In the
Supreme Court of the United States

VIRGINIA CALLAHAN; T.G.
Petitioners,

v.

PACIFIC CYCLE, INC.
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When reviewing a district court's ruling to admit hearsay into evidence, should the Court of Appeals apply an abuse of discretion standard or engage in a de novo review.

PARTIES TO THE PROCEEDINGS

The petitioners are a minor, T. G., and her grandmother and legal guardian, Virginia Callahan. The appellees below were Toys "R" Us, a toy store, now in bankruptcy, and Pacific Cycle, Inc. Toys "R" Us was dismissed below during the pendency of the appeal due to the bankruptcy but Pacific Cycle remains a party to the case.

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JURISDICTION

The Fourth Circuit issued its opinion on November 21, 2018. The mandate issued on December 13, 2018. This Court has jurisdiction to review final decisions of the Circuit Courts of Appeal pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fed. R. Evid. Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

…

(c) Hearsay. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

Fed. R. Evid. 802. The Rule Against Hearsay

Hearsay is not admissible unless any of the following provides otherwise:

- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Fed. R. Evid. 803. Exceptions to the Rule Against Hearsay--Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

…

(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness….

Fed. R. Evid. 805. Hearsay Within Hearsay

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

STATEMENT OF THE CASE

T.G. and her grandmother sued Pacific Cycle and Toys "R" Us in the U.S. District Court for the District of Maryland alleging that she was injured because of a defect in the bicycle manufactured by Yong Qi Bicycle Industrial Co. Ltd. and imported by Pacific Cycle. After being imported the final assembly and inspection was performed by Toys "R" Us in the store where the bike was sold. When it was delivered to Petitioners, the bike had a defective rear brake. The second time T.G rode the bike the rear brake failed to function properly, leading to a fall that caused her serious and permanent personal injuries. The District Court exercised diversity jurisdiction pursuant to 28 U.S.C. § 1332.

The jury trial was presided over by Magistrate Judge J. Mark Coulson. During the trial Respondents offered into evidence numerous "Certificates of General Conformity." The Certificates are prepared by Pacific Cycle for import purposes. The Certificates purport to certify that the bike in question conformed to all applicable federal safety regulations enacted by the U.S. Consumer Product Safety Commission. However, the bike was manufactured by Yong Qi Bicycle Industrial Co., not Pacific Cycle. The Certificates related to testing of an exemplar bike, not the bike involved in this case, and are prepared by Pacific Cycle when it is importing bicycles into the United States. The Certificates do not purport to contain personal

knowledge and are only stated "to the best of its [Pacific Cycle's] knowledge."

The Certificates are out of court statements and were offered by Respondents to prove the truth of the matter asserted therein. Judge Coulson overruled Petitioner's timely objection and admitted the Certificates. The Certificates state:

> Pacific Cycle, Inc. certifies that to the best of its knowledge and based on a reasonable testing program, the products identified herein conform(s) with the consumer product safety rules, bans, standards or regulations listed below.
>
> ....
>
> The bicycle model(s) that are subject to this certificate of Compliance meet or exceed 16 C.F.R. 1512 et. seq., as applicable.

The Certificates are not signed but contain the name of Jim Hineline, the Director of Quality & Compliance for Pacific Cycle. They purport to be based on testing done by a third-party testing laboratory, SGS Testing Service. Neither Mr. Hineline nor SGS appeared at trial to sponsor the Certificates and the proponent of the Certificates for the Respondent did not have personal knowledge of the facts recited in the Certificate.

The Certificates were not only hearsay, but they contained hearsay within hearsay. That is, the

Certificates are prepared by Mr. Hineline, a United States Pacific Cycle employee without personal knowledge, certifying that SGS, a company in China, found that a certain exemplar bike passed a safety inspection.

During closing argument Respondents referred to the Certificates and sarcastically argued: "No matter how many certificates of compliance we show in a stack, its never good enough." In the special verdict, the jury found for the Respondents on the issue of liability, holding that the Petitioners failed to establish that the bike was defective.

Petitioners appealed to the Fourth Circuit. The Fourth Circuit held that the District Court's decision to overrule the Petitioner's objection to the admissibility of the Certificates of General Conformity was subject to review for an abuse of discretion. The Fourth Circuit then held that the District Court did not abuse its discretion in admitting the Certificates of General Conformity.

REASONS FOR GRANTING THE PETITION

THERE IS A SPLIT AMONG THE CIRCUIT COURTS OF APPEAL REGARDING THE STANDARD OF REVIEW THAT APPLIES TO RULINGS ON HEARSAY.

The common law rule against hearsay was incorporated into the Federal Rules of Evidence (FRE) when they were adopted in 1973. In the forty-six years since the Supreme Court adopted the FREs it has not addressed the standard of review that should be applied to a trial court's rulings on hearsay.

In every appeal to the Circuit Courts the parties are required to cite the standard of review that applies to each issue. See Fed. R. App. P. 28 (a)(8)(B). In each Circuit the parties cite to that Circuit's iteration of its standard of review. For the most part, the Circuit Courts apply either a de novo review or an abuse of discretion standard. The standard of review utilized by the appellate court is often outcome determinative.

The FREs prohibit the admission of hearsay, unless a specific exception is found to apply. Fed. R. Evid. 801. When there is hearsay, contained within hearsay, an exception for both levels of hearsay must be established before the hearsay may be admitted into evidence. Fed. R. Evid. 805.

If a proper objection is lodged against hearsay, but the hearsay is admitted, an appellate issue is ripe for review. Petitioners contend that the Court of Appeals should review the trial court's ruling on the hearsay issue de novo rather than apply an abuse of discretion standard.

The discretion of the trial court should not come into play until the trial court finds that the hearsay at issue is subject to an exception. Under Fed. R. Evid. 403, once an exception to the prohibition against hearsay is found to apply, the trial court applies its discretion to determine whether the hearsay, like any other evidence, is relevant to the case and whether its probative value is outweighed by its prejudicial effect.

In this case, the Fourth Circuit applied an abuse of discretion standard stating:

> This court reviews the district court's evidentiary decisions for abuse of discretion. *See Campbell v. Boston Sci. Corp.*, 882 F.3d 70, 77 (4th Cir. 2018)…*Gen. Ins. Co. of Am. v. U.S. Fire Ins. Co.*, 886 F.3d 346, 357 (4th Cir. 2018) (reviewing an application of the business records exception to hearsay for abuse of discretion); …
>
> Accordingly, this court will overturn an evidentiary decision only if it was "arbitrary and irrational." *Gentry v. E. W. Partners Club Mgmt. Co.*, 816 F.3d 228, 239 (4th Cir. 2016)

> (quoting *Noel v. Artson*, 641 F.3d 580, 591 (4th Cir. 2011). In determining whether a decision was arbitrary and irrational, this court "look[s] at the evidence in a light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect." *United States v. Cole*, 631 F.3d 146, 153 (4th Cir.2011) (quoting *United States v. Udeozor*, 515 F.3d 260, 265 (4th Cir. 2008).

Callahan v. Pac. Cycle, Inc, *supra* at 4.

The Fourth Circuit further explained its holding:

> Appellants argue that the certificates of general conformity … did not satisfy the requirements of the business records exception. …
>
> ….
>
> With that testimony in mind, we conclude it was not arbitrary or irrational for the district court to rule that the [Certificate's] reliance on information from SGS is consistent with the business records exception to the hearsay rule.

Callahan v. Pac. Cycle, Inc, supra at 15-17.

The Fourth Circuit applied a classic iteration of the abuse of discretion standard that many Circuit Courts of Appeal apply. *Peterson v. Islamic Republic*

of Iran, 876 F.3d 63, 85, fn. 14 (2d Cir. 2017). *Abascal v. Fleckenstein,* 820 F.3d 561, 566 (2d Cir. 2016)*; Langbord v. United States Dep't of Treasury,* 832 F.3d 170, 196 (3d Cir. 2016)*; Moyer v. United Dominion Indus.,* 473 F.3d 532, 542 (3d Cir. 2007). *United States v. Am. Radiator & Standard Sanitary Corp.,* 433 F.2d 174, 195 (3d Cir. 1970); *RTM Media, L.L.C. v. City Of Houston,* 584 F.3d 220, 227, fn. 9 (5th Cir. 2009); *Abner v. Kansas City S. R. Co.*, 513 F.3d 154, 168 (5th Cir. 2008). *Bradley v. Work*, 154 F.3d 704, 708–09 (7th Cir. 1998). *Jordan v. Binns*, 712 F.3d 1123, 1126 (7th Cir. 2013). *United States v. Pirani,* 406 F.3d 543, 555 (8th Cir. 2005) (en banc). *United States v. Brooks,* 715 F.3d 1069, 1079 (8th Cir. 2013); *Christian Faith Fellowship Church v. Adidas AG*, 841 F.3d 986, 989 (Fed. Cir. 2016). *Air Land Forwarders, Inc. v. United States*, 172 F.3d 1338, 1341 (Fed. Cir. 1999).

The Sixth Circuit and the Third Circuit disagree with the abuse of discretion standard when reviewing rulings regarding hearsay. They apply a de novo standard of review. "Whether a statement is hearsay is a question of law, which we review de novo." *United States v. Rodriguez–Lopez,* 565 F.3d 312, 314 (6th Cir.2009). The Sixth Circuit described its own standard of review as "peculiar lexicon." *United States v. Brown,* 221 F.3d 1336 (6th Cir. 2000)(unreported).

The Sixth and Third Circuits understand that the proper analysis on appeal is a two-step process. First, the hearsay issue is reviewed de novo as a question of law. Second, if the trial court erred, as a matter of law, the appellate courts review the issue

to determine whether the error was harmless. Fed. R. Evid. 103 ("A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party.")

Although it generally engages in de novo review, even the Sixth Circuit has varied, on a case by case basis, in applying this standard of review. *Trepel v. Roadway Exp., Inc.,* 194 F.3d 708, 716–17 (6th Cir. 1999) ("Therefore, in disregard of our heretofore well-settled precedent that hearsay evidentiary rulings are reviewed de novo, we shall review the district court's ruling for an abuse of discretion." (internal citations omitted)).

In the Third Circuit the Court of Appeals stated that the District Court's interpretation of the Federal Rules of Evidence is subject to plenary review. *United States v. Brown,* 254 F.3d 454, 458 (3d Cir. 2001). The Third Circuit also explained:

> Although the abuse of discretion standard that governs our review of the District Court's evidentiary is quite deferential, it is not insurmountable and focusing on the deference properly afforded an evidentiary ruling ought not to substitute for an objective analysis of whether the ruling was an abuse of discretion.

Blunt v. Lower Merion Sch. Dist., 767 F.3d 247, 322 (3d Cir. 2014).

In *Complaint of Consolidation Coal Co.*, 123 F.3d 126, 131 (3d Cir. 1997), the Third Circuit

stated: "We exercise plenary review, however, of its rulings to the extent they are based on a legal interpretation of the Federal Rules of Evidence." See also *Barker v. Deere and Co.,* 60 F.3d 158, 161 (3d Cir. 1995); *Lippay v. Christos,* 996 F.2d 1490, 1496 (3d Cir. 1993)(our review is plenary as the district court's ruling on the admissibility of Mrs. Lippay's hearsay evidence implicates "the application of a legally set standard.")

The Ninth Circuit nominally applies an abuse of discretion standard but incorporates the de novo standard of review in its two-step process:

> Our circuit employs a "significantly deferential" two-step test to determine whether a district court abused its discretion. … The first step "is to determine de novo whether the trial court identified the correct legal rule to apply to the relief requested. If so, the second step "is to determine whether the trial court's application of the correct legal standard was (1) 'illogical,' (2) 'implausible,' or (3) without 'support in inferences that may be drawn from the facts in the record.'"

Wagner v. County of Maricopa, 673 F.3d 977, 949 (9th Cir. 2012), opinion withdrawn and superseded on denial of reh'g, 747 F.3d 1048 (9th Cir. 2013) (internal citations omitted). Stated another way, the Ninth Circuit applies both standards at different times. In *United States v. Morales*, 720 F.3d 1194, 1199 (9th Cir. 2013), the Court explained "[w]e

review … constructions of the hearsay rules de novo. We review decisions to admit evidence pursuant to a hearsay exception for abuse of discretion." (internal citations omitted).

The Tenth Circuit takes a slightly different approach and reverses if the lower court's decision is "manifestly erroneous." *Draper v. Rosario*, 836 F.3d 1072, 1080 (9th Cir. 2016). *United States v. Willis*, 826 F.3d 1265, 1270 (10th Cir. 2016) (quoting *United States v. Sturm*, 673 F.3d 1274, 1286 (10th Cir. 2012); *Payan v. United Parcel Serv.*, 905 F.3d 1162, 1171 (10th Cir. 2018).

The Eleventh Circuit uses a hybrid standard of de novo review and reviews for "clear error":

> We have often stated generally that evidentiary rulings are reviewed for abuse of discretion. However, things are not always so simple. While evidentiary rulings often require an exercise of discretion that calls for this standard of review, they may also require legal and factual determinations that call for different standards. Specifically, "[t]he factual findings underlying [evidentiary] rulings are reviewed for clear error." And questions of law underlying evidentiary rulings are reviewed de novo. … ("[B]asing an evidentiary ruling on an erroneous view of the law constitutes an abuse of discretion *per se")*.

Lamonica v. Safe Hurricane Shutters, Inc., 711 F.3d 1299, 1317 (11th Cir. 2013)(internal citations omitted).

However, with regard to a business record hearsay ruling, the Eleventh Circuit stated:

> A district court has broad discretion in determining the admissibility of evidence; we reverse an evidentiary ruling only "upon a clear showing of abuse of discretion."

Equity Lifestyle Properties, Inc. v. Florida Mowing And Landscape Serv., Inc., 556 F.3d 1232, 1243 (11th Cir. 2009) (internal citations omitted).

The Eleventh Circuit has also applied one standard of review for most hearsay exceptions but a different standard of review for the residual hearsay exception in FRE 807:

> We are "particularly hesitant to overturn a trial court's admissibility ruling under the residual hearsay exception absent a 'definite and firm conviction that the court made a clear error of judgment in the conclusion it reached based upon a weighing of the relevant factors.'"

Rivers v. United States, 777 F.3d 1306, 1312 (11th Cir. 2015)(internal citations omitted).

The split among the circuits has been explicitly recognized by the appellate courts and by

commentators. In the Sixth Circuit a dissenting judge articulated that there is a split of authority among the Circuit Courts when deciding on the standard of review. *United States v. Clay,* 677 F.3d 753, 755 (6th Cir. 2012) (dissenting opinion).

The Ninth Circuit also recognizes its lack of consistency in articulating the standard of review related to hearsay rulings:

> This circuit's case law is not entirely clear regarding whether we review de novo a district court's decision that a statement is or is not hearsay.

Wagner v. County of Maricopa, 706 F.3d 942, 949 (9th Cir. 2013), *opinion amended and superseded on denial of reh'g,* 747 F.3d 1048 (9th Cir. 2013).

If the instant case had not been removed to Federal Court, and had been tried in the Maryland Courts, the Court of Appeals would have applied a de novo standard of review. *Gordon v. State,* 431 Md. 527, 535, 66 A.3d 647, 651 (2013). In *Gordon* the Court of Appeals examined in detail the split among appellate courts regarding the standard of review when examining a trial court's ruling on hearsay. *Id. See also J.L. Matthews, Inc. v. Md.–Nat'l Capital Park & Planning Comm'n,* 368 Md. 71, 92, 792 A.2d 288, 300 (2002) (trial court's admission of hearsay "enjoys no presumption of correctness on review and is not entitled to any deference").

Numerous law review articles agree that the standard of review varies from circuit to circuit and that it ought to be made consistent by the

intervention of the Supreme Court. Peter Nicolas, *De Novo Review in Deferential Robes?: A Deconstruction of the Standard of Review of Evidentiary Errors in the Federal System*, 54 SYRACUSE L. REV. 531 (2004),. Todd J. Bruno, *Say What?? Confusion in the Courts Over What is the Standard of Review for Hearsay Rulings,* 18 SUFFOLK J. TRIAL & APP. ADVOC. 1 (2013). S. Bryn McDermott, *Square Peg, Round Hole: Common Sense versus Precedent in the Battle over the Standard of Review for Hearsay Rulings,* 36 AM. J. TRIAL ADVOC. 655 (2013). Matthew J. Peterson, *Discretion Abused: Reinterpreting the Appellate Standard of Review for Hearsay*, 6 CHARLOTTE L. REV. 145 (2015). David P. Leonard, *Appellate Review of Evidentiary Rulings*, 70 N.C. L. REV. 1152 (1992).

Although the Supreme Court has not addressed the standard of review for hearsay objections, it did address the standard of review with regard to expert testimony. The Supreme Court explained that, with regard to the admissibility of expert testimony, the standard of review is for abuse of discretion. *Gen. Elec. Co. v. Joiner,* 522 U.S. 136, 141, 118 S. Ct. 512, 139 L.Ed.2d 508 (1997). The Court's ruling with regard to expert testimony appears to have influenced the Circuits that apply an abuse of discretion standard in the context of the hearsay rule.

> In *Joiner* there is a sentence that reads "[a]ll evidentiary decisions are reviewed under an abuse-of discretion standard." [522 U.S. at 141] ... In context, it seems clear that this sentence refers to an

> argument attributed to one of the parties before the Court. Yet, it has been misinterpreted as being part of its holding by some appellate courts, thus causing them to feel bound to review all claims of evidentiary error under an abuse of discretion standard.

Nicholas, *supra* at 537.

A ruling on the admissibility of expert testimony is much more akin to a ruling under FRE 403 than to the hearsay rule. A ruling on whether a document is subject to an exception to the hearsay rule, on the other hand, is more akin to statutory interpretation, which is reviewed de novo. *Salve Regina Coll. v. Russell,* 499 U.S. 225, 231, 111 S. Ct. 1217, 1221, 113 L. Ed. 2d 190 (1991).

CONCLUSION

When applying the rule against hearsay the Circuit Courts are engaged in the equivalent of statutory interpretation. There are rules, such as FRE 403, that explicitly grant the trial judge discretion in weighing the probative value of evidence against its prejudicial effect. Similarly, in *Joiner* the Supreme Court held that discretion is required when determining the admissibility of expert testimony. However, when the trial court is ruling on whether a particular document is hearsay or is subject to an exception to the hearsay rule, the court is not exercising discretion – it is interpreting the law. It is not until the trial court determines that the document is admissible under a particular exception to the rule against hearsay that it applies discretion under FRE 403.

In light of the split of authority among the circuits, the Supreme Court should grant a writ of certiorari and establish a uniform standard of review with regard to rulings on hearsay. Petitioners contend that the ruling below regarding the Certificates of General Conformity was erroneous and that it affected the substantial rights of the parties. If a de novo review had been undertaken by the Fourth Circuit Court of Appeals, the district court verdict would have been reversed and the case remanded for a new trial.

Respectfully submitted,

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