UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 1:20-CV-24364-RLR

LATOYA LEWIS,

Plaintiff,

v.

CARNIVAL CORPORATION,

Defendant.
_____/

ORDER DENYING RENEWED OMNIBUS MOTION IN LIMINE

This matter is before the Court on Defendant's Renewed Omnibus Motion in Limine [DE 71]. The Court has considered the Motion in Limine, Plaintiff's Response in Opposition [DE 72], and Defendant's Reply [DE 75], and is fully advised in the premises. For the reasons below, the Motion is **DENIED**.

I. Opinions of Andres Correa

Defendant argues that the testimony of Plaintiff's expert witnesses, Andres Correa, is inadmissible. Defendant says that Correa is unqualified and that his opinions are unreliable, irrelevant to the case, and unhelpful to the jury.

A witness who is qualified to testify as an expert may offer opinion testimony if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. The proponent of expert testimony "must demonstrate that the witness is qualified to testify competently, that his opinions are based on sound methodology, and that his testimony will

be helpful to the trier of fact." *Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cnty., Fla.*, 402 F.3d 1092, 1107 (11th Cir. 2005). While a district court serves as a "gatekeeper" to the admissibility of expert testimony, evaluating the credibility and persuasiveness of testimony is reserved for the jury. *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1340-41 (11th Cir. 2003). "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596 (1993).

a. *Qualifications*

Defendant argues that Correa is not qualified to testify in this dispute because he has no education, training or experience in areas including maritime-related design and passenger safety, ship construction, human factors, naval architecture, and cruise ship maintenance. DE 71 at 3-5.[1]

"The qualifications of an expert must satisfy a relatively low threshold, beyond which qualification becomes a credibility issue for the jury." *McWilliams v. Novartis AG*, No. 2:17-CV-14302, 2018 WL 3364617, at *2 (S.D. Fla. July 9, 2018) (quotation marks omitted); *see also Hendrix v. Evenflo Co., Inc.*, 255 F.R.D. 568, 578 (N.D. Fla. 2009) ("[S]o long as the expert is at least minimally qualified, gaps in his qualifications generally will not preclude admission of his testimony, as this relates more to witness credibility and thus the weight of the expert's testimony, than to its admissibility.").

The Court finds that Correa is qualified to testify as an expert. Correa is a licensed professional civil engineer and building inspector. DE 71-1 at 47. He has consulted on building code compliance

[1] Defendant also argues in its Reply that Correa's testimony should be excluded because he did not explain how his experience helped formulate his opinions. DE 75 at 5-6. Since the Defendant did not raise the issue in its original brief, it was waived, and the Court does not consider it. *See KMS Rest. Corp. v. Wendy's Int'l, Inc.*, 361 F.3d 1321, 1328 n.4 (11th Cir. 2004) ("A party cannot argue an issue in its reply brief that was not preserved in its initial brief.") (quotation marks omitted); *see also Kellner v. NCL (Bahamas), LTD.*, 753 F. App'x 662, 667 (11th Cir. 2018) (collecting cases).

and walkway safety for more than eight years while working for Zimmerman Associates. *Id.*; *see also* DE 72 at 3. He has examined "several maritime vessels" in connection with litigation, including three or four times in Defendant's presence. DE 72 at 3. He has also served as an expert in approximately 10 to 15 maritime cases. *Id.* As an engineer and a building inspector, Correa designs "built environments" and certifies that they are constructed in accordance with applicable codes and standards. *Id.* Correa is also a voting member of the Pedestrian and Walkway Safety and Footwear Technical Committee. *Id.* Based on these circumstances, Correa meets the relatively low threshold for qualification. Defendant's argument that Correa is unqualified because he is neither an expert nor certified in various maritime subjects is too demanding a standard. *Furmanite Am., Inc. v. T.D. Williamson, Inc.*, 506 F. Supp. 2d 1126, 1129 (M.D. Fla. 2007) (citing *Maiz v. Virani*, 253 F.3d 641, 665 (11th Cir. 2001)) ("An expert is not necessarily unqualified simply because her experience does not precisely match the matter at hand.").

b. *Methodology*

Defendant argues Correa's methodology is unreliable. His opinions regarding the slip resistance of Defendant's flooring at issue (the "subject area") are unreliable because he did not perform (nor is certified to perform) relevant slip-resistance testing, did not review any relevant testimony, and did not review the subject area's specifications. DE 71 at 5-7. His testimony about Defendant's failure to maintain the subject area is likewise unreliable since he did not review relevant housekeeping procedures. *Id.* at 7-9.

When determining whether an expert's testimony is reliable, "the trial judge must assess whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue." *U.S. v. Frazier*, 387 F.3d 1244, 1261-62 (11th Cir. 2004) (quotation marks omitted). To make this determination, the district

court examines: "(1) whether the expert's theory can be and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential rate of error of the particular scientific technique; and (4) whether the technique is generally accepted in the scientific community." *Id.* at 1262 (citing *Quiet Tech.*, 326 F.3d at 1341). "The same criteria that are used to assess the reliability of a scientific opinion may be used to evaluate the reliability of non-scientific, experience-based testimony." *Id.* Thus, the aforementioned factors are not exhaustive, and the Eleventh Circuit has emphasized that alternative questions may be more probative to determine reliability. *See id.* ("Sometimes the specific *Daubert* factors will aid in determining reliability; sometimes other questions may be more useful."). Trial judges are afforded "considerable leeway" when deciding whether a particular expert's testimony is reliable. *Id.* at 1258.

The Court finds Correa's methodology reliable. Contrary to Defendant's contention, Correa's testimony is not "unexplained." DE 71 at 6. Rather, Correa conducted a visual inspection of the relevant walkway. DE 72 at 5. He reviewed Plaintiff's testimony, Defendant's expert reports, and Malit Morada's testimony. *Id.*; *see also* DE 71-2 at 9-10. Correa states in his report that he "reviewed the federal and international regulations governing maritime vessels" to evaluate compliance with the accident site. DE 71-1 at 4. He consulted the Code of Federal Regulations, the International Convention for the Safety of Life at Sea (SOLAS), and the International Safety Management Code pertaining to maritime vessels. *Id.* at 4-5. To determine the "compatibility of the pedestrian route with internationally recognized construction and maintenance Standards," Correa reviewed relevant portions of NFPA 301 (the "Code for Safety to Life from Fire on Merchant Vessels"), the International Building Code, and ASTM, Standard Practice for Safe Walking Surfaces, F1637-19. *Id.* 5. While Correa acknowledged that cruise ships are not specifically bound by certain building codes, he identified and relied on "universal criteria that govern[] the construction and maintenance of safe

walking surfaces." *Id.*; *see also* DE 72 at 5-7 (discussing codes and standards regarding non-slip surfaces).

Defendant's arguments that Correa is not certified to perform slip-resistance testing [DE 71 at 5], has no experience cleaning and maintaining ships or public areas [*id.* at 8], and is not an expert in human factors [*id.* at 9] are challenges to his qualifications rather than his methodology. The Court concluded above that Correa is qualified. *See supra* Section I.a. Furthermore, the Court is unpersuaded by Defendant's citations to *Rosenfield v. Oceania Cruises, Inc.*, 654 F.3d 1190, 1193-94 (11th Cir. 2011), *Great American Insurance Co. v. Cutrer*, 298 F.2d 79, 80-81 (5th Cir. 1962), and *Santos v. Posadas De Puerto Rico Associates, Inc.*, 452 F.3d 59, 63-64 (1st Cir. 2006). Although the experts in those cases performed friction testing, the cases do not establish that an expert *must* perform such testing to opine on a defendant's choice of flooring.

c. *Helpfulness*

Defendant argues that Correa's opinions are unhelpful because they are not "beyond the knowledge of the average layperson" and thus invade the province of the jury." DE 71 at 9.

"[E]xpert testimony is admissible if it concerns matters that are beyond the understanding of the average lay person." *Frazier*, 387 F.3d at 1262. "The touchstone of this inquiry is the concept of relevance." *Prosper v. Martin*, 989 F.3d 1242, 1249 (11th Cir. 2021). "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Id.*

The Court finds that Correa's testimony would help the jury. Correa's testimony regarding the applicable standards of care as to walkways is beyond the knowledge of average laypersons. This is supported by his testimony that "the Code of Federal Regulations requires you to take industry standards and regulations into account." DE 72 at 9. Moreover, the central issue in this case is whether Defendant breached its duty of reasonable care owed to Plaintiff regarding the subject area. Correa's

testimony appears squarely relevant to that issue. *See Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178, 1180 (5th Cir. 1975) ("Evidence of custom within a particular industry, group, or organization is admissible as bearing on the standard of care in determining negligence."). Furthermore, his testimony about whether the subject area was unreasonably slippery when wet will likely assist the jury. Although Defendant disagrees with the standards that Correa relies on and the conclusions he reaches, Defendant may challenge Correa during cross examination and present contrary evidence. *Daubert*, 509 U.S. at 596.

d. *Relevance*

Defendant argues that Correa relies on irrelevant and non-binding "land-based" standards to render his opinions, rather than applicable maritime standards. DE 71 at 12. Defendant says that any testimony about those standards, recommendations and guidelines will mislead the jury on the standard of care that Defendant owed Plaintiff. *Id.* at 14.

"Because of the powerful and potentially misleading effect of expert evidence, sometimes expert opinions that otherwise meet the admissibility requirements may still be excluded by applying Rule 403." *Frazier*, 387 F.3d at 1263 (citations and footnote omitted). "Exclusion under Rule 403 is appropriate if the probative value of otherwise admissible evidence is substantially outweighed by its potential to confuse or mislead the jury . . . ." *Id.* Admitting speculative and potentially confusing testimony runs contrary to the purpose of expert testimony contemplated by Rule 702. *Id.* "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." *Id.*

The Court concludes that the probative value of the standards relied on by Correa is not substantially outweighed by the risk of unfair prejudice or misleading the jury. Defendant challenges

several of the standards relied on by Correa, including provisions from SOLAS, NFPA, ASTM, and the International Building Code. DE 71 at 12-17. Even if the standards are not binding on Defendant, Correa testified that they echo the binding standards apparently relied on by the Defendant's own expert. *See id.* at 12 (citing DE 71-2 at 144:7-145:11). Defendant does not appear to dispute this point in its Reply. Therefore, the Court will not exclude such testimony at this time. During trial, however, Defendant may renew its relevance challenge, cross-examine Correa about these standards, and otherwise seek to attack the weight and credibility of the evidence.

II. Evidence of Loss of Future Earning Capacity and Future Loss of Earnings

Defendant argues that Plaintiff should be barred from introducing evidence regarding loss of future earning capacity or future loss of earnings, since she has not offered any evidence supporting either form of damages. *Id.* at 17-18. Defendant says that Federal Rule of Evidence 701 requires a qualified expert to testify about such damages, yet Plaintiff did not disclose an expert, and any self-serving statements would be inadmissible pursuant to Federal Rules of Evidence 401 and 403. *Id.*

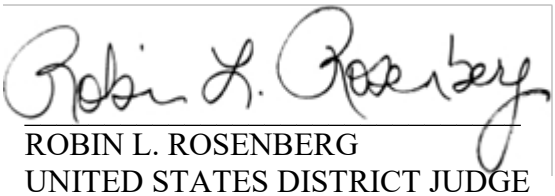
Defendant devoted roughly one-and-a-half pages of its Motion and less than one page of its Reply to this issue. Plaintiff's Response is similarly brief, spanning just one-and-a-half pages. With so little briefing, the Court cannot properly evaluate the matter and declines to foreclose entire categories of damages alleged by Plaintiff. Defendant may renew this challenge at trial as Plaintiff attempts to admit relevant evidence. *Murillo v. Rancel*, No. 16-24070-Civ-Scola, 2017 WL 4564921, at *1 (S.D. Fla. Oct. 11, 2017) ("Motions in limine are disfavored; admissibility questions should be ruled upon as they arise at trial. If evidence is not clearly inadmissible, evidentiary rulings should be deferred until trial to allow questions of foundation, relevancy, and prejudice to be resolved in context.") (citations omitted). This matter should be raised outside of the jury's hearing, and the parties should not mention the matter before presenting it to the Court for a ruling.

III. Evidence of Prior Incidents

Defendant argues that Plaintiff should be barred from offering evidence of two prior incidents that she believes are similar to her incident. DE 71 at 19. The two incidents involved two individuals who were also guests on the Carnival *Sensation*, though at different times than Plaintiff.

Defendant's request is denied. This issue is more appropriately raised at trial when the Court can evaluate the context in which the evidence is elicited and the objections thereto. *Murillo*, 2017 WL 4565921, at *1. Like the issue of Plaintiff's alleged damages, *see supra* Section II, this issue should be raised outside of the jury's hearing and not mentioned prior to a ruling by the Court.

DONE and ORDERED in Chambers, West Palm Beach, Florida, this 2nd day of November, 2021.



ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

Copies furnished to Counsel of Record