IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

WILLIAM THORPE, *et al*., *Plaintiffs*, v. VIRGINIA DEPARTMENT OF CORRECTIONS, *et al*., *Defendants*.	Civil Case No. 2:20-cv-00007-JPJ-PMS

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO EXCLUDE THE TESTIMONY OF LENARD VARE

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PRELIMINARY STATEMENT

Defendants' opposition fails to rebut Plaintiffs' arguments that the report and testimony of Defendants' purported ADA expert—Lenard Vare—should be excluded pursuant to the standard articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). On the contrary, the arguments that Defendants advance in their opposition brief serve only to underscore Mr. Vare's lack of qualifications and the unreliability of his methods, necessitating the exclusion of his testimony.

First, Defendants' attempt to recast Mr. Vare's "ancillary" experience with ADA-related issues as "significant" and "extensive" experience is unavailing. Defendants' principal argument is that Mr. Vare should be allowed to offer expert opinion testimony on ADA-related issues because he has experience working as a prison administrator and has overseen issues involving inmate suicides. ECF No. 397, Defs.' Opp. to Plfs.' Mot. to Exclude the Testimony of Lenard Vare [hereinafter "Opp."] at 16–18. *Daubert*, however, does not permit an individual to provide expert testimony on a subject outside of his area of expertise simply because he might qualify as an expert on an entirely *different* subject. With respect to the specific subject on which he is offered as an expert—ADA compliance—Mr. Vare has made clear that he has no meaningful experience in this regard. Instead, Mr. Vare has testified that his experience with devising, implementing, and reviewing ADA-related policies is limited to asking employees and other third parties to evaluate such policies. ECF No. 377-2, Vare Dep. at 63:19–64:11; *see* ECF No. 377, Plfs.' Memorandum of Law in Support of Their Mot. to Exclude the Testimony of Lenard Vare [hereinafter "Mot."] at 9–10. Such experience is insufficient to qualify Mr. Vare as an expert on the ADA.

Second, Defendants fail to rebut Plaintiffs' arguments about the unreliability of Mr. Vare's methods. While Defendants argue that the deficiencies Plaintiffs have identified go to the "weight, not [the] admissibility" of Mr. Vare's testimony, *see* ECF No. 397, Opp. at 26–28, the fact is that Mr. Vare has provided *no* principled methodology for arriving at his opinions, ECF No. 377, Mot. at 11–23. Because Mr. Vare's testimony fails to comply with *Daubert*'s minimum requirements, his opinions must be excluded, not simply devalued. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999) ("Federal Rule of Evidence 702 imposes a special obligation upon a trial judge to ensure that any and all [expert] testimony is not only relevant, but reliable." (cleaned up)).

For these and other reasons, Plaintiffs' motion should be granted.

ARGUMENT

I. Mr. Vare Is Not Qualified to Opine on the Topics for Which Defendants Offer Him as an Expert.

Defendants proffer Mr. Vare as an expert on (i) VDOC's purported compliance with the ADA, and (ii) the nature and severity of Plaintiffs' disabilities. *See* ECF No. 377-1, Vare Rep. at 1, 77–81. As Plaintiffs explained in their opening brief, Mr. Vare is not qualified to offer expert opinion testimony on *either* of these subjects because he lacks the requisite expertise. Nothing in Defendants' opposition calls Plaintiffs' arguments into question.

A. Mr. Vare Is Not Qualified to Opine on VDOC's Purported Compliance with the ADA.

By his own admission, Mr. Vare has only "ancillary" experience with issues related to ADA compliance. ECF No. 377-2, Vare Dep. at 81:21–82:14, 303:2–9. In their opposition, Defendants contend that Mr. Vare's characterization of his experience as "ancillary" in nature was meant to convey that he, in fact, has "significant" and "extensive" experience with the ADA. ECF No. 397, Opp. at 3–4, 16–18. That is simply not true. Defendants' position is utterly

divorced from the definition of the word "ancillary" as well as Mr. Vare's own deposition testimony, in which he expressly disclaimed specialized expertise on ADA-related issues. *See Ancillary*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/ancillary (last updated Oct. 20, 2023) (defining "ancillary" as of "a subordinate, subsidiary, or secondary nature"); ECF No. 377-2, Vare Dep. at 63:19–64:11, 81:21–82:14, 303:2–9.

Indeed, during his deposition, Mr. Vare was repeatedly asked to identify his experience working on ADA compliance issues, and in each instance, Mr. Vare denied having any meaningful experience. *See, e.g.*, *id.* at 38:16–39:8 ("Q. . . . So in the context of your experience as a corrections consultant, prior to this case had you ever been asked to assess compliance with the Americans with Disabilities Act specifically? A. Specifically, no." (objection omitted)), 39:15–18 ("Q. But you've never been asked to opine on whether a particular policy or practice is compliant with the ADA? A. Not specifically, no."), 82:10–14 ("Q. The experiences you've gained as a corrections consultant, does that include the ADA-related experiences we discussed earlier in this deposition? A. In an ancillary fashion."). To the extent that Mr. Vare has *ever* been involved in ADA compliance issues, he was quick to note during his deposition that he had delegated nearly all tasks related to ADA compliance—including the drafting, implementation, and review of ADA policies and procedures—to other people. *See, e.g.*, *id.* at 63:19–64:11 ("Q. How did you determine whether the policies were compliant with the American with Disabilities Act? A. . . . I would send it to the attorneys in the county counsel's office, and they would review it to make sure it met the standards."), 56:8–14 ("Q. . . . Did you have any role in drafting the policies and procedures related to the ADA? A. . . . I actually had to hire a staff member to rewrite all the policies . . . ."). This type of second-hand experience is insufficient to qualify as an expert witness. *See Kumho Tire*, 526 U.S.

at 152 (explaining that expert testimony must be based "upon professional studies or *personal experience*" (emphasis added)); *Estate of Ravenell ex rel. Ravenell v. Pugmill Sys., Inc.*, 2014 WL 7146848, at *5 (D.S.C. Dec. 15, 2014) (explaining that an "expert opinion" must be "an opinion informed by *the witness'* expertise" (emphasis added)); *Shreve v. Sears, Roebuck & Co.*, 166 F. Supp. 2d 378, 394 (D. Md. 2001) ("[A]n expert must have specific knowledge, not mere capacity to acquire knowledge.").

Recognizing that Mr. Vare lacks any meaningful experience with issues related to ADA compliance, Defendants argue that Mr. Vare's general experience in the "corrections context"—including his experience investigating inmate suicides—qualifies him to testify about the ADA. ECF No. 397, Opp. at 3–4, 16–18. Not so. To qualify as an expert, a witness must have relevant experience in the specific field in which he offers testimony. It is not enough that an expert has experience is some *other* field, even if that field is arguably related to the subject of the expert's testimony. *See, e.g.*, *Cooper v. Lab. Corp. of Am. Holdings, Inc.*, 150 F.3d 376, 380–81 (4th Cir. 1998) (affirming exclusion of expert proffered to testify about "urine alcohol testing" based on expert's lack of relevant "training, experience, or skill in the field of urine alcohol testing," notwithstanding that expert had "experience with breath alcohol testing"); *Shreve*, 166 F. Supp. 2d at 392 ("[A]n expert who is a mechanical engineer is not necessarily qualified to testify as an expert on any issue within the vast field of mechanical engineering"; instead, to qualify as an expert, "the engineer must possess 'some special skill, knowledge or experience'"). Here, Mr. Vare purports to opine on whether the policies, procedures, and practices underlying the Step-Down Program comply with the ADA. *See* ECF No. 377-1, Vare Rep. at 1. That Mr. Vare has experience with prison management generally—or even with inmate suicides specifically—does not demonstrate that he has the expertise necessary to opine on issues related to ADA

compliance. *See Kumho Tire*, 526 U.S. at 151 (holding that, to testify as an expert, a witness must have sufficient experience "in the relevant field"); *Shreve*, 166 F. Supp. 2d at 391 ("The fact that a proposed witness is an expert in one area[] does not *ipso facto* qualify him to testify as an expert in all related areas.").

The cases that Defendants cite are not to the contrary. In *American Strategic Insurance Corp. v. Scope Services, Inc.*, 2017 WL 4098722 (D. Md. Sept. 15, 2017), the court declined to find that an electrical engineer with more than fifty years' experience in electrical engineering—including experience with the installation of electrical systems, forensic analysis of failed electrical systems, and investigations of fires and explosions caused by electrical systems—was unqualified to testify as an expert in the field of electric meter installation over defendant's objection that the purported expert did not have experience installing the specific type of "smart" meter that caught fire in that case. *Id.* at *3. That situation is plainly distinguishable from the case at bar, in which Defendants claim that Mr. Vare's experience with prison administration generally qualifies him to testify about the wholly separate field of ADA compliance. And in any event, the *American Strategic Insurance* court ultimately excluded the engineer's testimony as unreliable because he relied on his qualifications as the basis for his testimony and yet "fail[ed] to identify . . . an adequate foundation for his opinions in adequate experience, theory, written materials, or industry custom and practice." *Id.* at *6–7. Mr. Vare's opinions suffer from the same deficiency.

Friendship Heights Associates v. Vlastimil Koubek, A.I.A., 785 F.2d 1154 (4th Cir. 1986), is equally inapposite. There, the Fourth Circuit reversed a district court decision excluding testimony from an architect who offered expert opinions on the standard of care applicable to architects. *Id.* at 1163. In reversing the district court's decision, the court emphasized that (i) the

district court did not state its reasons for its refusal to qualify the expert, (ii) the expert had extensive experience working in the relevant field, and (iii) the expert was able to articulate an appropriate standard of care. *Id.* at 1160–62. Here, by contrast, Mr. Vare does not have any meaningful experience—let alone *extensive* experience—working on ADA-related issues. His testimony should be excluded for the reasons discussed above.[1]

B. Mr. Vare Is Not Qualified to Opine on Whether Inmates Have Qualifying Disabilities.

Separate and apart from his lack of qualifications related to ADA compliance, Mr. Vare also lacks the qualifications necessary to testify about whether Plaintiffs are disabled. Indeed, Defendants offer no response to Plaintiffs' argument that Mr. Vare is unqualified to opine on whether Plaintiffs have qualifying disabilities. *See* ECF No. 397, Opp. at 16–22 (arguing only that Mr. Vare is qualified to offer opinions on VDOC's ADA-related policies and procedures). Instead, Defendants simply parrot Mr. Vare's statement that unspecified "records reflect that no named plaintiff had any impairment that [rises] to the level of a disability." ECF No. 397, Opp. at 11 (quoting ECF No. 377-1, Vare Rep. at 81). As Plaintiffs explained in their opening brief, Mr. Vare's purported summary of what certain "records reflect" is not an expert opinion. ECF

[1] The other cases Defendants cite are also distinguishable. Defendants cite *Slaton v. Correct Care Sols., LLC*, 2016 WL 3257660 (D.S.C. June 14, 2016), for the proposition that expert witnesses may permissibly rely upon "regulatory texts . . . including the standards of the American Correctional Association" in offering opinions. Opp. at 17. ACA standards, however, are not "regulatory texts," and in any event, the expert in *Slaton* did not cite ACA standards in opining on a prison's compliance with the ADA. *Slaton*, 2016 WL 3257660, at *1–2 (describing expert nurse's opinion with respect to "medical malpractice" claim). Defendants similarly cite *Ortiz v. Ben Strong Trucking, Inc.*, 624 F. Supp. 3d 567 (D. Md. 2022), for the proposition that a witness should be allowed offer expert opinion testimony as long as his experience is "close enough" to the issues on which he opines. Opp. at 17. But *Ortiz* does not permit the kind of "anything goes" standard for which Defendants advocate. In *Ortiz*, the court held that a witness who offered opinions regarding industry standards for vetting motor carriers was qualified to offer expert opinions based on his prior experience vetting motor carriers. 624 F. Supp. 3d at 590. Mr. Vare, by contrast, has *no* experience vetting ADA policies. He is therefore unqualified to offer such opinions in this case.

No. 377, Mot. at 16–17; *see, e.g.*, *In re Trasylol Prods. Liab. Litig.*, 709 F. Supp. 2d 1323, 1346 (S.D. Fla. 2010) (excluding expert witness that did "not analyze the facts," but rather "regurgitate[d] them and reache[d] conclusory opinions that are purportedly based on these facts"). And even if it were, Mr. Vare does not have the requisite expertise to opine on medical and mental health issues. ECF No. 377, Mot. at 11 (citing Mr. Vare's own admissions that he has no medical or mental health training or other qualifications to render this opinion). For these reasons, Mr. Vare's opinions should be excluded.

II. Mr. Vare's Opinions Are Based on Unreliable Methods.

In their opening brief, Plaintiffs argued that Mr. Vare's opinions about (i) Defendants' compliance with the ADA; (ii) Plaintiffs' lack of qualifying disabilities; (iii) the "safety and security threat" posed by Plaintiffs; and (iv) the costs associated with modifying the Step-Down Program, should be excluded due to Mr. Vare's unreliable methods. ECF No. 377, Mot. at 11–23. Nothing in Defendants' opposition casts doubt on Plaintiffs' arguments.

A. Defendants Have Not Shown That Mr. Vare's Opinions Regarding Red Onion's ACA Accreditation Are Reliable.

Defendants maintain that Plaintiffs have "mischaracterize[d]" Mr. Vare's opinion that ACA accreditation and associated audits "ensure continued compliance with ADA requirements." ECF No. 397, Opp. at 10. But Plaintiffs have simply quoted Mr. Vare's report. As Mr. Vare opines:

> OPINION 1: The Red Onion State Prison is ACA-accredited and has been fully inspected and provided with the accreditation for over 12 years. The facility has undergone all the 500 performance-based standards testing and passed the accreditation process. Mr. Wells apparently failed to consider the importance of ACA accreditation as it applied to VADOC's operations. He failed to address what I believe to be vital information related to ***ACA audits which also include inspection of policies, procedures, practices, programs, and services to ensure continued compliance with ADA requirements***.

ECF No. 377-1, Vare Rep. at 76 (emphasis added).

As Plaintiffs explained in their opening brief, Mr. Vare's statements about the purpose and effect of ACA accreditation are unreliable because such accreditation does not "ensure continued compliance with ADA requirements." ECF No. 377, Mot. at 4, 12–16. Indeed, Mr. Vare acknowledged this fact in his deposition. ECF No. 377-2, Vare Dep. at 230:18–231:1 ("Q. . . . [W]e discussed that the ACA accreditation does not necessarily indicate compliance with the ADA. Correct? A. It's possible that it – that sometimes things could happen even with the compliance in place."). Mr. Vare also acknowledged that that he is unaware of any literature suggesting that ACA accreditation "ensure[s] continued compliance with ADA requirements" or that ACA standards reflect "best practices" for ensuring ADA compliance. *Id.* at 178:10–19 ("Q. [A]re you aware if any of those four individuals [with whom Mr. Vare spoke 'over the years' about ACA accreditation] have published any literature on the ACA or best practices? A. I am not aware of it. Q. So I take it that means you did not read any literature from these four individuals in . . . preparing your expert report in this case? A. That's correct."). Without any basis for his opinions, Mr. Vare is not allowed to offer them.

Even if ACA accreditation were somehow relevant to a facility's compliance with the ADA—which it is not—Mr. Vare is unequipped to offer opinions related to the ACA accreditation process. As he conceded at his deposition, Mr. Vare:

- has never been employed by the ACA, *id.* at 129:10–12;
- has never been involved in the development of any ACA standards, *id.* at 129:21–130:1;
- has never conducted an audit on behalf of the ACA, *id.* at 129:15–17;
- has never conducted an audit based on ACA standards, *id.* at 129:18–20;
- has never participated in an ACA audit, *id.* at 130:2–4; and
- has never worked at a facility that has been ACA accredited, *id.* at 130:5–7.

Absent any relevant experience with ACA standards, accreditations, or audits, Mr. Vare's opinion that ACA standards somehow reflect "best practices" or that ACA accreditation is tantamount to ADA compliance is nothing more than rank speculation. *Daubert*, 509 U.S. at 590 (explaining that "'knowledge' connotes more than subjective belief or unsupported speculation"); *Sardis v. Overhead Door Corp.*, 10 F.4th 268, 281 (4th Cir. 2021) ("[D]istrict courts must ensure that an expert's opinion is based on scientific, technical, or other specialized *knowledge* and not on belief or speculation." (cleaned up)).

Recognizing that Mr. Vare lacks relevant experience with ACA standards, accreditations, or audits, Defendants attempt to piggyback off of Plaintiffs' expert's experience with ACA accreditations in order to buttress Mr. Vare's opinions. ECF No. 397, Opp. at 23–26. Defendants' argument is curious, given that Plaintiffs' expert "strongly disagree[s]" with Mr. Vare's assertion that "if a facility is accredited by the ACA, it must be compliant with the ADA." ECF No. 377-20, Wells Reply Rep. ¶¶ 10–11; *see also id.* ¶ 24 ("[T]he ACA standards and audit process do not—and simply cannot—comprehensively test a prison's compliance with all applicable provisions of the ADA."), ¶ 25 ("Only a handful of the 500-plus ACA standards even mention the term disability, and/or are specific to incarcerated persons with disabilities."), ¶ 30 ("The ACA standards also are largely silent on the provision of accommodations to incarcerated persons with disabilities."), ¶ 32 ("The limitations of ACA accreditation are further confirmed by the fact that other ACA-accredited facilities have been found to have violated the ADA." (citing ECF Nos. 377-18, 377-19)). Based on these opinions, it is unclear how Mr. Vare could possibly rely on the experience of Plaintiffs' expert to opine that ACA standards reflect "best practices" for ADA compliance. In any event, Defendants offer no support for the proposition that an

expert can opine on issues outside of his area of expertise simply because his counterpart would qualify as an expert if offered in that area.

B. Defendants Have Not Shown That Mr. Vare's Opinions Regarding Plaintiffs' Disabilities Are Reliable.

In contrast to Defendants' arguments with respect to Mr. Vare's opinions about Defendants' compliance with the ADA, Defendants offer no response to Plaintiffs' argument that Mr. Vare has not employed *any* methodology, let alone a reliable one, in arriving at his opinion that Plaintiffs lack qualifying disabilities. *See generally* ECF No. 397, Opp. In light of Defendants' silence on this issue, Mr. Vare's opinions with respect to Plaintiffs' disabilities should be excluded.

C. Defendants Have Not Shown That Mr. Vare's Opinions About the Purported Safety and Security Threat Posed by Plaintiffs Are Reliable.

Defendants also fail to respond to Plaintiffs' argument that Mr. Vare failed to employ a reliable methodology in opining that "each one of the named plaintiffs posed a considerable direct safety and security threat," thereby absolving Defendants of the need to provide any accommodations to Plaintiffs under the ADA based on their disabilities. ECF No. 377, Mot. at 18–20. While Defendants claim that Mr. Vare "weighed a different set of facts and used [a] methodology different from what Plaintiffs would devise," they offer no information about the set of facts that Mr. Vare *did* consider or the methodology that he *did* devise in formulating his opinions. ECF No. 397, Opp. at 27. Expert discovery is not supposed to be a game of hide and seek. The fact that Mr. Vare has failed to show his work is fatal to his ability to propound expert opinions in this case. *See, e.g.*, *Brosville Cmty. Fire Dep't, Inc. v. Navistar, Inc.*, 2014 WL 7180791, at *3 (W.D. Va. Dec. 16, 2014) ("Expert reports must include the 'how' and 'why' the expert reached a particular result, not merely the expert's conclusory opinions." (cleaned up)); *see also Elcock v. Kmart Corp.*, 233 F.3d 734, 747–48 (3d Cir. 2000) (holding that expert

testimony should have been excluded where expert "never explained his method in rigorous detail"); *U.S. All. Grp. v. Cardtronics USA, Inc.*, 645 F. Supp. 3d 554, 560 (E.D. La. 2022) (excluding expert testimony where expert failed to "explain[] the methodology he employed to reach his conclusions").

That Mr. Vare may have experience dealing with issues related to "inmate security" in other contexts is insufficient to qualify him as an expert witness in this case. ECF No. 377, Mot. at 9–10; *see* ECF No. 397, Opp. at 27. On the contrary, to qualify as an expert, Mr. Vare must "explain how [his] experience leads to the conclusion reached, why [his] experience is a sufficient basis for the opinion, and how [his] experience is reliably applied to the facts." *United States v. Wilson*, 484 F.3d 267, 274 (4th Cir. 2007). Because such information appears *nowhere* in Mr. Vare's report, Mr. Vare's opinions should be excluded.

D. Defendants Have Not Shown That Mr. Vare's Opinions About the Purported Costs Associated with Reforming the Step-Down Program Are Reliable.

Defendants claim that Mr. Vare can offer opinions about the "extensive modifications" and "tremendous cost[s]" associated with bringing the Step-Down Program into compliance with the ADA. ECF No. 397, Opp. at 28–30. Defendants offer this argument, even though they concede that Mr. Vare:

- did not have any specific accommodations in mind when opining on the necessary modifications or costs associated with changes to the Step-Down Program, *id.* at 29–30;
- did not identify the costs associated with any modification to the Step-Down Program, *id.* at 30; and
- did not review any budgetary or other financial information related to ROSP or VDOC, *id.* at 30 n.11.

Instead, Defendants fault Plaintiffs for failing to ask more questions during Mr. Vare's deposition about the bases for his opinions, including questions about the "facility upgrades" and "budget documents" that he supposedly reviewed. *Id.* at 30. But Defendants are required to

disclose all "facts or data considered by the [expert] witness in forming" his opinions. Fed. R. Civ. P. 26(a)(2)(B). Mr. Vare's report contains no information about any "facility upgrades" or "budget documents" that supposedly informed his opinions, and thus Plaintiffs could not have possibly known to explore these issues during Mr. Vare's deposition. *See* ECF No. 377-1, Vare Rep. at 82–86. Moreover, if Mr. Vare truly considered these materials in formulating his opinions, Defendants' failure to comply with the requirements of Federal Rule of Civil Procedure 26(a)(2) provides an *independent* basis for excluding Mr. Vare's opinions. *See* Fed. R. Civ. P. 37(c)(1) ("If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is 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 is harmless.").

In the alternative, Defendants contend that Mr. Vare was not required to explain the basis for his opinions because the burden and costs associated with making changes to the Step-Down Program are "self-evident." ECF No. 397, Opp. at 29. This argument fails for at least two reasons. First, the costs associated with implementing changes to a prison's solitary confinement system—and how those costs relate to the expenses associated with running a prison generally—will hardly be "self-evident" to jurors. This is presumably why Defendants tried (and failed) to proffer an expert witness to testify about such issues. Second, if the Court credits Defendants' argument about the supposed obviousness of the costs associated with implementing changes to the Step-Down Program, then Defendants have no need for an expert witness in the first place. *See, e.g.*, *Persinger v. Norfolk & W. Ry. Co.*, 920 F.2d 1185, 1188 (4th Cir. 1990) ("Rule 702 excludes expert testimony on matters within the common knowledge of jurors."); *Anderson v. Home Depot U.S.A., Inc.*, 2017 WL 2189508, at *4 (D. Md. May 16, 2017) ("Rule 702 makes

inadmissible expert testimony as to a matter which obviously is within the common knowledge of jurors because such testimony, almost by definition, can be of no assistance."). No matter how the issue is analyzed, Mr. Vare's opinions should be excluded.

E. Defendants' Other Arguments in Support of Mr. Vare's Testimony Are Unavailing.

Defendants offer two additional arguments in support of Mr. Vare's ability to offer expert opinion testimony, neither of which has any merit.

First, Defendants contend that Mr. Vare's failure to consider relevant facts and data is not a basis for excluding his testimony because experts can disagree about the salience of certain facts. ECF No. 397, Opp. at 26–28. While this may be true as a general rule, Defendants' argument sidesteps the specific facts that Mr. Vare failed to consider in this case. For example, Mr. Vare opines that Defendants have maintained an adequate ADA training program over the relevant time period, even though VDOC admits that it had no ADA training program prior to 2016. ECF No. 377-6, Va. Dep't of Corr.'s Objections and Answers to Plaintiffs' Reqs. for Admissions at No. 32. Mr. Vare similarly opines that VDOC's intake procedures are sufficient to identify inmates with disabilities, even though the current ROSP psychiatrist testified that the mental health screening that ROSP inmates receive does not account for factors that should be considered when identifying mental health conditions. ECF No. 377-10, McDuffie Dep. at 82:4–83:4, 254:6–9, 256:16–257:13. These facts go to the heart of Mr. Vare's opinions and are plainly "relevant" to his analysis. *See* ECF No. 377-1, Vare Rep. at 86–89, 90–92. That Mr. Vare failed to consider them renders his opinions unreliable. *See, e.g.*, *In re Bextra & Celebrex Mktg. Sales Pracs. & Prod. Liab. Litig.*, 524 F. Supp. 2d 1166, 1176 (N.D. Cal. 2007) (excluding expert opinion formed by "cherry-picking" supportive facts "and rejecting or ignoring the great weight of the evidence that contradicts [the] conclusion").

Second, Defendants contend that Mr. Vare's destruction of his notes should be excused because the "substance" of those notes is "captured in his Report." ECF No. 397, Opp. at 31. Defendants, however, cite no legal authority for the proposition that an expert is excused from the requirements of Rule 26(a)(2) as long as the "substance" of what he considered is reflected in his report. On the contrary, the purpose of Rule 26(a)(2)'s disclosure requirements is to allow parties to *test* the bases for an expert's opinions using the documents, information, and interviews the expert relied upon in formulating them. Plaintiffs have been thwarted in their efforts to test Mr. Vare's opinions because he remembers next to nothing about his trip to ROSP, including the individuals with whom he spoke and the facts supposedly relayed to him by those individuals. *See, e.g.*, ECF No. 377-2, Vare Dep. at 251:9–252:11, 253:22–254:7, 256:20–257:1, 261:10–12, 263:18–264:1, 271:19–272:6, 278:11–279:5. Defendants' suggestion that the Court should allow Mr. Vare to offer opinions for which he does not remember the basis should not be countenanced. *Sanchez v. Bos. Sci. Corp.*, 2014 WL 4851989, at *12 (S.D. W.Va. Sept. 29, 2014) ("If [the expert] cannot explain the basis of his opinion, I am simply unable to conclude that his opinion is reliable.").

CONCLUSION

For all of these reasons, Plaintiffs' motion to exclude the opinions of Lenard Vare should be granted.[2]

[2] Plaintiffs did not separately challenge the helpfulness of Mr. Vare's opinions and therefore do not offer a response to Defendants' self-serving and nonresponsive argument that his opinions will be helpful to the jury. *See* ECF No. 397, Opp. at 32–35. However, to the extent that Defendants suggest that Mr. Vare will offer opinions beyond those disclosed in his report, this Court should order that such testimony is inadmissible, and alternatively, Plaintiffs reserve the right to object to the admissibility of any undisclosed opinions at trial.

Dated: October 24, 2023

Respectfully submitted,

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Certificate of Service

I hereby certify that on the 24th day of October, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all CM/ECF participants.

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