IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

AARON MICHAEL ROGERS,	§	
	§	
Plaintiff,	§	**SA-16-CV-01171-FB**
	§	
vs.	§	
	§	
RUSTY HIERHOLZER, KERR COUNTY SHERIFF; SYLVIA FORAKER, KERR COUNTY JAIL ADMINISTRATOR; AND DR. FNU SMITH, KERR COUNTY JAIL DOCTOR;	§ § § § § §	
Defendants.		

ORDER

Before the Court in the above-styled and numbered cause of action is Plaintiff's Motion to Exclude Expert Testimony of David M. Mathis, M.D. [#64]. Also before the Court is Defendant Dr. Glen Smith's Response to Plaintiff's Motion to Exclude Expert Testimony of David M. Mathis, M.D. [#67]. On January 17, 2017, the Honorable Fred Biery referred all pre-trial proceedings in this case to the undersigned for disposition pursuant to Federal Rule of Civil Procedure 72 and Rules CV-72 and 1(c) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas. The undersigned has authority to enter this Order pursuant to 28 U.S.C. § 636(b)(1)(A). For the reasons set forth below, Plaintiff's Motion to Exclude Expert Testimony of David M. Mathis, M.D., is **DENIED.**

I. Factual Background

This case concerns allegations that prison officials were deliberately indifferent to the serious medical needs of Aaron Rogers during his incarceration at Kerr County Detention Center. Plaintiff Aaron Michael Rogers, proceeding *pro se*, originally commenced this action on November 18, 2016 [#1]. The *pro se* complaint asserted claims against Kerry County Sheriff

Rusty Hierholzer, Jail Administrator Sylvania Foraker, and Dr. Glen Smith (collectively, "Defendants") under 42 U.S.C. § 1983, alleging violations of the Eight Amendment's prohibition against cruel and unusual prohibition, as incorporated against the states by the Fourteenth Amendment. In his *pro se* complaint, Rogers requested that the Court appoint an attorney to represent him. Rogers subsequently brought a motion to appoint counsel [#10], which the Court granted on April 4, 2017 [#28]. The Court appointed counsel on April 7, 2017 [#30]. Rogers then filed an amendment complaint on May 16, 2017 [#34].

Rogers is an inmate at the Kerr County Detention Center in Kerrville, Texas. The Amended Complaint alleges a civil rights violation against Defendants. On December 22, 2015, Rogers attempted to commit suicide by putting a friend's gun under his chin and pulling the trigger, causing serious injuries to his face and jaw. (Am. Compl. [#34] at ¶ 13.) Rogers was treated at the San Antonio Military Medical Center (SAMMC), where doctors replaced his jaw with a titanium prosthesis held together by wires. (*Id.*) In February 2016, Rogers returned to SAMMC for a follow-up appointment. (*Id.*) According to the Amended Complaint, this was the last time that Rogers has received any medical care for his injuries. (*Id.* at ¶ 15.)

On October 23, 2016, Rogers was arrested for violating his parole by failing to report to his parole officer and two counts of unlawful possession of a firearm by a felon. (*Id.* at ¶ 16.) Rogers was held at the Kerr County Detention Center. (*Id.*) While incarcerated at Kerr County Jail, Rogers asked for medical attention to repair the wires holding together his titanium prosthesis as they had loosened and were causing him "excoriating pain." (*Id.* at ¶ 17.) Rogers also informed prison staff that he was in desperate need of a bone graft. (*Id.*) Rogers claims that he did not receive adequate pain treatment and was denied a bone graft. (*Id.*) Rogers also claims that his suicide attempt caused a foot drop, which made it necessary for him to wear a brace on

his ankle and foot to hold his foot in a normal position, and that his Ankle Foot Orthosis brace was taken from him by prison staff. (*Id.* at ¶ 18.) After his brace was confiscated, Rogers fell in the shower area, which caused a piece of bone to fall out of his jaw. (*Id.*) Rogers insists that he received no treatment for this "medical emergency." (*Id.*) Having re-injured his jaw, Rogers "experienced constant pain and the inability to fully move and operate the jaw." (*Id.* at ¶ 19.)

Dr. Glenn Smith was employed by Kerr County Jail to treat inmates. The Amended Complaint states that although Dr. Smith had been made aware of Rogers's medical situation and his repeated requests for medical attention, Dr. Smith never visited, examined, or provided Rogers with medical care. (*Id.* at ¶ 20.) On November 2, 2016, Rogers submitted a healthcare request in which he requested access to hydrocodone, which had been previously prescribed to him, to alleviate his pain. (*Id.* at ¶ 21.) This request was denied. (*Id.*)

After commencing this action, Rogers was permitted to see James D. Lussier, D.D.S. (*Id.* at ¶ 23). According to the Amended Complaint, "Dr. Lussier's examination revealed an erythematous right submandibular indentation with an orocutaneous fistula and non-restorable decayed teeth." (*Id.*) In January 2017, Dr. Lussier recommended removing Rogers's Erich arch bar, pulling the decayed teeth, and removing the fistula. (*Id.*) Hierholzer, Foraker, and Dr. Smith allegedly refused to provide this treatment. (Pl.'s Mot. [#64] at ¶ 9). Rogers maintains that he had to wait until he was transferred to the Texas Department of Criminal Justice before he was able to receive the medical care that he needed to alleviate his suffering. (*Id.*) Dr. Lussier eventually performed a procedure to repair Rogers's jaw on April 14, 2017. (Am. Compl. at ¶ 23.) Rogers claims that following this procedure he was again denied access to hydrocodone. (*Id.*) Rogers says that he "continues to experience pain and distress" and that his

"numerous requests for hospitalization or access to a medical doctor to treat his jaw and relieve his intense pain have been ignored." (*Id.* at ¶ 24.)

Rogers now moves to exclude the testimony of David M. Mathis, M.D., one of Dr. Smith's designated testifying experts, under Federal Rule of Evidence 702. Rogers claims that Dr. Mathis's testimony is unreliable and will not assist the trier of fact in deciding the relevant issues. The Court will deny Rogers's motion without prejudice to his seeking to limit certain portions of the expert's expected testimony without relevance first being established.

II. Governing Law

In *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 589 (1993), the Supreme Court held that trial judges must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. Subsequent to *Daubert*, Rule 702 of the Federal Rules of Evidence was amended to provide 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.

The *Daubert* analysis applies to all proposed expert testimony, including non-scientific "technical" analysis and other "specialized knowledge." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999). When expert testimony is challenged under *Daubert*, the burden of proof rests with the party seeking to present the testimony. *See Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 276 (5th Cir. 1998).

Under *Daubert*, expert testimony is admissible only if the proponent demonstrates that: (1) the expert is qualified; (2) the evidence is relevant to the suit; and (3) the evidence is reliable.

See Watkins v. Telsmith, Inc., 121 F.3d 984, 989 (5th Cir. 1997). A proffered expert witness "is qualified to testify by virtue of his 'knowledge, skill, experience, training, or education.'" *Wilson v. Woods*, 163 F.3d 935, 937 (5th Cir. 1999) (quoting Fed. R. Evid. 702). An expert must "possess a higher degree of knowledge, skill, experience, training, or education than an ordinary person." *Newton v. Roche Labs., Inc.*, 243 F. Supp. 2d 672, 676 (W.D. Tex. 2002).

If a court finds a given expert to be qualified to testify, Rule 702 imposes the additional obligation upon the trial judge to "ensure that any and all scientific testimony . . . is not only relevant but reliable." *Daubert*, 509 U.S. at 589–90. *Daubert* sets forth four specific factors that the trial court should ordinarily apply when considering the reliability of scientific evidence: (1) whether the technique can or has been tested; (2) whether it has been subjected to peer review or publication; (3) whether there is a known or potential rate of error; and (4) whether the relevant scientific community generally accepts the technique. *See id.* at 592–93. This test of reliability, however, is "flexible," and these factors "neither necessarily nor exclusively apply to all experts or in every case." *Kumho Tire Co.*, 526 U.S. at 141. "Rather, the law grants a district court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination." *Id.* at 142. "The proponent need not prove that the expert's testimony is correct, but she must prove by a preponderance of the evidence that the testimony is reliable." *Moore*, 151 F.3d at 276.

Notwithstanding the testing of an expert's qualification, reliability, and admissibility, "the rejection of expert testimony is the exception rather than the rule." Fed. R. Evid. 702, Adv. Comm. Notes (2000). "*Daubert* did not work a 'seachange over federal evidence law,' and 'the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system.'" *Id.* (quoting *United States v. 14.38 Acres of Land*, 80 F.3d 1074, 1078 (5th Cir.

1996)). "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596. A district court enjoys broad discretion in determining the admissibility of expert testimony, and such decisions will not be disturbed on appeal unless a ruling is "manifestly erroneous." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 142 (1997).

III. Analysis

Dr. Smith has designated David M. Mathis, M.D., as a potential testifying expert witness in this case. Rogers seeks to exclude this expert, challenging both the relevance and reliability of Dr. Mathis's testimony. That Dr. Mathis is qualified is not disputed. Having considered the motion and response thereto as well as the expert designation and expert report, the undersigned finds that the majority of Dr. Mathis's testimony is both reliable and likely to assist the trier of fact in deciding the relevant issues. Further, while there are discrete opinions contained in Dr. Mathis's Correctional Medical Expert Report that may not ultimately be relevant to the disputed issues in this case, the better approach is to evaluate their relevance in the context of trial and through the mechanism of a motion *in limine*.

A. Dr. Smith has not yet demonstrated the relevance of Dr. Mathis's opinion as to whether a physician-patient relationship existed between Dr. Smith and Rogers.

Dr. Mathis's expert designation states that "Dr. Mathis is expected to opine that Dr. Smith did not have a physician-patient relationship with Plaintiff." (Doc. 61 at 1.) And the Correctional Medical Expert Report states that "Doctor Smith had no physician patient relationship with Aaron Rogers." (Doc. 67, Ex. C at 14.) As this case involves an alleged violation of Rogers's Eight Amendment right to adequate medical care, rather than medical negligence on the part of Dr. Smith, it is unclear to the undersigned why at trial Dr. Mathis's

opinion with respect to the existence of a physician-patient relationship would be relevant or assist the trier of fact.

In their briefs, the parties spend a great deal of time arguing over whether a physician-patient relationship existed between Dr. Smith and Rogers during the latter's incarceration at Kerr County Detention Center. But whether a physician-patient relationship existed does not appear to be material to Rogers's claim. The existence of a physician-patient relationship is not an element of a deliberate indifference claim, and testimony on this point could potentially confuse the jury by presenting evidence not relevant to the underlying dispute.

Rogers asserts that Defendants violated his Eighth Amendment right to adequate medical care. The Eighth Amendment prohibits cruel and unusual punishment. An official violates the Eighth Amendment if his conduct demonstrates deliberate indifference to a prisoner's serious medical needs. The Fifth Circuit's Pattern Jury Instructions for Eight Amendment inadequate medical care cases states, in pertinent part, that "to recover damages for this alleged constitutional violation, Plaintiff [name] must prove by a preponderance of the evidence that: (1) Plaintiff [name] was exposed to a substantial risk of serious harm; (2) Defendant [name] displayed deliberate indifference to that risk; and (3) Defendant [name]'s deliberate indifference harmed Plaintiff [name]." Fifth Circuit Pattern Jury Instructions (Civil Cases) § 10.8 (2014); *see Easter v. Powell*, 467 F.3d 459, 463 (5th Cir. 2006); *Victoria W. v. Larpenter*, 369 F.3d 475, 483 (5th Cir. 2004); *Mace v. City of Palestine*, 333 F.3d 621, 625 (5th Cir. 2003).

Thus, there does not appear to be a need for Rogers to offer evidence of the existence of a physician-patient relationship in order for him to establish the elements of his claim. In fact, it seems disputed testimony on this issue could confuse the jury. Of course, many facts that might be relevant to whether a physician-patient relationship existed might also shed light on important

issues that are unquestionably in dispute, such as whether and to what extent Dr. Smith was aware of Rogers's medical condition; how Dr. Smith responded to Rogers's medical condition; and what Dr. Smith believed his obligation to be with respect to Rogers's medical condition. Testimony concerning these factual disputes would be proper.

Testimony from Dr. Mathis on the existence of a physician-patient relationship is potentially problematic for two additional reasons: Dr. Mathis's knowledge, skill, experience, training, and education do not appear to qualify him to render an opinion on the legal standard for the formation of a physician-patient relationship; nor is he permitted to give such a legal conclusion. *See Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983) (stating that Federal Rule of Evidence 704 "make[s] it clear that questions which would merely allow the witness to tell the jury what result to reach are not permitted" and that Rule 704 was not "intended to allow a witness to give *legal* conclusions."). Expert opinion testimony may not be objectionable solely because "it embraces an ultimate issue to be decided by the trier of fact," *see* Fed R. Evid. 704(a), but permitting Dr. Mathis to testify that a physician-patient relationship was not created as a matter of law falls into the gray area where ultimate issues of fact track closely with legal conclusions and therefore invade the province of the jury, *see Owen*, 698 F.2d at 240.

For these reasons, the undersigned recommends that the District Court consider granting a motion *in limine*, in the event Rogers files one, that would preclude Dr. Mathis from testifying during trial without first approaching the bench as to whether a physician-patient relationship existed between Dr. Mathis and Rogers as a matter of law. However, Dr. Mathis should be permitted to testify regarding his understanding of the facts bearing on whether Dr. Smith's conduct demonstrated deliberate indifference to Rogers's serious medical needs, and these facts may also affect the existence of a physician-patient relationship. At trial, the District Court

should consider limiting testimony from Dr. Mathis or any other witness directly on the point of whether a physician-patient relationship existed as a matter of law without the parties first establishing the relevance of that testimony.

B. Dr. Mathis's other expert opinion testimony is both relevant and reliable.

The Correctional Medical Expert Report indicates that, if allowed to testify at trial, Dr. Mathis will offer two opinions. First, Dr. Mathis will render an opinion as to whether a physician-patient relationship existed between Dr. Smith and Rogers during the latter's incarceration at Kerr County Detention Center. (Doc. 67, Ex. C at 14.) For the reasons mentioned above, Dr. Mathis will not be permitted to share his opinion on this point with the jury. In addition, Dr. Mathis has been designated as an expert witness to opine on the adequacy of Rogers's medical treatment. (*Id.* at 15.) Dr. Mathis will testify that Dr. Smith did not deny Rogers adequate medical treatment at any time and that Rogers is responsible for his own injuries. (*Id.*) Dr. Mathis is qualified to testify in this case with respect to the adequacy of Rogers's medical treatment and the causes of his injuries, and his testimony on these topics is both relevant and reliable.

Dr. Mathis possesses a higher degree of knowledge, skill, experience, training, or education about the subject of the testimony than an ordinary person. Therefore, Dr. Mathis is qualified to testify in this case with respect to the aforementioned issues. Rogers concedes as much. (Pl.'s Mot. at ¶ 23.) As to relevance, Rogers contends that Dr. Mathis's testimony is irrelevant because "[i]t does nothing to help the trier of fact to understand the evidence or to determine the facts in issue" and "[i]t will only confuse the jury by presenting an opinion not supported by and even contrary to Texas and Federal law and statute [sic]." (*Id.*) This argument is without merit. Dr. Mathis's testimony on the adequacy of Rogers's medical treatment and the

causes of Rogers's physical injuries and mental and emotional distress is without a doubt relevant to the ultimate legal question of whether Dr. Smith violated Rogers's Eight Amendment right to adequate medical care while he was incarcerated at Kerr County Detention Center, among other inquiries in this case.

As to reliability, Rogers maintains that Dr. Mathis's testimony is unreliable because his opinions are contrary to state and federal law. (*Id.* at ¶ 10.) In particular, Rogers challenges Dr. Mathis's opinion that Rogers himself is responsible for his condition because he attempted suicide and refused treatment as "contrary to well established Texas Laws and Statutes as well as Federal Statutes." (*Id.* at ¶ 12.) Rogers further states that Dr. Mathis's "opinions are not supported by case law and statutes and are therefore incorrect and unreliable." (*Id.*) The Court is unpersuaded by Rogers's attempt to portray his factual and legal arguments for why he believes that Dr. Mathis's opinions are incorrect as reliability issues with Dr. Mathis's testimony. Rogers believes that Dr. Mathis's testimony is unreliable because it is legally incorrect. But resolving the contentious legal questions in this case is unnecessary to evaluate whether Dr. Mathis's testimony is reliable. That is because Rogers's disagreement with Dr. Mathis's conclusions do not render them unreliable.

In essence, then, Rogers's motion is an improper attempt to litigate the merits of the underlying case disguised as an objection to the reliability of the expert's testimony. "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." *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987). A court will exclude an expert's opinion testimony only in cases where "the source upon which an expert's opinion relies is of such little weight that the jury should not be permitted to receive that

opinion." *Id.* Expert opinion testimony falls into this category when it is fundamentally unsupported by reliable evidence. That is clearly not the case here, where Dr. Mathis reviewed a long list of records, pleadings and discovery documents, and relevant literature in formulating his opinions, as detailed in his Correctional Medical Expert Report. (Doc. 67, Ex. C at 7–8.) The possibility that Dr. Mathis's conclusions may be later found to be incorrect does not render them unreliable in light of his undisputed education, training, and experience and the foundation for his testimony. In other words, expert opinion testimony may be reliable even though it is legally incorrect. *See Bocanegra v. Vicmar Servs., Inc.*, 320 F.3d 581, 585 (5th Cir. 2003) ("The party seeking to have the district court admit expert testimony must demonstrate that the expert's findings and conclusions are reliable, but need not show that the expert's findings and conclusions are correct."); *Moore*, 151 F.3d at 276 ("The proponent need not prove to the judge that the expert's testimony is correct, but she must prove by a preponderance of the evidence that the testimony is reliable."). Dr. Smith is not required to prove that Dr. Mathis's opinions are correct, merely reliable.

Dr. Smith has met this burden. To be clear, this Court does not express any opinion on any of the other disputed factual or legal issues in this case. But Rogers has not established that his issues with Dr. Mathis's testimony are issues of reliability so much as factual and legal disagreements with his testimony. Additionally, Rogers, of course, is free to attack Dr. Mathis's opinions through vigorous cross-examination and the presentation of contrary evidence. But "the *Daubert* analysis should not supplant trial on the merits." *Mathis v. Exxon Corp.*, 302 F.3d 448, 461 (5th Cir. 2002) (quoting *Pipitone v. Biomatrix, Inc.,* 288 F.3d 239, 250 (5th Cir. 2002)). Rather, "[t]he focus . . . must be solely on principles and methodology [of the expert witness],

not on the conclusions that they generate." *Watkins*, 121 F.3d at 989 (quoting *Daubert*, 509 U.S. at 594–95).

In summary, Dr. Smith has met his burden of proving by a preponderance of the evidence that Dr. Mathis is qualified, that his testimony is relevant to the underlying issues in this case, and that his testimony is reliable. Any other criticism of Dr. Mathis's testimony can be adequately addressed through a motion *in limine* as well as during trial through cross-examination and contemporaneous objection. The undersigned will allow Dr. Mathis to testify in this case as an expert to the extent set forth in this Order, and the trial court will consider objections to Dr. Mathis's testimony as they may arise at trial.

IV. Conclusion

For the reasons set forth above, the undersigned will allow Dr. Mathis to testify in this case as an expert to the extent set forth in this Order, and the District Court shall consider objections to Dr. Mathis's testimony as they may arise at trial and/or through any motions *in limine*.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Exclude Expert Testimony of David M. Mathis, M.D., [#64] is **DENIED.**

SIGNED this 28th day of December, 2018.

ELIZABETH S. ("BETSY") CHESTNEY
UNITED STATES MAGISTRATE JUDGE