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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Nathan Medcalf, et al.,

10 Plaintiffs,

11 v.

12 Jerry Robert Uzzell, et al.,

13 Defendants.
14

No. CV-20-00997-PHX-ESW

ORDER

15
16 This personal injury action arises out of a motor vehicle accident that occurred on
17 April 30, 2018 in Cochise County, Arizona. Initially filed in the Superior Court of Arizona,
18 Defendants Jerry and Lynnette Uzzell removed the matter to the District Court based on
19 diversity jurisdiction. (Doc. 1).

20 Pending before the Court are Defendants' "Motion to Preclude Testimony of Drew
21 Hunter, M.D. and Request for *Daubert* Hearing" (Doc. 31) and "Motion to Preclude
22 Testimony of Sean Southland, Ph.D., MDAST, and Request for *Daubert* Hearing" (Doc.
23 32). Plaintiff Nathan Medcalf and Tara Koester have filed Responses (Docs. 33, 34), to
24 which Defendants have not replied.

25 Plaintiffs disclosed Drew C. Hunter, M.D. and Sean Southland, Ph.D as witnesses
26 who may testify concerning Plaintiff Koester's medical conditions. (Doc. 33-1 at 21-33).
27 On March 12, 2020, Plaintiff Koester was assessed by Dr. Hunter for an impairment rating.
28 Dr. Drew assigned a 10% whole person impairment rating to Plaintiff Koester. (*Id.* at 31).

1 On October 29, 2019 and November 7, 2019, Plaintiff Koester saw Dr. Southland for a
2 neuro/neuropsych consultation. (*Id.* at 21). Plaintiffs' disclosure statement states that
3 Plaintiffs' treating medical providers "will offer expert testimony but may not be
4 independently retained to provide that expert testimony." (*Id.* at 33).

5 Defendants move to exclude the testimony of Drs. Hunter and Southland on the
6 ground that their opinions are unreliable under the standards set forth in Federal Rule of
7 Evidence 702 and *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 592 (1993). Plaintiffs
8 argue that Drs. Hunter and Southland's "expected testimony in this case is not subject to
9 scrutiny under *Daubert* guidelines, or expert witness requirements dictated in F.R.E. Rule
10 702 or F.R.C.P. Rule 26(b)(4), simply because [they were] not specially retained to provide
11 expert opinions, and [their] testimony and opinions are based on [their] personal
12 observations of Plaintiff in a clinical setting for purposes of medical treatment, and not in
13 anticipation of litigation or trial." (Doc. 33 at 4; Doc. 34 at 3).

14 In 2000, Federal Rule of Evidence 701 was amended. Rule 701 provides:

15 If a witness is not testifying as an expert, testimony in the form
16 of an opinion is limited to one that is:

17 (a) rationally based on the witness's perception;

18 (b) helpful to clearly understanding the witness's testimony or
19 to determining a fact in issue; and

20 (c) not based on scientific, technical, or other specialized
21 knowledge within the scope of Rule 702.

22 The Advisory Committee on the Federal Rules of Evidence explains:

23 Rule 701 has been amended to eliminate the risk that the
24 reliability requirements set forth in Rule 702 will be evaded
25 through the simple expedient of proffering an expert in lay
26 witness clothing. Under the amendment, a witness' testimony
27 must be scrutinized under the rules regulating expert opinion
28 to the extent that the witness is providing testimony based on
scientific, technical, or other specialized knowledge within the
scope of Rule 702. *See generally Asplundh Mfg. Div. v. Benton
Harbor Eng'g*, 57 F.3d 1190 (3d Cir. 1995). By channeling
testimony that is actually expert testimony to Rule 702, the
amendment also ensures that a party will not evade the expert
witness disclosure requirements set forth in Fed. R. Civ. P. 26

1 and Fed. R. Crim. P. 16 by simply calling an expert witness in
2 the guise of a layperson. . . .

3 The amendment does not distinguish between expert and lay
4 witnesses, but rather between expert and lay *testimony*.
5 Certainly it is possible for the same witness to provide both lay
6 and expert testimony in a single case. . . . The amendment
7 makes clear that any part of a witness' testimony that is based
8 upon scientific, technical, or other specialized knowledge
within the scope of Rule 702 is governed by the standards of
Rule 702 and the corresponding disclosure requirements of the
Civil and Criminal Rules.

9 Advisory Committee's Notes to Fed. R. Evid. 701 (2000 Amendments) (emphasis in
10 original).

11 The admissibility of expert testimony is governed by Federal Rule of Evidence 702,
12 which provides:

13 A witness who is qualified as an expert by knowledge, skill,
14 experience, training, or education may testify in the form of an
opinion or otherwise if:

15 (a) the expert's scientific, technical, or other specialized
16 knowledge will help the trier of fact to understand the evidence
or to determine a fact in issue;

17 (b) the testimony is based on sufficient facts or data;

18 (c) the testimony is the product of reliable principles and
19 methods; and

20 (d) the expert has reliably applied the principles and methods
to the facts of the case.

21 The Court has a "gatekeeping responsibility" to ensure that expert testimony has "a reliable
22 basis in the knowledge and experience of [the relevant] discipline." *Kumho Tire Co. Ltd.*
23 *v. Carmichael*, 526 U.S. 137, 149 (1999) (quoting *Daubert v. Merrell Dow Pharm.*, 509
24 U.S. 579, 592 (1993)). The Supreme Court "heavily emphasizes that judges are entitled to
25 broad discretion when discharging their gatekeeping function" related to the admission of
26 expert testimony. *United States v. Hankey*, 203 F.3d 1160, 1168 (9th Cir.
27 2000) (citing *Kumho Tire*, 526 U.S. at 152). "[N]ot only must the trial court be given broad
28 discretion to decide *whether* to admit expert testimony, it 'must have the same kind of

1 latitude in deciding *how* to test an expert’s reliability.” *Id.* (quoting *Kuhmo Tire*, 526 U.S.
2 at 152) (emphasis in original). If expert testimony is challenged, the party proffering the
3 expert testimony must show by a preponderance of the evidence that the expert’s testimony
4 is admissible. *Daubert*, 509 U.S. at 592 n.10.

5 In applying Rule 702, the Ninth Circuit “contemplates a broad conception of expert
6 qualifications.” *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1015 (9th
7 Cir. 2004) (emphasis, internal quotation marks, and citation omitted). “Shaky but
8 admissible evidence is to be attacked by cross examination, contrary evidence, and
9 attention to the burden of proof, not exclusion.” *Primiano v. Cook*, 598 F.3d 558, 564 (9th
10 Cir. 2010) (citing *Daubert*, 509 U.S. at 596). Alternative or opposing opinions or tests do
11 not “preclude the admission of the expert’s testimony—they go to the *weight*, not the
12 admissibility.” *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1231 (9th Cir. 1998) (emphasis
13 in original). Further, “[d]isputes as to the strength of [an expert’s] credentials, faults in his
14 use of [a particular] methodology, or lack of textual authority for his opinion, go to the
15 weight, not the admissibility, of his testimony.” *Id.* (quoting *McCulloch v. H.B. Fuller Co.*,
16 61 F.3d 1038, 1044 (2d Cir. 1995)); *see also Southland Sod Farms v. Stover Seed Co.*, 108
17 F.3d 1134, 1142 (9th Cir. 1997) (fact that expert’s opinions were based on data collected
18 by others was immaterial to determining whether opinions were admissible).

19 In *Daubert*, the Supreme Court enumerated a number of factors to aid the trial court
20 in its gatekeeping role: (i) whether the scientific knowledge can or has been tested; (ii)
21 whether the given theory or technique has been published or subjected to peer review; (iii)
22 the potential or known error rate; and (iv) whether the theory or technique has gained
23 general acceptance in the pertinent field. *Daubert*, 509 U.S. at 592-94. The court may
24 consider any or all of the *Daubert* factors, depending on the “particular circumstances of
25 the particular case at issue.” *Kumho Tire Co.*, 526 U.S. at 150 (“[W]e can neither rule out,
26 nor rule in, for all cases and for all time the applicability of the factors mentioned
27 in *Daubert*.”).

1 “A treating physician’s opinions regarding diagnosis of a medical condition are
2 almost always expert testimony, because diagnosis requires judgment based on scientific,
3 technical, or specialized knowledge in almost every case.” *Peshlakai v. Ruiz*, No. CIV 13-
4 0752 JB/ACT, 2013 WL 6503629, at *17 (D.N.M. Dec. 7, 2013). Therefore, it “clearly is
5 incorrect” to assert that because a witness is a treating physician, not a specially retained
6 expert, the witness’ opinions are not subject to *Daubert*. *Tavilla v. Cephalon Inc.*, No.
7 CV11-0270 PHX DGC, 2012 WL 1190828, at *4 (D. Ariz. Apr. 10, 2012). “[A] treating
8 physician who has not been identified as an expert witness pursuant to Rule 26(a)(2) may
9 not provide testimony beyond the scope of her treatment of plaintiff and [the physician’s]
10 conclusions must fall within the province of a lay witness.” *Parker v. Cent. Kan. Med.*
11 *Ctr.*, 57 F. App’x. 401, 404 (10th Cir. 2003) (internal quotation marks and citations
12 omitted); *see also Turner v. Iowa Fire Equip. Co.*, 229 F.3d 1202, 1207 (8th Cir. 2000)
13 (“[A] treating physician’s expert opinion on causation is subject to the same standards of
14 scientific reliability that govern the expert opinions of physicians hired solely for purposes
15 of litigation.”); *Alsadi v. Intel Corp.*, No. CV-16-03738-PHX-DGC, 2020 WL 4035169, at
16 *14 (D. Ariz. July 17, 2020) (“Plaintiffs are incorrect in their claim that Dr. Garcia can
17 testify about his treatment of Plaintiff without regard to Rule 702. If he expresses opinions
18 formed during the course of treatment, those opinions likely will be based on based on Dr.
19 Garcia’s scientific, technical, or other specialized knowledge and therefore will be subject
20 to the requirements of Rule 702.”) (citing Fed. R. Evid. 701(c), 702); *Witherspoon v.*
21 *Navajo Ref. Co., L.P.*, No. CIV 03-1160 BB/LAM, 2005 WL 5988650, at *1 (D.N.M. June
22 28, 2005) (observing that amended Rule 701 “compels courts to categorize more testimony
23 from treating physicians as subject to expert disclosure requirements and some courts have
24 barred testimony from physicians about their diagnosis and treatment, finding that such
25 opinions are necessarily based on expert knowledge”); *Lamere v. New York State Off. for*
26 *the Aging*, No. 03-CV-0356, 2004 WL 1592669, at *2 (N.D.N.Y. July 14, 2004) (“If the
27 treating physician’s testimony is limited to pure observation, an explanation of treatment
28 notes, etc., then the physician may properly be characterized as a fact witness If,

1 however, testimony is elicited that reasonably may be considered to be opinions based on
2 specialized skill and knowledge that fall within Fed. R. Evid. 702, then the physician may
3 properly be characterized as an expert witness . . .”).

4 The Court concludes that Defendants correctly assert that Drs. Hunter and
5 Southland’s opinions are properly characterized as expert testimony. Proponents of expert
6 testimony “do not have to demonstrate to the judge by a preponderance of the evidence
7 that the assessments of their experts are correct, they only have to demonstrate by a
8 preponderance of the evidence that their opinions are reliable. . . . The evidentiary
9 requirement of reliability is lower than the merits standard of correctness.” Advisory
10 Committee Notes to Fed. R. Evid. 702 (2000 Amendments) (quoting *In Re Paoli R.R. Yard*
11 *PCB Litig.*, F.3d 717, 744 (3rd Cir. 1994)). Plaintiffs have failed make such a showing.
12 For the reasons stated in Defendants’ Motions (Doc. 31, 32), the Court finds that Drs.
13 Hunter and Southland’s opinions do not meet the reliability standards set forth in *Daubert*
14 and Rule 702. Accordingly,

15 **IT IS ORDERED** granting Defendants’ “Motion to Preclude Testimony of Drew
16 Hunter, M.D. and Request for *Daubert* Hearing” (Doc. 31). Dr. Hunter is precluded from
17 offering expert opinions related to Plaintiff Koester’s purported cognitive impairment.

18 **IT IS FURTHER ORDERED** granting Defendants’ “Motion to Preclude
19 Testimony of Sean Southland, Ph.D., MDAST, and Request for *Daubert* Hearing” (Doc.
20 32). Dr. Southland is precluded from offering expert opinions at trial.

21 Dated this 18th day of November, 2021.

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24 Honorable Eileen S. Willett
United States Magistrate Judge
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