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United States District Court,
W.D. Texas, Austin Division.

NICHOLAS WAYNE RHODES, Plaintiff
v.
NOVA TRANSPORT
LLC et al., Defendants

No. 1:21-CV-191-DAE
|
Filed 11/08/2022

## ORDER

DUSTIN M. HOWELL UNITED STATES MAGISTRATGE JUDGE

***1** Before the Court is Plaintiff's Motion to Exclude the Expert Opinions and Testimony of Paul Marcus Murphy, CPPM, Dkt. 41, along with all associated responses and replies.

## I. STANDARD

Federal Rule of Evidence 702 sets the standard the admissibility of expert testimony. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 597-98 (1993). Rule 702 provides:

> A witness who is qualified as an expert by knowledge, 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. Under *Daubert*, a trial court acts as a "gatekeeper," making a "preliminary assessment of whether the reasoning or methodology properly can be applied to the facts in issue." 509 U.S. at 592-93; *see also Kumho Tire v. Carmichael*, 526 U.S. 137, 147 (1999); *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 243-44 (5th Cir. 2002). *Daubert* and its principles apply to both scientific and non-scientific expert testimony. *Kumho Tire*, 526 U.S. at 147. Experts need not be highly qualified to testify, and differences in expertise go to the weight of the testimony, rather than admissibility. *Huss v. Gayden*, 571 F.3d 442, 452 (5th Cir. 2009). Nonetheless, courts need not admit testimony that is based purely on the unsupported assertions of an expert. *Gen. Elec. Co. v. Joinder*, 522 U.S. 136, 146 (1997).

In addition to being qualified, an expert's methodology for developing the basis of his or her opinion must be reliable. *Daubert*, 509 U.S. at 592-93. "The expert's assurances that he [or she] has utilized generally accepted scientific methodology is insufficient." *Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 276 (5th

  

Cir. 1998). Even if the expert is qualified and the basis of his or her opinion is reliable, the underlying methodology must have also been correctly applied to the case's particular facts in order for the expert's testimony to be relevant. *Daubert*, 509 U.S. at 593; *Knight v. Kirby Inland Marine Inc.*, 482 F.3d 347, 352 (5th Cir. 2007). The party proffering expert testimony has the burden of establishing by a preponderance of the evidence that the challenged expert testimony is admissible. Fed. R. Evid. 104(a). The proponent does not have to demonstrate that the testimony is correct, only that the expert is qualified and that the testimony is relevant and reliable. *Moore*, 151 F.3d at 276. Pursuant to Rule 403, the Court may also exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Fed. R. Evid. 403.

## II. ANALYSIS

***2** This case involves a motor vehicle collision. Defendants Nova Transport, LLC and Everardo Pichardo are being sued by Plaintiff Nicholas Rhodes for injuries he sustained on December 3, 2019, when the Peterbilt truck driven by Pichardo collided with Rhodes' pickup while both were driving on IH-35. Rhodes alleges an injury to his cervical spine as a result of the accident and alleges he has required surgical intervention.

Defendants have named Paul Marcus Murphy to testify as an expert in this case on the issue of the reasonableness of Plaintiff Rhodes' medical bills and to controvert billing affidavits. Rhodes moves to exclude Murphy asserting: (1) he is not qualified to give his opinion on the reasonableness of Rhodes' medical bills; (2) his opinions are not reliable; (3) his opinions are not relevant; (4) his opinions are barred by the collateral source rule; and (5) his opinions are unfairly prejudicial.

### A. Qualifications

Defendants designated Murphy on April 8, 2022, to offer opinions that Plaintiff's medical bills are excessive and unreasonable. Dkt. 41-1, at 1-2. Murphy holds a Bachelor of Business Administration in Finance from the University of Houston, which he earned in 1978. Dkt. 41-2. Murphy is a "Practice Administrator" for John Obermiller, M.D., P.A. *Id.* Murphy submitted an expert report entitled "Controverting Affidavit of Paul Marcus Murphy to Cost of Services of Nicholas Rhodes." Dkt. 41-3. Rhodes moves to exclude testimony from Murphy, arguing Murphy is not qualified to give the opinions contained within his report because he: (1) is not a medical doctor; (2) is not a physician assistant; (3) is not a nurse practitioner; (4) is not a nurse; (5) has never treated patients; (6) does not have a degree in medical coding; (7) is not certified in medical coding; and (8) is not certified in medical billing. Dkt. 41, at 5.

Rhodes argues that Murphy should be excluded because Murphy's experience in medical billing is centered on collecting payments from insurance companies instead of setting the amounts physicians bill to patients. Rhodes further notes that Murphy was excluded in another personal injury case in which he

  

was hired to dispute the reasonableness of the plaintiff's medical bills: *Cantu v. Wayne Wilkins Trucking, LLC*, No. 5:19-CV-1067-XR, 2020 WL 5948267 (W.D. Tex. Oct. 7, 2020). In *Cantu*, the Court found that Murphy's "experience in helping medical providers 'get paid' " required the exclusion of his testimony because "there is a distinction between what a medical provider can charge a patient and what the medical provider will be paid." 2020 WL 5948267, at *4. Thus, in *Cantu*, the Court concluded that Murphy was not qualified to testified on the reasonableness of a medical charge. Rhodes asserts that the same reasoning applies here.

Defendants respond that Murphy has testified on the issue of medical billing in over 75 lawsuits. Defendants contend that Murphy's opinions are based on, among other things, what medical providers are *actually paid* for the services they provide, and that under Texas law, the amount medical providers are paid from "public payers" is "relevant to whether the charges to [the patient] were reasonable." Dkt. 42, at 2. Defendants cite various cases in support. *Id.* at 11-12 (citing *In re N. Cypress Med. Ctr. Operating Co., Ltd.*, 559 S.W.3d 128, 137 (Tex. 2018); *In re K & L Auto Crushers, LLC*, 627 S.W.3d 239, 244 (Tex. 2021)).

***3** In *North Cypress*, the Texas Supreme Court held that negotiated rates a medical provider charged to patients' private insurers and public-entity payors were relevant and discoverable on the issue of the reasonableness of the "full" rates the provider charged to an uninsured patient for the same services. 559 S.W.3d at 129. In *K&L*, the Texas Supreme Court held that *North Cypress*'s reasoning—which was applied in the context of a dispute over a hospital lien—extended to the personal-injury dispute in that case. 627 S.W.3d at 244. In this case, Defendants offer Murphy's testimony on the issue on the reasonableness of the provider's rates. Murphy explained in his deposition that he is a Certified Physician Practice Manager, and that as such he has extensive experience in that capacity setting medical costs for various providers across different modalities of treatment. Dkt. 42-6, at 5. (responding "yes" to the questions" "Do you have any experience setting charges at a pain management clinic in Texas?" and stating "I became their practice administrator for each solo practice, and I was the one setting the bill charges for the procedures that these doctors would provide.").

The undersigned thus finds that unlike in *Cantu*, the record before the undersigned supports that Murphy has experience setting medical rates and therefore is qualified to testify as to the reasonableness of the rates charged by Rhodes' medical providers. *See Gunn v. McCoy*, 554 S.W.3d 645, 673 (Tex. 2018) (noting that, given the complexity of modern health care costs and the lack of transparency in health care pricing, "it is not uncommon or surprising that a given medical provider may have no basis for knowing what is a 'reasonable' fee for a specific service" and concluding that insurance agents who have access to national and regional databases on which they can compare prices "are generally well-suited to determine the reasonableness of medical expenses."); *In re Allstate Indem. Co.*, 622 S.W.3d 870, 877-78 (Tex. 2021) (holding a nurse with two decades of experience in medical billing and coding,

  

along with experience using a nationwide database compiling the amounts charged for the same medical services or devices identified in the initial affidavits through standardized codes used by medical providers across the country was qualified to testify as to the reasonableness of medical charges).

**B. Reliability of Opinion**

Next, Rhodes attacks the reliability of Murphy's opinions. Rhodes argues that Murphy's opinions are based upon the amounts Medicare and Texas Workers Compensation Insurance would have reimbursed his providers if their bills had been paid by those programs and that Murphy incorrectly excludes the amount private insurers would have reimbursed his providers from his analysis. Dkt. 41, at 8. Defendants respond that Murphy's analysis is based upon the amounts charged Rhodes, calculated from CPT billing codes, and comparing those charges to costs and charges for medical services charged in the Medicare locale that includes Bexar County, Texas. Dkt. 42, at 9.

The undersigned finds that Murphy's alleged failure to consider the amounts paid on the same billing codes by private insurers does not render his opinion unreliable. "As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration." *United States v. 14.38 Acres of Land, More or Less Situated in Leflore County*, 80 F.3d 1074, 1077 (5th Cir. 1996) (quoting *Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 422 (5th Cir. 1987)). Rhodes is free to raise any flaws of Murphy's opinions at trial to inform what weight the jury should place on them. The undersigned declines to exclude Murphy's opinions and testimony based on any purported lack of reliability.

**C. Relevance of Opinions**

Rhodes next argues that Murphy's opinions are not relevant. Rhodes cites *Perez v. Boecken*, SA-19-CV-375XR, 2019 WL 5080392, at *4 (W.D. Tex. 2019), in support. *Perez* stands for the proposition that discovery of billing rates from third-party medical providers to establish that different rates charged to the patient are "reasonable" should be disallowed as not relevant. *See also Lackey v. Dement*, SA-17-CV-00514-FB, 2019 WL 3238896, at *4-5 (W.D. Tex. July 18, 2019); *Rodriguez v. Bryan Truck Line, Inc.*, 2018 WL 7348032, at *3 (W.D. Tex. Sept. 18, 2018) ("To [extend *North Cypress*] would set a troubling precedent where non-party medical providers would be required to produce proprietary information regarding their contractual terms with non-party insurers in any personal injury case where there was a dispute ... regarding how to calculate damages for the plaintiff's future medical care.").

***4** Defendants again respond that under Texas law, the amount medical providers are paid from other providers is relevant to whether the charges to the patient were reasonable. *N. Cypress*, 559 S.W.3d at 137; *In re K & L Auto Crushers*, 627 S.W.3d at 244. Medical bills must be "reasonable" to be recoverable as damages under Texas personal injury law. *See Hamburger v. State Farm Mut. Auto. Ins. Co.*, 361 F.3d 875, 887 (5th Cir. 2004) ("Under Texas law, a claim for past medical expenses must be supported by evidence that such expenses were reasonable and necessary.").

  

The line of cases cited by Rhodes deals with discovery of billing rates propounded to third-party medical providers who assert the discovery is irrelevant, overburdensome, and protected as trade secrets. In this case, that is not what is in issue. For instance, in *In re Interventional Pain Associates, P.A.*, in holding that *North Cypress* should not be extended to third-party medical providers in personal injury cases, the Court noted that "Plaintiff bears the burden of proving the reasonableness of her medical expenses through expert testimony or affidavits, and, as Interventional notes, *Defendants are free to offer their own expert evidence regarding the reasonableness of those expenses*." 510 F. Supp. 3d 448, 452 (W.D. Tex. 2021) (emphasis added). The undersigned finds this line of cases relied upon by Rhodes is inapplicable in the context of a motion to exclude expert testimony. Defendants here should also be allowed to present an expert on the reasonableness of Rhodes' medical expenses. Accordingly, Murphy's testimony as to the reasonableness of Rhodes' medical expenses is relevant. *See In re Allstate*, 622 S.W.3d at 870; *see also, e.g., Zuniga v. Tri-Nat'l, Inc.*, No. SA-20-CV-01417-ESC, 2022 WL 255427, at *2 (W.D. Tex. Jan. 27, 2022) ("In light of the Texas Supreme Court's holdings [in *In re K & L Auto Crushers, In re North Cypress Medical*, and *In re ExxonMobil Corp.*, 635 S.W.3d 631 (Tex. 2021)], the Court overrules any objection to the subpoena based on relevance.").

**D. Collateral Source Rule**

Rhodes next asserts that Murphy's opinions are barred by the collateral source rule. The collateral source rule bars a tortfeasor from reducing his liability by the amount plaintiff recovers from independent sources. *Davis v. Odeco, Inc.*, 18 F.3d 1237, 1243 (5th Cir. 1994). It is a substantive rule of law, as well as an evidentiary rule (disallowing evidence of insurance or other collateral payments that may influence a fact finder). *Id.* Rhodes asserts that Murphy intends to interject evidence of collateral sources, namely, Medicare and Texas Workers Compensation Insurance, to establish the reasonableness of Rhodes' medical bills. Dkt. 41, at 10. However, Murphy's testimony is not that Rhodes received insurance benefits, instead, his testimony only addresses the reasonable charges for the care Rhodes received, drawing on these data points as comparators. The collateral source rule is thus not in issue here, and this argument therefore fails. *See Cornejo v. EMJB, Inc.*, SA-19-CV-01265-ESC, 2021 WL 4526703, at *12 (W.D. Tex. Oct. 4, 2021) (stating "the collateral-source rule is not at issue here. ... Dr. Yates is not attempting to introduce into evidence any information regarding collateral benefits to which either Plaintiff might be entitled. His testimony goes to the question of the reasonableness of Plaintiffs' claimed damages in the first instance.").

**E. Unfairly Prejudicial**

***5** Lastly, Rhodes argues that Murphy's testimony is unfairly prejudicial pursuant to Federal Rule of Evidence 403 because it will lead the jury to believe that his medical bills are being paid by Medicare or some other form of insurance. Dkt. 41, at 11. "[T]he application of Rule 403 must be cautious and sparing. Its major function is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial

  

effect." *U.S. v. Fields*, 483 F.3d 313, 354 (5th Cir. 2007). The undersigned finds Rhodes' argument regarding prejudice to be unfounded. Any potential prejudice created by Murphy's testimony may be addressed through effective cross-examination. *See Daubert*, 509 U.S. at 596 (holding "[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"). And the Rules of Evidence favor admission rather than exclusion. *Young v. Ill. Cent. Gulf R.R. Co.*, 618 F.2d 332, 337 (5th Cir. 1980) ("Trial courts must not lose sight, however, of the liberal nature of the Federal Rules of Evidence. It must be remembered that the federal rules and practice favor the admission of evidence rather than its exclusion if it has any probative value at all."). The undersigned finds that Murphy's opinions should not be excluded.

It is THEREFORE ORDERED that Plaintiff's Motion to Exclude the Expert Opinions and Testimony of Paul Marcus Murphy, CPPM, Dkt. 41 is DENIED. The magistrate referral in this case is ORDERED CANCELED.

**All Citations**

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