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U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

IN RE: CHANTIX (VARENICLINE) PRODUCTS LIABILITY LITIGATION

Master File No.: 2:09-CV-2039-IPJ
MDL No. 2092

Plaintiff: Judy Ann Whitely, as trustee for the next-of-kin of Mark Alan Whitely, deceased

This Order Relates To:
CASE NO: 2:10-CV-1463-IPJ

MEMORANDUM OPINION AND ORDER

Pending before the court are a variety of motions and responses thereto, as well as voluminous exhibits, filed in the above styled case. The facts relevant to all of the pending motions are as follows:

This case is one of many in the above styled multi-district litigation in which users of the prescription drug Chantix have sued Pfizer, Inc., the manufacturer of the drug, alleging a wide range of physical and mental injuries from the use of the drug. In this specific action, the plaintiff alleges that the decedent committed suicide because of his use of Chantix, an aid in smoking cessation. The defendant denies that Chantix in any manner was the cause of decedent's suicide. The parties agree that Minnesota substantive law, and federal procedural law, govern this action.

With this background, the court considered each of the pending motions.

1. Defendant's Motion to Strike Untimely Expert Report of Fred Apple, Ph. D. (doc. 25) and Plaintiff's Response in Opposition thereto (doc. 50):

Defendant seeks to have a "supplemental" expert report, submitted by Fred Apple, Ph.D., and dated July 15, 2012, stricken on the basis of untimeliness. Defendant received the report on July 16, 2012, which post-dated Dr. Apple's deposition. Pursuant to Pretrial Order No. 9, plaintiff was required to serve case-specific expert reports no later than May 15, 2012. Although supplements to such reports are permitted by Rule 26(e), Fed.R.Civ.Pro., defendant complains that the July 15, 2012, report was not in the nature of a supplement because it contained entirely new opinions.

Plaintiff asserts that Dr. Apple's July 15, 2012, report is a rebuttal report, specific to the opinions of one of defendant's experts, Dr. Neil Grunberg. Plaintiff's opposition (doc. 50), at 2. According to plaintiff, defendant's expert reports, timely made on June 15, 2012, raised the issue of whether the decedent was suffering from nicotine withdrawal at the time of his death. *Id.* In support of this testimony, in his July 12, 2012, deposition, Dr. Grunberg opined for the first time that the toxicology report results indicated decedent had not smoked in the three days preceding his death. Thus, in response to such opinion, the plaintiff offered Dr. Apple's opinion that the toxicology report showed metabolites of nicotine, suggesting that decedent was in fact smoking shortly before he took his own life.

In his June 20, 2012, deposition, Dr. Apple disclosed his opinion that the metabolites in the toxicology report from MedTox contradicted defense experts. Pfizer's able counsel extensively questioned Dr. Apple regarding the basis for this opinion, but avoided asking any questions regarding Dr. Apple's opinion of Dr. Grunberg's report. In follow-up, Dr. Apple then submitted an additional expert report on his opinions regarding Dr. Grunberg's expert report.

According to the Scheduling Order agreed to by the parties and entered by the court, the plaintiff's deadline for disclosure of experts was May 15, 2012. Defendant had until June 15, 2012, and "case-specific discovery shall be completed by July 15, 2012." *See* PTO 9, ¶ 18. Because the parties never proposed any deadline for expert rebuttal reports, the court is of the opinion that this dispute is controlled by Rule 26(a)(2)(D)(ii), Fed.R.Civ.Pro. That Rule states in relevant part:

Absent a stipulation or a court order, the disclosures must be made:

> (ii) If the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

Rule 26(a)(2)(D)(ii), Fed.R.Civ.Pro.

The court finds Dr. Apple's opinions regarding whether the decedent smoked in the time preceding his death is clearly offered to rebut Dr. Grunberg's opinions that the decedent was suffering from nicotine withdrawal. As the Southern District

of Florida recently noted,

> Even assuming arguendo that [the expert]'s disclosure does not comport with the Court's Scheduling Order, the Court has discretion to decide whether to strike an expert witness. *Jackson v. Harvard Univ.*, 900 F.2d 464, 468–69 (1st Cir.1990). In determining whether to strike an expert witness, the Court should consider "several factors, including the history of the litigation, the proponent's need for the challenged evidence, the justification (if any) for the late disclosure and the opponent's ability to overcome its adverse effects (i.e., the degree of prejudice and whether it can be cured or ameliorated)." *Kendall Lakes Towers Condo. Ass'n, Inc. v. Pacific Ins. Co., Ltd.,* No. 10–24310–CIV, 2011 WL 6372198, at *3 (S.D.Fla. Dec.20, 2011) (citing *MaCaulay v. Anas*, 321 F.3d 45, 51 (1st Cir.2003)).

Feliciano v. City of Miami Beach, 2012 WL 12540, *1 (S.D.Fla.2012).

Under the facts of this specific case, the court is of the opinion that Dr. Apple's July 15, 2012, report is necessary for the plaintiff to offer testimony to rebut the proposition that the decedent was suffering from nicotine withdrawal. The court also finds that "the opponent's ability to overcome its adverse effects" is not at issue in this dispute, as defendant was aware of Dr. Apple's additional opinions and in fact examined him on the same at the time of his June 20, 2012, deposition. The defendant simply fails to demonstrate any real harm or surprise to merit such a drastic remedy as striking Dr. Apple's July 15, 2012 report.

The court finds no prejudice to the defendant from allowing this testimony. In fact, at the July 12, 2012, deposition of Dr. Grunberg, questions designed to refute the additional opinions of Dr. Apple were asked of Dr. Grunberg. *See*

defendant ex. 7, at 43-47, 163-164 (doc. 25-7), plaintiff ex. 6, at 161-164 (doc. 50-7). The same again supports the court's opinion that the defendant suffers no harm or surprise from the July 15, 2012, report.

Additionally, the court finds the materials contained in the July 15, 2012, report are clearly within the confines of Rule 26(e)(2), Fed.R.Civ.Pro., which states that the duty to supplement includes information given during the expert's deposition. Under this Rule, additions to information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due. *See* Rule 26(e)(2), Fed.R.Civ.Pro. That deadline was August 23, 2012. Scheduling Order (doc. 10), ¶ 10.

Having considered the foregoing, and being of the opinion that the defendant's motion to strike untimely expert report of Fred Apple, Ph.D., is due to be denied;

It is therefore **ORDERED** by the court that said motion (doc. 25) be and hereby is **DENIED.**

2. Defendant's Motion to Exclude in Part the Testimony of Mark Cohen, Ph.D. (doc. 31); Plaintiff's Response (doc. 56); Defendant's Reply (doc. 76); and Defendant's Supplemental Reply (doc. 79):

This dispute arises under and is controlled by Minnesota law. Dr. Mark Cohen was designated by plaintiff as an expert for opinions concerning the plaintiff and her deceased spouse's financial health at the time of the decedent's death, and

on the economic loss caused by decedent's death. The defendant argues any testimony regarding Mr. Whitely's lost earning capacity is necessarily speculative, as the decedent was retired and allegedly had no immediate plans to return to work.[1] Under Minnesota law

> A tort award for loss of future earning capacity is awarded to compensate for the impairment of one's ability to work due to the negligence of another. *See Midway Nat'l Bank v. Estate of Bollmeier*, 504 N.W.2d 59, 65 (Minn.App.1993). Jury awards for future economic losses are merely estimates of damages likely to occur in the future. During a trial it is difficult to prove future damages with absolute certainty and therefore future damages are recoverable if they are reasonably certain to occur. *Carpenter v. Nelson*, 257 Minn. 424, 427, 101 N.W.2d 918, 921 (1960); *Kwapien v. Starr*, 400 N.W.2d 179, 183 (Minn.App.1987). Loss of future earning capacity focuses on the impairment of the power to earn and does not require proof of actual lost earnings. *Wilson v. Sorge*, 256 Minn. 125, 130-31, 97 N.W.2d 477, 482 (1959).

Simpson v. American Family Ins. Co., 603 N.W.2d 860, 863 (Minn.App.2000).

Having considered the arguments of the parties and the relevant law, the court is of the opinion that whether or not the decedent would have any future earnings is wholly a factual matter reserved for the jury. See e.g., *Grilz v. Grilz,* 1993 WL 515816, *3 (Minn.App.1993) ("Although appellant was 69 years old at the time of trial, he made it clear that he did not intend to retire. Based on this evidence, the

[1]The court notes that in Dr. Jacobs' expert report, he writes that "as of two months prior to his death, Mr. Whitely was still supporting himself and his wife by working part-time assisting in delivering newspapers and loading trucks for the *Duluth News Tribune*." Jacobs' Report, at 10. Similarly, the defendant offers Dr. Jacob's opinions that the decedent was, at least in part, panicked over financial difficulties. *See e.g.*, Jacobs' Report, at 10; As such, whether decedent planned to return to work and have future earnings is both highly relevant and a factual determination.

jury's award was not shocking and did not result in plain injustice.") (citation omitted). Under Minnesota law,

> There are 12 factors for a jury to consider in determining an amount which "will fairly and adequately compensate [plaintiff] for the losses .... suffered as a result of [the] death: (1) past contributions, (2) life expectancy at the time of death, (3) health, age, habits, talents, and success, (4) occupation, (5) past earnings, (6) likely future earning capacity and prospects of bettering oneself had he or she lived, (7) living expenses, (8) legal obligation to support spouse or next of kin and the likelihood of fulfilling that obligation, (9) reasonable funeral and necessary medical expenses, (10) probability of paying off existing debts, (11) future counsel, guidance, and aid, and (12) future advice, comfort, assistance, and protection.

Youngquist v. Western Nat. Mut. Ins. Co., 716 N.W.2d 383, 386 (Minn.App.2006), citing 4A Minnesota Practice, CIVJIG 91.75 (1999).

Having considered the foregoing, and being of the opinion that the issue of whether decedent would have ever returned to work is squarely in the province of the jury, the court is of the opinion that the motion to exclude the opinion of Dr. Mark Cohen, concerning the decedent's potential earnings should he ever return to work, is due to be denied.[2]

It is therefore **ORDERED** by the court that said motion (doc. 31) be and

[2]Both the plaintiff and defendant offer various Minnesota cases which they argue clearly support their respective positions concerning whether a jury may award damages for loss of future earning capacity. Each of those cases turn on the specific facts before the court in each instance, and whether the plaintiff met the burden of proving such a loss. In other words, whether such testimony is admissible turns on the facts of each individual case. The court decides today only that testimony regarding the decedent's future earning capacity will not be held inadmissible at this time. Should testimony at trial support a finding that the decedent never would have returned to work, the court will make the appropriate rulings at that time.

hereby is **DENIED.**

3. Plaintiff's Motion to Amend Complaint to Add Claim for Punitive Damages (docs. 32, 39, 41 and 49); Defendant's opposition (docs. 61 and 66); and Plaintiff's Reply (docs. 73 and 80):

Under Minnesota law, a complaint cannot be filed with a claim for punitive damages. *See* Minn.Stat. § 549.191. Rather,

> After filing the suit a party may make a motion to amend the pleadings to claim punitive damages. The motion must allege the applicable legal basis under section 549.20 or other law for awarding punitive damages in the action and must be accompanied by one or more affidavits showing the factual basis for the claim. At the hearing on the motion, if the court finds prima facie evidence[3] in support of the motion, the court shall grant the moving party permission to amend the pleadings to claim punitive damages....

Minn.Stat § 549.191. *See also Haley v. I-Flow, LLC*, – F.Supp.2d – , 2012 WL 1185680, *2 (D.Minn.2012) ("In diversity actions in this Court, the pleading of punitive damage claims must generally conform to the requirements of Minnesota Statutes section § 549.191.").

In support of her motion, the plaintiff alleges the factual basis for a claim for punitive damages, as required by Minnesota law. In essence, the plaintiff asserts facts and documents which could support a finding that the defendant knew or intentionally disregarded facts that demonstrated a high probability of injury to the

[3]Minnesota law defines prima facie evidence as "...that evidence which, if unrebutted, would support a judgment in that party's favor." *McKenzie v. N. States Power Co.*, 440 N. W .2d 183, 184 (Minn.Ct.App.1989).

rights or safety of others. *See* Minn.Stat. § 549.20. When deciding whether plaintiff has established prima facie evidence in support of a claim for punitive damages, "[t]he Court makes no credibility rulings, and does not consider any challenge, by cross-examination or otherwise, to the plaintiff's proof." *Berczyk v. Emerson Tool Co.*, 291 F.Supp.2d 1004, 1008 n. 3 (D.Minn.2003).

In reaching a determination on whether Plaintiff has established a prima facie case for punitive damages, the Court must carefully scrutinize the evidence presented by the moving party to make sure that it amounts to a prima facie showing that the substantive requirements for punitive damages have been met. *Haley,* 2012 WL 1185680 at *2; citing *Ulrich v. City of Crosby*, 848 F.Supp. 861, 867 (D.Minn.1994). Indeed, "the function of the trial court is to do more than 'rubber stamp' the allegations in the motion papers"; rather the Court must determine if there is evidence in the record to support the plaintiff's prima facie case.[4] *Shetka*

[4]This court has already extensively considered the factual backdrop of this case. See e.g., Memorandum Opinion of July 23, 2012, in Master Case 2:09-cv-2039-IPJ, at 2-4. The court found:

> According to the plaintiffs, Chantix causes depression and other psychiatric disorders, some so severe that reports of suicide and attempted suicide from Chantix use have been made. Master Consolidated Complaint, ¶ 32. The plaintiffs allege defendant either knew or should have known about such side effects, but for defendant's intentional failure to design studies which were reflective of their targeted population. Master Consolidated Complaint, ¶¶ 27-31, 33-38. The defendant denies there is any merit to such allegations, and asserts that numerous studies show the side effects of Chantix to be in line with those of other nicotine replacement therapies (NRTs), such as nicotine patches.
>
> Because of reports of suicidal thoughts and acts, as well as other neuropsychiatric disorders, the labeling of Chantix since May 2006 has been changed to strengthen the warnings on the package inserts, culminating in a "black box warning" being placed on the package insert in July 2009. *See* defendant ex. 1 (doc. 590-1). In

v. Kueppers, Kueppers, Von Feldt & Salmen, 454 N.W.2d 916, 918 n. 1 (Minn.1990). A mere showing of negligence is not sufficient" to sustain a claim for punitive damages. *Admiral Merchs. Motor Freight, Inc. v. O'Connor & Hannan*, 494 N.W.2d 261, 268 (Minn.1992).

In essence, the plaintiff's evidence reflects that since its approval in May 2006, questions concerning the safety of Chantix have arisen due to reports of depression and suicidal behavior in those taking the medication. See e.g., *Rate of*

November 2007 the "adverse reactions" section of the label was updated to reflect post-marketing reports of depression, agitation, changes in behavior, suicidal ideation and suicide in patients taking Chantix. *See* defendant ex. 2 (doc. 590-2). In January 2008 the label was again updated, this time adding a "warnings" section which reflected "[s]erious neuropsychiatric symptoms have occurred in patients being treated with Chantix." Defendant ex. 3 (doc. 590-3) at 10. The warning continued that people taking Chantix "should be observed for ... changes in behavior, agitation, depressed mood, suicidal ideation and suicidal behavior." *Id*. That label also warned that such symptoms had been reported in patients taking Chantix, that individuals with serious psychiatric illnesses were excluded from pre-marketing studies of Chantix, and that the safety of Chantix had not been established in individuals with such pre-existing illnesses. *Id.* The label was again strengthened in May 2008 to state that patients taking Chantix who develop neuropsychiatric symptoms should stop taking the drug and contact their health care provider immediately. Defendant ex. 4 (doc. 590-4).
....

In October 2011 the FDA released a Safety Announcement which reported that the FDA reviewed two FDA-sponsored studies evaluating the risk of neuropsychiatric injury from Chantix. Defendant ex. 6 (doc. 590-6). That Announcement states

> Neither study found a difference in risk of neuropsychiatric hospitalizations between Chantix and ...NRT.... However, both studies had a number of study design limitations, including only assessing neuropsychiatric events that resulted in hospitalization, and not having a large enough sample size to detect rare adverse events .... Although these two studies did not suggest an increased risk of neuropsychiatric events that result in hospitalization, they do not rule out an increased risk of other neuropsychiatric events with Chantix.

Id., at 1. That Announcement further states that "[o]verall, FDA has determined that the current warnings in the Chantix drug label, based on post-marketing surveillance reports, remain appropriate." *Id.*, at 2.

Neurospychiatric Events in Varenicline Users, May 4, 2012 (doc. 73-7); *Use of the Patient Health Questionnaire-2 to Predict Suicidal Ideations in Patients Taking Varenicline* (doc. 73-10). The plaintiff has also presented evidence which arguably establishes defendant's cognizance of such reports. *See e.g.*, plaintiff ex. 000891 (11/13/2007 email from defendant employee stating "... I am not sure at this point what would be needed if we need to further describe the completed suicide cases to FDA ... but attached is an overview ... which summarizes the 13 cases reported through 13 October 2007"); plaintiff ex. 001266 (9/17/2007 letter from FDA to defendant noting "a possible safety signal involving suicidal ideation in patients treated with Chantix..."); plaintiff ex. 001949 (defendant internal email dated 1/17/2008 noting "[o]f the 29,522 post-marketing cases received through 31 December 2007, there is a total of 601 cases that contain an event coding to the Standard MedDRA Query (SMQ) Suicide/Self-injury.");[5] plaintiff ex. 002184 (defendant internal email dated 11/7/2007 stating "[I]n totaling the number of cases for this submission [to the FDA] we are looking at about 13,000+."); plaintiff ex. 002563 (emails between defendant and FDA dated 11/5/2007 and 11/8/2007, with FDA recommendations for language change in labeling to reflect "Treatment-emergent onset of psychiatric symptoms...have been reported in patients initiating

[5]A follow-up to this email suggests expressing "the count of reported psychiatric cases symptoms as a percentage (<0.01%) of the estimated patient exposure." Plaintiff ex. 003321.

treatment with Chantix.... not all patients had pre-existing psychiatric symptoms and not all had discontinued smoking. The role of Chantix in these cases is not yet clear."); plaintiff ex 002647 (4/4/2008 report of contact with FDA stating that while the FDA believed Chantix to be "an effective medicine in helping people to quit smoking, the agency is also concerned with the increase in neuropsychiatric symptoms, and in particular suicidality."); plaintiff ex. 012303; plaintiff ex. 012701; plaintiff ex. 015577.

Defendant of course disputes plaintiff's characterization of its actions as "deliberate indifference" and states numerous facts and evidence in support of its allegation that it was not deliberately indifferent. *See* defendant's response (doc. 66), at 8-25; defendant's exhibits (doc. 61), 1-3 and 5 (depo. of Dr. Martinia Flammer, at 92, stating "Neither myself, I can speak for myself in the medical, saw that there was any scientific evidence that Chantix causes a higher increased risk in these neuropsychiatric events that are due to the drug"), defendant ex. 15 (response to letter to editor in JAMA, 12/6/2006, explaining why defendant omitted individuals with psychiatric disorders from clinical trials), defendant ex. 17 (12/10/2007 comments from defendant on 11/2007 package insert update, stating "suicidal ideation was rare and occurred at a rate comparable to that seen in subjects who received placebo. There were no suicides attributed to CHANTIX in our clinical trials.") (doc. 61). Defendant also alleges that its actions after November

2007, when decedent committed suicide, cannot be considered in support of a claim for punitive damages. *Id.,* at 26. Clearly, what defendant knew prior to the time of Mr. Whitely's suicide is relevant to the issue of deliberate indifference. However, as stated above, there is ample evidence to support a prima facie case for punitive damages.[6]

Given the evidence reviewed by the court to date, the court is of the opinion that the plaintiff has satisfied the prima facie showing necessary in order to state a claim for punitive damages. The court has no opinion at this juncture as to whether the plaintiff can prove such claim by clear and convincing evidence so that punitive damages may be awarded, as such an issue in not currently before the court.

Having considered the foregoing, and being of the opinion the plaintiff's motion to amend complaint is due to be granted;

It is therefore **ORDERED** by the court that said motion (doc. 32) be and hereby is **GRANTED.**

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[6]In the voluminous evidentiary submissions before this court in both this and the main case, documents reflect that defendant arguably knew that Chantix had the potential to cause neuropsychiatric injuries, but designed its studies to exclude the class most susceptible to such injuries, namely those with prior psychiatric illness or injury. *See e.g.*, plaintiff ex. 004017; 006017; 007732; 007897. Additionally, the court has evidence before it that the defendant specifically designed its studies to have cut-offs of statistical significance at just above the point at which adverse reactions were seen. *See e.g.*, plaintiff ex. 008572. Similarly, an April 2007 email reflecting a report of a meeting of defendant's employees notes that "[a]greement was not reached to include the additional sentence, 'Care should be taken with patients with a history of psychiatric illness...." See ex. 2 (doc. 80). *See also* plaintiff ex. 009316 (defendant internal email congratulating employee for getting FDA to "rethink their position on placement of language on suicidality and suicides.").

4. Plaintiff's Motion to Exclude Testimony by James Ballenger Regarding General Causation (docs. 33 and 42); defendant's opposition (doc. 60); and plaintiff's reply (doc. 70):

The plaintiff seeks to exclude testimony by Dr. James Ballenger which falls within the realm of general causation testimony, as opposed to specific causation testimony. The defendant responds that Dr. Ballenger is a case specific expert and therefore was disclosed as such, but his opinions concerning the cause of decedent's suicide required Dr. Ballenger to review literature regarding whether Chantix causes suicide. The defendant does not dispute it did not disclose Dr. Ballenger prior to the deadline for case specific experts, that being June 15, 2012.

In his expert report, Dr. Ballenger states he was asked to render an opinion concerning the suicide of Mark Whitely and the plaintiff's allegation that Chantix was involved. *See* expert report of Ballenger (submitted as doc 42-1), at 1. The plaintiff challenges only the subsequent opinion that "there is no reliable scientific evidence showing that Chantix is associated with an increase in the base rate of serious neuropsychiatric events included suicide ideation, suicide attempts or completed suicide." *Id*. The report then goes on to criticize the general causation plaintiffs' experts, asserting that they "handpicked individual studies" or did not consider the "best evidence." *Id.*, at 2. It includes a section entitled "Summary of Chantix safety data" in which Dr. Ballenger opines that the "accumulated amount of reliable, well-controlled scientific data documenting that there is no increase in

serious neuropsychiatric events or in suicidal thought or behavior or completed suicide in patients taking Chantix is overwhelming and convincing."[7] *Id.*, at 18.

The court has already ruled on defendant's *Daubert* motions to strike plaintiffs' general causation experts on identical grounds to the criticisms raised by Dr. Ballenger. *See* 2:09-CV-2039-IPJ, Memorandum Opinion and Order of August 21, 2012 (doc. 642). In fact, the court finds defendant has multiple general causation experts already on the very issue of whether Chantix can cause "an increased risk of serious neuropsychiatric symptoms. Report of Ballenger, at 3. Allowing Dr. Ballenger to further testify to such issues, when he was not disclosed in a timely fashion as a general causation expert, is both duplicative and prejudicial to the plaintiff. As an expert for specific causation only, Dr. Ballenger is necessarily limited to opinions concerning whether Chantix did in fact cause the decedent's injuries. *See e.g., Kilpatrick v. Breg, Inc.*, 613 F.3d 1329, 1334 (11th Cir.2010). The court can find no basis to allow the defendant to add yet another general causation expert under the guise of labeling him an expert for specific causation.

Dr. Ballenger opines that the decedent suffered from "symptoms of panic disorder from at least 1955 and then consistently through the years up to his

[7]Interestingly, Dr. Ballenger testified in his deposition that he did not actually review any of defendant's internal documents or any of the documents defendant submitted to the FDA. Ballenger depo. (excerpt submitted as doc. 42-2) at 205.

suicide."[8] Report of Ballenger, at 5. Dr. Ballenger bases this post-mortem diagnosis in part on his own "belief that Mr. Whitely similarly believed that he had an "undetected life threatening illness." Report of Ballenger, at 21. He then leaps to the conclusion that "Mr. Whitely's undiagnosed and untreated panic disorder was a significant contributing factor in his suicide." Report of Ballenger, at 19. The court finds this spectacular leap of testimony is in no way dependent on Ballenger's testimony concerning whether Chantix can in fact cause suicidal behavior in the first place.[9]

Having considered the foregoing, and being of the opinion that the plaintiff's motion to exclude the general causation testimony of Dr. Ballenger is due to be granted;

It is therefore **ORDERED** by the court that said motion (doc. 33) be and hereby is **GRANTED**.

5. Plaintiff's Motion to Exclude Testimony that Mark Whitely Suffered from Panic Attacks or Panic Disorder (docs. 34 and 43); defendant's response (docs. 63 and 67); and plaintiff's reply (doc. 72):

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[8]Because the defendant's experts' opinions concerning whether the decedent suffered from panic attacks are the subject of a wholly separate motion, the court does not address this proposed testimony here.

[9]Obviously, Dr. Ballenger may testify that the decedent suffered from panic disorder, wholly undiscovered prior to his death, which was the cause of his suicide, without having to first testify to the "accumulated amount of reliable, well-controlled scientific data documenting that there is no increase in serious neuropsychiatric events or in suicidal thought or behavior or completed suicide in patients taking Chantix." Report of Ballenger, at 18.

Defendant offers the testimony of Dr. Ballenger and Dr. Douglas Jacobs that the decedent suffered from panic attacks which were never diagnosed by any doctor Mr.Whitely ever saw, despite the alleged fifty plus year history of these attacks, until they examined his medical records posthumously. *See e.g,.* Expert report of Ballenger (submitted as doc. 60-1), at 20-27; deposition excerpts of Dr. Jacobs, (submitted as doc. 72-2), at 85-92. The plaintiff seeks to exclude this testimony, as there is not a shred of evidence which supports it. *See e.g*, plaintiff's memorandum (doc. 34-1), at 2.

In the oft repeated standard, "*Daubert* requires that trial courts act as "gatekeepers" to ensure that speculative, unreliable expert testimony does not reach the jury." *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579, 597, n. 13, 113 S.Ct. 2786 (1993). Under *Daubert,* "a district judge asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist." *Allison v. McGhan Medical Corp*., 184 F.3d 1300, 1316–17 (11th Cir.1999). Neither the plaintiff nor the court questions that Dr. Ballenger and Dr. Jacobs are "genuine scientists." Rather, the court questions defendant procuring experts willing to testify to a post-mortem diagnosis when defendant itself agreed previously that the decedent had no underlying psychological issues.

In discussing which cases should be selected for trial, defense counsel

previously represented to this court that

> *Whitely* is unrepresentative for several reasons. Mr. Whitely had no history of psychiatric conditions, which is unlike over 70-80% of the docket; in the months before his death, he had angst over his physical health, his financial condition, and his estrangement from his siblings...

See Defendant Pfizer Inc.'s Submission Regarding the Selection of Trial Pool Cases, at 20. Given defendant's prior agreement that the decedent had no history of psychiatric conditions, defendant's attempt to manufacture such a history now is not well taken.

Dr. Ballenger based his diagnosis on the fact that decedent stuttered as a child, fainted several times at the age of 15, had tight muscles in his neck in 1970, and sought medical care three times for chest pain in four months. Ballenger report, at 22. These symptoms continued when, a year later, decedent reported to a doctor that he had chest pain for a year. *Id*., at 23. In fact, Ballenger finds following up with a doctor for a cut finger, having back pain, complaining of numbness in his left arm and shoulder, followed almost ten years later by chest and neck pain are all classic symptoms of panic attacks. *Id.* After noting various events in decedent's medical history, Dr. Ballenger is able to conclude

> The long history of panic disorder symptoms leading up to the time of his suicide is very important for Mr. Whitely's mindset leading to his suicide. It let to Mr. Whitely feeling very vulnerable and to his belief he was in fact medically ill despite what the doctors told him. It also led him to believe that he was close to death on multiple occasions ... In his expert report, Dr. Luepker opined that Mr. Whitely had "no

> reason to be burdened by his concerns over his heart," missing entirely that this is absolutely typical of panic disorder patients....Dr. Luepker does not list or consider the significance of two medical visits by Mr. Whitely in the 50's, one in 1972, another in 1979, two in 2000, and one in 2002 and 2003 for panic type symptoms.... This fear and concern was prominent at the time of his suicide, and contributed significantly to his being "overwhelmed" by fears that he had heart disease.

Id., at 27. Similarly, Dr. Jacobs seizes on the same events, noting that 35 years ago the decedent was prescribed Valium. Jacobs depo. at 88. According to Jacobs, this 35 year old medical note is further evidence of panic attacks. *Id.* at 88, 97. Jacobs insists this a correct diagnosis in spite of his agreement that Valium is used as a muscle relaxant and the decedent had been diagnosed, by a doctor who actually examined him, with muscle strain.[10] Jacobs depo. at 97-99.

Dr. Jacobs opined that

> Psychologically, Mr. Whitely also felt small, inadequate, and ineffectual....Until the day of his death, Mr. Whitely felt guilty about his not being able to stand up to his family of origin.... He knew that he would not be able to protect Mrs. Whitely from financial difficulties in the future....

Jacobs Report, at 10.

In his deposition, Dr. Ballenger admits that he could not know what Mr. Whitely was thinking, but could make "expert opinions about what almost certainly

[10]Dr. Jacobs refers to a medical note that the decedent fainted in high school more than 50 years prior to his suicide as evidence of "a limited symptom attack." Jacobs depo. at 101. He admits that he did not make this diagnosis until after he submitted his expert report asserting that the decedent had panic attacks. Jacobs depo. at 102.

he was thinking." Ballenger depo. (submitted as doc. 60-2), at 317. Despite defendant's assertion that "[t]he psychological autopsy method used by Drs. Jacobs and Ballenger to evaluate the cause of Mr. Whitely's suicide is an accepted methodology in both the scientific and legal communities,"[11] in his deposition Dr. Ballenger testified as follows:

> Q. It there a consensus in the psychiatric medical community that psychological autopsies are a valid methodology?
>
> A. I haven't researched that question. I know that they're utilized in hospitals where there is a staff and a reason to do a retrospective understanding of somebody's suicide that is widely utilized. I – I – I remember doing it 25, 30 years ago and –

Ballenger depo. at 317-318.

The court, at the moment, is not concerned with whether Drs. Jacob and Ballenger are "correct" in their post-mortem diagnosis, as the same is not the role of the court in considering expert testimony. *See U.S. v. Brown*, 415 F.3d 1257 (11th Cir.2005) ("The credibility of a witness is in the province of the factfinder," and we

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[11]Courts have not necessarily agreed with the defendant on this point. The Middle District of Tennessee recently held that

> It appears that, under certain circumstances, certain courts outside of the Sixth Circuit have found that "psychological autopsies," or at least certain aspects thereof, can meet the *Daubert* standard, typically in cases in which the cause of a confirmed suicide was at issue (i.e., did the manufacturer's drug cause the suicide?),or the manner of death was at issue (i.e., did the decedent commit suicide?). However, even courts acknowledging the potential admissibility of psychological autopsies have excluded them in whole or in part. *See, e.g., Fanning*, 2010 WL 4261476, at *6–*10; *Guthrie*, 627 N.W.2d at 419; *Blanchard*, 207 F.Supp.2d at 319–320, *Cloud,* 198 F.Supp.2d at 1135.

Smith v. Prudential Ins. Co. of America, 2012 WL 1965405, *8 (M.D.Tenn.2012).

"will not ordinarily review the factfinder's determination of credibility."). Rather, the issue before the court is whether such testimony is both "reliable" and "relevant." *United States v. Henderson*, 409 F.3d 1293, 1302 (11th Cir.2005). The testimony must have a reliable basis in the knowledge and experience of the relevant discipline. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149, 119 S.Ct. 1167, 1175 (1999) (citing *Daubert*, 509 U.S. at 592, 113 S.Ct. 2786); *United States v. Douglas*, 489 F.3d 1117, 1124-25 (11th Cir.2007).

Given that Dr. Ballenger could not even state that his methodology was generally accepted, and that he remembered doing psychological autopsies "25 or 30 years" previously, the court is of the opinion that Dr. Ballenger may not testify to the results of such methodology. *See e.g., Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.,* 326 F.3d 1333, 1342 (11th Cir.2003), citing *McCorvey v. Baxter Healthcare Corp*., 298 F.3d 1253, 1256 (11th Cir.2002).

Accepting Dr. Ballenger and Dr. Jacobs' new diagnoses of panic disorder for the decedent also requires an implicit finding that numerous other doctors who treated the plaintiff for many years were simply wrong.[12] Additionally, Drs. Ballenger and Jacob's opinions flat out contradict the testimony of defendant's other experts. For example, Dr. William C. Bailey, M.D., asserts in his expert

[12]*See e.g.*, Jacobs depo. at 112 (where in response to question as to whether any doctor ever diagnosed decedent with neuropsychiatric problem, Dr. Jacobs responded "No, and I wouldn't expect them to.").

report that the decedent "suffered from a number of medical conditions caused and/or aggravated by heavy cigarette smoking...," that he "had a number of risk factors for or indications of vascular disease including: history of a possible TIA, history of probable peripheral vascular disease with leg pain/heaviness on walking, numbness and tingling of face and arms considered possibly to be a residual of the TIA .... several episodes of chest pain over the last 8 to 10 years, all consistent with cardiac ischemia, each with a negative stress test."[13] Bailey expert report, at 1. Similarly, Dr. Laurence Carmichael, another of defendant's experts, opined that

> Plaintiff's expert Dr. Luepker lists some of the cardiac and vascular symptoms that Mr. Whitely presented with on various occasions.... He concludes that "there is no evidence that [Mr. Whitely] had any reason to be burdened by concerns over his heart....as he had been assured by multiple tests this was not a problem." I disagree. As a long-term, heavy smoker with a family history of early, sudden cardiac death ... repeated episodes of chest pain, chest pressure, numbness in the face and numbness and tingling in the extremities ... Mr. Whitely has reason to be concerned about his health and life expectancy.

Carmichael expert report, at 5. Defendant's expert Dr. Malcolm Taylor also opined that decedent's "well-documented episodes of chest pain ... are consistent with cardiac events." Taylor expert report, at 1.

Dr. Ballenger recognizes that "non-fearful panic disorder" has a low

[13]To create even more contradiction, Dr. Ballenger uses the negative stress test as evidence that the problem was panic attacks, while Dr. Bailey asserts "doctors have learned not to be reassured by a negative exercise test .... A negative exercise test does not rule out cardiovascular disease especially in a patient with Mr. Whitely's presentation. Bailey report, at 2.

diagnosis rate because patients with symptoms of such a disorder generally seek traditional medical treatment rather than psychiatric treatment, which "makes it much, much likely – less likely that they will be diagnosed." Ballenger depo. at 245.

As the court understands this theory of defendant, to allow this testimony to go to a jury, the court must find that the post-mortem diagnosis of panic disorder which was missed by medical doctors for over fifty years, but is now known because of a psychological autopsy, is based in valid evidence, although the majority of those individuals with panic disorder never get diagnosed because regular medical doctors apparently do not know about this diagnosis, and in spite of the multiple experts who stand by ready, willing, and able to testify that the decedent suffered chest pain because he had cardiac issues, and not panic disorder.[14]

"[V]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Allison,* 184 F.3d at 1311 (quoting *Daubert*, 509 U.S. at 596, 113 S.Ct. 2786). The correctness of an expert's

[14]Even more problematic for Dr. Ballenger's testimony is his opinion that Mr. Whitely had been planning his suicide for months before the event. Ballenger report, at 34. Given that, why would Mr. Whitely bother to attempt to quit smoking? In his zeal to point everywhere except at Chantix as a cause for Mr. Whitely's suicide, Ballenger's theory fails to account for this critical piece of evidence. Similarly, Dr. Jacobs asserts that decedent's suicide "was inconsistent with an impulsive suicide," but also states "Mr. Whitely had health and other motivations for starting Chantix." Jacobs' Report, at 45-46. Unless these experts are suggesting Mr. Whitely wanted to become healthy enough to commit suicide, there is a vast inconsistency in both their theories.

conclusions is thus left to the trier of fact to determine. *See e.g., U.S. v. Brown*, 415 F.3d at 1267, citing *U.S. v. Copeland*, 20 F.3d 412, 413 (11th Cir.1994). Accordingly, a district court may not exclude an expert because it believes one expert is more persuasive than another expert. *Rink v. Cheminova, Inc*., 400 F.3d 1286, 1293 (11th Cir.2005). In evaluating the reliability of an expert's method, however, a district court may properly consider whether the expert's methodology has been contrived to reach a particular result. *Rink v. Cheminova, Inc*., 400 F.3d 1286, 1293 n.7 (11th Cir. 2005); citing *Joiner*, 522 U.S. at 146, 118 S.Ct. at 519 (affirming exclusion of testimony where the methodology was called into question because an "analytical gap" existed "between the data and the opinion proffered").

> The court simply cannot follow the leap that Mr. Whitely's
>
> > panic disorder made him feel that he was sick, vulnerable, seriously ill, in financial danger and unable to handle things. At the end, he experienced nicotine withdrawal, which exacerbated his anxiety. He was then overwhelmed and overtaken by the long-term depressive themes in his life, especially the estrangement from his family and his wife's family.

Report of Ballenger, at 7.

> As the District Court for Western Virginia held:
>
> > an opinion "that fails to take serious account of other potential causes may be so lacking that it cannot provide a reliable basis for an opinion on causation." *See Westberry v. Gislaved*, 178 F.3d 257, 265 (4th Cir.1999). "Thus, if an expert utterly fails to consider alternative causes or fails to offer an explanation for why the proffered alternative cause was not the sole cause, a district court is justified in excluding

> the expert's testimony." *Cooper v. Smith & Nephew, Inc*., 259 F.3d 194, 202 (4th Cir.2001) (citing *Westberry*, 178 F.3d at 265-66) .... His belief is scientifically untestable. As the Supreme Court has stated, "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 157, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) (quoting *General Elec. Co. v. Joiner,* 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997)).

Waytec Electronics Corp. v. Rohm and Haas Electronic Materials, LLC, 459 F.Supp.2d 480, 488-489 (W.D.Va.2006). *See also Guinn v. AstraZeneca Pharmaceuticals, LP,* 602 F.3d 1245, 1253 (11th Cir.2010) (citing *Westberry, supra,* at 265); *Rosen v. Ciba-Geigy Corp*., 78 F.3d 316, 319 (7th Cir.) ("[A]n expert who supplies nothing but a bottom line supplies nothing of value to the judicial process."), *cert. denied*, 519 U.S. 819, 117 S.Ct. 73, 136 L.Ed.2d 33 (1996); *Turpin v. Merrell Dow Pharms., Inc*., 959 F.2d 1349, 1360 (6th Cir.1992) (holding evidence legally insufficient in *Bendectin* case when no understandable scientific basis was stated). An opinion on an ultimate issue that omits or ignores material facts bearing upon the ultimate issue cannot be helpful to the trier of fact. *Cf. Kieffer v. Weston Land, Inc.*, 90 F.3d 1496, 1499 (10th Cir.1996) (expert witness "acknowledged he was unable to formulate an opinion on the ultimate issue in dispute," whether wiring of a vending machine was defective, because of a missing machine part). *New Mexico v. General Elec. Co.* 335 F.Supp.2d 1266, 1273 (D.N.M.2004).

Having considered the foregoing, and being of the opinion that plaintiff's motion to exclude testimony that Mark Whitely suffered from panic attacks or panic disorder is due to be granted;

It is therefore **ORDERED** by the court that said motion (doc. 34) be and hereby is **GRANTED**.

6. Plaintiff's Motion to Exclude the Expert Opinion of Mrs. Cornelia Heflin (docs. 35 and 44); Defendant's Opposition (doc. 59); and Plaintiff's Reply (doc. 71):

In response to the plaintiff's expert, Dr. Mark Cohen, discussed above, the defendant offers Cornelia Heflin as an expert regarding the issue of whether the plaintiff and decedent had financial trouble. According to Dr. Cohen, the Whitely's financial situation was stable. *See* Expert Report of Cohen, at 2, 5-18. In response, Ms. Heflin asserts Dr. Cohen is simply wrong. Expert Report of Heflin, at 1.

For Ms. Helfin to testify, the court considers whether:

> (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert [v. Merrell Dow Pharm., Inc*., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)]; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

[*U.S. v. Frazier*,] 387 F.3d 1244, 1260 (11th Cir.2004) (quoting *City of Tuscaloosa v. Harcros Chems., Inc*., 158 F.3d 548, 562 (11th Cir.1998)). "While there is inevitably some overlap among the basic

> requirements—qualification, reliability, and helpfulness—they remain distinct concepts and the courts must take care not to conflate them." *Id.*

Rosenfeld v. Oceania Cruises, Inc. 654 F.3d 1190, 1193 (11th Cir.2011).

The plaintiff does not challenge Ms. Heflin's qualifications per se. She is a Certified Public Account and a Certified Valuation Analyst. Report of Heflin, at 1. Clearly, establishing the financial worth of a household is within her expertise. She considered the assumptions made by Dr. Cohen and offers opinions as to the accuracy or foundation of his assumptions, based on her education and experience. The court finds the same to be squarely within the realm of appropriate expert testimony.

In essence, the parties dispute whether Dr. Cohen's calculation concerning economic loss is accurate, as it was based on several assumptions which Ms. Heflin disputes. *See* plaintiff's memorandum (doc. 35-1), at 5-7; defendant's response (doc. 59), at 5-10. As previously stated in section II of this opinion, the court shall allow Dr. Cohen to testify to his economic loss calculations, which necessarily include loss to future earning capacity. For the same reasons, the court will allow Ms. Heflin to testify as to why she believes Dr. Cohen is wrong. Which expert is more credible is clearly a matter for the trier of fact. Plaintiff dislikes Ms. Heflin's approach to calculations, but offers no evidence in support of the assertion that her

methodology was wrong.[15]

Likewise, although the plaintiff seeks to have the opinion of Ms. Heflin that the Whitely's had financial issues excluded, the court finds no basis for doing so. The plaintiff challenges Ms. Heflin's disagreements with Dr. Cohen's assumptions. The fact that the respective parties to this litigation have found experts who disagree with each other is not a basis to exclude such testimony.

The Southern District of Florida captured the exact dispute presently before this court in its opinion in *U.S. v. Cordoba*. That court stated

> "it is not the role of the district court to make ultimate conclusions as to the persuasiveness of the proffered evidence." *Quiet Tech. DC–8, Inc*., 326 F.3d at 1341; *Maiz*, 253 F.3d at 666 (quoting *Alison,* 184 F.3d at 1311). Thus, the district court cannot exclude an expert because it believes the expert lacks personal credibility. *Rink*, 400 F.3d at 1293, n. 7.

U.S. v. Cordoba, 2012 WL 3620306, *3 (S.D.Fla,2012). The court went on to state that the challenges to the expert at issue there related "principally to the persuasiveness of her testimony," and were therefore "appropriately addressed through 'vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'" *Id.*, citing *Quiet Tech. DC–8, Inc.*, 326

[15]For example, plaintiff asserts that Ms. Heflin testified that she did not understand why Dr. Cohen did what he did. Plaintiff's memorandum, at 5-6. However, Ms. Helfin actually testified that "I don't understand his assumptions. I don't feel as though they are supported in a way that I could embrace." Heflin depo. at 145.

F.3d at 1341 (*quoting Daubert*, 509 U.S. at 596). *See also Ledbetter v. Blair Corp*., 2012 WL 2464000, *6 (M.D.Ala.2012) (*quoting In re Cessna 208 Series Aircraft Prods. Liab. Litig*., No. 05–md–1721–KHV, 2009 WL 1649773, at *1 (D. Kan. June 9, 2009) ("Numerous courts have permitted experts to testify at trial about the reliability of the opinions of opposing experts." (collecting cases)). As the court in *Ledbetter* concluded, here to as to methodology, the court finds that "[a] trial setting ... will provide the best operating environment for the triage [that] *Daubert* demands." *Ledbetter,* 2012 WL 2464000, at *6 (*quoting Rafaela Cortes–Irizarry v. Corp. Insular De Seguros*, 111 F.3d 184, 188 (1st Cir.1997)).

The plaintiff also seeks to exclude Ms. Heflin's opinions concerning the plaintiff's receipt of life insurance proceeds upon Mr. Whitely's death. Plaintiff's memorandum, at 11. The defendant asserts such proceeds are relevant to the opinions of Drs. Jacobs and Ballenger that concern causes for Mr. Whitely's suicide. Defendant's response, at 15.

Minnesota's collateral source statute, Minn.Stat. § 548.251, allows a party who has been found liable for tort damages to file a motion requesting the court to reduce the amount of the plaintiff's award by amounts the plaintiff has already received from collateral sources. The collateral source statute partially abrogates the common law collateral source rule, which "allows an injured person to recover damages from a tortfeasor even when that award results in a double recovery." *Do*

v. Am. Family Mut. Ins. Co., 779 N.W.2d 853, 857–58 (Minn.2010) (citing *Hueper v. Goodrich*, 314 N.W.2d 828, 830 (Minn.1982)). The primary purpose of the collateral source statute is "to prevent double recoveries by plaintiffs." *Imlay v. City of Lake Crystal*, 453 N.W.2d 326, 331 (Minn.1990).

In relevant part, the Minnesota Code offers the following definition:

> **Subdivision 1. Definition**. For purposes of this section "collateral sources" means payments related to the injury or disability in question made to the plaintiff, or on the plaintiff's behalf up to the date of the verdict, by or pursuant to:
>
> (2) health, accident and sickness, or automobile accident insurance or liability insurance that provides health benefits or income disability coverage; *except* life insurance benefits available to the plaintiff, whether purchased by the plaintiff or provided by others, payments made pursuant to the United States Social Security Act, or pension payments.

Minn.Stat. § 548.251, subd. 1(2) (emphasis added). Subdivision 5 of that statute cautions that "[t]he jury shall not be informed of the existence of collateral sources or any future benefits which may or may not be payable to the plaintiff." *Id*. However, life insurance proceeds are excepted from the definition of "collateral source."

Because the life insurance proceeds are the subject of a specific motion in limine (doc. 112), the court shall address the admissibility of the same in ruling on that motion. Similarly, because the issue of the Black Bear Casino documents' admissibility is the subject of a motion in limine (doc. 109), the court will address

the admissibility of documents and testimony relating to gambling in ruling on that motion.

Having considered the foregoing, and being of the opinion that the Motion to Exclude the Expert Opinion of Mrs. Cornelia Heflin is due to be denied;

It is therefore **ORDERED** by the court that said motion (doc. 35) be and hereby is **DENIED**.

7. Defendant's Motion to Exclude in Part the Testimony of Russell Luepker, M.D. (doc. 36); the Plaintiff's Memorandum in Opposition (doc. 55), and the Defendant's Reply (doc. 74):

Russell Luepker is a professor of epidemiology and community health and medicine at the University of Minnesota. Expert Report of Luepker, at 1. Prior to this time, he had a private medical practice in cardiology. Report of Luepker, at 2. He is offered by the plaintiff to provide testimony regarding the decedent's risk of cardiovascular disease. *Id.*, at 3. Defendant seeks to exclude any testimony from Dr. Luepker concerning the decedent's "state of mind" and any testimony concerning psychiatric issues. Defendant's motion (doc. 36), at 3.

Dr. Luepker offers the following opinions:

> There are several important observations in Mr. Whitely's medical history. First, because of his family history, elevated blood cholesterol and smoking habit he was viewed as high risk for cardiovascular disease during every encounter with health systems. At each point, a thorough evaluation of his cardiovascular status was obtained because of this status. At each point, the tests were negative. There was (sic) no signs of significant or treatable cardiovascular disease.

> In the two months leading up to his suicide, he had several physician visits and evaluations. Each of these was negative and he was given reassurance as to his cardiovascular health. In no instance was there a mention of signs of depression or other psychiatric disorders. In fact, he was seeking care for his longstanding dental problems. And after numerous attempts by many clinicians who examined him to start a smoking cessation program, he finally decided to quit smoking (sic) this 40-year habit. This "future perspective', caring about his health and taking action, is not a sign of someone contemplating suicide.
>
> In summary, a thorough review of Mr. Whitely's records reveals no evidence that he had any reason to be burdened by concerns over his heart or other vascular diseases as he had been assured by multiple tests that this was not a problem.

Report of Luepker, at 6-7.

In his deposition, Dr. Luepker explained that as a clinician, "[y]ou can't call for a psychiatric consult every time someone comes in and you say, 'This is a little off.' So I feel capable of looking at this history with my experience ... of offering opinion as a clinician on his mental condition and how his situation was handled." Dr. Luepker depo. at 35. Later in his deposition, Dr. Luepker stated:

> And somebody comes in with chest pain, and some type of emotional disorder is always in your mind. Is this something real or is this something that – because we've been so effective at telling people, "If you have chest pain, you need to get attention right away." I mean, I ran a campaign in ten cities doing this, and we changed people's opinions. I think that he did that. He was checked out, and there's no evidence in any of the records that this guy has – this is an affective disorder or emotional disorder that he likes going in to see doctors because he has panic attacks.

Dr. Luepker depo. at 105. He continued

> .... just as Dr. Ballinger (sic) may have 30 years experience at interviewing people with panic disorders, I have decades of experience interviewing people with chest pain who present. And I have, I believe, the ability within the limits of the data that both of us have to make an ascertainment whether this is an emotional disorder. Am I a greater expert in panic disorders than a psychiatrist? Of course not. I he a greater expert in evaluating cardiac chest pain that I am? Huh-uh.

Dr. Luepker depo. at 108-109.

Having considered the testimony of Dr. Luepker, the court finds the plaintiff is not offering the same for the purpose of Dr. Luepker testifying as an expert in psychiatry. Rather, as a practicing clinician, Dr. Luepker states he had to determine whether chest pain was cardiac in nature, the result of a mental disorder, or originating from another source. Dr. Luepker does not offer testimony regarding psychiatry in general, nor does he offer testimony which would be beyond his bounds of expertise. Clearly,

> An expert may not testify beyond the scope of his or her expertise, and holding a medical degree "is not enough to qualify [a doctor] to give an opinion on every conceivable medical question." *Christophersen v. Allied–Signal Corp.*, 939 F.2d 1106, 1113 (5th Cir.1991). "But a doctor need not be a specialist in the exact area of medicine implicated by the plaintiff's injury." *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1043 (2nd Cir.1995). So long as the expert has some specialized knowledge as a result of training or experience relevant to the opinions he offers, his testimony will meet the qualification requirement.

In re Heparin Products Liability Litigation, 803 F.Supp.2d 712, 747 (N.D.Ohio 2011).

Defendant's insistence that only a trained psychiatrist may offer testimony concerning the evaluation of a patient's mental state every time a patient visited a doctor is "at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to "opinion" testimony.'" *Daubert, supra*, 509 U.S. at 588, 113 S.Ct. 2786. "The language of Rule 702 and the accompanying advisory committee notes make clear that various kinds of 'knowledge, skill, experience, training, or education,' qualify an expert as such." *In re Paoli R.R. Yard PCB Litig*., 916 F.2d 829, 855 (3rd Cir.1990). Certainly, evaluating the cause of chest pain is within the realm of what cardiologists do on an every day basis. On this basis, Dr. Leupker's testimony is admissible. *See e.g., Allison*, 184 F.3d at 1312 (citing *In re Paoli R.R. Yard PCB Litig*., 35 F.3d at 744) ("the proponent of the testimony does not have the burden of proving that it is scientifically correct, but that by a preponderance of the evidence, it is reliable."). Of course, the defendant may, through cross-examination, bring each of its bases for challenging Dr. Leupker's testimony to light before the trier of fact. See *Allison,* 184 F.3d at 1311 (quoting *Daubert*, 509 U.S. at 596, 113 S.Ct. 2786). ("vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."); *U.S. v. Brown*, 415 F.3d at 1267(citing *U.S. v. Copeland*, 20 F.3d 412, 413 (11th Cir.1994)) (The correctness of an expert's

conclusions is thus left to the trier of fact to determine.).

Having considered the foregoing, and being of the opinion that the defendant's motion to exclude the testimony of Dr. Luepker is due to be denied;

It is therefore **ORDERED** by the court that said motion (doc. 36) be and hereby is **DENIED**.

8. Defendant's Motion for Summary Judgment on Counts VI, VII, VIII, IX, X, XII and XIII of Plaintiff's Short Form Complaint (doc. 40); Plaintiff's Memorandum in Opposition (docs. 58 and 65); and Defendant's Reply (doc. 77):

This motion is brought based on the viability of claims under Minnesota law. Thus, the court examines each of these claims from that perspective.

A. Count VI - Breach of Implied Warranty:

The plaintiff concedes that this count may be dismissed (plaintiff's opposition (doc. 58) at 26. The court shall so Order.

B. Counts VII - Fraudulent Misrepresentation and Concealment, and VIII - Negligent Misrepresentation and Concealment:

The defendant asserts that the complaint fails to identify any false or concealed claims by defendant regarding the safety or efficacy of Chantix. Defendant's motion (doc. 40), at 4. Pursuant to Minnesota law, "[a] misrepresentation may be made either (1) by an affirmative statement that is itself false or (2) by concealing or not disclosing certain facts that render the facts that are

disclosed misleading." *Jane Doe 43C v. Diocese of New Ulm,* 787 N.W.2d 680, 688 (Minn.App.2010); citing *Caritas*, 488 N.W.2d at 289; see also *Heidbreder*, 645 N.W.2d at 367 (same); *Gully v. Gully*, 599 N.W.2d 814, 821 (Minn.1999) (same); *Dakota Bank v. Eiesland*, 645 N.W.2d 177, 184 (Minn.App.2002) (same).

> To succeed in a fraudulent misrepresentation claim under Minnesota law, a plaintiff must prove:
>
> > (1) there was a false representation by a party of a past or existing material fact susceptible of knowledge; (2) made with knowledge of the falsity of the representation or made as of the party's own knowledge without knowing whether it was true or false; (3) with the intention to induce another to act in reliance thereon; (4) that the representation caused the other party to act in reliance thereon; and (5) that the party suffer[ed] pecuniary damage as a result of the reliance.
>
> *Hoyt Props., Inc. v. Prod. Res. Group, LLC*, 736 N.W.2d 313, 318 (Minn.2007). The elements of a negligent misrepresentation claim differ from fraudulent misrepresentation only with respect to the required state of mind. In a negligent misrepresentation claim, a plaintiff must show that the defendant "supplie[d] false information for the guidance of others in their business transactions" and in doing so "fail[ed] to exercise reasonable care or competence in obtaining or communicating the information." *Florenzano v. Olson*, 387 N.W.2d 168, 174 n. 3 (Minn.1986).

Trooien v. Mansour, 608 F.3d 1020, 1028 (8th Cir.2010).

Defendant argues that, regardless of what the plaintiff plead in her complaint, the plaintiff cannot prevail on these claims because under the learned intermediary doctrine, the plaintiff cannot show a false or misleading statement made to the

decedent's prescribing physician. Defendant's motion, at 6.

Under the learned-intermediary doctrine as applied by Minnesota, a maker of drugs has a duty to warn only doctors—and not patients—about the dangers associated with a drug or medical device. *Kapps v. Biosense Webster, Inc*., 813 F.Supp.2d 1128, 1152 (D.Minn.2011);citing *Mulder v. Parke Davis & Co.*, 288 Minn. 332, 181 N.W.2d 882, 885 n. 1 (1970) ("The manufacturer has no duty to warn the lay public regarding prescription drugs."); *Mozes v. Medtronic, Inc*., 14 F.Supp.2d 1124, 1130 (D.Minn.1998) (holding that *Mulder* extends to medical devices). Because the treating physician or other medical professional acts as the learned intermediary between the manufacturer and the ultimate consumer, courts have held that he or she "is in the best position to understand the patient's needs and assess the risks and benefits of a particular course of treatment." *In re Orthopedic Bone Screw Litigation,* 1999 WL 628688, *14 (D.Minn.1999); citing *Brooks v. Medtronic, Inc*., 750 F.2d 1227, 1231 (4th Cir.1984). However, even though the warning is due to the physician and not the patient, under Minnesota law ... "where the manufacturer ... of a product has actual or constructive knowledge of danger to users, the ... manufacturer has a duty to give warning of such dangers." *PLIVA, Inc. v. Mensing,* – U.S. – , 131 S.Ct. 2567, 2573 (2011) (quoting *Frey v. Montgomery Ward & Co.*, 258 N.W.2d 782, 788 (Minn.1977)).

Thus, the court must examine whether or not the defendant provided the

decedent's physician with adequate warnings.[16] The defendant asserts that it is entitled to judgment in its favor on this issue because decedent's doctor, Carl Sjoding, testified "he did not recall hearing or reading any statement that anyone from Pfizer made to him concerning Chantix." Defendant's motion, at 6. In his deposition Dr. Sjoding testified that he received a "Dear Doctor" letter from defendant in September 2007, prior to prescribing Chantix to Mr. Whitely. Sjoding depo. (doc. 58-2) at 207-208. That letter contained no warning about the risk of suicide or other psychiatric problems from the medication. *Id.*, at 208. However, even given the subsequent label changes, Dr. Sjoding testified that he believes his decision to prescribe Chantix to the decedent was appropriate. *Id.*, at 186.

Under the learned-intermediary doctrine a patient's failure-to-warn claim is foreclosed if a doctor (1) was aware of the information that, according to the plaintiff-patient, a defendant drug company or medical-device manufacturer wrongly failed to provide, and (2) would have taken the same action even if the defendant had included that information in a warning. *See Cornfeldt v. Tongen*, 262 N.W.2d 684, 698 (Minn.1977); *See Schilf v. Eli Lilly & Co.*, 687 F.3d 947, 949 (8th Cir.2012) ("To survive summary judgment, the Schilfs must establish a genuine issue of material fact whether an adequate warning would have altered Dr. Briggs'

[16]The court notes that, from the evidence before it, a reasonable jury could find that the FDA informed defendant that the warnings provided in the packaging needed to be strengthened prior to the time the July 2009 boxed warning took effect. *See e.g*, plaintiff ex. 002692 (doc. 65).

decision to prescribe Cymbalta.").

Dr. Sjoding testified that after he became aware of psychiatric problems with Chantix, he changed his prescribing habits. Sjoding depo. at 213-215. Although the question is close, the court must view the evidence in the light most favorable to the non-moving party on a motion for summary judgment. In that light, the plaintiff has provided enough of a factual dispute to present this claim to the finder of fact. *See Schilf v. Eli Lilly & Co.*, 687 F.3d 947, 951 (8th Cir.2012) (finding genuine issue of material fact remained where doctor testified he would not have changed his prescribing habits had he known of risk of suicide).

The defendant next asserts that Minnesota law does not recognize a cause of action for physical harm under a negligent misrepresentation theory. Defendant's motion, at 10. What the Supreme Court of Minnesota has actually stated was that "a claim of negligent misrepresentation involving the risk of physical harm" is "a tort that we have neither specifically adopted nor rejected in Minnesota." *Smith v. Brutger Companies*, 569 N.W.2d 408, 413 (Minn.1997). The Court in *Smith* went on to state that "While we do not foreclose the possibility of recognizing in Minnesota the tort of negligent misrepresentation involving the risk of physical harm, we decline to do so today. This case is not the appropriate vehicle to do so."[17]

[17]The court recognizes that, as put forth by defendant, *Flynn v. Am. Home Prods. Corp.*, 627 N.W.2d 342 (Minn.App.2001) states that the Minnesota Supreme Court "expressly declined to recognize the tort of negligent misrepresentation involving the risk of physical harm," citing to *Smith*. See defendant reply (doc. 77) at 1; *Flynn*, 627 N.W.2d at 351. However, this court

Id., at 414 (noting the facts of the case did not support such a claim even if one existed).

Given the facts and allegations of this case, the court is of the opinion that, as the Minnesota courts have left the question of whether such a cause of action exists open to debate, the court will allow this claim to proceed to trial.

Having considered the foregoing, and being of the opinion that the defendant's motion for summary judgment is due to be denied as to Counts VII – Fraudulent Misrepresentation and Concealment, and VIII–Negligent Misrepresentation and Concealment, the court shall so Order.

C. Count IX – Gross negligence

The plaintiff concedes that this count may be dismissed (plaintiff's opposition (doc. 58) at 26. The court shall so Order.

D. Count X – Unjust Enrichment:

Defendant argues that under Minnesota law, the plaintiff may not seek an equitable remedy when an adequate remedy exists at law. Defendant's motion, at 11. See e.g., *ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc*., 544 N.W.2d 302, 305 (Minn.1996). Under Minnesota law, to establish an unjust enrichment claim, a plaintiff must show that the defendant has knowingly received or obtained

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simply cannot make the Court of Appeals' holding in *Flynn* fit the language actually used by the Minnesota Supreme Court in *Smith*.

something of value for which the defendant "in equity and good conscience" should pay. *Klass v. Twin City Fed. Sav. & Loan Ass'n.*, 291 Minn. 68, 190 N.W.2d 493, 494–95 (1971) (quoting *Brand v. Williams*, 29 Minn. 238, 13 N.W. 42, 42 (1882)). However, as defendant asserts, a claim for equitable relief may only stand when no other legal remedies are available to the plaintiffs. *Daigle v. Ford Motor Co.,* 713 F.Supp.2d 822, 828 (D.Minn.2010).

The plaintiff responds that Minnesota law permits pleadings in the alternative. Plaintiff's opposition, at 22. In fact, the District Court of Minnesota explained that *ServiceMaster, supra,* and other cases actually stand for the proposition that a plaintiff who chooses not to pursue available remedies at law cannot recover under principles of equity. *In re Levaquin Products Liability Litigation,* 752 F.Supp.2d 1071, 1081 (D.Minn.2010). However, the fact that the plaintiff cannot recover for unjust enrichment when an adequate remedy exists at law is not akin to stating that the plaintiff cannot plead a claim for unjust enrichment because of the existence of an adequate legal remedy. As the Court in *Daigle v. Ford Motor Co.*, decided, "[t]he Court will permit simultaneous pleading of the breach of warranty and unjust enrichment claims on the grounds that, under Federal Rule of Civil Procedure 8(d), a party is permitted to plead in the alternative." *Id.*, 713 F.Supp.2d 822, 828 (D. Minn.2010).

Having considered the foregoing, and being of the opinion that the

defendant's motion for summary judgment is due to be denied as to Count X – Unjust Enrichment, the court shall so Order.

E. Count XII – Violations of Minnesota's Consumer Fraud Act ("CFA") and Deceptive Trade Practices Act ("DTPA"):

The plaintiff responds to the defendant's motion in regard to the DTPA by footnote stating only that the DTPA provides a means to recover equitable relief, specifically disgorgement, should the court allow the unjust enrichment claim to proceed. *See* plaintiff's opposition, at 16 n. 4. Under Minnesota law, however, the "sole statutory remedy for deceptive trade practices is injunctive relief." *Simmons v. Modern Aero, Inc.*, 603 N.W.2d 336, 339 (Minn.Ct.App.1999) (quoting *Alsides v. Brown Inst., Ltd.*, 592 N.W.2d 468, 476 (Minn.Ct.App.1999)). Here, the plaintiff does not allege and the evidence does not support a likelihood of future harm. However, at the summary judgment stage, the plaintiff must put forth evidence sufficient to support at least an inference of future harm to her. *See Gardner v. First American Title Insurance Co.*, 296 F.Supp.2d 1011, 1020 (D.Minn.2003). Having failed in this burden, the court is of the opinion that the defendant's motion for summary judgment is due to be granted on the plaintiff's claim under the DTPA, and shall so Order.

The parties more vigorously dispute whether the plaintiff may pursue a claim under the CFA. The defendant first claims that there is no private right of action

under Minn. Stat. § 325F.69. Defendant's motion, at 13. However, immediately thereafter, the defendant concedes that under Minnesota law, an individual can bring an action under the CFA if that person can demonstrate the same is for the "benefit of the public." *See e.g., In re Levaquin*, 752 F.Supp.2d at 1076, citing Minn.Stat. § 8.31, subd. 3a. Hence, the defendant next disputes whether the plaintiff's cause of action is indeed for the public benefit. Defendant's motion, at 14. In *Levaquin*, the Court noted that

> the fact that a plaintiff requests no injunctive relief "does not preclude either party from satisfying the public benefit requirement." *ADT Sec. Servs., Inc. v. Swenson, ex rel. Estate of Lee*, 687 F.Supp.2d 884, 892 (D.Minn.2009). Indeed, a request for injunctive relief does not necessarily establish a public benefit. *See, e.g., Jensen v. Duluth Area YMCA*, 688 N.W.2d 574, 578 (Minn.Ct.App.2004) (plaintiff seeking equitable relief of reinstatement of YMCA membership did not establish a public benefit because "[h]is claim relates to a single one-on-one incident that affected only him")....
>
> The other factor to consider in a public benefit inquiry—the form of the alleged misrepresentation—proved dispositive in *Collins v. Minnesota School of Business, Inc*., 655 N.W.2d 320 (Minn.2003). Collins concerned allegations by former students that a post-secondary school made "false, misleading, and confusing statements about its sports medicine program." *Id*. at 322. Plaintiffs brought both common law and statutory claims. *Id*. When the case settled, plaintiffs moved for attorney fees. *Id*.
>
> The trial court denied the motion on the ground that plaintiffs' claims did not benefit the public as required by the Private AG Statute. *Id.* at 330. The Minnesota Supreme Court concluded that the lower court "misapplied the holding in [*Ly*] by ignoring the fact that [the defendant] misrepresented the nature of its program to the public at large." *Id.* (emphasis added). Because the school in *Collins* made

> misrepresentations to the public at large, the students' successful prosecution of their lawsuit benefited the public for purposes of recovering attorney fees under the Private AG Statute. *Id*.
>
> As this Court has observed regarding *Collins,* "[n]either the Minnesota Court of Appeals nor the Minnesota Supreme Court indicated that the plaintiffs had sought injunctive relief." *ADT Sec. Servs., Inc. v. Swenson*, 2008 WL 2828867, at *6 (July 21, 2008). *See Collins*, 655 N.W.2d at 329–30; *Collins v. Minn. Sch. of Bus., Inc.,* 636 N.W.2d 816, 820–21 (Minn.Ct.App.2001). "Nonetheless, both courts concluded that plaintiffs had sought a sufficient 'public benefit' for the purposes of the Private Attorney General Statute." *ADT Sec. Servs*., 2008 WL 2828867, at *6.
>
> Thus, although federal courts in Minnesota have focused the public benefit inquiry on whether plaintiff is seeking only money damages—a factor which disfavors plaintiffs here—after *Collins*, it seems reasonable to infer that the Minnesota Supreme Court is as much if not more concerned with the degree to which defendants' alleged misrepresentations affect the public—a factor in plaintiffs' favor. *See Summit Recovery, LLC v. Credit Card Reseller,* LLC, No. 08–5273, 2010 WL 1427322, at *5 (D.Minn. Apr. 9, 2010) (concluding that under Minnesota law "[m]isleading advertising to the general public supports a finding that a claim benefits the public [while] a one-on-one misrepresentation is purely private and is not a ground for relief") (citations omitted).

Id., 752 F.Supp.2d at 1077-1078. In considering the application of the above to the specific facts before it, that court instructively held

> plaintiffs' injuries are based on the alleged inadequacies of older Levaquin warnings which have been replaced by a stronger black box warning at the insistence of the FDA. Plaintiffs' suit cannot therefore directly result in the removal of Levaquin from the market or the strengthening of its label to reflect its comparatively higher tendon toxicity relative to other fluoroquinolones.
>
> The Court finds, however, that as in *Collins* and *ADT Sec. Servs*., this

> lawsuit may indirectly lead to such changes. Plaintiffs argue that the earlier Levaquin warnings were inadequate because, among other reasons, they did not sufficiently warn that Levaquin was comparatively more tendon toxic than other fluoroquinolones .... That inadequacy, they allege, is continuing. (*See id.*) Plaintiffs' counsel reiterated this position at oral argument. In *ADT Sec. Servs*., this Court denied a motion to dismiss claims seeking only damages under Minnesota's consumer protection statutes where there were "no concrete indications" that the challenged practices had ceased even though the plaintiffs were not entitled to seek equitable relief. 687 F.Supp.2d at 892 n. 4; *cf. Tuttle v. Lorillard Tobacco Co.*, No. 99–1550, 2003 WL 1571584, at *6 (D.Minn. Mar. 3, 2003) ("To the extent that Plaintiff wants to warn the public of the dangers of smokeless tobacco, the FDA-required warnings already accomplish that purpose.").

Id., at 1078-1079. See also *ADT Security Services, Inc. v. Swenson, ex rel. Estate of Lee,* 687 F.Supp.2d 884, 892 n. 4 (D.Minn.2009)(noting that, in comparison to *Tuttle v. Lorilland Tobacco Co.*, 2003 WL 1571584, *6 (D.Minn.2005) "the *Tuttle* lawsuit was not likely to change the manner in which tobacco is marketed, because the practices at issue in the lawsuit had already been corrected. Here, however, there are no concrete indications that the types of improper sales and installation practices alleged by defendants have stopped.").

The court finds that applying the rule of *Levaquin* to the facts before it, the plaintiff's claim under the CFA may proceed. Having considered the foregoing, and being of the opinion that the defendant's motion for summary judgment is due to be denied as to Count XII – Violations of Minnesota's Consumer Fraud Act, the court shall so Order.

F. Count XIII – Loss of Consortium:

According to defendant, under Minnesota law a wrongful death action necessarily precludes a claim for loss of consortium. Defendant's motion (doc. 40), at 16. The plaintiff disagrees. Plaintiff's opposition (doc. 58), at 23. Minnesota case law on this issue is sparse, but a review of relevant cases is helpful to the resolution of defendant's motion on this claim.

Until 1969, no cause of action for loss of consortium for a wife existed under Minnesota law. *See Thill v. Modern Erecting Co.*, 170 N.W.2d 865, 868 (Minn. 1969). In *Thill*, the Minnesota Supreme Court noted that

> Starting in 1950 with *Hitaffer v. Argonne Co.*, 87 U.S.App.D.C. 57, 183 F.2d 811, 23 A.L.R.2d 1366, certiorari denied, 340 U.S. 852, 71 S.Ct. 80, 95 L.Ed. 624, the wife's right to maintain an action for loss of consortium is now recognized in numerous jurisdictions. This results from recognition of the equal status of the partners in the marriage relationship and a rejection of the medieval concept that the husband had a proprietary right to his wife's services, mainly domestic service, but that the wife, as the property of her husband, had no reciprocal right to his.
>
> ...
>
> The rule that we establish today is that the wife of a husband injured as the direct result of the negligence of another shall have a right of action against that same person for her loss of consortium, subject to these essential conditions: (a) Because we hold her right of action to be a derivative right, she may recover only if her husband recovers from the same defendant; (b) because we deem it an indispensable safeguard against the danger of double recovery, she will have her cause of action only if it is joined for trial with the husband's own action against the same defendant; and (c) because the wife's action

> for lost consortium is so much based upon impairment of marital relationship, were it to continue in the future, any award for her loss of consortium shall be joined in judgment with that of her husband, except only if she shall specifically declare to the jury her insistence for judgment in her own name alone.

Thill, 170 N.W.2d at 868-869. *Thill* did not involve a wrongful death claim, thus it does not offer any guidance to the court on the issue of whether a loss of consortium claim is precluded by a wrongful death claim.

Under Minnesota statute 573.02,

> When death is caused by the wrongful act or omission of any person or corporation, the trustee appointed as provided in subdivision 3 may maintain an action therefor if the decedent might have maintained an action, had the decedent lived, for an injury caused by the wrongful act or omission....The recovery in the action is the amount the jury deems fair and just in reference to the pecuniary loss resulting from the death, and shall be for the exclusive benefit of the surviving spouse and next of kin, proportionate to the pecuniary loss severally suffered by the death. The court then determines the proportionate pecuniary loss of the persons entitled to the recovery and orders distribution accordingly. Funeral expenses and any demand for the support of the decedent allowed by the court having jurisdiction of the action, are first deducted and paid. Punitive damages may be awarded as provided in section 549.20.
>
> If an action for the injury was commenced by the decedent and not finally determined while living, it may be continued by the trustee for recovery of damages for the exclusive benefit of the surviving spouse and next of kin, proportionate to the pecuniary loss severally suffered by the death. The court on motion shall make an order allowing the continuance and directing pleadings to be made and issues framed as in actions begun under this section.

M.S.A. § 573.02, subd. 1.

As noted by the Minnesota Court of Appeals, the above statute is "clear on its fact. It permits a trustee to bring a cause of action to recover the entire pecuniary loss suffered by the surviving spouse ... as a result of a decedent's death." *In re Appointment of Trustee for Heirs of Bodeker,* 661 N.W.2d 271, 276 (Minn.App. 2003). However, the plaintiff asserts that, in spite of the above language, the right to pursue a claim for loss of consortium is not subsumed by an action for wrongful death. The plaintiff directs the court to *Bonhiver v. Fugelso, Proter, Simich and Whiteman Inc*., in support of its argument.[18] In that case, the court found

> Although cases like *Peters, Schwalich*, and *Thill v. Modern Erecting Co.*, 284 Minn. 508, 170 N.W.2d 865 (1969), support respondents' contention that damages for loss of consortium are derivative, these cases do not necessarily lead to the conclusion that Homer Bonhiver's claim for loss of consortium abated because Moira Bonhiver's claim for personal injuries died when she did. Both *Prosser* and *Fowlie v. First Minneapolis Trust Co.*, 184 Minn. 82, 237 N.W. 846 (1931), indicate that a spouse's cause of action for loss of consortium does not abate upon the death of his/her mate. *See also Mattfeld v. Nester*, 226 Minn. 106, 32 N.W.2d 291 (1948).

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[18]The plaintiff also cites the court to *American Standard Insurance Co. of Wisconsin v. Forsythe*, 915 F.2d 1212, 1217 (8th Cir.1990) specifically for the language that "[T]here are two distinct claims in this case, the wrongful death claim by the estate and the consortium claim by Jamie Lynn Smith." That language does indeed appear in that case. However, the issue before the court was whether, under Missouri law, the "per occurrence" limits in an uninsured motorist insurance policy would allow recovery for both types of actions. As the court phrased the issue "The final issue for determination is whether the district court erred in declaring that the per occurrence limits, or $50,000, for each vehicle apply to this case as opposed to the per person limits, or $25,000, for each vehicle." *Id*. It has nothing to do with the facts before this court.

Similarly, although the plaintiff directs the court to the case of *Willert v. Stockwell Const*., 2006 WL 279080 (Minn.App.2006), in support of her position, that case is of no assistance to the plaintiff. There, a jury awarded $3 million for a wrongful death claim and $3,000.00 on a loss of consortium claim. However, the $3 million award was for the wife of the decedent, whereas the loss of consortium award was for the wife of a wholly separate individual who was also injured at the time the decedent was killed.

Bonhiver v. Fugelso, Porter, Simich and Whiteman, Inc., 355 N.W.2d 138, 145 (Minn.1984). However, in *Bohiver, Fowlie*, and *Mattfeld*, the decedent spouse survived the injury at issue for some period of time, creating a loss of consortium claim prior to the time a wrongful death claim came into existence. *See Mattfeld v. Nester*, 32 N.W.2d 291, 297-299 (Minn.1948) (wife survived injury for approximately nine months); *Fowlie v. First Minneapolis Trust Co.*, 237 N.W. 846, 846 (Minn.1931) (wife survived injury for approximately five weeks); *Bohiver*, 355 N.W.2d at 139 (wife survived injury for two and a half years). In *Roers v. Engebreston*, 479 N.W.2d 422 (Minn.App.1992), the argument that loss of consortium claims were recoverable only through a wrongful death action was rejected by the court, where no wrongful death action was brought because the injured spouse was still alive. *Id.* at 423. Thus, the court concluded that "future loss of consortium due to death is recoverable at common law while the injured party is living." *Id.,* at 424.

More closely akin to the facts before this court is *Kaldec v. Tri-State Bobcat, Inc*. There, in resolving a dispute concerning distribution of settlement proceeds the Court of Appeals held

> The complaint alleged that Richard Kadlec's "next of kin * * * suffered pecuniary loss" due to his death. In determining whether this allegation encompasses a loss of consortium claim, we note that some Minnesota cases have held that loss of consortium, while derivative from a personal injury claim, is a separate claim with separate injuries.

> *Huffer v. Kozitza*, 375 N.W.2d 480, 482 (Minn.1985); *Thill v. Modern Erecting Co.*, 284 Minn. 508, 513, 170 N.W.2d 865, 869 (1969). However, these cases involve personal injuries which did not result in death, where the spouses were required to bring their action jointly to prevent double recovery and duplicate litigation. By contrast, Marie Kadlec's loss of consortium claim is not an adjunct to a spouse's personal injury action but an element of the damages that she seeks for the wrongful death.

v. Tri-State Bobcat, Inc., 1989 WL 12377, *1 (Minn.App.1989).

In light of the foregoing, the court is of the opinion that, under Minnesota law, a loss of consortium claim is necessarily subsumed by a wrongful death claim where the injured spouse does not survive the injury. Thus, the court finds that the defendant's motion for summary judgment on the plaintiff's claim for loss of consortium is due to be granted, and the court shall so Order. However, the court is also of the opinion that, as Minnesota law allows recovery for pecuniary losses resulting from wrongful death, the plaintiff's ability to recover for loss of consortium is not foreclosed. It simply is part of her damages should she recover on her wrongful death claim. *See Kadlec, supra.*

Having considered the foregoing, the court is of the opinion that the defendant's motion for summary judgment on Counts VI, VII, VIII, IX, X, XII and XIII of the plaintiff's complaint is due to be granted in part and denied in part.

It is therefore **ORDERED** by the court that said motion is **GRANTED** as to Counts VI, IX, and XIII, the court finding no genuine issue of material fact remains

and defendant is entitled to judgment in its favor on these claims. Said motion is also **GRANTED** as to Count XII on plaintiff's claim for violation of the DTPA.

It is further **ORDERED** by the court that said motion is **DENIED** as to Counts VII, VIII, and X, for the reasons set out herein. Said motion is further **DENIED** as to Count XII on the plaintiff's claim for violation of the CFA.

9. Defendant's Motion to Exclude Testimony of Joseph Glenmullen, M.D. (doc. 45); Plaintiff's Memorandum in Opposition (docs. 57 and 64); and Defendant's Reply (doc. 75):

Defendant seeks to prevent Dr. Joseph Glenmullen, designated as one of plaintiff's expert witnesses, from testifying that Chantix caused decedent's injuries.[19] Defendant's motion (doc. 45) at 10. As the court found in its Memorandum Opinion concerning the defendant's motions to exclude various plaintiff's experts, Dr. Glenmullen is a specialist in psychopharmacology, and an oft recognized expert in this field. See Opinion of August 27, 2012 (doc. 642) at 38-39; *In re Chantix (Varenicline) Products Liability Litigation,* 2012 WL 3871562, *15 (N.D.Ala.2012). The court will not repeat those findings or his extensive credentials here.

Relevant to the pending motion is Dr. Glenmullen's opinion that Chantix can cause neuropsychiatric injuries, and that Chantix did cause Mr. Whitely's injuries.

[19]Since the defendant filed this motion, the court has ruled on the defendant's motion to exclude Dr. Glenmullen as an expert on general causation in the master case, *In re Chantix Products Liability Litigation* (doc. 642), 2012 WL 3871562, * 15-17 (N.D.Ala.2012). The court will not repeat those findings or rulings here.

Defendant's motion, at 10; Joseph Glenmullen Expert Report, at 1 ("It is my opinion based on a reasonable degree of medical certainty and based on my education, training, and clinical experience that Chantix was a substantial contributing factor in causing Mark's death.").

Dr. Glenmullen states he considered and ruled out other diagnoses in forming an opinion as to whether or not Mr. Whitely's suicide was caused by Chantix. Report of Glenmullen, at 47. Using this differential diagnosis method, Dr. Glenmullen opines that Mr. Whitely did not commit suicide due to underlying depression, an underlying anxiety disorder, nicotine withdrawal, retirement, lack of family relationship, overwhelming health or dental concerns, financial strain, or multiple other causes. *Id*., at 48-51. Rather, in Dr. Glenmullen's opinion, having ruled out other reasons for his suicide, Dr. Glenmullen concludes that Chantix was a substantial contributing factor in Mr. Whitely's suicide. *Id.*, at 53-54.

Defendant asserts that Dr. Glenmullen's opinions as they specifically relate to the decedent are unreliable and not based on any scientific methodology.[20] Defendant's motion (doc. 45), at 13. The defendant again attacks Dr. Glenmullen's biological mechanism theory. Defendant's motion, at 16. Similarly, defendant again criticizes Dr. Glenmullen for not being able to predict who will have adverse

[20]Defendant also requests the court hold an evidentiary hearing at which defendant's counsel may examine Dr. Glenmullen on these issues. Defendant's motion, at 19-20. As defendant has already extensively deposed Dr. Glenmullen, the court finds no merit in this request. Hence, the same is **DENIED.**

neuropsychological reactions to Chantix and who will not. See e.g., defendant's reply (doc. 75), at 2-6. The court has already ruled that Dr. Glenmullen may testify to the same, and will not delve into those arguments again. *See In re Chantix*, 2012 WL 3871562, at *17 and n. 27.

The plaintiff sets forth Dr. Glenmullen's testimony in regard to Mr. Whitely, specifically that he relied on a differential diagnosis in ruling out all possible causes for decedent's suicide other than Chantix. Plaintiff's opposition (doc. 57), at 25. Numerous courts have acknowledged that a differential diagnosis can form the basis for a valid expert opinion under *Daubert*. *Johnson v. Arkema, Inc.*, 685 F.3d 452, 468 (5th Cir.2012) (*citing Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 262-263 (4th Cir.1999) (quoting *Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 807 (3rd Cir.1997))); *In re Aredia and Zometa Products Liability Litigation*, 2012 WL 2016249, *5 (6th Cir.2012) (recognizing "differential diagnosis" as an appropriate method for determining specific causation)(citing *Best v. Lowe's Home Ctrs., Inc.*, 563 F.3d 171, 178 (6th Cir.2009)).

The Eleventh Circuit has described this method as "a process of elimination in which (1) an expert compiles all possible causes of an injury, *see Hendrix ex rel. G.P. v. Evenflo Co.,* 609 F.3d 1183, 1195 (11th Cir.2010), and (2) he rules out each of the potential causes "until reaching one that cannot be ruled out or determining which of those that cannot be excluded is the most likely, *Guinn v. AstraZeneca*

Pharm. LP, 602 F.3d 1245, 1253 (11th Cir.2010) (per curiam)." *Southern States Co-op., Inc. v. Melick Aquafeeds, Inc.*, 2012 WL 1320118, *2-3 (11th Cir.2012). The Court continued that "[w]hen ruling out causes in the second step, an expert 'must provide reasons for rejecting alternative hypotheses using scientific methods and procedures and the elimination of those hypotheses must be founded on more than subjective beliefs or unsupported speculation.'" *Id.* (citations omitted).

The defendant challenges the use of a differential diagnosis in forming a general causation opinion. Defendant's motion, at 12. The court agrees the same would be inappropriate, but finds no indication that Dr. Glenmullen has used his differential diagnosis of decedent in the formation of his general causation theory. The defendant next asserts that Dr. Glenmullen's opinions should be excluded because they are unreliable as applied to the facts of this case. *Id.,* at 12. Defendant argues the same is true because Dr. Glenmullen's general causation theory to Mr. Whitely is "not 'grounded in the methods and procedures of science.'" *Id.*, at 13-14.

Specifically, defendant asserts that Dr. Glenmullen's "vulnerable subpopulation" opinion does not apply to the facts in Mr. Whitely's case. Defendant motion at 14. Although defendant asserts Dr. Glenmullen's testimony was that he did not know why Mr. Whitely would be included in this subpopulation (defendant's motion at 15), Dr. Glenmullen explained that there was no way to predict who would have a neuropsychiatric reaction to Chantix, and who would not.

Glenmullen depo. at 262-264. Specifically, the testimony was as follows:

> Q. What is it about Mr. Whitely that made him be part of the small vulnerable subpopulation of patients?
> ....
>
> A. What makes him part of that small vulnerable subset of populations – small vulnerable subset of patients is that he has no prior psychiatric history, has no history of ever being depressed, he has no history of ever being suicidal, he has no history of ever having an anxiety disorder, alcoholism, et cetera. He goes on Chantix, and as described in the black box and accompanying warning, he develops severe insomnia, anxiety, restlessness, he develops a depressed mood, difficulty coping, crying, breaking down and ultimately irresistible suicide urges that are characteristic of prescription medication-induced suicidality, and Chantix in particular as described in the warning, not nicotine withdrawal because they're way too severe to be that, the side effects, and he was still smoking, and he kills himself. So it's the complete picture that makes it clear that he was in fact, sadly, one of the people that can have this reaction.
>
> Q. No, I understand that's your opinion.
> My question is why Mr. Whitely, what about Mr. Whitely physically, biologically, chemically, anything else that you know of, why was he part of the small vulnerable subpopulation?
> ....
>
> A. Well, as discussed in the general causation deposition, it's impossible to predict who will have this reaction. There's no blood test or other diagnostic test that you can do.

Glenmullen depo. (doc. 45-28) at 263-264.

Having considered Dr. Glenmullen's expert report and deposition testimony, he clearly applied his "vulnerable subpopulation" theory to the specific facts of this case by using the differential diagnosis method to include all likely theoretical

causes for Mr. Whitely's suicide, and then ruled out all the causes for which there was no evidence to support such a theory. As this court has repeatedly stated, whether the proposed testimony is scientifically correct is not a consideration for this court, but only whether or not the expert's testimony, based on scientific principles and methodology, is reliable. *Allison v. McGhan Medical Corp*., 184 F.3d 1200, 1312 (11th Cir.1999). "[V]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *See e.g. Rosenfeld v. Oceania Cruises, Inc*., 654 F.3d 1190, 1193 (11th Cir.2011). "[T]he fact that another explanation might be right is not a sufficient basis for excluding [the expert]'s testimony." *Milward v. Acuity Specialty Products Group, Inc*., 639 F.3d 11, 22 (1st Cir.2011).

Each of the defendant's disagreements with Dr. Glenmullen's proposed testimony is an appropriate topic for cross-examination, not exclusion of the testimony completely. *See e.g., Davids v. Novartis Pharmaceuticals Corp*., 2012 WL 1356658, *10 (E.D.N.Y.2012); *Kammerer v. Wyeth,* 2011 WL 5237757 (D.Neb.2011); *In re Fosamax Products Liability Litigation,* 807 F.Supp.2d 168, 182 (S.D.N.Y.2011); *In re Aredia and Zometa Products Liability Litigation,* 2010 WL 5071063, *2 (M.D.Tenn.2010)("Defendant's arguments impugn the credibility and accuracy of Dr. Kraut's opinions and may be the components of an effective

cross-examination."); *Giles v. Wyeth, Inc*., 500 F.Supp.2d 1048, 1061-1062 (S.D.Ill. 2007)(finding differences in experts' opinions to be grist for cross-examination).

Having considered the foregoing, and being of the opinion that defendant's motion to exclude testimony of Joseph Glenmullen, M.D., is due to be denied;

It is therefore **ORDERED** by the court that said motion (doc. 45) be and hereby is **DENIED.**

In summary, the court **ORDERS** as follows:

1. Defendant's Motion to Strike Untimely Expert Report of Fred Apple, Ph. D. (doc. 25) is **DENIED**.

2. Defendant's Motion to Exclude in Part the Testimony of Mark Cohen, Ph.D. (doc. 31) is **DENIED**.

3. Plaintiff's Motion to Amend Complaint to Add Claim for Punitive Damages is **GRANTED**.

4. Plaintiff's Motion to Exclude Testimony by James Ballenger Regarding General Causation (doc. 33) is **GRANTED**.

5. Plaintiff's Motion to Exclude Testimony that Mark Whitely Suffered from Panic Attacks or Panic Disorder (doc. 34) is **GRANTED.**

6. Plaintiff's Motion to Exclude the Expert Opinion of Mrs. Cornelia Heflin (doc. 35) is **DENIED**. With regard to the admissibility of life insurance proceeds and Black Bear Casino documents, the court will address the same in the context of

the pending motions in limine.

7. Defendant's Motion to Exclude in Part the Testimony of Russell Luepker, M.D. (doc. 36), is **DENIED**.

8. Defendant's Motion for Summary Judgment on Counts VI, VII, VIII, IX, X, XII and XIII of Plaintiff's Short Form Complaint (doc. 40) is **GRANTED in PART** and **DENIED in PART**. Said motion is **GRANTED** as to Counts VI, IX, and XIII. Said motion is also **GRANTED** as to Count XII on plaintiff's claim for violation of the DTPA. Said motion **DENIED** as to Counts VII, VIII, and X. Said motion is further **DENIED** as to Count XII on the plaintiff's claim for violation of the CFA.

9. Defendant's Motion to Exclude Testimony of Joseph Glenmullen, M.D. (doc. 45), is **DENIED**.

DONE and **ORDERED** this 18th day of September, 2012.

INGE PRYTZ JOHNSON
U.S. DISTRICT JUDGE