

U.S. SC# _____

COA No. 328801

MI. SC 155311

IN THE
SUPREME COURT OF THE UNITED STATES

MATTHEW JOSEPH BUSSING — PETITIONER
(Your Name)

VS.
STATE OF MICHIGAN
COURT OF APPEALS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

MICHIGAN SUPREME COURT / STATE OF MICHIGAN COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

MATTHEW JOSEPH BUSSING
(Your Name)

8585 N. CROSWELL ROAD
(Address)

ST. LOUIS MI. 48880
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. The Court abused its discretion when it permitted a rebuttal witness who was an expert in pediatric child abuse to testify outside her competence on biomechanical engineering issues where the testimony: 1) did not satisfy the foundational requirements of MRE 702, 2) had a tendency to confuse and mislead the jury, and 3) was unfairly prejudicial to the defense. The Court of Appeals reviewed for error and claimed no abuse of discretion. The ruling by the Court of Appeals conflicts with rulings by the United States Supreme Court.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

| | |
|--|-----|
| OPINIONS BELOW..... | 1 |
| JURISDICTION..... | 2 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 3-6 |
| STATEMENT OF THE CASE | 7 |
| REASONS FOR GRANTING THE WRIT | 8 |
| CONCLUSION..... | 9 |

INDEX TO APPENDICES

APPENDIX A - MICHIGAN SUPREME COURT order.

APPENDIX B - STATE OF MICHIGAN COURT OF APPEALS (Administrative 1983
-7)

APPENDIX C - APPEAL BRIEF STATEMENT OF FACTS (pg. 3-11)

APPENDIX D - MOTION TO PROCEED IN forma pauperis

APPENDIX E - CERTIFICATE OF COMPLIANCE

APPENDIX F

TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

| | |
|--|---|
| Daubert v. Merrill Dow Pharm. Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) | 3 |
| Unocal Corp. v. Carmichael, 526 U.S. 137, 152, 119, S. Ct. 167, 143 L. Ed. 2d 238 (1999) | 3 |
| United States v. DICO, Inc., 246 F. 3d 864, 869 (8th Cir. 2001) | 4 |
| Pioneer v. ISP, Inc., 259 F. 3d 924, 929-30 (8th Cir. 2001) | 4 |
| Lang v. Kohl's Food Stores Inc., 217 F. 3d 919, 924 (7th Cir. 2000) | 4 |
| Chalfman v. Maytag Corp., 297 F. 3d 680, 687 (7th Cir. 2002) | 5 |
| Ergenre-Britani v. KPMG Peat Marwick, 2 F. 3d 183, 186-87 (7th Cir. 1993) (quoting Daubert, 509 U.S. at 592-593) | 5 |

STATUTES AND RULES

| | |
|---|---|
| Fed. Rules of Evidence 104 | 5 |
| Fed. Rules of Evidence 702 | 5 |
| The Constitution of the U.S. Amendment <u>IX</u> | 8 |
| The Constitution of the U.S. Amendment <u>XI</u> | 8 |
| The Constitution of the U.S. Amendment <u>XIV</u> | 8 |

OTHER

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

[] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
X is unpublished.

The opinion of the STATE OF MICHIGAN COURT OF APPEALS court appears at Appendix B to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
X is unpublished.

JURISDICTION

[] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[] No petition for rehearing was timely filed in my case.

[] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.
2

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was July 25, 2017. A copy of that decision appears at Appendix A.

[] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.
2

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Before accepting the testimony of an expert witness, the trial court is charged with a "gatekeeper" function of determining whether an opinion is based upon sound and reliable theory, or whether it constitutes rank speculation. *Daubert v. Merrell Dow Pharmas Inc.*, 509 U.S. 579, 589-90, 113 S. Ct. 2786, 125 L. Ed. 2d. 469 (1993). In *Daubert*, the United States Supreme Court imposed an obligation upon trial court judges to ensure that scientific testimony is not only relevant, but also reliable under the rules of evidence. In doing so the court can consider 1.) whether the theory or technique can be and has been tested. 2.) whether the theory or technique has been subjected to peer review and publication. 3.) the known rate of potential error and 4.) whether the theory has been generally accepted. The purpose of these requirements "is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employ in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field" *Kumho tire Co. v. Carmichael*, 526 U.S. 137, 152, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999). In *Kumho tire*, the Supreme Court determined "the trial judge must have considerable leeway in deciding in a particular case how to go about determining

whether particular expert testimony is reliable. In other words, a trial court should consider the specific factors identified in Daubert, where they are reasonable measures of the reliability of expert testimony. The objective of that requirement is to ensure the reliability and relevancy of expert testimony. The courts focus should be on whether the statements made during testimony are grounded upon scientifically valid reasoning or methodology. *United States v. Dico Inc.*, 266 F. 3d 864, 869 (8th Cir. 2001). "As a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it's up to the opposing party to examine the factual basis for the opinion in cross-examination, only if the experts opinion is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be excluded." *Bonner v. ISP Techs. Inc.*, 259, F. 3d 924, 929-30 (8th Cir. 2001). An Experts work is admissible "only to the extent it is reasoned, uses the methods of the discipline, and is founded on data. Talking off the cuff, deploying neither data nor analysis is not an acceptable methodology" *Lang v Kohl's Food Stores Inc.*, 217, F. 3d 919, 924 (7th Cir. 2000) 4

The experts testimony must "fit the issue to which the expert is testifying." Chapman v. Maytag Corp. 297 F.3d 682, 687 (7th Cir. 2002) As part of the determination required under Fed. Rules of Evid. 104(a) to answer preliminary questions regarding the admissibility of experts testimony under Fed. Rules of Evid. 702, the court must ensure that proposed expert testimony is relevant to the task at hand. This is the "fit" requirement. When making a preliminary finding regarding an experts qualifications under Fed. Rules of Evid. 104(a) the courts are to examine the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question. The trial court must determine whether the experts training and qualifications relate to the subject matter of their proposed testimony. "The Fed. Rules of Evid. Requires a judge to undertake a preliminary assessment of whether reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts at issue." Frymire-Brinati KPMG peat Marwick, 2 F.3d 183, 186-87 (7th Cir. 1993) (quoting Daubert, 509 U.S. at 592-593). Had the trial

Court adequately performed its gatekeeping functions as set forth in Daubert the expert testimony on rebuttal would not have been admitted into evidence. And the petitioner in this case would have had a likely chance of being found not guilty.

STATEMENT OF THE CASE

During a three day trial where the petitioner was convicted of first degree child abuse MCL 750.136(b)2. And he was sentenced to serve 20-30 years imprisonment. Several witnesses testified, including expert witnesses. Then after the petitioner himself testified on his behalf and the defense rested its case. The prosecution called back to the stand a Dr. Simms as a rebuttal witness to statements made by the petitioner. The Dr. was admitted originally as an expert in pediatric child abuse. And over objection and strong argument by defense counsel Dr. Simms was allowed to testify. She extended outside her expertise into the realm of the physics of falling bodies, rather than restricting herself to medical conclusions. (See Attachment Appendix C)

REASONS FOR GRANTING THE PETITION

Every citizen of the United States of America enjoys certain freedoms. Freedoms guaranteed by the Constitution of the United States. The right to a trial by jury and to have witnesses testify for and the right to confront witnesses against him. (Constitution of the U.S. Art. VI). The right to due process of law. (Constitution of the U.S. Art. ~~IV~~ VI). Without these rights we are left without justice. The Petitioner respectfully asks this honorable court to uphold the rulings made by the Federal courts in this matter. Because it is essential for the citizens of the United States of America to keep these fundamentally sound rights protected and upheld in every court in the land. So that we all as a civilized society will have trust and faith in a fair and just judicial process. And so that unreliable expert testimony will not taint and mislead the process in any way.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

 668024
Matthew Bussing

Date: 5-15-18