

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO**

MARIA BERRIOS-GONZALEZ, on behalf  
of her minor son EBB,

Plaintiffs,

v.

CIVIL NO. 22-1069 (HRV)

HOSPITAL MENONITA GUAYAMA, INC.,  
et al.,

Defendants.

**OPINION AND ORDER**

**I. INTRODUCTION**

Before the Court is defendants’ motion *in limine* to exclude the testimony of plaintiffs’ expert witness, Dr. Robert J. Lerer (hereinafter “Dr. Lerer”). (Docket No. 40). The plaintiffs have filed a response in opposition. (Docket No. 41). For the reasons set forth below, the motion *in limine* is DENIED.

**II. BACKGROUND**

This is a medical malpractice action brought by plaintiff Maria Berrios-Gonzalez on behalf of her minor son. Jurisdiction is premised on diversity of citizenship. The complaint alleges in general that as a result of defendants’ negligence in providing adequate medical care to plaintiff and her minor son EBB during the birth, the child suffered severe injuries, including a diagnosis of cerebral palsy and developmental delay.

1 Specifically, the plaintiffs allege that the defendants breached their duty of care in the  
2 handling of a hypoglycemia episode suffered by the baby.

3 On June 30, 2023, the parties informed the Court that discovery had been  
4 completed. (Docket No. 34). Given the parties' representations and the fact that  
5 settlement appeared unlikely, the Court set deadlines for dispositive motions, and  
6 motions *in limine*, as well as a deadline for the filing of the proposed pretrial  
7 memorandum. (*Id.*) A pretrial conference was scheduled for December 18, 2023, and  
8 trial is currently set to begin on March 15, 2024. (*Id.*)

9  
10 On September 8, 2023, defendants moved the Court to exclude the testimony of  
11 Dr. Lerer arguing that the disclosure of said rebuttal opinion expert is untimely. (Docket  
12 No. 40). Further, defendants complain that due to said late disclosure, they will be  
13 prejudiced and unduly burdened, particularly because they have not been able to depose  
14 him, or "provide a rebuttal to his opinions." (*Id.* at 2). The plaintiffs responded on  
15 September 12, 2023, claiming (1) that the defendants themselves submitted the report of  
16 their expert late; (2) that the need to rebut arose only after plaintiffs received said late  
17 report; and (3) that Rule 26(a)(2)(D) of the Federal Rules of Civil Procedure allows the  
18 proposed rebuttal expert because disclosure has occurred more than 90 days in advance  
19 of the trial date. (Docket No. 41).

### 22 **III. APPLICABLE LAW AND DISCUSSION**

23 Pursuant to Rule 26(a)(2)(D) of the Federal Rules of Civil Procedure, an expert  
24 witness and his or her report must be disclosed "at the times and in the sequence that  
25 the court orders." Fed. R. Civ. P. 26(a)(2)(D). Absent stipulation or a court order, expert  
26 testimony "intended solely to contradict or rebut evidence on the same subject matter  
27 identified by another party" must be disclosed "within 30 days after the other party's  
28

1 disclosure.” Fed. R. Civ. P. 26(a)(2)(D)(ii). The case management order in this case, as  
2 well as other scheduling orders are silent as to expert rebuttal evidence. Therefore, the  
3 default 30-day rule in subsection (ii) is applicable. *See Casillas v. Triple S Vida, Inc.*,  
4 Civil No. 16-2564 (PAD), 2018 U.S. Dist. LEXIS 11723; 2018 WL 3414142 (D.P.R., July  
5 11, 2018).  
6

7         There is no dispute that Dr. Lerer’s report, which I have reviewed because it was  
8 attached by defendants to Docket No. 40, is truly a rebuttal report. It does not introduce  
9 new opinions or subjects. It purports to contradict the defendants’ expert, Dr.  
10 Rubenstein, as to the matter of life expectancy and care plan. On the other hand, the  
11 fillings of the parties do not allow me to clearly understand the timing. Dr. Lerer’s report  
12 was apparently disclosed on August 17, 2023. Discovery in this case closed on June 6,  
13 2023. (*See* Dockets Nos. 33 and 34). The plaintiffs argue in their response to the motion  
14 *in limine*, that the defendants themselves were late in their disclosure of their expert  
15 report. But a date is not provided for me to assess if Dr. Lerer’s report falls within the  
16 30-day default rule.  
17

18         Notwithstanding the above, even if untimely, I will not exclude Dr. Lerer’s report.  
19 Under Rule 37(c)(1), exclusion is the appropriate sanction for a party’s failure to adhere  
20 to the expert disclosure requirements. Fed. R. Civ. P. 37(c)(1)<sup>1</sup>; *see also Lohnes v. Level*  
21 *3 Communs., Inc.*, 272 F.3d 49, 60 (1st Cir. 2001). But Rule 37 contains a scape hatch  
22 provision. If the failure to timely disclose is “substantially justified or harmless”, the  
23  
24

---

25  
26  
27 <sup>1</sup> “If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is  
28 not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial  
unless the failure was substantially justified or harmless.” Fed. R. Civ. P. 37(c)(1).

1 Court may allow the use of the untimely evidence. Fed. R. Civ. P. 37(c)(1); *Zampierollo-*  
2 *Rheinfeldt v. Ingersoll-Rand De P.R., Inc.*, 999 F.3d 37, 47 (1st Cir. 2021).

3 I find that allowing Dr. Lerer’s testimony, even if disclosure is untimely as alleged,  
4 is both justified and harmless. The defendants have not disputed the claim that their  
5 own expert report was late or that the plaintiffs’ need to rebut arose after such late  
6 disclosure. Further, the record does not reveal any prejudice to the defendants. The  
7 rebuttal evidence was submitted more than six months before trial is set to begin.  
8 Defendants have sufficient time to prepare to confront said evidence. “When a disclosure  
9 reasonably appraises a party of an expert’s expected testimony, the risk of unfair surprise  
10 is reduced and preclusion is unnecessary.” *Ortiz v. Toro Verde Eco Adventure Park*, Civil  
11 No. 19-1972, 2023 U.S. Dist. LEXIS 169716 at \*10-11; 2023 WL 6201396 (D.P.R. Dec. 22,  
12 2023)(citing *Saucedo v. Gardner*, 2018 U.S. Dist. LEXIS 35175, 2018 WL 1175066 at \*3  
13 (D.N.H. Mar. 5, 2018)).

14  
15  
16 **IV. CONCLUSION**

17 In view of the above, the defendants’ motion *in limine* to exclude Dr. Lerer’s  
18 testimony is DENIED.

19  
20 **IT IS SO ORDERED**

21 In San Juan, Puerto Rico this 8th day of November, 2023.

22 S/Héctor L. Ramos-Vega  
23 HÉCTOR L. RAMOS-VEGA  
24 UNITED STATES MAGISTRATE JUDGE  
25  
26  
27  
28