UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 4:19-cv-10172-KMM

DUANE DOZER,

Plaintiff,

v.

COKA VENTURES, LLC, *et al.*,

Defendants.
_____/

ORDER

THIS CAUSE came before the Court upon Defendants CoKa Ventures, LLC and S/F *Bad Habit's* ("Defendants") Daubert Motion to Strike and Exclude Plaintiff's Expert Witness Testimony. ("Mot.") (ECF No. 47). Plaintiff Duane Dozer ("Plaintiff") filed a Response in Opposition. ("Resp.") (ECF No. 57). Defendants filed a Reply. ("Reply") (ECF No. 67). The Motion is now ripe for review.

I. BACKGROUND

This action arises out of medical conditions Plaintiff experienced while employed by Defendants as a charter boat fisherman and captain of the S/F *Bad Habit*. *See generally* ("Am. Compl.") (ECF No. 23). First, Plaintiff alleges that Defendants failed to provide him "maintenance and cure" for a gallbladder surgery he had in August 2018, and a back injury he sustained while onboard the S/F *Bad Habit* in July 2019. *Id.* ¶¶ 65–73. Second, Plaintiff alleges that Defendants failed to promptly, properly, and adequately obtain medical care to treat his back injury—resulting in permanent damage, in violation of the Jones Act, 46 U.S.C. § 30104. *Id.* ¶¶ 74–78. Third, Plaintiff alleges that Defendants wrongfully terminated his employment in retaliation for exercising his right to seek maintenance and cure. *Id.* ¶¶ 79–82.

Trial in this matter is set to commence the two-week trial period beginning July 19, 2021. Plaintiff identified the following expert witnesses as part of his initial disclosures: Dr. Criag H. Lichtblau, Shaun Aulita, Dr. Bernard F. Pettingill, Stuart I. Platt, Dr. Juan Uribe Villa ("Dr. Uribe"), and Dr. Fabio Roberti ("Dr. Roberti") (ECF Nos. 32–35, 37, 39). Now, Defendants move to strike and exclude Dr. Uribe and Dr. Roberti from testifying in this matter. *See generally* Mot.

II. LEGAL STANDARD

Rule 702 of the Federal Rules of Evidence provides that:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. "Pursuant to Rule of Evidence 702, as well as *Daubert* and its progeny, 'district courts must act as gatekeepers, admitting expert testimony only if it is both reliable and relevant.'" *Finestone v. Fla. Power & Light Co.*, 272 F. App'x 761, 767 (11th Cir. 2008) (quoting *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1291 (11th Cir. 2005)) (alterations adopted). In this gatekeeping role, "district courts must engage in a rigorous inquiry to determine whether":

> (1) [T]he expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

Rink, 400 F.3d at 1291–92 (quoting *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 562 (11th Cir. 1998)) (internal quotation marks omitted). "The party offering the expert has the burden of satisfying each of these three elements by a preponderance of the evidence." *Id.* at 1292 (citing *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1306 (11th Cir. 1999)).

> Rule 701 of the Federal Rules of Evidence provides that:
>
> > If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid. 701. "Subsection (c) was added in 2000, in an attempt to rein in the admission of expert testimony under the guise of lay opinion." *United States v. Henderson*, 409 F.3d 1293, 1300 (11th Cir. 2005) (citing Fed. R. Evid. 701, Advisory Committee's note to 2000 amendment). "[T]he ability to answer hypothetical questions is 'the essential difference' between expert and lay witnesses." *Id.* (quoting *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1202 n.16 (3d Cir. 1995)) (alteration adopted) (finding the treating physician's diagnosis of an injury was permissible lay testimony and the statement about the cause of the injury was a "hypothesis").

III. DISCUSSION

Defendants move to exclude the testimony and opinions of Dr. Uribe and Dr. Roberti because they fail to satisfy the requirements under *Daubert* and the Federal Rules of Evidence. Mot. at 11. Specifically, Defendants argue that Plaintiff should be precluded from relying on Dr. Uribe and Dr. Roberti's testimony because (1) their causation opinions are unsupported by empirical scientific data, thereby rendering those opinions inadmissible as speculative, unscientific, and anecdotal; and (2) their opinions are based on intuition, common sense, and general experience, and thus will not assist the trier of fact. *Id.* at 12–19. Plaintiff argues that the testimony of Dr. Uribe and Dr. Roberti is admissible as lay opinion testimony under Rule 701 of the Federal Rules of Evidence, and thus no *Daubert* analysis is required. Resp. at 4–16. Specifically, Plaintiff argues that—unlike another doctor who was retained by Plaintiff's counsel as a medical expert to provide medical opinions for litigation purposes—Dr. Uribe and Dr. Roberti

are Plaintiff's treating physicians and their testimony is admissible as lay opinion testimony because it is based on their treatment of him. *Id.* Plaintiff argues that, because Dr. Uribe and Dr. Roberti "have not been given any hypothetical questions by Plaintiff's counsel to answer," they "have not crossed the line from lay to expert witnesses requiring compliance with Rule 702 and the strictures of *Daubert*." *Id.* at 6. According to Plaintiff, a treating physician is not an expert witness, and thus Rule 702 and *Daubert* are inapplicable, if the physician formed his causation opinion in connection with the patient's treatment and prior to the onset of litigation. *See id.* at 8–9.

"The testimony of treating physicians presents special evidentiary problems that require great care and circumspection by the trial court." *Williams v. Mast Biosurgery USA, Inc.*, 644 F.3d 1312, 1316 (11th Cir. 2011). "[A] physician may offer lay *opinion* testimony, consistent with Rule 701, when the opinion is 'based on his experience as a physician and is clearly helpful to an understanding of his decision making process in the situation.'" *Id.* at 1317 (quoting *Weese v. Schukman*, 98 F.3d 542, 550 (10th Cir. 1996)) (alteration adopted). "[W]hen a treating physician's testimony is based on a hypothesis, not the experience of treating the patient, it crosses the line from lay to expert testimony, and it must comply with the requirements of Rule 702 and the strictures of *Daubert*." *Id.* at 1317–18; *see also Wilson v. Taser Intern., Inc.*, 303 F. App'x 708, 712–13 (characterizing statements related to the *diagnosis* of an injury as permissible lay testimony not requiring *Daubert* analysis, and statements related to the *cause* of the injury as a hypothesis requiring *Daubert* analysis).

Here, Plaintiff's expert disclosures inform the Court that Dr. Uribe "has expert opinions that Plaintiff will submitted [sic] at trial pursuant to Federal Rules of Evidence 702, 703 or 705." (ECF No. 37) at 1. Plaintiff identifies that, in addition to discussing Plaintiff's treatment, Dr. Uribe

opines Plaintiff "has chronic neuropathy involving the right L4 and L5 nerve roots *likely associated to* delay in treatment for a herniated disc." *Id.* at 2 (emphasis added). Further, Dr. Uribe will testify at trial that "the employer's and insurance company's failure to timely provide surgery to [Plaintiff] *likely caused* his right foot drop." *Id.* (emphasis added). Similarly, Plaintiff's expert disclosures inform the Court that "Dr. Roberti will provide opinion testimony about [Plaintiff's] work-related back injury, the urgency of performing surgery to decompress [Plaintiff's] right L5 nerve to provide him the best chance for a meaningful recovery, and *how the delay in conducting prompt surgery will cause a suboptimal result*." (ECF No. 39) at 2 (emphasis added).

The causation issue in this case rests on whether Defendants' delay in securing payment to allow Plaintiff to proceed with surgery caused Plaintiff further injury—*i.e.*, a suboptimal surgical outcome. Plaintiff very clearly classified Dr. Uribe and Dr. Roberti as expert witnesses and identified their relevant testimony in this matter. *See* (ECF Nos. 37, 39). That testimony includes Dr. Uribe and Dr. Roberti's opinions as to causation, which are hypothetical in nature and require scrutiny under *Daubert*. *See Wilson*, 303 F. App'x at 712–13; *see also McDowell v. Brown*, 392 F.3d 1283, 1299 (11th Cir. 2004) (affirming the trial court's determination that "the earlier, the better" theory of causation—that a doctor based "on the common sense and 'universal' axiom that expedited treatment is preferable to delayed treatment"—"lacked testing, peer review, a potential error rate, and general acceptance"). Plaintiff does not refute Defendants' contention that Dr. Uribe and Dr. Roberti cannot satisfy Rule 702 and *Daubert* analysis because their medical opinions "are not supported by established medical science and are anecdotal in nature," *see* Mot. at 4. *See generally* Resp.

Left with only the potential admission of the testimony under Rule 701, the Court finds that the testimony of Dr. Uribe and Dr. Roberti must be limited in nature to ensure that it does not cross the line from lay to expert testimony. Accordingly, Dr. Uribe and Dr. Roberti's testimony at trial will be limited to their direct treatment of Plaintiff. Dr. Uribe and Dr. Roberti, as non-experts, may not testify as to their opinions on causation in this matter. *See Williams*, 644 F.3d at 1317 ("[A] physician may offer lay *opinion* testimony, consistent with Rule 701, when the opinion is 'based on his experience as a physician and is clearly helpful to an understanding of his decision making process in the situation.'") (quoting *Weese*, 98 F.3d at 50) (alteration adopted).

IV. CONCLUSION

UPON CONSIDERATION of the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUGED that Defendants' Motion (ECF No. 47) is GRANTED IN PART and DENIED IN PART. It is further ORDERED that the testimony of Dr. Uribe and Dr. Roberti shall be limited in nature and shall not include opinions on causation as discussed herein.

DONE AND ORDERED in Chambers at Miami, Florida, this 27th day of May, 2021.

K. MICHAEL MOORE
CHIEF UNITED STATES DISTRICT JUDGE

c: All counsel of record