

**BRIAN MICHAEL KELLY and JAMES MARYANSKI v. CITY OF  
PHILADELPHIA, ET AL.**

**CIVIL ACTION NO. 93-259**

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF  
PENNSYLVANIA**

*1995 U.S. Dist. LEXIS 7169*

**May 25, 1995, Decided**

**May 25, 1995, Filed**

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendants, officers, the city, and the commissioner of police, filed a motion in limine to preclude expert testimony in an action brought by plaintiff victims alleging violations of 42 U.S.C.S. § § 1983, 1985 and state tort claims.

**OVERVIEW:** The claims against the officers were based on an off-duty assault for which they were convicted. The claim against the city was based on its failure to train the officers as to off-duty behavior. The expert was to testify that the officers violated accepted police custom and used unjustifiable force, that the city's investigation was incomplete, that the assault was a part of a pattern of inappropriate action by off-duty officers, and that the assault was a predictable result of failure properly to train officers. The city argued that the testimony was based on subjective belief and that the probative value was substantially outweighed by the prejudice. The court denied the motion. The expert held a doctorate in criminal justice, was a professor, and had published books and articles on police and criminal justice issues. His hypothesis was tested in studies to quantify the effect of deficient training on incidents of excessive force. He was to testify as to the precise disputed factual issue. He based his opinion on the investigative report, the complaint, the criminal trial transcripts, exhibits, and his research. There was nothing particularly confusing about the testimony.

**OUTCOME:** The court denied the motion in limine and allowed the testimony to be admitted.

**LexisNexis(R) Headnotes**

*Evidence > Witnesses > Expert Testimony*

[HN1] *Fed. R. Evid. 702* contains three requirements for the admissibility of expert testimony. First, a witness must possess specialized knowledge, skill, or training in the pertinent subject matter to qualify as an expert. Second, the proposed testimony must be reliable, that is, based on the methods and procedures of science rather than subjective belief or unsupported speculation. And third, the proposed testimony must fit or have a valid scientific connection to the disputed factual issues in the case.

***Evidence > Witnesses > Expert Testimony***

[HN2] *Fed. R. Evid. 702* provides as follows: 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.

***Evidence > Witnesses > Expert Testimony***

[HN3] In determining whether expert testimony is sufficiently reliable to be admissible under *Fed. R. Evid. 702*, eight factors should be considered in addition to any other relevant information: (1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; (8) the non-judicial uses to which the method has been put. The reliability requirement must not be used as a tool by which the court excludes all questionably reliable evidence and there is a strong preference for admission.

***Evidence > Witnesses > Expert Testimony***

[HN4] Because *Fed. R. Evid. 702* requires the expert's

testimony to assist the trier of fact, admissibility depends in part on the proffered connection between the scientific research or test result to be presented and particular disputed factual issues in the case.

***Evidence > Witnesses > Expert Testimony***

[HN5] *Fed. R. Evid. 703* requires the court to perform an independent analysis of the bases of an expert's opinion to make sure that they are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.

***Evidence > Relevance > Confusion, Prejudice & Waste of Time***

***Evidence > Witnesses > Expert Testimony***

[HN6] The balancing test of *Fed. R. Evid. 403* has a special role in cases involving expert witnesses because expert evidence is often more misleading than other evidence. However, in order for a district court to exclude scientific evidence, there must be something particularly confusing about the scientific evidence at issue--something other than the general complexity of scientific evidence.

**COUNSEL:** [\*1] For BRIAN MICHAEL KELLY, PLAINTIFF: LOUIS T. SAVINO, JR., PHILA, PA. ROBERT REBSTOCK, PHILADELPHIA, PA. ALAN L. YATVIN, POPPER AND YATVIN, PHILA, PA. For JAMES MARYANSKI, PLAINTIFF: ALAN L. YATVIN, POPPER AND YATVIN, PHILA, PA.

For CITY OF PHILADELPHIA, WILLIE WILLIAMS, Individually and as Commissioner of the Police Department of the City Philadelphia, ANDREW MARTIN, Individually and in his capacity as an Officer of the Police Department of the City of Philadelphia, JOHN MAC DONALD, Individually and in his capacity as an Officer of the Police Department of the City of Philadelphia, TERRANCE LYNCH, Individually and in his capacity as an Officer of the Police Department of the City of Philadelphia, DEFENDANTS: WILLIAM P. BOLAND, CITY OF PHILADELPHIA, LAW DEPARTMENT, PHILA, PA. LEK DOMNI, JEFFREY M. SCOTT, ASSISTANT CITY SOLICITOR, PHILA, PA. SHELLEY R. SMITH, ASST. CITY SOLICITOR, PHILA, PA. For FRANCIS CHENEY, Individually and in his capacity as an Officer of the Police Department of the City of Philadelphia, PAUL VIOLA, Individually and in his capacity as an Officer of the Police Department of the City of Philadelphia, DEFENDANTS: LEK DOMNI, ASSISTANT CITY SOLICITOR, PHILA, PA. [\*2] JEFFREY M. KOLANSKY, TUTTLE & KOLANSKY, PHILA, PA. SHELLEY R. SMITH, ASST. CITY SOLICITOR, PHILA, PA. COLETTE A. PETE,

KOLANSKY AND STRAUSS, P.C., PHILA, PA.

For PATRICK TROISI, Individually and in his capacity as an Officer of the Police Department of the City of Philadelphia, WILLIAM SCHILLING, Individually and in his capacity as an Officer of the Police Department of the City of Philadelphia, PHILLIP ARNOLD, Individually and in his capacity as an Officer of the Police Department of the City of Philadelphia, DEFENDANTS: LEK DOMNI, ASSISTANT CITY SOLICITOR, PHILADELPHIA, PA. SHELLEY R. SMITH, ASST. CITY SOLICITOR, PHILA, PA.

**JUDGES:** JUDGE JAN E. DUBOIS, J.

**OPINIONBY:** JAN E. DUBOIS

**OPINION:**

MEMORANDUM

**DUBOIS, J.**

**MAY 25, 1995**

This case arises out of an assault by two off-duty Philadelphia police officers on plaintiffs, Brian Michael Kelly and James Maryanski ("Kelly and Maryanski"). Presently before the Court is the Motion in limine of defendant, the City of Philadelphia ("the City"), to Preclude the Expert Testimony of James Fyfe, Ph.D. For the following reasons, the Motion will be denied without prejudice to the right of defendants to object at trial to improper [\*3] questions and to move to strike inadmissible evidence.

**I. Background**

On March 2, 1992, Kelly and Maryanski were assaulted by two off-duty Philadelphia police officers near Exeter and Convent Streets in Northeast Philadelphia. The two police officers, Francis Cheney and Paul Viola, both of whom are defendants in the instant action, were convicted of aggravated assault on September 25, 1992.

Kelly and Maryanski filed this action against Cheney, Viola, the City, the Commissioner of the Police, and six other Philadelphia police officers who arrived at the scene after the attack, alleging violations of 42 U.S.C. § 1983 and 42 U.S.C. § 1985, and setting forth several supplemental state tort claims. The claims against Cheney and Viola are based primarily on the assault. The claim against the City is based, in large part, on its alleged failure to train police officers as to appropriate off-duty behavior which, according to plaintiffs, amounted to deliberate

indifference to the rights of persons with whom the police came into contact and was closely related to plaintiffs' injuries.

At trial, Kelly and Maryanski intend to offer the testimony of Dr. Fyfe, a professor of criminal [\*4] justice, in order to prove their failure to train claim against the City. Specifically, Dr. Fyfe will testify that, inter alia, (1) officers Cheney and Viola violated generally accepted police custom and practice in becoming involved with Maryanski and Kelly; (2) Officers Cheney and Viola used unnecessary and unjustifiable force; (3) the Philadelphia Police Department's investigation was so shoddy, incomplete and misleading that it could have been designed only to whitewash the police misconduct involved; (4) the police misconduct in this incident is a part of a pattern of wrongdoing and inappropriate action by off-duty Philadelphia Police Department officers which extends back as far as 1975; and (5) this incident and the pattern of misconduct by off-duty Philadelphia Police Department officers of which it is a part are direct and predictable results of the Philadelphia Police Department's long-term failure properly to train and supervise officers as to their duties and responsibilities while off-duty.

The City argues that Dr. Fyfe's testimony should be excluded under *Federal Rules of Evidence* 402, 403, 702 and 703. According to the City, the proposed testimony is "unreliable" [\*5] and does not "fit" the issues in the instant case because it is based on Dr. Fyfe's own subjective belief rather than a reliable scientific method. Moreover, the City contends that the probative value of the proposed testimony, if any exists, is substantially outweighed by the danger of unfair prejudice and confusion of the issues at trial because, in forming his expert opinion, Dr. Fyfe relied on several hundred past incidents involving off-duty police officers, and the City would have to engage in separate mini-trials on each incident in order to cross-examine him effectively.

## II. Discussion

### A. Federal Rule of Evidence 702

[HN1] *Federal Rule of Evidence* 702 contains three requirements for the admissibility of expert testimony. n1 First, a witness must possess specialized knowledge, skill, or training in the pertinent subject matter to qualify as an expert. Second, the proposed testimony must be "reliable," that is, based on the "methods and procedures of science" rather than "subjective belief or unsupported speculation." And third, the proposed testimony must "fit" or have a valid scientific connection to the disputed factual issues in the case. The Court concludes [\*6] that all three requirements of Rule 702 are satisfied in this case. n2

n1 [HN2] *Federal Rule of Evidence* 702 provides as follows:

"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 . . . ."

n2 Some courts have formulated a two-part test for admissibility under Rule 702 by combining this Court's second and third requirements. See, e.g., *Surace v. Caterpillar, Inc.*, 1995 U.S. Dist. LEXIS 6683, No. 94-1422, slip op. at 3 (E.D. Pa. May 16, 1995).

### 1. Qualifications

Rule 702 establishes a liberal policy of admissibility which extends to the substantive as well as formal qualification of experts, and "a broad range of knowledge, skills, and training qualify an expert as such." *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 741 (3d Cir. 1994). Dr. Fyfe holds a Ph.D. in criminal justice [\*7] from the State University of New York at Albany and is currently a professor of criminal justice at Temple University. He has published five books and more than 75 articles and book chapters on police and criminal justice issues and has testified in over 60 matters as an expert on police practices in federal and state courts throughout the United States. He has also testified as an expert on police administration, supervision, training, use of force, and accountability in the United States Congress, the Pennsylvania House of Representatives, and the Philadelphia City Council. Over the past 20 years more than 40,000 New York City police officers have been trained in a course that he developed, and he currently serves on the Commission on Accreditation for Law Enforcement Agencies. Prior to his current academic appointment, Dr. Fyfe served as a police officer in the New York City Police Department, retiring after 16 years with the rank of lieutenant. During this time, he held a variety of training and administrative positions. In light of the foregoing, the Court concludes that Dr. Fyfe is amply qualified to testify as an expert with regard to the issues in this case and that the first [\*8] requirement of Rule 702 is met.

### 2. Reliability

[HN3] In determining whether expert testimony is sufficiently reliable to be admissible under Rule 702, the Third Circuit has enumerated eight factors which should be considered in addition to any other relevant information: (1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; (8) the non-judicial uses to which the method has been put. *Paoli*, 35 F.3d at 742 n.8. However, the Third Circuit warned that "the reliability requirement must not be used as a tool by which the court excludes all questionably reliable evidence" and expressed its "strong preference for admission." *Id.* at 744-45.

Considering the applicable factors set forth above, the Court concludes that Dr. Fyfe's testimony is sufficiently reliable to satisfy the second [\*9] requirement of Rule 702. n3 Dr. Fyfe's hypothesis, that "police administrators' failure to promulgate and enforce reasonable regulations guiding officers' behavior produces behavior that is arbitrary, unreasonable, and unjustifiable," has been tested by Dr. Fyfe and others in studies which attempt to quantify the effect of deficient training on the number of incidents of excessive force. See, e.g., Plf.'s Response to Def.'s Mot. In Limine Exhibit B, at 16 (study of Gerald Uelman which concludes that major determinant of police shootings in 51 Los Angeles County police departments was not level of crime and violence but rather the philosophies and policies of the department chiefs) (Factor 1). Furthermore, many of the studies conducted by Dr. Fyfe have been reviewed by his peers and have been cited or reprinted in their subsequent publications. See *Id.* at 8-10 (listing 14 of Dr. Fyfe's peer-reviewed articles) (Factor 2).

n3 The Court discusses *infra* all of the Paoli factors excepting the sixth, which it deems inapplicable to this case.

**[\*10]**

The method Dr. Fyfe employs to reach the conclusion that the attack on Kelly and Maryanski was the direct and predictable result of the City's failure to train its officers is based primarily on his many years of experience as a police officer, a training specialist, and a researcher (Factor 5). While not particularly formalistic, this method is generally accepted in the field and has been relied upon by the New

York City and Metro-Dade Police Departments in establishing their training programs (Factor 8).

The City argues that because there are no objective standards which control the technique's operation (Factor 4) and there is no quantifiable rate of error (Factor 3), Dr. Fyfe's testimony is unreliable. Although the Court might have some reservations about the reliability of an expert witness whose opinion is based solely on his experience in a particular field and not on objective standards with a quantifiable rate of error, Dr. Fyfe's qualifications and his extensive research on issues of police training allay any concerns the Court might have in this case (Factor 7).

**3. Fit**

[HN4] Because Rule 702 requires the expert's testimony to assist the trier of fact, admissibility [\*11] depends in part on "the proffered connection between the scientific research or test result to be presented and particular disputed factual issues in the case." *Paoli*, 35 F.3d at 743. The connection in this case is extremely close. Dr. Fyfe will testify as to the precise disputed factual issue in the case--that the attack on Kelly and Maryanski was a direct and predictable result of the Philadelphia Police Department's long-term failure properly to train and supervise officers as to their duties and responsibilities while off-duty. The City states that "there is absolutely no evidence which can allow Dr. Fyfe to state that the City of Philadelphia encouraged Defendants, Cheney and Viola to violate the plaintiffs' civil rights." This argument, however, misses the mark because it is addressed to the sufficiency of the evidence supporting the expert's opinion rather the relationship of the opinion to the disputed factual issue in the case. Although the standard for "fit" is higher than bare relevance, the Third Circuit emphasized that the standard is "not that high." *Paoli*, 35 F.3d at 745. Accordingly, this Court concludes that there is a sufficient connection between Dr. Fyfe's [\*12] testimony and the disputed factual issues and that the third requirement of Rule 702 is met.

**B. Federal Rule of Evidence 703**

[HN5] *Federal Rule of Evidence 703* requires the court to perform an independent analysis of the bases of an expert's opinion to make sure that they are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Dr. Fyfe based his opinion on a review of the Police Investigative Report, the Complaint in the instant matter, the trial transcripts in *Commonwealth v. Viola* and *Commonwealth v. Cheney*, defendant's proposed trial exhibits, and data from his previous research and expert testimony regarding alleged incidents of wrongdoing and inappropriate action

by off-duty Philadelphia Police Department officers extending back as far as 1975.

Dr. Fyfe reviewed the facts of the instant case and the current training materials employed by the Philadelphia Police Department and used his knowledge, experience, and prior research to form an opinion as to the adequacy of the training program and the effect of any deficiencies. It appears to the Court that Dr. Fyfe relied upon all of the available data [\*13] on the issues presented. Based on Dr. Fyfe's statements and the absence of any contrary evidence, the Court concludes on the present state of the record that the materials relied upon by Dr. Fyfe are of a type reasonably relied upon by criminal justice experts in forming an opinion regarding the adequacy of police training programs. On the present state of the record, what was done by Dr. Fyfe meets the requirements of Rule 703. Defendants will be permitted, however, to object at trial to any testimony by Dr. Fyfe which they contend is based on evidence or other data or material which does not satisfy the requirements of Rule 703. n4

n4 Although the City lists Rule 703 in its Motion in limine as a basis for excluding Dr. Fyfe's testimony, there is no discussion of this Rule in its accompanying Memorandum of Law.

### C. *Federal Rule of Evidence 403*

Defendants argue that evidence of prior off-duty incidents on which Dr. Fyfe relies, and his conclusions based on these prior incidents, should be excluded [\*14] under *Federal Rule of Evidence 403* on the ground that the probative value of such evidence is substantially outweighed by the danger of unfair prejudice and confusion of the issues. It is defendants' position that allowing such testimony based on numerous prior off-duty incidents will require defendants to engage in a separate mini-trial on each prior incident in cross-examining Dr. Fyfe, resulting in unfair prejudice and confusion of the issues.

In making this argument defendants rely heavily on a prior failure to train case in which Magistrate Judge Leomporra used Rule 403 to prevent Dr. Fyfe from referring to 29 "shooting books" as a basis for his opinion because the court decided that the defendant would have to cross-examine Dr. Fyfe on each incident, requiring separate mini-trials. n5 See *Strauss v. Springer*, 817 F. Supp. 1211 (E.D. Pa. 1992). Although the possibility of separate mini-trials may have been a concern in *Strauss*, the Court concludes, on the present state of the record, that any such concern in this case does not warrant preclusion

of Dr. Fyfe's testimony.

n5 A "shooting book" is a record of police shootings and the response taken by the Police Department.

[\*15]

The City argues that prior investigations in which no assertion of police authority was alleged to have occurred should be excluded under *Federal Rule of Evidence 402* because "these incidents are so factually dissimilar from the facts presented instantly that reference to them has no probative value whatsoever." See Mem. of Law in Support of Mot. in Limine § B.1. The Court notes that Dr. Fyfe has opined, in part, that the attack on Kelly and Maryanski was a predictable result of "the City's failure to provide officers with policy and training to the effect that they should avoid off-duty altercations and that they should not use their enforcement powers to resolve their personal disputes." See Id. Exhibit A. Such testimony purports to make all off-duty incidents relevant to the disputed factual issues in the case.

The Third Circuit instructed in *Paoli* that [HN6] the balancing test of *Federal Rule of Evidence 403* has a special role in cases involving expert witnesses because expert evidence is often more misleading than other evidence. The Third Circuit held, however, that in order for a district court to exclude scientific evidence, there must be something particularly [\*16] confusing about the scientific evidence at issue--something other than the general complexity of scientific evidence. *Paoli*, 35 F.3d at 747. Because there is nothing particularly confusing about Dr. Fyfe's testimony in this case and because defendants have failed to articulate the basis of any prejudice unrelated to the alleged confusion of the issues, Dr. Fyfe will be allowed to rely on all relevant prior incidents of alleged police misconduct in forming his expert opinion, subject to defendants' right to cross-examine him on any such incidents and to object to any inadmissible evidence and/or move to strike any opinions as to which there is an insufficient basis.

### III. Conclusion

For the foregoing reasons, the Motion in limine of defendant, the City of Philadelphia, to Preclude the Expert Testimony of James Fyfe, Ph.D., will be denied. The denial of the Motion is without prejudice to the right of defendants to object at trial to improper questions and to move to strike inadmissible evidence. An appropriate Order follows.

**ORDER**

**AND NOW**, to wit, this 25th day of May, 1995, upon consideration of the Motion in limine of Defendant, the City [\*17] of Philadelphia, to Preclude the Expert Testimony of James Fyfe, Ph.D. (Document No. 91), and the Response of Plaintiff, James Maryanski, to the City of Philadelphia's Motion in limine (Document No. 96), **IT IS ORDERED** that, for the reasons set forth in the accompanying Memorandum, the Motion in limine of

Defendant, the City of Philadelphia, to Preclude the Expert Testimony of James Fyfe, Ph.D., is **DENIED WITHOUT PREJUDICE** to the right of defendants to object at trial to improper questions and to move to strike inadmissible evidence.

**BY THE COURT:**

**JAN E. DUBOIS, J.**