ADAM BRAVERMAN
United States Attorney
BRETT NORRIS
Assistant U.S. Attorney
Cal. State Bar No. 224875
PAUL L. STARITA
Cal. State Bar No. 219573
Office of the U.S. Attorney
880 Front Street, Room 6293
San Diego, CA 92101-8893
Telephone: (619) 546-7620/7701
Facsimile: (619) 546-7751
Email:brett.norris@usdoj.gov/paul.starita@usdoj.gov

Attorneys for Defendant
UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

RHONDA G. COZAD, an individual,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Case No.: 17cv0099-MMA-JMA

POINTS & AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO EXCLUDE TESTIMONY OF PLAINTIFF'S EXPERT WITNESS EUGENE VANDERPOL

To be admissible, an expert witnesses' opinions must, among other things, be: (1) scientific, technical, or specialized; and (2) the product of reliable principles or methods.[1] Here, Plaintiff designated Eugene Vanderpol as a "Biomechanical Engineer and Accident Reconstructionist."[2] Mr. Vanderpol's reports, however, contain no scientific, technical, or specialized analysis.[3] Nor do they contain an application of any principle or method. In fact, Mr. Vanderpol's reports provide only a summary of documents and testimony, followed by his "preliminary opinions."[4] Are Mr. Vanderpol's "opinions" admissible?

[1] Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999).
[2] Plaintiff's designation of Mr. Vanderpol, Exhibit 1 to accompanying Notice of Lodgment.
[3] Mr. Vanderpol's June 21, 2018 report, Exhibit 2 to Notice of Lodgment; Mr. Vanderpol's August 27, 2018 addendum report, Exhibit 3 to Notice of Lodgment.
[4] *Id.*

I

FACTS

On June 12, 2014, Plaintiff collided with a United States Postal Service ("USPS") vehicle while riding her motorcycle in Rainbow, California. Plaintiff later sued the United States for the injuries she sustained in the accident.[5]

On March 16, 2018, Plaintiff designated Mr. Vanderpol as an expert witness.[6] The designation describes the scope of Mr. Vanderpol's anticipated testimony, in pertinent part, as follows:

> Mr. Vanderpol will testify regarding liability, causation and damages. Mr. Vanderpol will testify from an accident reconstruction and biomechanical perspective. Mr. Vanderpol's testimony will include, but is not limited to, the physical forces generated by motor vehicle accidents, the physical forces generated by this particular motor vehicle accident, a reconstruction of this motor vehicle accident and how the forces involved affect the human body and all related issues, the specific forces involved in this collision . . .[7]

In June 2018, Plaintiff produced Mr. Vanderpol's expert report.[8] The report is comprised of three sections: (1) "Preliminary Findings;" (2) "Accident Description;" and (3) "Preliminary Opinions." In the Preliminary Findings section, Mr. Vanderpol briefly describes the scope of his assignment, the materials he reviewed, and his conclusion that the driver of the USPS vehicle, Kathi Frantzich, "was the cause of the subject motorcycle v. vehicle traffic accident."[9] In the Accident Description section, Mr. Vanderpol summarizes his understanding of what happened in the moments before, during, and after the accident.[10] Finally, in the "Preliminary Opinions" section, Mr. Vanderpol opines that:

- "Ms. Frantzich was the cause of the subject accident and performed an unsafe left turning maneuver [and] failed to yield to [Plaintiff's] right-of-way . . .;"[11]

---

[5] Doc. No. 1.
[6] Exhibit 1 at p. USA_001-015.
[7] *Id.* at p. USA_003:8-15.
[8] Exhibit 2 at p. USA_016-023.
[9] *Id.* at p. USA_018.
[10] *Id.* at p. USA_018-19.
[11] *Id.* at p. USA_019.

- "Lack of proper vehicle maintenance by Ms. Frantzich and the USPS generated a hazardous visibility condition . . ."[12] and
- "A motorcyclist in [Plaintiff's] position traveling approximately 50 mph would not have been able to reasonably deliver evasive maneuvering to have avoided the subject incident . . ."[13]

And based on these opinions, Mr. Vanderpol ends his report by concluding that "the cause of the 6/12/14 traffic collision was Ms. Frantzich's hazardous driving actions, which includes failure to yield when turning left and inattention to the obvious approaching roadway vehicles/conditions, as well as the improperly maintained USPS mail carrier vehicle's window."[14]

On August 30, 2018 (two days after the discovery cutoff), Defendant received a second report from Mr. Vanderpol, entitled "FIRST ADDENDUM TO PRELIMINARY FINDINGS."[15] In that two-page report, Mr. Vanderpol identifies some additional documents that he reviewed, and notes that the opinions expressed in his original report remain unchanged.[16]

Although Mr. Vanderpol's reports reference documents (like the CHP collision report) and testimony (like Ms. Frantzich's deposition testimony), neither contains any application of any principle or methodology to the facts of the case. His reports also contain no data, no measurements, no analysis, no formulas, and no calculations. And, contrary to Plaintiff's designation of Mr. Vanderpol, neither report contains a discussion of the accident's "physical forces," or a "reconstruction" of the collision.

//

//

//

---

[12] *Id.* at p. USA_020.
[13] *Id.* at p. USA_021.
[14] *Id.* at p. USA_022.
[15] Exhibit 3 at p. USA_024-029.
[16] *Id.* at p. USA_027.

II

LEGAL STANDARD

Fed. R. Evid. 702 governs the admissibility of expert testimony.[17] It allows a qualified expert witness to provide opinion testimony, but only when:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.[18]

Rule 702 "imposes a special obligation upon a trial judge to 'ensure that any and all [expert] testimony . . . is not only relevant, but reliable.'"[19] Relevancy requires that "[t]he evidence . . . logically advance a material aspect of the party's case."[20] Reliability requires that an expert's testimony "have a reliable basis in the knowledge and experience of his discipline."[21]

Under Rule 702, the district court assumes "a gatekeeping role, to assess whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue."[22] As the gatekeeper, "the trial court must . . . exclude junk science that does not meet Federal Rule of Evidence 702's reliability standards by making a preliminary determination that the expert's testimony is reliable."[23] When determining the admissibility of an expert's opinion, district courts are not concerned with the "correctness of the expert's conclusions but the soundness of his

---

[17] *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 859 (9th Cir. 2014).
[18] Fed. R. Evid. 702.
[19] *Kumho Tire, supra,* 526 U.S. at 147 (quoting *Daubert, supra,* 509 U.S. at 589). *See also Estate of Barabin v. Asten Johnson, Inc.*, 740 F.3d 457, 462 (9th Cir. 2014).
[20] *Cooper v. Brown*, 510 F.3d 870, 942 (9th Cir. 2007).
[21] *Barabin, supra,* 740 F.3d at 462 (quoting *Kumho Tire*, 526 U.S. at 148).
[22] *Ollier, supra*, 768 F.3d at 860 (quoting *Daubert*, 509 U.S. at 592–93) (internal quotation marks omitted).
[23] *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011).

methodology."[24] A court is not required "to admit or to exclude evidence based on its persuasiveness;" but rather "to admit or exclude evidence based on its scientific reliability and relevance."[25] A district court abuses its discretion by admitting expert testimony without first determining whether the testimony is both relevant and reliable.[26]

The Supreme Court suggests that courts consider four factors to determine whether expert testimony is sufficiently reliable to assist the trier of fact.[27] Those factors are: (1) whether the expert's methodology can be tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error; and (4) whether the theory or technique has gained general acceptance within the relevant scientific community.[28] This analysis applies to all proffered specialized knowledge, not solely scientific expert testimony.[29] The party seeking to offer the expert testimony bears the burden of establishing its admissibility.[30]

III

ARGUMENT

Mr. Vanderpol's testimony should be excluded because none of his "opinions" satisfy Rule 702. As discussed below, Mr. Vanderpol's opinions are not scientific, technical, or specialized. Nor are they the product of reliable principles or methods. And because of these shortcomings, his testimony will not assist the trier of fact (*i.e.*, this Court). In fact, admission of Mr. Vanderpol's testimony will only waste time and cause prejudice.

//

//

---

[24] *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010) (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,43 F.3d 1311, 1318 (9th Cir. 1995)).

[25] *Ellis, supra*, 657 F.3d at 982.

[26] *Barabin, supra*, 740 F.3d at 464; *United States v. Tillisy*, 697 Fed. Appx. 910, 913 (9th Cir. 2017).

[27] *Daubert*, 509 U.S. at 593–94.

[28] *Id.*

[29] *Kumho Tire*, 526 U.S. at 141.

[30] *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 549 (C.D.Cal.2014) (citations omitted).

A. Mr. Vanderpol's Opinions Are Not The Product of Reliable Principles Or Methods

Under Rule 702(c), Mr. Vanderpol's opinions must be "the product of reliable principles and methods." Additionally, Rule 702(d) requires Mr. Vanderpol to show that he has "reliably applied the principles and methods to the facts of the case." Neither Rule 702(c) nor 702(d) are satisfied here.

Mr. Vanderpol is a licensed professional engineer and a board certified forensic examiner.[31] Plaintiff designated Mr. Vanderpol to opine on the "physical forces" involved in the accident (and others like it) and the effect of those forces on the human body. Plaintiff also designated Mr. Vanderpol to "reconstruct" the accident. Given his background and designation, one would expect Mr. Vanderpol's reports to contain significant amounts of data – such as speed, time, and distance measurements. One would also expect to find information regarding the subject roadway (*e.g.*, its width; its sightlines; its gradient; the material it is made of, *etc.*), as well as information regarding the subject vehicles (*e.g.*, their year, make, and model; their weight; the brand and condition of their tires; their braking systems, *etc.*). Armed with this data and information, one would then expect Mr. Vanderpol's reports to contain a discussion of various engineering formulas and calculations, followed by an explanation of how each is regularly applied by the engineering and forensics communities in collisions like this one. Next, one would expect Mr. Vanderpol's report to contain an application of those formulas and calculations to the accident data and information. And finally, one would expect to find the results of those calculations (*e.g.*, the forces generated by the accident and their effect on the vehicles, Plaintiff, and Ms. Frantzich), along with a discussion of margins of error, degrees of confidence, and the likelihood of alternative scenarios.

None of the foregoing are present in either of Mr. Vanderpol's reports. They include no data, no formulas, and no calculations. And although his original report contains one vague reference to "accident reconstruction principles and techniques," neither report

[31] Mr. Vanderpol's Curriculum Vitae, Exhibit 1 at p. USA_006.

contains an application of any principle or technique to the facts of this case.[32] In fact, his original report implies that he did not apply any principles or methodologies. He claims he reached his conclusions, in part, by using:

> "Current accident reconstruction principles and techniques that can include:
>
> - PhotoModeler photogrammetric evidence analysis
> - AR Pro accident reconstruction tool suite
> - PC-Crash collision simulation program."[33]

Read in isolation, Mr. Vanderpol's use of the words "can include" (as opposed to "did include") makes it uncertain whether he actually applied any principles and techniques to the facts of this case. But considering that both his original and supplemental reports contain no data, calculations, or analysis; no discussion of how these alleged principles were applied; no description of the results these alleged principles generated; and only his "preliminary opinions" (as opposed to final opinions) – there is no doubt Mr. Vanderpol did not perform any scientific, technical, or specialized analysis of the facts in this case.[34] Instead, Mr. Vanderpol's reports provide only a cherry-picked summary of documentary evidence and testimony, followed by his own conclusory "opinions."

As noted above, the Supreme Court has identified four factors for courts to consider when attempting to determine whether an expert's opinion is reliable and, thus, admissible.[35] Mr. Vanderpol's report fails to satisfy each of those factors. For one, Mr. Vanderpol's methodology cannot be tested because he uses no methodology. Second, his

---

[32] Exhibit 2 at p. USA_018.

[33] *Id.* (Underline added.)

[34] Plaintiff may argue that Mr. Vanderpol did apply these so-called "principles and techniques" to the facts of the case, but that he chose not to include any details regarding his methods, his data, his calculations, or his results in his report. If so, Mr. Vanderpol's opinions are still inadmissible under Fed. R. Civ. P. 26(a)(2)(B)(i), Rule 37(c), and the Court's Scheduling Order (Doc. 11 at ¶ 12.) Rule 26(a)(2)(B)(i) requires an expert report to contain "a complete statement of all opinions the witness will express and the basis and reasons for them." Rule 37(c) and the Court's Scheduling Order prohibit parties from relying on information not disclosed in accordance with Rule 26(a).

[35] *Daubert, supra*, 509 U.S. at 593–94.

technique has not been subjected to peer review because, again, he employs no technique. Third, there is no "known or potential rate of error" for Mr. Vanderpol's opinions because they are not based on any calculations. And finally, Mr. Vanderpol's technique is not accepted within the relevant community because he employs no technique for any community to even consider, let alone accept.

In sum, Rule 702(c), Rule 702(d), and *Daubert* (and its progeny) prohibit the admission of Mr. Vanderpol's testimony because his opinions are not scientific, technical, or specialized; he employed no principles or methods; and it is impossible to test the reliability of his opinions.

B. Mr. Vanderpol's Testimony Will Not Help the Finder of Fact

Mr. Vanderpol's testimony is also inadmissible under Rule 702(a). That rule allows an expert to provide opinion testimony, but only when his "scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or determine a fact in issue." "The upshot of Rule 702's helpfulness requirement is that the proffered expert testimony must actually help the factfinder 'understand facts that are *outside common understanding*.'"[36] An expert cannot just recite a factual narrative that does not draw technical or scientific conclusions.[37] "Expert testimony 'must be directed to matters

---

[36] *In re Lyondell Chemical Co.*, 558 B.R. 661, 667 (Bankr. S.D.N.Y. 2016) (quoting *LinkCo, Inc. v. Fujitsu Ltd.*, No. 00-cv-7242 (SAS), 2002 WL 1585551 at *1 (S.D.N.Y. July 16, 2002) (emphasis added). *See also Bartak v. Bell-Galyardt*, 629 F. 2d 523, 530 (8th Cir. 1980) ("Where the subject matter is within the knowledge or experience of laymen, expert testimony is superfluous."); *Salem v. U.S. Lines Co.*, 370 U.S. 31, 35 (1962) (expert testimony should be excluded when "all the primary facts can be accurately and intelligibly described to the jury" and the jury is capable of understanding them) (quoting *United States Smelting Co. v. Parry*, 166 F. 407, 415 (8th Cir. 1909); *In re Rezulin*, 309 F. Supp. 2d 531, 551 (S.D.N.Y. 2004) (excluding portion of expert's testimony because it was "merely a 'narrative of the case which a juror is equally capable of understanding'").

[37] *Lyondell, supra*, 558 B.R. at 667. *See also e.g., LinkCo, supra*, 2002 WL 158551 at *1 (excluding expert report because it did "not address technical questions that may be difficult for a juror to comprehend," but rather asserted "arguments and conclusory statements about questions of fact masquerading behind a veneer of technical language"); *In re Fosamax Prod. Liab. Litig.*, 645 F. Supp. 2d 164, 192 (S.D.N.Y. 2009) (excluding

within the witness' scientific, technical, or specialized knowledge and not to lay matters which a jury is capable of understanding and deciding without the expert's help.'"[38]

Mr. Vanderpol's testimony is inadmissible under Rule 702(a) because his report provides no insight into any facts that are "outside common understanding."[39] His report, as noted above, is neither scientific, technical, nor specialized. On the contrary, it merely recites a version of the facts most favorable to Plaintiff, and then concludes that Defendant is liable. In this regard, Mr. Vanderpol's report is nothing more than a closing argument, dressed-up as an expert report, designed to tell this Court how to decide the case. Courts have held that this is exactly the type of expert testimony Rule 702 is designed to prohibit.[40] Additionally, because Mr. Vanderpol's report provides no scientific, technical, or specialized insight, his testimony will not be helpful to this Court. Indeed, Mr. Vanderpol's report seeks to supplant the Court's role in interpreting the evidence. For these reasons, Mr. Vanderpol's testimony must be excluded pursuant to Rule 702(a).

---

portion of expert's report that simply "regurgitate[d] the evidence"); *Highland Capital Mgmt.*, 379 F. Supp. 2d 461, 468–69 (S.D.N.Y. 2005)("[T]o the extent that [the expert] is simply rehashing otherwise admissible evidence about which he has no personal knowledge, such evidence – taken on its own – is inadmissible.")

[38] *United States v. Pacific Gas and Elec. Co.*, No. 14-cr-175, 2016 WL 1640462 (N.D. Cal. Apr. 26, 2016)(quoting *Andrews v. Metro N. Commuter R.R. Co.*, 882 F.2d 705, 708 (2d Cir. 1989)). *See also Fujifilm Corp. v. Motorola Mobility LLC*, No. 12-cv-03587-WHO, 2015 WL 757575, at *27 (N.D. Cal. Feb. 20, 2015) (striking portions of expert report that were "replete with observations and inferences that jurors are perfectly capable of making for themselves without [expert] assistance . . .").

[39] *Lyondell* at 667 (quoting *LinkCo* at *1).

[40] *Rezulin, supra*, 309 F. Supp. 2d at 541. ("[E]xperts should not be permitted to supplant the role of counsel in making argument at trial, and the role of the jury in interpreting the evidence.") *Primavera Familienstifung v. Askin*, 130 F. Supp. 2d 450, 530 (S.D.N.Y. 2001) (expert who offers factual conclusions dependent on his own interpretation of deposition testimony "does no more than counsel for the [plaintiff] will do in argument, *i.e.*, propound a particular interpretation of [the defendant's] conduct"); *Butler v. First Acceptance Ins. Co.*, 652 F. Supp. 2d 1264 (N.D. Ga. 2009) (excluding expert whose testimony did not amount to "any more than what Plaintiff's counsel could argue in closing arguments.")

C. Mr. Vanderpol's Testimony Is Inadmissible Under Fed. R. Evid. 402 and 403

Rule 402 prohibits the admission of irrelevant evidence. Rule 403 allows Courts to exclude evidence if its probative value is outweighed by, among other things, a danger of unfair prejudice or wasting time. Mr. Vanderpol's testimony is inadmissible under Rule 402 because it is irrelevant. His personal interpretation of the evidence – without application of any scientific, technical, or specialized principle or methodology – is entirely immaterial (and, as noted above, unhelpful). And because it is immaterial, Mr. Vanderpol's testimony has no probative value. Admission of his testimony will not only waste time, it will prejudice Defendant. Accordingly, Mr. Vanderpol's testimony must also be excluded pursuant to Rules 402 and 403.

IV

CONCLUSION

Plaintiff designated Mr. Vanderpol to provide opinions regarding the "physical forces" involved in the subject accident and to reconstruct the collision. Mr. Vanderpol's reports, however, provide no scientific, technical, or specialized analysis of the accident. Nor do they contain an application of any principle or methodology to the facts of the case. Instead, Mr. Vanderpol's reports do nothing more than deliver a biased factual summary followed by conclusory statements. As a result, Mr. Vanderpol's testimony will not assist this Court, and will do nothing more than waste time and cause prejudice. Defendant therefore respectfully asks the Court to exclude Mr. Vanderpol's testimony pursuant to Rules 702, 402, and 403, and pursuant to *Daubert*, *Kumho Tire*, and their progeny.

DATED: September 25, 2018

ADAM BRAVERMAN
United States Attorney

/s *Brett Norris*
BRETT NORRIS
Assistant U.S. Attorney
PAUL L. STARITA
Assistant U.S. Attorney
Attorneys for Defendant