

## **New Jersey Supreme Court Embraces Use Of Daubert Factors To Determine Admissibility Of Expert Opinion**

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August 2, 2018

On August 1, 2018, the New Jersey Supreme Court issued an important decision in Multi-County Litigation ("MCL") cases involving the pharmaceutical drug, Accutane. The decision has wider implications in the pharmaceutical and product liability realms as it impacts the standard by which experts' opinions are evaluated by trial courts. In the case of *In re: Accutane Litigation* (A-25-17)(079958), for the first time, our Supreme Court held that the factors identified originally in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) should be incorporated for use by New Jersey State trial courts as a "helpful guide" in determining admissibility of expert reports. However, the Court fell short of deeming New Jersey a "Daubert" jurisdiction, stating that "we find the factors useful, but hesitate to embrace the full body of Daubert case law as applied by state and federal courts."

At issue in *In re: Accutane Litigation* (A-25-17)(079958) was the admissibility of Plaintiffs' expert reports linking the drug Accutane to Chron's disease. A pre-trial Kemp[1] hearing was held by the trial court to determine admissibility of the opinions. After the hearing, the trial court concluded that Plaintiffs' experts violated scientific protocol by relying on case reports and animal studies while ignoring epidemiology studies and, thus, barred their opinions. Without general causation experts, Plaintiffs' claims were dismissed. Plaintiffs appealed the trial court's decision to the Appellate Division. The Appellate Division reversed the trial court's ruling and, instead, held that Plaintiffs' experts used sound scientific methodology and that the matter should be presented to a jury. Thereafter, the New Jersey Supreme Court granted Certification. The issues considered by our Supreme Court were: (1) whether the Appellate Division employed the correct standard in reviewing and overturning the trial court's decision; and (2) whether the *Daubert* standard's factors can inform a New Jersey trial court's determination for assessing the reliability of an expert's testimony.

First, our Supreme Court reaffirmed that an abuse of discretion standard must be applied by an appellate court when determining whether a trial court has properly admitted or excluded expert scientific testimony in a civil case.

Second, our Supreme Court addressed whether the *Daubert* standard should play a role in assisting the trial courts in their capacity as "gatekeeper" of expert testimony. In its decision, the Court reaffirmed the standards set forth in *Rubanick*[2] and *Landrigan*,[3] and cited to those cases for the proposition that: "a scientific theory of causation that has not yet reached general acceptance may be found to be sufficiently reliable if it 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." This methodology-based inquiry is predicated on the determination of whether comparable "experts in the field would actually rely on that information."

Our Supreme Court further reasoned that, during a Rule 104 hearing, the trial court must assess both the methodology used by the expert and the underlying data used in formation of the opinion. In doing so,

the New Jersey Supreme Court, for the first time, endorsed the usage of the *Daubert* factors which have been employed in other state jurisdictions, as well as in the federal courts.<sup>[4]</sup> These factors include, but are not limited to: (1) whether the scientific theory at issue can be, or has been tested; (2) whether the scientific theory has been published or subjected to some form of peer review; (3) whether there is any known or potential rate of error; and, (4) whether there exists a general acceptance in the scientific community about the scientific theory. The Court reasoned that these factors 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.” Although sanctioning the use of the *Daubert* factors, the Court was very careful to note that its opinion does not transform New Jersey into a “*Daubert* jurisdiction,” stating that “like several other states, we find the factors useful, but hesitate to embrace the full body of *Daubert* case law as applied by state and federal courts.”

Because our Supreme Court’s opinion does not mandate the use of the *Daubert* factors, but only states that they “should” be incorporated for use by our trial courts as a “helpful—but not necessary or definitive guide,” it remains to be seen to what extent the trial courts will be receptive to applying the *Daubert* factors in state court litigation. However, this decision does signal an important shift away from the very liberal and admittedly controversial methodology-based standard of *Rubanick*. For pharmaceutical and products liability defendants and their attorneys, this is a very positive development.

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[1] *Kemp ex. Rel. Wright v. State*, 174 N.J. 412, 427 (2002).

[2] *Rubanick v. Witco Chemical Corp.*, 125 N.J. 421 (1991).

[3] *Landrigan v. Celotex Corp.*, 127 N.J. 404 (1992).

[4] The *Daubert* trilogy includes: *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).