

No. 26-20183

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

CARLO GIUSEPPE CIVELLI; Aster Capital S.A. (LTD) Panama,
Plaintiffs-Appellees,

v.

PHILLIP EMANUEL MULACEK; Michelle Mulacek Vinson, Pierre Mulacek,
Mauricette Mulacek,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Texas, Case No. 17-3739 (Crane, J.)

**BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS
CURIAE SUPPORTING APPELLANTS AND REVERSAL**

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September 24, 2026

CERTIFICATE OF INTERESTED PERSONS

Case No. 26-1083
Carlo Giuseppe Civelli, et al.,
v.
Phillip Emanuel Mulacek, et al.

Under the fourth sentence of Rule 28.2.1, I certify that the following listed persons and entities, including those listed in the parties' Certificates of Interested Persons, have an interest in this case's outcome. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

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RULE 26.1 DISCLOSURE STATEMENT

Washington Legal Foundation is a not-for-profit corporation under section 501(c)(3) of the Internal Revenue Code. It has no parent company, issues no stock, and no publicly held company owns a ten percent or greater interest in it.

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INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as amicus curiae to urge the exclusion of unreliable and insufficient expert evidence and the correction of a district court's gatekeeping failures. WLF also filed as amicus in each of the Supreme Court's "*Daubert* trilogy" cases. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

INTRODUCTION AND SUMMARY OF ARGUMENT

As Appellants aptly put it, the trial below "was a cascading series of prejudicial errors." Mulacek Br. 2. This brief is about just one of those consequential failures: the district court's failure to keep Civelli's proffered digital forensics expert witness, Noel Kersh, from taking the stand.

* No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission.

The Federal Rules of Evidence limit judicial discretion and ensure that litigants play within established bounds. Rule 702 imposes “a gatekeeping obligation” on the district courts. *Kumho Tire*, 526 U.S. at 148. This is no casual charge. The admission of an uncleared witness—who may offer a lay jury “expertise that is *fausse* and science that is junky,” *id.*, at 159 (Scalia, J., concurring)—can risk the integrity of a verdict. The negligent may be cleared. The blameless may be found liable. What’s true for computers is true for the courtroom: “garbage-in, garbage-out.”

And so Rule 702 insists on rigor. Qualified experts can’t smuggle in the unverified analysis of others. Since the expert can’t know whether the underlying data is sufficient, it follows that the expert’s testimony can’t be vetted for reliability. That’s why experts must “*independently . . . validate or assess the basis for his or her assumptions,*” *In re: Taxotere (Docetaxel) Prods. Liab. Litig.*, 26 F.4th 256, 268 (5th Cir. 2022) (emphasis added), and “an expert cannot forgo [his or her] own independent analysis and rely exclusively on what an interested party tells them.” *Harris v. FedEx Corp. Servs., Inc.*, 92 F.4th 286, 303 (5th Cir. 2024) (internal quotation marks and citation omitted). It’s the district

court's job to ensure proffered testimony honors this code.

That didn't happen here. Rushed by Civelli's late inclusion of Noel Kersh as a witness—on the eve of trial and after jury selection—the district court rapidly moved to qualify him, even though Kersh hadn't submitted a formal expert report or even been subject to a pre-trial deposition. Such hurrying doesn't just risk general fairness and due process issues, it can also easily lead to procedural mistakes. A serious one followed.

The court added Kersh because it presumed he was testifying as to his independent analysis of Phil Mulacek and Marc Vinson's computers, aided by the output of reliable software that had stripped the data from those devices to create reviewable clones of them ("forensic images"). Had that been so, Rule 702's "exacting standards," *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000), might have been met. But the district court was wrong. Kersh was really testifying to his understanding of a partial summary—not a copy or even a copy-of-a-copy, but separate and incomplete analysis—of the forensic images, prepared by a third-party e-discovery and digital forensic firm, HaystackID. These Haystack Reports might have been reliable or based on sufficient data. But Kersh couldn't

possibly know that, because he never had access to the forensic image to check the Reports for accuracy. Still, Kersh testified.

Worse yet, the lower court's gatekeeping failure couldn't be cured through a rebuttal witness or cross-examination. All too often, "cross-examination does little to affect jury appraisals of expert testimony." Christopher B. Mueller, *Daubert Asks the Right Questions: Now Appellate Courts Should Help Find the Right Answers*, 33 Seton Hall L. Rev. 987, 993 (2003). Nor could later trial testimony ever unring Kersh's bell—it went to the heart of Mulacek's case. In a trial largely about the content of alleged oral agreements, Kersh's testimony strongly suggested that Phil Mulacek fraudulently created and backdated a written instrument, the Letter of Wishes. So Kersh's testimony was fatal twice over. First, it took away one of the few tangible pieces of evidence in the case. Next, it wrecked Mulacek's credibility beyond repair. The combination made the case below a "he-said/he-said"—where the jury would have every reason to discount or ignore *everything* Phil Mulacek said.

The only remedy for this kind of gatekeeping failure is reversal and remand for a new trial.

ARGUMENT

THE DISTRICT COURT’S GATEKEEPING FAILURE DEMANDS REVERSAL.

With a jury already picked and trial due to start in five days, Civelli noticed Noel Kersh as an expert. No path for a continuance. No time for a deposition. In a rush—and expressly stating that “Mr. Kersh is a very important witness to the Plaintiffs”—the district court let counsel’s late admission slide. ROA.36208.

The court was wrong to do that, but it wasn’t wrong about the importance of Kersh’s testimony to Civelli’s case. In a case largely about oral promises (or the lack thereof), Kersh was the plaintiffs’ best route to discredit a written document that backs Phil Mulacek’s side of the story: the Letter of Wishes. Kersh’s testimony suggested that Mulacek forged that document years after its listed date.

But Kersh didn’t testify as an eyewitness to chicanery. He testified as an expert, professing an ability to translate arcane indicia of digital ghosts of deleted files on Phil Mulacek and Marc Vinson’s computers. That’s highly complicated stuff. Such a prejudicial late expert entry (coming, no less, without a formal expert report in tow) should have been denied on fair notice and due process alone. *See Keough v. Tate Cnty. Bd.*

of Educ., 748 F.2d 1077, 1082 (5th Cir. 1984) (late notice of witnesses is more likely to not “satisfy procedural due process” in “a sophisticated court trial involving complex fact or legal issues”); *see also* Mulacek Br. 37.

But Kersh’s path to the witness chair wasn’t just rushed, it violated Federal Rule of Evidence 702. The lower court failed to ensure that Kersh would offer an expert opinion “rest[ing] on a reliable foundation.” *Daubert*, 509 U.S. at 597. To pass a witness through the Rule 702 gate, a “court must find that the [expert’s] evidence is *both* relevant and reliable before it may be admitted.” *Harris*, 92 F.4th at 303 (quoting *United States v. Valencia*, 600 F.3d 389, 424 (5th Cir. 2010)) (emphasis added).

That means that “the court also must ensure that the expert has reliably applied the methods in question.” *Id.* And that, in turn, can happen only if there’s “some objective, *independent* validation of the expert’s methodology. The expert’s assurances that he has utilized generally accepted scientific methodology is insufficient.” *Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 276 (5th Cir. 1998) (en banc) (emphasis added). And “unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the

admissibility requirements,” the “expert testimony may not be admitted.” Fed. R. Evid. 702, 2023 Advisory Comm. Note. In short, experts that merely recite the work of others don’t make the grade, since it can’t be reliably “demonstrate[d] to the judge by a preponderance of the evidence that” such proffered hearsay “opinions are reliabl[y]” undergirded by sufficient data. *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 744 (3d Cir. 1994); cf. Mulacek Br. 37 (“Kersh did nothing but parrot the hearsay third-party reports”). The belt-and-suspenders of Rule 702’s joint demand for reliability and underlying sufficiency is supposed to bar that kind of testimony from reaching the jury.

Rule 702 imposes such “exacting standards,” *Weisgram*, 528 U.S. at 455, for good reason. Improper evidence can and will produce improper jury verdicts. Credible-sounding nonsense is remarkably resistant to cure-by-cross. One reason that studies show “cross-examination is largely ineffective in undoing the impact of erroneous or misleading evidence,” is because “[w]hen judges allow expert testimony to reach the jury, they are implicitly lending credence to the testimony, increasing its persuasiveness.” N.J. Schweitzer & Michael J. Saks, *The Gatekeeper Effect: The Impact of Judges’ Admissibility Decisions on the*

Persuasiveness of Expert Testimony, 15 Psychol. Pub. Pol’y & L. 1, 4, 13 (2009). Since there’s no cure for such evidentiary contamination, Rule 702 insists that the courtroom be a clean room. And so, when a court fails to ensure that vital-to-a-party expert “testimony is based on sufficient facts or data” or “is the product of reliable principles and methods,” Fed. R. Evid. 702, that gatekeeping failure demands reversal. *Carlson v. Bioremedi Therapeutics Sys., Inc.*, 822 F.3d 194, 202 (5th Cir. 2016) (remanding where “the district court’s abuse of discretion” in admitting a non-702-compliant expert witness “affected the [defendants’] substantial rights”).

So how did this failure happen? Well, the rush of time caused by Civelli’s late addition of Kersh certainly didn’t help. Rule 702 “requir[es] a far more managerial role for judges than they are used to assuming in the American adversarial system” and proper expert review “places substantial . . . demands on [district courts].” David E. Bernstein, *The Misbegotten Judicial Resistance to the Daubert Revolution*, 89 Notre Dame L. Rev. 27, 66 (2013). There’s good reason for such a careful and time-consuming process. Proper 702 review lets a court, upon real reflection and not the press of upcoming trial, answer the “critical

questions of the sufficiency of an expert's basis, and the application of the expert's methodology." Fed. R. Evid. 702, 2023 Advisory Comm. Note. With just five days to go until the trial started, there was just no time in this case for that critical work to be done.

The day after receiving Civelli's motion, the district court hurriedly held a status conference where the parties discussed (among other items) adding Kersh to the witness list. Perhaps adrift without the benefit of normal pre-trial expert-vetting, the district court seems to have misunderstood the basis for Kersh's upcoming opinion testimony. Kersh was proffered as a witness who would testify about the Haystack Reports. It's normal, in digital forensics cases, for a computer's data to be essentially cloned into a new file (called, confusingly, an "image" of the computer). HaystackID, an e-discovery and digital forensics company, created the images of Mulacek and Vinson's computers, then created its own, non-comprehensive, reports about those images.

Unless you know something about the inner workings of a Windows computer, the Haystack Reports are hardly intuitive. But every party agrees on one thing: *The Haystack Reports aren't the images of either computer.* When deciding whether Kersh should be added to the witness

list, however, the district court seemed to think that’s more or less what they were. The judge compared the Haystack Reports to “harvest[ing] all the data like off a hard drive,” such as occurred in “child porn cases” the court dealt with in the past. ROA.36202–03. The lower court characterized Haystack’s work as “a data dump that any expert can interpret who is skilled in doing so.” ROA.36208. But, again, they aren’t like that at all. (And indeed, in the very context of child sexual abuse material, this Court has blocked similar third-party reports from presenting as conclusive evidence without proper “predicate or foundation”—the same thing Rule 702 works to avoid. *See United States v. Baker*, 538 F.3d 324, 330 (5th Cir. 2008); *Daubert*, 509 U.S. at 597.)

Had they been, the district court might have had a point. If Kersh analyzed a forensic image and drew his own conclusions from that—or at least had access to the image so he could “cite-check” the Haystack Reports—there would have been no gatekeeping failure. Kersh would have met the Rule’s mandate that “an expert witness independently . . . validate or assess the basis for his or her assumptions.” *Taxotere*, 26 F.4th at 268 (emphasis supplied). *Harris*, 92 F.4th at 303 (“[A]n expert cannot forgo [his] own independent analysis”) (internal quotation marks

and citation omitted). But he didn't. Instead, he just recited Haystack's work without such independent verification. That "cast[s] considerable doubt upon the reliability of both the explicit theory ([the deletions on Mulacek and Vinson's computers]) and the implicit proposition ([Phil Mulacek forged a critical document])" born of his testimony. *Kumho Tire*, 526 U.S. at 154. The judge should have closed the courthouse door to Kersh's testimony.

By all accounts, both Haystack and Kersh are well regarded in the field of digital forensics. But having a quality reputation doesn't substitute for satisfying the rigors of the Rule. There were two valid paths by which Civelli could have carried his Rule 702 burden. Kersh could have been given the image so he could arrive at an independent analysis or somebody from Haystack with access to the image could have testified about the Haystack Reports. The lower court opted for neither. Instead, Kersh was permitted to testify, offering his assurance at trial that the incomplete third-party reports he reviewed are "the type of information typically relied on by people like [him] in doing [his] forensic work"—exactly the sort of self-justification that Rule 702 forbids.

ROA.37783; *Moore*, 151 F.3d at 276 (“The expert’s assurances that he has utilized generally accepted scientific methodology is insufficient”).

CONCLUSION

“By allowing [Kersh] to testify without a proper foundation, the district court abdicated its role as gatekeeper.” *Harris*, 92 F.4th at 303. This Court should reverse and remand. *Carlson*, 822 F.3d at 202.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limits of Federal Rule of Appellate Procedure 29(a)(5) because it contains 2,269 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f).

I also certify that this brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) because it uses 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I certify that, on September 24, 2026, I served all counsel of record via the Court's CM/ECF system.

/s/ Zac Morgan
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