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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DEBRA O'BRIEN, Plaintiff and Appellant, v. HABSA SALIM RAZOUK, Defendant and Respondent.	B227907 (Los Angeles County Super. Ct. No. NC053083)

APPEAL from a judgment of the Superior Court of Los Angeles County, Roy L. Paul, Judge. Affirmed.

Steven B. Stevens; and John P. Blumberg for Plaintiff and Appellant.

Hager & Dowling, Jeffrey D. Lim and Lauren E. Misajon for Defendant and Respondent.

Plaintiff Debra O'Brien (O'Brien) appeals from a judgment in favor of defendant Habsa Salim Razouk (Razouk) in her action brought for negligence arising from an automobile collision. On appeal, O'Brien contends (1) the jury's verdict is not supported by substantial evidence because both parties' medical testimony (plaintiff's treating physician and defendant's medical expert) established that O'Brien sustained injuries in the collision, thereby establishing causation as a matter of law, and (2) the trial court erred in admitting the expert testimony of defendant's accident reconstruction expert because the expert's methodology is not generally accepted in the scientific community and did not comply with *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*). We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Both O'Brien and Razouk are employees at Disneyland. On July 8, 2007, they collided near the intersection of Katella Avenue and Clementine Street as they drove to the employee parking at Disneyland. At the time of the collision both parties were approaching the intersection from opposition directions on Katella, and simultaneously turned onto and were driving in the same direction on Clementine when they collided. Razouk was travelling down Katella Avenue to make a right turn onto Clementine Street. After approaching the red light at the intersection of Katella and Clementine, Razouk made the right turn onto Clementine. At the same time, O'Brien made a left turn with the green arrow from Katella onto Clementine.

While making the right turn, Razouk's Nissan Altima swung wide and straddled both the left and right lanes, colliding with O'Brien's GMC Safari, which was in the left lane of Clementine, having just turned onto Clementine. O'Brien had traveled between one and four car lengths beyond the intersection of Katella and Clementine. O'Brien was traveling 10 miles per hour; Razouk at 10 to 15 miles per hour.

At the moment of impact, O'Brien's body twisted to the right. She experienced a sharp pain, and could not lift her right leg. Razouk's right side mirror fell off; O'Brien's vehicle was rendered undrivable.

O'Brien had been injured in another car accident when she was a passenger in her sister's car on June 14, 2007. At that time, another car ran a red light and collided with her sister's car.[1]

Before the accident at issue, O'Brien worked as the lead in the Lost and Found Department at Disneyland, and acted as the manager of her apartment complex on nights and weekends (for which she made $150 per month) and was a dog-sitter. After the accident, O'Brien had trouble going up and down stairs at her apartment building, had problems lifting her arms and frequently dropped things. O'Brien could no longer take care of dogs. As a result of her reduced function, O'Brien became depressed.

At the time of the July 2007 collision, O'Brien suffered from pain associated with fibromyalgia[2] that had been diagnosed in 1996. Her fibromyalgia felt like a bad case of the flu, and she had grown accustomed to feeling generalized pain. She had pain in her back, neck, and other parts of her body on occasion as a result of fibromyalgia. In addition, O'Brien felt more numbness in her hands after the July 2007 accident, had headaches, and experienced sharper pain than usual in her neck. She had trouble breathing. She had pain before the accident; but after the accident, her movement was more guarded.

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[1] Plaintiff's complaint originally named as a defendant George Maisano, who was the driver of the vehicle that hit her sister's car. Before trial, O'Brien resolved her dispute with Maisano pursuant to a good-faith settlement approved by the court.

[2] Fibromyalgia is a chronic pain condition causing widespread body pain that is considered to be a form of arthritis, and is caused by a defect in the central nervous system. Patients typically have severe pain throughout their body for a sustained period of time, but on examination the muscles, nerves and joints are normal. Nonetheless, the patient has "tender point[]" areas of pain. Fibromyalgia is not difficult to diagnose because the patient presents with a variety of symptoms, including severe fatigue, stiffness in the morning sometimes linked to headaches, irritable bowels and irritable bladder, numbness and tingling in various areas of the body that does not conform to areas of nerve damage. While a person with fibromyalgia may feel pain, their brain interprets that pain to be much more severe than a person without the condition.

According to the testimony of O'Brien's treating orthopedist, Dr. Edward Green, who had been O'Brien's physician since November 2006 when she had consulted him about an ankle injury, O'Brien came to him in February 2007 for shoulder problems. Dr. Green saw her again in March and April 2007 for these complaints.

O'Brien next came to see him in August of 2007 complaining of pain in her lower back, neck, jaw, and right shoulder. Based on his evaluation of O'Brien, Dr. Green opined this pain O'Brien experienced and her injuries were caused by the July 2007 collision.[3] In his opinion, O'Brien suffered from soft tissue injuries and muscle strains.

Dr. Green continued to treat O'Brien for her injuries, including those caused by falls in February 2008 and July 2009, respectively. The first fall occurred when O'Brien caught her right foot in a stair and tripped down the stairs and hit a security door. She experienced neck pain, mid-back pain, and low back pain. The second fall occurred when she tripped on a concrete slab, causing increased right arm and shoulder pain, chest pain, and upper back pain. O'Brien claimed her falls were the result of an injury sustained from the July 2007 collision. As of the date of trial, Dr. Green believed O'Brien had recovered from all of her injuries with the exception of those sustained during the July 2007 collision.

Dr. Green also believed O'Brien suffered long term effects from the collision, and that she had a predisposition to suffer from increased or prolonged pain when injured, such as the July 2007 collision. Despite his knowledge of her fibromyalgia, Dr. Green believed the bulk of her medical complaints since July 2007 were the result of the accident. Dr. Green has no experience in treating fibromyalgia.

As a result of his treatment of O'Brien, Dr. Green informed Disneyland that O'Brien was temporarily disabled from employment. Dr. Green continued to see O'Brien on a regular basis every four to six weeks; in May 2008, he recommended that

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[3] On cross-examination, he attributed her injuries to both the June and July 2007 accidents, although on redirect examination he asserted that the "larger portion" of her injuries were the result of the July 2007 accident.

she return to work. As a result of her disability, O'Brien lost approximately $62,000 in income through the end of 2010 and amassed $32,900.58 in medical bills.

Dr. Peng Thim Fan, a specialist in rheumatology, testified for defendant that in his opinion the pain experienced by O'Brien and the "bulk of her symptoms" were the result of the fibromyalgia and not of physical injury from the July 2007 accident. In general, according to Dr. Fan, soft tissue injuries such as those O'Brien suffered in the July 2007 accident would have resolved after four to six weeks. After that time, the cause of O'Brien's symptoms would have reverted back to her long-standing fibromyalgia.

Dr. Fan noted that O'Brien complained of persistent pain in her neck, shoulder, lower back, right leg, with numbness and tingling in her arms and hands; these symptoms had been consistent since the accident in July 2007. Dr. Fan's examination of O'Brien disclosed normal function with respect to her joints, nerves and muscles—with the exception of limited movement of her neck, shoulders and hip girdle, which was restricted by pain. Dr. Fan also noted some evidence of degenerative arthritis in O'Brien's neck and back that could have contributed to her symptoms.

Dr. Peter Burkhard testified at trial on behalf of defendant as a biomechanical engineer.[4] Dr. Burkhard possesses a Ph.D from the University of California, San Diego, in biomechanics and worked for General Motors studying how injuries are causally related to automobile collisions. Dr. Burkhard testified that for this case, to determine the force of impact of the two cars involved, he utilized photographs of the vehicles,[5] the speed of the vehicles, police reports, O'Brien's medical records, O'Brien's deposition testimony regarding the accident, repair estimates, crash data from the National Highway Safety Administration, and descriptions of the damage. Dr. Burkhard employed this information along with the "brach" formulation for collision analysis, which he described

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[4] Before trial, O'Brien moved to exclude Dr. Burkhard's testimony as discussed in part II, *infra*.

[5] The photographs are part of record on appeal and depict crumple damage to the vehicles.

as a restatement of Newton's laws of motion,[6] to calculate the collision based on the speeds of the vehicles. The conservation of linear momentum, which Dr. Burkhard described as Newton's second law of motion, was central to his opinion.

Dr. Burkhard believed collision and test data is useful for analyzing an accident because if, for example, there is less deformation to a vehicle than that of a crash test and the crash was very similar to the case at issue, then there must be less energy involved than in the test. "So we are able to use the crash data in that manner as a one-to-one comparison between what happened in the subject accident with that of actual crash data."

Dr. Burkhard further testified that he never physically inspected the vehicles nor had he measured the crumple damage of either vehicle, but he determined the force of impact to be analogous to a car striking a curb at two to three miles per hour.

During jury deliberations, the court was asked to clarify the definition of "'substantial factor'" as it pertained to negligence. The court instructed the bailiff to read CACI No. 430 to the jury which stated in part, "Conduct is not a substantial factor in causing harm if the same harm must have occurred without that conduct."

The jury reached a verdict using a special verdict form. The jury unanimously found defendant Razouk to have been negligent, but found that Razouk's negligence was not a substantial factor in causing harm to O'Brien by a 10 to two vote, and awarded no damages.

DISCUSSION

O'Brien contends that both parties' medical experts agreed that the automobile collision with defendant caused her injury, and only disagreed about how long she was

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[6] Newton's laws of motion are the three physical laws which describe motion at the physical (i.e., nonnuclear) level of observation: They are (1) the velocity of a body will remain constant unless acted upon by an external force, (2) the acceleration of a body is parallel and directly proportional to the net force and inversely proportional to the mass, and (3) the mutual forces of action and reaction between two bodies are equal, opposite, and collinear.

affected by her injuries, yet the jury found that defendant was negligent but did not cause any injury, thus rendering a verdict contrary to the evidence. O'Brien also argues that the court prejudicially erred in admitting Dr Burkhard's testimony because Dr. Burkhard's opinion lacked foundation and did not comply with *Kelly*, *supra*, 17 Cal.3d 24, and functioned as an invitation to the jury to disregard the medical expert's testimony.

I. THE JURY WAS NOT REQUIRED TO ACCEPT DR. GREEN'S OR DR. FAN'S EXPERT TESTIMONY AS CONCLUSIVE ON THE ISSUE OF CAUSATION

Generally, expert testimony is required where an element of proof of a cause of action or defense is outside an ordinary person's common knowledge. (*People v. McDonald* (1984) 37 Cal.3d 351, 366.) Thus, expert testimony is required to establish a professional standard of care, breach and causation. (*Scott v. Rayhrer* (2010) 185 Cal.App.4th 1535, 1542.) Further, where causation is based upon scientific knowledge beyond common law experience, expert testimony is required. (*Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 403; *Stephen v. Ford Motor Co.* (2005) 134 Cal.App.4th 1363, 1373–1376 (*Stephen*).)

Nonetheless, a jury may reject the testimony of a witness even where uncontradicted by other evidence as long as the jury's rejection is not arbitrary. (*Conservatorship of McKeown* (1994) 25 Cal.App.4th 502, 509.) "'This rule is applied equally to expert witnesses.' [Citations.]" *(Ibid*.) Although a jury may not arbitrarily or unreasonably disregard the testimony of an expert, it is not bound by the expert's opinion except in cases of professional negligence. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 633 (*Howard*).) As explained in *Howard*, "the stated principle—uncontroverted expert opinion testimony may be 'conclusive' on the jury—is actually the 'single exception' to the general rule that 'expert testimony, like any other, may be rejected by the trier of fact, so long as the rejection is not arbitrary.' [Citation.] . . . The *exceptional* principle requiring a fact finder to accept uncontradicted expert testimony as conclusive applies *only* in professional negligence cases where the standard of care must

be established by expert testimony. In such instances, 'the plaintiff must prove by members of the defendant's profession the standard of care or skill ordinarily used in the practice of that profession at a particular place' [citation]; only then may this 'standard of care, when testified to by experts who are uncontradicted, . . . be conclusively shown by such testimony.' [Citation.]" (*Id*. at p. 632.)

Here the jury was not required to accept the testimony of either expert that O'Brien suffered injury as a result of the July 2007 collision with defendant. The doctors' expert testimony on causation was not conclusive: this is not a professional negligence case. Further, because the jury could disregard the testimony, we need only determine whether their rejection of this testimony was arbitrary. The facts adduced at trial established that O'Brien suffered from chronic fibromyalgia, which caused numerous symptoms and ongoing pain to her on a nearly daily basis. Coupled with the fact Dr. Burkhard's testimony demonstrated that the collision generated a minimal amount of force, the jury could have necessarily concluded that O'Brien suffered *no* injury from the collision with defendant, but rather suffered solely from fibromyalgia and continued to suffer from it after the collision. As the expert testimony in this case is not conclusive, the jury was free to ignore both experts and conclude fibromyalgia caused O'Brien's symptoms.[7]

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[7] We reject O'Brien's reliance on *Smith v. Putter* (Pa.Super. 2003) 832 A.2d 1094, and *Krause v. Apodaca* (1960) 186 Cal.App.2d 413. First, *Smith* is an out-of-state case and not binding authority; in any event, *Smith* is factually distinguishable because there, two doctors testified to causation of an aggravation of a pre-existing condition, and there was no evidence of any other factors that could have caused the aggravation of plaintiff's condition. (832 A.2d at pp. 1097–1098.) Here, by contrast, there is another explanation for O'Brien's symptoms: fibromyalgia. Further, in *Krause*, two experts submitted uncontradicted testimony concerning the cause of a fire; the court found the jury's verdict for the defendant unsupported because "[t]here [was] no testimony as to the cause of the conflagration except that of the two experts . . . . The record suggests no reasonable explanation of the fire except that expressed by these experts." (186 Cal.App.2d at p. 417.) Again, here there is another explanation for O'Brien's symptoms: fibromyalgia.

II. ADMISSION OF DR. BURKHARD'S TESTIMONY

O'Brien argues the trial court erred in admitting the expert witness testimony of biomechanical engineer, Dr. Peter Burkhard. Plaintiff's argument on appeal is that Burkhard's testimony on the force of impact of the collision relied on new, unproven scientific methods in violation of *Kelly*, *supra*, 17 Cal.3d 24, and should have been excluded on that basis.

A. Factual Background

1. Motion in Limine

Before trial, O'Brien filed a motion in limine to preclude any medical causation testimony by biomechanical expert Dr. Burkhard. O'Brien argued that Dr. Burkhard was not qualified to render a medical opinion on injury causation because he had no education in medicine, physical therapy, chiropractic, or nursing. Further, O'Brien argued that Dr. Burkhard was not qualified to testify about the harm a fragile plaintiff would sustain as a result of a collision. The trial court granted the motion in part, holding Dr. Burkhard could testify about the force and impact of the collision, but would not be permitted to testify about any effect the force may have on a person in such a collision.

2. Evidence Code section 402 Hearing

Before trial, plaintiff moved to exclude Dr. Burkhard's testimony concerning the relative speed and angle of contact of the vehicles, and therefore because the biomechanical forces were very low, he would not expect injury to result from the accident. Plaintiff argued in her brief that Dr. Burkhard's opinion was based upon "junk science" but added that where biomechanical testing is admitted, the testing upon which the opinion is based reflects the actual conditions of the case at trial. Here, on the other hand, she argued that the experimental testing upon which the expert formed his opinion were dissimilar to the circumstances of the accident and the plaintiff herself.

O'Brien argued that pursuant to *Kelly*, *supra*, 17 Cal.3d 24, Dr. Burkhard's testimony was not based upon scientific techniques that have gained general acceptance in the relevant field, as set forth in *People v. Dellinger* (1984) 163 Cal.App.3d 284, nor

was his testimony based upon tests that were substantially similar to the accident at issue, such as the tests employed in *People v. Roehler* (1985) 167 Cal.App.3d 353. In particular, plaintiff complained that Dr. Burkhard calculated the change in speed of the vehicles solely by "eyeballing second generation photographs" and reviewing repair estimates and comparing those estimates to general averaged repair estimates and photographs related to fixed-barrier crash tests performed by the automotive industry. Dr. Burkhard did not inspect any of the vehicles involved in the accident, did not measure skid marks, crash damage, or any physical evidence related to the accidents.

Dr. Burkhard testified at the Evidence Code section 402 hearing that he relied on photographs of the two cars involved and damage repair estimates for the vehicles to determine the speed of the vehicles, the force of the impact, and the resulting harm to plaintiff. Specifically, he testified that in order to determine the forces that affect a body, he would need to know the direction of impact. Pursuant to the laws of physics, the relative speeds between two vehicles would determine the level of acceleration or deceleration that a vehicle experienced. To determine the Delta V (change in velocity) of O'Brien's car, he used crash data applicable to a GMC SUV, including consumer reports data (which simulates vehicle-to-vehicle impact damage that give miles an hour), the Insurance Institute for Highway Safety's crash testing data for angled front bumper impact at five miles an hour (which produced crumple damage more significant than that of the accident at issue), and correlated the impact damage on the two vehicles. Dr. Burkhard also considered the weight of the vehicles, the deposition testimony which indicated the vehicles were traveling at similar speeds (about 15 miles an hour), and the damage to the GMC, which indicated the cars impacted at a 30-degree angle.

Dr. Burkhard did not read defendant's deposition. He did not inspect either vehicle or inspect the accident scene. He did not measure the crumple damage of the vehicles, or rely on any textbooks. He viewed the photographs taken of the two cars involved, although he did not know who took them. Dr. Burkhard did not know plaintiff's position in her car at the time of the accident, or whether she had any warning

of the accident. He used the photographs to correlate them to other crash testing, specifically using the methodology that is taught at the Northwestern Traffic Institute. His methodology is the same as that used at General Motors and Ford Motor Company, although there is no explicit authority for relying solely on photographs. He has testified in 600 cases, with 90 to 99 percent of his testimony concerning automotive accidents and the speed, force of impact, and in other cases, the resulting effect (mechanical) on the body.

The court ruled that Dr. Burkhard's testimony was admissible and that it was up to the jury to determine what weight, if any, to give his evidence. Applying *Kelly*, *supra*, 17 Cal.3d 24, the court stated that although "there are no articles written or peer review articles as to the use of photographs, the court notes that in the particular case, [Dr. Burkhard] did not only use the photographs, he used the estimates of the damage. He used the photographs. He looked at the angles. And his education and the way he was trained [at Northwestern Institute of Traffic] . . . [would] be subject to the trier of fact's [assignment of] weight, not admissibility."

B. Dr. Burkhard's Accident Reconstruction Testimony Is Not Governed by the *Kelly* Test

Expert witness testimony in the form of an opinion is admissible if it is related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact and based on matter (including his special knowledge, skill, experience, training, and education) known to the witness or made known to him at or before the hearing. (Evid. Code, § 801.)

With respect to scientific expert testimony, the *Kelly* rule provides that the "admissibility of expert testimony based on 'a new scientific technique' requires proof of its reliability—i.e., that the technique is '"sufficiently established to have gained general acceptance in the particular field to which it belongs."'" (*People v. Venegas* (1998) 18 Cal.4th 47, 76, quoting *Kelly*, *supra*, 17 Cal.3d at p. 30.) Once an appellate court has affirmed in a published opinion a trial court ruling admitting evidence based on a new

scientific technique, the precedent may control future trials, at least until new evidence is presented that reflects a change in the scientific community's attitude. (*Venegas*, at p. 76; *People v. Bolden* (2002) 29 Cal.4th 515, 545.) *Kelly* is implicated by "'that limited class of expert testimony which is based, in whole or part, on a technique, process, or theory which is *new* to science and, even more so, the law.'" (*People v. Leahy* (1994) 8 Cal.4th 587, 605.) As the definition of "'scientific'" is so broad, *Kelly's* application has often been limited to its "'common sense' purpose . . . to protect the jury from techniques which, though 'new,' novel, or '"experimental,"' convey a '"misleading aura of certainty."'" (*People v. Stoll* (1989) 49 Cal.3d 1136, 1155–1156.)

In *Kelly, supra*, 17 Cal.3d 24, the Supreme Court struck down the use of voiceprints employing "spectrograms" to make comparisons of human voices to identify the defendant. Ruling for the defendant, the court held the record was insufficient to justify the admissibility of the voiceprint "until the scientific community has had ample opportunity to study, evaluate and accept its reliability." (*Id.* at p. 41.) Similarly, in *People v. Leahy*, *supra*, 8 Cal. 4th 587, the Supreme Court affirmed the exclusion of the Horizontal Gaze Nystagmus test in DUI cases because it was a new scientific technique and needed to comply with the *Kelly* test. (*Id.* at pp. 612–613.) *People v. Wochnick* (1950) 98 Cal.App.2d 124, reversed a murder conviction gained through the use of a polygraph test. In ordering a new trial, the court held that a polygraph test "'has not yet gained such standing and scientific recognition as to justify the admission of expert testimony deduced from tests made under such theory.'" (*Id.* at p. 128.)

"The trial court is . . . vested with broad discretion in ruling on the admissibility of evidence." (*Smith v. Brown-Forman Distillers Corp.* (1987) 196 Cal.App.3d 503, 519.) The court's ruling will only be upset if there is a clear showing for abuse of discretion. (*Id.* at p. 520.) "'"The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason."'" (*Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431.)

Here, we agree Dr. Burkhard's expert testimony regarding the force of impact and calculation of the Delta-V of the automobile collision is not new science and is thus not governed by the *Kelly, supra,* 17 Cal.3d 24 test. Although there is no published case in California specifically addressing the use of photographs of vehicular damage, repair estimates, the speed of the vehicles and Newtonian physics equations to determine the force of impact of a collision, Dr. Burkhard was merely applying the factual variables of the accident to well-known and generally accepted physics principles to determine the forces of the vehicles involved in the collision.[8] This is not new science, and O'Brien's argument that Dr. Burkhard's methodology (the use of physics equations) is so novel to be considered new to science and law is without any support. Accepted scientific methods utilized by experts in conducting tests and reaching their conclusions is not new scientific evidence. (*People v. Peneda* (1995) 32 Cal.App.4th 1022, 1030.) As a consequence, because Dr. Burkhard only testified to the force of impact, rather than the effect the impact would have had on O'Brien, his testimony was not an invitation to the jury to disregard the expert medical testimony at trial.[9]

Rather, O'Brien's complaint lies with Dr. Burkhard's use of photographs and repair estimates from which he extracted the variables that were plugged into the Newtonian principles of physics. As such, because O'Brien did not dispute the contents

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[8] In *DePalma v. Rodriguez* (2007) 151 Cal.App.4th 159, 162, Dr. Burkhard testified to the speed of the plaintiff's vehicle based on damage to the vehicles involved in the accident; however, the foundation of his testimony was not at issue in the case; rather, *DePalma* addressed whether Dr. Burkhard's trial testimony exceeded the scope of his deposition. (*Ibid.*)

[9] Plaintiff also relies on *People v. Dellinger* (1984) 163 Cal.App.3d 284 to support her argument that Dr. Burkhard's testimony should have been excluded under *Kelly, supra,* 17 Cal.3d 24. *Dellinger* is distinguishable because the biomechanical engineer expert in *Dellinger* used an anthropomorphic dummy to simulate a fall and purported injuries sustained by the victim, but no trajectory analysis was made. (*Dellinger*, at p. 293.) The court held because no such methodology had been used before, and there was no corroboration of the reliability of the techniques or the acceptability of the procedures, the expert's testimony was inadmissible. (*Id.* at p. 295.) Here, on the other hand, Newton's laws of physics are generally accepted scientific principles.

of the repair estimates or photographs (other than to assert they were "second-generation," namely they likely to be less accurate) the trial court correctly found that O'Brien's arguments went to the weight of the evidence, rather than its admissibility.

Nonetheless, O'Brien relies on *Stephen, supra*, 134 Cal.App.4th 1363 to support her argument that Dr. Burkhard's use of photographs is not proper methodology for reconstructing a traffic collision. O'Brien's argument is incorrect and overly broad. In *Stephen*, the plaintiff brought a suit against Ford and Bridgestone Tire, for negligence in manufacturing and installing a defective tire on her 1996 Ford Explorer. (*Id*. at pp. 1365–1366.) At trial, the expert testimony of the plaintiff's "tire engineer" was excluded for lack of foundation. (*Id.* at pp. 1369–1370.) The Court of Appeal affirmed the trial court's ruling, holding that "Stephen's tire was not examined by [the tire engineer] or anyone else, and no forensic photographs were taken, which meant [the engineer] relied on supposedly similar tire failures and the amateur photographs taken by the insurance adjuster and [the plaintiff's] boyfriend." (*Id.* at p. 1371.) "As a result, [the engineer's] opinions and conclusions were mere speculation." (*Ibid*.)

Stephen, supra, 134 Cal.App.4th 1363 is distinguishable from the case here. First, *Stephen* concludes that photographs are not an acceptable substitute for the expert's own examination of a defective product. (*Id*. at p. 1372.) The expert in *Stephen* admitted that no one had ever inspected the tire in question and that he relied on the photographs of similarly damaged tires to form his opinion. (*Ibid*.) Dr. Burkhard's testimony in this case has nothing to do with a defective product; instead, he relied on the photographs to determine the angle of impact of the collision. Furthrmore, while Dr. Burkhard never examined the vehicles, he also relied on repair estimates of the damage to the vehicles. Additionally, the expert in *Stephen* did not provide additional information beyond his examination of the photographs to build a foundation for his testimony. (*Ibid*.) Here, Burkhard provided adequate foundation about his use of the vehicle photographs, his methodology, his education, and his experience.

DISPOSITION

The judgment is affirmed. Respondent is to recover her costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, Acting P. J.

CHANEY, J.