IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

CONNELL WEST TRUCKING CO., INC., FIDADELFO JUAREZ, and GUCHARAN SINGH,	§	
Plaintiffs,	§	
v.	§	**CAUSE NO. EP-20-CV-312-KC**
ESTES EXPRESS LINES and CAROLYN DRIGGARS, as the Representative of the Estate of Deborah Regan,	§	
Defendants.	§	

ORDER

On this day, the Court considered Defendant Estes Express Lines' ("Estes") Motion to Exclude or Limit Expert Testimony of Dr. Robert Montgomery ("Motion"), ECF No. 105. For the reasons set forth below, the Motion is **DENIED**.

I. BACKGROUND

This case arises out of a motor vehicle collision. On September 25, 2020, Plaintiffs filed suit in state court in Harris County, Texas. *See* Notice Removal ¶ 1, ECF No. 1. Defendants subsequently removed the case to the United States District Court for the Southern District of Texas. *See id*. And on December 18, 2020, it was transferred to this Court. Order Transfer Case, ECF No. 10. At this stage, the only remaining Plaintiffs are Juarez and Singh, and the only remaining Defendant is Estes. *See* Sept. 6, 2022, Order, ECF No. 108; Oct. 26, 2021, Text Order; July 30, 2021, Final J., ECF No. 45.

The present Motion only pertains to Singh's claims. *See generally* Mot. Among other forms of relief, Singh seeks damages for future medical expenses related to his knee. 2d Am. Compl. ¶ 10.1(b), ECF No. 62; Resp. ¶ 13, ECF No. 109. To that end, on March 23, 2022, Plaintiffs and Estes deposed Dr. Robert Montgomery, Singh's orthopedic surgeon. Dr. Montgomery was questioned about knee surgeries—a replacement and a revision—Singh may need in the future. *See* Resp. Ex. B, ECF No. 109-2. Dr. Montgomery had examined Singh's knee in August 2021, and he evaluated Singh's medical records during the deposition. *See id*. at 7, 10, 13. Based on this examination and evaluation, Dr. Montgomery made three statements in his deposition that are relevant here.

First, Plaintiffs' attorney asked, "[I]f [Mr. Singh] continues to have [pain in his knee] . . . is it your opinion within a reasonable degree of medical probability that Mr. Singh is more likely than not going to have a knee replacement in his lifetime?" *Id*. at 12. Dr. Montgomery responded, "Yeah, in my experience I think that a patient with this type of condition would eventually require a knee replacement because the other non-operative methods of treatment will probably fail." *Id*. When asked how long a knee replacement would last before a revision surgery was necessary, Dr. Montgomery answered eight to twenty years. *Id*. at 12–13.

Second, Plaintiffs' attorney asked, "[I]s it your opinion that Mr. Singh would more likely than not require a total knee replacement in his left knee and a revision at some point in his lifetime?" *Id*. at 14. Dr. Montgomery answered, "Yes." *Id*. Third, Estes's attorney sought to confirm that "[n]ow, at this time," he was "not recommending . . . surgery for Mr. Singh," and Dr. Montgomery responded, "Not at this time. I haven't seen him since his initial visit," over six months prior. Mot. Ex. B 28–29, ECF No. 106. Following up, Estes's attorney asked, "Before you can reach an opinion that you would recommend surgery, you would want him to undergo

additional conservative treatment measures," and Dr. Montgomery answered, "Yes." *Id*. at 29. When asked if he "would also want to ask [Singh] to undergo another MRI" before he recommended surgery, Dr. Montgomery responded, "Sometimes." *Id*.

On September 2, 2022, Estes filed the instant Motion, asking the Court to exclude or limit Dr. Montgomery' testimony. Mot. ¶ 2. Estes argues that his testimony should be excluded or limited because it is speculative and because it lacks a foundation. *See* Mot. ¶ 12; Reply ¶ 10, ECF No. 110. On September 9, Plaintiffs filed their Response, and on September 16, Estes filed its Reply.

II. DISCUSSION

A. Standard

Federal Rule of Evidence 702 governs the admissibility of expert testimony in the federal court system. In its entirety, the rule reads:

> 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.

Fundamentally, the rule instructs that an expert witness must be qualified as an expert in the sphere relevant to their testimony and that they must have applied their methodology reliably, using relevant data. *See* Fed. R. Evid. 702; *Pedraza v. Jones*, 71 F.3d 194, 197 (5th Cir. 1995). It also requires that they ground their testimony in an "adequate foundation." *Brown v. Parker-Hannifin Corp.*, 919 F.2d 308, 311 (5th Cir. 1990).

To ensure evidence is relevant, reliable, and has a foundation, the Supreme Court in *Daubert v. Merrell Pharm. Inc.*, 509 U.S. 579 (1993), directed district courts to act as

gatekeepers. *Id.* at 595; *Carlson v. Bioremedi Therapeutic Sys., Inc.*, 822 F.3d 194, 199 (5th Cir. 2016). The party offering the expert witness must prove by a preponderance of the evidence that the proffered testimony satisfies the requirements of Rule 702. *See Mathis v. Exxon Corp.*, 302 F.3d 448, 459–60 (5th Cir. 2002).

B. Analysis

Estes does not challenge Dr. Montgomery's qualifications, only the relevance, reliability, and foundation of his testimony. *See* Mot. 2; Resp. 2; Reply 2.

1. Dr. Montgomery's testimony is relevant and reliable.

Estes argues that Dr. Montgomery's testimony is speculative—namely, irrelevant and unreliable—because he has not yet made a surgical recommendation and would want to exhaust more conservative treatments before doing so. Mot. ¶¶ 9–16. It also argues his testimony is speculative because he opined that Singh would need surgery "eventually," only at "some point in his lifetime." *Id.* ¶ 10; Reply ¶¶ 1–5.

a. State substantive law bears on admissibility.

The Federal Rules of Evidence define relevance clearly, as evidence that "has any tendency to make a fact more or less probable . . . ." Fed. R. Evid. 401. But "the rules fail to address reliability with the same regard for precision." *Vigil v. Michelin N. Am., Inc.*, No. EP-05-CV-001-KC, 2007 WL 2778233, at *2 (W.D. Tex. Aug. 23, 2007) (citing *Mathis*, 302 F.3d at 459–60). To aid trial courts in determining the reliability of expert testimony, the *Daubert* Court announced a non-exhaustive list of factors for trial courts to consider—for instance, whether a theory can be tested or has been subjected to peer review. *Daubert*, 509 U.S. at 592–94.

But *Daubert's* factors should only be considered when "appropriate." *Black v. Food Lion, Inc.*, 171 F.3d 308, 312 (5th Cir. 1999). After determining whether one or more *Daubert*

factors apply, "the court then can consider whether other factors, not mentioned in *Daubert*, are relevant to the case at hand." *Id.* "[W]hether *Daubert's* suggested [factors] apply to any given testimony depends on the nature of the issue at hand, the witness's particular expertise, and the subject of the testimony." *Seatrax, Inc. v. Sonbeck Int'l, Inc.*, 200 F.3d 358, 372 (5th Cir. 2000). On questions concerning future medical expenses, many courts have not considered the *Daubert* factors at all. *See, e.g.*, *Robin v. Weeks Marine, Inc.*, No. CV 17-1539, 2018 WL 10776315, at *2 (E.D. La. Nov. 19, 2018); *Booker v. Moore*, No. 5:08-CV-309, 2010 WL 2426013, at *2, 4 (S.D. Miss. June 10, 2010).

Instead, courts regularly determine reliability in these circumstances by looking to state substantive law. *See, e.g.*, *Robin*, 2018 WL 10776315, at *2; *Booker*, 2010 WL 2426013, at *2, 4. To be sure, "[t]he admissibility of evidence is a procedural issue governed by federal law." *Wells v. SmithKline Beecham Corp.*, No. A-06-CA-126-LY, 2009 WL 564303, at *7 (W.D. Tex. Feb. 18, 2009) (citing *Black*, 171 F.3d at 310, 314). But admissibility "is governed in part by whether the testimony is relevant to the plaintiff's burden of proof under [state] substantive law, and testimony that will not . . . advanc[e] an element of the plaintiff's case should be excluded." *Cano v. Everest Min. Corp.*, 362 F. Supp. 2d 814, 822 (W.D. Tex. 2005) (first citing *Daubert v. Merrell Dow Pharm. Inc.*, 43 F.3d 1311, 1320 (9th Cir. 1995); and then citing *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 884 n.2 (10th Cir. 2005)).

Looking to state law is sensible: "[i]f evidence is admissible under federal procedural law but fails to [satisfy state] substantive law, [a p]laintiff[']s victory on the admissibility question would be a hollow one." *Id.* at 821. Indeed, the federal procedural standard and Texas's substantive standard serve the same purpose. The factors articulated by the *Daubert* Court are meant to ensure that an expert's opinion is grounded in more than "unsupported speculation."

Curtis v. M & S Petroleum, Inc., 174 F.3d 661, 668 (5th Cir. 1999) (citing *Daubert*, 509 U.S. at 590). Likewise, the standard employed by Texas courts dictates that "[f]uture medical expenses cannot be recovered based on pure speculation." *Koenig v. Beekmans*, No. 5:15-CV-0822-OLG, 2017 WL 7732809, at *2 (W.D. Tex. Mar. 23, 2017).

b. Testimony is not speculative when it reflects state substantive law.

Accordingly, federal courts have held an expert's testimony on future medical expenses is not speculative when it echoes the applicable state substantive standard for recovering damages. *See, e.g.*, *Robin*, 2018 WL 10776315, at *2; *Booker*, 2010 WL 2426013, at *2, 4. For instance, in *Robin*, the relevant state standard was preponderance of the evidence. 2018 WL 10776315, at *2 n.15 (citing *Boudreaux v. Ace Am. Ins. Co.*, No. CIV.A. 11-1213, 2013 WL 1288633, at *3 (E.D. La. Mar. 26, 2013)). And in an affidavit, a doctor stated that "it is more probable than not that patients[ ] who undergo similar surgeries like [the plaintiff] will undergo a second surgery within 15 to 20 years of the first surgery or earlier." *Id.* at *2. Comparing the state's preponderance of the evidence standard to the doctor's "more probable than not" assessment, the court held that the testimony was not speculative. *Id.*

Expert testimony is not necessarily speculative even when it concerns medical expenses far in the future. This was true in *Robin*, where the doctor opined that the plaintiff would probably need surgery in a decade or two. *See id.* This was also true in *Booker*, where a doctor's statement was not speculative, even though he anticipated that "[the plaintiff] will need [medical treatment] every ten years [ ] over the rest of his life." 2010 WL 2426013, at *4.

Nor is testimony speculative when it concerns expenses that will occur at an indeterminate time in the future—or may never occur at all—because the expenses hinge on the plaintiff's medical state. In *Mitchell v. Ace Am. Ins. Co.*, No. CV 15-15, 2017 WL 6211035

(E.D. La. Apr. 24, 2017), for example, the defendants argued that two doctors' testimony was inadmissible because the doctors said surgery was unnecessary "unless and until [the plaintiff] loses his ability to ambulate." *Id.* at *2. Relying on this testimony, they contended that "there is no indication that [the plaintiff] . . . will ever have . . . surgery."[1] *Id.* The court rejected their argument: "Although [the plaintiff's] doctors do not recommend surgery at this time, his condition could deteriorate to the point where he would require the [ ] surgery." *Id.* As a result, the testimony was admissible. *Id.*

c. Dr. Montgomery's testimony reflects Texas substantive law.

In this case, Texas law bears on the reliability of Dr. Montgomery's testimony. And "[u]nder Texas law, recovery for future medical expenses requires a showing that there is a reasonable probability that such medical expenses will be incurred in the future." *Koenig*, 2017 WL 7732809, at *2 (citing *Columbia Med. Ctr. of Las Colinas v. Bush*, 122 S.W.3d 835, 862–63 (Tex. App. 2003)). A reasonable probability generally means a probability greater than fifty percent. *See Kovaly v. Wal-Mart Stores Texas, LLC*, 157 F. Supp. 3d 666, 672 (S.D. Tex. 2016).

Dr. Montgomery's testimony mirrored this standard when he affirmed that "within a reasonable degree of medical probability" Singh would "more likely than not" need surgery because other treatment would "probably" fail. Resp. Ex. B 12. The resemblance between his testimony and Texas's standard weighs heavily in favor of its admissibility. *See Cano*, 362 F. Supp. 2d at 822; *Robin*, 2018 WL 10776315, at *1.

That conclusion is not undermined by Dr. Montgomery's opinion that Singh will only need replacement surgery "eventually," at "some point in his lifetime," and only if he exhausts other treatment. *See* Mot. ¶ 10. In that sense, Dr. Montgomery's testimony resembles the

[1] Though they lodged their argument under Federal Rule of Evidence 401, *Daubert* employs 401's standard. *Daubert*, 509 U.S. at 587.

testimony in *Mitchell*, which was admissible even though the plaintiff needed surgery at an indeterminate point and only if his condition deteriorated. *See* 2017 WL 6211035, at *2. Nor is this conclusion undermined by Dr. Montgomery's opinion that Singh may not need a revision surgery for decades. On that point, his testimony resembles the testimony in *Booker*, which was admissible even though the plaintiff needed treatment every decade over the course of his whole life. *See* 2010 WL 2426013, at *4. Like the doctors' testimony in *Mitchell* and *Booker*, Dr. Montgomery's testimony here is not too speculative to be admissible.

2. Dr. Montgomery's testimony has a proper foundation.

Estes also argues that Dr. Montgomery's testimony lacks a foundation because he could not recommend surgery until he examined Singh again. Mot. ¶ 17; Reply ¶¶ 10–13. Estes points out that Dr. Montgomery had not examined Singh in over six months at the time of the deposition. Mot. ¶ 17.

When it comes to the foundation for their testimony, "an expert is permitted wide latitude to offer opinions." *Daubert*, 509 U.S. at 592 (citing Fed. R. Evid. 703). "A treating physician is generally qualified to testify about a patient's [ ] treatment . . . including the future course of treatment, so long as the testimony is based on personal knowledge and the doctor's history, treatment and examination of the patient." *Labat v. Rayner*, No. CV 20-447, 2022 WL 1442982, at *3 (E.D. La. May 4, 2022) (quoting *Schlueter v. Ingram Barge Co.*, No. 3:16-CV-02079, 2019 WL 5683371, at *4 (M.D. Tenn. Nov. 1, 2019)). So, "[a]s a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned [to] that opinion rather than its admissibility and should be left for the jury's consideration." *Tripkovich v. Ramirez*, No. CIV. A. 13-6389, 2015 WL 3849392, at *3 (E.D. La. June 22, 2015) (quoting *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987)).

Under this standard, courts exclude a doctor's testimony for want of foundation only when that testimony lacks almost any grounding. In *McNabney v. Lab'y Corp. of Am.*, 153 F. App'x 293 (5th Cir. 2005), for example, the Fifth Circuit affirmed the district court's decision to exclude because the expert had never reviewed the plaintiff's medical history. *Id*. at 295. For similar reasons, the Fifth Circuit in *Viterbo* affirmed the trial court's decision to exclude testimony about whether the defendant's actions caused the plaintiff's medical issues, which included hypertension. 826 F.2d at 423. The testimony lacked foundation because the expert never learned that the plaintiff had a family history of hypertension, because he presented no scientific literature linking hypertension to the defendant's actions, and because he had no experience with the alleged cause of the plaintiff's injuries. *Id*. at 422–23. These cases stand in contrast to *Tripkovich*, where a doctor's testimony had a foundation because he had "extensive experience with similar causes of injury . . . and he performed extensive testing that supported his conclusions." 2015 WL 3849392, at *3.

The foundation for Dr. Montgomery's testimony resembles that in *Tripkovich* rather than that in *McNabney* or *Viterbo*. Just as the doctor in *Tripkovich* had extensive relevant experience, Dr. Montgomery has years of experience treating injuries similar to Singh's. *See* Resp. Ex. B 3–4; Resp. Ex. C 1, ECF No. 109-1. And like the expert in *Tripkovich*, he examined Singh himself, albeit six months before his deposition. Resp. Ex. B 19; *see Tripkovich*, 2015 WL 3849392, at *3. But unlike the expert in *McNabney*, he personally reviewed Singh's medical records. Resp. Ex. B 7, 13; *see McNabney*, 153 F. App'x at 295. Dr. Montgomery's first-hand examination and evaluation formed the basis for his testimony about potential future surgeries. *See, e.g.*, Resp. Ex. B 13. Built on this basis, his testimony has a proper foundation. *See Tripkovich*, 2015 WL 3849392, at *3.

In sum, Dr. Montgomery's testimony is not speculative because it reflects Texas's substantive standard for recovering future medical expenses, and it has an adequate foundation because he examined Singh and reviewed his medical records.

III. CONCLUSION

For the foregoing reasons, the Motion, ECF No. 105, is **DENIED**.

SO ORDERED.

SIGNED this 22nd day of November, 2022.

KATHLEEN CARDONE
UNITED STATES DISTRICT JUDGE