

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2020-003148

06/16/2022

HONORABLE MARGARET R. MAHONEY

CLERK OF THE COURT  
P. McKinley  
Deputy

AMERICA M YOUNG

WILLIAM MORRIS FISCHBACH III

v.

CITY OF PHOENIX, THE

ANDREW ABRAHAM

DAVID BARLOW  
DARYL D MANHART  
JUDGE MAHONEY

***DAUBERT HEARING***

East Court Building – Courtroom 411

Prior to the commencement of today's proceedings, Plaintiff's Exhibit numbers 1 through 22 and Defendant's Exhibits numbers 23 through 35 were marked for identification.

2:40 p.m. This is the time set for a virtual *Daubert* hearing on Defendant's Motion To Preclude Opinion Testimony By Raymond Brown, filed 12/1/21. Plaintiff is represented by Counsel, William Morris Fischbach, III and David Barlow. Also present is witness Raymond Brown. Defendant is represented by Counsel, Daryl D. Manhart. Also present are City of Phoenix representatives Paul Li and Christopher DePerro. All appearances are virtual and/or telephonic via Court Connect/Microsoft Teams.

A record of the proceedings is made digitally in lieu of a court reporter.

The Court has reviewed:

1. Defendant's Motion To Preclude Opinion Testimony By Raymond Brown, filed 12/1/21;

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2. Plaintiff's Response To Defendant's Motion To Preclude Opinion Testimony, filed 12/29/21;
3. Defendant's Reply In Support Of Motion To Preclude Testimony By Raymond Brown, filed 1/6/22;
4. Plaintiff's Request For Oral Argument Re: Defendant's Motion To Preclude Opinion Testimony By Raymond Brown, filed 1/6/22;
5. Defendant's List Of Witnesses And Exhibits, filed 6/10/22;
6. Plaintiff's List of Witness And Exhibits, filed 6/15/21; and
7. Plaintiff's Amended List of Witness And Exhibits, filed 6/15/22.

The Court inquires of Plaintiff as to the specific amendment in Item #7 above made to Plaintiff's List of Witness and Exhibits. Plaintiff informs the Court that Plaintiff added Exhibit "22". The Court does not have Plaintiff's Exhibit "22" in her bench book and discussion is held. Following discussion, it is determined that Plaintiff's Exhibit "22" was submitted electronically, was marked by the Clerk, an enlargement was provided to the Court for ease of legibility, but a copy was not provided for the Court's bench book. Exhibit numbering is therefore off from the marked electronic exhibits as compared to the exhibit numbers tabbed and being utilized by the Court and counsel.

Plaintiff's Exhibits "1" through "22" and Defendant's Exhibits "23" through "35" are received in evidence by stipulation.

The Court confirms that Plaintiff has listed Raymond Brown as Plaintiff's witness and Defendant has listed Raymond Brown and Christopher DePerro as Defendant's witnesses.

Raymond Allan Brown is sworn and testifies.

4:47 p.m. Court stands in recess.

4:52 p.m. Court reconvenes with respective counsel and parties present.

A record of the proceedings is made digitally in lieu of a court reporter.

Closing arguments are presented.

Before the Court today is a *Daubert* Rule 702 motion.

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Rule 702 Ariz. Rules of Evid. 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.

As to qualifications, the Court finds Raymond Brown to be a qualified expert, as Defendant concedes.

The Court in *State v. Bernstein*, 237 Ariz. 226 (2015) held:

We hold that courts, as gatekeepers, should consider whether a methodology has been correctly applied. But we conclude that errors in application should result in the exclusion of evidence only if they render the expert's conclusions unreliable; otherwise, the jury should be allowed to consider whether the expert properly applied the methodology in determining the weight or credibility of the expert testimony.

The Comment to the 2012 Amendment to Rule 702 reads in pertinent part:

The 2012 amendment of Rule 702 adopts Federal Rule of Evidence 702, as restyled. The amendment recognizes that trial courts should serve as gatekeepers in assuring that proposed expert testimony is reliable and thus helpful to the jury's determination of facts at issue. The amendment is not intended to supplant traditional jury determinations of credibility and the weight to be afforded otherwise admissible testimony, nor is the amendment intended to permit a challenge to the testimony of every expert, preclude the testimony of experience-based experts, or prohibit testimony based on competing methodologies within a field of expertise. The trial court's gatekeeping function is not intended to replace the adversary system. Cross-examination, presentation of contrary evidence, and

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careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.

**THE COURT FINDS** that the standards of Evidence Rule 702 have been met, and Mr. Brown's opinions are both relevant and reliable.

**THE COURT FURTHER FINDS** that Raymond Brown's opinions are not speculative.

For the reasons stated on the record,

**IT IS ORDERED** denying Defendant's Motion To Preclude Opinion Testimony By Raymond Brown.

**IT IS FURTHER ORDERED** affirming **virtual** Oral Argument on **8/2/22 at 2:30 p.m.** (time allotted: 1 hour) on Plaintiff's Motion For Partial Summary Judgment, filed 12/1/21.

The Court informs counsel she will be retiring from the bench very soon and Judge Scott Blaney is assuming this Division's calendar and will be hearing the Oral Argument on 8/2/22.

5:22 p.m. Matter concludes.

\* \* \* \*

**IT IS FURTHER ORDERED** that when the Court so directs expressly, or when a filing is time-sensitive, the parties shall also *email it contemporaneously to all parties and Court staff*, when eFiling the document due to the processing time in the Clerk's Office for all e-filed documents.

Email address for Court staff is as follows:

JA, Jennifer "JJ" Sommerville, [Jennifer.Sommerville@jbazmc.maricopa.gov](mailto:Jennifer.Sommerville@jbazmc.maricopa.gov)

**IT IS FURTHER ORDERED** that any party who intends to ask the Court to vacate or reset any scheduled hearing shall notify this Division of said request as soon as possible, and absent extraordinary circumstances, in any event no later than two (2) full Court days before the scheduled proceeding. Reasons for such a request may include, but are not limited to, the movant intends to withdraw the motion which is set for hearing, the parties have resolved the issue, the motion has become moot, or scheduling conflicts have arisen.

**PLEASE NOTE:** This Division requires that all motions, responses, replies and other Court filings in this case must be submitted individually. Counsel shall not combine any motion with a responsive pleading. All motions are to be filed separately and designated as such. **No filing**

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**will be accepted if filed in combination with another. Additionally, all filings shall be fully self-contained and shall not “incorporate by reference” other separate filings for review and consideration as part of the pending filing.**

**NOTE:** Every person should have a face covering in his/her possession because face masks may be required at the discretion of the Judge.