

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<p>KATHERINE VARNUM, et al.,</p> <p>Plaintiffs,</p> <p>vs</p> <p>TIMOTHY J. BRIEN,</p> <p>Defendant.</p>	<p>Case No. CV5965</p> <p>RULING ON PLAINTIFFS' AND DEFENDANT'S MOTIONS FOR - SUMMARY JUDGMENT</p>
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This matter came before the Court for hearing on the parties' competing motions for summary judgment on May 4, 2007. Representing Plaintiffs were attorneys Dennis Johnson, Camilla Taylor, and Kenneth Upton, Jr. Representing Defendant was Assistant Polk County Attorney Roger Kuhle. Having entertained the arguments of counsel, having reviewed the parties' motions, resistances, and all supporting submissions, and being otherwise fully advised in the premises, the Court now makes its ruling on said motions.

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CLERK DISTRICT COURT

I. STANDARD OF REVIEW

Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Robinson v. Poured Walls of Iowa, Inc., 553 N.W.2d 873, 875 (Iowa 1996); IOWA R. CIV. P. 1.981(3). The Court shall determine whether summary judgment is appropriate by first examining the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, to determine whether there is any genuine issue of material fact. IOWA R. CIV. P. 1.981(3); Wilson v. Darr, 553 N.W.2d 579, 582 (Iowa 1996). When the facts are undisputed and the only issue is what consequences flow from the facts,

summary judgment is appropriate. Smith v. CRST Int'l, Inc., 553 N.W.2d 890, 893 (Iowa 1996).

“A fact issue is generated if reasonable minds can differ on how the issue should be resolved.” Schlueter v. Grinnell Mut. Reins. Co., 553 N.W.2d 614, 616 (Iowa Ct. App. 1996). “An issue of fact is ‘material’ only when the dispute is over facts that might affect the outcome of the suit, given the applicable governing law.” Junkins v. Branstad, 421 N.W.2d 130, 132 (Iowa 1988) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). “The requirement of a ‘genuine’ issue of fact means that the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson, 477 U.S. at 248.

The moving party has the burden to show the nonexistence of any genuine issue of material fact and the record must be viewed in the light most favorable to the nonmoving party. Schlueter, 553 N.W.2d at 615; Thorp Credit, Inc., v. Gott, 387 N.W.2d 342, 343 (Iowa 1986). The statement of undisputed facts submitted by the moving party does not “constitute a part of the record from which genuine issues of material fact may be determined” except insofar as the statement of undisputed facts may contain “express stipulations concerning the anticipated summary judgment ruling.” Griglione v. Martin, 525 N.W.2d 810, 813 (Iowa 1994) (citing Glen Haven Homes, Inc. v. Mills County Bd. Of Review, 507 N.W.2d 179, 182 (Iowa 1993)). The statement of undisputed facts “is intended to be a mere summary of claims that must rise or fall on the actual contents of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any.’” Id.

To resist the motion, the nonmoving party must set forth specific facts

constituting competent evidence to support a prima facie claim. Hoefer v. Wisconsin Educ. Ass'n Ins. Trust, 470 N.W.2d 336, 339 (Iowa 1991). If the moving party has supported its motion for summary judgment, the nonmoving party “may not rest upon the allegations or denials in his pleadings, but must show there is a genuine issue of fact.” Colonial Baking Co. of Des Moines v. Dowie, 330 N.W.2d 279, 282 (Iowa 1983) (citing IOWA RULE CIV. PRO. 1.981(5)). The nonmoving party must plead “ultimate facts and cannot rely upon conclusions by themselves.” Schulte v. Mauer, 219 N.W.2d 496, 500 (Iowa 1974). An expert’s affidavit submitted in resistance to a motion for summary judgment must “set forth specific facts in order to create an issue of fact for trial.” Bell v. Swift Adhesives, Inc., 804 F.Supp. 1577 (S.D. Ga. 1992) (citations omitted); *See* Brody v. Ruby, 267 N.W.2d 902, 904 (federal interpretations of Federal Rule of Civil Procedure 56 are persuasive in considering Iowa Rule of Civil Procedure 1.981). When the expert’s opinion is based on speculation, hypothesis and is otherwise unsubstantiated by evidence in the record, it is inadequate to prevent the entry of summary judgment. Merit Motors, Inc. v. Chrysler Corp., 569 F.2d 666 (D.C. App. 1977).

II. UNDISPUTED FACTS

A. Preface to Statement of Undisputed Facts

Both the Defendant and the Plaintiffs have submitted, by affidavit, the statements of several purported expert witnesses in support of and in resistance to the opposing motions for summary judgment. In ruling on a motion for summary judgment, the Court should only consider evidence which would be admissible at trial. Pink Supply Corp. v. Hiebert, Inc., 612 F. Supp. 1334, 1338 (D.C. Minn. 1985) (citing FED.R.CIV.P. 56(e)); *See* McSpadden v. Mullins, 456 F.2d 428 (8th Cir. 1972); Chambers v. United States, 357

F.2d 224, 228 (8th Cir. 1966). For the reasons articulated below, this Court rejects certain expert testimony submitted by the parties.

In order for the opinion of an expert witness to be admissible at trial, the proffered evidence must meet several standards set forth by the Iowa Supreme Court in Leaf v. Goodyear Tire & Rubber Co. First, the evidence must be relevant. Leaf v. Goodyear Tire & Rubber Co., 590 N.W.2d 525, 533 (Iowa 1999) (citing IOWA R. EVID. 5.402). Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence” IOWA R. EVID. 5.401. Secondly, the evidence “...must be evidence in the form of ‘scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue.’” Leaf, 590 N.W.2d at 525 (citing IOWA R. EVID. 5.702). Lastly, “...the witness must be ‘qualified as an expert by knowledge, skill, experience, training or education.’” Id. Additionally, it is not sufficient that an expert witness “be generally qualified in a field of expertise; the witness must also be qualified to answer the particular question propounded.” Tappe v. Iowa Methodist Medical Center, 477 N.W.2d 396, 402 (Iowa 1991).

If a case is particularly complex, the Iowa Supreme Court has indicated that a trial court is free to utilize one or more relevant considerations articulated by the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc. Leaf, 590 N.W.2d at 533. The Court, pursuant to Daubert, is free to consider the following factors in evaluating the reliability of expert testimony: “(1) whether the theory or technique is scientific knowledge that can and has been tested, (2) whether the theory or technique has

been subjected to peer review or publication, (3) the known or potential rate of error, or (4) whether it is generally accepted within the relevant scientific community.” Leaf, 590 N.W.2d at 533 (citing Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 593-94, 113 S.Ct at 2797, 125 L.Ed.2d at 483 (1993)). The United States Supreme Court has since extended the application of Daubert to all expert testimony involving “technical and other specialized knowledge” See Kumho Tire Ltd. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

1. The Defendant’s Expert Witnesses:

The Plaintiffs object to several of the Defendant’s expert witnesses. First, the Defendant has submitted the statement of Margaret Somerville. Ms. Somerville possesses a post-graduate degree in comparative law and is the Founding Director of the McGill Centre for Medicine, Ethics and Law. Ms. Somerville describes herself as:

an ethicist with expertise in ethical aspects of new technoscience, including new reproductive technologies, which requires taking into account their impact on social values, including in the context of marriage, and the cultural meaning, symbolism and moral values that traditional marriage places around the inherently procreative male/female relationship, thereby protecting that relationship and the children who result from it.

Ex. F, Appendix to Defendant’s Reply Brief and Brief in Resistance to Plaintiffs’ Motion for Summary Judgment, Vol. 1 (hereafter “Defendant’s Appendix”). Ms. Somerville intends to testify “about the ways in which redefining marriage to include same-sex couples would undermine these roles of the institution of marriage, in turn undermining marriage’s ability and society’s capacity to protect the inherently procreative relationship and the children who result from it, and related matters.” Id at 1-2. She also intends to testify regarding “the impact that redefining marriage to include same-sex couples would

have on the affiliative rights of children to relationships with their biological parents, and related matters.” Id at 2. The Defendants have also submitted the statements and deposition of Paul Nathanson, Ph.D. Dr. Nathanson is a senior researcher in the Department of Religious Studies at McGill University and possesses a Ph.D. in Religious Studies. Nathanson indicates that he possesses expertise in the areas of: “the relation between religion and secularity; ethics (new reproductive technologies; children’s rights); popular culture (family and marriage); and gender (especially, maleness/masculinity).” Ex. C, Defendant’s Appendix. He indicates that he will testify “regarding the significance of marriage as a social institution and the state’s role in maintaining it, and related matters.” Id. The Defendant also submits the testimony of Dr. Katherine Young, a professor of Religious Studies at McGill University. Dr. Young also possesses a Ph.D. in Religious Studies. Dr. Young seeks to testify on “what universally constitutes marriage and why.” Ex. H, Defendant’s Appendix.

The Court believes that the proposed expert testimony of Ms. Somerville, Dr. Nathanson and Dr. Young would be inadmissible at trial. Though the testimony of these individuals is potentially relevant to assist the trier of fact in determining what the State may have considered to be rational bases for the enactment of Iowa Code §595.1, the Court does not believe that the expected testimony of these individuals is scientific, technical, or other specialized knowledge that will assist the trier of fact to understand the evidence or to determine a fact in issue as required by the Iowa Rules of Evidence and Leaf. Leaf, 590 N.W.2d at 525 (citing IOWA R. EVID. 5.702). Additionally, the Court concludes that these individuals are not qualified to testify as experts regarding the issues in this matter. Id. Though they may have expertise in certain areas, such expertise is

insufficient to qualify Ms. Somerville, Dr. Young and Dr. Nathanson to answer the particular questions that they are asked. Tappe, 477 N.W.2d at 402. Though these experts desire to make statements regarding gender, results of same-sex marriage on children and the universal definition of marriage, they do not appear to possess expertise in relevant fields such as sociology, child development, psychology or psychiatry. Ms. Somerville specifically eschews empirical research and methods of logical reasoning in favor of “moral intuition.” She has no training in empirical research and admits having no knowledge of existing social science research relevant to this case. She concedes that her views do not reflect the mainstream views of other ethicists. Dr. Young claims that she pulls together factors from many academic disciplines, including sociological, economic, political and religious factors, though she does not profess expertise in these areas. Nathanson indicates that his methodology involves observing “what people say about religion.” The views espoused by these individuals appear to be largely personal and not based on observation supported by scientific methodology or based on empirical research in any sense. They do not meet the criteria for the admission of expert testimony under the Iowa Supreme Court’s test in Leaf and certainly fail the more stringent test articulated by the United States Supreme Court in Daubert.

The Defendant also submits the statements of Allan Carlson, Ph.D. Dr. Carlson possesses a Ph.D. in Modern European History and is the President of the Howard Center for Family, Religion & Society. Carlson intends to testify as to “the history and public purposes of marriage in the United States and the relationship of marriage to broader family policy.” Ex. A, Defendant’s Appendix. The consequences of marriage for children are relevant factual determinations to be made in this case. Though Carlson

proposes to testify regarding the importance of marriage to children and family policy, he also conducts no empirical data collection and possesses no formal training in empirical research. He has no formal training in a relevant social science discipline enabling him to make reasoned and informed conclusions regarding the impact of marriage on children. This Court does not believe that Dr. Carlson possesses scientific, technical or specialized knowledge which will assist the trier of fact in its determination of whether a rational basis exists for preventing same-sex marriage. Leaf, 590 N.W.2d at 525 (citing IOWA R. EVID. 5.702). Despite Carlson's impressive academic credentials, the Court does not believe he possesses the knowledge or experience to answer the specific questions propounded to him. *See* Tappe, 477 N.W.2d at 402.

The Defendant also submits the statements of purported economist Dr. Steven Rhoads. Dr. Rhoads possesses a Ph.D. in government and an M.P.A. in Economic Analysis and Public Policy. Dr. Rhoads describes his research as "...big synthetic stuff and wander[ing] into other people's territories." Dr. Rhoads indicates that he intends to testify "regarding the significance of marriage in an overall scheme of laws and public policy founded on an accurate understanding of biological differences between men and women, the ways in which typical male and female parenting styles each contribute uniquely to the healthy development of children and related matters." Dr. Rhoads has no expertise relating to child development nor has he conducted any empirical research concerning same. The Court believes that Rhoad's testimony will not provide the trier of fact with scientific, technical, or other specialized knowledge that will assist the trier of fact to understand the evidence or to determine a fact in issue as required by the Iowa Rules of Evidence and Leaf. Leaf, 590 N.W.2d at 525 (citing Iowa R. Evid. 5.702). Dr.

Rhoad's admitted "wandering" into other disciplines is further indication that he lacks the qualifications to answer the specific questions posed in this case. See Tappe, 477 N.W.2d at 402.

As a consequence, none of the factual propositions contained in "Defendant's Statement of Material Facts in Dispute Which Bar Plaintiff's Motion for Summary Judgment" which come from these experts are admissible and they will not be considered for that reason. The Plaintiffs concede that the Defendant's three remaining experts - Alan Hawkins, Warren Throckmorton, and Sharon Quick - are "professionals in potentially relevant fields (medicine, mental health, or child development)". As such, the Court will consider the statements of these experts to the extent they are relied upon by the Defendant.

2. The Plaintiffs' Expert Witnesses:

The Plaintiffs have also submitted the statements of several purported experts in resistance to the Defendant's motion for summary judgment and in support of their own motion for summary judgment. The Defendants specifically object to a few of the Plaintiffs' expert witnesses. With regard to the remainder of the Plaintiffs' experts, the Defendant attacks the weight to be given to their testimony, but does not specifically challenge its admissibility. The Defendant also alleges that many of the Plaintiffs' expert witnesses exhibit bias or are "advocates." However, the potential bias exhibited by a witness also goes to the weight of the evidence and not to the admissibility of the evidence. Hubby v. State, 331 N.W.2d 690, 698 (Iowa 1983).

The Defendant objects to the proffered testimony of Plaintiffs' expert witness, Dan Johnston. Mr. Johnston is licensed to practice law in the State of Iowa and served as

the Polk County Attorney from 1977 – 85. He also served as an Assistant Iowa Attorney General. Mr. Johnston purports to be an expert on anti-gay bias and discrimination in Iowa, the efforts of gays and lesbians to exercise political power and the obstacles faced by the gay and lesbian community. Such facts would be potentially relevant in this case. However, while Mr. Johnston’s statement recounting his life experience as a gay man in Iowa is an emotional one, it is essentially anecdotal and, for that reason, the Court does not believe that Mr. Johnston’s statements are admissible as expert testimony, as Mr. Johnston’s personal experiences do not provide scientific, technical, or other specialized knowledge as required by Leaf and Iowa Rule of Evidence 5.702. Leaf, 590 N.W.2d at 525 (citing IOWA R. EVID. 5.702).

The Defendant also objects to the statements of purported expert witness Mr. John Schmaker. Mr. Schmaker is currently the Chief Financial Officer for the Central Iowa Chapter of the American Red Cross and has previously been employed by several other organizations including the Iowa Democratic Party, the Greater Iowa Chapter of the Alzheimer’s Association, the Varsity Café, and the Iowa Communications Group. Mr. Schmaker purports to be an expert on anti-gay bias and discrimination in Iowa, the efforts by gays and lesbians to exercise political power and the obstacles they face in the exercise of political power. Testimony regarding the political power of gays and lesbians and the discrimination they face in Iowa could be relevant to determining facts of consequence in this case. However, much like Mr. Johnston, the Court believes that Mr. Schmaker’s statements are also essentially anecdotal as they are all based on his personal experiences while living in Iowa. For that reason, his testimony likewise does not

constitute scientific, technical, or other specialized knowledge and would not be admissible at trial. Leaf, 590 N.W.2d at 525 (citing IOWA R. EVID. 5.702).

The Defendant also objects to the statements of Plaintiffs' expert witnesses Sharon Malheiro and Deborah Tharnish, attorneys licensed to practice law in the State of Iowa. Ms. Malheiro has represented gay and lesbian clients in over 200 family-related matters. Ms. Tharnish has participated in over 100 adoption proceedings, approximately 10 of which have involved same-sex couples. Both Ms. Tharnish and Ms. Malheiro intend to testify as to their experiences as attorneys with regard to certain legal difficulties or financial costs faced by gay and lesbian individuals because of their inability to marry. Their statements regarding these challenges and costs involve facts of consequence in this case such that their testimony would be relevant. *See* IOWA R. EVID. 5.401. Ms. Malheiro's testimony as to the legal challenges and costs incurred by gay couples is also evidence in the form of specialized knowledge that would assist the trier of fact. *See Leaf*, 590 N.W.2d at 525 (citing IOWA R. EVID. 5.702). She is qualified to testify with regard to these specific issues by reason of her experience as an attorney representing gay and lesbian clients in approximately 200 family-related matters. *Id.* Ms. Tharnish's testimony regarding the requirements for adoption and, more specifically, same-sex adoption is also evidence in the form of specialized knowledge. *Id.* Ms. Tharnish is qualified to testify with regard to these matters by virtue of her experience as an attorney having participated in 100 adoptions, including several same-sex adoptions. Both Ms. Tharnish's and Ms. Malheiro's testimony would be admissible as expert testimony at trial and as such, their statements are properly considered by this Court.

