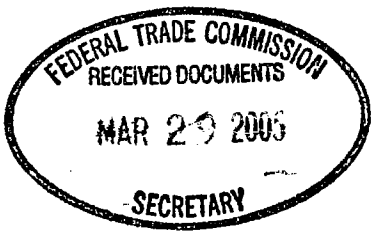
UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the matter of	)	
Evanston Northwestern Healthcare Corporation, a corporation	)	Docket No. 9315
	)	**Public Record Version**

RESPONDENT'S BRIEF ON ADMISSIBILITY OF EXPERT REPORTS AS A PARTY ADMISSION

Pursuant to the Court's oral pronouncement on March 23, 2005, Respondent Evanston Northwestern Healthcare, Inc. ("ENH") hereby submits its brief on whether expert reports can be deemed a party admission under Rule 801(d)(2) of the Federal Rules of Evidence ("Rules.")

INTRODUCTION

Complaint Counsel asserted at the inception of the hearing that expert reports constitute inadmissible "hearsay and should not be admitted," and this Court "agree[d]," confirming that, "as a rule, we do not enter expert reports in the record. They are hearsay." 2/8/05 Final Pretrial Conf. Tr. 6 (Ex. 1).[1] Complaint Counsel now has switched gears, because it suits its position to do so, and argues that statements made in expert reports may be offered into evidence as a party admission under Rule 801(d)(2). In particular, Complaint Counsel asserts that it was entitled to read into evidence large portions of Dr. Jonathan Baker's November 2, 2004, expert report during his cross-examination on March 22, 2005. Trial Tr. 4724 (Ex. 2). Complaint Counsel is wrong.

[1] Respondent agreed with Complaint Counsel and the Court, and undersigned counsel confirmed that they had not "moved any expert report into evidence." 2/8/05 Final Pretrial Conf. Tr. 7 (Ex. 1).

As demonstrated below, courts have held that the statements of independent expert witnesses do not qualify as party admissions under Rule 801(d)(2). Dr. Baker is an independent expert hired by ENH to testify at trial as to his impartial opinion; he is not an "agent" whose statements qualify for non-hearsay pursuant to Rule 801(d)(2). Complaint Counsel, therefore, cannot admit any portion of Dr. Baker's report under this Rule. Nor has Complaint Counsel provided any basis to reverse the law of the case described above that, "as a rule, we do not enter expert reports in the record. They are hearsay." 2/8/05 Final Pretrial Conf. Tr. 6 (Ex. 1).

Nevertheless, should the Court be inclined to admit portions of Dr. Baker's report into evidence, ENH requests the opportunity to introduce into evidence select portions of reports submitted by Complaint Counsel's various experts.

ARGUMENT

I. Dr. Baker Is Not An Agent Of ENH And, Therefore, His Hearsay Expert Report Cannot Be Admitted Under Rule 801(d)(2).

Expert Reports are "merely discovery materials" and are presumptively inadmissible. *Blue Cross and Blue Shield United of Wisconsin v. Marshfield Clinic*, 152 F.3d 588, 595 (7th Cir. 1998). Complaint Counsel's sole argument to admit Dr. Baker's expert report is that it purportedly constitutes a party admission under Rule 801(d)(2). Trial Tr. 4724 ("To show – to get this into evidence, we're relying on the fact that the expert report is an admission of the party...."). (Ex. 2) Rule 801(d)(2), which governs party admissions, generally provides that a statement is not hearsay if the statement is offered against a party and was made by the party itself or a person acting as the party's agent. Fed. R. Evid. 801(d)(2). Such an agency relationship "is created as the result of conduct by two parties manifesting that

one of them is willing for the other to act for him subject to his control, and that the other consents so to act." Restatement (Second) of Agency § 1 cmt. a (1958).

The Third Circuit in *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147 (3d Cir. 1995), rejected an argument that statements by a testifying expert fall within the party-admission hearsay exception. The court reasoned that testifying experts do not fall within the traditional definition of an agency relationship:

> In theory, despite the fact that one party retained and paid for the services of an expert witness, expert witnesses are supposed to testify impartially in the sphere of their expertise. Thus, one can call an expert witness even if one disagrees with the testimony of the expert. *Rule 801(d)(2)(c) requires that the declarant be an agent of the party-opponent against whom the admission is offered, and this precludes the admission of the prior testimony of an expert witness where, as normally will be the case, the expert has not agreed to be subject to the client's control in giving his or her testimony.*

Id. at 164 (emphasis added). The court ultimately concluded that "[s]ince an expert witness is not subject to the control of the party opponent with respect to consultation and testimony he or she is hired to give, the expert witness cannot be deemed an agent." *Id.*

As in *Kirk*, Dr. Baker is not an agent of ENH and, therefore, his report cannot be deemed a party admission. At the hearing, Complaint Counsel elicited no testimony from Dr. Baker to show that he was authorized to make admissions on ENH's behalf. *See id.* (holding that the party wishing to introduce expert testimony as a party admission must establish the requisite agency relationship at trial). Nor could Complaint Counsel have elicited such testimony given that, as the Third Circuit held in *Kirk*: "[W]e fail to comprehend how an expert witness, who is not an agent of the party who called him, can be authorized to make an admission for that party." *Id.* Although Dr. Baker has been compensated by ENH, as is typical

with testifying experts, he clearly has not functioned as ENH's agent with authorization to make party admissions.

A case cited by Complaint Counsel – back when it took the position that expert reports are inadmissible hearsay – proves this very point. *See* Mot. to Strike Expert Rep. as Exhibit to Resp.'s Pretrial Br., at 2. In moving to strike Dr. Noether's report (a report that was never offered into evidence but, instead, merely was attached as an exhibit to Respondents' pretrial brief), Complaint Counsel cited to the Tenth Circuit's decision in *Potts v. Sam's Wholesale Club*, 1997 U.S. App. LEXIS 5355 (10th Cir. Mar. 21, 1997) (Ex. 3). In *Potts*, the plaintiffs sought to admit into evidence an initial report prepared by the defendant's medical expert that conflicted with a subsequent report and his trial testimony. The trial court refused to admit the report into evidence and allowed it to be used for impeachment purposes only. The Tenth Circuit affirmed the holding because expert reports are, in fact, inadmissible hearsay:

> *The magistrate judge was therefore correct to conclude that the [expert] report was hearsay.* Given that the expert testified extensively at trial as to his opinion, including the reasons his opinion changed from his first report, the judge acted within his discretion in refusing to admit the report as an exhibit.

Id. at *9-10 (emphasis added). As in *Potts*, Complaint Counsel has no evidentiary basis to admit into evidence statements from Dr. Baker's initial report, especially given that Dr. Baker "testified extensively at trial as to his opinion, including the reasons his opinion changed from his first report." *Id.*

Try as it might, Complaint Counsel cannot run away from its own authority, or the position it took in a pre-trial motion and at the Final Pretrial Conference that expert reports are inadmissible hearsay. At the hearing, Complaint Counsel relied on two cases to try to

justify its position that select portions of Dr. Baker's November 2, 2004, expert report should be admitted into evidence. Trial Tr. 4722-23 (March 22, 2005) (Ex. 2). But neither of those cases – *Collins v. Wayne Corp.*, 621 F.2d 777 (5th Cir. 1980), or *In re the Chicago Flood Litigation*, 1995 WL 437501 (N.D. Ill. 1995) – supports Complaint Counsel's argument.

The first case relied on by Complaint Counsel, *Collins*, is plainly inapposite. This case addressed whether deposition testimony by someone hired by the defendant to investigate an accident involving a bus manufactured by defendant was held to be an admission of the defendant. 621 F.2d at 782. The agent prepared a "Report of Investigation" for his employer – but there is no indication that he prepared any expert report under Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure, which governs testifying experts. *Id.* at 780. The Fifth Circuit accepted, without discussion, that the investigator was defendant's agent and thus held that "his *deposition testimony* in which he explained his analysis and investigation was an admission of Wayne." *Id.* at 782 (emphasis added). This case has no bearing on the issue raised by Complaint Counsel – *i.e.*, whether Dr. Baker's expert report is a party admission under Rule 801(d)(2) – given that: (1) *Collins* did not address the pertinent question of whether testifying experts identified under Rule 26(a)(2)(B) act as a party's agent; and (2) the statements at issue in *Collins*, unlike those in Dr. Baker's report, were under oath. *See* Fed. R. Evid. 801(d)(1).

Later cases have confirmed that *Collins* is either limited to its facts and thus irrelevant to the present inquiry, or wrongly decided. The Third Circuit in *Kirk* outright rejected the application of *Collins* to testifying experts: "To the extent that Collins holds that an expert witness who is hired to testify on behalf of a party is automatically an agent of that party who called him and consequently his testimony can be admitted as non-hearsay in future

proceedings, we reject this rule." *Kirk*, 61 F.3d at 164 n.20. Again, the court explained that because an "expert witness is not subject to the control of the party opponent with respect to consultation and testimony he or she is hired to give, the expert witness cannot be deemed an agent." *Id.* at 164.

Likewise, in *Koch v. Koch Indus.*, 37 F. Supp. 2d 1231, 1244 (D. Kan. 1998), *aff'd, rev'd on other grounds*, 203 F.3d 1202 (10th Cir. 2000), the District of Kansas refused to extend *Collins* to testifying experts. *Koch* distinguished the case of an expert "only retained by the defendants for the purpose of giving an expert opinion at trial and . . . not retained in any other capacity by defendants" from the apparent "'speaking agent' authority accepted by the court in *Collins*." *Koch*, 37 F. Supp. 2d 1231, 1244 (D. Kan. 1998). The court held that, "[l]ike the Third Circuit, this court rejects *Collins* to the extent that it suggests that an expert who is hired by a party is inexorably an agent of that party under Rule 801(d)(2)(C)." *Id.* at 1245; *see also Bostick v. ITT Hartford Group, Inc.*, 82 F. Supp. 2d 376, 379 n.2 (E.D. Penn. 2000) ("This court has not recognized defendants' expert, Lee A. Davis, as an agent of defendants, and as an expert he is presumptively an independent contractor and not an agent of the party who calls him unless it is proved otherwise.").

The second case offered by Complaint Counsel, *In re the Chicago Flood Litigation*, 1995 WL 437501 (N.D. Ill. 1995), is an unpublished decision that merely relies on *Collins* and a second (also unpublished) case that is equally inapposite to the issue at hand.[2] The pertinent holding in *Chicago Flood* is limited to the following summary observation: "A party's pleadings and expert reports often constitute party admissions pursuant to [Rule

[2] The case cited by *Chicago Flood Litigation* is *Allendale Mutual Ins. Co. v. Bull Data Sys. Inc.*, 1994 WL 687579 at *1-2 (N.D. Ill. Dec. 7, 1994), which held that pleading in the alternative should not be used as party admissions. This holding is plainly irrelevant to the question now before the Court concerning the admissibility of expert reports under Rule 801(d)(2).

801(d)(2)." *Id.* at *11. This conclusory statement falls far short of providing a persuasive reason to ignore the conflicting authority discussed above and, therefore, should be disregarded.

II. Complaint Counsel's Position Is Barred By The Law of the Case Doctrine.

Complaint Counsel's position concerning the admissibility of Dr. Baker's report also conflicts with the law of the case. At the Final Pretrial Conference, this Court settled the issue of whether expert reports should be admitted into evidence:

> "Well, let me just say that first of all, expert reports are hearsay. It's my understanding that Evanston has not asked that they be entered into the record, and it shall not be entered into the record. So, if that will help complaint counsel overcome whatever anxiety it may have about that fact, I will assure you that that expert report [of Dr. Monica Noether] is not going to come into the evidence."

2/8/05 Final Pretrial Conf. Tr. 7; *see also id.* at 6 ("Hearsay is what expert reports are."). (Ex. 1) For the reasons discussed above, this Court got it right the first time. Reconsideration of the Court's ruling is thus neither warranted nor appropriate. *See, e.g.*, Moore's Federal Practice § 134.21[1] ("The Supreme Court has held that although a court has the power to revisit its own decisions or those of a coordinate court, it should not do so absent extraordinary circumstances showing that the prior decision was clearly wrong and would work a manifest injustice.") (citing *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988)).

III. Complaint Counsel's New Position Has Prejudiced ENH.

ENH relied on the Court's ruling concerning the admissibility of expert reports throughout Complaint Counsel's case-in-chief and, consequently, did not attempt to introduce any of Complaint Counsel's expert reports into evidence. Nor did ENH attempt to circumvent the Court's ruling by reading reports submitted by Complaint Counsel's experts into the record and asking the witnesses to confirm that they wrote the relevant statements. Complaint

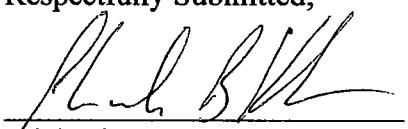
Counsel's present position should be rejected on this basis alone. Nevertheless, fairness principles dictate that, if the Court decided to reconsider its prior ruling at the Final Pretrial Conference and admit selected portions of Dr. Baker's expert report into evidence, ENH should have the right to admit into evidence select portions of reports submitted by Complaint Counsel's experts. [3]

CONCLUSION

For the foregoing reasons, Respondent asks the Court to uphold its prior ruling that expert reports constitute admissible hearsay and deny Complaint Counsel's request to admit portions of Dr. Baker's expert report into evidence. In the alternative, and to the extent the Court determines that expert reports do constitute party admissions under Rule 801(d)(2), Respondent requests the right to offer into evidence select portions of reports submitted by Complaint Counsel's experts.

Dated: March 29, 2005

Respectfully Submitted,



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[3] For example, if the parties were to be permitted to submit statements of opposing parties' experts into evidence, ENH would request an opportunity to move into evidence statements by Complaint Counsel's experts, such as the following statement by Dr. Romano on page 27 of his initial report: **[REDACTED]**.

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Counsel for Respondent

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the matter of	)	
Evanston Northwestern Healthcare Corporation, a corporation	)	Docket No. 9315

ORDER

Upon consideration of Respondents' Brief on Admissibility of Expert Reports as a Party Admission, any opposition thereto and the entire record in this action, it is hereby

ORDERED, that expert reports constitute inadmissible hearsay and, therefore, shall not be admitted into evidence.

The Honorable Stephen J. McGuire
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2005, copies of the foregoing ***Respondent's Brief On Admissibility Of Expert Reports As A Party Admission*** (Public Record Version) and proposed order were served (unless otherwise indicated) by email and first class mail, postage prepaid, on:

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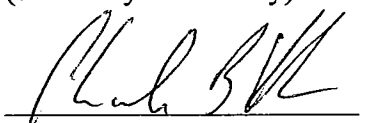

Charles B. Klein, Esq.

Exhibits

In The Matter Of:

EVANSTON NORTHWESTERN HEALTHCARE CORP., ET AL
MATTER NO. D09315

FINAL PRETRIAL CONFERENCE
February 8, 2005

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Original File 50208EVA.ASC, 46 Pages
Min-U-Script® File ID: 1825854871

Word Index included with this Min-U-Script®

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MS. HENNING: It's H E N N I N G.
JUDGE MCGUIRE: Okay, thank you, Ms. Henning.
Then for respondents?
MR. KELLEY: Good morning, Your Honor, I'm Duane Kelley from Winston & Strawn in Chicago.
JUDGE MCGUIRE: Thank you.
MR. SIBARIUM: Good morning, Your Honor, Michael Sibarium, Winston & Strawn, Washington.
JUDGE MCGUIRE: Thank you.
MR. KLEIN: Good morning, Your Honor, Charles Klein, Winston & Strawn in Washington.
JUDGE MCGUIRE: Thank you, Mr. Klein.
Counsel, as you know, the main purpose of this prehearing conference today is going to determine what evidence is going to come in at this point in time, but before we go to that, there's a few other housekeeping tasks I want to take up, and at the end of this prehearing conference, if there are any outstanding issues that either side wants to take up, we'll be happy to do so.
The first thing I want to address is pending motions. I think we have before us currently three motions. The first is from complaint counsel, and that is a motion to strike an expert report from Evanston's pretrial brief. I've had a chance to go over your own

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briefs on this issue.
Does anyone want to say anything else before I go into that? I already know what I'm going to do, but if you want to add any further comments.
Mr. Brock?
MR. BROCK: Thank you, Your Honor.
The one thing that I would mention is that the expert reports have also been — some of the expert reports have also been submitted as exhibits. The three expert reports of respondents have been included. We have included one of the expert reports as a protective matter, and in the event that the Court does rule in favor of allowing expert reports on the record, we would seek leave to file some additional expert reports.
Having said that, we still take the position that they're hearsay and should not be admitted.
JUDGE MCGUIRE: Well, I agree with that. Hearsay is what expert reports are.
Are you saying that there's other — there's other expert reports that the parties have agreed to come in? Because as — as a rule, we do not enter expert reports in the record. They are hearsay.
MR. BROCK: No, we have not agreed to that.
JUDGE MCGUIRE: Okay.
MR. BROCK: The respondents submitted them on

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their exhibit list. We did this purely as a defensive measure, and as I said, if the Court were to allow the — we still oppose the submission of expert reports on the record.
JUDGE MCGUIRE: Okay, I understand.
Did you have anything you want to add to this, Mr. Kelley? I am not going to spend a lot of time on this.
MR. KELLEY: Your Honor, I don't believe so, and my understanding from Mr. Klein is that we have not — I'll let him —
MR. KLEIN: The only thing to add is that we haven't moved any expert report into evidence.
JUDGE MCGUIRE: Right, right.
Well, let me just say that first of all, expert reports are hearsay. It's my understanding that Evanston has not asked that they be entered into the record, and it shall not be entered into the record. So, if that will help complaint counsel overcome whatever anxiety it may have about that fact, I will assure you that that expert report is not going to come into the evidence.
Other than that, I don't see anything in the Part 3 rules that would preclude it being attached as long as it's not entered, and therefore, I don't find

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any prejudice to the opposition that it is attached. So, on that grounds, I'm going to deny complaint counsel's motion, again, with the clarification that the expert report that is attached to their pretrial brief is not going to be entered into evidence, okay?
Are we clear on that?
There is another outstanding motion from complaint counsel where they filed a revised pretrial brief.
Is there any opposition to that, Mr. Kelley?
MR. KELLEY: No, Your Honor.
JUDGE MCGUIRE: If not, then that motion is granted.
Then I understand there are currently some party and nonparty in camera motions still pending. Do the parties want to comment on their own motions? I understand there's two outstanding motions from complaint counsel, and I believe there's three from respondents.
I will say that when we get a chance, we are going to go through those and issue an order on all of those, probably within the next two or three days, but is there anything else on that that we need to take up?
MR. BROCK: No, Your Honor, thank you.
MR. KELLEY: No, Your Honor.

EXHIBIT 2

[REDACTED]

LEXSEE 1997 U.S. APP. LEXIS 5355

CAROLE POTTS; JAMES POTTS, Plaintiff - Appellant, v. SAM'S WHOLESALE CLUB, doing business as Sam's Wholesale Club, Wal-Mart Stores, Inc., Defendant - Appellee.

No. 95-5253

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

1997 U.S. App. LEXIS 5355

March 21, 1997, Filed

NOTICE: [*1] RULES OF THE TENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported in Table Case Format at: *108 F.3d 1388, 1997 U.S. App. LEXIS 9761.*

PRIOR HISTORY: (Northern District of Oklahoma). (D.C. No. CV-94-184-W).

DISPOSITION: AFFIRMED.

LexisNexis(R) Headnotes

COUNSEL: For CAROLE POTTS, JAMES POTTS, Plaintiffs - Appellants: Robert A. Flynn, Frasier & Frasier, Tulsa, OK.

For SAM'S WHOLESALE CLUB, Wal-Mart Stores, Inc. dba Sam's Wholesale Club, Defendant - Appellee: Joseph A. Sharp, Karen M. Grundy, Catherine Louise Campbell, Best, Sharp, Holden, Sheridan, Best & Sullivan, Tulsa, OK.

JUDGES: Before ANDERSON, LUCERO and MURPHY, Circuit Judges.

OPINIONBY: CARLOS F. LUCERO

OPINION:

ORDER AND JUDGMENT *

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Carole and James Potts sued Sam's [*2] Wholesale Club for damages arising from injuries Carole suffered when she fell at a Sam's Club store. The parties agreed to proceed before a magistrate, and after a trial the jury returned a verdict for the defendant. Plaintiffs appeal, asserting that the trial court erred in instructing the jury, in allowing the defendant to present testimony of two witnesses via deposition, and in excluding defendant's expert witness's report, which conflicted with his later report and testimony he presented at trial. We conclude that the magistrate acted properly in all respects, and affirm.

A brief statement of the facts is sufficient for our analysis. While visiting a Sam's Club store, Carole Potts allegedly slipped on residue of automobile tires, injuring herself sufficiently to require several surgeries. Her claimed damages included medical bills, pain and suffering, and emotional distress. Her husband's claim is predicated on loss of consortium. Defendant raised several factual issues to counter plaintiffs' claims. In particular, it contended that Mrs. Potts's injuries were caused by medical problems unrelated to her fall at Sam's Club. Although not made part of the record, the jury

Exhibit 3

apparently [*3] returned a general verdict in favor of defendant.

Plaintiffs' first claimed error involves Jury Instruction No. 8, which addresses the consideration to be given the opinion of medical experts. In particular, plaintiffs take issue with the language in the instruction that "the opinions of medical experts are to be based on a reasonable degree of medical certainty. However, absolute certainty is not required." Appellants' App. at 217. This instruction was added after closing arguments, in response to remarks by plaintiffs' counsel, who stated in closing argument that "there were questions asked about certainty, a medical certainty. Now, I represent to you that a medical certainty is not what you are here to decide. You're here to decide what's more probable than not." Appellants' App. at 145; see also id. at 149 ("Anytime anyone asked a question of certainty, then you should remember that the proper question should be, 'what's more probable than not.'"). Plaintiffs challenge both the propriety of the instruction and the timing of its addition.

The question of whether this jury instruction was erroneous is one of state law, but federal law determines whether the instruction in question [*4] affected the instructions as a whole and requires reversal of the verdict. *Dillard & Sons v. Burnup & Sims, 51 F.3d 910, 915 (10th Cir. 1995).* Whether a jury was properly instructed is a question we review de novo. *United States v. Lee, 54 F.3d 1534, 1536 (10th Cir. 1995).* "We consider all the jury heard and, from [the] standpoint of the jury, decide not whether the charge was faultless in every particular but whether the jury was misled in any way and whether it had understanding of the issues and its duty to determine these issues." *United States v. Voss, 82 F.3d 1521, 1529* (10th Cir.) (quotations omitted), cert. denied, *117 S. Ct. 226 (1996).* We conclude that the jury instruction was not erroneous.

Requiring medical opinions regarding causation to be made to a "reasonable degree of medical certainty" is a well-established evidentiary standard, and Oklahoma appears to follow other states that have adopted the general standard. aSee *McKellips v. Saint Francis Hosp., Inc.,741 P.2d 467, 472 (Okla. 1987)* (quoting cases from other jurisdictions); cf. *New York Life Ins. Co. v. Kramer, 324 P.2d 270, 272, 273 (Okla. 1957)* (crediting medical opinion made to [*5] a "reasonable degree of medical certainty"). Plaintiffs contend that McKellips is limited to medical malpractice cases, but this assertion is belied by the language of McKellips itself: "In Oklahoma, the general principles of proof of causation in a medical malpractice action are the same as in an ordinary negligence case." *741 P.2d at 471.* Moreover, plaintiffs assert that McKellips has been limited by the recent case of *Hardy v. Southwestern Bell Telephone Co., 910 P.2d 1024 (Okla. 1996).* Hardy, however, reaffirms McKellips, which, in addition to stating the general rule of causation, established an exception for cases involving medical malpractice causing lost chance of survival to the decedent; the McKellips exception would allow plaintiffs to recover for medical malpractice creating an increased risk of death even if experts could not opine that the malpractice was the cause of death. *McKellips, 741 P.2d at 474.* Hardy limited the McKellips exception to cases involving medical malpractice creating a lost chance of survival. *Hardy, 910 P.2d at 1030.* The court's jury instructions in this case properly stated the applicable law involving [*6] opinions of medical experts.

We also find no error in the court's addition of the jury instruction after closing argument. We review the trial court's decision to accept a proffered instruction for an abuse of discretion. *Lyon Dev. Co. v. Business Men's Assurance Co. Of Am., 76 F.3d 1118, 1124 (10th Cir. 1996).* Moreover, it is clear from the rules of procedure that the trial court retains considerable discretion on the timing of the jury instructions. See *Fed. R. Civ. P. 51* ("The court, at its election, may instruct the jury before or after argument, or both."). Given plaintiffs' attorney's closing argument, the instruction became necessary to avoid confusion. His remarks could be construed as allowing the jury to consider any medical opinion, regardless whether it was made to a reasonable degree of medical certainty. The added instruction was offered to cure any confusion plaintiffs' counsel may have created in closing argument. The magistrate did not abuse his discretion in adding the medical opinion instruction after closing argument.

Plaintiffs' second and third issues are even more straightforward. They contend the court improperly permitted defendant to read witness [*7] deposition testimony into evidence without proving the witnesses were unable to appear and without giving plaintiffs adequate notice. We generally review the trial court's decisions regarding witness testimony for an abuse of discretion. See, e.g., *FDIC v. Oldenburg, 34 F.3d 1529, 1556 (10th Cir. 1994)* (reviewing for abuse of discretion trial court's decision on proposed testimony by witness not listed on pretrial order). In this case, both witnesses who testified by deposition were listed in the pretrial order and, contrary to plaintiffs' assertion, the magistrate judge satisfied himself that the witnesses were unavailable upon representations made by defendant's counsel. The federal rules explicitly allow depositions to be used at trial if the witness is unavailable to testify in person. *Fed. R. Civ. P. 32(a)(3).* Under this rule, no notice need be given the opposing party unless the witness is available but "exceptional circumstances" exist to permit the deposition testimony. Compare *Fed. R. Civ.*

P. 32(a)(3)(E) (requiring notice to use deposition testimony in open court if no showing of unavailability). In finding the witnesses to be unavailable, the magistrate accepted **[*8]** the representation of defendant's counsel that the two deposition witnesses were truly unavailable. The magistrate did not abuse his discretion in allowing them to testify by deposition.

Finally, plaintiffs argue that the trial court erred in refusing to admit as an exhibit a report prepared by defendant's medical expert, a report that conflicted with his later report and with his testimony at trial. Both of the expert's reports, as well as his testimony at trial, involved his opinion regarding the sources of Mrs. Potts's injuries. Plaintiffs were allowed to present the medical expert as a witness in their case-in-chief, even though he was not listed in the pretrial order. The court, however, would not allow the earlier report to be presented as an exhibit, treating it as hearsay evidence. Instead, the court permitted plaintiffs to use the document to impeach the expert's opinion as expressed in his later report and his trial testimony.

We review the trial court's exclusion of evidence for an abuse of discretion. *Cartier v. Jackson, 59 F.3d 1046, 1048 (10th Cir. 1995).* We will not disturb the trial court's decision unless we are left with the firm and definite conviction that **[*9]** it made a clear error in judgment or exceeded the bounds of permissible choice under the circumstances. *Moothart v. Bell, 21 F.3d 1499, 1504 (10th Cir. 1994).* Plaintiffs argue that the first report, provided by the expert in preparation for testimony and disclosed pursuant to *Fed. R. Civ. P. 26(a)(2)*, is not hearsay as defined by *Fed. R. Evid. 801*, specifically, Rule 801(d)(1). That rule reads: "A statement is not hearsay if . . . the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." *Fed. R. Evid. 801(d).* While the earlier report may indeed have been inconsistent with the expert's later opinion, plaintiffs do not assert that the document contains a statement "given under oath . . . at a trial, hearing, or other proceeding, or in a deposition." The magistrate judge was therefore correct to conclude that the report was hearsay. Given that the expert testified extensively at trial as to his opinion, including the reasons his opinion changed **[*10]** from his first report, the judge acted within his discretion in refusing to admit the report as an exhibit.

AFFIRMED.

ENTERED FOR THE COURT

Carlos F. Lucero

Circuit Judge