SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16
(Dept 16 is now hearing cases that were formerly in Dept 2)
Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 10-24-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear in person or by video. Parties are asked NOT to appear by telephone only.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.
The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

TO CONTEST THE RULING: Before 4:00 p.m. today you must notify the:

(1) Court by calling (408) 808-6856 and
(2) Other side by phone or email that you plan to appear and contest the ruling
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court will call the cases of those who appear in person first. If you appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. You must use the current link.

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. You may make an online reservation to reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Go to the Court's website at www.scscourt.org to make the reservation.

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

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COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

LINE #	CASE #	CASE TITLE	RULING
LINE 1	24CV433325 Hearing: Demurrer	FPP MB, LLC vs Jennifer Lewis et al	Notice appearing proper, the unopposed demurrer by Defendants Lewis and Mandal to the FAC is SUSTAINED WITHOUT LEAVE TO AMEND. Defendants shall submit the final order within 10 days.
LINE 2	24CV433325 Hearing: Motion to Strike	FPP MB, LLC vs Jennifer Lewis et al	Notice appearing proper, the unopposed motion to strike by Defendants Lewis and Mandal is GRANTED. Defendants shall submit the final order within 10 days.
LINE 3	21CV387448 Motion: Summary Judgment/Adjudication	SHAHNAWAZ SOROYA vs RAY L. HELLWIG MECHANICAL CO. INC. et al	See Tentative Ruling. The Court will prepare the final order.

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The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 4	22CV398917 Motion: Compel	Mark Arnold vs Benson Security Systems, INC. et al	Notice appearing proper and good cause appearing the unopposed motion to compel the deposition of David Jerome Dixon is GRANTED. The failure to file a written opposition "'creates an inference that the motion or demurrer is meritorious.'" *Sexton v. Superior Court* (1997) 58 Cal.App.4th 1403, 1410. Mr. Dixon is ordered to appear on November 25, 2024 at 9 am via Zoom for a deposition to be taken by Plaintiff's counsel. Further, Mr. Dixon shall pay sanctions of $1155 (paralegal time reduced to 2 hours) to Plaintiff's counsel for costs and attorney's fees. Plaintiff shall submit the final order within 10 days of the hearing.
LINE 5	23CV421206 Motion: Compel	Vivek Kothari vs Michelle Chen et al	See Tentative Ruling. The Court will prepare the final order.
LINE 6	23CV425276 Motion: Compel	YSMAEL MARTINEZ-ARELLANO vs NANCY PEET et al	See Tentative Ruling. The Court will prepare the final order.
LINE 7	21CV388731 Motion: Stay	Jinsong Hu vs David Herrera	The case against Herrera was dismissed on 10/21/24 such that the motion to stay is now MOOT. There is a CMC hearing at 10 am.
LINE 8	23CV423899 Motion: Vacate	Jpmorgan Chase Bank, N.a. vs Santiago Ramos	Plaintiff's unopposed motion to vacate the judgment is GRANTED. Plaintiff shall submit the final order within 10 days of the hearing.

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The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 9	23CV421930 Hearing: Compromise of Minor's Claim	Gnanashanmugam Shankaran vs Lucile Salter Packard Children's Hospital at Stanford et al	The GAL and counsel for GAL shall appear at the hearing so that the court can conduct voir dire and determine that the settlement is reasonable and knowing.
LINE 10			
LINE 11			
LINE 12			
LINE 13			
LINE 14			
LINE 15			
LINE 16			
LINE 17			

- oo0oo -

Calendar Line 3
Case Name: *Soroya v. Ray L. Hellwig Mechanical Co. Inc., et al.*
Case No.: 21CV387448

Ray L. Hellwig Mechanical Co. Inc., ("Hellwig Inc.") and Elden Shreve ("Shreve" or "Defendant") (collectively, "Defendants") move for summary adjudication of the request for punitive damages in the operative Complaint filed by Shahnawaz Mohammad Soroya ("Plaintiff").

I. Background

This is an action for negligence arising out of a motor vehicle accident that occurred at the intersection of North Park Victoria Drive and Wessex Place in Milpitas, California. (Complaint, ¶¶ 1-2.)

A. Factual

According to allegations of the Complaint, on October 20, 2020, Defendant Shreve was driving a pickup truck while intoxicated when he failed to yield to oncoming traffic as he made a left turn and struck Plaintiff's motorcycle. (Complaint, ¶¶ 1-2, 4.) As a result of the collision, Plaintiff sustained serious injuries. (Complaint, ¶ 2.)

Shreve's subject pickup truck "was owned by and registered to" Hellwig Inc., and Shreve had Hellwig Inc.'s "express consent" to use the subject vehicle. (Complaint, ¶ 5.)

B. Procedural

Plaintiff initiated this action on August 17, 2021, asserting a single cause of action for "negligence/negligence *per se*" against Defendants Hellwig Inc. and Shreve and seeking to recover punitive damages from Defendant Shreve only.

On June 25, 2024, Defendants filed the instant motion for summary adjudication of Plaintiff's request for punitive damages. Plaintiff opposed the motion on October 10, 2024. Defendants filed reply papers a week later.

II. Evidentiary Objections

A. Plaintiff's Objections

Plaintiff submits objections to evidence offered by Defendants in support of their motion for summary adjudication. As the objections are not in the proper format, the Court need not rule on them. California Rules of Court, Rule 3.1354, subdivision (c) requires the filing of two documents: evidentiary objections and a separate proposed order on the objections, and both must be in one of the two approved formats set forth in the Rule. Instead, Plaintiff has filed a single document, listing objections with a place for the Court to checkmark its rulings, signed by Plaintiff's counsel, but with no place for a judge's signature.

Regardless, the Court declines to rule on these objections because they are not material to the outcome of the motion. (See Code of Civ. Proc., § 437c, subd. (q) ["In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review."].)

B. Defendants' Objections

Defendants submit, in proper format, objections to evidence offered by Plaintiff in opposition to Defendants' motion for summary adjudication. But, Defendants' proposed order was rejected by the court clerk, and Defendants did not refile the proposed order with the requested cover sheet. In any event, the Court, in its discretion, will rule on Defendants' evidentiary objections.

Cox Declaration (Def. Obj. No. 1)

Defendant objects to the declaration of Plaintiff's counsel, Daniel Cox ("Cox Decl."), in its entirety, on grounds of hearsay, lack of authenticity, speculation, and misstatement of testimony. (See Objections to Evidence Presented in Plaintiff's Opp. to MSA ("Def. Obj."), No. 1; see also Cox Decl., ¶¶ 1-6.)

Declarations filed in support of a motion for summary adjudication "shall be made by a person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations." (Code Civ. Proc., § 437c, subd. (d); see also Evid. Code, § 702, subd. (a) ["the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter"].) Here, the purpose of Cox's declaration is to authenticate and summarize the documents attached thereto. (See Cox Decl., ¶¶ 1-6.) Authentication of a writing, which means the introduction of evidence sufficient to sustain a finding that the writing constitutes what the proponent claims it to be or the establishment of facts by other means provided by law, is required before it may be admitted into evidence. (Evid. Code, §§ 1400-1401.) It is routine in law-and-motion practice for a party's attorney to authenticate writings offered as evidence when the attorney has personal knowledge of how the writings were obtained in the litigation, how they have been identified, who identified them, and their status as true and correct copies of the originals. (*Greenspan v. LADT, LLC* (2010) 191 Cal.App.4th 486, 523; see also *Luckman Partnership, Inc. v. Superior Court* (2010) 184 Cal.App.4th 30, 34-35 [plaintiff's counsel sufficiently authenticated documents in declaring he had personal knowledge that the documents attached to his declaration were the defendant's verified interrogatory responses in the action].)

Defendants' blanket objection to Cox's declaration is overreaching, and their challenge to the admissibility of particular documents is more appropriately addressed on an individual basis because of the existence of considerations that do not apply equally to each document in question.

Thus, Def. Obj. No. 1 is OVERRULED.

Deposition Testimony of Defendant Shreve and Plaintiff (Def. Obj. Nos. 2-3)

Defendant objects to his own deposition testimony marked as Exhibit H to Cox's Declaration (See Cox Decl., ¶ 3, Exh. E – Deposition transcript of Elden Eugene Shreve ("Shreve Depo."), and Plaintiff's Deposition (Cox Dec., ¶ 4; Exh. F – Plaintiff Depo.), on the same grounds listed under objection number one. (See, e.g., Def. Obj. No. 1.) Shreve's own deposition testimony and Plaintiff's testimony are not based on hearsay, are not speculation, nor are the testimonies irrelevant or misleading. Each was a percipient witness to the accident. Shreve's testimony is based on his own beliefs and experiences especially given that he was the driver involved in the subject incident, and Plaintiff was the injured party in the subject incident. Any alleged hearsay statements appear to either have non-hearsay purposes (e.g. knowledge) or fall within recognized hearsay exceptions. (See Evid. Code, § 702 ["[T]he testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter"]; see also *People v. Southern Cal. Edison Co.* (1976) 56 Cal.App.3d 593, 606 ["Except to the extent that an expert may give testimony not based on personal knowledge, under Evidence Code section 702, subdivision (a), which codifies a long-existing rule of evidence, the testimony of every witness, whether expert or lay, concerning facts to which he testifies is inadmissible unless he has personal knowledge of those facts"].)

Thus, Def. Obj. Nos. 2 and 3 are OVERRULED.

Shreve's Medical Records and Traffic Collision Report (Def. Obj. Nos. 4-5)

The Court OVERRULES Defendants' objection to the submission of Shreve's medical records. The medical records meet the business records exception to hearsay and have been properly authenticated. (*Wicks v. Antelope Valley Healthcare Dist.* (2020) 49 Cal.App.5th 866, 876 ["[T]he medical records were properly authenticated as the hospital's business records, and as such, they are not hearsay. They are the type of records on which medical experts may and do rely in order to give expert testimony in a medical malpractice case. [Citation.] . . . Here, defense counsel's declaration stated that the copies of Mr. Wick's medical records provided to Dr. Holland for review 'were true and exact copies of the records provided directly to my office by the hospital's Health Information Management supervisor' . . . ."].)

Thus, Def. Obj. No. 4 is OVERRULED.

Finally, the traffic collision report attached as Exhibit H to Cox Decl., ¶ 6, is OVERRULED for similar reasons. As to the hearsay objection, the report is covered by the Evidence Code section 1280 hearsay exception. (See *Lake v. Reed* (1997) 16 Cal.4th 448, 461; *Rupf v. Yan* (2000) 85 Cal.App.4th 411, 430, fn. 6 ["a police officer's report is admissible under Evidence Code section 1280 if it is based upon the observations of a public employee who had a duty to observe facts and report and record them correctly"]; *Coe v. City of San Diego* (2016) 3 Cal.App.5th 772, 786–788 [police reports admissible under official records exception].)

Thus, Def. Obj. No. 5 is OVERRULED.

Def. Obj. Nos. 6-9

The Court declines to rule on these objections because they are material to the outcome of the motion. (See Code of Civ. Proc., § 437c, subd. (q) ["In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review."].)

Accordingly, this Court OVERRULES Def. Obj. Nos. 1-5. The Court declines to rule on Def. Obj. Nos. 6-9.

III. Requests for Judicial Notice ("RJN")

A. Plaintiff's RJN

"Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter." (*Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117, citations and quotation mark omitted.)

In support of his opposition, Plaintiff requests the Court to take judicial notice of the existence of the following documents to provide an overview of driving under the influence:

1) National Highway Traffic Safety Administration Report "Alcohol-Impaired Driving Traffic Safety Facts 2022 Data"

2) MedlinePlus Medical Encyclopedia website, "definition of shock" <https://medlineplus.gov/ency/article/000039.htm>

3) The Recovery Village Columbus website, "Mixing Ambien (Zolpidem) and Alcohol: Side Effects and Dangers" <https://www.columbusrecoverycenter.com/alcohol-addiction/ambien-and-alcohol>

Evidence Code section 452, subdivision (h) states that judicial notice may be taken of facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

The first requested item is an NHTSA Report, which includes a "Traffic Safety" fact sheet on fatal motor vehicle traffic crashes in 2022. (See Plaintiff's Request for Judicial Notice in Support of Plaintiff's Opposition ("RJN Opp.") to Defendant's Motion for Summary Adjudication ("MSA"), p. 1, Exh. 1.)

The request for judicial notice of the NHTSA Report is DENIED as it is irrelevant to Plaintiff's claims. (See *People ex rel. Lockyer v. Shamrock Foods Co*. (2000) 24 Cal.4th 415, 422, fn. 2 [only relevant matters are subject to judicial notice]; see also *Gbur v. Cohen* (1979) 93 Cal.App.3d 296, 301 [judicial notice is confined to those matters which are relevant to the issue at hand].)

Plaintiff's second document is a "recovery center" webpage summarizing the "dangers and side effects" of mixing medication with alcohol. Plaintiff's third document is a medical webpage summarizing symptoms of "shock." (See RJN Opp, pp. 1-2, Exhs. 2-3.)

The request for judicial notice of items two and three is also DENIED. Plaintiff does not merely seek judicial notice of the existence of these documents. Rather, Plaintiff requests that the Court take judicial notice of the truth of the matters stated in the documents. "Beyond the mere fact that the [document] exists, the availability of the [document] on the Internet hardly renders the content of the [document] 'not reasonably subject to dispute.'" (*Conlan v. Shewry* (2005) 131 Cal.App.4th 1354, 1364.)

Accordingly, Plaintiff's requests for judicial notice of items one through three are DENIED.

B. Defendants' RJN

"Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter." (*Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117, citations and quotation mark omitted.)

In support of their motion, Defendants ask this Court to take judicial notice of Plaintiff's operative Complaint for the instant action. As the Complaint is the pleading under review, this request is DENIED as unnecessary. (See *Paul v. Patton* (2015) 235 Cal.App.4th 1088, 1091, fn. 1 [denying as unnecessary a request for judicial notice of pleading under review].)

IV. Defendants' Motion for Summary Adjudication

Pursuant to Code of Civil Procedure section 437c, Defendants move for summary adjudication of Plaintiff's punitive damages claim against Defendant Shreve only.

A. Legal Standard

A motion for summary adjudication may be directed to a cause of action, an affirmative defense, a claim for punitive damages, or an issue of duty, and may only be granted if it completely disposes of the targeted matter. (Code Civ. Proc., § 437c, subd. (f)(1).) The requirement of complete disposal of a cause of action, affirmative defense, claim for punitive damages, or issue of duty is intended to prevent piecemeal adjudication of facts or issues that would not completely dispose of a substantive area. (*Catalano v. Superior Court* (2000) 82 Cal.App.4th 91, 97; see also *Hood v. Superior Court* (1995) 33 Cal.App.4th 319, 323.)

Any party may move for summary judgment. (Code of Civ. Proc., § 437c, subd. (a); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code of Civ. Proc., 437c, subd. (c); *Aguilar, supra*, at p. 843.) The object of the summary judgment procedure is "to cut through the parties pleading" to determine whether trial is necessary to resolve the dispute. (*Aguilar, supra*, at p. 843.) Summary adjudication works the same way, except it acts on specific causes of action or affirmative defenses, rather than on the entire complaint. (Code of Civ. Proc., § 437c, subd. (f).) … Motions for summary adjudication proceed in all procedural

respects as a motion for summary judgment.'" (*Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal.App.4th 458, 464.)

"A defendant seeking summary judgment must show that at least one element of the cause of action cannot be established, or that there is a complete defense to the cause of action…The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue." (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72, internal citations omitted; emphasis added.)

When a defendant moves for summary judgment, "its declarations and evidence must either establish a complete defense to plaintiff's action or demonstrate the absence of an essential element of plaintiff's case. If plaintiff does not counter with opposing declarations showing there are triable issues of fact with respect to that defense or an essential element of its case, the summary judgment must be granted." (*Gray* v. *America West Airlines, Inc*. (1989) 209 Cal.App.3d 76, 81.)

If the moving party makes the necessary initial showing, the burden of production shifts to the opposing party to make a *prima facie* showing of the existence of a triable issue of material fact. (Code of Civ. Proc., 437c, subd. (c); *Aguilar, supra*, 25 Cal.4th at p. 850.) A triable issue of material fact exists "if, and only if, the evidence would allow of reasonable trier of fact to find the underlying facts in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra*, at p. 850, fn. omitted.) If the party opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (*Id*. at p. 843.)

Throughout the process, the trial court "must consider all of the evidence and all of the inferences drawn therefrom." (*Aguilar, supra*, 25 Cal.4th at p. 856.) The moving party's evidence is strictly construed, while the opponent's is liberally construed. (*Id*. at p. 843.)

B. Analysis

As stated above, Defendants move for summary adjudication of Plaintiff's claim against Defendant Shreve for punitive damages.

In California, the standard for punitive damages is high. The right to recover such damages requires proof of "oppression, fraud, or malice" on the part of the defendant by "clear and convincing evidence." (Civ. Code, § 3294, subd. (a).) Here, malice serves as the foundation of Plaintiff's request for punitive damages. (Complaint, ¶ 9). Under the punitive damages statute, Civil Code section 3294, "malice" is defined as conduct which is intended by the defendant to cause injury to the plaintiff or "despicable conduct" which is carried on by the defendant with "a willful and conscious disregard of the rights or safety of others." (Civ. Code, § 3294, subd. (c)(1).) "Despicable conduct," in turn, has been described as conduct that is "so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people." (*Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 331.)

In sum, for an award of punitive damages, "[t]he wrongdoer must act with the intent to vex, injure, or annoy, or with a conscious disregard of the plaintiff's rights. Punitive damages are appropriate if the defendant's acts are reprehensible, fraudulent or in blatant violation of

law or policy. The mere carelessness or ignorance of the defendant does not justify the imposition of punitive damages. Punitive damages are proper only when the tortuous conduct rises to levels of extreme indifference to the plaintiff's rights, a level which decent citizens should not have to tolerate." (*Tomaselli v. Transamerica, Inc. Co*. (1994) 25 Cal.App.4th 1269, 1287 (*Tomaselli*), internal quotation marks and ellipsis omitted.)

Punitive damages must be proved by "clear and convincing evidence." (Civ. Code § 3294.) "Clear and convincing evidence requires a finding of high probability requiring that the evidence be so clear as to leave no substantial doubt; sufficiently strong to command an unhesitating assent of every reasonable mind." (*Tomaselli, supra,* 25 Cal.App.4th at p. 1288, internal quotation marks and ellipsis omitted.)

Here, Defendants maintain that summary adjudication on Plaintiff's request for punitive damages is warranted because Plaintiff cannot establish, by clear and convincing evidence, that Defendant Shreve's purported conduct was malicious or "despicable" within the meaning of Civil Code section 3294. (Defendants' Motion for Summary Adjudication Against Plaintiff as to Punitive Damages ("MSA MPA"), p. 3:8-13.) Instead, Defendants contend Shreve's conduct "was simply careless" as he did not intend to harm Plaintiff, did not have prior "DUI" offenses, and was not an alcoholic. (MSA MPA, p. 3:18-20; see also Defendants' Reply iso MSA ("Reply"), p. 2:7-11.)

In the operative Complaint, Plaintiff alleges that punitive damages are appropriate because:

1) Before the subject car accident Defendant Shreve "consumed alcohol to the point of intoxication" with knowledge of the following:

   a. he would subsequently be driving the subject truck;
   b. the subject truck is "capable of great speed and force;"
   c. "intoxicated driving [as he did] is a serious danger to [himself and] other drivers on the road;" and
   d. driving "while intoxicated or impaired by any substance" is illegal to "protect person on the road from danger."

(Complaint, ¶ 10.)

2) Shreve "being aware of the probable dangerous consequence of driving a vehicle while under the influence, he willfully and deliberately did so" and that "SHREVE acted with malice and despicable conduct that was carried on by him with willful and conscious disregard of the rights or safety of others for which Plaintiff seeks the recovery of punitive damages pursuant to Civil Code section 3294" (Complaint, ¶ 11.)

3) Defendant Shreve "acted with malice because he drove the SUBJECT VEHICLE while intoxicated under the influence showing willful and conscious disregard for the safety of others given the dangers of intoxicated driving. (Complaint, ¶ 9.)

In support of their motion, Defendants submit the following purportedly undisputed material facts:

1) On October 20, 2020, around 7:07 p.m., Plaintiff sustained injury, at the intersection of North Park Victoria Drive and Wessex Place in Milpitas, California, when Shreve, who was driving a pickup truck, failed to "yield to oncoming traffic as he made a left turn, and crashed into Plaintiff's [motorcycle.]" (Defendants' Separate Statement of Undisputed Material Facts in Support of Motion for Summary Adjudication ("UMF") No. 1).

2) Prior to the subject accident, Shreve had dinner and drinks at "Spin a Yarn Steakhouse." (UMF No. 2; Declaration of Stephanie Guerra ("Guerra Decl."), ¶ 3, Exh. 1 – Deposition Transcript of Elden Shreve ("Shreve Depo."), p. 26:18-27:12). Shreve "typically consumed alcohol once or twice a week prior to the collision. (UMF No. 3; Guerra Decl., ¶ 3, Ex. 1 - Shreve Depo., p. 31:5-7).

3) After dinner, as Shreve was driving, he slowed down to make a left-hand turn and there was a collision. (UMF No. 4; *Id.*, ¶ 3; *Id.,* p. 26:18-22.) At the time, he was not driving in excess of the speed limit. (UMF Nos. 11, 13; *Id.,* ¶ 5, Exh. 3 – Traffic Collision Report, dated October 20, 2020 ("Traffic Report").)

4) Shreve thought it was clear prior to making his turn, and did not believe other vehicles were on the roadway in either direction of North Park Victoria Drive. (UMF No. 5; *Id.,* ¶¶ 3, 5, *Id.*, pp. 72:16-73:7, Exh. 3 – Traffic Report).

5) During the subject incident: a) the subject truck was not defective, b) Shreve did not have a medical condition impairing his ability to drive, c) he was not distracted or using his phone, and d) he was not listening to music. (UMF Nos. 6-10, Guerra Decl., ¶ 3, Exh 1 – Shreve Depo., pp. 49-52).

6) Plaintiff admitted to the investigating officer that he was driving his motorcycle above the speed limit. (UMF Nos. 14-15; Guerra Decl., ¶ 5, Exh. 3 – Traffic Report).

7) Shreve was in "shock" after the subject accident. He could not believe what had happened. He went to his house and alerted his wife to call 911, and subsequently returned to his truck where the police were. (UMF Nos. 17-19, *Id.,* ¶ 3, Exh. 1 - Shreve Depo., p. 38:9-17).

8) Shreve did not have any prior driving under the influence offenses. (UMF No. 20).

9) The investigating officer observed that Shreve appeared "distraught" and had a look of "sorrow" (UMF No. 21; Guerra Decl., ¶ 6, Exh. 4 – Deposition Transcript of Officer Lap La ("La Depo."), p. 47:20-48:1.)

Plaintiff disputes, in relevant part, UMF Nos. 4, 5, 7-8, by alleging the following: 1) Shreve could not have known whether the subject roadway was clear because "he recalls looking to the left at the people coming out of a park" before he became aware of the crash; 2) Shreve had glaucoma, high blood pressure, and was on "Ambien" at the time of the incident,

and 3) Shreve knew the risks of drinking alcohol while on sleep medications. (See Plaintiff's Responses to Defendants' UMFs, pp. 3-4; Declaration of Daniel Cox ("Cox Decl."), ¶¶ 3, 5, Exh. E – Deposition Transcript of Defendant Shreve ("Shreve Depo."), pp. 52:15-23 and 53:13-17, Exh. G - Palo Alto Eye Group Records.)

Based on the foregoing, Defendants maintain that there is "simply no evidence," that Shreve engaged in despicable conduct as he "never intended to harm Plaintiff." (MSA MPA, p. 7:18-19.) Additionally, Defendants assert Plaintiff has not alleged any specific facts to support their punitive damages claim, and his allegation that "Mr. Shreve willfully drove while intoxicated and with knowledge of the risk that [his] conduct would injure others" is conclusory. (MSA MPA, p. 7:19-21.) Defendants maintain that unlike Plaintiff, who "sped his motorcycle 10 miles over the speed limit," Shreve had observed the speed limit while making a left turn. (UMF Nos. 11, 14-15.) Defendants conclude Shreve's "mistaken belief" that the road "was clear of all vehicles" while making a left turn (UMF Nos. 5, 11), and that he was in "shock" after the accident, (UMF Nos. 8-10, 17-18) indicate he did not intend "to harm any individual." (MSA MPA, p. 7:21-28.) Such conduct, Defendants contend, shows that Shreve did not act despicably with a conscious disregard for the safety of others, but instead, was "simply careless." (Reply, pp. 4:19-21; 6:1-5.)

The Court finds that the foregoing is insufficient to meet Defendants' initial burden. Defendants misconstrue the requisite legal standard in arguing that Shreve did not engage in "despicable conduct" because he did not intend to harm Plaintiff, expressed sorrow at the time of the accident, and had no prior drunk driving offenses.

The seminal California Supreme Court case *Taylor v. Super. Ct*. (1979) 24 Cal.3d 890, 892 (*Taylor*), which is cited by both parties, is squarely on point. (But see *Taylor*, *supra*, 24 Cal.App.3d at pp. 899-900 [cautioning against the extension of the court's holding to circumstances not including drunk driving].) Specifically with regard to claims arising out of the operation of a motor vehicle while intoxicated, the California Supreme Court in *Taylor, supra,* 24 Cal.3d at p. 892, concluded that the act of operating a motor vehicle while intoxicated may constitute an act of malice under Civil Code section 3294 if performed under circumstances which disclose a conscious disregard by the defendant of the probable dangerous consequences of his or her conduct.

The California Supreme court stated that there is "a very commonly understood risk which attends every motor vehicle driver who is intoxicated." (*Taylor, supra,* 24 Cal.3d at p. 897; see also *Coulter v. Super. Ct.* (1978) 21 Cal. 3d 144, 152-154.) "One who wil[l]fully consumes alcoholic beverages to the point of intoxication, knowing that he thereafter must operate a motor vehicle, thereby combining sharply impaired physical and mental faculties with a vehicle capable of great force and speed, reasonably may be held to exhibit a conscious disregard of the safety of others." (*Taylor, supra*, 24 Cal.3d at p. 898.) The California Supreme Court ultimately held:

> One who "voluntarily commences, and thereafter continues, to consume alcoholic beverages to the point of intoxication, *knowing from the outset that he must thereafter operate a motor vehicle* demonstrates, [. . .] 'such a conscious and deliberate disregard of the interests of others that his conduct may be called willful or wanton.'" (*Taylor*, *supra,* 24 Cal.3d at p. 899, citations omitted and italics added.)

The *Taylor* court explained "Defendant became intoxicated and thereafter drove a car while in that condition, despite his knowledge of the safety hazard he created thereby." (*Id.,* at p. 896.) This, the *Taylor* court concludes, is an example of "a conscious disregard of the probable dangerous consequences." (*Id.,* at p. 892.)

In 1980, the Legislature amended former Civil Code section 3294 by adding the definition of malice stated in *Taylor, supra.* (See Stats. 1980, ch. 1242, § 1, pp. 4217-4218; *College Hospital Inc. v. Super. Ct*. (1994) 8 Cal.4th 704, 713 (*College Hospital Inc*.) That definition of malice was amended again in 1987 to require proof that the defendant's conduct is "despicable" and "willful." (See Stats. 1987, ch. 1498, § 5, p. 5780.) Courts have found that the statute's reference to "despicable conduct" represents "a new substantive limitation on punitive damage awards." (*Lackner v. North* (2006) 135 Cal. App. 4th 1188, 1211 (*Lackner*), quoting *College Hospital, Inc., supra,* 8 Cal.4th at p. 725.) The Court of Appeal in *Lackner* noted that while the California Supreme Court in *Taylor* held that punitive damages may be assessed where the defendant was driving under the influence of alcohol at the time of the collision, despicable conduct was not a requirement when *Taylor* was decided. (*Ibid.*) Moreover, the Court of Appeal indicated that the circumstances in *Taylor* were particularly egregious and warranted punitive damages because the defendant had been an alcoholic for a substantial period of time, was well aware of the serious nature of his alcoholism, had a history and practice of driving a motor vehicle while under the influence, and had been convicted numerous times. (*Ibid.*) That said, the amendment to Civil Code section 3294 did not abrogate the holding in *Taylor* that drunk driving, with knowledge of the dangers, demonstrates a conscious disregard for others, that is more than mere recklessness.

Both parties also point to *Dawes v. Superior Court* (1980) 111 Cal.App.3d 82 (*Dawes*) as an example of poor driving sufficient to support punitive damages allegations. In *Dawes*, the intoxicated defendant drove at a high speed and ran a stop sign, while zigzagging through traffic, in the middle of the afternoon, and in locations of high pedestrian and vehicle traffic, resulting in a crash injuring the plaintiff. (*Dawes*, *supra*, 111 Cal.App.3d at p. 88.) The appellate court concluded that, from these allegations, "the factfinder could reasonably find that [the intoxicated driver] acted with 'malice' -- with a conscious disregard of safety and the probable injury of others as a result of his conduct." (*Id.* at pp. 88-89.) Here, like in *Dawes,* Shreve was intoxicated at the time of the collision and the Complaint contains allegations that Shreve committed multiple vehicle code violations:

> Defendant SHREVE's actions violated California Vehicle Code §23152, which states that "(a) It is unlawful for person who is under the influence of any alcoholic beverage to drive vehicle. (b) It is unlawful for person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive vehicle..."
>
> Defendant SHREVE's actions violated California Vehicle Code §23153(a), which states that "It is unlawful for person, while under the influence of any alcoholic beverage, to drive vehicle and concurrently do any act forbidden by law, or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver."
>
> SHREVE's actions violated California Vehicle Code §21801(a), which states that "The driver of vehicle intending to turn to the left or to complete U-turn

> upon highway, or to turn left into public or private property, or an alley, shall yield the right—of—way to all vehicles approaching from the opposite direction which are close enough to constitute hazard at any time during the turning movement, and shall continue to yield the right—of—way to the approaching vehicles until the left turn or U-turn can be made with reasonable safety."

(Complaint, ¶¶ 12-14.)

The Court acknowledges that Shreve's poor driving was less reprehensible than that of the *Dawes* defendant. But that does not mean he could not be liable for punitive damages.

Finally, this Court would be remiss not to mention a more recent, and highly instructive case, *Sumpter v. Matteson* (2008) 158 Cal.App.4th 928, 930 (*Sumpter*), where the Court of Appeal found that there was abundant evidence of "despicable conduct" and that the defendant acted with a conscious disregard for the safety of others that would have supported the imposition of punitive damages. Notably, the Court of Appeal upheld the jury's decision not to find "malice," despite concluding that the facts *could* have supported a finding of malice. (*Id.* at p. 934.) Specifically, in the case, the defendant ran a red light and struck multiple vehicles as he passed through the intersection. (*Id.,* at p. 936.) The defendant had ingested drugs right before he left his house, admitted that he knew he was under the influence when he got into his car, admitted that he knew the light was red for over a quarter mile before he entered the intersection, admitted that he never braked, and admitted that he chose to take the risk and run the red light. (*Ibid.*) Although the *Sumpter* defendant's conduct was more egregious than Shreve's, there, like here, defendant knowingly became intoxicated, knew he was drunk when he got in the car to drive, and knew that that he posed a danger to others. Like in *Sumpter*, Defendant Shreve admitted, at his deposition, that he knew he drank four to five glasses of wine (Shreve Depo., p. 27:15-19), was under the influence when he entered his pickup truck, and chose to take the risk anyway:

> Q. And when you were drinking wine at Spin A Yarn on October 20th of 2020, you understood that consuming alcohol could affect your ability to make decisions and judgments on the roadway; correct?
>
> A. Correct.
>
> Q. You also understood that it was illegal to drink and have a blood alcohol level over a certain level and drive a vehicle in California; correct?
>
> A. Correct.
>
> …
>
> Q. You understand that when you drink and drive, you don't just pose a danger to yourself; you pose a danger to other drivers on the roadway; correct?
>
> …
>
> The Deponent: Correct

…

Q. Do you take responsibility for causing the collision that you were in on October 20th of 2020?

A. Yes.

(Cox Decl., ¶ 3, Exh. E – Shreve Depo., pp. 31:8-18; 32-33:1-3.)

In sum, an individual who willfully consumes alcoholic beverages to the point of intoxication, knowing that they must subsequently operate a motor vehicle, "thereby combining sharply impaired physical and mental faculties with a vehicle capable of great force and speed," namely a pickup truck, reasonably may be held to exhibit a conscious disregard of the safety of others. (*Taylor, supra*, 24 Cal.3d at p. 898.)

This Court acknowledges Defendants' contention in reply that merely driving while intoxicated is not a basis for punitive damages. (Reply, p. 4:6-14.) But here there is also evidence that Defendant Shreve willfully became intoxicated knowing that he would operate a vehicle and knowing that he would endanger others and that he violated the vehicle code by failing to "yield the right-of-way to all vehicles approaching from the opposite direction" (Complaint, ¶ 14). Here, Shreve "dined alone" and knew he must drive himself later that evening at the time he drank four, possibly five, glasses of red wine, on the night of the accident; Defendant knew he was driving while intoxicated, knew that posed a danger, and he ultimately failed to yield to oncoming traffic as he made a left turn. (See Declaration of Stephanie Guerra iso MSA, ¶¶ 3, 4-5, Exh. 1 – Shreve Depo., p. 27:13-16, 31, Exh. 3 – Traffic Report.) This is sufficient to create a material issue of fact on the issue of malice. (See *Sumpter, supra,* 158 Cal.App.4th at p. 932.)

Accordingly, there remains a triable issue of material fact on malice.

C. Conclusion

As Defendants have not met their initial burden, Defendants' motion for summary adjudication of the punitive damages claim against Defendant Shreve is DENIED.

The Court will prepare the final order.

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Calendar Line 5
Case Name: *Kothari v. Chen*
Case No.: 23CV421206

This is an action for breach of two promissory notes and for fraud. On June 26, 2022, defendant Michele Chen ("Chen") contacted plaintiff Vivek Kothari ("Plaintiff") to solicit a loan in the amount of $2,000,000 so that Chen could invest in cryptocurrency exchange company CDAX Holdings Limited. (See first amended complaint ("FAC"), ¶¶ 17-18.) Chen provided a promissory note agreeing to pay ten percent interest which was executed on June 27, 2022 and Plaintiff thereafter wired $2,000,000 to Chen. (See FAC, ¶¶ 21-24.) Chen requested to modify the amount of the loan from $2,000,000 to $1,000,000 and on July 11, 2022, Chen wired $1,000,000 back to Plaintiff, retaining $1,000,000. (See FAC, ¶ 26.) On October 28, 2022, Chen pressured Plaintiff to execute another promissory note for an additional $500,000, secured by properties in Anaheim, Buena Park and Coeur D'Alene. (See FAC, ¶ 27.) Chen failed to pay back any of the monies. (See FAC, ¶¶ 29-38.) The properties listed as security interest for the second promissory note do not belong to Chen. (See FAC, ¶¶ 70.) Plaintiff theorizes that since Chen sent the money to Don Shiroishi ("Shiroishi") to invest in CDAX, Chen and Shiroishi may have conspired to defraud Plaintiff. (See Pl.'s motion to compel p.6:27-28.)

On December 1, 2023, Plaintiff filed the FAC against Chen and Doe defendants, asserting causes of action for:

1) Breach of contract;
2) Breach of implied covenant of good faith and fair dealing;
3) Unfair business practices;
4) Fraud, misrepresentation, concealment and inducement; and,
5) Negligent misrepresentation.

Plaintiff propounded requests for production of documents ("RPDs") on defendant Chen, including RPD 13 which seeks "[a]ll documents referring to Don Shiroishi from January 1, 2022 through the present." Chen provided her responses to the RPDs, including her response to RPD 13, which includes objections based on overbreadth and relevance, the attorney-client privilege, the attorney work product doctrine, the joint defense privilege, and then states that she "will produce non-privileged documents in her possession, custody and control that refer to Don Shiroishi and relate to the funds Plaintiff loaned to Responding Party." Chen produced documents that she believed were non-privileged and related to the funds loaned to her. After multiple meet and confer attempts, including a request for a privilege log, Chen stated that she would not further respond to RPD 13.[1] Plaintiff moves to compel a further response to RPD 13.

I. PLAINTIFF'S MOTION TO COMPEL A FURTHER RESPONSE TO REQUEST FOR PRODUCTION OF DOCUMENTS NUMBER 13

While Chen has produced some documents, Plaintiff asserts that: Chen has redacted or refused to produce information from February 16, 2023 to August 23, 2023 and from August

[1] There is a protective order in place between parties. (See Pl.'s memorandum of points and authorities in support of the motion to compel, p.11:27-28, fn. 2.)

31, 2023 to November 30, 2023 without explanation or information as to what was withheld or redacted; and, has provided other incomplete portions of documents or have redacted documents without explanation or information as to what was redacted.

In opposition, Chen argues that the documents are not relevant because the complaint does not allege a business relationship between Chen and Shiroishi, and Plaintiff does not attempt to explain the withheld text messages' relevance.

Chen must provide the withheld text messages referring to Shiroishi

As to Chen's objections of relevance and overbreadth, it is true that the FAC does not allege that Shiroishi had a business relationship with Chen. However, it is undisputed that Chen provided Shiroishi with monies received from the loan from Plaintiff as Chen states that she has already produced "more than 600 text messages comprising more than sixty pages… that related to the loans at issue in this motion." (Chen's separate statement in opposition to Pl,'s motion to compel a further response to RPD 13, p.5:22-24.) In her opposition, Chen acknowledges that "Shiroishi is a principal of CDAX." (Chen's opposition to Pl.'s motion to compel a further response to RPD 13 ("Opposition"), p.4:22.) Chen's view of relevance in the discovery context is too narrow. "The scope of discovery is very broad." (*Tien v. Super. Ct. (Tenet Healthcare Corp.)* (2006) 139 Cal.App.4th 528, 535; see also *Children's Hospital Central California v. Blue Cross of California* (2014) 226 Cal.App.4th 1260, 1276 (stating that "[t]he scope of permissible discovery is very broad").) "For discovery purposes, information is relevant if it might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement." (*Children's Hospital Central California*, *supra*, 226 Cal.App.4th at pp.1276-1277 (also stating that "[a]dmissibility is not the test… [r]ather, it is sufficient if the information sought might reasonably lead to other admissible evidence"); see also *Moore v. Mercer* (2016) 4 Cal.App.5th 424, 44 (stating that "[i]n the context of discovery, evidence is 'relevant' if it might reasonably assist a party in evaluating its case, preparing for trial, or facilitating a settlement"); see also *Haniff v. Super. Ct. (Hohman)* (2017) 9 Cal.App.5th 191, 205 (Sixth District stating that "Section 2017.010 has been construed to authorize discovery of information that is relevant because 'it 'might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement'"").) Here, these withheld text messages might reasonably assist Plaintiff in evaluating the case, preparing for trial, or facilitating settlement. While Shiroishi is not yet a party, this evidence may very well determine whether he should be added as a Doe defendant or whether new causes of action or allegations should be brought. Plaintiff may not have the ability to bring such claims against Shiroishi absent this evidence. (See Code Civ. Proc. § 128.7, subd. (b)(4) (stating that by submitting the pleading, an attorney or unrepresented party is certifying that the claims are warranted and that the allegations have evidentiary support, or are likely to have evidentiary support after further discovery).) There is good cause for RPD 13, and Chen's objection to RPD 13 on the grounds of relevance and overbreadth are OVERRULED.

While Chen characterizes RPD 13 as "burdensome" (Opposition, p.2:20), the withheld text messages are easily within her control since she "used a text extraction application to pull all text messages with Mr. Shiroishi during the relevant period… [which] put all he messages in one document." (Opposition, p.5:5-11.) RPD 13 is not unduly burdensome.

As to the remaining objections on the grounds of the attorney-client privilege, the attorney work product doctrine and the joint defense privilege, Chen's opposition does not

address these objections whatsoever. Accordingly, as Chen fails to justify these objections, these objections are also OVERRULED.

Accordingly, Plaintiff's motion to compel a further response to RPD 13 is GRANTED.

Defendant Chen shall provide a further, verified, code-compliant response to SI 5 without objections within 20 calendar days of this order.

Chen's request for monetary sanctions

In opposition to the motion, Chen requests monetary sanctions in the amount of $3,600 against Plaintiff and his counsel. Chen did not prevail in opposing the motion. Chen's request for monetary sanctions is DENIED.

Plaintiff's request for monetary sanctions

In connection with his motion, Plaintiff also requests monetary sanctions against Chen also in the amount of $3,600. Plaintiff prevailed on his motion. However, the request for monetary sanctions is not code-compliant. Code of Civil Procedure section 2023.040 requires that "[a] request for a sanction… shall be… accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought." (Code Civ. Proc. § 2023.040.) Here, Plaintiff filed a declaration with the motion but did not include any facts supporting the amount of any monetary sanction sought. Moreover, Plaintiff seeks 2 hours for meeting and conferring on the motion and anticipates two hours for drafting the reply brief and 1 hour for appearing and arguing the motion. The Court does not award anticipatory costs nor costs for meeting and conferring. Accordingly, Plaintiffs' request for monetary sanctions is DENIED.

Conclusion

Plaintiff's motion to compel a further response to RPD 13 is GRANTED.

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Calendar Line 6
Case Name: *Martinez-Arellano v. Peet, et al.*
Case No.: 23CV425276

According to the allegations of the complaint, on April 12, 2022, plaintiff Ysmael Martinez-Arellano {"Plaintiff") was hit by a vehicle driven by defendant Nancy Peet ("Nancy") near 3140 Story Road in San Jose. (See complaint, ¶¶ MV-1, MV-2.) Defendant William Peet ("William") entrusted Nancy with the motor vehicle even though he knew or should have known that Nancy was incompetent, unlicensed or otherwise unfit to operate the subject motor vehicle. (See complaint, ¶ MV-2; see also complaint, third cause of action, ¶¶ 1-6.)

On October 31, 2023, Plaintiff filed a form complaint against Nancy and William (collectively, "Defendants") and Doe defendants, asserting causes of action for:

6) Motor vehicle negligence;
7) General negligence; and,
8) Negligent entrustment of a motor vehicle.

In response to form interrogatory number ("FI") 6.2, Plaintiff indicated that she sustained a traumatic brain injury and post-traumatic headaches, and suffered from post-concussional syndrome, post-traumatic stress disorder, mild cognitive impairment and major depressive disorder. On February 14, 2024, Defendants served Plaintiff with a notice of an independent medical examination ("IME") for an examination with Dr. Mark H. Strassberg on February 27, 2024. Plaintiff objected to the IME and expressed a willingness to meet and confer. On March 7, 2024, Defendants served an amended notice of IME, set for March 26, 2024 with psychiatrist Dr. Strassberg. Defendants also served a notice of IME for an April 19, 2024 psychological examination with psychologist Ronald H. Roberts. Defendants did not first obtain leave of court for the April 19, 2024 psychological examination with Mr. Roberts. Plaintiff's counsel objected to both IMEs but expressed willingness to meet and confer. On June 28, 2024, Defendants' counsel asserted that Defendants were entitled to demand the "mental IME"; however, Plaintiff's counsel responded that Plaintiff would not submit to the IMEs as noticed and the parties did not engage in any further meet and confer before filing the instant motion.

Defendants move to compel both IMEs, arguing that: the condition in controversy is not raised by the pleadings and there is good cause for the IMEs; and, more than one examination may be ordered as "[t]here is nothing in the language of Code of Civil Procedure Section 2032.010 et seq. that expressly limits the number of mental or physical examinations."

II. DEFENDANTS' MOTION TO COMPEL INDEPENDENT MEDICAL AND MENTAL EXAMINATIONS

In support of their motion to compel IMEs, Defendants submit the declaration of their counsel who attaches: Plaintiff's responses to the FIs; the notice of the February 27, 2024 IME with Dr. Strassberg; Plaintiff's February 23, 2024 objection to the February 27, 2024 IME; the first amended notice of the March 26, 2024 IME with Dr, Strassberg; the April 19, 2024 notice for the IME with Mr. Roberts; Plaintiff's March 18, 2024 objection to the March 26, 2024 IME; and, Plaintiff's March 18, 2024 objection to the April 19, 2024 IME. Defendants also

provide the declaration of Mr. Roberts, who states that he will conduct an approximately 7-hour neuropsychological examination excluding breaks, which will consist of a brief interview to assess factors such as sleep, pain, medication or other potential issues that could affect the examination, followed by the administration of a number of standardized, validated psychological and neuropsychological tests, possibly including WAIS-IV, WMS-IV, TMT, WCST, Stroop, Hooper VOT, COWA, FAS, TOMM, RAVLT, MMPI-3, PAI, Rorschach, VIP, Shipley-3, CVLT-3, Animal Naming, CPT-3, Ravens, TONI-4, Nelson Denny, Smell Identification Test, WRAT-V, Hare PCI-R, Beery VMI-6th, Peabody PVT5, WMT, MSVT, Non-verbal MSVT, MCI, RWT, SIMS, LAQ-2, PDR-SF & PDR-C, CTT, TOPH and D-KEFS. Defendants also provide the declaration of Dr. Strassman, who states that he will conduct a 4.5 hour neuropsychiatric examination of Plaintiff, which will consist of a history of Plaintiff's injury exposure and the problems initially associated with it, subsequent treatment and responses to the treatment, the effects of the injury on Plaintiff socially, occupationally and emotionally, Plaintiff's current functions socially, occupationally and emotionally, any medication Plaintiff is taking, the treatment Plaintiff is receiving for his injuries and Plaintiff's past history.

Code of Civil Procedure section 2032

Defendants argue that "[t]here is nothing in the language of Code of Civil Procedure Section 2032.010 et seq. that expressly limits the number of mental or physical examinations." (See Defs.' memorandum of points and authorities in support of motion to compel IMEs ("Defs.' memo"), pp.5:10-28, 6:1-11, citing *Shapira v. Super. Ct. (Sylvestri)* (1990) 224 Cal.App.3d 1249, 1254-1256.) Code of Civil Procedure section 2032.220, subdivision (a) states that "[i]n any case in which a plaintiff is seeking recovery for personal injuries, any defendant may demand one ***physical*** examination of the plaintiff, if… [t]he examination does not include any diagnostic test or procedure that is painful, protracted, or intrusive… [and] is conducted at a location within 75 miles of the residence of the examinee." (Code Civ, Proc. § 2032.220, subd. (a) (emphasis added).) As Defendants note, the *Shapira* court noted that former section 2032, subdivision (c)(2)—which provided "that a defendant is entitled to one physical examination on demand"—does not "specifically limit the number of available examinations" but that IMEs may only be allowed "for good cause shown" with "a stronger showing of good cause of a second examination than for the first." (*Shapira*, *supra*, 224 Cal.App.3d at pp.1254-1255.)

With regards to a mental examination, however, the relevant statute is Code of Civil Procedure section 2032.310, subdivision (a), which states that "[i]f any party desires to obtain discovery… by a ***mental*** examination, the party shall obtain leave of court." (Code Civ. Proc. § 2032.310 (emphasis added).) Here, as Plaintiff notes, Defendants did not obtain leave of court for any mental examination.

While Defendants should be able to perform a mental examination of Plaintiff, they have not demonstrated good cause for multiple days of testing, or that their testing would not be protracted or more intrusive than necessary.

Here, as a result of the accident, Plaintiff has been diagnosed with traumatic brain injury, post-traumatic headaches, post-concussion syndrome, post traumatic headache, post-traumatic syndrome and major depressive disorder. (See Castillo decl., exh. A, Pl.'s response to FI 6.2.) Thus, Defendants are entitled to defend themselves, evaluate their potential liability,

determine potential damages and prepare for trial by having a mental examination of Plaintiff. (See *Randy's Trucking, Inc. v. Super. Ct. (Buttram)* (2023) 91 Cal.App.5th 818, 833 (stating that "[a] defendant generally may obtain a mental examination of a plaintiff if the plaintiff has placed his or her mental condition in controversy").) However, "[t]he court may order the mental examination only on a showing of good cause." (*Id.*; see also Code Civ. Proc. § 2032.320, subd. (a).)

Here, Defendants have not demonstrated why they need to perform multiple mental examinations over multiple days. Code of Civil Procedure section 2032.320, subdivision (d) requires Defendants to "specify the person or persons who may perform the examination, as well as the time, place, manner, diagnostic tests and procedures, conditions, scope, and nature of the examination." (Code Civ. Proc., § 2032.320, subd. (d); see also *Carpenter v. Super. Ct. (Yamaha Motor Corp., USA)* (2006) 141 Cal.App.4th 249, 261-269 (stating that "section 2032.320 requires the trial court to list by name the diagnostic tests and procedures to be employed in the mental examination… the need to identify the 'diagnostic tests and procedures' with specificity furthers the evident purpose of the statute… [s]ection 2032.320 applies to mental examinations… where there are multiple physical examinations or the proposed procedures will be painful, protracted, or intrusive… [t]hus, in the instances covered by section 2032.320, there is a heightened risk of undue mental or physical invasion").) The Strassberg declaration does indicate the diagnostic tests and procedures, conditions and scope of the examination. The Roberts declaration, on the other hand, lists a number of tests, but does not explain their necessity. It appears that the Strassberg IME and the Roberts IME could, in fact, be duplicative and involve unnecessary testing; thus, the IMEs as presented may be intrusive and protracted. Defendants have not demonstrated good cause for multiple days of testing or that their proposed IMEs would not be protracted or more intrusive than necessary.

The Roberts declaration and the notice of the Roberts IME also have statements that do not comport with the law

The first amended notice of the April 19, 2024 IME with Mr. Roberts states that "Plaintiff's counsel and Defendants' counsel may not be present for the examination. Only Dr. Roberts and Plaintiff will be present during the examination. The testing will not be recorded as it is copywritten test content and recording of testing may well compromise the test results." (Defs.' first amended notice of April 19, 2024 IME of Plaintiff with Roberts, p.2:24-26.) The same language is in paragraph 7 of the Roberts declaration in support of the motion to compel. (See Roberts decl. in support of Defs.' motion to compel, ¶ 7.)

Code of Civil Procedure section 2032.530, subdivision (a) plainly states that "[t]he examiner and examinee shall have the right to record a mental examination by audio technology." (Code Civ. Proc. § 2032.530.) Code of Civil Procedure section 2032.510, subdivision (a) states that "[t]he attorney for the examinee or for a party producing the examinee, or that attorney's representative, shall be permitted to attend and observe any physical examination conducted for discovery purposes, and to record stenographically or by audio technology any words spoken to or by the examinee during any phase of the examination." (Code Civ. Proc. § 2032.510, subd. (a).) Subdivision (b) states that "[t]he observer under subdivision (a) may monitor the examination, but shall not participate in or disrupt it." (Code Civ. Proc. § 2032.510, subd. (b).) Subdivision (d) states that "[i]f in the judgment of the observer the examiner becomes abusive to the examinee or undertakes to

engage in unauthorized diagnostic tests and procedures, the observer may suspend it to enable the party being examined or producing the examinee to make a motion for a protective order." (Code Civ. Proc., § 2032.510, subd. (d).)

These statements in both the first amended notice of the April 19, 2024 IME and the Roberts declaration itself are clearly contrary to the law.

Defendants' motion to compel the IMEs is DENIED.

That said, Defendants do have good cause to one day of testing and may apply for leave of court to conduct a single day of mental examination of Plaintiff at a single location.

As previously stated, however, Defendants do have good cause to conduct a mental examination of Plaintiff as he has placed his mental condition in controversy. Moreover, Plaintiff agrees to subject himself to a mental examination. (See Pl.'s opposition to motion to compel IME, p.8:6-16.) Defendants may apply for leave of court to conduct a single day of mental and/or physical examination of Plaintiff at a single location. Testing may not exceed a total of 9 hours, *inclusive of* a one-hour lunch break, 15-minute breaks every two hours, and a 30-minute break between any different examiner (if using multiple examiners). Any application for leave of court to conduct an examination or any stipulation regarding the mental examination shall be filed no later than Friday, November 15, 2024.

Parties are ordered to enter into the Model Confidentiality Order as found on the Complex Civil Litigation webpage of the Superior Court at https://santaclara.courts.ca.gov/system/files/model-confidentiality-order_0.pdf. Should Defendants still proceed with a mental or physical examination, any recording of the examination will be considered as confidential pursuant to the order.

Conclusion

Defendants' motion to compel the IMEs is DENIED.

Parties are ordered to enter into the Model Confidentiality Order as found on the Complex Civil Litigation webpage of the Superior Court at https://santaclara.courts.ca.gov/system/files/model-confidentiality-order_0.pdf.

Defendants may apply for leave of court to conduct a single day of mental and/or physical examination of Plaintiff at a single location. Testing may not exceed a total of 9 hours, *inclusive of* a one-hour lunch break, 15-minute breaks every two hours, and a 30-minute break between any different examiner (if using multiple examiners). Any application for leave of court to conduct an examination or any stipulation regarding the mental examination shall be filed no later than Friday, November 15, 2024.

The Court will prepare the Order.

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