



## **Puente et al v. Phoenix, City of et al**

2021 | Cited 0 times | D. Arizona | March 30, 2021

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Puente, et al.,

Plaintiffs, v. City of Phoenix, et al.,

Defendants.

No. CV-18-02778-PHX-JJT ORDER

At issue is the admissibility of expert testimony provided by Dr. Edwina Barvosa Professor Edwina Barvosa Under Rule 702 and Daubert Opposition (Doc. 2 this matter appropriate for decision without oral argument. See LRCiv 7.2(f). The Court

will grant in part and deny in part I. LEGAL STANDARD Rule 702 of the Federal Rules of Evidence tasks the trial court with ensuring that any expert testimony provided is relevant and reliable. Daubert v. Merrell Dow Pharm., Inc. (Daubert has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of

whether the testimony is valid and whether the reasoning or methodology can properly be applied to the facts in issue. Daubert, 509 U.S. at 592 93. Factors to consider in this

assessment include: whether the methodology can be tested; whether the methodology has been subjected to peer review; whether the methodology has a known or potential rate of error; and whether the methodology has been generally accepted within the relevant professional community. Id. at 593 Id. be solely on principles and methodology, not on the

Id. The Daubert analysis is applicable to testimony concerning scientific and non- scientific areas of specialized knowledge. Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141 (1999). However, the Daubert factors may not apply to testimony that depends on knowledge and experience of the expert, rather than a particular methodology. U.S. v. Hankey, 203 F.3d 1160, 1169 (9th Cir. 2000) (citation



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omitted) (finding that Daubert

undercover with gangs). An expert qualified by experience may testify in the form of opinion if his or her experiential knowledge will help the trier of fact to understand evidence or determine a fact in issue, as long as the testimony is based on sufficient data, is the product of reliable principles, and the expert has reliably applied the principles to the facts of the case. See Fed. R. Evid. 702; Daubert, 509 U.S. at 579. The advisory committee notes on the 2000 amendments to Rule 702 explain that Rule 702 (as amended in response to Daubert See Kumho Tire Co., 526 U.S.

at -examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking Daubert, 509 U.S. at 596 (citation omitted). II. ANALYSIS In their Motion to Exclude, Defendants offer three arguments in support of excluding testimony: 1) that Dr. Barvosa is not an expert in the relevant subject area; 2) that Dr. Barvosa did not gather sufficient facts; and 3) that Dr. Barvosa did not use reliable principles and methods. The Court will examine each of these arguments in turn.

A. Expertise in the Relevant Subject Area Defendants argue that Dr. Barvosa is improperly qualified to testify as an expert under Rule Kumho Tire Co. opinion

that every class member developed a neural encoding of fear is, at bottom, a psychological then argue that, because Dr. Barvosa is not a psychologist, psychiatrist, or neurologist, she

is not qualified in the relevant field.

To be sure, Dr. Barvosa is not an expert in clinical psychology. She possesses a Ph.D. in Political Science from Harvard University and is an interdisciplinary social scientist. She specializes in group identity formation and teaches classes on applied social and political theory in the Department of Feminist Studies at UC Santa Barbara. As Defendants point out, she is not a psychologist, psychiatrist, or neurologist. Kumho Tire Co.,

526 U.S. at 150. Moreover, Rule 702 describes education as merely one of a number of ways in which an expert may be qualified to testify.

17.)

exclusive from the areas of psychology or neuroscience. Rather, she has spent years studying and applying political theory, social psychology, and neuroscience. The fact that she does not possess a degree in psychology or have experience conducting clinical assessments will not preclude Dr. Barvosa from being qualified to testify in this matter.

B. Sufficient Facts



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as is required by Rule 702(b). - but ignored other important facts because she did not review the Phoenix Police

-Action Report or any officer incident reports, and she only reviewed three officer depositions. Furthermore, Dr. Barvosa only watched eleven abbreviated video clips of the incident provided to her by Plaintiffs, but she did not watch the twenty-three full videos Defendants used in their opposition to class certification. Defendants further revealed inconsistencies with this Co

Rule 702 is not intended to provide a means to exclude expert testimony Advisory Comm. No that motion. (Doc. 91, Order

at 1, n.1.) But it does not follow that those are the facts Dr. Barvosa must consider in forming her opinion. The Court finds any disagreement as to the sufficiency of the facts a matter more appropriate for - of contrary See Daubert, 509 U.S. at 596.

C. Reliable Principles and Methods Rule 702 requires

702(c) testimony. Daubert, 509 U.S. at 597. Factors to consider in determining reliability include:

1) whether the methodology can be tested; 2) whether the methodology has been subjected to peer review; 3) whether the methodology has a potential rate of error; and 4) whether the methodology has been generally accepted within the relevant professional community. Daubert, 509 U.S. at 592 94. These factors are not exclusive; they serve merely as guideposts. Kumho Tire, 526 U.S. at 141. expert has unjustifiably extrapolated from an accepted premise to an unfounded

(2000). Courts may exclude

testimony where there Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997).

To form her opinion here, Dr. Barvosa took reviewing -3, Ex. A, Barvosa Dep. at 62.) She did not interview any class members, conduct any kind of test or assessment on any class members, or review any of their medical or psychological records. (Doc. 235-2, Ex. 2, Barvosa Dep. at 164.) Based on her review of the materials combined with her knowledge on neural encoding, she opines that every member of the class has suffered a common harm, which is the neural encoding of fear associated with public assembly.

grounds that she did not speak to any class members or account for individual differences in the class members, that the declarations and depositions she reviewed do not support her opinion, and that the publications she cites do not support her opinion either. When asked about the proper method to evaluate neural encoding, Dr. Barvosa responded that to verify a neural encoding of fear or (Ex. 2, Barvosa Dep. at 193, 172.) Dr. Barvosa failed to do so, and she



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thus failed to exercise her own principal method.

Dr. Barvosa also explains that an event will only cause a neural encoding of fear in an individual if it overwhelms that . Dep. at 199.) She elaborates by stating Dep. at 199.) Yet Dr.

inconsistent with the principle that the threshold for the creation of this encoding is particularized to individuals.

Furthermore, Dr. Barvosa only reviewed about sixty-five declarations or depositions from the class members. Meanwhile, the class ly in Support of Motion for

Class Certification at 14.) While these declarations and depositions may provide some insight into the minds of some members, 1

this method of review is not a reliable one in forming the opinion that every class member now has a neural encoding of fear.

Finally, Dr. Barvosa cites a number of publications by neuroscientists in support of her opinion. Most of the publications discuss only general principles of neuroscience, including the basic neurological mechanism by which the class members could have suffered their alleged harm, and Dr. Barvosa uses them simply to provide a background. But some of the publications regard trauma specifically, and these do not support the opinion that there was a uniform class-wide harm because Dr. Barvosa states that not every sa Dep. at 158.) The Court must

### III. CONCLUSION

founded on her expert opinions regarding survival system scripts and neural encoding, as summarized in her expert report. These opinions identify the basic mechanisms by which Dr. Barvosa believes the class members could have suffered their harm. Defendants have not challenged these underlying opinions, and the Court finds that they satisfy the admissibility requirements of Rule 702 and Daubert. However, the principles and methods that Dr. Barvosa used to conclude that every class member suffered a common harm are unreliable and require too great an analytical leap. The Court will therefore exclude Dr. each member of the class did, in fact, suffer the same categorical harm of a neural encoding of fear of public assembly.

1 Defendants cite certain substantive paragraphs repeated in various declarations and argue - offer no meaningful insight into the mind of any particular class member. However, the declarations are not so identical as to render each one unreliable in analyzing the mental state of its declarant.

IT IS THEREFORE ORDERED Motion to Exclude Opinions of Professor Edwina Barvosa Under



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Rule 702 and Daubert.

(Doc. 234.) Dated this 29th day of March, 2021.

Honorable John J. Tuchi United States District Judge

