

Eighth Circuit Report

Experts May Opine Based on Factual Assumptions but May Not Opine that Disputed Facts Actually Occurred

By Patrick J. Kenny



In a fairly granular opinion, the District Court for the Northern District of Iowa provided a good reminder in *McElree v. City of Cedar Rapids, Iowa*, 372 F. Supp. 3d 770 (N.D. Iowa 2019), of the line between expert testimony based on assumed facts, and expert testimony that purports to resolve a disputed fact.

McElree involved a summary judgment motion in a civil rights suit. The underlying incident that led to the suit involved the detention and shooting of the plaintiff's decedent, Jonathan Gossman, by the Cedar Rapids Police Department ("CRPD"). The CRPD believed that Mr. Gossman and two other men were in the process of obtaining pseudoephedrine to manufacture methamphetamine. *Id.* at 778-79. When the police attempted to arrest the men, Mr. Gossman resisted, broke free, and attempted to fire on the police. The police returned fire, and Mr. Gossman was killed. *Id.* at 780-81.

In the civil rights suit, several of the issues concerning expert testimony centered on the opinions of plaintiffs' law enforcement expert. Among other things, that expert testified that: (1) the officers "clearly" were using informants; (2) one of those informants instructed one of the suspects to purchase pseudoephedrine; (3) it was impossible to identify Mr. Gossman during the surveillance; (4) Mr. Gossman was secured with his hands behind his back when removed from the vehicle; and (5) it was unlikely that Mr. Gossman pointed a gun. *Id.* at 787.

The district court struck all of the above testimony. On the first two points, the court noted that an expert's review of other evidence and concluding that "the use of an informant was 'clear' is a determination of a factual issue which invades the province of the jury." *Id.* The court similarly concluded that the expert's opinion on the possibility that the officers could identify Mr. Gossman was a determination of fact, not expert opinion. *Id.*

The expert's testimony concerning Mr. Gossman's hands being secured behind him when he was removed from the vehicle apparently was based on deposition testimony taken out of context and contradicted by all the witnesses

present at the scene. On this point the district court noted that:

an expert's recitation of facts as to which he does not have personal knowledge does *not* generate a material disputed fact.

Id. (emphasis in original).

The court barred the expert from testifying as to whether it was likely for Mr. Gossman to point a gun under the circumstances at the time of his arrest, noting that the opinion was one that a fact witness at the scene might be able to form, but not a non-eye-witness expert on law enforcement. *Id.*

Finally the court struck two of the expert's opinions:

(1) that there was a lack of reasonable suspicion to stop the [suspects' vehicle]; and

(2) that the police action on the night in question was "unreasonable."

Id.

On these last two points the district court explained that the expert:

can testify as to "routine and acceptable" police practices based on his training and expertise, he can "respond to abstract or hypothetical questions by opining" that the police action described "was or was not reasonable in the circumstances described in such a question," and can "opine as to whether he personally believed that" the police action was reasonable, but he cannot opine as to whether police action met the legal standard for reasonableness.

Id.

Based on its rulings on the testimony of plaintiffs' expert and other evidentiary matters, the district court also granted defendants' motion for summary judgment.

McElree provides an important reminder to distinguish between opinions on disputed facts, as opposed to opinions that assume certain facts. That is a subtle, often relevant distinction, to which practitioners should be attuned.

Patrick J. Kenny serves as the Editor-in-Chief of Daubert Online and served for many years as a member of and Expert Witness Chair for the Steering Committee for DRI's Commercial Litigation Committee. He is a partner with Armstrong Teasdale LLP where he chairs the firm's Class Action Practice Group and is an active member of the firm's Insurance Coverage and Litigation Practice Group and the Appellate Practice Group. He has received numerous recognitions for his insurance and commercial litigation practices including listing by Best Lawyers as the 2016 Insurance Law "Lawyer of the Year" in St. Louis. He also long has been listed as a "Super Lawyer" by Missouri/Kansas Super Lawyers / Super Lawyers Business Edition, and has an AV rating in Commercial Litigation and as an Appellate Lawyer by Martindale-Hubbell and American Lawyer Media (ALM). He previously served as a judicial clerk to the Hon. Pasco Bowman (U.S.C.A., Eighth Circuit). He handles complex litigation and appellate matters including bad faith and insurance coverage disputes, ERISA litigation (both pension and benefits), statutory actions, and matters involving fraud, non-compete agreements, and trade secrets. He has tried jury cases to verdict in Missouri and Illinois, handled and supervised numerous appeals, and served as a neutral in scores of cases. He can be reached at Armstrong Teasdale LLP, 7700 Forsyth Blvd., Ste. 1800, St. Louis, Missouri 63105, (314) 552-6613 (direct), (314) 612-2262 (direct fax), e-mail: pkenny@atltp.com or pkenny@armstrongteasdale.com. For further information see his bio at: <http://www.armstrongteasdale.com/patrick-kenny>.