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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

COORDINATION PROCEEDING SPECIAL
TITLE (RULE 3.550)
ROUNDUP PRODUCTS CASES

THIS DOCUMENT RELATES TO:
Pilliod, et al. v. Monsanto Company, et al.
Alameda Superior Court Case No.: RG17862702

JCCP NO. 4953

Case No.: RG17862702

**PLAINTIFF ALVA AND ALBERTA
PILLIOD'S RESPONSE IN OPPOSITION
TO MONSANTO'S MOTION TO
EXCLUDE CERTAIN OPINIONS OF
JAMES MILLS**

BY FAX

Hon. Judge Winifred Smith
Department 21

Hearing Date: March 7, 2019

Time: 10:00 a.m.

Department: 21

Reservation No.: R-2048312

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Defendant seeks to exclude the opinions of James Mills as to Ms. Pilliod's future medical expenses
3 of the prescription drug Revlimid (lenalidomide). Defendant makes three arguments in favor of
4 precluding Plaintiffs from introducing any evidence regarding the value of the future costs of Revlimid.
5 Defendant's first argument is that the value of such treatment was not calculated on what Plaintiff actually
6 pays. Defendant's second and third arguments are based on the Mr. Mills' using unreliable methodology
7 in his reliance that she will need Revlimid for the rest of her projected life and the calculation of Ms. her
8 life expectancy. None of Defendant's arguments are a correct interpretation of the law concerning
9 evidence of the value of future medical expenses and at most, they support grounds for cross-examination
10 but do not support excluding these opinions in their entirety. As a result, Defendant's motion must be
11 denied.

12 **I. FACTUAL BACKGROUND**

13 Plaintiff Alberta Pilliod needs significant ongoing treatment for her CNS-lymphoma. James Mills
14 is an economist that has quantified her future medical costs. In his analysis he relied on the testimony of
15 medical physicians in determining her future medical costs and common standards in the field of
16 economics such as life expectancy charts. In particular, Mr. Mills relied on the testimony of Plaintiff's
17 expert oncologist, Dr. Nabhan, to determine the costs of medications and duration of anticipated ingestion.
18 Dr. Nabhan noted in his report on Ms. Pilliod:

19 Despite her disease being under control currently, she is still at risk of relapse. She is still
20 on lenalidomide at 5mg daily for 21-days followed by 7-days of rest. A 28-day supply of
21 5 mg lenalidomide is priced at \$20,338.69. Mrs. Pilliod has been on that agent since April
22 2017 and is likely to continue for the foreseeable future.

23 *See, Hoke Decl., Ex 1 at 19.*

24 Mr. Mills accordingly used this information to calculate the future costs for Plaintiff. *See, Hoke*
25 *Decl. Ex 2.* Mr. Mills used a reliable economic model to adjust for present value and future growth and
26 Defendants to not challenge this methodology rather the underlying assumptions.

27 **II. STANDARD OF REVIEW**

28 Cal. Evidence Code § 801(b) provides that an expert may provide an opinion “based on matter
(including his special knowledge, skill, experience, training and education) perceived by or personally
known to the witness or made known to him at or before the hearing, whether or not admissible, that is of

1 a type that reasonably may be relied upon by an expert in forming an opinion upon which the subject to
2 which his testimony relates, unless an expert is precluded by law in from using such matter as a basis for
3 his opinion.” “The court does not resolve scientific controversies. Rather, it conducts a ‘circumscribed
4 inquiry’ to ‘determine as a matter of logic the studies and other information cited by experts adequately
5 support the conclusion that the experts general theory or technique is valid.’” *Sargon Enterprises, Inc. v.*
6 *Univ. of S. Cal.*, (2012) 55 Cal. 4th 747, 776. In the Court’s gatekeeping role “[t]he gate tended is not a
7 partisan checkpoint. It bars expert opinion only if it fails to meet the minimum qualifications for
8 admission. If the opinion is based on materials on which the expert may reasonably rely in forming the
9 opinion, and flows in a reasoned chain of logic from those materials rather than from speculation or
10 conjecture, the opinion may pass, even though the trial court or other experts disagree with its conclusion
11 or the methods and materials used to reach it.” *Davis v. Honeywell Int’l Inc.*, (2016) 245 Cal. App. 4th
12 477, 492.

13 The trial court should examine the foundation of the expert’s opinion to determine whether the
14 matter relied upon can provide a reasonable basis for the opinion, in which case the opinion should be
15 admitted. Questions on the weight to be given to an expert opinion should be left to a jury. *People v.*
16 *Jones*, 54 Cal 4th at 59 (2012); *People v. Eubanks*, 53 Cal 4th 110, 143 (2011).

17 **III. PLAINTIFF IS ENTITLED TO RECOVER FOR THE REASONABLE COST OF**
18 **REASONABLY NECESSARY FUTURE MEDICAL CARE**

19 Civil Code section 3333 provides that the proper measure of plaintiffs’ damages is the full amount
20 “which will compensate for all the detriment proximately caused” by defendant’s negligence. Section 3283
21 provides that such damages include those “reasonably certain to result in the future.” (*See, also*, CACI
22 No. 3903A.) In *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, the court summarized the law with
23 regard to future damages: An injured plaintiff is entitled to recover the reasonable value of medical
24 services that are reasonably certain to be necessary in the future. 215 Cal.App.4th at 1330. In *Markow v.*
25 *Rosner* (2016) 3 Cal.App.5th 1027, the court stated that the standard to be used in assessing future damages
26 is the market or exchange rate of the medical services.

27 Since 2017, Plaintiff has received Revlimid through an economic hardship program. As the
28 program expires each annum and Plaintiff must apply to renew her eligibility, there is no guarantee that

1 Plaintiff will be eligible for the program in the future. As such the circumstances are distinguishable from
2 *Corenbaum* and the Court must follow the holdings of various Courts finding that the total costs may be
3 brought into evidence to prove the reasonable value of the medical services rendered. *See, Bermudez v.*
4 *Ciolek*, 237 Cal.App.4th at pp. 1330–1331; *Uspenskaya v. Meline* (2015) 241 Cal.App.4th 996.

5 Regarding future damages, no competent testimony has indicated that any specific insurance plan
6 will cover any of Plaintiff's future needs. Defendant's limited statutory authority for limiting evidence to
7 amounts already paid is inapplicable to future damages under these facts. In light of the factual ambiguity
8 as to Ms. Pilliod's cost of Revlimid in the future, Dr. Nabhan will testify to its market cost which is
9 probative to the question of the reasonable value of future medical services. Mr. Mills relied on the
10 opinions of Dr. Nabhan and reliably adjusted the costs to present value. Therefore, Plaintiff has met her
11 burden of proof on the extent and costs of future damages by using qualified experts presenting factual
12 issues as to her future medical costs and Defendant may seek to cross Mr. Mills on issues relating to offsets
13 to the extent that they are not barred by the collateral source rule.

14 **IV. MR. MILLS' OPINIONS AS TO MS. PILLIOD'S FUTURE TREATMENT INCLUDING** 15 **HER ONGOING NEED FOR REVLIMID AND LIFE EXPECTANCY ARE RELIABLE**

16 Defendants seeks to exclude testimony by James Mills regarding the need and value of future
17 medical treatment from Revlimid as "irrelevant" and "lacking a reasonable foundation". Mr. Mills did not
18 make any medical determinations on his own and relied upon the testimony of Dr. Nabhan and national
19 statistics on life expectancy. California law is clear that the question of future damages is one for the jury,
20 based upon expert testimony as to medical probabilities.

21 In *Ostertag v. Bethlehem Shipbuilding Corporation* (1944) 65 Cal.App.2d 795, the appellant
22 contended that there was insufficient evidence to support a finding that Ostertag was permanently
23 disabled. Ostertag's doctor had testified at trial that he could not say "positively what this boy's future is,
24 but... I think it is reasonable to assume he is going to have trouble with them in the future. Just how much,
25 I don't know. Just what the course of that trouble will be, I don't know." The court held that it was "for the
26 jury to determine whether future detriment is reasonably certain to occur," and stated "testimony no
27 stronger has in several cases been held sufficient to support a finding of future damages with reasonable
28 certainty." (*Id.* at 805-807, citing *Kimic v. San Jose-Los Gatos etc. Ry. Co.*, 156 Cal. 273 (testimony that

1 a shock “might result” from an injury and that injuries “would probably be permanent” found to be
2 sufficient to support the jury's finding there was a “reasonable certainty” that the plaintiff had been
3 permanently injured); *Cordiner v. Los Angeles Traction Co.*, 5 Cal.App. 400 (testimony that a brain injury
4 “might produce convulsions and paralysis and that there was a danger of mental deterioration” was
5 sufficient to support the jury's finding of “future evil consequences.”).

6 Dr. Nabhan’s opinions regarding Ms. Pilliod’s need for future Remlivid is based on Dr. Nabhan’s
7 practice and knowledge of Plaintiff's physical and medical condition. After having evaluated Plaintiff, Dr.
8 Nabhan believes this additional future medical care is necessary. He is unable to state exactly how long
9 this treatment will be needed but anticipates it for the “foreseeable future”. *See*, Hoke Decl., Ex 1 at 19.
10 Such testimony is far from speculative and forms the basis on what Mr. Mills has relied upon in projecting
11 the medication for the remainder of her life expectancy. Dr. Nabhan’s testimony is certainly sufficient
12 evidence for the jury to make a determination as to whether “future detriment is reasonably certain to
13 occur.” As someone who has actually prescribed Revlimid, Dr. Nabhan is intimately familiar with its
14 price. In order to further obtain a clear picture of the cost of a 28-day supply of Revlimid, Dr. nabhan
15 summed up his methodology as follows:

16 There is a website called drugs.com that lists a lot of indications, prices, and costs of these
17 chemotherapy drugs. Obviously, as somebody who prescribed this therapy, it's expensive,
18 but I wanted to get a more accurate measure of the price. So that's what I did. *See*, Decl.
of Curtis Hoke, Exhibit 3, Deposition Trans. of Dr. Nabhan at 192:8-13.

19 In fact, from the time Dr. Nabhan wrote his expert report on January 11, 2019 to the time his
20 deposition was taken on January 19, 2019 – a period of just eight days – the price of Revlimid had
21 increased from \$20,338.69 to \$21,050.26, or an increase of \$711.57 in a little over a week. *See*, Decl. of
22 Curtis Hoke, Exhibit 3, Deposition Trans. of Dr. Nabhan at 192:8 – 194:1; Decl. of Curtis Hoke, Exhibit
23 4, Deposition of Chadi Nabhan, Exhibit 20 (Drugs.com price of Revlimid as of 1/19/19).

24 Further, Mr. Mills’ reliance on national statistics for life expectancy is reliable. Computations and
25 estimates generally used by practitioners in a field may constitute reliable matter that an expert opinion
26 may be based on, such as where an architect properly relied on cost estimators for cost computations.
27 *Appel v. Burman* (1984) 159 Cal.App.3d 1209, 1217. Mr. Mills relied on standard life expectancy tables
28 often relied upon by economists. Defendant may cross-examine Mr. Mills to the extent they believe that
Ms. Pilliod’s life expectancy is below the national average.

1 In this case, plaintiffs' expert economist James Mills has been asked to make certain assumptions,
2 and he will testify based on such assumptions. Under California law, asking experts to render opinion
3 based on certain assumptions or hypothetical facts is a permitted use of expert testimony, and an expert's
4 reliance on assumptions does not preclude his testimony. If the assumptions are thereafter proved by
5 admissible evidence, then the expert's opinions are admissible. Consequently, Defendant's motion to
6 exclude Mr. Mills testimony about the need for and value of future medical care must be denied in its
7 entirety.

8 **V. CONCLUSION**

9 For all the reasons articulated above, the Motion to Exclude portions of Mr. Mills testimony should
10 be denied.

11 DATED: February 21, 2019

Respectfully submitted,

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14 By: /s/ Curtis G. Hoke

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