

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

JOSEPH SCHRADER, individually and as the)
Personal representative for the Estate of)
VALARIE R. SCHRADER, deceased.)

Plaintiff,)

v.)

THE GOVERNOR JUAN F. LUIS)
HOSPITAL AND MEDICAL CENTER,)
DEPARTMENT OF HEALTH,)
GOVERNMENT OF THE VIRGIN ISLANDS)
and WARREN D. BRISCOE, M.D.,)
Defendants.)

CIVIL NO. SX-12-CV-066

ACTION FOR WRONGFUL DEATH and
DAMAGES

(JURY)

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Plaintiff Joseph Schrader's Motion for Daubert Hearing and to Exclude from Trial the Testimony and Report of Defendants' Medical Expert, Ronald Bolognese (Motion), filed August 5, 2016; Defendants' Response thereto, filed August 17, 2016; and Plaintiff's Reply, filed September 13, 2016. For the reasons that follow, Plaintiff's Motion will be denied.

Legal Standard

The Federal Rules of Evidence govern proceedings in the Superior Court of the Virgin Islands pursuant to Act No. 7161, § 15(b), signed into law on April 7, 2010. *Antilles School, Inc. v. Lembach*, 2016 V.I. Supreme LEXIS 7, at *20 (V.I. 2016). In requesting a *Daubert* hearing, exclusion of Defendant's expert testimony, and exclusion of Defendants' expert report,¹ Plaintiff relies primarily upon Federal Rule

¹ Although it would appear that the written report of a testifying expert may not generally be admissible at trial, the Court will defer ruling at this time on the trial admissibility of Defendants' expert's report, and this Order is limited to consideration of whether the expert may testify at trial. *See, e.g., Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 729 (6th Cir. 1994) (holding that admission of expert reports was erroneous; explaining that experts are entitled to testify as to their opinions and rely on inadmissible evidence, but neither their written opinions nor the materials on which they relied are admissible under FRE 702 and 703); *but see NAACP v. A.A. Arms, Inc.*, 2003 WL 2003750, at *1 (E.D.N.Y. Apr. 4, 2003) ("As a general matter the admission of written expert reports into evidence when the expert has testified orally at trial is not redundant. Having available an expert's comprehensive written report may help a jury to more fully understand and evaluate that expert's testimony and conclusions and their impact on the case. Oral testimony is often chopped up and hard to follow. In some instances, the proponent may simply offer the report, subject to cross examination") (cited in THE LITIGATION MANUAL: SUPPLEMENT 1998-2004 518 (Priscilla Anne Schwab, 3rd ed. 2007); *Sommerfield v. City of Chicago*, 2008 U.S. Dist. LEXIS 88760, at *38-41 (N.D. Ill. 2008)).

of Evidence 702 supplemented by Federal Rules of Evidence 401 and 403.² Motion, at 5.

Admission of expert testimony in proceedings in the Superior Court of the Virgin Islands is governed by Federal Rule of Evidence 702. *Lembach*, 2016 V.I. Supreme LEXIS 7, at *19-21.

Federal Rule of Evidence 702 provides:

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.

In *Lembach*, the Supreme Court definitively held that the Superior Court must apply *Daubert* factors in determining whether to admit expert testimony under Rule 702. 2016 V.I. Supreme LEXIS 7, at *28 ("the *Daubert* standard represents the soundest rule for the Virgin Islands") (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)). Pursuant to the *Daubert* standard:

a trial judge must determine at the outset... whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

Lembach, at *21 (citing *Daubert*, 509 U.S. at 592-93).

To determine whether an expert's opinion is based on reliable reasoning or methodology, the United States Supreme Court listed several non-exhaustive factors to consider, including whether the opinion can be (and has been) tested, whether the theory or technique has been subjected to peer review and publication, what the known or potential rate of error is, and the existence and maintenance of standards controlling the technique's operation.

Id. at *21-22 (citing *Daubert*, 509 U.S. at 593-94).

When a party brings a FRE 702 challenge, the Court must also be mindful of other applicable rules, particularly FRE 703, 706, and 403. *Daubert*, 509 U.S. at 595. Federal Rule of Evidence 703 establishes the standard governing the types of facts and data upon which an expert may rely. *See*

² Federal Rule of Evidence 401 states: "Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action."

Federal Rule of Evidence 403 states:

The Court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Alexander v. People of the Virgin Islands, 60 V.I. 486, 506-08 (V.I. 2014). Federal Rule of Evidence 703 provides:

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Although Plaintiff purports to challenge the admissibility of the expert report and testimony of Dr. Ronald Bolognese based on FRE 702, he does not question Dr. Bolognese's qualifications, knowledge, skills, experience, training, or education under Rule 702(a). Plaintiff's challenge does not specifically identify any factors that would warrant exclusion of Dr. Bolognese's testimony and report, but only attacks the expert's conclusions.³ Plaintiff's Motion is evaluated as challenging the admissibility of Defendants' expert's testimony pursuant to FRE 702(b), (c), and (d), and FRE 703.

Discussion

Plaintiff moves the Court to conduct a *Daubert* hearing, to exclude the medical expert report and to preclude the testimony of Dr. Ronald Bolognese, and specifically his statement "*that the death of Valarie Schrader was not caused by inappropriate patient care by Defendants, but by the failure of Valarie to agree to transfer to a tertiary care center.*" Motion, at 1 (emphasis in original). Plaintiff focuses on the exclusion of Dr. Bolognese's conclusions, which Plaintiff argues are based upon two disputed facts in the record: that Valarie Schrader twice declined "(1) transfers to a tertiary care center to P.R. or Miami, and (2) 24 hour admission." Motion, at 5. Plaintiff claims that the report "is nothing more than a 'hired guns' advocacy report, designed to generate improper influence on the Court and encroach on the function of the jury" and that the report "is based solely on the subjective belief and the unsupported speculations of Briscoe's and the JFLH." *Id.* at 5-6 (emphasis omitted).

Plaintiff attacks Dr. Bolognese's report arguing that the expert "blatantly adopts" Defendants' theory of the case, specifically the following language:

³ Plaintiff states that Defendants' expert report is (1) contradictory and confusing to the jury; (2) "silent as to Defendants' preparedness, if any, for Valarie's (alleged) transfer to a tertiary care center;" (3) absent of any explanation regarding the "methodology which he used to reach his conclusion;" and (4) not relevant and offers no probative value. Motion, at 6. Even though Plaintiff states that he attacks the methodology, his attack is unsupported by any detailed argument beyond the assertion that the expert's reliance upon deposition testimony is inappropriate.

It is my opinion with a reasonable degree of medical certainty that Valarie Schrader was provided with appropriate obstetrical care by Briscoe and the medical personnel at the Hospital *within the limitations imposed by the couple. She presented with clinical symptoms of mild preeclampsia and was appropriately managed as an outpatient...* Her diagnosis, mild preeclampsia, remained stable when she was seen on 7/22 and 7/23/11. *Briscoe expressed concern about her condition worsening leading to the need for premature delivery*, particularly with no neonatologist present on the island to provide with necessary to the infant [sic]. *The couple refused transfer, as well as 24 hour observation admissions on 7/22 and 7/23/11.* Unfortunately, her preeclampsia abruptly and significantly worsened as anticipated by Dr. Briscoe.

Motion, at 5 (emphasis in original).

Plaintiff contends that Defendants' expert's opinions are inappropriate because they rely mostly upon affirmative defenses and "self-serving" deposition statements, which are not scientific facts. *Id.* at 5-6. Plaintiff further argues that Defendants have failed to produce the "requisite 'informed consent' information, as set forth in the JFLH 'Patient's Bill of Rights,' so as to enable her to make an informed decision relative to the so-called transfer and admission issues, raised by Defendants in their pleadings." Motion, at 5. Issues relating to the patient's informed consent may be relevant to Defendants' compliance with the appropriate standard of care and Plaintiff correctly notes that this determination is well within the jury's fact-finding function. However, the existence of that "open question for the jury" (*id.* at 6) does not operate to bar the expert's report and testimony of his opinion gleaned from the facts and records presented to him.

Defendants argue that the report is relevant and reliable and that Plaintiff's motion must fail because it focuses on "conclusions generated" by the report rather than its "principles and methodology." Response, at 1. Defendants respond that Dr. Bolognese may testify as a qualified expert for the following reasons: (1) he has specialized knowledge in Obstetric Gynecology; (2) his report is based on sufficient facts and data; (3) the report is the product of reliable principles and methods and can be reproduced by independent testing; and (4) the report reliably and appropriately applies the principles and methods of medicine to the facts of this case. Response, at 2.

Defendants point to specific differences in Plaintiff's and Defendants' expert reports—"Bolognese opines that Valarie Schrader had mild preeclampsia as opposed to severe preeclampsia as indicated by Plaintiffs' expert report by Dr. Frederick Gonzalez." *Id.* at 5. Further, Dr. Bolognese's opinion was based on the methodology and publication by the American College of Obstetricians and Gynecologists (ACOG) Committee Opinion No. 514. *Id.* Defendants contend that Dr. Bolognese's reference in his report to the refusal of the patient and her husband to permit her transfer to a tertiary care facility does not simply parrot

Defendants' affirmative defense, but rather relies upon valid relevant evidence in the record that should be presented to the jury. *Id.* at 5-6.

The Court examines the content of the expert report to determine whether it complies with FRE 702 and 703. The Notes of the Advisory Committee on FRE 702 explain that it is "permissible for the experts to take the further step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts." *See* Notes of the Advisory Committee on FRE 702. The Notes also explain that contradictory expert testimony may be admitted and may be found to be reliable.⁴

The Supreme Court has held that the Superior Court may not grant a motion in limine seeking to *exclude* expert testimony without first conducting a *Daubert* hearing; but no such requirement exists that would require the Court to conduct a hearing in advance of denying a motion in limine challenging the admissibility to *include* an expert's testimony. *Samuel v. United Corporation*, 2016 V.I. Supreme LEXIS 13, at *22-23 (V.I. 2016) ("By excluding [plaintiff's] proposed expert testimony without conducting a hearing, the Superior Court "failed to 'provide the plaintiffs with sufficient process for defending their evidentiary submissions"). The more liberal *Daubert* standard represents the soundest rule for the Virgin Islands, rather than the previous "general acceptance" test espoused in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), promoting a policy of inclusion of testimony and against wrongful exclusion of expert testimony. *Lembach*, 2016 V.I. Supreme LEXIS 7, at *29 (discussing that exclusion of expert evidence "has been criticized as a misappropriation of the jury's responsibilities," noting that "while strict adherence to the *Daubert* framework may result in relevant expert testimony being wrongfully excluded, the *Frye* standard poses an even greater risk of evidence being unjustly excluded"); *see also*, *3RC & Co. v. Boynes Trucking Sys., Inc.*, 63 V.I. 544, 558 (V.I. 2015) (discussing the importance of hearing from witnesses to create a record from which to resolve the disputed issues of fact).

Daubert explains that, unlike an ordinary witness, an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation. *Daubert*, 509 U.S. at 592. Moreover, exclusion of an expert's conclusion merely because it is incongruent with the challenging party's theory of the case is impermissible since the jury may determine how to weigh the credibility of

⁴ The Notes of Advisory Committee on the FRE 702, 2000 amendments also state: "Rule 702 has been amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 [125 L. Ed. 2d 469] (1993), and to the many cases applying *Daubert*, including *Kumho Tire Co. v. Carmichael*, [143 L. Ed. 2d 238,] 119 S.Ct. 1167 (1999). ... The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. *See, e.g., Heller v. Shaw Industries, Inc.*, 167 F.3d 146, 160 (3d Cir. 1999) (expert testimony cannot be excluded simply because the expert uses one test rather than another, when both tests are accepted in the field and both reach reliable results)."

each expert witness, just as it would the credibility of a lay witness. *See Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 394-95 (V.I. 2014) (discussing the jury's role in weighing expert and lay testimony equally); *see also, John v. People of the Virgin Islands*, 63 V.I. 629, 648-49 (V.I. 2015).⁵ Therefore, although granting a motion in limine to preclude expert testimony is inappropriate without first conducting a hearing, it is fully within the discretion of the Court to deny such a motion without a hearing when it is apparent based on the briefs presented, that the expert meets the standards set forth under FRE 702 and 703. *Rodriguez v. Rodriguez-Ramos*, 2016 V.I. Supreme LEXIS 9, at *6 (V.I. 2016) ("the admission of expert testimony lies within the discretion of the trial court"). To hold a hearing on the motion, purely as a matter of formality, when the briefs establish that the expert meets the appropriate standards would be an inefficient and unnecessary waste of judicial resources.

As to the contents of Dr. Bolognese's report, the Superior Court has held that "[w]hile an expert may rely upon facts contained in hearsay to form an opinion, the expert may not recite those facts at trial, or at the summary judgment stage, under the guise of an 'opinion.'" *Sickler v. Mandahl Bay Holding*, 2013 V.I. LEXIS 61, at *14-15 (V.I. Super. Ct. 2013). Courts throughout multiple jurisdictions routinely hold that qualified experts may rely upon hearsay evidence or otherwise inadmissible evidence under FRE 703 when forming their opinions and when testifying before a jury. *See, e.g., In the Matter of: [Child in Need of Care]*, 2003 Mont. Dist. LEXIS 2843, at *12 (Mont. Dist. Ct. 2003) ("[a] properly qualified expert may incorporate hearsay testimony in forming his or her opinions"); *People v. Zavala*, 2013 Cal. App. LEXIS 7542, at *148-50 (Cal. App. 6th Dist. 2013) (unpublished) ("Expert testimony may be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions"); *Sabo v. Josephps*, 2008 N.J. Super. LEXIS 898, at *19-20 (App. Div. 2008) (unpublished) (same); *United States v. Dukagjini*, 326 F.3d 45, 58 (2d Cir. 2002) (an expert witness may rely on hearsay evidence while reliably applying expertise to that hearsay evidence, but may not rely on hearsay for any other aspect of his testimony); *In re James Wilson Associates*, 965 F.2d 160, 172-73 (7th Cir. 1992) (courts routinely allow experts to rely upon

⁵ *See also, NAACP v. A.A. Arms, Inc.*, 2003 U.S. Dist. LEXIS 8111, at *5-6 (E.D.N.Y. 2003) ("Disagreement with defendants' experts does not diminish [plaintiff's expert]'s qualifications to testify as an expert witness in this matter. There may be multiple disagreements between the experts on either side and among the experts on each side, but all of the experts are distinguished professionals and have done a thorough and commendable job in attempting to analyze difficult data, sometimes for the first time that the data has been available for analysis by experts of any kind. As this court has held in prior in limine evidentiary rulings, the experts for both sides are in compliance with Federal Rule of Evidence 702 and *Daubert*, and the bases for their opinions satisfy Federal Rule of Evidence 703").

inadmissible evidence, not for the truth of the matters asserted, but to inform the jury of the basis of the expert's opinion); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1313, 1322 (E.D. Pa. 1980) (discussing expert witness testimony as "a widely-recognized exception to the rule against hearsay testimony. It has long been the rule of evidence in the federal courts that an expert witness can express an opinion ... even though his opinion is based in part or solely upon hearsay sources").

Based upon this persuasive guidance, the Court finds that Dr. Bolognese's report appropriately synthesized and referenced information in the available record in forming an opinion concerning the medical care Valarie Schrader received from Dr. Briscoe and JFL.⁶ Dr. Bolognese legitimately relied upon and summarized Dr. Briscoe's deposition testimony. In *Modica v. Maple Meadows Homeowners Ass'n*, the Eastern District of Pennsylvania excluded expert testimony for failure to comply with FRE 702 and 703, noting three reasons: a significant portion summarized deposition testimony;⁷ the opinion did not rely upon scientific, technical, or specialized knowledge that would assist the trier of fact; and the expert impermissibly drew legal conclusions, such as that plaintiff assumed the risk, plaintiff's actions constituted contributory negligence, and defendant was not negligent.⁸ 2014 U.S. Dist. LEXIS 45912, at *2, n. 3 (E.D. Pa. 2014). The court further noted that when expert opinions are excluded, it is often because they are unhelpful and therefore superfluous and a waste of time. *Id.* (discussing that "opinions, such as to how humans walk and the potential dangerousness of wearing high heels, are not properly characterized as expert because they do not concern matters that the average juror is not capable of understanding on his or her own") (citing *United States v. Mejia*, 545 F.3d 179, 194 (2d Cir. 2008)).

Here, Dr. Bolognese's report predominately relies directly upon JFL's medical records of the

⁶ In his report, Dr. Bolognese states that he reviewed the following records: (1) Plaintiff's Complaint; (2) Notice of Service of Defendants' Rule 26 Initial Disclosures; (3) Medical Records regarding the 2007 pregnancy of Valarie Schrader; (4) Prenatal records of the 2011 gestation of Valarie Schrader; (5) JFL Emergency Department Records regarding Valarie Schrader dated 7/19/11; (6) JFL Admission Records regarding Valarie Schrader dated 7/20/11 to 7/21/11; (7) Outpatient records dated 7/22/11 evaluating Valarie Schrader's medical condition and fetal testing; (8) Outpatient records dated 7/23/11 regarding Valarie Schrader's medical condition and fetal testing; (9) JFL Admission and Delivery Records regarding Valarie Schrader dated 7/25/11; Plaintiff's Report of Frederick A. Gonzalez, M.D., dated 8/27/13. Report, at 1-2 (cited in Motion, Exhibit A; Opposition, Exhibit A). Although not listed as one of the "records" reviewed, the report also references deposition testimony of Defendant Dr. Briscoe. *Id.* at 4, 6. All of the records Dr. Bolognese reviewed in preparing his report form a part of the record.

⁷ "A party may not filter fact evidence and testimony through his expert merely to lend credence to the same nor may expert testimony be used merely to repeat or summarize what the jury independently has the ability to understand. Moreover, to allow an expert to opine as to the likelihood that another witness's testimony is truthful would encroach upon the jury's vital and exclusive function to make credibility determinations." *Modica*, 2014 U.S. Dist. LEXIS 45912, at *2, n. 3.

⁸ "Although Federal Rule of Evidence 704 permits an expert witness to give expert testimony that embraces an ultimate issue to be decided by the trier of fact, an expert witness is prohibited from rendering a legal opinion. Such testimony is prohibited because it would usurp the District Court's pivotal role in explaining the law to the jury." *Id.*

treatment of Valarie Schrader. Plaintiff asserts that the report consists of “mere conclusory opinions.” Reply, at 4. Yet, upon close examination, the report contains a detailed review and analysis of many documents in the record. Dr. Bolognese begins by summarizing the case based on his reading of JFL’s records; he references deposition testimony, briefly summarizing relevant portions of Dr. Briscoe’s deposition. *See* report, at 4. Dr. Bolognese’s analysis consists of three basic steps: first, he addresses the pre-eclampsia diagnosis by referencing Dr. Gonzalez’s report and Valarie Schrader’s lab results detailing her liver function studies, low platelet count, proteinuria, and decreased creatinine clearance, blood pressure, BUN, serum creatinine, BUN/creatinine ratio, uric acid, PT, and PTT, and he compares those levels to the guidelines set forth in the ACOG Committee Opinion No. 514 (*id.* at 5); second, Dr. Bolognese addresses the appropriateness of outpatient treatment by again referencing Dr. Gonzalez’s report, Valarie Schrader’s lab results, and standards set by the National High Blood Pressure Education Program Working Group, and drawing a conclusion (*id.* at 6); and third, Dr. Bolognese restates Dr. Briscoe’s testimony. Dr. Bolognese draws a final conclusion, based on a comprehensive evaluation of the documents he references in the report. *Id.* at 7.⁹ Dr. Bolognese’s report is clearly predicated upon his specialized knowledge of obstetric care standards and is supported by adequate, applicable medical guidelines and methodology. It is clear that a lay jury member would not be able to interpret the lab results and the nuances in the differences between criteria for diagnoses of severe pre-eclampsia versus mild pre-eclampsia without expert assistance.

The Court finds that Dr. Bolognese’s testimony is unlikely to confuse the jury; but will rather assist the fact-finders decide material issues of fact to determine whether Defendants departed from the appropriate standard of care. *See Alexander*, 60 V.I. at 495-97 (discussing contradictory testimony in the context of FRE 403; *cf. United States v. Pires*, 642 F.3d 1, 11-12 (1st Cir. 2011) (in child pornography trial, expert testimony that defendant was not a pedophile was properly excluded because it “might well

⁹ Plaintiff argues that Dr. Bolognese may not opine as to the cause of death because he is not a pathologist. Reply, at 3. Pathology is the “branch of medical study that examines, the origins, symptoms, and nature of diseases.” *Black’s Law Dictionary* 1163 (8th ed 2004). “Pathologist” has been defined as “a physician who practices, evaluates, or supervises diagnostic tests, using materials removed from living or dead patients, and functions as a laboratory consultant to clinicians, or who conductsexperiments or other investigations to determine the causes or nature of disease changes;” (*see Farlex Partner Medical Dictionary*. (2012), available at <http://medical-dictionary.thefreedictionary.com/pathologist>, last visited September 21, 2016) and “obstetrician” as a practitioner in “the specialty of medicine concerning with the care of women during pregnancy, paruition, and the puerperium.” (*See Farlex Partner Medical Dictionary*. (2012). available at <http://medical-dictionary.thefreedictionary.com/obstetrician>, last visited September 21, 2016). Because Plaintiff’s case asserts that “Valarie Schrader [], age 39, was in her 31st weeks [sic] of pregnancy...” Motion, at 1, an obstetrician is an appropriate expert to opine on whether the care given Valarie Schrader toward the end of her pregnancy met the applicable standard of care. Moreover, Plaintiff’s expert is also an obstetrician and gynecologist. *See* Motion, Exhibit B, at 1.

‘shift attention away from a key question — whether the defendant had knowledge of the contents of the videos — to a wholly irrelevant one — whether or not he is a pedophile’’). Unlike the expert in *Modica*, only a slight, rather than significant, portion of Dr. Bolognese’s report summarizes deposition testimony. Dr. Bolognese has relied upon scientific and specialized knowledge that will assist the trier of fact, and he has not explicitly drawn legal conclusions. Interestingly, the report of Plaintiff’s expert, Dr. Gonzalez, does not cite or refer to any guidelines to demonstrate that his assessment that Valarie Schrader’s caregivers departed from the acceptable standard of care was based upon his specialized knowledge, and was the product of reliable scientifically valid methodology applicable to the facts of the case. *See* Gonzalez report, at 2.

The Court concludes that in forming his opinion, Dr. Bolognese properly relied upon, referenced, and summarized a portion of the deposition testimony of Dr. Briscoe. *cf. Martínez-Morales v. Victaulic Co.*, 2013 U.S. Dist. LEXIS 80457 (D.P.R. 2013) (denying the exclusion of plaintiff’s expert witness testimony and opinions; discussing that FRE 702’s requirement of sufficient facts or data “is not intended to exclude an expert’s testimony on the ground that the court believes one version of the facts and not the other”) (collecting cases).

Plaintiff’s contention that Dr. Bolognese’s report usurps the function of the jury and will create unnecessary confusion is unpersuasive. Ample case law demonstrates that this type of expert testimony is appropriate and the probative value is not outweighed by any potential unfair prejudice. *See, e.g., Cooper v. Carl A. Nelson & Co.*, 211 F.3d 1008, 1020 (7th Cir. 2000).

Rule 403 permits the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.... Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge, in weighing possible prejudice against probative force under Rule 403 of the present rules, exercises more control over experts than over lay witnesses.

Daubert, 509 U.S. at 595 (internal quotations omitted).

The inherent prejudicial effect of any expert’s testimony is recognized, as such a witness is presented as someone with special knowledge. However, particularly in this case, Plaintiff will have the opportunity to present his own expert and his expert’s opinion concerning the particular information to which Plaintiff primarily objects (i.e. the decision of the patient and her husband to decline transfer to a tertiary care facility or overnight admission). Defendants’ expert briefly refers to deposition testimony of the treating physician, to which both parties had equal access and upon which both are entitled to rely.

Contrary to Plaintiff's assertion, Defendants do not offer the expert as a witness to circumvent the rules of evidence. For the reasons stated, it is appropriate to deny Plaintiff's motion to exclude Dr. Bolognese's testimony.

Dr. Gonzalez's Report

In their Response, Defendants "ask the Court to exclude for trial the testimony and the Report of Plaintiff's Medical Expert, Frederick Gonzalez, for failure to comply with admission requirements under *Daubert*." Response, at 9. Defendants do not present this request as a separately filed motion, and have not otherwise elaborated any legal or factual bases for their request. Plaintiff has not responded to or even acknowledged Defendants' request. The Court will deny Defendants' request and will not exclude the testimony of either expert. It is the role of the jury to decide which expert's testimony is more credible.

In light of the foregoing, it is hereby

ORDERED that Plaintiff's Motion for Daubert Hearing and to Exclude from Trial the Testimony and Report of Defendant's Medical Expert, Ronald Bolognese is DENIED. It is further

ORDERED that Defendants' request that the Court exclude the testimony and report of Plaintiff's medical expert Frederick Gonzalez is DENIED.

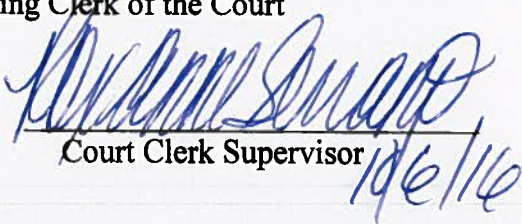
DATED: October 6, 2016.


DOUGLAS A. BRADY, JUDGE

ATTEST:

ESTRELLA GEORGE
Acting Clerk of the Court

By:


Court Clerk Supervisor 10/6/16