

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

Robin Foley, Gregory Vankooiman, J.P. *
and V.P. *

Plaintiff *

v. * **Civil Action No. 10-CV-335-JL**

JURY TRIAL DEMANDED

The Town/Municipality of Lee New *
Hampshire; Lee Police Department *
Chester Murch, Chief of Police; *
Brian Huppe, Sergeant; *
Scott Flanagan, Former Patrolman; *
Raymond Pardy, Former Patrolman; *
and *
Brenda Tenaglia/Griffin *

Defendants *

**DEFENDANTS' MOTION IN LIMINE TO PRECLUDE
TESTIMONY OF LAWRENCE A. VOGELMAN, ESQ.**

The Town of Lee, Lee Police Department, Chief Chester Murch, Sergeant Brian Huppe and Officers Scott Flanagan and Raymond Pardy (collectively referred to as "Lee Defendants") move to preclude the testimony of Attorney Lawrence Vogelman, Plaintiffs' police procedures witness. Attorney Vogelman does not have the appropriate scientific, technical, or specialized knowledge to render an opinion regarding the police procedures relevant to this matter, nor did Attorney Vogelman follow accepted and reliable methodology in forming his opinion. In support of this motion, Lee Defendants say:

1. Attorney Vogelman has no criminal justice degree, law enforcement experience, or academic publications on police procedures. *See* Deposition of Attorney Vogelman, Exhibit B at 42:9-15; 43:12-20; 44:10-45:3 (hereinafter "Vogelman Depo.").

Nonetheless, he opined in his report dated May 15, 2011 that the individual police defendants failed to follow established police procedure in this case. *See* Vogelmann Report, Exhibit A. Plaintiffs apparently intend to present this opinion at trial.

2. Rule 702 of the Federal Rules of Evidence provides the backdrop for any consideration of expert testimony. That rule provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

3. The U.S. Supreme Court's decisions in *Kumho Tire* and *Daubert* guide a district court in determining how to assess the admissibility of expert testimony. *See, generally, Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). Consistent with those cases, the district court must perform a gatekeeping function by preliminarily assessing whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue. *Seahorse Marine Supplies, Inc. v. Puerto Rico Sun Oil Co.*, 295 F.3d 68, 80 (1st Cir. 2002) (internal citations and quotations omitted);

4. In *Kumho Tire*, the Court extended its holding in *Daubert* and found that the gatekeeping function applies to technical and other specialized knowledge in addition to scientific testimony. 526 U.S. at 141. Whether the specific expert testimony focuses upon specialized observations, specialized translation of those observations into theory, the specialized theory itself, or the application of the theory to a particular case, the expert's testimony will rest upon an experience confessedly foreign to the jury's own. *Id.* at 149 (internal citations and quotations omitted). It is the court's obligation to ensure that the

specialized testimony is reliable and relevant; that the expert's testimony has a valid "connection to the pertinent inquiry as a precondition to admissibility." *Id.* (quoting *Daubert*, 509 U.S. at 592). Where an expert's factual testimony is called into question, the court must determine whether the testimony has a "reliable basis in the knowledge and experience of [the relevant] discipline." *Id.* (quoting *Daubert*, 509 U.S. at 592).

5. Attorney Vogelman intends to testify to three opinions: 1) that the individual police defendants did not follow established police procedure; 2) that it was improper for the police defendants to make a legal decision about whether plaintiffs were licensed to or privileged to remain in the camper at the campground absent a court order; and, 3) that absent a court order, the police had no authority to assist the seller of the camper in removing the plaintiffs from the camper and the campground. *See* Vogelman Depo. at 11:15-12:9. Attorney Vogelman does not intend to offer any other opinions, *id.* at 12:10-12, and should be prevented from doing so.

6. As a basis for his first opinion, Attorney Vogelman relied upon his review of statutes, the discovery in this case, his own experience, and conversations with Plaintiffs' counsel. *Id.* at 12:13-13:5. Attorney Vogelman did not perform any case law research in support of this opinion. *Id.* at 15:17-16:2.

7. As the basis for his second opinion, Attorney Vogelman relied solely upon his review of the discovery in this case and his reading of two relevant statutes. *See* Vogelman Depo. at 20:20-23.

8. As the basis for his third opinion, Attorney Vogelman relied upon his review of the discovery in this case and his review of RSA 635:2. *Id.* at 25:18-26:1. He performed no other research. *Id.* at 26:7-13.

9. Here, notwithstanding Attorney Vogelmann's years of legal practice, his expert opinion on police procedure in this case is not based upon a reliable and knowledgeable experience of the relevant discipline. Attorney Vogelmann's own testimony belies his expert knowledge and invalidates the fundamental underpinnings of admissibility of his expert opinion

10. Attorney Vogelmann does not hold a degree in criminal justice. *See* Vogelmann Depo. at 42:9-12. Attorney Vogelmann has not attended any police academy. *Id.* at 42:13-15. Attorney Vogelmann has not acted as a certified or uncertified police officer. *Id.* at 43:12-17. Attorney Vogelmann has no on-the-job experience in law enforcement. *Id.* at 43:18-20. Attorney Vogelmann has never been qualified as a police expert. *Id.* at 58:9-11.

11. Attorney Vogelmann has not published any research or peer-reviewed scholarly articles related to the police practices implicated in this case. *Id.* at 43:21-45:3. Attorney Vogelmann has never prepared police department policies or procedures dealing with warrantless arrests or the distinction between civil and criminal matters. *Id.* at 46:14-21. Attorney Vogelmann has never been involved in an internal investigation of a police officer for misconduct. *Id.* at 57:16-21. Attorney Vogelmann did not review the Lee Police Departments SOPs or policies when forming his expert opinion. *Id.* at 56:5-7.

12. Most striking is the following exchange between Attorney Vogelmann and Defendants' counsel at Attorney Vogelmann's deposition:

Q: You're familiar with the *Daubert* and *Kumho Tire* line of cases?

A: I am.

Q: What are your understandings of the – or what are the requirements of expert testimony in those cases.

A: Boy. I lecture on that, so that's not going to be easy. Because it's – the Supreme Court has not really helped us out by making anything clear. But to synopsise it, the district court judge, and this is in federal court, acts as a gatekeeper to try to ensure that whatever expert opinion is given is reliable. And there are certain standards that they use. Different standards for scientific and nonscientific, even though there's a lot of fudging in there.

Q: Okay. What are the benchmarks? What are the touchstones?

A: Well, for my opinion here, it would be more a Kumho Tire opinion than a Daubert because I'm not giving any science. So things like peer-reviewed journals and things like that would be less applicable here. But it would be based on my experience and my knowledge whether or not my opinion is reliable. It's much fuzzier with Kumho Tire than it is with Daubert.

Q: Well, mindful of those requirements, if you had the plaintiffs in this case, would you have hired you as your expert – as their expert?

MS. ZIZZA: Objection.

A: No.

See Vogelmann Depo. at 59:12-60:17.

13. Admittedly, in certain fields, experience is the predominant basis for reliable expert testimony without regard to the particular *Daubert* criteria. *Warford v. Indus. Power Sys., Inc.*, 553 F. Supp. 2d 28, 33 (D.N.H. 2008). But unlike the experienced marine electrical switchboard designer in *Warford* drawing upon his experience in the field

to testify as to a faulty generator, here, Attorney Vogelman admittedly has no experience in the police-procedures field upon which to draw his expert opinion.

14. In *St. Laurent v. Metso Minerals Indus., Inc.*, 2005 WL 2277058 (D.N.H. 2005) (collecting cases), an expert's opinion was ruled inadmissible because his report contained no stated principles or methodology. The *St. Laurent* Court held that a plaintiff's failure to demonstrate how an expert's proffered testimony satisfies either the *Daubert* factors or any other set of reasonable reliability criteria supports a finding that the requirements of Rule 702 have not been satisfied.

15. Attorney Vogelman's expert report cites only his thirty years of experience handling civil rights cases, his experience defending persons accused of crimes and his professional affiliations. *See* Exhibit A. Nowhere in his two-page report, nor in his deposition, does Attorney Vogelman state that his actions in this matter (a review of statutes and relevant discovery and conversations with Plaintiffs' counsel) are consistent with the principles, methodology, and reasonably reliable criteria upon which an expert may base an opinion on police procedure.

16. The U.S. Supreme Court has cautioned that "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert." *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). Here, Plaintiffs seek to do just that and should be prevented from doing so.

17. Attorney Vogelman's expert report should be excluded and Attorney Vogelman should be prevented from testifying at trial.

18. No memorandum is necessary as the relevant authority is cited herein.

19. Given the nature of the relief sought, no effort to obtain plaintiffs' consent was made.

WHEREFORE, Lee Defendants respectfully request that this Honorable Court:

- A. Grant this Motion in Limine;
- B. Preclude Attorney Vogelmann from testifying at trial;
- C. Exclude Attorney Vogelmann's expert report from evidence as inadmissible;
- D. In the alternative, limit Attorney Vogelmann's testimony solely to those opinions articulated at Paragraph 5 of this motion;
- E. Grant such other and further relief as is just and equitable.

Respectfully Submitted,

**TOWN OF LEE (NH); LEE POLICE
DEPARTMENT; CHESTER MURCH, CHIEF
OF POLICE; SGT. BRIAN HUPPE; SCOTT
FLANAGAN, FORMER PATROLMAN;
And RAYMOND PARDY, FORMER PATROLMAN**

By Their Attorneys,
GALLAGHER, CALLAHAN & GARTRELL, P.C.

Dated: April 2, 2012

By: /s/ R. Matthew Cairns

R. Matthew Cairns, Esq. (#411)
214 North Main St., P.O. Box 1415
Concord, NH 03302-1415
(603) 545-3622
cairns@gcglaw.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served this date via the Electronic Case Filing (ECF) system on all counsel of record.

Dated: April 2, 2012

By: /s/ R. Matthew Cairns

R. Matthew Cairns, Esq. (#411)