

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ROBERT L. VAZZO, LMFT, etc., et al.,)
)
) Plaintiffs,)
) Case No. 8:17-cv-2896-T-02AAS
v.)
)
CITY OF TAMPA, FLORIDA,)
)
) Defendant.)
)

**PLAINTIFFS’ MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANT’S MOTION TO EXCLUDE EXPERT TESTIMONY**

Plaintiffs ROBERT L. VAZZO, LMFT, individually and on behalf of his patients, and SOLI DEO GLORIA INTERNATIONAL, INC. d/b/a NEW HEARTS OUTREACH TAMPA BAY, individually and on behalf of its members, constituents, and clients, pursuant to Local Rule 3.01 and the Court’s Case Management and Scheduling Order (D.183), file this memorandum of law in opposition to Defendant Motion to Exclude Expert Testimony of Bernard[] O. Hudson, M.D. and Christopher Rosik, Ph.D. and Incorporated Memorandum of Law (D.191, “Tampa Expert Motion”).

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INTRODUCTION

The City begins its motion to exclude Plaintiffs’ experts with the same nose-counting “medical consensus” argument that drives its entire defense of Tampa’s therapy ban Ordinance. (Tampa Expert Mot. 1–2; D.202, Plaintiffs’ Memorandum of Law in Opposition to Defendant’s Motion for Summary Judgment (“Plaintiffs’ MSJ Opposition”), at 2–3.) But it is the City’s burden to prove the constitutionality of its Ordinance by establishing empirical or concrete evidence of harm justifying the Ordinance to satisfy the compelling interest prong of strict scrutiny. (D.194, Plaintiffs’ Motion for Summary Judgment and Motion to Exclude Certain Opinions of Defendant’s Expert (“Plaintiffs’ MSJ”), at 7–8.) Thus, it is not Plaintiffs’ burden to prove the efficacy of “conversion therapy,” and Plaintiffs do not proffer their experts for that purpose. Rather, Plaintiffs’ experts and their opinions, taken as a whole, are proffered for the purpose of showing the Court the absence of empirical or concrete evidence of harm caused by “conversion therapy,” which absence dooms Tampa’s campaign to satisfy its strict scrutiny burden.

For example, Dr. Rosik’s summary of the main points of his Declaration includes, *inter alia*:

- (1st) [T]he scientific literature does not support the conclusion that voluntary, speech-based SOCE causes harm. In fact, **the actual research studies reject causal attribution of harm to SOCE as an empirical matter**, rendering any pro-SOCE-ban position statements based on the studies at best unreliable and at worst dishonest.
- (2nd) Given the empirically determined fact that all therapy includes some risk of harm, and **the absence of any empirical data on harm specifically from SOCE therapy, the actual degree of harm attributable to SOCE is unknowable at this time.**

(D.191-2, Declaration of Christopher Rosik, Ph.D. (“Rosik Declaration”), PageID 4887 (emphasis added).)

As another example, Dr. Hudson’s Rebuttal Declaration states:

According to the American Psychological Association’s 2015 “Guidelines for Psychological Practice with Transgender and Gender Nonconforming People” (“APA, 2015”), discussed in my initial declaration: “Due to the evidence that not all children persist in a TGNC [‘transgender’ and ‘gender nonconforming’] identity into adolescence or adulthood, and because **no approach to working with TGNC children has been adequately, empirically validated, consensus does not exist** regarding best practice with prepubertal children.” (Emphasis added.)

(D.201-1, Rebuttal Declaration of Bernard O. Hudson MD (“Hudson Rebuttal Declaration”) ¶ 3.¹)

The Court should admit all of the testimony of Plaintiffs’ experts as relevant and reliable for its intended purpose, and reject the City’s heavy-handed attempt at wholesale exclusion.

ARGUMENT

I. PLAINTIFFS’ EXPERTS’ TESTIMONY SATISFIES THE STANDARDS FOR ADMISSIBILITY UNDER RULE 702.

A. The Eleventh Circuit Employs a Three-Part Test for the Admissibility of Expert Testimony Under Rule 702.

Federal Rule of Evidence 702 provides:

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. The Eleventh Circuit’s formulation of the Rule 702 standard consists of three parts. Specifically, this Court must consider whether—

¹ The City’s experts agree with the premises and conclusions of the 2015 APA TGNC Guidelines quoted by Dr. Hudson. (D.193, Plaintiffs’ Statement of Undisputed Facts in Support of Motion for Summary Judgment (“Plaintiffs’ SUF”), ¶ 21.)

(1) the 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.

Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK, Ltd., 326 F.3d 1333, 1340-41 (11th Cir. 2003). The Eleventh Circuit simplifies these concepts into a three-pronged approach: (a) qualification, (b) reliability, and (c) helpfulness. *See United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004); *Ward v. Carnival Corp.*, No. 17-24628-CV-SCOLA/TORRES, 2019 WL 1228063, *1 (S.D. Fla. Mar. 14, 2019) (“The Eleventh Circuit refers to these elements as the qualification, reliability, and helpfulness prongs.”). But, importantly, these three factors are “distinct concepts that courts and litigants must take care not to conflate.” *Quiet Tech.*, 326 F.3d at 1341; *Hendrix v. Evenflo Co., Inc.*, 255 F.R.D. 568, 578 (N.D. Fla. 2009) (same).

B. Plaintiffs’ Experts Satisfy the Standard for Qualification Which Is Not Stringent and Requires Only Minimal Training in the Requisite Field.

Plaintiffs’ experts are easily qualified. The standard for determining whether an expert is qualified in his field is a minimal inquiry, not subject to stringent standards. *See Hendrix*, 255 F.R.D. at 578 (“First, as to qualification, **the standard for admissibility is not stringent.**” (emphasis added)); *see also Leathers v. Pfizer, Inc.*, 233 F.R.D. 687, 692 (N.D. Ga. 2006) (“Rule 702 takes a liberal approach to expert witness qualification.”); *Ward*, 2019 WL 1228063, at *3 (same). Under Rule 702, “a witness may be qualified as an expert by virtue of his or her knowledge, skill, experience, training, or education.” *Quiet Tech.*, 326 F.3d at 1342; *Leathers*, 233 F.R.D. at 692 (same). Indeed, “it is not necessary that the witness be recognized as the leading authority in the field in question,” *Leathers*, 233 F.R.D. at 692, the Eleventh Circuit merely requires that the proffered expert be “at least minimally qualified in his field.” *Hendrix*, 255 F.R.D. at 578.

This inquiry merely “requires the trial court to examine the credentials of the proposed expert in light of the subject matter of the proposed testimony and ascertain whether the expert is qualified to testify competently regarding the matters he or she intends to address.” *Ward*, 2019 WL 1228063, at *3; *see also Fumanite Am., Inc. v. T.D. Williamson, Inc.*, 506 F. Supp. 2d 1126, 1129 (M.D. Fla. 2007) (same). Where a proposed expert’s curriculum vitae and other documents reveal “extensive academic and real-world experience,” there is no question the proposed expert is qualified to offer testimony on the subjects at issue. *Ward*, 2019 WL 1228063, at *3.

Plaintiffs’ experts’ Declarations, which include their curricula vitae, more than establish their qualification under the applicable standard. (D.191-2, Rosik Decl.; D.191-7, Declaration of Bernard O. Hudson MD (“Hudson Declaration”).)

C. Plaintiffs’ Experts Satisfy the Standard for Reliability Which Is Flexible and Not Subject to a Definitive Checklist or Test.

The testimony of Drs. Rosik and Hudson, for the purposes proffered, is sufficiently reliable to be admissible. As this Court has noted, there are three sub-components of the reliability prong: (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.” *Furmanite*, 506 F. Supp. at 1130. As the Supreme Court held in *Daubert*, however, “[n]othing in the text of the rule establishes ‘general acceptance’ as an absolute prerequisite to admissibility.” *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 588 (1993). Indeed, adoption of “a rigid ‘general acceptance’ requirement would be at odds with the liberal thrust of the Federal Rules [of Evidence] and their general approach to relaxing the traditional barriers to opinion testimony.” *Id.*

Thus, many courts, including *Daubert*, have stated that “although helpful, these factors should not be considered the definitive checklist or test for reliability,” *Daubert*, 509 U.S. at 593,

and that “evidence which does not meet all or even most of these factors may still be admissible because other factors may dominate.” *Hendrix*, 255 F.R.D. at 588 (citing *United States v. Brown*, 415 F.3d 1257, 1267-68 (11th Cir. 2005)). Indeed, “[t]hese factors are illustrative, not exhaustive; not all of them will apply in every case, and in some cases other factors will be equally important in evaluating the reliability of proffered expert opinion.” *Frazier*, 387 F.3d at 1262. As such, this Court’s inquiry into the reliability of a given expert’s testimony is “a flexible one.” *Daubert*, 509 U.S. at 594-95; *Chapman v. Procter & Gamble Distrib., LLC*, 766 F.3d 1296, 1305 (11th Cir. 2014) (same).

Contrary to the City’s arguments, Plaintiffs do not proffer their experts for the purpose of establishing the efficacy of any theory of “conversion therapy” or reducing the nose-count making up the City’s irrelevant “consensus.” (Tampa Expert Mot. 8-17.) Rather, as shown above, Plaintiffs’ experts are proffered for their opinions on what the empirical record actually shows with respect to causal attribution of harm to “conversion therapy,” and their opinions accurately refer to the relevant and available authorities. (D.191-2, Rosik Decl.; D.191-3, Rebuttal Declaration of Christopher Rosik, Ph.D. (“Rosik Rebuttal Declaration”); D.191-7, Hudson Decl.; D.201-1, Hudson Rebuttal Decl.) For this purpose their opinions are sufficiently reliable for admissibility. The City fails to identify any authority inaccurately represented or cited by Plaintiffs’ experts.

D. Plaintiffs’ Experts Satisfy the Standard for Helpfulness Which Is Minimal and Merely Ensures That Expert Testimony Is Not Presented on Matters That Can Be Appropriately Determined by Lay People.

Contrary to the City’s arguments (Tampa Expert Mot. 4-8), Plaintiffs experts easily satisfy the helpfulness prong. In determining helpfulness, a court is merely to determine whether matters upon which the expert is testifying are not “lay matters which a jury is capable of understanding and deciding without the expert’s help.” *Hendrix*, 255 F.R.D. at 579 (citing *In re Rezulin Prods.*

Liability Litig., 309 F. Supp. 2d 531, 541 (S.D.N.Y. 2004)). To satisfy this standard, the expert's "testimony need only *assist* the trier of fact, through the application of scientific, technical, or specialized expertise." *City of Tuscaloosa v. Hacros Chem., Inc.*, 158 F.3d 548, 565 (11th Cir. 1998); *see also United States v. Frazier*, 387 F.3d 1244, 1262 (11th Cir. 2004) (helpfulness of expert testimony determined by whether it will assist the trier of fact). In that regard, the helpfulness of an expert's proffered testimony is measured by minimal standards of relevance. *Quiet Tech.*, 326 F.3d at 1347.

For the purposes proffered, Plaintiffs' experts' testimony is relevant and helpful. As shown above, it is the City's burden to satisfy strict scrutiny with empirical or concrete evidence of harm caused by "conversion therapy." The testimony of Plaintiffs' experts provides both context and analysis of the relevant empirical record, and is therefore relevant to what the empirical record actually shows (and does not show).

E. The Court Should Consider the City's Criticisms of Plaintiffs' Experts' Conclusions as Matters of Weight, Not Admissibility.

Given that Plaintiffs' experts' proffered testimony is both reliable and helpful, and that Plaintiffs' experts are qualified to give it, the Court should consider the City's criticisms of the experts' conclusions as matters of weight, not admissibility. Courts in the Eleventh Circuit, including this Court, follow the traditional function of the jury in determining the weight of an expert's proffered testimony, rather than excluding such testimony altogether. *See, e.g., Hendrix*, 255 F.R.D. at 578-79 (questions concerning the validity of an expert's conclusions go to weight, not admissibility); *Pane v. C.R. Bard, Inc.*, NO. 6:11-cv-1582-Orl.-376GJK, 2014 WL 988754 (M.D. Fla. Mar. 13, 2014) ("When the methodology is sound and the evidence relied upon is sufficiently related to the case at hand, disputes about the degree of relevance or accuracy (above this minimum threshold) may go to the testimony's weight, but not its admissibility."); *Costa v.*

Wyeth, Inc., No. 8:04-cv-2599-T-27MAP, 2012 WL 1069189, *2 (M.D. Fla. Mar. 29, 2012) (same); *Solis v. Tyson Foods, Inc.*, No. 2:02-CV-1174-VEH, 2009 WL 10687775, *10 (N.D. Ala. Sept. 11, 2009) (same); *Trade AM Int'l, Inc. v. Cincinnati Ins. Co.*, No. 1:08-CV-3711-ECS, 2010 WL 11509297, *2 (N.D. Ga. Oct. 6, 2010) (same).

CONCLUSION

For all of the foregoing reasons, the Court should admit Plaintiffs' experts' testimony and deny Tampa's motion to exclude Plaintiffs' experts.

Respectfully submitted,

/s/ Roger K. Gannam _____
Mathew D. Staver
Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
Phone: (407) 875-1776
Fax: (407) 875-0770
E-mail: rgannam@LC.org
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this September 16, 2019, I caused a true and correct copy of the foregoing to be filed electronically with the Court's CM/ECF system. Service upon all counsel of record will be effectuated by the Court's electronic notification system.

/s/ Roger K. Gannam _____
Roger K. Gannam
Attorney for Plaintiffs