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United States District Court
Central District of California

FREDRIC GLASSMAN; JENNIFER GLASSMAN; and S.G., a minor, by and through his Guardian Litem, JENNIFER GLASSMAN,

Plaintiffs

v.

HOME DEPOT USA, INC., TECHTRONIC INDUSTRIES NORTH AMERICA, INC.; ONE WORLD TECHNOLOGIES, INC.; RYOBI TECHNOLOGIES, INC.; RYOBI LIMITED, and DOES 1 to 100, inclusive,

Defendants.

Case № 2:16-cv-07475-ODW-E

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [30]

I. INTRODUCTION

Plaintiffs Fredric Glassman, Jennifer Glassman, and their son, S.G. (collectively, the "Glassmans"), bring strict product liability and negligence claims against Defendants relating to a fire that occurred in their garage. (Pls.'s Separate Statement of Disputed & Undisputed Mat. Facts ("PSUF") No. 1, ECF No. 31-1.) Defendants Home Depot U.S.A., Inc., Ryobi Technologies, Inc., One World

Technologies, Inc., and Techtronic Industries North America, Inc. (collectively, "Defendants") move for summary judgment on all of the Glassmans' claims. They argue that the Court should exclude the Glassmans' causation expert, George White, pursuant to *Daubert*, and because without White, the Glassmans cannot prove causation. The Ryobi defendants manufactured and/or distributed a lithium-ion battery for a leaf blower that the Glassmans claim caused the fire. For the reasons below, the Court **DENIES** Defendants' Motion.[1] (ECF No. 30.)

II. FACTUAL BACKGROUND

Early in the morning in January 2015, a fire started in the Glassmans' garage, which resulted in property damage and personal injury. (*See* PSUF No. 1.) The Glassmans identified four potential Ryobi products that they claim could have started the fire. (PSUF No. 2.) Mr. Glassman owned a Ryobi battery charger, model number P118, which came as part of a Ryobi leaf blower he purchased at Home Depot. (PSUF No. 4.) In addition to the charger, the leaf blower came with a lithium-ion battery, model number P102. (*Id.*) Mr. Glassman later purchased two additional Ryobi batteries, which bore model number P107. (PSUF No. 5.[2]) He testified that after he purchased the new batteries, he stopped using the P102 battery, and placed it in storage somewhere in the garage. (*Id.*) The afternoon of the incident, Mr. Glassman had used the leaf blower. (Glassman Depo at 81:5–82:4.) When he was done, he placed one of the P107 batteries in the charger on a workbench in the garage,

[1] After carefully considering the papers filed in support of and in opposition to the Motions, the Court deemed the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; L.R. 7-15.

[2] The Glassmans dispute this fact because it "is in conflict with the evidence in this case…," and object on several grounds. (PSUF No. 5.) The Glassmans cite White's deposition testimony, expert report, and declaration to dispute the fact. However, Mr. Glassman testified specifically regarding these facts at deposition, and White's opinions do not contradict Mr. Glassman's testimony. (Declaration of Lance Cidre, Ex. J ("Glassman Depo") at 83:2–84:13, ECF No. 30-3). The Glassmans claim that Mr. Glassman lacks personal knowledge regarding what he did with the various battery packs. (*See id.*) This objection is frivolous, burdens the Court, and will subject counsel to sanctions in the future, in the event counsel lodges such frivolous objections with this Court. The Court **OVERRULES** the Glassmans' objections. The Court addresses the remainder of Ryobi's pertinent objections below.

and the other he left in the leaf blower, which he hung on the west wall of the garage. (*See* PSUF No. 25.) The fire started sometime early the next morning. Investigators recovered additional chargers and batteries from the scene of the fire, which Ryobi did not manufacture. (PSUF No. 7.)

The Glassmans initially responded to interrogatories that the product that caused the fire had been destroyed in the fire. (PSUF No. 9.) Later, they supplemented their interrogatory responses to identify a battery pack as the cause of the fire, as identified by their electrical engineering expert, White. (*See* PSUF Nos. 10–11.) White worked with a fire origin expert, Laura Cygan. (PSUF No. 12.) Cygan opined that the fire originated on the top of a workbench in the garage. (Declaration of Lance Cidre ("Cidre Decl."), Ex. O ("Cygan Depo.") at 129:13–130:4, ECF No. 30-3.)

After Cygan eliminated some potential causes of the fire, including smoking, arson, and others, White used his background as an electrical engineer to evaluate potential electrical sources of ignition. White has over thirty years of experience investigating fires. (Def.'s Resp. to Pl.'s Additional Undisputed Material Facts ("DRUMF") No. 9, ECF No. 32-1.) He has investigated approximately 40 to 60 fires involving lithium-ion batteries, over the past 10 years, and is a licensed electrical and mechanical engineer in California. (Declaration of George White ("White Decl.") ¶ 2, ECF No. 31-5.) White investigated the scene of the fire, and subsequently performed an arc mapping survey, which he claims supports Cygan's opinion as to the area of origin. (DRUMF No. 10.) Arc mapping is a tool documented in the NFPA 921. (Cidre Decl., Ex. L ("White Expert Report"), ECF No. 30-3.) The NFPA 921 is a guide for proper procedures for investigating the origin and cause of a fire, which the National Fire Protection Association developed. White's initial hypothesis was that a Ryobi charger or battery sitting in the charger was the cause of the fire. (Reply Declaration of Lance Cidre ("Reply Cidre Decl."), Ex. A ("White Depo") at 51:14–54:13, ECF No. 32-3; Cidre Decl., Ex. L ("White Expert Report").) After White

submitted his initial expert report, a physical inspection of the battery he identified as the cause of the fire revealed that Ryobi did not manufacture it. (PSUF No. 17.)

Shortly thereafter, White maintained that he needed to conduct additional testing on some of the other battery cells recovered from the scene in the area of origin. (*See* PSUF No. 18.) White also obtained an exemplar battery to conduct additional examinations, and had a laboratory conduct CT Scans of two Ryobi batteries that investigators recovered from the floor of the garage near the workbench. (White Decl. ¶¶ 3–5.) White cites several peer-reviewed articles, which he read, that establish CT Scans as a proper way to evaluate a lithium-ion battery for potential failures. (White Decl. ¶¶ 4, 11–13, Exs. 6–8.) After reviewing the CT Scans, White claims that he identified a "thermal runaway" in one of the Ryobi batteries taken from the floor near the workbench. The thermal runaway generated heat and explosive gases, which he claims was the most likely cause of the fire. (Cidre Decl., Ex. M ("Supp. White Report").) White included this new analysis in a Supplemental Report, which he provided before his deposition. (*Id.*)

Jackson Hyde is Defendants' expert and he disagrees as to the cause of the fire. Hyde opines that the fire started in an electrical outlet in the garage, and contests White's conclusions. (Declaration of Jack Hyde ISO Mot. for Sum. J. ("Hyde Decl."), Ex. A ("Hyde Expert Report"), ECF No. 32-5.)

III. LEGAL STANDARD

Defendants style their Motion as a motion for summary judgment, but, practically, it seeks two forms of relief. First, Defendants ask the Court to exclude the Glassmans' expert, and then requests summary judgment because without the expert, the Glassmans could not prove their prima facie case. *See Stephen v. Ford Motor Co.*, 134 Cal. App. 4th 1363, 1373 (2005) ("A product liability case must be based on substantial evidence establishing both the defect and causation (a substantial probability that the design defect, and not something else, caused the plaintiff's injury).").

A. Motion to Exclude

Federal Rule of Evidence 702 imposes a "gatekeeping" obligation on trial courts to "ensure that any and all scientific testimony . . . is not only relevant, but reliable." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993); *see also* Fed. R. Evid. 702. Courts exercise this function by excluding unreliable expert scientific testimony. *Daubert*, 509 U.S. at 589. "The proponent of the expert testimony bears the burden of establishing by a preponderance of the evidence that the expert testimony is admissible under Rule 702 . . . ." *Colony Holdings, Inc. v. Texaco Refining and Mktg., Inc.*, No. SA-CV-00217-DOC (MLGx), 2001 WL 1398403, at *3 (C.D. Cal. Oct. 29, 2001). Rule 702 provides that expert testimony is admissible if the witness is sufficiently qualified as an expert by knowledge, skill, experience, training, or education, and:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702; *see also Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1232 (9th Cir. 2017).

In *Daubert*, the Supreme Court provided guidelines for determining the reliability, and thus admissibility, of expert testimony. *See Daubert*, 509 U.S. at 579. The court stressed that trial courts should focus their inquiry "solely on [a potential expert's] principles and methodology, not on the conclusions that they generate." *See id.* at 580. The four factors provided by the court are: whether (1) the theory "can be (and has been) tested"; (2) the theory "has been subjected to peer review and publication"; (3) the theory has a "known or potential rate of error"; and (4) whether or not the theory or technique enjoys "general acceptance" within a "relevant scientific community." *Daubert*, 509 U.S. at 592–94 (internal quotation marks

omitted). The Supreme Court has since emphasized that the list of non-exhaustive factors provided in *Daubert* are flexible, and are "meant to be helpful, not definitive." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 151 (1999).

B. Motion for Summary Judgment

A court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Courts must view the facts and draw reasonable inferences in the light most favorable to the nonmoving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007). A disputed fact is "material" where the resolution of that fact might affect the outcome of the suit under the governing law, and the dispute is "genuine" where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1968). Conclusory or speculative testimony in affidavits is insufficient to raise genuine issues of fact and defeat summary judgment. *Thornhill's Publ'g Co. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). Moreover, though the Court may not weigh conflicting evidence or make credibility determinations, there must be more than a mere scintilla of contradictory evidence to survive summary judgment. *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000).

Once the moving party satisfies its burden, the nonmoving party cannot simply rest on the pleadings or argue that any disagreement or "metaphysical doubt" about a material issue of fact precludes summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *Cal. Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987). Nor will uncorroborated allegations and "self-serving testimony" create a genuine issue of material fact. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002). The court should grant summary judgment against a party who fails to demonstrate facts sufficient to establish an

element essential to his case when that party will ultimately bear the burden of proof at trial. *See Celotex*, 477 U.S. at 322.

Pursuant to the Local Rules, parties moving for summary judgment must file a proposed "Statement of Uncontroverted Facts and Conclusions of Law" that should set out the material facts to which the moving party contends there is no genuine dispute. C.D. Cal. L.R. 56-1. A party opposing the motion must file a "Statement of Genuine Disputes" setting forth all material facts as to which it contends there exists a genuine dispute. C.D. Cal. L.R. 56-2. "[T]he Court may assume that material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are (a) included in the 'Statement of Genuine Disputes' and (b) controverted by declaration or other written evidence files in opposition to the motion." C.D. Cal. L.R. 56-3.

IV. DISCUSSION

The Court first addresses whether to exclude the Glassmans' cause expert, and then Defendants' Motion for Summary Judgment

A. George White's Opinions Are Shaky, but Admissible

Defendants do not dispute the qualifications of George White in their moving papers. He is an electrical engineer with over thirty years of experience investigating fires. (Def.'s Resp. to Pl.'s Additional Undisputed Material Facts ("DRUMF") No. 9, ECF No. 32-1.) He has investigated approximately 40 to 60 fires involving lithium-ion batteries, over the past 10 years, and is a licensed electrical and mechanical engineer in California. (White Decl. ¶ 2.)

Defendants primarily dispute the methodology White employed in coming to his conclusion that the Ryobi battery pack found on the floor of the Glassmans' garage caused the fire. (Mot. 9–12.) Under Federal Rule of Evidence 702, the Court must consider whether an expert's opinion is the product of "reliable principles and methods," and whether "the witness has applied the principles and methods reliably to the facts of this case." Both Defendants' and the Glassmans' experts agree that a fire

origin and cause investigation typically relies on the NFPA 921, which is the Guide for Fire and Explosion Investigations. (*See e.g.*, Hyde Expert Report, (relying on NFPA 921 standard to discuss arc mapping);) *see also Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, No. C06-1750JLR, 2014 WL 1494023, at *4 (W.D. Wash. Apr. 16, 2014) (collecting cases) ("AFM is correct that numerous courts have found NFPA 921 to be an acceptable guide for fire investigation methodology."). Thus, Defendants do not dispute that NFPA 921 is an appropriate method to use in evaluating the cause of a fire, but contend that White improperly implemented it.

Defendants claim that White started with a conclusion—that the fire was caused by a battery charging in a Ryboi charger—and catered his investigation to conform to that conclusion. (Mot. 11.) White initially opined that a battery placed in the charger, which turned out not to be manufactured by Ryobi, started the fire. (PSUF No. 17.) He claims to have gone back to the drawing board, and employed the methodology set forth in NFPA 921, after receiving the report of Defendants' experts, and additional information gleaned from examining an exemplar product. (PSUF No. 19.)

In his Supplemental Report, White explained his methodology for conducting additional destructive testing on two battery packs located on the floor of the garage near the workbench. (White Supp. Report 2–3.) This included visual inspection, and the use of a CT Scan to evaluate the two battery packs. (*Id.*) White's review of the images led him to believe that one of the battery packs suffered from a thermal runaway condition, which was caused by the loss of a plastic separator between the cells of the battery. (*Id.*) According to him, this condition, which resulted in heat and explosive gases, was the most likely cause of the fire. (*Id.*)

White has viewed thousands of images taken by different radiography technologies, and attended a seminar regarding how to analyze CT Scans of lithium-ion batteries to analyze failure modes. (White Decl. ¶ 3.) Several peer-reviewed articles support this method of analysis, and White claims to have reviewed these articles in coming to his revised opinion. (White Decl. ¶ 4, Exs. 6–8.) Defendants'

expert, Hyde, does not dispute that CT Scan images may reveal failure modes to analyze the reason for a battery's failure. Instead, Hyde contends that the CT Scans, which were taken approximately 3 years after the incident, show defects in the end caps of the battery's cells that were not apparent in the initial investigation photographs he took. (Hyde Decl. ¶¶ 6–7.) Hyde goes on to say that because "incorrect facts…serve as the basis for Mr. White's ultimate opinion regarding the cause of the fire, his conclusion is therefore clearly erroneous." (*Id.* ¶ 7.) One World's Product Safety Manager, Andrew Hornick, submits a similar declaration that, with the exception of Hornick's background, tracks Hyde's declaration verbatim. (*See* Declaration of Andrew Hornick ¶¶ 4–9, ECF No. 32-4.) A difference of expert opinion is exactly the type of thing that the Court cannot resolve on summary judgment. *See Addisu*, 198 F.3d at 1134.

However, two things give the Court pause. First, White's decision to conduct further destructive analysis happened to come almost immediately after Ryobi revealed that it did not manufacture the battery that White initially suspected as the cause. To say this raises an eyebrow is an understatement. Second, even after White decided to conduct his CT Scan analysis, he only chose to scan two batteries, which he knew to be Ryobi products, despite there being other batteries that Ryobi claims were in the general area of origin. The two batteries White chose to scan were found on the floor of the garage, which is contrary to Glassman's testimony that he left one battery in the charger on the workbench, and one battery in the leaf blower, which hung on the west wall of the garage. (*See* PSUF No. 25.)

White's serendipitous changes of heart will be readily apparent to a jury, after cross-examination of White by an adept attorney. While White's conclusions are disputed, and the timing of his Supplemental Report is suspect, at best, he submits evidence setting forth his methodology, with few exceptions. *See Schlesinger v. United States*, 898 F. Supp. 2d 489, 505 (E.D.N.Y. 2012) ("The decision not to follow the methodology set forth in NFPA 921, as well as other purported flaws in the Russo

methodology—e.g., the failure to rule out other possible causes—goes to the weight of the evidence, not its admissibility."). Accordingly, because the methods underlying White's conclusions are not so unreliable as to render them "junk science," the Court **DENIES** Defendants' request to exclude White's opinions. *See Wendell* 858 F.3d at 1237–38 (citing *Daubert*, 509 U.S. at 596) ("[T]he interests of justice favor leaving difficult issues in the hands of the jury and relying on the safeguards of the adversary system—'[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof'—to 'attack[ ] shaky but admissible evidence….'"); s*ee also Allstate Ins. Co. v. Gonyo*, No. 07–CV–1011, 2009 WL 1212481, at *6 (N.D.N.Y. April 30, 2009) (denying *Daubert* challenge to an arson expert who did not "ardently and strictly followed each step of NFPA" and holding that "[i]f there is any question that [the arson expert] did not eliminate every cause for the fire, this will not be determinative as to whether he will testify; all that it suggests is that the credibility of his decision may be subject to an attack.").

B. Motion for Summary Judgment

Defendants concede that their only basis for moving for summary judgment is that the Court should exclude White's causation testimony. (Mot. 8–9.) There are many disputed facts regarding the cause of the fire, as evidenced by the competing expert opinions discussed above. Accordingly, the Court **DENIES** Defendants' Motion for Summary Judgment. (ECF No. 30)

C. Defendants' Objections

Since Defendants' Motion for Summary Judgment depends on excluding White's opinions, many of the allegedly disputed facts in the parties' competing separate statements are not material. *Anderson*, 477 U.S. at 248 (holding that controlling law governs what facts are "material"). That the parties dispute some of the facts on which White relies for his opinions is not determinative to the Court's analysis of the admissibility of his opinions under *Daubert*. As noted above,

Defendants should address these weaknesses on cross-examination. *See Wendell* 858 F.3d at 1237–38.

Defendants assert several objections to evidence the Glassmans submitted in support of their Opposition. (Defs.'s Objections, ECF No. 32-2.) The objections are styled as contesting Plaintiff's Statement of "Additional Undisputed Material Facts." (*See id.*) The Court addresses only those objections to evidence on which the Court relies.

Expert Reports of George White & Laura Cygan: Defendants object to these documents as inadmissible hearsay to which no exception is applicable. They cite *In re Citric Acid Litigation*, 191 F.3d 1090, 1102 (9th Cir. 1999) for the proposition that "an expert report cannot be used to prove the existence of the facts set forth therein." The *Citric* court held this in response to a party seeking to establish the truth of underlying facts that were included in an expert's report. *Id.* at 1102. Here, the Court does not rely on White's expert reports for the truth of the matter asserted; rather, it relies on them to analyze his opinions and the bases for them, even if the underlying facts forming the basis for his opinions are disputed. Accordingly, the Court **OVERRULES** Defendants' objections on these grounds.

White's CT Scan Interpretation Opinions: Defendants argue that White is not qualified to interpret CT Scans of lithium-ion batteries. (Defs.'s Objections at 3.) As discussed above, White claims that he has reviewed thousands of radiography images, including CT Scans, and taken a course in their interpretation. (White Decl. ¶ 3.) He also submitted scientific literature addressing the topic.

Surprisingly, Defendants do not mention this argument in their moving papers, or otherwise expand on White's purported lack of expertise regarding CT Scan interpretation. In their objections, Defendants claim that "White's experience in interpreting CT Scan images for the purpose of determining failure modes in lithium-ion batteries is almost non-existent, consisting of little more than reviewing no more

than five such scans in his entire career before now, and attending a 1-2 hour presentation approximately five years ago." (Defs.'s Objections at 3–4.)

At deposition, White generally admitted those facts. However, he also explained that he consulted the CT Scan operator, Adam Bovie, who was an expert in the field of CT Scan analysis, for approximately three and a half hours. (Kanne Decl., Ex. 3 at 177:5–178:12, ECF No. 31-3.) Bovie had performed 80 to 90 scans of the model of battery cell at issue. (*Id.*) White also consulted technical literature. Ultimately, these purported holes in White's knowledge provide ample fodder for cross-examination, but do not warrant exclusion. The Court **OVERRULES** Defendants' objections on these grounds.

White's Declaration: Defendants first object to his declaration in its entirety because it contains an electronic "/s/" instead of an ink signature. (Defs.'s Objections 4.) Central District Local Rule 5-4.3.4(a)(3) provides "In the case of documents requiring signatures other than those of registered CM/ECF filers (such as declarations), the filer shall scan the hand-signed signature page(s) of the document in PDF format…." White failed to hand sign the declaration. However, the Court finds this objection largely form over substance. *See Vogel v. Winchell's Donut Houses Operating Co., LP*, 252 F. Supp. 3d 977, 982 (C.D. Cal. 2017) (declining to strike declaration for failure to provide hand signature). Accordingly, the Court **CONDITIONALLY OVERRULES** Defendants' objection on this ground, provided that the Glassmans submit a hand-signed declaration from White on, or before the Pre-Trial conference on **July 24, 2018**.

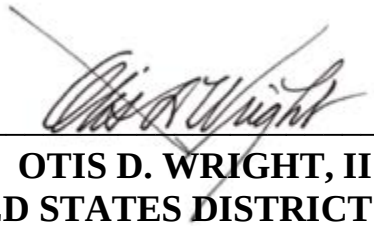
Defendants also object to Paragraphs 6 through 10 of White's declaration because the opinions expressed lack foundation. (Defs.'s Objections 5–7.) Defendants largely base this contention on their own experts' interpretation of the evidence. As noted above, these differences in opinion should form the basis of the Glassmans' cross-examination of White. The Court **OVERRULES** Defendants' objections on these grounds.

V. CONCLUSION

For the foregoing reasons, the Court **DENIES** Defendants' Motion for Summary Judgment. (ECF No. 30)

IT IS SO ORDERED.

July 20, 2018



OTIS D. WRIGHT, II
UNITED STATES DISTRICT JUDGE