

Attorneys' Fee Request Not the Time to Challenge Expert

By [Robert Ambrogio, Contributing Author](#) on 2013/02/19

You would expect a challenge to an expert witness to be made before trial, before the expert has the opportunity to testify. In an unusual case out of a federal court in Florida, however, the challenge came after the jury had rendered its verdict, in the plaintiff's post-trial motion for an award of costs and attorneys' fees. Unfortunately for the plaintiff, the challenge came too late – the judge ruled that it should have been raised in a pre-trial *Daubert* motion.

The ruling came in a wrongful death lawsuit against tobacco manufacturer R.J. Reynolds Tobacco Company. This was one of the so-called Engle progeny lawsuits that resulted from the decertification of the class action named for the original lead plaintiff, Howard Engle. In this case, the plaintiff was Alvin Walker, as personal representative of the estate of Albert Walker, a long-time smoker who claimed his addiction to tobacco caused the lung cancer that led to his death.

After an eight-day trial in May 2012, the Jacksonville jury returned a verdict for Walker and awarded \$275,000 in compensatory damages. Because the jury also found that Albert Walker was 90 percent at fault for his lung cancer and death, the court reduced the verdict to \$27,500.

Following the trial, Walker asked the court to award attorneys' fees pursuant to Federal Rule of Civil Procedure 37(c)(2). Under Rule 37, if a party files a pretrial request for admissions and the opposing party fails to admit a fact that is later proved to be true, then the requesting party can ask for reimbursement of the attorneys' fees incurred in making the proof.

Here, three of the requested admissions were central to Walker's case. They asked R.J. Reynolds to admit that Walker was addicted to cigarettes and that his addiction caused his lung cancer. But R.J. Reynolds contended otherwise, presenting a psychiatric expert who testified that Walker smoked because he enjoyed it, not because he was addicted, and that he never seriously tried to quit.

Credibility of Expert at Crux

Walker's attorneys' fee request was referred to U.S. Magistrate Judge Joel B. Toomey. Finding that R.J. Reynolds had a reasonable ground to believe it might prevail on the issue of addiction, he denied the request. "It is clear that the issue of addiction was a genuine issue for trial," he wrote. "Thus, Defendant did not act unreasonably in denying these requests."

Walker's attorneys objected to the magistrate's report, arguing that R.J. Reynolds' position on addiction was unreasonable and disingenuous. In support of that position,

they contended that the expert testimony R.J. Reynolds presented to refute Walker's addiction was neither credible nor consistent with current science and law.

"It is correct that R.J. Reynolds presented a psychiatrist's opinion that Mr. Walker was not addicted," Walker's lawyers asserted. "However, his opinions are not credible and represent an unreasonable position—rendering R.J. Reynolds denial of the request for admission unreasonable."

The mere fact that the expert's opinion was supportive of the denial of the request for admission should not be, of itself, sufficient to render R.J. Reynolds' denial reasonable, Walker's attorneys argued. "Rather, the denial should be viewed in the context of the reasonableness of the opinion expressed and whether such opinion has been reached fairly and consistent with scientific norms. ... [The expert's] opinion is premised on a unique and un-medically supported opinion of addiction."

After considering Walker's objections, U.S. District Judge Roy B. Dalton Jr. issued an order on Dec. 12, 2012, adopting the magistrate's recommendations and denying Walker's request for attorneys' fees. Judge Dalton's order was brief, but he specifically addressed Walker's arguments concerning the credibility and reliability of R.J. Reynolds' expert.

"While the Plaintiff raises troubling issues regarding the development and bases of Defendant's expert opinions in this and other Engle progeny cases," Judge Dalton wrote, "those considerations are more properly the subject of a *Daubert* motion regarding the admissibility of the testimony rather than a post-trial motion for attorney's fees and costs under Fed. R. Civ. P. 37(c)(2)."

That was all he said on the subject, but it was all he had to say. This post-trial motion was not the time for Walker to challenge R.J. Reynolds' expert. Walker's fee request hinged on the reasonableness of R.J. Reynolds' stance on addiction. With that stance ostensibly supported by expert testimony, and that testimony being too late to challenge, Walker's Rule 37 motion had to fail.

The case is *Alvin Walker v. R.J. Reynolds Tobacco Company*, Case No. 3:09-cv-10598 (M.D. Fla., Dec. 12, 2012).

Related documents:

- [Order](#) issued by U.S. District Judge Roy B. Dalton Jr.
- [Report and Recommendation](#) of U.S. Magistrate Judge Joel B. Toomey.
- [Plaintiff's Rule 72\(A\) Objection to the Magistrate's November 1, 2012 Report and Recommendation.](#)

Do you agree with the ruling that Walker's Rule 37 motion had to fail?

This article was originally published in [BullsEye](#), an expert witness and litigation news blog published by IMS ExpertServices. IMS ExpertServices is a full service [expert witness](#) and

litigation consultant search firm, focused exclusively on providing best-of-class experts to attorneys. We are proud to be the choice of nearly all of the AmLaw Top 100.