

# WHEN AN EXPERT CONTRADICTS HIS CLIENT

Robert Ambrogi

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Picture yourself as the defendant's lawyer in this courtroom scenario: The plaintiff testifies that his injury occurred one way. Then comes his expert, who testifies that the injury clearly occurred another way. You can well imagine the defendant's counsel itching to pounce on the inconsistency.

And pounce he did. The defendant's counsel asked the court to exclude the expert's testimony, arguing that its inconsistency with the plaintiff's own recollection made it irrelevant under the federal rule governing the admissibility of expert evidence. The district court agreed. With no expert to support the plaintiff, the case was dismissed.

Of course, were that the end of the story, we would have no blog post. The plaintiff appealed to the 6<sup>th</sup> U.S. Circuit Court of Appeals. On July 29, a three-judge panel of that court issued its opinion. Two of the judges ruled one way. One dissented. Before we tell you how it turned out, let us review what happened.

## Target Practice Gone Bad

In November 2006, the plaintiff, Mark D. Lee, was target shooting with his Smith & Wesson 460XVR revolver. After firing two shots, Lee shot a third time. This time, the gun discharged improperly, seriously injuring Lee's right eye, face and nose.

Lee filed a product liability lawsuit against Smith & Wesson, asserting that the gun was defectively manufactured and designed and lacked adequate safety warnings. Smith & Wesson countered that Lee's injuries were caused by recoil, not by any defects in the gun.

In support of his case, Lee sought to introduce the testimony of Roy Ruel, an expert in mechanical engineering, firearms and ballistics. After examining the gun and all the circumstances, Ruel concluded that the injury occurred because the gun fired without its cylinder fully closed and locked, causing hot, high-pressure gas to shoot out and strike Lee in the face.

The gun was defective, the expert determined, because it could be cocked and fired with a pull of the trigger without its cylinder closed and locked, and also because its ejector rod could become loose, preventing the cylinder from closing and locking.

## Inconsistent Versions of Events

The expert's theory certainly sounded plausible. But from the defendant's point of view, there was a big problem with it. The theory depended on a version of events that was inconsistent with the plaintiff Lee's version in several ways:

- Ruel testified that the gun did not immediately fire on the third shot because the cylinder failed to close fully. Lee testified that he had no difficulty firing the gun the third time.
- Ruel said that the cylinder was open when Lee fired the third shot. Lee testified that he was able to close the cylinder and that it had closed normally.

- Ruel testified that when the gun would not immediately fire the third time, Lee pushed on the thumb latch and was able to cock and fire the gun with the chamber still open. Lee's demonstration of his grip on the gun showed that he did not touch the thumb latch.

Given these inconsistencies, Smith & Wesson moved to exclude the expert's testimony on the ground that it failed to satisfy the relevancy requirement of Federal Rule of Evidence 702. The district court agreed.

### **Testimony Was Admissible**

On appeal, two members of the three-judge panel ruled that Ruel's expert testimony should have been admitted. Even though Ruel's expert theory contradicted Lee's testimony, "a party is not precluded from proving his case by any relevant evidence, even though that evidence may contradict the testimony of a witness previously called by him," the court said.

The admissibility of expert testimony should be determined solely by the principles and methodology used by the expert, not by the conclusions they generate, the court said. Here, the expert had the appropriate qualifications, he used reliable methods, and his opinion was based on physical evidence from the accident.

A jury hearing the conflicting testimony could well have concluded that Lee was mistaken about whether he had closed the cylinder, the court noted. "A reasonable fact finder could conclude that Lee *thought* he had closed the chamber but in fact did not, and instead overlooked the opening, which Ruel suggests was the case in Lee's accident."

This case is different from those in which expert testimony is based on facts which are clearly contradicted by the evidence, the court explained. Here, a jury could plausibly reject parts of Lee's recollection and credit the expert's version of events.

"Lee's memory and Ruel's deductions both clearly reject Smith & Wesson's argument that the injury was caused by heavy recoil," the court concluded. "Therefore, the central factual issue—the cause of Lee's injury—was still in dispute, and the mismatch between Lee's and Ruel's theories of whether the cylinder was fully closed should not have precluded the admissibility of Ruel's expert opinion."

### **A Dissenting Opinion**

One member of this 6<sup>th</sup> Circuit panel disagreed. In a dissenting opinion, Circuit Judge Damon J. Keith argued that the district judge properly exercised his gatekeeping duties under Rule 702 in excluding the testimony.

"*Daubert* does not require that a trial judge open the gate to all speculation, especially speculation from an expert who openly admitted that he disregarded the Plaintiff's account of the events in reaching his hypothesis," Keith asserted.

The satirist and essayist Jonathan Swift once wrote, "There is nothing constant in this world but inconsistency." When it comes to expert testimony, it would appear the 6<sup>th</sup> Circuit agrees.

The case is [\*Lee v. Smith & Wesson\*](#), No. 13-3597 (6<sup>th</sup> Cir. July 29, 2014).