

**UNPUBLISHED**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
CEDAR RAPIDS DIVISION**

ALICE McCABE and CHRISTINE  
NELSON,

Plaintiffs,

vs.

BRUCE MACAULAY, MICHAEL  
PARKER, HOLLY MICHAEL, IOWA  
STATE PATROL, TROY BAILEY, RICK  
BUSCH, LINN COUNTY, IOWA, and  
MICHELLE MAIS,

Defendants.

No. C05-73-LRR

**ORDER**

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This matter is before the court on the motion (Doc. No. 111) of the defendants Iowa State Patrol, Troy Bailey, and Rick Busch (the “State Defendants”) to exclude from trial the expert testimony of Mark McCormick and Larry D. Helvey. The motion has been resisted by the plaintiffs (Doc. No. 113), and the State Defendants have filed a response (Doc. No. 115).

On September 3, 2004, President George W. Bush appeared and spoke at a political rally held at Noelridge Park in Cedar Rapids, Iowa. The plaintiffs, both school teachers, attended the rally to protest against the policies of the Bush administration and against the war in Iraq. Alice McCabe was carrying a sign that stated, “War no more,” showing a “W” with a slash through it. Christine Nelson was wearing a button proclaiming her support for John Kerry and John Edwards. Ms. McCabe and Ms. Nelson were standing on a street adjacent to the park when they had contact with law enforcement officials. At some point,

Ms. McCabe and Ms. Nelson both were arrested<sup>1</sup> and charged with criminal trespass. They were taken to the Linn County Jail, where they were strip-searched. Eventually, the charges were amended to interference with official acts, and later the charges against the two were dropped.

In this lawsuit, the plaintiffs allege they were singled out by the defendants for protesting against the policies of the Bush administration. *See* Doc. No. 85 - the Fourth Amended and Substituted Complaint. They allege the defendants violated their rights to assemble peaceably and to exercise free speech, in violation of the First Amendment to the United States Constitution and Section Seven of the Iowa Constitution; they were subjected to unreasonable searches and seizures, in violation of their rights under the Fourth Amendment to the United States Constitution and Section Eight of the Iowa Constitution; they were denied equal protection under the Fourteenth Amendment to the United States Constitution and Section Six of the Iowa Constitution; they were denied substantive due process under the Fourteenth Amendment to the United States Constitution and Section Nine of the Iowa Constitution; and they were the victims of a conspiracy by the defendants to deprive them of their civil and constitutional rights, in violation of 42 U.S.C. § 1985(3). *Id.*

The plaintiffs have designated Mark McCormick and Larry D. Helvey, M.D., J.D. as expert witnesses in this case. In his report, Mr. McCormick, a noted Iowa lawyer and former Justice of the Iowa Supreme Court, states he has been employed by the plaintiffs as an expert witness to express his opinions “regarding whether probable cause existed for the arrests.” Doc. No. 111, p. 4. On this subject, he tenders the following opinions:

Neither the federal secret service agents nor the state troopers identified as defendants in this case had probable cause to arrest McCabe and Nelson for any crime of which I am aware, including trespass, intentional interference with official acts, or a violation of 8 U.S.C. § 1752(a)(1)(ii) or 18 U.S.C. §3056. The information I reviewed clearly establishes that McCabe and

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<sup>1</sup>Ms. McCabe was arrested by the defendant Troy Bailey, and Ms. Nelson was arrested by the defendant Rick Busch.

Nelson were at all material times prior to their arrest within the public right-of-way of 42<sup>nd</sup> Street in Cedar Rapids. Under Iowa law, it is not a trespass for a person to be “upon the right-of-way of a public road or highway.” *See* Iowa Code §716.7(4). Moreover, the right-of-way had not been closed by city council resolution as permitted under Iowa Code § 34.12(2)(a).

The evidence is undisputed that McCabe and Nelson were within the right-of-way of 42<sup>nd</sup> Street at the time they were first confronted by the defendant secret service agents and troopers. Despite a conflict in the evidence concerning whether McCabe and Nelson refused to move from the north sidewalk when requested to do so by the officers, the contention of McCabe and Nelson that they did comply with the request to move is supported by the videotape of the immediate aftermath of the arrests. The video shows McCabe approximately in the middle of 42<sup>nd</sup> Street in handcuffs and Nelson all the way across 42<sup>nd</sup> Street past the south curb and close to the south sidewalk near Richmond Road. No evidence exists that McCabe and Nelson were moved to the south after their arrests, and the videotape confirms that each of them was well south of the position they were in when first confronted by the officers.

Moreover, the information established that numerous other individuals, none of whom apparently were displaying signs of disagreement with the policies of the Bush administration, were allowed to stand or sit on the north side of 42<sup>nd</sup> Street within the allegedly “restricted” area. In addition to the person collecting money for the Republican party, which everyone admits was present, Trooper Busch admits that other people were sitting with their backs up against the fence on the north side of the right-of-way. The videotape also shows people standing on the north side of 42<sup>nd</sup> Street, including west of the pool house’s driveway, and shows a young man which the evidence shows was selling yellow ribbons, who was walking across 42<sup>nd</sup> Street in a southerly direction in approximately the same area as McCabe and Nelson were when they were arrested. Deposition Exhibits 24 and 26 show individuals on the north side of 42<sup>nd</sup> Street collecting signatures on a petition, which the record shows was a petition to change the Cedar Rapids form of government. The evidence does not show that McCabe and Nelson were in a “restricted access” area, which would be

required to establish a violation of the state and federal statutes.  
See *United States v. Bursley*, 416 F.3d 301 (4th Cir. 2005).

Doc. No. 11, at pp. 4-5.

In Dr. Helvey's report, he concludes "the injuries sustained by Plaintiff Nelson, as shown by the photographs, are not consistent with the appropriate and reasonable placement of handcuffs at the time of her arrest. The ecchymosis depicted could only have been caused by handcuffs that were placed too tightly. The depicted ecchymosis would not have occurred if the handcuffs were placed on Nelson's wrist with enough room for Trooper Busch to place his finger between the cuff and the wrist." *Id.*, at p. 9.

Federal Rule of Evidence 702 provides for the liberal admission of expert testimony regarding factual matters. The Rule states:

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.

A trial judge is charged with a gate-keeping responsibility to ensure all expert testimony or evidence admitted at trial is relevant, reliable, and "will assist the trier of fact to understand the evidence or to determine a fact in issue." *Daubert v. Merrill Dow Pharmaceutical, Inc.*, 509 U.S. 579, 589, 113 S. Ct. 2786, 2795, 125 L. Ed. 2d 469 (1993).

Expert testimony is admissible when it will assist the trier of fact in understanding the evidence or determining a disputed issue of fact. *United States v. Brodie*, 858 F.2d 492, 496 (9th Cir. 1988). However, "resolving doubtful questions of law is the distinct and exclusive province of the trial judge." *Id.*, 858 F.2d at 497. Accordingly, federal courts typically prohibit lawyers, professors, and other experts from interpreting the law for the court or from advising the court about how the law should apply to the facts of a particular case. Testimony "which articulates and applies the relevant law . . . circumvents the [fact finder's]

decision-making function by telling it how to decide the case.” *Specht v. Jensen*, 853 F.2d 805 (10th Cir. 1988).

In their motion, the State Defendants do not contest the knowledge or qualifications of Mr. McCormick or Dr. Helvey, the reliability of their proposed testimony, or the principles or methods they applied to reach their opinions. Instead, they argue the proposed testimony of these witnesses would be irrelevant,<sup>2</sup> unduly prejudicial, and would not assist the trier of fact to understand the evidence or to determine a fact in issue. *See* Doc. No. 111, p. 2.

In arguing that Mr. McCormick’s testimony should be excluded, the State Defendants cite *Estes v. Moore*, 993 F.2d 161 (8th Cir. 1993), and *Peterson v. City of Plymouth*, 60 F.3d 469 (8th Cir. 1995). In *Estes*, the court upheld a district court ruling precluding an expert from testifying as to the existence of probable cause. The court held as follows:

The district court sustained an objection to allowing Estes’s expert to testify as to whether probable cause for the arrest existed. Estes argues that the district court could not exclude the expert testimony just because it went to the ultimate issue in the case. *See* Fed. R. Evid. 704(a). Expert opinion testimony is only admissible if it “assists the trier of fact to understand the evidence or determine a fact in issue.” *See* Fed. R. Evid. 702. While the existence of probable cause is a mixed question of law and fact, the ultimate conclusion is a question of law. *United States v. Campbell*, 843 F.2d 1089, 1092 (8th Cir. 1988). The proposed testimony was, therefore, not opinion testimony but rather it was a statement of a legal conclusion. *See Kostelecky v. NL Acme Tool/NL Indus. Inc.*, 837 F.2d 828, 830-31 (8th Cir. 1988).

*Estes*. 993 F.2d at 163.

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<sup>2</sup>The issue of whether the experts’ testimony is relevant is beyond the scope of this order. However, the court notes the State Defendants argue that where, as here, qualified immunity has been raised as a defense, the issue for purposes of liability is not probable cause, but whether a reasonable officer would have believed the arrest was unlawful. *See* Doc. No. 111-2, p. 3. This is not correct. To succeed in their claims, the plaintiffs would have to show *both* that there was no probable cause for their arrests *and* that a reasonable officer would have believed the arrests were unlawful.

In *Peterson*, the court ruled the trial court had committed reversible error by admitting expert opinion testimony that police officers had acted “reasonably” in a Fourth Amendment context. “Over the course of his testimony, [the expert] set forth his opinion as to why each action the officers took was consistent with ‘nationally accepted standards.’” *Peterson*, 60 F.3d at 475. Citing *Estes*, the court held, “[T]he only disputed issues at trial involved whether the officers actually had probable cause and whether, under qualified immunity analysis, they could reasonably believe they had probable cause. Both probable cause and qualified immunity are ultimately questions of law.” *Id.* The court further held, “[The expert’s] testimony was not a fact-based opinion, but a statement of legal conclusion. . . . The legal conclusions were for the court to make. It was an abuse of discretion to allow the testimony.” *Id.* Virtually every Circuit Court that has addressed this question has agreed with the holdings in *Estes* and *Peterson*. See, e.g., *In re Initial Public Offering Sec. Litigation*, 174 F. Supp. 2d 61, 64 (S.D.N.Y.2001) (“every circuit has explicitly held that experts may not invade the court’s province by testifying on issues of law.”); see also *Nieves-Villanueva*, 133 F.3d 92, 99-100 (1st Cir. 1997) (“At least seven circuit courts have held that the Federal Rules of Evidence prohibit such testimony, and we now join them as to the general rule.”).

Federal Rule of Evidence 704(a), which removes the common-law bar on “otherwise admissible” testimony that “embraces an ultimate issue to be decided by the trier of fact,” does not vitiate the rule against expert opinion on questions of law. The common law did not allow an expert witness to inform the jury of his or her factual conclusion concerning the “ultimate issue” in the case because this was thought to invade the province of the jury. The abolition in Rule 704(a) of this “ultimate issue” rule allows the expert witness to offer his or her factual conclusion in order to aid the jury, which properly can choose to accept or reject it. However, questions of law are not “to be decided by the trier of fact”; rather, it is for the judge, not the lawyers or the witnesses, to inform the jury of the law applicable in the case and to decide any purely legal issues. The abolition of the “bar on ‘ultimate issue’

opinions . . . is not a carte blanche for experts.” *Dinco v. Dylex, Ltd.*, 111 F.3d 964, 973 (1st Cir. 1997). See *Burkhart v. Washington Metro. Area Trans. Auth.*, 112 F.3d 1207, 1213 (D.C. Cir. 1997) (“Each courtroom comes equipped with a ‘legal expert,’ called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards”).

The plaintiffs note in their resistance that Mr. McCormick’s opinions are “stated in terms of lack of probable cause for arrest, which is not directly the applicable legal standard for determining the Plaintiffs’ claims in this case.” Doc. No. 113-2, p. 2. While it is true that Mr. McCormick’s opinions do not address *per se* the specific legal requirements of the plaintiffs’ claims against the defendants, they do relate to a specific element of some of those claims; that is, whether the defendants had probable cause to arrest the plaintiffs. The court can find no authorities that would permit the admission of this evidence at trial based on this distinction, and the court can see no logical basis for such a distinction.

The trial judge in this case is fully capable of deciding legal issues relating to probable cause, and instructing the jury on these issues if necessary. In fact, as much as any other subject in federal jurisprudence, federal courts deal with the concept of probable cause on a routine basis, and are fully prepared to deal with these issues without the assistance of an expert witness.<sup>3</sup>

The court concludes the opinions of Mr. McCormick simply would not be helpful to the fact-finder in this case. As the Fourth Circuit Court of Appeals observed in *United States v. Barile*, 286 F.3d 749 (4th Cir. 2002):

“The most common reason for excluding opinion testimony that gives legal conclusion is lack of helpfulness . . . . The testimony supplies the jury with no information other than the witness’s view of how the verdict should read.” The role of the district court, therefore, is to distinguish opinion testimony that

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<sup>3</sup>The trial court in this case is no exception. See, e.g., *United States v. Stevens*, slip op., 2007 WL 294285, at \*4 (N.D. Iowa Jan. 25, 2007) (Reade, J.); *United States v. Torres-Lona*, slip op., 2006 WL 3254538, at \*7 (N.D. Iowa Nov. 9, 2006); (Reade, J.); *United States v. Snyder*, slip op., 2006 WL 2375005, at \*6 (N.D. Iowa. Aug. 14, 2006) (Reade, J.).

embraces an ultimate issue of fact from opinion testimony that states a legal conclusion.

*Id.*, 286 F.3d at 760 (quoting Weinstein’s Federal Evidence § 704.04 [2][a] (2d ed. 2001)). Accordingly, the motion to exclude this testimony from evidence at trial is **granted**.

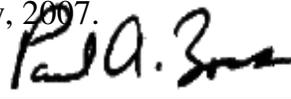
The plaintiffs ask, in the alternative, that Mr. McCormick’s report be reserved and considered by the court in ruling on any dispositive motions filed in this matter. *See* Doc. No. 113-2, p. 3. In the State Defendants’ motion to exclude the expert testimony, the State Defendants only ask that the evidence be excluded from trial, so nothing in this order prohibits the plaintiffs from submitting the report in support of or in resistance to any dispositive motion in this case. However, the plaintiffs are cautioned that evidence offered to support or oppose a motion for summary judgment must be admissible. Fed. R. Evid. 56(e); *Brooks v. Tri-Systems, Inc.*, 425 F.3d 1109, 1111 (8th Cir. 2005).

The State Defendants also ask to exclude Dr. Helvey’s testimony as not relevant to the issues in this case. They argue this evidence would be relevant only to a claim of excessive force, which is not a claim made in this case. The court disagrees. It is not possible at this stage of the case to determine whether this evidence would tend “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.” Fed. R. Evid. 402. For example, this evidence might be relevant to an element of one of the pled claims, to credibility, or even to damages. The court simply cannot make this judgment at this stage of the case or on this record. The motion to exclude this testimony from evidence at trial is **denied**, without prejudice to the assertion at trial of any appropriate objections to the admission of the evidence.

Accordingly, the motion is **granted in part and denied in part**, consistent with this order.

**IT IS SO ORDERED.**

**DATED** this 26th day of February, 2007.

  
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PAUL A. ZOSS  
MAGISTRATE JUDGE  
UNITED STATES DISTRICT COURT