No. 16-489

IN THE

Supreme Court of the United States

JOHNSON & JOHNSON VISION CARE, INC.,
Petitioner,

v.

REMBRANDT VISION TECHNOLOGIES, L.P.,
Respondent.

On Petition for a Writ of Certiorari to the
U.S. Court of Appeals for the Federal Circuit

REPLY ON PETITION FOR CERTIORARI

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REPLY IN SUPPORT OF PETITION

In the past decade, litigants have filed more than 2000 Rule 60(b)(3) motions seeking to overturn final judgments on grounds of fraud, misrepresentation or misconduct by an opposing party. Despite the prevalence of these motions, the circuits are deeply divided over the requirements for relief under the Rule. Respondent glosses over these circuit splits, but they are real and require this Court's guidance.

Petitioner preserved its position on each question presented, and a ruling by this Court would be outcome-determinative. If this case had arisen in virtually any other circuit, the fact that respondent's claim of patent infringement was defeated as a matter of law on a ground totally unrelated to the misconduct at issue on the Rule 60(b)(3) motion would have led to the motion being denied because the misconduct and the judgment are completely unrelated. Meanwhile, the Federal Circuit's rulings that Rule 60(b)(3) allows relief absent any wrongdoing by a party, and for accidental discovery violations, conflicts with the plain text of the Rule and the law of other circuits.

The Federal Circuit's decision lessens the showing required on a Rule 60(b)(3) motion at every turn and upsets the balance the Rule strikes between the interests of justice and the finality of judgments. The Rule is not intended to reopen final judgments where, as here, alleged misconduct had no possible impact on the outcome.

I. The Circuit Splits Raised by the Petition Are Real and Important

Respondent minimizes the conflicts between the circuits concerning Rule 60(b)(3). But those conflicts are real and raise important issues meriting this Court's review.

A. The Circuits Are Split on Whether Rule 60(b)(3) Requires Clear and Convincing Evidence that the Challenged Misconduct Adversely Affected the Movant's Ability to Present Its Case

1. Respondent engages in sleight of hand when it argues "there is no conflict because every circuit applies the clear and convincing evidence standard." Opp. 7. All circuits do require clear and convincing proof of fraud, misrepresentation or misconduct, but as respondent recognized in the court of appeals, that is only *one of two separate requirements* for Rule 60(b)(3) relief. The second required showing is that the fraud "prevented [the movant] from fully and fairly presenting its case." Response to Pet. For Reh'g at 4, No. 15-1079 (Fed. Cir. June 20, 2016), ECF No. 56 ("Response to Pet. for Reh'g") In the court of appeals, respondent argued—and the court of appeals agreed—that "[c]lear and convincing evidence is *only* required to prove the first part of the standard for relief: that fraud, misrepresentation, or misconduct occurred." *Id.* (emphasis added).

All the circuits likewise require two separate showings—the existence of fraud and the impact of that fraud—before granting Rule 60(b)(3) relief. While the circuits uniformly require clear and convincing

evidence on the first issue, they are deeply divided on the second issue. The second issue is presented here.

The circuits have adopted four different rules under Rule 60(b)(3) for assessing the impact of a party's fraud or other misconduct on an opposing party's ability to present its case. The Third, Fifth, Seventh, Eighth and Eleventh Circuits require clear and convincing evidence that the misconduct denied the movant a full and fair opportunity to present its case.[1] The Ninth, Tenth and D.C. Circuits require a showing of "substantial interference" with the movant's ability to present its case,[2] without explicitly addressing the evidentiary standard for that showing. Although distinct, both of these approaches are geared towards ensuring the misconduct at issue does not concern tangential or inconsequential issues, but rather significantly impairs the movant's ability to present its case.

The First and Sixth Circuits take an entirely different approach. Where fraud is intentional—and intentional fraud is, of course, the paradigm form of misconduct under the rule—they reverse the burden of

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[1] *See Boldrini v. Wilson*, 609 F. App'x 721, 724 (3d Cir. 2015); *Matthews, Wilson & Matthews v. Capital City Bank*, 614 F. App'x 969, 971 (11th Cir. 2015); *Greiner v. City of Champlin*, 152 F.3d 787, 789 (8th Cir. 1998); *Lonsdorf v. Seefeldt*, 47 F.3d 893, 896-97 (7th Cir. 1995); *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1339 (5th Cir. 1978).

[2] *See Zurich N. Am. v. Matrix Serv.*, 426 F.3d 1281, 1290-91 (10th Cir. 2005); *Summers v. Howard Univ.*, 374 F.3d 1188, 1193 (D.C. Cir. 2004); *Jones v. Aero/Chem. Corp.*, 921 F.2d 875, 878-79 (9th Cir. 1990).

proof and require the non-movant to show by clear and convincing evidence that the fraud or misconduct did not adversely affect the movant's ability to present its case.[3]

Here, the Federal Circuit adopted yet a fourth approach. Rather than require clear and convincing evidence—or indeed, any evidence—that misconduct regarding the "surface layer" limitation impaired the movant's ability to present its case on the separate "soft" limitation (on which JMOL of noninfringement was granted), the Federal Circuit "w[ould] not speculate as to what impact the fraud and misconduct had on the ultimate judgment of noninfringement …." Pet. App. 12a; *see also id.* 13a ("We cannot and will not speculate" about the impact of the misconduct). By refusing to "speculate" on the impact of the misconduct, the Federal Circuit adopted an irrebuttable presumption, unconnected to actual evidence, that the misconduct impaired the movant's ability to litigate. This standard is irreconcilable with that of the other circuits.

2. Respondent incorrectly asserts that because all circuits require clear and convincing evidence of fraud or misconduct, they also uniformly require clear and convincing evidence of its impact. They do not (as respondent itself recognized in successfully pressing the contrary argument in the court of appeals). For example, respondent cites *Zurich N. Am. v. Matrix Serv*, 426 F.3d 1281 (10th Cir. 2005), and *Shepard v.*

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[3] *See Anderson v. Cryovac*, 862 F.2d 910, 923 (1st Cir. 1998); *Jordan v. Paccar*, 97 F.3d 1452, 1996 WL 528950, at *1-2 (6th Cir. 1996) (unpublished table decision).

ABC, 62 F.3d 1469 (D.C. Cir. 1995), to show that the Tenth and D.C. Circuits both "apply the clear and convincing evidence standard." Opp. 8. But the language respondent quotes shows only that the Tenth Circuit requires "clear and convincing proof *of fraud, misrepresentation, or misconduct*," *id.* (quoting *Zurich*, 426 F.3d at 1290) (emphasis added), and that the D.C. Circuit likewise requires a movant to "prove *the fraud* by clear and convincing evidence," *id.* 9 (quoting *Shepard*, 62 F.3d at 1477) (emphasis added).[4] Neither circuit requires clear and convincing evidence of the impact, if any, of the misconduct on the movant's ability to present its case. Only by conflating proof of misconduct with proof of an adverse impact is respondent able to deny the existence of the circuit split.[5] This error permeates respondent's brief. *See, e.g.*, Opp. 7 ("[The court of appeals] cited the district court's acknowledgement that there was clear and convincing evidence of Dr. Bielawski's misconduct."); *id.* 11 ("[T]here is clear and convincing evidence that Dr. Bielawski gave false testimony.").

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[4] Likewise, the language respondent quotes from *Tiller v. Baghdady*, 294 F.3d 277, 280 (1st Cir. 2002), only shows that the First Circuit requires "clear and convincing evidence *that the claimed fraud or misconduct occurred*." Opp. 9 (quoting *Tiller*, 294 F.3d at 280) (emphasis added).

[5] Respondent cites *De Saracho v. Custom Food Machinery*, 206 F.3d 874, 880 (9th Cir. 2000), for the proposition that the Ninth Circuit requires proof "by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct …." Opp. 8-9. As the petition explains (Pet. 23-24 n.4), that case deviates from other Ninth Circuit cases applying a different standard.

Respondent fares no better in its attempt to reconcile the First and Sixth Circuits' burden-shifting approach with the rule in other circuits. Respondent asserts that the burden-shifting approach is confined to a "specific subset of cases … involving intentional misconduct." Opp. 10. But that supposed "subset" includes *the vast majority of* Rule 60(b)(3) cases which, by definition, involve fraud, misrepresentation or other misconduct. The approach in the First and Sixth Circuits—requiring the non-movant to show the misconduct had no effect—is exactly the opposite of the majority approach. Respondent does not cite a single case from those circuits applying a different standard. *See id.*

Respondent's further assertion that the Federal Circuit applied the "clear and convincing" standard here, *see* Opp. 7, is belied by the Federal Circuit's own statement that it "refused to speculate" on the impact of the misconduct on respondent's ability to fully litigate its case. It is also belied by respondent's own argument in the Federal Circuit, where it argued that clear and convincing evidence was "only" required to prove the existence fraud or misconduct, not its impact. *See* Response to Pet. for Reh'g at 4.

3. The dispositive issue here—on which JMOL of noninfringement was granted by the district court and affirmed in the prior appeal—concerned respondent's "fail[ure] to offer any admissible evidence" on an element of respondent's case, *i.e.*, the '327 patent's "soft" limitation, which was separate and distinct from the "surface layer" limitation about which Dr. Bielawski gave false testimony. Pet. App. 59a-60a. The court of appeals did not identify any evidence—much

less clear and convincing evidence—that Dr. Bielawski's misconduct concerning the "surface layer" limitation impaired respondent's ability to present evidence on the outcome-dispositive "soft" limitation in any way. Pet. App. 59a-60a. No such evidence exists. Dr. Bielawski's testimony was "irrelevant to the legal issues upon which the case turned …." Pet. App. 25a (Dyk, J., dissenting) (quoting *Simons v. Gorsuch*, 715 F.2d 1248, 1253 (7th Cir. 1983)).

Instead of requiring clear and convincing evidence—or *any* evidence—that misconduct on the "surface layer" limitation impaired respondent's ability to present its case on the dispositive "soft" limitation, the Federal Circuit required no evidence whatsoever, announcing it "w[ould] not speculate" on that issue. Pet. App. 12a. The court of appeals adopted this standard explicitly—not "*sub silentio*," as Respondent incorrectly argues. Opp. 7; *see also* Pet. App. 12a ("[W]e will not speculate as to what impact the fraud and misconduct had on the ultimate judgment of noninfringement …."); *id.* 13a ("We cannot and will not speculate about the profound effects" of the misconduct). Judge Dyk was correct that "the majority's holding renders the 'full and fair' requirement a nullity." *Id.* 24a (Dyk, J., dissenting). "Neither Rembrandt nor the majority can point to any case where Rule 60(b)(3) relief has been granted based on such speculation." *Id.*

Respondent's argument that the "clear and convincing evidence" standard would "make[] no difference in this case," Opp. 11, is refuted by the facts. There is no evidence—much less clear and convincing evidence—that any misconduct concerning the "surface

layer" limitation in any way caused respondent's "fail[ure] to offer any admissible evidence" on the separate and distinct "soft" limitation. Pet. App. 59a-60a. The two issues were unrelated, so requiring clear and convincing evidence that the misconduct affected the judgment would inevitably lead to a different outcome here.[6] To the extent this Court has any doubts, that is an issue that could be addressed by the Federal Circuit, or the district court, on remand.

Finally, respondent's waiver argument is meritless. Opp. 14-15. Petitioner expressly argued to the Federal Circuit that Rule 60(b)(3) requires "clear and convincing evidence of 'fraud, misrepresentation or misconduct [1] 'by an opposing party,' … which [2] 'prevented the movant from fully and fairly presenting its case.'" Response Br. at 32-33 (quoting Pet. App. 41a-42a) (brackets added in appeal brief). The Federal Circuit rejected petitioner's contention as to bracketed point [2] and that is the issue presented here.

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[6] Straining to make Dr. Bielawski's testimony relevant to the "soft" limitation, respondent notes, as did the court of appeals, that Dr. Bielawski criticized Dr. Beebe's testing. But that criticism was directed solely to Dr. Beebe's testing on the "surface layer" limitation. Dr. Bielawski said not one word about the "soft" limitation or about Dr. Beebe's testing on the "soft" limitation. *See* Response Br. at 9, No. 15-1079 (Fed. Cir. Feb. 26, 2015) ("Response Br."); ECF No. 304 in No. 11-cv-819 at 67-186 (M.D. Fla. May 9, 2012). Neither did any other witness on behalf of petitioner.

B. The Circuits Are Split on Whether an Expert's Misconduct Is Misconduct "By an Opposing Party" Under Rule 60(b)(3)

The circuits also are split on the second question presented: whether misconduct by an expert is misconduct "by an opposing party" under Rule 60(b)(3).[7] In holding that perjury by an expert qualifies as misconduct by "an opposing party" under Rule 60(b)(3), the court of appeals relied on *Harre v. A.H. Robins*, 750 F.2d 1501 (11th Cir. 1987), and on "a subsequent Eleventh Circuit case [that] cited *Harre* for the proposition that mere 'perjury [by an expert] constitutes fraud under [Rule] 60(b)(3).'" Pet. App. 16a (quoting *Bonar v. Dean Witter Reynolds*, 835 F.2d 1378, 1383 n.7 (11th Cir. 1988)).

As Judge Dyk stated in dissent, "two other circuits that have confronted the issue have reached the opposite conclusion." Pet. App. 31a (citing *Metlyn Realty v. Esmark*, 763 F.2d 826, 833 (7th Cir. 1985), and *Richardson v. Nat'l R.R. Passenger Corp.*, 49 F.3d 760, 765 (D.C. Cir. 1995)). Respondent describes this circuit split as "illusory," Opp. 17, but it is undeniable and real.

Respondent confuses the issue by arguing that the court of appeals found petitioner should have known of Dr. Bielawski's false testimony. In fact, the court's "should have known" language related only to *document* discovery, which is not relevant to this question. Pet. App. 17a. As to the *false testimony*, the

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[7] As with question one, the resolution of questions two and three could be outcome-determinative here. A reversal by this Court on both issues would require reversal of the judgment.

court of appeals did not disturb the district court's finding that respondent's evidence was "not sufficient to establish that [petitioner] should have known of [the expert's] misconduct," *Id.* 45a.[8] Instead, the Federal Circuit held that the district court erred in requiring proof that "JJVC or its counsel was complicit in Dr. Bielawski's false testimony." Pet. App. 18a. Thus, the court's decision was based squarely on the proposition that false testimony by an expert, without more, is attributable to the party that called the witness. That position is flatly contrary to the position of two other circuits.

Petitioner preserved its position on this issue, arguing on appeal that false testimony by an expert is not misconduct by "an opposing party" under Rule 60(b)(3). *See* Response Br. at 57-59.

C. The Circuits Are Split on Whether "Misconduct" Under Rule 60(b)(3) Includes Accidental Omissions

Respondent concedes there is a split among the circuits on whether "misconduct" under Rule 60(b)(3) includes accidental omissions. Opp. 20-21.

The Federal Circuit aligned itself with the First and Fifth Circuits, which hold that "misconduct" under Rule 60(b)(3) "can cover even *accidental* omissions …." Pet. App. 15a (quoting *Anderson*, 862 F.2d at 923 (emphasis added by the Federal Circuit); *see also id.*

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[8] Although respondent complains that the district court denied discovery on this issue, Opp. 16, it never made the showing needed to overcome work product protection for the discovery it sought. *See* ECF No. 399 in Case No. 3:11-cv-00819 (M.D. Fla. Aug. 25, 2014).

(citing *Bros Inc. v. W.E. Grace Mfg. Co.*, 351 F.2d 208, 211 (5th Cir. 1965)).

The Sixth Circuit disagrees. It has rejected "[the] interpretations of Rule 60(b)(3) by the First, Fifth, and Eleventh Circuits" on this issue as "not squar[ing] with the plain meaning of the rule." *Jordan*, 1996 WL 528950, at *6. Respondent minimizes *Jordan* as "an unpublished, nonprecedential decision," Opp. 20, but the Sixth Circuit has adopted *Jordan*'s holding in a published, precedential decision. *See Info-Hold v. Sound Merchan.*, 538 F.3d 448, 455 (6th Cir. 2008) ("Rule 60(b)(3) clearly requires the moving party to 'show that the adverse party committed a *deliberate act* that adversely impacted the fairness of the relevant legal proceeding ...." (quoting *Jordan*, 1996 WL 528950, at *6) (emphasis added)). District courts in the Sixth Circuit have relied on *Jordan* twenty-six times.

The Federal Circuit held that while JJVC should have known that data existed from Dr. Bielawski's testing of competitors' lenses, it "need not determine whether JJVC's failure to obtain and produce th[e] data was intentional or merely accidental" because, in its view, "even an accidental omission qualifies as misconduct under Rule 60(b)(3)." Pet. App. 15a. A decision rejecting that view, and agreeing with the Sixth Circuit's approach, would require a different outcome here.

Petitioner preserved this issue. *See* Response Br. 57 (arguing that Rule 60(b)(3) "requires a showing of wrong-doing" by an opposing party); *id.* 63 (noting that Dr. Bielawski "repeatedly reassured JJVC's counsel that he had given them all of the data he generated and all of the documents he relied upon" and that JJVC's

counsel "produced the documents it received and withheld nothing").

II. This Case Is an Ideal Vehicle for Addressing the Questions Presented

In the past decade, district courts have issued more than 2000 decisions on Rule 60(b)(3) motions. The standards governing such motions vary from circuit-to-circuit, in ways that can control the outcome in any given case. This Court has never construed Rule 60(b)(3) and has not had an opportunity to do so in fifteen years. During that time, the law has grown more confused and the conflicts have proliferated. This Court should grant certiorari to resolve the issues presented here.

This case demonstrates the need for a uniform rule, appropriately balancing the interests of fairness and finality. Despite an entirely separate ground for affirmance—totally unrelated to the misconduct that was the subject of the Rule 60(b)(3) motion—the Federal Circuit applied what amounted to an irrebuttable presumption of interference with respondent's ability to litigate its case and thus ordered an unnecessary and expensive retrial. Applying the correct standards for Rule 60(b)(3) would clarify the law and prevent the unnecessary expenditure of the litigants' and the judiciary's resources.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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