

SUPREME COURT OF NEW JERSEY
Docket No. 079958¹

IN RE: ACCUTANE LITIGATION

CIVIL ACTION

On Certification from the
Superior Court,
Appellate Division,
Nos. A-4698-14, A-910-16

Sat below: Judges Reisner,
Koblitz, and Sumners

BRIEF OF PROPOSED *AMICUS CURIAE*
NEW JERSEY CIVIL JUSTICE INSTITUTE

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STATEMENT OF INTEREST

The New Jersey Civil Justice Institute ("NJCJI") advocates for a civil justice system that treats all parties fairly. NJCJI has a strong interest in the clear, predictable, and fair application of the law and is concerned with the broader civil justice implications that cases, such as this one, may have on the professionals and businesses in this State.

Founded in 2007 as the New Jersey Lawsuit Reform Alliance, NJCJI is a bipartisan, statewide group comprised of small businesses, individuals, not-for-profit groups, and many of the State's largest business association and professional organizations. In that capacity, NJCJI monitors New Jersey legislation to assess its impact on issues related to civil justice, offers comments on proposed amendments to New Jersey's Rules of Court, and participates as *amicus curiae* in matters of interest to its membership.

In recent years, NJCJI has appeared as *amicus curiae* before the New Jersey Supreme Court and the Appellate Division of the New Jersey Superior Court in important consumer and tort litigation including Kendall v. Hoffman-La Roche, Inc., 209 N.J. 173 (2012); Allen v. V&A Bros., Inc., 208 N.J. 114 (2011); Bosland v. Warnock Dodge, Inc., 197 N.J. 543 (2009); and In re Pelvic Mesh/Gynecare Litigation, 426 N.J. Super. 167 (App. Div. 2012).

NJCJI and its members believe that a fair civil justice system resolves disputes expeditiously, without bias, and based solely upon application of the law to the facts of each case. Such a system fosters public trust and motivates professionals, sole proprietors, and businesses to provide safe and reliable products and services, while ensuring that injured individuals are compensated fairly for their losses.

NJCJI believes a fair civil justice system is one in which judges meaningfully perform their gatekeeping role in evaluating expert testimony before that evidence reaches the jury.

PRELIMINARY STATEMENT

Under New Jersey law, the proponent of medical expert testimony on a "not yet generally accepted theory of causation" must prove that such testimony is "based on a 'sound, adequately-founded scientific methodology involving data and information of the type reasonably relied on by experts in the scientific field.'" Kemp v. State, 174 N.J. 412, 427, 430 (2002) (quoting Rubanick v. Witco Chem. Corp., 125 N.J. 421, 449 (1991)). The "key to admission" of the expert's opinion "is the validity of the expert's reasoning and methodology." Landrigan v. Celotex Corp., 127 N.J. 404, 414 (1992).

This methodology-based review depends on robust judicial gatekeeping to distinguish bad science from good – just as the trial judge performed here following a two-week Kemp hearing. SCA2. The Appellate Division, however, reversed the trial judge's studied judgment and "relaxed" the trial court's gatekeeping. SCA53. The Appellate Division permitted unsubstantiated medical causation evidence to reach the jury because a credentialed expert could offer "plausible scientific explanations" for his outlier viewpoint. SCA4. In the Appellate Division's view, whenever "highly reputable scientists" view evidence "differently," the dispute should go to the jury without any meaningful judicial investigation into the methodological soundness of the dispute. SCA4.

Not only is that standard at odds with well-settled New Jersey law, but it defies what we know about juries' ability to conduct the methodology-based inquiries Kemp requires. Although jurors perform their basic fact-finding role admirably, jurors are ill-suited for evaluating an expert's "reasoning and methodology." Juries presume the validity of admitted evidence, and research indicates that they gain little insight on methodological soundness from dueling experts, cross-examination, and jury instructions.

The Appellate Division and Plaintiffs have it backwards: a robust Kemp process is even more important in cases like these, where methodological flaws lie beneath the surface of sterling credentials. Identifying obvious junk science may be relatively easy; cutting through jargon and credentials to understand methodological flaws is harder, but equally critical to ensure reasoned decision-making. In complex and technical cases, the judge's attention is needed most. Plaintiffs' approach would strip Kemp of any real value in the most complex scientific cases — precisely the cases where juries are the least equipped to assess scientific validity and methodological soundness.

STATEMENT OF FACTS

NJCJI relies upon the Statement of Facts presented by Defendants-Petitioners.

ARGUMENT

The Appellate Division's decision disregarded established guardrails on the admission of expert testimony in New Jersey. Instead of allowing the trial court to perform the robust gatekeeping that Kemp, Landrigan, and Rubinick require for expert testimony based on not-yet-generally-accepted science, the Appellate Division punted questions of methodological soundness to the jury. The Appellate Division recognized that the gold standard for expert evidence on general medical causation - epidemiological studies - refuted the plaintiffs' experts' causation theory. SCa75-76. Nevertheless, the Appellate Division held that plaintiffs are free to offer expert testimony based on studies that fall well short of that gold standard, so long as the proposed testifying experts are "extremely well-qualified" and can offer some explanation for their rejection of widely-accepted science. SCa72.

The Appellate Division thus limited the trial court's gatekeeping function to excluding only the most extreme and obvious forms of junk science, "relax[ing]" the Kemp requirements in cases where the expert can identify "plausible" reasons for his disagreement with established science. SCa4. In so doing, the Appellate Division assumed that "[v]igorous cross-examination, presentation of contrary evidence, and

careful instruction on the burden of proof," would be sufficient to help the jury resolve validity issues. SCa84.

Social science research, however, supports the opposite conclusion. None of those safeguards — cross-examination, dueling experts, and jury instructions — enable juries to resolve issues of methodological soundness. The Appellate Division has ignored the real limitations on the ability of jurors to conduct the kind of methodological-based assessment that the Appellate Division delegated to them. Judges, and not juries, are in the best position to assess methodological legitimacy. And the rigor of the Daubert standard, which has been developed for decades by federal courts, is the best means to ensure careful judicial gatekeeping in complex and technical cases.

I. Juries Depend On Robust Judicial Gatekeeping That Evaluates The Methodological Soundness Of Expert Testimony.

Social science research reveals two truths about juries and experts: First, expert testimony is essential and influential in cases, like these, involving issues of medical causation. Second, juries struggle to absorb the complex methodological and statistical information that expert witnesses offer, and they are therefore poorly equipped to assess methodological soundness.

These observations confirm what this Court observed more than twenty-five years ago: Juries "can be misled by highly paid experts who will find at least some support in voluminous scientific literature for any position, even when that position is repudiated by the majority of scientists." Rubanick, 125 N.J. at 453 (citations and quotation marks omitted). That juries struggle to evaluate highly technical information is precisely why it should remain the judge's obligation "to distinguish scientifically sound reasoning from that of the self-validating expert, who uses scientific terminology to present unsubstantiated personal beliefs." Landrigan, 127 N.J. at 414.

A. Expert Evidence on Causation is Indispensable in Products Liability Cases.

The importance of expert testimony in tort cases cannot be overstated. "In major civil cases, expert testimony has become virtually indispensable, especially on the issues of causation and damages." Ronald L. Carlson, et al., Evidence: Teaching Materials For an Age of Science and Statutes 601 (5th ed. 2002); see also William P. Lynch, Doctoring the Testimony: Treating Physicians, Rule 26, and the Challenges of Causation Testimony, 33 Rev. Litig. 249, 250 (2014) ("The federal courtroom has been overrun by experts."); David E. Bernstein, The Misbegotten Judicial Resistance to the Daubert Revolution, 89 Notre Dame L.

Rev. 27 (2013) (identifying mass tort cases as the crucible for expert testimony revolution).

And for good reason: juries tend to find expert testimony credible and influential, especially when the "testimony is more specific and/or conclusive about the case at hand" - i.e., when the expert testimony is in its most potent form. Michael T. Nietzel, et al., Juries: The Current State of the Empirical Literature, in Psychology and the Law: The State of the Discipline 23, 39-41 (R. Roesch et al. eds., 1999); see also Joan M. Cheever & Joanne Naiman, Expert Witnesses Found Credible by Most Jurors, Nat'l L.J., Feb. 22, 1993, at S7 (reporting that eighty-nine percent of recent criminal and civil jurors found experts believable and that seventy-one percent of the jurors polled said experts made a difference in the verdict).

B. Juries Struggle to Make Methodological-Based Distinctions in Evaluating Expert Testimony.

It is a "long-established principal" that jurors are "well-suited to determine each witness's knowledge, bias, consistency and overall credibility." Gately v. Hamilton Memorial Home, Inc., 442 N.J. Super. 542, 561-562 (App. Div. 2015), citing State v. Nash, 212 N.J. 518, 553 (2013). Indeed, "credibility is an issue which is peculiarly within the jury's ken and with respect to which ordinarily jurors require no expert assistance." State v. Frisby, 174 N.J. 583, 595

(2002). This is because "[a] jury represents a cross section of the citizens of a community, men and women of varying backgrounds and experience who bring an understanding of the everyday practical realities of life." State v. Garron, 177 N.J. 147, 173 (2003).

Although juries are well-suited to weigh evidence and make credibility findings, they are not well-positioned to evaluate the methodological roots of that evidence. Because jurors are predisposed to accept evidence clothed in scientific garb, and have a relatively passive role in evaluating that evidence, judicial gatekeeping is essential. Adversarial safeguards – including cross-examination, dueling experts, and jury instructions – do not provide juries with adequate substitutes for judicial testing of scientific evidence to ensure appropriate methodology.

As an initial matter, research reflects that juries actually *presume* the legitimacy of admitted evidence. "[B]y admitting scientific evidence, judges are inadvertently endorsing that evidence and causing jurors to be less critical in their evaluations of the evidence." N.J. Schweitzer & Michael J. Saks, Jurors and Scientific Causation: What Don't They Know, and What Can Be Done About It?, 52 Jurimetrics J. 433, 436 (2012).

In one study, mock jurors presented with low-quality or high-quality evidence were more persuaded by the evidence than were individuals who evaluated the same evidence *outside* of the trial context. See 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, 1 (2009) (discussing study).

Perhaps because of the presumption of legitimacy that juries give to admitted evidence, the adversarial process does not aid juries in drawing methodological distinctions in evaluating expert testimony. "Cross-examination may not effectively assist jurors in making sound decisions concerning scientific evidence," and traditional jury instructions may not adequately sensitize jurors to reliability issues. Lora M. Levett & Margaret Bull Kovera, The Effectiveness of Opposing Expert Witnesses for Educating Jurors About Unreliable Expert Evidence, 32 Law & Hum. Behav. 363, 364 (2008).

Strong cross-examinations tend to influence the jury's perception of the attorney, but they do little to influence the jury's perception of the expert witness herself, much less her methodology. See Shari Seidman Diamond et. al., Juror Reactions to Attorneys at Trial, 87 J. Crim. L. & Criminology 17, 41 (1996) (study's findings "call into question" the ability of "cross-examination to reduce the impact of a prosecution expert

who makes unwarranted claims about a defendant's future dangerousness"). Likewise, it is unlikely that a battle between experts at trial will educate jurors on the reliability and methodology of the evidence itself. See generally Levett & Kovera, supra (discussing study that supports conclusion that dueling experts are not effective in educating juries about methodological flaws).

Reflecting the limitations of the adversarial process, studies paint a "dismal picture" of the jury's ability to evaluate the quality of scientific testimony. N.J. Schweitzer & Michael J. Saks, Jurors and Scientific Causation: What Don't They Know, and What Can Be Done About It?, 52 Jurimetrics J. 433, 434 (2012). Research indicates that "the quality of scientific research presented by an expert [does] not affect jurors' evaluations of the credibility or validity of that research." Id.

Jurors struggle to make the kind of distinctions that the Kemp process requires of trial judges. "[I]n the absence of any procedural safeguards, most jurors may be unable to recognize flaws in research presented in the context of expert testimony." See Margaret Bull Kovera, et al., Assessment of the Commonsense Psychology Underlying Daubert: Legal Decision Makers' Abilities to Evaluate Expert Evidence in Hostile Work Environment Cases, 8 Psychol. Pub. Pol'y & L. 180, 190 (2002); see also Levett &

Kovera, supra, at 363 ("jurors have difficulty differentiating between expert testimony based on flawed or valid research").

Put simply, "in cases involving complex scientific evidence, juries have a difficult time reaching the truth." Joseph Sanders, Bendectin on Trial: A Study of Mass Tort Litigation 193 (1998). Jurors "appear[] to lack sensitivity to some important factors that b[ear] on the ability of the expert to draw conclusions from the data that were collected." Vidmar & Diamond, supra, at 1158. Experimental research thus confirms that jurors "struggle" to make methodological distinctions. Id. at 1165.¹

C. Judges, and Not Juries, Are Best Positioned to Evaluate Methodological Soundness.

Given the limitations of the adversarial process and the struggles juries face, judges are best suited to evaluate the

¹ Mass tort cases are not the only cases where jurors are thought to struggle with comprehending complex scientific concepts like methodology. In the patent arena, there has been significant skepticism regarding the role of the juries in resolving those technically complex cases. See, e.g., Kimberly A. Moore, Judges, Juries, and Patent Cases—An Empirical Peek Inside the Black Box, 11 Fed. Cir. B.J. 209, 213-220 (2002) (discussing wide-spread concern over the role of juries in patent cases); see also id. at 209 ("Honest to God, I don't see how you could try a patent matter to a jury. Goodness, I've gotten involved in a few of these things. It's like somebody hit you between your eyes with a four-by-four. It's factually so complicated.") (quoting Judicial Panel Discussions on Science and the Law, 25 Conn. L. Rev. 1127, 1144 (1993) (statement of Judge Covello, U.S. District Judge, Dist. of Conn.)).

soundness of all scientific evidence through use of a Kemp hearing in New Jersey (or a Daubert hearing in federal court).

A Kemp hearing facilitates a meaningful inquiry into the methodological soundness of a proposed expert's testimony. Unlike the adversarial process at trial, the Kemp hearing's focus is on methodological soundness. As part of that process, the judge possesses powers to delve into methodological soundness that a jury does not. A judge has access to — and, indeed, is required to consult — the scientific literature on which the expert bases his or her opinion. See Rubanick, 125 N.J. at 449-50 (establishing that courts should consult scientific literature to determine methodological soundness). The judge may inquire directly, and without limitation, into the basis for the expert's testimony during the hearing.

Unlike the jury, the judge builds a bank of experience on scientific issues, and he or she can draw on those experiences in future cases. Indeed, this is especially true in multicounty litigation, where complex mass tort cases are sent to a judge who is familiar with the types of scientific and technical disputes that occur frequently in these cases. That is exactly what happened here. Although the Appellate Division faulted the trial court for being too familiar with the scientific issues surrounding the Accutane litigation, SCA6, that experience is

indispensable for resolving complex scientific disputes – and it is experience that the jury can never gain.

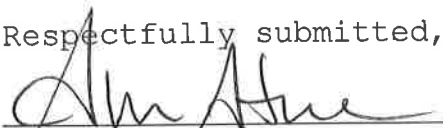
Ultimately, the “relaxed” version of judicial gatekeeping the Appellate Division endorsed will not lead to predictable or fair results in jury trials. Formal adoption of the federal Daubert standard would be one way to ensure that New Jersey courts remain faithful to their gatekeeping role. Indeed, NJCJI has long advocated for the adoption of the federal standard – precisely because borrowing from federal law would provide New Jersey judges with more guidance on thorny methodological issues. Although it is not necessary to resolve that issue to reverse the Appellate Division’s decision here (because that decision contravenes existing New Jersey law), NJCJI continues to support formal adoption of the Daubert standard.

Robust judicial gatekeeping of proposed expert testimony is an essential feature of any complex mass tort trial. New Jersey’s civil justice system – and New Jersey juries – depend on it.

CONCLUSION

For these reasons, the Court should reverse the Appellate Division and affirm the trial court's decision as to the admissibility of Plaintiffs' expert evidence.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'Shalom D. Stone', is written over a horizontal line.

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