



## The Tenth Circuit Imparts a Gatekeeping Lesson with Textbook Application of Rule 702

by Stephen J. McConnell

Federal Rule of Evidence 702 is the gate that slams shut on experts whose opinions amount to mere *ipse dixit*, a Latin phrase that essentially means “because I say so.” Even when experts are qualified, their opinions must be “based on sufficient facts or data” and must be “the product of reliable principles and methods.” When expert opinions vault across analytical or factual gaps by mere say-so, Rule 702 should keep them out of the case. In *Herman v. Sig Sauer Inc.*, No. 23-6136 (10th Cir. June 13, 2025), the U.S. Court of Appeals for the Tenth Circuit upheld the district court’s vigorous application of Rule 702 to exclude expert opinions that amounted to mere *ipse dixit*. That exclusion resulted in summary judgment in favor of the defendant.

The plaintiff in *Herman* was seriously injured when his Sig Sauer P320 striker-fire handgun unintentionally discharged while he was trying to remove a new holster that held the handgun. The plaintiff filed a lawsuit against the gun manufacturer, asserting claims for strict products liability, negligence, breach of the implied warranty of merchantability, breach of express warranty, negligent infliction of emotional distress, and intentional infliction of emotional distress. In support of his claims, the plaintiff offered expert testimony from both a gunsmith and a human factors engineer. The version of the P320 pistol involved in this case did not come with an external manual safety, such as a tabbed trigger or a thumb safety. The plaintiff’s experts both opined that the failure to incorporate a manual safety into the P320 caused the plaintiff’s injuries. The defendant moved to exclude these causation opinions under Federal Rule of Evidence 702. (Such motions have long been called *Daubert* motions, named after the case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). But Rule 702 has been amended several times since the *Daubert* case, and the *Daubert* label is now obsolete and misleading to the extent it imports out of date and incorrect case law.) The defendant also moved for summary judgment, arguing that the plaintiff’s claims necessarily failed without admissible evidence of causation.

The plaintiff had purchased a new holster that would permit him to carry his P320 in front of his body inside his pants along his waistline, a method known as “appendix carry.” On the first day that he attempted to use this holster, the plaintiff put the P320 into the holster, placed the holster inside the waistband, then rebuttoned his pants. The holstered gun felt uncomfortable to the plaintiff, so he tried to remove the holster and gun. When he pulled on the holster, the gun “just went off,” injuring the plaintiff. The testimony was unclear as to exactly where the plaintiff’s finger was when the accident occurred. According to an emergency responder, the plaintiff said that pulling on the holster caused his “finger accidentally to pull the trigger causing the firearm to discharge.”

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The plaintiff's experts testified that there were two types of external gun safeties that would have prevented the plaintiff's injuries. (The P320 has internal safeties that prevent it from being fired unless the trigger is pulled. Such internal safeties were not at issue in this case.) First, the pistol could have included a thumb safety, which is a switch on the side of the pistol that can be flipped on or off with the user's thumb. Unless and until the thumb safety is flipped down, the trigger cannot be actuated. There are many pistols that come equipped with a thumb safety. If you have ever seen the *Lethal Weapon* movies (or even just the posters), you likely saw Mel Gibson holding a Beretta 92 FS pistol. On the upper rear of the pistol you would have seen a red spot. That red spot indicated that the safety was off and that the gun was 'hot'—ready to fire. Second, there could have been a tabbed trigger safety, which is a small tab within the trigger that must be depressed for the trigger to be able to depress and fire the weapon. Many Glock pistols have trigger safeties. The concept is that the user's finger must be placed squarely on the trigger to prompt the gun to discharge. A glancing brush of the trigger with such a safety should not cause the gun to fire. (There is a third form of external safety that is found on some guns, such as classic 1911s, whereby the gun will not fire unless pressure is applied to the grip. A grip safety was not at issue in *Herman*.)

We should note that there have been other cases making similar allegations involving the Sig Sauer P320. The P320 is a popular, widely sold pistol. It has been the choice for several branches of the United States military, as well as many law enforcement agencies. (Anyone who was a prosecutor, such as the author of this paper, has worked with case agents who carried a Sig Sauer P320.) Some plaintiffs who brought actions alleging that the P320 is defective have, in fact, been police officers. In some of the lawsuits, the plaintiff sued the holster manufacturer, alleging that a flaw in the holster resulted in the trigger being pulled. There have also been several claims filed against the pistol manufacturer, including allegations that the pistol discharged without the trigger being pulled at all. In some cases, plaintiffs alleged that the pistol fired after being dropped. In other cases, as in the *Herman* case, a holster was involved. Occasionally, the defendant contended that the plaintiff was using the wrong holster, or was using a holster that, through age and wear, had malformed in such a way as to permit it to pull the trigger.

Many cases against the P320 have been dismissed. In a recent case in Philadelphia, the manufacturer successfully moved to vacate an award of punitive damages after showing its vigorous quality control and testing procedures, as well as the existence of a patented safety feature that eliminated the need to pull the trigger to disassemble the pistol. Further, the state of New Hampshire, where the Sig Sauer USA entity is based, passed a law shielding the company from product liability actions alleging that the lack of an external safety was a defect.

We should also note that the existence or nonexistence of the trigger safeties is an open and obvious fact. There are many pistol purchasers who do not wish to have such external safeties on their pistol, seeing them as inconvenient or even, under certain conditions, as being less safe. For example, if one forgets to disengage the thumb safety in a stressful, self-defense situation, the consequences could be fatal. Consumers have a choice. Gun instructors often say that the ultimate "safety" is between one's ears.

The trial court in the *Herman* case recognized its "important gatekeeping function with regard to the admissibility of expert opinion" and applied Rule 702 to exclude the plaintiff expert opinions because those experts "lacked a sufficient factual basis to offer their opinions about causation" and were not reliable. The bottom-line opinion of the plaintiff experts was that if the plaintiff's "P320 had been equipped with a manual safety such as a tabbed trigger safety or a thumb safety, the weapon would most likely not have discharged" when it did. The problem was that these opinions were "based on speculation—not facts in the record." Why were the expert opinions speculation?

First, there was no evidence in the record making it improbable that some part of the plaintiff's finger or part of his holster came into direct contact with the trigger and squarely depressed it. The expert opinions were based on "liberal interpretations" of the plaintiff's testimony, but the plaintiff himself did not testify that no part of his body or the holster came into contact with the trigger. So much for the notion that a tabbed trigger safety would have made any difference. Second, a thumb safety prevents a firearm from firing only if it is engaged. The safety switch must be placed in the "safe" position (so you would not see any red on Mel Gibson's pistol). But there was no factual basis for the experts to conclude that the plaintiff would likely have engaged a thumb safety if it was on his P320. After all, the plaintiff purposely purchased a pistol without a thumb safety. The trial court excluded the plaintiff expert opinions.

The Tenth Circuit reviewed the trial court's decision under the abuse of discretion standard. That standard affords "substantial deference" to the district court's application of Rule 702. After having considered the arguments and reviewing the testimonial record, the Tenth Circuit held that the trial court "did not abuse its discretion in excluding the two experts' testimony." The experts "lacked information about how the trigger on [the] P320 was engaged during the incident and what actually caused the weapon to discharge." The experts' opinions "are based on liberal interpretations" of the plaintiff's "testimony that do not align with the record." The appellate court agreed with the trial court that under any fair reading of the record, it was just as likely that the plaintiff had pulled the trigger directly and would not have engaged a thumb safety as any other scenario that the plaintiff or his experts might wish into place.

The plaintiff on appeal attempted to save his case by arguing that, as a youngster, he had been taught by his father always to have the safety on until he was ready to shoot. But that argument had not been made below and the plaintiff did not (and probably could not) argue for plain error. In any event, neither expert pointed to this non-evidence as a basis for their opinions.

Without expert testimony that the pistol's absence of external safeties caused his injury, summary judgment was inescapable. Causation of the injury in question was a necessary element of the claims for product liability, negligence, intentional and negligent infliction of emotional distress, and breach of warranty. Even if expert testimony on causation was not required (though in a technical case of this nature it surely was), this case lacked the requisite circumstantial evidence needed to establish probability, not mere possibility. Accordingly, the Tenth Circuit affirmed the district court's grant of summary judgment for the manufacturer.

The *Herman* court explicitly parted ways with the outcome reached in *Davis v. Sig Sauer, Inc.*, 126 F.4th 1213 (6th Cir. 2025). That other case involved the same expert witnesses. The Sixth Circuit case involved Kentucky law, as opposed to the Oklahoma law applicable in *Herman*. Moreover, in *Davis* the plaintiff testified directly and unambiguously that "he did not pull the trigger and that the gun was fully holstered." By contrast, the plaintiff in *Herman* had "not pointed to any clear evidence in the record about whether parts of his body or his holster did or did not come into contact with the trigger of his P320 at the time of the incident." That is why the *Herman* experts, with their "liberal interpretations" of the plaintiff's testimony, amounted to *ipse dixit*.

A court less faithful to Rule 702, which places the burden squarely on the proponent of the expert opinions, might have sent such *ipse dixit* opinions to the jury. But the *Herman* court was faithful to its gatekeeping role and faithful to the strictures of Rule 702.