IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

JO ANNE SICKLER **Plaintiff**)		CASE NO. ST-10-CV-0000331
)		ACTION FOR: WRONGFUL DEATH
vs)		
MANDAHL BAY HOLDING, INC.,)		
Defendant		

NOTICE OF ENTRY OF MEMORANDUM OPINION AND ORDER

TO: JOEL H. HOLT, ESQUIRE
MICHAEL C. QUINN, ESQUIRE
SUPERIOR COURT JUDGES
SUPERIOR COURT MAGISTRATES
CLERK OF THE COURT
SUPERIOR COURT LAW CLERKS

Please take notice that on August 29, 2013 a(n) MEMORANDUM OPINION AND ORDER dated August 28, 2013 was entered by the Clerk in the above-entitled matter.

Dated: August 29, 2013

Venetia H. Velazquez, Esq.
Clerk of the Court

AUDREY BRIN
COURT CLERK II

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
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JO ANNE SICKLER, AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN DIEHL,	)	CASE NO. ST-10-CV-331
Plaintiff,	)	ACTION FOR WRONGFUL DEATH
v.	)	JURY TRIAL DEMANDED
MANDAHL BAY HOLDING INC.,	)	
Defendant.	)	

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CHRISTIAN, ADAM G., Judge

MEMORANDUM OPINION
(Filed: August 28, 2013)

Presently before the Court are the following items: 1) Plaintiff's "Motion to Supplement Summary Judgment Record";[1] 2) "Defendant's Opposition to Plaintiff's Motion to Supplement the Summary Judgment Record and Cross-Motion for Preclusion Under FED. R. CIV. P. 56(c)(2)";[2] 3) Plaintiff's "Reply to Defendant's Opposition to Plaintiff's Motion to Supplement Record re Summary Judgment and Opposition to Defendant's Cross-Motion for Preclusion"; and 4) "Defendant's Reply Memorandum in Further Support of its Cross-Motion for Preclusion Under FED. R. CIV. P. 56(c)(2)." For the reasons set forth below, Plaintiff's motion will be denied, and Defendant's cross-motion will be denied as moot.

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1 Defendant has filed a motion for summary judgment which Plaintiff opposes. The Court's decision on that motion for summary judgment will be addressed in a separate opinion.

2 The incorporation of a cross-motion within a memorandum in response or opposition to an existing motion is not authorized by the federal or local rules of procedure. Going forward the attorneys are advised to file separate a motion with a supporting memorandum as required by LRCi 7.1, which applies in this Court pursuant to SUPER. CT. R. 7. *See, Jimenez v. Pepsico Foods Caribbean, Inc.* Civil Action No. 2010-74, 2011 WL 4738113 at * 4 n. 7 (D.V.I. Oct. 6, 2011)

I. PROCEDURAL DISCUSSION.

This civil action grows out of the murder of John Diehl on February 8, 2009 by Neville Potter, Jr. Plaintiff contends that Defendant's failure to properly maintain and secure its real property, known commonly as the Old Mandahl Inn, was the cause of Mr. Diehl's horrifying and untimely demise. At this time, Plaintiff requests that the Court consider the declaration and expert report of Delroy Richards, Sr. when it decides Defendant's motion for summary judgment. Mr. Richards is a retired member of the Virgin Islands Police Department, and is now a licensed investigator in the U.S. Virgin Islands. In support of this motion, Plaintiff contends that: 1) an expert witness report may be considered by the Court on a motion for summary judgment; 2) Mr. Richards' report was produced to Defendant in the course of discovery so its contents were known to Defendant; and 3) although the report itself was not initially verified, a sworn declaration of Mr. Richards affirming the authenticity of the document and verifying the contents thereof has been provided.[3]

In its opposition memorandum, Defendant contends that: 1) the report of Mr. Richards is not verified; 2) to the extent that Mr. Richards recites certain facts that, as to him, are hearsay, the report is inadmissible because he has no personal knowledge of said averments; 3) the documents Mr. Richards relies upon, which are attached to his report, also constitute inadmissible hearsay; 4) he lacks sufficient experience to qualify as an expert in the area of premises security; 5) Mr. Richards' methodology is unreliable; and 6) the opinions in his report are not relevant to the issue of Defendant's legal duties which are the subject of the pending motion for summary judgment.

In her reply brief, Plaintiff asserts that: 1) the declaration of Mr. Richards addresses the lack of verification of the expert report; 2) the report need not be verified for purposes of a summary judgment motion; 3) expert witnesses may rely upon hearsay and other inadmissible evidence in forming their opinions; 4) the facts stated in the report and the attachments to Mr. Richards' report will be testified to and/or properly authenticated at trial; 5) Mr. Richards' qualifications are sufficient; 6) his methodology is satisfactory based upon his experience; and 7) there is a sufficient fit between Mr. Richards' opinions and the facts of this case. In its reply on the cross-motion, Defendant reiterates the points stated in its opposition memorandum, and contends that the cases relied upon by Plaintiff are inapposite.

[3] In response to Defendant's motion for summary judgment, Plaintiff filed Mr. Richards' unsworn expert report. Plaintiff's motion to supplement was submitted primarily to address this perceived deficiency by providing Mr. Richards' sworn declaration with respect to his report. However, whether Mr. Richards' report meets the requirements of Rule 702 of the Federal Rules of Evidence is a central component of the parties' above-listed submissions. Therefore, the Court will address the propriety of the report in this opinion.

II. LEGAL DISCUSSION.

a. The evidence submitted in support of a summary judgment motion, or in opposition thereto, is not required to be presented in a form that is admissible at trial.

The initial issue to be disposed of is whether the report of Mr. Richards can be considered by the Court in ruling on Defendant's motion for summary judgment. Defendant contends that the facts recited in the report and the attachments to the report are inadmissible hearsay, and the report is not verified. Therefore, according to Defendant, Mr. Richards' report cannot be used in Plaintiff's defense against the motion for summary judgment. Defendant's position in this regard is premised, it seems, on the proposition that the materials submitted in support of, or in opposition to, a motion for summary judgment must be in admissible form at the summary judgment stage. Plaintiff objects to Defendant's characterization of what is required at this phase of the litigation.

Defendant's supposition is incorrect. When considering a motion for summary judgment, the evidence presented does not have to be in a format that is admissible at trial, but the materials must be of the type that can be presented in an admissible character at trial.[4] The factual statements contained in Mr. Richards' report were gathered from several sources, including his own observations, the statements, affidavits, and depositions of several individuals, the parties' responses to interrogatories and requests for production of documents, and photographs of the site in question. If the persons named in the report make the same statements, and can authenticate the photographs and other documents, under oath at trial, this information would be admissible at that time. In addition, because Plaintiff took affirmative steps to obtain a verification of the report while the motion was being briefed, her initial failure to provide a sworn statement of Mr. Richards has been adequately rectified.[5] Therefore, the Court concludes that Mr. Richards' report can be used at the summary judgment stage,[6] provided, however, that the report meets the requisites of FED. R. EVID. 702.

b. While Delroy Richards is a qualified expert, his report will not be considered in deciding Defendant's motion for summary judgment because it lacks sufficient indicia of reliability and will not assist the jury.

Both the Virgin Islands Legislature and the Rules of the Superior Court direct that the Federal Rules of Evidence govern civil proceedings in this tribunal.[7] Rule 702 of the Federal Rules of Evidence provides:

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4 *Trevizo v. Adams*, 455 F.3d 1155, 1160 (10th Cir. 2006); *Stinnett v. Iron Works Gym/Exec. Health Spa, Inc.*, 301 F.3d 610, 613 (7th Cir. 2002). *See also*, FED. R. CIV. P. 56(c)(4).

5 *See, Airlines Reporting Corp. v. Belfon*, Civil No. 2003/146, 2010 WL 3664065 at * 7 n. 4 (D.V.I. Sept. 16, 2010) (citing *Fowle v. C & C Cola, a Div. of ITT-Cont'l Baking Co.*, 868 F.2d 59, 67 (3d Cir. 1989)).

6 *See, E.E.O.C. v. West Customer Mgmt. Group, LLC*, 899 F. Supp. 2d 1241, 1250 (N.D. Fla. 2012) ("Thus, the fact that evidence currently may be in an inadmissible form does not prevent consideration of the evidence at summary judgment.")

7 2010 V.I. Sess. Laws 50, Act No. 7161 § 15(b); SUPER. CT. R. 7, 12.

> 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.

The decision to admit or exclude opinion testimony under Rule 702 rests in the sound discretion of the trial court.[8] The duty of the court is to act as a "gatekeeper" and only allow such opinion testimony which will be of assistance to the trier-of-fact.[9] Rule 702 embodies a "liberal policy of admissibility" when the proposed expert testimony has the potential to assist the trier-of-fact.[10] In order for testimony to be admissible under FED. R. EVID. 702, "(1) the witness must be an expert; (2) the procedures and methods used must be reliable; and (3) the testimony must 'fit' the factual dispute at issue so that it will assist the jury."[11] In short, FED. R. EVID. 702 requires that the proposed testimony be supported by "good grounds," that it is relevant to the issue, and that the reasoning and methodology underlying the proposed opinion testimony can be applied to the facts in issue.[12] Finally, a full *Daubert* hearing is not required in all cases in which expert testimony is proposed, but, rather, the trial court should exercise its discretion to hold a hearing under the circumstances of a particular matter.[13]

Defendant challenges Mr. Richards' qualifications as set forth in his curriculum vitae because, while they may qualify him as an expert in armored-car security and investigations, they do not qualify him as an expert in "premises security." However, Defendant ignores the portions of Mr. Richards' curriculum vitae which state that he also provides "security consultation and site assessment."[14] Moreover, the same document notes that he has provided "on site security assessments" as a licensed investigator from 1978 to present.[15] As recently and succinctly expressed by the District Court of the Virgin Islands:

> An expert is qualified if he "possess[es] specialized expertise." *Schneider ex rel. Estate of Schneider v. Fried,* 320 F.3d 396, 404 (3d Cir. 2003). This does not necessarily require formal credentials, as "a broad range of knowledge, skills, and training qualify an expert," and may include informal qualifications such as real-

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8 *Gov't v. Jackson*, 47 V.I. 123, 125 (Super. Ct. 2005) (citing *Kuhmo Tire Co. v. Carmichael,* 526 U.S. 137 (1999)).
9 *Id.* (citations omitted).
10 *United States v. Schiff*, 602 F.3d 152, 173 (3d Cir. 2010) (citations omitted).
11 *Saldana v. Kmart Corp.*, 43 V.I. 361, 365, 260 F.3d 228, 232 (3d Cir. 2001) (citations omitted). *See also, Etienne v. United Corp.*, 44 V.I. 113, 119 (Terr. Ct. 2001) (citations omitted).
12 *Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579, 590 (1993) ("*Daubert*").
13 *Murray v. Marina Dist. Dev. Co.*, 311 F. App'x 521, 523 (3d Cir. 2008); *Miller v. Baker Implement Co.*, 439 F.3d 407, 412 (8th Cir. 2006). In this case, the Court does not require a full *Daubert* hearing as the issue of the admissibility of Mr. Richard's report and testimony is adequately addressed by the written submissions of the parties.
14 Resume of Delroy Richards at p. 1.
15 *Id.*

> world experience. *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 741 (3d Cir. 1994). The qualification standard is a liberal one, and an expert may be sufficiently qualified under Rule 702 even if "the trial court does not deem the proposed expert to be the best qualified or because the proposed expert does not have the specialization that the court considers most appropriate." *Holbrook v. Lykes Bros. S.S. Co.*, 80 F.3d 777, 782 (3d Cir. 1996).[16]

Defendant has indicated dissatisfaction with Mr. Richards' qualifications. However, under the liberal legal standard described above and the contents of his resume, the Court concludes that Mr. Richards has a sufficient background to qualify as an expert in site security assessment for purposes of the pending motion for summary judgment. Therefore, he meets the qualification standard pursuant to *Daubert*.

The second factor for the Court to consider is whether the methodology used by Mr. Richards to form his opinions is reliable. In *Daubert*, the Supreme Court declined to set a definitive test for trial judges to follow when assessing whether proposed expert testimony is reliable.[17] However, the High Court did delineate certain general observations it deemed appropriate, "[n]amely: (1) that the theory can be and has been tested; (2) that the theory has been subjected to peer review and publication; and (3) that the theory has been generally accepted."[18] "A [trial] court should also consider whether a method produces testable hypotheses; the existence of standards controlling the technique's operation; the degree to which the expert testifying is qualified; the relationship of a technique to more established modes of scientific analysis; and the non-judicial uses to which the scientific technique are put."[19]

In this instance, Mr. Richards does not specify which methods, theories, procedures, or learned security treatises he relied upon in forming the opinions contained in his report. Rather, he simply states "This conclusive analysis is based on my expertise, training and experience."[20] While a second declaration of Mr. Richards describing his methodology is attached to Plaintiff's reply memorandum, it provides very little information other than generally describing the physical process utilized when he views a site for assessment. His broad statements do not allow this tribunal to properly apply any of the three guiding observations set by the United States Supreme Court in *Daubert* for determining reliability. While, in some cases, the reliability of an expert's opinion can be established solely upon his or her knowledge and experience, the proponent must substantiate why said knowledge and experience are sufficient standing alone.[21]

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16 *Barnes v. Century Aluminum Co.*, Civil Action No. 05-62, 2013 WL 760577 at * 1 (D.V.I. Feb. 28, 2013).

17 *Daubert*, 509 U.S. at 592.

18 *Id.*

19 *Anders v. Puerto Rican Cars, Inc.*, Civil Action No. 04-0036, 2009 WL 3007367 at * 4 (D.V.I. Sept. 15, 2009) (citing *United States v. Downing*, 753 F. 2d 1224, 1238-39 (3d Cir. 1985)), *aff'd*, 409 F. App'x 539 (3d Cir. 2011).

20 Richards Report at p. 4.

21 *See, Pappas v. Sony Elecs., Inc.*, 136 F. Supp. 2d 413, 425 n. 16 (W.D. Pa. 2000) ("Before expert testimony grounded solely in knowledge and experience can be admissible under Rule 702, the expert must still prove that his methodology is reliable. In such cases, the expert may do so by: 1) discussing his experience and knowledge in detail; 2) explaining the methods he has used in the past; 3) indicating the success or failure that he has enjoyed in employing these methods; and 4) testifying about how he used the same methods in the investigation at issue.") (citing *Oddi v. Ford Motor Co.*, 234 F. 3d 136, 157 (3d Cir. 2000)).

That has not been accomplished in this case. Therefore, the Court agrees with Defendant that Mr. Richards' opinions in his report are not sufficiently reliable, and cannot be used in deciding the pending motion for summary judgment.

The final issue for consideration by the Court is whether the opinion of Mr. Richards would be helpful to a jury at trial. Defendant contends that Mr. Richards makes only broad statements about the subject property in Estate Mandahl and general speculation about safety and security issues. Plaintiff responds that Mr. Richards described the historical criminal activity on the Old Mandahl Inn property and points out which security measures could have been implemented by Defendant.

In the "Analysis and Opinion" section of his report,[22] Mr. Richards essentially recites the facts obtained from the statements, depositions, and other documents he reviewed. These include that: 1) the Old Mandahl Inn was abandoned real property; 2) the property was not regularly maintained and cleared of vegetation; 3) there was no fencing, signage, or other deterrents placed on the property to dissuade persons from entering the area; and 4) persons utilized the property to use drugs, conducted other criminal activities there,[23] and also squatted at the site. At trial, these allegations would have to be elicited from the witnesses with personal knowledge of such facts. As to Mr. Richards, these facts would be inadmissible hearsay. While an expert may rely upon facts contained in hearsay to form an opinion,[24] the expert may not recite those facts at trial, or at the summary judgment stage, under the guise of an "opinion."

Additionally, Mr. Richards merely concludes that placing fencing, a chain, and signs on the property, as well as regularly cleaning and maintaining the property, would decrease the likelihood that persons would enter onto the Old Mandahl Inn property. A jury can glean such conclusions from normal human experience. It is obvious to a reasonable layperson that placing fencing, chains, or signage around or upon a piece of real property can discourage others from trespassing. Moreover, Mr. Richards' report does not address how his security suggestions apply to the facts of this particular case wherein: 1) two persons were at the Old Mandahl Inn property smoking marijuana; 2) two other persons arrived on the site and one began to fire gunshots at the first two trespassers; 3) the victims fled from the Old Mandahl Inn property to escape the gunfire; 4) the gunman chased them off of the property; 5) the Decedent, who lived nearby, went to investigate the gunfire; and 6) the Decedent encountered the gunman and was chased and shot by this horrendous character. Because reasonable jurors can draw the same conclusions reached by Mr. Richards based solely on the facts presented and their own experiences, and there is no established connection between the proposed expert testimony and the very unique facts of this case, the opinion can be of no assistance to them and it should not be allowed under Rule 702.

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[22] Richards Report at pp. 4-5.

[23] Although a murder had previously occurred at the Mandahl Bay beach, that is a separate property from the Old Mandahl Inn site. There is no evidence in the record that any homicide occurred at the Old Mandahl Inn property prior to the incident underlying this litigation.

[24] *See,* FED. R. EVID. 703.

III. CONCLUSION.

While Delroy Richards is qualified as an expert in site security assessments for purposes of the pending motion for summary judgment, his opinion does not reflect sufficient indicia of reliability, nor can it assist the jury in the trial of this matter. Therefore, the Court will deny Plaintiff's motion to supplement the record of this case, and will not rely upon this report when to decide Defendant's motion for summary judgment. In light of the disposition of Plaintiff's motion, Defendant's cross motion for preclusion is moot. An appropriate Order of even date will be entered consistent with this opinion.

Dated: August 28, 2013

Hon. Adam G. Christian
Judge of the Superior Court
of the Virgin Islands

ATTEST:
Venetia H. Velazquez, Esq.
Clerk of the Court

By: ______________________
Lori Boynes-Tyson
Court Clerk Supervisor 8/28/2013

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
****

JO ANNE SICKLER, AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN DIEHL, Plaintiff, v. MANDAHL BAY HOLDING INC., Defendant.	CASE NO. ST-10-CV-331 ACTION FOR WRONGFUL DEATH JURY TRIAL DEMANDED

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CHRISTIAN, ADAM G., Judge

ORDER

THIS MATTER is before the Court on Plaintiff's "Motion to Supplement Summary Judgment Record"; 2) "Defendant's Opposition to Plaintiff's Motion to Supplement the Summary Judgment Record and Cross-Motion for Preclusion Under FED. R. CIV. P. 56(c)(2)"; 3) Plaintiff's "Reply to Defendant's Opposition to Plaintiff's Motion to Supplement Record re Summary Judgment and Opposition to Defendant's Cross-Motion for Preclusion"; and 4) "Defendant's Reply Memorandum in Further Support of its Cross-Motion for Preclusion Under FED. R. CIV. P. 56(c)(2)." For the reasons set forth in the Court's Memorandum Opinion of even date, and the Court being otherwise satisfied in the premises, it is hereby

ORDERED that Plaintiff's Motion to Supplement Summary Judgment Record is **DENIED**; and it is further

ORDERED that Defendant's Cross-Motion for Preclusion Under FED. R. CIV. P. 56(c)(2) is **DENIED AS MOOT**; and it is further

ORDERED that the Court will not consider the report of Delroy Richards, Sr. when it decides Plaintiff's motion for summary judgment; and it is further

ORDERED that copies of this Order and accompanying Memorandum Opinion shall be directed to Joel H. Holt, Esquire and Michael C. Quinn, Esquire.

Dated: August 28, 2013

Hon. Adam G. Christian
Judge of the Superior Court
of the Virgin Islands

ATTEST:
Venetia H. Velazquez, Esq.
Clerk of the Court

By: ______________________
Lori Boynes-Tyson
Court Clerk Supervisor 8/28/2013