

Thomas J. Beers  
BEERS LAW OFFICES  
234 East Pine; P.O. Box 7968  
Missoula, Montana 59807-7968  
Telephone: (406) 728-4888  
blo@montana.com

James Manley, Esq.  
Ann L. Moderie, Esq.  
Manley Law Firm  
201 Fourth Avenue East  
Polson, MT 59860  
Telephone: (406) 883-6285  
jimmanleylaw@centurytel.net  
**Attorneys for Plaintiffs**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION

SAMANTHA CHILCOTE,	)	Cause No. CV-06-47-M-DWM
	)	
Plaintiff,	)	
	)	RESPONSE BRIEF TO DEFENDANT’S
vs.	)	MOTION IN LIMINE OR IN THE
	)	ALTERNATIVE MOTION FOR A
	)	<i>DAUBERT</i> HEARING AND A
FIREMAN’S INSURANCE CO.,	)	CONTINUANCE OF THE TRIAL
RICHARD CURTIS, JOHN DOES 1-3	)	
	)	
Defendant.	)	
	)	

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**I. INTRODUCTION**

Fireman’s Fund Insurance Company and Richard Curtis (Defendants) seek to exclude the

testimony and/or report of Dr. Hipskind, or in the alternative it seeks a *Daubert* hearing on the scientific efficacy of the “Brain Matters” SPECT Scan as objective evidence of traumatic brain injury. Defendants also seek to exclude Dr. Cullis, Dr. Espy, Dr. Hipskind, and Dr. Beljan for untimely disclosure. In the alternative, Defendants seek to continue the trial to “prepare for and respond to testimony of these recently-disclosed witnesses”.

Defendants allege the SPECT scan and the testimony of Dr. Hipskind, M.D. Ph.D. will be offered by the Plaintiff Dr. Samantha Chilcote (Plaintiff) for the purpose of showing objective evidence of Traumatic Brain Injury (TBI). Though the SPECT scan does provide imaging evidence of traumatic brain injury just as an MRI or CT scan does, it does not have the ability to demonstrate the brain injury was caused by the automobile incident. That fact has already been determined in the diagnoses by past treating physicians. That was not the purpose of the current treating medical providers in seeking a SPECT scan. The purpose of the SPECT scan was to better identify the nature and extent of the brain injury within the particular parts of the brain, so that more focused and better treatment could be provided by them. With that clarification, it appears to Plaintiff the memorandum of authority offered by Defendants concedes that for this purpose the SPECT scan is appropriate.

“It is clear that SPECT scan evidence may be helpful *within a diagnostic scheme* as one measure of brain function to aid in the evaluation of brain injury.”

*Defendants’ Memorandum*, page 14. (Emphasis added.) This quotation is consistent with the purpose of the treatment providers in seeking the SPECT scan in this case.

The reports of care and treatment and expected testimony of Dr. Cullis, M.D. , Dr. Espy, L.C.S.W., Ph.D., and Dr. Paul Beljan, Psy.D, ABPdN is simply reflective of their attempts at

providing their patient, Dr. Chilcote, ongoing care and treatment consistent with the current medical knowledge available. That would always be the case when a patient has injuries that are continuing in nature. If Dr. Stahl, the original primary care giver, was still in the area, any ongoing reports by him would not be resisted, nor would updated reports and testing from treating neuropsychologist Dr. Harrison.

For the reasons stated below, the testimony of the ongoing treating medical providers, Dr. Cullis, Dr. Espy, Dr. Hipskind, and Dr. Beljan should be allowed. Likewise, there is no need for a *Daubert* hearing as the Brain Matters SPECT scan and the related testimony of Dr. Hipskind, M.D., Ph.D. meet the requirements of Rule 702 of the Federal Rules of Civil Procedure.

As to Defendants arguments of timeliness, Defendants were notified on December 4, 2004 of Dr. Chilcote being seen by Dr. Espy and Dr. Cullis. Defendants received a copy of the Brain Matters SPECT Scan on December 4, 2007. Plaintiff made sure Defendants were aware of any medical development as soon as the Plaintiff was aware. It is now interesting that when in two years no experts were ever hired by the Defense in this case,<sup>1</sup> to counter the opinions of care, treatment, and prognosis by treating physicians (who repeatedly diagnosed her with TBI), they now claim they need experts to counter her current treating physicians.

## **II. ADMISSIBILITY OF SPECT SCAN AND TESTIMONY OF DR. HIPSKIND**

### **A. BACKGROUND AS TO THE REASON FOR THE USE OF BRAIN MATTERS SPECT SCAN IN THIS CASE**

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<sup>1</sup>

Dr. Wilson, the only defense expert, did his IME and rendered his opinions in the underlying case and it was his report from that case that was provided as the expert disclosure in this case.

Dr. Chilcote was diagnosed with traumatic brain injury from this automobile accident many years ago by her treating physicians, Dr. Stahl (Stahl medical record, Ex. 1, Index to Plaintiff's Exhibits on page 19 of this brief) and neurologist psychologist Lindsey. (Lindsey medical record, Ex. 2.) That diagnosis was followed by neuropsychological care provided by Dr. Harrison, who subsequently also tested for TBI and concluded that a concussion was possible due to forces on the brain as a result of Dr. Chilcote's high speed accident and that Dr. Chilcote sustained a concussion with cognitive problems, including attention, concentration, and memory. (Harrison medical record, Ex. 3, pg. 4.) His testing and analysis corroborated the original diagnosis made by Dr. Stahl and Dr. Lindsey. Expert biomechanical analysis done by Mariusz Ziejewski Ph.D. concluded "[t]he forces on Samantha Chilcote's head resulting from the collision on January 17, 2003 were sufficient to cause a brain injury". (Ziejewski report, Ex. 4, pg. 5.) He concluded that these results are consistent with the medical opinions indicating a brain injury. (Ex. 4, pg. 5.)

Attempting to follow her career, Dr. Chilcote took a position with The Wild Salmon Foundation in Oregon. Defendants' characterization of Plaintiff's medical treatment during that period is incorrect. There is no basis for Defendants' allegation that Plaintiff received no medical treatment between September 2004 and November 7, 2007. (Defendants' Motion in Limine or in the Alternative Motion for a *Daubert* Hearing and a Continuance of the Trial, pg. 2.) Although she was financially unable to follow a sustained course of medical care during that time (Fireman's Fund refused to pay for Dr. Chilcote's ongoing medical care or treatment), she did receive medical care during that time span. (Medical treatment chronology, Ex. 5.)

Defendants received those medical records.

In October 2007, Dr. Chilcote returned to Montana to take a position at the Yellow Bay Biological Station, which allowed her to be closer to people that supported her. She had great difficulty doing work in Oregon which, prior to the accident, she could handle. She was having great difficulty with the ability to keep on task and understand high level science reports. She was having a hard time with her life.

Mr. Manley recommended a local Polson counselor, Dr. John Espy, who had helped a relative of Mr. Manley's. Defendants' brief suggests this was a referral for a new expert. The only factual record on this is Mr. Phillips' deposition of Dr. Espy, which indicates the opposite:

Q: (by Mr. Phillips): Who referred Dr. Chilcote to you?

A: (by Dr. Espy): I believe Mr. Manley referred her to me.

Q: And do you know why?

A: Have had some dealings with Mr. Manley's family in the past, and there's a level of trust there.

Q: Have you ever consulted with Mr. Manley in any other legal proceedings ?

A: No.

(Dr. Espy depo., Ex. 16, pg. 48.)

Dr. Chilcote made the appointment, and learned that, in addition to his counseling, Dr. Espy has considerable knowledge of brain anatomy and function, has taught courses at the University level on subjects such as "Introduction to NeuroSPECT Imaging as a Diagnostic Evaluation Tool." Dr. Espy was familiar with SPECT Scan, and more specifically, with the work of the Brain Matters SPECT Scan.

In light of his background, his review of the existing medical records, and his extensive knowledge of the brain, he was concerned that the symptoms that Dr. Chilcote was relating to

him had not been adequately understood and addressed in her care and treatment. He suggested a SPECT scan be performed to more clearly define the specific areas of the brain that are injured. He recommended that she see a neuropsychologist familiar with the SPECT scan who could use the scan to better correlate clinical findings, neuropsychological testing, and the imaging. In light of Judge Lynch's ruling on stacking of med pay, it was believed there would now be monies available to pay for this ongoing medical care and treatment.

Dr. Espy asked Dr. Chilcote to see Dr. Cullis M.D., who had previously, with Dr. Espy, used a SPECT scan as part of their diagnosis regime in the past. Dr. Cullis met with Samantha, agreed with Dr. Espy, and determined ordered the SPECT scan. (Cullis depo., Ex. 6, pgs. 9-15.) Dr. Cullis testified he did not have prior records at the time and he would need those to ultimately develop a treatment plan. (Ex. 6, pgs. 15, 17-23.) Dr. Cullis testified - as is appropriate with a SPECT scan - he would not rely on the SPECT scan solely for the diagnosis of TBI, but that it can contribute some good information. (Ex. 6, pgs. 17, 8-18.) It can give information about perfusion to areas of the brain and could potentially show a significant abnormality not seen by other tests. (Ex. 6, pgs. 17, 8-18) He testified the SPECT scan of Samantha did show abnormalities, and an evaluation of those abnormalities should take a multi-disciplinary approach, including neurologists, neuropsychologists, and psychologists. (Ex. 6, pgs. 18.) As with any imaging, the treating providers would have to correlate any SPECT scan imaging with the clinical findings (Ex. 6, pgs. 21.) Dr. Cullis opined he believed it contributes information that modalities such as MRIs and CTs cannot in regards to diagnosis of TBI, since they just show structure. (Ex. 6, pgs. 23-24.) The SPECT gives access to [blood] perfusion and that adds something. (Ex. 6, pgs. 23-24.)

The SPECT Scan was accomplished on November 14-16, 2007. (SPECT scan report, Ex. 7.) Plaintiff received a copy of the scan and Dr. Hipskind's report on December 4, 2007 and it was sent to Defendants that same day. (Summary and documentation of communications with Defense counsel, Ex. 8, pgs. 1,3,4.)

**B. THE BRAIN MATTERS SPECT SCAN**

The Brain Matters SPECT scan is the most advanced brain-dedicated SPECT scan in the world. It uses the most technologically advanced (brain dedicated) imaging available which allows high resolution images of cortical and sub-cortical brain structures, which could not be seen by previous functional brain imaging modalities. (Hipskind Affidavit, Ex.9.)

Brain Matters uses a four head gamma camera to take its images and a spatial resolution of 2.5 mm. Because the Brain Matters gamma camera is brain dedicated, it is able to get as close as possible to the patients cranium- a key element of the technological protocol for brain SPECT imaging. (Ex. 9.) Brain Matters utilizes the recommended low energy, high resolution collimators (as opposed to fan beam collimators) and butterworth filtration with chang spatial correction. This allows the detection of functional abnormalities not able to have been detected previously, and gives physicians functional neuro-imaging of information available about TBI and its complications. The Brain Matters SPECT measures regional cerebral blood flow, which is a measurement of cerebral brain function that correlates directly with cerebral metabolism. Regional cerebral blood flow has an extraordinarily high correlation with metabolism not only in many neurological disorders but also in other settings. SPECT imaging is a procedure providing an indirect measure of brain metabolism by measuring cerebral blood flow. Patterns of regional cerebral blood flow generally match the metabolic requirements of the brain and thus will

provide information regarding the status of the brain tissue. (Ex. 9.)

The Brain Matters SPECT scan can be compared to a normative database that is sex and age delineated. The database was compiled by Ismaiel Mena, M.D, the world's leading expert on brain SPECT imaging while he was director of the nuclear medicine division at LAC Harbor - UCLA Medical Center. (Ex. 9.) This has provided unprecedented quantitative data of brain SPECT images measured in standard deviations representing normal and abnormal cerebral blood perfusion benchmarks.(Ex. 9.)

The Brain Matters SPECT Scan can also compares the patient's data by "brodmann" areas of the brain. The 47 different "brodmann" areas of the brain correlate to the known functionalities that each "brodmann" area of the brain controls. The SPECT scan can determine which brain functions are most likely being affected by the shown blood perfusion abnormalities in each affected "brodmann" area. This can be very helpful in directing cognitive rehabilitation for TBI cases. (Ex. 9.)

The SPECT scan is accomplished twice with a patient. The first day it is done while the patient is performing the Stroop test which requires the patient's concentration abilities to be progressively taxed. The Scan measures the perfusion of blood in the various parts of the brain while the patient is being tested. The next day, the same measurements of blood perfusion are taken when the brain is not being taxed in order to create a baseline. By looking at the "brodmann" areas of the brain cannot only compare the perfusion of blood in the patients brain to established norms, but can compare the perfusion of blood in the various part of the brain while the patient is under stress and not under stress. By this means the Brain Matters SPECT scan is able to help the treatment providers in directing cognitive rehabilitation for TBI. (Ex. 9.)

As explained above, the purpose of sending Dr. Chilcote to Brain Matters was to more definitively distinguish the actual areas of the brain that have been impacted as a result of the TBI to enable continued assessment of the scope and extent of the injury and hence, provide Dr. Chilcote better treatment options. A meeting on those options will occur between Dr. Cullis, Dr. Espy, and Dr. Hipskind now that the new neuropsych testing is received and reviewed. (Ex. 6, pgs. 37, 2-11.)

**C. DR. PAUL BELJAN**

Neuropsychologist, Dr. Paul Beljan's report was received on January 10, 2007 and immediately provided to Mr. Phillips. (Ex. 10.) Dr. Beljan is a licensed neuropsychologist in both Arizona and in Illinois. He was the president of the American Board of Pediatric Neuropsychology from 2004 to 2006, and remains the chair of the Examination Committee of the American Board of Pediatric Neuropsychology.

Importantly, he is a neuropsychologist that is familiar with SPECT scans and has had the opportunity to use SPECT scans in his practice. As is clear from his affidavit (Beljan Affidavit, Ex. 11) and report (Ex. 10, pg. 21), the SPECT scan is used to validate and corroborate the findings of his neuropsychological evaluation. (Ex. 11.)

**D. BRAIN MATTERS SPECT SCAN IS A MEDICALLY RELIABLE TEST  
UNDER RULE 702, FEDERAL RULES OF PROCEDURE**

Defendants provide to the Court an affidavit of a Missoula neurologist, several exhibits, and several case citations that are offered to raise an issue of the medical reliability of the Brain Matters SPECT scan in this case, and the testimony of Dr. Hipskind interpreting that scan.

Defendants seek a *Daubert* hearing on the matter. There is no necessity for a *Daubert* hearing, as

it is clear the Defense concedes that the SPECT scan is a medically reliable tool, albeit one of several that medical practitioners use in the evaluation, care, treatment, and prognosis of traumatic brain injury.

As stated at the beginning of this brief, the purpose of the SPECT scan was to better effectuate the evaluation, care, treatment, and prognosis for Samantha Chilcote. The purpose of the brain scan was not to be a “stand alone” demonstration of traumatic brain injury. It, coupled with clinical impressions and neuropsychological evaluations, are all tools used to better define the deficits, which allows for improved evaluation and treatment.

Defendants concede:

“It is clear that SPECT scan evidence may be helpful within a diagnostic scheme as one measure of brain function to aid in the evaluation of brain injury.”

That is how Dr. Cullis, Dr. Espy, and Dr. Beljan have used it in the past and are using it in this case. In light of Defendants’ concession, how can Fireman’s say it is not “medically reliable”?

The Defense Affidavit of Dr. Wilson merely attests to the fact that *in his experience* the SPECT scan is not clinically relevant to him in diagnosing or treating the sequalea of mild traumatic brain injury. Of course, SPECT scan is not available in Missoula, Montana. To support his position he cites the Report of the Therapeutic and Technology Subcommittee, American Academy of Neurology, Assessment of Brain SPECT. Of great significance, that report was written in 1996. Beyond that, the defense cites several articles, most in the 1990s, that are offered to not only say SPECT is unreliable, but as well, PET scans.

The operative federal rule is rule 702 of the Federal Rules of Evidence. That rule provides:

...If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

F.R.Civ.P. Rule 702.

Under that rule, the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) has required that expert testimony must be both relevant and reliable. *Daubert* at 589. This Court spoke to the Court's "gate keeping" role in the case of *Schlecht v. American Power Pull Corp., et al.*, 33 M.F.R 11, 30. There Magistrate Erickson ruled:

Rulings on the admissibility of expert testimony under Fed. R. Evid. 702 are in the sound discretion of the trial court. *General Electric Co. v. Joiner*, 522 U.S. 136, 142 (1997). In determining whether testimony is both relevant and reliable the Court must engage in an assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. *Daubert*, at 592-3. The case law has identified various factors which bear on the issue of whether certain testimony is sufficiently reliable, however the list is not exclusive and the district court has "the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 142, 152, 119 S. Ct. 1167, 1171, 1176 (1999). *Daubert* merely requires that all expert testimony must satisfy a "standard of evidentiary reliability". *Id.* at 149, 119 S. Ct. at 1175 (quoting *Daubert*, 509 U.S. at 590, 113 S. Ct. at 2795). The requirement is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. *Kumho Tire*, at 152, 119 S. Ct. at 1176.

*Schlecht*, 33 M.F.R at 30.

In *Rohm v. Fuji Heavy Industries Co. and Subaru of America* 25 M.F.R. 204 (1999), this Court, in a *Daubert* challenge to Hedonic Damages ruled :

*Hedonic Damages* based upon willingness to pay principles may be controversial, but they have sufficient acceptance within the economic field to be reliable.

*Rohm*, 25 M.F.R. at 213.

## 1. MEDICAL LITERATURE

The Defense and Dr. Wilson cite the Assessment of Brain SPECT by the American Academy of Neurology, a 1996 publication that is now eleven years old. At the time of that report there were only six Brain Spect Studies using the radiopharmaceutical (HMPAO) available to the committee during its 1996 research and writing process and there was only the use of single head cameras. (Ex. 9.) Brain Matters uses a four head camera and HMPAO. The determinations of that article were addressed in other scientific literature, which concluded that the ability of SPECT to predict outcomes in mild TBI is unmatched by other modalities. Jacobs, A., Put, E., Ingels, M. and Bossuyt, A., One-year follow-up to Technitium-99m-HMPAO SPECT in Mild Head Injury, The Journal of Nuclear Medicine. 1996:37,1605-1609. (Medical literature, Ex. 12, pgs. 44-48.) Prospective Evaluation of Technetium-99m-HMPAO SPECT in Mild and Moderate Traumatic Brain Injury, Journal of Nuclear Med.1994; 35(6);947-8. (Ex. 12, pgs. 7, 11.)

In recognition of these significant advancements in SPECT technology, the European Association of Nuclear Medicine, considers the evaluation of TBI as a “common indication” for the authorization of brain SPECT imaging. European Association of Nuclear Medicine Procedure Guidelines for Brain Perfusion SPECT Using 99mTc-labeled Radiopharmaceuticals, European Journal of Nuclear medicine, 29, BP 36-BP42Cite 28. (Ex. 12, pgs. 30-43.)

Likewise, the American College of Radiology and the Society of Nuclear Medicine both

agree that SPECT is an accepted diagnostic test for the evaluation of TBI. American College of Radiology. (2003). ACR Practice Guideline for the Performance of Single- Photon Emission Computed Tomography (SPECT) Brain Perfusion Imaging. ACR Practice Guideline. Res. 19; 487-491 (1999). (Ex. 12, pgs. 25-29.) Society of Nuclear Medicine Procedure Guideline for Brain Perfusion Single Photon- Emission Computed Tomography ( SPECT) using Technetium-99m radiopharmaceuticals. 39, version 2.0, approved February 7, 1999. (Ex. 12, pgs. 1-6.)

Also, the 2003 CDC Report entitled “Report to Congress on Mild Traumatic Brain Injury in the United States; Steps to Prevent a Serious Public Health Problem” notes that “a variety of radiological and laboratory techniques have been used to *diagnose* TBI, including x-rays of the skull, computed, tomography of the brain, MRI (magnetic resonance imaging), and SPECT (single photon emission computed tomography).”[emphasis added], National Center for Injury Prevention and Control, Report to Congress on Mild Traumatic Brain Injury in the United States: Steps to Prevent a Serious Public Health Problem, Atlanta, Georgia: Centers for Disease Control and Prevention. 2003. (Ex. 12, pgs. 61, 75.)

Though a clearly accepted medical procedure for the diagnosis of mild traumatic brain injury, many scientific articles discuss and call for a multimodal integration of clinical evaluation, neuropsychological assessment, and cerebral perfusion studies in the evaluation of mild traumatic brain injury. Cerebral Blood Flow in Chronic Symtomatic Brain Injury. Psychiatry Research 2003 Nov; 124(3): 141-152. (Ex. 12, pgs. 12, 20-22.) That is exactly what is being done in this case.

## 2. CASE LAW

In their brief, Defendants question the utilization of scans, such as PET scans and SPECT

scans. Defendants cite *Penney v. Praxair, Inc.*, 116 F.3d 330 (8<sup>th</sup> Cir. 1997) in support of its position that PET scans are not reliable for use in courts.

First, PET scans are not even present in this case and any such discussion is irrelevant. Even if PET scans were at issue, the case Defendants cite related to the admissibility of PET scans is not applicable. In *Penney*, the issue was whether a trial court erred in excluding PET scan evidence. The plaintiff's PET scan was compared to PET scans from a control group of 31 people ranging in age from 18 to 70 to detect abnormalities in the brain. The 8<sup>th</sup> Circuit Court of Appeals found that the trial court did not abuse its discretion in excluding that evidence because plaintiffs failed to establish sufficient foundation to support the admission. *Penney*, 116 F.3d at 333. The court questioned how accurate a comparison that particular control group could provide, noting among other things, that plaintiff was 66 years old.

*Id.* Therefore, it was the plaintiff's foundation that was held unreliable, not the PET scan itself.

Defendants cite several cases for their argument that SPECT scans are not reliable under Rule 702 F.R.Civ.P. *Brent Boyd v. Burt Bell, Pete Roselle NFL Players' Retirement Plan*, 410 F.3d 1173 (9<sup>th</sup> Cir. 2005); *Summers and Potts v. Missouri Pac. R.R. System*, 132 F.3d 599 (10<sup>th</sup> Cir. 1997); *Spect Imaging, Inc. V. Allstate Ins. Co.*, 633 N.W.2d 461 (Mich. 2001); *Seibert v. Standard Ins. Co.*, 220 F.Supp.2d 1128 (Central Dist. Cal. 2002); *Garner-Cook v. Sec'y*, Not Reported in Fed. Cl., 2003 WL 2149667 (Fed. Cl. Apr. 28, 2003); *In re Welding Fume Products Liability Litigation*, 2006 WL 45078593 (N.D. Ohio Aug. 8, 2006).

All of the cases Defendants cite are distinguishable and not persuasive authority. In *Brent Boyd v. Burt Bell, Pete Roselle NFL Players' Retirement Plan*, 410 F.3d 1173 (9<sup>th</sup> Cir. 2005), the issue was an ERISA administrator (Retirement Board) abused its discretion in determining that a

former NFL player's disability arose from his football activities. Boyd's doctors utilized a SPECT scan to diagnose brain injury. The court held that the Retirement Board did not abuse its discretion because of the inconsistent and incomplete medical reports. *Brent Boyd*, 410 F.3d at 1179. There was absolutely no discussion regarding whether SPECT scans are admissible under Rule 702.

*Summers and Potts* addressed the use of SPECT scans to diagnose "chemical sensitivity". *Summers and Potts*, 132 F.3d at 604. *Seibert* discussed the use of SPECT scans to diagnose Chronic Fatigue Syndrome, although not even in the context of admissibility under Rule 702. *Seibert*, 220 F.Supp.2d at 1137. *Garner-Cook* questioned the use of SPECT and PET scans to diagnose demyelinating diseases from Hepitis B vaccinations, but had no discussion of admissibility of those scans under Rule 702. *Garner-Cook*, 2003 WL 2149667, \* 9. An issue in the case, *In re Welding Fume Products Liability Litigation*, was the admissibility of SPECT scans in the context of diagnosing Parkinson's disease due to chemical exposure. *In re Welding Fume Products Liability Litigation*, 2006 WL 45078593, \*2, 3.

Plaintiff Samantha Chilcote is not requesting admission of SPECT scans for diagnosis of chemical sensitivity, Chronic Fatigue Syndrome, demyelinating diseases, nor Parkinson's Disease.

It is worth noting that even if Plaintiff was urging the admission for chemical exposure injuries, there is conflicting authority. *Rhilinger v. Jancsics*, No. 932223, 1998 WL 1182058, at \*4-5 (unpublished, Mass.Super. 1998) (Ex. 13.) In *Rhilinger*, a SPECT scan was allowed as one of the diagnostic tools for diagnosing brain injury due to chemical exposure. *Id.* at \*4-5. The court noted that evidence of SPECT imaging is admissible where it was one of a constellation of

diagnostic tools in support of a diagnosis and accepted the plaintiff's position that the medical community had used SPECT technology for at least 15 years prior. *Id.* The court concluded that there was no dispute that SPECT scans show abnormalities in brain function nor was there a dispute that SPECT scans cannot conclusively establish the existence or non-existence of Toxic Solvent Encephalopathy in a patient. *Id.*

Defendants' reliance on *Spect Imaging, Inc. v. Allstate Ins. Co.*, 633 N.W.2d 461 (Mich. 2001) is also misplaced. *Spect Imaging, Inc.* addressed whether the trial court erred in determining as a matter of law that SPECT scans constitute "reasonable and necessary expenses" under a particular insurance policy for diagnosing traumatic brain injury. The appellate court held that the trial court did err because there were questions of fact whether the scans were "reasonable and necessary" for each individual insured. *Spect Imaging, Inc.*, 633 N.W.2d at 576. The case was remanded for an evidentiary hearing to determine admissibility under Rule 702.

With the scientific literature demonstrating not only the acceptability of SPECT scans, but more so, its great usefulness in the diagnosis and treatment of brain injury, courts are allowing its admissibility and indicating acceptance of the scan's reliability. *In re Air Crash at Little Rock Arkansas*, 291 F.3d 503, 511 (2002); *Fini v. General Motors Corp.* 2003 WL 1861025, at \*4 (unpublished, Mich.App. 2003) (Ex. 14.)

The issue in *In re Air Crash at Little Rock Arkansas* was whether Post Traumatic Stress Disorder (PTSD) was actually a physical injury to the brain. The Court questioned why the plaintiff was not given a PET scan nor a SPECT scan, both of which the plaintiff's doctor testified could be used to show the functioning of the plaintiff's brain. *In re Air Crash at Little Rock Arkansas*, 291 F.2d at 511.

In *Fini*, the use of SPECT scans at trial were challenged by the defendants on appeal. The court held that the trial court was correct in ruling the SPECT scans admissible, concluding that the “evidence demonstrated that SPECT scans were generally accepted within the scientific community as having an ability to show abnormalities in brain functioning.” *Fini* at \*4.

Attached as Exhibit 15 is the transcript of the order in *Searcy v. Hamburger*, Civil Action # 02-Z-2260 (MJW). There, Senior Judge Zita L. Weinshenk of the United States District Court for the District of Colorado ruled that the testimony of Dr. Hipskind of Brain Matters Imaging Centers was admissible under Rule 702 and *Daubert*.

Clearly, the medical literature and case law supports the admissibility of SPECT scans and Dr. Hipskind’s testimony under Rule 702 and *Daubert*. Defendants and their expert effectively concede that fact and have cited no case law that persuasively supports their position.

## **II. CONTINUANCE OF TRIAL**

Defendants’ factual representations are not accurate. Defendants’ Motion represents there was a break in Plaintiff’s medical treatment. That is not accurate. Exhibit 5 is the medical treatment chronology. There is no break. Plaintiff acknowledges more treatment was possible, if Defendants would pay it as they are supposed to under the law. Defendants represent they “very recently” learned of the SPECT scan and other treatment, and did not have time for discovery. That is also not accurate. Exhibit 8 is the summary, and communications on that point.

Defendants received the SPECT scan and information regarding Drs. Hipskind, Espy, and Cullis on December 4, 2007 (60 days before trial). Exhibit 8 shows the great lengths Plaintiff’s counsel went to make the witnesses available for depositions. That exhibit shows Defendants were repeatedly asked to tell us when they wanted to take the depositions. They have had six



INDEX TO EXHIBITS TO PLAINTIFF'S RESPONSE BRIEF

1. Dr. Stahl Medical Record
2. Dr. Lindsay Medical Record
3. Dr. Harrison Neuropsychological Record
4. Dr. Ziejewski Report
5. Medical Treatment Log
6. Dr. Cullis Deposition, pages cited
7. SPECT Scan Report
8. Summary of Communications with Defense Counsel
9. Dr. Hipskind Affidavit
10. Supplemental Response to Discovery (Dr. Beljan Report)
11. Dr. Beljan Affidavit
12. Medical Literature
13. Rhilinger v. Jancec, Case No. 932223, 1998 WL 1182058 at \*4-5 (Unpublished, Maso. Seper. 1998)
14. Fini v. General Motors Corp., 2003 WL 1861025 at \*5 (Unpublished, Mich. App. 2003)
15. Transcript and Order. Searcy v. Hanbergor, Cause No. 02-2-2260. United States District Court for the District of Colorado
16. Dr. Espy Deposition, pages cited