

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 11-CV-01430-PAB-MEH

UNITED STATES OF AMERICA,

Plaintiff,

v.

KENNETH SCOTT and
JO ANN SCOTT,

Defendants.

**PLAINTIFF UNITED STATES' MOTION IN LIMINE TO EXCLUDE EXPERT
OPINION TESTIMONY**

Plaintiff, the United States of America (the "United States"), through its undersigned attorneys, submits this motion in limine to exclude expert opinion testimony of Defendant Kenneth Scott's ("Defendant") purported expert, Jane M. Brennan. Ms. Brennan's testimony is not relevant, is not reliable, and does not meet the criteria set forth in Federal Rule of Evidence 702 for expert testimony.

CERTIFICATION PURSUANT TO D.C.COLO.LCivR 7.1.A

The United States certifies that it has in good faith conferred with counsel for Defendant, who does not consent to this Motion.

MOTION TO EXCLUDE

Defendant seeks to offer expert opinion testimony by Jane M. Brennan at the January 26, 2012 Preliminary Injunction hearing. Ms. Brennan's expert report¹ appears to contain two opinions: "[t]hat abortion hurts women," and that "[t]here is psychological, physical and emotional damage caused to women by abortion." See "Expert Report of Jane M. Brennan, M.S." attached as Exhibit 1. Ms. Brennan testified during her deposition that she also intends to testify that abortion causes "spiritual" harm to women. See Brennan Dep. 60:13-61:2, 63:4-10, January 10, 2012, attached as Exhibit 2.

None of Ms. Brennan's opinions are relevant to the issue in this case: whether Defendant violated the Freedom of Access to Clinic Entrances Act, ("FACE"), 18 U.S.C. § 248(a)(1), by making passage in or out of a reproductive health center unreasonably difficult or hazardous. Additionally, none of Ms. Brennan's opinions meets the reliability requirement of Rule 702. Finally, the opinion regarding "spiritual harm" was not disclosed in the expert report, and thus should be excluded. See Fed. R. Civ. P. 26(a)(2)(B).

A. Opinions about Medical Procedures are not Relevant to Physical Access to a Reproductive Health Center

Expert opinion testimony must be "relevant" to the claim at issue to be admissible. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589, 597 (1993). The sole issue here is whether Defendant violated FACE by physically obstructing access to a reproductive health facility. The fact-finder must determine whether: (1) there was a physical obstruction; (2) done intentionally; (3) that injured, intimidated, or interfered with, or attempted to intimidate or

¹ Defendant submitted the report on January 9, 2012, the day before Ms. Brennan's deposition. As such, the United States did not have an earlier opportunity to challenge the expert opinions offered.

interfere with any person; (4) because that person is or has been obtaining or providing reproductive healthcare services. U.S. v. Mahoney, 247 F.3d 279, 282 (D.C. Cir. 2001). Physical obstruction is defined as “rendering passage to or from” a facility that provides reproductive health services “unreasonably difficult or hazardous.” See 18 U.S.C. § 248(e)(4); New York ex rel. Spitzer v. Cain, 418 F.Supp.2d 457, 480 (S.D.N.Y. 2006); U.S. v. Gregg, 32 F.Supp.2d 151, 156 (D.N.J. 1998). Evidence purporting to show the harmful impacts of abortion and to justify the opinions of those opposed to abortion is irrelevant to whether Defendant’s conduct constituted an obstruction in violation of FACE. See, e.g., U.S. v. Rahman, 189 F.3d 88, 134-35 (2nd Cir. 1999) (excluding expert testimony about the precepts of Islam where the issue in dispute was whether the defendant conspired to commit acts of terrorism against the United States or solicited others to do so).

Ms. Brennan’s opinions are analogous to the opinions rejected in U.S. v. Rahman, 189 F.3d 88, 134-35. There, the defendant, who was charged with conspiracy to wage war against the United States through acts of terrorism, sought to introduce expert opinions on the meaning of Islam and whether the defendant’s actions were governed by Islamic law. The Second Circuit upheld the exclusion of the expert opinion testimony, as the majority of the testimony was not relevant to the issues and the remaining opinions were of “marginal relevance” and “likely to cause confusion among jurors.” Id. at 136.

Here, Ms. Brennan’s opinions all relate to the legitimacy of abortions and the harms that may be caused by such a procedure. The nature of any medical procedure and the possible harms caused by abortion are not at issue in this FACE matter. See, e.g., U.S. v. Lucero, 895 F.Supp. 1421, 1425-26 (D. Kan.1995)(denying defendants motion to present evidence of “what abortion is and what abortions do” as part of a necessity defense to a FACE claim because the

necessity defense was inapplicable due to legal alternatives to dissuade women against having abortions). The opinions are not relevant to whether Defendant's actions meet the obstruction element of a FACE violation.

B. Ms. Brennan's Opinions are Based Upon Unreliable Personal Anecdotes that Have Not Been Tested, Peer-Reviewed or Accepted in the Scientific Community and Therefore Do Not Meet the Basic Requirements of Rule 702

Ms. Brennan's opinions are not reliable and do not meet the requirements of the Rules of Evidence for expert opinion testimony. Rule 702 permits a witness to provide expert opinions where (a) the opinion will "help the trier of fact to understand the evidence or to determine a fact in issue;" (b) the "testimony is based upon sufficient facts or data;" (c) the opinion "testimony is the product of reliable principles and methods;" and (d) the witness "has applied the principles and methods to the facts of the case." Fed. R. Evid. 702. The Tenth Circuit articulated the four non-exclusive Daubert factors that a court must consider in determining whether an opinion is reliable as follows: (1) whether the opinion has been subjected to testing or is susceptible of such testing; (2) whether the opinion has been subjected to publication and peer review; (3) whether the methodology used has standards controlling its use and known rate of error; and (4) whether the theory has been accepted in the scientific community. Truck Ins. Exchange v. MagneTek, Inc., 360 F.3d 1206, 1210 (10th Cir. 2004) (citing Daubert, 509 U.S. at 590). The proponent of the expert testimony bears the burden to "show that the method employed by the expert in reaching the conclusion is scientifically sound and that the opinion is based on facts which sufficiently satisfy Rule 702's reliability requirements." Mitchell v. Gencorp, Inc., 165 F.3d 778, 781 (10th Cir. 1999). "Under Daubert, any step that renders the expert's analysis unreliable ... renders the expert's testimony inadmissible." Id. at 782. Ms. Brennan's proffered expert opinions do not meet any of the reliability requirements.

Opinions 1 and 2: Ms. Brennan’s opinion that “abortion hurts women” and that “there is psychological, physical and emotional damage caused to women by abortion” are not based on reliable principles and methods. Ms. Brennan is not a psychiatrist, a psychologist, or a social worker, and has no medical training. Brennan Dep. 7:12-15, 8:5-16, 65:21-66:1. She is not licensed in counseling. Id. at 8:21-25. Ms. Brennan bases her opinions on studies she reads on the Internet at <http://afterabortion.org/>, on her “own abortion experience,” and on counseling and interviewing “post-abortive” women. See Brennan Report at 1; see also Brennan Dep. 39:16-21. This counseling occurs in Ms. Brennan’s home and consists of grief counseling. Brennan Dep. at 9:3-7, 33:10-18. She conducted the interviews for her book, *Motherhood Interrupted: Stories of Healing and Hope After Abortion*, a collection of personal stories by sixteen women, including Ms. Brennan, who experienced abortion. Id. at 39:22-25, 40:17-25-41:1. She conducted the interviews in coffee shops and over the phone. Id. 40:23-25-41:1. Ms. Brennan also bases her opinion on discussions she had with women at pro-life and religious speaking engagements. Id. at 24:4-8, 25:3-7, 26:1-14, 39:3-11.

Ms. Brennan’s opinions are based, not on scientific analysis, but instead on her subjective beliefs about abortion, her personal experience, and her conversations with other women who underwent a similar medical procedure. Her opinions have not been subjected to scientific testing or review, and in fact are not even capable of scientific testing. Ms. Brennan admits that her articles include no scientific analysis and no peer review. Id. 19:16-18, 21:4-9.

Her opinions are only published in religious and advocacy journals that are focused on religious conversion and religious thought. For example, Ms. Brennan published an article about her personal experiences in “Envoy Magazine,” a magazine whose purpose is “evangelization and conversion.” Brennan Dep. 17:6-16; 20:9-23. Ms. Brennan also published four articles

recounting her personal experience and repeating her opinions on the CatholicExchange website. Id. at 20:24-25-21:1-3. The CatholicExchange is not a website focused on psychology or counseling, but instead seeks to spread information on Catholic beliefs. Id. at 19:1-12.

Ms. Brennan's opinions will not illuminate the issues in this matter. Her opinions are based on her personal, religious, and political objections to abortions; not on reliable principles and methods. Ms. Brennan is also personally invested in this case. She describes the defendant as a "fellow warrior" in "the fight against abortion." Brennan Dep. 43:23-25, 44:1-7. She considers Defendant to be a "fellow warrior" because "[h]e and I think – have the same thoughts and opinions about abortions ... and about protesting against it and highlighting its effect." Id. at 44:8-10. Ms. Brennan engages in vigils outside of Planned Parenthood of the Rocky Mountains three to four times a month. Id. at 36:1-9. Ms. Brennan also had a prominent position with the Silent No More Campaign, as the Colorado Coordinator, an organization dedicated to protesting abortions and highlighting the harms of abortion. Id. at 29:2-14.

Ms. Brennan claims to rely on a number of articles, including some from scientific journals, in forming her opinions. The articles are provided on a website dedicated to providing abortion opponents with information to support their position. Ms. Brennan's access to, and review of, these articles provide no further information to the trier of fact. Moreover, the defendant has provided no explanation of how these articles are applicable to the facts at issue in this case.

Opinion 3: The defendant seeks to offer Ms. Brennan's opinion that abortion causes "spiritual" harm as expert opinion testimony. Brennan Dep. 60:13-61:2, 63:4-10. Ms. Brennan testified that the basis for this opinion is her "Catholic faith." Id. at 66:6-9. This opinion is not based on facts or data or any reliable methodology. This opinion only reflects Ms. Brennan's

personal and religious beliefs. As such, it fails to meet the requirements of Rule 702. Finally, this opinion should be excluded because it was not disclosed in the expert report. See Fed. R. Civ. P. 26(a)(2)(B).

CONCLUSION

For the foregoing reasons, the United States requests that the Court order that Ms. Brennan is prohibited from offering any expert opinions at the January 26 hearing in this matter.

Dated: January 20, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed electronically using the CM/ECF system, which will provide notice of such filing to all registered parties.

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Judge Philip A. Brimmer**

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UNITED STATES OF AMERICA,

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KENNETH SCOTT and
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**ORDER GRANTING UNITED STATES' MOTION IN LIMINE TO EXCLUDE
EXPERT OPINION TESTIMONY [DKT. ___]**

The Court, having reviewed the United States' Motion in Limine to Exclude Expert Opinion Testimony, and sufficient cause appearing, hereby GRANTS the motion.

It is ORDERED that the United States' Motion in Limine to Exclude Expert Opinion Testimony is GRANTED, and

It is ORDERED that Jane Brennan is prohibited from providing expert opinion testimony in this matter.

Dated this _____ day of _____, 2012.

BY THE COURT:

United States District Judge