

1 that Angeles suddenly pulled his tractor trailer into the emergency lane blocking the Mitsubishi
2 being driven by Richards as Richards was in the process of trying to merge back into freeway
3 traffic. Plaintiff claims Richards was forced out of the emergency lane to avoid hitting the tractor
4 trailer, lost control, and swerved onto the freeway striking two vehicles before ending up stopped
5 in the middle traffic lane. Plaintiff claims Angeles was cited and pled guilty to making an unsafe
6 lane change and is at fault for the accident. Legacy claims that Richards was at fault for the
7 accident because he was highly intoxicated, and driving recklessly at a high rate of speed on the
8 shoulder of the road. What is not disputed is that Dixon was airlifted from the accident to UMC
9 where she was treated for life-threatening injuries.

10 The Complaint (ECF No. 1) in this case was filed July 17, 2015. The parties requested and
11 received special scheduling review when the court approved a joint proposed Discovery Plan and
12 Scheduling Order (ECF No. 23) on October 21, 2015. The initial discovery plan and scheduling
13 order established an April 18, 2016 deadline for disclosure of experts, and a June 13, 2016 deadline
14 for completing discovery. The parties requested and received two extensions of the discovery plan
15 and scheduling order deadlines extending the deadline for disclosure of experts until May 31, 2016,
16 and later to October 21, 2016. A third stipulation to extend the deadlines was filed by the parties
17 on December 19, 2016 (ECF No. 39). At a hearing held on January 10, 2017, on their third request
18 for extension, the court was dissatisfied with the parties' discovery progress and required the
19 parties to schedule all remaining discovery and inform the court of what specific discovery was
20 still needed to be completed as well as proposed schedule for completing that discovery. *See*
21 *Minutes of Proceedings* (ECF No. 49). The court was also skeptical about defendants' claims they
22 should receive another extension of the expert disclosure deadline because they had been unable
23 to retain a trucking standard of care expert because their own client, Angeles, had not yet been
24 deposed. The parties submitted a stipulated discovery plan and proposed order which the court
25 approved extending the deadline for defendant to disclose a trucking standard of care expert until
26 February 17, 2017. However, all other initial expert disclosures were closed.

27 This litigation has become increasingly contentious, and the court has decided many, many
28 discovery disputes. It is apparent that there have been communication breakdowns among counsel

1 that have contributed to counsel imputing bad faith and ill motives to one another that have resulted
2 in an inordinate amount of motion practice on matters counsel would ordinarily work out among
3 themselves without judicial intervention.

4 DISCUSSION

5 In the current motion, plaintiff seeks to strike the testimony of Legacy expert witness
6 Michael Dilich, or in the alternative, preclude him from testifying regarding the speed at which
7 Ryan Richards was traveling at the time of the collision. Plaintiff argues the testimony is
8 inadmissible under Fed. R. Evid. 702, and that the court should exercise its gatekeeping function
9 to exclude his testimony. Both sides in this case retained an accident reconstructionist expert.
10 Plaintiff argues that the opinions of defendants' expert, Michael Dilich, are not based on proper
11 scientific principles and ignore "a massive amount of evidence" developed in deposition and other
12 discovery in this case. His opinions are highly speculative and unreliable because they are
13 contradicted by eyewitness testimony. Both the plaintiff and defendants' experts agree that neither
14 can give reliable testimony regarding Richards' speed at the time of the collision because they lack
15 the foundation to form such an opinion. This is because the NHP trooper investigating this
16 accident testified there were no measureable skid marks and he did not call in a specialty team to
17 assist in his investigation. The lack of physical evidence and Dilich's failure to consider critical
18 eyewitness testimony, it is argued, should preclude his testimony.

19 Defendants oppose the motion arguing that expert testimony is admissible if it: (1) will
20 assist the trier of fact to understand the evidence; (2) is based on sufficient facts and data; and (3)
21 is the product of reliable methodology. Defendants assert Mr. Dilich's opinions and report meet
22 this standard. Plaintiff's own accident reconstructionist, Mr. Jones, testified at his deposition about
23 Richards' speed at the time of the collision. Mr. Jones testified that, assuming Richards' estimate
24 of his own speed at a certain point was correct, his speed at the time of the accident would be in
25 the area of 60-70 m.p.h. Mr. Dilich's opinion and analysis is based on Richards' testimony and
26 other testimony. Defendants dispute that Mr. Dilich's opinions are contrary to, or fail to address,
27 eyewitness testimony provided in this case.

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1 Plaintiff replies that Leoncio Angeles was cited and pled guilty to making an unsafe lane
2 change. The experts for both sides are unable to estimate Richards' speed at the time of the
3 accident based on the lack of physical evidence. Trooper Tully, who investigated this accident,
4 admits that he did not have enough skid marks at the scene to perform measurements to calculate
5 speed at the time of the collision and therefore, his speed estimate was based solely on eyewitness
6 testimony. Under these circumstances, the court should exclude Mr. Dilich's testimony pursuant
7 to Rule 702.

8 Having reviewed and considered the moving and responsive papers and the arguments of
9 counsel at the hearing, the court will deny the motion. The court has reviewed Mr. Dilich's report.
10 The report opines that Richards' loss of control and crash could be reconstructed to some extent if
11 there were sufficient measurements regarding the path of his vehicle on and off the shoulder and
12 damage sustained to his vehicle. However, he acknowledges that he has no such measurements
13 and does not know if they are available. He also agrees that there is no physical evidence to
14 reconstruct whether or not Angeles swerved into the shoulder and caused Richards to lose control
15 as Richards claims, or to reconstruct if the truck [tractor trailer] was even at the crash site, let alone
16 Richards' loss of control. His report acknowledges that whether or not Angeles was a factor in
17 Richards' loss of control depends on the validity of witness memory. His opinions regarding the
18 speed of Richards' vehicle at the time of the collision are based on Richards' testimony concerning
19 his speed at the time of the accident. In essence the report opines that *if* Richards' estimate of his
20 speed is correct, applying the laws of physics and doing the math, the accident did not occur as
21 Richards claims.

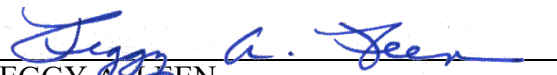
22 Both plaintiff's expert and defendants' expert agree that there was inadequate physical
23 evidence collected at the accident scene to conduct an accident reconstruction. Both offer opinion
24 testimony tailored to alternative scenarios suggested by conflicting eyewitness accounts. The court
25 finds that whether or not Mr. Dilich has any admissible testimony to offer should be deferred until
26 the time of trial. Given the admitted lack of physical evidence, and the parties' acknowledgement
27 that the eyewitness testimony is essential and somewhat in conflict, the district judge will only be
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1 able to determine whether Mr. Dilich has any admissible expert testimony to offer after hearing
2 the foundational evidence at trial. Accordingly,

3 **IT IS ORDERED** that Plaintiff's Motion to Strike Legacy's Expert Witness Michael
4 Dilich, or Alternatively, to Preclude Expert Testimony Regarding the Speed that Third-Party
5 Defendant Ryan Richards was Traveling at the Time of the Collison [sic] Pursuant to FRE 702
6 (ECF No. 130) is **DENIED without prejudice** to filing a motion in limine to exclude or limit the
7 scope of his testimony at trial.

8 DATED this 6th day of September, 2017.

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PEGGY A. ZEEN
UNITED STATES MAGISTRATE JUDGE