

No. 25-953

In the
Supreme Court of the United States

FINESSE WIRELESS LLC,

Petitioner,

v.

AT&T MOBILITY LLC & NOKIA OF AMERICA
CORPORATION,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

Despite their best efforts, respondents cannot obscure the pressing need for this Court's review. On the merits, respondents have no real defense of the Federal Circuit's decision to disregard the jury's verdict (and the Seventh Amendment) based on purported inconsistencies in one expert's testimony—and so respondents relegate their discussion of the merits to barely a page at the end of their brief. That alone is a powerful tell that the decision below is indefensible and that this intrusion into the jury's province would not fly in any other circuit.

Respondents' remaining efforts to avoid this Court's scrutiny are equally unavailing. They insist that the decision below does not conflict with other courts of appeals, but the caselaw says otherwise: No other circuit accepts the Federal Circuit's uniquely intrusive approach to appellate review of jury findings and expert testimony, which effectively creates a patent-only exception to the normal standards of appellate review (and explains why the Federal Circuit cites its own verdict-invalidating precedents in lieu of the regional circuit precedent it is supposed to apply on non-patent issues). That practice is indefensible—which is why a vocal minority of Federal Circuit judges, along with numerous commentators and the United States, have all criticized the Federal Circuit for serially failing to respect the jury's constitutionally assigned province. Respondents have no good answer to that chorus of criticism, and their insistence that this is just business as usual only highlights the need for this Court's intervention.

Lacking any persuasive defense of the decision below or viable denial of the lopsided circuit conflict it entrenches, respondents devote most of their efforts to identifying purported vehicle problems. Most prominently, respondents repeatedly assert that the Federal Circuit did not rest its decision on the rejection of inconsistent expert testimony, but found that the verdict was not supported by any testimony at all. That assertion does not withstand a reading of the Federal Circuit's actual opinion, which makes crystal clear that it rests on the purportedly contradictory and confusing nature of Dr. Wells' testimony, and nowhere even remotely concludes that Dr. Wells' testimony failed to support the jury's verdict at all. This Court should reject respondents' strained efforts to evade further review, grant certiorari, and end the Federal Circuit's ongoing disregard of the jury's constitutional role.

I. The Decision Below Is Profoundly Wrong.

One could certainly make the case that the complexity of patent cases makes sorting out the inevitable dueling expert opinions a task best reserved for highly specialized jurists. But the Framers had other ideas, *see* U.S. Const. amend. VII, and this Court has been faithful to their vision and made clear for over 150 years that the responsibility for evaluating expert evidence in patent cases rests with the jury, not the appellate courts. *Bischoff v. Wethered*, 76 U.S. (9 Wall.) 812, 814-15 (1869); *see* Pet.23-24. The Federal Circuit's casual disregard of that settled rule, and its uniquely intrusive appellate review of jury verdicts and the expert testimony on which they rely, requires this Court's intervention. Pet.23-28.

Respondents have no persuasive justification for the Federal Circuit’s routine disregard of jury verdicts, or its palpable error in setting aside the particular verdict here—which is why respondents leave their discussion of the merits to a scant page at the end of their brief. *See* BIO.34-35. That cursory defense of the decision below is as weak as its placement suggests. Respondents insist that Finesse’s expert at trial “clearly, consistently, and extensively” gave “testimony that is inconsistent with liability,” such that no reasonable jury could have found in Finesse’s favor. BIO.34. But the Federal Circuit itself found nearly the opposite, deeming the expert’s testimony “confusing and unclear” and ultimately “contradictory.” Pet.App.8-9; *see* Pet.App.9 (“There is nothing clear about Dr. Wells’ testimony.”) But “contradictory” testimony by its very nature supports liability, at least in part, and it is settled law and the command of the Seventh Amendment that sorting out any confusion or contradiction was a role for the jury, not the Federal Circuit itself. And the jury here (like the district court) had no difficulty understanding Dr. Wells’ testimony and finding that it supported a verdict for Finesse. *See* Pet.App.27-47.

Respondents do not dispute that “reasonable factfinders may credit part of a witness’[] testimony without accepting it all,” and so the Federal Circuit could not properly dismiss Dr. Wells’ testimony because it deemed the testimony contradictory. BIO.34 (brackets omitted). Respondents nevertheless insist that Dr. Wells’ only testimony supporting the verdict was “at best conclusory and unexplained.” BIO.34. If that were true, respondents should have moved to exclude Dr. Wells’ testimony under *Daubert*

v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), which provides a legitimate framework for judges (albeit, principally trial judges) to exclude truly unreliable expert testimony. Respondents never raised any such *Daubert* challenge—neither pre-trial, nor post-trial after they had the full benefit of his supposedly hapless testimony providing (they claim) zero support for the jury’s liability verdict. Perhaps respondents made that tactical choice and forewent a meritless *Daubert* challenge with full confidence that the Federal Circuit would flyspeck the expert testimony anyways. But that just highlights the need for this Court’s review, because such intrusive appellate review is neither a legitimate substitute for *Daubert* nor remotely consistent with the Seventh Amendment.

II. The Decision Below Contravenes Decisions From Other Courts of Appeals.

The decision below is not only profoundly wrong, but entrenches a clear conflict between the Federal Circuit and the other courts of appeals. *See* Pet.28-32. In any other court of appeals, the jury’s decision on how to evaluate any confusion or uncertainty in Dr. Wells’ testimony would have been dispositive, as “conflicts in plaintiff’s expert’s testimony are for the jury to resolve.” *Poertner v. Swearingen*, 695 F.2d 435, 437 (10th Cir. 1982); *see, e.g., United States v. Flores*, 945 F.3d 687, 710-11 (2d Cir. 2019) (“[I]t is the province of the jury and not of the court to determine whether a witness who may have been inaccurate, contradictory and even untruthful in some respects was nonetheless entirely credible in the essentials of his testimony.” (emphasis omitted)); *Payton v. Abbott*

Labs., 780 F.2d 147, 156-57 (1st Cir. 1985) (“[I]t is a matter for the jury to resolve any inconsistencies in expert testimony.”). The Federal Circuit, by contrast, sees any purported inconsistency in an expert’s testimony as an invitation to ignore the jury’s verdict and decide for itself whether that testimony was persuasive enough to warrant a finding of infringement. *See* Pet.23-28. That conflict—and the Federal Circuit’s misguided approach—should not remain unaddressed.

Respondents offer no good reason to ignore that clear conflict. They start by claiming that there is “virtual unanimity” in favor of the Federal Circuit’s misguided approach, invoking this Court’s decision in *Cleveland v. Policy Management Systems*, 526 U.S. 795 (1999). BIO.24. But the “virtual unanimity” that *Cleveland* references involves a different rule entirely: the so-called “sham affidavit” rule providing that a party cannot survive summary judgment “simply by contradicting his or her own previous sworn statement ... without explaining the contradiction or attempting to resolve the disparity.” 526 U.S. at 806. This case does not involve that issue at all. Summary judgment, like *Daubert*, involves a judicial gate-keeping function that is fully consistent with the Seventh Amendment. But when, as here, the expert is not excluded under *Daubert* and the case survives summary judgment and goes to the jury, there is no basis for the appellate court to disregard the jury’s verdict based on perceived contradictions or inconsistencies in the expert’s testimony. On that question—i.e., the question presented, *see* Pet.i—the Federal Circuit stands alone.

Respondents have equally little success in trying to distinguish the “virtual unanimity” of regional circuit cases holding that evaluating purported inconsistencies in expert testimony is a quintessential jury question. *Contra* BIO.25-27. Respondents accuse Finesse of misrepresenting the Tenth Circuit’s decision in *Poertner* by quoting the plaintiff’s argument rather than the court’s holding, but the opinion speaks for itself: “Poertner contends that this inconsistency within the testimony of her expert witness is an issue of credibility for the jury to resolve, and therefore the trial court erred in directing a defense verdict. *We agree that the trial court erred.*” 695 F.2d at 436 (emphasis added).

Respondents misread the Sixth Circuit’s decision in *Teti*, claiming it “rejected the claim of contradiction.” BIO.25-26 (citing *Teti v. Firestone Tire & Rubber Co.*, 392 F.2d 294 (6th Cir. 1968)). But *Teti* explicitly quoted the contradictory testimony, *see* 392 F.2d at 297-98, and then concluded that the defendant’s “skillful attempt’ to ‘destroy’ the expert’s testimony,” BIO.25, was not fatal because the Sixth Circuit (unlike the Federal Circuit) refused to “usurp the function of a jury and determine the credibility of a witness,” *Teti*, 392 F.2d at 298. Respondents attempt to distract by citing *Peck v. Bridgeport Machines, Inc.*, 237 F.3d 614 (6th Cir. 2001), but that case just applies the inapposite sham-affidavit rule of *Cleveland*.

As for the First Circuit’s *Payton* decision, respondents claim it “concerned *consistent* testimony,” BIO.26, but the court could not have been clearer in holding that “it is a matter for the jury to resolve any

inconsistencies in expert testimony,” 780 F.2d at 156. And the First Circuit’s holding in *Samuels* that a “directed verdict ... was inappropriate” where the witness “was self-contradictory,” because “the jury could believe whichever account it chose,” did not depend on Massachusetts state law. *Samuels v. Hood Yacht Sys. Corp.*, 70 F.3d 150, 153 (1st Cir. 1995). *Contra* BIO.26-27. Respondents cite *Johnson v. Gordon*, 409 F.3d 12 (1st Cir. 2005), but that copyright decision held only that the plaintiff’s expert’s bare assertion of similarity—which was undermined by his actual analysis—was insufficient to raise an inference of copying. *Id.* at 22. That similarity-does-not-equal-copying holding has no bearing here.

The Second Circuit deems it “well established” that “[i]t is the province of the jury and not of the court to determine whether a witness who may have been inaccurate, contradictory and even untruthful in some respects was nonetheless entirely credible in the essentials of his testimony.” *Flores*, 945 F.3d at 710-11 (emphasis omitted). Respondents claim that “says nothing about whether testimony that is self-contradictory *in its essentials* can alone be sufficient,” BIO.27, but that just begs the question; it is for the jury, not the court, to decide whether a contradiction is essential or peripheral. Respondents also cite *Fosamax*, but that is yet another inapposite *Cleveland/sham-affidavit* case. *See In re Fosamax Prods. Liab. Litig.*, 707 F.3d 189, 193-94 (2d Cir. 2013).

In short, no regional court of appeals agrees with the Federal Circuit’s uniquely intrusive approach to appellate review of jury verdicts. The Federal

Circuit’s specialized jurisdiction may tempt it to view itself as the true expert, but its jurisdictional grant is no license to disregard the critical transsubstantive guarantees of the Seventh Amendment.

III. Correcting The Federal Circuit’s Overreach Is Exceptionally Important, And This Case Is An Ideal Vehicle.

Because respondents cannot persuasively defend the decision below on the merits or disguise its conflict with the regional circuits, they focus their efforts on minimizing the issue’s importance and concocting perceived vehicle problems. Respondents are wrong on both counts.

1. Respondents say this case is uncertworthy because it asks only whether “the Federal Circuit misapplied Fifth Circuit law.” BIO.21. But the Federal Circuit’s error goes far deeper. While the panel paid lip service to its obligation to follow Fifth Circuit law, it ignored it in practice, citing *zero* Fifth Circuit cases and relying instead on its own decision in *Johns Hopkins University v. Datascope Corp.*, 543 F.3d 1342 (Fed. Cir. 2008)—which was not purporting to apply Fifth Circuit law, but does famously exemplify the Federal Circuit’s disregard for jury verdicts. Pet.App.8-10; *see* Pet.18.

Respondents claim that the reliance on *Datascope* was harmless, because (they say) the Fifth Circuit likewise holds that an appellate court can overturn a jury verdict that rests on “self-contradictory” expert testimony. BIO.22 (citing *Doucet v. Diamond M Drilling Co.*, 683 F.2d 886 (5th Cir. 1982)). Not so. *Doucet* does not endorse anything like the Federal Circuit’s misguided approach—which is why neither

respondents nor the Federal Circuit cited it below. Instead, *Doucet* simply holds that a purely conclusory assertion by an expert witness that is contradicted by all the other record evidence is insufficient to prove negligence. 683 F.2d at 891-92. Nothing like that is presented here; the Federal Circuit found Dr. Wells' testimony "confusing and unclear," Pet.App.8, but it was hardly conclusory. *Doucet* does not remotely suggest that any purported contradiction in an expert's testimony empowers an appellate court to disregard the jury's verdict. Only *Datascope* does that—which is why the Federal Circuit routinely cites *Datascope* no matter which regional circuit's law it is supposed to be applying. See Pet.26-27 (collecting examples).

2. Respondents next attempt to paint this case as *sui generis*, claiming that there is no "trend" of Federal Circuit cases "undermining Seventh-Amendment rights." BIO.28-29. Numerous parties with no stake in this dispute beg to differ. As the petition notes, a vocal minority of Federal Circuit judges have been calling out the court's penchant for appellate factfinding for years, along with numerous commentators, including the United States. See Pet.1-2. And that trend continues: In a matter of days, this Court will review yet another petition asking whether the Federal Circuit "contravenes this Court's and the regional circuits' precedents by usurping the jury's role as factfinder and depriving litigants of their right to a jury trial." 2d.Appl.2, *Sunoco Partners v. Powder Springs Logistics*, No. 25A1126 (U.S. May 5, 2026). The Federal Circuit's well-documented disregard of the jury's role will continue until this Court intervenes.

3. Finally, the purported vehicle problems that respondents raise are illusory. As their lead argument, respondents insist that the question presented “is not presented at all,” because (according to respondents) the Federal Circuit actually held that there was “no testimony at all” to support Finesse’s infringement theory. BIO.15-16.

That is wishful thinking that simply misreads the Federal Circuit’s opinion. The Federal Circuit did not hold that “no testimony at all” supported the jury’s verdict here—that phrase never appears in its opinion. *Contra* BIO.17. Instead, it found that Dr. Wells’ testimony was “confusing and unclear,” that he “never clarified [what] he meant,” that there was “nothing clear about [his] testimony,” that he “offered no clear or detailed explanation for his contradictory testimony,” and that an appellate court may disregard “an expert’s self-contradictory testimony.” Pet.App.8-9. In short, the Federal Circuit’s opinion makes crystal clear that the court’s holding rested on its dismissal of Dr. Wells’ testimony as confusing and contradictory. Having dismissed Dr. Wells’ testimony—as “contradictory,” not because of any *Daubert* issue that respondents never raised—there may have been no *other* evidence to support the verdict. But that just highlights the Federal Circuit’s error. *Daubert* provides a legitimate framework for judges to reject unreliable testimony. Simply dismissing the expert’s testimony as contradictory is just a Seventh Amendment violation plain and simple.

Respondents emphasize a single sentence in the Federal Circuit’s opinion, in which the court observed that Dr. Wells “never testified x1 and x2 correspond to

the ‘signals of interest’ and ‘interference generating signals.’” Pet.App.9. But the fact that Dr. Wells never used that phrase *en haec verba* does not mean the Federal Circuit found “no testimony at all” to support that view. *Contra* BIO.16. Quite the opposite: The Federal Circuit recognized that the district court read Dr. Wells’ testimony as “clearly” supporting the jury’s finding, and responded only that there was “nothing clear about Dr. Wells’ testimony.” Pet.App.8-9. That clarity/contradictory dismissal of Dr. Wells’ testimony was the court’s holding. Respondents’ strained attempt to invent an independent alternative holding only underscores their unwillingness to defend the Federal Circuit’s actual analysis.

Respondents contend that the petition “identifies no issue with the Federal Circuit’s ruling on the ’775 patent.” BIO.19. But the petition clearly explains that the panel made the exact same error with respect to the ’775 patent. *See* Pet.18-21, 35. And that the panel repeated its error only heightens the need to reverse the Federal Circuit’s consistent disdain for jury findings and the Seventh Amendment. *See* Pet.23-28, 32-35.

Respondents’ remaining purported vehicle problems scarcely warrant discussion. Respondents assert that the petition faces “insurmountable vehicle problems” because, in their view, Dr. Wells’ testimony was so deficient that no reasonable juror could accept *even the testimony that supported Finesse’s theory* as sufficient to warrant a verdict in Finesse’s favor. BIO.30-31. Of course, that assertion is difficult to square with the jury’s *actual* verdict in Finesse’s favor, or with the post-trial ruling by the experienced district

court judge (who, like the jury, heard all of the testimony at trial) finding that Dr. Wells' testimony "clearly" supported that verdict. Pet.App.32; *see* Pet.App.27-47. More to the point, even the Federal Circuit did not find that the portions of Dr. Wells' testimony favoring Finesse were insufficient to support the verdict; it held only that the testimony was "confusing and unclear" enough that it could disregard the jury's finding. Pet.App.8-9.

Finally, respondents claim that Finesse's "fundamentally inconsistent explanations," "ever-shifting theories," and purported "forfeiture problems" would impede this Court's review. BIO.32-34. That litany of accusations is baseless, *see* Pet.14-18, 20-21 (describing Finesse's consistent infringement theories), and irrelevant as none of respondents' unfounded complaints would have any effect on this Court's ability to correct the Federal Circuit's straightforward error here in failing to properly defer to the jury's verdict and its resolution of any purported inconsistencies in the expert testimony. At the end of the day, there is simply no denying that the Federal Circuit is supposed to be applying regional precedent that universally respects the province of the jury. Instead, it is applying a bespoke standard exemplified by *Datascope* and the decision below that makes appellate judges the arbiters of the expert evidence. This Court should grant review and end this ongoing Seventh Amendment violation.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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