OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: KUMHO TIRE COMPANY, LTD., ET AL., Petitioners v.

PATRICK CARMICHAEL, ETC., ET AL.

CASE NO: 97-1709 c. 2

PLACE: Washington, D.C.

DATE: Monday, December 7, 1998

PAGES: 1-56

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 KUMHO TIRE COMPANY, LTD., :

4 ET AL., :

5 Petitioners :

6 v. : No. 97-1709

7 PATRICK CARMICHAEL, ETC., :

8 ET AL. :

9 - - - - - - - - - - - - - - - - - -X

10 Washington, D.C.

11 Monday, December 7, 1998

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States at

14 10:04 a.m.

15 APPEARANCES:

16 JOSEPH P. H. BABINGTON, ESQ., Mobile, Alabama; on behalf

17 of the Petitioners.

18 JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor

19 General, Department of Justice, Washington, D.C.; on

20 behalf of the United States, as amicus curiae,

21 supporting the Petitioners.

22 SIDNEY W. JACKSON, III, ESQ., Mobile, Alabama, on behalf

23 of the Respondents.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument

4 first this morning in Number 97-1709, the Kumho Tire

5 Company v. Patrick Carmichael.

6 Mr. Babington.

7 ORAL ARGUMENT OF JOSEPH P. H. BABINGTON

8 ON BEHALF OF THE PETITIONERS

9 MR. BABINGTON: Mr. Chief Justice, and may it

10 please the Court:

11 We are here today because the circuit court

12 unduly restricted the district court's evaluation of the

13 reliability of certain expert testimony offered by

14 respondents. The Eleventh Circuit barred the district

15 court from considering the reliability factors set forth

16 in this Court's decision in Daubert v. Merrell Dow.

17 If permitted to stand, the Eleventh Circuit's

18 decision would allow experts to escape scrutiny under the

19 reliability factors merely by invoking experience in some

20 broad sense as a basis for testimony.

21 QUESTION: At some point during your argument --

22 I just am troubled by this, and wish you would address it.

23 It sounded to me as if your expert, the defense

24 expert, used just about the same methodology as the

25 plaintiff's expert. He talked about over-deflected

1 operation because of severe beading, groove compressions,
2 the discoloration on the side, and I don't know if it's
3 waiver, or estoppel, or stipulation, but it seems to me
4 that this is what your expert was talking about, too, and
5 I'm troubled by it. Just during the course of your
6 argument, if you could mention that.
7 MR. BABINGTON: Justice Kennedy, we disagree
8 with that interpretation of the record. First, the -- it
9 it is clear that the petitioners' expert physically
10 examined the tire before he issued his report. The
11 respondents' expert, by contrast, issued his report
12 containing his conclusion before conducting any physical
13 examination of the tire.
14 In addition, there was a completely different
15 methodology that was used, and that's what troubled, most
16 troubled the district court. The methodology used by the
17 respondents' expert was a process of elimination, rule of
18 thumb methodology that we pointed out in our briefs, and
19 by contrast, our expert used a methodology that asked very
20 broadly, what are the causes, why did this tire come out
21 of service, and in asking that looked at all of the
22 evidence and did not limit his consideration of the
23 evidence just to eliminating certain factors of abuse.
24 QUESTION: The principal attack in the briefs,
25 as I understood it, on the plaintiff's expert was that he

1 had these four factors. Now, I recognize that he said, if
2 there are four and any two are present, then I'll make one
3 conclusion, and you may argue about that, but so far as
4 the factors that he uses, i.e., the discoloration, the
5 beading, et cetera, they were the same, were they not, as
6 your own expert?

7 MR. BABINGTON: They looked for the same
8 evidence on the tire in some respects. The respondents'
9 expert, of course, limited his consideration, did not look
10 for particularly affirmative evidence of defect.

11 But the major difference was the way that
12 they -- the method that they applied to get from what they
13 saw on the tire to their ultimate conclusion in the case,
14 and our point is that a district court, in evaluating the
15 reliability of expert testimony offered by parties before
16 a court should not be prohibited from considering the
17 logical, common sense questions that flow out of this
18 Court's Daubert factors, broadly understood.

19 The lower courts have applied and understood the
20 Daubert factors in a flexible, broad manner, as this Court
21 intended.

22 QUESTION: Well now, let me ask you something.
23 The Eleventh Circuit apparently reviewed the decision of
24 the trial court to apply the Daubert standard de novo.
25 The Eleventh Circuit looked at that de novo, said it was a

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1 question of law and it would look at it de novo, but I
2 think acknowledged that the ultimate decision of the
3 district court whether to exclude the evidence should be
4 reviewed on an abuse of discretion standard.
5 Now, I'm a little confused. What is the
6 standard we should apply to this question that you present
7 us with here? Do we look at it de novo, or do we look at
8 it under an abuse of discretion standard?
9 MR. BABINGTON: The standard of review of the
10 Eleventh Circuit's holdings that were the basis for its
11 decision should be reviewed de novo.
12 The Eleventh Circuit made two errors of law.
13 First, it crafted this experience exception that I was
14 discussing, which is that if an expert invokes
15 experience --
16 QUESTION: Well, let me back up, then. What
17 standard of review should the Eleventh Circuit have
18 applied, abuse of discretion, or some de novo review, or a
19 combination of the two?
20 MR. BABINGTON: Well, I think it would be a
21 combination. Certainly as to the standard that should be
22 applied, that's a question of law. Our point is that the
23 Eleventh Circuit erred in how it interpreted this Court's
24 Daubert decision.
25 In footnote 8 in Daubert, this Court said, our

1 discussion is limited to the scientific context, because
2 that was what was before the Court.
3 QUESTION: Well, certainly Daubert itself
4 indicated that it was dealing there with some kind of
5 scientific evidence, and it didn't purport to establish
6 some global principles of the four factors in every case,
7 did it?
8 MR. BABINGTON: Well, the -- what we contend the
9 Court did in Daubert was to set forth general, broad,
10 common sense criteria that courts can use to determine the
11 reliability of a broad range of expert testimony.
12 QUESTION: Well, there's a lot of discussion
13 about whether we should look to a standard that directs
14 the trial judge's attention to indicia of reliability in
15 the field at issue. I mean, what is it regarding this
16 issue in the field that is recognized as legitimate for an
17 inquiry?
18 Now, is there anything in this record to show
19 that the district court made any findings on the indicia
20 of reliability that prevail in the tire manufacturing
21 field?
22 MR. BABINGTON: Yes. If you look at the
23 district court's opinion on reconsideration, I think it's
24 specifically discussed in the joint appendix at pages 91
25 and 92.

1 The district court considered the respondents'
2 argument that the respondents' expert did the same thing
3 as the petitioners' expert, and that there was evidence in
4 the record that supported the view that what the
5 respondents' expert did was commonly accepted. Everyone
6 did it this way.
7 And the district court specifically rejected
8 that, saying that the evidence before the court did not
9 establish that. At most, all it established was that the
10 two experts used the same method of -- or technique of
11 gathering data, and that's really not that surprising.
12 You should look first to the product in question to gather
13 your data.
14 What most troubled the district court was the
15 methodology, how the experts got from the information on
16 which they were basing their opinion to their ultimate
17 conclusion, and as this Court pointed out in Joiner, the
18 ipse dixit of the expert is insufficient to support the
19 ultimate conclusion.
20 There must be some objective validation or
21 criteria that the district court can look to. How does
22 the district court otherwise know that the expert's not
23 just making it up, and that's really the point of our
24 argument, that the district court, in answering that
25 central question, should be allowed to ask the logical,

1 common sense questions that flow out of this Court's
2 Daubert criteria.
3 QUESTION: Well, does the record show the
4 district court looked at anything other than the four
5 Daubert factors?
6 MR. BABINGTON: Absolutely. What the district
7 court did was consider the fact, the logical flaws in the
8 respondents' expert's approach.
9 For example, that even though he had a
10 methodology, he didn't even apply the methodology in this
11 case. Instead of physically examining the tire first, he
12 looked at photographs of the tire, and he admitted that he
13 didn't know whether his past analyses of failed tires had
14 ever been correct.
15 QUESTION: Mr. Babington, there's circulating
16 now a proposed revision of Rule 702, and that is set forth
17 in the appendix to the respondents' brief. It says there
18 are three things to look at, 1) the reliability of the
19 facts, the reliability of the principles and method, and
20 finally the reliability of the application.
21 Would you think that that's an adequate
22 statement? You tell us that the Eleventh Circuit is no
23 good because they removed all of the standards. Daubert,
24 on the other hand, has these four factors, and the
25 district court did organize its decision under those.

1 But suppose we had, instead -- suppose the
2 district court or the Eleventh Circuit had said, Daubert
3 is too rigid, we like these standards, would that be
4 acceptable?
5 MR. BABINGTON: Well, we think that the proposed
6 rule merely is an attempt to put down more clearly the
7 existing law, is what I understand that the advisory
8 committee is attempting to do. It is a mere proposal. It
9 hasn't been acted on yet.
10 But that standard is an effort by the advisory
11 committee to put down in the rules what the lower courts
12 have thought about how they should assess reliability of
13 expert testimony following this Court's landmark Daubert
14 decision, and under the new rule, or under the -- so to
15 answer your question, the answer really wouldn't be any
16 different.
17 The Daubert criteria, broadly understood and
18 flexibly applied, lead to exactly the type of questions
19 that the district court asked of this expert to determine
20 if his testimony was more than just his say-so, more than
21 just guesswork or speculation.
22 QUESTION: What you are saying, Mr. Babington, I
23 take it, is that the Daubert opinion dealt with kind of
24 scientific peer review type of evidence, but that the
25 gatekeeper function extends beyond that to anything

1 covered by Rule 702 when it's dealing with expert
2 evidence.
3 MR. BABINGTON: That's correct, Mr. Chief
4 Justice. We are saying that it's clear that the
5 gatekeeper function applies to any expert offered under
6 Rule 702. The respondents agree with that. The Solicitor
7 General agrees with that. I don't think any of the amici
8 seriously question that. That's very clear.
9 QUESTION: Well, you're contending more than
10 that. You're contending, as well, that the Daubert
11 factors can be applied to any expert testimony.
12 MR. BABINGTON: What we're --
13 QUESTION: Are broadly applicable to any expert
14 testimony, not exclusive, but broadly applicable.
15 MR. BABINGTON: That's correct, Justice Scalia.
16 What we are saying is that the gatekeeper function
17 definitely applies to all experts, and then in how the
18 judge exercises his gatekeeper function to determine
19 whether there is a reliable foundation for the expert
20 testimony that's been proffered involves his asking of
21 questions such as those that logically flow out of the
22 Daubert factors.
23 QUESTION: Not all. Not all would do that. I
24 mean, wouldn't it depend on whether the shoe fits? I
25 mean, why couldn't you have an expert in painting, a great

1 expert, and he looks at that and says, this is deep
2 magenta. I don't even know what magenta is.
3 (Laughter.)
4 QUESTION: And you say, how do you know? How do
5 you know? He says, I've looked at 50,000 paintings.
6 Believe me, I work for the Philadelphia Museum of Art,
7 I've looked at so many, I know. I recognize it. You
8 wouldn't apply Daubert factors in such a case.
9 I mean, isn't it Daubert factors where they
10 belong, when you're trying a general theory, and some
11 other thing where it's not?
12 MR. BABINGTON: Justice Breyer --
13 QUESTION: Is that right, or not?
14 MR. BABINGTON: Justice Breyer, we agree that
15 the Daubert factors can be flexibly applied --
16 QUESTION: No, flexibly -- what in my deep
17 magenta case -- you know, the Daubert factors are whether
18 the technique or theory used could be tested or refuted,
19 whether it's been a subject of peer review, the rate of
20 error.
21 I mean, think of my artist, my artist expert.
22 He says, I've seen 50 million paintings. Believe me, I
23 know deep magenta when I see it. The Daubert factors have
24 no bearing there, do they?
25 MR. BABINGTON: We agree that in certain cases

1 it may be appropriate not to apply --
2 QUESTION: All right. Then if that's so, why
3 did you answer Justice O'Connor the way you did? Why
4 wouldn't it be whether the shoe fits, i.e., whether the
5 Daubert factor applies here or not, is a matter for the
6 district judge, subject to review for abuse of discretion?
7 MR. BABINGTON: Well, the district -- our point
8 is that the district judge should be allowed to ask the
9 logical, common sense questions.
10 QUESTION: I'm asking my question. My question
11 is, why did you reply to Justice O'Connor by saying -- why
12 didn't you say -- I want you to have a chance -- whether
13 you apply the Daubert factors or whether you apply my deep
14 magenta, which is experience, depends on the circumstance.
15 The circumstance is up to the district judge, reviewable
16 for abuse of discretion in the court of appeals.
17 Now, you either agree with that, or you don't.
18 I want to know if you agree with it and, if you don't, why
19 not?
20 MR. BABINGTON: We think that the broad --
21 QUESTION: Do you agree with what I said or not?
22 MR. BABINGTON: We think that the broad standard
23 should be that -- reviewable as for -- under -- as I
24 understood, Justice O'Connor's question was, what was the
25 standard of review, and the standard is a matter of law.

1 Now, how that standard is applied is for abuse
2 of discretion.
3 QUESTION: I'm sorry, I still want to know if
4 you agree with the way I put it.
5 You don't have to agree by any means, but I'd
6 really like to know. I -- do you want me to repeat it
7 again, or not?
8 MR. BABINGTON: No. I think I understand the
9 question, which is that in certain cases, would a district
10 court be wrong, or would he err in not applying the
11 Daubert factors. Is that the --
12 QUESTION: No. My question is whether the shoe
13 fits, whether you apply Daubert factors to an expert or
14 something else, like deep magenta, experience, whether you
15 do one or the other depends on whether the shoe fits in
16 the particular case. It's up to the district judge,
17 reviewable for abuse of discretion.
18 Whether our case is a case involving a general,
19 testable theory, or our case is a case involving reliance
20 upon the expert's personal experience, whether it's the
21 one or the other is up to -- you see what I'm saying? Am
22 I clear?
23 MR. BABINGTON: I think, you know, we're arguing
24 over semantics. Where I'm having trouble with your
25 question is, I think that the standard is a legal

1 standard, reviewable de novo, but how that standard is
2 applied in a particular case is reviewable by abuse of
3 discretion.

4 QUESTION: I thought your -- are you going back
5 on your brief? I thought your brief's position was, it's
6 always okay to use the Daubert standards, and even in the
7 deep magenta case, is it relevant that his estimation of
8 what is deep magenta is not susceptible to testing or
9 falsification?

10 Suppose you have another witness who says, yes,
11 I've also examined 100, and I have had my judgment tested
12 by one methodology or another. Isn't it relevant whether
13 it's subject to testing or falsification?

14 MR. BABINGTON: Exactly. Our point is that the
15 district court should be allowed to ask these questions as
16 appropriate --

17 QUESTION: It's never wrong --

18 MR. BABINGTON: -- in every case.

19 QUESTION: It's never wrong to ask those
20 questions.

21 MR. BABINGTON: Right. If --

22 QUESTION: Isn't that your position?

23 MR. BABINGTON: Yes. If the proponent of the
24 evidence, Justice Scalia, comes forward and says, this
25 factor should not be given much weight in this case, then,

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1 of course, the court can say, as this Court noted in
2 Daubert, that perhaps peer review isn't something that
3 would be applicable in every case, and it should be given
4 little or no weight, and the --
5 QUESTION: Isn't it applicable in every case?
6 If you have two witnesses, and one of them comes up with a
7 magenta kind of stuff, and the other one comes up with
8 something that seems equivalently fuzzy but he says, and
9 by the way, my judgment as to these 1,000 paintings was
10 subjected to peer review, and the entire artistic
11 community agreed with me, wouldn't that make his testimony
12 more reliable?
13 MR. BABINGTON: That's exactly our point. It
14 should be based on the evidence that's before the court.
15 It may be that in a particular case the expert
16 can't trace from the facts to the conclusion by --
17 QUESTION: Questions are always relevant.
18 Aren't the questions always relevant?
19 MR. BABINGTON: The questions are always
20 relevant, absolutely. That's our point.
21 QUESTION: How about the beehive keeper that the
22 Eleventh Circuit fastened on as an example of somebody who
23 has great expertise based on constant observation, but the
24 Daubert factors don't seem to fit that kind of expert.
25 MR. BABINGTON: Our point, Justice Ginsburg, is

1 that it's -- the district court should be allowed to ask
2 those questions and have the expert explain why the
3 particular question flowing out of one of the Daubert
4 criteria doesn't apply to that particular expert, but we
5 believe the beekeeper can be adequately reviewed under the
6 Daubert factors.
7 I think one of our amici, the Product Liability
8 Advisory Council, in fact, in their footnote 12 in their
9 brief, pointed out that there are studies dealing with
10 beekeepers that actually speak to the issue that's
11 mentioned in that analogy.
12 I would like to reserve the --
13 QUESTION: May I ask you one last --
14 QUESTION: Just one --
15 QUESTION: Justice Stevens.
16 QUESTION: I just wanted -- you didn't really
17 have much chance to respond to Justice Kennedy's beginning
18 question. You did point out that the man who testified
19 had not looked at the tire.
20 It is your view, though, is it not, that even if
21 Edwards had been the witness, his testimony would also
22 have been inadmissible.
23 MR. BABINGTON: That's correct.
24 QUESTION: So it isn't a matter of not having
25 looked at the tire.

1 MR. BABINGTON: That's correct. We'd like to
2 reserve the balance of my --
3 QUESTION: I have one last question I'd like to
4 ask you. Do I understand you correctly that your position
5 is that the Daubert factors are always relevant, that the
6 four Daubert questions may always properly be asked, but
7 there are some cases in which an expert might flunk on all
8 four Daubert factors and nonetheless properly be admitted
9 to testify. Is that --
10 MR. BABINGTON: That's correct, if there was
11 some objective, other objective support that the expert
12 could put forth to show that his testimony was based on
13 good grounds on proper validation.
14 I'd like to reserve the balance.
15 QUESTION: Thank you, Mr. Babington.
16 Mr. Minear, we'll hear from you.
17 ORAL ARGUMENT OF JEFFREY P. MINEAR
18 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
19 SUPPORTING THE PETITIONERS
20 MR. MINEAR: Mr. Chief Justice, and may it
21 please the Court:
22 The United States submits that the court of
23 appeals erred in holding that expert testimony based on
24 experience is categorically exempt from the reliability
25 analysis that this Court described in Daubert.

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1 Daubert makes clear that a trial judge must
2 ensure that expert testimony, whatever its subject matter,
3 rests on a reliable foundation and is relevant to the task
4 at hand. This Court did not draw distinctions in that
5 respect between expert testimony that rests on scientific
6 principles and expert testimony that rests on experience,
7 nor did it lay down iron-clad rules governing what
8 reliability factors a trial judge may properly consider.
9 Instead, the court recognized that the
10 reliability inquiry is a flexible one, and that a trial
11 judge should be able to call upon the full range of
12 relevant considerations in determining whether the expert
13 testimony is sufficiently reliable to assist the trier of
14 fact.
15 The Daubert decision did identify four general
16 factors that a court may find useful in assessing an
17 expert's methodology.
18 QUESTION: Mr. Minear, do you agree that as a
19 general matter the trial court judge should exercise the
20 gatekeeping function --
21 MR. MINEAR: Certainly.
22 QUESTION: -- of 702 by looking to the indicia
23 of reliability prevailing in the relevant discipline?
24 MR. MINEAR: We think --
25 QUESTION: Is that what they do?

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1 MR. MINEAR: We think that is a relevant
2 consideration and, in fact, broadly speaking, that is
3 reflected in one of the Daubert factors, whether there's
4 general acceptance of the opinion that's expressed, but we
5 also believe that that's only one factor, and --
6 QUESTION: What if there's no standard of -- I
7 mean, what if there's no standard of reliability in the
8 relevant discipline? I mean, what if there is a whole
9 cadre of tire examiners out there, all of which use, you
10 know, witchcraft science?
11 (Laughter.)
12 QUESTION: Do you have to say, well, since there
13 are no standards of reliability in this field, we have to
14 let any expert testify?
15 MR. MINEAR: Certainly not. We think the
16 ultimate responsibility for the trial judge is to make a
17 rational determination of whether the evidence is
18 sufficiently reliable to assist the trier of fact.
19 If there is no indicia of reliability
20 whatsoever, if the field is simply raft with odd theories
21 that cannot be reconciled and have never been tested, and
22 we think that's an important consideration for the trial
23 judge to take into account, and would most likely exclude
24 that type of evidence.
25 Now, the Court did identify those four

1 factors --

2 QUESTION: Do you think that in this case the

3 district court's decision not to admit the testimony

4 should have been affirmed?

5 MR. MINEAR: Yes, we do, Your Honor. We believe

6 that the trial court here did not abuse its discretion in

7 determining that Mr. Carlson's methodology was not

8 sufficiently reliable.

9 QUESTION: And you think that the court of

10 appeals should review it on an abuse of discretion

11 standard, that we don't have some issue of law here?

12 MR. MINEAR: That is correct, although there is

13 an issue of law here, based on what the court of appeals

14 said. The court of appeals established as a matter of

15 law, so it said on page 104 of the joint appendix, that

16 Daubert does not apply to this type of expert. In a

17 sense, it created a categorical exemption for this type of

18 evidence, and --

19 MR. MINEAR: And the district court, I assume,

20 on your theory would have committed an error of law if it

21 had said, the four Daubert factors are the only things we

22 ever consider and if, in fact, one flunks the four Daubert

23 factors, that as a matter of law precludes the testimony,

24 that would have been a legal error, too --

25 MR. MINEAR: That would have been a legal

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1 error --

2 QUESTION: -- taken to the other extreme.

3 MR. MINEAR: Yes. I agree with that, Justice --

4 QUESTION: Indeed, that would have been a legal

5 error even with regard to the most scientific of

6 scientific testimony, wouldn't it?

7 MR. MINEAR: I think that's right. An example,

8 perhaps, to explain that would be a statistician who

9 offers a theory that -- Bayes' theory on statistics, and

10 he attempts to validate that theory simply by a logical

11 proof, and he goes step by step and proves that that

12 statistical theory is accurate. That's sufficient basis

13 for it to be admitted without testing, without peer

14 review, without the other requirements.

15 QUESTION: In this case, would it have been

16 error to admit the expert's testimony?

17 MR. MINEAR: Would -- it would have been --

18 would it have been error to admit -- I think under these

19 circumstances we would think that it would have been an

20 abuse of discretion.

21 QUESTION: Would not?

22 MR. MINEAR: Would have.

23 QUESTION: Would have.

24 MR. MINEAR: It affirmatively would have been an

25 abuse of discretion.

1 QUESTION: And is that because there was nothing
2 to link the experience with the conclusion that he was
3 ready to offer?
4 MR. MINEAR: That's correct. If Mr. Carlson was
5 simply testifying on his own visual examination of the
6 standards of abuse on the tire, we don't think that that
7 would necessarily be an abuse of discretion.
8 The problem with Mr. Carlson's testimony here
9 was there was nothing to support his ultimate conclusion
10 that there must be a defect. His -- there was no way in
11 which the trial court -- this is what concerned the trial
12 court. There was no way it could validate his opinion
13 that because there are only marginal signs of abuse, there
14 must be a defect, and that's where his focus was.
15 QUESTION: It would be as if in Justice Breyer's
16 hypothetical he said, this is magenta, and therefore it
17 must have been based -- it must have been painted over a
18 canvas that had been sprayed with dye.
19 MR. MINEAR: That's correct. In other words,
20 you're drawing is an analytical leap, to use the language
21 that was set forth in Joiner, that simply was not
22 justified on a rational basis alone, and that's why the
23 court here thought it necessary to make a further inquiry.
24 Now, all four of the inquiries it made were
25 highly pertinent to that question. If Mr. Carlson's

1 testimony was, in fact, accurate, if his methodology was
2 accurate, then it should be susceptible to testing.
3 What was really concerning the trial court here
4 was that there was no testing that was done here, and
5 there was no way to know whether any of Mr. Carlson's
6 projections or predictions with respect to defects had
7 ever been proved. Now --
8 QUESTION: May I ask, if there had been -- the
9 plaintiffs had gotten some expert testimony, would the
10 respondent's expert witness testimony have been
11 admissible?
12 MR. MINEAR: We think the -- excuse me, the
13 respondents' expert?
14 QUESTION: I mean -- I'm sorry, I got it
15 backwards, the petitioners' expert. The defendants'
16 expert. Would that testimony have been admissible had it
17 been necessary to reach, you know, a conflict in the
18 evidence?
19 MR. MINEAR: Yes, I think so, and what we had
20 here, what we could have had here would simply be a
21 dispute over whether or not the tire was abused, in which
22 case the petitioners' expert and respondents' expert did
23 use similar methodology with regard to examining the tire,
24 saying what they found and what they concluded from that
25 with regard to abuse.

1 The problem in this case is that respondents
2 have to prove that there is a defect. They had no
3 affirmative evidence of a defect, and they relied on this
4 process of elimination theory to reach that conclusion,
5 and that's where the trial court said there was simply too
6 far of an analytical leap simply to say that, well, we've
7 looked at the tire and there's only marginal signs of
8 abuse, so there must be a defect, even though there was no
9 evidence of a defect and the expert was unable to prove
10 that whenever this situation occurs there in fact is a
11 defect. There was never any controlled laboratory test to
12 establish the veracity or corroborate that conclusion.
13 QUESTION: Well, you would agree -- I mean,
14 depending on how broadly you mean the word abuse -- would
15 a road hazard be an abuse? I mean, you know, you non-
16 negligently run over a nail in the road. You consider
17 that abuse?
18 MR. MINEAR: Yes, if --
19 QUESTION: Okay.
20 MR. MINEAR: If abuse is read broadly enough.
21 QUESTION: Is read broadly. Now, is it a
22 rational proposition that if a tire has not been subject
23 to abuse and fails, it must have been because of a
24 manufacturing defect?
25 MR. MINEAR: No, I don't think that necessarily

1 follows.

2 QUESTION: Well, what else could it be due to?

3 MR. MINEAR: The tire could simply wear out. In

4 this case, 90 percent --

5 QUESTION: Oh, okay.

6 MR. MINEAR: -- of the tread was gone. The tire

7 was bald.

8 QUESTION: Well, you're not defining abuse

9 broadly enough, then.

10 MR. MINEAR: Yes. I don't believe that Mr.

11 Carlson defined abuse that broadly. I mean, he did do it

12 in the context of the service life of the tire, so I think

13 that it depends if -- the problem with the process of

14 elimination --

15 QUESTION: He didn't say there was no abuse. He

16 said there was no evidence of abuse. That was the real

17 logical flaw in his analysis, wasn't it? Since I cannot

18 find evidence of abuse, it must have been a manufacturing

19 defect.

20 I might have gone along with him if he had said,

21 since there -- since I can testify for sure there was no

22 abuse, reading abuse broadly, including running the tire

23 too long, running over a nail and everything else.

24 MR. MINEAR: Well, I think even he agreed that

25 there were some signs of abuse, although he discounted

1 them based on his experience and the like, so I don't
2 think that he testified that there was no evidence of
3 abuse. I think actually his testimony was that oh, yes,
4 there is shoulder wear on the tire, but I ascribe that to
5 causes other than abuse.
6 But the real problem here was that leap that,
7 well, simply because I only see these signs of abuse, the
8 tire must be defective.
9 The problem with the process of elimination
10 approach is, you must make sure that you've eliminated all
11 of the possible causes, and certainly there are many
12 tabloids that reported flying saucers based on a flawed
13 process of elimination technology. Many magic tricks turn
14 on a flawed process of elimination basis to trick the
15 viewer.
16 And that's why I think the trial court was
17 rightly skeptical of the application of a process of
18 elimination theory without any sort of supporting
19 corroboration that would indicate that that process was,
20 in fact, valid, and that again was what I think really
21 concerned the trial court.
22 If there are no further questions, thank you.
23 QUESTION: Thank you, Mr. Minear.
24 Mr. Jackson, we'll hear from you.
25 ORAL ARGUMENT OF SIDNEY W. JACKSON, III

1 ON BEHALF OF THE RESPONDENTS

2 MR. JACKSON: Thank you, Mr. Chief Justice

3 Rehnquist, and may it please the Court:

4 First, to set the record straight about what the

5 trial court said about applicable Alabama law in this

6 diversity case, on page 36 of the joint appendix the Court

7 discounted the attack on a process of elimination form of

8 proof. Despite defendants' exhortations to the contrary,

9 the court perceives no inherent flaw in a process of

10 elimination form of proof per se, as long as the

11 underlying methodology is scientifically valid.

12 Under Alabama law --

13 QUESTION: Excuse me. You say this is 36 you

14 were just reading from?

15 QUESTION: I can't find where you're --

16 MR. JACKSON: Footnote 7.

17 QUESTION: Of the joint appendix, you said?

18 MR. JACKSON: Yes, sir, of the joint appendix,

19 Your Honor, page 37, footnote 7 in the court's first

20 order.

21 QUESTION: 36, footnote 7.

22 MR. JACKSON: I'm sorry, judge -- justice -- Mr.

23 Justice Scalia, page 36, yes, sir, and that flows from the

24 Hillhaven Farms v. Sears case, which interpreted Alabama

25 law in a tire failure case where the plaintiff did not

1 rule out abuse, and the case was sent back in order that
2 the plaintiff could do such -- put on such proof.
3 QUESTION: Well, how much of this, Mr. Jackson,
4 is controlled by Alabama law and how much by the Federal
5 law of evidence?
6 MR. JACKSON: Your Honor, the substantive
7 Alabama law would be applied to see whether or not we have
8 presented sufficient proof to let a defect go to the jury.
9 QUESTION: Yes.
10 MR. JACKSON: The Federal Rules of Evidence, of
11 course, will apply on what evidence comes in and what
12 evidence does not come in, so it would be the Federal
13 Rules of Evidence who make procedural --
14 QUESTION: So then, what is the relevance of
15 Alabama law to this particular case and this question we
16 have before us now?
17 MR. JACKSON: Your Honor, the relevance of
18 Alabama law deals directly with the reliability and
19 relevance of what Mr. Carlson was going to do in this
20 case.
21 QUESTION: Well, if you say -- but that -- what
22 Mr. Carlson was trying to do was to qualify himself as an
23 expert, was he not?
24 MR. JACKSON: Yes, sir, and his
25 qualifications --

1 QUESTION: Why would Alabama law control whether
2 or not the district court should admit his testimony under
3 Rule 702?
4 MR. JACKSON: It would not, Mr. Chief Justice.
5 QUESTION: Then why are you saying what you are?
6 MR. JACKSON: Because the petitioners take the
7 point, or take the standpoint in their briefs and down
8 below that this type of expert testimony cannot lead
9 anywhere in the context of the facts of this case, and
10 certainly his testimony, his proffer can, because we know
11 that if abuse is ruled out as the cause of the
12 Carmichaels' tire failure, then whether or not the tire
13 failed due to a defect is properly an issue for the jury.
14 It's a question of fact.
15 And here, Mr. Carlson was going to take the
16 tire, he was going to take it in front of the jury, he was
17 going to explain that, based on his years of experience at
18 Michelin in watching thousands of tires fail and examining
19 the carcass of those tires, that there would be four
20 signs, objective indicia of abuse, and he would show where
21 those signs should be, and he would point to the sidewall
22 deterioration and show --
23 QUESTION: I did not understand that he was
24 going to say that there could be no abuse unless he found
25 signs of abuse. Was he willing to say that, that he could

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1 guarantee the jury that if there was any abuse, I would
2 have seen signs of abuse?
3 MR. JACKSON: No, Your Honor, he could not
4 guarantee the jury that.
5 QUESTION: Well, if he can't do that, then he
6 can't eliminate abuse, and if you can't eliminate abuse,
7 you cannot make the assumption that there must have been a
8 manufacturing defect.
9 MR. JACKSON: Well --
10 QUESTION: He can just say, I didn't see any
11 signs of abuse.
12 MR. JACKSON: Well, Justice Scalia --
13 QUESTION: But there may have been abuse that
14 I -- that didn't produce any signs, and as long as there's
15 that gap, it seems to me you never get to the conclusion.
16 MR. JACKSON: Yes, Your Honor, but this is not a
17 production burden issue.
18 The issue here is whether or not this testimony
19 should be admitted to begin with, and what factors the
20 court should or should not look at in determining that
21 threshold of reliability in order to allow him to testify,
22 because what Mr. Carlson is going to do is to take a
23 fairly mundane object, a tire, and he is going to assist
24 the jury in reading that tire.
25 QUESTION: I understand what you're saying, if

1 he was being introduced to the jury simply to prove the
2 point that there were no objective indicia of abuse, but
3 that isn't what he testified. He testified to the jury,
4 there was a manufacturing defect in this tire, and he
5 could not testify to that unless he could testify that if
6 there had been abuse, I would have seen some objective
7 indicia of it, and you say he didn't testify that and
8 couldn't testify that.
9 MR. JACKSON: Justice Scalia, I believe the
10 record will show that Mr. Carlson, the expert, candidly
11 stated that he cannot point to the specific defect. That
12 is next to impossible in a tire failure case.
13 But what he can do is, is he knows to look for
14 certain types of objective indicia to rule out abuse and
15 the Eleventh Circuit cited the --
16 QUESTION: He couldn't rule out abuse. I
17 thought you answered my question --
18 MR. JACKSON: Then I misspoke.
19 QUESTION: -- that he never testified that if
20 there was abuse, I would certainly have seen indicia of
21 it. Did he say that?
22 MR. JACKSON: Well, he stated that if there is
23 abuse, there are four common signs that are apparent in
24 most all tires that fail due to abuse, and most tires do
25 fail due to abuse, and he would rule those out. In

1 essence, he would show a negative to determine whether or
2 not this --
3 QUESTION: I think all he could have testified
4 to was, I saw no signs of abuse. Now, maybe that expert
5 testimony could go to the jury.
6 MR. JACKSON: I believe that is sufficient, Your
7 Honor.
8 QUESTION: But he wanted to testify to more than
9 that. He wanted to testify to the jury, ladies and
10 gentlemen of the jury, this tire was defectively
11 manufactured, and he had no basis, scientifically or
12 otherwise, for that conclusion.
13 MR. JACKSON: Well, his basis would be, based on
14 his experience, that if you do not see those signs of
15 abuse, then the only conclusion is that it failed due to a
16 defect, and at least that should be sufficient, with the
17 other evidence we have, to determine whether or not there
18 is a proper question for the jury.
19 QUESTION: Unless there was abuse that left no
20 signs.
21 MR. JACKSON: Well, we propose, Justice Scalia,
22 that would go to the weight and not the admissibility, and
23 if that were a consideration, I believe Mr. Dodson, the
24 expert for the tire industry, would have said, no, these
25 signs are totally off the wall. That doesn't mean

1 anything. The methodology is incorrect.
2 QUESTION: I don't think it goes to the weight
3 at all. I think it goes to the conclusion. I think it is
4 logically impossible to testify that there was a
5 manufacturing defect unless you can say, if there had been
6 abuse, I would have seen signs of it, and you tell me he
7 couldn't testify to that.
8 He could testify that normally, usually when
9 there is abuse, some sign is there.
10 MR. JACKSON: There are four signs.
11 QUESTION: But he couldn't say -- he couldn't
12 say that there was always a sign.
13 MR. JACKSON: Well, but again, the calculus that
14 has to be invoked here is Alabama substantive law. We do
15 not have to prove a specific defect. To do so, we would
16 have to go back to Korea and depose the people that made
17 the tire on a specific day, and do it that way.
18 Under Alabama law, the negligence is placing a
19 defective product in the stream of commerce that reaches
20 the end user in a dangerously defective condition. It
21 lightens up the burden of having to go prove a specific
22 defect, and this case, along with a lot of cases cited by
23 the Government in their brief, is perfect area of
24 testimony for experienced-based testimony.
25 QUESTION: But how -- yes. You've put your

1 finger on just the question that's bothering me.

2 In this case, I take it he said, if you don't

3 find the abuse factors, then, he says, it's probably a bad

4 tire.

5 MR. JACKSON: Probably a bad tire --

6 QUESTION: Yes. Now --

7 MR. JACKSON: -- but you have to look.

8 QUESTION: Yes, but the look is out of this.

9 that wasn't what was -- that's a different issue. I don't

10 think look, except in -- he says, these are the factors.

11 Tread wear, sidewall deterioration, something called

12 beading, and something on a flange.

13 And the judge is thinking to himself, now, wait

14 a minute, here. I have a tire that's gone perhaps 100,000

15 miles, it's bald in places, it's had a nail driven into

16 it, the nail hole seems not -- what do you mean, if those

17 four factors aren't there there's only abuse. I mean, it

18 has to be a defect. There are all kinds of other things

19 here.

20 So he says to the expert, expert, you mean to

21 say even in a tire like this one, in the absence of those

22 four factors there had to be a defect? What about the

23 nail? What about the bald spot? What about all that

24 stuff?

25 And the expert says, no, in my experience if

1 those four factors aren't there, there's a manufacturing
2 defect, and at that point the judge is thinking, my
3 goodness, what kind of a theory is that? Is there any
4 other expert who believes that?
5 And that is what it seems to me is in front of
6 us. Has the judge abused his discretion in that
7 circumstance to say, if there's some theory that without
8 those beading problems, it's a manufacturing defect, and
9 nails don't count, and 100,000 miles doesn't count, if
10 there's scientific theory like that, you'd better tell us
11 what it is, because you couldn't have had that much
12 experience.
13 Now, that's -- I'd like to hear your response.
14 MR. JACKSON: To answer your question on the
15 abuse of discretion from a factual standpoint --
16 QUESTION: Uh-huh, yes.
17 MR. JACKSON: -- first, Mr. Carlson did rule out
18 other causes such as cuts, puncture holes. He did look at
19 those, and so that one goes to weight and not the
20 admissibility.
21 The age of the tire is a problem. This was not
22 a brand new tire, but it was not an illegal tire. It had
23 enough tread to make it legal under the Alabama standards.
24 QUESTION: Your witness thought it was 10 years
25 older than it was, as I recall.

1 MR. JACKSON: Yes, Your Honor.
2 QUESTION: That's what he said, initially.
3 MR. JACKSON: They don't know the exact date,
4 but the tire was made in 1988, yes, sir.
5 QUESTION: Yes, and he said '78 in his
6 initial --
7 MR. JACKSON: I believe that was a typographical
8 error in the report.
9 QUESTION: Which he repeated in the later
10 deposition as well.
11 MR. JACKSON: Yes, sir, that's correct.
12 QUESTION: I thought where you were going when
13 you began your argument was to say, the only thing
14 relevant so far as this expert's testimony is concerned,
15 was whether there had been signs of abuse. After that,
16 Alabama law would take care of it.
17 But that was not my understanding of his
18 affidavit. I thought he went on to say that because of my
19 examination with reference to abuse, I find that it was
20 due to a defect.
21 Now, that's a big difference.
22 MR. JACKSON: He does make that conclusion,
23 Justice Kennedy, and that is in his affidavit.
24 As far as proof at trial, which we haven't
25 gotten there yet --

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1 QUESTION: Well then, it isn't just abuse that
2 we're talking about.
3 MR. JACKSON: Well, I believe ruling out
4 abuse --
5 QUESTION: It's this very, very critical leap,
6 or inference from the finding of no abuse, okay, expert
7 testimony on that is -- it's subject to expert testimony,
8 Daubert evaluation. Maybe he makes -- maybe he makes it
9 through the Daubert gate, but then he goes on to say, and
10 because there was no abuse, it was a defect.
11 MR. JACKSON: I don't believe this expert will
12 ever make it through the Daubert gate, because he is
13 experience -- he has experience-based --
14 QUESTION: Well --
15 MR. JACKSON: -- testimony. He will fit in the
16 fourth criteria, I believe, if it is not limited to the
17 scientific community.
18 QUESTION: Mr. Jackson, looking for perhaps the
19 larger implications of this case, do you defend the
20 Eleventh Circuit's splitting off expert testimony into
21 scientific testimony and nonscientific testimony to be
22 treated quite differently in light of the gatekeeper
23 function?
24 MR. JACKSON: Mr. Chief Justice Rehnquist, I
25 believe what the Eleventh Circuit did is, they made a

1 distinction without a difference. They distinguished
2 between scientific and nonscientific. You know the old
3 saying, there's more than one way to skin a cat.
4 That was an easy way to do it, because this
5 expert's testimony was so far removed from a teratologist
6 that the criteria in Daubert just had no place at all, but
7 we think the better approach, as Professors Berger,
8 Imwinkelried, and Salzburg said, is, you look at the
9 intellectual rigor used in the field in question, and the
10 first thing --
11 QUESTION: So you don't really defend the
12 Ninth -- the Eleventh Circuit's reasoning here.
13 MR. JACKSON: I do not disagree with the
14 reasoning. I think they ruled that under U.S. v. Koon,
15 the sentencing guideline case where the judge deviated
16 from the sentencing guidelines, that this was an absolute
17 error of law to incorrectly interpret Daubert and
18 incorrectly apply rule 702, and the Eleventh Circuit has
19 again recently spoken on that in City of Tuscaloosa v.
20 Harsco --
21 QUESTION: But Mr. Jackson, the division of the
22 world into scientific versus nonscientific -- we have two
23 neat boxes, Daubert for scientific, and everything else
24 nonscience. I think it was convincingly argued that the
25 world is not that simple, that there are shades.

1 MR. JACKSON: Yes, Your Honor.
2 QUESTION: Then there's a scale from highly
3 scientific, and then going down to pure observation.
4 MR. JACKSON: Yes, Your Honor.
5 QUESTION: So it seems to me that the Eleventh
6 Circuit was looking for an easy categorization that just
7 doesn't conform to reality.
8 MR. JACKSON: Well, I believe in the Eleventh
9 Circuit, using the beekeeper analogy, they kind of drew a
10 spectrum, beekeepers on one end, teratologists on the
11 other, and said, this tire failure analysis, who gets his
12 hands dirty showing the jury what's there and what's not
13 there is more like a beekeeper who has a lot of
14 experience.
15 QUESTION: But he had a test. He said, here's
16 my method, I've got these four factors. Going back to
17 Justice Breyer's question, isn't it at least appropriate
18 to ask, do the other experts agree with this four-factor
19 test, and if you don't find two, whatever his method was.
20 And on that point, is there anything that
21 attests to the reliability of his method, that four-factor
22 method?
23 MR. JACKSON: Justice Ginsburg, there is no test
24 known of by any expert in the field that we have come
25 across that can test a failed tire. It's like --

1 QUESTION: And if there were, you think it would
2 have been irrelevant.
3 MR. JACKSON: No, Your Honor.
4 QUESTION: Well then, you think the Daubert
5 factors are relevant. Let's take factor number 3, the
6 known or potential error rate.
7 MR. JACKSON: There's no --
8 QUESTION: Suppose your witness, your expert
9 witness had been able to come to the court and tell the
10 judge, my observations have been -- have been tested by
11 later experts and I have been found to be accurate 95
12 percent of the time. You think that would have been
13 irrelevant. Or, suppose --
14 MR. JACKSON: No, Your Honor. I don't believe
15 it would be irrelevant.
16 QUESTION: Suppose he came in and said, my
17 methodology has been reported in Tire Testing Journal and
18 has been approved by -- you know. That would have been
19 irrelevant?
20 MR. JACKSON: I do not believe that would be
21 irrelevant, but it just does not exist in this field.
22 That is like checking a cadaver for reflexes. A failed
23 tire does not have the testability that a tire before it
24 fails does.
25 QUESTION: Merely because your answer to a

1 question is no does not mean that the question is
2 irrelevant.
3 MR. JACKSON: I understand, Your Honor.
4 QUESTION: The answer might have been yes, so
5 the question is relevant, and that's all we're talking
6 about, whether the Daubert factors are relevant.
7 MR. JACKSON: Yes, Your Honor, but the point I'm
8 not very eloquently making is, you need to look at the
9 field to see if those questions are relevant, not just
10 apply the questions in a one-size-fits-all wooden,
11 rigorous approach that the trial court did here. Look at
12 what --
13 QUESTION: Well, you have to look to the field
14 to see whether you should have expected a yes answer,
15 perhaps.
16 MR. JACKSON: Well --
17 QUESTION: It seems to me the questions can
18 always be asked.
19 MR. JACKSON: They can always be asked, and
20 there's flexibility in Daubert, we agree, but in the field
21 of tire failure analysis, handwriting analysis, trace
22 evidence analysis, finger printing analysis, you never
23 really know if you're correct, so to do what the
24 petitioners want is to have a -- to have a -- there must
25 be some validation by objective criteria is not in Rule

1 702.

2 QUESTION: No, I don't think that's what he's

3 arguing at all. He said in response to my question that

4 all four Daubert factors may properly be applied. They

5 are always relevant, but one might flunk every single one

6 of them and yet nonetheless produce admissible testimony

7 because there would be other good reasons to let it in,

8 and there would be good reasons to discount the failure to

9 meet the Daubert factors. That's all he's saying.

10 MR. JACKSON: We agree with that proposition.

11 QUESTION: You accept that proposition?

12 MR. JACKSON: Yes, sir.

13 QUESTION: Then don't you necessarily have to

14 accept the position that the Eleventh Circuit was wrong in

15 making this categorical exclusion of relevance based on

16 drawing a line between what is in some pure sense

17 scientific and what is not? Wasn't that at least an error

18 of law on the circuit's part --

19 MR. JACKSON: Your Honor --

20 QUESTION: -- to draw that categorical

21 distinction?

22 MR. JACKSON: I don't believe that was an error

23 of law, Your Honor. The result is correct, and they

24 determined that woodenly, rigidly applying Daubert is an

25 error of law. They used a distinction between scientific

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1 and nonscientific like the Sixth Circuit did in City of
2 Detroit, but when they --
3 QUESTION: Didn't they do so in order to exclude
4 the four considerations as distinct from saying the four
5 considerations are always relevant but may be of little or
6 no weight? Isn't that the -- the failure to draw that
7 distinction I think may be attributed to the circuit.
8 MR. JACKSON: Yes, Your Honor.
9 QUESTION: And wasn't that failure an error of
10 law?
11 MR. JACKSON: Well, I still don't believe that
12 was an error of law. They remanded saying that the
13 Daubert factors may be applied by the district court, but
14 that the district court should not put himself in the
15 place of the jury or in the adversarial system.
16 QUESTION: Well, of course, our Joiner opinion
17 says the court of appeals shouldn't place itself in the
18 place of the district court, either, that they're supposed
19 to review a question of admissibility like this on an
20 abuse of discretion standard, which the court of appeals
21 certainly didn't do here.
22 MR. JACKSON: That's correct, Mr. Chief Justice
23 Rehnquist, but this is not a Joiner case. In Joiner, the
24 parties argued over what methodology was proper in trying
25 to find out whether PCB's caused lung cancer, and there

1 were tests on mice where they would inject things in the
2 stomach, and then they would develop one type of cancer,
3 and the parties never agreed on this is the correct
4 methodology.
5 Here, the record evidence, the only record
6 evidence below is that this protocol, this methodology, I
7 gather the information, I study it, I look for abuse, I
8 make a conclusion, is the exact methodology used by Mr.
9 Carlson and Mr. Dodson, and it is what is validated by the
10 marketplace for this information.
11 QUESTION: That wasn't the reason in the court
12 of appeals.
13 MR. JACKSON: It -- no, Your Honor, and as we
14 said, the court of appeals, their opinion did not leave
15 much guidance on what the court should do below.
16 But recently they have cleared that up in City
17 of Tuscaloosa v. Harsco, where ironically they reversed a
18 judge kicking out a statistician saying he did not fit
19 under Daubert by saying, you must look at the field in
20 issue. You must look at the reliable indicators for a
21 statistician, and the court said that man, that
22 statistician can testify, and I think increasingly in the
23 lower courts they are not woodenly and rigidly applying
24 Daubert because it's a useless task in a lot of --
25 QUESTION: So is that -- maybe we -- there's a

1 kind of general agreement here, I don't know, but at least
2 with the Solicitor General, and is it the case that you
3 agree -- in your experience as a trial lawyer -- you're
4 experienced with the -- the object is to let the district
5 court do its job, and its job is a gatekeeping job with
6 all these experts. Are you with -- you agree with that?
7 MR. JACKSON: I agree with that.
8 QUESTION: All right, and then you'd also agree
9 that there isn't a rigid categorization as between science
10 or not where you could say the Daubert test is or is not
11 useful. The answer is both within and outside something
12 that the Harvard University would call science or
13 something. I mean, sometimes within that, sometimes
14 outside of it the Daubert's helpful, sometimes it's not
15 helpful.
16 MR. JACKSON: I agree.
17 QUESTION: All right. So that should be up to
18 the district -- to the trial judge to say which is which.
19 Reviewable for abuse of discretion in the court of
20 appeals?
21 MR. JACKSON: Let me answer you this way. I
22 agree with the Solicitor General saying that a flexible
23 approach is appropriate. Where we disagree is saying that
24 this trial judge or any district court judge can select
25 the wrong criteria, and that be only an abuse of

1 discretion.

2 QUESTION: I don't know --

3 MR. JACKSON: That's an error of law based on a

4 misinterpretation of Rule 702, which 702 does not say

5 you've got to have objective validation. It does not say

6 you've got to have peer review and publication.

7 QUESTION: But that converts the abuse of

8 discretion standard into almost a de novo standard if you

9 pick out something that the district court did and say,

10 well, this was an error of law and therefore we're not

11 going to use abuse of discretion.

12 Certainly just because the court of appeals

13 disagrees with the district court as to its use of a

14 particular factor, that's not an error of law.

15 MR. JACKSON: Mr. Chief Justice Rehnquist, I

16 believe again the Joiner case is a good example where the

17 district court judge had to make a judgment call on what

18 criteria is appropriate to this health case based on

19 exposure, and that should be reviewed for abuse of

20 discretion. I believe that will be a fairly rare case.

21 You take a tire failure expert, these gentlemen

22 basically do the same thing, and if the court, the trial

23 court makes the inquiry initially to the parties, what's

24 this expert about, what is this testimony about, he's

25 probably going to get fairly similar criteria, and that

1 can be borne out in the record.

2 Like in this case, there's no evidence saying

3 this protocol is not proper. In fact, I don't think they

4 can.

5 QUESTION: But they're not saying that this -- I

6 would guess, let's see what you respond, that the

7 hardest -- maybe you could win even under an abuse of

8 discretion standard. I don't know.

9 MR. JACKSON: Depends on which way the judge

10 rules.

11 (Laughter.)

12 QUESTION: Well, the hardest -- but imagine

13 you're in the Eleventh Circuit applying abuse of

14 discretion standard.

15 I guess the -- in my mind, anyway, I think the

16 hardest question for you would be, you'd say, well, look,

17 there is a theory going on here that in the absence of

18 these four specific factors, not any kind of abuse but

19 four kinds, beading, flange, whitewall discoloration, and

20 some other thing, that your expert seems to say, in the

21 absence of those four things, it must have been defect.

22 And immediately a common sense person thinks,

23 what? You mean nails couldn't be an abuse? You mean,

24 it's bald couldn't be an abuse?

25 And the expert says -- if the expert then says,

1 well, I have a lot of experience at this, you say, wait a
2 minute. You couldn't have seen hundreds or thousands of
3 tires that have had two nails -- you know, two nails
4 driven into them, and they're bald, and they've gone
5 100,000, and you've found the absence of this stuff, and
6 yet you still -- that's impossible. You're going on some
7 theory, and if you're going on some theory, you tell me
8 who else believes that theory.
9 Do you see what I'm saying? I'm saying you'd
10 have to deal with that question, and your response to that
11 question would be?
12 MR. JACKSON: My response to that question would
13 be, the two nail holes, it's being run a long time, it's
14 not the best tire on earth, that goes to the weight and
15 not the admissibility of this testimony, and this
16 testimony is certainly reliable, because this expert did
17 consider the nail holes, he did consider the bald spot,
18 and he had an answer for that.
19 It may not be an answer that the jury believes,
20 but it's based on reliable experience with the leader in
21 the tire industry, namely, Michelin. They paid for that
22 type of work for 10 years while he was at Michelin, and
23 that goes to the soul of 702, knowledge.
24 And it didn't say knowledge based on joining a
25 science club or something like that. Knowledge can be

1 based on knowledge, under Rule 702. It can be based on
2 experience, or skill, or training, or education, and those
3 factors go to the inquiry of the relevancy.
4 And then does his testimony fit? Well,
5 certainly it fits, because he saw this same thing happen,
6 so he says, at Michelin, and again, if that's not good
7 enough for the jury, that's fine, but 702 is to enable the
8 jury to hear all of this testimony and then the judge
9 should determine, have we sustained our burden, producing
10 enough evidence to get it to the jury. That's all we ask
11 to do.
12 QUESTION: Why don't we say the same for other
13 experts, then? I mean --
14 MR. JACKSON: I'm sorry, Your Honor.
15 QUESTION: Just dump it all before the jury.
16 Ladies and gentlemen, this is an expert. He has this
17 cockamamie theory --
18 (Laughter.)
19 QUESTION: -- that contradicts common sense.
20 That goes to the weight of whether you should believe him.
21 (Laughter.)
22 QUESTION: But all of this junk science can come
23 into court. It just goes to the weight.
24 MR. JACKSON: Well, Your Honor, this is not junk
25 engineering. It is based on valid, reliable, experience-

1 based testimony. If there is not a creditable link --
2 QUESTION: I'm not talking about this case.
3 MR. JACKSON: I understand.
4 QUESTION: I'm talking about your theory that it
5 just goes to the weight. I mean, that's just not an
6 adequate explanation, if you believe that it's the role of
7 the judge to stop some cases from going to the jury
8 because there's simply not enough real evidence to justify
9 a verdict for the plaintiff.
10 MR. JACKSON: I don't have a problem with judges
11 stopping some experts from going to the jury, but the
12 judge should not have to be an amateur scientist or an
13 amateur engineer on Tuesday and a statistician on
14 Wednesday. They're just not equipped.
15 And we -- we believe that the correct approach,
16 as set out in the amici, is to let the judge ask the
17 parties, what is this field here.
18 QUESTION: But that doesn't square with your
19 answer to Justice Breyer. You don't have to be an amateur
20 rocket scientist to know that when two nails have been
21 driven into a tire and it's bald, the absence of four
22 other abuse factors does not suggest that there's a
23 manufacturing defect, and your only response to that is,
24 that goes to its weight and it should come before the
25 jury.

1 MR. JACKSON: That is a wonderful cross-
2 examination, but this expert considered those factors, and
3 I think any expert would, and an expert can be ruled out
4 of court if he fails to rule out a crucial test.
5 On the same page where the judge said he didn't
6 like our analytical leap from the evidence to the
7 conclusion, he cited the Diviero case. In Diviero a tire
8 expert was kicked out of court because he did not do
9 exactly what Mr. Carlson did here.
10 He did not rule out abuse, tire cracking,
11 sidewall deterioration, and they said -- and that was
12 based on testimony from the tire industry that unless you
13 rule out abuse, you cannot prove defect.
14 So in essence what Mr. Carlson did here is
15 something that's been approved by the industry. There's
16 no doubt that the judge should make there be a threshold
17 status of reliability before an expert testifies, but the
18 burden is not as high as petitioners want it.
19 If the burden is, you've got to fit within the
20 Daubert factors, then all of this experience-based
21 testimony, which is by and large used by law enforcement,
22 is in danger.
23 QUESTION: But it wasn't just experience-based.
24 He gave a method, and that's -- it seems to me makes him
25 closer to the aeronautical engineer than the beehive

1 keeper, because he said, now, here's my theory. Here are
2 these four things, and if I find two, then it's one way,
3 and if I don't, then it's another way. That's not just,
4 now, I look at this and based on my experience reach this
5 conclusion.

6 MR. JACKSON: Well, I believe that method, so to
7 speak, is to give the tire the benefit of the doubt,
8 because this is not an exact science, and this is
9 subjective, and there's subjectivity involved, and this
10 expert knows he's going to get cross-examined about the
11 weaknesses in his testimony.

12 But I believe the trial judge saw the word,
13 methodology, and immediately leaped into Daubert, and when
14 he could not see an objective test, or objective
15 validation, then he had a big problem with this testimony.
16 He just did not like it. But when --

17 QUESTION: He didn't stop there. He went on to
18 see if there were any other justifications, explanations
19 and so forth.

20 MR. JACKSON: Your Honor --

21 QUESTION: He went on to say, you know, it is --
22 it seems to me illogical, he said. It isn't just that
23 there are no scientific journals that support it. It's
24 not just that there's no testing or verification. It
25 seemed to him illogical.

1 I mean, that's a bit different from just saying,
2 you know, you fail the four Daubert tests and you're out
3 of here.
4 MR. JACKSON: Well, from the get-go he applied
5 the four factors and we flunked him. He was asked to
6 apply other criteria, which is referenced in footnote 8 of
7 Daubert, and said those were of dubious merit because the
8 Supreme Court, U.S. Supreme Court did not approve of them
9 explicitly.
10 Those factors give litigants and courts other
11 criteria to use that may fit the particular field at
12 issue, and again will give judges basis to look at the
13 intellectual rigor, or lack of intellectual rigor,
14 whatever you have, in that field, just like the magenta
15 example.
16 For an experience-based expert not to be able to
17 give his opinion on something that he has learned in his
18 experience, or in his lifetime, just tears 702 up, which
19 is supposed to be a rule of inclusion.
20 QUESTION: Thank you, Mr. Jackson.
21 Mr. Babington, you have 2 minutes remaining.
22 REBUTTAL ARGUMENT OF JOSEPH P. H. BABINGTON
23 ON BEHALF OF THE PETITIONERS
24 MR. BABINGTON: Mr. Chief Justice, and may it
25 please the Court:

1 Respondents have offered no defense of the
2 Eleventh Circuit's holding. This Court should reverse the
3 Eleventh Circuit, because its decision was based on two
4 errors of law. It's wrong to take away from the district
5 court the logical, common sense questions that flow from
6 this Court's Daubert factors.
7 These questions should be always available to be
8 asked, and the proponent of the evidence can explain why
9 in a particular case they may be inapplicable or entitled
10 to less weight.
11 We urge the Court to go further and affirm the
12 district court's holding, because the district court got
13 it right here. It did not abuse its discretion.
14 The district court considered the respondent's
15 primary argument before this Court on page 93 in the joint
16 appendix in its opinion on reconsideration, and it said
17 there that the plaintiffs contend that Mr. Carlson's
18 testimony reveals that the methodology and principles
19 adopted by Carlson are widely accepted in the relevant
20 community. The court declines to make such a leap.
21 So the district court has already considered the
22 respondent's primary argument and rejected it, and for
23 these reasons we believe it should be affirmed.
24 If there are no further questions --
25 CHIEF JUSTICE REHNQUIST: Thank you,

1 Mr. Babbitt.

2 The case is submitted.

3 (Whereupon, at 11:04 a.m., the case in the

4 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

KUMHO TIRE COMPANY, LTD., ET AL., Petitioners v. PATRICK CARMICHAEL, ETC., ET AL.
CASE NO: 97-1709

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Mari Federico

(REPORTER)