

Civil No. 13-1747 (GAG)

1 After reviewing the submissions and applicable law, the Court hereby **DENIES** HIMA's
2 motion in limine at Docket No. 136; **DENIES** Dr. Aponte's motion in limine at Docket No. 137;
3 and **DENIES** Dr. Aponte's motion in limine at Docket No. 138.

4 **I. Background**

5 The Court briefly summarizes the uncontested facts as started by the parties in their
6 Amended Proposed Pretrial Order. (See Docket No. 124, at 20-22.) On September 26, 2012,
7 Plaintiff had a medical visit with Dr. Aponte. Dr. Aponte performed an examination of Plaintiff's
8 lower back area and ordered a CT scan, which revealed an abdominal aortic aneurysm. As a
9 result, Dr. Aponte scheduled Plaintiff's admission to HIMA for surgery. On October 11, 2012, Dr.
10 Aponte performed surgery on Plaintiff's abdominal aorta. The next day, Plaintiff complained of
11 pain radiating from his right hip to right foot. Plaintiff consulted with a neurologist, who ordered
12 an MRI of Plaintiff's lower back area. On October 22, 2012, Plaintiff was discharged from HIMA
13 and sent to physical therapy.

14 Approximately one month later, Plaintiff returned to the HIMA emergency room with an
15 abdominal wound infection. On November 24, 2012, Dr. Aponte saw Plaintiff at HIMA. On
16 November 30, 2012, Plaintiff is discharged from HIMA. A week later, on December 5, 2012,
17 Plaintiff returned to the HIMA emergency room. On December 11, 2012, Dr. Aponte performed a
18 second surgery (aortobifemoral bypass) on Plaintiff. Following the second surgery, Plaintiff was
19 discharged from HIMA on December 23, 2012.

20 A month later, Plaintiff returned to HIMA's emergency room. This time, he received a CT
21 scan of his brain. On February 6, 2013, Plaintiff had a follow-up appointment with Dr. Aponte.

22 Plaintiff then moved to Florida. On May 17, 2013, Plaintiff saw Dr. Ramdev for the first
23 time. On July 19, 2013, Dr. Ramdev performed a right leg amputation below Plaintiff's knee.

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1 who is retained or specifically employed to provide expert testimony in the case” by way of an
2 expert report. FED. R. CIV. P. 26(a)(2)(B). This requirement applies to persons testifying “under
3 Rule 702 of the Federal Rules of Evidence with respect to scientific technical, and other
4 specialized matters.” FED R. CIV. P. 26(a)(2). However, “[t]hat definition does not encompass a
5 percipient witness who happens to be an expert.” Gomez v. Rivera Rodriguez, 344 F.3d 103, 113
6 (1st Cir. 2003).

7 The advisory committee guidelines provide further guidance. “A treating physician, for
8 example, can be deposed or called to testify at trial without any requirement for a written report.”
9 FED. R. CIV. P. 26(a)(2) advisory committee’s note to 1993 amendment. The First Circuit has
10 followed the advisory committee’s example, holding that treating physicians provide testimony as
11 fact, not expert, witnesses. Gomez, 334 F.3d at 113. “This is because ‘the triggering mechanism
12 for [the] application of Rule 26’s expert witness requirements is not the status of the witness, but,
13 rather, the essence of the proffered testimony.’” Ramos-Rios v. United States, No. 12-1985
14 (GAG), 2014 WL 6612508, at *2 (D.P.R. Nov. 18, 2014) (quoting Gomez, 334 F.3d at 113).

15 This rule squarely applies to Plaintiff’s treating physician, Dr. Ramdev. Dr. Ramdev
16 treated Plaintiff in May 2013 and performed a right leg amputation procedure in July 2013.
17 (Docket No. 124 at 17.) Dr. Ramdev will “provide testimony arising from [his] role” as an actor in
18 the events giving rise to litigation, and is therefore appropriately viewed as a fact witness not
19 subject to Rule 26’s requirements for expert witnesses. See Talavera v. Municipality of San
20 Sebastian, 865 F. Supp. 2d 150, 153 (D.P.R. 2011).

21 Relevant evidence is generally admissible, unless excluded by a specific rule. FED. R.
22 EVID. 402. A trial court should not exclude relevant evidence unless its probative value is
23 substantially outweighed by the danger of unfair prejudice. FED R. EVID. 403. Under Puerto

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1 Rico's general tort statute, the three elements of a medical malpractice claim are (1) the duty owed,
2 i.e. the minimum standard of professional knowledge and skill under the circumstances; (2) an act
3 or omission in breach of that duty; and (3) a sufficient causal nexus between the breach and the
4 harm claimed. Cortes-Irizarry v. Corporacion Insular De Seguros, 111 F.3d 184, 189 (1st Cir.
5 1997). At minimum, Dr. Ramdev's testimony is directly relevant to establish the causal nexus
6 between Plaintiff's prior treatment and Plaintiff's alleged injury.

7 Dr. Ramdev's testimony may draw on his professional background and specialized
8 knowledge. Such testimony is relevant to Dr. Ramdev's understanding of Plaintiff's injuries. This
9 will not unfairly prejudice Defendants. Plaintiff disclosed Dr. Ramdev as a treating physician in
10 their initial disclosures, interrogatory answers, and in the Amended Pretrial Order. (Docket No.
11 139, ¶ 3.5.) Defendants had the opportunity to depose Dr. Ramdev. If Defendants had wanted to
12 discover further information from Plaintiff's treating physician in advance of trial, they would
13 have deposed him. They did not.

14 Therefore, the Court **DENIES** HIMA's motion in limine to exclude Dr. Ramdev's
15 testimony (Docket No. 136, ¶¶ 3-18) and **DENIES** Dr. Aponte's motion in limine to limit Dr.
16 Ramdev's testimony. (Docket No. 137.)

17 B. Plaintiff's Expert Witness

18 Both Defendants seek to exclude the testimony of Plaintiff's expert witness, Dr. De Natale,
19 albeit for different reasons. HIMA argues the expert testimony was not properly noticed, and
20 should therefore be excluded as to Plaintiff's EMTALA claim. (Docket No. 136, ¶¶ 19-25.) Dr.
21 Aponte argues the expert testimony does not satisfy the reliability requirements set established by
22 Daubert v. Merrell Dow, and should therefore be excluded as to Plaintiff's medical malpractice
23 claim. (Docket No. 138.)

Civil No. 13-1747 (GAG)*i. HIMA's Argument at Docket No. 136.*

1
2 HIMA's request to exclude the testimony of Dr. De Natale—along with all other evidence
3 relating to an EMTALA violation—takes essentially two forms: one broad and one narrow.
4 (Docket No. 136, ¶¶ 3, 4, 15, 17.) Broadly, HIMA seeks to exclude *any* evidence of an EMTALA
5 violation on the grounds that Plaintiff failed to produce such evidence in discovery. (Docket No.
6 136, ¶ 17.) Substantively, this conclusory argument is not supported by the record. Procedurally,
7 summary judgment is the proper tool for a party alleging no genuine dispute as to any material
8 fact. FED R. CIV. P. 56(a). In this case, the dispositive motion deadline lapsed on October 1, 2015.
9 (Docket No. 101.) HIMA did not file a dispositive motion. A motion in limine is not the
10 appropriate tool to move for judgment on a particular claim. See 21 Charles A. Wright & Kenneth
11 W. Graham, Fed. Prac. & Proc. § 5037.18 (2d ed.) (noting that “preexisting caselaw provides
12 ammunition against those who would use the motion in limine as a substitute for a motion for
13 summary judgment”).

14 More narrowly, HIMA seeks to exclude Dr. De Natale's testimony regarding any
15 EMTALA violation for insufficient notice under Rule 26 of the Federal Rules of Civil Procedure.
16 (Docket No. 136, ¶ 3, 4, 15.) Yet, as HIMA notes, Dr. De Natale produced an expert witness
17 report dated December 24, 2013 and was deposed on November 20, 2014. Id. at ¶ 3. Further, the
18 Court notes that a trial date has not yet been scheduled. Clearly, HIMA has received sufficient
19 notice to prepare for Dr. De Natale's trial testimony.

20 Dr. De Natale's testimony is relevant to Plaintiff's EMTALA claim against HIMA.
21 EMTALA imposes a duty on covered hospitals to (a) provide screening for emergency medical
22 conditions and (b) provide further examinations necessary to stabilize certain medical conditions.
23 42 U.S.C. § 1395dd(a), (b)(1)(A); Alvarez-Torres v. Ryder Mem. Hosp., Inc., 582 F.3d 47, 51 (1st

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1 Cir. 2009). Dr. De Natale testified at deposition that Plaintiff’s reported right leg pain was “a
2 medical emergency situation.” (Docket No. 136, ¶ 4.) HIMA had the opportunity to further
3 develop that testimony at deposition. HIMA has not shown such surprise and unfair prejudice as
4 to justify the exclusion of an expert witness of which HIMA has known for nearly *three years*.
5 See Pagés-Ramirez v. Ramirez-Gonzalez, 605 F.3d 109, 113 (1st Cir. 2010) (vacating the district
6 court’s exclusion of an expert, and finding no surprise or unfair prejudice to defendants who were
7 provided with expert report *three months* in advance of trial) (emphasis added).

8 Therefore, the Court **DENIES** HIMA’s motion in limine to exclude Dr. De Natale’s
9 testimony at Docket No. 136, ¶¶ 3-18.

10 *ii. Dr. Aponte’s Argument at Docket No. 138.*

11 Dr. Aponte moves to exclude the testimony of Plaintiff’s expert witness, Dr. De Natale, as
12 lacking sufficient reliability because Dr. De Natale reviewed only a portion of Plaintiff’s medical
13 records. (Docket No. 138, 9-12.)

14 Federal Rule of Evidence 702 governs the admission of expert testimony. Rule 702
15 requires expert testimony be (1) “based on sufficient facts or data;” (2) “the product of reliable
16 principles and methods;” and (3) that the witness apply “the principles and methods reliably” to the
17 particular facts of the case. FED R. EVID. 702. The trial court serves a gatekeeping function to
18 ensure the witness’s “specialized knowledge will help the trier of fact to understand the evidence
19 or to determine a fact in issue[.]” Id.; Pagés-Ramirez, 605 F.3d at 113 (citing Gaydar v. Sociedad
20 Instituto Gineco-Quirurgico y Planificacion Familiar, 345 F.3d 15, 24 (1st Cir. 2003).

21 Dr. Aponte does not challenge Dr. De Natale’s qualifications as an expert in the field.
22 Rather, Dr. Aponte argues the testimony reflects an unreliable methodology because Dr. De Natale
23 only reviewed a portion of Plaintiff’s medical records. (Docket No. 138, at 9-12.) Plaintiff

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1 responds that Dr. De Natale's decision to review a limited portion of the medical records was
2 based on the narrow opportunity to reverse the paralysis in Plaintiff's right leg following the first
3 surgery on October 11, 2012. (Docket No. 139, at 12, 13.)

4 Dr. Aponte's argument raises questions relating to the persuasiveness and credibility of Dr.
5 De Natale's expert opinion—that is, Dr. De Natale's decision to conduct a limited review of
6 Plaintiff's medical records. Questions of persuasiveness and credibility are properly reserved for
7 the jury. See Cruz-Vázquez v. Mennonite Gen. Hosp., Inc., 613 F.3d 54, 59-60 (1st Cir. 2010)
8 (finding the district court abused its discretion in excluding a qualified expert witness as biased).

9 The issue Dr. Aponte presents for resolution by this Court is whether a qualified expert's
10 review of a portion of Plaintiff's medical records will help the jury to determine any issue of fact
11 in a medical malpractice claim. The Court answers in the affirmative. Dr. De Natale's testimony
12 will help the jury to determine both the applicable professional standard of care and the causal
13 nexus between the alleged breach and Plaintiff's injury. Therefore, the Court **DENIES** Dr.
14 Aponte's motion in limine to exclude Dr. De Natale's testimony at Docket No. 138.

15 C. Other Matters Raised by HIMA

16 HIMA moves to exclude evidence of corporate responsibility and the principal-agent
17 relationship. (Docket No. 136, ¶¶ 26-37.) HIMA also moves to exclude any reference to hospital
18 staff direct liability. Id. at 38-40. In response, Plaintiff reiterates that a motion in limine is not a
19 vehicle for summary judgment in disguise. (Docket No. 140.)

20 Plaintiff will be given an opportunity to prove his case at trial. That includes presenting
21 evidence of the medical malpractice claim (as to Dr. Aponte and HIMA) and the EMTALA claim
22 (as to only HIMA). To the extent the doctrines of corporate responsibility or principal-agent
23 relationship assist Plaintiff in proving the essential elements of medical malpractice or an

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1 EMTALA violation, such evidence is relevant and therefore admissible. See, e.g., Pagés-Ramirez
2 v. Hosp. Español Auxillo Mutuo De P.R., Inc., 547 F. Supp. 2d 141, 150-52 (D.P.R. 2008)
3 (discussing hospital liability for physician malpractice under Puerto Rico law); Suárez Matos v.
4 Ashford Presbyterian Cmty. Hosp., Inc., 4 F.3d 47, 52 (1st Cir. 1993) (Puerto Rico law holds
5 hospitals responsible when a physician with admitting privileges who shares profits with the
6 hospital commits malpractice). Moreover, HIMA has not identified the specific evidence it seeks
7 to exclude. HIMA instead seeks to exclude theories of tort liability. Therefore, HIMA's motion in
8 limine to exclude on these grounds at Docket No. 136 is **DENIED**.

9 **III. Conclusion**

10 For the reasons stated above, HIMA's motion in limine at Docket No. 136 is **DENIED**; Dr.
11 Aponte's motion in limine at Docket No. 137 is **DENIED**; and Dr. Aponte's motion in limine at
12 Docket No. 138 is **DENIED**.

13 In light of the Court's order, this case is hereby referred to Magistrate Judge Camille
14 Vélez-Rivé for a final pretrial settlement conference. Following the conference, this matter will be
15 scheduled for trial.

16 **SO ORDERED.**

17 In San Juan, Puerto Rico, on this 19th day of October, 2016.

18 *s/ Gustavo A. Gelpí*
19 GUSTAVO A. GELPI
United States District Judge