UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-CV-23874-MORENO/LOUIS

DAVID DISLER

Plaintiff,

vs.

ROYAL CARIBBEAN CRUISE LTD.,

Defendant.
_____/

REPORT AND RECOMMENDATION

This cause came before the Court upon Defendant's Motion *in Limine* to Exclude Dr. Marek Mirski (ECF No. 88), and Motion *in Limine* to Exclude Testimony of Lt. Daniel Deutermann (ECF No. 91).These Motions were referred to the undersigned United States Magistrate Judge, pursuant to 28 U.S.C. § 636(b)(1)(A) and the Magistrate Judge Rules of the Local Rules of the Southern District of Florida, by the Honorable Federico A. Moreno, United States District Judge. These Motions having been fully briefed and upon consideration of the pertinent parts of the record, the Parties' arguments at a hearing conducted on June 17, 2019, and being otherwise fully advised in the premises, the undersigned recommends that Defendant's Motion *in Limine* to Exclude Dr. Marek Mirski (ECF No. 88) be granted, and Defendant's Motion *in Limine* to Exclude Testimony of Lt. Daniel Deutermann (ECF No. 91) be denied.

I. BACKGROUND

This case arises from Plaintiff David Disler's negligence claims against Royal Caribbean Cruise Ltd. ("RCCL" or "Defendant"). In the operative complaint, Plaintiff alleges that while he was a passenger on Defendant's cruise ship, *Anthem of the Seas*, he suffered a stroke and that his

permanent injuries were exacerbated by the delay in medical care caused by the acts and omissions of the ship's staff. *See* Pl.'s Third Am. Compl. (ECF No. 21).

The facts pertinent to the resolution of these Motions are drawn from Plaintiff's Third Amended Complaint, as well as the Court's familiarity with the evidence presented on summary judgment. Plaintiff alleges that on the penultimate day of his cruise, at around 8:00 AM, he suffered an ischemic stroke. His husband, Kurt Weber, called 911 from their cabin to report a medical emergency. Plaintiff was promptly examined by the ship's doctor, Dr. Ntsiki Mthombeni. Dr. Mthombeni suspected that Plaintiff had suffered a stroke, and that it had occurred before he awoke that morning. At 8:30 AM, following her examination, Dr. Mthombeni contacted the ship's bridge and spoke to Staff Captain Wendy Williams to determine the ship's proximity to port in order to determine whether Plaintiff should be evacuated by the United States Coast Guard ("USCG"). According to notes recorded in Plaintiff's medical chart, Staff Captain Williams advised Dr. Mthombeni that any deviations at that stage would take longer than if the ship continued pushing towards the final port in Bayonne than if the ship turned back to meet with the USCG. Approximately one hour later, Dr. Mthombeni made a second call to Williams. Based on her second call to the ship's bridge, Dr. Mthombeni noted in Plaintiff's treatment notes that "whether we deviate the ship and try to meet up with a helicopter, go to another [port] or if we go full speed to Bayonne, the patient will receive help at approximately the same time frame." Plaintiff's vitals remained stable for the remainder of the voyage. The ship reached Bayonne on the morning of October 29, 2016, twenty-two hours after Plaintiff's medical condition became known to Defendant.

Following this Court's order on Defendant's Motion for Summary Judgment, Plaintiff's sole remaining claim is negligence (ECF No. 92). Plaintiff alleges that but for Defendant's

negligent failure to call the USCG, he would have received medically indicated stroke treatment when he was still within the window of time that would have made a meaningful difference in his long-term prognosis. His theory of causation, accordingly, depends on his ability to prove that the USCG would have responded to a request for medical evacuation and transported Plaintiff to a stroke treatment center within the window of time necessary to receive treatment. It is undisputed that this window of time is no more than six hours from stroke onset.

In support of his causation theory, Plaintiff relies on the expert opinions of Lieutenant Daniel Deutermann, a marine search and rescue expert, and Dr. Marek Mirski, an intensive care unit neurologist. Lt. Deutermann was tasked with providing an operational analysis regarding the feasibility of a medical evacuation of Plaintiff on the morning of the stroke onset.[1] *See* Lt. Daniel Deutermann Report (ECF No. 91-1). In his report, Lt. Deutermann created a hypothetical helicopter rescue scenario for Plaintiff's evacuation to Bon Secours Maryview Medical Center ("Maryview Hospital"), a comprehensive stroke treatment center, in the event the ship's bridge called the USCG. The scenario takes into account the time it would take the USCG to dispatch a rescue helicopter crew, the H-60 helicopter's capabilities, the time it would take the ship to arrive at the meet-up point, patient hoisting, and the time it would take to arrive at Maryview Hospital. Lt. Deutermann opined that (1) the rescue mission would have taken just under 4.5 hours, arriving at the hospital at 12:24 PM; (2) there is no excuse for Defendant to not have called the USCG for Plaintiff's medical evacuation; and (3) the ship was capable of meeting with a rescue helicopter.

During his deposition, Lt. Deutermann conceded that his timeline should allow an additional 15 minutes for the necessary USCG personnel – flight surgeon and the watch person –

[1] Defendant disputes that Plaintiff's stroke occurred as alleged at 8:00AM, as some record evidence indicates that it may have occurred overnight; if so, Plaintiff's window of treatment would have closed much earlier or possibly even before he awoke and his husband reported the symptoms.

to communicate with each other and the ship's physician before the helicopter is dispatched. *See* Daniel Deutermann Deposition Transcript (ECF No. 91-2, 95:22-96:1-9). Accordingly, he modified his opinion to increase the time to arrive at the hospital by 15 minutes, to 12:39 PM.

Plaintiff also retained Dr. Marek Mirski who opined that if Plaintiff had been medically evacuated from Defendant's ship, he would have been a candidate to receive emergency stroke treatment within the window of time in which the treatment likely would have reduced Plaintiff's injuries. Dr. Mirski's initial report identified two forms of treatment that would have been available to Plaintiff had he been evacuated: (1) intravenous tPA; and (2) mechanical thrombectomy. *See* Dr. Mirski Report (ECF No. 88-1). It is undisputed that intravenous tPA is a treatment for ischemic strokes, which works by dissolving the clot and improving blood flow to the brain.[2] A mechanical thrombectomy refers to an endovascular procedure which removes a clot through a stent by threading a catheter through an artery in the groin and up to the blocked artery in the brain.[3]

The relevant window of treatment for the two procedures, which Dr. Mirski adopts in his report, is 4.5 hours after the onset of symptoms for tPA, and 6 hours for a thrombectomy. Relying on the guidelines set forth by the American Heart Association/American Stroke Association ("AHS/ASA"), Dr. Mirski originally opined that Plaintiff would have been a candidate for both tPA and a thrombectomy if he had been presented to a comprehensive stroke center within the respective time frame for each treatment.

Dr. Mirski does not offer an opinion as to the length of time it would have taken to extract Plaintiff from the ship and transport him to the stroke center but does offer an opinion regarding the time it would take from presentation at the stroke center to initiate treatment. He based his time calculations on the timeline required by the Joint Commission, a non-profit organization

[2] https://www.strokeassociation.org/en/about-stroke/treatment/why-getting-quick-stroke-treatment-is-important
[3] https://www.strokeassociation.org/en/about-stroke/treatment/ischemic-stroke-treatment

responsible for accrediting and certifying comprehensive stroke centers.[4] (ECF No. 88-1). Based on this timeline, Dr. Mirski opined that Plaintiff would have been a candidate to receive both tPA and a thrombectomy within 90 minutes of arriving at the hospital and critically, within the window required for both treatments.

Dr. Mirski issued a supplemental report dated January 11, 2019, in which he clarified that if Plaintiff did not arrive at a comprehensive stroke treatment center within 4.5 hours of symptom onset, he would nonetheless be a candidate for a mechanical thrombectomy and the procedure could be performed within 60 minutes of arrival, as opposed to his original opinion that Plaintiff would receive treatment within 90 minutes of arrival; he based this revised time estimate on his assertion that certain steps related to tPA candidacy would not be required if he arrived too late to be a candidate for that procedure. *See* Dr. Mirski's Supplemental Report (ECF No. 88-3).

II. LEGAL FRAMEWORK

A motion *in limine* seeks to exclude evidence prior to trial. A *Daubert* motion is a specific type of motion *in limine*, referring to the Supreme Court's decision in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), wherein the Court held that the trial court must serve as a "gatekeeper" of expert witnesses to ensure that their testimony is both reliable and relevant. Federal Rule of Evidence 702, amended in 2000 in response to the *Daubert* decision, states that an expert witness may testify if: "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence 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(a)-(d).

[4] https://www.jointcommission.org/about_us/about_the_joint_commission_main.aspx

The Eleventh Circuit has required the trial court to conduct a "rigorous three-part inquiry" under Rule 702, considering whether: (1) the expert is qualified to testify competently regarding the matter she intends to address ("qualification"); (2) the methodology by which the expert reaches her conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert* ("reliability"); and (3) the testimony will assist the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue ("helpfulness"). *See United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004).

With respect to the qualification prong, expert witnesses may be qualified in a litany of ways, including scientific training, education, and experience in a field. *Id.* The qualification prong is not rigorous; so long as an expert is minimally qualified, objections to the level of the expert's expertise go to the credibility and weight of the testimony, not to its admissibility. *Nature Prod., Inc. v. Natrol, Inc.*, No. 11-62404-CIV, 2013 WL 11275370, at *2 (S.D. Fla. Oct. 8, 2013) (citing *Kilpatrick v. Breg, Inc.*, No. 08-10052-CIV, 2009 WL 2058384, at *3 (S.D. Fla. June 25, 2009)).

Under the reliability prong, an expert's proposed testimony must be supported by appropriate methodology. *Umana-Fowler v. NCL (Bahamas) Ltd.*, 49 F. Supp. 3d 1120, 1122 (S.D. Fla. 2014). A court cannot admit an expert witness's testimony merely because the expert states that he relied on a scientific method to reach his conclusion. *Id*. Likewise, an expert cannot rely on her experience without explaining in detail how her experience coupled with other sources consulted resulted in the opinion advanced. *Id.* (citing *Frazier*, 387 F.3d at 1265). To satisfy this prong, the expert testimony must be relevant to a material aspect of the case. *See McDowell v. Brown*, 392 F.3d 1283, 1298-99 (11th Cir. 2004).

Lastly, to satisfy the helpfulness prong, an expert's testimony is admissible if it addresses matters that are beyond the understanding of the average lay person. *Frazier*, 387 F.3d at 1262.

Expert testimony generally will not help a trier of fact if it offers nothing more than the arguments that the parties will argue at trial. *Id*. at 1262-63. If an expert opinion is more likely to confuse a trier of fact, it should not be admitted. *Id*. The court may exclude expert testimony that is imprecise or unspecific, or whose factual basis is not sufficiently explained. *Edwards v. Shanley*, 580 F. App'x 816, 823 (11th Cir. 2014). *Daubert* requires that in order for expert testimony to help a trier of fact, the testimony must have a "justified scientific relationship" to the facts of the case. *See McDowell*, 392 F.3d at 1299.

Notwithstanding a finding that expert testimony meets the admissibility requirements of *Daubert* and its progeny, sometimes expert opinions may still be excluded by applying Rule 403, which requires that the probative value of the otherwise admissible evidence is not substantially outweighed by its potential to confuse or mislead the jury and is not cumulative or needlessly time consuming. Fed. R. Evid. 403; *Xtec, Inc. v. CardSmart Techs., Inc.*, No. 11-22866-CIV, 2014 WL 10250974, at *4 (S.D. Fla. Dec. 4, 2014). "Simply put, expert testimony may be assigned talismanic significance in the eyes of lay jurors, and, therefore, the district courts must take care to weigh the value of such evidence against its potential to mislead or confuse." *Frazier*, 387 F.3d at 1263.

III. DISCUSSION

A. Lt. Deutermann

Plaintiff proffers Lt. Deutermann to opine on whether Plaintiff would have made it to Maryview Hospital within the window required for treatment to be effective, specifically, within 4.5 hours for tPA and 6 hours for a thrombectomy. In his report, Lt. Deutermann concluded that the rescue mission would have resulted in Plaintiff arriving at Maryview hospital by 12:24 PM, or just under four and a half hours from the onset of stroke symptoms (assuming an 8:00 AM time of

stroke). In reaching this conclusion, Lt. Deutermann concluded that the helicopter could travel at a maximum speed of 140 knots continuously under ideal weather conditions and without any unanticipated delays or circumstances. During his deposition, Lt. Deutermann conceded that an additional 15 minutes should be added to his hypothetical mission to account for the necessary discussions between the USCG flight surgeon, pilot, and the ship's physician, making the time of arrival at Maryview Hospital 12:39 PM.

Defendant now moves to exclude Lt. Deutermann's opinions with respect to the time the mission would have taken, the capabilities of the rescue helicopter, and the choice of comprehensive stroke center. Defendant moves to exclude Lt. Deutermann on the grounds that the expert fails to satisfy any of the *Daubert* prongs.

1. Lt. Deutermann is Qualified

Lt. Deutermann is an expert with extensive experience, training, skill, and knowledge in the field of helicopter maritime search and rescue missions ("SAR"). Lt. Deutermann received United States Naval Flight training, served as a pilot for three years, and then served as a flight instructor for an additional three years. In 2001, Lt. Deutermann was commissioned by the USCG and assigned to Air Station Savannah to fly helicopter SAR missions. Lt. Deutermann retired in 2011 and presently teaches applied safety management system principals and operational risk management to private and commercial aviation companies, provides oversight for SAR Operational Audit teams, and is an SAR consultant for a foreign government.

Defendant argues that Lt. Deutermann is not qualified to serve as an expert on the feasibility of Plaintiff's medical evacuation, specifically the underlying H-60 helicopter logistics, since the witness has never piloted an H-60 helicopter, the helicopter used in his hypothetical rescue mission. Defendant also attacks Lt. Deutermann's qualifications on the basis that he has

never piloted a rescue mission of 220 nautical miles such as would be required in this case. Defendant also contends that Lt. Deutermann is not qualified because he has piloted less than 10 rescue missions involving cruise ships, his last mission was over 8 years ago, and he was never in a command position.

In his opposition, Plaintiff argues that Defendant's position that Lt. Deutermann is unqualified because he has never piloted an H-60 helicopter is immaterial since Lt. Deutermann is not being offered for the purpose of determining the mechanics or capabilities of an H-60 helicopter. *See* Plaintiff's Resp. in Opp'n (ECF No. 94). Plaintiff also clarifies that the witness' testimony regarding the rescue missions refers to the number of cruise ship rescue missions involving stroke patients. Plaintiff further points out that Lt. Deutermann has actually piloted hundreds of SAR missions.

The qualification standard for expert testimony is "not stringent," and "so long as the expert is minimally qualified, objections to the level of the expert's expertise [go] to credibility and weight, not admissibility." *Vision I Homeowners Ass'n, Inc. v Aspen Specialty Ins., Co.*, 674 F. Supp. 2d 1321, 1325 (S.D. Fla. 2009) (quoting *Kilpatrick v. Breg, Inc.*, 2009 WL 2058384 (S.D. Fla. 2009)). Rule 702 contemplates a broad spectrum of expert qualifications, as evident by the Advisory Committee Notes, which emphasize "that Rule 702 is broadly phrased and intended to embrace more than a narrow definition of a qualified expert." *Chau v. NCL (Bahamas) Ltd.*, No. 16-21115-CIV, 2017 WL 3623562, at *9 (S.D. Fla. May 3, 2017).

Defendant's attack of Lt. Deutermann's qualifications on the ground that he has not personally piloted an H-60 helicopter is misplaced as the witness is not being offered as an expert on the mechanics of flying a particular type of helicopter. Instead, Lt. Deutermann is being offered to provide an analysis of a rescue scenario for which the Court finds he is qualified to provide in

light of his experience and knowledge on the subject. Lt. Deutermann has participated in several SAR missions, including missions specifically evacuating stroke patients from cruise ships. Accordingly, the undersigned finds that the witness is more than minimally qualified to render an opinion on the timeline of a hypothetical SAR mission under the facts of this case.

2. Lt. Deutermann's Methodology is Reliable

Defendant challenges Lt. Deutermann's methodology with respect to several aspects of his hypothetical timeline, ostensibly for his failure to account for necessary steps. Defendant first takes issue with Lt. Deutermann's methodology as to the amount of time between the intake call and the USCG's approval of the mission. Defendant argues that Lt. Deutermann fails to account for every step involved in that intake and conceded that his timeline could be off by fifteen minutes.

In its Motion, Defendant lists the tasks that must be completed between the intake call and the helicopter's departure and argues that Lt. Deutermann failed to consider those specific tasks in preparing his timeline. However, a review of Lt. Deutermann deposition reveals that Lt. Deutermann does recount what the adjusted time would be if "you're going to add the 15 minutes in for those phone conversations," further notes that in his experience that those conversations are typically short given the inherent emergent context of a rescue mission. (ECF No. 94-3, 95:4-9, 96:3-14). He also testified that he considered the time those initial intake discussions would take and persisted in his opinion that all the intake steps could be completed within thirty minutes, satisfying the guidelines set forth by the U.S. Coast Guard Addendum to the United States National Search and Rescue Supplement to the International Aeronautical and Maritime Search and Rescue Manual (ECF No. 94-3, 96:3-14). The Addendum, which is attached to Plaintiff's response, provides that USCG SAR helicopters be ready to proceed within 30 minutes of notification, which independently supports that aspect of Lt. Deutermann's timeline (ECF No. 94-5). As such, the

undersigned is satisfied that Lt. Deutermann's experience and reliance on the times required by the Search and Rescue Manual satisfy the second *Daubert* prong. Defendant's challenge goes to the weight of the evidence as opposed to its admissibility under Rule 702 and should be raised during cross-examination.

Defendant's next challenge is that Lt. Deutermann's methodology is flawed as he relied on inadmissible text message communications between the witness and active H-60 helicopter pilots. The text messages, which are attached to Defendant's Motion, display communications between the witness and three pilots, in which the witness seeks information as to the maximum speed the H-60 helicopter could reach and the maximum distance the pilots would feel comfortable traveling at that speed. *See* Text Message Communication (ECF No. 91-2). The first pilot responded that the maximum crew speed the H-60 could travel is 140 knots, and the farthest mission he would accept is 250 nautical miles. The second pilot responded that he would feel comfortable traveling 275 nautical miles during the day and 250 miles during the night. The third pilot responded that he would travel 250 miles and "you can push to 275. But that's getting tight." During his deposition, Lt. Deutermann admitted that he was not aware what the published maximum H-60 helicopter speed was, explaining that is why he reached out to active pilots. (ECF No. 94-3, 58:9-15).

Rule 703 allows an expert witness to testify based on facts that would otherwise be inadmissible. *See Knight through Kerr v. Miami-Dade Cty.*, 856 F.3d 795, 809 (11th Cir. 2017) (citing *U.S. v. Scrima*, 819 F.2d 996, 1002 (11th Cir. 1987)). However, Rule 703 "is not an open door to all inadmissible evidence disguised as expert opinion." *Scrima*, 819 F.2d at 1002. The hearsay statements on which the expert relies must be the type of evidence reasonably relied upon

by the experts in the particular field in forming opinions on the matter. *Id.*; *Cardona v. Mason and Dixon Lines, Inc.*, No. 16-22704, 2017 WL 2363647, at *2 (S.D. Fla. Mar 31, 2017).

Defendant urges the Court to find that the text messages are not the type of hearsay evidence on which experts typically rely in rendering opinions on the subject yet does not provide the Court with examples of what experts do typically rely on when rendering an opinion in this field. While Defendant characterizes the text messages as wholly unsubstantiated communications between pilots, Lt. Deutermann explains in his deposition that he personally knows the three pilots, all of whom are active pilots of H-60 helicopters in SAR missions. Moreover, *Knight through Kerry v. Miami-Dade Cty*., which Defendant cites, supports the notion that experts may rely on hearsay statements of persons with first-hand knowledge of the underlying facts at issue. 856 F.3d 795, 809 (11 Cir. 2017) (finding expert's reliance on police and eye-witness statements permissible despite the hearsay nature of the statements). Lt. Deutermann's testimony evidenced that the active H-60 helicopter pilots on whom he relied have personal knowledge of the helicopter's speed and capacity.

In reviewing the plaintiffs' motion *in limine*, the *Knight* court also noted that the plaintiffs in that case failed to consider that their own expert relied on similar information before testifying. *Id.* at 809. The *Knight* court noted that the Eleventh Circuit has held that it would be an abuse of discretion to exclude the opinion of a party's expert on a critical issue, while allowing the opinion of his adversary's expert on the same issue when he relied on the same underlying information. *Id.*; *see also Frazier*, 387 F.3d at 1301. Defendant's expert, Captain Kenin, relied on the same speed of 140 knots as the operational cruise speed of the H-60 helicopter for his calculations. *See* Captain Kenin Deposition (ECF 94-4, 131:18-23). In his deposition, Captain Kenin stated that in forming his own hypothetical rescue mission, he too had the helicopter traveling at 140 knots

because it is the published maximum speed (ECF No. 94-4, 131:18-23).

Because both Parties' experts rely on the same information – the maximum crew speed of a H-60 helicopter is 140 knots – both of which were obtained through hearsay sources, the undersigned finds that even if Lt. Deutermann's reliance on the pilots' text message exchanges is unconventional in similar circumstances, it would be an abuse of discretion to exclude Lt. Deutermann's testimony while admitting Captain Kenin's calculation. *See Frazier*, 387 F.3d at 1301. Moreover, to the extent that Defendant criticizes Lt. Deutermann's reliance on the text messages as opposed to the helicopter manual on which its expert relied for determining the helicopter speed and travel time, the undersigned finds that this challenge is appropriate for cross-examination as it goes to the weight of the evidence and is not a basis for exclusion under *Daubert*.

Defendant also challenges Lt. Deutermann's calculation of 30-35 minutes for evacuation because the witness fails to consider several factors, such as whether Plaintiff was still at the medical center at the time the helicopter reached the ship or whether a nurse from the ship would also be evacuated – both of which, Defendant argues, would increase the evacuation time. Upon review of the record, the undersigned finds that Lt. Deutermann considered several variables, including those which Defendant raises, in rendering his opinion. In his report, Lt. Deutermann describes many factors that he considered which can affect the amount of time required in hoisting a patient from a ship to a helicopter all "drawn from [his] own experiences conducting medevac missions to cruise ships." (ECF 91-1). Lt. Deutermann breaks down the steps involved prior to hoist operations, which include: establish communications, request the ship adjust its speed and its course for relative winds, "[r]equest ship's crew move patient to ready location near designated hoist area," and advise the crew of expected next steps. Lt. Deutermann next reports that the time to complete the steps required in hoisting can be "reduced by 5-10 min if a medical professional

from the ship were not going to attend on the flight (saving one hoist period) and Mr. Disler was pre-positioned near the hoist area just as the helicopter begins hoisting rescue swimmer down (sometimes the ship's staff don't move a patient from below decks until the helicopter hoist down the swimmer)." (ECF No. 91-1). Lt. Deutermann also outlines reasonable steps for hoisting procedures and the time needed to complete those steps, based on his extensive experience with SAR missions. He further states that the evacuation time can change based on different circumstances and concedes in his report that his timeline does not anticipate complications or unusual delays based on the records presented to him do not suggest that any of those conditions, such as adverse weather would have been an issue. Lt. Deutermann also explains that the calm seas and clear skies would have provided little challenges for the aircrew. Accordingly, Lt. Deutermann's methodology for establishing his evacuation timeline satisfies *Daubert*.

Defendant also criticizes Lt. Deutermann's assumptions that on the return trip, the helicopter would have traveled at its top speed; Defendant faults Deutermann for failing to consider delays due to a lack of tailwind or due to unfavorable weather. The record here shows that Lt. Deutermann sufficiently disclosed his consideration of these variables. Lt. Deutermann's report provides a weather analysis which explains that there were light winds and no storm activity documented in that 24-hour period in the ship's log, and thus the flight environment and transit would have been benign (ECF No. 91-1). Further, at his deposition, Lt. Deutermann explained that there is no way to confirm what the head and tail winds were in that area of the ocean that day, but his assumptions of the winds' effects in his calculations are based on his experience flying helicopters. ("[I]f I had a head wind on the way out, I'd have a perfect tailwind on the way back.") (ECF No. 94-3, 155:6-9). In this respect, Lt. Deutermann's timeline for the return flight is not based on speculative assumptions and are instead supported by the witness' experience and an

analysis of ship weather records on the date of the incident.

Lastly, Defendant challenges Lt. Deutermann's conclusion that the flight crew would have chosen Maryview Hospital as the destination to which Plaintiff would be delivered. Lt. Deutermann's report, as noted above, provides a timeline for delivery to Maryview Hospital but asserts no explanation for electing that destination. In his deposition, Lt. Deutermann explained that the flight surgeon advises the pilot as to what hospital a patient should be taken to based on a number of factors, but that it is customary for patients to be taken to the nearest hospital that can "get the patient to the level of care they need." (ECF 91-1, 158:18-19). Lt. Deutermann chose Maryview Hospital because it was the nearest comprehensive stroke treatment center on a list of hospitals provided by Plaintiff's counsel. Defendant challenges this choice on the basis that it was given to him by the Plaintiff and because the witness lacks personal knowledge that it is the closest comprehensive stroke center or that Plaintiff would have been taken there.

In this respect, Defendant mischaracterizes Lt. Deutermann's opinion. The witness does not offer an opinion that the USCG would have transported Plaintiff to Maryview Hospital, nor could he, as he admits in his deposition. (ECF No. 94-3, 156:18). Rather, Lt. Deutermann assumes for the purposes of his opinion that if the USCG had evacuated Plaintiff to a comprehensive stroke center, Maryview would have been that destination because it made sense given its proximity to the ship and the USCG base and because it is a comprehensive stroke center. (ECF No. 94-3, 154:22, 155:1-2). Defendant's reliance on *Tyger Const. Co. Inc. v. Pensacola Const. Co.*, 29 F.3d 137, 142 (4th Cir. 1994), for the proposition that "an expert's opinion should be excluded when it is based on assumptions which are speculative and are not supported by the record," is misplaced. In finding the expert's opinion there not admissible, the *Tyger* court noted that record evidence directly contradicted the expert's speculative opinion. By contrast, there is no dispute that

Maryview is located 205 nautical miles from the proposed rescue location and that it was on a list of the nearest comprehensive stroke centers to which Plaintiff could have been transported. The fact that Lt. Deutermann relied on a list of hospitals provided by Plaintiff's counsel goes to the weight, not admissibility, of his opinion regarding the time it would take to transport Plaintiff there.

3. Lt. Deutermann's Opinions are Helpful to the Trier of Fact

Lt. Deutermann's opinions provide information of a technical and specialized kind not expected to be known by the average lay persons and thus are helpful to the Court in determining the time required for a helicopter rescue mission in the given conditions. *See Frazier*, 387 F.3d at 1262 (noting that to satisfy the helpfulness prong, an expert's testimony is admissible if it addresses matters that are beyond the understanding of the average lay person). Lt. Deutermann's opinion will aid the trier of fact in understanding the specifics of a USCG helicopter rescue operation and the time it would take to deliver Plaintiff to Maryview Hospital. For these reasons, the undersigned recommends that Defendant's Motion (ECF No. 91) be denied.

B. Dr. Mirski

Plaintiff's causation expert, Dr. Mirski, issued two reports, in which he opined that (1) if Plaintiff had been presented to Maryview Hospital within the timeframe for tPA and thrombectomy, he would have been a candidate to receive both treatments within 90 minutes of his arrival; but (2) if he was presented too late to be a candidate for tPA, he would have been a candidate for a thrombectomy, which would have been administered within 60 minutes of arrival. Defendant moves to exclude Dr. Mirski as a witness on the grounds that Dr. Mirski is not qualified to render opinions as to Plaintiff's eligibility for tPA or thrombectomy treatment, that the methodology used to render his opinions is unreliable, and that his opinions would not be helpful

to a jury because at most, Dr. Mirski can only offer the opinion that Plaintiff would have been a candidate for the thrombectomy, but cannot opine that he would have received the treatment. At the hearing, Plaintiff's counsel represented that he would not be introducing Dr. Mirski's tPA opinion at trial as Plaintiff's causation theory relies solely on Dr. Mirski's thrombectomy opinion. Accordingly, the Court limits its analysis to Defendant's remaining challenges with respect to the thrombectomy opinion.

1. Dr. Mirski is Qualified

Defendant urges the Court to exclude Dr. Mirski because it contends that he is not qualified to opine as to stroke treatment because he is neither a neurosurgeon nor the person who would perform a thrombectomy.

In determining the qualification of an expert, courts must recognize that "while scientific training or education may provide possible means to qualify, experience in a field may offer another path to expert status." *Frazier*, 387 F.3d at 1260-61. To determine whether a witness is qualified to testify as an expert regarding the matters he intends to address, the witness must possess a general knowledge of the subject on which he is to opine on, and need not have specialized training or experience, so long as his testimony would likely assist a trier of fact. *Whelan*, 976 F. Supp. 2d 1322, 1326 (S.D. Fla. 2013).

Defendant contends that Dr. Mirski is not qualified to opine on whether a patient is a candidate for tPA or a thrombectomy because he is not a neurosurgeon. However, in his deposition Dr. Mirski explained how his experience as an intensive care unit neurologist qualifies him to opine on the matter. *See* Dr. Mirski's Deposition (ECF No. 96-4, 4:16-25). Dr. Mirksi explained that qualification for treatment may evolve within an emergency room setting, where an early point of contact screens a patient for eligibility for treatment despite not being the doctor who performs

the necessary medical procedure. Moreover, Dr. Mirski is an intensive care unit neurologist, was the co-director of the Johns Hopkins Comprehensive Stroke Center, has specialized in the field of neurology, and is currently working both as a researcher and a clinical physician at the stroke center. Dr. Mirski's proffered opinion relates to Plaintiff's candidacy for a thrombectomy, as opposed to an opinion on how to perform a thrombectomy; therefore, his lack of experience in performing the procedure does not disqualify him from providing his candidacy opinion, which this Court finds he is qualified to provide. Accordingly, Plaintiff has met his burden to show that Dr. Mirski meets the *Daubert* qualification prong.

2. Dr. Mirski's Methodology is Not Reliable

In his supplemental report, Dr. Mirski opines that if Plaintiff had arrived at a comprehensive stroke center too late to be a candidate for tPA, he would not have been subjected to tPA screening tests and thus could have received a thrombectomy within 60 minutes from arrival at the hospital. *See* Dr. Mirski's Supplemental Report (ECF No. 88-3) ("Additionally, if he was already outside the time window for tPA, there would be no need to evaluate him for tPA candidacy, thus eliminating this step in the process and reducing the total time from his arrival at the hospital to groin puncture."). Dr. Mirski explained that upon arrival, Plaintiff would have only needed a CT scan to confirm he was having an ischemic stroke, confirming his eligibility for a thrombectomy, as opposed to needing lab work and tPA screening in addition to a CT scan. *Id*.

Defendant challenges Dr. Mirski's methodology with respect to his supplemental opinion, which reduced the time required for preparation for the thrombectomy from 90 to 60 minutes. Specifically, Defendant contends that Dr. Mirski inexplicably revised his opinion two days after Plaintiff's expert Lt. Deutermann conceded that the minimum amount of time in which USCG could have transported Plaintiff to Maryview Hospital was more than 4.5 hours from stroke onset,

thus Plaintiff's theory of causation fails unless Mirski could opine that the thrombectomy would have been administered in less than 90 minutes. Defendant advances two challenges to Dr. Mirski's methodology: (1) Dr. Mirski fails to cite to any studies or research showing that a patient would receive a thrombectomy faster if the patient was not eligible for tPA; and (2) Dr. Mirski lacks any basis to opine that Plaintiff would have actually received treatment within 60 minutes at Maryview Hospital, a facility with which Dr. Mirski has no personal experience. Both challenges are valid.

Neither Dr. Mirski's supplemental report nor his deposition testimony disclose a basis for his opinion that the time from arrival to procedure would have been reduced to 60 minutes if Plaintiff arrived beyond the window of time to perform tPA. Dr. Mirski does not cite to personal knowledge, studies nor literature that supports this opinion. Dr. Mirski's conclusion that these steps would have been skipped—and the resulting time to treatment shortened—is no more than *ipse dixit*. *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997) ("[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.").

While Dr. Mirski's initial report cited to the guidelines set forth by the Joint Commission and AHA/ASA to support his estimate of 90 minutes from door to puncture, his supplemental report does not identify what specific steps would be omitted if Plaintiff were no longer a candidate for tPA or the amount of time that would be saved per skipped step. Instead, the supplemental report simply states that "if he was already outside the time window for tPA, there would be no need to evaluate him for tPA candidacy, thus eliminating this step in the process and reducing the total time from his arrival at the hospital to groin puncture" without further explanation (ECF No. 88-3).

In his opposition, Plaintiff defends Dr. Mirski's methodology with citation to Dr. Mirski's deposition testimony that "an hour's timeframe is very reasonable in our institution and others." (ECF No. 96-4, 55:3-10). Plaintiff further cites to Dr. Mirski's testimony which identifies the steps that would be omitted because Plaintiff was not a tPA candidate. ("They have to get the, you know, PIT, PT done, make sure that they've reached the eligibility criteria for tPA, then they give tPA, and then they go on to get the – passed down to interventional for thrombectomy, so that takes time.") (ECF No. 96-4, 60:20-25, 61:1-7).

Careful review of Dr. Mirski's deposition testimony reveals the absence of any basis for this proffered opinion. Dr. Mirski does not purport to draw on personal experience with patients who have had a thrombectomy performed within 60 minutes of arrival at a treatment center, nor studies conducted regarding treatment times at other institutions. Instead, he exclusively cites to undisclosed "internal data" from Johns Hopkins as the basis for his opinion (ECF No. 96-4, 56:3). Assuming that the internal data on which Dr. Mirski relies refers to knowledge obtained in his role at Johns Hopkins, it is indisputably insufficient to form any opinion for treatment else. He concedes this at his deposition.

> Q: So you can speak to what happens at Johns Hopkins?
> A: I agree.
> Q: But you cannot speak to what happens throughout the country?
> A: I agree.

(ECF No. 96-4, 56:23-25, 57:1-3). Thus, notwithstanding his assertion that an hour's timeframe is reasonable, and the suggestion that this estimate would be applicable to all stroke centers, including Maryview, his express admission belies his lack of knowledge to offer that opinion. Dr. Mirski testified that did not have any knowledge about Maryview Hospital, whether it was a comprehensive stroke center in 2016, or what the volume of patients was at the time, though he concedes that volume of patients bears on the speed at which it administers the relevant procedures.

(ECF No. 66:1-12). Dr. Mirski fails to connect his opinion and underlying internal data to the time it would have taken at Maryview Hospital and as such, he should be excluded as a causation expert. *See McDowell*, 392 F.3d 1283, 1300 (11th Cir. 2004) ("[A]n expert opinion is inadmissible when the only connection between the conclusion and the existing data is the expert's own assertions…").[5]

The undersigned also finds the malleability of Dr. Mirski's opinions problematic as they have changed to fit Lt. Deutermann's amended timeline. *See Haller v. AstraZeneca Pharm. LP*, 598 F. Supp. 2d 1271, 1296-97 (M.D. Fla. 2009) (excluding expert causation opinion as unreliable as "the grounds for his causation opinion have been a veritable moving target…[having] changed in direct response to AstraZeneca's motion in practice."). As Defendant points out, Dr. Mirski supplemented his initial report on January 11, 2019 – the day after Lt. Deutermann testified that his initial timeline should be extended by 15 minutes, for a total time to transport plaintiff that exceeded 4.5 hours. Dr. Mirski requested to reschedule his deposition date, which was also originally scheduled for January 11, 2019 (ECF No. 96-4, 72:16-25, 73:1-9). The timing of Dr. Mirski's amendment is significant because his initial report relied on Lt. Deutermann's timeline placing Plaintiff at Maryview Hospital within the window required to receive both tPA and a thrombectomy. However, once Lt. Deutermann testified that his initial timeline did not account for 15 minutes of logistics before the helicopter took off – which would have put Plaintiff at the hospital outside the tPA window – Dr. Mirski amended his report and for the first time, opined that only 60 minutes of pre-procedure steps would be required before a thrombectomy would be

[5] The undersigned rejects Defendant's remaining argument that Dr. Mirski's methodology fails because he testified that he cannot say within reasonable medical certainty that Plaintiff would have received a thrombectomy within sixty minutes. (ECF No. 96-4, 68:23-25, 69:1-9). However, Rule 702 does not require that an expert's opinion be given with any degree of certainty or probability. *See Steward-Patterson v. Celebrity Cruises*, Inc., No. 12-20902-CIV, 2012 WL 5868397, at n. 7 (S.D. Fla. Nov. 19, 2012).

administered. This "post-hoc rationalization" of the hypothetical treatment timeline is not reliable and contravenes the methodology requirements of *Daubert. Haller*, 598 F. Supp. 2d at 1297.

Dr. Mirski's deposition testimony conveys his lack of comfort in offering the opinion expressed in his supplemental report. When pressed by defense counsel on the topic, he resisted adoption of the 60-minute opinion, testifying "before you go to this, I'm not here to testify about the hour time." (ECF No. 96-4, 57:9-10). Rather, he reiterated his opinion from his initial report that was "just saying that 90 minutes door to puncture is a reasonable…timeframe to pursue all of those activities before you go to a thrombectomy." (ECF No. 96-4, 57:12-16). Dr. Mirski also clarified that his supplemental report simply opines that Plaintiff would have been a candidate for a thrombectomy if he had been delivered to a comprehensive stroke center within six hours of symptom onset (ECF No. 96-4, 58:1-4). Ultimately, Dr. Mirski should not be permitted to offer an opinion in this case that the time from arrival to administration of a thrombectomy would have been within 60 minutes.

3. Dr. Mirski's Opinions Is Not Helpful to the Trier of Fact

Defendant's last challenge is that Dr. Mirski's opinion would not be helpful to a trier of fact because he is unable to show that if Plaintiff had been taken to Maryview Hospital, he would in fact have received a thrombectomy within sixty minutes because his opinion relies entirely on "internal data" for Johns Hopkins, and that data offers no correlation to what would have occurred at Maryview Hospital (ECF No. 88). Notably, Plaintiff fails to respond to this challenge in his response (ECF No. 96).

In determining whether expert testimony satisfies the helpfulness prong, courts must ensure that the testimony is relevant to the task at hand, in other words, "that it logically advances a material aspect of the proposing party's case." *Allison v. McGhan v. Remington Arms Co.*, 184

F.3d 1300, 1312 (11th Cir. 1999); *see also Seamon v. Remington Arms Co.*, 813 F.3d 983, 988 (11th Cir. 2016) (stating "that the requirements of the 'helpfulness, or fit goes primarily to relevance,' and looks to whether the proffered opinion has a 'valid scientific connection to the pertinent injury.'") (citations omitted). Additionally, for expert testimony to be helpful to the tier of fact, it must offer insights "beyond the understanding of the average lay person." *Frazier*, 387 F.3d at 1244. Expert testimony is properly excluded when it is not needed to clarify facts and issues within the common understanding of jurors. *Hibiscus Assocs. Ltd. v. Bd. Of Trs.of Policemen & Firemen & Ret. Sys*., 50 F.3d 908. 917 (11th Cir. 1995).

Dr. Mirski's opinion, that if Plaintiff had been presented to a comprehensive stroke center within 4.5 to 5 hours of onset he would have been a candidate for a thrombectomy within 60 minutes, is not helpful to the trier of fact because there is too great a leap between the facts of this case and his opinion. Assuming *arguendo* that Dr. Mirski had satisfied the methodology prong, Dr. Mirski's proposed opinion does not satisfy *Daubert*'s "fit" requirement because he cannot connect his "internal data" regarding treatment times at Johns Hopkins to the practices at Maryview Hospital. Dr. Mirski testified that the internal data represented treatment times at Johns Hopkins and as such, he could only opine as to the practices at that particular hospital (ECF No. 96-4, 56:3,20, 23-25, 57:1-3). Dr. Mirski also testified that he did not know anything about the Maryview Hospital – he was not aware if the hospital was a stroke treatment center at the time of Plaintiff's stroke or what the patient volume was, both of which he states are factors that affect the arrival to puncture time.

> A: I'd agree with the first premise. Mostly, it has to do with volume. If you are not a high-volume center, you don't tend to be as efficient.
> Q: Okay. Where is Maryview Hospital?
> A: Don't know.
> Q: Have you ever heard of Maryview Hospital?
> A: No.

Q: Do you know anything at all about Maryview Hospital?
A: No.

(ECF No. 96-4, 65:17-25, 66:1-3). Upon review of Dr. Mirski's reports and testimony, it is evident that Dr. Mirski's testimony is sufficient to only raise the possibility that Plaintiff might have been able to receive a thrombectomy within 60 minutes of arrival at Maryview Hospital. Dr. Mirski does not offer any factual or logical basis for his opinion that Maryview Hospital would have been able to render treatment as fast as Johns Hopkins. Thus, even if Dr. Mirski could offer the opinion that Johns Hopkins could have administered the treatment within 60 minutes of arrival, he cannot connect that opinion to what would have happened at Maryview. His opinion, accordingly, would not aid the jury's determination on causation: that Defendant's failure to call for evacuation and air transport to the nearest stroke center caused Plaintiff's exacerbated injuries. Because his opinion would not "logically advance a material aspect of the case," *McDowell*, 392 F.3d 1299, it should be excluded.

IV. CONCLUSION

For these reasons, the undersigned respectfully recommends that the Court grant Defendant's Motion *in Limine* to Exclude Dr. Marek Mirski (ECF No. 88) and deny Defendant's Motion *in Limine* to Exclude Testimony of Lt. Daniel Deutermann (ECF No. 91).

Pursuant to Local Magistrate Rule 4(b), the Parties have fourteen (14) days from the date of this Report and Recommendation to serve and file written objections, if any, with the Honorable Federico A. Moreno, United States District Judge. Failure to timely file objections shall bar the Parties from *de novo* determination by the District Judge of any factual or legal issue covered in the Report and shall bar the parties from challenging on appeal the District Judge's Order based on any unobjected-to factual or legal conclusions included in the Report. *See* 28 U.S.C. §

636(b)(1); 11th Cir. Rule 3-1; *Patton v. Rowell*, 2017 WL 443634 (11th Cir. Feb. 2, 2017); *Cooley v. Commissioner of Social Security*, 2016 WL 7321208 (11th Cir. Dec. 16, 2016).

RESPECTFULLY SUBMITTED in Chambers at Miami, Florida this 10th day of July, 2019.

LAUREN LOUIS
UNITED STATES MAGISTRATE JUDGE