UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 23-CV-20264-SCOLA/GOODMAN

ROGER SCAIFE

Plaintiff,

v.

CARNIVAL CORPORATION,

Defendant.
_____/

ORDER ON PLAINTIFF'S MOTION TO STRIKE AND/OR EXCLUDE EXPERTS

This Order **denies** (but with restrictions to prevent speculative and inappropriate opinion testimony) Plaintiff's motion [ECF No. 26] to strike and/or exclude two of Defendant Carnival Corporation's expert witnesses in this maritime personal injury lawsuit. Senior United States District Judge Robert N. Scola Jr. referred this motion to the Undersigned. [ECF No. 27].

A passenger on the Carnival *Legend,* Plaintiff Roger Scaife alleges that a metal plumbing panel swung down as he was using a toilet in the ship's on-board gym. Scaife's motion seeks to strike two of Carnival's experts -- a biomechanical engineering expert (Dr. Tyler Kress) and a hand surgeon (Dr. Lewis Eastlick) -- because Carnival's disclosures were tardy. Plaintiff contends that Dr. Eastlick is actually a direct expert disguised as a purported rebuttal expert and that the disclosure is actually *late* if the

doctor is not considered a rebuttal expert. The motion also seeks to exclude Dr. Kress's opinion because Dr. Kress is supposedly not qualified to offer an opinion Plaintiff describes as being about medical causation of the alleged injury.

After reviewing the motion, Carnival's opposition response [ECF No. 28] and Scaife's reply [ECF No. 29], the Undersigned **denies** the motion because (1) the late disclosures were not prejudicial to Plaintiff; and (2) Dr. Kress will not be opining about medical causation (and the law permits a biomechanical engineer to testify about the energy involved in the incident or whether that energy is sufficient to have cause an injury Plaintiff alleges to have suffered). But Dr. Kress will be prohibited from offering opinions on certain specific issues, as outlined in greater detail below.

I. Factual Background

Plaintiff filed his Complaint on January 23, 2023, alleging he sustained an injury to his right thumb after he caught a falling plumbing panel while using the toilet.

This Court's Scheduling Order set a deadline of December 15, 2023 for the parties to disclose experts. [ECF No. 15]. Pretrial motions, including motions in *limine* and *Daubert* motions, were due March 5, 2024. Trial is currently scheduled for the two-week period beginning May 6, 2024.

On November 13, 2023, the parties agreed to informally extend the expert disclosure deadline and discovery cutoff. They agreed to extend the expert disclosure deadline to January 29, 2024, and the discovery cutoff to March 1, 2024. The parties did

not advise the Court of their private agreement at the time to enlarge the deadlines, and the Court's Trial Scheduling Order did not provide them with the ability to unilaterally extend deadlines.[1]

Plaintiff's deposition was scheduled within his home state of Virginia on December 14, 2023. Defense counsel, who entered an appearance on October 26, 2023, discovered that Plaintiff had never provided responses to Defendant's initial discovery requests (served on May 24, 2023 and due on June 23, 2023). Plaintiff's counsel advised that Plaintiff's responses would be served by November 21, 2023, but did not serve his answers to Defendant's initial interrogatories until December 4, 2023.

After multiple follow-up e-mails, Plaintiff served documents responsive to Defendant's first request for production on December 12, 2023 (two days before his deposition).

Defense counsel arranged for a vessel inspection for both parties on January 19, 2024 in Ocho Rios, Jamaica. Plaintiff did not bring his own expert to the ship inspection. During the inspection, Dr. Kress made numerous detailed measurements of the panel

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[1] Some judges in this district sometimes issue trial scheduling Orders which authorize the parties to participate in discovery after the expiration of the discovery deadline. *See. e.g.*, *Michaelson v. Baronoff*, No. 21-cv-21543 [ECF No. 285, p. 5, Nov. 21, 2023] (providing that "counsel may, by agreement, conduct discovery after the expiration of the discovery deadline, but should not rely on the Court to resolve any discovery disputes arising after the discovery cutoff date. In addition, counsel should not seek to extend any deadline, including summary judgment-related deadlines, based on post-deadline discovery pursuant to this provision.").

and noted that it weighs 23.7 pounds and has a thickness of approximately 1.25 inches. Dr. Kress' report says the panel is "certainly not unique to a marine environment" because "it is simply a panel on the wall to allow easy access to plumbing pipes and associated valves." [ECF No. 26-1, p. 12].

On January 29, 2024, the parties agreed to an additional extension of the expert disclosure deadline until and through February 7, 2024. Defense counsel advised Plaintiff's counsel that it would likely be disclosing experts on both liability and causation.

On February 7, 2024, Defense counsel requested an additional one-week extension for the parties to disclose experts, advising that an issue had arisen with Carnival's medical expert completing his report. Plaintiff's counsel opposed the request and disclosed his own medical expert's report from Dr. Randy Davis later that day.

The depositions of Defendant's 30(b)(6) representative and spa manager, Chantel Barlow, to whom Plaintiff initially reported the incident, took place on February 9 and 13, 2024, respectively.

On February 15, 2024, Defendant disclosed its Rule 26 report from Dr. Kress.

On February 20, 2024, Defendant requested the deposition of Dr. Davis, before March 5. Plaintiff's counsel advised he was unavailable before March 5, and offered deposition dates for Dr. Davis's deposition on March 6 and March 12, 2024. The parties scheduled Dr. Davis's deposition for March 12, 2024.

On February 22, 2024, at the request of Plaintiff's counsel, Defendant provided the file materials from Dr. Kress.

On March 4, 2024, Defendant served its purported "rebuttal" report from its medical expert, orthopedic surgeon Dr. Eastlick. This was within 30 days of Plaintiff's disclosure of his medical expert, Dr. Davis. Defendant also provided dates of availability for Dr. Eastlick's deposition to take place on March 12 or March 19, 2024.

Plaintiff never took Dr. Eastlick's deposition.

The parties completed Dr. Davis's deposition on March 12, 2024.

During his deposition, Dr. Davis stated he has been provided with both of Defendant's expert reports and had an opportunity to review them. Dr. Davis also provided comments in response to both of Defendant's expert reports.

Plaintiff never took Dr. Kress's deposition, nor did he ask for it to be scheduled. His motion includes a footnote about this scenario: "Given preexisting obligation, was (sic) not possible for the undersigned to schedule Dr. Kress's deposition testimony to be taken before the March 5 deadline hereto." [ECF No. 26, p. 2, n. 2]. In his Reply, Plaintiff's counsel quoted an email he sent to Carnival's counsel, explaining "Unfortunately, I cannot agree to this second request for additional time to disclose experts. My schedule before March 5 (deadline for *Daubert* and pretrial motions) is basically nonstop." [ECF No. 29, pp. 4-5],

Dr. Kress's report explains that he performed certain tests on the panel. His report contains nine numbered paragraphs of opinions, but only two are at issue in Plaintiff's *Daubert* challenge:

> 8. Mr. Scaife testified that he was really hyped on adrenaline (a.k.a. epinephrine). He indicated that he became so pumped full of the hormone, in part, because he feared that his "manliness" may be hit by the panel that was rotating out of the wall. Biomedically, adrenaline does certainly speeds (sic) up muscle contraction; adrenaline makes your blood vessels contract to direct your blood to major muscle groups; when one experiences an adrenaline rush, muscles use stored glycogen in your body. This process helps them maintain strong, extended contractions. As a result it is commonly understood that there can be a feeling of weakness in the limbs afterward. I know Mr. Scaife said that he didn't feel anything when he caught the panel, but that he woke up in the morning and couldn't move his arms. He said something was wrong, that he was sore, and that his muscles were bad. If he had such soreness, then **perhaps** the major adrenaline rush could be an explanation. **I do not know**, but regardless, I **do** know that the evidence is **not consistent** with acute bioengineering insult or failure of the UCL.
>
> 9. In summary, acute permanent tissue failure would not be expected from the exposure from the single minor subject incident/exposure, and certainly any musculoskeletal degeneration/compromise or chronic/cumulative ligamentous problem would be best explained from a combination of life experience/exposure, repetitive wear-and-tear, personal risk factors, occupational exposures, hobbies, and/or other injuries. Mr. Scaife has worked out a lot throughout his life and since he was young, and he has participated in martial arts (e.g., fighting, punching, striking, etc. are all cumulative risk factors for developing gamekeeper's thumb). Mr. Scaife uses a keyboard a lot, and has throughout his work life, and he has had previous hand/wrist injuries. From a biomedical engineering standpoint, the diagnostics (anatomical outputs) in Mr. Scaife's medical records are consistent with chronic musculoskeletal changes and osteoarthritis, not any acute engineering input from the subject incident on the cruise.

[ECF No. 26-1, p. 22 (emphasis added)].

In its opposition, Carnival responds to Plaintiff's language-focused challenge to the opinion offered in numbered paragraph 8. [ECF No. 28, p. 12]. It specifically and unequivocally represents that Dr. Kress is not "attempting to offer opinions on medical causation, differential diagnosis, and the specific cause of Plaintiff's injuries." *Id*. Instead, Carnival explains, he is being offered "to opine about the forces involved in Plaintiff's alleged incident – the force of the plumbing panel falling, and whether that force was sufficient to cause the injury complained of – a partial tear of the ulnar collateral ligament within Plaintiff's right thumb." *Id.*

Carnival's memorandum of law also clarified that it is not producing him "to render medical diagnoses or testify regarding any adrenaline rush Plaintiff felt. Rather, Dr. Kress is being offered to address that 'acute permanent tissue failure would not be expected from the exposure' and the "anatomical outputs within this case are not the result of any acute engineering input from the subject incident." *Id*. at 15.

Concerning Dr. Eastlick and his status as a rebuttal expert (or a direct expert), Carnival contends that his opinions directly rebut the opinions of Dr. Davis, Plaintiff's expert. To demonstrate this, it included a chart comparing Dr. Davis's report to Dr. Eastwick's report. *Id*. at 7. Dr. Davis says that it is medically probable that Scaife has "persistent, permanent disability associated with the ulnar collateral ligament injury sustained on the right hand and thumb caused by the accident[,]" and that it is medically probable that he will need to have the hardware removed after a year. *Id*.

But Dr. Eastlick's report says he "wholly disagree[s]" because "no surgery was indicated for a reconstruction of the ulnar collateral ligament in the MP joint of the right thumb and the CMC osteoarthritis in Mr. Scaife's thumb predated his cruise." *Id*. In addition, he says that "[a]t present, there is no indication that the hardware in Mr. Scaife's thumb has failed, is loose or is in any way not functioning appropriately." *Id*. Therefore, he concludes, "there would not be a surgical indication for removal of the hardware, irrespective of what the physician's assistant might think." *Id*.

The chart contains no other illustrations of rebuttal-type opinions.

II. Applicable Legal Standards and Analysis

A. Untimely Disclosures

Dr. Kress

Federal Rule of Civil Procedure 26(a)(2) requires a party to disclose the identity of any expert witness who might be used at trial, along with a written expert report. Fed. R. Civ. P. 26(a)(2). *OFS Fitel, LLC v. Epstein, Becker and Green, P.C.*, 549 F.3d 1344, 1360-61 (11th Cir. 2008). "[T]he expert disclosure rule is intended to provide opposing parties 'reasonable opportunity to prepare for effective cross examination and perhaps arrange for [rebuttal] expert testimony from other witnesses.'" *Reese v. Herbert*, 527 F.3d 1253, 1265 (11th Cir. 2008) (quoting *Sherrod v. Lingle*, 223 F.3d 605, 613 (7th Cir. 2000)); *OFS Fitel, LLC*, 549 F.3d at 1362.

District courts may admit untimely expert reports, *Bearint ex rel. Bearint v. Dorell Juvenile Grp., Inc.*, 389 F.3d 1339, 1349 (11th Cir. 2004), if the untimely disclosure "was substantially justified or [was] harmless." Fed. R. Civ. P. 37(c)(1); *see also OFS Fitel, LLC,* 549 F.3d at 1363.

The failure to disclose an expert is substantially justified if there is "'justification to a degree that could satisfy a reasonable person that parties differ as to whether the party was required to comply with the disclosure request.' A harmless failure to disclose exists 'when there is no prejudice to the party entitled to receive the disclosure.'" *Northrup v. Werner Enter., Inc.*, No. 8:14-cv-1627-T-27JSS, 2015 WL 4756947, at *1 (M.D. Fla. Aug. 11, 2015) (citations omitted) (denying motion to strike rebuttal expert and quoting *Hewitt v. Liberty Mut. Grp., Inc.*, 268 F.R.D. 681, 682-83 (M.D. Fla. 2010)).

This Court has broad discretion in deciding whether a failure to disclose evidence is substantially justified or harmless under Rule 37(c)(1). *Northrup*, 2015 WL 4756947, at *2 (relying on *United States ex rel. Bane v. Breathe Easy Pulmonary Servs., Inc.*, No. 8:06–cv–00040–T–33MAP, 2009 WL 92826, at *3 (M.D. Fla. Jan.14, 2009).

In the Undersigned's view, Plaintiff has not suffered prejudice through the late disclosure of Dr. Kress's report.

His report was served only a week after the parties' agreed-disclosure date, his file was provided at Plaintiff's request, Plaintiff never requested that his deposition be taken, Plaintiff's expert (Dr. Davis) had an opportunity to review the opinions, and Plaintiff had

the opportunity to file a *Daubert* motion against him. Plaintiff's cryptic comment, in a footnote, that "preexisting obligations" prevented his counsel from taking the deposition is too vague and detail-free to be persuasive. [ECF No. 26, p. 4 n. 2]. Moreover, even if Plaintiff's counsel had a busy schedule, he could have attempted to reschedule other appointments or sought leave of Court to take the deposition. He did neither.

The Undersigned considers Plaintiff's failure to seek Dr. Kress's deposition to significantly undermine his claim of prejudice. *See Baker v. Carnival Corp.*, No. 17-CV-24427, ECF No. 72 at p. 4 (S.D. Fla. Jun. 18, 2019) (denying motion to strike late disclosed expert as delay was substantially justified and harmless as Carnival had an opportunity to take the witness's deposition almost three months before trial); *AIM Recycling of Fla., LLC v. Metals USA, Inc.*, No. 18-CV-60292, 2019 WL 11505086, at *3 (S.D. Fla. Oct. 8, 2019) (denying motion to strike expert because of untimely disclosure and collecting cases holding that untimely expert disclosures were harmless); *Ellison v. Windt,* No. 6:99-cv-1268-ORLKRS, 2001 WL 118617, at *3 (M.D. Fla. Jan. 24, 2001) (holding that the belated expert report disclosure was harmless if the opposing party was given an opportunity to depose the expert before trial). *See also Predelus v. Atain Specialty Ins. Co.*, No. 21-23382, 2022 WL 11202228, at *5 (S.D. Fla. Oct. 19, 2022) (rejecting argument that untimely expert disclosure should result in an order excluding the expert and citing *AIM* because the moving party had ample time to take the expert's deposition); *Charlemagne v. Alibayof*,

No. 20-cv-62043, 2022 WL 1642384, at *4 (S.D. Fla. Apr. 19, 2022) (finding late disclosure harmless because movant still took the expert's deposition).

Dr. Eastlick

Determining whether the disclosure for Dr. Eastlick was late depends on whether he is a rebuttal expert. If he is a genuine rebuttal expert, then the disclosure was timely (as it was made within 30 days of Plaintiff's disclosure of his medical expert).[2]

Plaintiff argues that Dr. Eastlick is not an actual rebuttal witness because Carnival's attorney wrote to Plaintiff's counsel on February 7, 2024 and said "[w]e have run into an issue with *our* medical expert completing the report. Please advise if there is any objection to a week-long extension for the parties to exchange reports." [ECF No. 26, p. 5 (emphasis added)]. Plaintiff objected, and Carnival served its Dr. Eastlick disclosure on March 4, 2024. But Carnival now describes Dr. Eastlick as a *rebuttal* expert (even though it earlier indicated he is a standard expert whose disclosure was required by the agreed, enlarged deadline of February 7, 2024). [ECF No. 28, p. 6].

Carnival has not adequately explained why Dr. Eastlick was a standard medical expert on February 7, 2024 but somehow morphed into a rebuttal expert by March 4, 2024.

[2] As noted earlier, the parties agreed to establish disclosure deadlines beyond the ones provided for in the Court's Scheduling Order. Plaintiff made his disclosure and produced Dr. Davis's report on February 7, 2024. Carnival served Dr. Eastlick's report on March 4, 2024 (within 30 days of Plaintiff's expert disclosure).

The mere fact that Carnival has pinpointed two sentences from Dr. Eastlick's report where he expressly disagrees with Dr. Davis does not make him a rebuttal expert for purposes of complying with the expert disclosure deadline.

Moreover, Plaintiff emphasizes that Dr. Eastlick's report mentions for the first time that Plaintiff has a long history of osteoarthritis.

Given the procedural history, it is clear that Carnival initially intended Dr. Eastlick to be a standard, direct expert but then strategically changed his designation to a rebuttal expert when Plaintiff objected to another deadline extension – a development which would have made a disclosure untimely if Dr. Eastlick were not a rebuttal witness. So Carnival's disclosure was untimely, which means Carnival may not use his opinion testimony at trial unless the delay was substantially justified or harmless. The Undersigned considers the modest delay to be harmless.

Plaintiff did not take Dr. Eastlick's deposition -- even though Carnival offered several dates for it during the same week that Dr. Davis's deposition was to be taken. Plaintiff could have eliminated or reduced any potential prejudice arising from the late disclosure by simply taking the doctor's deposition. For some undisclosed reason, he chose not to pursue this opportunity. Nevertheless, Dr. Davis, Plaintiff's medical expert, was able to review Dr. Eastlick's report by the time he gave a deposition and provided opinions to counter Dr. Eastlick's views.

The "severe sanction" of excluding expert testimony is "not warranted when the party allegedly harmed by a late disclosure has an **opportunity to remedy** any prejudice suffered by it **but chooses not to**." *Lord. v. Univ. of Miami*, No. 13-22500, 2022 WL 18023293, at *8-9 (S.D. Fla. July 26, 2022). *See also Zaki Kulaibee Establishment v. McFlicker*, No. 08-60296-Civ, 2011 WL 1327145, at *4 (S.D. Fla. Apr. 5, 2011); *Rossi v. Darden*, No. 16-21199-Civ, 2017 WL 2129429, at *4 (S.D. Fla. May 17, 2017) (explaining that a party "may not delay in challenging a Rule 26 violation and then seek the most extreme of sanctions in a ... motion filed after the proper time for challenging discovery violations has expired" (alteration added)).

The Undersigned **denies** Plaintiff's late-disclosure-based motion to strike Dr. Eastlick.[3]

[3] Plaintiff also argues that Dr. Eastlick did not provide a list of his expert witness testimony. But the Undersigned is not persuaded to impose the harsh sanction of excluding him when (according to Carnival) Plaintiff's *own* expert failed to include that information. *See generally Westwood Plaza, LLC v. Citi Trends, Inc.*, No. 4-22cv204, 2023 WL 9103621, at *1 (N.D. Fla. Dec. 18, 2023) (denying defense motion to strike expert because "[w]hat is good for the goose is good for the gander" -- and *both* sides filed untimely expert reports). In his Reply [ECF No. 29, p. 6], Plaintiff says he *did* provide his expert's list of prior expert testimony and pinpoints when he did so (i.e., "simultaneously with its disclosure"). Without an evidentiary hearing or the submission by both sides of declarations, the Undersigned cannot comfortably determine which side is providing the accurate version. Confronted with competing and diametrically opposed representations, the Undersigned will **require both Plaintiff and Carnival to serve (but not file on CM/ECF) a past testimony list from all of the respective experts by March 28, 2024.**

B. Exclusion Under *Daubert* -- Dr. Kress

Plaintiff contends that Dr. Kress should be excluded on substantive grounds.

A 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) (emphasis added). This "manifestly erroneous" standard is used because "by virtue of the trial court's role in presiding over trial proceedings, it is in the best position to decide such matters." *See United States v. Brown*, 415 F.3d 1257, 1264-65 (11th Cir. 2005).

The decision to admit or exclude expert testimony is within the trial court's discretion and the court enjoys "considerable leeway" when determining the admissibility of this testimony. *See Cook v. Sheriff of Monroe Cnty., Fla.*, 402 F.3d 1092, 1103 (11th Cir. 2005) (emphasis supplied).

Federal Rule of Evidence 702 governs the admission of expert testimony, as explained and refined by the United States Supreme Court in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 582 (1993) 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, 1260 (11th Cir. 2004) (*en banc*). 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, a court cannot exclude an expert because it believes the expert lacks personal credibility. *Rink*, 400 F.3d at 1293 n.7. Instead, "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*. (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 Trasylol 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); *cf. Peng v. Citizens Property Ins. Co.*, 337 So. 3d 488, 493 (Fla. 3d DCA 2022) ("[A]ny discrepancies between [an expert]'s affidavit and his deposition may provide fertile ground for cross-examination but should not serve as the basis for being stricken under *Daubert*.").

On the other hand, courts do not hesitate to exclude purported expert testimony which does not pass muster. *See Allison*, 184 F.3d at 1322 (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 action against pesticide manufacturer and therefore affirming summary judgment for defendant); *Frazier*, 387 F.3d at 1263 (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, 1201–03 (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).

But regardless of whether a court admits or excludes expert opinion testimony under *Daubert*, "it is difficult to persuade a court of appeals to reverse a district court's judgment on *Daubert* grounds." *Brown*, 415 F.3d at 1264-66 (explaining that the "considerable deference" given to trial judges on evidentiary rulings "applies with equal or even greater force to Daubert issues in particular" because it is "an area where the abuse of discretion standard thrives").

Qualifications

The Undersigned finds that Dr. Kress is qualified to provide biomechanical engineering opinions -- as long as he does not venture into impermissible (for him) opinion testimony about medical causation.

Plaintiff focuses on Dr. Kress's status as a biomechanical engineer, as opposed to a medical doctor, to support his effort to establish that Carnival's expert lacks the qualifications to offer testimony on medical causation. Although the wording of some portions of his report might arguably support the view that Dr. Kress is offering opinions on medical causation, Carnival confirms that he is not doing that and will not do that at trial.

Dr. Kress holds a B.S., M.S., and Ph.D. (with major concentrations in Biomedical Engineering and Human Factors Engineering) and has taught engineering and safety at the university and graduate levels for over 35 years. His doctoral dissertation was titled "Impact Biomechanics of the Human Body," and he has spent much of his professional career studying engineering and medical aspects of human injury, various mechanisms of injury, why and how injuries occur, and means by which injuries can be reduced or prevented. He has participated in and conducted tests and research in human injury for many years, both at the University of Tennessee and Virginia Tech. He has studied extensively (through research using cadavers, dummies, humans, etc.) the relationship between engineering inputs (e.g. force, orientation, acceleration, type of impacting object/surface, direction, velocity, timing, etc.) as they relate to anatomical outputs (i.e. potential accident occurrence, human response, potential for hard and/or soft tissue damage, injury, bioengineering compromise to neurological, vascular, and/or musculoskeletal components, etc.).

As part of forming his opinions, Dr. Kress relied on his education, training, and professional experience. He reviewed case-specific materials and evidence associated with Plaintiff's claimed incident, including pleadings, photos of the plumbing panel, Plaintiff's deposition, and medical records. Dr. Kress also attended an inspection and performing testing onboard the *Legend* cruise ship. Dr. Kress documented the details of the subject wall panel and made numerous measurements of the stall and area where the

claimed incident occurred. Copies of the 138 photographs and video taken during this inspection were provided to Plaintiff's counsel.

Dr. Kress addressed the most relevant engineering dynamics and principals he relied on in this case from the laws of motion and principles associated with momentum, first published in *Prinicpia Mathematica* in 1687. He relied upon the three physical laws that provide the foundation for classical (Newtonian) mechanics. He considered: "how humans interface and respond in the environment when the panel rotates outward (as described)[;]" "[t]he bioengineering details of human interfacing with respect to human/product interfacing/movement such as when standing and something falls and strikes your (sic) or your catch or stop (sic) a moving object[;]" "and what occurs biomechanically to a human and their body parts from the exposure [.]" [ECF No. 28, p. 14].

Dr. Kress references and cites scientific literature within his report, primarily about ulnar collateral ligament injuries and biomedical engineering. This scientific literature includes an article titled "Mechanical Properties of the Ligament and Tendon," which addresses strains and loads on ligaments and tendons. Several other citations address ulnar collateral ligament tears, which is Plaintiff's claimed injury in this case. Dr. Kress's report provides that

> [t]he acute engineering failure mechanism of the UCL of the MCP joint are considered to occur in a sequence, starting with forceful abduction and then combined with a significant rotational or torsional motion that initially stretches the tissue beyond its elastic limits and eventually ruptures what is

> called the proper UCL and ultimately the accessory UCL too in the most severe exposures.

[ECF No. 26-1, p. 19].

Dr. Kress's opinions address the (1) plumbing panel's ability to hinge and fall from the wall as claimed by Plaintiff during deposition; (2) the static force of contact from the plumbing panel to an individual's hands; (3) the dynamic impact force from the panel contacting an individual's hands; (4) the potential biomechanical forces imparted onto Plaintiff's hands during the subject incident; (5) that the exposure is an order-of-magnitude less than the force and torque level associated with an acute bioengineering failure or damage; and (6) that the calculated force exposure to the hands, including specifically the ulnar collateral ligaments, is not consistent with stress that would come close to approaching biomechanical elastic limits.

Chief District Judge Cecilia M. Altonaga permitted the expert testimony of Dr. Jamie Williams, a biomechanical engineer in *Berner v. Carnival Corp*., 632 F. Supp. 2d 1208 (S.D. Fla. 2009).[4] Similar to Dr. Kress, Dr. Williams also relies on Newton's Laws of Physics. After reviewing the applicable case law authority, Judge Altonaga held that a biomechanical engineer is qualified to testify about the forces involved in an accident, how those forces may affect an individual or object, and the kinds of injuries which may have resulted from them (but without expressing any specific opinions about whether

[4] In *Berner*, Carnival tried to *exclude* the expert testimony of a biomechanical engineer, while it is seeking to *use* that type of expert opinion testimony here.

the plaintiff had in fact suffered a brain injury or the cause of the alleged brain injury). *Id.* at 1212-1213. (citing, among other authorities, *Smelser v. Norfolk S. Ry. Co.*, 105 F.3d 299, 305 (6th Cir.1997) (the biomechanical engineer "was qualified to render an opinion that made use of his discipline's general principles, described the forces generated in the ... rear-end collision, and spoke in general about the types of injuries those forces would generate.... [But] his expertise in biomechanics did not qualify him to testify about the cause of [the employee]'s specific injuries.").

Other courts in our District have followed this ruling. *See generally Velazquez v. Gator Park, Inc.*, No. 18-20864, 2021 WL 2385332 (S.D. Fla. Apr. 22, 2021), at *2 (denying motion in *limine*, noting that expert was not called to render a medical diagnosis on whether the plaintiff suffered an injury and permitting biomechanical engineer to give expert opinion testimony about whether it is "biomechanically plausible" that the plaintiff was seated at the time he was allegedly ejected from an airboat); *Horrillo v. Cook, Inc.*, No. 08-60931, 2014 WL 2708544 (S.D. Fla. June 6, 2014), at *4 (finding biomedical engineer qualified to give opinions on general causation about the effect blood pressure liability may have on the human body and the ways in which an implanted stent can affect the human body).

Dr. Kress is qualified to offer opinion testimony about the forces involved in Plaintiff's alleged incident and whether they are consistent with the injuries he allegedly sustained.

Methodology

Plaintiff argues that Dr. Kress's opinions (as narrowed by the ruling above) lack a sufficient methodology because he did not rely on empirical data, research, testing or written authority to support the view that "the force he calculated cannot cause an ulnar collateral ligament injury as he claims." [ECF No. 26, p. 9]. More specifically, he challenges the lack of study on the ulnar collateral ligament, unlike the biomechanical engineer in *Berner* who used her calculations and a study on concussions resulting from head impacts as a basis for her conclusions.

According to Plaintiff, Carnival attached a portion of a study entitled "Mechanical Properties of Ligament and Tendon" to its response [ECF No. 28] but failed to explain *how* that study relates to the ulnar collateral ligament, "or how it supports Dr. Kress's methodology." [ECF No. 29, p. 7]. To the extent that Plaintiff wishes to pursue a methodology challenge to the study or other specific points in Dr. Kress report, he is certainly free to attack and challenge those opinions on cross-examination.

Plaintiff is especially troubled by Dr. Kress's opinions that his injuries are the result of "life experience/exposure, repetitive wear-and-tear, personal risk factors, occupational exposures, hobbies, and/or other injuries … [or because] Mr. Scaife uses a keyboard a lot …" [ECF No. 26, p. 10]. According to Plaintiff, these opinions lack a sufficient foundation and are further undermined by the absence of calculations to apply them to reliable data.

Not surprisingly, Carnival disagrees. It notes that Dr. Kress references and cites scientific literature within his report, primarily about ulnar collateral ligament injuries and biomedical engineering. [ECF Nos. 28, p. 14; 26-1, pp. 52-53 (listing citations of scientific literature)]. This scientific literature includes the "Mechanical Properties of the Ligament and Tendon" article which addresses strains and loads on ligaments and tendons. Several other citations address ulnar collateral ligament tears, which is Plaintiff's claimed injury in this case. [ECF No. 26-1, pp. 52-53].

According to Carnival, Dr. Kress's opinions concern: the (1) plumbing panel's ability to hinge and fall from the wall as claimed by Plaintiff during deposition; (2) the static force of contact from the plumbing panel to an individual's hands; (3) the dynamic impact force from the panel contacting an individual's hands; (4) the potential biomechanical forces imparted onto Plaintiff's hands during the subject incident; (5) that the exposure is an order-of-magnitude less than the force and torque level associated with an acute bioengineering failure or damage; and (6) that the calculated force exposure to the hands, including specifically the ulnar collateral ligaments, is not consistent with stress that would come close to approaching biomechanical elastic limits. [ECF No. 28, pp. 14-15].

If those were the only opinions in his report, then the Undersigned would agree with Carnival. But Dr. Kress's opinions go beyond those topics. But they do not go as far as Plaintiff claims.

In his motion, Plaintiff contends that one of Dr. Kress's opinions is that Plaintiff's injuries **"are"** the result of factors such as life experience/exposure, repetitive wear-and-tear, personal risk factors, etc." [ECF No. 26, p. 10 (emphasis supplied)]. But his report does not say *that*. It does not say that those factors did, in fact, cause his injuries. It does not say the injuries "are" caused by one or more of the factors. Rather, his report explains that, in his opinion, the injuries "would be best explained" from a combination of the factors and that the "diagnostics (anatomical outputs) in Mr. Scaife's medical records are **consistent with** chronic musculoskeletal changes and osteoarthritis, not any acute engineering input from the subject incident on the cruise." [ECF No. 26-1, p. 22 (emphasis added)].

Therefore, Dr. Kress is testifying in the more-limited way authorized by the *Berner* Court, and the Undersigned **will permit it** here.

To avoid any confusion about the scope of this ruling, however, the Undersigned will specify the permissible and impermissible opinions:

Dr. Kress *may* give expert opinion testimony about: the forces involved in the fall of the panel; how those forces may affect a person; whether they were sufficient to have caused his injuries; and whether Plaintiff's chronic conditions are consistent with his injuries. He may *not*, however, give an opinion as to: whether Plaintiff has a specific type of injury; whether the falling panel caused that injury (or injuries); whether his chronic conditions and experiences in fact caused the injury to his ulnar collateral ligaments; and

whether a major adrenaline rush could be the cause of soreness (assuming that Plaintiff was, in fact, sore).[5]

III. Conclusion

The Undersigned **denies** Plaintiff's Motion to Strike Defendant's Untimely Expert Disclosures and *Daubert* Motion to Exclude the Opinions of Dr. Tyler Kress. [ECF No. 26].[6]

DONE AND ORDERED in Chambers, in Miami, Florida, on March 26, 2024.

Jonathan Goodman
UNITED STATES MAGISTRATE JUDGE

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[5] In his report, Dr. Kress wrote: "I know Mr. Scaife said that he didn't feel anything when he caught the panel, but that he woke up in the morning and couldn't move his arms. He said something was wrong, that he was sore, and that his muscles were bad. **If** he had such soreness, then **perhaps** the major adrenaline rush **could be** an explanation. **I do not know**, …" [ECF No. 26-1, p. 22 (emphasis added)].

The use of words such as "if" , "perhaps" , "could be", and "I don't know" establish that this discussion is entirely speculative and equivocal – and Dr. Kress will **not** be able to provide these opinions and comments at trial. *McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1256 (11th Cir. 2002) (affirming trial court order excluding engineering expert because the methodology was "not scientifically reliable and that his causation opinion was based wholly on speculation").

[6] Given the restrictions I imposed on Dr. Kress's opinion testimony, it is accurate to say that the Undersigned **granted in part and denied in part** the motion to strike.

Copies Furnished to:
The Honorable Robert N. Scola, Jr.
All Counsel of Record