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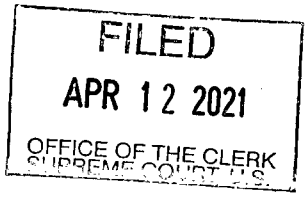

IN THE

SUPREME COURT OF THE UNITED STATES

GANIYU AYINLA JAIYEOLA — PETITIONER
(Your Name)

vs.

TOYOTA MOTOR N. A., INC., ET AL — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

GANIYU AYINLA JAIYEOLA
(Your Name)

749 PRESERVE CIRCLE DRIVE SE APT. 6
(Address)

GRAND RAPIDS, MICHIGAN 49548
(City, State, Zip Code)

616 635 4025
(Phone Number)

QUESTION(S) PRESENTED

1. Whether the United States Court of Appeals for the Sixth Circuit created an intra-circuit and inter-circuit split by wrongly deciding that the District Court did not abuse its discretion when it imposed expert report exclusion sanction on Plaintiff for Plaintiff expert report that was untimely (two (2) months untimely but one (1) month and twenty-one (21) days before the end of discovery) and not excluding Defendants expert report that was untimely (three (3) months untimely and twenty (20) days after the end of discovery); even though both Plaintiff and Defendants argued harmlessness or justification at the District Court and the District Court conducted no *Daubert* or any expert or expert report admissibility hearing or evaluation (on Plaintiff's expert and his report or the Defendants four (4) experts and their reports).
2. Whether a reversible error occurred when the District Court issued a decision without considering a relevant motion before issuing the decision.
3. Whether the Federal District Court needed to get a certification from the Michigan Supreme Court before it could allow two Defendants to remove a case from a Michigan State Court because a motion for reconsideration on seven dismissed Defendants in the case was pending before the Michigan State Court.
4. Whether the United States Court of Appeals for the Sixth Circuit created a split with the U.S. Supreme Court and intra-circuit split when it wrongly

decided that a motion for sanction directed at some collateral issues can be mooted if the motion relates to merits issues; even if the motion is not asking for relief on merits issues.

LIST OF PARTIES

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

[X] 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:

1. TOYOTA MOTOR CORPORATION, a foreign corporation

2. AISAN INDUSTRY CO., LTD, a foreign corporation

RELATED CASES

- *Jaiyeola v. Toyota Motor N. Am., Inc., et al.*, No. 2016 32271, Ionia County Circuit Court, Ionia, Michigan. Judgment entered on Aug. 3, 2017.

- *Jaiyeola v. Toyota Motor North America, Inc., et al.*, No. 1:17-cv-00562, U. S. District Court for the Western District of Michigan. Judgment entered Aug. 5, 2019.

- *Jaiyeola v. Toyota Motor North America, Inc., et al.*, No. 19-1918, U. S. Court of Appeals for the Sixth Circuit. Judgment entered Feb. 1, 2021.

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STATUTES AND RULES

MICHIGAN LAW

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 A to the petition and is

☒ reported at Jaiyeola v. Toyota Motor N. Am., Inc., et al., No. 19-1918 (6th Cir. Feb. 1, 2021); 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 B to the petition and is

☒ reported at Jaiyeola v. Toyota Motor N. Am., Inc., et al., No. 1:17-cv-562 (W.D. Mich. Aug. 5, 2019); 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 _____ 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 _____ 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.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was February 1, 2021.

[ ] 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: March 16, 2021, and a copy of the order denying rehearing appears at Appendix C.

[ ] 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_____.

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 _____. A copy of that decision appears at Appendix _____.

[ ] 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_____.

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

STATEMENT OF THE CASE

The U.S. Supreme Court asserted that *pro se* pleadings and motions should be viewed liberally and held to a lesser standard than those drafted by Attorneys.[1]

This is a motor vehicle product liability case in which *pro se* Ganiyu Jaiyeola ("Jaiyeola") asserted claims for injuries and other damages against the Defendants (Toyota Motor Corporation and Aisan Industry Co., Ltd – both indicated as "Toyota") arising out of Jaiyeola's 1996 Toyota Camry LE ("Camry") sudden unintended acceleration ("SUA")[2] car accident that occurred on November 25, 2013. Jaiyeola is a disable because of the SUA car accident. Jaiyeola is married with four (4) children (21, 13, 10, and 8 years). The facts on Jaiyeola's Camry, the Camry accident of November 25, 2013, Jaiyeolas' injuries (including Brain (Subdural Hematoma), Spinal Cord (Cervical Stenosis with Myelopathy), and Fractured Left Eye Socket), brain surgery, pending spinal cord surgery, and health prognosis are stated in Jaiyeola's affidavit. (Jaiyeola's Affidavit, R[3]. 243-2, Page ID ##5500-5510.).

On August 5, 2019, the District Court granted summary judgment (Exhibit O) in favour of Toyota because the District Court alleged that Jaiyeola had no expert report on record; an expert report is a requirement for a product liability case in Michigan. However, the District Court excluded Jaiyeola's expert report. The District Court excluded Jaiyeola's expert report because Jaiyeola was untimely in

[1] *Haines v. Kerner*, 404 U.S. 520 (1971).
[2] "SUA" refers to sudden unintended acceleration of the Camry.
[3] "R." refers to the record entry number in the District Court Docket. "R'." refers to the record entry number in the Sixth Circuit Docket.

the production of his expert report; even though Jaiyeola submitted his expert report one (1) month and twenty-one (21) days before the end of discovery. The Sixth Circuit Court of Appeals affirmed the summary judgment on February 1, 2021. Jaiyeola's petition for rehearing en banc was denied by the Sixth Circuit on March 16, 2021.

I. The Sixth Circuit Five Factors For Justified or Harmless

The Six Circuit panel asserted: "In assessing whether a party's untimely disclosure was justified or harmless, we analyze five factors:

(1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence; and (5) the nondisclosing party's explanation for its failure to disclose the evidence.". (ORDER, Case No. 19-1918, R'. 51-2, Page ID #6, ¶ 3, Feb. 1, 2021). However, the panel ignored the key facts of the case as regards Jaiyeola's expert report and therefore did not correctly apply the five factors. The panels' decisions in this case as regards Jaiyeola's expert report, a relevant motion not considered before a Court decision, and Michigan Supreme Court certification created intra-circuit, inter-circuit, and U.S. Supreme Court conflicts.

A. Jaiyeola's Affidavit

Jaiyeola's affidavit affirms the key facts in this lawsuit as regards Jaiyeolas' Attorney and expert searches and expert reports. **(App. 19-21)**.

B. Jaiyeola Produced Dr. Ganiyu Jaiyeola's Expert Report One Month (1) And Twenty-One (21) Days Before The End of Discovery

An Attorney, Mr. Burmeister, declined to be Jaiyeola's Attorney because Mr. John Stilson[4] could not be Jaiyeola's expert. **(App. 22-28)**. On June 10, 2018 (2 months and 12 days before the end of discovery), Jaiyeola identified Dr. Ganiyu Jaiyeola (himself) as an expert witness and produced a report on Dr. Jaiyeolas' qualifications. **(App. 29-48 – relevant pages only.)**. Dr. Jaiyeola produced an expert report on July 1, 2018 (1 month and 21 days before the end of discovery). **(App. 49-91 – relevant pages only)**. Dr. Jaiyeola was a Failure Analysis Expert (from 2011 to 2015) at Element Materials Technology, Wixom, Michigan. **(App. 92)** and Jaiyeola has been a Materials Engineering Consulting expert at GJ-OJ Consulting LLC (Grand Rapids, Michigan) since 2015. On August 10, 2018 (12 days before the end of discovery), the Magistrate ruled that Dr. Ganiyu Jaiyeola would not be allowed to be an expert. **(App. 93 – relevant page only)**. On November 13, 2018 (3 months after the end of discovery), the Magistrate denied Jaiyeola's motion for reconsideration for Dr. Jaiyeola to be an expert witness. **(App. 94-96 – relevant pages only)**. On August 5, 2019, the District Court Judge denied Jaiyeola's motion appeal for Dr. Jaiyeola to be an expert and for Dr. Jaiyeola's expert report to be used in this case. Jaiyeola argued harmlessness or justification before the Magistrate and the District Judge. Discovery ended on August 22, 2018 and trial was to start on June 3, 2019. **(App. 97-98)**.

[4] *Adams v. Toyota Motor Corp.*, No. 15-2507 (8th Cir. 2017).

C. The Evidence (Broken Air Cleaner Hose) Was No Surprise

The evidence was a defect in the plastic Air Cleaner Hose of the Camry engine. Dr. Jaiyeola proved that the defect in the Hose of the Camry's throttle control system[5] caused the Hose to crack and break.[6,7] Toyota knew about the defect in the Hose since April 29, 2014 (**App. 99-100** - 4 years and 4 months before the end of discovery). Toyota also deposed Jaiyeola on the defect on January 30, 2018 (7 months before the end of discovery).

D. Dr. Ganiyu Jaiyeola As An Expert Was No Surprise

Starting from May 12, 2017 (15 months before the end of discovery), Jaiyeola produced to Toyota the information on Dr. Jaiyeola's qualifications. Toyota viewed[8] Jaiyeola's LinkedIn profile on July 11, 2017 (13 months before the end of discovery). When Toyota deposed[9] Jaiyeola on January 30, 2018, they used information from Jaiyeola's educational qualifications and work experiences as a science and materials engineering expert.

E. Jaiyeola Could Not Hire An Expert Because Jaiyeola Could Not Hire An Attorney

[5] (Labelled Diagram and Pictures for the Camry Engine Throttle System, R. 130-2, Page ID #2077-2080).

[6] (Accident Camry Engine, Defect in Air Cleaner Hose (Plastic, Crack, and Break), R. 273-6, Page ID ##6385-6387, R. 173-8, Page ID ##2919-2925).

[7] (Jaiyeola's Expert Report, R. 237-2, PageID ##5275-5357).

[8] (Appellees' Attorney Viewed Jaiyeola's LinkedIn Profile on July 11, 2017, R. 13, Page ID ##272-274; R. 15, Page ID #289-302; R. 123, Page ID ##1781-1782; R. 178, Page ID ##3133-3145; R. 182, Page ID ##3718-3719 and R. 183, Page ID ##3730-3731).

[9] (Deposition of Jaiyeola (January 30, 2018), R. 132-1, Page ID ##2138-2398).

Jaiyeola was untimely because Jaiyeola was searching for an Attorney on contingency basis and Jaiyeola regularly updated[10,11,12] the District Court on his Attorney search. The experts that Jaiyeola tried to hire declined because Jaiyeola was a *pro se*; the experts would rather work with an Attorney.

F. Expert Report From Mr. Robert Landis (Toyota Expert) Was Untimely By Three (3) Months

The report from Toyota expert, Mr. Robert M. Landis (a Toyota employee) was produced to Jaiyeola on September 11, 2018 (3 months after the Toyota expert deadline of June 8, 2018) and 20 days after the end of discovery (August 22, 2018). Jaiyeola filed a motion for Landis expert report to be excluded, the District Court denied the motion, and therefore declined to impose exclusion on Landis report even though Landis expert report was late by more than 3 months.

G. The Format in Toyota Expert (Mr. Landis) Report is Similar to the Format in Dr. Jaiyeola's Report

Mr. Landis's **(App. 101-116)** and Dr. Jaiyeola's **(App. 49-91)** expert reports have a similar format. Dr. Jaiyeola did inspection and measurement testing of the defect and submitted a supplemental expert report. **(App. 117-180)**. Landis did inspection but no testing and he asserted "Testing is not always necessary when

[10] (December 22, 2017 Hearing Transcript - Jaiyeola Attorney search update, R. 317, Page ID #6784 (Line 24-25), Page ID #6785 (Line 1-14), Page ID #6786 (Line 11-25), Page ID #6789 (Line 22-25), Page ID #6790 (Line 1-21), Page ID #6797 (Line 13-25), and Page ID #6798 (Line 15-24)

[11] (February 2, 2018 Hearing Transcript - Jaiyeola Attorney search update, R. 321, Page ID #7002 (Line 9-22), Page ID #7003 (Line 12-19), Page ID #7007 (Line 4-21), Page ID #7009 (Line 10-17), and Page ID #7010 (Line 12-22)

[12] (March 19, 2018 Hearing Transcript - Jaiyeola Attorney search update, R. 87, Page ID #1300 (Line 3-10), Page ID #1307 (Line 3-22), and Page ID #1311 (Line 21-22)

analyzing a vehicle system. My opinions are based on my education, training and experience in the automotive field, and an understanding of how the throttle control system works in the 1996 Camry.". **(App. 181-189**, R. 233-2, Page ID #5082, ¶ 2, Lines 2-5).

H. Toyota Expert (Mr. Landis) Argued Against The Broken Hose Theory in Dr. Jaiyeola's Expert Report

Landis's argument (in a declaration) validated the existence of Dr. Jaiyeola's expert report. **(App. 181-189)**. Dr. Jaiyeola responded to Landis's argument on the broken hose in a declaration. **(App. 190-198)**.

II. The Magistrate Did Not Consider Jaiyeola's Motion For Disqualification Before She filed Her Summary Judgment Report and Recommendation

Jaiyeola filed a Motion for Leave to file a Motion for Disqualification of the Magistrate on November 29, 2018 (7 days before the Magistrate filed her summary judgment Report and Recommendation on December 6, 2018). **(App. 199-201)**. The Magistrate never considered Jaiyeola's Motion for Leave. This was an abuse of discretion and a reversible error. A motion not considered is a motion denied. *Marks v. Shell Oil Co.*, 830 F.2d 68 (6th Cir. 1987).

III. The District Court was Judicially Biased Against Jaiyeola

Jaiyeola filed a judicial misconduct complaint against the Magistrate with the Sixth Circuit Court of Appeals in October 2018. **(App. 202)**. Unfortunately, the District Court was privy to the complaint because Jaiyeola made the mistake of first sending it through the District Court Clerk's office and the complaint was returned to Jaiyeola by another Magistrate. **(App. 203)**. The Magistrate's Report and

Recommendation for summary judgment in favour of Toyota was filed on December 6, 2018; after the Magistrate was privy to Jaiyeola's judicial misconduct complaint of November 29, 2018.

REASONS FOR GRANTING THE PETITION

Pro se Ganiyu Jaiyeola hereby petitions for a writ of certiorari on THREE (3) of the Sixth Circuit panel decisions in *Ganiyu Jaiyeola v. Toyota Motor North America, Inc., et al.,*: **1.)** "The district court did not abuse its discretion by striking Jaiyeola's untimely supplemental Rule 26 disclosures." **(App. 8, ¶ 1 Lines 8-9.)**. The decision conflicts with Sixth Circuit decisions and other Circuit precedents as regards the use of exclusions or preclusions as Fed. R. Civ. P. 37(c)(1) sanctions. **2.)** "The district court adopted the magistrate judge's conclusion that Jaiyeola failed to discharge his reciprocal burden by not putting forth any admissible expert evidence in support of his Michigan product-liability claims." **(App. 6, para 1, Lines 1-3.)**. This assertion is false and it splits with Supreme Court, Sixth Circuit, and other Circuits because admissibility of an expert or an expert report is determined through reliability standards like *Daubert*. The District Court never determined the admissibility of Jaiyeola's expert as an expert or his expert report using *Daubert* or any expert reliability standard. **3.)** "While Jaiyeola argues that it was improper for the magistrate judge to issue her report and recommendation prior to ruling on his pending motion for her to recuse herself due to alleged bias, he cannot show prejudice arising therefrom because the district court subsequently considered his recusal motion and denied it on the merits.". **(App. 9, ¶ 1 Lines 10-13.)**. That decision conflicts with Sixth Circuit and other Circuit precedents. The Magistrate's Summary Judgment Report and Recommendation was a decision and the Magistrate did not consider Jaiyeola's recusal motion (for the Magistrate to recuse

from this case) before making that decision. The later decision on Jaiyeola's recusal motion was made by the District Judge. **4.)** "Jaiyeola argues that the district court erroneously allowed the defendants to remove the lawsuit to federal court without first "getting a certification" from the Michigan Supreme Court." **(App. 5, ¶ 2 Lines 1-2.)**. That decision conflicts with Supreme Court, Sixth Circuit, and other Circuit precedents. There were other Defendants in this case that were dismissed (without prejudice) by the Michigan State Court. Jaiyeola filed a motion for reconsideration of the dismissal. The reconsideration motion was pending before the Michigan Court when the Federal District Court allowed Toyota to remove the case to the District Court. **5.)** "Considering that the underlying accusations relate to evidentiary matters, we cannot say the district court abused its discretion in construing the requested relief as related to the merits, and thus moot." **(App. 10, ¶ 2, Lines 13-15.)**. That decision conflicts with the Supreme Court and Sixth Circuit as regards motions for sanctions on collateral issues when a relief on merits is not an issue.

I. INTRA-CIRCUIT AND INTER-CIRCUIT SPLIT REGARDING EXCLUSION AS A SANCTION UNDER Fed. R. Civ. P. 37(c)(1)

The Circuits are split on the use of exclusion or preclusion as a sanction under Rule 37(c)(1); even the Sixth Circuit does not automatically apply exclusion as a sanction. The Eleventh Circuit cited a review that shows "..three circuits—the Second, Sixth, and Seventh—have concluded that the absence of substantial justification or harmlessness does not automatically result in exclusion, whereas four circuits—the First, Fourth, Eighth, and Ninth— provide for automatic, or near-

automatic, exclusion under the same circumstances. ....". See *Taylor v. Mentor Worldwide LLC*, 940 F.3d 582 (2019). In *Taylor*, the Eleventh Circuit even argues "....that exclusion is not automatically required, even if the omission is not harmless. ...[because].. Rule 37(c)(1) states, in its first sentence, that a party who fails to provide information as required by 26(e) "is not allowed to use that information ... at a trial, unless the failure was substantially justified or is harmless," the next sentence provides: "In addition to or instead of this sanction, the court" may impose "other appropriate sanctions." Fed. R. Civ. P. 37(c)(1); Fed. R. Civ. P. 37(c)(1)(C) (emphasis added). ....given that text, ...exclusion is not automatically required by the rule.".

For Rule 37(c)(1), exclusion or preclusion of an expert or expert report "is not a strictly mechanical exercise." *Santiago-Diaz v. Laboratorio Clinico Y De Referencia Del Este*, 456 F.3d 272, 276 (1st Cir.2006). In *Esposito v. Home Depot U.S.A., Inc.*, 590 F.3d 72 (2009), the First Circuit asserted that ".. decision to preclude [Plaintiff's] expert ["as a result of missing the discovery deadlines"]..effectively amounted to [a case dismissal in an expert-dependent case]". The District Judge has a lot of flexibility "in lieu of this sanction [of total exclusion].... See *Dura Auto. Sys. of Indiana, Inc. v. CTS Corp.*, 285 F.3d 609, 615-16 (7th Cir. 2002) (". . . the rule goes on to authorize the judge, `in lieu of this sanction [of total exclusion]. . . to impose other appropriate sanctions.'"); *Vance v. United States*, No. 98-5488, 1999 WL 455435, at *4 (6th Cir. June 25, 1999) (noting that Rule 37(c)(1) is mandatory, but that "the rule somewhat tempers this mandate

by permitting courts to excuse failures to disclose to some degree (i.e., to impose other sanctions `in lieu of this sanction')"); Fed. R. Civ. P. 37(c)(1) advisory committee's note (1993) (noting that "the rule provides the court with a wide range of other sanctions"). ...". See *Roberts ex Rel. Johnson v. Galen of Virginia*, 325 F.3d 776 (6th Cir. 2003). Also, "[W]here exclusion necessarily entails dismissal of the case, the sanction must be one that a reasonable jurist, apprised of all the circumstances, would have chosen as proportionate to the infraction." *Musser v. Gentiva Health Servs.*, 356 F.3d 751, 756 (7th Cir. 2004). A trial date delay should not be an excuse for exclusion. *Dickenson v. Cardiac & Thoracic Surgery of Eastern Tennessee, P.C.*, 388 F.3d 976 (6th Cir. 2004) (where the district court was concerned about a delay in the trial date if a non-exclusion sanction was granted.).

If exclusion or preclusion (that amounts to a case dismissal) is to be applied for Rule 37(c)(1), the Ninth Circuit asserted that "the district court was required to consider whether the claimed noncompliance involved willfulness, fault, or bad faith" and conduct "harmlessness inquiry". See *R&R Sails, Inc. v. Ins. Co. of Pennsylvania*, 673 F.3d 1240 673 F.3d 1240 (9th Cir. 2012). "harmlessness inquiry" is considered in many Circuit Courts. "*Design Strategy, Inc. v. Davis*, 469 F.3d 284, 296 (2d Cir.2006) (requiring the district court to consider the possibility of a continuance); *S. States Rack & Fixture, Inc. v. Sherwin–Williams Co.*, 318 F.3d 592, 597 (4th Cir.2003) (requiring consideration of the surprise to the party against whom the evidence would be offered and the ability of that party to cure the surprise); *Tex. A & M Research Found. v. Magna Transp., Inc.*, 338 F.3d 394, 402

(5th Cir.2003) (requiring consideration of the possibility that a continuance would cure prejudice to the opposing party).". *Id. R.C. Olmstead, Inc. v. CU Interface, LLC, et al.*, No. 09-3428 (6th Cir. 2010) (If there is no argument of harmlessness or justification, a district court has not abused its discretion in excluding the expert's report.). *Benjamin v. Sparks*, ___ F.3d ___, 2021 WL 161981, at *6 (4th Cir. Jan. 19, 2021) (addressing the "five factors that should guide a district' court's analysis" of "substantial justification or harmlessness" under Rule 37(c)(1)). However, Jaiyeola argued harmlessness or justification at the District Court.

In *Esposito*, the First Circuit sums the use of exclusion as a Rule 37(c)(1) sanction as follows: "In our view, a less severe remedy could have easily achieved the same aims as the preclusion of the expert while still giving [Plaintiff], potentially the innocent victim of a defective product, his day in court. [*Malot v. Dorado Beach Cottages Assocs.*, 478 F.3d 40 (1st Cir. 2007)] (recognizing "the strong presumption in favor of deciding cases on the merits"); [*Young v. Gordon*, 330 F.3d 76 (1st Cir. 2003)] (referencing the "salutary policy favoring the disposition of cases on the merits").".

In the Sixth Court, *Vance, Roberts ex Rel. Johnson, Dickenson*, and *R.C. Olmstead, Inc.* showed that exclusion should not be used as a sanction under Fed. R. Civ. P. 37(c)(1) unless there is egregious circumstances; which has not happened in this case. The Sixth Circuit panel in this case created an intra-circuit and inter-circuit split by its decision to affirm the District Court exclusion of Dr. Jaiyeola's expert report.

II. SUPREME COURT, INTRA-CIRCUIT, AND INTER-CIRCUIT SPLIT REGARDING *Daubert*

In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court held that "The court of appeals must apply an abuse-of-discretion standard when it reviews the trial court's decision to admit or exclude expert testimony. *General Electric Co. v. Joiner*, 522 U.S. 136, 138—139. That standard applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion.". Where an expert and expert testimony is required, Courts commonly determine admissibility of an expert or expert report by following the *Daubert*[13] standard. This is a Michigan product liability case. A product liability case in Michigan requires an expert and expert testimony as stated in Michigan Product Liability Act[14]. Therefore, admissibility of an expert or expert report has to follow the *Daubert* standard or consider other reliability factors. The District Court held no *Daubert* hearing or consider any other reliability factors to determine the admissibility of an expert or expert report. The Sixth Circuit panel abused its discretion, created an intra-circuit and inter-circuit split, and a split from the U.S. Supreme Court by wrongly deciding on the admissibility of Dr. Jaiyeola as an

[13] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Weisgram v. Marley Co.*, 528 U.S. 440 (2000); *Babcock Power v. Kapsalis*, Nos: 19-5494/5542 (6th Cir. 2021); *Prantil et al. v. Arkema Inc.*, No. 19-20723 (5th Cir. 2021); *Prosper v. Martin*, No. 19-12857 (11th Cir. Mar. 5, 2021); *United States v. LaVictor*, No. 15-1580 (6th Cir. 2017); *Lee v. Smith & Wesson Corp.*, No. 13-3597 (6th Cir. 2014); *Newell Rubbermaid, Inc. v. Raymond Corp.*, 676 F.3d 521 (6th Cir. 2012).

[14] Mich. Comp. Laws § 600.2945 *et seq.*

expert and Dr. Jaiyeola's expert report without any consideration for the *Daubert* standard or any other reliability factors.

III. A RELEVANT MOTION NOT CONSIDERED BEFORE A DISTRICT COURT DECIDES WOULD RESULT IN A REVERSIBLE ERROR

In *Marks v. Shell Oil Co.*, 830 F.2d 68 (6th Cir. 1987), the Sixth Circuit held that for a motion that would impart summary judgment, "it is apparent that when [such] a motion ... is not even considered, much less not granted, an abuse of discretion has occurred." and the summary judgment that was awarded after the non-consideration of the motion "is VACATED and the case REMANDED". *Id.* See *Espey v. Wainwright*, 734 F.2d 748 (11th Cir. 1984) (unless the District Court gives "readily apparent" reasons), *Ellison v. Ford Motor Co.*, 847 F.2d 297, 300 (6th Cir. 1988), and *Coplin and Associates, Inc. v. United States of America*, 27 F.3d 566 (6th Cir. 1994) (not considering a motion before the Court made a decision was an abuse of discretion and a "reversible error".).

Jaiyeola filed a Motion for Leave to file a Motion for Disqualification of the Magistrate on November 29, 2018. Jaiyeola filed a motion for leave because the Magistrate had ordered that no motion must be filed without first filing a motion for leave. The Magistrate filed her summary judgment Report and Recommendation in favour of the Defendants on December 6, 2018; seven (7) days after Jaiyeola's motion. The Magistrate did not consider Jaiyeola's Motion for Leave to file a Motion for Disqualification of the Magistrate before she filed her summary judgment Report and Recommendation. The Magistrate abused her discretion and created a reversible error on her summary judgment Report and Recommendation

because a Report and Recommendation is a Court decision. A relevant motion not considered before a decision is a motion denied and a reversible error is generated. *Marks*, *Espey*, and *Ellison*.

IV. CASE REMOVAL TO FEDERAL COURT WITHOUT STATE SUPREME COURT CERTIFICATION COULD CREATE A WRONG *Erie* GUESS

In a diversity jurisdiction action, federal courts are required to apply the law of the state in which the court sits, except when deciding procedural matters, constitutional issues, or matters specifically governed by acts of Congress. (*Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (holding that "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state"). The Eighth Circuit asserted that: "As a federal court, our role in diversity cases is to interpret state law, not to fashion it.". (*Orion Fin. Corp. v. Am. Foods Group, Inc.*, 281 F.3d 733, 738 (8th Cir. 2002).). Indeed, the United States Supreme Court was the first court to use certification by suggesting that the Fifth Circuit certify a question of Florida state law to the Florida Supreme Court in *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 212 (1960).

Two Defendants were allowed to remove this case from a Michigan (State) Court to a Federal District Court when a motion for reconsideration **(App. 208-2012)** on some dismissed ("dismissed without prejudice") Defendants **(App. 204-207)** was pending before the Michigan Court. The Federal District Court obtained no certification from the Michigan Supreme Court as to whether the removal was a violation of Michigan law or not. The reconsideration motion was on the State

Court's dismissal **(App. 213-216)** of the other Defendants because Jaiyeola failed to timely serve them. In *Eubanks v. County of Wayne et al.*, No. 2:07-cv-11403, Doc # 6 (E.D. Mich. 2007), the Court asserted that "Furthermore, while Plaintiff has submitted a request and affidavit for an entry of default, there is no evidence that the clerk of the Wayne County Circuit Court has yet entered any default. Finally, an entry of default in state court does not nullify a proper removal under 28 U.S.C. § 1441; it is possible for a default to be set aside in federal court.". In this instant, the Federal District Court cannot set aside the decision of the Michigan Court if the Michigan Court decided to grant Jaiyeola's motion for reconsideration on the dismissal ("dismissed without prejudice") of the other Defendants in this case; the granting of the reconsideration motion would nullify the removal under 28 U.S.C. § 1441. Also, the Michigan State Court Order on the other Defendants was dismissal "without prejudice"; which, in all likelihood, would toll the 3-year Statute of Limitation for Jaiyeola to serve the dismissed Defendants. Jaiyeola's Toyota Camry accident occurred on November 25, 2013 and Jaiyeola filed his lawsuit on November 22, 2016. The tolled service on the dismissed Defendants would negate the removal by Toyota of this lawsuit to the Federal District Court.

V. SUPREME COURT AND INTRA-CIRCUIT SPLIT REGARDING MOOTING SANCTIONS ON COLLATERAL ISSUES

The Sixth Circuit panel correctly followed the U.S. Supreme Court and its own Sixth Circuit when it held that "A district court retains jurisdiction to consider collateral issues, such as sanctions, even after entry of judgment on the merits.

split with the Supreme Court (*Cooter & Gell*) and intra-circuit split (*Knight Capital Partners Corp.*) because both (R. 264) and (R. 265) are related to collateral and not merit issues. Indeed, in *Knight Capital Partners Corp.*, the Sixth Circuit "..REMAND .. sanctions motion for full consideration" and the Sixth Circuit panel should have done no less for Jaiyeolas' two sanction motions.

"A district court has inherent authority to award sanctions when a party litigates in bad faith or commits a fraud on the court. See *First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501, 512–16 (6th Cir. 2002) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50, 111 S. Ct. 2123, 2135–36 (1991)). In *First Bank of Marietta*, the Sixth Circuit noted that a district court may invoke its inherent authority to impose sanctions for bad-faith conduct, even if the district court failed to consider whether sanctions may be appropriate under any rules or statutes.". (*Quantum Sail Design Group, LLC v. Jannie Reuvers Sails, Ltd. et al.*, No. 1:2013cv00879 - Document 233 (W.D. Mich. 2018).).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: APRIL 9, 2021