this accident, Mr. Broome testified that he rarely missed work. Since the accident, he has missed work multiple times due to migraine headaches. He estimated that he has missed up to two months of work. Mr. Broome testified that before the accident he was in great health. He described his prior hobbies as including martial arts, landscaping, working out at the gym, skateboarding, jogging, and participating in biathlons. Mr. Broome testified that since the accident he has gained about fifty pounds (from 180 to 230 pounds). He attributed this weight gain to his inability to engage in physical activities since the accident. He explained that he gets very sickly when he moves around a lot. When he plays with his children, he readily becomes tired and has to rest. Mr. Broome testified that his physical appearance has changed since the accident. Not only has he gained weight, but also he still has a scar on his head from the ladder striking him.

Dr. Donald Adams

Testifying for the defendants, Dr. Adams, who was qualified as an expert in neurosurgery, stated that he was retained to perform an IME on Mr. Broome. Dr. Adams testified that according to the medical [*38] literature an assessment immediately or very shortly after a head injury is crucial. [11] Dr. Adams thus focused on the Ochsner emergency room records regarding Mr. Broome's treatment immediately following the accident. The emergency room records reflect that Mr. Broome complained of a laceration to the head, which Dr. Adams characterized as a "small scalp laceration." Mr. Broome told both the triage nurse and emergency room [Pg 25] physician that he had not been knocked out; he specifically denied loss of consciousness, headache, vomiting, and neck pain. Dr. Adams noted that the emergency room staff did not note Mr. Broome to be confused and did not note any other complaints referable to a head injury. Dr. Adams further noted that the emergency room staff neither made a concussion diagnosis, nor ordered a MRI, which is part of the standard workup on an acute basis for someone who has been unconscious. Rather, the emergency room staff sutured Mr. Broome's head laceration and discharged him. Dr. Adams still further noted that on September 15, 2007, when Mr. Broome returned to Ochsner to have his sutures removed he made no mention of headache, confusion, or vertigo. Although the Ochsner [*39] records show that he was discharged that day with a notation "improved with symptoms resolved," he complained on that same date when he went to have an MRI of constant migraines, nausea, dizziness, and balance offset.

> 11 Dr. Adams identified several well accepted categories in the medical literature for measuring the severity of sports injuries or brain injuries. One category widely used by emergency personnel is the Glasgow Coma Scale, which ranges from 3 to 15, with 15 being normal. Another category is based on the length of altered consciousness; less than thirty minutes is characterized as a mild traumatic brain injury. All of these categories depend on an assessment immediately or shortly after the injury occurring, such as in the emergency room. Dr. Adams noted that in sports, if a player has a mild brain injury that clears within fifteen minutes, the player is sent back into the game.

Dr. Adams indicated that even assuming that the emergency room staff simply overlooked Mr. Broome's head injury, Mr. Broome had no worse than a mild traumatic brain injury (a mild concussion). Dr. Adams thus concluded in his report that "[s]ince it is generally agreed in the medical literature that [*40] the after effects of a concussion produce symptoms that are maximum at or shortly after the injury, it is very difficult to relate his subsequent complaints to this particular injury."

Dr. Adams disputed Dr. Shamsnia's opinion that Ms. Broome's current problems are related to the 2003 accident; he stated:

> The natural history of problems that follow a concussion is that they get better and generally resolve. The symptoms of what has been termed the persistent post concussive syndrome are thought in the medical literature to be primarily related to medication overuse or [Pg 26] psychological issues. In Mr. Broome's case, the records document that his symptoms went away as would be expected.

Dr. Adams further stated that "[a]lthough it took longer than usual for the symptoms following a blow to the head to resolve in this case, they are clearly documented as having gone away." In support of the position that the symptoms went away Dr. Adams cited Dr. Shamsnia's September 8, 2004 office note, which stated that Mr. Broome was "essentially neurologically asymptomatic" and discharged him. Dr. Adams thus concluded that there

was "no possible biological mechanism to relate the current problems [*41] to the accident in question."

Dr. Adams emphasized that the neuropsychological testing failed to show any difficulties in the areas generally known to be affected by mild traumatic brain injuries. "The anticipated difficulties would most prominently affect attention and concentration and speed of information processing" and possibly short term memory. Although problems with language were noted in the testing, Dr. Adams pointed out that this is not an area of brain function affected by this type of injury and that one would have to review Mr. Broome's prior school records to determine if he had prior problems in this area. Regardless, Dr. Adams pointed out that Mr. Broome acknowledged that his perceived cognitive difficulties had resolved. Insofar as the sleep abnormalities, Dr. Adams stated that injuries of the type Mr. Broome sustained are not associated with permanent changes in brain architecture or sleep function.

As to the 2007 MRI, Dr. Adams disputed the need for Mr. Broome to go to Las Vegas for a MRI. He opined that the local MRI facilities were acceptable and that "[h]igh field strength magnets are necessary to do diffusion tensor imaging studies, but the changes seen with this [*42] methodology do not, to date, have any [Pg 27] accepted meaning in the evaluation of brain injury and no consistent correlation with observed changes in function or on psychometric testing." Dr. Adams testified that he did not observe atrophy of the hippocampus on the 2007 MRI film. Although the hippocampus is exquisitely involved in memory functioning, the neuropsychological testing did not show Mr. Broome to have problems with his memory. Dr. Adams noted that when hippocampal atrophy is seen in the general population, the most common causes are alcohol and marijuana use. Dr. Adams also noted that the medical literature supports a finding of hippocampal atrophy in cases involving severe brain injury, not mild head injuries such as the type Mr. Broome sustained.

Dr. Adams also testified that he was unable to observe dilated perivascular spaces on the MRI. He noted that about fifteen to twenty percent of the normal population has some sort of minor white matter abnormality on high resolution MRI scanning. Dr. Adams testified that he thus would not call this an abnormality. He pointed out that this is the reason why it is important to focus on how the brain works and on the neuropsychological [*43] tests. He still further noted that in severe brain injury cases where there is atrophy there also is an increased size of the Virchow-Robin spaces.

As to the vertigo, Dr. Adams emphasized that Dr. Shamsnia's records did not reflect a complaint or diagnosis of vertigo until March 2004, six months after the accident. Describing vertigo as a "noxious symptom," Dr. Adams stated that it was unlikely it would have been overlooked. He further noted that "[s]ince vertigo has many potential causes, this delay in onset makes it very difficult to relate the current complaints to the accident of 09/03/2003 in which he was struck in the head by the ladder." Dr. Adams also disputed the notion that Mr. Broome's vertigo [Pg 28] could have improved and then reoccurred and worsened. Dr. Adams noted that when Mr. Broome returned to Dr. Gianoli in 2008 after a four year gap the testing results changed and were consistent with vertigo related to a fistula. According to Dr. Adams, "[v]ertigo related to a fistula would not have latency of onset and would have begun at or very shortly after the accident of September 2003 if it were related to it." He further noted it was unlikely that someone with the symptoms [*44] vertigo produces would have gone years without having it evaluated. Dr. Adams also acknowledged that a fistula could develop from any form of direct blow to the ear or from an electrical charge or a taser.

In sum, Dr. Adams' conclusions were as follows:

> . The records do not document that Mr. Broome suffered a concussion at the time he was hit in the head in September 2003. Assuming that he was briefly unconscious, or perhaps simply stunned, he was clearly alert, oriented, and coherent with an unremarkable cognitive evaluation within a brief period of time. If one applied the current guidelines for management of concussion in sports, he would have been felt to have a grade 1 or the most minimal concussion, and once the post concussive symptoms had cleared (which they appear to have done by the time he left the emergency department), if an athlete he would have been allowed to return to the football game or whatever contest had been in progress when he was injured.
>
> . Lasting sequellae from an injury of this degree are not expected and probably do not occur in younger individuals. We also know from the medical records that this man's symptoms had resolved by 2004. There is, therefore, no [*45] reason to relate the current complaints to the accident in question. By Mr. Broome's own description he no longer has any problems with cognitive processing.
>
> . Given the significant delay in onset of his complaint of vertigo, the significant

> change in the character of that vertigo, and the new findings on evaluation in 2008, I do not see a basis for relating the current problem with vertigo to the accident involving the ladder.

Although Dr. Adams testified that he did not see any indication that Mr. Broome was not giving a valid effort or malingering, he also testified that he did not see any evidence that Mr. Broome was impaired.

[Pg 29] *Dr. Kevin Bianchini*

The defendants' other expert who testified was Dr. Bianchini, a clinical psychologist and neuropsychologist. Dr. Bianchini testified that he was retained by B&K and Gemini to evaluate Mr. Broome. Dr. Bianchini tested Mr. Broome over the course of a three day period in March 2009. At that time, Mr. Broome attributed the following three symptoms to the accident involving the ladder: (i) dizziness--several things triggered these symptoms, including heights and moving quickly from back to front and anything that jars his head, and he becomes [*46] nauseous; (ii) tinnitus--he had constant ringing in his ears; and (iii) headaches--he had migraines and also smaller headaches once or twice a week that lasted for two to three hours.

Dr. Bianchini, like Dr. Adams, testified regarding the importance with brain injuries to focus on the symptoms at the time of the injury. For this reason, he characterized the emergency room report as the most important document. Dr. Bianchini noted that considering the emergency room report from Ochsner, there was no indication that Mr. Broome experienced even the mildest form of traumatic brain injury. Even assuming a brief loss of consciousness, Dr. Bianchini opined that the record does not support a finding of anything more than a mild traumatic brain injury, also known as a concussion. Based on the studies that have been conducted, he noted out that most people (85 to 90%) recover from such injury within a period of months. As to the subset of people who have persistent symptoms, the studies have shown that this group has motivational factors, such as litigation, that are believed to explain their persistent symptoms.

Overall, Dr. Bianchini's opinion was that Mr. Broome did not have residual neurocognitive [*47] problems that were attributable to being struck in the head by the [Pg 30] ladder. Dr. Bianchini noted Mr. Broome indicated that he had no problems with concentration, memory, speech, or processing speed; that he was helped from hearing the positive results from Dr. Andrews' testing, presumably meaning that he was not impaired; and that "he has improved and does not have meaningful cognitive impairments at this time." Like Dr. Adams, Dr. Bianchini disputed Dr. Shamshia's conclusion that Mr. Broome had hippocampal atrophy given that Mr. Broome did not have any short term memory deficit. Dr. Bianchini also disagreed with Dr. Andrews insofar as she suggested that the results of her neurological testing were consistent with the location of Mr. Broome's scalp laceration and the 2007 MRI findings. He noted that "Dr. Andrews reports some findings that she indicates are consistent with the mechanism of injury, including consideration of the MRI. Some of these are problems that are not typically impaired as a result of concussion, including motor and language function." Disagreeing, he stated that "the idea of relating a set of neuropsych findings to a scalp laceration is not supported by the [*48] literature."

In response to the trial court's question regarding what he would attribute the problems in Mr. Broome's testing results, Dr. Bianchini testified that:

> The naming, the lowered verbal I.Q. score, which really doesn't come even with more severe forms of traumatic brain injury seems to suggest and is somewhat consistent with Mr. Broome's history of himself in academics. He was not real, you know, wasn't knocking the lights out as a student. Those things could be related to that, the language problem.

Dr. Bianchini noted the formal symptom validity and symptom evaluation measures that were included in the testing were entirely negative. He thus noted that during the evaluation there was no indication of Mr. Broome's intentional exaggeration of symptoms or intentional poor performance on the testing.

[Pg 31] Returning to the issue of whether the general damage award was excessive (or inadequate), we note that general damages may be established in three ways: (i) the circumstances of the case, (ii) expert medical testimony, and (iii) the tort victim's testimony. Frank L. Maraist & Thomas C. Galligan, Jr., *Louisiana Tort Law*, §7-2 (c)(1996). In this case, the circumstances of the [*49] 2003 ladder accident were virtually undisputed. Mr. Broome's complaints regarding his symptoms were noted by all the experts to be truthful. The experts also were in agreement that he was not a malingerer. The expert medical testimony regarding the nature and degree of injuries Mr. Broome sustained, however, was conflicting. Resolving that conflict in Mr. Broome's favor, the trial court concluded that:

> David Broome suffered a mild brain injury with residual symptomatology of chronic headaches, decreased verbal and motor skills, and a likelihood of early dementia. Mr. Broome also suffers from a traumatically induced inner ear injury with chronic symptoms of vertigo and tinnitus.
>
> Mr. Broome also suffered a severe head laceration and nausea following the accident which has resolved, as well as depression, worry and anxiety regarding his medical condition and his injuries would prevent him from taking [care] of his two young children. The court finds these injuries were causally related to the accident of September 4, 2003 when he was struck in the head by a ladder.

Based on its finding that the evidence established Mr. Broome sustained a mild brain injury, inner ear damage, and a deep scalp [*50] laceration as a result of this accident, the trial court awarded Mr. Broome general damages in the amount of $ 400,000. Under the particular circumstances of this case, in light of the pain and suffering that Mr. Broome experienced shortly after the accident and the migraine headaches and other physical problems he continues to experience we cannot say that the trial court clearly abused its discretion or that the award is so high that it [Pg 32] shocks the conscience. Accordingly, we decline to disturb the trial court's award of general damages.

The trial court also awarded Mr. Broome $ 100,000 for his loss of enjoyment of life. In so doing, the trial court reasoned that "Mr. Broome's ongoing problems with headaches, dizziness, and ringing in the ears have resulted in his inability to participate in the activities and pleasures of life that he formerly enjoyed." The court thus found Mr. Broome suffered a "detrimental alteration of his lifestyle as a result of his physical injuries."

Although a form of general damages, loss of enjoyment of life is conceptually distinct from pain and suffering. It "refers to detrimental alterations of the person's life or lifestyle or the person's inability [*51] to participate in the activities or pleasures of life that were formerly enjoyed prior to the injury." *McGee v. AC and S, Inc., 05-1036, pp. 3-4 (La. 7/10/06), 933 So.2d 770, 773-75.* The record supports the trial court's finding that Mr. Broome can no longer pursue many of the physical activities and hobbies he once enjoyed due to the accident. Mr. Broome, corroborated by his girlfriend (Ms. Guntner), testified regarding his inability to engage in certain activities since the accident. Given his young age, the loss of enjoyment of life he has sustained will span most of his lifetime and result in the curtailment of many activities that he otherwise would have been expected to enjoy. As with the general damage award, we cannot say that the trial court clearly abused this discretion or that this award is so high that it shocks the conscience. Accordingly, we decline to disturb the trial court's award of loss enjoyment of life damages.

[Pg 33] The trial court awarded Mr. Broome past medical expenses of $ 20,160.94, which are documented in the record. At trial, Mr. Broome identified these expenses. We find no error in this award.

The trial court also awarded Mr. Broome future medical expenses [*52] in the amount of $ 241,700, which included $ 233,700 in future prescription medication expenses and $ 8,000 in future medical treatment. The trial court explained this award as follows:

> Mr. Broome testified his migraines are sometimes as often as once a week or it may be a few weeks between episodes. Mr. Shael Wolfson, plaintiff's expert economist, totaled Mr. Broome's annual prescription costs at $ 5,651.00. This figure is based on an average combined cost of six Axerts Mr. Broome is prescribed for headaches a monthly supply of plaintiff's seizure medicine, Topamax. Based on Mr. Broome's life expectancy of 44 years, an inflation rate of 4.5% for the cost of the medication, and a present day discount value, Mr. Wolfson calculated the cost of plaintiff's future prescription medications at $ 233,700.00.
>
> Also, Mr. Wolfson averaged expenses associated with Mr. Broome's future medial care with Dr. Gianoli to have a present day value of approximately $ 8,000.00.

Future medical expenses are a form of special damages. The Louisiana Supreme Court has held that "[f]uture medical expenses must be established with some degree of certainty and will not be awarded in the absence of medical testimony [*53] that they are indicated and sets out their probable cost." *Hanks v. Seale, 04-1485, p. 16 (La. 6/17/05), 904 So.2d 662, 672* (citing *Duncan v. Kansas City So. Railway Co., 00-0066, p. 17 (La. 10/30/00), 773 So.2d 670, 685).* The proper standard for determining whether a plaintiff is entitled to an award of future medical expenses is "proof by a preponderance

of the evidence that the future medical expenses will be medically necessary." *Hall v. Folger Coffee Co., 02-0920, p. 23 (La. App. 4 Cir. 10/1/03), 857 So. 2d 1234, 1250* (quoting *Hoskin v. [Pg 34] Plaquemines Parish Government, 97-0061, pp. 4-6 (La. App. 4 Cir. 12/1/97), 703 So.2d 207, 210-11)*. When the record sufficiently establishes the need for future medical care, but not the exact cost of such care, "the factfinder may make a reasonable award." *Lacy v. ABC Ins. Co., 97-1182, p. 13 (La. App. 4 Cir. 4/1/98), 712 So.2d 189, 196*. The record in this case supports the trial court's finding that Mr. Broome met his burden of proving an entitlement to future medical expenses. Dr. Shamshia testified that Mr. Broome will need to take the prescribed medication for the indefinite future. We thus find that the record supports the future medical [*54] expenses award.

(2) Mr. Broome's Appeal: His Damages

Mr. Broome's appeal seeks an increase in general damages and loss of enjoyment of life damages. For the reasons set forth above, we find no basis to disturb these awards. Mr. Broome's appeal further seeks review of the trial court's failure to award damages for lost wages and impairment of earning capacity. We find no evidence in the record to support such awards. We therefore find the trial court did not err in failing to award such damages.

(3) Defendants' Appeal: Ms. LeBouef's Damages

Ms. LeBoeuf introduced into evidence the deposition testimony of her three physicians: Dr. Bradley Bartholomew, a neurosurgeon; Dr. Fred DeFrancesch, an expert in the fields of physical medicine and rehabilitation; and Dr. Thomas Lyons, an orthopedic surgeon. Ms. LeBoeuf testified as a witness on her own behalf. B&K and Gemini called in opposition Dr. John Steck, the IME and a neurologist.

Melissa LeBoeuf

Describing her injuries and course of treatment, Ms. LeBoeuf testified that at the time of the accident at Delgado she had an immediate onset of pain in her neck [Pg 35] and arms. She was treated that day at the Ochsner emergency room. At the emergency [*55] room, her complaints were soreness in her neck and pain in her arms. On September 10, 2003, Ms. LeBoeuf went to Dr. Dominic Arcuri, her primary care physician, with complaints of pain in her arm, and a sore neck. She also indicated that she had begun to feel a bit of tingling in her fingers. He recommended that she rest, apply ice, and "keep an eye on it."

From October 2003 through May 2004, Ms. LeBoeuf treated with Dr. Marshall Book, an orthopedic surgeon. Her complaint during this time was soreness and pain in her neck that would radiate down her arms. She had tingling in her third and fourth finger and "[i]t would eventually start to go numb." Based on Dr. Book's recommendation, she attended physical therapy for about one month, which provided some short term relief. She did not dispute a reference in Dr. Book's records of her complaining of hurting her neck when moving a couple of Christmas trees.

In November 2004, Ms. LeBoeuf changed doctors and went to Dr. Bartholomew because she was continuing to have pain and physical therapy was not helping. Again, in August 2005, she changed doctors and went to Dr. DeFrancesch because Dr. Bartholomew wanted her to undergo another round of Vertis, [*56] [12] which she testified was painful, and because she was not getting any better.

12 Vertis is also called percutaneous neuromodulation therapy ("PNT").

On August 1, 2006, Ms. LeBoeuf was in a subsequent automobile accident. According to Ms. LeBoeuf, she experienced an increase in pain after the [Pg 36] automobile accident. For that reason, she saw Dr. Lyons on one occasion in August 2006.

Ms. LeBoeuf testified that she has radiating pain in her left shoulder, which goes through her arm; numbness and tingling in her third and fourth fingers of her left hand; and headaches. All the conservative treatment she has received has provided only short term relief. Ms. LeBoeuf testified that before the 2003 ladder accident she had no prior accidents or injuries to her neck and that since the 2006 automobile accident she has had no subsequent accidents. She testified that following the 2006 automobile accident her neck and arm pain were worse for about three months and then returned to the same level of pain that she had been experiencing since the 2003 ladder accident.

Ms. LeBoeuf described herself as very active and in good physical condition before the 2003 accident. She testified that before the [*57] 2003 accident she enjoyed exercising, playing golf, playing basketball, and running. She noted that in high school she played golf in the Junior PGA and that she was an avid golfer. She testified that she is no longer able to play golf because it is uncomfortable for her to swing a golf club. She testified that she also no longer exercises, jogs, plays tennis or lift weights.

At the time of trial, Ms. LeBoeuf was twenty-five years old and working as a project manager for a landscaping company. She testified that her job has drastically changed since the accident. Her present job responsibilities require her to oversee landscaping and maintenance crews. She indicated that she would prefer to work outside with plants as she did before the 2003

accident, but because of her neck injury she has assumed more administrative duties. Ms. LeBoeuf [Pg 37] acknowledged that the injury from the 2003 accident did not interfere with her academic performance and that she obtained her decree.

Dr. Bradley Bartholomew

On November 16, 2004, Ms. LeBoeuf first saw Dr. Bartholomew, a neurosurgeon. She gave a history of being injured on September 4, 2003, when she was hit in the neck by a ladder, and she denied [*58] a loss of consciousness. She reported that she had immediate neck pain and that she was treated in the emergency room where she was x-rayed and released. She also reported having seen two other physicians for this injury: Dr. Arcuri, her primary care physician; and Dr. Book, an orthopedic surgeon.

On her first visit to Dr. Bartholomew, Ms. LeBoeuf's complaints were continuing neck pain, pressure, pinching, and a painful sensation going to the left shoulder. She reported that the pain in the neck was not constant and not every day and that the pain was brought on by things that put stress on the neck. She also reported pain going to the left upper extremity to approximately the forearm, which also was not constant and not every day. She still further reported occasional left hand numbness and weakness and tingling in the left hand digits three and four. She denied any previous history of neck pain. Dr. Bartholomew noted that a MRI of the spine dated April 26, 2004 was normal. He concluded Ms. LeBoeuf was not a surgical candidate given the continuing spasm she was experiencing despite conservative measures. Dr. Bartholomew prescribed a muscle stimulator to use at home and medication (Skelaxin [*59] and Naprosyn). He instructed her to return in one month.

On January 25, 2005, Dr. Bartholomew saw Ms. LeBoeuf for a second time. On this visit, she reported that her neck was better. She stated that she was using [Pg 38] the stimulator every day. She indicated that she had pain every other day for three to four hours and that the pain was worse at night and in the afternoon. She stated that when the weather changed she experienced a picking type or pulsating sensation into the left upper extremity. Overall, Ms. LeBouef estimated that she was about "50% better." Dr. Bartholomew continued her on the muscle stimulator and instructed her to return in two months.

On March 22, 2005, Dr. Bartholomew saw Ms. LeBoeuf a third time. On this visit, she stated that her neck had been fine for about six weeks, but about three weeks earlier without any trauma she woke with a stiff, sore neck. Given Ms. LeBoeuf's MRI was normal, Dr. Bartholomew recommended a home exercise program along with a muscle relaxant (Robaxin) and continued the home stimulator. He instructed her to return in about one month.

On March 26, 2005, Dr. Bartholomew saw Ms. LeBoeuf a fourth time. She reported some pulsating pain that [*60] became worse about three weeks earlier. She indicated that the pain was in the left neck area and trapezius. She also reported pain in the left elbow to the wrist and numbness in the third and fourth fingers. On this visit, he gave her a trigger point injection in the left trapezius area, which he noted provided her with some immediate decrease in pain in the area.

On May 17, 2005, Dr. Bartholomew saw Ms. LeBoeuf a fifth time. She reported that for a week and a half following the trigger point injection 80% of the pain was gone, but it gradually returned. She reported pain in the neck going to the left upper extremity. She indicated that the left upper extremity pain was not constant, but that the neck pain was constant. She described the pain as sometimes sharp. Dr. Bartholomew opined that most likely the radicular symptoms were a [Pg 39] result of the spasm. He noted that she agreed with his recommendation to try Vertis, which he noted is called percutaneous neuromodulation therapy ("PNT").

On August 9, 2005, Dr. Bartholomew saw Ms. LeBoeuf for the last time. On this visit, Ms. LeBoeuf had her first PNT. Dr. Bartholomew noted that the PNT was painful at the insertion of the needles [*61] on the left side where she was having the spasm. He further noted that Ms. LeBouef tolerated the treatment and that she was going to consider whether she wanted to have another PNT. He discussed other treatment options including message therapy and a chiropractor. He again opined that she was not a surgical candidate.

Dr. Fred DeFrancesch

On January 17, 2006, Dr. DeFrancesch, an expert in the fields of physical medicine and rehabilitation (a pain management doctor), first saw Ms. LeBoeuf. At this time, Ms. LeBoeuf's complaints were paresthesias in the left third and fourth fingers and occasional weakness throughout her hand. Dr. DeFrancesch found that she had cervicalgia, possibly left C6-C7 radiculitis/radiculopathy, and myofascial pain. He prescribed medication and suggested that she have an EMG (electromyogram) and nerve conduction study to determine if neurological issues were present. On February 14, 2006, the tests were done, which showed nerve abnormalities. On February 27, 2006, Ms. LeBouef had a second MRI of the cervical spine, which was compared to the prior one of April 2004. The MRI was normal; it showed no evidence of disc herniation.

On June 20, 2006, Dr. DeFrancesch last [*62] saw Ms. LeBoeuf. On this visit, Ms. LeBoeuf related that "[s]he was doing okay." She rated her pain as 4 out of 10 (10 being the most intense) in intensity, but noted that a week earlier she had one episode of exacerbation at 8 out of 10 when she extended her neck and had [Pg 40] "pinching in the neck." Dr. DeFrancesch's diagnosis was cervicalgia, facet disorder, myofascial pain, cervical strain, and soft tissue injury. He continued her on medication (Celebrex and Robaxin) and a home exercise plan. Although he also continued her on physical therapy (which she went to in March and May 2006), Dr. DeFrancesch noted that "it has not provided significant relief."

Dr. DeFrancesch testified that Ms. LeBoeuf appeared to be truthful in her complaints and that she was not malingering. In response to whether he would expect her to still be experiencing pain when he saw her, Dr. DeFrancesch replied that some patients who have similar symptoms have pain that never resolves.

Dr. Thomas Lyons

Dr. Lyons, an orthopedic surgeon, testified that he saw Ms. LeBoeuf on one occasion, August 2, 2006. On this visit, Ms. LeBoeuf's complaints were pain in her neck, upper back, headaches, and pain involving the [*63] left arms and extending into the hand. Dr. Lyons testified that these complaints for which Ms. LeBoeuf sought treatment arose from a motor vehicle accident that had occurred the prior day, August 1, 2006. Ms. LeBoeuf never mentioned to Dr. Lyons the September 2003 ladder accident; however, she related to him that she had prior neck pain and upper extremity symptoms.

Dr. John Steck

Testifying for the defendants, Dr. Steck, a neurosurgeon, stated that he saw Ms. LeBoeuf on one occasion, on July 31, 2006, for an IME. According to Dr. Steck, Ms. LeBoeuf provided a history of being struck by a ladder in the lower cervical spine at the junction of the spine and the trapezius. She was knocked to the ground. Her primary symptoms were neck pains and numbness and panesthesias into the third and fourth fingers of the left hand. Based on the history, [Pg 41] physical exam, and review of the medical records from Dr. Bartholomew's office, Dr. Steck concluded that Ms. LeBoeuf had a soft tissue injury to the muscles of the neck and the supporting structure of the left shoulder. Dr. Steck testified that "[h]er examination was normal other than a slight decrease in pin prick or a sensitivity to pin sensation [*64] in the fourth finger of the left hand." He testified that this generally was not something that would cause pain or disability. He concluded that more than likely her injuries could be managed conservatively and would not require surgery. In response to the trial court's questions, Dr. Steck testified that the existence of a pending lawsuit is something that is put in a patient's medical records because it "may be a motivating factor for them to either compain more, complain longer, or not to respond to therapy."

As noted, the trial court awarded Ms. LeBoeuf $ 125,000 in general damages and $ 8,027.74 in past medical expenses. In its reasons for judgment, the trial court stated that it agreed with the defendants' expert neurosurgeon, Dr. Steck, that Ms. LeBoeuf sustained a soft tissue cervical injury. The court noted that Dr. Steck testified "the EMG ordered by Dr. Fred DeFrancesh, plaintiff's treating physician, showed abnormalities in the C-6, C-7 nerve distribution. This objective finding supports plaintiff's complaints of chronic pain." The jurisprudential doctrine that a treating physician's opinion should be accorded greater weight than the opinion of a doctor who examines a patient [*65] only once for purposes of litigation (or for purposes of rendering an expert opinion concerning the party's condition) is not irrebuttable. Rather, "the inquiry is whether, based on the totality of the record, the jury was manifestly erroneous in accepting the expert testimony presented by defendants over that presented by plaintiff." *Miller v. Clout, 03-0091, p. 6, n. 3 (La. 10/21/03), 857 So.2d 458, 462.* Given the particular circumstances of this [Pg 42] case, we cannot say that the trial court abused its vast discretion. Accordingly, we decline to disturb the trial court's award of general damages. We further find the award of past medical expenses supported by the record.

DECREE

For the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED

DISTRICT COURT, JEFFERSON COUNTY, COLORADO 100 Jefferson County Parkway Golden, Colorado 80401-6002	
MARION WHILDEN AND MARY WHLDEN Plaintiff, v. **KIMBERLY CLINE, ELMER DUDDEN and COLORADO CAB COMPANY, L.L.C.** Defendants.	▲ **COURT USE ONLY** ▲
	Case Number: 08CV4210 Div.: 7 Ctrm.: 4-A

ORDER

THIS MATTER comes before the Court upon Defendant's Motion in *Limine* re Testimony of William W. Orrison. The court having considered the motion, the supporting materials and oral argument, hereby **DENIES** the motion.

Plaintiff claims to have been injured in motor vehicle accidents in which the various Defendants were at fault. He claims to have suffered mild brain trauma as a result. Dr. Orrison, administered a 3-Tesla MRI to Plaintiff and read the results. He also employed computer software called Diffusion Tensor Imaging ("DTI") and auditory functional magnetic resonance imaging ("fMRI") and read those results. In his opinion Plaintiff's brain shows signs of axonal shearing, damaged or missing connective fibers, abnormal blood flow pattern and a smaller than expected hippocampus. Dr. Orrison has diagnosed Plaintiff with a mild traumatic brain injury. He relies on these readings in forming his opinion.

DTI and fMRI are the type of novel scientific processes that were once governed by *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923) and are now

governed by *People v. Shreck,* 22P.3d 68 (Colo. 2001). See also *People v. Hampton*, 746 P.2d 947, 950-951 (Colo.1987). The admission of expert testimony is governed by CRE 702 and CRE 403. *Shreck,* at 77. The Court's inquiry should focus on the reliability and the relevance of the scientific evidence, and a determination should be made as to (1) the reliability of the scientific principles; (2) the qualifications of the witness; and (3) the usefulness of the testimony to the jury. *Id.* at 78. The Court's inquiry should consider the totality of the circumstances in the case and be broad in nature. *Id.* Finally, to ensure the probative value of the evidence not be substantially outweighed by unfair prejudice, the Court should apply its discretionary authority under CRE 403. *Id.* at 79.

The court has considered two distinct questions. The first is the reliability of the 3-Tesla MRI and associated software ("the technology") in producing its results – evidence of axonal shearing, damaged or missing connective fibers, abnormal blood flow patterns and a smaller than expected hippocampus. The second is the appropriateness of using those results diagnostically.

The court finds the technology to be sufficiently reliable and scientifically accepted so as to be of benefit to the jury. Therefore the motion in limine will be denied.

3-Tesla MRI machines are powerful and expensive. The DTI and fMRI software is also expensive. This technology is not in general use, is seldom used by clinicians and is very rarely considered (because it is so rarely available) in forming a diagnosis. This court is convinced that it produces predictable, reproducible results and accurately images the portions of the brain to which it is applied. For these purposes, it is sufficiently accepted in the scientific and medical communities.[1] It has been the subject of a substantial number of published studies and articles, including peer reviewed articles.[2]

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[1] Many of the Defendants' own expert witnesses have used many of these techniques. *See* Response.
[2] There have been at least 2504 articles on hippocampal atrophy with at least 135 involving brain injury and

62 involving traumatic brain injury. *Id.* at 6. There have been at least 3393 articles on DTI with 176 articles related to DTI and traumatic brain injury and 29 articles related to DTI and mild traumatic brain injury. *Id.* at 7. A search for auditory fMRI revealed 4598 documents, and a search for fMRI and mild traumatic brain injury showed 292 documents. Id. at 9.

The qualifications of the witness do not seem to be questioned when it comes to the use of the technology. He is an expert in neuroradiology, has authored several peer reviewed articles and books, and has been practicing and researching in this area for over twenty-five years. The issue of Dr. Orrison's qualifications does not relate to the use of the technology, but rather to diagnosing mild traumatic brain injury through the use of the technology.

The court would have serious concerns about the appropriateness of diagnosing mild traumatic brain injury as the cause of abnormality *solely* from the presence of the abnormalities revealed by the technology. It is undisputed that some if not all of the abnormalities revealed by the technology can result from many causes. Among them are Multiple Sclerosis, aging, disease processes consistent with dementia, other disease processes and trauma. It is also undisputed that Dr. Orrison did not have available for comparison any MRI images, enhanced by DTI or fMRI, of the Plaintiff before the auto collisions that form the basis of this suit. While the abnormalities revealed by the technology may correlate to mild traumatic brain injury, correlation does not necessarily imply causation. Thus, if it were the intention of the Plaintiff to elicit from Dr. Orrison an opinion that the presence of these abnormalities, *without more*, is diagnostic of mild traumatic brain injury, Defendant would be permitted to renew this motion at trial and the opinion would likely be disallowed. The technology has not yet been proven to be of sufficient value as to reasonably exclude other reasonably possible causes.

But the court understands Dr. Orrison's opinion to be based upon the readings from the technology, coupled with the Plaintiff's history. This dilemma is one commonly faced by lawyers and jurors in auto accident cases. The medical professionals on the plaintiff's side regularly [1] find an injury or condition consistent with trauma, [2] accept without question the history provided by the plaintiff or his attorney, and [3] conclude that the injury or condition was caused by the auto accident. The medical professionals on the defendant's side often [1]

accept without question the history provided by the defense and [2] conclude that the injury or condition was not caused by the auto accident.

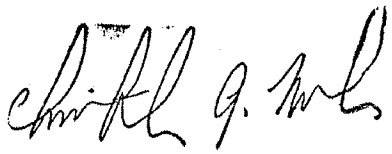
Finally, the Defendants argue that Dr. Orrison's testimony would be too unfairly prejudicial. The Court is not convinced. Many of the Defense's complaints go to the weight that the jury may afford to the evidence offered. These issues will be addressed on cross-examination and the Defendants will offer their own expert witness to point out any perceived problems with Dr. Orrison's testimony. Additionally, the Court expects the jury will be instructed that it may give as much or as little weight to expert opinions as the jurors think those opinions deserve.

The *Shreck* question presented to this court has to do with whether the images revealed by the technology properly document the condition of the tissue within the brain. The court is convinced that they do.

The issue of whether that condition was caused by mild traumatic brain injury (and, if so, as a result of one of these auto accidents) is one that the jury can reasonably determine with the help of the witnesses, the lawyers and the direct and cross examinations.

Done in Golden, Colorado this 10th day of May, 2010

BY THE COURT:



Christopher J. Munch
District Judge

The moving party is ORDERED to mail a copy of this ORDER to all *pro se* parties and file a certificate of mailing with the Court within five days.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

KIRSTEN MACY-HALBERT, Plaintiff, vs. HYUNG RYUL SHIN, Individual; and DOES 1-10, Inclusive, Defendants.	Case No. BC469602

Deposition of STEPHEN L.G. ROTHMAN, M.D., taken on behalf of Plaintiff at 100 Wilshire Boulevard, Suite 2100, Santa Monica, California, commencing at 1:05 p.m., Tuesday, August 13, 2013, pursuant to Notice.

Reported by: Laurie Beth Kay, CSR No. 8427

APPEARANCES OF COUNSEL:

EXHIBIT 7

consist of three bills, dated 6/22/2013, 5/24/2013, and 5/8/2013.

(Exhibit 6 marked and attached.)

/ / /

BY MR. WELLS:

Q. Are there any other bills that you have associated with this case other than those?

A. No.

Q. If we could, now, I would like to go to your May 9, 2013, report.

We will just start with the first sentence in that report. You say you have reviewed an MRI scan of the brain 2/4/13 on Kirsten Macy-Halbert. That's correct?

A. Yes.

Q. Now, is that a film study that you actually reviewed the actual film?

A. I reviewed a DVD with it or a CD with the digital information on it.

Q. And is that what is known as a 3TVI MRI?

A. Well, it's an MRI scan that happens to be done on a 3 Tesla scanner.

I said I reviewed a CD. I didn't comment here. I think I had reviewed a CD.

But I went over it. I had pictures.

Q. But let's get the name down correctly. Do we call it a 3T MRI?

A. It's an MRI scan which just happens to be

25 on a 3T scanner.

Q. All right. You noted in your report that you did see some thinning of what appears to be some of the fibers of the tractography. Is that true?

A. There were pictures from the tractography. I don't do tractography as part of my clinical practice, and I cannot tell you if those pictures are or are not correct. I cannot tell you whether those pictures are or are not officially what is really present.

But based on what they show, there is some thinning of some of the white matter tracts as compared to textbook normal. I don't know whether these are or are not normal, but the tracts look a bit thin, which suggests some -- maybe some abnormal diffusion in those white matter tracts.

Q. So you would agree that the MRI shows some abnormal findings with respect to some of the fibers on the tractography; is that correct?

A. Well, no, not necessarily. What I said was that the pictures that they showed appeared to demonstrate that. Whether those pictures are a true demonstration of what is present there, I don't know, and I won't comment about that. The pictures show what look like some thinning of the tracts, and that's how it was read, basically.

Q. Okay. And you agree with that?

A. At least on the basis of these pictures, yes.

Q. Are you an expert on MRIs done in a 3 Tesla machine?

A. It's an MRI scan of the brain. There's no difference, except for the fact the resolution is slightly higher and it allows one to do things like diffusion images in a reasonable amount of time. You can do it on other machines, but it is generally done on a high full-strength scanner.

I do not do tractography or diffusion-weighted three-dimensional imagery. That's a research tool, and that's not what I do. But it's a very interesting tool, research tool.

Q. So you are not an expert in diffuse imaging; is that true?

A. Correct.

Q. And you are not an expert with respect to tractography; is that correct?

A. Correct. I do not do tractography.

Q. And I take it you are not an expert with respect to the PET scans as well. Is that true?

A. Correct. I don't do PET scans at all.

Q. What do you do?

necessarily mean it was caused by it. There's a difference between causation and correlation.

The only thing that you can do with a PET scan is correlate. You can't make any causal statement that it's because of trauma.

Q. Irrespective of your testimony, you have already indicated that you are not an expert on PET scanning, you have never published on it, you have never done any research on it; is that true?

A. Correct. And I won't comment whether his interpretation of this PET scan is or isn't correct.

Q. But you have a general opinion that you don't think PET scanning is diagnostically helpful; is that true?

A. Correct.

I mean, I can't remember the exact citation. I didn't realize there was going to be a PET scan issue here. But I think it was the American Academy of Neurology that has a position paper on PET scans that says that PET scanning is inappropriate. I couldn't conjure it up in the last ten minutes before I got here. I think it was the

American Academy of Neurology.

Q. In your c.v. do you have any publications dealing with PET scan?

A. No, of course not.

Q. Do you have any publications dealing with the 3T MRI?

A. No.
Q. Have you ever ordered a 3T MRI?
A. I don't order MRIs.
Q. Okay. And you have indicated that as part of your practice you don't interpret 3T MRIs; is that true?
A. Well, occasionally -- the way my clinical practice works is that the patients are sent out for imaging. I don't even know most of the scanners that they are on.
As far as I am concerned, at least in the majority of stuff that I do, it's irrelevant what scanner it's on.
Since I do not in my own private practice in any way evaluate patients for anything that a 3T would be useful for, I don't specifically look for it.
Q. So in your private practice in radiology, you have never ordered a 3T MRI; is that right?

A. Well, I never order any MRIs. But I don't think -- I am actually not sure that any of the patients have or have not been done on a 3T scan. I have never specifically asked for it.
Q. In your private practice, have you ever been referred a patient where the neurologist requested a 3T MRI?
A. No.

what physical property we are measuring. We make pictures of that physical property which looks like pictures of anatomy, but it isn't. It's pictures of moving water molecules.

So we know a lot about moving water molecules. We don't know what the electromicroscope looks like or what the microscope looks like. We don't know, really, the anatomy of the processes.

Q. Before your deposition today, did you look

at some of the most recent literature regarding the tensor diffuse imaging?

A. I have not.

Q. When was the last time you did a literature search regarding diffuse tensor imaging?

A. It's been a while. Like a year, probably.

Q. Do you have an opinion what the signs and symptoms of a mild traumatic brain injury patient are?

A. I have no opinion.

Q. Have you formed any opinions in this case?

A. Just that the objective anatomic studies on the brain do not show evidence of anatomic injury -- it's a bunch of negatives -- there's no evidence of any bleeding into the brain, there's no objective abnormalities which are correlatable.

For example, one point that Dr. Buchsbaum

PROOF OF SERVICE
(C.C.P. 1013A, 2015.5)

STATE OF CALIFORNIA

I am employed in the county of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 100 Wilshire Boulevard, 21st Floor, Santa Monica, California 90401.

On August 20, 2013 I served the foregoing document, described as **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION *IN LIMINE* NO. 4 TO EXCLUDE TRACTOGRAPHY; DECLARATION OF MOLLY M. McKIBBEN AND EXHIBITS** on the interested parties in this action by placing a true copy enclosed in sealed envelopes addressed as stated on the attached mailing list.

____ **BY MAIL.**

____ As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Santa Monica, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

____ **BY PERSONAL SERVICE.** I delivered such envelope by hand to the offices of the addressee.

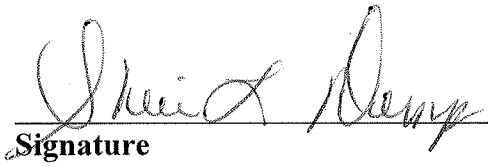
__XX__ **BY OVERNIGHT DELIVERY.** I caused such envelope to be deposited with a delivery service (Federal Express) in Santa Monica, California, for overnight delivery to the addresses set forth on the attached list.

____ **BY FACSIMILE.** I faxed a copy of the above-described document to the interested parties as set forth on the attached list.

Executed on August 20, 2013 at Santa Monica, California.

__X__ **(State)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Sheri L. Dempsey
Name


Signature

Macy-Halbert v. Shin, et al.
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