2024 WL 4594666 (C.A.11) (Appellate Brief)
United States Court of Appeals, Eleventh Circuit.

4539 PINETREE, LLC, Plaintiff-Appellant,
v.
CERTAIN UNDERWRITERS AT LLOYD LONDON,
Subscribing to Policy B1180D160620/100NC, Defendant-Appellee.

No. 24-12713.
October 22, 2024.

Appeal from the United District Court for the Southern District of Florida,
No. 22-22901-Civ-Martinez

Appellant's Opening Brief

Brian Wisniewski, Esq., Loss Recovery Law Group, PL, 20295 NE 29th Place, Suite 201, Aventura, Florida 33180, Telephone: (305) 900-6212, for appellant, 4539 Pinetree LLC.

***C-1 Certificate of Interested Persons and Corporate Disclosure Statement**

Pursuant to this Court's Rule 26.1-1, Plaintiff-Appellant 4539 Pinetree, LLC states that the following people and entities have an interest in the outcome of this appeal:
4539 Pinetree, LLC

Boymelgreen, Elyakim

Boymelgreen, Sarah

Boymelgreen, Shaya

Boaziz, Rami of Stellar Public Adjusting Services

Blanco, Michael

Certain Underwriters at Lloyd London

Dygert, James, Esq. of Loss Recovery Law Group

Micali, John of Allied Building Inspection Services

Wisniewski, Brian, Esq. of Loss Recovery Law Group, LLC

Zelonka Jr., Richard E., Esq. of Wood Smith Henning and Berman, LLP

***i Statement Regarding Oral Argument**

Plaintiff-Appellant, 4539 Pinetree, LLC requests oral argument. This case involves a lengthy record and disputes of facts and law. Argument will allow the Court to understand the balance between the Court's gatekeeping function versus the usurpation of jury's function when a court excludes expert witness testimony.

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Plaintiff-Appellant 4539 Pinetree, LLC, sued Defendant, Certain Underwriters at Lloyd's London Subscribing to Policy B1180D160620/100NC, in District Court for breach of a homeowners insurance policy. The District Court had jurisdiction subject to 28 U.S.C. § 1332. The district court struck three of Plaintiff-Appellant's witnesses and granted summary judgment against Plaintiff-Appellant on all its claims on July 18, 2024. [ECF No. 70]. The Notice of Appeal was timely filed on August 22, 2024. [ECF No. 72]. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

*1 Statement of the Issues

District Courts are given broad latitude to act as gatekeepers of testimony and evidence which is to be presented to juries. However, exclusion of expert testimony must be done with extreme caution and as a last resort as this function usurps the right of a party to a trial by jury. This appeal presents the following issues:

I. Whether the methodologies of Plaintiff's expert witness Micali were sufficient such that exclusion of his testimony was an unjustified sanction by the lower Court.

II. Whether actual notice of witness and his potential testimony by defendant constitutes harm or surprise such that exclusion of his testimony was an unjustified sanction by the lower Court.

III. Whether striking witnesses and granting a motion for summary judgment is too harsh a penalty where other less harmful means to cure are available.

*2 Statement of the Case

I. Factual Background

Plaintiff-Appellant 4539 Pinetree, LLC, (hereinafter "Plaintiff Pinetree" or "Appellant") owned property located at 4539 Pine Tree Drive, Miami Beach, Florida 33140 (hereinafter the "Property"). Plaintiff Pinetree and Defendant, Certain Underwriters at Lloyd's London Subscribing to Policy B1180D160620/100NC (hereinafter the "Defendant") entered into an insurance contract, Policy No. B1180D170620/098NC (the "Policy") to insure the Property. [ECF No. 1-1, pages 1 thorugh 78] The Declaration Page of the Policy outlines the coverages. [ECF No. 1-1, page 8 of 78] On September 10, 2017, Hurricane Irma made landfall in South Florida. Following the storm, Plaintiff noticed water infiltrating Property and promptly and timely provided notice to Defendant of the loss. [ECF No. 1, page 2 of 4]. Defendant assigned Claim No. 919662 (hereinafter the "Claim"), determined that coverage did exist, but did not fully indemnify Plaintiff which resulted in the action. Plaintiff Pinetree hired John Micali,

President of Allied Building Inspection Services (hereinafter "Micali") to inspect the Property's roof and to opine on the cause of the interior water intrusion. Micali is a Florida licensed general contractor for more than thirty (30) years [ECF No. 33-8, page 5 of 39, transcript page 16, lines 20-22]. Micali inspected the Property and produced a report of his findings. [ECF No. 33-8, page 3 of 39, transcript page 8, lines 17-22]. Defendant deposed Micali ***3** who testified as to the work performed during his inspection. The report and testimony show that Mr. Micali inspected the roof and the interior and studied the weather conditions during the relevant time period, including wind speeds and rainfall. The age and pitch of the roof were considered as well as the overall condition of the roof and tiles.

II. Proceedings below

Plaintiff Pinetree brought this action against Defendant to recover damages related to a residence property located at 4539 Pine Tree Drive, Miami Beach, Florida, under a policy of insurance issued by Defendant, caused by Hurricane Irma. Defendant denied their Hurricane Irma claim. [ECF No. 33-2, Coverage Letter dated November 8, 2018; ECF No. 15, Defendant's Answer, ¶12]. Plaintiff Pinetree made timely Rule 26 Disclosures in this matter. In its disclosure, Plaintiff Pinetree disclosed Stellar Public Adjusting Services as having prepared the estimate of repairs (hereinafter the "Stellar Estimate") after having inspected the damages to the subject property [ECF No. 49-4]. Plaintiff Pinetree also filed amended expert disclosures disclosing its expert John Micali [ECF No. 33-7]. On December 15, 2023, Defendant moved to strike the testimony of Micali alleging that his opinions were not based on sufficient facts, not the product of reliable methodology and not helpful to the trier of fact. [ECF No. 34]. On December 15, 2023, Defendant also filed its Motion for Summary Judgment and Supporting Memorandum of Law [ECF No. 32] asserting ***4** that Plaintiff Pinetree's reliance on the Stellar Estimate was insufficient evidence upon which to quantify Plaintiff Pinetree's actual cash value damages. Defendant Underwriters filed another Motion to Strike expert Novak as he became unavailable during the discovery process. [ECF No. 35] In response, on January 9, 2024, Plaintiff Pinetree filed the Affidavit of Rami Boaziz in Support of Plaintiff's Response and Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment. [ECF 49-1]. On January 19, 2024, Defendant Underwriters filed a Motion to Strike the Affidavit of Rami Boaziz alleging that 1) Rami's testimony is undisclosed witness testimony and 2) that Mr. Boaziz testimony and Stellar Estimate are irrelevant. Plaintiff Pinetree has properly disclosed Stellar through their Rule 26 Disclosures and both Mr. Boaziz' testimony and the Stellar Estimate are relevant to Plaintiff's claims. On July 19, 2024, the District Court entered an Order granting Defendant's Motion for Summary Judgment [ECF No. 32] and granting Defendant's Motion to Strike testimony of witnesses Novak, Micali and Boaziz [ECF Nos. 34, 35, 52]. [1] The Order further directed the Clerk of Court to close the case. [ECF No. 70] as there remained no more witnesses for Plaintiff to support its case.

***5 Summary of the Argument**

The Federal Rules of Evidence allow parties to bring qualified expert witnesses before the court to testify on issues that, beyond the understanding of a layperson, require expertise that is helpful to the jury in rendering a verdict. Federal Rules of Evidence Rules 702 & 703. Understanding the causation between windstorms and the damage they cause is not within a layperson's common experience and it is reasonable to allow an expert to testify to the causation. If a qualified witness can provide expertise that is helpful to the jury, and that expertise has probative value that is not substantially outweighed by the potential for misuse, that expert should be permitted to testify. The lower court found that Mr. Micali's testimony was not based on sufficient data or facts and is unreliable because he did not itemize the damages to the roof, and therefore his testimony would not be helpful to the trier of fact determining the issues at hand. Despite the Court finding Mr. Micali is a qualified expert, it nonetheless struck him as a witness. [ECF No. 70. The lower court applied the wrong standard for assessing reliability and ignored the flexible standard set by this Court. Mr. Micali's testimony would be helpful for the jury because he applies a scientific, studied practice to determine the causation of the water intrusion into the Property. Mr. Micali's testimony directly addresses a key issue in this case making his testimony highly probative.

***6** Mr. Boaziz' testimony was struck because his affidavit in response to Defendant's Motion for Summary Judgment was characterized as a late disclosure of an expert witness. Mr. Boaziz and the documents generated by Stellar Public Adjusting

were disclosed to Defendant in Rule 26 Disclosures. Defendant Underwriters knew of this witness and any potential testimony he would elicit (based on the estimate and other documents provided to Defendant during initial disclosures and during the initial claim handling process), thus Defendant cannot be prejudiced by its introduction.

Further, the Court had options to cure rather than dispose of this action in its entirety. It was incumbent upon the lower court to provide an opportunity to cure any defects especially in light of the unfortunate circumstances of Plaintiff's witness Novak who became unavailable during the proceedings. Striking all of Plaintiff's witnesses and granting summary judgment in this matter was too harsh a remedy and should be overturned.

*7 Argument

This Court reviews de novo a district court's grant of summary judgment, applying the same standards as the district court. *Newcomb v. Spring Creek Cooler, Inc.*, 926 F.3d 709, 713 (11th Cir. 2019). This Court must consider "all evidence, and make all reasonable inferences, in light most favorable to" Plaintiff Pinetree. *Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1311 (11th Cir. 2001). Motions to Strike witnesses are reviewed under an abuse of discretion standard. *Kuhmo Tire Co., Ltd. V. Carmichael*, 526 US 137, 152 (1999).

I. The district court erred in excluding expert witness testimony of John Micali.

A. Micali's Testimony was based on sufficient data and facts, was reliable and would have assisted a trier of fact in determining the issues at hand.

The Southern District Court's decision should be reversed because it misapplied this Court's decision in *Kuhmo Tire, supra* and prevented valuable expert testimony from being admitted due to its lack of reliable methodology on a subject essential to the cause of action. The lower court's determination that Micali's methodology was flawed and striking his testimony altogether goes beyond their role as "gatekeepers." Courts are to implement "conventional devices" such as "[v]igorous cross-examination, [the] presentation of contrary evidence, and [the] careful instruction on the burden of proof"--"rather than wholesale exclusion...are the appropriate safeguards where the basis of scientific testimony meets the standard ***8** of Rule 702." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 598 US 579, 596 (1993). The lower Court should have applied the more flexible analysis as prescribed in *Daubert*. "The court's gatekeeping function 'is not intended to supplant the adversary system or the role of the jury.' " *Diamond Resorts U.S. Collection Development, LLC v. Newton Group Transfers, LLC*, 2022 WL 1642865 (S.D. Fla. 2022).

B. The lower Court misapplied *Daubert* by applying weight dispositive weight on inapplicable reliability factors.

i. Daubert rejects the requirements of a formulaic analysis favoring a flexible approach to assess reliability.

The lower court reviewed the deposition testimony of John Micali in making the determination that his testimony was not based on sufficient data or facts. [ECF 70]. The Court focused on the tests Mr. Micali did NOT perform citing to responses he gave in his deposition. The Court made a conclusory determination that failure to perform these tests or have any knowledge of the condition of the roof prior to his inspection rendered Mr. Micali's testimony unreliable and unhelpful to a jury. [ECF 70]. In determining whether an expert's testimony is reliable, a court "must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline." *Kuhmo Tire* at 149. This Court has explained that there are "many different kinds of expertise." Which is why "*Daubert* makes clear that the factors it mentions do not constitute a 'definitive checklist or test.' " ***9** *Kuhmo Tire* at 150 (citing *Daubert* at 593). The inquiry by the court must be related to the facts of the particular case. Rejection of expert testimony is the exception rather than the rule. *Altidor v. Carnival Corp.*, 550 F.Supp.3d 1322 (S.D. Fla. 2021).

Here, the Southern District Court failed to analyze the type of expertise before it in order to determine which flexible factors must be used to analyze reliability. The lower court failed to consider whether Mr. Micali's methods and techniques for determining causation of the water infiltration were ones that could be tested or whether these techniques were typical in the industry. The court placed weight on the fact that Mr. Micali had no knowledge of the roof conditions prior to his inspecting it, where this is the standard for any expert hired to take a look at damages *after* the damage inducing incident has occurred. Any expert hired to determine causation would have had no prior knowledge of the roof's condition prior to inspection. The lower court made no comparisons to proper ways to test and draw conclusions only noting that Mr. Micali's was not the appropriate methodology. Mr. Micali's expertise along with his numerous years inspecting such intrusions and finding the cause of same makes him highly qualified to testify in this matter. The Court's arbitrary standards as to his methodologies are in conflict with this Court's prior rulings encouraging a flexible approach to looking at applied methodologies and techniques.

***10** When opining on causation an expert must show the methodology appropriate for the particular case. *Navelski v. Int'l Paper Co.*, 244 F. Supp.3d 1275 (2017). The *Navelski* Court overturned a lower court's order excluding an expert witness' testimony disagreeing with it that the methodology applied there did not establish general or specific causation. *Id*. at 1289. The expert in *Navelski* opined as to the causation of a dam failure by "systematically and scientifically" ruling out each potential explanation " 'until reaching one that cannot be ruled out or determining which of those that cannot be ruled out is the most likely.' " *Id. citing Guinn v. AstraZeneca Pharmaceuticals LP*, 602 F.3d 1245, 1253 (11th Cir. 2010). In determining that the lower court abused its discretion in excluding the expert witness, the 11th Circuit Court noted all of the different materials and resources the expert used in reaching his conclusion:

> But, it is noteworthy in this case that Dr. Ross based his causation opinion on considerably more evidence than just the universally accepted science of dam failures and water flow, as his methodology also accounts for the specific drainage characteristics of *this* dam and real-time rainfall data from *this* storm. More specifically, Dr. Ross testified that he examined the Dam site, the subject neighborhoods, and the topographic, hydrologic, and vegetation characteristics of the Elevenmile Creek watershed. Dr. Ross also analyzed historical rain gauge data....calculated the dimensions of the dam. *Id*. at 1289-90

The 11th Circuit disagreed that the expert needed to prove causation with scientific certainty and found that argument inconsistent with *Daubert* and Rule 702. Much like the expert in *Navelski*, the expert here conducted an inspection of ***11** Property, utilized storm data and arrived at a causation conclusion by considering and ruling out all possible causes of the water intrusion. [expert report] Mr. Micali's causation testimony was " 'properly grounded, well-reasoned, and not speculative.' " *Id*. at 1290 citing to *United States v. Frazier*, 387 F.3d 1244, 1296 (11th Cir. 2004). The lower court here rendered Mr. Micali's methodology unreliable by pointing out the answers he was unable to answer or tests he did not perform. This analysis was improper. Any criticism of the methodology went to its probative value not admissibility. *Navelski* at 1301. "It is not the role of the district court to make ultimate conclusions as to the persuasiveness of the proffered evidence...quite the contrary, '[v]igorous 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." *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1341 (11th Cir. 2003).

The *Quiet Technology* Court found that the lower district court conflated the question of admissibility of testimony with the weight to be given to that testimony when it evaluated the credibility and persuasiveness of the evidence and further that it abused its discretion by excluding an expert witness. *Id*. In sum, whatever perceived flaws the lower court found in Mr. Micali's methodology went to the weight and not admissibility of his testimony. The Order that is the subject of this appeal highlights Mr. Micali's perceived methodologic failures namely: "he did not ***12** perform a calculation to calculate wind speeds lifting tile...he had no evidence of the condition of the property prior to the storm aside from a satellite photo of the property....he did

not even count how many tiles were damaged or how many tiles were on the roof." It is evident that the lower court supplanted its own ideas of methodology for that used by Mr. Micali, who routinely performs such inspections.

The lower court's record reflects that Mr. Micali testified that he observed hundreds of broken tiles during his inspection and explained how his methodology in relying on weather report data helped him reach his causation conclusions. [DE 39]. He also explained why itemizing the broken tiles was not practical under the circumstances. Despite a thorough analysis based on well grounded methodology, the lower court supplanted it own methods (requiring itemization of damaged tiles, among other things) over those of an expert they themselves deemed qualified. Mr. Micali's opinion was based on the same facts that led to the opposing opinion. Finally, the lower court's assertions that the conclusions were based on insufficient facts or data is misplaced and erroneous. Similar inspections under similar circumstances have been found to be sufficient and reliable. *Peng v. Citizens Prop. Ins. Corp.*, 337 So.3d 488 (3d DCA 2022).

***ii*. Expert testimony is helpful to the jury when it presents a valid scientific connection to the inquiry**

The lower court failed to apply the correct helpfulness standards by conflating Mr. Micali's expert opinion on causation of water intrusion with the determination ***13** of reliability. In giving causation testimony, an expert must have "a valid...connection to the pertinent inquiry." *Daubert* at 591-92. The term helpfulness "goes primarily to relevance" or rather whether or not the expertise "fits" the facts in dispute. *Id*. Mr. Micali was seeking to provide testimony to help a jury understand the cause of the damage to Property's roof. Unless jurors have themselves studied the science behind windstorm damage they are not properly armed with the knowledge and expertise required to determine causation of water intrusion into a home. Testimony is considered helpful if it "logically advances a material aspect of a case. *Diamond Resorts U.S. Collection Dev., LLC v. Newton Group Transfers*, LLC, 2022 WL 1642865 (S.D. Fla. 2022) *citing* *McDowell v. Brown*, 392 F.3d 1283, 1298-99 (11th Cir. 2004). Thus, Mr. Micali's testimony is helpful in that it logically advances Plaintiff Pinetree's case by establishing the cause of the water intrusion. There is sufficient record evidence to establish that this opinion was given by a qualified person and based on his observations and applications of scientific methodology for the jury to understand the scientific results stemming from his inspection of Property. Once informed of the science behind the causation of damages, they can use that information to understand the facts of this case.

A civil engineer's opinion that hurricane winds caused roof damage is precisely the type of inquiry this Court has found to satisfy the helpfulness prong of the admissibility test. ***14** *Clena Invs., Inc. v. XL Specialty Ins. Co.*, 280 F.R.D. 653, 665 (11th Cir. 2012). The *Clena* Court reviewed a similar exclusion of a civil engineer's expert testimony opining that roof damage was most likely due to Hurricane Wilma than any previous hurricane or storm. *Id*. In determining that the testimony was helpful the Court found that the expert's "knowledge and training that enable him to opine that the roof membrane would have blown off had it been in its current condition prior to Hurricane Wilma are not universally shared and fall outside the realm of the average person's understanding. Similarly, most people do not possess the requisite specialized knowledge and training to determine damages to the Property most probably attributable to Hurricane Wilma. Thus, both of these opinions survive *Daubert's* helpfulness inquiry." *Id*.

Ultimately, Mr. Micali meets all prongs of *Daubert* and *Kuhmo*: 1) he is a highly qualified witness, having conducted hundreds of weather related property inspections and maintaining his license in good standing 2) his opinion will provide a scientific basis for the jury to interpret the causation data, 3) his opinions are based on the specific relevant facts from this case, 4) his testimony is the product of reliable methods and principles and 5) those principles and methods were applied to the facts of this case in reaching his conclusion. Mr. Micali's report and testimony shed light on important information related to the roof's construction and its effect on potential roof damage:
Q: Well, what about these specific tiles that you observed was indicative of wind damage?

***15** A: So a roof will--especially a little roof or a roof that is somewhat ageable--break at its weak points, not necessarily where the wind forces are the greatest, so corner breaks, breaks at the bottom where the edge of the tile is free, it is not underpinned or locked in. That is the part that moves and breaks the most.

Q: What do you mean “moves”?

A: The edge of the tile that is not interlocked or overlapped is the edge of the tile that lifts the most and where the tile will frequently break away.

Q: When you say “lift,” do you mean the tile is physically moving during the windstorm?

A: Well, it will move to break. It will move, yes.

Q: Okay. And how do you know that these tiles were moving during the storm?

A: I see visible evidence of windstorm damage on the roof surface with broken tiles.

[ECF No. 33-8, page 9 of 39, Micali transcript at pages 31:21-32:17].
Q: Okay. Well, what information in your observations would tell you that this damage was from Hurricane Irma that happened a year and a half before your inspection?

A: The condition of the physical damage I see up there.

Q: Explain to me what that was.

A: The leakage within the home. Had this been leaking for years and years, I would expect for the damage to be much greater. The physical damage to the exterior of the home, all the impacts on the outside of the house, the gouges and, you know, where debris has hit the home and put a big gouge in it. The combination of all this data gives me a high degree, a reasonable degree of professional certainty.

Q: That it happened in Hurricane Irma?

A: Look, I'm never going to rule out a hundred percent that some other source couldn't have done this. But I did an inspection. I told you my findings. I see it based on my professional opinion and a reasonable degree of certainty based on the inspection, data, the interview, the weather reports, all of this that this is windstorm damage to this roof.

[ECF No. 33-8, page 10 of 39, Micali transcript at 36:17-37:16

***16** Mr. Micali's proffered testimony “is relevant to an issue in the case (causation) and offers insights ‘beyond the understanding and experience of the average citizen.’ ” *Diamond* at 13, *citing* *United States v. Rouco*, 765 F.2d 983, 995 (11th Cir. 1985). Where the proffered testimony is relevant and has probative value, it should be admitted even if not found to be helpful to a jury on all points. *Id*. at 26. The layperson does not have the requisite knowledge regarding the construction of this particular roof, how concrete tile movement can affect the system as a whole, and repair of widespread wind damage. Mr. Micali was also expected to testify as to how windstorm forces affect certain roofing elements which would have undoubtedly assisted the jury in making a determination about the causation of damages and thus, coverage. Unless jurors have, themselves, studied the science behind roof construction or effects of wind damage on different roof components, they are not properly armed with the knowledge or experience required to assess the roof damage at issue in this case.

In considering Defendant's Motion to Strike Testimony of Expert Witness John Micali, the lower court erred by weighing the testimony rather than limiting itself to an examination of its admissibility. Since his methodology is well grounded in

scientific principles and testimony helpful, any deficiencies in either goes to the weight and not admissibility of his testimony. Additionally, since all of the ***17** requirements of *Daubert* are met, and under the flexible analysis that this Court has applied in *Daubert* and *Kuhmo*, John Micali should be admitted as an expert witness.

II. The district court abused its discretion in excluding expert witness testimony of Rami Boaziz

A. Defendant was aware of witness report and potential testimony and would suffer no harm from allowing this testimony

The lower district court abused its discretion when it struck Rami Boaziz as a witness in this matter. [ECF No. 70]. At the outset, Mr. Boaziz was the public adjuster assigned to this claim. *See* Boaziz Affidavit [ECF No. 49-1, page 2 of 4, ¶5]. Further, Mr. Boaziz was corresponding with Defendant during the pendency of the claims investigation and adjustment. *See* Boaziz Affidavit [ECF No. 49-1, page 3 of 4, ¶11].

In March 2023 the Parties exchanged disclosures pursuant to Fed. R. Civ. Proc. 26 listing Stellar Public Adjusting Services as "Plaintiff's public adjuster [who] was responsible for preparing Plaintiff's estimate and handling matters associated with Plaintiff's claim including inspecting the damages and communicating with Defendant." Along with the disclosure, Plaintiff also turned over the Stellar Estimate [ECF 49-4] and all communications and documents related to this witness. While district courts have discretion to exclude undisclosed witnesses, there is no specific set of factors that render such rulings clearly erroneous. Other District Courts have considered guidance from the Fourth Circuit:

> ***18** In exercising its broad discretion to determine whether a nondisclosure of evidence is substantially justified or harmless for purposes of Rule37(c)(1) exclusion analysis, a district court should be guided by the following factors: (1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4)the importance of the evidence; and (5) the nondisclosing party's explanation for its failure to disclose the evidence.

Tucker v. Orkin, LLC, 2018WL1964593 (N.D. Ala. 2018) *citing Southern States Rack and Fixture Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 597 (4th Cir. 2003). The *Tucker* Court explained the importance of including testimony where it was substantially justified or harmless to the other party, especially where any surprise to the opposing party can be cured. *Id*. In realizing how critical the witness was to the case, the *Tucker* Court determined that this was not the scenario warranting exclusion of the expert witness. *Id*. Exclusion of an expert witness is an abuse of discretion where the record does not show surprise and there was no willfulness in the failure. *OFS Fitel, LLC v. Epstein, Becker and Green, P.C.*, 549 F.3d 1344, 1365-66 (11th Cir. 2008). Here, witness was disclosed as a party with information but not as an expert. Since the proffered testimony is based on the disclosed estimate it cannot be said to be harmful to Defendant. Further, the testimony of Rami Boaziz was not considered to be "expert" testimony by Plaintiff and was submitted as a rebuttal to Defendant's Motion for Summary Judgment. For that reason, the witness and report were not disclosed as experts by Plaintiff. Nevertheless, the delay in classifying Mr. Boaziz as an expert is substantially justified under the circumstances. ***19** Mr. Boaziz and his relevance to this case have been known to Defendant before the initial lawsuit was filed and since Initial Disclosures were made in this matter and there was plenty of time to conduct discovery related to him. For these reasons, the drastic remedy of exclusion was an abuse of discretion by the lower court.

B. Exclusion was too harsh a penalty and a less severe alternative available

Where the names of the "surprise" witness was known to the parties, the penalty of exclusion is unwarranted. *Rice v. Self*, 2023 WL 6518863 (N.D. Ga. 2023). "[T]he Court recognizes Defendants' assertions of prejudice if these witnesses are allowed to

testify at trial without prior deposition, however, said assertions of prejudice are not without a cure." *Id*. at *9. Exclusion of Plaintiff's witnesses, here, was case dispositive warranting the closure of this case by way of summary judgment. Where the delay in identifying an expert witness is harmless with no showing of willfulness, the court abuses its discretion in excluding an expert witness. *OFS Fitel* at 1365. While the *OFS Fitel* Court grappled with the lower court's striking of an expert witness, the resulting dismissal of the suit was too harsh a penalty for the court too consider same. *Id*. Courts consider exclusion of testimony of dismissal of a case as a harsh penalty where the witness is important to the presentation of the case or their testimony dispositive of the case. *Tucker* at *4. Where any prejudice can be cured, the best course of action is to allow the case to proceed on its merits. *Id*. Defendant's Motion for Summary Judgment rested on the ***20** exclusion of Plaintiff's witnesses and their testimony. Reversal on the rulings excluding the witnesses will logically reverse the lower court's decision granting Defendant's Motion for Summary Judgment. *Seamon v. Remington Arms Co., LLC*, 813 F.3d 983, 991 (11th Cir. 2016).

CONCLUSION

While procedure is paramount to the judicial process, equally so is the disposition of cases on their merits. In the case at hand, the lower court eliminated any way forward for Plaintiff by striking the witnesses upon which its case rested. It is evident from precedent law and the record below that the lower Court did not conduct the proper analysis established by law to justify the striking of Boaziz's and Micali's testimonies. The lower Court abused its discretion when it struck Micali's testimony finding his methodology unreliable. The Court mentioned the prongs for analyzing methodology such as whether the techniques performed by Micali were generally accepted by the scientific community, however, based its decision to strike on its own decided standard, i.e. Micali's failure to itemize damages. The Court never looked to see whether Micali's methods were scientifically accepted or peer-reviewed and published, they summarily concluded the testimony was not based on sufficient data and struck his testimony. Striking Boaziz as a witness finding among other things that this testimony would prejudice Defendant, was equally an abuse of the lower Court's discretion. Boaziz was the public adjuster that Defendant has been ***21** dealing with over this claim prior to the filing of the lawsuit. All disclosures related to Boaziz and his involvement in this case have been turned over to Defendant at the beginning of the lawsuit. It was always anticipated that his testimony would be critical to Plaintiff's case. Again, the lower Court ignored current law weighing the harm to Plaintiff (importance of the testimony) versus the prejudice to Defendant (availability to continue the case to allow for further discovery) and concluded that Plaintiff failed to demonstrate the lack of prejudice and harm to itself. The Court found no harm to Plaintiff in the same Order it disposed of Plaintiff's case in its entirety. Plaintiff believes the lower Court abused its discretion in striking all of Plaintiff's witnesses and disposing of its case without performing the analyses cited in the Order. Plaintiff respectfully requests that this Court reverse the lower Court's decision to strike the testimonies of Micali and Boaziz and allow this case to move forward on its merits.

Date: October 22, 2024

Loss Recovery Law Group, PL

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Footnotes

1 Plaintiff recognizes Novak's unavailability warrants his exclusion from testifying and is not appealing the lower court's decision for this witness.

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