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Product Liability ALERT

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NJ CONFIRMS THE COURT'S GATEKEEPER FUNCTION AND JOINS THE SLOW MARCH TOWARD STATE-COURT ACCEPTANCE OF *DAUBERT*

By Stephanie A. Short and Jay Evans

Twenty-five years after the United States Supreme Court's seminal decision on the admissibility of expert evidence, New Jersey has confirmed that it accepts the factors identified in *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993), as part of its expert admissibility analysis in civil cases. *In re: Accutane Litigation,* No. A-25-17, -- A.2d --, 2018 WL 3636867 (N.J. 2018). The *In re Accutane* opinion completes New Jersey's march away from the "general acceptance" test originally articulated in *Frye v. United States*, towards a methodology-based approach for expert reliability that began in 1991 with the pre-*Daubert* case, *Rubanick v. Witco Chem. Corp.*, 593 A.2d 733 (N.J. 1991). The Court determined that *Daubert* had the same goals as New Jersey's preexisting precedent related to expert admissibility, specifically, both support a methods-based test and both ask whether an expert's opinions and reasoning are scientifically valid. Thus, the Court held, the *Daubert* factors "dovetail with the overall goals of [New Jersey's] evidentiary standard and would provide a helpful – but not necessary or definitive – guide for our courts to consider when performing their gatekeeper role concerning the admission of expert testimony." *In re Accutane*, 2018 WL 3636867 at * 32.

The difference between *Daubert* and *Frye* is material and often outcome determinative. Theoretically, the *Frye* standard is more restrictive, however most Courts applying *Frye* do not focus on the "gatekeeping" aspect of the judicial function. Therefore, while, in theory, *Daubert* allows more questionable opinions into the Courtroom, the rigorous "gatekeeping" requirements often end up being the important part of the decision to litigants. "Gatekeeping" has long been part of New Jersey law, particularly by application of the "net opinion" rule. *Buckelew v. Grossbard*, 87 N.J. 512 (1981). In *In re Accutane*, the Court was careful to reaffirm the value of providing guidance to trial courts: "[r]ecognizing proper gatekeeping when it is performed provides a discernible pathway for other courts to follow." *In re Accutane,* 2018 WL 3636867 at *28; *see also Landrigan v. Celotex Corp.*, 605 A.2d 1079, 1086 (N.J. 1992) ("Defined landmarks guide a trial court in making this determination")

In re Accutane does not purport to overrule preexisting New Jersey law on expert admissibility; instead it clarifies that the original *Daubert* factors are harmonious with and encompassed by New Jersey law. It is clear that New Jersey does not have a preference for "let it all in" judicial analysis, and judicial exclusion of questionable evidence will

be given substantial deference by appellate Courts. Trial courts can and must weigh expert methodologies and potential testimony with great rigor, giving trial courts "permission," and even charge, to take their gatekeeper roles seriously:

> When this Court modified the general acceptance standard to adopt a more relaxed approach for causation expert testimony in toxic tort litigation, and later for all medical cause-effect expert testimony, it envisioned the trial court's function as that of a gatekeeper -- deciding what is reliable enough to be admitted and what is to be excluded. Those are not credibility determinations that are the province of the jury, but rather legal determinations about the reliability of the expert's methodology. . . Charged with determining whether to admit expert testimony, the trial court is responsible for advancing the truth seeking function of our system of justice.

Even if it only represents a "recap" of existing New Jersey law, by recognizing the *Daubert* factors, *In re Accutane* brings New Jersey in line with the majority of other states, thus advancing uniformity in expert evidence rules, and ultimately limiting the potential for forum shopping. With the addition of New Jersey, the courts of 41 states and the District of Columbia now look to the *Daubert* factors to assess expert reliability. Others may soon follow.

It will be interesting to watch whether the last remaining *Frye* stalwarts, like Florida, Pennsylvania, California, and New York, find decisions like *In re Accutane* persuasive enough to consider a shift towards *Daubert* and a consistent, nationwide standard for the judicial role of gatekeeping and for expert admissibility. Florida, which currently adheres to the *Frye* "general acceptance" test, is a candidate to fall into line next. In March 2018, the Florida Supreme Court heard oral arguments in *Delisle v. Crane Co., et al.*, SC16-2182, in which the court was asked whether recent legislative changes to the Florida Rules of Civil Procedure incorporated the *Daubert* standard.

New York has also made some fits and starts towards making gatekeeping a serious judicial obligation, even without abrogating *Frye*. *See Parker v. Mobil Oil Corp.*, 857 N.E. 2d 1114 (N.Y. 2006).

Of additional interest to those practicing in toxic tort and other exposure-based litigation is the Court's approval of the trial court's analysis regarding the proper role of epidemiology. In particular, the court agreed that selective "cherry picking" of which epidemiological studies to rely upon is unacceptable, and favorably pointed to the hierarchy of evidence set forth in the Reference Manual on Scientific Evidence (which places animal studies and case reports at the bottom). In addition, the Court noted with disapproval application of the so-called "Bradford Hill" criteria[1] absent a study demonstrating an actual association between the exposure and the disease in question. This approach is consistent with other recent

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[1] The Bradford Hill criteria include a weighing of the following factors **if** an association between an exposure and the injury is found: (1) strength of association (i.e., is the association strong and statistically significant?); (2) consistency of the relationship whether it has been repeatedly observed in other persons?) (3) specificity of association (i.e., is there a particular association between the substance and the condition it purportedly causes?); (4) temporality (are the cause and effect bound in time, or as Hill states, "which is the cart and which is the horse?); (5) biological gradient (does the association reveal a dose-response curve?); (6) plausibility (i.e., whether there exists a biologically plausible mechanism by which the agent could cause the disease?); (7) coherence (does cause-and effect interpretation of the data conflict with the history and biology of the disease?); (8) experiment (is the frequency of the associated events affected by reducing the amount of the suspected substance?); (9) analogy (should science anticipate similar results from a consideration of alternative explanations?). Hill AB, *The environment and disease: association or causation?*, Proc. R. Soc. Med. 58:295–300 (1965).

decisions in New Jersey, including the unpublished decision in *Carl v. Johnson & Johnson*, ATL-L-6546-14, ATL-6540-14, 2016 WL 4580145 (N.J. Super. Sept. 2, 2016) (finding fault with Plaintiffs' experts' selective reading of epidemiology, while also not being able to explain to the trial court's satisfaction the biological plausibility of talc causing cancer).

That New Jersey, home to much of the pharmaceutical industry, has welcomed questionable expert methodology in toxic tort cases, has always posed an odd disconnect. Whether plaintiffs will now have to look elsewhere to find a friendly forum remains to be seen, but what is clear is that the appellate Courts in New Jersey will back lower Courts that wish to take a gatekeeper role seriously.

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