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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

SHAWNEE HANNAH, et al.,  
  
Plaintiffs,  
  
v.  
  
UNITED STATES OF AMERICA, et  
al.,  
  
Defendants.

No. 2:17-cv-01248-JAM-EFB

**ORDER DENYING THE UNITED STATES'  
MOTION TO STRIKE EXPERT WITNESS  
DR. MICHAEL HURWITZ**

This matter is before the Court on Defendant United States' Motion to Strike. Mot., ECF No. 15. Plaintiffs Shawnee Hannah and Bonnie Hannah ("Plaintiffs") filed an opposition, Opp'n, ECF No. 16, to which the United States replied, Reply, ECF No. 17. On January 9, 2019, the Court held an evidentiary hearing regarding the admissibility of Dr. Michael Hurwitz's proffered testimony. Minute Order, ECF No. 24. After consideration of the parties' briefing on the motion and relevant legal authority, the Court DENIES the United States' Motion to Strike with respect to Dr. Hurwitz.<sup>1</sup>

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<sup>1</sup> The Court will rule on the United States' motion regarding nurse life-care planner April Stallings's at a future date after additional briefing and a further hearing, if necessary.

1 I. BACKGROUND

2 This medical malpractice action arises out of treatment  
3 Plaintiff Shawnee Hannah received at the Department of Veterans  
4 Affairs ("VA") Mather facility. Compl., ECF No. 1, pp. 6-10.  
5 Mr. Hannah sought treatment at Mather for right-sided neck pain  
6 and stiffness in May 2015. Id. at 6-7. Mr. Hannah underwent  
7 surgery to drain a neck abscess on May 21, 2015. Id. at 7. When  
8 Mr. Hannah woke up from anesthesia, he was quadriplegic. Id. at  
9 8-9. Mather was unable to perform a cervical MRI on Mr. Hannah  
10 while he was intubated, so medical staff attempted to transfer  
11 him to a different facility after he stabilized. Id. at 8. The  
12 hospital asserts that no beds were available for Mr. Hannah's  
13 transfer until May 24, 2015, when he was transferred to UC Davis  
14 Medical Center. Id. at 9. Mr. Hannah remained quadriplegic.  
15 Id.

16 Plaintiffs submitted a September 2016 expert report from Dr.  
17 Michael Hurwitz, a general surgeon who reviewed Shawnee Hannah's  
18 medical records from the VA and UC Davis Medical Center. Hurwitz  
19 Report, ECF No. 15-2, pp. 10-18. In that report, Dr. Hurwitz  
20 states that the VA provided Mr. Hannah with "timely and  
21 appropriate surgical care." Id. at 3. Dr. Hurwitz goes on to  
22 describe the "diligent" consultations that Mr. Hannah received  
23 from internal medicine, ENT, infectious disease, neurology,  
24 pulmonology and cardiology, but notes those specialties are  
25 beyond his purview. Id. He opines that although he is "not  
26 trained in neurology and neurosurgery," "there appears to have  
27 been a very narrow window of time in which Mr. Hannah's  
28 neurologic function might have been salvageable[.]" Id.

1 Nevertheless, he states it is "beyond [his] expertise to  
2 speculate as to when this window closed." Id. Finally, Dr.  
3 Hurwitz concludes that Shawnee Hannah required emergent transfer  
4 to a facility with MRI and neurosurgical capabilities "if there  
5 was to be any hope for preservation of neurologic function" and  
6 by its failure to provide such emergent access, VA fell below the  
7 standard of care. Id.

## 9 II. LEGAL STANDARD

10 In a case arising under the Federal Tort Claims Act (FTCA),  
11 the Court applies the law of the state in which the alleged tort  
12 occurred. Liebsack v. United States, 731 F.3d 850, 855 (9th Cir.  
13 2013). The burden of proof for a medical malpractice claim in  
14 California requires the plaintiff to offer competent expert  
15 testimony. Flowers v. Torrance Mem'l Hosp. Med. Ctr., 884 P.2d  
16 142, 147 (Cal. 1994).

17 Federal Rule of Evidence 702 governs the admissibility of  
18 expert witness testimony in federal courts. In conjunction with  
19 the preliminary inquiry required by Federal Rule of Evidence 104,  
20 the Court must assess the expert witness's qualifications, the  
21 relevance of his or her testimony, and that testimony's  
22 reliability. Daubert v. Merrell Dow Pharm., Inc. ("Daubert I"),  
23 509 U.S. 579, 594-95 (1993). The Court has wide discretion when  
24 acting as a gatekeeper for the admissibility of expert testimony.  
25 Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 151-52 (1999).

26 The Court considers an expert's "scientific, technical, or  
27 other specialized knowledge" in assessing whether the expert's  
28 qualifications "will help the trier of fact to understand the

1 evidence or to determine a fact in issue." Fed. R. Evid. 702(a).  
2 "If an individual is not qualified to render an opinion on a  
3 particular question or subject, it follows that his opinion  
4 cannot assist the trier of fact with regard to that particular  
5 question or subject." Morin v. United States, 534 F. Supp. 2d  
6 1179, 1185 (D. Nev. 2005), aff'd, 244 F. App'x 142 (9th Cir.  
7 2007). An expert's testimony is relevant if "it logically  
8 advances a material aspect of the proposing party's case."  
9 Daubert v. Merrell Dow Pharm., Inc. ("Daubert II"), 43 F.3d 1311,  
10 1315 (9th Cir. 1995).

11 An expert's mere assurances of reliability are insufficient  
12 under Daubert. Daubert II, 43 F.3d at 1319. "Rather, the party  
13 presenting the expert must show that the expert's findings are  
14 based on sound science, and this will require some objective,  
15 independent validation of the expert's methodology." Id. at  
16 1316.

### 17 18 III. DISCUSSION

#### 19 A. Dr. Hurwitz's Opinions Are Not Excluded

20 Plaintiff seeks to offer Dr. Hurwitz's testimony that  
21 physicians at Mather violated the standard of care regarding the  
22 timeliness of Mr. Hannah's transfer. The United States seeks to  
23 strike Dr. Hurwitz's testimony, arguing that Dr. Hurwitz rendered  
24 opinions on matters outside his established expertise. Mot. at  
25 6-7.

##### 26 a. Dr. Hurwitz Is Qualified to Provide Testimony

27 The Court first considers Dr. Hurwitz's "scientific,  
28 technical, or other specialized knowledge" to determine if he is

1 qualified to testify on the topics at issue. See Fed. R. Evid.  
2 702(a).

3 At the hearing, Dr. Hurwitz testified that he has been a  
4 practicing physician for over 20 years. He currently serves as a  
5 general surgeon and chief of staff at a hospital in Newport  
6 Beach, California. Dr. Hurwitz relies on his education,  
7 training, years of practice, and review of medical literature to  
8 draw conclusions about the appropriate standard of care in a  
9 medical situation. He believes that a general surgeon should  
10 recognize that "an acute neurological change requires immediate  
11 intervention, assessment and intervention." In this case, he  
12 opines that the general surgeons at Mather fell below the  
13 standard of care by not providing emergent transfer to a facility  
14 where a MRI machine could accommodate an intubated patient.

15 The United States objects, inter alia, that Dr. Hurwitz's  
16 current position does not entail overseeing patient transfer and  
17 that he has not personally transferred a patient within the last  
18 year. Furthermore, the United States argues that Dr. Hurwitz is  
19 not knowledgeable about the transfer policies at different  
20 hospitals. The United States appears to contend that only a  
21 specialist in the field of patient transfer, with experience at  
22 VA medical facilities, may testify about the topic.

23 The Ninth Circuit has not imposed such stringent  
24 requirements for medical experts. See Doe v. Cutter Biological,  
25 Inc., a Div. of Miles Labs., Inc., 971 F.2d 375, 385 (9th Cir.  
26 1992) (finding it was an abuse of discretion for a district court  
27 to grant a motion to strike medical experts for lack of personal  
28 knowledge). "Ordinarily, courts impose no requirement that an

1 expert be a specialist in a given field, although there may be a  
2 requirement that he or she be of a certain profession, such as a  
3 doctor." Id. Here, Dr. Hurwitz is an experienced general  
4 surgeon, testifying about the standard of care by other general  
5 surgeons as it pertains to the timeliness of transferring  
6 patients. Although he admittedly has not transferred a patient  
7 within the last year, Dr. Hurwitz testified that he has past  
8 experience transferring patients.

9 The Court finds Dr. Hurwitz to be sufficiently qualified to  
10 testify about the timeliness of transfer by general surgeons.

11 b. Dr. Hurwitz's Testimony Is Relevant

12 Next, the Court reviews whether Dr. Hurwitz's testimony  
13 "logically advances a material aspect" of Plaintiffs' case.  
14 Daubert II, 43 F.3d at 1315. The Court finds that Dr. Hurwitz's  
15 testimony is relevant because it relates to standard of care and  
16 causation, essential elements of Plaintiff's case.

17 c. Dr. Hurwitz's Testimony Is Reliable

18 Finally, the Court determines whether Dr. Hurwitz's  
19 testimony is soundly based on objective, independent methodology.  
20 Daubert II, 43 F.3d at 1316. Concerns about reliability are  
21 lessened where, as here, the Court sits as trier of fact. CFM  
22 Commc'ns, LLC v. Mitts Telecasting Co., 424 F. Supp. 2d 1229,  
23 1233 (E.D. Cal. 2005). See also Volk v. United States, 57 F.  
24 Supp. 2d 888, 896 n.5 (N.D. Cal. 1999) ("[I]t bears noting that  
25 the Daubert gatekeeping obligation is less pressing in connection  
26 with a bench trial.").

27 As noted above, Dr. Hurwitz based his conclusions on his  
28 education, training, years of practice, and review of medical

1 literature. Based on a thorough review of the record and Dr.  
2 Hurwitz's report, the Court finds that Dr. Hurwitz's conclusions  
3 and report are based on sufficient facts to satisfy the  
4 reliability prong. Indeed, as the Court repeatedly stated at the  
5 hearing on this motion, the United States' objections to Dr.  
6 Hurwitz's testimony go primarily to the weight to be given to  
7 this evidence rather than its admissibility.

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IV. CONCLUSION AND ORDER

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Accordingly, the Court hereby DENIES the United States'  
Motion to Strike with respect to Dr. Hurwitz's report and  
testimony.

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IT IS SO ORDERED.

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Dated: January 23, 2019

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JOHN A. MENDEZ,  
UNITED STATES DISTRICT JUDGE

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