

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No.: 1:24-cv-20060-WILLIAMS/GOODMAN

ARTHUR LEHMANN,

Plaintiff,

v.

CARNIVAL CORPORATION,

Defendant.

OMNIBUS ORDER ON THE PARTIES' DAUBERT MOTIONS

In his opening statement at his September 12, 2005 confirmation hearing for Chief Justice of the United States, John G. Roberts, Jr. made some often-repeated comments to the Senate Judiciary Committee about the role of judges. He said that “judges are like umpires. Umpires don’t make the rules, they apply them. . . . I will remember that it’s my job to call balls and strikes, and not to pitch or bat.”

In other words, judges are not supposed to volunteer strategy. That is what *coaches* do, and judges are *umpires* (and are not supposed to be coaches or involved in coaching). Judges may call legal balls and strikes; determine the size of an evidentiary strike zone; decide whether a party was metaphorically tagged out at the plate through an Order denying a motion; and reach other conclusions. They may not, however, transform

themselves into a legal Casey Stengel by suggesting, for example, that the legal equivalent of a bunt might be a wise play.

This often-discussed baseball metaphor about judging and umpiring arises here in this maritime lawsuit because many of the best arguments to be made to support motions to exclude expert testimony were not raised by the parties (and I will not switch my role from umpire to coach and pitch legal fastballs by raising and developing never-asserted challenges).

The procedural history underlying my decision to not morph into a coach arises from a garden-variety personal injury lawsuit filed by a cruise ship passenger:

In this personal injury maritime action, Plaintiff Arthur Lehmann (“Plaintiff” or “Lehmann”) and Defendant Carnival Corporation (“Defendant” or “Carnival”) (collectively “the Parties”) filed motions to strike expert opinions under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). Plaintiff filed a motion to strike Defendant’s medical expert, Dr. Dominic Lewis (“Lewis”) [ECF No. 33], and Defendant’s rebuttal liability expert, David Martyn (“Martyn”) [ECF No. 34]. Defendant filed a response to each motion [ECF Nos. 41; 44], and Plaintiff filed optional replies [ECF Nos. 47; 48].

Additionally, Defendant filed a motion to strike Plaintiff’s tender operations

expert,¹ Randal Jaques (“Jaques”) and Plaintiff’s medical billing expert, Dr. William Tejeiro (“Tejeiro”). [ECF No. 35]. Plaintiff filed a response addressing both challenges [ECF No. 43], and Defendant filed a reply (also discussing both experts). [ECF No. 49].

United States District Judge Kathleen M. Williams referred the Parties’ motions to the Undersigned. [ECF No. 4].²

For the reasons discussed below, the Undersigned **respectfully recommends** that the Court: **grant in part** and **deny in part** Defendant’s Motion [ECF No. 35]; **deny** Plaintiff’s Motion on Lewis [ECF No. 33]; and **grant** Plaintiff’s Motion on Martyn [ECF No. 34].

I. FACTUAL BACKGROUND³

Plaintiff brought this action against Defendant after he fell when boarding one of Defendant’s tender boats. [ECF No. 1, ¶ 11]. His Complaint asserts three counts: Negligence Against Defendant (Vicarious Liability) (Count I); General Negligence

¹ According to Carnival, a tender boat is a small vessel that supports larger ships by transporting passengers between the larger ship and shore. [ECF No. 35, p. 1].

² Because this could be deemed a case-dispositive ruling, a Report and Recommendations, as opposed to an Order, is appropriate.

³ The facts in this introduction are derived from the Complaint [ECF No. 1-1] and submissions related to a no-longer-pending summary judgment motion: Defendant’s Statement of Material Facts [ECF No. 28], Plaintiff’s Response to Defendant’s Statement of Material Facts and Additional Facts [ECF No. 33], and Defendant’s Response to Plaintiff’s Additional Facts [ECF No. 38].

Against Defendant (Count II); and Negligent Failure to Warn Against Defendant (“Count III”). His Complaint alleges that:

9. On July 13, 2023, CARNIVAL anchored the vessel off the coast of Cabo San Lucas, Mexico, and required passengers to board a tender vessel, via gangway from the cruise ship, in order for passengers to access [the] port in Cabo San Lucas; a scheduled port of call for the subject voyage.

10. On July 13, 2023, Plaintiff tried to board a tender boat, from the Panorama, to reach [the] port in Cabo San Lucas. While on CARNIVAL’s gangway, and before boarding the tender, a CARNIVAL employee and/or agent on the tender instructed Plaintiff to give the employee/agent his cane, and Plaintiff complied with the CARNIVAL employee’s and/or agent’s instruction and handed him his cane. Plaintiff then boarded the tender, and within a few seconds of being on the tender without his cane, the tender became unstable in the water and Plaintiff fell to the ground.

11. After Plaintiff boarded the tender and before he fell, no CARNIVAL employee and/or agent assisted Plaintiff as to where he should sit down. Further, despite the availability of handicap seating near the captain’s area, no CARNIVAL employee and/or agent on the tender directed Plaintiff to sit there after he boarded the vessel and before he fell on the tender.

12. The subject incident caused Plaintiff to suffer a fractured ankle, shin injury, hip injury and back injury. Plaintiff underwent surgical treatment for his ankle and remained in a hospital for several weeks.

Id. at ¶¶ 9–12.

At issue here are four experts: Tejeiro, Jaques, Lewis, and Martyn. [ECF Nos. 33–35]. Defendant seeks to strike Tejeiro and Jaques’ opinions based on unreliable methodology, impermissible legal conclusions, and unhelpful testimony. [ECF No. 35]. Plaintiff seeks to strike Lewis and Martyn’s opinions, and he provides similar arguments.

II. LEGAL FRAMEWORK

The district court has “broad discretion in determining whether to admit or exclude expert testimony, and its decision will be disturbed on appeal only if it is manifestly erroneous.” *Evans v. Mathis Funeral Home*, 996 F.2d 266, 268 (11th Cir. 1993). Federal Rule of Evidence 702 governs the admission of expert testimony, as explained and refined by the United States Supreme Court in *Daubert*, 509 U.S. at 582 and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). Under this framework, district courts are charged with a gatekeeping function “to ensure that speculative, unreliable expert testimony does not reach the jury.” *McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1256 (11th Cir. 2002).

Rule 702 provides that:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

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

Fed. R. Evid. 702.

To fulfill its obligation under *Daubert*, a trial court engages in a three-part inquiry: (1) whether the expert is qualified to testify competently; (2) whether the methodology used to reach the conclusions is sufficiently reliable; and (3) whether the testimony assists the trier of fact to understand the evidence or to determine a fact at issue. *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1291-92 (11th Cir. 2005).

As an overarching principle, the district court must “ensure that speculative, unreliable expert testimony does not reach the jury.” *McCorvey*, 298 F.3d at 1256. “In order to be admissible, an expert’s testimony must be based on ‘more than subjective belief or unsupported speculation.’” *Haggerty v. Upjohn Co.*, 950 F. Supp. 1160, 1167 (S.D. Fla. 1996) (quoting *Daubert*, 509 U.S. at 590). There should be “[s]cientific method; good grounds and appropriate validation.” *United States v. Masferrer*, 367 F. Supp. 2d 1365, 1371 (S.D. Fla. 2005).

Reliability of the methodology requires “an exacting analysis of the proffered expert’s methodology.” *McCorvey*, 298 F.3d at 1257. That analysis takes into consideration a number of factors, including: (1) whether the expert’s methodology can be, and has been, tested; (2) whether the expert’s scientific technique has been subjected to peer review and publication; (3) whether the method employed has a known rate of error; and (4) whether the technique is generally accepted in the scientific community. *Rink*, 400 F.3d

at 1292; see also *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1341 (11th Cir. 2003).

These reliability factors, however, are non-exhaustive. *Kumho Tire*, 526 U.S. at 150; *Rink*, 400 F.3d at 1292. Thus, “[i]n evaluating the reliability of an expert’s method . . . a district court may properly consider whether the expert’s methodology has been contrived to reach a particular result.” *Rink*, 400 F.3d at 1293 n.7. The burden of establishing the reliability of an expert’s opinions rests on the proponent of that expert’s testimony. *United States v. Frazier*, 387 F.3d 1244 (11th Cir. 2004). The party proffering the expert also has the burden of “laying the proper foundation for the admission of the expert testimony . . . and admissibility must be shown by a preponderance of the evidence.” *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1306 (11th Cir. 1999).

“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. Thus, the district court cannot exclude an expert because it believes the expert lacks personal credibility. *Rink*, 400 F.3d at 1293 n.7. To the contrary, “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.” *Quiet Tech. DC-8, Inc.*, 326 F.3d at 1341 (quoting *Daubert*, 509 U.S. at 596).

A less-than-perfect expert opinion may still be admitted, even if it contains gaps. See *In re Trasyolol Prods. Liab. Litig.*, No. 08–MD–01928, 2010 WL 1489793, at *6 (S.D. Fla. Feb. 24, 2010) (“Only if the expert’s opinion is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be excluded.”).

Furthermore, courts “must be careful not to conflate questions of admissibility of expert testimony with the weight appropriately to be accorded to such testimony by the fact finder.” *Id.* at *7 (quoting *Quiet Tech DC–8, Inc.*, 326 F.3d at 1341).

On the other hand, courts do not hesitate to exclude purported expert testimony which does not pass muster. See *Allison*, 184 F.3d 1300 (affirming summary judgment in favor of silicone breast implant manufacturers and upholding district court’s exclusion of proffered expert’s causation testimony under *Daubert*); *Rink*, 400 F.3d at 1286 (affirming exclusion of expert testimony in products liability and toxic trespass claims against pesticide manufacturer and therefore affirming summary judgment for defendant); *Frazier*, 387 F.3d 1244 (finding trial court in criminal case did not abuse its discretion in excluding proffered expert testimony from forensic investigator); *Hendrix v. Evenflo Co., Inc.*, 609 F.3d 1183 (11th Cir. 2010) (affirming defense summary judgment for infant car seat manufacturer in products liability lawsuit involving child who sustained traumatic brain injuries and upholding trial court ruling which excluded expert testimony because the experts were not sufficiently reliable).

If a case is proceeding as a bench trial, then the court's gatekeeper function is relaxed. While *Daubert* requires trial courts to act as "gatekeepers" to ensure a jury is not exposed to "speculative, unreliable expert testimony," *McCorvey*, 298 F.3d at 1256, these concerns "are greatly reduced when the expert will testify during a bench trial," *Exim Brickell LLC v. Bariven, S.A.*, No. 09-CV-20915, 2011 WL 13131317, at *4 (S.D. Fla. Mar. 11, 2011). As stated by the Eleventh Circuit, "[t]here is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself." *United States v. Brown*, 415 F.3d 1257, 1269 (11th Cir. 2005).

III. ANALYSIS

a. Dr. Dominic Lewis⁴

Lewis is a "board-certified orthopedic surgeon, specializing in foot and ankle surgery[.]" [ECF No. 41, p. 1]. On July 23, 2024, Lewis conducted a compulsory medical exam on Plaintiff. In his report, Lewis discussed Plaintiff's medical history and stated the following, "It is also important to note that from a causation standpoint, the patient reported a history of a bad right knee, and noted that his fall resulted from his leg giving way." [ECF No. 33-1, p. 4].

Plaintiff takes issue with that statement and seeks an Order barring Lewis from 1)

⁴ A complete, unredacted copy of Lewis' expert report is available on CM/ECF. [ECF No. 33-1].

offering at trial “his opinion(s) as to how Plaintiff became injured, including whether any of Plaintiff’s preexisting medical conditions contributed to his alleged incident;” and 2) offering “human factor opinions at trial.” [ECF No. 33, p. 2]. He argues that Lewis’ “opinions as to contributing factors to Plaintiff’s fall are simply his speculative personal opinions—not expert opinions that are supported by a scientific methodology.” *Id.* at 6 (citing *McClain v. Metabolife Int’l, Inc.*, 401 F.3d 1233, 1245 (11th Cir. 2005)).

Defendant disagrees and contends that Lewis performed the typical methodology for medical experts (*i.e.*, giving a compulsory medical examination, taking Plaintiff’s medical history, and reviewing medical records/imaging). [ECF No. 41, p. 4 (citing *Ballesteros v. Wal-Mart Stores E., LP*, No. 2:19-CV-881-SPC-NPM, 2021 WL 1737452, at *6 (M.D. Fla. May 3, 2021) (collecting cases)). It also argues that:

Medical causation opinions are only excludable where the doctor “engaged in very few standard diagnostic techniques by which doctors normally rule out alternative causes and the doctor offered no good explanation as to why his or her conclusion remained reliable” or if “the defendants pointed to some likely cause of the plaintiff’s illness other than the defendants’ action and [the doctor] offered no reasonable explanation as to why he or she still believed that the defendants’ actions were a substantial factor in bringing about that illness.”

Id. at 3 (quoting *Wilson v. Taser Int’l, Inc.*, 303 F. App’x 708, 714 (11th Cir. 2008)).

Plaintiff highlights in his reply that this argument works in *his* favor because Lewis failed to “take into consideration and rule out the greater weight of the evidence that Plaintiff fell because a Carnival tender agent instructed Plaintiff to give up his cane.” [ECF

No. 48, pp. 3–4]. However, Defendant additionally argues that “a doctor usually may primarily base his opinion as to the cause of a plaintiff’s injuries on his history where the plaintiff has sustained a common injury in a way that it commonly occurs[;]” and that “[e]xpert testimony is admissible which connects conditions existing later to those existing earlier provided the connection is concluded logically.” [ECF No. 41, pp. 3–4 (quoting *Wilson*, 303 F. App’x at 714 (internal quotations omitted) and *Chau*, 2017 WL 3623562, at *10 (citing *Jones*, 861 F. 2d at 662)).

Here, Lewis’ statement on causation logically connects Plaintiff’s medical history to his injury and is supported by Lewis’ review of Plaintiff’s medical records and testimony. Additionally, during his deposition, Plaintiff even acknowledged that his right knee is so bad that doctors have recommended that it be replaced:

Q. [Defense Counsel]: Have your doctors recommended undergoing a right knee replacement?

A. [Plaintiff]: They said I should, yes.

Q. When did they recommend that you undergo the right knee replacement?

A. A long time ago. About the same time.

Q. About the same time you got the left knee replaced?

A. Yeah.

Q. So sometime around 2012?

A. Yes.

Q. And why did you elect not to undergo the right knee replacement?

A. Because the left was so bad, and then the right knee, I can live with. It's not that, you know – it's – it's just something that I live with.

[ECF No. 33-3, p. 7].

Plaintiff argues that Lewis' statement will not help the trier of fact because it is speculative, but it is not speculative to the extent it is based on what Plaintiff *directly communicated* to Lewis (and supported by Lewis' professional experience and review of Plaintiff's medical records).

The Undersigned notes that Lewis' report fails to comply with Fed. R. Civ. P. 26(a)(2)(B). The Federal Rules of Civil Procedure state the following about expert witness reports:

(B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report **must** contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

Fed. R. Civ. P. 26(a)(2)(B).

Here, Lewis' report fails to comply with Fed. R. Civ. P. 26(a)(2)(B) because the report does not contain any of the above requirements. *See Ballesteros*, 2021 WL 1737452, at *4 (stating that retained experts, including non-treating physicians, must produce a full report under Fed. R. Civ. P. 26(a)(2)(B)).

Additionally, is what Lewis said in his report even an *opinion*? It is not. Lewis' statement (in his report) reflects a simple note or recitation about what Plaintiff **told** him. Lewis does not quote Plaintiff as saying that Defendant's actions (or actions of its employees) did in fact cause him to fall. In a way, this report suggests that Plaintiff implicitly conceded that his own bad knees share some responsibility for his fall. Moreover, the report **does not contain a conclusion or opinion** by Lewis that Plaintiff's pre-existing medical condition caused the fall.

However, neither of those arguments and challenges to Lewis will be discussed because Plaintiff failed to make either argument in his motion. *See Fails v. Bd. of Trustees Univ. of W. Fla.*, No. 3:22CV7026-TKW-HTC, 2023 WL 5666438, at *10 (N.D. Fla. Sept. 1,

2023) (“Here, the Court would have to make [the] [p]laintiff’s argument for him and link particular adverse actions to particular protected activities before it could even consider [the] [p]laintiff’s claims. The Court will not do so.” (citing *Reaves v. Sec’y, Fla. Dep’t of Corrs.*, 872 F.3d 1137, 1149 (11th Cir. 2017) (“It is not [the Court’s] job, especially in a counseled civil case, to create arguments for someone who has not made them or to assemble them from assorted hints and references scattered throughout the brief.” (citation and internal quotation marks omitted)))).

As drafted, Plaintiff’s motion to strike Lewis’ opinions [ECF No. 33] should be **denied** because Lewis’ statement is logically connected to Plaintiff’s medical history and testimony. Plaintiff’s arguments regarding Lewis’ methodology application are issues better suited for cross-examination. *Quiet Tech.*, 326 F.3d at 1345 (“The identification of such flaws in generally reliable scientific evidence is precisely the role of cross-examination.”). The other problems plaguing Lewis’ statements in his report (*i.e.*, the fact that he did not actually offer an opinion and the report’s failure to comply with Rule 26(a)(2)(B)’s requirements) may well be persuasive challenges but, as noted, they were never asserted.

Of course, the ultimate decision on the admissibility of expert opinion testimony at trial is reserved for Judge Williams, and she may determine that Lewis’ note about what Plaintiff told him is not an expert medical opinion on causation. Similarly, Judge

Williams may at trial prevent Lewis from testifying about his conclusions (assuming he reached any, which is not apparent from his written report) or opinions or observations because his written report does not comply with Rule 26. But those are decisions for another day. For now, the Undersigned **respectfully recommends** that Plaintiff's motion be **denied** because his motion does not assert as grounds the most-likely-to-be-successful arguments.

b. Randall Jaques⁵

Jaques is a maritime safety consultant and accident analyst, and Plaintiff retained him to "perform a cruise ship accident analysis with respect to Plaintiff[.]" [ECF No. 35-2, p. 1]. Carnival describes him as a "jack-of-all-trades 'safety' expert [who] frequently appears on behalf of cruise passenger plaintiffs in maritime tort cases." [ECF No. 35, p. 1]. Jaques offers the following opinions:

1. Cruise ship-to-tender transfer operations are dangerous for cruise ship passengers; this is well known to cruise lines, but not an obvious danger to cruise passengers.

2. Cruise ship crew and their tender agents responsible for assisting passengers [sic] transfer from the cruise ship to the tender must exercise caution for the safety of cruise ship passengers.

3. In this particular case, Carnival's crew and tender agents did not act reasonably under the circumstances because they failed to assist [Plaintiff with] board[ing] the tender vessel.

⁵ A complete, unredacted copy of Jaques' expert report is available on CM/ECF. [ECF No. 35-2].

4. The conduct of Carnival's crew and agent directly caused [Plaintiff] to become injured.

[ECF No. 35, p. 2].

Defendant argues that Jaques' testimony should be stricken because his methodology is unreliable and his testimony will not assist the trier of fact. Defendant faults Jaques' methodology for not including any testing. Instead, it is based on his review of materials, including CCTV footage, an interview with Plaintiff, depositions taken in the case, Defendant's policies and procedures, and other documents provided in discovery.⁶

In *Maxwell v. Carnival Corp.*, No. 19-CV-23054, 2021 WL 1049513, at *4 (S.D. Fla. Mar. 18, 2021), the plaintiff suffered a slip-and-fall on one of Defendant's ships and retained Jaques "as an expert witness to provide his opinion as to why [the] [p]laintiff 'slipped and fell on a liquid slimy substance.'" *Id.* at * 1 (internal citation omitted). The *Maxwell* Court found that the circumstances paralleled those described in *Higgs v. Costa Crociere S.p.A. Co.*, No. 15-60280-CIV, 2016 WL 4370012, at *6 (S.D. Fla. Jan. 12, 2016), and quoted the following:

⁶ His report states that he specifically reviewed: Defendant's Responses to Plaintiff's First Request for Production; Defendant's Responses to Plaintiff's First Request for Admissions; Defendant's Responses to Plaintiff's Initial Interrogatories; CCTV video of the incident; pictures of the tender vessel; and Plaintiff's injury statement. [ECF No. 35-2, p. 3].

The Court finds Jaques' opinions sufficiently reliable regarding Defendant's conformity to industry safety standards concerning floor-level obstructions on the date of [the] [p]laintiff's injury. Such opinions do not require detailed measurements or experiments. In formulating his opinions, Jaques relied on his personal inspection and pictures of the dining area where the incident occurred, a review of relevant discovery documents, and his extensive experience as a security officer for multiple cruise lines. According to the supplemental disclosures, Jaques also spoke with [the] [p]laintiff and at least one member of her family who witnessed the accident. DE 39-4 at 2. Although citations to specific safety regulations would have improved the reliability of Jacques' [sic] opinions, the Court does not find such citations essential in this instance.

2021 WL 1049513, at *4 (quoting *Higgs*, 2016 WL 4370012, at *6).

The *Maxwell* Court explained that:

Here, in forming his opinions, [] Jaques relied upon his years of experience as a maritime security and safety officer for Defendant and other cruise lines, in which he investigated over 2,000 shipboard accidents, including slip and falls. [] Jaques also relied upon his interview with [the] [p]laintiff, photographs taken of the incident scene, the passenger injury statement submitted on [the] [p]laintiff's behalf, and the depositions of [the] [p]laintiff and [corporate representative Monica] Borgegue. While [] Jaques testified that he did not read, or receive a copy of, Defendant's spill policies, those materials were certainly not ignored. Indeed, the deposition of Ms. Borgegue sufficiently describes and sets forth Defendant's policies on responding to hazardous spills. Thus, upon review of the record presented, the Court finds that [] Jaques' opinions regarding the industry standard of care, including Defendant's own policies, on marking and responding to hazardous spills are sufficiently reliable.

Id. (internal citations omitted).

The Undersigned agrees with the rationale used in both *Higgs* and *Maxwell* for

Jaques' *first* two opinions.⁷ Those opinions clear the reliability hurdle for the industry standard of care concerning the ship-to-tender transfer. To be sure, his report fails to include citations to specific safety regulations, but, like in *Higgs*, while it would have improved the reliability of his opinion, the lack of specificity does not lead to *exclusion* of his opinion concerning the safety standards.

Defendant repeatedly argues that Jaques' methodology is unreliable because he failed to perform any testing or personally inspect the vessel, but opinions related to safety standards and certain dangers do not require detailed measurements or experiments. *See Maxwell*, 2021 WL 1049513, at *4 (quoting *Higgs*, 2016 WL 4370012, at *6). Defendant then states that Jaques did not review any materials as to trainings, but Jaques testified that he reviewed a still frame from one of Defendant's instructional videos for its passengers related to using tender boats and that he is familiar with it. [ECF No. 35-1, p. 69]. Additionally, Plaintiff notes that Jaques did not review any training materials because Defendant "never disclosed such crew training material, and it likely doesn't exist." [ECF No. 43, p. 8].

⁷ As previously stated, his first two opinions are: (1) cruise ship-to-tender transfer operations are dangerous for cruise ship passengers; this is well known to cruise lines, but not an obvious danger to cruise passengers; and (2) cruise ship crew and their tender agents responsible for assisting passengers transfer from the cruise ship to the tender must exercise caution for the safety of cruise ship passengers. [ECF No. 35-2, p. 5].

Plaintiff also highlights how, even though Defendant did not produce any crew-member training materials in discovery, its “[c]orporate [r]epresentative testified that Carnival’s training for tender operations is simply ad hoc and done onboard.” [ECF No. 43, p. 8]. Defendant’s representative testified that he knew “some type of training” is provided for the crewmembers but was unable to provide any specifics, and he spoke about it in a generalized manner:

Q. [Plaintiff’s Counsel] . . . does Carnival provide its tender agents any training for tender operations?

A. [Defendant’s Corporate Representative] **I’m not sure** if we provide any of the tender agents training.

Q. Okay. But regardless of the specifics, Carnival does provide its crew members training for tender ops; is that right?

A. **I believe we do. I can’t guarantee** – I don’t know the procedures of it, but we – we do provide some type of a training.

Q. Carnival does have a policy to assist its passengers when they’re making the transfer from a cruise ship to a tender; is that right?

A. Correct.

Q. And what type of assistance would Carnival expect its crew members to provide?

A. Oh, **maybe** expecting individuals to use the handrails. . . .

[ECF No. 43-4, pp. 51–53 (emphasis added)].

Therefore, in addition to being reliable, Jaques' first two opinions are *not* issues of common understanding and could be helpful to the trier of fact because there is nothing in the factual record that would assist the trier of fact to know the industry safety standards. "Helpful expert testimony is admissible because it illuminates matters beyond the understanding of the average lay person." *Umana-Fowler v. NCL (Bahamas) Ltd.*, 49 F. Supp. 3d 1120, 1122 (S.D. Fla. 2014) (quoting *Frazier*, 387 F.3d at 1262).

However, while the first two opinions may be permissible, the latter two are **not** because they revolve around unreliable methodology and are unhelpful to the trier of fact.⁸

As Defendant argues, Jaques based these two opinions, in large part, on his analysis of the CCTV footage, something that the **trier of fact is just as capable of evaluating**. *Easterwood v. Carnival Corp.*, No. 19-CV-22932, 2020 WL 6880369, at *10 (S.D. Fla. Nov. 23, 2020) ("The trier of fact 'does not need [] Jaques to view videos and pictures or review other admissible evidence, such as of industry standards or guidelines, to determine if Defendant violated a duty it owed to [the] [p]laintiff,' and it 'is just as capable as [] Jaques at evaluating [the] [p]laintiffs [sic] narrative and theories of liability.'" (citing

⁸ As previously outlined, the latter opinions are: (3) in this particular case, Carnival's crew and tender agents **did not act reasonably under the circumstances** because they failed to assist Plaintiff with boarding the tender vessel; and (4) the conduct of Carnival's crew and agent **directly caused** Plaintiff's injury. [ECF No. 35-2, p. 5 (emphasis added)].

Horne v. Carnival Corp., No. 1:16-CV-21842-JLK, 2018 WL 4623527, at *2 (S.D. Fla. Sept. 26, 2018)). See also *Mendel v. Royal Caribbean Cruises Ltd.*, No. 10-23398-CIV, 2012 WL 13129839, at *5 (S.D. Fla. Jan. 9, 2012) (expert testimony is unhelpful where “the basis for [Jaques’] opinion that the deck was a high traffic area that was difficult to maneuver was the video of [the plaintiff’s] fall”), *report and recommendation adopted*, No. 10-23398-CIV, 2012 WL 13129834 (S.D. Fla. Feb. 22, 2012); *St. Cyr v. Flying J, Inc.*, No. 3:06-cv-13-J-33TEM, 2008 WL 2608127, at *6 (M.D. Fla. June 29, 2008) (“[T]he Eleventh Circuit follows the generally accepted rule that expert testimony is properly excluded when it is not needed to clarify facts and issues of common understanding which jurors are able to comprehend for themselves.”).

Additionally, both opinions contain impermissible legal conclusions. “The Eleventh Circuit has made clear that legal conclusions or statements instructing what conclusion the jury should reach are impermissible to pass muster under *Daubert*.” *Webb v. Carnival Corp.*, 321 F.R.D. 420, 426 (S.D. Fla. 2017) (citing *Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cnty., Fla.*, 402 F.3d 1092, 1112 n.8 (11th Cir. 2005) (“[C]ourts must remain vigilant against the admission of legal conclusions” (citations and internal quotations marks omitted))); see also *Montgomery y v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990) (“An expert may not . . . merely tell the jury what result to reach.”). “A witness also may not testify to the legal implications of conduct; the court must be the jury’s only

source of law.” (citing *U.S. v. Poschwatta*, 829 F.2d 1477, 1483 (9th Cir. 1987); *U.S. v. Baskes*, 649 F.2d 471, 479 (7th Cir. 1980))).

There is no “per se rule against testimony regarding ultimate issues of fact. By the same token, however, courts must remain vigilant against the admission of legal conclusions, and an expert witness may not substitute for the court in charging the jury regarding the applicable law.” *United States v. Milton*, 555 F.2d 1198, 1203 (5th Cir. 1977).⁹ And while it is true that Federal Rule of Evidence 704 “states that testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact[,] . . . Rule 704 was not intended to allow experts to offer opinions embodying **legal** conclusions.” *St. Cyr*, 2008 WL 2608127, *8 (citing Advisory Committee Notes (2000) to Rule 704 Fed. R. Evid.) (emphasis added).

The *St. Cyr* Court ultimately ruled that an expert was qualified to opine on the cause and origin of a fire at the heart of the case, but that did not qualify him to make legal conclusions regarding the plaintiffs' duty to maintain a propane system or other legal issues. *Id.*

In *Brown v. Bray & Gillespie III Mgmt. LLC*, the court concluded that an expert's opinion that “the operators of the hotel knew, or should have known, that hotel water

⁹ In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981), our appellate court held that all Fifth Circuit decisions issued before the close of business on September 30, 1981 would become binding precedent in the Eleventh Circuit.

systems, including whirlpool spas, present a risk of Legionnaire's Disease and must be maintained to minimize Legionella bacteria[]” was an inappropriate legal conclusion because an expert “may not testify as to what these Defendants knew or should have known.” No. 6:06-cv-661-Orl-22GJK, 2008 U.S. Dist. LEXIS 45673, at *5 (M.D. Fla. June 10, 2008).

Therefore, unless Defendant opens the door, Jaques should be barred from opining on his latter two opinions (3 and 4) because they impermissibly assign fault to Defendant and indicate that its employees did not act reasonably. *See Maxwell*, 2021 WL 1049513, at *5 (“[T]he Court agrees with Defendant that portions of [] Jaques’ opinions assigning fault to Defendant and indicating that Defendant had notice of the dangerous condition impermissibly opine on the ultimate legal conclusions at issue in this case.”); *O’Malley v. Royal Caribbean Cruises, Ltd.*, No. 17-21225-CIV, 2018 WL 2970728, at *4 (S.D. Fla. June 13, 2018) (“Mr. Gras’ generic opinions are intertwined with legal conclusions that [the] [d]efendant was negligent and that the vessel’s personnel caused [the] [p]laintiff’s injuries. Therefore, we conclude that Mr. Gras may not testify that [the] [d]efendant was at fault or that [the] [d]efendant breached its duty of care.”); *Higgs*, 2016 WL 4370012, at *7 (concluding that [] Jaques’ opinions that a defendant “is at fault” or that its crew is “careless,” and testimony concerning the applicable legal standard, *i.e.*, that a defendant is “legally required to exercise at least ‘reasonable care for the safety’ of the passengers in

question,” all constitute unhelpful and impermissible legal conclusions that should be stricken).

At bottom, the Undersigned **respectfully recommends** that Defendant’s motion [ECF No. 35]¹⁰ be **granted in part** and **denied in part** with regards to Jaques’ testimony.

c. Dr. William Tejeiro¹¹

Tejeiro “is a medical doctor board certified in orthopedic surgery.” [ECF No. 43-1, p. 2]. Defendant argues that Plaintiff is impermissibly attempting to use Tejeiro as an orthopedic surgery expert, a medical billing expert, and a life care planner/physiatrist. [ECF No. 35, p. 8]. Defendant states that Tejeiro’s testimony should be limited to Plaintiff’s medical condition and not the cost of his future medical treatment or the reasonableness of his past treatment *Id.*

Defendant argues that Tejeiro’s opinion as to the cost of Plaintiff’s future medical treatment should be stricken because he failed to review any “Medicare guidelines, tables, or reimbursement rates” for Plaintiff’s medical costs, and at one point even relied on *Google* as a source. It highlights the following testimony from his deposition:

Q. [Defense Counsel] And, again, did you arrive at that \$80,000 the

¹⁰ Defendant’s motion included an argument related to a new opinion Jaques provided in his deposition. However, the Undersigned will not address it because Plaintiff, in his response, stated that this new opinion is withdrawn. [ECF No. 43, p. 15].

¹¹ A complete, unredacted copy of Tejeiro’s expert report is available on CM/ECF. [ECF No. 35-3].

same way that you arrived at the \$90,000, which you provided as an estimate for the right ankle fusion surgery in the paragraph before that?

A. [Tejeiro] Yeah. But, in that case, we have a little bit more experience because, you know, I do ask patients, who have undergo [sic] joint replacement, what their costs. So we have actually a more of a basis for coming about that opinion, based on my interview with multiple patients who've undergone joint replacement of the knee.

Q. Okay. So that -- that \$80,000-figure that's something that's based off of your interviews with other patients who you treated who've undergone a similar procedure; is that correct?

A. Medicare -- Medicare patients, yes.

Q. Okay. But your office is not charging those patients presently for that same procedure. You haven't performed surgeries in five years, right?

A. No, we don't do surgeries anymore.

Q. For purposes of arriving at that \$80,000-figure, I just want to confirm: **You didn't actually go to the Medicare guidelines or tables –**

A. **No**, I did not.

Q. -- and specifically calculate what it would cost for the right knee arthroplasty, the surgeon's fees, hospital fees, anything like that, correct?

A. Correct.

Q. And, again, that \$80,000-figure that you provided there for the right total knee arthroplasty, that -- that would be based in Miami-Dade County, not Montgomery, Texas, where [] Lehmann lives, correct?

A. Correct. And also barring any complications.

Q. And you didn't review specifically Medicare or -- guidelines or tables for purposes of coming up with that \$18,000 per year **to see what Medicare would actually pay** for that treatment, did you?

A. No, that's kind of beyond the scope for what I was doing for []Lehmann. I was giving an estimate as to what I thought the cost might be. I can't actually give you more than that.

Q. Would it be fair to say that that's kind of just a ballpark estimate of what it would cost?

A. Absolutely. Could be more, could be less.

Q. Would it be fair to say that -- that all the estimates for -- for all the costs for -- for future treatment that you included in your report would be just that as well, ballpark estimates?

A. Yeah

Q. You indicated that, "Long-term care at a skilled nursing facility costs an, average of \$100,000 to \$130,000, depending on the area of the country where the patient resides," correct?

A. Correct.

Q. Okay. So what exactly did you do to come up with that estimate of \$100,000 to \$100,000 -- what -- excuse me -- getting tired. What exactly did you do to come up with that estimate of \$100,000 to \$130,000 per year in terms of the cost for long-term care at a skilled nursing facility?

A. Okay. That, I specifically looked up online. So I went to several sites on the --under -- in -- on the internet on Google, and we just looked up the average -- average cost of skilled nursing facilities and that is the number we arrived for this area. So...

Q. For which area?

A. For Miami-Dade County.

Q. Okay. So the number you provided is an average of the annual cost per year **in** Miami-Dade County for a long-term care and skilled nursing facility?

A. *Correct.*

Q. Okay. And you arrived at that figure by -- **by looking up information on Google?**

A. Yes. There several sites that provide that for -- cost estimates for -- for this type of determination, I guess, for other patients planning on long-term care, to get an idea of what the costs are.

Q. Okay. Can you tell us **specifically** what sites you -- you referred to to come up with that -- that range of \$100,000 to \$130,000 per year?

A. It would be **whatever came up** when I did the -- my Google search at the time, but **I couldn't tell specifically** what -- what we reviewed, but we reviewed several of them.

[ECF No. 35-4, pp. 71–72, 96, 106–08 (emphasis added)].

In response, Plaintiff argues that Tejeiro's methodology is reliable and based on his personal knowledge and experience. [ECF No. 43, p. 17]. The Undersigned disagrees and notes that Tejeiro's methodology is problematic because his calculations are based on costs in Miami-Dade County, Florida, *not* Montgomery County, Texas (where Plaintiff lives). Tejeiro even acknowledges that some of his calculations depend on the area of the country where the patient resides, and there is nothing indicating that Plaintiff will be

moving to Miami-Dade County to have any treatment done. Additionally, Tejeiro's reliance on simple internet searches is unhelpful because not only is it something an average lay person could complete, but his report fails to cite to *any* of the results he relied on.

However, neither of these two challenges (*i.e.*, the distinction between medical charges in Texas and South Florida and the use of basic internet searches) will be grounds to exclude Tejeiro's opinions because Defendant failed to make either argument in its motion. *See Fails*, 2023 WL 5666438, at *10 and *Reaves*, 872 F.3d at 1149.

Plaintiff argues that "any challenges Carnival may have relating to Dr. Tejeiro's cost opinions should be left for cross-examination at trial." [ECF No. 43, p. 18 ("[I]t is not the role of the district court to make ultimate conclusions as to the persuasiveness of the proffered evidence." (citing *Quiet Tech. DC-8, Inc.*, 326 F.3d at 1341))]. However, *Quiet Tech. DC-8, Inc.* also states that "[t]he identification of such flaws in generally **reliable** scientific evidence is precisely the role of cross-examination." 326 F.3d at 1345 (emphasis added). And Tejeiro's opinions on future costs are plagued by the fact that he never cross-referenced his findings with the **current** applicable Medicare guidelines (and Plaintiff is a Medicare recipient).

Expert testimony inherently has a "powerful and potentially misleading effect." *Frazier*, 387 F.3d at 1263. "Exclusion under Rule 403 is appropriate if the probative value

of otherwise admissible evidence is substantially outweighed by its potential to confuse or mislead the jury." *Id.* (citing *Hull v. Merck & Co., Inc.*, 758 F.2d 1474, 1477 (11th Cir.1985) (*per curiam*) (finding that admission of speculative and "potentially confusing testimony is at odds with the purposes of expert testimony as envisioned in Fed. R. Evid. 702"); *see also United States v. Stevens*, 935 F.2d 1380, 1399 (3d Cir. 1991) (finding expert testimony properly excluded because its probative value was outweighed by concerns of "undue delay, waste of time, or needless presentation of cumulative evidence").

Tejeiro's methodology and failure to refer (or cite) to the current guidelines (but instead relying on his experience)¹² renders his findings unreliable. *Moore v. GNC, Holdings, Inc.*, No. 12-61703-CIV, 2014 WL 12684287, at *4 (S.D. Fla. Jan. 24, 2014) ("The Report contains no details that would allow one to refer to the relevant studies, research, or sources in order to check, test, affirm, or rebut Dr. Blumenkrantz's factual assertions and ultimate conclusions. In sum, there is no way to test Dr. Blumenkrantz's methodology, nor is there any basis for the Court to conclude that the methodology is reliable.").

Therefore, the Undersigned **respectfully recommends** that the Court **grant** Defendant's Motion [ECF No. 35] with regards to Tejeiro's opinions about Plaintiff's

¹² During his deposition, Tejeiro stated that he is semiretired and stopped performing surgeries as an orthopedic surgeon approximately five years ago. [ECF No. 35-4, pp. 9-10].

estimated *future* costs because they are based on unreliable methodology (but not because of the never-raised arguments).

In addition to requesting the Court to strike Tejeiro's opinions on estimated future costs, Defendant requests that his opinions as to Plaintiff's past costs be stricken because he failed to include them in his report and provided his opinion only during his deposition. [ECF No. 35, p. 10]. Carnival's argument is straightforward: "There is no explanation given for why Dr. Tejeiro did not previously provide these opinions, and they are well outside his field of orthopedics. Carnival is unfairly prejudiced by having to respond to these new opinions after the close of discovery and expert discovery." *Id.*

Plaintiff highlights how he timely disclosed Tejeiro and how his expert disclosure informed Defendant that Tejeiro would opine on Plaintiff's past medical costs. [ECF No. 43, p. 20]. Plaintiff argues that Defendant's motion as to Tejeiro's past medical costs opinion should be denied because it failed to timely address the issue and compares Defendant's plight to the scenario in *Kroll v. Carnival Corp.*, No. 19-23017-CIV, 2020 WL 4926423, at *6 (S.D. Fla. Aug. 20, 2020).

In *Kroll*, the Undersigned addressed a situation where Defendant sought to exclude expert testimony by arguing that the plaintiff's expert witness disclosure was insufficient. The Undersigned found that "Carnival's decision to withhold its dissatisfaction from the Court until after the expert discovery deadline expired had, in

the Undersigned's view, evolved into a substantial factor precluding an order striking the witnesses." 2020 WL 4926423, at *6 (citing *Griffith v. General Motors Corp.*, 303 F.3d 1276, 1283 (11th Cir. 2002) (finding that the district court did not abuse its discretion in denying passenger's motion *in limine*, seeking to exclude an expert witness because of deficient pretrial disclosures, and emphasizing that the plaintiff allowed the dissatisfaction to continue unresolved for more than two years without asking for judicial relief)).

Defendant contends that *Kroll* is not applicable because in *Kroll*, "the passenger would likely be subjected to directed verdict without causation evidence." [ECF No. 49, p. 4]. The Undersigned disagrees.

Judge Williams mandated the following deadlines in this case: "the Parties shall disclose experts, expert witness summaries, and reports" by October 10, 2024; "the Parties shall complete all discovery, including expert discovery" by November 21, 2024; and "the Parties shall file all dispositive pretrial motions and . . . any motions to strike or exclude expert testimony" by December 13, 2024. [ECF No. 17]. Tejeiro's report is dated September 18, 2024 [ECF No. 35-3], and his deposition took place on December 4, 2024 (thirteen days *after* all discovery was due). [ECF No. 35-4]. Defendant filed its motion to strike Tejeiro on December 13, 2024. [ECF No. 35].

When Defendant chose to take Tejeiro's deposition **outside** of the discovery period, it assumed the risks associated with the after-the-deadline discovery. If

Defendant had obtained the deposition in a more-timely manner, then it would have been able to better remedy the situation. Instead, Defendant chose to wait until the last day dispositive motions were due [ECF No. 17] to bring the issue to the Court's attention.

Defendant argues that "Carnival is unfairly prejudiced by having to respond to these new opinions after the close of discovery and expert discovery." [ECF No. 35, p. 10]. The Undersigned disagrees and finds that Defendant's own actions caused its prejudice. Had Defendant taken Tejeiro's deposition sooner, then it would not need to respond to the new opinions after the close of discovery. "The movant has the burden to demonstrate that the evidence is inadmissible." *Johnson v. Carnival Corp.*, 533 F. Supp. 3d 1196, 1202 (S.D. Fla. 2021) (citing *United States v. Gonzalez*, 718 F. Supp. 2d 1341, 1345 (S.D. Fla. 2010)).

Therefore, the Undersigned **respectfully recommends** that the Court **deny** Defendant's Motion [ECF No. 35] concerning Tejeiro's opinions on Plaintiff's estimated past medical costs.¹³

Therefore, by way of summary, the Undersigned **respectfully recommends** that Judge Williams **deny in part** and **grant in part** the motion to exclude Tejeiro's opinions at trial.

¹³ Unlike Tejeiro's opinions about Plaintiff's future medical expenses, his opinion on the reasonableness of Plaintiff's past medical expenses is based on analysis from the same part of the country (*i.e.*, Miami-Dade County), as opposed to Texas, which was not adequately analyzed in the opinion on future medical expenses.

d. **David Martyn**¹⁴

Martyn is a forensic engineer, specializing in naval architecture, marine engineering, mechanical engineering, and industrial safety engineering. Defendant retained him to testify as to the following:

Martyn will testify to all aspects of liability relating to the safety of the subject tender boat operations at Cabo San Lucas, MX, including the transfer of passengers including Plaintiff onto tender boats from Carnival cruise ships in Cabo San Lucas, including but not limited to reasonableness in the use of the subject transfer/tender procedure, compliance with any applicable codes, regulations, and/or standards as to boarding tenders such as the one involved in the subject incident, adequacy of Carnival's policies and procedures regarding tender operations and assistance to passengers, the applicable standard of care, issues of causation, if any, and the contributory negligence/liability of Plaintiff. Martyn will provide his expert opinions and testimony based upon his review of all relevant documents and the CCTV video, all deposition testimony, the work of other experts, any and all research conducted, and his education, training, and experience. Martyn will specifically be called on to rebut the opinions of Plaintiff's liability expert, Randall Jaques.

[ECF No. 34-1, p. 1]. Plaintiff highlights (and challenges) the following three opinions offered by Martyn and describes them as problematic:

1. "Jaques faulted Carnival for instructing [] Lehmann to hand his cane to a crewmember; **this is incorrect. The video shows that [] Lehmann held his cane in his right hand during the fall.**"

2. "Jaques did not perform a biomechanical analysis to explain if the cane was a causal factor in [] Lehmann's fall. **The incident video showed [] Lehmann carrying his cane, yet he still fell.**"

¹⁴ A complete, unredacted copy of Martyn's expert report and CV are available on CM/ECF. [ECF No. 34-1].

3. **“The right-hand railing would have been visible to [] Lehmann’s right, immediately before, and as he boarded the tender.”**

[ECF No. 34, p. 2 (emphasis in original)].

Plaintiff argues that Martyn’s three opinions should be stricken because they are not supported by any sworn testimony in this case, and because “expert testimony that simply tells the jury what the expert thinks the CCTV shows is not helpful.” *Id.* at 2.

The Undersigned notes that Martyn’s three challenged rebuttal opinions will not be necessary if the Court were to adopt this Report and Recommendations because Martyn was retained to *rebut* Jaques’ opinions and this Report and Recommendations ruling *excludes* Jaques’ at-issue opinions which Martyn would rebut if he were to testify.

As previously discussed, the specific opinions of Jaques which this Report recommends to be excluded are: (3) in this particular case, Carnival’s crew and tender agents did not act reasonably under the circumstances because they failed to assist Plaintiff board the tender vessel; and (4) the conduct of Carnival’s crew and agent directly caused Plaintiff’s injury. [ECF No. 35-2, p. 5]. Both of those opinions by Jaques should be excluded because they impermissibly assign fault to Defendant and are based on unreliable methodology.

Martyn’s three challenged opinions **directly relate** to those two at-issue opinions of Jaques because they address how Defendant is or is not at fault. Neither expert should

be permitted to offer an opinion as to whether Defendant is at fault. *See Higgs*, 2016 WL 4370012, at *7 (concluding that Jaques' opinions that a defendant "is at fault" or that its crew is "careless," and testimony concerning the applicable legal standard, *i.e.*, that a defendant is "legally required to exercise at least 'reasonable care for the safety' of the passengers in question," all constitute unhelpful and impermissible legal conclusions that should be stricken). Martyn's challenged opinions are **tethered** to Jaques' challenged opinions. Therefore, if the Court adopts this Report and Recommendations and bars Jaques from offering those two opinions, then Martyn will no longer be needed to rebut them because they will not be offered at trial.

However, in an abundance of caution, the Undersigned will substantively evaluate the challenge to three of Martyn's opinions (in case the Court were to reject my recommendations and permit Jaques to provide expert testimony on the opinions at trial).

Plaintiff's main argument is that Martyn's three challenged opinions are inadmissible because he based his opinions solely upon a review of the CCTV footage. The Undersigned agrees. If an expert opinion is based **only** on CCTV footage, then it is unreliable because it is purely speculative. *Birren v. Royal Caribbean Cruises, LTD.*, No. 20-CV-22783, 2022 WL 446207, at *4 (S.D. Fla. Feb. 14, 2022) ("In short, Mr. Edmonds' opinion on this matter is pure speculation based solely on his view of the CCTV footage. His expert opinion on this issue is not based on reliable, scientifically valid methodology.").

In addition to being purely speculative, opinions based solely on CCTV footage review are **not helpful** to the trier of fact because “CCTV footage speaks for itself and any testimony offering general observations of the CCTV footage is inadmissible[.]” *Id.* at *5 (citing *Jackson v. Catanzariti*, No. 6:12-CV-113, 2019 WL 2098991, at *9 (S.D. Ga. May 14, 2019), where “the court found that an expert could not give a general overview of what a particular video showed without offering ‘expert gloss or explanation’ because the jury could determine for itself the contents of the video”).

Martyn’s report includes five conclusions. [ECF No. 34-1, pp. 7–8]. The three that Plaintiff attacks (as discussed in this Report and Recommendations) are problematic and inadmissible. As noted, Plaintiff does not seek to exclude the remaining two opinions.

Specifically, the two opinions which Martyn offers (and which are *not* encompassed by the *Daubert* motion challenge) are: (4) Jaques faulted the tender crew for not assisting Lehmann to his seat. Again, this was also not a causal factor. Lehmann fell at the spot where he boarded the tender; and (5) Jaques did not cite any specific lapses or departures from the instructions in Carnival’s HESS Procedure during Lehmann’s incident.

The Undersigned notes that Opinion No. 4 (*i.e.*, “ Jaques faulted the tender crew for not assisting [] Lehmann to his seat. Again, this was also not a causal factor.”) is impermissible because it is seemingly based on a review of only CCTV footage and is

unhelpful to a trier of fact. But Plaintiff did not object to this opinion. The Undersigned will not provide any further analysis on the issue because Plaintiff failed to make this argument in his motion (and failed to even challenge the opinion). *See Fails*, 2023 WL 5666438, at *10 and *Reaves*, 872 F.3d at 1149.

Concerning the last opinion (*i.e.* Opinion No. 5),¹⁵ Martyn's report sufficiently supports it by citing what he relied on and explaining how he reached that conclusion. As is, his opinion on the final conclusion is sufficiently reliable and helpful. And Plaintiff never challenged it anyway, so the Undersigned will not spend time addressing arguments which Plaintiff never asserted.

Therefore, if Judge Williams were to **adopt** my ruling in the Report and Recommendations concerning Jaques, then the Undersigned **respectfully recommends** that the Court **grant** Plaintiff's motion [ECF No. 34] because Martyn's three opinions are not needed for rebuttal. However, this ruling should not strike Opinions Nos. 4 or 5 because Plaintiff failed to include the request in his motion, never mounted a legal challenge to them, or they are permissible.

IV. CONCLUSION

For the reasons discussed above, the Undersigned **respectfully recommends** that

¹⁵ "Jaques did not cite any specific lapses or departures from the instructions in Carnival's HESS Procedure during [] Lehmann's incident." [ECF No. 34-1, p. 8].

the Court: **grant in part** and **deny in part** Defendant's Motion [ECF No. 35]; **deny** Plaintiff's Motion on Lewis [ECF No. 33]; and **grant** Plaintiff's Motion on Martyn [ECF No. 34].

Plaintiff's Motion on Lewis [ECF No. 33] should be **denied** because Lewis' statement is logically connected to Plaintiff's medical history and testimony.

Plaintiff's Motion on Martyn [ECF No. 34] should be **granted** because the three opinions he challenged are moot because there is no need to rebut opinions which will not be presented at trial.


Defendant's Motion on Jaques and Tejeiro [ECF No. 35] should be **granted in part** because Jaques' third and fourth opinions impermissibly assign fault to Defendant and indicate that its employees did not act reasonably and Tejeiro's opinions as to Plaintiff's estimated future costs are based on unreliable methodology. However, the motion [ECF No. 35] should be **denied in part**, allowing Tejeiro to offer his opinion on Plaintiff's past medical expenses, because Defendant failed to show how it is prejudiced (other than through its own actions -- or inactions). Furthermore, Jaques should be permitted to offer his first and second opinions because they are sufficiently reliable and helpful to the trier of fact.

V. OBJECTIONS

The parties will have fourteen (14) days from the date of being served with a copy

of this Report and Recommendations within which to file written objections, if any, with Judge Williams. Each party may file a response to the other party's objection within fourteen (14) days of the objection. Failure to file objections timely shall bar the parties from a de novo determination by the District Judge of an issue covered in this Report and Recommendations and shall bar the parties from attacking on appeal any factual or legal conclusions contained in this Report and Recommendations and to which they did not object, except upon grounds of plain error if necessary in the interest of justice. *See* 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *Henley v. Johnson*, 885 F.2d 790, 794 (11th Cir. 1989); CTA11 Rule 3-1.

RESPECTFULLY RECOMMENDED in Chambers, in Miami, Florida, on January 29, 2025.



Jonathan Goodman
CHIEF UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

The Honorable Kathleen M. Williams
All Counsel of Record