No. 16-_____

IN THE

Supreme Court of the United States

HOWARD E. NEASE AND NANCY NEASE,

Petitioners,

v.

FORD MOTOR COMPANY, a Delaware Corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under Fed. R. Civ. P. 52(a)(3), a district court is "not required to state findings or conclusions when ruling on a motion . . . unless these rules provide otherwise . . . ." In its "*Daubert* trilogy," this Court explicated the substantive standards for admitting expert testimony but did not specify whether district courts are required to engage in explicit factfinding in resolving *Daubert* motions, nor the appropriate remedy for a failure to discharge any such duty.

The questions presented are:

1. When a district court grants or denies a motion *in limine* concerning expert testimony, need it state only its ultimate ruling on admissibility (as permitted in the First and Second Circuits), or must it also set forth explicit findings of fact regarding each aspect of the expert testimony rules cited in the motion (as required by most other circuits, including the Fourth Circuit below)?

2. When a federal appellate court concludes that a district court erred procedurally by admitting or excluding expert testimony in a jury trial without explicit *Daubert* factfinding, is the appropriate remedy for such procedural error: (a) a remand so that the omitted findings can be made by the district court (the rule applied in at least two circuits); (b) a remand for a mandatory new trial (the rule applied in the Ninth and Tenth Circuits); or (c) *de novo* decision of the admissibility issue on appeal (the rule applied by the Fourth Circuit below and by the Seventh Circuit)?

PARTIES TO THE PROCEEDING

Petitioners, Howard E. Nease and Nancy Nease, were plaintiffs in the District Court and appellees in the Fourth Circuit. Respondent Ford Motor Company was defendant in the District Court and appellant in the Fourth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully submit this petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's published opinion is reported at 848 F.3d 219. Pet. App. 1a-30a. The District Court's March 13, 2015, order rejecting respondent's *Daubert* argument, and admitting petitioners' expert testimony, is unreported. *Id.* 52a-55a. The District Court's July 24, 2015, posttrial order rejecting respondent's renewed *Daubert* argument is unreported. *Id.* 31a-51a.

JURISDICTION

The Fourth Circuit entered judgment on February 1, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULES INVOLVED

Fed. R. Civ. P. 52(a)(3) states:

Rule 52. Findings and Conclusions by the Court; Judgment on Partial Findings

* * *

(a) Findings and Conclusions

* * *

(3) For a Motion. The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion.

Fed. R. Evid. 104(a) states:

Rule 104. Preliminary Questions

(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

Fed. R. Evid. 702 states:

Rule 702. Testimony by Expert Witnesses

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.

INTRODUCTION

Plaintiffs Howard and Nancy Nease of West Virginia filed this product liability action against defendant Ford Motor Company, alleging that Mr. Nease was seriously injured due to a design defect in his Ford vehicle which caused it to accelerate out of control and crash into a brick wall. In preparation for trial, the Neases designated an engineering expert to testify regarding the design defect. The District Court

rejected Ford's challenge under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), ruling that the Neases' expert was qualified and was using a standard engineering methodology, and that Ford's criticisms went only to weight, not admissibility. The jury found in favor of the Neases. On appeal the Fourth Circuit reversed and entered judgment in favor of Ford based on *Daubert*, in an opinion implicating two procedural questions involving *Daubert* which have long divided the federal circuits.

First, the Fourth Circuit held that the District Court committed procedural error in its *Daubert* analysis, by failing to make explicit findings of fact on every aspect of analysis under *Daubert* and Rule 702. Its holding that district courts have a duty to engage in detailed factfinding on motions *in limine* involving expert testimony is consistent with the law of most circuits but is difficult to square with Fed. R. Civ. P. 52(a)(3), which provides that district courts are "not required to state findings or conclusions when ruling on a motion . . . unless these rules provide otherwise . . . ." At least two circuits decline to require district courts to engage in explicit factfinding on *Daubert* motions.

Second, rather than remand the case to permit the District Court to make the omitted factual findings, the Fourth Circuit itself made them. Engaging in *de novo* review, with no hint of deference to what facts the District Court could have found on remand, the Fourth Circuit held that the Neases' expert testimony was inadmissible under *Daubert*, and entered judgment in Ford's favor. By contrast, had this case been litigated in the Ninth or Tenth Circuits, the remedy on appeal would have been the grant of a new trial. In other circuits the remedy would have been a simple remand.

Review should be granted to resolve the conflict among the circuits concerning these two basic procedural aspects of motion practice under *Daubert*.

STATEMENT OF THE CASE

On November 20, 2012, petitioner Howard Nease was driving his 2001 Ford Ranger pickup truck in St. Albans, West Virginia. While traveling 45-50 mph, he discovered that the truck would not slow down when he took his foot off the accelerator pedal. Nor was he able to slow the truck using the brakes. Because the truck was running out of control, to avoid hitting pedestrians or other vehicles he was forced to steer off the road. Pet. App. 3a-4a. As the District Court summarized, there was ample eyewitness testimony indicating that something was seriously wrong with the truck:

> Mr. Nease gave compelling testimony that he was operating his truck in an ordinary fashion when the accelerator pedal stuck and the truck went out of control for a considerable distance before he struck a brick wall. A witness at the scene, John Alan Kemplin, Jr., testified that he saw Mr. Nease's truck traveling fast off the road, through landscaping, over curbs, and through a carwash bay and the throttle sounded as if it was in a wide-open position. Trial Tr., 26-30, Mar. 25, 2015, ECF No. 249. He further stated that, after Mr. Nease hit the wall, his truck continued to run with a wide-open throttle, with the tires spinning, until the engine blew. *Id*. at 36. In addition, the police officer who responded to the scene, Jacob Dent, testified he found that the accelerator pedal was in the down position,

> and he directed another officer to photograph it.

Pet. App. 35a.

Subsequently the Neases filed suit against Ford alleging, among other things, that the truck had run out of control, seriously injuring Mr. Nease, as a result of a defect in the design of the truck's accelerator pedal-to-throttle assembly. Pet. App. 3a-4a. The Neases retained an engineering expert, Samuel Sero, in support of this strict products liability design defect claim.[1] On July 14, 2014, as required by Fed. R. Civ. P. 26(a)(2)(B), the Neases filed Sero's expert report, which set out his opinions, the basis and reasons for them, and the facts and data he had considered in forming them. J.A. 49-55. Sero's general conclusion, based on his analysis of the facts surrounding the crash and "over twenty years of investigating unwanted accelerations and failures to decelerate," was that "Mr. Neases' Ford Ranger experienced a failure to decelerate caused by the binding of the lost motion portion of the cruise servo cable." J.A. 53. Sero also explained his reasoning process, setting forth eight factual conclusions upon which he relied. Pet. App. 9a (quoting expert report).

On Nov. 5, 2014, Ford deposed Sero, allowing it ample opportunity to obtain detailed information on Sero's engineering methodology and the manner in which he had applied it in this case. J.A. 265-69. The expert report and deposition put Ford in a position to submit, with its motion *in limine*, an expert affidavit

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[1] The District Court rejected Ford's argument that Sero was unqualified to testify as an expert, Pet. App. 10a, a ruling the Fourth Circuit left undisturbed.

challenging Sero's methology, and/or its application, as too unreliable to satisfy Fed. R. Evid. 702.[2]

However, in its motion in *limine* filed Dec. 18, 2014, Ford submitted no expert affidavit challenging the reliability of the expert methodology set out by Sero in his expert report and deposition.[3] Instead, Ford relied on arguments of its attorneys contained in a legal memorandum, criticizing the three key conclusions reached by Sero: "(1) that the speed control cable *can* stick; (2) that the speed control cable *did* stick, causing Mr. Nease's wreck and (3) that Mr. Nease was incapable of stopping the Ranger with the brakes during the crash sequence."[4]

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[2] *See generally* Margaret A. Berger, *Procedural Paradigms for Applying the* Daubert *Test*, 78 MINN. L. REV. 1345, 1369-72 & n.139 (1994).

[3] The only material submitted with the motion written by an expert and referring to Sero was an unsworn expert report submitted by Ford's engineering expert (Karl Stopschinski). J.A. 106-08. Ford's expert submitted his report before Sero was even deposed, and thus he had no occasion to analyze Sero's methodology as explicated in his deposition. Further, nowhere did Ford's expert assert that Sero's methodology was flawed; rather, he opined that Sero's conclusion was unreasonable, and that his own conclusion was the correct one. J.A. 107-08 ("Mr. Sero's description of the speed control cable binding is not a reasonable explanation for the vehicle's acceleration . . . . The cause of the crash was that the driver, Mr. Nease, pressed the accelerator pedal, likely instead of the brake pedal, causing the vehicle to accelerate rapidly and crash. A malfunction of the vehicle was not the cause of the crash.").

[4] Ford Motor Company's Memorandum of Law in Support of Its Motion to Exclude Expert Testimony of Samuel J. Sero, P.E., ECF No. 76 (filed Dec. 18, 2014), at 7 (emphasis added). *See also id*. at 15-20 (legal argument against Sero's methodology, unsupported by any opposing expert testimony questioning its reliability).

Of course, such arguments made by attorneys in legal briefs do not create a factual record.[5] Given the absence of record evidence impugning the reliability of Sero's methodology and his application of it in this case, in denying Ford's *Daubert* challenge, the District Court elected to write only a brief opinion, concluding that "Mr. Sero used standard engineering methodology to conduct his physical inspection and reach his opinions," and that "[e]very argument raised by Defendant goes to the weight, not admissibility, of his testimony." Pet. App. 54a.

At no point at the trial level did Ford suggest to the District Court that it had failed to make sufficiently detailed *Daubert* findings.

When called as an expert witness at trial, J.A. 600-731, Sero testified that in reaching his conclusions he was "following Ford's methodology" of "failure mode effects analysis," J.A. 609, using the "same fault tree analysis" used by Ford engineers. J.A. 610. Using this methodology, Sero concluded that Mr. Nease's Ford truck crashed due to a design defect which made the vehicle unreasonably unsafe, and that there were technologically and economically feasible alternative designs that Ford could have employed to prevent this outcome. J.A. 650, 662-75.

At trial Ford made no further *Daubert* objections based on the trial record. Instead, Ford rested on the

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[5] *E.g.*, *Kulhawik v. Holder*, 571 F.3d 296, 298 (2d Cir. 2009) (per curiam) ("[a]n attorney's unsworn statements in a brief are not evidence"); *Jupiter v. Ashcroft*, 396 F.3d 487, 491 (1st Cir. 2005) ("Counsel's factual assertions in pleadings or legal memoranda are not evidence"); *United States v. White*, 366 F.3d 291, 302 (4th Cir. 2004) ("unsworn statements in memoranda . . . do not constitute evidence"); *Skyline Corp. v. N.L.R.B.*, 613 F.2d 1328, 1337 (5th Cir. 1980) ("Statements by counsel in briefs are not evidence").

record it had made on its motion *in limine*, in an oral motion made prior to Sero's testimony. J.A. 591. In its Rule 50 motion made after Sero's testimony it did not attack Sero's trial testimony or even mention *Daubert*. J.A. 745-57. *Cf. Macsenti v. Becker*, 237 F.3d 1223, 1230-34 (10th Cir. 2001) (*Daubert* motion made at close of evidence was untimely).

The jury credited Sero's testimony and returned a verdict for the Neases on their design defect claim, awarding approximately $3 million in total damages. Pet. App. 13a; J.A. 582-87. (Mr. Nease was awarded $762,828.35 for past medical bills, $500,000 for future medical care, $750,000 for permanent injury, and $750,000 for past and future pain and suffering; Mrs. Nease was awarded $250,000 in loss-of-consortium damages. J.A. 587.)

Eventually, in posttrial motions, Ford made a *Daubert* objection to Sero's testimony at trial. *Cf. Naeem v. McKesson Drug Co.*, 444 F.3d 593, 610 (7th Cir. 2006) (*Daubert* challenge made in posttrial motions was untimely). Ford's analysis consisted solely of references to Sero's testimony, and assertions by Ford's counsel that Sero "lacked any competent foundation for his opinion" and used a "flawed methodology."[6] Ford did not cite testimony from any of the experts it had called at trial regarding the reliability of the methodology applied by Sero in *his* testimony.[7]

In its memorandum opinion rejecting Ford's post-trial motions and upholding the jury's verdict, the District Court rejected these assertions that Sero's

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[6] Memorandum in Support of Ford Motor Company's Renewed Motion for Judgment as a Matter of Law, ECF No. 239 (Apr. 30, 2015), at 6, 8.

[7] *Id.* at 7-13.

methodology was unreliable. Pet. App. 33a-37a. The District Court credited Sero's testimony that he "relied upon Ford's own fault tree analysis" and on a "methodology developed by Ford and adopted by the Society of Automotive Engineers" – a methodology, Sero testified, that "is consistent and trustworthy and what historically is used in failure to decelerate cases." Pet. App. 34a. *See also* Pet. App. 35a ("Given Mr. Sero's explanation as to how he reached his opinion and the totality of his testimony, the Court finds that Mr. Sero did not engage in 'junk science.'"); *id*. at 36a ("The Court finds that Ford's arguments go to the weight the jury should afford Mr. Sero's testimony, not its admissibility.").

Nonetheless, on appeal the Fourth Circuit held "that Sero's testimony should not have been admitted" and that without Sero's testimony "the Neases cannot prove their case under West Virginia law," requiring entry of judgment in Ford's favor. Pet. App. 3a. Its analysis proceeded in two distinct steps.

First, observing that "Rule 702 imposes a special gatekeeping obligation on the trial judge to ensure that an opinion offered by an expert is reliable," Pet. App. 20a, the Fourth Circuit held that the District Court erred procedurally by simply crediting Sero's uncontroverted testimony that the methodology he employed was trustworthy and standard in the field. It faulted the District Court's pretrial *Daubert* ruling as follows:

> The court did not use *Daubert*'s guideposts or any other factors to assess the reliability of Sero's testimony, and the court did not make any reliability findings. Indeed the district court referred neither to Rule 702 nor to *Daubert*. We are forced to conclude that the court abandoned its gatekeeping function with respect to Ford's motion *in limine*.

Pet. App. 21a. With respect to the District Court's post-trial ruling, the Fourth Circuit similarly found that "the district court did not perform its gatekeeping duties with respect to Sero's testimony." Pet. App. 22a.

Second, rather than remand the case to permit the District Court to make the omitted factual findings (as other circuits do in this situation, see p. 20-23, *infra*), the Fourth Circuit itself made the factual findings. Engaging in *de novo* review, with no hint of deference to the facts that the District Court could have found on remand, and referencing assertions made by Ford's counsel attacking Sero's testimony at trial (ranging far beyond the pretrial *in limine* record), the Fourth Circuit held Sero's testimony inadmissible under *Daubert*. Pet. App. 22a-29a. This petition follows.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari to resolve the conflict among the circuits concerning two basic procedural aspects of motion practice under *Daubert* which are implicated in this case.

First, there exists a sharp conflict among the circuits concerning whether district courts are required to make explicit findings of fact in resolving *Daubert* challenges under Rule 702. At least two circuits decline to require district courts to engage in explicit fact-finding on *Daubert* motions, on the view that a district court's ruling on the ultimate issue of admissibility implies that all necessary factual findings sustainable on the record were made. Most circuits, however – including the Fourth Circuit in its decision below – insist that district courts make detailed findings in resolving *Daubert* motions. This basic aspect of *Daubert* practice should be treated uniformly nationwide, a result obtainable through a grant of certiorari.

Second, among the majority of circuits (including the Fourth Circuit) which *do* require explicit findings of fact on *Daubert* motions, there is complete disarray concerning what *remedy* is appropriate when a district court has erred procedurally by admitting or excluding expert testimony in a jury trial without the required findings. Some circuits, consistent with normal appellate practice, simply order a remand so that the omitted findings can be made. In sharp contrast, the Ninth and Tenth Circuits deny district judges this opportunity, and mandate a new trial, based on a candidly expressed concern that district judges cannot be trusted to avoid post-hoc rationalization. At least two circuits (including the Fourth Circuit below) *entirely* override district courts that omit factual findings on evidentiary issues, by engaging in *de novo* review to make the omitted findings.

Review is needed to resolve these fundamental conflicts regarding federal practice under *Daubert*.

I. The Circuits Are Divided Over Whether District Courts Are Required to Make Explicit Findings of Fact on *Daubert* Motions

The Fourth Circuit's decision in this case deepens a growing rift among the circuits concerning whether a district court faced with a *Daubert* motion need state only its ultimate ruling on admissibility, or whether it must also set forth explicit findings of fact regarding each aspect of Fed. R. Evid. 702 raised in the motion.

1. Initially it is worth noting that no federal statute or rule explicitly states that a federal district court has any obligation when faced with a *Daubert* motion – or *any* motion regarding the admission or exclusion of evidence – to do anything but decide the motion (i.e.,

grant or deny it on the extant record). The evidence rules require only that a district court "must *decide*" whether "evidence is admissible," Fed. R. Evid. 104(a) (emphasis added), not that it must *explain*, in any level of detail, its ultimate decision. "Rule 104(a) does not require the judge to make explicit findings of fact . . . ." 21A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5053.6, at 116 (2d ed. 2005). *See also* Fed. R. Evid. 103(b) (district court is required merely to "*rule*[] definitively on the record") (emphasis added). To read Rule 104(a), or some other rule, as implying a factfinding obligation on *Daubert* motions is difficult to square with Fed. R. Civ. P. 52(a)(3), which provides that district courts are "not required to state findings or conclusions when ruling on a motion . . . unless these rules provide otherwise . . . ." *See generally* 9C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL §§ 2571, 2574, 2575, 2579 (3d ed. 2008).

2. Largely congruent with this framework are the decisions of the First and Second Circuit, which grant maximum flexibility to district courts in the procedures they use in considering and ruling on *Daubert* motions and on other motions regarding the admissibility of evidence, an approach influenced by this Court's statement "that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

In a decision issued shortly after *Daubert*, the Second Circuit rejected the idea that district courts must make explicit findings of fact before admitting expert testimony. In *United States v. Locascio*, 6 F.3d

924 (2d Cir. 1993), criminal defendants objected that the district court had admitted expert testimony without stating factual findings under the evidence rule involved in that case (trustworthiness of information under Rule 703). *Id*. at 938. The court declined "to shackle the district court" with mandated explicit findings. *Id*. That the district court had made the necessary findings was *implicit* in its ultimate ruling, the Second Circuit held: "we assume that the district court consistently and continually performed a trustworthiness analysis *sub silentio* of all evidence introduced at trial." *Id*. at 939.

By implying the required findings when they are not made explicitly, the Second Circuit avoids burdening district courts "with the necessity of making an explicit determination for all expert testimony." *Id*. *See also United States v. Williams*, 506 F.3d 151, 161 (2d Cir. 2007) (citing *Kumho Tire*, 526 U.S. at 141-42) (district court denied criminal defendants' *Daubert* motion without a hearing; ruling affirmed on basis that district court's admission of government's expert testimony "constituted an implicit determination that there was a sufficient basis for doing so").

The Second Circuit's reasoning in *Locascio* was adopted by the First Circuit in *Hoult v. Hoult*, 57 F.3d 1 (1st Cir. 1995), which observed:

> We think *Daubert* and Rule 104(a) place some burden on the district court judge to make preliminary evaluations with respect to the reliability of evidence, but we decline to "shackle the district court with a mandatory and explicit" reliability analysis. Rather, we assume that the district court performs such analysis *sub silentio* throughout the trial with respect to all expert testimony.

Id. at 5 (quoting *Locascio*, 6 F.3d at 939). In the First Circuit, "there is no particular procedure that the trial court is required to follow in executing its gatekeeping function under *Daubert*." *United States v. Diaz*, 300 F.3d 66, 73 (1st Cir. 2002), provided of course that it does "not altogether abdicate its role under *Daubert* . . . ." *Smith v. Jenkins*, 732 F.3d 51, 64-65 (1st Cir. 2013) (finding abdication where there were "no statements on the record indicating that the court conducted a *Daubert* analysis").

3. But most circuits, including the Fourth Circuit below (see pp. 9-10, *supra*), decline to accord this degree of latitude to district courts. They insist that district courts must engage in explicit factfinding on *Daubert* motions and other motions involving the admissibility of expert testimony.

The Third Circuit imposed this requirement even before *Daubert*. For example, in *In re Paoli R.R. Yard PCB Litigation*, 916 F.2d 829, 858 (3d Cir. 1990), it reversed a district court ruling because the district court "did not make explicit enough findings on the reliability of" an expert's methodology. *See also id*. at 854 n.29 ("factfinding is a prerequisite to definite conclusions"). And in sharp contrast to other circuits,[8] the Third Circuit has indicated that often district courts must hold "*in limine* hearings under Rule 104(a) in making the reliability determination required under Rule 702 and *Daubert*." *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 417 (3d Cir. 1999). *E.g.*, *Elock v. Kmart*

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[8] *See, e.g.*, *United States v. Phillipos*, 849 F.3d 464, 471 (1st Cir. 2017); *United States v. Alatorre*, 222 F.3d 1098, 1102-03 (9th Cir. 2000); *United States v. Nichols*, 169 F.3d 1255, 1262-64 (10th Cir. 1999); *Kirstein v. Parks Corp.*, 159 F.3d 1065, 1067 (7th Cir. 1998); *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116, 1124 (9th Cir. 1994).

Corp., 233 F.3d 734, 750 (3d Cir. 2000) ("we feel compelled . . . to remand for a *Daubert* hearing"). The Third Circuit's view is that generally "under *Daubert* a judge at an *in limine* hearing must make findings of fact on the reliability of complicated scientific methodologies . . . . ." *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 739 (3d Cir. 1994).

Similarly, in the Fifth Circuit, "[a]t a minimum, a district court must create a record of its *Daubert* inquiry and 'articulate its basis for admitting expert testimony . . . .'" *Carlson v. Bioremedl Therapeutic Systems, Inc.*, 822 F.3d 194, 201 (5th Cir. 2016) (quoting *Rodriguez v. Riddell Sports, Inc.*, 242 F.3d 567, 581 (5th Cir. 2001)). In *Carlson*, for example, the court held that the district court had erred "by not conducting a *Daubert* inquiry or making a *Daubert* determination on the record." *Id.*

The Sixth Circuit specifically requires a district court to "create a record evidencing the nature of the determination that was made pre-trial in order to ensure that a proper assessment was in fact made in the event of an appeal." *Busch v. Dyno Nobel, Inc.*, 40 Fed. Appx. 947, 961 (6th Cir. 2002). Under this rule, district courts are charged "with the duty of making specific factual findings on the record explaining their decision to admit or exclude expert testimony." *Id.* In *Busch*, for example, the court found error in "the district court's failure to make any specific factual determinations explaining its conclusion that the testimony was unsound . . . ." *Id.* However, the court has also indicated that "specific findings as to reliability" may not be required where an expert's methodology is "relatively uncontroversial." *Bureau v. State Farm Fire and Cas. Co.*, 129 Fed. Appx. 972, 976 (6th Cir. 2005).

Under Seventh Circuit precedent, "[t]o satisfy its essential role, the gatekeeper must do more than just make conclusory statements." *Fuesting v. Zimmer, Inc.*, 421 F.3d 528, 535 (7th Cir. 2005), modified on rehearing on other grounds, 448 F.3d 936 (7th Cir. 2006). In *Fuesting*, for example, the court found the district court's explanation of its ruling "inadequate." *Id*. The court likewise found district court error in *Naeem v. McKesson Drug Co.*, 444 F.3d 593 (7th Cir. 2006), on the ground that the district court's "conclusory statements were not sufficient to show that a *Daubert* analysis was performed adequately." *Id*. at 608. *Baugh v. Cuprum S.A. de C.V.*, 845 F.3d 838 (7th Cir. 2017), faulted the district court for merely ruling that the testimony of several expert witnesses was admissible and not supplying "any further analysis regarding the considerations that animated the judge's ruling." *Id*. at 844.

The Ninth Circuit follows a similar approach, emphasizing that "[t]he trial court must act as a 'gatekeeper' to exclude 'junk science' that does not meet Rule 702's reliability standards by making a preliminary determination that the expert's testimony is reliable." *Mukhtar v. California State University*, 299 F.3d 1053, 1063 (9th Cir. 2002), amended by 319 F.3d 1073 (9th Cir. 2003). For example, in *Mukhtar* the court held that the district court had erred by admitting a plaintiff's expert testimony "without any discussion of its reliability," explaining that the district court was required "to make *some* kind of reliability determination to fulfill its gatekeeping function." *Id*. at 1064-66.

In *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 464 (9th Cir. 2014) (en banc), the court reiterated that district courts have a duty "to make appropriate determinations under *Daubert* and Federal

Rule of Evidence 702." It held that the district court in that case had "failed to assume its role as gatekeeper" given the absence of "any indication that [it] assessed, or made findings regarding, the scientific validity or methodology of [the expert's] proposed testimony." *Id.* *See also Pyramid Technologies, Inc. v. Hartford Cas. Ins. Co.*, 752 F.3d 807, 814 (9th Cir. 2014) (holding that district court erred, through "two conclusory sentences and without analysis or explanation," in "summarily determining" that [plaintiff's expert] was not qualified as an expert").

The Tenth Circuit has given particularly careful consideration to a district court's factfinding obligations under *Daubert*. *See generally United States v. Avitia-Guillen*, 680 F.3d 1253, 1258-60 (10th Cir. 2012). In *United States v. Velarde*, 214 F.3d 1204, 1209 (10th Cir. 2000), a criminal case, it observed that the district court "must, on the record, make *some* kind of reliability determination." Because the record revealed "no such reliability determination," the district court was held to have erred in admitting expert testimony. *Id*. *Goebel v. Denver and Rio Grande Western R.R. Co.*, 215 F.3d 1083 (10th Cir. 2000), specifically held "that a district court, when faced with a party's objection, must adequately demonstrate by specific findings on the record that it has performed its duty as gatekeeper." *Id.* at 1089. "A conclusory statement that the court has made such a determination will not suffice," the court made clear in *United States v. Roach*, 582 F.3d 1192, 1207 (10th Cir. 2009), because "before admitting expert testimony, the district court is required to make specific, on-the-record findings that the testimony is reliable under *Daubert*." *Id.*

In a recent decision, the Tenth Circuit observed that it had "yet to identify some unifying theory or principle for discerning the precise point at which a

district court's gate-keeping findings prove sufficient," but it pointed to "several lessons" drawn from its decisions. *Storagecraft Technology Corp. v. Kirby*, 744 F.3d 1183, 1190 (10th Cir. 2014) (Gorsuch, J.). These lessons might aid in the formulation of a uniform nationwide standard governing *Daubert* gatekeeping if this petition is granted:

(1) "it is not sufficient for a district court simply to say on the record that it has decided to admit the expert testimony after due consideration";

(2) "the district court must reply in some meaningful way to the *Daubert* concerns the objector has raised";

(3) however, a "district court doesn't have to discuss in every case all of the reliability factors identified in *Daubert* and *Kumho*" (it should "focus its attention on the specific factors implicated by the circumstances at hand"); and

(4) "other things being equal, more complicated challenges demand lengthier discussions while less complicated challenges require less discussion." *Id*.

4. The circuits are in conflict over the fundamental question of what factfinding, if any (see pp. 11-12, *supra*), is required of district courts when ruling under Fed. R. Evid. 104(a) either to admit or exclude expert testimony. At one extreme, the First and Second Circuits require very little of district courts, and readily imply factual findings where district courts have not made them explicitly. At the other extreme, the Third and Fourth Circuits are exacting in their insistence that district courts create a detailed *Daubert* record and make specific factual findings. Other circuits are somewhere in between. There is no serious prospect that this longstanding conflict and confusion will resolve itself absent review by this Court.

II. The Circuits Are Divided Over What Remedy Follows When a District Court Has Erred Procedurally by Admitting or Excluding Expert Testimony in a Jury Trial Without Making Required Factual Findings

The Fourth Circuit's decision in this case also exacerbates a separate conflict among the circuits, which concerns the appropriate *remedy* for a district court's mere procedural gatekeeping error. When a district court has conducted a jury trial and the appellate panel concludes that the district court failed to make adequately detailed *Daubert* findings in support of its rulings on expert testimony, some circuits follow normal appellate practice and simply remand for further factfinding, so that a new trial can be avoided if, on remand, the ultimate ruling on admissibility remains unchanged.

Other circuits (including the Fourth Circuit) jettison deferential review and make the omitted findings, and the final ruling, themselves, on *de novo* review.

Still other circuits, unwilling to engage in *de novo* review, but also unwilling to trust district courts to avoid post-hoc rationalization, remand the case for a mandatory new trial (which must then occur even if the substantive result reached on the original ruling was within the district court's proper exercise of discretion).

Only the first approach is easily defensible. The other approaches are problematic in light of various statutes, rules, and decisions of this Court circumscribing appellate control of district courts on evidentiary matters, particularly regarding the grant of new trials.

1. Under the Federal Rules of Evidence, when a district court has admitted or excluded evidence, its ruling is reviewable for abuse of discretion. *General Electric Co. v. Joiner*, 522 U.S. 136, 141-43 (1997). If a district court, in the exercise of its discretion, has a duty to find facts and explain the reasons supporting its ruling (but see pp. 11-12, *supra*), then it follows that its *failure* to carry out that duty is an abuse of discretion. As Judge Posner has summarized this general point (in a context not involving expert testimony), if a district court has failed to apply the proper legal test, the decision "cannot be defended as an exercise of discretion. It is an abuse of discretion not to exercise discretion." *Nightingale Home Healthcare, Inc. v. Anodyne Therapy, LLC*, 589 F.3d 881, 883 (7th Cir. 2009).

What is the appropriate remedy when a district court has committed procedural error by failing to rule under the proper legal framework? The general practice in such situations is for the appellate court to remand the case so that the district judge can exercise discretion under the proper legal framework. *See generally* 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 4.02, at 4-16 to 4-18 (4th ed. 2010).

The general rule that when discretion has been exercised improperly on evidentiary matters by a district court, the standard remedy is a remand to permit its proper exercise, is illustrated by this Court's decision in *Sprint/United Management Co. v. Mendelsohn*, 552 U.S. 379 (2008), which involved an appeal by an unsuccessful age discrimination plaintiff. In *Mendelsohn* the district court, without detailing its reasons, excluded "me too" testimony from five other employees who claimed age discrimination at the hands of company supervisors unconnected to plaintiff. *Id.* at

381-83. The Tenth Circuit reversed, holding that the district court had excluded the testimony based on a prohibited *per se* rule. Applying the legally correct balancing test, the Tenth Circuit then held the evidence admissible, and granted a new trial. *Id.* at 383.

This Court unanimously reversed. It noted that the district court's decision was "unclear," *id.* at 383, and "ambiguous," regarding whether an impermissible *per se* rule had been employed. *Id.* at 386; *see also id.* at 388 ("there is no basis in the record for concluding that the District Court applied a blanket rule."). After suggesting that the Tenth Circuit should have remanded the case to permit "the district court to clarify its order," *id.* at 386, and should not have conducted "its own balancing" to decide whether the evidence was admissible, *id.* at 387, this Court "remand[ed] the case with instructions to have the District Court clarify the basis for its evidentiary ruling under the applicable Rules." *Id.* at 388.

At least two circuits apply an approach similar to *Mendelsohn*'s in the context of expert testimony, holding that a remand for further proceedings is the standard remedy when a district court has committed gatekeeping error. The leading decision is the Third Circuit decision in *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985), which ably explicated the proper division of authority between appellate and district courts where a district court has erred procedurally in ruling on expert testimony. *Downing*, authored by Judge Becker – and one of the landmark pre-*Daubert* decisions on expert testimony (its Rule 702 "fit"

analysis was adopted by this Court in *Daubert*[9]) – was a criminal case in which the district court had used an improper legal test to bar the defendant from calling a psychologist on the unreliability of eyewitness identifications. *Id*. at 1228-32. As the remedy for this procedural gatekeeping error, the court directed the district court to reopen the record, by holding "an evidentiary hearing concerning the admissibility of [defendant's] proffered expert testimony." *Id*. at 1244. Whether a new trial could be granted depended on the result of that hearing: "The district court's error will become harmless if on remand the district court . . . decides that the proffered testimony is not admissible. . . . [A] new trial is required only if the district court determines that the proffered testimony is admissible." *Id*. at 1243. *See also id*. at 1244 ("judgment of conviction against appellant should be reinstated" if testimony again found inadmissible).

The Fifth Circuit follows the approach of *Mendelsohn* and *Downing*, of remanding evidentiary issues to the district court for the proper exercise of discretion, where the district court failed to properly exercise its discretion on the original ruling. In *Carlson v. Bioremedi Therapeutic Systems, Inc.*, 822 F.3d 194 (5th Cir. 2016), following a civil jury trial ending in defendants' favor, on appeal the court held that the district court had erred "by not conducting a *Daubert* inquiry or making a *Daubert* determination on the record." *Id*. at 201, Despite its grave misgivings about the admissibility of the testimony of defendants' expert, *see id*. at 198-200, the Fifth Circuit panel declined to make the ultimate *Daubert* determination (compare pp.

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[9] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591 (1993).

29-31, *infra*). And it did not order an outright new trial (compare pp. 23-29, *infra*). It merely held that "[a]dmitting this testimony without performing the requisite *Daubert* inquiry amounts to an abuse of discretion," 822 F.3d at 201, and it remanded the case for further proceedings, *id*. at 202, thus preserving the prospect of avoiding a new trial (if, in the proper exercise of discretion, the district court ultimately reached the same result).

2. In sharp contrast, the Ninth and Tenth Circuits have formulated a doctrine (the "*Mukhtar* doctrine") under which, in cases like *Downing* and *Carlson*, the district court is *not* given a second chance to properly exercise its discretion. Under the *Mukhtar* doctrine, where a jury trial has been held in which the district court committed gatekeeping error concerning important expert testimony, generally a new trial *must* be ordered. This doctrine is influenced by concern that district courts simply cannot be trusted to avoid post-hoc rationalization in this context (because, if not mandated to hold a new trial, they may skew their analysis to reach the same result so as to avoid a new trial). Ninth Circuit judges have advocated vigorously, on two occasions, to have the doctrine overturned, but it remains good law in both the Ninth and Tenth Circuits.

The *Mukhtar* doctrine finds its origins in the Tenth Circuit. In *United States v. Velarde*, 214 F.3d 1204 (10th Cir. 2000), which involves review of a criminal conviction, the court held that the district court had erred procedurally by admitting a prosecution expert witness without a "reliability determination," *id*. at 1209, and it then ordered a new trial. *Id*. at 1213. It made no effort to explain why it eschewed ordinary appellate practice and didn't simply remand the case to

permit the district court to make the omitted findings and perhaps avoid the need for a new trial.

In *Goebel v. Denver and Rio Grande Western R.R. Co.*, 215 F.3d 1083 (10th Cir. 2000), which involved review of a jury verdict won by a tort plaintiff, the court held that the district court had erred procedurally by admitting the plaintiff's expert witness without an on-the-record *Daubert* analysis. *Id.* at 1086-88. In deciding on "the appropriate remedy," the court eschewed the option of engaging in *de novo* review, noting that "appellate courts are not well-suited to exercising the discretion reserved to district courts." *Id.* at 1089. It then ordered a new trial, *id.*, without explaining why a simple remand would be an inadequate remedy for procedural gatekeeping error.

The rationale for mandating a new trial, even if the district court's original ruling admitting or excluding expert testimony turns out to have been substantively correct (as within the district court's proper exercise of discretion), was first openly expressed by the Ninth Circuit panel decision in *Mukhtar v. California State University*, 299 F.3d 1053, 1063 (9th Cir. 2002), *amended by* 319 F.3d 1073 (9th Cir. 2003). *Mukhtar*, like *Goebel*, reviewed a jury verdict won by a plaintiff whose key expert witness had been allowed to testify without an on-the-record *Daubert* analysis. 299 F.3d at 1065-66. As in *Goebel*, the Ninth Circuit panel then ordered a new trial. *Id.* at 1068. In a supplemental opinion responding to a petition for rehearing (supported by an *amicus brief* filed by legal scholars), arguing "that the panel should remand for an evidentiary hearing to determine reliability instead of remanding for a new trial," the panel declined, explaining:

> To remand for an evidentiary hearing post-jury verdict undermines *Daubert*'s requirement that *some* reliability determination must be made by the trial court *before* the jury is permitted to hear the evidence. Otherwise, instead of fulfilling its mandatory role as a gatekeeper, the district court clouds its duty to ensure that only reliable evidence is presented with impunity. A post-verdict analysis does not protect the purity of the trial, but instead creates an undue risk of post-hoc rationalization.

319 F.3d at 1074.

The panel decision was vigorously opposed by eleven active Ninth Circuit judges (two short of a majority) who dissented from the denial of rehearing en banc. Decrying as "wholly unprecedented" the taking away of a "jury's verdict because the district judge failed to make explicit her reasons for allowing an expert witness to testify," the dissenters pointed out that the *Mukhtar* panel's mandate of an automatic retrial for mere procedural gatekeeping error was impossible to reconcile with fundamental principles of harmless-error review:[10]

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[10] Under harmless-error review, generally (i.e., absent structural error in a criminal case, *see United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-49 (2006)), a new trial may only be ordered for trial error which had a "substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos v. United States*, 328 U.S. 750, 776 (1946). *See also Brecht v. Abrahamson*, 507 U.S. 619, 631-32 & n.7 (1993). In addition to the harmless-error rules primarily directed at district courts, *see* Fed. R. Civ. P. 61, Fed. R. Crim P. 52(a), Fed. R. Evid. 103(a), in 1949 Congress enacted 28 U.S.C. § 2111 (Act of May 24, 1949, c. 139, § 110, 63 Stat. 105), specifically to ensure that harmless-error principles

> The error cannot be prejudicial if the testimony of the expert witness consisted of evidence that the jury could properly have heard, had the court announced the reasons for its ruling. The district court's alleged failure to provide an explanation does not, *in itself*, injure the opposing party in any way or affect the verdict. Under the harmless error standard, reversible error could occur only if the jury heard evidence that the district judge did not have the discretion to let it hear. . . . In the absence of a determination that the expert testimony did not qualify for admission under *Daubert*, its admission cannot be deemed to have constituted "harmful" error or to have affected the substantial rights of the parties.

319 F.3d at 1075-76 (Reinhardt, Circuit Judge, with whom Circuit Judges Pregerson, Hawkins, Tashima, Thomas, McKeown, Wardlaw, W. Fletcher, Fisher, Paez, and Berzon join, dissenting from denial of rehearing en banc).

Rather than mandate a new trial in the absence of harmful error, the dissenters argued that one of two permissible options should have been exercised by the panel: (1) "presume[] that the district court made an implicit *Daubert* determination," and then review that

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would be binding on appellate courts. 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2881, at 442 (2d ed. 1995). Section 2111, enacted pursuant to Congress's power under art. I, § 8, cl. 18 "to enact laws carrying into execution the powers vested in other departments of the Federal Government," *Kaiser Aetna v. United States*, 444 U.S. 164, 172 n.7 (1979), explicitly denies appellate courts jurisdiction to grant new trials based on "errors or defects which do not affect the substantial rights of the parties."

"determination for an abuse of discretion," *id*. at 1076-77 (see pp. 12-14, *supra*); or (2) simply "remand[] to allow the district court to make its *Daubert* findings explicit, or to reconsider its ruling." *Id*. at 1077 (see pp. 20-23, *supra*). For the panel to do neither, and "reverse a jury decision reached after a lengthy trial, simply because, in its view, the district court failed to explain or state its reasons for its ruling on the *Daubert* issue," was a "startling departure" from settled law, the dissenters concluded. *Id*. *Cf*. Fed. R. Civ. P. 59(a)(1)(A) (a new trial may be granted only for a "reason for which a new trial has heretofore been granted in an action at law in federal court").

A year after *Mukhtar*, the Tenth Circuit endorsed the rationale for the doctrine explicated by the *Mukhtar* panel. In *Dodge v. Cotter Corp.*, 328 F.3d 1212 (10th Cir. 2003), involving review of a jury verdict won by environmental tort plaintiffs, the Tenth Circuit held that "the district court did not perform its gatekeeper function with respect to plaintiffs' experts . . . ." *Id*. at 1225. In justifying its remand for a new trial, the *Dodge* panel endorsed the view of the *Mukhtar* panel that district courts should not be trusted with remands affording an opportunity to rectify gatekeeping error without being mandated to conduct a new trial:

> We decline to entertain the possibility of a remand to the district court to make specific findings relative to these experts, for we think no district court would be well positioned to make valid findings given the overwhelming temptation to engage in post hoc rationalization of admitting the experts.

Id. at 1229 (citing *Mukhtar*, 319 F.3d at 1074).

Absent this Court's intervention, there appears no real prospect that the Tenth Circuit will abandon its adherence to the highly problematic *Mukhtar* doctrine, given its recent decision in *Adamscheck v. American Family Mut. Ins. Co.*, 818 F.3d 576, 586, 591 (10th Cir. 2016) (vacating plaintiff's verdict and ordering new trial based on district court's failure "to perform its gatekeeping function"). *See also id.* at 590 (rejecting plaintiff's request for "remand for the limited purpose of allowing the district court to conduct a retrospective *Daubert* hearing").

Nor does it appear that the Ninth Circuit will on its own manage to free itself of the *Mukhtar* doctrine, even though it may well be that most of its active judges disapprove of it. In *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457 (9th Cir. 2014) (en banc), tort plaintiffs whose jury verdict had been vacated by a Ninth Circuit panel based on the district court's gatekeeping omission persuaded a majority of the 27 active Ninth Circuit judges to grant en banc rehearing to consider the validity of the *Mukhtar* doctrine. However, it turned out that a majority of the eleven judges randomly selected to serve on the "mini-en banc" court (which excluded the author of the panel concurrence criticizing *Mukhtar*) favored the doctrine, which survived by a 6-to-5 vote. *Id.* at 467 (rejecting dissent's view "that we should remand for a post-hoc *Daubert* hearing").

The *Mukhtar* doctrine is not limited to civil cases. Indeed, it has been successfully invoked by criminal defendants to obtain new trials, both where a district court excluded a defendant's expert testimony and where a district court admitted the government's expert testimony. In *United States v. Christian*, 749 F.3d 806 (9th Cir. 2014), the panel held that in excluding the defendant's expert the district court had com-

mitted procedural gatekeeping error, requiring a new trial. *Id.* at 810-14. Rejecting the argument that *Mukhtar* should be limited to civil cases, it explained: "Although *Barabin* involved the *admission* of expert testimony in a *civil* trial and this case involves the *exclusion* of expert testimony from a *criminal* trial, we hold that *Barabin*'s analysis applies with equal force to these circumstances." *Id.* at 814. In *United States v. Young*, 571 Fed. Appx. 558 (9th Cir. 2014), the *Daubert* gatekeeping error related not to the exclusion of a defense expert witness, but to the admission of the government's expert witness. A new trial was ordered solely because the district court had failed to make specific findings regarding the government expert's DNA methodology. *Id.* at 558-59.

3. The final remedy applied by the federal appellate courts in cases in which a district court has committed procedural gatekeeping error relating to expert testimony is the one applied by the Fourth Circuit below: the jettisoning of deferential review, with the appellate panel making the omitted *Daubert* findings, and the final ruling, rather than remanding the case for further factfinding (Third and Fifth Circuits) or for a mandated new trial (Ninth and Tenth Circuits).

Thus, in this case Fourth Circuit panel, after holding that the District Court erred by failing to make on-the-record *Daubert* reliability findings regarding Sero's testimony, see pp. 9-10, *supra* (citing Pet. App. 20a-21a), proceeded to a review of various materials in the Joint Appendix, based on which it made the *Daubert* reliability findings on its own, with no hint of deference to the facts that the District Court could have found on remand. Based on this *de novo* review, it held

the testimony inadmissible and ordered the entry of judgment for Ford. *Id*. at 10 (citing Pet. App. 22a-29a).

This approach is of course extremely difficult to square with this Court's holding that appellate courts are limited to abuse-of-discretion review in the area of expert testimony, *see Joiner*, *supra*, 522 U.S. at 141-43, and this Court's holding in *Mendelsohn* (see pp. 20-21, *supra*), dealing with another evidence rule heavily dependent on the exercise of discretion, that the appellate panel should not have conducted "its own balancing" to decide whether the evidence was admissible. 552 U.S. at 387. As the Tenth Circuit has wisely observed, "appellate courts are not well-suited to exercising the discretion reserved to district courts." *Goebel*, *supra*, 215 F.3d at 1089.

The Fourth Circuit is hardly alone in employing *de novo* review to resolve cases hinging on the admissibility of expert testimony, where in the appellate panel's opinion the district court has committed procedural gatekeeping error. The Seventh Circuit has relied on this approach for more than a decade.

In *Fuesting v. Zimmer, Inc.*, 421 F.3d 528 (7th Cir. 2005), modified on rehearing on other grounds, 448 F.3d 936 (7th Cir. 2006), after holding that the district court's explanation of its *Daubert* ruling was "inadequate," *id*. at 535, on *de novo* review the panel held that the testimony of the plaintiffs' expert in a product liability case was inadmissible under Rule 702, overturning the jury verdict. *Id*. at 536-38. *See also Lapsley v. Xtek, Inc.*, 689 F.3d 802, 809 (7th Cir. 2012) ("we refused to defer to a conclusory *Daubert* determination in *Fuesting*").

A year later, in *Naeem v. McKesson Drug Co.*, 444 F.3d 593, 608 (7th Cir. 2006), the court refused to accord the district court's order admitting the plaintiff's expert "the deference normally afforded to a district

court," given the district court's conclusory *Daubert* analysis. Based on its independent review of the record, the court found that the expert's "testimony did not meet the requisite level of reliability." *Id*.

Likewise, in *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 760 (2010), the court held that because "the district court failed to perform a *Daubert* analysis . . . [w]e therefore must review the admissibility of the expert testimony de novo." *Id*.

Last year , in *Hall v. Flannery*, 840 F.3d 922 (7th Cir. 2016), the court held that because the district court "failed to apply" the Rule 702/*Daubert* framework, its "review of the admission of these opinions is de novo." *Id*. at 926, 928. On *de novo* review, the court held that part of one expert's testimony was inadmissible, and on that basis ordered a new trial. *Id*. at 929-31.

Most recently, earlier this year, in *Baugh v. Cuprum S.A. de C.V.*, 845 F.3d 838 (7th Cir. 2017), in reviewing a jury verdict won by a tort plaintiff, the court held that the district court had erred procedurally in denying the defendant's motions *in limine* based on a conclusory analysis. As a result, "rather than reviewing the denial of the MILs for abuse of discretion," the court "review[ed] the denial here de novo." *Id*. at 844 (citing *Hall*, *supra*, 840 F.3d at 926).

* * *

This Court should grant certiorari to resolve these conflicts and ensure that cases involving expert testimony are handled on appeal in a uniform way throughout the nation. In particular, this Court should use this case to decide whether district courts have a duty to find facts and supply reasons in support of their ultimate rulings on the admissibility of expert testimony.

If this Court holds that no such duty exists under the statutes and rules currently governing federal practice, it should direct federal appellate judges to imply findings and then review for abuse of discretion, as do the First and Second Circuits, and it should remand this case to the Fourth Circuit for further consideration. If, instead, this Court holds that district courts *do* have a duty to find facts and supply reasons for their rulings on expert testimony, it should provide concrete guidance to district courts on the extent of that duty (see, for example, p. 18, *supra*). It should then decide whether that duty was met by the orders issued by the District Court in this case and, if not, it should direct that the case be remanded to the District Court to afford it an opportunity to revisit the *Daubert* issues with the benefit of this Court's clarification of its duty. In no event should this Court endorse the approach of the Fourth and Seventh Circuits, of engaging in *de novo* review of district court rulings on expert testimony whenever an appellate panel concludes that the district court should have explained and justified its ruling in more detail.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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May 2, 2017

APPENDIX

TABLE OF APPENDICES

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-1950

HOWARD E. NEASE; NANCY NEASE,

Plaintiffs – Appellees,

v.

FORD MOTOR COMPANY, a
Delaware Corporation,

Defendant – Appellant.

Appeal from the United States
District Court for the Southern District
of West Virginia, at Huntington.

Robert C. Chambers, Chief District Judge.
(3:13-cv-29840)

Argued: September 21, 2016
Decided: February 1, 2017

Before MOTZ, TRAXLER, and AGEE,
Circuit Judges.

Reversed and remanded with instructions by published opinion. Judge Traxler wrote the opinion, in which Judge Motz and Judge Agee joined.

ARGUED: Jonathan D. Hacker, O'MELVENY & MYERS LLP, Washington, D.C., for Appellant. Larry Lee Javins, II, BAILEY, JAVINS & CARTER, L.C., Charleston, West Virginia, for Appellees.

ON BRIEF: Andrew B. Cooke, FLAHERTY, SENSABAUGH & BONASSO, PLLC, Charleston, West Virginia; Bradley N. Garcia, O'MELVENY & MYERS LLP, Washington, D.C., for Appellant. Tony L. O'Dell, TIANO O'DELL, PLLC, Charleston, West Virginia, for Appellees.

TRAXLER, Circuit Judge:

Howard and Nancy Nease commenced this product liability action against Ford Motor Company, alleging that Howard suffered serious injuries in an accident caused by a design defect in the speed control system of his 2001 Ford Ranger pickup truck. Over Ford's objection, the Neases offered the expert testimony of Samuel Sero that the speed control cable in the 2001 Ranger is susceptible to getting stuck or "bound" while the throttle to which it is linked is in the open position, thus preventing the driver from slowing down the vehicle. The Neases claim that this is precisely what

happened while Howard was driving his 2001 Ranger. A West Virginia jury awarded the Neases $3,012, 828.35 in damages. Ford made several post-trial motions, including a motion for judgment as a matter of law under Rule 50(b) of the Federal Rules of Civil Procedure. In its motion, Ford renewed its pre-trial argument that Sero's testimony was inadmissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and should have been excluded. In the alternative, Ford sought a new trial on the basis that the district court erroneously instructed the jury on strict liability under West Virginia law and erroneously admitted evidence of prior incidents involving Ford vehicles.

The district court denied Ford's post-trial motions. Ford now appeals. For the reasons that follow, we conclude that Sero's testimony should not have been admitted. And, without any other expert testimony to establish that the 2001 Ford Ranger was defectively designed and that there were safer alternative designs available that a reasonably prudent manufacturer would have adopted, the Neases cannot prove their case under West Virginia law. Accordingly, we must reverse and remand for entry of judgment in Ford's favor.

I.

On November 20, 2012, Howard was driving his recently purchased, used 2001 Ford Ranger pickup truck on U.S. Route 60 in St. Albans, West Virginia. According to Howard, he was traveling 45-50 mph when he discovered his vehicle would not slow down when he released the accelerator pedal. He tried to slow the pickup truck by applying the brakes, but to no

avail. In order to avoid running into pedestrians or other cars, Howard turned the Ranger off the road, drove over a curb, and crashed into a brick car wash building. For about 25-30 seconds after the pickup truck hit the brick wall, the tires reportedly continued spinning until the engine shut down. Howard's Ranger had approximately 116,000 miles on it at the time of the accident, and there is no indication in the record that the vehicle had ever manifested problems with the accelerator, cruise control or throttle. The Neases thereafter filed this action against Ford Motor Company, alleging that Ford defectively designed the accelerator pedal-to-throttle assembly of the 2001 Ranger pickup truck. The complaint asserted causes of action for strict liability, negligence, and breach of warranty.

A.

The general design and function of the throttle control system in the 2001 Ford Ranger is typical of any modern passenger vehicle. The driver controls engine speed by depressing the accelerator pedal, which is linked to the throttle, which, in turn, regulates the amount of air flowing into the engine. When the accelerator pedal is depressed, the throttle opens and engine speed increases; when the accelerator pedal is released, the throttle closes, airflow is restricted and engine speed decreases.

In the 2001 Ford Ranger, the accelerator pedal is linked to the throttle body by a steel accelerator cable. The accelerator cable is attached to a lever on the throttle body; the lever operates the throttle valve and the throttle valve controls the engine's air intake. As "the accelerator pedal is depressed, the accelerator

cable [which is attached to the throttle lever] is pulled to open the throttle [valve] and increase the engine speed." J.A. 83. In essence, the accelerator pedal, the accelerator cable and the throttle lever form a pulley system that opens the throttle. As a safety feature, the throttle lever is equipped with return springs that exert 7.2 pounds of continuous force to pull the throttle closed when the driver takes his foot off of the accelerator.

In addition to the accelerator pedal-to-throttle assembly, another means by which the driver of a 2001 Ranger can open the throttle is the cruise control system. This system is operated by a "speed control actuator and [a] speed control cable." J.A. 85. The cruise control system incorporates an electric motor that operates a steel cable – the speed control cable – to open and close the throttle. The speed control cable and the accelerator cable are attached to the same throttle lever/pulley system that operates the throttle valve. When the speed control actuator receives input from the cruise control switch on the steering column, the motor manipulates the speed control cable to pull the throttle lever independently of the main accelerator cable.

The throttle control design takes into account that both cables are attached to the same throttle lever/pulley-system. In order to prevent significant stress to the speed control cable that could potentially occur when the cruise control is not engaged and the throttle lever is being controlled by the accelerator pedal and cable, Ford incorporated a "'lost motion' configuration" for the speed control cable assembly. J.A. 85. In this design, the steel speed control cable runs from the motor in the speed control actuator through a plastic "guide tube," and is attached to the

throttle lever by a plastic "connector." *Id.* The connector and the guide tube move with the throttle lever when it is being operated by the accelerator cable. The speed control cable itself stays stationary while the guide tube moves up and down the cable and in and out of a stationary plastic casing tube, called a "casing cap," which is attached to the motor. *Id.* The gap between the moving guide tube and the stationary casing cap is approximately 0.04 inches.

B.

Following the accident, plaintiffs hired Samuel Sero, an electrical engineer, to examine the engine and the throttle assembly in Howard's 2001 Ford Ranger. Sero approached his examination with the view that in failure-to-decelerate cases, the issue is often one of "mechanical binding" and that a post-accident investigation should "look at the accelerator cable, [to] see if there's anything on it that bound up and prevented it from closing the throttle when the accelerator pedal was released, looking for . . . any kind of grime, grit, or anything that could bind that one." J.A. 613.[1] Sero indicated that a post-accident investigation should therefore look for the presence of contaminants and particles that could lodge between the speed control guide tube and the casing cap and create a "wedging effect." J.A. 628. Sero used a borescope to inspect the speed control assembly.

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[1] Contaminants that typically build up on automobile engine parts over time include carbon, substances accumulating from "vapors off of gasoline, brake fluid, hydraulic fluids, battery acids, steel, copper, aluminum, [and] magnesium," J.A. 644, as well as the dirt and grime that washes up into the engine from the surface of the road.

A borescope is essentially a fiber-optic tube equipped with a light that a mechanic or an engineer can insert into an inaccessible area of the engine and view a given component without having to disassemble the engine. When he examined the speed control cable in the Neases' pickup, Sero did not find any materials wedged between the guide tube and the cap. In fact, he noted that the speed control cable moved freely. Nevertheless, Sero concluded that contaminants had entered and built up in the casing cap over time, causing the guide tube to stick and, therefore, the throttle plate to remain open. Sero testified that he was able to identify "a lot of contaminant . . . deposited" in the casing cap, J.A. 636, and "along the guide tube," J.A. 631. Sero also noticed "gouges or striations" on the guide tube. J.A. 645. From this observation, Sero believed that there had been "a rough, abrasive material between the . . . interior of the [casing] cap tube and the surface of the guide tube," indicative of binding. J.A. 645. Sero surmised that sufficient debris had accumulated to create the "wedging effect" needed to keep the throttle open after the accelerator pedal was released. However, Sero had no way of knowing precisely how much contaminant was present in the casing cap or whether it was enough to lodge in the 0.04 inch-gap between the cap and the guide tube such that the throttle would be stuck in the open position. The borescope is simply a viewing tool; it does not afford a means for determining the amount of the contaminant that can be seen with the device.

To bolster his opinion, Sero pointed to a document Ford had prepared in 1987 identifying potential risks Ford engineers should consider addressing in the design of particular vehicles in the future. This docu-

ment is called a Failure Mode and Effects Analysis ("FMEA"). According to Ford's "Potential Failure Mode and Effects Analysis" Handbook, "[a]n FMEA can be described as a systemized group of activities intended to: (a) recognize and evaluate the potential failure of a product/process and its effects, (b) identify actions which could eliminate or reduce the chance of the potential failure occurring, and (c) document the process." J.A. 968. The primary purposes of an FMEA include "identify[ing] potential failure modes and rat[ing] the severity of their effects" and "help[ing] engineers focus on eliminating product and process concerns and help[ing] prevent problems from occurring." *Id.* An FMEA "is meant to be a 'before-the-event' action, not an 'after-the-fact' exercise." *Id.*

Sero testified that the 1987 FMEA "directly addresse[d] the fact [that] dirt, grease or ice has formed between cable and cable sheath" and therefore demonstrated that "Ford [was] well aware of the problem of binding in the lost motion device/cruise cable." J.A. 52. Sero asserted therefore that the 1987 FMEA proved the speed control assembly in the 2001 Ford Ranger was susceptible to binding. Sero was apparently unaware, however, that the 1987 FMEA did not even apply to the 2001 Ford Ranger. The 1987 FMEA "dealt with a vacuum-actuated speed control system" that was not present in the 2001 Ranger. J.A. 1260.

Based on his borescope exam and the 1987 FMEA, Sero opined that the 2001 Ford Ranger's design was not reasonably safe and that there were several alternative designs that Ford could have utilized in the design of the speed control assembly:

> It is my opinion, . . . within a reasonable degree of engineering certainty that . . .
>
> 1. Mr. Nease's 2001 Ranger experienced a failure to decelerate by reason of the binding of the lost motion portion of the cruise . . . cable while the throttle was substantially open;
>
> 2. The cable design employed by Ford in the subject 2001 Ranger permits dirt, grease and grime to enter the conduit through which the cable passes and is known to cause sticking or binding of the cable;
>
> 3. The subject cable is defectively designed;
>
> 4. The binding of the cable . . . was caused by particles of dirt and/or debris typically found under the hood of motor vehicles;
>
> 5. The open-throttle condition . . . almost immediately deplete[d] the vacuum assist to the brakes;
>
> 6. The open-throttle condition, accompanied by loss of vacuum assist, required the application of brake pedal forces beyond the physical capabilities of Mr. Nease;
>
> 7. The binding of the defectively-designed cable was the proximate cause of the crash of the Nease vehicle;
>
> 8. Safer, feasible alternative designs were available and known to Ford Motor Company at the time the 2001 Ranger was manufactured.

J.A. 53-54.

Prior to trial, Ford moved to exclude Sero's opinions under *Daubert* on the grounds that Sero's opinions were not based on any reliable methodology

and that Sero had not established through testing or other means, such as scientific literature, that the binding of the speed control assembly could actually occur. *See Daubert,* 509 U.S. at 597 (explaining that the district court must "ensur[e] that an expert's testimony . . . rests on a *reliable* foundation" (emphasis added)). Ford also argued that Sero, as an electrical engineer, was unqualified to render an expert opinion on matters of automotive design. The district court denied Ford's motion to exclude Sero's testimony, concluding that Sero was sufficiently qualified by means of his experience "design[ing] and operat[ing] . . . mechanical systems in a variety of settings." J.A. 525. The court also determined that in arriving at his opinion, Sero employed "standard engineering methodology to conduct his physical inspection and reach his opinions." *Id.* This methodology included "physically inspecting the vehicle's parts, understanding how they are designed to operate, observing evidence of whether some material interfered with the operation of the cable, and opining how that could and did occur here." *Id.* at 526.

The case proceeded to trial and Sero offered his opinions. Ford attacked Sero's opinions on cross examination and offered its own expert testimony. Sero acknowledged that when he performed his inspection of the speed control cable in the Neases' Ranger, he did not find any materials *actually* wedged between the guide tube and cap, and he noted that the speed control cable moved freely. Sero further admitted that he had never actually found a bound speed cable assembly *in any vehicle* that he had inspected.

In contrast to Sero's professed inability to determine how much debris was present in the casing

cap (because the borescope does not provide a way to determine the scale of the contaminants), Ford's experts performed tests on the Neases' vehicle and were able to quantify the size of the contaminants found on the Ranger's guide tube. Dr. Steven MacLean, an expert in the field of mechanical engineering, used a scanning electron microscope to determine that "the thickest region . . . [found] on Mr. Nease's guide tube . . . was approximately 50 microns in thickness," J.A. 2438. For perspective, Dr. MacLean explained that a piece of paper is about 60 microns thick, making it 10 microns thicker than the contaminants found on the guide tube in the speed control assembly. Either one is far smaller than the .04 inch gap between the casing cap and guide tube. And, with respect to the gouge marks Sero noticed during the borescope exam that he believed were indicative of binding, Dr. MacLean testified that his analysis indicated that these marks "are from the manufacturing process, the molding process of these parts," not "a binding event." J.A. 2419.

Sero agreed that he had never conducted any testing to determine whether enough debris could accumulate in the casing cap during normal operation to resist the 7.2 pounds of force exerted by the return spring and to cause the throttle to stick open. Sero simply relied upon his observations during the borescope exam, which was videotaped. At trial, however, Sero was unable to distinguish between the video of the Nease borescope and a borescope exam for a previous case in which Sero had testified that the speed control cable did *not* bind. He could not tell the borescope of the cable that he said did bind from the borescope of the cable that he said did *not* bind. In other words, he could not tell one from the other.

With regard to the FMEA process that was so central to Sero's opinion, Ford presented evidence that potential failure modes identified in the FMEA had not occurred during actual vehicle operation. For example, Dr. MacLean explained that a FMEA is a common "engineering tool," J.A. 2475, used before marketing a new product to the public to "proactively try to determine what are all of the possible failure modes for that particular new design." *Id.* According to MacLean, an FMEA is not a record of existing problems but rather "a forward-looking tool for . . . a new product." J.A. 2481. When an FMEA is performed, the manufacturer "bring[s] in design engineers, analysis engineers, manufacturing engineers, people from all different disciplines, and . . . [the group tries] to come up with a very comprehensive and exhaustive list of failure modes. . . . [and seek to determine] how likely it is to occur, and what does my system do to possibly detect it and prevent it from happening." J.A. 2475. Similarly, Karl Stopschinski, a registered professional engineer and member of the Society of Automotive Engineers, testified that the FMEA process is akin to a "brainstorming session" to "identify any *potential* failure modes." J.A. 2157 (emphasis added). Additionally, Ford's engineering experts indicated that the 1987 FMEA on which Sero relied did not even apply to the Neases' 2001 Ranger pickup truck. Rather, James Engle, a design analysis engineer, indicated that it is the 2004 FMEA that applies to the 2001 Ranger because it was "originated in February of '97 and carried forward." J.A. 1265.

Finally, Sero testified that several alternative speed control cable designs were available at the time and that Ford could have made the 2001 Ranger safer by incorporating one of these designs. He admitted,

however, that he had not tested any of these alternative designs to determine whether any of them would have prevented the accident in question. In Sero's opinion, testing of the alternative designs he identified was unnecessary because the designs had been in use in other vehicles for years and were therefore "proven commodit[ies]." J.A. 717.

The district court instructed the jury that on plaintiffs' strict liability claim, plaintiffs had to prove that the design of the 2001 Ford Ranger was not "reasonably safe for its intended use." J.A. 1922. Although the court explained that the "plaintiffs are only entitled to a reasonably safe product, not to an absolutely safe product," the court then instructed, over Ford's objection, that "[i]f a product can be made safer and the danger may be reduced by an alternative design at not substantial increase in price, then the manufacturer has a duty to adopt such a design." *Id.* During closing argument, plaintiffs' counsel highlighted the safer alternative design instruction:

> . . . If a product can be made safer and the danger reduced by an alternative design or device at no substantial increase in cost, then the manufacturer has a duty to adopt such design. All that means is if you find that one of the other designs was safer and it wasn't going to cost very much . . . [t]hen you can find that Ford breached its duty.

J.A. 1960.

The jury returned a verdict for the Neases on the strict liability count and awarded damages of $3,012,828.35. The jury returned defense verdicts on the negligence and breach of warranty counts.

After trial Ford filed a Renewed Motion for Judgment as a Matter of Law pursuant to Rule 50(b). First, Ford argued that "there was insufficient evidence to support the jury's verdict for strict liability because the claim was dependent upon the testimony of Plaintiffs' expert . . . Sero." J.A. 3477. And, Ford argued, as it had prior to trial, that Sero's testimony should not have been admitted because Sero was unqualified to testify as an expert and that Sero's opinions should have been excluded under *Daubert*. Specifically, Ford argued that "Sero never demonstrated unidirectional binding of Mr. Nease's speed control cable, he did not attempt to simulate his theory, he did not conduct any tests that a foreign substance could withstand the seven-pound spring pressure, [and] he did not demonstrate alternative designs were equally or more safe." J.A. 3478. The district court denied the Rule 50 motion, concluding that Sero's methodology was reliable because he used the FMEA methodology used by Ford and that the borescope examination was "consistent and trustworthy and what historically [was] used in failure to decelerate cases." J.A. 3479.

Alternatively, Ford moved for a new trial pursuant to Rule 59(a)(1)(A), arguing that the verdict should be set aside because the district court issued an improper "duty to adopt" jury instruction as to safer alternative designs. Ford also contended that the district court erroneously admitted evidence of other incidents involving Ford vehicles with an allegedly defective speed control assembly unit. The district court denied the motion for a new trial on both grounds. The court did not expressly reject Ford's position that the "duty to adopt" instruction was incorrect under West Virginia law. Instead, the district court concluded that

even if the jury instruction was erroneous, it was harmless because the jury found that the product was defective and not reasonably safe, and thus the jury did not need to reach the question of the duty to adopt a safer alternative design. Additionally, the district court noted that the jury instructions were otherwise correct and informed the jury that the Neases were not entitled to an absolutely safe product. Finally, the district court ruled that even if the admission of evidence regarding other incidents was erroneous, it was harmless in view of court's limiting instruction to the jury that it "only consider the alleged other incidents for the limited purpose of determining whether Ford had notice of the defect" and not "as evidence that the 2001 Ford Ranger was defective." J.A. 3486.

Ford appeals, arguing that the district court incorrectly admitted Sero's expert testimony in contravention of the requirement that such testimony be reliable under *Daubert* and its progeny; that the district court's erroneous "duty to adopt" jury instruction was not harmless in view of the fact that it was the only instruction that counsel for Nease highlighted in his closing argument to the jury; and that the erroneous admission of other incident evidence was not rendered harmless by the district court's limiting instruction because the limiting instruction did not apply to the other incidents at issue. To resolve this appeal, we need only address Ford's *Daubert* argument.

II.

Ford contends that the district court erroneously denied its motion to exclude Sero's opinion that Ford's

design of the speed control assembly in the 2001 Ford Ranger was defective and that Ford could have used a different design that would have prevented Nease's accident. We review the district court's application of *Daubert* for abuse of discretion. *See Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248, 260 (4th Cir. 2005). "If the district court makes an error of law in deciding an evidentiary question, that error is by definition an abuse of discretion." Id. (internal quotation marks omitted). A district court likewise abuses its discretion in deciding a *Daubert* challenge if its conclusion "rests upon a clearly erroneous factual finding." *Bryte ex rel. Bryte v. American Household, Inc.*, 429 F.3d 469, 475 (4th Cir. 2005).

A. *Daubert*'s Applicability

We first must visit the question of whether *Daubert* even applies under these circumstances. The Neases insist that it does not. We disagree; *Daubert* clearly applies here.

In *Daubert*, the Supreme Court addressed an evidentiary issue that had long divided federal courts – whether the admissibility of expert scientific testimony was governed by the "general acceptance" test established in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)[2] or the later-adopted standards set forth in Federal Rule of Evidence 702, *see* 509 U.S. at 586–87 & n.5. *Daubert* held that the Federal Rules of Evidence superseded *Frye* and that the admissibility

[2] Under *Frye*, expert scientific testimony was admitted only if the expert opinion was based on principles that were "generally accept[ed]" in "the particular field in which it belongs." 293 F. at 1014.

of scientific evidence no longer was limited to knowledge or evidence "generally accepted" as reliable in the relevant scientific community. *See* 509 U.S. at 588–89.

Thus, *Daubert* made clear that the governing standard for evaluating proposed expert testimony was set forth in Rule 702, which at the time provided: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." *Daubert*, 509 U.S. at 588. Implicit in the text of Rule 702, the *Daubert* Court concluded, is a district court's gatekeeping responsibility to "ensur[e] that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Id.* at 597 (emphasis added).

Relevant evidence, of course, is evidence that helps "the trier of fact to understand the evidence or to determine a fact in issue." *Id.* at 591 (internal question marks omitted). To be relevant under *Daubert*, the proposed expert testimony must have "a valid scientific connection to the pertinent inquiry as a precondition to admissibility." *Id.* at 592.

With respect to reliability, the district court must ensure that the proffered expert opinion is "based on scientific, technical, or other specialized *knowledge* and not on belief or speculation, and inferences must be derived using scientific or other valid methods." *Oglesby v. Gen. Motors Corp.*, 190 F.3d 244, 250 (4th Cir. 1999). *Daubert* offered a number of guideposts to help a district court determine if expert testimony is sufficiently reliable to be admissible. First, "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." 509 U.S. at 593. A second question to be considered by a district court is "whether the theory or technique has been subjected to peer review and publication." *Id.* Publication regarding the theory bears upon peer review; "[t]he fact of publication (or lack thereof) in a peer reviewed journal will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised." *Id.* at 594. Third, "in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error." *Id.* Fourth, despite the displacement of *Frye*, "'general acceptance'" is nonetheless relevant to the reliability inquiry. *Id.* "Widespread acceptance can be an important factor in ruling particular evidence admissible, and a known technique which has been able to attract only minimal support with the community may properly be viewed with skepticism." *Id.* (citation and internal quotation marks omitted). *Daubert*'s list of relevant considerations is not exhaustive; indeed, the Court has cautioned that this "list of specific factors neither necessarily nor exclusively applies to all experts or in every case," *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999), and that a trial court has "broad latitude" to determine whether these factors are "reasonable measures of reliability in a particular case," *id*. At 153.

The Neases contend that we can affirm because the district court was not obliged to perform its *Daubert* gatekeeping function in the first place: "Because the *Daubert* test for assessing the validity of scientific evidence applies only to novel scientific

testimony, it does not apply in the expert field of engineering." Brief of Appellees at 29. This bifurcated argument is dead wrong on both counts.

First, *Daubert* itself makes clear that its application is not limited to newfangled scientific theory, explaining that "we do not read the requirements of Rule 702 to apply specially or exclusively to unconventional evidence." *Daubert*, 509 U.S. at 592 n.11. The Court recognized the common-sense premise that "well-established propositions are less likely to be challenged than those that are novel," *id.*, but clearly never suggested that longstanding theories are immune to a *Daubert* analysis.

Second, the Supreme Court made clear more than 17 years ago in *Kumho Tire* that *Daubert* was not limited to the testimony of scientists but also applied "to testimony based on 'technical' and 'other specialized' knowledge." 526 U.S. at 141. Despite having cited *Kumho Tire* in their brief, the Neases are apparently unaware that the very issue there involved the application of *Daubert to the testimony of a mechanical engineer*. *See id.* at 141 ("This case requires us to decide how *Daubert* applies to the testimony *of engineers* and other experts who are not scientists." (emphasis added)). The *Kumho* Court concluded that Rule 702 "applies to all expert testimony" as its "language makes no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge. It makes clear that any such knowledge might become the subject of expert testimony." *Id.* at 147. The *Kumho* Court affirmed the district court's application of *Daubert* and decision to exclude the engineering

expert's testimony as unreliable. *See id.* at 158.[3] And, finally, if *Kumho* were not enough, this court has also sanctioned the application of *Daubert* to assess the reliability of expert engineering testimony. *See Oglesby*, 190 F.3d at 250-51 (affirming district court's application of *Daubert* principles to testimony of a mechanical engineer and concluding that the district court did not abuse its discretion in excluding the engineer's opinion as unreliable).

Accordingly, we conclude that *Daubert* most certainly applies to Sero's testimony. We now turn to consider whether, under *Daubert*, the district court properly admitted Sero's testimony.

B. The District Court's Application of *Daubert* to Sero's Opinions

As we already explained, Rule 702 imposes a special gatekeeping obligation on the trial judge to ensure that an opinion offered by an expert is reliable. And although a trial judge has broad discretion "to determine reliability in light of the particular facts and circumstances of the particular case," *Kumho*, 526 U.S. at 158, such discretion does not include the decision "to abandon the gatekeeping function," *id.* at 158–59 (Scalia, J., concurring).

In ruling on Ford's motion in limine to exclude Sero's testimony as unreliable under *Daubert*, the district court simply dismissed "[e]very argument raised by [Ford]" as "go[ing] to the weight, not

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[3] In so holding, the Supreme Court rejected the Eleventh Circuit's view that engineering testimony "[fell] outside the scope of *Daubert*, [and] that the district court erred as a matter of law by applying *Daubert* in this case," *Kumho Tire*, 526 U.S. at 146, which is precisely the same argument the Neases make here.

admissibility, of [Sero's] testimony." J.A. 526. The court did not use *Daubert*'s guideposts or any other factors to assess the reliability of Sero's testimony, and the court did not make any reliability findings. Indeed, the district court referred neither to Rule 702 nor to *Daubert*. We are forced to conclude that the court abandoned its gatekeeping function with respect to Ford's motion in limine.

In denying Ford's post-trial Rule 50(b) motion for judgment as a matter of law (which renewed Ford's argument that Sero's opinion should have been excluded under *Daubert*), the district court again "[found] that Ford's arguments go to the weight the jury should afford Mr. Sero's testimony, not its admissibility." J.A. 3481. Although the district court this time cited *Daubert* and stated that, according to Sero, "the methodology he employed is consistent and trustworthy and what historically is used in failure to decelerate cases," J.A. 3479, the court repeatedly emphasized that Ford effectively raised its objections to Sero's opinion through cross-examination. For the district court to conclude that Ford's reliability arguments simply "go to the weight the jury should afford Mr. Sero's testimony" is to delegate the court's gatekeeping responsibility to the jury. "The main purpose of *Daubert* exclusion is to protect juries from being swayed by dubious scientific testimony." *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 613 (8th Cir. 2011). The district court's "gatekeeping function" under *Daubert* ensures that expert evidence is sufficiently relevant and reliable *when it is submitted to the jury*. Rather than ensure the reliability of the evidence on the front end, the district court effectively let the jury make this determination after listening to Ford's cross examination of Sero.

In sum, the district court did not perform its gatekeeping duties with respect to Sero's testimony. The fact that an expert witness was "subject to a thorough and extensive examination" does not ensure the reliability of the expert's testimony; such testimony must still be assessed before it is presented to the jury. *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1238 (11th Cir. 2005). Thus, we are of the opinion that the district court abused its discretion here "by failing to act as a gatekeeper." *Id.*; *see Kumho*, 526 U.S. at 158–59 (Scalia, J. concurring) ("[T]rial-court discretion in choosing the manner of testing expert reliability . . . is not discretion to abandon the gatekeeping function . . . [or] to perform the function inadequately.").

C. Sero's testimony should have been excluded under *Daubert*

1. Sero's testimony that the speed control assembly was not reasonably safe because it was susceptible to binding

"[A] plaintiff may not prevail in a products liability case by relying on the opinion of an expert unsupported by any evidence such as test data or relevant literature in the field." *Oglesby*, 190 F.3d at 249 (internal quotation marks omitted). "A reliable expert opinion must [not] be based . . . on belief or speculation." *Id.* at 250. One especially important factor for guiding a court in its reliability determination is whether a given theory has been tested. According to *Daubert,* "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." 509 U.S. at 593.

Sero's opinion had three critical components: that the speed control assembly in the 2001 Ford Ranger was vulnerable to binding because the design allowed for contaminant to lodge between the speed control guide tube and the casing cap; that such binding in fact occurred while Howard was driving his 2001 Ranger, resulting in the accident; and that there were safer alternative speed control assembly designs available to Ford for use in the 2001 Ranger.

Testing was of critical importance in this case as Sero conceded that the speed control cable in the Neases' Ranger was not bound or wedged; the cable "moved freely" when Sero performed a post-accident inspection of the Neases' Ranger. J.A. 676. In fact, Sero admitted he has *never seen any vehicle* with "post-crash binding." J.A. 679. Sero, however, conducted no testing whatsoever to arrive at his opinion. Specifically, he has never tested a 2001 Ford Ranger to determine whether it is actually possible for enough debris to accumulate in the casing cap during normal operation to resist the 7.2 pounds of force exerted by the return springs to pull the throttle closed. Sero conceded that he never ran any tests to confirm his theory:

> Q. Now, as I understand it, . . . you have not demonstrated your unidirectional binding theory on Mr. Nease's speed control cable, have you?
>
> A. No, I have not.

Q. You have not even attempted to simulate your speed control binding theory on Mr. Nease's speed control cable, have you?

A. No.

Q. You have not demonstrated your unidirectional binding theory [using] another 2001 Ford Ranger, have you?

A. No.

Q. You have not even attempted to simulate your speed control malfunction theory with an exemplar 2001 Ford Ranger, have you?

A. No, I have not.

J.A. 678.

Sero's failure to test his hypothesis renders his opinions on the cause of Howard's accident unreliable. Although Sero's theory is plausible and "may even be right[,] . . . it is no more than a hypothesis, and it thus is not knowledge, nor is it based upon sufficient facts or data or the product of reliable principles and methods applied reliably to the facts of the case." *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665, 670 (6th Cir. 2010) (internal quotation marks and alterations omitted). Generally, scientific methodology involves "generating hypotheses and testing them to see if they can be falsified." *Daubert,* 509 U.S. at 593. Sero presented a hypothesis only – he failed to validate it with testing.

Daubert is a flexible test and no single factor, even testing, is dispositive. But *Daubert*'s other reliability markers likewise suggest that Sero's testimony should not have been admitted under Rule 702. Sero has not published or otherwise subjected his theory to peer review. Actually, it would hardly be possible to solicit peer review since Sero conducted no tests and used no "methodology" for reaching his opinions other than merely observing dirt on the speed control assembly components. And, for this same reason, we cannot assess the potential rate of error of Sero's methodology – he did not employ a particular methodology to reach his conclusions.

Daubert also suggests that district courts, in performing their gatekeeping functions, consider whether and to what extent an expert's theory has been accepted within the relevant scientific or engineering community. *See Daubert*, 509 U.S. at 593-94. Despite their contention that *Daubert* does not apply, the Neases nonetheless suggest that the internal FMEA performed by Ford in 1987, which Sero relied upon to support his opinion, is widely accepted by engineers – Ford's own engineers in this case – as a method for identifying design defects. The FMEA relied upon by Sero, however, does not establish that Sero's theory is widely accepted in the relevant engineering community.

To begin with, the 1987 FMEA does not even apply to the 2001 Ranger; rather, the 2004 FMEA, which originated in 1997, applied to the 2001 Ranger at issue here. In other words, Sero rests his theory on an FMEA produced for different designs. The 1987 FMEA, therefore, lacks a "valid scientific connection to the pertinent inquiry," *Daubert*, 509 U.S. at 592, and is not "relevant to the task at hand," *id*. at 597.

Moreover, to the extent Nease claims the FMEA performed by Ford in 1987 proves that the speed cable is susceptible to binding, he misconstrues the nature of the FMEA process. FMEA is part of the *design process itself*; design engineers follow this method well before the design is complete to "identify potential failure modes and rate the severity of their effects" and "help engineers focus on eliminating product and process concerns and help prevent problems from occurring." J.A. 968. As Ford engineer James Engle explained, "[t]he purpose [of] the FMEA is to analyze the [current] design . . . [and] give[] the engineer information beforehand . . . to let the engineer know areas where he needs to focus." J.A. 1279. It is a "brainstorming session" performed on the front end of the design process to "identify any potential failure modes." J.A. 2157. And, in this case, because it is "conceivable" that "grime or some sort of debris [could] enter[] into the cable and caus[e] sticking," Ford naturally listed the potential binding of the speed control cable "in a brainstorming session of [potential] failure modes." J.A. 2157. But Ford included numerous "mitigating" features in its final design, such as an engine cover, aimed at eliminating potential problems identified in the FMEA. J.A. 2157. Ford also placed the throttle "high up on the engine" to mitigate the intake of "[b]igger and heavier particles [which] take more force to be . . . moved up . . . to the top of the engine." J.A. 2157-58. Additionally, the components of the speed control assembly were made of nylon that had a slippery quality and "a very low coefficient of friction." J.A. 2433.

In sum, the FMEA relied upon by Sero cannot be viewed as having established that the binding of the speed control cable was a recurring design problem in

the 2001 Ranger. And it cannot be used as a proxy for the testing that Sero failed to do. Ford's FMEA process merely identifies conceivable design failures; it does not produce them via testing.

2. Sero's testimony that there were safer alternative designs that Ford could have used in the 2001 Ranger

To establish strict liability under West Virginia law, the plaintiff must show that the "product is defective in the sense that it is not reasonably safe for its intended use." *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666, 683 (W. Va. 1979). "The standard of reasonable safeness is determined . . . by what a reasonably prudent manufacturer's standards should have been at the time the product was made." *Id.* Significantly, the West Virginia Supreme Court explained that the determination of what a "reasonably prudent manufacturer's standards *should have been* at the time" requires a consideration of "the general state of the art of the manufacturing process, including design." *Id.* (emphasis added).

Ford argues that West Virginia law, as articulated by the *Morningstar* court, therefore requires a products liability plaintiff to prove that a reasonably prudent manufacturer would have adopted a safer design during the relevant time period. The Neases disagree, relying on a couple of district court opinions that suggest the West Virginia Supreme Court "has not stated one way or the other whether a design defect claim requires proof of a safer alternative design of the allegedly defective product." *Mullins v. Ethicon, Inc.*, 117 F. Supp. 3d 810, 821 (S.D.W. Va. 2015)

(internal quotation marks omitted); *Keffer v. Wyeth*, 791 F. Supp. 2d 539, 547 (S.D.W. Va. 2011).

While it is true that West Virginia law on the matter is not crystal clear, we agree with Ford that *Morningstar* "can only be read to require the production of evidence on reasonable alternative design, to gauge what 'should have been.'" Restatement (Third) of Torts: Products Liability § 2, Reporter's Note (1998). Although *Morningstar* does not use the phrase "alternative design," a plaintiff in a design case, for all practical purposes, must identify an alternative design in order to establish the "state of the art." *See Church v. V.R. Wesson*, 385 S.E.2d 393, 396 (W. Va. 1989) (holding plaintiff in a defective design case failed to establish a prima facie case because plaintiff's expert identified an alternative design that was not feasible at the time of manufacture and thus failed to prove that defendant's design was not "state of the art").

Sero testified that safer, proven design alternatives existed during the relevant time period that would have prevented Howard's accident. One preferable alternative, according to Sero, incorporates a "nipple wipe" to clean contaminants off the cable as it moves. Another alternative identified by Sero utilizes a "boot" which blocks debris and grime from accumulating on the cable. And, a third alternative design that Sero believed would have prevented Howard's accident simply had a larger gap between the guide tube and the casing cap. Sero pointed out that Ford had been using all of these alternative design features for many years by the time the 2001 Ranger was produced.

Sero, however, performed no tests or studies to determine whether, in fact, these older, long-standing

designs were involved in fewer binding incidents. According to Sero, such tests were unnecessary because designs such as the nipple wipe had been in use for 50 years and therefore were "proven elements." J.A. 669. Similarly, he offered no data from any other studies or accident records to prove that the older designs were less likely to bind than the one incorporated in the Neases' 2001 Ranger. Sero instead simply proclaimed without any support that the alternative designs he identified were safer than the design of the speed control cable assembly in the 2001 Ranger.

This testimony should have been excluded as it was "unsupported by any evidence such as test data or relevant literature in the field." *Oglesby*, 190 F.3d at 249 (internal question marks omitted). The fact that the alternatives have generally been in use for decades is wholly insufficient to prove that such designs were safer with respect to the alleged binding incident and that reasonably prudent manufacturers would have adopted them.[4]

[4] To the extent that the Neases argue that testing or other comparative analysis of Sero's alternative designs was unnecessary because they were not novel designs, their argument relies upon the same flawed understanding of Daubert that we have already rejected.

III.

Without Sero's testimony, the Neases cannot prove that the design of the speed control assembly in the 2001 Ford Ranger renders the vehicle "not reasonably safe for its intended use." *Morningstar,* 253 S.E.2d at 683. Accordingly, we reverse the district court's denial of Ford's post-trial motion for judgment as a matter of law and remand the case to the district court for entry of judgment in Ford's favor. And, because the granting of judgment as a matter of law effectively ends this litigation, we need not reach Ford's challenges to the jury instruction and the admission of prior incidents evidence.

REVERSED AND REMANDED
WITH INSTRUCTIONS

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

HUNTINGTON DIVISION

CIVIL ACTION NO. 3:13-29840

HOWARD E. NEASE and NANCY NEASE,
Plaintiffs,

v.

FORD MOTOR COMPANY,
a Delaware Corporation, Defendant.

MEMORANDUM OPINION AND ORDER

On April 3, 2015, a jury awarded Plaintiffs Howard E. and Nancy Nease $3,012,828.35 in damages as the result of an automobile crash. On the verdict form, the jury found that Defendant Ford Motor Company was liable to Plaintiffs because the 2001 Ford Ranger Mr. Nease was driving at the time of the crash was defective and not reasonably safe for its intended use, and the defect was the proximate cause of Plaintiffs' injuries and damages. *Verdict Form*, ECF No. 216. Although the jury found in favor of Plaintiffs on their strict liability claim, the jury found in favor of Ford on Plaintiffs' claims of negligence and breach of warranty. *Id*. Ford now has filed two post-trial motions. First, Ford has filed a Renewed Motion for Judgment as a Matter of Law pursuant to Rule 50(b) of the Federal

Rules of Civil Procedure. ECF No. 238. Second, Ford has filed a Motion, in the Alternative, for a New Trial pursuant to Rule 59(a)(1)(A) of the Federal Rules of Civil Procedure. ECF No. 240. Plaintiffs also have filed a Motion for Leave to Submit a Sur-Reply. ECF No. 250. For the following reasons, the Court **DENIES** Ford's motion pursuant to Rule 50(b) and **DENIES, in part**, and **GRANTS, in part**, Ford's motion pursuant to Rule 59(a)(1)(A). The Court also GRANTS Plaintiffs' motion to file a Sur-Reply.

I.
RULE 50(b) MOTION

Pursuant to Rule 50(b), this Court must determine "whether a jury, viewing the evidence in the light most favorable to [the nonmovant], 'could have properly reached the conclusion reached by this jury.' If reasonable minds could differ about the result in this case, . . . [the Court] must affirm the jury's verdict." *Bryant v. Aiken Reg'l Med. Ctrs. Inc.*, 333 F.3d 536, 543 (4th Cir. 2003) (citations and internal quotation marks omitted); *accord Int'l Ground Transp. v. Mayor and City Council Of Ocean City*, 475 F.3d 214, 218–19 (4th Cir. 2007) ("When a jury verdict has been returned, judgment as a matter of law may be granted only if, viewing the evidence in a light most favorable to the non-moving party (and in support of the jury's verdict) and drawing every legitimate inference in that party's favor, the only conclusion a reasonable jury could have reached is one in favor of the moving party." (citation omitted)). In this case, Ford argues that there was insufficient evidence to support the jury's verdict for strict liability because the claim was dependent upon the testimony of Plaintiffs' expert

Samuel J. Sero. Ford asserts the Court erred in permitting Mr. Sero to testify because he was not qualified and his testimony was unreliable and lacked foundation. Ford further argues that, even if admissible, Mr. Sero's testimony was insufficient to establish a defect.

The essence of Mr. Sero's testimony in this case was that, at the time of Mr. Nease's crash, contaminants bound the speed control cable in his 2001 Ford Ranger, causing the throttle to stick in the open position and making the brakes ineffective in stopping the vehicle. By Memorandum Opinion and Order entered on March 13, 2015, this Court previously found Mr. Sero's testimony admissible. As the Court stated therein, Mr. Sero "is a registered professional engineer with a degree in electrical engineering." *Mem. Op. & Order*, at 2, ECF No. 172. He has experience in "the design and operation of mechanical systems in a variety of settings, in addition to his forensic evaluations." *Id.* His opinions in this case involved general engineering principles, for which he has the "knowledge, skill, experience, training, [and] . . . education" to testify. Fed. R. Evid. 702, in part. In considering the arguments made by Ford, the Court found they went to the weight, not the admissibility, of Mr. Sero's testimony. *Mem. Op. & Order*, at 3. Therefore, the Court denied Ford's Motion to Exclude. *Id.* Ford renewed its motion at trial, and the Court again denied it.

Ford now argues, inter alia, that Mr. Sero's testimony was unreliable because the borescope examination he performed on the cable lacked scientific methodology. During cross-examination, Mr. Sero was shown the borescope examination he performed in this case compared to a borescope

examination he performed in another case. Although he could not distinguish between the two borescopes, he opined in this case the cable was bound, but in the other case the cable was not bound. Ford asserts this evidence proves Mr. Sero's testimony is unreliable and merely speculative. Additionally, Ford argues Mr. Sero never demonstrated unidirectional binding of Mr. Nease's speed control cable, he did not attempt to simulate his theory, he did not conduct any tests that a foreign substance could withstand the seven-pound spring pressure, he did not demonstrate alternative designs were equally or more safe, and he has never published his theory in a peer-reviewed journal. Thus, Ford contends the Court should have excluded Mr. Sero's testimony.

This Court rejects Ford's contention that Mr. Sero engaged in "junk science." Mr. Sero relied upon Ford's own fault tree analysis and Potential Failure Modes and Effects Analysis (FMEA). FMEA is the methodology developed by Ford and adopted by the Society of Automotive Engineers. Mr. Sero also conducted visual inspections of Mr. Nease's truck; collected data from the vehicle, the cable, and the guide tube; performed a borescope examination of the cable and guide tube; and applied general engineering principles in reaching his opinion. Mr. Sero further stated that the methodology he employed is consistent and trustworthy and what historically is used in failure to decelerate cases. Although Ford's counsel questioned Mr. Sero about the borescope he performed in another case, Mr. Sero explained that the facts of the two cases were different and the facts in the other case led him to reach a different conclusion than he did in the present case.

Specifically, in this case, Mr. Nease gave compelling testimony that he was operating his truck in an ordinary fashion when the accelerator pedal stuck and the truck went out of control for a considerable distance before he struck a brick wall. A witness at the scene, John Alan Kemplin, Jr., testified that he saw Mr. Nease's truck traveling fast off the road, through landscaping, over curbs, and through a carwash bay and the throttle sounded as if it was in a wide-open position. Trial Tr., 26-30, Mar. 25, 2015, ECF No. 249. He further stated that, after Mr. Nease hit the wall, his truck continued to run with a wide-open throttle, with the tires spinning, until the engine blew. *Id.* at 36. In addition, the police officer who responded to the scene, Jacob Dent, testified he found that the accelerator pedal was in the down position, and he directed another officer to photograph it. *Id.* at 65. All of this evidence is consistent with Mr. Sero's opinion that the pedal was stuck. Given Mr. Sero's explanation as to how he reached his opinion and the totality of his testimony, the Court finds that Mr. Sero did not engage in "junk science."

Upon examination of the cable and the guide tube, Mr. Sero identified contaminants and gouges in the in the wall of the cable housing on Mr. Nease's vehicle. Mr. Sero testified to a reasonable degree of engineering certainty that the contaminants made the cable bind and the throttle to stick in the open position. Trial Tr., 82-83, Mar. 26, 2015, ECF No. 221. He further opined it would not take much binding to resist the seven-pound spring and the brakes would be ineffective in this type of situation. *Id.* at 57 & 83. Upon his review and analysis, Mr. Sero opined that the speed control system was defective and not reasonably safe. *Id*. at 83. Additionally, he stated there

were other safer design alternatives, such as a nipple wipe and a boot, which existed prior to the 2001. *Id.* at 81. Mr. Sero explained his conclusions, and Ford cross-examined him on his methodology and conclusions.

As this Court stated in its earlier Memorandum Opinion and Order, Mr. Sero's testimony was consistent with Ford's own engineers. *Mem. Op. & Order*, at 2, ECF No. 172. Ford's "design engineers had recognized, many years before when Ford developed the basic configuration of this throttle control system, that a cable such as this may become jammed from foreign material which typically may be found under the hood of a vehicle." *Id*. at 2. Ford agrees it identifies a jammed cable as a potential problem, but it asserts its design addressed the problem and there is no evidence any cable actually has jammed. However, after listening to Ford's thorough cross-examination of Mr. Sero and the other evidence presented, including Ford's own experts, the jury obviously rejected Ford's argument that the potential problem was resolved.

Based upon the evidence, the Court also rejects Ford's argument that Mr. Sero's methodology was unreliable and based upon his "subjective belief or unsupported speculation." *Daubert v. Merrell Dow Pharms., Inc*., 509 U.S. 579, 590 (4th Cir. 1998). The Court finds that Ford's arguments go to the weight the jury should afford Mr. Sero's testimony, not its admissibility. Given the evidence presented and viewing it in a light most favorable to Plaintiffs, the Court has no difficulty finding a reasonable jury could have reached a verdict in favor of Plaintiffs on their strict liability claim. *See* Syl. Pt. 4, *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666 (W. Va. 1979) (stating "the general test for establishing strict

liability in tort is whether the involved product is defective in the sense that it is not reasonably safe for its intended use. The standard of reasonable safeness is determined not by the particular manufacturer, but by what a reasonably prudent manufacturer's standards should have been at the time the product was made"). Accordingly, the Court **DENIES** Ford's Renewed Motion for Judgment as a Matter of Law.

II.
RULE 59(a)(1)(A) MOTION

In its alternative motion for a new trial under Rule 59(a)(1)(A), Ford argues the verdict should be set aside because (1) there was an improper jury instruction; (2) the jury's verdict on strict liability is inconsistent with its decision on negligence; (3) the Court erred in allowing evidence of other incidents; (4) the verdict is a miscarriage of justice because Plaintiff used altered or false evidence; and (5) the Court erred in allowing undisclosed opinions from Mr. Nease's treating physician, Dr. Moreland, and denying rebuttal testimony from Ford's expert, Dr. Lisa Gwin. The Court will separately address each of these grounds.

A.
Jury Instruction

Ford's first argument is that the Court erred in giving the following jury instruction: "If a product can be made safer and the danger may be reduced by an alternative design at no substantial increase in price, then the manufacturer has a duty to adopt such a design." Trial Tr., 200, Mar. 31, 2015, ECF No. 232. Ford argues that there is no standard in West Virginia

that a manufacturer has a duty to adopt an alternate design if a product can be made safer at no substantial increase in price. Instead, the strict liability standard entails determining whether "the manufacturer use[d] reasonable care in designing and manufacturing the product at the time it was marketed, not whether it could have possibly been made better or more safe, or later has been made better or more safe." *Chase v. Gen. Motors Corp.*, 856 F.2d 17, 20 (4th Cir. 1988) (applying West Virginia law); Syl. Pt. 4, *Morningstar*, *supra*. Ford argues that the instruction erroneously suggests that it had a duty to adopt the safest possible design at a comparable cost, rather than whether the design it actually used was reasonably safe.

On the other hand, Plaintiffs point out that the West Virginia Supreme Court also held in *Morningstar* that economic costs are appropriate factors for the jury to consider under the strict liability in tort standard. Specifically, it stated that "[t]he term 'unsafe' imparts a standard that the product is to be tested by what the reasonably prudent manufacturer would accomplish in regard to the safety of the product, having in mind the general state of the art of the manufacturing process, including design, . . . as it relates to economic costs, at the time the product was made." Syl. Pt. 5, *Morningstar*. Thus, Plaintiffs argue the instruction is accurate. Moreover, Plaintiffs assert that, even assuming arguendo that the instruction was erroneous, Ford has suffered no actual prejudice and, therefore, there is no reversible error.

In its Reply, Ford does not dispute design and economic costs are factors to consider. However, Ford asserts there is no "duty to adopt" a particular design based on cost. Ford argues that Plaintiffs' instruction ignores the threshold determination that a product is

"unsafe" before there can be a determination as to whether the unsafeness of the product can be designed away at a reasonable cost. Under Plaintiffs' instruction, Ford insists it would have to adopt an alternate design even if its product already is reasonably safe.

In considering whether a particular jury instruction should result in a new trial, the Fourth Circuit has stated that "[a] jury charge must be construed in light of the whole record." *Abraham v. County of Greenville, S.C.*, 237 F.3d 386, 393 (4th Cir. 2001) (citation omitted). If a jury instruction is given in error, "a judgment will be reversed . . . only if the error is determined to have been prejudicial, based on a review of the record as a whole." *Id.* (citation omitted); *accord Volvo Trademark Holding Aktiebolaget v. Clark Mach. Co.*, 510 F.3d 474, 484 (4th Cir. 2007) (stating "jury instructions will not furnish a basis for reversal of an adverse verdict so long as, taken as a whole, they adequately state the controlling law" (internal quotation marks and citation omitted)).

Assuming arguendo that the instruction in this case overstates the law in West Virginia, the Court finds the instruction was of no consequence and was harmless error. First, the jury expressly found on the verdict form that Mr. Nease's 2001 Ford Ranger "was defective in that it was not reasonably safe for its intended use." *Verdict Form*, 1, ECF No. 216. Thus, as the jury determined the product was defective and not reasonably safe, the jury never reached Ford's argument that a jury could decide, based upon this instruction, that Ford had a duty to the make an already safe product safer if it could do so at a reasonable cost. Second, even if the jury had not made this express finding that the Ranger was defective

from the outset, the instruction Ford asserts is erroneous is a single sentence amongst five-pages of instructions on strict liability, which is just a small part of the overall instructions. Trial Tr., 189-215 & 285-87, ECF No. 232. In context, these instructions further provided:

> Now, in this case plaintiff has alleged that there were design alternatives available to Ford which, had they been adopted, would have prevented the injuries and damages to the plaintiffs. Such a showing by the plaintiffs in and of itself is not sufficient to establish that the design used by Ford was defective. The plaintiffs are only entitled to a reasonably safe product, not an absolutely safe one.
>
> In balancing the benefits and risks of a vehicle's design, you may consider the cost, feasibility, and utility, usefulness, of alternative designs for the Ford Ranger. If a product can be made safer and the danger may be reduced by an alternative design at no substantial increase in price, then the manufacturer has a duty to adopt such a design.
>
> In presenting a design alternative for the subject vehicle, plaintiffs must establish that their design is feasible and show that it would have eliminated or significantly reduced the risk about which they complain, while at the same time not creating other hazards or harms or risks of injuries.

Id. at 200-21. The jury was fully instructed on what constitutes a defect and strict liability under West

Virginia law, including the *Morningstar* standard quoted by Ford. *Id*. at 197-201. In addition, the Court instructed the jury that, although Plaintiffs are entitled to a reasonably safe product, they are not entitled "to an absolutely safe product." *Id*. at 200. The Court finds that Plaintiffs presented more than sufficient evidence to support the jury's verdict in favor of their strict liability claim. Therefore, based upon the record as a whole, the Court finds no reversible error.[1]

B.
Strict Liability & Negligence

Ford next argues that the verdict is inconsistent on its face because the jury determined "by a preponderance of the evidence that the 2001 Ford Ranger owned by Howard Nease was defective in that it was not reasonably safe for its intended use," but the jury also found Ford was not "negligent with respect to the design of the 2001 Ford Ranger owned by Howard Nease." *Verdict Form*, 1-2, ECF No. 216. Ford insists that the inconsistent verdict also demonstrates the jury's confusion as a result of the "duty to adopt" instruction. In order to prove negligence, a plaintiff must prove "duty, breach, causation, and damages." *Carter v. Monsanto Co.*, 575 S.E.2d 342, 347 (W. Va. 2002). On the other hand, "'strict liability in tort' is

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[1] Ford further asserts that Plaintiffs' counsel's mention of this instruction during his closing argument seriously prejudiced it. For the reasons stated above, the Court rejects Ford's argument. In addition, the Court recognizes that Plaintiffs' counsel brief mention of this instruction was followed by a statement that the jury could "find that Ford breached its duty," which implicates a negligence theory, not strict liability." *Id*. at 238.

designed to relieve the plaintiff from proving that the manufacturer was negligent in some particular fashion during the manufacturing process and to permit proof of the defective condition of the product as the principal basis of liability." Syl. Pt. 3, *Morningstar*. To prove strict liability, a plaintiff must prove a "product is defective in the sense that it is not reasonably safe for its intended use. The standard of reasonable safeness is determined not by the particular manufacturer, but by what a reasonably prudent manufacturer's standards should have been at the time the product was made." Syl. Pt. 4, *id*. Thus, the negligence and strict liability are different concepts under West Virginia law, and it is possible for a jury to find in favor of a plaintiff under a strict liability theory, but find in favor of defendant on a negligence theory.

Here, the Court finds the jury easily could conclude that, although there existed a design defect for purposes of strict liability, the design of the product did not violate an industry standard for purposes of negligence. In fact, although there was testimony as to Ford's practices, there was very little testimony about what the practices of the automotive industry were at the time. Thus, given the totality of the evidence presented, the Court finds no inconsistency in the verdict[2] and **DENIES** Ford's motion on this issue.

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[2] Moreover, "even if the general verdicts are internally inconsistent, such is the jury's prerogative if . . . there is evidence to support the finding reached by the jury." *Borel v. Fibreboard Paper Prods. Corp*., 493 F.2d 1076, 1094 (5th Cir. 1973).

D.
Evidence of Other Incidents

Ford also argues that the Court erred in admitting evidence from *Huber v. Ford*, Civ. Act. No. 01-C-391 (Cir. Ct. of Monongalia Cty., W. Va.), and *Olson v. Ford*, 4:04-cv-00102-DLH-SCM (N.W. Dist. N.D. 2006), because Plaintiffs did not establish the vehicles involved in those cases had substantially similar speed control cables as the 2001 Ford Ranger driven by Mr. Nease. Therefore, Ford asserts the evidence should have been excluded pursuant to Rules 401, 402, 403, 404(b), and 801 of the Federal Rules of Evidence. However, the jury was instructed the evidence could not be considered at all with respect to Plaintiffs' strict liability claim. Specifically, the Court instructed the jury that:

> [i]n this case, the plaintiffs offered testimony concerning reports made to Ford of alleged other incidents of unintended acceleration. You are instructed that you may only consider the alleged other incidents for the limited purpose of determining whether Ford had notice of the defect that the plaintiffs allege. You may not consider this testimony for any purpose in evaluating plaintiffs' strict product liability claim, and you may not consider it as evidence that the 2001 Ford Ranger was defective or not reasonably safe for its intended use.

Trial Tr., 192, ECF No. 232. Thus, as the jury was instructed it only could be considered for the purpose of notice and not for the purpose of evaluating

Plaintiffs' strict liability claim, the Court **DENIES** Ford's argument.[3]

E.
Allegation of Altered or False Evidence

Ford further argues that the case was based upon "altered" or "false evidence" regarding the position of the acceleration pedal. Specifically, Ford asserts the Court erred in allowing Officer Dent to testify that he observed the accelerator pedal in the down position and had it photographed. Trial Tr., 65, ECF No. 249. However, when the pedal was inspected by Mr. Sero nearly a year later, the pedal was in its normal position. Therefore, Ford insists evidence of the accelerator pedal being down was either spoliated or the evidence presented by Office Dent was false.

The Court finds no merit to Ford's spoliation argument. To prove spoliation, a party must show:

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[3] When discussing the jury instructions outside the presence of the jury, the Court stated that it "already ruled that evidence about the cables in *Huber* and *Olson* and Mr. Sero's inspection of them produces enough substantial similarity that it's relevant and that it can go to defect, but – and the parties can argue that, but I don't have an instruction before me. So it's premature to object." Trial Tr., 65, ECF No. 232. When the actual jury instructions were read to the jury, they specifically included the aforementioned limiting instruction. Given this limiting instruction, it was of no consequence that Plaintiffs' counsel stated during closing argument that "[y]ou also heard Ford claim that stuck throttles because of clogged up cap tubes don't happen in the real world, that there is no evidence of it. . . . Remind them when Mr. Sero talked about the *Huber* and the *Olson* cases that basically had substantially similar design of the speed cables." *Id.* at 233.

> [T]he party having control over the evidence had an obligation to preserve it when it was destroyed or altered; (2) the destruction or loss was accompanied by a "culpable state of mind;" and (3) the evidence that was destroyed or altered was "relevant" to the claims or defenses of the party that sought the discovery of the spoliated evidence, to the extent that a reasonable factfinder could conclude that the lost evidence would have supported the claims or defenses of the party that sought it.

Goodman v. Praxair Serv., Inc., 632 F. Supp.2d 494, 509 (4th Cir. 2009) (internal quotation marks and citations omitted).

In this case, Mr. Nease was taken to the hospital with serious injuries following the crash. As is typical in this situation, his truck was towed to a salvage yard, and Mr. Nease had no control over the vehicle. The truck was then moved to a different salvage yard by his insurer. The truck was not returned to Mr. Nease's control until April of 2013, five months after the crash, when Plaintiffs' counsel was able to locate the truck and purchase it for salvage value from the insurance company. Mr. Sero testified that by the time he inspected the pedal and the speed control cable the pedal was off the floor and the cable was free to move. Trial Tr., 34, 63, & 88, ECF No. 221. However, he testified that he saw evidence of contaminants in the guide tube. *Id.* at 49.

Under these facts, there is absolutely no evidence of spoliation. Clearly, Plaintiffs did not have continuous control over the vehicle, nor has Ford set forth any evidence that they "willfully engaged in conduct resulting in the evidence's loss or destruction."

Turner v. U.S., 736 F.3d 274, 282 (4th Cir. 2013) (citation omitted). Moreover, although Ford was well aware of Plaintiffs' theory of their case and the fact the pedal was in its normal position and the cable was not bound at the time it was inspected by Mr. Sero, Ford never raised the spoliation issue prior to its current motion. Thus, the Court further finds the motion untimely. *See Goodman*, 632 F. Supp.2d at 508 ("The lesson to be learned from the cases that have sought to define when a spoliation motion should be filed in order to be timely is that there is a particular need for these motions to be filed as soon as reasonably possible after discovery of the facts that underlie the motion. This is because resolution of spoliation motions are fact intensive, requiring the court to assess when the duty to preserve commenced, whether the party accused of spoliation properly complied with its preservation duty, the degree of culpability involved, the relevance of the lost evidence to the case, and the concomitant prejudice to the party that was deprived of access to the evidence because it was not preserved." (citation omitted)).

Additionally, Ford's suggestion that Officer Dent presented false evidence is without merit. Officer Dent presented evidence about what he observed at the scene, which was consistent with Mr. Nease's assertion that the accelerator pedal was stuck. The fact Officer Dent's observation of the pedal was different than what was found months later by Mr. Sero does not mean Officer Dent lied about what he saw. The jury easily could have determined that the cable became unbound and the pedal returned to its normal position between the date of the accident in November of 2012 and October of 2013, when Mr. Sero first inspected it.

Therefore, the Court denies Ford's spoliation and false evidence arguments.

E.
Opinion Evidence

Next, Ford argues that the Court erred in allowing Plaintiffs' expert Dr. Mark Moreland to testify about matters outside Mr. Nease's medical record and by not disclosing those opinions pursuant to Rule 26(a)(2) of the Federal Rules of Civil Procedure. As a result, Ford argues that its expert, Dr. Lisa Gwin, did not have the opportunity to add opinions to rebut Dr. Moreland's testimony and develop a defense that sensory difficulties in Mr. Nease's foot resulted in pedal error.

Dr. Moreland was Mr. Nease's treating physician and also was disclosed as an expert witness by Plaintiffs on July 15, 2014. Plaintiffs stated in their disclosure that he would offer expert testimony "within . . . [his] respective areas of expertise, based upon . . . [his] respective knowledge of Howard Nease's course of treatment, care, diagnoses, prognoses, medical condition and future medical care needs related to the subject crash[.]" Exhibit C *to Pls' Resp. in Opp. to Ford Motor Co.'s Mot., in the Alternative, for a New Trial*, at 6, ECF No. 245-3. Dr. Moreland's testimony regarding what medications Mr. Nease took prior to the crash fell within his range of treatment. As such, it was unnecessary for Dr. Moreland to prepare a written expert report pursuant to Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure. *See Order*, at 1-2, ECF No. 174 (holding "[t]he disclosures described in FR Civ P 26(a)(2)(B) shall not be required of physicians and other medical providers who examined or treated a party . . . unless the examination was for

the sole purpose of providing expert testimony in the case"); *In re C.R. Bard, Inc.*, 948 F. Supp.2d 589, 616 (S.D. W. Va. 2013) (stating "treating physicians are, of course, able to testify as to opinions formed during the course of treatment"). Moreover, this testimony should have been of no surprise to Ford, and it certainly did not cause any unfair prejudice to Ford. *See id.* (finding any violation of Rule 26(a)(2)(B) was substantially justified or harmless to the extent the treating physicians offered opinions outside the scope of treatment because the defendant was not surprised, allowing the testimony did not disrupt the trial, and the plaintiffs relied upon a previous decision by the court in deciding not to submit expert reports).

As to Ford's arguments with respect to Dr. Gwin, the Court previously addressed these issues in its Memorandum Opinion and Order entered on March 19, 2015, finding she could not offer her opinion about whether Mr. Nease was experiencing side effects of his medications at the time of the accident. *Mem. & Op.*, at 2 ECF No. 186. As Dr. Gwin was an expert, and not a treating physician, she was required to put her opinions in an expert report. The Court decision to limit Dr. Gwin's testimony to those things contained in her report was not error.

F.
The Jury Award

Lastly, Ford argues that this Court should set aside or remit the jury verdict as excessive. Ford asserts the damages awarded for future medical care were against the clear weight of the evidence. At trial, Plaintiffs' forensic economist Zachary Meyers opined the present value of Mr. Nease's future life care plan

was $239,741. Trial Tr., 21, Mar. 27, 2015, ECF No. 242. Despite no other present value calculation presented by Plaintiffs, the jury awarded $500,000 in future medical care and expenses. *Verdict Form*, 6, ECF No. 216. Ford argues the jury obviously speculated in making its decision because there was no evidence Mr. Nease would incur $500,000 in future medical care.

Plaintiffs argue, however, that Mr. Meyers testified that his figure was very conservative because he typically calculates damages up through age 100, but in Mr. Nease's case he stopped at age 86. Trial Tr., 25-26, ECF No. 242. Given Mr. Meyer's testimony, Plaintiffs assert the jury was free to award an amount greater than the bare minimum, particularly in light of Dr. Moreland and Cathy Gross' testimony that Mr. Nease will require future medical care.

"Remittitur, which is used in connection with Fed. R. Civ. P. 59(a), is a process . . . by which the trial court orders a new trial unless the plaintiff accepts a reduction in an excessive jury award." *Cline v. Wal–Mart Stores, Inc.*, 144 F.3d 294, 305 (4th Cir. 1998) (quotation marks omitted). The decision as to whether a damage award is excessive and should therefore be set aside is "entrusted to the sound discretion of the district court." *Robles v. Prince George's Cty., Maryland*, 302 F.3d 262, 271 (4th Cir. 2002) (internal quotation marks and citation omitted). Under the practice of remittitur, "the trial court orders a new trial unless the plaintiff accepts a reduction in an excessive jury award." *Cline*, 144 F.3d at 305 (internal quotation marks and citation omitted).

In this case, Mr. Meyers opined that $239,741 was a conservative figure for Mr. Nease's future medical care to age 86, for a total of 12.25 years based upon

Ms. Gross's life care plan. Trial Tr., 20-21, ECF No. 242. He further stated that, in calculating the cost of future medical care, the amount of the life care plan is discounted each year by a person's life expectancy. *Id.* at 25. Thus, for each year the life care plan extends into the future, the lower the damages are because there is less chance of being alive at that age. For instance, Mr. Meyer calculated the Present Value of Total Life Care Plan for Mr. Nease at age 74 as $25,272. Exhibit 9B, at 3, ECF No. 227-17. At age 86, Mr. Meyers calculated the value at $12,732. *Id.* However, in this case, the jury more than doubled the amount of future medicals calculated by Mr. Meyers through age 86. Even if the jury believed Mr. Meyer's figure was too conservative and he should have calculated the damages through age 100, there is simply no evidence that the amount of damages from age 87 through 100 would exceed the future medical expenses Mr. Nease would incur between the ages of 74 and 86. In fact, such a calculation is contrary to Mr. Meyers' own testimony that the present value for each year in the future would decrease. Therefore, the Court finds that a remittitur is appropriate and **GRANTS** Ford's motion on this issue. As Plaintiffs' best evidence was that Mr. Nease would incur $239,741 in future medical care and expenses, the Court reduces the jury award to that amount for his future medical care and expenses. If Plaintiffs do not agree to a remittitur, the Court will order a new trial on damages.

III.
CONCLUSION

Accordingly, for the foregoing reasons, the Court **DENIES** Ford's motion Renewed Motion for Judgment as a Matter of Law pursuant to Rule 50(b) of the Federal Rules of Civil Procedure (ECF No. 238), and **DENIES, in part**, and **GRANTS, in part**, Ford's Motion, in the Alternative, for a New Trial pursuant to Rule 59(a)(1)(A) of the Federal Rules of Civil Procedure. ECF No. 240. The Court also **DIRECTS** Plaintiff to notify the Court within seven (7) days of entry of this Memorandum Opinion and Order whether it accepts the remittitur or wants the Court to set a new trial. The Court also **GRANTS** Plaintiffs' Motion for Leave to Submit a Sur-Reply. ECF No. 250.

The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented parties.

ENTER: July 24, 2015
Robert C. Chambers,
Chief Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

HUNTINGTON DIVISION

CIVIL ACTION NO. 3:13-29840

HOWARD E. NEASE and NANCY NEASE,
Plaintiffs,

v.

FORD MOTOR COMPANY,
a Delaware Corporation, Defendant.

MEMORANDUM OPINION AND ORDER

Pending are Defendant's Motion to Exclude Expert Testimony of Samuel J. Sero, P.E. (ECF No. 75) and Defendant's Motion for Summary Judgment (ECF No. 85). For the reasons stated below, the Court **GRANTS** in part summary judgment to Defendant on the punitive damages claim and **DENIES** the remainder of each Motion. Further, Defendant's Motion to Exclude Evidence or Reference to Punitive Damages (ECF No. 102) is **DENIED as moot**.

Each Motion relies substantially on Defendant's objections to Mr. Sero's findings and opinions. If his testimony is excluded, Defendant posits, Plaintiffs cannot demonstrate sufficient evidence to support their claims. Mr. Sero examined the vehicle on October 11, 2013, and March 10, 2014. His report summarized

the observable physical condition of the vehicle, including the speed control cables, accelerator pedal, throttle control components, and other parts which he examined to form the basis for his opinion. He observed and noted the condition of the steel speed control cable and plastic sheath surrounding it, finding evidence of abrasion and leading him to use a borescope to further examine it. He found evidence of some foreign substance, material which Mr. Sero opines interfered with the cable's intended movement within the plastic sheath. He made a video recording of the examination and discussed having made similar findings and reached opinions on other Ford vehicles with similar parts.

As Defendant's motion acknowledges, Mr. Sero's opinion is that "a mechanical binding of that cable" resulted from some foreign material becoming lodged in the plastic sheath through which the cable should pass. Defendant makes much of Mr. Sero's theory that the cable was able to move in the direction resulting in acceleration but not in the opposite direction necessary to lessen acceleration. Defendant's design engineers had recognized, many years before when Ford developed the basic configuration of this throttle control system, that a cable such as this may become jammed from foreign material which typically may be found under the hood of a vehicle.

Mr. Sero also offered opinions related to the braking system. He relied upon characteristics of the braking system identified by Ford's own compliance documents to consider, if the brakes were pressed as Plaintiffs described, how the "vacuum assist" feature would be ineffective and the brakes unable to properly slow or stop a vehicle when the accelerator pedal is pressed or throttle remains open. His theory is

consistent with and partly based on the description of the event by Mr. Nease.

The Court agrees with Plaintiffs that Mr. Sero used standard engineering methodology to conduct his physical inspection and reach his opinions. Mr. Sero is a registered professional engineer with a degree in electrical engineering. His experience includes the design and operation of mechanical systems in a variety of settings, in addition to his forensic evaluations. His opinions, and the basis he relies upon to support them, involve general engineering matters, particularly mechanical engineering principles typical of automotive systems such as those at issue here. Unlike the opinions he was precluded from offering in *Buck v. Ford Motor Co.*, 810 F. Supp. 2d 815 (N.D. Ohio 2007) (Ford's NGSC system and alleged electromagnetic interference), his inspection and opinions here concern the mechanical operation of the parts of throttle control cables and the brakes. His methodology consisted of physically inspecting the vehicle's parts, understanding how they are designed to operate, observing evidence of whether some material interfered with the operation of the cable, and opining how that could and did occur here. Every argument raised by Defendant goes to the weight, not admissibility, of his testimony. Defendant's Motion to Exclude is **DENIED**.

Plaintiffs have evidence that Ford identified a sticking or jammed cable as a particular potential failure mode in the early design phase in a similar acceleration system. Ford has also produced customer and dealer service technician reports which Plaintiffs purport include reports of "sticking throttle" in similarly caused unintended acceleration events. Plaintiffs have identified evidence sufficient to create

genuine issues of material facts as to their liability claims. However, Plaintiffs fail to articulate a basis for punitive damages. At most, Plaintiffs' proffered evidence is that Ford identified the possibility of unintended acceleration related to a sticking cable and failed to adequately investigate consumer complaints of this specific problem actually occurring. That evidence consisted of a relatively small number of reports of stuck accelerators to dealers who were generally unable to replicate the complaint. They offer no evidence in the record that Ford committed the type of egregious conduct necessary to support punitive damages. Defendant's Motion for Summary Judgment is **DENIED** in part, and **GRANTED** in part, as to punitive damages. As a result, Defendant's Motion to Exclude Financial Evidence is **DENIED as moot**.

The Court **DIRECTS** the Clerk to send a copy of the written Memorandum Opinion and Order to counsel of record and any unrepresented parties.

ENTER: March 13, 2015.

Robert C. Chambers,
Chief Judge