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Francesco G. Salpietro*

INTRODUCTION

Expert opinions are a fundamental strategic component in the field of products liability litigation.¹ The success of a party's claim or defense often depends upon an expert's testimony at trial, and the "battle of the experts" forces triers of fact to "abdicate their fact-finding obligations" and, instead, simply adopt the opinions of the expert witnesses whose testimony they find persuasive.² The benefits of an expert's opinion have prompted considerable manipulation in court—in an effort to avail themselves of the highly persuasive nature of a credible expert's opinion, litigants have attempted to introduce expert testimony bearing only a tenuous connection to the case at hand.³ In response, the Federal Rules of Evidence and corresponding U.S. Supreme Court ("Supreme Court" or "Court") precedent have severely curtailed these abusive litigation tactics, instead forcing trial court judges to assess a proffered expert's opinion for both relevancy and reliability to ensure that the opinion adequately "fits" the facts of the case.⁴

This Note critiques the progression of the admissibility of expert testimony codified by Federal Rule of Evidence 702 ("Rule 702") and subsequently expanded

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¹ 4A AMERICAN LAW OF PRODUCTS LIABILITY 3D § 54:82 (John D. Hodson et al. eds., 1987).

² Douglas R. Richmond, *Regulating Expert Testimony*, 62 MO. L. REV. 485, 486–87 (1997) (quoting Judge Charles R. Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Civil and Criminal Jury Trials*, 154 F.R.D. 537, 541 (1994)).

³ See *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 153 n.6 (1997) (Stevens, J., concurring in part and dissenting in part) (admonishing litigants for their use of expert testimony based upon "junk science").

⁴ See generally FED. R. EVID. 702; *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); *Joiner*, 522 U.S. at 137–50 (majority opinion); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

upon by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* and its progeny. Part I provides a brief history of the admissibility of expert testimony in federal court. Part II addresses a recent decision made by the Sixth Circuit, *Lee v. Smith & Wesson Corp.*, which extended the admissibility under Rule 702 to include an expert's opinion that directly contradicts the oral testimony of its own witness. Finally, Part III analyzes the 2-1 decision in *Smith & Wesson Corp.* and argues against the logic of the majority's opinion, instead favoring the dissent's interpretation of *Daubert*, its progeny, and Rule 702.

I. A BRIEF HISTORY OF THE ADMISSIBILITY OF EXPERT TESTIMONY

Prior to the official codification of Rule 702, courts across the United States applied the logic of the D.C. Circuit in determining the admissibility of expert testimony at trial.⁵ Under the seminal case, *Frye v. United States*, the *Frye* test required the scientific basis for expert testimony to “be sufficiently established to have gained general acceptance in the particular field in which it belong[ed].”⁶ As opposed to inquiries about the skill, experience, and knowledge of the expert himself, courts examined the “evidential support” of the expert's opinion based upon “well-recognized scientific principle[s]” to either admit or deny an expert's testimony at trial.⁷

Nearly sixty years after the initial application of the *Frye* test, the Supreme Court granted certiorari to decide whether this test of general acceptance had been superseded by the enactment of Rule 702.⁸ Consequently, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court held that it had.⁹ At the time of *Daubert*, Rule 702 provided: “[i]f 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.”¹⁰ In a textual examination

⁵ Richard T. Stilwell, Kumho Tire: *The Battle of the Experts Continues*, 19 REV. LITIG. 193, 195 (2000).

⁶ *Id.*; *Frye v. United States*, 293 F. 1013, 1013–14 (D.C. Cir. 1923).

⁷ *Frye*, 293 F. at 1014.

⁸ Margaret A. Berger, *The Supreme Court's Trilogy on the Admissibility of Expert Testimony*, in REFERENCE MANUAL ON SCI. EVIDENCE 9, 11 (2d ed. 2000).

⁹ *Daubert*, 509 U.S. at 589.

¹⁰ *Id.* at 588 (citing Rule 702 as it appeared in 1993). Rule 702 was later amended in 2000 to better reflect the Supreme Court's holding in *Daubert* and again in 2011 “as part of the restyling of the Evidence Rules

of Rule 702, the Court formed a two-prong inquiry for trial judges to apply when determining the admissibility of expert testimony: the trial judge must resolve “whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.”¹¹ As such, the trial judge serves as the “gatekeeper to screen proffered expertise, and the objective of the screening is to ensure that what is admitted is not only relevant, but reliable.”¹²

Regarding the first prong of reliability, the Court held that a judge must ascertain whether the scientific testimony is sufficiently rooted in the methods and procedures of science.¹³ Accordingly, the expert’s opinion must rise above mere subjective belief, unsupported hypotheses, or speculation.¹⁴ In the Court’s opinion, Justice Blackmun provided a set of “flexible” factors to gauge this evidentiary reliability—while certainly permitted to examine the general acceptance of such methodology by the scientific community as outlined in *Frye*, the trial judge may weigh other factors in determining the admissibility of the proffered expert’s opinion.¹⁵ In order to determine the reliability of the evidence presented, a judge may examine whether the theory or technique can be (or has been) empirically tested, whether the theory has been subject to peer review or publication, and whether the theory has been prone to any known or potential error in order to determine the reliability of the evidence presented.¹⁶

to make them more easily understood” FED. R. EVID. 702 advisory committee’s notes. Rule 702 currently reads as follows:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

FED. R. EVID. 702.

¹¹ *Daubert*, 509 U.S. at 592.

¹² Berger, *supra* note 8, at 11 (citing *Daubert*, 509 U.S. at 589).

¹³ *Daubert*, 509 U.S. at 590.

¹⁴ *Id.*

¹⁵ *Id.* at 593–94 (providing examples of factors for the trial judge to consider, including testability, peer review, potential rate of error, and general acceptance by the scientific community).

¹⁶ Stilwell, *supra* note 5, at 197 (citing *Daubert*, 509 U.S. at 594).

Regarding the second prong of relevancy, the Court held that lower courts are bound by Federal Rule of Evidence 401 (“Rule 401”), namely, that evidence is relevant if: “(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of the consequence in determining the action.”¹⁷ Stated more simply—and within the confines of expert testimony—the theory presented cannot assist the trier of fact in resolving a factual dispute unless it is sufficiently tied to the facts of the case.¹⁸ As such, lower courts have “aptly described [the relevancy consideration] as one of ‘fit.’”¹⁹

Applying this new standard to the facts in *Daubert*, the Court ruled that the Ninth Circuit erroneously affirmed Merrell Dow’s Motion for Summary Judgment.²⁰ Although the plaintiff’s experts based their opinions regarding a pharmaceutical defect on *in vitro* and *in vivo* animal studies, pharmacological discoveries, and a reanalysis of other research, the district court excluded the opinions since their scientific bases had not yet gained acceptance within the general scientific community.²¹ However, under *Daubert*, since general acceptance is no longer a requisite nor dispositive element in a determination of the admissibility of expert testimony, the Court remanded the case and directed the lower court to broaden its review in accordance with its opinion.²²

Four years later, the Supreme Court revisited *Daubert* in *General Electric Co. v. Joiner*.²³ The Court reaffirmed the flexibility granted to trial judges in reviewing and analyzing expert testimony and clarified the standard of review to apply to admissibility challenges on appeal.²⁴ In the Court’s opinion, Chief Justice Rehnquist held that an abuse of discretion standard was the proper standard of review regarding *all* challenges to evidentiary rulings made by the trial judge, including challenges to expert opinions.²⁵ Since the Eleventh Circuit erroneously applied a “particularly

¹⁷ FED. R. EVID. 401.

¹⁸ *Daubert*, 590 U.S. at 589 (citing FED. R. EVID. 702).

¹⁹ *Id.* at 591.

²⁰ *Id.* at 583–85, 597–98.

²¹ *Id.* at 585–86.

²² *Id.* at 598.

²³ See generally *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997).

²⁴ *Stilwell*, *supra* note 5, at 197–98.

²⁵ *Joiner*, 522 U.S. at 141–43.

stringent standard of review” to assess the trial judge’s exclusion of expert testimony, the Court ultimately gave great deference to the district court by leaving the application of the *Daubert* factors to the sound discretion of the trial judge.²⁶

Regarding the facts of the case in *Joiner*, the Court upheld the trial judge’s exclusion of the plaintiff’s expert’s opinion, as there was “simply too great an analytical gap between the data and the opinion proffered.”²⁷ Even though the plaintiff’s expert presented evidence from four epidemiological studies allegedly linking cancer to the carcinogenic toxin to which plaintiff was exposed, these studies were subject to critique: two studies failed to show a conclusive, statistically significant link to said exposure and cancer,²⁸ another study limited its findings to a particular substance not at issue in the case at bar,²⁹ and a fourth study linked a number of other carcinogenic substances ingested by its subjects to cancer.³⁰ As none of these studies applied directly or analogously to the facts at hand, the Court held that the trial judge did *not* abuse his discretion in excluding the expert’s opinion.³¹

In a final expansion of the so-called “*Daubert* Trilogy,”³² the Supreme Court resolved another circuit split, holding that the trial court’s gatekeeping function extends to *all* expert testimony, not just to “scientific” experts.³³ While the Eleventh Circuit found the factors outlined in *Daubert* unworkable outside of the scientific arena, the “general holding [of *Daubert*] was not meant to be so limited.”³⁴ Instead, since Rule 702 made “no relevant distinction” between scientific, technical, and other specialized knowledge,³⁵ since the Court in *Daubert* explained that the test for admissibility was a “flexible” one,³⁶ and since “[t]oo much depends upon the

²⁶ *Id.* at 143.

²⁷ *Id.* at 146.

²⁸ *Id.* at 145.

²⁹ *Id.*

³⁰ *Id.* at 145–46.

³¹ *Id.* at 146.

³² David E. Bernstein, *The Misbegotten Judicial Resistance to the Daubert Revolution*, 89 NOTRE DAME L. REV. 27, 41–50 (2013) (explaining the “*Daubert* Trilogy” and Rule 702).

³³ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (citing FED. R. EVID. 702).

³⁴ Stilwell, *supra* note 5, at 202.

³⁵ *Kumho Tire Co.*, 526 U.S. at 147.

³⁶ *Id.* at 138.

circumstances of the particular cases at issue,³⁷ the Court held that same abuse of discretion standard applies to all challenges to a party's expert witness.³⁸ Moreover, the Court provided another mode of analysis when assessing the reliability of an expert's opinion: the expert's testimony shall employ "the same level of intellectual rigor" that the expert would use outside the courtroom when working in the relevant discipline."³⁹

II. *LEE V. SMITH & WESSON CORP.*, 760 F.3D 523 (6TH CIR. 2014)

A. *The Majority Opinion*

The Sixth Circuit loosened the "fit" test for relevancy under *Daubert* and its progeny in *Lee v. Smith & Wesson Corp.*⁴⁰ In this case, Mark Lee ("Lee" or "Plaintiff")⁴¹ was injured in an accident while target shooting with his revolver that was designed, manufactured, and distributed by Smith & Wesson Corp. ("Smith & Wesson" or "Defendant").⁴² After successfully firing the gun twice, the gun discharged improperly on Lee's third shot, seriously injuring Lee's right eye, face, and nose.⁴³ According to Lee's sworn testimony, the gun cylinder swung open during his third shot after he closed it completely, thereby knocking off his safety glasses and ultimately causing loss of vision and extreme pain.⁴⁴ Lee then brought a products liability action in Ohio state court and alleged a defect in design, manufacturing, and failure to warn of the gun's inherent dangers, including nonconforming representations made by the Defendant.⁴⁵ Shortly thereafter, the Defendant removed

³⁷ *Id.* at 150.

³⁸ *Id.* at 158 ("In sum, Rule 702 grants the district judge the discretionary authority, reviewable for its abuse, to determine reliability in light of the particular facts and circumstances of the particular case.").

³⁹ Berger, *supra* note 8, at 19 (citing *Kumho Tire Co.*, 526 U.S. at 151).

⁴⁰ *Lee v. Smith & Wesson Corp.*, 760 F.3d 523, 524–28 (6th Cir. 2014).

⁴¹ This Note uses "Plaintiff" and "Defendant" to refer to the actual parties in *Smith & Wesson Corp.*—that is, Lee and Smith & Wesson, respectively. In addition to referencing parties in other court opinions, this Note uses "plaintiff" and "defendant" to refer to the general parties in a products liability action—that is, an individual and a corporation, respectively.

⁴² *Id.* at 524.

⁴³ *Id.* at 524–25.

⁴⁴ *Id.*

⁴⁵ *Id.* at 525.

the action to the U.S. District Court for the Northern District of Ohio under diversity jurisdiction.⁴⁶

Prior to the start of trial, Lee and his attorneys sought to introduce the expert testimony of a skilled mechanical engineer, Roy Ruel (“Ruel”).⁴⁷ In an examination of the revolver and other relevant material on the record, supposedly including the testimony of Lee himself, Ruel determined that the accident resulted from defects in both design and manufacturing.⁴⁸ According to Ruel, the revolver could have been cocked and fired without its cylinder closed and locked, and a defective ejector rod likely caused mechanical interference regarding the gun’s closure.⁴⁹ As such, under Ruel’s expert analysis, the absence of a closed chamber allegedly caused “hot high pressure to be expelled from the revolver when fired, striking Lee in the face,” thereby causing his injuries.⁵⁰ Ruel also opined that Smith & Wesson failed to provide adequate warnings about this harmful condition.⁵¹ Not surprisingly, Smith & Wesson claimed just the opposite: Lee’s injuries did *not* result from a manufacturing defect, rather, Lee sustained injuries from the gun’s heavy recoil.⁵²

In Smith & Wesson’s motion in limine, Smith & Wesson moved to exclude Ruel’s expert testimony.⁵³ Since Ruel’s opinion directly contradicted Lee’s sworn testimony made during Lee’s own deposition, Smith & Wesson argued that such inconsistencies failed to satisfy the “relevancy” requirement outlined in *Daubert*.⁵⁴ Stated more specifically, Ruel’s expert testimony did not sufficiently “fit” the facts of the case, thus failing to satisfy the standard under Rule 702.⁵⁵ Under Smith & Wesson’s legal theory, since Ruel completely ignored Lee’s testimony in forming his opinion—that Lee did, in fact, close the chamber prior to taking his third shot—

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 528.

⁵³ *Id.*

⁵⁴ *Id.* at 525–26.

⁵⁵ *Id.*

Ruel's failure to include this testimony in crafting his opinion effectively barred its introduction at trial.⁵⁶

The district court granted Smith & Wesson's motion based on the following inconsistencies between Lee's oral and demonstrative testimony and Ruel's expert opinion: (1) while Ruel opined that the revolver failed to fully close at the time of fire, Lee testified that the cylinder closed completely prior to his third shot; (2) while Ruel opined that the gun did not immediately fire at the time of his third shot, Lee testified that he had no difficulty firing the revolver a third time; and (3) while Ruel opined that Lee had pushed on the thumb latch, Lee demonstrated that he did not touch the latch prior to dispatch of the bullet.⁵⁷

On appeal, the Sixth Circuit reversed the trial judge's decision, holding that the district court abused its discretion in excluding Ruel's proffered opinion.⁵⁸ According to the Sixth Circuit, Ruel adequately met the flexible *Daubert* standard, since "he had the appropriate qualifications, he used reliable methods, and his opinion was based on physical evidence from the accident."⁵⁹ In fact, even though Lee's testimony directly contradicted Ruel's expert opinion, Ruel nevertheless examined physical evidence, including the gun, numerous medical reports, eyewitness accounts, and photos of the revolver, and he based his opinion upon these concrete facts.⁶⁰ Under Ohio law, "as well as in federal practice[,] . . . 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."⁶¹ The court reasoned that Lee could have been mistaken about whether the cylinder was fully closed at the time of his third fire.⁶² Moreover, since two eyewitnesses testified that the cylinder was open after the dangerous misfire, Ruel's alternative explanation, although contradictory to Lee, did not preclude the jury from believing Ruel's theory

⁵⁶ *See id.* (outlining the procedural posture of the case and each party's argument in district court and on appeal).

⁵⁷ *Id.* at 526 (referencing the trial judge's allegedly erroneous analysis); *see also* Lee v. Smith & Wesson Corp., No. 1:11-CV-1940, 2013 U.S. Dist. LEXIS 9048, at *5-*7 (N.D. Ohio Jan. 23, 2013), *rev'd*, 760 F.3d 523 (6th Cir. 2014) (explaining the rationale of the trial court).

⁵⁸ *Smith & Wesson Corp.*, 760 F.3d at 526.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* (citing *Dickerson v. Shepard Warner Elevator Co.*, 287 F.2d 255, 260 (6th Cir. 1961)).

⁶² *Id.* at 527.

of the case.⁶³ According to the Sixth Circuit, zealous attorneys should be given the opportunity to prove that their client's memory was faulty, thus persuading the jury to believe their own expert.⁶⁴ Since a witness's testimony, whether in the form of fact or an expert opinion, is a question of credibility to be assessed by the jury, and since the "jury could reasonably conclude that the plaintiff's memory was faulty," the Sixth Circuit consequently reversed the trial court's motion to exclude Ruel's expert opinion.⁶⁵

The Sixth Circuit found additional support in *Greenwell v. Boatwright*.⁶⁶ In *Greenwell*, the plaintiff's expert based his accident theory on eyewitness testimony—that the negligent "fish-tailing" by the defendant's truck caused an injurious vehicular collision.⁶⁷ Conversely, the defendant's expert opined that no "fish-tailing" occurred, citing to his accident reconstruction based on the physical evidence of the case.⁶⁸ According to the court, since "[e]xpert testimony is not inadmissible simply because it contradicts eyewitness testimony," and since the party opposing the expert's opinion "d[id] not challenge the factual basis of the expert's testimony—the physical evidence"—the court denied the exclusion of the defendant's expert testimony.⁶⁹ In a similar sense, Smith & Wesson did not challenge the physical evidence used by Ruel to shape his opinion.⁷⁰ Accordingly, under the deferential abuse-of-discretion standard outlined in *Joiner*, the district court's exclusion of Ruel's testimony was simply not proper.⁷¹

B. Judge Keith's Dissent

In a vigorous dissent, Senior Circuit Judge Damon Keith argued to the contrary: the district court properly exercised its discretion when it performed its gatekeeping

⁶³ *Id.*

⁶⁴ *Id.* at 528.

⁶⁵ *Id.*

⁶⁶ *Id.* at 527–28 (discussing *Greenwell v. Boatwright*, 184 F.3d 492, 497–98 (6th Cir. 1999)).

⁶⁷ *Greenwell*, 184 F.3d at 497–98.

⁶⁸ *Id.*

⁶⁹ *Id.* at 497.

⁷⁰ *Smith & Wesson Corp.*, 760 F.3d at 528.

⁷¹ *Id.* Note that the Sixth Circuit also rejected Smith & Wesson's argument that Lee's testimony was a judicial admission subsequently adopted by Lee's counsel. *Id.* Instead, since the contradictory testimony made by Lee was not made "to promote the expedition of trial[]," and since it was not clearly and unambiguously admitted by Lee's attorney for that purpose, it was not a formal "admission." *Id.*

duties by deciding to exclude Ruel's expert opinion.⁷² In his view, the *Daubert* "fit" test does not mandate that a court "open the gate to all speculation" by the expert, especially when that speculation directly contradicts a plaintiff's own account of the events giving rise to an expert's theoretical conclusion.⁷³ While Ruel may have posited that Lee was mistaken about whether he fully closed the gun's cylinder—a consideration that would have certainly been relevant in a determination of the gun's defect had the mistake been true—the trial judge was "not required to navigate the outer-most bounds of speculation, especially [when] the facts of the case [did] not support this hypothesized condition."⁷⁴ In fact, noticeably absent from the majority's opinion was Ruel's contention that Lee "deliberately manipulated the firearm . . . in a highly unusual manner."⁷⁵ Since the facts supporting such speculation existed nowhere in the record,⁷⁶ Ruel's opinion went well beyond the confines of the case.⁷⁷ According to Judge Keith, Ruel disregarded Lee's sworn testimony and provided only a very weak link to the physical evidence, thereby creating too great an analytical gap between the testimonial "facts" and the opinion proffered.⁷⁸ As such, the trial court did not abuse its discretion.⁷⁹ Instead, the majority's extension of the *Daubert* test enabled a frightening risk for future courts: a "one-size-fits-all" model for expert opinions, transforming the relevance requirement outlined in *Daubert* into a legal nullity.⁸⁰

⁷² *Id.* at 529 (Keith, J., dissenting).

⁷³ *Id.*

⁷⁴ *Id.* at 530.

⁷⁵ *Id.*

⁷⁶ The photograph of Lee's re-enactment shows his finger nowhere near the thumb latch of the gun. *Id.* at 529 (citing to the district court's order). Instead, his finger appears upon the revolver's frame, as a skilled gunman would ordinarily hold his firearm. *Id.* As a result, Ruel's ignorance of Lee's testimony and demonstration is further suspect.

⁷⁷ *Id.* at 529–30.

⁷⁸ *Id.* at 530 (citing *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)).

⁷⁹ *Id.*

⁸⁰ *Id.*

III. ANALYSIS AND PROJECTION

In an examination of the *Daubert* test outlined by Rule 702, its primary purpose is to assist the trier of fact in reaching a decision.⁸¹ As the advisory committee points out, the role of the judge in making expert witness determinations is to “provide[] some general standards that the trial court must use to assess the reliability and *helpfulness* of proffered expert testimony.”⁸² In the most obvious sense, expert testimony that is not rooted in the facts of the case will serve only to mislead the jury, thereby warranting exclusion at trial. Moreover, due to the formal pomp used in court to certify an expert in front of the jury, jurors tend to lend more credence to an expert’s testimony over that of a lay witness.⁸³ Given the complicated, scientific, and technical nature of the factual issues in a case, jurors may arbitrarily assess the expert based on subjective factors, including the impressiveness of that expert’s credentials or “performance” on the witness stand, rather than on the substantive validity of any analyzed conclusions.⁸⁴ Accordingly, the trial judge’s role as “gatekeeper” serves mainly to curtail this risk.⁸⁵

Certainly, there must be some judicial check in place to protect against this sort of “junk science”⁸⁶—that is, “unsupported testimony or evidence cloaked in the

⁸¹ See *Lakeside Feeders, Inc. v. Producers Livestock Mktg. Ass’n*, 666 F.3d 1099, 1111 (8th Cir. 2012) (affirming the exclusion of expert testimony as a legal conclusion: one that did not, as a matter of law, assist the trier of fact).

⁸² FED. R. EVID. 702 (emphasis added).

⁸³ See generally Jane Goodman et al., *What Confuses Jurors in Complex Cases: Judges and Jurors Outline the Problem*, TRIAL, Nov. 1985, at 65–67 (discussing post-juror interviews of evaluating the merits and credibility of multiple experts’ opinions in complex commercial litigation matters).

⁸⁴ *Id.* at 66–67 (concluding that many jurors will assess the merits of an expert based solely on his or her credibility at trial); see also PSYCHOLOGY & LAW: AN EMPIRICAL PERSPECTIVE 313 (Neil Brewer & Kipling D. Williams eds., 2005) (same). However, these assumptions may be misconstrued, as one study shows that, popular to contrary belief, jurors consider “both the messenger and the message” in their evaluation of an expert’s credibility. Sanja Kutnjak Ivkovic & Valerie P. Hans, *Jurors’ Evaluations of Expert Testimony: Judging the Messenger and the Message*, 28 L. & SOC. INQUIRY 441, 441 (2003) (contending that juries do examine the underlying facts and explanation of an expert’s opinion in shaping their verdict).

⁸⁵ See *Antioch Co. Litig. Trust v. Morgan*, Case No. 3:10-cv-156, 2014 U.S. Dist. LEXIS 47740, at *7 (S.D. Ohio Apr. 7, 2014).

⁸⁶ See *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 153 n.6 (1997) (Stevens, J., concurring in part and dissenting in part) (admonishing litigants for their use of expert testimony based upon “junk science”).

credentials of a testifying expert⁸⁷—especially when that testimony serves to confuse or mislead, rather than assist, the trier of fact. Both attorneys and judges recognize the persuasive power of an expert’s opinion over the minds of the jury, and the risk of “expert shopping” may provoke trial judges to rule against expert opinions with a more fervent hand.⁸⁸ While not mentioned in the opinion of the Sixth Circuit in *Smith & Wesson Corp.*, Lee presented a *different* expert’s theory prior to the case at bar: one who opined that the cylinder of the gun was closed at the time Lee pulled the trigger.⁸⁹ However, this expert’s opinion was fatally flawed, and Smith & Wesson quickly disproved the expert’s hypothesis through alternative experimental testing.⁹⁰ As a result, Lee’s counsel voluntarily dismissed its first products liability claim without prejudice, only to bring it back under the veil of a new theory: that of Ruel.⁹¹ Compared to the first expert report presented, Ruel’s report vastly departed from the first theory of the gun’s defect: the injuries were no longer a result of a defectively designed cylinder-retaining screw, rather, the defect resulted from the ability to fire the gun with its cylinder partially open.⁹² In a theory “180 degrees removed from that which the [P]laintiff pursued in the first state court action,”⁹³ the strategic introduction of a new expert arguably underlines a seemingly desperate attempt by Lee and his counsel to add merit to an otherwise meritless claim. Since Lee’s first expert, despite his qualifications, failed to proffer a plausible theory of defect, Lee’s counsel may have sought another expert to circumvent this implausibility, thereby ensuring the case to proceed on quasi-unfounded facts. As many experts “can be bought very easily and . . . will say whatever you want them to say,”⁹⁴ attorneys may flagrantly manipulate their litigation strategy through the use of an expert to best serve their client. While it is indisputably unethical to pay an

⁸⁷ *In re Heparin Prods. Liab. Litig.*, 803 F. Supp. 2d 712, 733 (N.D. Ohio 2011) (quoting *McClellan v. I-Flow Corp.*, 710 F. Supp. 2d 1092, 1101 (D. Or. 2010)).

⁸⁸ See PETER W. HUBER, *GALILEO’S REVENGE: JUNK SCIENCE IN THE COURTROOM* 206–09 (1994) (describing how the prevalent practice of “expert shopping” leads to bad science); *Lithuanian Commerce Corp. v. Sara Lee Hosiery*, 202 F. Supp. 2d 371, 378 (D.N.J. 2002) (prohibiting the plaintiffs from playing “fast and loose” after previously being found to have engaged in “expert shopping”).

⁸⁹ Brief of Appellee at 3–4, *Lee v. Smith & Wesson Corp.*, 760 F.3d 523 (6th Cir. 2014) (No. 1:11-CV-01940) (citing a proffered opinion by Richard Ernest).

⁹⁰ *Id.* at 4.

⁹¹ *Id.* at 4–5.

⁹² *Smith & Wesson Corp.*, 760 F.3d at 525.

⁹³ Brief of Appellee, *supra* note 89, at 5.

⁹⁴ James W. McElhane, *Experts on Experts*, 85 A.B.A. J. 64, 69 (1999).

expert to forcibly proffer the “correct” opinion for a case,⁹⁵ judges should be wary of a party’s strategic change in theory through the utilization of an alternative expert’s opinion.

Although not present in the trial court’s opinion itself, one must ask whether Lee’s previous expert’s testimony, entirely different than that of Ruel’s, at all played a role in the trial judge’s refusal to admit Ruel’s expert testimony at trial. Certainly, the existence of a first expert’s report—a report that better aligned with Plaintiff Lee’s own testimony—makes Ruel’s expert opinion easier to attack, consequently weakening Plaintiff’s case-in-chief. Given the vastly different theories proffered by Lee, an implication arises that Lee and his counsel may well have been “grasping at air” to create a plausible products liability theory and force a settlement. As such, the judge may well have been frustrated with Lee’s attempt to return to court under another (arguably weaker) theory of liability, justifying exclusion of the opinion at trial. However, is it the role of the trial judge to screen out cases that he or she believes lack merit due to manipulative tactics by counsel? Moreover, is it the trial judge’s role to determine the strength of a plaintiff’s case based on the introduction of a theoretically different opinion of another expert in a wholly different litigation? Arguably, the strengths and weaknesses of an expert’s opinion, including an expert’s credibility, are determinations better reserved for the trier of fact.⁹⁶

Despite the district court judge’s motivation behind his decision to exclude Ruel’s expert report, the Sixth Circuit’s order to admit the opinion carries with it practical implications at trial. Ordinarily, attacking a witness’s credibility based on lack of knowledge or memory is a matter reserved for opposing counsel on cross-examination.⁹⁷ Opposing counsel will often create a line of questioning to discount a witness’s memory of the recounted event.⁹⁸ However, after *Smith & Wesson Corp.*, the Sixth Circuit has turned this traditional role on its head. Since the focus on a mistake of a party’s eyewitness testimony can now serve as the basis to admit that

⁹⁵ For a general discussion on the ethical considerations of hiring an expert, see George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1 (2000).

⁹⁶ See *Greenwell v. Boatwright*, 184 F.3d 492, 496 (6th Cir. 1999) (“[T]he district court judge [properly] advised the jury that it was to weigh the credibility of each witness and if it determined that the expert’s opinion was entitled to no weight, the jury could disregard the expert’s testimony entirely.”).

⁹⁷ THOMAS A. MAUET, *TRIALS: STRATEGY, SKILL, AND THE NEW POWERS OF PERSUASION* 229 (2d ed. 2009) (advising trial attorneys that, “[i]f there are reasons why the witness’s memory is questionable, this should be brought out” on cross-examination).

⁹⁸ *Id.* at 229–31 (providing examples of a persuasive lines of questioning).

same party's expert's opinion,⁹⁹ lawyers may be forced to discount their chief witness's memory in an effort to support their own expert's theory of a defect. Contrarily, opposing counsel will then be forced to bolster the strength of this opposing party's memory on cross-examination. As a result, this strategy may likely confuse the jury: Why are defendant's counsel bolstering the accuracy of plaintiff-witness's memory? Why are plaintiff's attorneys diminishing the recollection of their *own* client? The incongruities of admission, as encouraged by the Sixth Circuit, thereby serve only to fuel confusion. Moreover, a party-witness's performance on the stand, based on credibility determinations or otherwise, can significantly alter the jury's award for damages.¹⁰⁰ Thus, a reversal of the roles of the direct- and cross-examiner may adversely affect a party at the end of trial; when the judge asks the jury to weigh the evidence presented by adversarial parties, the skepticism surrounding Plaintiff's faulty memory may likely lead to a reduction in damages based upon a lack of believability or likeability.¹⁰¹ As a result, counsel should understand these practical risks before proffering an expert's opinion at trial.¹⁰² Certainly, a lawyer may still attack the expert's credibility, methodology, or use of underlying facts to critique the reliability of an opinion by conducting "thoughtful cross-examination,"¹⁰³ but the judge must still play a "gatekeeping" role as a threshold matter. Arguably, this role includes screening for opinions with only a weak, tenuous connection to the facts of the case.

⁹⁹ *Lee v. Smith & Wesson Corp.*, 760 F.3d 523, 524 (6th Cir. 2014) ("[N]otwithstanding that aspects of Lee's memory contradict his own expert's theory, the expert testimony was not properly excluded.").

¹⁰⁰ Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberation Groups*, 7 PSYCH. PUB. POL. & L. 622, 706–12 (2001) (summarizing empirical studies regarding jury deliberations and awards).

¹⁰¹ *Id.*

¹⁰² As the Federal Rules of Evidence make clear, "any party, including the party that called the witness, may attack the witness's credibility." FED. R. EVID. 607. However, the invocation of this rule typically arises when the witness's testimony at trial contradicts a statement made previously under oath. *See* FED. R. EVID. 607 advisory committee's notes (discussing impeachment in the context of a prior inconsistent statement). Moreover, courts have marked the distinction between an attorney's *impeachment* of his or her witness and *contradiction* of his or her party's witness with other facts. *See, e.g.*, *United States v. Finis P. Ernest, Inc.*, 509 F.2d 1256, 1263 (7th Cir. 1975) ("A witness'[s] testimony may be contradicted without being impeached." (citing *United States v. Williamson*, 424 F.2d 353, 355 (5th Cir. 1970))).

¹⁰³ Squire Patton Boggs, *Sixth Circuit Daubert Reversals Since 2010*, SIXTH CIRCUIT APPELLATE BLOG (Feb. 21, 2014), <http://www.sixthcircuitappellateblog.com/news-and-analysis/sixth-circuit-daubert-trends-since-2010>.

Based on Supreme Court precedent, the “[r]ejection of expert testimony under *Daubert* is the exception rather than the rule.”¹⁰⁴ As such, it appears that trial courts should approach Rule 702 with a “liberal thrust”—that is, with a general preference for admission.¹⁰⁵ Due to the low threshold showing required under the “Test for Relevant Evidence” as outlined in Rule 401,¹⁰⁶ it would seem that a trial judge should not overstep his role as “gatekeeper” in prohibiting expert testimony.¹⁰⁷ In fact, the movement away from the *Frye* test of general acceptance to Rule 702’s baseline reliability and relevancy determinations arguably favors acceptance of an expert’s opinion.¹⁰⁸ As the advisory committee points out, the “broadly phrased” rule should do nothing more than provide a “common sense inquiry” as to whether the opinion would be of assistance to the trier of fact.¹⁰⁹ Accordingly, the low standard should encourage the admission of opinions like Ruel’s in *Smith & Wesson Corp.* However, while it is true that an expert may put after-the-fact observations together to shape his or her opinion, the court must draw a clearer line between admissible and inadmissible testimony, especially when the facts for which an expert’s opinion is based are so rooted in speculation.

In fact, the Sixth Circuit’s holding that excluding Ruel’s expert report was an abuse of discretion may well have exceeded the scope of its appellate review. Courts have routinely admonished the use of speculation in forming an expert’s opinion.¹¹⁰ As the Supreme Court pointed out in *Joiner*, “[n]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.”¹¹¹ In so stating, an expert cannot fill in core deficiencies without a sufficiently grounded basis

¹⁰⁴ Von Wiegen v. Shelter Mut. Ins. Co., No. 5:13-040-DCR, 2014 U.S. Dist. LEXIS 1932, at *13 (E.D. Ky. Jan. 8, 2014).

¹⁰⁵ *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 588 (1993).

¹⁰⁶ FED. R. EVID. 401 (“Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”).

¹⁰⁷ *Daubert*, 509 U.S. at 589.

¹⁰⁸ *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 142 (1997) (“[T]he Federal Rules of Evidence allow district courts to admit a somewhat broader range of scientific testimony than would have been admissible under *Frye* . . .” (citation omitted)).

¹⁰⁹ FED. R. EVID. 702 advisory committee’s note.

¹¹⁰ *J.B. Hunt Transp., Inc. v. GMC*, 243 F.3d 441, 444 (8th Cir. 2001) (“Expert testimony that is speculative is not competent proof and contributes nothing to a legally sufficient evidentiary basis.” (internal citation omitted)).

¹¹¹ *Joiner*, 522 U.S. at 146 (italization added).

scientifically rooted in the facts of the case.¹¹² Accordingly, expert witnesses cannot pull a theory out of mid-air to appeal to one party, as this is arguably the type of “junk science” Rule 702 sought to avoid.¹¹³ Contradictorily, the Sixth Circuit in *Smith & Wesson Corp.* allowed the expert to form his opinion based on a speculative mistake by Lee’s own testimony.¹¹⁴ Surely, an expert may reconstruct an accident so long as there is a reasonable foundation for such conclusion, often made to a reasonable degree of scientific certainty,¹¹⁵ but is a conclusion made in direct contradiction to an eyewitness—an eyewitness “who was actually there, the person who pulled the trigger”—at all reasonable?¹¹⁶ Even so, the Sixth Circuit merely concluded that “a reasonable fact finder *could* conclude that Lee *thought* he had closed the chamber but in fact did not”¹¹⁷ Thus, is not the allowance of this mistake within testimony, in-and-of-itself, speculation by the appellate court?¹¹⁸ Nothing in Ruel’s report explicitly discussed nor rebutted Lee’s testimony under oath,¹¹⁹ and the closest Ruel came to a rebuttal was providing testimony that an open chamber *after* the gun misfired led to the inference that the chamber was open *before* Lee fired the gun.¹²⁰ While the trial judge was certainly free to reject this tenuous connection as an unreasonable link to prove Ruel’s theory of defect, by enabling conjecture in firm contradiction to the resolute testimony of Lee, the Sixth Circuit’s reversal only serves to fuel speculation by experts in future products liability actions.¹²¹ Since Rule 702’s primary purpose is to screen out speculation, not fuel it,

¹¹² See *id.* at 144–45 (summarizing the trial judge’s proper exclusion of an expert’s opinion).

¹¹³ FED. R. EVID. 706 advisory committee’s notes.

¹¹⁴ *Lee v. Smith & Wesson Corp.*, 760 F.3d 523, 527–28 (6th Cir. 2014).

¹¹⁵ See MAUET, *supra* note 97, at 390–91 (“[E]xperts commonly testify to their opinions (and usually ‘to a reasonable degree of medical or scientific certainty’)”).

¹¹⁶ Michael Hoenic, *When Experts Contradict Their Own Party’s Testimony*, N.Y. L.J. (Sept. 15, 2014), <http://www.newyorklawjournal.com/id=1202669940799/When-Experts-Contradict-Their-Own-Partys-Testimony>.

¹¹⁷ *Smith & Wesson Corp.*, 760 F.3d at 527 (first emphasis added).

¹¹⁸ Hoenic, *supra* note 116 (“But isn’t that surmise of ‘possibilities’ in itself speculation (by the appellate court)?”).

¹¹⁹ Expert Report of Roy Ruel, P.E., *Lee v. Smith & Wesson Corp.*, No. 1:11-CV-1940 (N.D. Ohio July 9, 2012) (failing to account for Lee’s testimony in shaping the expert opinion).

¹²⁰ Deposition of Roy Ruel, *Lee v. Smith & Wesson Corp.*, No 1:11-CV-1940 (N.D. Ohio Nov. 26, 2012) (“All three of them said that when they took the gun from Mr. Lee, the cylinder was open.”).

¹²¹ *Smith & Wesson Corp.*, 760 F.3d at 529–30 (Keith, J., dissenting).

the admission of contradictory testimony obfuscates the very function of the Federal Rules of Evidence.¹²²

Finally, the decision in *Smith & Wesson Corp.* reflects a trend within the Sixth Circuit of reversing a trial judge's decision to exclude expert testimony.¹²³ For example, in *Andler v. Clear Channel Broadcasting, Inc.*, the Sixth Circuit reversed the exclusion of expert testimony regarding a calculation of future damages as an abuse of discretion.¹²⁴ Similarly, in *Dilts v. United Group Services, LLC*, the Sixth Circuit reversed a trial court's decision to exclude a plaintiff's expert's accident reconstruction report, since the expert properly based his opinion on photographs, observations, and precise algebraic and mathematic equations.¹²⁵ Furthermore, the Sixth Circuit reversed the exclusion of another expert's opinion in a products liability action, since the expert was otherwise qualified as a mechanical engineer, albeit not in the specialized field of firearms.¹²⁶ Accordingly, the Sixth Circuit held that "the scope of his expertise may cut against the weight given to his opinion, but it does not affect its admissibility."¹²⁷

With these precedents in mind, one commentator opines that "a district court's discretion is broader when allowing testimony than when excluding it."¹²⁸ Certainly, the Sixth Circuit is unique in its approach to hold a decision to exclude at a somewhat looser standard than a decision to include an expert's opinion, and this series of opinions marks a movement towards favoring admissibility under Rule 702. Based

¹²² *Id.* at 529 ("But *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 reaching his hypothesis.").

¹²³ Squire Patton Boggs, *supra* note 103; Justin Jennewine, *Daubert in the Sixth Circuit*, SIXTH CIRCUIT APPELLATE BLOG (Nov. 13, 2015), <http://www.sixthcircuitappellateblog.com/news-and-analysis/daubert-in-the-sixth-circuit>.

¹²⁴ *Andler v. Clear Channel Broad., Inc.*, 670 F.3d 717, 728–29 (6th Cir. 2012). While the use of a higher paying salary than that of plaintiff's pre-injury salary was speculative on behalf of the expert, it was not unreasonable speculation, since the plaintiff could well return to a full-time job as her kids grew older. *Id.* at 729. As a result, it was an abuse of discretion for the trial judge to exclude such testimony, especially since the jury could have weighed the expert's opinion with the help of the defendant's "vigorous cross-examination." *Id.* See Squire Patton Boggs, *supra* note 103 (summarizing *Andler*, 670 F.3d 717).

¹²⁵ *Dilts v. United Grp. Servs., LLC*, 500 F. App'x 440, 444–46 (6th Cir. 2012). See Squire Patton Boggs, *supra* note 103 (summarizing *Dilts*, 500 F. App'x 440).

¹²⁶ *Palatka v. Savage Arms, Inc.*, 535 F. App'x 448, 454–55 (6th Cir. 2013). See Squire Patton Boggs, *supra* note 103 (summarizing *Palatka*, 535 F. App'x 448).

¹²⁷ *Palatka*, 535 F. App'x at 455; Squire Patton Boggs, *supra* note 103.

¹²⁸ Squire Patton Boggs, *supra* note 103.

on this long line of precedent, the dissent's fears in *Smith & Wesson Corp.* are even more real: in forcing the admissibility of an expert's opinion with large "analytical gap[s]," the court is not just "run[ning] the risk of creating," but it is *actually* creating, "a one-size-fits-all standard of expert evidence that makes the relevancy requirement a [legal] nullity."¹²⁹

CONCLUSION

In less than a year after the publication of the Sixth Circuit's opinion in *Smith & Wesson Corp.*, both circuit and lower courts have cited this opinion with approval.¹³⁰ However, these courts neglect the implications of this split decision, diminishing the "gatekeeping" function of the trial judge in making evidentiary determinations.¹³¹ Moving forward, parties post-*Smith & Wesson Corp.* can still learn from this decision. Within the Sixth Circuit, plaintiffs are no longer precluded from producing an opinion that contradicts the sworn testimony of one or more of their own parties' witnesses.¹³² As a result, plaintiffs maintain great latitude in the breadth of potential opinions proffered. From an expert's perspective, should an expert choose to ignore the sworn recount by an eyewitness, the expert should explain his or her reasoning so that the quality of the report is not strongly attacked upon cross-examination. By making reference explicitly, not impliedly, an expert can provide stronger justification on paper. In fact, tackling the problem head-on may deter opposing counsel from pointing out these inconsistencies at trial. Finally, defendants should be aware of the Sixth Circuit's rationale in *Smith & Wesson Corp.* and understand that exclusion of an expert's testimony under Rule 702 may continue to be an uphill battle post-*Daubert*. Nevertheless, counsel can learn from this opinion and its dissent, which provide strong grounds for a credibility attack should the district court judge admit the expert's report at trial.

¹²⁹ Lee v. Smith & Wesson Corp., 760 F.3d 523, 530 (6th Cir. 2014) (Keith, J., dissenting).

¹³⁰ See Stuhlmacher v. Home Depot U.S.A., Inc., 774 F.3d 405, 410 (7th Cir. 2014) (citing *Smith & Wesson Corp.*, 760 F.3d at 526, for the proposition that "a party may prove his case by any relevant evidence, even though that evidence may contradict the testimony of witness previously called by him"); Gummo v. Ward, 57 F. Supp. 3d 871, 881 (M.D. Tenn. 2014) ("[The] rule in 'federal practice is that 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.'" (citing *Smith & Wesson Corp.*, 760 F.3d at 526 (majority opinion))).

¹³¹ See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993) (discussing the gatekeeping role of the trial judge in ruling on the admissibility of an expert's opinion under Rule 702).

¹³² *Smith & Wesson Corp.*, 760 F.3d at 528. Note that both plaintiffs and defendants can avail themselves of the rule outlined in *Smith & Wesson Corp.*, since Rule 702 applies to any party seeking to make use of an expert's opinion. FED. R. EVID. 702 (emphasis added).