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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Kristen Burnham, Individually and as
Representative of the Estate of Caroline
Burnham and as Representative of E.M.,
a minor,

No. CV-07-8017-PHX-DGC

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Plaintiff,

ORDER

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vs.

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United States of America; and Richard
Alan Young,

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Defendants.

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Defendant Richard Young is a United States Navy officer stationed in Norfolk,
Virginia. On Sunday, May 29, 2005, during the Memorial Day weekend and while Young
was on temporary assignment in Yuma, Arizona, Young was involved in a traffic accident
that caused the death of Caroline Burnham. Caroline’s sister, Kristen Burnham, brings this
negligence action on behalf of Caroline’s estate and minor son. The third amended
complaint asserts both that Young is personally liable and that Young was acting within the
scope of his employment, rendering the United States liable for Young’s alleged negligence
under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.* (“FTCA”). Dkt. #37 at 3-4.
The Court granted a motion for summary judgment on scope of employment filed by the
United States, finding as a matter of law that Defendant Young was not acting within the
scope of his employment at the time of the accident. Dkt. #79.

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1 Defendant Young has now filed a motion for summary judgment on the issue of
2 liability. Dkt. ##101-102. The motion has been fully briefed. Dkt. ##108-110, 113.
3 Plaintiff has filed two motions to strike, challenging Detective Luna's affidavit and
4 Defendant's expert witness, Toby Gloekler. Dkt. ##111, 116. Defendant has filed a motion
5 to strike Plaintiff's expert witness, Anselmo Najera. Dkt. #114. For the reasons stated
6 below, the Court will grant Defendant Young's motion for summary judgment. The motions
7 to strike will be denied as moot.¹

8 **I. Background Facts.**

9 The following facts are not disputed. The accident occurred on an isolated stretch of
10 highway with no other vehicles in the vicinity. Defendant Young was knocked unconscious
11 and has no recollection of the accident. Ms. Burnham died in the accident. There were no
12 other witnesses.

13 Defendant Young was traveling southbound at the time of the accident. Photographs
14 of the scene show that after the accident Ms. Burnham's Volkswagen ended up off the
15 shoulder of the northbound lane facing away from the highway. Defendant Young's vehicle
16 came to rest on the shoulder of the northbound lane, also facing away from the highway.

17 Photographs show that Defendant Young's vehicle was primarily damaged on the
18 front end of the driver's side of the vehicle. Ms. Burnham's Volkswagen was primarily
19 damaged on the driver's side door and front driver's side portion of the vehicle. The
20 passenger compartment of her vehicle was largely crushed from the impact.

21 Detective Luna of the Arizona Department of Public Safety investigated the accident.
22 He concluded from evidence at the scene that the accident occurred when Ms. Burnham
23 turned from the right shoulder of the southbound lane, across the southbound lane, and into
24 the northbound lane – that she was making a u-turn from the southbound shoulder to head
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26 ¹Both parties' requests for oral argument are denied. Oral argument will not aid the
27 Court's decision and, given the complete briefing, the denial will not result in unfair
28 prejudice to either party. *See Lake at Las Vegas Investors Group, Inc. v. Pac. Dev. Malibu Corp.*, 933 F.2d 724, 729 (9th Cir. 1991).

1 north. As she did so, Luna concluded, she was struck by Defendant Young who was
2 proceeding south. Detective Luna’s report found Ms. Burnham to be at fault and found “no
3 improper action” on the part of Defendant Young. Dkt. #102-2 at 3.

4 **II. Motion for Summary Judgment.**

5 Summary judgment is appropriate if the evidence, viewed in the light most favorable
6 to the nonmoving party, shows “that there is no genuine issue as to any material fact and that
7 the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). Only disputes
8 over facts that might affect the outcome of the suit will preclude the entry of summary
9 judgment, and the disputed evidence must be “such that a reasonable jury could return a
10 verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
11 (1986). A motion for summary judgment must be granted if, after sufficient time for
12 discovery, the nonmoving party “fails to make a showing sufficient to establish the existence
13 of an element essential to that party’s case, and on which that party will bear the burden of
14 proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

15 To prevail on her negligence claim, Plaintiff must prove four elements: a duty on the
16 part of Defendant to exercise reasonable care, a breach of that duty, a causal connection
17 between Defendant’s negligent conduct and the claimed injuries, and actual damages. *See*
18 *Gipson v. Kasay*, 150 P.3d 228, 230 (Ariz. 2007). The existence of a duty is generally a
19 question of law, while the other three elements are factual issues “generally within the
20 province of the jury.” *Ritchie v. Krasner*, --- P.3d ---, 2009 WL 1065195, at *2 (Ariz. App.
21 Apr. 21, 2009). Even though the factual issues are usually reserved for the jury, summary
22 judgment in a negligence action is appropriate “where the facts are undisputed and only one
23 conclusion may reasonably be drawn from them.” *Flying Diamond Corp. v. Pennaluna &*
24 *Co.*, 586 F.2d 707, 713 (9th Cir. 1978); *see Camacho v. Du Sung Corp.*, 121 F.3d 1315, 1317
25 (9th Cir. 1997) (same).

26 **A. Defendant’s Motion.**

27 The moving party bears the initial burden of showing that there exists no genuine
28 issue of material fact, a burden that can be “discharged by . . . pointing out to the district

1 court . . . that there is an absence of evidence to support the nonmoving party’s case.”
2 *Celotex*, 477 U.S. at 323, 325; *see also Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d
3 1099, 1102 (9th Cir. 2000) (“[T]he moving party [may] . . . show that the nonmoving party
4 does not have enough evidence of an essential element to carry its ultimate burden of
5 persuasion at trial.”). Defendant asserts that Plaintiff has presented no evidence that
6 Defendant breached his duty of reasonable care. Dkt. #101 at 1, 5-6. There were no eye
7 witnesses to the accident, and Plaintiff failed to disclose an expert accident reconstructionist
8 by the disclosure deadline set by the Court. *Id.* at 5-6; *see* Dkt. #80 ¶2. The only admissible
9 evidence from which negligence could be inferred, Defendant argues, is the report authored
10 by Detective Luna and police photographs of the accident scene. Dkt. #101 at 1-2, 5. As
11 noted above, Detective Luna’s report found Ms. Burnham to be at fault. Dkt. #102-2.²

12 **B. Plaintiff’s Response.**

13 Once the moving party has met its initial burden, as Defendant has here, the
14 nonmoving party bears the burden of demonstrating the existence of some genuine issue of
15 material fact – of producing sufficient admissible evidence to support a jury verdict in its
16 favor at trial. *Celotex*, 477 U.S. at 324, 327; *see Matsushita Elec. Indus. Co. v. Zenith Radio*
17 *Corp.*, 475 U.S. 574, 586 (1986) (stating that a nonmoving party must show more than “some
18 metaphysical doubt as to the material facts”). Plaintiff relies on two categories of evidence.
19 The Court will address them separately.³

21 ²Plaintiff has objected, in a motion improperly couched as a motion to strike (see
22 LRCiv 7.2(m)), to the admissibility of Detective Luna’s affidavit (Dkt. #102-2 at 20-22), but
23 has not objected to the admissibility of Detective Luna’s report. Dkt. #111. The Court has
24 considered only the report in ruling on this motion. *See* Fed. R. Ev. 803(8).

25 ³Plaintiff included an excerpt from Kathleen Godley’s deposition testimony as an
26 exhibit to her response (Dkt. #108-5), but did not cite that testimony in her argument
27 (Dkt. #107 at 9-11; Dkt. #110). The Court nonetheless reviewed Ms. Godley’s testimony.
28 She asserts that the site of the accident is a foolish place to make a u-turn and that Ms.
Burnham had never indicated she was returning to Yuma (Dkt. #108-5 at 2), but this meager
evidence could not support a jury finding of negligence by Defendant Young. It is doubtful
Ms. Godley’s testimony about the foolishness of making a u-turn at the site of the accident

1 **1. Delmar Foote.**

2 Delmar Foote, a friend of Ms. Burnham, visited the accident scene on the day after
3 the accident. The vehicles and debris had already been removed. Mr. Foote nonetheless
4 concluded from his inspection of the site that Defendant Young caused the accident.

5 Mr. Foote's conclusion was based on an oil stain in the northbound lane which he
6 attributed to Ms. Burnham's car, a gouge in the northbound lane which he found to be
7 consistent with the loss of the wheel on Ms. Burnham's vehicle and with the condition of Ms.
8 Burnham's vehicle which he later examined, and debris that he located to the side of the
9 northbound lane several yards beyond where he believed the accident occurred. Dkt. #107-7.
10 Mr. Foote concluded that Defendant Young drifted across the center line and struck Ms.
11 Burnham's car, shearing off the left front wheel of her car and causing the I-beam of her car
12 to gouge the road. *Id.* He concluded that her car came to rest where he found the oil stain
13 in the northbound lane near the gouge mark (even though photographs of the scene show that
14 her car came to rest well off the roadway), and that debris from her car was thrown forward
15 many yards because of the momentum she had while driving straight up the highway. *Id.*

16 Mr. Foote based his opinions on "[y]ears of working on V.W.'s," "numerous years"
17 of working as the service manager for a Chrysler dealer, and the fact that he had "been
18 around wrecked cars and stuff" for "a good portion of my life." *Id.* at 2-4. During his
19 deposition, Mr. Foote discussed the I-beam and ball joint assembly that, he said, Volkswagen
20 started using in 1967 and that was present on Ms. Burnham's car. *Id.* at 5-7. He concluded
21 that this beam caused the gouge mark on the road, and used photographs of another
22 Volkswagen to make the explanation. *Id.* Mr. Foote further testified, on the basis of his
23 work on Volkswagens and his years of servicing Chryslers, that the front end of the

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25 would be admissible under Rule 701 – such a personal observation would not be particularly
26 helpful to the jury. But even if the opinion were admitted, and even if it and the fact that Ms.
27 Burnham did not indicate she was returning to Yuma managed to cast some doubt on the
28 conclusion in Detective Luna's police report that the accident occurred because Ms. Burnham
made a u-turn, Plaintiff would still need evidence showing that Defendant Young caused the
accident through his negligence. Ms. Godley's testimony provides no such evidence.

1 Volkswagen was distinctive – that other cars did not have a similar design. *Id.* at 5. He
2 concluded that the straight line of the gouge mark showed that Ms. Burnham’s car was
3 traveling in a straight line when it was struck, not making a u-turn as Detective Luna
4 concluded. *Id.* at 4.

5 Plaintiff’s response asserts that Mr. Foote will not be called to testify at trial as an
6 expert witness under Rule 702 of the Federal Rules of Evidence, but that he instead will
7 provide lay opinion testimony under Rule 701. Dkt. #107 at 10. The Court concludes,
8 however, that Mr. Foote cannot express his opinions as a lay witness. Rule 701 provides that
9 a layman’s opinions are admissible only if they are “*not* based on scientific, technical, or
10 other specialized knowledge.” Fed. R. Evid. 701(c) (emphasis added). This provision of the
11 rule ensures that evidence qualifying as expert testimony under Rule 702 will not evade the
12 reliability scrutiny mandated by the Supreme Court’s decision in *Daubert v. Merrell Dow*
13 *Pharms., Inc.*, 509 U.S. 579 (1993). *See* Jack B. Weinstein & Margaret A. Berger,
14 *Weinstein’s Federal Evidence*, § 701.03[4][b] (2d ed. 2008). It also ensures that parties will
15 not use Rule 701 to evade the expert disclosure requirements of Rule 26 of the Federal Rules
16 of Civil Procedure. *Id.*; *see* Fed. R. Civ. P. 26(a)(2)(A) & (B). Allowing Mr. Foote to render
17 opinions as to the cause of the accident would frustrate both of these objectives.

18 First, there is ample reason to believe that Mr. Foote’s opinions would fail *Daubert*
19 scrutiny if he were presented as a witness under Rule 702. Mr. Foote did not witness the
20 accident, did not inspect the scene while the vehicles were there, viewed the scene only after
21 it had been cleaned up and the debris moved or removed, never read Detective Luna’s report
22 or examined accident scene photographs, concluded that Ms. Burnham’s vehicle came to rest
23 in a location entirely inconsistent with accident scene photographs, had no idea where
24 Defendant Young’s car came to rest, admitted that the gouge mark in the roadway could have
25 been made by almost any car, did not look for or examine skid marks at the scene, and does
26 not know the speed of the vehicles. Moreover, although Mr. Foote has substantial
27 automotive experience, he has no accident reconstruction training. Dkt. ##107-7; 113 at 5-6.

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1 Second, Mr. Foote was never disclosed as an expert witness and never prepared the
2 detailed expert reports required by Rule 26(a)(2)(B). Allowing him to testify as a lay witness
3 would evade these important disclosure obligations and their attendant checks on witness
4 reliability. The Court’s Case Management Order emphasized these disclosure obligations
5 and the importance of providing them on the Court’s schedule:

6 As stated in the Advisory Committee Notes to Rule 26 (1993 Amendments),
7 expert reports disclosed under Rule 26(a)(2)(B) must set forth “the testimony
8 the witness is expected to present during direct examination, together with the
9 reasons therefore.” Full and complete disclosures of such testimony are
required on the dates set forth above; absent truly extraordinary circumstances,
parties will not be permitted to supplement their expert reports after these
dates.

10 Dkt. #39 ¶5(f). The Case Management Order also made clear that Plaintiff was obligated to
11 provide expert disclosures for witness who were not specially retained as experts but who
12 nonetheless would be asked to give expert opinions at trial: “Disclosures under Rule
13 26(a)(2)(A) must include the identities of treating physicians and other witnesses who have
14 not been specially employed to provide expert testimony in this case, but who will provide
15 testimony under Federal Rules of Evidence 702, 703, or 705.” *Id.* at ¶5(e). This provision
16 clearly applied to Mr. Foote, and yet no such disclosures were made.

17 The Court concludes that Mr. Foote cannot provide opinions as to the cause of the
18 accident under Rule 701. Plaintiff seeks to use him to provide opinions based on specialized
19 knowledge, something he cannot do under Rule 701. Allowing Mr. Foote to testify as a lay
20 witness clearly would frustrate the purposes of Rule 701(c).

21 Plaintiff does not propose to present Mr. Foote’s testimony under Rule 702, and could
22 not in any event. As noted above, Plaintiff never disclosed Mr. Foote as an expert witness
23 under Rule 26(a)(2)(A) or (B) and never complied with the disclosure obligations of the
24 Court’s Case Management Order.

25 Without his opinions on the cause of the accident, Mr. Foote’s testimony would be
26 limited to his observations of the accident scene on the day after the accident. *See*
27 Dkt. #107-7 at 1-8, Dkt. #107-8 at 1. Standing alone – without interpretations by a qualified
28 expert witness – these observations provide no basis for a jury to conclude that Defendant

1 Young caused the accident. Mr. Foote’s factual observations therefore provide no basis upon
2 which to deny the motion for summary judgment.

3 **2. Anselmo Najera.**

4 Plaintiff’s response to the motion for summary judgment includes a previously
5 undisclosed expert report by Anselmo Najera. Defendant objects to the admissibility of Mr.
6 Najera’s report because it was not timely disclosed. Dkt. ##113 at 8; 114 at 3-5. The Court
7 agrees.

8 The Court’s Case Management Order required Plaintiff to produce “full and
9 complete” expert reports by November 7, 2008. Dkt. #39 ¶5(a). The Court later extended
10 the deadline to March 27, 2009. Dkt. #80 ¶2. Plaintiff disclosed no expert witness by this
11 date.

12 The Court’s Case Management Order required that rebuttal experts be disclosed by
13 January 26, 2009, a deadline later extended to May 29, 2009. Dkt. ##39 ¶5(c); 80 ¶4. The
14 Court made clear, however, that “[r]ebuttal experts shall be limited to responding to
15 opinions stated by initial experts.” *Id.* (emphasis added). The Court included this provision
16 to prevent parties from hiding the ball – from introducing initial experts in the guise of
17 rebuttal experts and thereby frustrating their opponents’ opportunity to respond to those
18 experts.

19 Mr. Najera’s report was disclosed by the rebuttal expert deadline, but he clearly is not
20 a rebuttal witness. Mr. Najera affirmatively opines that Defendant Young caused the
21 accident. Dkt. ##108-6 to -8. His opinions are based on police reports, photographs of the
22 accident scene, photographs of Ms. Burnham’s vehicle, and the deposition testimony of Mr.
23 Foote – all factors that Mr. Najera could have evaluated before the initial disclosure deadline.
24 Dkt. ##108-6 at 3; 108-7 at 10. Mr. Najera’s report is not limited to responding to
25 Defendant’s expert witness as required by the Case Management Order. Indeed, Mr.
26 Najera’s report does not even mention Defendant’s timely-disclosed expert or his opinions.

27 Mr. Najera clearly is an initial expert who should have been disclosed by March 27,
28 2009. Mr. Najera’s report instead was disclosed well after this deadline and well after

1 Defendants had produced their expert report in the absence of any Plaintiff's expert.
2 Plaintiff's late production in effect asks the Court to extend the deadline for disclosure of
3 initial experts. The Court specifically advised Plaintiff's counsel, however, that the deadlines
4 in this case were real and that the initial expert disclosure deadline of March 27, 2009, would
5 not be extended. Dkt. ##39 ¶10, 80 ¶7.

6 Rule 16 of the Federal Rules of Civil Procedure requires district judges to enter case
7 management schedules and provides that such schedules "shall be modified only for good
8 cause[.]" Fed. R. Civ. P. 16(b); see *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604,
9 608 (9th Cir. 1992) ("The scheduling order 'controls the subsequent course of the action'
10 unless modified by the court.") (quoting Fed. R. Civ. P. 16). "Good cause" exists when a
11 deadline "cannot reasonably be met despite the diligence of the party seeking the extension."
12 Fed. R. Civ. P. 16 Advisory Comm.'s Notes (1983 Am.). Thus, "Rule 16(b)'s 'good cause'
13 standard primarily considers the diligence of the party seeking the amendment." *Johnson*,
14 975 F.2d at 609.

15 The expert deadlines in this case provided Plaintiff ample time to produce an expert
16 report. This case was filed in May of 2007. The Court's schedule, after extension, allowed
17 Plaintiff 20 months to complete her expert work. Plaintiff knew from the beginning that the
18 cause of the accident was a key issue. Plaintiff has not shown that she was unable through
19 reasonable diligence to find and prepare an expert witness in the 20 months before March 27,
20 2009. Plaintiff therefore has not established good cause to extend the deadline.

21 "In these days of heavy caseloads, trial courts . . . set schedules and establish
22 deadlines to foster the efficient treatment and resolution of cases." *Wong v. Regents of the*
23 *Univ. of Cal.*, 410 F.3d 1052, 1060 (9th Cir. 2005). "Parties must understand that they will
24 pay a price for failure to comply strictly with scheduling and other orders[.]" *Id.* Because
25 Plaintiff's expert report was not disclosed by the deadline established and emphasized by the
26 Court, Mr. Najera will not be permitted to testify at trial.

27 Allowing Mr. Najera to testify would prejudice Defendant, who prepared his expert
28 report, completed discovery, and drafted his motion for summary judgment in reliance on the

1 fact that no opposing expert had been designated. If Mr. Najera's report were allowed, the
2 Court would be compelled to permit Defendant to depose Mr. Najera, to produce a revised
3 expert report, and possibly to conduct other discovery related to Mr. Najera's new opinions
4 – all well after the already-extended discovery period has closed. The Court will not
5 continue to delay the resolution of this already-overdue case, particularly when much of the
6 delay has been due to Plaintiff's incorrect litigation activities. *See, e.g.*, Dkt. #21 at 2.

7 **C. Summary Judgment Conclusion.**

8 To defeat summary judgment, Plaintiff must produce evidence "such that a reasonable
9 jury could return a verdict" in her favor. *Anderson*, 477 U.S. at 248. For the reasons
10 explained above, the evidence on which Plaintiff relies in response to the summary judgment
11 motion – the opinions Mr. Foote and Mr. Najera – will not be admitted at trial. Without this
12 evidence, Plaintiff clearly has failed to provide evidence from which a reasonable jury could
13 find that Defendant Young was negligent and caused the accident. The motion for summary
14 judgment will therefore be granted.

15 **III. Motions to Strike.**

16 Plaintiff's motions to strike challenge the admissibility of Detective Luna's affidavit
17 (Dkt. #111) and Defendant's expert (Dkt. #116). The Court has not considered this
18 challenged evidence in ruling on Defendant's motion for summary judgment and Plaintiff's
19 motions to strike are therefore denied as moot. In light of the Court's summary judgment
20 ruling, Defendant's motion to strike (Dkt. #114) is also moot.

21 **IT IS ORDERED:**

- 22 1. Defendant Young's motion for summary judgment (Dkt. #101) is **granted**.
23 2. All other pending motions (Dkt. ##111, 114, 116) are **denied** as moot.
24 3. The Clerk of Court shall terminate this action.

25 DATED this 20th day of July, 2009.

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David G. Campbell
United States District Judge