No. 12-14667-DD

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MEGAN SANDS,

Plaintiff-Appellee/Cross-Appellant,

v.

KAWASAKI MOTORS CORP., U.S.A. and
KAWASAKI HEAVY INDUSTRIES, LTD.,

Defendants-Appellants.

On Appeal From the United States District Court
For the Southern District of Georgia, Statesboro Division

BRIEF OF AMICUS CURIAE PRODUCT LIABILITY ADVISORY COUNCIL IN SUPPORT OF APPELLANTS, IN SUPPORT OF REVERSAL

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CONSENT OF ALL PARTIES

All parties have consented to the filing of an amicus brief by the Product Liability Advisory Council, Inc. ("PLAC").

INTEREST OF AMICUS CURIAE PRODUCT LIABILITY ADVISORY COUNCIL

Amicus Curiae PLAC is a non-profit association with 101 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective derives from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. Several hundred of the leading product liability defense attorneys in the country are also sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed more than 980 briefs as *amicus curiae* in both state and federal courts, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as an Appendix. Kawasaki is a corporate member of PLAC, but no counsel for a party authored this brief in whole or in part and no person other than PLAC made a monetary contribution to its preparation or submission.

A major issue before this Court concerns the proper standard for admissibility of expert evidence, and the proper appellate standard of review of trial court decisions concerning such evidence. PLAC is well situated to address these issues. Its members are subject to defending an increasing number of product liability lawsuits. Expert testimony is the rule, not the exception, in those cases. PLAC's members regularly face litigation on issues relating to the propriety of expert evidence and the standard of review.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT:

Pursuant to 11th Cir. R. 26.1-1, 26.1-2, and 26.1-3, counsel for Amicus Curiae, the Product Liability Advisory Council, Inc., certifies that it knows of no persons or entities with an interest in the outcome of this case or appeal other than those listed in the Brief of Appellants and:

Martin Bischoff Templeton Langslet & Hoffman, L.L.P., counsel for the Product Liability Advisory Council, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1-1, 26.1-2, and 26.1-3, counsel for Amicus Curiae, the Product Liability Advisory Council, Inc., discloses that it has no parent corporation, and that no publicly-held company owns ten percent or more of its stock. A list of its corporate members is attached as an Appendix to this brief.

ARGUMENT

Federal Rule of Evidence 702 requires trial judges to act as "gatekeepers" to ensure that all expert testimony is based on reliable methodology, reliably applied to the issues in dispute. Trial judges who engage and address complex issues of reliability in accordance with Rule 702 should be given wide berth to make difficult decisions. But a trial judge has no discretion to admit conclusory opinions lacking any foundation except the expert's say-so; to switch the burden to establish reliability from the proponent to the opponent; nor to treat the right of cross examination as a proxy for gatekeeping. That is what occurred in the present case.

I. Legal Standards for Expert Testimony.

A. The *Daubert* Trilogy and the 2000 Amendments to Rule 702 Have Established Clear Reliability Criteria.

The legal standards for a trial court's gatekeeping obligations under Federal Rule of Evidence 702 have been dramatically transformed in the past two decades as a result of the so-called *Daubert* trilogy of Supreme Court decisions, followed by the 2000 amendments to Rule 702. Decisions of this circuit have recognized these changes and applied them. However, the trial court in the present case did not.

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), of course, rejected the common-law *Frye* test, and required trial judges to act as "gatekeepers" of expert testimony before permitting the expert to testify. The

Court explained that "the district court's role is especially significant since the expert's opinion can be both powerful and quite misleading because of the difficulty in evaluating it." *Daubert,* 509 U.S. at 595 (quoting Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended,* 138 F.R.D. 631, 632 (1991)).[1]

The Court articulated four non-exclusive criteria by which to judge the reliability of scientific testimony. One most pertinent to the present case was testing. As *Daubert* stated:

> Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested. 'Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry.'

Daubert, 509 U.S. at 593 (citation omitted).[2]

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[1] Quoted in *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004).

[2] Among the leading articles explaining why testing of testable hypotheses is such a critical determinant of reliability are David L. Faigman, *Making The Law Safe For Science: A Proposed Rule For The Admission Of Expert Testimony*, 35 Washburn L.J. 401, 426 (1996) ("If a discipline advances testable hypotheses, they must be tested before being advanced in court."); and Victor E. Schwartz & Cary Silverman, *The Draining Of Daubert And The Recidivism Of Junk Science In Federal And State Courts*, 35 Hofstra L. Rev. 217, 242 (2006) ("An example of such abrogation occurs when a court ignores a relevant *Daubert* factor, such as when it admits an expert's theory that is readily testable even though the expert did not attempt to prove its accuracy.").

General Elec. Co. v. Joiner, 522 U.S. 136 (1997), built on *Daubert* by addressing two important issues. The Eleventh Circuit had applied a more stringent standard of review for the exclusion of expert testimony when such a decision resulted in summary judgment than when it admitted such testimony or the ruling was not determinative of the outcome. The Supreme Court reversed, holding that the same deferential standard of review applied to the exclusion of expert testimony as to its admission, even when the decision resulted in summary judgment. *Id.* at 141-143.

Despite *Daubert's* statement that the gatekeeping focus "must be solely on principles and methodology, not on the conclusions that they generate," (509 U.S. at 595), *Joiner* also held that conclusions and methodology "are not entirely distinct from one another," and neither *Daubert* nor the Federal Rules "requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. *Joiner*, *supra*, at 146. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Id.*[3] Justice Breyer's concurrence stressed that the majority's holding "emphasizes *Daubert's* statement that a trial judge, acting as 'gatekeeper,' must 'ensure that any

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[3] Quoted with approval in *U.S. v. Frazier*, 387 F.3d 1244, 1261 (11th Cir. 2004) (en banc) ("the expert's bald assurance of validity is not enough").

and all scientific testimony or evidence admitted is not only relevant, but reliable.'"[4] *Id.* at 147 (citation omitted).

In *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137 (1999), the Court rejected the lower court holding that "a *Daubert* analysis" applies only where an expert relies "on the application of scientific principles," rather than "on skill or experience-based observation." 526 U.S. at 146 (quoting lower court opinion). The Court of Appeals had concluded that the expert's testimony, which it viewed as relying on experience, "falls outside the scope of *Daubert,*" that "the district court erred as a matter of law by applying *Daubert* in this case," and that the case must be remanded for further (non-*Daubert*-type) consideration under Rule 702. *Id.*

The Supreme Court, however, held that Rule 702 required trial judges to act as gatekeepers over the reliability of *all* expert testimony, not merely that of "scientific" experts. It stated:

> And whether the specific expert testimony focuses upon specialized observations, the specialized translation of those observations into theory, a specialized theory itself, or the application of such a theory in a particular case, the expert's testimony often will rest 'upon an experience confessedly foreign in kind to [the jury's] own.' *Ibid.* The trial judge's effort to assure that the specialized testimony is reliable

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[4] Quoted with approval in *McClain v. Metabolife Intern., Inc.*, 401 F.3d 1233, n. 4 at 1238 (11th Cir. 2005) (quoting Justice Breyer's concurrence, *Joiner, supra*, at 148 ("Of course, neither the difficulty of the task nor any comparative lack of expertise can excuse the judge from exercising the 'gatekeeper' duties that the Federal Rules of Evidence impose....").

> and relevant can help the jury evaluate that foreign experience, whether the testimony reflects scientific, technical, or other specialized knowledge.

Id. 526 U.S. at 149.

The Court emphasized that the purpose of the gatekeeping requirement was "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire*, at 152.[5] It also cited with approval the Federal Rules Advisory Committee's comments to the then-proposed amendments to Rule 702, "stressing that district courts must 'scrutinize' whether the 'principles and methods' employed by an expert 'have been properly applied to the facts of the case.'" *Kumho, supra*, at 157.

The following year, Rule 702 was amended to incorporate three mandatory conditions: that (1) the testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the expert has reliably applied the principles and methods to the facts of the case. The Advisory Committee Notes described these new requirements as "general standards that the trial court *must use* to assess the reliability and helpfulness of proffered expert testimony." (Emphasis supplied). Thus, the broad discretion the trial judge

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[5] *Accord, Rider v. Sandoz Pharmaceuticals Corp.*, 295 F.3d 1194, 1197 (11th Cir. 2002).

possesses to assess the reliability of expert testimony does not include the discretion to disregard the three conditions set forth in the 2000 amendments to Rule 702.

B. The Eleventh Circuit's Application of the *Daubert* Trilogy.

In *U.S. v. Frazier*, 387 F.3d 1244 (11th Cir. 2004) (en banc), the Eleventh Circuit's leading case, this court mandated meticulous application of the stringent standards set forth under the *Daubert* trilogy and the 2000 amendments to Rule 702. It voiced concern that experts can easily mislead the jury if they employ unreliable methodologies:

> Indeed, no other kind of witness is free to opine about a complicated matter without any firsthand knowledge of the facts in the case, and based upon otherwise inadmissible hearsay if the facts or data are 'of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.' Fed.R.Evid. 703.

Id. at 1260.

Frazier concluded that Rule 702 "compels the district courts to perform the critical 'gatekeeping' function"—as to both scientific and technical expert evidence. *Id.* This, in turn, requires an "exacting analysis" whose importance "cannot be overstated." *Id.* There "will be occasions in which we affirm the district court even though we would have gone the other way had it been our call. That is how the abuse of discretion standard differs from *de novo* standard of review." *Id.* at 1259, *citing Rasbury v. I.R.S. (In re Rasbury)*, 24 F.3d 159, 168

(11th Cir.1994). However, the court concluded, "[t]he trial court's gatekeeping function requires more than simply 'taking the expert's word for it.'" *Id.* at 1261. Moreover, the court made clear that the "proponent of expert testimony always bears the burden" of establishing the expert's qualifications, the reliability of the testimony and that it would be helpful to the trier of fact. *Id.* at 1260. How reliability is evaluated may vary, but the requirement that the trial judge determine it is properly grounded, well-reasoned, not speculative, and applies to *all* cases. *Id.* at 1262 (emphasis in original), citing Advisory Committee Notes, 2000 amendments to Rule 702.

C. The Standard of Review After *Joiner*.

(1) Eleventh Circuit

This court elaborated on the abuse of discretion standard under Rule 702 in *McClain v. Metabolife Intern., Inc.*, 401 F.3d 1233, 1238 (11th Cir. 2005):

> A "district court enjoys 'considerable leeway' in making [reliability] determinations" under *Daubert. Kumho,* 526 U.S. at 152, 119 S.Ct. 1167. Thus, "[w]hen applying [the] abuse of discretion standard, we must affirm unless we at least determine that the district court has made a 'clear error of judgment,' or has applied an incorrect legal standard." *See Piamba Cortes v. Am. Airlines, Inc.,* 177 F.3d 1272, 1306 (11th Cir.1999) (quoting *SunAmerica Corp. v. Sun Life Assurance Co. of Canada,* 77 F.3d 1325, 1333 (11th Cir. 1996)). *A trial court, however, abuses its discretion by failing to act as a gatekeeper.* (Emphasis supplied).

Even if the trial court does not abdicate its role, as it explicitly did in *McClain*, this court held that the trial court would still abuse its discretion "if the record of [the expert's] testimony demonstrates that [the expert's] testimony failed to satisfy the standards of reliability required under *Daubert* and its progeny. *Id.* *McClain*'s holding cited the concurrence in *Kumho Tire,* which added specificity to the abuse of discretion standard, making clear that the standard of review "is not discretion to perform the function inadequately. Rather, it is discretion to choose among *reasonable* means of excluding expertise that is *fausse* and science that is junky." *Kumho Tire*, *supra*, at 158-159 (emphasis in original), cited in *McClain, supra*, n. 4 at 1238. Thus, the standard is tantamount to *de novo* review as to whether the trial court applied the proper legal standard. *See Young v. New Process Steel, LP*, 419 F.3d 1201, 1203 (11th Cir. 2005).

(2) Relevant Case Law From Other Circuits

Other circuits have interpreted the standard of review in a fashion similar to this circuit, but some acknowledge more explicitly that they first undertake a *de novo* review of whether the district court properly followed the analytical framework established in *Daubert*. *Chapman v. Maytag Corporation*, 297 F.3d 682, 686 (7th Cir. 2002). The First Circuit held that the standard of review is "not monolithic" because "within it, embedded findings of fact are reviewed for clear error, questions of law are reviewed *de novo*, and judgment calls are subjected to

classic abuse-of-discretion review." *Milward v. Acuity Specialty Products Group, Inc.*, 639 F.3d 11, 13-14 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 1002 (2012). The Tenth Circuit recently summarized its application of the scope of review:

> We review de novo whether the district court applied the proper standard in performing its gatekeeper role. *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1223 (10th Cir. 2003). We review the court's actual application of the standard in deciding whether to admit or exclude an expert's testimony for abuse of discretion. *Id.* "A district court abuses its discretion when it renders an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 968 (10th Cir. 2001).

Hoffman v. Ford Motor Co., 2012 WL 3518997, *7 (10th Cir. August 16, 2012).

Thus, although there is broad discretion in how a trial judge discharges his or her gatekeeping duties under Rule 702, that discretion is constrained by the legal standards, as set forth above. It is not discretion "to perform the function inadequately. Rather, it is discretion to choose among *reasonable* means of excluding expertise that is *fausse* and science that is junky." *Kumho Tire*, at 159 (Scalia, J., concurring), quoted in *McClain, supra*, n. 4 at 1238 (emphasis in original). The trial judge does not have discretion to fail to conduct the gatekeeping analysis at all, or to fail to "properly follow[] the analytical framework established in *Daubert*." *Chapman, supra*, at 686. Indeed, in a leading pre-*Daubert* decision addressing this balance, the Fifth Circuit presciently observed:

> [T]he trial judge ought to insist that a proffered expert bring to the jury more than the lawyers can offer in argument.... Our customary deference also assumes that the trial judge actually exercised his

> discretion. In saying this, we recognize the temptation to answer objections to receipt of expert testimony with the shorthand remark that the jury will give it "the weight it deserves." This nigh reflexive explanation may be sound in some case, but in others it can mask a failure by the trial judge to come to grips with an important trial decision.

In re Air Crash Disaster at New Orleans, La., 795 F.2d 1230, 1233 (5th Cir. 1986).

II. The Trial Court Applied Erroneous Legal Standards to the Expert Testimony At Issue.

Despite repeated entreaties by Kawasaki, the trial judge applied incorrect legal standards to pivotal evidentiary issues in three respects: a) Failing to assess the reliability of the disputed expert testimony as to the specific issue actually in dispute; b) Reversing the burden of persuasion from the proponent of the testimony to the opponent as to its reliability; and c) concluding that cross examination is a legally-sufficient substitute for the court's gatekeeping duties under Rule 702. None of these legal errors is within a trial court's discretionary power.

A. First Prerequisite to Gatekeeping Under Rule 702: Properly Identifying and Addressing the Issue in Dispute.

Plaintiff had to prove two elements to establish a reasonable alternative design:

> The existence of a safer, practical, alternative design must be proved by showing that: (a) [t]he plaintiff's injuries would have been eliminated or in some way reduced by use of the alternative design; and that (b) taking into consideration such factors as the intended use of the [product], its styling, cost, and desirability, its safety aspects, the foreseeability of the particular accident, the likelihood of injury, and the probably seriousness of the injury if that accident occurred,

> the obviousness of the defect, and the manufacturer's ability to eliminate the defect, the utility of the alternative design outweighed the utility of the design actually used.

Richards v. Michelin Tire Corp., 21 F.3d 1048, 1056 (11th Cir. 1994), citing *Beech v. Outboard Marine Corp.,* 584 So.2d 447, 450 (Ala. 1991); Restatement, Torts 3d, Products Liability, §2, cmt. *f.*

Plaintiff's expert, Mr. Burleson, provided the only expert evidence of a design defect. The bulk of Burleson's proffered testimony was that some kind of seat back would have benefited the Plaintiff in this accident by preventing her from sliding off the back of the seat and into the water. However, he presented no testing or engineering analysis to show that the alternative design would have improved the *overall* safety and utility of the product. Instead, his opinion rested solely on an unsupported, conclusory statement in his report, which was precisely the kind of "analytical leap" and *ipse dixit* condemned in *Joiner.* He made no showing that his conclusion was, in the words of Rule 702, (1) based on sufficient [or any] facts or data; (2) the product of reliable [or any] principles and methods; and (3) reached by reliably applying the principles and methods to the facts of the case.

Mr. Burleson's expert report was required to contain, *inter alia*: "(i) a complete statement of all opinions the witness will express and the basis and reasons for them; and (ii) the facts or data considered by the witness in forming

them." Fed. R. Civ. P. 26(a)(2)(B). Yet his only reference to the second element of the required standard for proof of design defect was this:

> The seatback provided both comfort and safety without sacrificing utility of the product or creating dangerous hazards. Previously noted claims by Kawasaki experts that a seatback on a watercraft creates new hazards is simply unwarranted and without proven basis.

(Burleson Report, Dkt. 58-2, pp. 9-10). Absent any evidence of engineering analysis, data, or testing, this was a hypothesis, dressed up as expert opinion. Indeed, conclusory statements such as this may be stricken from an expert report. *Cook ex rel. Estate of Tessier v. Sheriff of Monroe County, Fla.*, 402 F.3d 1092, 1112-13 (11th Cir. 2005). And this court has also upheld the exclusion of supporting evidence offered *post facto*, rather than in the expert report itself. *Mitchell v. Ford Motor Co.*, 318 Fed.Appx. 821, 2009 WL 593897 (11th Cir. 2009). In the present case, no such evidence was ever forthcoming.

Kawasaki's argument, clearly stated in its motion in limine, was that Burleson had "not tested whether a seatback would pose other dangers of equal or greater magnitude to the danger it would supposedly address." (Defendant's Motion in Limine, Dkt. #62, Sec. VI (A), p. 11.). Kawasaki did not challenge the admissibility of Burleson's assertion that his seat back concept, if used, would have eliminated or reduced the risk of injury *to Plaintiff*.

Plaintiff's response did not dispute the applicable legal standard but simply argued that Burleson had tested the seat he had invented (Plaintiffs' Response to

Motion in Limine, Dkt. #70, pp. 5-6);[6] that other courts had allowed him to testify in other cases (*Id.* p. 7); and that there was "no evidence that the raised seat back or sculpted seat would create hazards equal to or greater than those suffered by Sands." *Id.* p. 8. Plaintiff attacked Kawasaki's expert's criticism of Burleson's alternative design as untested. *Id.* pp. 8-9.

In denying Kawasaki's motion in limine, the trial court did not identify, let alone address, the specific objection Kawasaki presented. Rather, it uncritically accepted Plaintiff's mischaracterization of its contention: "that neither Mr. Burleson nor the engineering community adequately tested his proposed designs." (Opinion, Dkt. 91, p. 8.) It characterized Plaintiff's response as asserting that "Mr. Burleson performed adequate testing of his proposed seatback." *Id.* The court cited Burleson's deposition testimony concerning testing and his expert report, but never identified any testing or engineering analysis or data that showed anything Burleson did to determine its overall safety or to identify or assess any risks such an alternative design might create.

The trial court found Kawasaki's arguments "unavailing" because they "address the creditability of the testimony, not its admissibility." (Opinion, Dkt.

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[6] Burleson also offered testimony about a "sculpted" seat from a 2003 Yamaha personal watercraft, but he cited no testing or engineering analysis of that seat to determine whether it satisfied *either* element of the two-part *Richards* test. The court sustained Kawasaki's objection to Burleson's opinion about the untested Yamaha seat for lack of foundation. (Tr. 3:369-470).

91, n. 5 at p. 10.). Likewise, when Kawasaki challenged the admission of Burleson's opinion again in post-trial motions, the trial court again summarily rejected the argument, saying it saw "no need to rehash its reasoning and conclusions." (Opinion, Dkt. 234 (8/15/12), p. 16).

The trial court did not—and could not—make the reliability determination required under Rule 702 without addressing the particular issue in dispute. It described the issue merely as whether "adequate testing" was conducted, justifying its denial of Kawasaki's motion in limine based on a cursory description of the record. But the meager and irrelevant evidence in the record, such as the number of tests or the length of time Burleson tested, was unresponsive to the specific objection that Kawasaki had raised. Neither the Plaintiff nor the trial court ever identified any test or other engineering data supporting Burleson's conclusory assertion about the overall safety of the alternative design. Nor is there is any indication that the court assessed the reliability of Burleson's conclusory answer to the pertinent question in dispute. Without determining what Burleson did to answer the critical question, there was no way the trial court could *begin* to determine whether his opinion was based on a reliable methodology.

More fundamentally, the court needed to understand the technical hypothesis at issue in order to determine whether the expert had employed a reliable methodology to answer it. The expert's methodology must be judged by

considering the reasonableness of applying the approach to the facts of the particular case and the validity of the expert's particular method of analyzing the data and drawing conclusions therefrom. *Hendrix ex rel. G.P. v. Evenflo Co., Inc.*, 609 F.3d 1183, 1195 (11th Cir. 2010). The trial court cannot satisfy Rule 702's gatekeeping requirements by assessing the reliability of the wrong question. Rule 702's "helpfulness" requirement is satisfied only to the extent the expert's analysis helps to answer a "fact in issue." A trial court's failure to address the "fact in issue" thwarted any meaningful determination under Rule 702.

A trial court's discretion under Rule 702 does not extend to decisions that fail to address the reliability issue actually in dispute. Answering the wrong question is tantamount to failing to carry out gatekeeping responsibilities altogether.

B. Second Prerequisite to Gatekeeping Under Rule 702: Properly Applying the Burden of Establishing the Reliability of the Expert's Methodology.

The trial court's admitted Burleson's conclusory opinion based on the tepid conclusion that it was "*un*able to say that Mr. Burleson's testimony regarding a fixed seatback is *un*reliable," (Opinion, Dkt. 91, n. 5 at pp. 9-10) (emphasis supplied). In effect, the court switched the burden to show *un*reliability to Kawasaki. This was contrary to *Frazier*, which held that the proponent always

bears the burden to establish reliability. *Frazier, supra,* 387 F.3d at 1260.[7] At the close of the evidence, the trial judge, at last, correctly noted that it was Sands' burden to prove that the alternative design would not unduly increase the product's cost, decreasing its usefulness, or introducing other hazards (Tr. 6:1039); yet he still mistakenly assumed that *absence* of an admission by Burleson that the alternative design would introduce a risk of other hazards permitted the jury to conclude that the alternative design was reasonable. (Tr. 6: 1040). Relieving Plaintiff of her burden was contrary, both to the substantive tort law, which places the burden on the Plaintiff to establish that the proposed alternative design would have greater overall safety than the existing design (*see Richards, supra)*, and to *Frazier*'s holding that always imposes the burden on the proponent of expert testimony to establish its reliability. It goes without saying that a trial court does not have discretion to switch the burden under Rule 702 from the proponent of expert evidence to the opponent of such evidence. And, yet this erroneous legal standard was a necessary predicate for the trial court's admission of this evidence.

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[7] Plaintiff invited this error by complaining that the *defense* expert's criticisms had not been tested, in her opposition to Kawasaki's motion in limine. This constituted the same questionable reasoning that this court utilized in *Carmichael*, justifying the proffered testimony of plaintiff's expert by citing similar insufficiencies in the methodology of defendant's expert. *Carmichael v. Samyang Tire, Inc.*, 131 F.3d 1433, n. 8, 10, at 1436, 1437 (1997), *reversed sub nom. Kumho Tire, supra*. It should go without saying that, if the proponent's evidence is inadmissible under Rule 702, the admissibility of the opponent's rebuttal of that evidence is immaterial.

C. Third Prerequisite to Gatekeeping Under Rule 702: Cross Examination is Not a Substitute for Admissibility or Reliability.

The trial court cited *Quiet Technology DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333 (11th Cir. 2003), at 1341 (sic) for the proposition that any insufficiency of Mr. Burleson's testing, or the "dissimilar" conditions under which it was conducted, simply went to the weight of the expert testimony, not its admissibility. (Opinion, Dkt. 91, n. 5 at p. 10, Sept. 30, 2009). Stated another way, as long as the expert tested something, it was immaterial whether he tested the proposition at issue.

Quiet Tech attributed this legal proposition to *Bazemore v. Friday*, 478 U.S. 385, 400 (1986). *Quiet Tech*, 326 F.3d at 1346.[8] However, *Bazemore* cannot justify the admission of Burleson's opinion in this case. First, *Bazemore* predated, and therefore did not address, the standards governing *Daubert* challenges to expert testimony. Second, *Quiet Tech* never addressed how the 2000 amendments to Rule 702 affected the admissibility of such evidence. Third, whatever vitality *Bazemore* might have had when *Quiet Tech* was decided evaporated after this court subsequently explained Rule 702's requirements, *en banc,* in *Frazier*.

Quiet Tech acknowledged that the Supreme Court decided *Bazemore* "in a different substantive context." (*Id.* at 1346). The more recent—and pertinent—

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[8] Another panel of this circuit has cited this language from *Quiet Tech. Rosenfeld v. Oceania Cruises, Inc.*, 654 F.3d 1190, 1193 (11th 2011).

precedent (also quoted in *Quiet Tech*) is *Daubert,* which states that "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but *admissible* evidence." *Daubert*, 509 U.S. at 596 (emphasis supplied), cited in *Quiet Tech* at 1345. *Daubert* made clear that "admissible" evidence presupposes that such evidence "both rests on a reliable foundation and is relevant to the task at hand." *Daubert, supra*, at 597. Thus, *Bazemore* (and hence, *Quiet Tech*), cannot be read to permit cross examination, no matter how vigorous, to substitute for the trial court's gatekeeping responsibilities. Nothing in the *Daubert* trilogy supports such an abdication. Any doubt over the correctness of this proposition when *Quiet Tech* was decided in 2002 should have been resolved in 2004, when this court, *en banc*, declared in *Frazier*:

> If admissibility could be established merely by the *ipse dixit* of an admittedly qualified expert, the reliability prong would be, for all practical purposes, subsumed by the qualification prong. Thus, it remains a basic foundation for admissibility that "[p]roposed [expert] testimony must be supported by appropriate validation-i.e., 'good grounds,' based on what is known." *Daubert*, 509 U.S. at 590, 113 S.Ct. at 2795. As the Supreme Court put it, "the Rules of Evidence-especially Rule 702-... assign to the trial judge the task of ensuring that an expert's testimony ... rests on a reliable foundation." *Id.* at 597, 113 S.Ct. at 2799.

Frazier, supra, 387 F.3d at 1261.

Justice Breyer discussed this very distinction in his introduction to the Second Edition of the Federal Judicial Center's *Manual on Scientific Evidence*. He

noted that scientific research can produce "controversy and uncertainty," even when conducted properly, but distinguished such disputes from those in which "so-called" science "isn't even good enough to be wrong." *Id.* at 4, 5-6. There is little doubt that a bald conclusion, devoid of any research, data, or analysis, falls into the latter category.

Thus, even when a *Daubert* challenge in this circuit involved the admissibility of statistical multiple regression expert evidence such as that offered in *Bazemore*, this court properly analyzed the issue under the then-applicable principles of Rule 702 rather than *Bazemore*. *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 563-568 (11th Cir. 1998).

Judge Posner's remarkable opinion in *ATA Airlines, Inc. v. Federal Exp. Corp.*, 665 F.3d 882, 889-895 (7th Cir. 2011), *cert. denied*, 2012 WL 189940 (Oct. 1, 2012), illustrates the proper approach to a Rule 702 challenge to multiple regression. The trial judge had admitted expert testimony with a cursory conclusion (not unlike the trial judge's in the present case), that whatever flaws in the expert's work could be "explored on cross-examination at trial" and that "regression analysis is accepted, so this is not 'junk science.' [The expert] appears to have applied it. Although defendants disagree, he has applied it and come up with a result, which apparently is acceptable in some areas under some models. Simple regression analysis is an accepted model." *Id.* at 889.

The Seventh Circuit reversed. It emphasized the district court's duty to understand the expert's "principles and methods." The opinion identified the available sources a trial judge should consider, when necessary, to discharge that duty properly. That approach, rather than that used by the trial court here is, what Rule 702 requires.

The trial court's reliance upon *Bazemore* demonstrates that it applied an erroneous legal standard. This is not within a trial court's exercise of discretion. Rule 702 permits trial judges to exercise their discretion only *after* conducting the "exacting analysis" required by *Frazier* and determining that the criteria of Rule 702 have been satisfied.

III. The Trial Court Applied a Double Standard in Excluding Defendant's MADYMO Exhibit.

Despite permitting Mr. Burleson to offer an unsubstantiated opinion about the overall safety of his alternative seatback design, as well as the safety of a competitor's seat which Burleson had not tested at all, the trial court excluded an exhibit (Ex. No. 72) prepared by Kawasaki's expert, showing the jury a MADYMO computer-generated kinematic analysis, because he did not test the watercraft. Tr. 6: 978). Exhibit 72 provided reliable and relevant evidence showing the potentially adverse effects of the proposed alternative design. Tr. 6:977-978. The defense expert laid the foundation that the MADYMO program was reliable, was the type of program commonly used in the design process, and

that it helped to identify potential risks of danger if Burleson's design were utilized. Tr. 6:330-333.[9]

The trial court's additional reason for exclusion—that the exhibit depicted an operator rather than a passenger—did not give the trial judge discretion to exclude the exhibit for unfair prejudice. The exhibit was reliable technical evidence that Burleson's seatback posed increased risks to watercraft operators. This was relevant to the substantive question whether the proposed alternative design improved the overall safety of the product, as Burleson claimed. Kawasaki was entitled to show why the proposed alternative design could introduce other dangers of equal or greater magnitude, despite whatever benefit it might have provided Plaintiff in this accident. Thus, it was highly relevant, and its only "prejudice" was its refutation of an element of Plaintiff's design defect claim. As such, it was precisely the sort of evidence appropriate to an issue in dispute.

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[9] In denying Kawasaki's post-trial motions, the trial judge later amplified his earlier ruling, saying that the witness

> did not perform any analysis on the PWC model involved in the accident. In addition, the exhibit depicted the injuries that a PWC operator might sustain, not a passenger.... Furthermore, the Court only denied the admission of the visual depiction contained in the exhibit because it was not substantially similar to the accident in question, and its probative value was greatly outweighed by its potential to prejudice and mislead the jury.

Order (August 16, 2012), Dkt. 234, pp. 16-17.

This ruling illustrates the trial court's failure to understand the central evidentiary issue in the case. The judge permitted Plaintiff's expert to offer an *ipse dixit* about the overall safety of the alternative design but precluded the defendant's expert from attempting to rebut the Plaintiff's expert on the same subject with reliable evidence. As with the trial court's handling of the testimony of Plaintiff's expert, the trial judge failed to understand that a material issue in a design defect case was whether the proposed alternative design would provide greater *overall* safety than the existing design.

The trial court's additional rationale for excluding the exhibit, that it was misleading because it depicted situations "not substantially similar to the accident in question," further confirms the trial judge's lack of understanding, both of the issues presented and the law applicable to those issues. The "substantial similarity" standard applies to experiments or demonstrations (frequently, but not necessarily, in court) offered to re-create the event at issue. See, e.g., *United States v. Gaskell*, 985 F.2d 1056, 1060 (11th Cir. 1993); cf. *United States v. Rackley*, 742 F.2d 1266, 1272 (11th Cir. 1984).[10] Nothing in the challenged exhibit purported to

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[10] The author of this amicus brief has questioned the propriety of a substantial similarity standard even in the case of such experiments or demonstrations because such a standard is not based on (and, indeed, predates) the Federal Rules of Evidence, and distracts from the appropriate use of the reliability, relevance, and unfair prejudice standards of Rules 702, 401 and 403. See Jonathan M. Hoffman, *If the Glove Don't Fit, Update the Glove: The Unplanned Obsolescence of the*

recreate the accident, and so "substantially similarity" had nothing to do with its admissibility.

Nor was the exhibit simply "demonstrative" evidence.[11] Rather, it was part of the expert's engineering modeling analysis concerning the kinematics of operators and passengers. It identified potential hazards created by the incorporation of the alternative design proposed by Mr. Burleson. It showed the jury that defendant's expert applied real engineering, which was a basis for jurors to credit his analysis vis-à-vis that of Mr. Burleson. Absent a challenge to its reliability or relevance (and we could find no record of any objection being raised to the exhibit), there simply was no legal basis to exclude such evidence, let alone under Rule 403.

IV. This Court Should Encourage Trial Judges to Utilize Readily-Available Resources in Carrying Out Their Gatekeeping Duties Under Rule 702.

A variety of tools are available to assist a trial judge in determining the reliability of complex scientific or technical evidence, if the judge is unfamiliar with the particular topic. The *Joiner* concurrence suggested that, even when facing difficult and sophisticated questions under *Daubert*, trial judges should consider

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Substantial Similarity Standard for Experimental Evidence, 86 Neb. L. Rev. 633 (2008).

[11] See discussion of confusion over the meaning of the term "demonstrative evidence" in *Hoffman, supra*, at 647-650.

other procedures, such as defining and narrowing issues of dispute under Rule 16 and using court-appointed experts. *Joiner, supra*, at 148-150 (Breyer, J. concurring). Courts may appoint either Rule 706 experts or technical advisors to assist them. *See, e.g.*, FJC, *Reference Manual on Scientific Evidence* (2d. ed.), pp. 59-66; Stephanie A. Scharf, et al. (eds.), PLI, *Product Liability Litigation: Current Law, Strategies, and Best Practices*, chapter 30 (2011 ed.). Even hearings, either with oral argument by counsel or live presentation of expert testimony *in limine*, can help the judge to understand and assess both the technical and legal issues presented in support and opposition to evidentiary objections to expert testimony.

The trial court also might have consulted the FJC's *Reference Manual on Scientific Evidence* before summarily rejecting Kawasaki's challenges to Mr. Burleson's methodology. In 1994, prior to *Joiner*, the Federal Judicial Center published its first edition of the *Reference Manual*. Judge Schwarzer explained in the Introduction to the first edition of FJC Manual that its purpose "is to assist judges in managing expert evidence, primarily in cases involving issues of science or technology." *Id.* at 1. The courts have recognized that the FJC *Manual* helps judges in this regard. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 327 (2002) (Rehnquist, C.J., dissenting) (discussing survey evidence); see also, *Frazier, supra*, n. 14 at 1261; *McClain, supra*, at 1239; *Hendrix, supra*, n. 8 at 1196; *ATA, supra*, at 889-890.

The Second and Third Editions contain a Reference Guide on Engineering.[12] They describe the processes by which engineers design—and redesign—products (3d. ed., pp. 904 *et seq.*), how engineers think about and assess safety and risk in design (3d ed., pp. 908 *et seq.*), and the kinds of analysis and testing engineers perform. It provides templates by which the trial court can assess the reliability of an engineer's proffered testimony. Use of such materials can help a trial judge determine whether the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire*, at 152; *Rider v. Sandoz Pharmaceuticals Corp.*, *supra*, 295 F.3d at 1197.

In the present case, the trial judge chose not to avail himself of any of these resources. This case represents an opportunity for this court to remind district judges not only that the "importance of *Daubert's* gatekeeping requirement cannot be overstated," (*Frazier, supra,* at 1260), but also that trial judges should take advantage of the tools available to help them discharge their "critical 'gatekeeping' function" (*Quiet Tech, supra,* 326 F.3d at 1335) in a "rigorous" and "exacting" manner. *Frazier, supra,* at 1260. Given the discretion trial judges have concerning

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[12] The Product Liability Advisory Council Foundation also published a book, Bert Black, Patrick W. Lee, *Expert Evidence: A Practitioner's Guide to Law, Science, and the FJC Manual* (West 1997). Pages 43-58 of *Expert Evidence* discuss "Applying *Daubert* and Rule 702 to Technical and Other Specialized Knowledge," as does pp. 3-21 of the 2000 Supplement issued following the *Kumho Tire* decision.

such evidence, it is essential that they understand it. It is unrealistic and inappropriate to expect the jury to determine scientific or technical reliability of expert testimony despite the trial judge's unwillingness to do so. Despite the difficulty the task may impose on trial judges, it "is 'less objectionable than dumping a barrage of scientific evidence on a jury, who would likely be less equipped than the judge to make reliability and relevance determinations.'" *Rider v. Sandoz Pharmaceuticals Corp.*, 295 F.3d 1194, 1197 (11th Cir. 2002), *citing Allison v. McGhan Med. Corp.,* 184 F.3d 1300, 1310 (11th Cir.1999).

CONCLUSION

PLAC fully supports a deferential standard of review of expert testimony in the federal courts. But that presupposes rigorous gatekeeping of such testimony in conformity with Rule 702, in the first place. That simply did not occur here. For

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the foregoing reasons, PLAC respectfully submits that the decision of the district court should be reversed.

DATED this 6th day of November, 2012.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,437 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14 font size and Times New Roman.

Jonathan M. Hoffman
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Dated: November 6, 2012

CERTIFICATE OF SERVICE

This is to certify that I have on November 6, 2012 served all parties in this case with a copy of the foregoing **BRIEF OF AMICUS CURIAE PRODUCT LIABILITY ADVISORY COUNCIL IN SUPPORT OF APPELLANTS, IN SUPPORT OF REVERSAL** by filing on the Court's CM/ECF system and by depositing in the United States Mail a copy of the same in envelopes with adequate postage thereon, addressed as follows:

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