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In The

Supreme Court of the United States

MICHAEL ROPER,

Petitioner,

v.

KAWASAKI HEAVY INDUSTRIES, LTD.,
KAWASAKI MOTORS CORP., U.S.A. and
MOTIONS-HONDA-KAWASAKI-SUZUKI-YAMAHA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The circuits are divided as to when the District Court may exclude expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Some circuits will disallow an expert only if the expert's methodology is unreliable thereby allowing a jury to resolve disputes as to the expert's application of the methodology and other factual issues. Other circuits are stricter and hold that "*any* step that renders the analysis unreliable under the *Daubert* factors renders the expert's testimony inadmissible, whether the step completely changes a reliable methodology or merely misstates that methodology." The Question Presented therefore is:

In a civil damages case, when may a District Court exclude expert testimony as unreliable for reasons other than the expert's use of a faulty methodology or principle, especially when the decision to exclude is outcome determinative, thereby denying a Plaintiff his Right to a Trial by Jury guaranteed by the Seventh Amendment?

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit:

1. Michael Roper, Petitioner on Review, was the Plaintiff-Appellant below.

2. Kawasaki Heavy Industries, LTD. and Kawasaki Motors Corp. and Motions-Honda-Kawasaki-Suzuki-Yamaha were the Defendants-Appellees below.

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PETITION FOR A WRIT OF CERTIORARI

Michael Roper respectfully Petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's unpublished opinion was entered March 21, 2016 and is attached in Petitioner's Appendix. The District Court entered its order on June 29, 2015 and is also attached in Petitioner's Appendix.

JURISDICTION

The Eleventh Circuit entered its opinion on March 21, 2016. This Court's jurisdiction rests on 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND RULES

The Seventh Amendment to the Constitution of the United States provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Federal Rule of Evidence (FRE) 702 provides: "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."

STATEMENT OF THE CASE

A. BACKGROUND AND STATEMENT OF FACTS

This petition arises out of a diversity action, removed to Federal Court, in which summary judgment was granted to the Respondents by the United States District Court for the Northern District of Georgia and affirmed by the U.S. Court of Appeals for the Eleventh Circuit. The basis of Petitioner's original complaint was that the voltage regulator in certain Kawasaki motorcycles would malfunction thereby causing the motorcycle to stall. Petitioner further alleged that because Kawasaki knew of this defect before Petitioner's crash, and did not warn Petitioner of the known risk, then Kawasaki would be liable under Georgia products liability law.

On February 27, 2011, Petitioner, Michael Roper, was riding a 2009 Kawasaki motorcycle, manufactured

and marketed by Respondents. The Petitioner alleges that while he was riding the motorcycle on a curvy, downhill stretch of road, the motorcycle's engine stalled, causing him to lose control and crash into an oncoming car. He suffered catastrophic orthopedic injuries incurring approximately one million dollars in medical bills as a direct and proximate result of the collision.

Following the crash, Roper told his wife, Arlene Roper, and his surgeon Dr. Daniel R. Schlatterer that the motorcycle engine had stalled, causing the crash and that the motorcycle "cut off on him and seemed to malfunction." Additionally, at least one of the eyewitnesses to the wreck reported seeing Roper looking down and struggling with his motorcycle, as if there were something going wrong with it, just prior to the crash.

Then, in February of 2012, one year after the wreck, Respondents recalled thousands of Kawasaki motorcycles, including Roper's, because of a "defect which relates to motor vehicle safety." Specifically, Kawasaki told its customers, dealers, the United States government, and to itself that in some of the motorcycles it manufactured and sold, including Roper's, "the voltage regulator can overheat, causing uncontrolled current output which can result in insufficient charging current being provided to the battery." According to Kawasaki, "[t]his can cause discharge of the battery and can lead to engine stalling. . . ." Finally, Kawasaki warned that "[e]ngine stalling while

riding can create the potential for a crash resulting in injury or death."

Kawasaki even sent a card to Roper after the "Warning and Recall Notice" reiterating these same points. Kawasaki told Canadian customers and the Canadian government that "[e]ngine stalling [because of the voltage regulator defect] would result in lost vehicle propulsion which, in conjunction with traffic and road condition, and the rider's reactions, could increase the risk of a crash involving property damage and/or personal injury."

Upon inspection after the wreck, the Roper motorcycle showed such melting, consistent with overheating during failure from the defect. The melting supports the conclusion that the regulator overheated and failed shortly before the collision because of the flow-pattern in the melted substances, which means the casing was heated to liquid form and flowed toward the ground where the bike came to rest on its left side.

The record includes expert testimony of Mr. Wayne Denham, a mechanical engineer and ASE-Certified Master Technician, who "hold[s] the opinion to a reasonable degree of scientific certainty that a manufacturing defect existed in the voltage regulator in the subject motorcycle, which defect caused Mr. Roper's motorcycle engine to stall on February 27, 2011, and directly led to the collision."

The record also includes expert testimony of Mr. Randy Nelson, an expert in motorcycle handling and

stability including the effects of engine stall, who holds the opinion that the loss of engine power increases the risk of a crash and is the probable cause of the crash that injured Mr. Roper.

Mr. Nelson has extensive experience riding motorcycles and has testified in court as an expert on motorcycle handling and stability on many occasions. Mr. Nelson performed specific testing by riding an exemplar Kawasaki Ninja ZX-10R through the scene of the Roper incident. Taking into account his extensive experience riding motorcycles and multiple occasions on which an engine has stalled while Mr. Nelson was riding, Mr. Nelson was able to use this information and specific ride-through testing to provide a basis to reach an expert opinion regarding the effects of an engine stall on the handling and stability of Mr. Roper's motorcycle on the subject roadway.

B. THE DECISIONS BELOW

1. In the district court below, the Respondents moved to exclude both of Petitioner's experts and for summary judgment, basing its summary judgment motion totally on the exclusion of the experts. *In a single order*, the trial court excluded the testimony of expert witness Wayne Denham, a mechanical engineer and ASE-Certified Master Technician, holding that he was not qualified to testify that the voltage regulator in the subject motorcycle was defective because he had not "ruled out every possibility other than the defective [voltage regulator]." Further, the trial court ruled, as a

matter of law, that the testimony of Respondent's expert, Randall Nelson, should also be excluded on the basis that Nelson relied to some extent on Denham's opinion, which the trial court found to be inadmissible. Then, finally, with both of the Petitioner's experts excluded, the district court granted summary judgment. The District Court's determination to exclude the experts was, therefore, outcome determinative of the case, ending it prior to trial by jury.

2. The Eleventh Circuit U.S. Court of Appeals affirmed the district court, holding that it was appropriate for the Court, as opposed to a jury, to weigh and balance the experts' testimony. For example, the Eleventh Circuit agreed "with the district court that Denham's differential analysis was unreliable because he failed to exclude causes (other than the voltage regulator) which the evidence showed reasonably could have caused the accident." Denham's application of his methodology, the appeals court said, failed to exclude these alternative possible causes (such as excessive speed or operator error) and therefore could not be relied upon to "rule in" the voltage regulator as the cause. The Eleventh Circuit also approved findings and conclusions based on police photographs taken at the scene some 70-90 minutes after the wreck, drawing conclusions about whether a failed voltage regulator had been the proximate cause of the wreck.

3. Even a cursory reading of either the district court or the appellate court decision reveals that the determinations made, went far beyond the "gatekeeping" functions envisioned in Federal Rule of Evidence

702. Instead of determining the efficacy of a single expert's testimony by weighing it against established scientific principles and standards, the courts here "pitted" the testimony of one side's expert against the others. This analysis necessarily involved engaging in tasks typically reserved for juries, like the review and weighing of photographs from the scene against testimony of competing experts to determine who is most believable.

4. Finally, it should be noted that the source of the determinations made about the testimony were made based upon review of discovery depositions, not testimony which was subject to the type of thorough and sifting cross examination used at trial. And, that the ultimate grounds for exclusion, which became outcome determinative of the case, was that Petitioner's expert could not exclude all other possible causes of the wreck. This is a much more severe burden than any plaintiff would ever be forced to carry at trial where he would only need to prove his case by a preponderance of the evidence. In essence, what occurred in this case was that the trial judge determined which experts she believed, struck the other experts under *Daubert*, and decided this case without a jury.

REASONS FOR GRANTING THE PETITION

The Circuits are divided as to when conflicts in expert testimony should be resolved by pre-trial *Daubert*

hearings or by a jury. *Daubert* and Federal Rule of Evidence 702 are subject to widely divergent views amongst the circuits on this most important threshold issue. Allowing the District Court broad latitude to exclude testimony for an endless number of reasons violates the right to a jury trial provided by the Seventh Amendment to the United States Constitution. Application of a Federal Rule of Evidence should never be interpreted in such a manner as to deny a Constitutional right. Furthermore, the decision of the 11th Circuit is wrong in that it affirmed a District Court that went far beyond the gatekeeping requirements imposed by *Daubert*. The best interpretation of FRE 702 and *Daubert* is to allow the jury to decide most of the issues regarding the validity and credibility of an expert's testimony. Granting certiorari in this case will enable the Court to address and resolve the most important question remaining under Rule 702 after *Daubert*: The effect which overly broad exclusions of expert testimony on the right to trial by jury. *See Apple, Inc. v. Motorola, Inc.*, 2012 WL 1959560, at *1 (N.D. Ill. May 22, 2012) (Posner, J., sitting by designation) ("The biggest challenge to the judge at a *Daubert* hearing . . . is to distinguish between disabling problems with the proposed testimony, which are a ground for excluding it, and weaknesses in the testimony, which are properly resolved at the trial itself on the basis of evidence and cross-examination.") (excluding expert damages testimony), *rev'd*, 757 F.3d 1286, 1313-26 (Fed. Cir. 2014) (reversing exclusion order). The lower courts are deeply divided on this issue.

Several of the circuits require the District Court to be far more exacting in its *Daubert* analysis, thereby leading to the frequent exclusion of experts. Other circuits limit the trial court's inquiry only to the reliability of the experts "methodology" leaving challenges to the expert's application of that methodology as well as any disputes as to factual extrapolations and conclusions to be decided by a jury.

I. THE CIRCUITS ARE SPLIT AS TO WHAT STANDARDS SHOULD BE APPLIED BY THE DISTRICT COURT IN DETERMINING WHETHER TO EXCLUDE AN EXPERT WITNESS.

In addition to the Eleventh Circuit, the Second, Third, Sixth and Tenth Circuits apply far more scrutiny before admitting expert testimony, by adopting the bright line rule that "*any* step that renders the analysis unreliable under the *Daubert* factors renders the expert's testimony inadmissible, . . . whether the step completely changes a reliable methodology or merely misstates that methodology." *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994) (emphasis added).

The Second Circuit in *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 265-70 (2d Cir. 2002) held substantially the same thing as did *Paoli* in relying on Rule 702 and *Paoli II* to affirm the trial court order excluding expert testimony offered to show a causal link between plaintiff's exposure to workplace

toxins and his injuries because one expert "fail[ed] to apply his stated methodology reliably to the facts of the case."

In *Tamraz v. Lincoln Electric Co.*, 620 F.3d 665, 670 (6th Cir. 2010) the Sixth Circuit required a far more restrictive evaluation of the experts testimony that would have been undertaken in other circuits ruling that gaps in expert's reasoning from previously published studies meant that his testimony was "at most a working hypothesis, not admissible scientific 'knowledge'" based upon "'sufficient facts or data'" or "'the product of reliable principles and methods . . . applied reliably to the facts of the case.'"

Most importantly, the 10th Circuit in *Attorney General of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 779 (10th Cir. 2009) appears to go somewhat further by citing *Paoli II* "any step" rule with approval and *specifically rejecting* the argument "that *Daubert* should not have been used to assess the *application* of the experts' methodologies, but rather should have been used to assess *only the methodologies* upon which [they] relied." (Emphasis in original). The issue that is specifically rejected in *Tyson Foods* forms the crux of the circuit split.

The Seventh, Eighth and Ninth Circuits apply far less scrutiny before admitting expert testimony, reasoning that faults in the expert's application of the appropriate methodology and other factual disputes go to the weight of the expert's opinion and not their admissibility.

In *Johnson v. Mead Johnson & Co.*, 754 F.3d 557 (8th Cir. 2014), the Eighth Circuit reversed the District Court decision excluding expert testimony offered to prove that contaminated infant formula caused a child's brain damage. Although the experts did not rule out the child's home environment or the municipal water supply as possible sources of the contamination, the Eighth Circuit construed *Daubert* to "call for the liberal admission of expert testimony" and held that "such considerations go to the weight to be given the testimony by the factfinder, not its admissibility." *Id.* at 560-62, 564.

Similarly, the Seventh Circuit in *Manpower Inc. v. Ins. Co. of Penn.*, 732 F.3d 796 (7th Cir. 2013) reversed trial court decisions excluding expert testimony, reasoning that challenges to the expert's assumptions were matters for cross-examination, and not issues that go to issues of reliability under FRE 702. Specifically, the Court said that "[r]eliability . . . is primarily a question of the validity of the methodology employed by an expert, not the quality of the data used in applying the methodology or the conclusions produced." *Id.* at 806. The Court reversed a trial court order excluding expert damages testimony because the concerns that prompted exclusion implicated not the reliability of the expert's methodology, but the data from which he chose to extrapolate. *Id.* at 807-10.

In *SQM North America Corporation v. City of Pomona*, 750 F.3d 1036 (9th Cir. 2014), the City of Pomona was seeking to hold SQM liable for perchlorate in its water supply. The District Court excluded the

Plaintiff's expert and the Ninth Circuit reversed holding that "only a faulty methodology or theory, as opposed to imperfect execution of laboratory techniques, is a valid basis to exclude expert testimony."

There is simply no uniform rule on the judge/jury issue regarding the scrutinizing of expert testimony in Federal Court. The Court should grant the Petition for Writ of Certiorari in order to resolve a clear circuit split and to restore consistency as to expert testimony admissibility in the Federal Courts.

II. THE ELEVENTH CIRCUIT'S DECISION IS WRONG

A. PETITIONER'S SEVENTH AMENDMENT RIGHTS WERE VIOLATED

The Seventh Amendment to the Constitution of the United States provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." In this case, the Petitioner's Seventh Amendment rights were clearly violated. The Petitioner should have been permitted to have a jury decide the disputed issues regarding the expert.

The deprivation of the right to a trial by jury "at the hands of the English was one of the important

grievances" leading to the American Revolution. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 340 (1979) (Rehnquist, J., dissenting). The Declaration of Independence also cites the lack of trial by jury as one of the gravest injuries against free people, "having as its direct object the establishment of an absolute Tyranny over the States." *The Declaration of Independence*, 20 (U.S. 1776) ("For depriving us in many cases, of the benefits of Trial by Jury").

Although the Founders often spoke of the importance of criminal juries, they viewed civil juries with similar reverence. Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 664 (1973). Alexis de Tocqueville also commented on the importance of civil jury trials in the new America: "Juries, especially civil juries, instill some of the habits of the judicial mind into every citizen, and just those habits are the very best way of preparing people to be free." Alexis De Tocqueville, *Democracy In America* 274 (Jacob Peter Mayer ed., 2000).

It is very clear that the Framers were most concerned about protecting personal liberties from an oppressive executive, but they were also weary of an oppressive judiciary. To be sure, quite a number of the debates at the 1787 Continental Congress involved creating government structures that minimized the potential for judicial oppression. From these debates, the civil jury emerged "as [a] necessary . . . counterbalance [to] an invigorated judiciary." Stephen Landsman,

The Civil Jury in America: Scenes from an Unappreciated History, 44 Hastings L.J. 579, 580-81 (1993). In short, the Founders viewed the civil jury as an important bulwark against all forms of government oppression; it protected against the overzealous prosecutor just as much as it safeguarded against the corrupt judge. *Williams v. Florida*, 399 U.S. 78, 100 (1970); *see also Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting) (describing jury trials as an "important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary"). *See also Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) ("The purpose of a jury is to guard against the exercise of arbitrary power – to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge."); *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) ("Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard . . . against the compliant, biased, or eccentric judge.").

The coverage of the Seventh Amendment is "limited to rights and remedies peculiarly legal in their nature, and such as it was proper to assert in courts of law and by the appropriate modes and proceedings of courts of law." *Shields v. Thomas*, 59 U.S. (18 How.) 253, 262 (1856). Specifically, the term "common law" was used in contradistinction to suits in which equitable rights alone were recognized at the time of the framing

of the Amendment and equitable remedies were administered. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 443, 447 (1830); *Barton v. Barbour*, 104 U.S. 126, 133 (1881).

Petitioner's case is a simple common law damages case. In a copyright case, in *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998), this Court flatly rejected the notion that a damages case is equitable in nature and that no jury was required. The Court said: "Rather, Columbia merely contends that statutory damages are clearly equitable in nature. We are not persuaded. We have recognized the 'general rule' that monetary relief is legal", *Teamsters v. Terry*, 459 U.S. 558, 570 (1990), and an award of statutory damages may serve purposes traditionally associated with legal relief, such as compensation and punishment. *See Curtis v. Loether*, 415 U.S. 196 (1974) (actual damages are "traditional form of relief offered in the courts of law"); *Tull v. United States*, 481 U.S. 422 (1987). *Pernell v. Southall Realty*, 416 U.S. 363, 416 U.S. 370 (1974) (" '[W]here an action is simply for the recovery . . . of a money judgment, the action is one at law' "), quoting *Whitehead v. Shattuck*, 138 U.S. 146, 138 U.S. 151 (1891); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 369 U.S. 476 (1962) ("Petitioner's contention . . . is that insofar as the complaint requests a money judgment it presents a claim which is unquestionably legal. We agree with that contention"); *Gaines v. Miller*, 111 U.S. 395, 111 U.S. 397-98 (1884) ("Whenever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for

money had and received. The remedy at law is adequate and complete"). *See also Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989).

Petitioner suggests that a restrictive *Daubert* standard is simply inconsistent with the Seventh Amendment. Petitioner's case proves this. It is certainly reasonable to say that *Daubert* is nothing more than another evidentiary constraint that limits a jury's exposure to irrelevant or prejudicial information, much the same as hearsay or speculation. However, such a view fails to recognize *Daubert's* use and misuse in the modern day world. This Court may well have intended *Daubert* to give Federal District Courts gatekeeping power over evidence. But, in practice, *Daubert* is increasingly used to deny the right to a trial by jury in civil cases altogether. In Petitioner's case, the District Court considered two *Daubert* motions relating to Petitioner's experts and a Motion for Summary Judgment in one order. The District Court struck one expert based upon FRE 702, then excluded the second expert because he, in part, relied on the first expert and held, that in the absence of experts, Plaintiff had no case. In short, *Daubert* has become the proverbial tail wagging the dog whereby a pretrial ruling based upon a Federal Rule of Evidence is suddenly applied in such a way as to deny the Constitutional right to a trial by jury.

Daubert has shifted substantial adjudicatory power away from juries and into the hands of judges. Chief Justice Stanley Feldman of the Arizona Supreme Court explains why this shift is so dangerous:

> "In my mind, *Daubert* gives trial judges far more authority over civil cases than they ought to have. . . . What I feared would happen eventually, and what has happened, is that instead of having jury trials we now have *Daubert* hearings before the judge. The judge, in effect, then determines the outcome of the case by granting summary judgment. To my mind, this far exceeds any power that the Constitution gave judges over jury trial." Tellus Institute, The Most Influential Supreme Court Ruling You've Never Heard Of, June 2003, at 5, available at http://www.defendingscience.org/upload/-The-Most-InfluentialSupreme-Court-Decision-You-ve-Never-Heard-Of-2003.pdf; at 15 (quoting Arizona State Supreme Court Chief Justice Stanley Feldman) (emphasis added)

Sorting out conflicting facts and determining the appropriate credence to give to competing expert witnesses is the constitutionally safeguarded *purpose* of the jury. *Barefoot v. Estelle*, 464 U.S. 880, 902 (1983); *see also United States v. Cisneros*, 203 F.3d 333, 343 (5th Cir. 2000) ("Credibility determinations are the exclusive province of the jury.").

This Court should grant certiorari in order to return the power to resolve disputed factual issues to where the Constitution says it belongs: The jury.

B. THE DISTRICT COURT AND THE ELEVENTH CIRCUIT WENT FAR BEYOND BEING GATEKEEPERS.

The trial court impermissibly decided that it believed the testimony of Respondent's expert over the testimony of Plaintiff's expert, Wayne Denham, and used that as a basis to exclude Denham. The trial court, in so doing, abandoned its position as a gatekeeper and decided on the issue of credibility, not just admissibility.

The decision of whether one expert witness is more credible than the other is inherently a question for a jury, not a trial judge. By invading this province, the trial court here demonstrated a manifest abuse of discretion. "A judge must be cautious not to overstep its gatekeeping role and weigh facts, evaluate the correctness of conclusions, impose its own preferred methodology, or judge credibility, including the credibility of one expert over another. These tasks are solely reserved for the fact finder." *Apple, Inc. v. Motorola, Inc.*, 757 F.3d at 1314; *see, e.g.*, *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000) ("The soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact."); *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1293 n. 7 (11th Cir. 2005) ("a district court may not exclude an expert because it believes one expert is more persuasive than another expert"). Yet, this is precisely what the District Court did. For example, on page 12 of

the court's Order it chose to disbelieve plaintiff's expert because of his manner in testifying and because "Denham was unable to give precise answers." Then on page 18 of its Order the Court again believed defense expert over plaintiff's expert regarding the issue that the motorcycle's taillight and instrument panel were on between 70-90 minutes after the wreck, by noting that "According to Kawasaki, this is significant for multiple reasons." The court simply discarded any explanation by Petitioner's expert testimony about this electrical phenomenon, solely because his "inspection was conducted on the day after the accident and does not explain why the motorcycle's meter display remained illuminated for more than an hour after the wreck." The Court simply chose to ignore his testimony and believe that of his adversary. These several instances show the impermissible action of the District in favoring one expert's testimony over another to be able to reach its conclusions. This is error as a matter of law and an abuse of discretion.

And yet, the Eleventh Circuit chose to overlook these errors or, in some instances, even engage in them themselves. This passage, from the Eleventh Circuit opinion, illustrates how the appellate court reviewed the evidence below by simply "re-weighing" it at the appellate level:

> We agree with the district court that Denham's differential analysis was unreliable because he failed to exclude causes (other than the voltage regulator) which the evidence showed reasonably could have caused

> the accident. "Although a reliable differential diagnosis need not rule out all possible alternative causes, it must at least consider other factors that could have been the sole cause of the plaintiff's injury." *Guinn v. AstraZeneca Pharm. LP*, 602 F.3d 1245, 1253 (11th Cir. 2010). There was evidence of such other causes in this case, e.g., excessive speed, operator error. Denham's methodology failed to exclude these alternative possible causes and therefore cannot be relied upon to rule in the voltage regulator as the cause.

Clearly, this is not the type of language which reflects a "gate-keeping" analysis. It weighs and balances credibility. Worse yet, it implies a near impossible standard by excluding an expert because he cannot rule out ALL other possible alternatives. At trial, a plaintiff need only prove his case by a preponderance of the evidence, not rule out all other possibilities. But here the Eleventh Circuit has sanctioned the practice of not even letting an expert take the stand unless he can rule out ALL possibilities that conflict with his opinion. FRE 702 and *Daubert* do not require that.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT

Arising in antiquity, the right to trial by jury in civil matters at common law was so important to the founding fathers that it was enshrined in the Seventh Amendment. And to hold this right inviolate from intrusion by the courts, they included within the Seventh

Amendment a provision that, "no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law." Consequently, damage disputes in the United States have, even before the Constitution, been decided by lay jurors who hear the testimony of competing witness and observe the cross examination and arguments of counsel.

The adoption of the Federal Rules of Evidence and this Court's decision about expert testimony in *Daubert* have provided Federal trial courts with an important tool to insure that "junk science" does not mislead jurors in the discharge of their duties. But that tool should not be used to deny a party the right to trial by jury of the facts of the case or to invade the province of the jury which is charged with the obligation of weighing those facts and ascertaining the credibility of witnesses. There is no doubt that soothsayers and tea leave readers should be, and are, excluded from offering expert testimony in a Federal court, but a disturbing trend has emerged. Unfortunately, the rules are now being applied in such a way as to exclude experts with established credentials in fields like science, medicine and engineering. Worse yet, requests for these overly broad exclusions are now being bootstrapped onto motions for summary judgment in order to get judges to read the depositions of competing experts and decide who they, the judges, believe before the case ever reaches a courtroom or a jury.

Clearly, better guidance is needed and the case at bar presents a classic case for dissection. In one single

order the trial court weighed its assessment of the competing experts, chose to believe those employed by the Respondents and threw the Petitioner out of court in one fell swoop. On appeal, the Eleventh Circuit not only sanctioned this analysis, but joined in with its own weighing and balancing of the facts in a way that would never be sanctioned in some other Federal circuits. Accordingly, the Court is urged to accept this case and outline the proper balancing of a parties right to a jury trial on the facts against the "gatekeeping" function of the judge.

The issue in this case is unquestionably important and is presented with unusual clarity by the circuit conflict. Technological advances keep emerging scientific theories and methodologies at the center of legal disputes. "Proper resolution of those disputes matters not just to litigants, but also to the general public – those who live in a technologically complex society and whom the law must serve." Federal Judicial Center, Reference Manual on Scientific Evidence, Stephen Breyer, Introduction at 2 (National Academies Press 3d ed. 2011) (Reference Manual)

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-13363

D.C. 1:13-cv-03661-ELR

MICHAEL ROPER,

Plaintiff-Appellant,

versus

KAWASAKI HEAVY INDUSTRIES, LTD., KAWASAKI MOTORS CORP., U.S.A., et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(March 21, 2016)

Before JORDAN and ANDERSON, Circuit Judges, and KALLON,* District Judge.

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* Honorable Abdul K. Kallon, United States District Judge for the Northern District of Alabama, sitting by designation.