No. _____

In the Supreme Court of the United States

JEFFREY BOUDREAU,
as Personal Representative of the Estate of Wendy Boudreau,

Petitioner,

v.

SHAW'S SUPERMARKETS, INC.

Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

October 16, 2020

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QUESTIONS PRESENTED

Petitioner Jeffrey Boudreau's wife Wendy was murdered at the Shaw's Supermarket in Saco, Maine on August 19, 2015. The murderer, a regular customer who had previously been banned from the store for scaring customers, visited Shaw's twice on August 19, 2015. The second time, she walked through the store with a determined gait, frightening appearance, and an odd demeanor. The murderer found her victim standing alone in the ice cream aisle and slit Wendy Boudreau's throat.

The voluminous evidentiary record on summary judgment included direct testimony from other witnesses who reported being stalked around the store by the murderer and employees who were uncomfortable with or threatened by her. Petitioner offered sworn testimony from a retail security and loss prevention expert who opined that harm to Mrs. Boudreau was reasonably foreseeable and preventable. In violation of this Court's precedent in *Daubert* and *Kumho*, which mandates a gatekeeping analysis of expert testimony under Rule 702, the First Circuit affirmed the district court's grant of summary judgment in favor of Respondent.

The questions presented to this Court are as follows:

1. When a legal duty exists in a premises liability context to protect business invitees from reasonably foreseeable harm, is the question of foreseeability a factual issue that must be decided by the jury?

2. If foreseeability of harm is a factual issue, may a trial court sitting in diversity dispense with the *Daubert/Kumho* gatekeeping function of assessing the admissibility of expert evidence on summary judgment, when the proffered retail

security/loss prevention expert determined that harm to a customer was reasonably foreseeable?

PARTIES TO THE PROCEEDINGS

Petitioner (Plaintiff/Appellant in the First Circuit) is Jeffrey Boudreau, the Personal Representative of the Estate of his late wife, Wendy Boudreau.

Respondent (Defendant/Appellee in the First Circuit), is Shaw's Supermarkets, Inc.

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The district court's decision and order granting summary judgment is reported as follows: *Boudreau v. Shaw's Supermarkets, Inc.*, 2019 U.S. Dist. LEXIS 1195811 (July 18, 2019), Case No. 2:17-cv-00259-DBH. 24a.

JURISDICTION

The United States Court of Appeals for the First Circuit issued its decision affirming the district court's grant of summary judgment on April 10, 2020. The First Circuit denied Boudreau's Petition for Rehearing En Banc on May 19, 2020. 56a. On March 19, 2020, this Court issued an order extending the deadline to file a petition for writ of certiorari by 150 days from the denial of a timely petition for rehearing.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Federal Rule of Evidence 701

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. 57a.

Federal Rule of Evidence 702

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. 57a.

Federal Rule of Evidence 703

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect. 58a.

Federal Rule of Evidence 704

In General—Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue. 58a.

INTRODUCTION

In this wrongful death and negligent security case, Petitioner alleged that it was reasonably foreseeable to Shaw's that Wendy Boudreau's murderer, Connor MacCalister ("MacCalister"), posed a threat to customers. 2a, 34a. Therefore, Shaw's owed customers like Mrs. Boudreau a duty of care under Maine's law of premises liability. 2a, 34a.

The August 19, 2015 stabbing in this case was reasonably foreseeable based on the testimony of multiple fact witnesses, employees, and Petitioner's retail security expert, Stephen Melia. In the district court, Shaw's never challenged Melia's testimony pursuant to Rule 702. Therefore, the district court never performed the gatekeeping function mandated by *Daubert* and *Kumho*. In affirming, the First Circuit committed a serious and immensely consequential error, which must be corrected by this Court.

Always adorned in suspicious, baggy clothing that included combat boots, backpack, and a "hoodie," MacCalister visited Shaw's almost daily. 37a. She often did not appear to be engaged in a normal shopping pattern. 37a. Her frightening appearance and deviant behavior stood out to employees and customers alike. 35a-42a. MacCalister was precisely the kind of customer that retail management and loss prevention are trained to continuously monitor. 79a. Loss prevention is a technical field that involves the kind of training and expertise contemplated by Fed. R. Evid. 702. 79a. The field literally entails watching suspicious behavior. The purpose of loss

prevention and retail security is not only to prevent the loss of retail by theft, but also to keep customers and employees safe. 79a.

There was no dispute in the summary judgment record that former Shaw's manager John DeRoche called the police on MacCalister and had her banned from the store. 34a, 36a. Customers complained that MacCalister was scaring them. In DeRoche's own words, it "was like something out of scary movie." 75a.

Further undisputed in the record below, three separate Shaw's customers testified that MacCalister had stalked them around the store in the days leading up to the murder. One such customer indisputably reported concerns about Macalister to a cashier. 85a. Respondent conceded that this employee's knowledge was imputed to Shaw's for purposes of the duty analysis. 35a.

Pursuant to Fed. R. Evid. 701, none of the employee witnesses Shaw's relied on in moving for summary judgment were designated or qualified to provide an expert witness opinion about the foreseeability of harm to another customer based on MacCalister's behavior. Instead, under Fed. R. Evid. 702, Petitioner and Respondent both designated retail security/loss prevention experts before the trial court. Their competing expert opinions should have been vetted by a jury. The facts on which Petitioner's expert witness based his opinion are summarized below.

STATEMENT OF THE CASE

A. Fact Witnesses Under Fed. R. Evid. 701

Police arrested MacCalister at the scene of the crime and she confessed to premeditated murder. 11a. MacCalister admitted that she entered Shaw's and

walked around "looking for someone old who wouldn't be able to fight back." 25a. She chose Mrs. Boudreau at random after spotting her alone in the ice cream aisle. MacCalister turned down the aisle and waited, watching her victim. She had been contemplating stabbing someone on North Street in Saco, but she saw an opportunity inside Shaw's because Mrs. Boudreau was "in the open with no one around." 11a. MacCalister opened her knife in her pocket, grabbed Mrs. Boudreau around the neck, and slit her throat. 11a. Mrs. Boudreau fought back. A struggle ensued before store personnel and customers ran to the scene in response to Mrs. Boudreau's screams. 11a.

i. The Day of the Murder

In opposition to summary judgment, Petitioner introduced video footage and still photographs, which retail security expert Stephen Melia also reviewed prior to rendering his opinion.[1] 63a. The footage included MacCalister visiting the store earlier on the day of the murder around noon. 68a. She marched through the store erratically wearing sunglasses, with long sleeves and baggy, camouflaged clothing despite the hot August weather. 68a. She walked throughout the store with neither cart nor basket, purchasing only a few items. 10a, 68a. After the checkout, MacCalister sat down on the ground directly outside the automatic door sensor for several minutes, blocking customer traffic. 69a. This deviant behavior should have

[1] Before the district court, Petitioner brought a Rule 37 motion for sanctions related to spoliation of video footage showing MacCalister's behavior in the 30 days leading up to the murder. The video footage destroyed by Shaw's likely contained critical evidence related to MacCalister stalking witnesses throughout the store just prior to the murder. However, given the abuse of discretion standard of review on this issue before the First Circuit, the questions presented in this Petition do not include spoliation of evidence.

caught Shaw's' attention and prompted an interaction with front-end employees. 69a – 70a.

When MacCalister returned to Shaw's around 3pm on the day of the murder, she crossed paths with two City of Saco EMTs, who encountered MacCalister separately while shopping. 64a-66a. Still photos showed each EMT near MacCalister as she marched through the back of the store. 64a-66a. The still photos also showed more than one store employee near MacCalister as she walked around with a determined gait, scoping out her victim. 65a-67a. The EMTs acknowledged that MacCalister's overall demeanor and presentation was "different." 65a. They exchanged words about MacCalister being a "nut ball" or "crazy."[2] MacCalister caught their eye because she was pacing like she was in a hurry or looking for something. 11a. Again, she had neither a cart nor a basket. 64a.

Immediately after the attack began, Shaw's employee Alexandra Gogos ran to Mrs. Boudreau's aid. 75a. Gogos testified that she heard from "many different" employees after the murder that MacCalister was considered creepy and rumored to steal. 75a.

Shaw's customer Thomas Wright was shopping in the next aisle at the time of the murder. He immediately recognized MacCalister when he saw the gruesome scene. MacCalister had the same scary, angry look on her face as always. She was dressed in military fatigues on a hot August day. 37a-38a. Wright occasionally rode

[2] This fact was cited in the record below at ECF No. 84, PageID # 1337.

the bus with MacCalister in Saco. 38a. He did not want to sit near MacCalister because she looked angry, hateful, and like something was wrong with her.

ii. Lay Witness Testimony from Store Employees

As a customer of Shaw's, MacCalister was known to multiple employees for looking "suspicious." 75a. She always displayed attributes that are a "red flag" for retail security, like carrying a backpack, wearing sunglasses, and sporting baggy clothes or a large coat out of season. 37a, 68a, 83a. The record below established that employees and customers knew MacCalister to be strange, weird, creepy, scary, "F-ing crazy," a "psycho," "intense," and "angry." 42a. MacCalister's angry, shocking appearance (dark black makeup, combat boots, bulging eyes, shaved head, and Nazi/Swastika tattoos) was depicted in the record below. 37a.

Shaw's employee Michelle Schaffer testified that MacCalister made her uncomfortable and others may have found her "threatening." 38a-39a. Schaffer thought it was natural to be more on guard around MacCalister, who would sometimes be shaking or "on something" when she shopped. Before the murder, people told Schaffer that MacCalister "steals" from the health/beauty and liquor aisles. 39a. Schaffer never followed MacCalister because she "never wanted to." 75a.

Former store manager John DeRoche was trained to watch for customers with backpacks and baggy clothing that is not appropriate for the weather. 68a. DeRoche testified that Shaw's often has customers that are suspected of shoplifting. Even if such customers are not actually caught in the act, store personnel (including loss prevention) should keep watching. 19a.

The first time DeRoche saw MacCalister, he was "a little shocked" based on her shaved head, "really baggy clothes, like the baggiest I've ever seen on anybody, chain down on her side." 75a. DeRoche specifically asked loss prevention to watch MacCalister because she looked suspicious to him. 4a,75a. Loss prevention admitted they had already been watching MacCalister. 5a. When DeRoche called the police in 2011 to report that MacCalister was "acting very strange," at least two customers had told him she scared them. 4a, 75a-76a. In response, DeRoche called the police and asked them to remove MacCalister from the premises. *Id.* She was standing next to an ashtray blowing smoke rings toward customers with a hoodie up over her head "kind of cover[ing] her face." 4a. DeRoche said: "It looked like something out of a scary movie. . . this figure, all dark." 4a. The police told DeRoche, "we've had interactions with her before." 4a. More than a year later, DeRoche let MacCalister back in the store, but told her not to cause any problems. 4a. He knew MacCalister was "someone we want to keep an eye on" and asked loss prevention to watch her. 76a. DeRoche knew that other employees thought MacCalister was frightening or "creepy."[3]

Store manager Bryan Goodrich testified that his job was to observe the sales floor, looking up constantly to greet customers. 80a. Eighty percent of a manager's shift time at Shaw's should be spent on the floor, providing customer service. 80a. However, Goodrich did not recognize MacCalister at the time of the murder even though she was in the store almost daily. 85a. Managers also look for indications that a customer might pose a safety risk. 80a. These indications include loitering around

[3] This fact was cited in the record below at ECF No. 84, PageID # 1327.

the store, not shopping in a typical pattern with a cart or basket, or simply "looking suspicious." 81a. Assistant store manager Adam Veno was new to the job at the time of the murder, but he acknowledged that a customer wearing heavy or hot clothing on a summer day stands out. 79a. Store management is responsible for making sure that they are on the floor, watching and engaging with customers. 79a. In the six weeks before Mrs. Boudreau's murder, Veno never observed MacCalister. 79a.

Shaw's has a policy stating that shoplifters "can create a serious risk for customers and associates of the Company." 19a. Shoplifters may be armed, under the influence of drugs, violent, or pose other risks. 19a. Safety is the "top priority" in any shoplifting situation, and the "best and safest form" of shoplifting prevention is **customer service**." Shaw's employees are trained to: (1) Greet customers; (2) Be visible; (3) Offer assistance to customers; and (4) Stay on the sales floor as much as possible while on the clock. Employees should greet "every customer both inside and outside the store," and also "offer them a cart or basket if they do not have one." *Id.*[4]

The first bullet point of Shaw's' mission statement is: "Providing our customers with a safe, secure and hospitable shopping environment." 81a. The mission is achieved through encouraging "awareness" and "involvement" by "each associate" in preventing losses. *Id.* Shaw's also ensures the "physical security of our stores," by being "prepared to handle all emergencies." *Id.* The loss prevention manual describes the dress and mannerisms of shoplifters, which "should cause associates to notify Store Management or Loss Prevention." These items include: Persons wearing loose

[4] *See also* multiple citations in the record below at ECF No. 84, PageID # 1329, 1362, and 1395.

or baggy clothing; persons with backpacks; customers wearing clothing which doesn't match the weather, such as heavy coats on hot days; customers who linger near exits and in odd places for no apparent reason. 19a.

The loss prevention manual emphasizes deviant behavior, defined as: "behavior which is different from the accepted norm of society." When a Shaw's associate encounters deviant behavior in the store, the "primary objective of Loss Prevention is to protect and safeguard the associate or customer." 77a. Shaw's loss prevention specialists are instructed to drive around the parking lot and store area when arriving at work to look for suspicious activity.[5]

Inside the store, loss prevention specialists are expected to contact a member of store management if they observe the kind of "unusual or suspicious activity" described above, or those "lingering around high-ticket items who do not have a hand basket, carriage or anything in their hands." Other red flags include customers who appear to be "on a mission," walking at a fast pace, or those "who are not following routine shopping patterns or habits." 83a.

Shaw's' loss prevention team admittedly watched MacCalister before and after she was banned from the store in 2011. 4a, 5a, 82a. For inexplicable reasons, loss prevention claimed to stop monitoring her after 2014. 5a, 36a. Nonetheless, Warren McCourt admitted that it is typical for suspected shoplifters to not get caught stealing; this does not mean that loss prevention stops watching. 19a. In violation of company policy, district loss prevention manager Rick DesFosses was never notified

[5] This fact was part of the record below at ECF No. 84, PageID # 1346.

that MacCalister had been banned from the Saco store in 2011. 82a. DesFosses agreed that loss prevention should watch closely and monitor customer behavior that creates a disturbance. Behavioral observations are important to the job of loss prevention. 83a.

Loss prevention is trained to look for "deviant" behavior. 83a. DesFosses agreed that people who are hanging around the store but do not appear to be engaged in a normal shopping pattern are a red flag for loss prevention that warrants close scrutiny. 83a. Even for management who are not in loss prevention, customer service is the best deterrent because, "if you're not a thief, you're happy to have somebody helping you out." 83a. Shaw's management is familiar with the directive to go "customer service" a shopper who seems suspicious. 83a. Supervisory employees are always present in the front end of the store for this very reason. 84a.

iii. Lay Witness Testimony from Other Customers

In the two weeks leading up to the murder, MacCalister stalked three separate female customers around Mrs. Boudreau's age through Shaw's: Debra Surran, Katherine Corriveau, and Cindy Belanger. 20a, 43a, 44a. Surran testified that MacCalister was following her through each aisle but did not appear to be shopping. Surran was pushing a cart around the store and MacCalister would "just show up like a ghost," "standing there" at the end of each aisle, staring at Surran. 8a. MacCalister then appeared in the checkout line behind Surran, with a "darkness" to her angry expression. MacCalister appeared "crazed." The encounter was "very scary" and Surran sensed MacCalister was getting ready to hurt someone. The hair on the

back of her neck stood up and she instinctively knew not to let MacCalister get close. Surran became so upset talking about the event at deposition that she began to cry.

The checkout cashier during this encounter was Michelle Lavoie. Surran whispered to Lavoie there was something wrong with MacCalister. 8a. When Lavoie ignored her concerns, Surran said it again. 85a. She boxed herself in with a grocery cart to create distance between her and MacCalister, who glared at Surran "like she really wanted to hurt me." 85a. Sensing she was in danger, Surran came up with a plan to "ram" MacCalister with her cart to defend an attack.[6] Surran interpreted CM's behavior as "hostile," threatening, and dangerous. She feared for her own safety (40a), an instinct that turned out to be correct. Several weeks after this encounter, MacCalister murdered Mrs. Boudreau.

To avoid MacCalister attacking her outside, Surran waited in the front of the store with her groceries until MacCalister was long gone. 40a. She waited for five or six minutes without any employee noticing or providing customer service. Lavoie blew off Surran's two complaints about MacCalister, saying: "she's fine, she's in here all the time." 8a. Nevertheless, Lavoie testified that she knew Surran "wasn't thrilled" with MacCalister. 8a-9a. Respondent conceded during oral argument that Lavoie's knowledge was imputed to Shaw's for purposes of the duty analysis. 35a.

Katherine Corriveau encountered MacCalister in the very ice cream aisle where the murder occurred just a couple weeks later. 9a. Corriveau was a regular Shaw's customer who recognized MacCalister's military fatigues, purposeful gait,

[6] Surran's testimony was cited in the record below at ECF No. 84, PageID# 1340, among other places.

angry expression, and clenched jaw. On the day in question, Corriveau rode her bike past MacCalister, who followed Corriveau into the store. 9a. Corriveau had a "gut feeling" that MacCalister was following her. 9a. Five minutes later, MacCalister was standing by Corriveau in the ice cream aisle with neither basket nor cart. 9a. Corriveau was convinced she was being followed. 43a. She moved clear across the store to the produce section, breaking the up and down the aisle shopping pattern. MacCalister followed yet again, confirming Corriveau's suspicions.

Cindy Belanger's frightening encounter with MacCalister occurred in the checkout line. 84a. Belanger saw MacCalister hanging out with a group of "thugs" in the front of the store, several aisles away. 84a. MacCalister noticed Belanger and lunged at her, screaming "RAH" in a threatening manner. 10a. MacCalister was standing toward the other end of the store during the encounter, but Belanger could still see MacCalister because "it's not that big of a store." They were close enough that the encounter scared Belanger. She described MacCalister's behavior as: "you know, if you wanted to try to scare somebody, you would have done that." Belanger testified that MacCalister's lunging and yelling was noticeable enough that other people in line saw it and reacted. MacCalister's behavior was "very scary" and Belanger "definitely took it as a threat." *Id.* Multiple front-end Shaw's employees were standing between Belanger and MacCalister while this happened.

The summary judgment record included affidavits from other community members. Steven Boucouvalas is a retired City of Saco dispatcher. 35a, 70a-71a. He received calls about MacCalister's behavior on an almost daily basis. 70a. Concerned

citizens described MacCalister as a "psycho" who would pretend to shoot at people and engage in other bizarre behavior. Boucouvalas also received calls from Shaw's employees who reported that MacCalister had returned to the store after being banned. 36a. Shaw's did not make a record of these calls, but that was also true when John DeRoche had MacCalister banned from the store in 2011. 70a.

A Saco resident who lived very close to Shaw's, Mark Anderberg, testified that MacCalister walked by his house every day on her way to Shaw's. 71a. She behaved in a bizarre, repetitive manner that concerned Anderberg, taking about five paces and then getting down on one knee as she walked along the street right outside Shaw's. 71a. As set forth below, Petitioner's expert witness, Stephen Melia, took into account the observations and experiences of numerous store employees, customers, and other lay witnesses in rendering his opinion regarding foreseeability. 76a.

B. Petitioner's Unchallenged Expert Opinion Under Rule 702

In opposition to summary judgment below, Petitioner offered the Rule 702 expert witness opinion of a retail security and loss prevention expert with thirty years of relevant experience working at Walmart Stores, Inc. Fed. R. Evid. 702. Stephen Melia's affidavit has been submitted along with this Petition at Appendix E. 59a-86a. In Melia's deposition as well as Appendix E, he opined that it was reasonably foreseeable to Shaw's that MacCalister[7] posed a threat to other customers like Mrs. Boudreau.[8] 86a.

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[7] Throughout Appendix E, Connor MacCalister's name was abbreviated to "CM." Petitioner has used the name "MacCalister" as did the district court and First Circuit.

[8] Before the district court, Melia's deposition was provided at ECF No. 56-17. At page 17, he specifically testified it was foreseeable that MacCalister posed a threat to customers.

The Shaw's employees, customers, and witnesses discussed above provided lay testimony in this case under Fed. R. Evid. 701. Shaw's never designated its employees, managers, or loss prevention as experts. Therefore, these employees cannot offer an opinion on the foreseeability of harm from a retail security standpoint; neither could the trial court.

By contrast, Melia's testimony demonstrated that he was qualified by "knowledge, skill, experience, training, or education" under Rule 702 to provide an expert opinion about the field of loss prevention and retail security. 59a-86a. Under Fed. R. Evid. 703, Melia's opinion could be based on facts and information provided to him, not necessarily his own personal observations. 59a.

Melia opined that the harm to Mrs. Boudreau was foreseeable and preventable through deterrence methods common in the retail security industry. 69a. Although foreseeability was the "ultimate issue" on the question of duty, Fed R. Evid. 704 no longer makes that kind of expert opinion inadmissible. The same was true for Respondent's retail security expert, Jon Groussman. The competing expert opinion offered by Groussman is not reviewed in this Petition because it consisted of material disputed facts, precluding summary judgment.

In Melia's opinion, Shaw's knew that MacCalister was a foreseeable threat to customers in 2011; that is why DeRoche banned her from the premises. When MacCalister later returned to the store, employees noticed her bizarre, uncomfortable, threatening behavior. Employees recognized that MacCalister was a "red flag," and in the exercise of due care Shaw's should have banned her again.

Instead, Shaw's failed to closely observe and remove MacCalister from the store after 2011, despite ongoing deviant behavior. 85a-86a. Shaw's failed to provide reasonably safe premises for customers to shop. As acknowledged by the court below, employees felt so uncomfortable and threatened by MacCalister that they called the police after she returned from being banned. 36a, 71a. In Melia's opinion, based on the extensive testimony of customers and witnesses, any reasonable retail employee or loss prevention officer would have known that MacCalister continued to pose a threat to customers shopping in the store. 77a.

MacCalister would likely have been deterred from murdering Mrs. Boudreau on the premises if Shaw's had initiated more customer service interaction with her. 76a. In Melia's opinion, these additional interactions are standard in the retail security industry to provide a deterrence. 77a. Customer service interactions are specifically required by Shaw's' own loss prevention policies. Melia testified that Shaw's employees likely did not interact with MacCalister more often because of her frightening appearance and demeanor. These attributes should have increased, not decreased, the number of interactions initiated by store employees.

The First Circuit affirmed the district court's finding that this case was not about shoplifting. However, that conclusion overrode Melia's expert opinion about standards in his industry for detecting and monitoring those who are likely to commit crimes in a retail establishment. Ultimately, suspected shoplifters must be monitored not only for stealing product, but for their willingness to engage in aberrant criminal behavior, including shoplifting. The court below overlooked the specialized, technical

expertise of loss prevention and retail security—fields in which the experts know that the best deterrent to criminal activity in the retail environment is consistent and intentional customer service. 69a.

In Melia's expert opinion, a loss prevention officer does not cease monitoring a "red flag" customer with MacCalister's suspicious attributes simply because the customer has not yet been caught stealing. 74a-76a. On the contrary, loss prevention should continue watching a suspicious customer. Those suspected of shoplifting pose a threat of violence above and beyond the average customer. The loss prevention policy at Shaw's echoed this point, and the record was undisputed about MacCalister's rumored propensity for stealing.

In Melia's professional experience, both violent and non-violent criminals want to avoid being noticed if their intent is to commit a crime. 77a. Safety and security threats are minimized when a retail establishment closely monitors shoppers with deviant behavior or appearance (baggy clothes, dressing out of season, backpack, sunglasses). 77a-78a. Approaching these customers and providing customer service deters crime. Conversely, in Melia's expertise, a retail establishment does not meet its standard duty of reasonable care by taking a "no contact" approach to suspicious customers like MacCalister.

Further, Shaw's ignored not one but two direct customer complaints by Surran to cashier Michelle Lavoie about MacCalister. 85a. In the trial court, Respondent acknowledged that Lavoie's knowledge was imputed to Shaw's, providing ample evidence of foreseeability. 35a. In addition to the role of loss prevention, front end

employees and managers are expected to observe customers throughout the store and report "all unsafe conditions to store management and the security supervisor." 86a. Based on Melia's industry expertise, MacCalister presented a safety hazard every time she was in the store, which Shaw's ignored. 86a. On summary judgment, there was no dispute that Lavoie knew a customer was concerned and complained about MacCalister, yet she did nothing. 35a, 86a.

Regarding the stalking incidents experienced by Cindy Belanger and Katie Corriveau, Melia opined that Shaw's employees should have seen the same behavior in the exercise of reasonable care. 78a-80a. Instead, Shaw's took an ostrich approach and ignored MacCalister's obvious, deviant, "red flag" behavior.

In Melia's opinion, MacCalister's own confession established that Shaw's provided her with a retail environment where no one was watching her behavior in the store. She therefore chose Shaw's as the perfect location to murder Mrs. Boudreau. 69a-71a.

Based on the video and still photos from the day of the murder, Melia opined that MacCalister's bizarre behavior at noontime was similar to the conduct that got her banned from the store in 2011. 69a. A manager or front-end employee should have approached MacCalister to ask why she was loitering bizarrely at the entrance, sitting on the ground blocking customer traffic. This is the kind of opportunity to interact with MacCalister that Shaw's employees could have taken on a regular basis, which likely would have deterred her from murdering Mrs. Boudreau.

The Saco EMTs who saw MacCalister just moments before the murder had enough time to notice MacCalister and discuss amongst themselves that she was "crazy" or a "nut ball." Nearby, a Shaw's employee also encountered MacCalister and had the same opportunity to observe her. 65a. In Melia's professional experience, because MacCalister was in the store for at least 15 minutes prior to the murder, multiple Shaw's employees had ample time to notice, approach, and deter her.

Based on Melia's entire review of this case, it appears as though Shaw's did not interact with MacCalister because employees were just as frightened of MacCalister as the customers. 85a-87a. Employee Michelle Schaffer admitted that she "never wanted to" interact with MacCalister. 75a-77a. In Melia's opinion, strong evidence of foreseeability exists whenever the employees of a retail establishment are fearful of interacting with a customer.

On the issue of what Shaw's should have known or anticipated, Melia considered the dearth of interactions between MacCalister and store management in the year leading up to the murder. 77a-86a. In Melia's opinion, this evidence strongly supports rather than detracts from Petitioner's foreseeability argument. It is highly unusual and negligent for a store manager to avoid getting to know a customer who had previously been banned from the store for scaring customers. 84a-86a. This is all the more true for a customer who had repeated calls to the police,[9] who marched

[9] Melia based his opinion in part on the affidavit of former Saco dispatcher Steven Boucouvalas, who received daily calls about MacCalister's behavior, sometimes while she shopped at Shaw's. Based on Melia's training and expertise, retail customers and employees do not typically call the police simply because of the way someone is dressed, even a woman dressed like a man or in military fatigues. The observable behavior that would prompt a customer or employee to call the police typically rises to the level of frightening or threatening, not simply "weird" looking.

around bizarrely with a "shocking," angry expression, and who continuously engaged in observably deviant shopping behavior that loss prevention is trained to recognize. 77a-86a. Indeed, MacCalister engaged in her bizarre, abnormal shopping routine not once but twice the day she murdered Mrs. Boudreau.

In Melia's opinion, the foregoing attributes were all consistent with the reason why Shaw's banned MacCalister from the premises back in 2011. She was scary and objectively appeared dangerous. MacCalister's behavior made employees and customers feel threatened. Nothing changed after 2011. Right up to the time of the murder, MacCalister continued to act and look – in the words of former manager John DeRoche – "like something out of a scary movie." The only reasonable inference to be drawn from DeRoche's statement is that "something out of a scary movie" has the potential for harm or violence. Melia drew that reasonable inference, ultimately concluding that it was reasonably foreseeable MacCalister would harm a customer. Respondent never challenged the admissibility of Melia's testimony on this point. Accordingly, both the district court and the First Circuit erred in bypassing Melia's trained opinion on the issue of foreseeability.

C. Procedural History

Respondent moved for summary judgment on Petitioner's wrongful death and negligent security case. 24a. Jurisdiction was based on diversity of citizenship. 24a, n.2; 13a. In opposition to summary judgment, Petitioner also brought a motion for sanctions for spoliation of evidence. 24a-26a. The district court denied the motion for sanctions (24a-32a) and granted Respondent's motion for summary judgment. 33a-

55a. This Petition does not challenge the First Circuit or the district court's decision regarding the Rule 37 motion for sanctions.

The district court denied summary judgment by concluding that: "[w]hat Shaw's knew, should have known, or should reasonably have anticipated did not suggest that on August 19, 2015 MacCalister was a danger to other customers." 53a-54a. In so concluding, the district court found that Plaintiff's proffered expert was limited to shoplifting policies, and murder "was not within the scope of risk that Shaw's shoplifting policies were concerned with." 54a, n. 27. However, Melia's expert opinion was not so limited. Without any of the gatekeeping functions required by Rule 702 concerning Melia's opinion – indeed, without Shaw's challenging the admissibility of his opinion at all – the district court found it was not relevant. *Id.*

Petitioner filed a timely appeal to the First Circuit (13a), which affirmed the district court's judgment. 2a. The First Circuit, like the district court below, found that Shaw's did not owe Mrs. Boudreau a duty of care because the attack by MacCalister was not foreseeable. 2a.

Petitioner requested rehearing en banc of the First Circuit's decision on the questions of whether: (1) the duty analysis in a negligence action under Maine law is a pure question of law, or a mixed question of law and fact; and (2) the question of what is reasonably foreseeable in the context of a duty giving rise to premises liability under Maine law is one of fact for a jury to decide. *See* Case No. 19-1754, Doc No. 00117581495, p. 5. The Petition for Rehearing also pointed out that no Maine case had ever resolved the issue of reasonableness in the context of competing expert

opinions (p. 9-10), especially when the factual issue of foreseeability is the subject of expert testimony that was never challenged under Rule 702. *Id.* p. 17.

The First Circuit denied rehearing on May 19, 2020, with Torruella, Circuit Judge, dissenting. Appendix C, 56a.

REASONS FOR GRANTING THE PETITION

This case is an ideal vehicle for correcting the First Circuit's error in interpreting the gatekeeping function required by Rule 702, as set forth in *Daubert* and *Kumho*. The questions presented are of exceptional importance because Petitioner had a constitutional right to have all questions of fact decided by a jury below. This Court should exercise its supervisory authority to resolve whether the trial court had discretion to exclude expert testimony in the form of technical expertise, which would have assisted the trier of fact to evaluate foreseeability in the retail security setting.

Petitioner does not ask this Court to correct a fact-bound error that was wrongly decided on summary judgment; nor does Petitioner seek correction of an erroneous rule of state law regarding the legal duty of care owed to business invitees. Instead, this Court should correct the First Circuit's significant and consequential error on two points: (1) foreseeability is a question of fact for a jury to decide, and therefore the proper subject of expert testimony; and (2) an expert opinion regarding foreseeability in the retail security context is admissible under Rules 702, 703, and 704 of the Federal Rules of Evidence.

The court below correctly recited the duty of care owed in a case like this: "Duty involves the question of 'whether the defendant is under any obligation for the benefit of the particular plaintiff.'" *Trusiani v. Cumberland & York Distribs., Inc.*, 538 A.2d 258, 261 (Me. 1988). If a legal duty exists, it is always the same: "to conform to the legal standard of reasonable conduct in light of the apparent risk." *Id.* (citing W. P. Keeton, *Prosser and Keeton on Torts* § 53 at 359 (5th ed. 1984)).

The renowned common-law test of duty expressed by Chief Judge Cardozo states as follows: "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension." *Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 100 (N.Y. 1928). Maine law echoes the *Palsgraf* test, stating that: the "risk reasonably to be perceived within the range of apprehension delineates the duty to be performed and the scope thereof." *Brewer v. Roosevelt Motor Lodge*, 295 A.2d 647, 651-52 (Me. 1972). Hence, the existence of a duty to be performed is a threshold legal question distinct from the scope of that duty. The second part of the duty analysis necessarily involves factual questions of reasonableness and foreseeability.

The existence of a duty on the part of a business or retail establishment to "guard [patrons] not only against dangers of which he has actual knowledge but also against those which he should reasonably anticipate" has long been clear in Maine and beyond. *Id.* Maine law is also clear that duty is a "mixed question of law and fact," with the "facts in any given case" determining whether a duty is owed. *Brown v. Delta Tau Delta*, 118 A.3d 789, 791 (Me. 2015). Accordingly, a jury should decide premises

liability when the issue of foreseeability involves competing inferences, credibility of witnesses, or circumstantial evidence. *Id.* (acknowledging that a duty existed but sounded in premises liability).

Because Mrs. Boudreau was a business invitee, Shaw's owed her a duty of care to provide "reasonably safe premises." *Budzko v. One City Center Assoc., Ltd.*, 2001 ME 37, ¶ 10, 767 A.2d 310, 313-14. Given the black letter law of Maine, Shaw's undeniably owes its patrons a duty to protect "against not only known dangers but also those which it 'should reasonably anticipate.'" *Kaechele v. Kenyon Oil Co.*, 747 A.2d 167, 170 (Me. 2000). Because Shaw's had a "duty to act reasonably to protect its patrons, the touchstone of liability" in this case was a question of fact: Whether Shaw's was on notice of risk, "both general and specific, and the exercise, or lack thereof, of reasonable care." *Id.* at 171.

Based on lay and expert witness testimony and related inferences, a jury could have concluded that Shaw's had constructive knowledge of MacCalister posing a threat to customers. Beyond constructive knowledge, the court below recognized that Shaw's had *actual*, imputed knowledge from a cashier that a customer complained about MacCalister just weeks before the murder. At the very least, Petitioner proved a history of Shaw's believing that MacCalister should not be present in the store because she scared customers. That notice is all Plaintiff needed to establish to survive summary judgment. *See Currier v. Toys 'R' Us*, 680 A.2d 453, 455 (Me. 1996). Under Maine law, a "business owner 'who is aware of the existence of a recurrent condition that poses a potential danger to invitees may not ignore that knowledge

and fail reasonably to respond to the foreseeable danger of the likelihood of a recurrence of the condition." *Dumont v. Shaw's Supermarkets, Inc.*,664 A.2d 846, 848-49 (Me. 1995).

Foreseeability is a question of fact for the jury to decide, and therefore the expert testimony proffered by Petitioner would have been helpful to the trier of fact in this case. *See* Fed. R. Evid. 702. Melia's opinion was admissible even though it relied on the personal observations of lay witnesses and employees. *See* Fed. R. Evid. 703. Finally, Melia's opinion was admissible notwithstanding his conclusion on an "ultimate issue" in the case. *See* Fed. R. Evid. 704. The First Circuit disregarded Melia's expert opinion and failed to determine whether it was reliable and therefore admissible under Rule 702, committing a critical error that this Court must correct.

A. THIS COURT SHOULD GRANT CERTIORARI AS AN EXERCISE OF ITS SUPERVISORY POWER TO CLARIFY AND RESOLVE THAT FORESEEABILITY IS A QUESTION OF FACT FOR A JURY TO DECIDE, AND THEREFORE THE PROPER SUBJECT OF EXPERT OPINION TESTIMONY

i. Foreseeability

On appeal, the First Circuit agreed with the district court's decision below on the issue of duty: "Maine's law of premises liability is clear that the harm must have been foreseeable." 15a. This issue, however, was not in dispute below. Instead, Petitioner argued that *some harm* to Mrs. Boudreau was reasonably foreseeable based on the facts presented as well as the expert witness opinion proffered in opposition to summary judgment. Initially, duty is a question of law. However, the

scope of the duty is factual and depends on the "totality of the circumstances." *Pelletier v. Fort Kent Golf Club*, 662 A.2d 220, 221-222 (Me. 1995).

The First Circuit concluded that MacCalister's attack on Mrs. Boudreau was not foreseeable, but the exact kind of harm suffered by plaintiff need not be foreseeable. *See, e.g., Brewer v. Roosevelt Motor Lodge*, 295 A.2d 647, 651-52 (Me. 1972). *Kaechele v. Kenyon Oil Co.*, 747 A.2d 167, 171 (Me. 2000); *Merriam v. Wanger*, 757 A.2d 778 (Me. 2000); *Schultz v. Gould Academy*, 332 A.2d 368, 371 (Me. 1975). For the First Circuit's decision to be correct, it must have found that MacCalister posed no foreseeable threat of harm at Shaw's whatsoever. If that were true, why was she banned from the store for over a year after scaring customers?

State and Federal courts across this country routinely recognize that the question of whether "a particular injury was a foreseeable consequence of some particular conduct" is a "factual determination." *Cameron v. Pepin*, 610 A.2d 279, 282 (Me. 1992).[10] Indeed, the Restatement (Third) of Torts addresses the issue squarely: "A lack of foreseeable risk in a specific case may be a basis for a no-breach determination, but such a ruling is not a no-duty determination. Rather, it is a determination that no reasonable person could find that the defendant has breached

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[10] *See also Greer v. Kaminkow*, 401 F. Supp. 3d 762, 776 (E.D. Ky. 2019) ("[T]he foreseeability of the risk of harm should be a question normally left to the jury under the breach analysis."); *Munn v. Hotchkiss Sch.*, 24 F. Supp. 3d 155, 170 (D. Conn. 2014) ("Whether a duty exists is a question of law, but the scope of that duty and whether the defendant acted as "a reasonable person would have done under the circumstances is a question to be determined by the trier of fact."); *Aegis Ins. Servs. V. 7 World Trade Co., L.P.*, 737 F.3d 166, 178 (2d Cir. 2013) ("Foreseeability, alone, does not define duty—it merely determines the scope of the duty once it is determined to exist."). *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 784 N.W. 2d 907, 914 (Neb. 2010); *Ileto v. Glock*, 349 F.3d 1191, 1204 (9th Cir. 2003) ("Although whether a duty exists is a question of law, foreseeability often is a question left for the jury to decide.");. *Fund v. Hotel Lenox*, 635 N.E.2d 1189, 1190 (Mass. 1994); *Gould v. Taco Bell*, 722 P.2d 511, 513–14 (Kan. 1986).

the duty of reasonable care." Restatement (Third) of Torts: Phys. & Emot. Harm, § 7, cmt. j (Am. Law. Inst. 2010).

The instant case is a dangerous departure from the First Circuit's previous precedent, which held that a jury should decide foreseeability. *Coyne v. Taber Partners I*, 53 F.3d 454, 459 (1st Cir. 1995). In *Coyne*, the First Circuit reversed a grant of summary judgment because the violent attack at issue was foreseeable, and a security consultant expert's affidavit was "potentially significant." *Id.* at 461. Addressing whether a propensity for violence made the plaintiff's harm foreseeable, this Court cited "the lack of adequately trained security personnel" as supporting a finding of foreseeability. *Id.* at 459. The same is true here, because Shaw's security and management employees demonstrated woefully inadequate knowledge, experience, and interaction with MacCalister despite her being a daily fixture in the store. More importantly, the experts should opine on this issue rather than the arguments of counsel and conclusions of the court.

A "tri-cornered combination of affinity, knowledge, and control, rather than a one-dimensional location test," is the "key to determining whether a duty to provide security exists." *Id.* Issues like past knowledge, control, and the general likelihood of violence were "sufficient to trigger a legally enforceable duty." *Id.* Stated differently, "If a dog has vicious propensities, even the first bite may well be foreseeable. It is no defense to allege that the precise course or the full extent of the consequences could not be foreseen." *Id.* at 461.

The First Circuit's decision in this case also conflicted directly with *Mu v. Omni Hotels Mgmt. Corp.*, 882 F.3d 1 (1st Cir. 2018). In *Mu*, even without a "past occurrence" of violence, the sequence of events leading up to the attack made the harm foreseeable. *Id.* at 9-10. By contrast, when a hotel patron claimed negligence after suffering a bite from a rabid mongoose, which had never been seen on the premises before, the First Circuit affirmed the finding that the attack was truly unforeseeable. *See Woods–Leber v. Hyatt Hotels of P.R., Inc.,* 124 F.3d 47 (1st Cir. 1997).

The Eighth Circuit has grappled with the question presented herein, describing the duty/foreseeability dichotomy as an "important threshold question: Who decides whether a risk of injury was foreseeable in a negligence action, the judge or a jury?" *Scott v. Dyno Nobel, Inc.*, 967 F.3d 741, 745 (8th Cir. 2020). Like the district court below, the trial court in *Scott* had treated foreseeability as "a question of law and decided the issue on summary judgment." *Id.* However, the Eighth Circuit noted that such an approach "places a court 'in the peculiar position of deciding questions, as a matter of law, that are uniquely rooted in the facts and circumstances of a particular case and in the reasonability of the defendant's response to those facts and circumstances." *Id.*

The court reviewed the approach taken by other jurisdictions to this issue, noting that "even among jurisdictions that consider foreseeability in determining duty, some provide that foreseeability is to be decided by a jury." *Id.* at 746 (citing W. Jonathan Cardi, *The Hidden Legacy of Palsgraf; Modern Duty Law in Microcosm*, 91

B.U.L. Rev. 1873, 1900-13 (2011)). Ultimately, *Scott* concluded that the question of foreseeability "is subject to varying inferences and is therefore an issue for a jury." *Id.* at 747. The First Circuit should have reached the same conclusion in the instant case.

This Court has also weighed in on the issue of foreseeability in the FELA context, explaining that:

> "[R]easonable foreseeability of harm," we clarified in *Gallick*, is indeed "an essential ingredient of [FELA] *negligence*." The jury, therefore, must be asked, initially: Did the carrier "fai[l] to observe that degree of care which people of ordinary prudence and sagacity would use under the same or similar circumstances[?]" In that regard, the jury may be told that "[the railroad's] duties are measured by what is reasonably foreseeable under like circumstances." Thus, "[i]f a person has no reasonable ground to anticipate that a particular condition . . . would or might result in a mishap and injury, then the party is not required to do anything to correct [the] condition."

CSX Transp., Inc. v. McBride, 564 U.S. 685, 703 (2011).

ii. Reasonableness

Like foreseeability, the First Circuit has held that reasonableness is ordinarily a question of fact for a jury to decide. *See Rodi v. Southern New England School of Law*, 532 F.3d 11, 15 (1st Cir. 2008); *Keeler v. Hewitt*, 697 F.2d 8, 12 (1st Cir. 1982). In the employment law context, the court recently held that reasonableness should be submitted to a jury instead of decided by the district court on summary judgment. *Roy v. Correct Care Solutions, LLC*, 914 F.3d 52, 69 (1st Cir. 2019). In *Roy*, there was "no doubt that a jury could find that [a coworker] calling [the plaintiff] a 'bitch' was connected to her sex." *Id.* at 63. This was true even if another potential motivation existed for calling the plaintiff a bitch. *Id.* In so concluding, the Court appropriately evaluated context and potential inferences. *Id.*

The same was true in *Chadwick v. WellPoint, Inc.*, where the First Circuit reversed the district court's grant of summary judgment because a jury should have been allowed to draw inferences about whether the comment "Bless you!" was meant to be friendly or motivated by discriminatory animus. 561 F.3d 38, 42-46 (1st Cir. 2009). This Court acknowledged that the defendant "may succeed in painting a different picture" for the jury at trial, but the statements at issue were "susceptible of various interpretations." *Id.* at 45 and n.10 ("A jury could agree with Chadwick's view that Miller's comment suggested pity rather than respect.").

Because the inference-laden questions of foreseeability and reasonableness are for a jury to decide, the First Circuit's decision must be corrected in an exercise of this Court's supervisory power. This Court has long held that the Seventh Amendment to the United States Constitution "assigns the decisions of disputed questions of fact to the jury." *Gasperini v. Ctr for Humanities*, 518 U.S. 415, 432 (1996). Furthermore, because foreseeability and reasonableness are factual issues, they are the proper subject of expert witness testimony under Rules 702-704.

B. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE QUESTION OF WHETHER A TRIAL COURT HAS DISCRETION TO DISPENSE WITH THE RULE 702 GATEKEEPING FUNCTION UNDER *DAUBERT* AND *KUMHO*

i. The Gatekeeping Function of Rule 702 Articulated in *Daubert*

In *Daubert v. Merrell Dow Pharms, Inc.*, this Court held that the long-accepted *Frye* test for the admissibility of expert witness testimony had been superseded by the adoption of the Federal Rules of Evidence. 509 U.S. 579, 586-87 (1993). The trial court granted summary judgment after excluding plaintiff's expert witnesses for

failure to meet the *Frye* requirement that a scientific principle must attain "general acceptance in the particular field" in order to be admissible. *Id.*

This Court found that Rule 702 expressly omitted any mention of a "general acceptance" standard as a prerequisite to admitting expert testimony. *Id.* at 588. The Court discussed the requirements found in Rule 702, which is distinguishable from lay witness testimony under Rule 701:

> Unlike an ordinary witness, an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation. Presumably, this relaxation of the usual requirement of firsthand knowledge – a rule which represents a "most pervasive manifestation" of the common law insistence upon "the most reliable sources of information," – is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline.

Id. at 592.

Under Rule 702, reliable expert witness testimony is admissible when it will "assist the trier of fact to understand or determine a fact in issue." *Id.* The gatekeeping function of the trial court emphasized in *Daubert* ensures that expert evidence "rests on a reliable foundation and is relevant to the task at hand." *Id.* at 597.

ii. Technical or Specialized Knowledge Under *Kumho*

Rather than scientific methodology, in the instant negligence case the "fact in issue" was reasonable foreseeability of harm to a retail customer. This issue is the subject of expert opinion evidence, based on the professional "discipline" of Petitioner's retail security expert, not the court's view of the evidence. The First Circuit agreed with the district court that Melia's expert opinion was not relevant to

the analysis of duty, but this conclusion was error because foreseeability in a retail security setting is factual. Melia did not need to be a scientist to have relevant information about the standards and practices of his profession.

In *Kumho Tire Co. v. Carmichael,* this Court clarified its decision in *Daubert* where, as here, the proffered expert opinion was based on "technical" or "specialized" knowledge, not scientific principles. 526 U.S. 137, 141 (1999). According to *Kumho*, the trial court's "basic gatekeeping obligation" applies to all expert testimony, because the Federal Rules of Evidence grant "latitude to all experts, not just to 'scientific' ones." *Id.* at 148. This Court explained that no clear line separates expert testimony based on science from that based on technical or specialized knowledge. *Id.* Indeed, "[e]xperts of all kinds tie observations to conclusions through the use of what Judge Learned Hand called 'general truths derived from . . . specialized experience." *Id.* It is precisely the kind of "specialized experience" possessed by Melia that the court below erroneously overlooked in concluding that his opinion was "not relevant" to issues of foreseeability or the reasonable anticipation of harm. Respondent brought no *Daubert/Kumho* motion to vet these issues. In the absence of a proper expert challenge, the trial court was obligated to admit Melia's opinion.

Under *Kumho*, expert testimony need only have a valid connection "to the pertinent inquiry as a precondition to admissibility." *Id.* at 149. Rather than taking on the task of determining what kind of harm (or crime) was reasonably foreseeable in a retail setting, the district court should have first engaged in the gatekeeping function of deciding whether Melia's testimony had "a reliable basis in the knowledge

and experience" of the retail security and loss prevention field. *Id.* With 141 paragraphs of information provided by Melia, as well as a CV that showed his expertise in the field (88a), the court below was obligated to give Melia's opinion more than a cursory conclusion about relevance and shoplifting.

Reliability under Rule 702 may arise from "personal knowledge or experience." *Id.* at 150. Expert witnesses come in many forms, including on topics concerning "drug terms, handwriting analysis, criminal *modus operandi*, land valuation, agricultural practices, railroad procedures, attorney's fee valuation, and others." *Id.* Even when the subject matter at first blush appears to "fall within jurors' common knowledge," expert testimony is "routinely required" in cases involving security and crime prevention. *Burke v. Air Serv. Int'l, Inc.*, 775 F. Supp. 2d 13, 16-17 (D.D.C. 2011). By contrast, the failure to designate an expert to opine on matters outside of the jury's "common knowledge and everyday experience" is grounds for dismissal. *Farooq v. MDRB Corp.*, 498 F. Supp. 2d 284, 287 (D.D.C. 2007).

The Seventh Circuit has reversed summary judgment in a case involving campus sexual assault, finding that the proffered expert's testimony about security standards and the lack of security in a dorm were admissible under Rule 702. *Lees v. Carthage College*, 714 F.3d 516, 518 (7th Cir. 2013). Expert testimony on the issue of foreseeability in other contexts, such as products liability, is also routinely permitted. *See, e.g., Lapsley v. Xtek, Inc.*, 689 F.3d 802, 808 (7th Cir. 2012); *Carideo v. Whet Travel, Inc.*, 2018 U.S. Dist. LEXIS 43356, *41-42 (S.D. Fla. Mar. 16, 2018).

Kumho holds that a trial court has wide discretion to determine *how* to test an expert's reliability. 526 U.S. 137 at 152. However, almost every Circuit Court of Appeals recognizes that there is no discretion to abandon the gatekeeping function of *Daubert* and *Kumho* altogether. *See Elcock v. Kmart Corp.*, 233 F.3d 734, 746 (3d Cir. 2000). The First Circuit has held that "the question of whether the district court actually performed its gatekeeping function in the first place is subject to de novo review." *Smith v. Dorchester Real Estate, Inc.*, 732 F.3d 51, 64 (1st Cir. 2013). *See also U.S. v. Williams*, 506 F.3d 151, 160-161 (2d Cir. 2007) (quoting *Kumho*, 526 U.S. at 142 (Scalia, J. concurring)); *U.S. v. Nacchio*, 555 F.3d 1234, 1241 (10th Cir. 2009) ("Though the district court has discretion in how it conducts the gatekeeping function, we have recognized that it has no discretion to avoid performing the gatekeeping function."); *Jinro Am., Inc. v. Secure Invs., Inc.*, 266 F.3d 993, 1006 (9th Cir. 2001).

In the Fourth Circuit, the failure to mention Rule 702 or *Daubert/Kumho* in ruling on expert witness testimony has been held an abandonment of the gatekeeping function required by the trial court. *See Nease v. Ford Motor Co.*, 848 F.3d 219, 230 (4th Cir. 2017) ("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."). Similarly, in the Eleventh Circuit, when a doctor was qualified to testify about the standard of care, "her methodology was reliable, and her testimony would assist the trier of fact," the trial court abused its discretion in excluding the expert testimony. *Adams v. Lab. Corp. of Am.*, 760 F.3d 1322, 1336 (11th Cir. 2014).

Moreover, competing expert opinions are not tantamount to unreliable expert opinions. *Kumho*, 526 U.S. at 153. *See also Kuziw v. Lake Engineering Co.*, 586 F.2d 33, 36-37 (7th Cir. 1978) ("Conflicting testimony of expert witnesses raises an issue which is normally determined by the trier of fact."). In the instant case, the trial court did not engage in a Rule 702 gatekeeping analysis for either expert. The court did not conclude that Melia's opinion was unreliable or irrelevant to the field of retail security. On the contrary, the court conceded Melia's opinion would be relevant but for the erroneous conclusion that foreseeability of harm in a retail setting was for the court, not the jury, to decide. In essence, the trial court raised a *sua sponte Daubert* motion in the context of summary judgment, but these motions are not the same. A *Daubert* motion is not a dispositive motion, but an evidentiary motion that each party should have an opportunity to fully brief under Rule 702. *See Gov't Employees Ins. Co. v. KJ Chiropractic Ctr., LLC*, 2014 U.S. Dist. LEXIS 192132, * 12 (D. Fla. Nov. 28, 2014).

Because foreseeability and reasonableness are questions of fact that inform the duty analysis, the trial court should have considered Melia's opinion on these issues, especially when Shaw's raised no *Daubert/Kumho* challenge. *See Garcia v. Sec'y of HHS*, 2010 U.S. Claims LEXIS 390, *37 (May 19, 2010) (holding that "there is no reason to infer a *sua sponte* duty of the Court to raise reliability where specific grounds for objection have not been raised by a party").

The First Circuit committed grave error in concluding that Petitioner provided "no authority for the proposition" that the loss prevention policies at Shaw's were

relevant to the question of foreseeability. 19a. The authority for specialized expertise in retail security came from Petitioner's expert. The court below appears to have passed judgment on the weight of Melia's opinion rather than its admissibility. That error has constitutional implications worthy of this Court's intervention. As stated by the Eleventh Circuit, the *Daubert/Kumho* gatekeeping function "does not imbue trial courts with the authority to give their imprimatur to the theories of expert witnesses or 'make ultimate conclusions as to the persuasiveness of the proffered evidence.'" *Currie v. Chevron U.S.A., Inc.*, 2006 U.S. Dist. LEXIS 97251, *6-10 (N.D. Ga. Sept. 19, 2006) (quoting *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK, Ltd.*, 326 F.3d 1333, 1341 (11th Cir. 2003)).

iii. Basis for Expert's Opinion Under Rule 703

This Court has explained the "settled evidence law" under Fed. R. Evid. 703 as follows:

> [A]n expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true. It is then up to the party who calls the expert to introduce other evidence establishing the facts assumed by the expert. While it was once the practice for an expert who based an opinion on assumed facts to testify in the form of an answer to a hypothetical question, modern practice does not demand this formality and, in appropriate cases, permits an expert to explain the facts on which his or her opinion is based without testifying to the truth of those facts. See Fed. Rule Evid. 703. That is precisely what occurred in this case, and we should not lightly "swee[p] away an accepted rule governing the admission of scientific evidence."

Williams v. Illinois, 567 U.S. 50, 57 (2012).

The district court overlooked Rule 703 in finding that Melia had no foundation for testifying about the lunging/threatening incident between MacCalister and Cindy

Belanger (44a, n.28), or that Shaw's employees were fearful of MacCalister. 49a, n.32. Rule 703 permits an expert to draw inferences from the evidence in rendering an opinion. *See Dura Auto Sys. of Ind., Inc. v. CTS Corp.*, 285 F.3d 609, 613 (7th Cir. 2002). Moreover, an expert opinion is not objectionable merely because it is based on hearsay. *Id.* Therefore, contrary to the court's ruling below, the "unverified rumor" that MacCalister was known to steal was appropriate for Melia to consider under Rule 703. 37a.

iv. Ultimate Issue of Foreseeability Under Rule 704

Because Respondent never brought a *Daubert/Kumho* motion, and the district court never conducted a *Daubert/Kumho* hearing to vet Melia's opinion, Petitioner was at a distinct disadvantage on appeal to the First Circuit. At the very least, the appellate court should have remanded for a *Daubert/Kumho* hearing. Such a hearing would have enabled the trial court to assess whether, in fact, Melia possessed specialized, technical knowledge that would assist a trier of fact in determining whether the harm to Mrs. Boudreau was foreseeable from the perspective of a retail management or loss prevention expert. Shaw's, after all, employs both kinds of professionals to discharge its duty of providing reasonably safe premises for customers to shop.

The First Circuit affirmed the trial court's implicit conclusion that the field of retail security/loss prevention does not require specialized expertise. However, neither the court nor the lay juror has such technical, practical experience. Following a *Daubert/Kumho* hearing, the district court would have been able to conclude

whether it was permissible for Melia to render an opinion on the "ultimate issue" of foreseeability in this case.

According to the Advisory Committee Notes for Fed. R. Evid. 704:

> The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact. In order to render this approach fully effective and to allay any doubt on the subject, the so-called "ultimate issue" rule is specifically abolished by the instant rule. The older cases often contained strictures against allowing witnesses to express opinions upon ultimate issues, as a particular aspect of the rule against opinions. The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information. 7 Wigmore §§ 1920, 1921; McCormick § 12. The basis usually assigned for the rule, to prevent the witness from "usurping the province of the jury," is aptly characterized as "empty rhetoric." 7 Wigmore § 1920, p. 17. Efforts to meet the felt needs of particular situations led to odd verbal circumlocutions which were said not to violate the rule. Thus a witness could express his estimate of the criminal responsibility of an accused in terms of sanity or insanity, but not in terms of ability to tell right from wrong or other more modern standard. And in cases of medical causation, witnesses were sometimes required to couch their opinions in cautious phrases of "might or could," rather than "did," though the result was to deprive many opinions of the positiveness to which they were entitled, accompanied by the hazard of a ruling of insufficiency to support a verdict. In other instances the rule was simply disregarded, and, as concessions to need, opinions were allowed upon such matters as intoxication, speed, handwriting, and value, although more precise coincidence with an ultimate issue would scarcely be possible.

USCS Fed. R. Evid. 704, Advisory Committee Notes (internal citation omitted).

An opinion that is based on disputed facts "may not be excluded simply because it pertains to an issue to be decided by the jury." *Richard v. Sheahan*, 415 F. Supp. 2d 929, 943 (N.D. Ill. 2006). While Rule 704 permits the trial court to exclude expert opinions under Rule 403, there was no such finding in the instant case by the district

court because a careful "gatekeeping" analysis of Melia's expert opinion never occurred.

Because the question of reasonable foreseeability of harm to Mrs. Boudreau was one of fact to be decided by the jury, Melia's expert opinion should have been admitted, or at least examined, under Rules 702, 703, and 704. This Court should grant certiorari to correct a grave error of law by the First Circuit that departs from its own precedent and the decisions of other circuit courts, and raises constitutional concerns about the Seventh Amendment right to a jury trial.

CONCLUSION

For all of the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

Dated: October 16, 2020

/s/ Laura H. White

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In the Supreme Court of the United States

JEFFREY BOUDREAU,
as Personal Representative of the Estate of Wendy Boudreau,

Petitioner,

v.

SHAW'S SUPERMARKETS, INC.

Respondent.

On Petition for Writ of Certiorari To The
United States Court of Appeals for the First Circuit

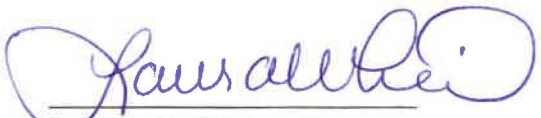
PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF SERVICE

I, Laura H. White, counsel of record for Petitioner and a member of the Bar of this Court, hereby certify that on October 16, 2020, I served the Petition for Writ of Certiorari and Appendix on counsel for Respondent, Shaw's Supermarkets, Inc., at the law firm of Richardson, Whitman, Large & Badger, by electronic means to the following addresses, and that all parties have been served in accordance with this Court's Order dated April 15, 2020:

Elizabeth G. Stouder, Esq., email: estouder@rwlb.com
Heidi J. Eddy, Esq., email: heddy@rwlb.com

Dated: October 16, 2020



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