

facts of the case.” Under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93 (1993), the trial court has a preliminary responsibility to determine whether an expert witness is qualified to give the testimony he or she proffers. Rule 702 requires that a qualifying expert have sufficient specialized knowledge to assist the jurors in deciding fact issues in the case. See *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1178 (1999). The burden of proof during a court's preliminary Daubert assessment is on the proponent of the expert testimony. See *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269, 276 (5th Cir. 1998).

In addition to being qualified as an expert, Rule 702 requires that an expert demonstrate his opinion is based on a reliable source or methodology, more than a mere “subjective belief” or “unsupported speculation.” *Daubert*, 509 U.S. at 590. The Fifth Circuit has repeatedly upheld the exclusion of expert testimony when the district court determined there was no reliable basis for the alleged expert opinion. *Hathaway v. Bazany*, 507 F.3d 312, 318 (5th Cir. 2007) (holding the “existence of sufficient facts and a reliable methodology is in all instances mandatory.”); *Mac Sales, Inc. v. E.I. du Pont de Nemours & Co.*, 24 F.3d 747, 752 (5th Cir. 1994) (holding the district court should exclude expert testimony that lacks an adequate foundation where a market analyst who researched domestic markets was not qualified to testify on foreign markets); *Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 422 (5th Cir. 1987) (when “the source upon which an expert’s opinion relies is of such little weight...the jury should not be permitted to receive that opinion.”).

A party offering expert witness testimony must submit a written report that gives “a complete statement of all opinions the witness will express and the basis and reasons for them.” Expert witnesses are required to provide a factual basis for all opinions expressed in their report. *Sierra Club v. Cedar Point Oil Co., Inc.*, 73 F.3d 546, 571 (5th Cir. 1996) (holding a one and a half page expert report and a one paragraph expert report were not sufficiently “detailed and complete” because there

were only conclusory opinions without factual support); *Elder v. Tanner*, 205 F.R.D. 190, 193 (E.D.Tex. 2001) (holding “[t]he expert reports must contain some discussion of their reasoning and thought process that lead to their ultimate opinions.”). According to the Advisory Committee notes on Rule 26, an expert report must be “detailed and complete” in order “to avoid the disclosure of ‘sketchy and vague’ expert information.” See, *Sierra Club*, 73 F.3d at 571.

Federal Rule of Civil Procedure 26(2)(C) forbids surprise expert testimony and reports. Under that rule, a party “must” make expert disclosures “at the times and in the sequence that the court orders.” The consequences of failing to do so are well-established. “A party that without substantial justification fails to disclose information required by Rule 26(a) . . . is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed.” Fed. R. Civ. P. 37(c)(1).

B. Testimony of Dr. Voth should be excluded

Voth attempts to offer opinions concerning the Totality of Circumstances factor number 6: “the use of overt or subtle racial appeals in political campaigns” (S.Rep. No. 97-417, 97th Cong., 2d Sess. (1982), pages 28-29), although he does not know this.¹ Voth offers three opinions in his report. See “Summary.” App. 54. The 2nd and 3rd bulleted opinions are irrelevant to the case, are probably

¹ Page 86:

2• • • Q• • Okay• The ~ we’re ~ well, let me ask it •
 3• •this way:• Were you told ~ or do you have an •
 4• •understanding in any way how it is that your testimony •
 5• •and opinions in this case dovetail with the legal issues •
 6• •the Court has to resolve? •
 7• •A• • I really don’t know• I really only know like, •
 8• •well, what’s the extent of race arguments in this area. •
 9• •I don’t know the larger argument that this legal case
 10• •seeks to make.

not reliable either, but given their irrelevance, Defendants do not challenge those opinions here. The one opinion Voth seeks to offer that could be relevant is opinion (1) where he opines that "race and ethnically based arguments are strongly evident in political arguments by candidates."

However, Voth's methodology is badly flawed and critical disclosures of underlying data and analysis have not been made. In reaching his conclusion concerning race and "political arguments by candidates," Voth took a dual track approach. Both tracks of his approach completely lack scientific rigor and reliability.

In the first approach, Voth took 800 pages of media articles provided him by Plaintiffs' counsel and reviewed them looking to see whether race based arguments existed therein. App. 1446, 38:5-40:11. No explanation is provided as to how the 800 pages were selected by Plaintiffs' counsel. It is not known if these articles were pulled from a given time period or they were cherry picked. It is impossible to reach conclusions from such an unexplained, ad hoc data sample.

In order to spot the race based arguments in the 800 pages, Voth claims he used his training and experience in debate and argument to spot race-based arguments. App. 1447, 43.

Apparently recognizing the limitations of reaching conclusions from a set of data provided by Plaintiffs' counsel that is supported by no rhyme or reasons, Voth testified as follows:

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2• . . . So, you know, Dan Morenoff wanted to know
3• are there race-based arguments in these [800 pages of counsel provided] documents.
4• He ~ he provided those documents ~
5• . . . Q• Okay.
6• . . . A• ~ okay? And that sort of raises the question
7• about scientific method. So I did analyze, you know,
8• these 800 pages of documents, but I also then applied ~
9• I said, okay, let's take a look at a controlled
10• comprehensive set, which is ~ and I ~ I consulted with
11• the librarian at SMU. I said, you know, do we have a
12• database access for The Dallas Morning News

App. 1445.

Voth described his second track of utilizing the Dallas Morning News Database as follows:

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10... Q... Okay. So you, ultimately, decide to search
11... The Dallas Morning News database from 2012 to the
12 present; is that ~
13... A... Right.
14... Q... ~ right?
15... Now, do you have or can you provide to us
16... the search that you used?
17... A... Yeah, I probably ~ I probably could. I don't
18... think I ~ I ~ I listed that here, but I basically took
19... the things that I found in the original documents and ~
20... and applied those same words into The Dallas Morning
21... News database.
22... Q... So there's a list of words that you searched
23 for. Is that accurate?
24... A... Yeah, I think ~ I think that's ~ yeah,
25... initial search to articles referencing quote ~ and
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1... these are the things. I used racism and election, those
2... kind of things, yeah.

17... Q... So just to make sure our record's clear
18... because you've sort of been reading from things and
19... saying some things, what is the query that you performed
20... against The Dallas Morning News database?
21... A... Let me make sure I say this right here. So
22... the search sought racism and election within any story
23... that the database had.

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5... Q... Why did you choose those terms? I mean, I
6... understand election. So why did you choose racism?
7... A... Because I think to detect an argument about
8... race, that would probably, you know, discover that and
9... the ~ to what is the frequency of race as an appeal,
10... that would be there.

16... Q... So why not search for some other terms?
17... A... Well, I think that racism is a more
18... rhetorically loaded term. I mean, that would point to
19... journalists and public figures trying to assess a pretty
20... powerful rhetorical charge. And so I think that would

21. ·come closer to helping a Court or something answer like
22. ·are there effectively ~ and that's kind of the hard
23. ·thing we were asking about earlier ~ but like get a
24. ·result of something to ~ to just mention that, you
25. ·know, somebody is Hispanic or some ethnic identity, it
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1 might be nothing, sort of like you're saying. But I'm
2 trying to get at would it produce a result ~ you know,
3 racism is, yeah, a much more loaded term and almost
4 everyone knows and agrees about that and so I chose that
5 term.

9. . . Q. ·Okay. So what number of responses were
10 triggered?
11. . . A. ·There were 26 articles since 2012.
12. . . Q. ·And do you provide those with your report?
13. . . A. ·No.
14. . . Q. ·Why not?
15. . . A. ·Again, I ~ just sitting here with 800 pages,
16. ·I don't think that we need to have them because we can
17. ·all ~ I mean, literally, we can like pull up on a
18. ·laptop those 26 articles and we can ~ we can get them.
19. ·It's ~ it's not hard.

App. 1453-54.

It is clear from the testimony that Plaintiffs have not fully disclosed at this late date all the necessary information to replicate the flawed analysis. It is inexcusable that Plaintiffs did not disclose the search terms Voth used in his DMN analysis until the deposition. It is even more troubling that Voth has not produced the 26 articles his DMN search supposedly returned; nor has he described with particularity or given Defendants access to the database he used. Defendants are not required under Rule 26 to extract an expert's underlying data and methodology like pulling teeth.

Furthermore, the analysis Voth performed lack academic rigor, does not comply with the scientific method and is not compliant with the accepted scientific consensus on this subject. For example, Voth says he reviewed 800 articles supplied by plaintiffs' counsel. Putting aside the fact that Voth failed to perform his own independent analysis of which articles to review (only analyzing

articles hand-picked by plaintiffs' counsel), Voth also failed to identify the denominator for this analysis. In other words, we know he reviewed 800 articles but we don't know how many articles are out there on this topic that he failed to review.

Dr. Barreto, one of Defendants' experts, explains in his rebuttal report, with citation to appropriate academic and scholarly literature, that political scientists have developed an accepted methodology to determine whether racial appeals appear in campaigns in a significant way. App. 1160-63. Voth did not follow this accepted method at all. *Id.* Voth concedes that he could have performed the more scientific analysis that Dr. Barreto describes, but he did not:

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15• • • Q• •And it would have been possible, though, even
16• •setting aside, you know, additional coders, it would
17• •have been possible for you to have gone through,
18• •provided a unique identifier to each of the materials
19• •Mr. Morenoff provided, create a table, and code one or
20• •zero as to whether you recognized that ~ each
21• •individual document as having a racial appeal. Is that
22• •that true?
23• • • A• •Yeah, I think that's possible.

App. 1451.

Coding and creating data from the media articles is the first step to a meaningful analysis. Dr. Barreto and the sources he cite relay the developed methodology Voth should have followed but he did not. Voth's analysis is nothing more than what social scientists call selecting on the dependent variable, a social science no-no — a strategy Dr. Barreto (App. 1159, ¶ 28) and Plaintiffs' other expert, Dr. Hood (App. 1539, 116:3-17), both emphatically reject. When asked about the selecting on the dependent variable problem, Voth testified "I don't know" and criticized Dr. Barreto for not being in the field of communication. App. 1462-63, 105:21-107-16. The problem is that what Voth is trying to do is not a communication exercise, it is a political science and there are accepted methodologies

in the field that Voth is apparently unaware of. The full answer Voth gave in response to this line of inquiry is long but worthy of review; it lays bare that Voth's opinions are outside of his area of expertise. *Id.*

Given the lack of timely disclosure of Voth's data and methods and given that Voth's methods were badly flawed, the Court should exclude Voth's opinions. Whatever Voth's methods, the conclusions he reaches are not legally significant to this case and do not assist the trier of fact on any material issue.

CONCLUSION AND PRAYER

Defendants pray that this motion be granted and the Court exclude the opinions of Dr. Voth as described herein.

Dated this 1st day of December, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of December 2017, a true and correct copy of the foregoing was served by the Court's Electronic Case Filing System on all counsel of record.

By: /s/ Chad W. Dunn

UNITED STATES DISTRICT COURT
FOR THE NORTHERNDISTRICT OF TEXAS
DALLAS DIVISION

ANNE HARDING, et al.,

Plaintiffs,

v.

COUNTY OF DALLAS, TEXAS,
et al.,

Defendants.

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C.A. NO. 3:15-CV-00131-D

ORDER GRANTING DEFENDANTS' MOTION TO EXCLUDE
OPINIONS OF DR. BEN VOTH

The Court has considered the Defendants' Motion to Exclude Opinions of Dr. Ben Voth.

The Court hereby GRANTS the motion and excludes Plaintiffs' expert witness Dr. Ben Voth and his accompanying expert report. Furthermore, the Court excludes any testimony by Dr. Voth regarding his opinions.

SIGNED this ____ day of _____, 2017.

PRESIDING JUDGE

APPROVED AND ENTRY REQUESTED:

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