UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:19-cv-24173-UU

KOURTNEY D. YVON,

Plaintiff,

v.

CARNIVAL CORPORATION,

Defendant.
_____/

ORDER ON DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE is before the Court upon that Defendant Carnival Corporation's Motion for Final Summary Judgment, D.E. 35 (the "Motion"). The Court has reviewed the Motion and the pertinent portions of the record and is otherwise fully advised of the premises. For the reasons discussed below, the Motion is GRANTED.

I. Procedural Background

Plaintiff Kourtney D. Yvon ("Plaintiff") commenced this medical negligence action on October 9, 2019. *See* D.E. 1. On December 3, 2019, the Court entered its Scheduling Order for Pretrial Conference and Trial, setting (among other deadlines) a deadline of May 29, 2020, to file all motions for summary judgment and motions related to summary judgment motions. D.E. 11 (the "Scheduling Order").[1]

Defendant Carnival Corporation ("Carnival") filed the instant Motion on May 29, 2020, seeking final summary judgment based on Plaintiff's alleged failure to disclose any expert witnesses, let alone provide any expert testimony to support her claim. *See* D.E. 35. Under Local Rule 7.1(c), Plaintiff's response to the Motion was due on June 12, 2020. On the eve of her

[1] On May 28, 2020, Plaintiff moved for a 30-day extension of the deadline to file pre-trial motions, the joint pretrial stipulation, and jury instructions, D.E. 33, which the Court granted, D.E. 34.

response deadline, Plaintiff moved for a two-week extension of time to respond to the Motion. D.E. 37. The Court found no good cause to grant the request but nevertheless granted a brief extension of time, requiring Plaintiff to file her response on or before June 16, 2020. D.E. 38.[2]

As of the date of this Order, Plaintiff has not responded to the Motion.

II. Factual Background

The Court cannot grant summary judgment solely by virtue of a party's default. *United States v. One Piece of Property, 5800 S.W. 4th Ave., Miami, Florida*, 363 F.3d 1101 (11th Cir. 2004) ("[t]he district court cannot base the entry of summary judgment on the mere fact that the motion was unopposed but, rather, must consider the merits of the motion."). However, the Court may take the moving party's statement of material facts as admitted pursuant to Local Rule 56.1(b):

> **Effect of Failure to Controvert Statement of Undisputed Facts.** All material facts set forth in the movant's statement filed and supported as required above will be deemed admitted unless controverted by the opposing party's statement, provided that the Court finds that the movant's statement is supported by evidence in the record.

Local Rule 56.1(b). Accordingly, as Carnival's statement of material facts is supported by facts in the record, *see* Mot. at 1–4 & Ex. A–D; *see also* D.E. 36 ("SOMF"), the Court deems Carnival's statement of material facts as admitted. *See id.* As the facts are uncontroverted, the Court does not recite them in full here, but a brief summary of the facts is as follows.

Plaintiff was a fare-paying passenger on the Carnival *Dream* from August 12–19, 2018. SOMF ¶ 1; D.E. 1 ¶¶ 10–11. She alleges that she began to experience severe pain and swelling in her lower legs while on a shore excursion on August 15, 2018. SOMF ¶ 2; D.E. 1 ¶ 12. Plaintiff visited the ship's infirmary on August 15th but was unable to be seen; she returned the next day

[2] *See also Watts v. Club Madonna, Inc.*, 784 F. App'x 684, 687 (11th Cir. 2019) (no abuse of discretion in denying extension of time to file response to summary judgment motion where parties had been well-aware of the deadlines imposed by this Court's scheduling order and local rules).

and was seen by the onboard doctor, who diagnosed Plaintiff with "oedema" (fluid retention), prescribed her some pain medication, an antibiotic, an antihistamine, and an anti-inflammatory drug, and discharged her. SOMF ¶ 2; D.E. 1 ¶¶ 12–13.

Plaintiff alleges that, after disembarking on August 19, 2018, she visited a hospital in Texas, where she was diagnosed and treated for rhabdomyolysis (the breakdown of muscle tissue that leads to the release of muscle fiber contents into the blood) and compartment syndrome (a condition that occurs when injury causes generalized painful swelling and increased pressure within a compartment to the point that blood cannot supply the muscles and nerves with oxygen and nutrients). SOMF ¶ 3; D.E. 1 ¶ 15 & nn. 1–2. Plaintiff claims that Carnival's onboard medical team was negligent in failing to properly diagnose and treat her, which failure exacerbated her compartment syndrome and caused significant injury. *See generally* D.E. 1; *see also* SOMF ¶ 3.

Pursuant to this Court's December 13, 2019 Scheduling Order, all discovery—including expert discovery—was set to close on May 8, 2020. D.E. 11 at 1. The parties were required to "agree upon a schedule for expert disclosures and depositions which will facilitation their completion by that date." *Id.* Plaintiff was required to "file the schedule with the Court within 30 days of the issuance of" the Scheduling Order. *Id.* Plaintiff complied (albeit belatedly) by filing her Notice of Compliance on February 4, 2020. D.E. 17. The Notice of Compliance provided that the parties would furnish expert witness lists and summaries/reports on or before March 23, 2020. D.E. 17; *see also* SOMF ¶ 4. Carnival timely disclosed its expert witnesses. SOMF ¶ 5; *see also* D.E. 35-4. Plaintiff, however, failed to disclose any expert witnesses, either by the deadline or at any point in time thereafter. SOMF ¶ 6; D.E. 35 at 3–4.

On April 9, 2020, Carnival moved for a 30-day extension of the discovery deadline, D.E. 25, which the Court granted, D.E. 26. The discovery cutoff thus was extended to June 8, 2020. *Id.*

No other motions to extend the discovery deadline were filed. Nor were any motions pertaining to expert witness disclosures filed. Plaintiff's treating physician from the hospital in Texas, Dr. Stephen Ray McMahon, was deposed, *see* D.E. 35 at 2–3; D.E. 35-2, but Plaintiff's counsel expressly disclaimed that Dr. McMahon was to be considered an expert. *See* D.E. 35-2 at 14, p. 50, lines 11–16. Likewise, another treating physician from the hospital in Texas, Dr. Sonal R. Patel, was deposed, *see* D.E. 35 at 2–3; D.E. 35-3, but he was not purported to be an expert, nor did he offer any opinion testimony.

III. Legal Standard

Summary judgment is authorized only when the moving party meets its burden of demonstrating that "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. When determining whether the moving party has met this burden, the Court must view the evidence and all factual inferences in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Rojas v. Florida*, 285 F.3d 1339, 1341-42 (11th Cir. 2002).

The party opposing the motion may not simply rest upon mere allegations or denials of the pleadings; after the moving party has met its burden of proving that no genuine issue of material fact exists, the non-moving party must make a showing sufficient to establish the existence of an essential element of that party's case and on which that party will bear the burden of proof at trial. *See Celotex Corp. v. Catrell*, 477 U.S. 317 (1986); *Poole v. Country Club of Columbus, Inc.*, 129 F.3d 551, 553 (11th Cir. 1997); *Barfield v. Brierton*, 883 F.2d 923, 933 (11th Cir. 1989).

IV. Discussion

Carnival argues that summary judgment is warranted because Plaintiff has no expert witness support for her claim of medical negligence. *See generally* Mot. To prevail on a claim for medical negligence, a plaintiff must establish that a certain standard of care was owed by the defendant, the defendant breached the standard of care, and the breach proximately caused the damages claimed. *See Cagle v. United States*, 738 F. App'x 633, 638 (11th Cir. 2018); *Anderson v. Mascara*, 347 F. Supp. 3d 1163, 1175 (S.D. Fla. 2018).

Under maritime law, "[e]xpert testimony is required to establish medical causation for conditions not readily observable or susceptible to evaluation by lay persons." *Mann v. Carnival Corp.*, 385 F. Supp. 3d 1278, 1285 (S.D. Fla. 2019) (citing *Rivera v. Royal Caribbean Cruises Ltd.*, 711 F. App'x 952, 954 (11th Cir. 2017)). Courts have recognized that soft-tissue injuries (for example, back and leg pain) are not "readily observable" nor susceptible to layperson evaluation and, therefore, expert testimony as to the cause of such injuries is required. *Id.*; *see also Morhardt v. Carnival Corp.*, 304 F. Supp. 3d 1290, 1298–99 (S.D. Fla. 2017); *Jones v. Royal Caribbean Cruises, Ltd.*, No. 12-20322-CIV, 2013 WL 8695361, at *6 (S.D. Fla. Apr. 4, 2013) (citing *Crest Prods. v. Louise*, 593 So. 2d 1075, 1077 (Fla. 1st DCA 1992) and *Vero Beach Care Ctr. v. Ricks*, 476 So. 2d 262, 264 & n.1 (Fla. 1st DCA 1985)).

Likewise, "[i]n medical malpractice cases, the standard of care is determined by a consideration of expert testimony." *Cagle*, 738 F. App'x 633, 638 (11th Cir. 2018) (quoting *Pate v. Threlkel*, 661 So. 2d 278, 281 (Fla. 1995)); *Prieto v. Total Rental Care, Inc.*, No. 18-21085 2019 U.S Dist. LEXIS 101186 at *3 (S.D. Fla. June 18, 2019).[3] If the plaintiff is unable to establish a

[3] Federal courts exercising maritime or admiralty jurisdiction may look to "the extensive body of state law" applying negligence concepts such as proximate causation and the applicable standard of care. *See Jones*, 2013 WL 8695361, at *6 n.4.

standard of care, she is unable to show that a breach of that standard could have occurred. *See Cagle*, 738 F. App'x at 638 (citing *Stepien v. Bay Memorial Medical Center*, 397 So. 2d 333, 334 (Fla. 1st DCA 1981)).

Accordingly, if a plaintiff provides no expert testimony whatsoever, she is unable to establish a *prima facie* case of medical negligence, and summary judgment is appropriate as there is no genuine issue as to a material fact. *See Cagle*, 738 F. App'x at 639–40 (holding that with no expert testimony to establish an appropriate standard of care, a breach of that standard of care, and damages as a proximate cause of the breach, there is no genuine issue of material fact).

The unrefuted evidence here shows that Plaintiff cannot establish a *prima facie* medical negligence claim. Plaintiff does not dispute that she failed to disclose any expert witness.[4] Because the uncontroverted statement of material facts and supporting evidence show that Plaintiff can neither establish that Carnival breached any applicable medical standard of care when the onboard doctors treated and diagnosed Plaintiff on August 16, 2018, nor that any such breach caused Plaintiff's alleged soft-tissue injuries (e.g., compartment syndrome), Plaintiff cannot show that Carnival was medically negligent. Carnival is entitled to summary judgment in its favor.

[4] To the extent Plaintiff would argue that her treating physicians should be permitted to offer the requisite expert testimony, Plaintiff has waived such argument by failing to raise it (indeed, by failing to respond to the Motion in any way). Moreover, Rule 26(a)(2)(D) requires a party to provide expert disclosures "at the times and in the sequence the court orders." Fed. R. Civ. P. 26(a)(2)(D). Courts have broad discretion to exclude untimely expert testimony. *Guevara v. NCL (Bahamas) Ltd.*, 920 F.3d 710, 718 (11th Cir. 2019). "Courts routinely strike expert reports or exclude expert testimony, which is not timely disclosed, even if the consequence is to preclude an entire party's claim or defense." *Frasca v. NCL (Bah.) Ltd.*, No. 12-20662 2014 U.S. Dist. LEXIS 31970 at *4-5 (S.D. Fla. March 12, 2014); *see also Bearint v. Dorell Juvenile Grp., Inc.*, 389 F.3d 1339, 1348-49 (11th Cir. 2004) (holding that exclusion of expert witness testimony was proper as the party failed to submit the expert before the required deadline). If a party wishes to use a "hybrid witness" as an expert, disclosure of the treating physician with a summary of their facts and opinions is still required. Fed. R. Civ. P. 26(a)(2)(C). Failure to disclose a hybrid witness, and furthermore, a failure to provide a summary of their facts and opinions, is a failure to comply with the expert witness disclosures mandated by Federal Rule of Civil Procedure 26(a). *See Pediatric Nephrology Assoc. v. Variety Children's Hosp.*, No. 1:16-cv-24138-UU 2017 U.S. Dist. LEXIS 200023 at *18 (S.D. Fla. November 6, 2017); *see also Mann*, 385 F. Supp. at 1286 n.2 (treating physician "could testify as a lay witness, but because he was not properly disclosed as an expert witness, he would be precluded from offering an opinion about the cause of her injuries").

V. Conclusion

Deeming Carnival's statement of material facts as admitted and having reviewed the Record and the merits of Carnival's Motion, the Court finds that, for the reasons discussed *supra*, Carnival is entitled to summary judgment. Accordingly, it is

ORDERED AND ADJUDGED that Defendant Carnival Corporation's Motion for Final Summary Judgment, D.E. 35, is GRANTED. The Court will separately enter final judgment. It is further

ORDERED AND ADJUDGED that the Clerk of Court SHALL administratively close this case. All future hearings are CANCELLED and all pending motions are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this _18th__ day of June, 2020.

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

cc: counsel of record