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ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
06/21/2019 at 03:18:00 PM
Clerk of the Superior Court
By Treva Cutts, Deputy Clerk

6 Attorneys for Plaintiff/Cross-Defendant LARRY GERACI and
7 Cross-Defendant REBECCA BERRY

8 **SUPERIOR COURT OF CALIFORNIA**
9 **COUNTY OF SAN DIEGO, CENTRAL DIVISION**

10 LARRY GERACI, an individual,

11 Plaintiff,

12 v.

13 DARRYL COTTON, an individual; and DOES 1
14 through 10, inclusive,

15 Defendants.

16 DARRYL COTTON, an individual,

17 Cross-Complainant,

18 v.

19 LARRY GERACI, an individual, REBECCA
20 BERRY, an individual, and DOES 1
THROUGH 10, INCLUSIVE,

21 Cross-Defendants.

Case No. 37-2017-00010073-CU-BC-CTL

Judge: Hon. Joel R. Wohlfeil
22 Dept.: C-73

**PLAINTIFF/CROSS-DEFENDANTS'
23 NOTICE OF MOTION AND MOTION IN
LIMINE TO EXCLUDE EVIDENCE OF
24 COTTON'S ALLEGED HEART ATTACK
AND/OR TIA AND/OR ALLEGED
25 PHYSICAL, MENTAL, OR
26 PSYCHOLOGICAL DAMAGE**

[MIL NO. 13 OF 15]

[IMAGED FILE]

Complaint filed: March 21, 2017
27 Trial Date: June 28, 2019

28 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:**


PLEASE TAKE NOTICE that on June 28, 2019 at 8:30 a.m. or as soon thereafter as the
matter may be heard in Department C-73 of the San Diego Superior Court, located at 330 West
Broadway, San Diego, California, Plaintiff/Cross-Defendant, LARRY GERACI, and Cross-
Defendant, REBECCA BERRY, will move *in limine* pursuant to Evidence Code §§ 210, 350 and
352 for orders precluding any evidence, examination or reference to Mr. Cotton's alleged heart
attack and/or TIA and/or Mr. Cotton's alleged ongoing physical, mental and psychological damage

1 which he attributes to the litigation. Such evidence is not relevant, is more prejudicial than
2 probative, and would in any event require expert witness testimony. Mr. Cotton has not designated
3 any expert witnesses.

4 This motion will be based on this Notice of Motion, the Memorandum of Points and
5 Authorities, and Notice of Lodgment served and filed herewith, on the records and file herein, and
6 on such evidence as may be presented at the hearing of this motion.

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8 FERRIS & BRITTON
A Professional Corporation

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10 Dated: June 20, 2019

11 By: 
12 Michael R. Weinstein
13 Scott H. Toothacre
14 Attorney for Plaintiff and Cross-Defendant LARRY
15 GERACI and Cross-Defendant REBECCA BERRY
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Mr. Cotton testified that right after the hearing on Mr. Cotton’s Request for Temporary
4 Restraining Order, he had an emergency room visit and he was diagnosed with a Transient Ischemic
5 Attack or TIA. (Cotton Depo. p. 229:23-25, true and correct excerpts are attached as Exhibit 13 to
6 NOL.) Mr. Cotton attributes the TIA to the ongoing litigation and the stresses related to financing
7 the litigation. (Cotton Depo. p. 234:15-19; 235:4-9, true and correct excerpts are attached as Exhibit
8 13 to NOL.) Mr. Cotton was not prescribed any medications at Scripps related to his TIA. (Cotton
9 Depo. 237:15-17, true and correct excerpts are attached as Exhibit 13 to NOL.)

10 Moreover, in response to Form Interrogatory 17.1 H(b), Mr. Cotton responded: “Defendant
11 has sustained significant damages as referenced herein; Defendant has and is suffering from ongoing
12 physical, mental and psychological damage *which requires experts to fully ascertain and describe.*”
13 (Bold/Italics added) (True and correct copies of excerpts of that interrogatory response is attached
14 as Exhibit 17 to NOL.)

15 Mr. Cotton has not designated a medical professional as an expert witness in this case, nor
16 has he listed a medical professional on his witness list. Thus, it appears that he has no way to put
17 on the evidence which he admits “requires experts to fully ascertain and describe.”

18 **II. LEGAL ARGUMENT**

19 **A. The Evidence is Not Relevant.**

20 Evidence of physical, medical and psychological damage arising from the ongoing litigation
21 and the stresses related to financing litigation are not relevant to any issues to be determined in this
22 action.

23 **B. The Court May Exclude Prejudicial Evidence in Advance of Trial by way of an**
24 **In Limine Motion.**

25 The court has the inherent power to grant a motion in limine to exclude “any kind of evidence
26 which could be objected to at trial, either as irrelevant or subject to discretionary exclusion as unduly
27 prejudicial.” (*Clemens v. American Warranty Corp.* (1987) 193 Cal.App.3d 444; *Peat, Marwick,*
28 *Mitchell & Co. v. Superior Court* (1988) 200 Cal.App.3d 272, 288).

1 **C. The Evidence Regarding The Diagnosis and Causation of Mr. Cotton’s TIA**
2 **and/or Heart Attack and/or his Alleged Ongoing Physical, Mental and**
3 **Psychological Damage are the Exclusive Domain of the Medical Profession**

4 Medical opinions, including opinions on the diagnosis and cause of injury, are the exclusive
5 domain of the medical profession. Medical doctors are qualified (in fact, are the only ones qualified
6 to offer expert testimony relevant to medical causation. (*Salasguevara v. Wyeth Laboratories, Inc.*
7 (1990) 222 Cal.App.3d. 379; *Gin Non Louie v. Chinese Hospital Association* (1967) 249 Cal.App.2d
8 774, 784; *Stephenson v. Kaiser Foundation Hospitals* (1962) 203 Cal.App.2d 631, 635.)

9 The law is well settled that causation must be proven within a reasonable medical probability
10 based upon competent expert testimony. Mere possibility alone is insufficient to establish a prima
11 facie case. “That there is a distinction between a reasonable medical ‘probability’ and a medical
12 ‘possibility’ needs little discussion. There can be many possible ‘causes,’ indeed, an infinite number
13 of circumstances which can produce an injury or disease. A possible cause only becomes ‘probable’
14 when, in the absence of other reasonable causal explanations, it becomes more likely than not that
15 the injury was a result of its action. This is the outer limit of inference upon which an issue may be
16 submitted to the jury. [Citation]” (*Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396,
17 402-403.)

18 Inasmuch as Mr. Cotton has failed to designate a medical doctor as an expert witness, the
19 evidence of the diagnosis and causation related to Mr. Cotton’s TIA and/or heart attack and/or
20 alleged ongoing physical, mental and psychological damage, which he admits must be proven by an
21 expert, must be excluded.

22 **D. Mr. Cotton May Not Offer Hearsay Statements Regarding the Diagnosis and**
23 **Causation Related to His Alleged TIA and/or Heart Attack**

24 Any testimony by Mr. Cotton regarding what he was told during his emergency room visit
25 by the doctors or physician’s assistants would be inadmissible pursuant to California Evidence Code
26 §§ 1200 et. seq., as inadmissible hearsay without exception.

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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO, CENTRAL DIVISION**

LARRY GERACI, an individual,
Plaintiff,
v.
DARRYL COTTON, an individual; and DOES 1
through 10, inclusive,
Defendants.

DARRYL COTTON, an individual,
Cross-Complainant,
v.
LARRY GERACI, an individual, REBECCA
BERRY, an individual, and DOES 1
THROUGH 10, INCLUSIVE,
Cross-Defendants.

Case No. 37-2017-00010073-CU-BC-CTL

Judge: Hon. Joel R. Wohlfeil
Dept.: C-73

**ORDER [PROPOSED] RE
PLAINTIFF/CROSS-DEFENDANTS'
MOTION IN LIMINE NO. 13 OF 15 TO
EXCLUDE EVIDENCE OF COTTON'S
ALLEGED HEART ATTACK AND/OR
TIA AND/OR ALLEGED PHYSICAL,
MENTAL, OR PSYCHOLOGICAL
DAMAGE**

[MIL NO. 13 OF 15]

[IMAGED FILE]

Complaint filed: March 21, 2017
Trial Date: June 28, 2019

1 After considering all moving, opposition and reply papers, as well as the oral argument of counsel,
2 **IT IS HEREBY ORDERED THAT** Plaintiff/Cross-Defendants' Motion in Limine No. 13 of 15 is
3 [GRANTED/GRANTED WITHOUT PREJUDICE/DENIED/DENIED WITHOUT PREJUDICE].
4 [Any evidence, examination, argument or other reference to Mr. Cotton's alleged heart attack and/or
5 TIA and/or Mr. Cotton's alleged ongoing physical, mental and psychological damage which he
6 attributes to the litigation, is precluded, and all counsel are ordered to advise their clients and
7 witnesses of the Court's Order.]

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9 Dated: July __, 2019

10 _____
11 HON. JOEL R. WOHLFEIL
12 Judge of the San Diego County Superior Court
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