

Expert Owes No Duty to Party in Suit

By David E. Frank

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A disgruntled plaintiff in a suit involving a denture-cleaning device could not sue his expert for malpractice as the law does not recognize the existence of a fiduciary relationship between a witness and litigant, a Superior Court judge has ruled.

The plaintiff, whose case was dismissed after U.S. District Court Judge Richard G. Stearns found the expert's testimony did not pass muster under *Daubert*, argued that his reliance on the expert's specialized skills implicated a sense of trust giving rise to a fiduciary duty.

But Judge Herman J. Smith Jr. disagreed and granted the expert's motion for summary judgment.

"The problem with [the plaintiff's] reasoning is that it would lead to a fiduciary relationship between any service professional and their customers," Smith said. "Anyone paying for the services of a mechanic, an interior decorator, a tailor, a butcher, a baker, or a candlestick-maker, to name just a few examples, is relying on that professional's specialized knowledge and expertise."

The judge also dismissed a related legal malpractice claim against the plaintiff's former Boston lawyers, Albert R. Zabin and Robert C. Zaffrann, of Schneider Reilly.

The eight-page decision is *Albert v. Zabin, et al.*, Lawyers Weekly No. 12-004-11. The full text of the ruling can be ordered at www.masslawyersweekly.com.

Disruption avoided

The plaintiff's lawyer, Robert W. Walk-

er of Bedford, said he plans to appeal the decision. The expert negligently submitted work that was not in accordance with generally accepted industry principles, he said.

"If the ruling is affirmed, it means that an expert witness can go about performing his services, either in a negligent manner or in a manner inconsistent with what he represented to the client, and have absolutely no accountability," Walker said, calling the judge's candlestick-maker comparison an inappropriate analogy under the circumstances.

Concerns over an expert's ability to be truthful before the court are unfounded, he added.

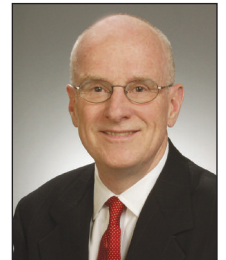
"It is an absolutely ridiculous contention to say that a witness's duty to be candid before the tribunal would be affected by the presence of a fiduciary duty," he said. "Anyone who is going to offer testimony in court has to do so truthfully, regardless of what capacity they are providing the testimony."

Thomas E. Peisch and Ronald M. Jacobs, both of Boston's Conn, Kavanaugh, Rosenthal, Peisch & Ford, represented the expert. Peisch said their client was hired in the case that was before Judge Stearns to help establish the plaintiff's lost profits.

No court had ever held that an expert retained for such a purpose owes the same duty as an attorney, Peisch said. One reason for the lack of appellate authority on the subject is that malprac-

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— Thomas E. Peisch, lawyer for expert



tice cause of actions over expert witnesses are still a new phenomenon, he noted.

"This is a narrowing of a creative theory of liability, which represents a common-sense application of law to a landscape that is still expanding," Peisch said. "It is the rare civil case these days that doesn't have an expert witness, so this is an important ruling."

If experts like his client owe such a duty, their obligation to testify truthfully could be undermined, he added.

"Had this case gone the other way, it would have been terribly disruptive to the litigation system and to the expert's obligation to tell the truth and concede weak parts of an opinion when questioned under oath," Peisch said. "What expert is going to agree to participate in a trial [that] could expose them to a breach-of-fiduciary-duty claim if the case does not go the right way?"

While experts must live up to the terms of a contract, they are not guarantors that their ultimate opinions will survive *Daubert* challenges, he said.

"The expert did everything the contract required, but unfortunately for [the plaintiff], the federal judge considering the case bought the argument that the

opinion was not well grounded,” he said. “[The plaintiff] never appealed [Stearns’] decision, and instead chose to go out and just to sue everybody else.”

Peabody & Arnold lawyer Allen N. David, who represented the defendant lawyers on their legal malpractice claims, said one of the problems with the plaintiff’s case was his inability to prove damages. While liability against an expert is appropriate if negligence can be shown, recognizing a fiduciary duty would be unheard of, he said.

“It’s quite a different story if you do the job appropriately and a judge or jury doesn’t accept your opinion,” the Boston lawyer said. “The notion that you have a fiduciary duty to the person paying you strikes me as preposterous and makes no sense.”

Denture dollars

In 1993, plaintiff Harvey Albert entered into negotiations with Warner Lambert, a national health products company, to develop and distribute a denture-cleaning device he had invented.

When Warner Lambert terminated negotiations in 1998, Albert hired attorneys Zabin and Zaffrann to sue the company in U.S. District Court. His complaint alleged

CASE: *Albert v. Zabin, et al.*, Lawyers Weekly No. 12-004-11

COURT: Superior Court

ISSUE: Can a plaintiff in a civil lawsuit sue his expert witness for malpractice?

DECISION: No

Warner Lambert misrepresented its intentions to invest in the product, which caused him to forego other business opportunities.

His lawyers retained the defendant expert, Policy and Management Associates, to measure lost profits.

But at the conclusion of the expert’s deposition, Stearns granted Warner Lambert’s motion to exclude the testimony on *Daubert* grounds. Because the expert’s opinion was the plaintiff’s sole evidence on damages, the case was dismissed.

Although the plaintiff did not appeal Stearns’ ruling, he filed a malpractice suit in Middlesex Superior Court against his lawyers and the expert, alleging that their negligence caused him to lose the case.

Economic loss

In granting summary judgment for the



Ronald Jacobs

expert, Smith said the economic loss doctrine prevented the plaintiff from bringing suit.

The doctrine provides that when a defendant negligently interferes with a contract of economic opportunity but causes no harm, a plaintiff cannot recover for purely economic loss.

The judge rejected the plaintiff’s argument that the economic loss doctrine did not bar his claim against the expert because it fell within an exception that applies to cases in which a fiduciary relationship exists.

It was the plaintiff’s burden to prove such a relationship, Smith said.

The judge found it undeniable that an expert has a duty to testify truthfully and to assist the fact finder. But if the court were to find the existence of a fiduciary relationship, he said, that duty could be seriously undermined.

“The definition of a fiduciary duty, however imprecise, does not encompass all these situations,” he said.



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