

SUPREME COURT OF NEW JERSEY

IN RE: ACCUTANE LITIGATION

DOCKET NO.: 079958

ON PETITION FOR CERTIFICATION
FROM SUPERIOR COURT OF NEW
JERSEY, APPELLATE DIVISION

Docket Nos. A-4698-14T1 &
A-0910-16T1

Sat Below:

Hon. Susan L. Reisner

Hon. Ellen L. Koblitz

Hon. Thomas W. Summers, Jr.

On Appeal from:

Superior Court of New Jersey
Law Division, Atlantic County
Case No. 271

Sat Below:

Hon. Nelson C. Johnson, J.S.C.

CIVIL ACTION

BRIEF OF AMICI CURIAE KENNETH S. BROUN, DANIEL J. CAPRA,
JOANNE A. EPPS, DAVID L. FAIGMAN, LAIRD KIRKPATRICK,
MICHAEL M. MARTIN, LIESA RICHTER, AND STEPHEN A. SALTZBURG IN
SUPPORT OF PETITION FOR CERTIFICATION

LOWENSTEIN SANDLER LLP
One Lowenstein Drive
Roseland, New Jersey 07068
973.597.2500
Attorneys for Amici Curiae

Of Counsel and on the Brief:

DANIEL J. CAPRA

Philip Reed Professor of Law
Fordham University School of Law

STEPHEN A. SALTZBURG

Wallace and Beverly Woodbury Professor of Law
George Washington University Law School

TABLE OF CONTENTS

	<u>Page No.</u>
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST OF <u>AMICI CURIAE</u>	1
PRELIMINARY STATEMENT	1
ARGUMENT	2
I. THE COURT SHOULD GRANT REVIEW TO CLARIFY THE EXPERT ADMISSIBILITY STANDARD AND DETERMINE WHETHER IT WILL ADOPT THE <u>DAUBERT</u> APPROACH IN CIVIL CASES.	2
A. There is Confusion in New Jersey on the Governing Standards of Admissibility for Expert Testimony in Toxic Tort Cases.	2
B. Language in <u>Accutane</u> Read Out of Context Can Lead to Error.	4
C. The Appellate Division's Purported Reliance on <u>Daubert</u> Is a Misapplication of the <u>Daubert</u> Gatekeeping Function.	7
D. The Lynchpin of a <u>Daubert</u> Analysis.	10
E. There is a Risk in Giving Undue Deference to Experts.	11
II. THIS COURT SHOULD EXPLICITLY ADOPT THE <u>DAUBERT</u> GATEKEEPING STANDARDS AS CURRENTLY REFLECTED IN <u>FED.</u> <u>R. EVID. 702</u> BECAUSE <u>DAUBERT</u> HAS PROVED ITSELF IN FEDERAL PRACTICE AND IN THE 37 STATE COURTS THAT HAVE ADOPTED IT.	12
A. There Are Advantages to Uniformity With the Federal Rule.	12
B. 37 States Have Explicitly or Implicitly Adopted <u>Daubert</u>	13
C. <u>Daubert</u> Is Especially Important In Toxic Tort Cases.	14

D. Even if the Substantive Differences Are Minor, Adoption of Daubert is Necessary to Eliminate Confusion. 15

III. BY GRANTING REVIEW THIS COURT CAN DEMARCATATE THE DIFFERENT ROLES PLAYED BY N.J.R.E. 702 AND 703. 15

IV. BY GRANTING REVIEW THE COURT CAN CLARIFY THE APPELLATE REVIEW STANDARD. 17

A. The U.S. Supreme Court Adopted an Abuse of Discretion Standard. 17

B. The Standard of Review in New Jersey in Civil Cases is Unclear. 18

CONCLUSION 20

TABLE OF AUTHORITIES

CASES	PAGE No.
<u>Clark v. Safety-Kleen,</u> 179 <u>N.J.</u> 318 (2004)	7
<u>Daubert v. Merrell Dow Pharm., Inc.,</u> 43 <u>F.3d</u> 1311 (9th Cir. 1995)	9, 10
<u>Daubert v. Merrell Dow Pharm., Inc.,</u> 509 <u>U.S.</u> 579 (1993)	passim
<u>Gen. Elec. Co. v. Joiner,</u> 522 <u>U.S.</u> 136 (1997)	passim
<u>Hisenaj v. Kuehner,</u> 194 <u>N.J.</u> 6 (2008)	18, 19
<u>Kemp v. State,</u> 174 <u>N.J.</u> 412 (2002)	passim
<u>Kumho Tire Co. v. Carmichael,</u> 526 <u>U.S.</u> 137 (1999)	10
<u>Motorola Inc. v. Murray,</u> 147 <u>A.3d</u> 751 (D.C. App. 2016)	14
<u>Parker v. Mobil Oil Corp.,</u> 7 <u>N.Y.3d</u> 434 (2006)	14
<u>Rubanick v. Witco Chem. Corp.,</u> 125 <u>N.J.</u> 421 (1991)	passim
<u>Ryan v. KDI Sylvan Pools,</u> 121 <u>N.J.</u> 276 (1990)	2
<u>State v. Harvey,</u> 151 <u>N.J.</u> 117 (1997)	18, 19
<u>United States v. Brown,</u> 415 <u>F.3d</u> 1257 (11th Cir. 2005)	18
 OTHER AUTHORITIES	
ABA Trial Evidence Committee, <u>Daubert v. Frye:</u> <u>Admissibility of Expert Testimony</u> (2016)	19

Bernstein, Frye, Frye, Again: The Past, Present, and Future of the General Acceptance Test, 41 Jurimetrics J. 385 (2001) 17

Edward K. Cheng & Albert H. Yoon, Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards, 91 Va. L. Rev. 471 (2005) 14, 15

RULES OF COURT

Fed. R. Evid. 702 passim

N.J.R.E. 702 passim

N.J.R.E. 703 passim

N.J. Evid. R. 56(2) 15

STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae (as listed on Exhibit A) are academics who focus on the law of evidence and share an opinion that this Court should clarify the admissibility standard for expert testimony in civil cases and explicitly decide that the Daubert reliability standard should apply in toxic tort cases in New Jersey.

PRELIMINARY STATEMENT

This Court should grant the petition for certification and hear this appeal for four reasons. First, as is apparent from the very different approaches taken in this case by the trial court and Appellate Division, New Jersey law on the admissibility of expert testimony in civil cases is confused. Review will give this Court an opportunity to provide clarity to lower courts. Second, review will enable the Court to decide that the Daubert standards for determining the admissibility of expert testimony in cases such as this, as 37 jurisdictions recognize, is superior to other approaches and should be explicitly adopted in New Jersey. Third, review will give this Court an opportunity to provide guidance and clarification on the differing requirements imposed by N.J.R.E. 702 and 703 (which the Appellate Division conflated in this case). Fourth, review will provide an opportunity for the Court to clarify the

appellate standard of review in civil cases for trial court rulings on expert testimony.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW TO CLARIFY THE EXPERT ADMISSIBILITY STANDARD AND DETERMINE WHETHER IT WILL ADOPT THE DAUBERT APPROACH IN CIVIL CASES.

A. There is Confusion in New Jersey on the Governing Standards of Admissibility for Expert Testimony in Toxic Tort Cases.

For many years, this Court held that the Frye "general acceptance" test governed the admissibility of all expert scientific testimony. Ryan v. KDI Sylvan Pools, 121 N.J. 276, 286 (1990). But in Rubanick v. Witco Chemical Corp., 125 N.J. 421, 432 (1991), the Court established a different standard for reviewing expert testimony in a toxic tort case. The Court reasoned that "plaintiffs in toxic-tort litigation . . . may never recover if required to await general acceptance by the scientific community of a reasonable, but as yet not certain, theory of causation." Id. at 434. But the Court did not by any means lift all evidentiary constraints on scientific experts. It stated that an expert's opinion may be admissible "even though it is controversial and its acceptance is not widespread," but only if "it is based on a sound methodology that draws on scientific studies reasonably relied on in the scientific community, and has actually been used and applied by responsible

experts or practitioners in the particular field.” Id. at 447 (emphasis added).

Kemp v. State, 174 N.J. 412 (2002), was this Court’s first opportunity to consider the standard for admitting scientific expert testimony following the U.S. Supreme Court decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). As the Supreme Court did in Daubert, the Kemp Court held that the trial court should hold a hearing pursuant to N.J.R.E. 104 to determine whether there is sufficient evidence that the scientific methodology used by the plaintiff’s expert in determining medical causation was sound. The Court stated that “[t]he appropriate inquiry is not whether the court thinks the expert’s reliance on the underlying data was reasonable, but rather whether comparable experts in the field [would] actually rely on that information.” Kemp, supra, 174 N.J. at 412 (citations and quotations omitted).

Rubanick and Kemp each contain language suggesting that New Jersey courts should approach scientific expert testimony much like a Federal court would evaluate it under Daubert and Fed. R. Evid. 702. But there are two steps required by Federal courts in a Daubert inquiry that are not clearly enough required by this Court’s decisions, and those steps are critical to assure that an expert’s opinion is reliable.

The Federal trial court inquiry in a Rule 104(a) Daubert

hearing not only examines the soundness of the methodology employed by the expert and the expert's explanation of how that methodology was employed (which this Court requires); the Federal court takes two additional steps: (1) it investigates the expert's factual basis to determine whether it is sufficient to support the expert's conclusion, and (2) it reviews the expert's application of that methodology to determine whether the resulting opinion is reliable. A Federal trial court must exclude the expert's testimony unless the proponent has established by a preponderance of the evidence that it has satisfied all three steps: reliable methodology, sufficiency of basis, and reliable application of methodology.

The fact that this Court has never specifically required the second and third steps of the inquiry has resulted in a confused and uncertain state of affairs in lower New Jersey courts which, like the Appellate Division in this case, freely cite Federal cases -- including Daubert and General Electric Co. v. Joiner, 522 U.S. 136 (1997) -- but do not follow the gatekeeper requirement established by those Federal decisions.

B. Language in Accutane Read Out of Context Can Lead to Error.

In Kemp, this Court provided the following guidance to lower courts:

an expert must be able to identify the factual basis for his conclusion, explain

his methodology, and demonstrate that both the factual basis and underlying methodology are scientifically reliable[; and]

[t]he court's role is to determine whether the expert's opinion is derived from a sound and well-founded methodology that is supported by some expert consensus in the appropriate field.

[Supra, 174 N.J. at 427 (citations and quotations omitted).]

The trial court assessed the admissibility of expert testimony as to Accutane by being true to the full range of inquiry that Kemp and Rubanick require. The trial court explained the admissibility standard in these words:

[I]n evaluating the totality of the evidence presented by Plaintiffs, the court's task may be stated as follows: Query, have the Plaintiffs shown that their expert's theories of causation are sufficiently reliable as being based on a sound, adequately-founded scientific methodology, to wit, relying upon methods upon which experts in their field would reasonably rely in forming their own (possibly different) opinions about what caused the Plaintiffs' disease?

[Pa3 (emphasis added).]

The Appellate Division concluded that the trial court, in stating the question as it did, "inappropriately condemned the experts for relying on relevant scientific evidence other than epidemiological studies, despite their plausible explanations for doing so." Sca4.

The difference between the two approaches is clear. The

trial court reasoned that experts who choose to dismiss epidemiological studies relied upon by experts in a field must be able to show that other experts would also would dismiss those studies as unreliable. The trial court concluded that one expert's ipse dixit -- that virtually every epidemiological study is so flawed that all may be dismissed -- is not sufficient evidence of a reliable methodology that is reliably applied. See, e.g., Joiner, supra, 522 U.S. at 146 (noting that "nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert").

The trial court reasonably required, as the language of Rubanick and Kemp would seem to demand (and certainly as Daubert demands), that experts show that the application of their methodology, including the decision not to rely on epidemiological studies, is regarded as reliable by other experts in the field. The trial court found no support for the plaintiffs' expert testimony regarding Accutane in professional journals, texts, conferences, symposia, or judicial opinions accepting the methodology.

The Appellate Division in contrast appears to read Rubanick and Kemp to permit any expert to testify to an opinion if the expert uses a methodology that others in the field use, and then

simply offers a "plausible" (to the court) explanation for how the expert used that methodology in a particular case -- even if the expert used it in a manner that other experts would regard as unreliable and unreasonable.¹

Thus, the admissibility standard needs clarification and adopting the Daubert standards would provide that needed clarification.

C. The Appellate Division's Purported Reliance on Daubert Is a Misapplication of the Daubert Gatekeeping Function.

Kemp seems to look to Daubert for guidance, and the Appellate Division freely cited Daubert and other Federal cases applying it. But, the Appellate Division read this Court's opinions as admitting expert testimony that would not pass muster under Daubert and decisions of the U.S. Supreme Court. The Appellate Division quoted from Kemp, which quoted in turn from Daubert: "The focus of the trial court's inquiry must be 'solely on principles and methodology, not on the conclusions

¹ The Appellate Division purported to find support in this Court's decision in Clark v. Safety-Kleen, 179 N.J. 318 (2004), where this Court referred to Rubanick as saying "[o]ur only caveat was that the expert's conclusion derive from a methodology that is supported by some consensus of experts in the field." Id. at 337. The Appellate Division clearly was of the view that even if all experts other than the one called to testify reject as unreliable the application of a methodology to facts, the testifying expert's testimony is admissible as long as the expert explains it. This is an extraordinary interpretation of a requirement that there must be a consensus of experts on methodology.

that they generate.'" SCA54. But, the U.S. Supreme Court quickly realized that this language was inadequate, and in Joiner, it stated that "conclusions and methodology are not entirely distinct from one another" and that a court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered." Supra, 522 U.S. at 146.

The experts in Joiner relied upon animal studies and epidemiological studies and offered reasoned (one might say "plausible") explanations for their reliance. The U.S. Supreme Court found this insufficient, because the studies were not properly applied to the facts of the case. Under the Appellate Division's approach, the expert's opinion in Joiner is likely admissible, even though the Appellate Division sought to distinguish Joiner as one in which there was "simply too great an analytical gap between the data and the expert's opinion." SCA65.

Ironically, the Appellate Division asked the right question: "does the relevant scientific community accept the process by which Kornbluth and Madigan reasoned to a conclusion that the epidemiological studies (despite the lack of a statistically significant association) and the other relevant evidence supported a finding of a causal relationship between Accutane and Crohn's disease?" SCA65. But the court offered no

evidence to bolster the conclusion that anyone other than these two experts reasoned as they did. Instead, the court relied exclusively on the self-serving testimony of the two experts.

Even the result in Daubert itself would be different under the Appellate Division's approach. After establishing the gatekeeping function, the Daubert Court remanded the case to the Ninth Circuit. That court found that experts using recognized methodologies -- metanalysis of epidemiological studies, animal studies, and comparisons of Bendectin to similar chemical structures -- did not reach reliable conclusions. Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311 (9th Cir. 1995).

Much like the Accutane expert testimony, the Ninth Circuit found that "[e]ach expert proffered by the plaintiffs assures us that he has utilized the type of data that is generally and reasonably relied upon by scientists in the relevant field, and that he has utilized the methods and methodology that would generally and reasonably be accepted by people who deal in these matters." Id. at 1316 (quotations and citations omitted).² But nonetheless the Ninth Circuit rejected the expert testimony, which closely resembles that offered in this case as to Accutane, and wrote:

² The Ninth Circuit recognized the dangers of relying on the ipse dixit opinions of experts paid by litigants for their opinions and emphasized the importance of independent research-- independent from that used to testify in court. Id. at 1317.

[P]laintiffs rely entirely on the experts' unadorned assertions that the methodology they employed comports with standard scientific procedures. . . . [P]laintiffs' experts . . . neither explain the methodology the experts followed to reach their conclusions nor point to any external source to validate that methodology. We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under Daubert, that's not enough.

[Id. at 1319.]

D. The Lynchpin of a Daubert Analysis.

After deciding Daubert and Joiner, the U.S. Supreme Court decided Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).³ Kumho Tire represented the Court's general approach to assessing the admissibility of expert testimony and established what is now regarded as the lynchpin of gatekeeping: The court must "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Id. at 152.

The Appellate Division did not insist on this, and instead substituted its judgment for that of the trial court which did

³ The U.S. Supreme Court decided Daubert in 1993, Joiner in 1997, and Kumho Tire in 1999. The Advisory Committee on the Federal Rules of Evidence closely followed the Court's decisions and recommended an amendment to Fed. R. Evid. 702 to capture the essence of the Daubert trilogy. The Supreme Court approved the amendment and it took effect in 2000.

insist on it.⁴ Thus, the two plaintiffs' experts in this case will be allowed to offer opinions that the trial court found they would not offer outside of a trial setting.

The Appellate Division explained that "[g]iven that our evidence rules embody a strong preference for admissibility, we conclude that the court mistakenly applied its discretion in excluding the expert scientific testimony." SCA73. That statement is at odds with the Federal Rules, which establish a preference for reliability, not admissibility, of scientific expert testimony. Under Daubert the proponent has the burden of showing reliability by a preponderance of the evidence.⁵ The Appellate Division has apparently switched that burden to the opponent. This Court can resolve any confusion about the applicable standard of proof for the admissibility determination by granting review in this case.

E. There is a Risk in Giving Undue Deference to Experts.

The extreme deference shown by the Appellate Division to the plaintiffs' experts might well, as a practical matter,

⁴ As the trial court found in this case, the challenged experts made a number of assumptions that they would not make in their work outside a courtroom setting. The Appellate Division does not even mention the many applications of that standard that the trial court employed.

⁵ The Daubert Court clearly places the burden on the proponent to show that the expert's opinion is more likely than not reliable. See supra, 509 U.S. at 591, n.10 ("These matters should be established by a preponderance of proof.")

eliminate the role of trial judges in excluding unreliable scientific expert testimony. Under that approach, a well credentialed expert who rejects the best available science will be permitted to offer opinion testimony that is neither peer reviewed nor accepted as reliable by peers, as long as the expert gives a "plausible" reason for rejecting the best science and for arriving at an opinion -- even if that opinion is speculative, not generally accepted, not previously tested, and essentially is little more than ipse dixit.

By granting review in this case, the Court has the opportunity to provide guidance to the lower courts as to whether the three federal components of Daubert gatekeeping apply in New Jersey courts -- and by implementing the Daubert standards the Court can assure that trial courts can exercise meaningful review over scientific expert testimony.

II. THIS COURT SHOULD EXPLICITLY ADOPT THE DAUBERT GATEKEEPING STANDARDS AS CURRENTLY REFLECTED IN FED. R. EVID. 702 BECAUSE DAUBERT HAS PROVED ITSELF IN FEDERAL PRACTICE AND IN THE 37 STATE COURTS THAT HAVE ADOPTED IT.

A. There Are Advantages to Uniformity With the Federal Rule.

The decision to adopt the federal rule for New Jersey does not only promote reliability for scientific expert testimony. It also avoids the substantial transaction costs that currently exist in having two different standards in State and Federal courts. Having a single approach to expert testimony will help

to discourage forum shopping; it will free practitioners from having to master two separate standards for the same exact testimony; and it will assure that all litigants in New Jersey benefit from a well-established approach to screening expert testimony.

B. 37 States Have Explicitly or Implicitly Adopted Daubert.

Twenty-four states have explicitly adopted the Daubert gatekeeper-reliability test to assess the admissibility of expert testimony such as that proffered in this case. The 24 states are: Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Texas, Vermont, West Virginia, Wisconsin, and Wyoming. See ABA Trial Evidence Committee, Daubert v. Frye: Admissibility of Expert Testimony at 149-50 (2016). Just as importantly, thirteen more states are employing the Daubert factors and reliability requirements while not having yet specifically stated that Daubert controls. Those states are: Alabama, Georgia, Hawaii, Idaho, Indiana, Iowa, Maine, Massachusetts, Missouri, North Dakota, Rhode Island, South Dakota, and Tennessee. Ibid.

Finally, many of the remaining states (such as New Jersey) are essentially flirting with the Daubert standards -- requiring

the judge to look to the expert's methodology, relying freely on federal case law -- without coming out and saying that Daubert controls. See, e.g., Parker v. Mobil Oil Corp., 7 N.Y.3d 434 (2006) (citing federal case law and conducting a Daubert-like enquiry into the expert's methods and application of methods).⁶

It is notable that the very jurisdiction that created Frye recently reconsidered it and adopted the Daubert/Rule 702 standards. See Motorola Inc. v. Murray, 147 A.3d 751 (D.C. App. 2016) (stating that "[t]he ability to focus on the reliability of principles and methods, and their application, is a decided advantage that will lead to better decision-making by juries and trial judges alike" (emphasis added)).

The predominance of the Daubert gatekeeping function is the strongest proof that it has worked well to shield the jury from unreliable expert testimony masquerading as science, while still permitting plaintiffs to offer reliable expert testimony.

C. Daubert Is Especially Important In Toxic Tort Cases.

Adoption of Daubert is especially important in toxic tort cases because a jury often will be unable to wade through the sophisticated terminology and standards that these cases present, creating the risk that something that sounds reliable

⁶ See Edward Cheng & Albert H. Yoon, Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards, 91 Va. L. Rev. 471, 474 (2005) (noting that "Daubert's shadow now casts itself over state court opinions even in jurisdictions that have not formally adopted the Daubert test.").

will sway the jury and yet will not in fact be reliable. The record in this case demonstrates the complexity of the scientific issues that are better considered in the first instance by a judicial gatekeeper who can employ a variety of techniques unavailable to a jury to analyze these issues.

D. Even if the Substantive Differences Are Minor, Adoption of Daubert is Necessary to Eliminate Confusion.

New Jersey has certainly adopted a gatekeeping standard that has Daubert elements. But even if the substantive difference is slight, significant transaction costs arise when courts flirt with Daubert rather than explicitly adopt it. Professors Cheng and Yoon, who found only a minor substantive difference in applying Frye or Daubert, cogently argue that "state courts should consider uniformly adopting Daubert as their scientific admissibility standard" because "the skirmishing between the champions of Frye and Daubert yields few benefits and creates more confusion than anything else."⁷

III. BY GRANTING REVIEW THIS COURT CAN DEMARCATATE THE DIFFERENT ROLES PLAYED BY N.J.R.E. 702 AND 703.

When this Court decided Rubanick, the governing rule was N.J. Evid. R. 56(2), the essential components of which are now

⁷ Cheng & Yoon, supra, at 503-04. See also Bernstein, Frye, Frye, Again: The Past, Present, and Future of the General Acceptance Test, 41 Jurimetrics J. 385, 407 (2001) (arguing that state courts should adopt the Daubert test to promote uniformity and eliminate confusion).

found in N.J.R.E. 702⁸ and 703,⁹ as is also the case under the Federal Rules of Evidence. The Appellate Division failed to focus on the different requirements of these two evidence rules and interpreted them as both being satisfied in toxic tort cases as long as a qualified expert relied upon facts or data reasonably relied upon by similar experts. In other words it conflated Rules 702 and 703, which in fact impose independent requirements.¹⁰

The plaintiffs' experts demonstrate how expert testimony might satisfy Rule 703 and fail Rule 702. In this case, the "method" they used was to review the extant studies on the connection between Accutane and Crohn's disease. Nobody can dispute that at some level of generality, reviewing studies is a generally accepted method for reaching a conclusion on causation

⁸ "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."

⁹ "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

¹⁰ That is made clear in the Advisory Committee Note to the 2000 amendment to Federal Rule 702. The Note instructs that the sufficiency of the expert's basis, and the reliability of the expert's methods, are questions to be resolved under Rule 702 -- and that it is not enough that the expert is relying on some information of a type that other experts would rely upon.

and that experts reasonably rely on such studies in compliance with Rule 703. But the simple existence of a method cannot be enough to assure reliability under Rule 702 if the expert is applying it in such a way as to reach an unreliable conclusion -- that is, applying the method in such a way that they would never do in their work outside a courtroom setting. The Court should hear the appeal in this case to instruct the lower courts that Rules 702 and 703 are independent, and that an expert cannot be permitted to testify by satisfying only one of those rules.

IV. BY GRANTING REVIEW THE COURT CAN CLARIFY THE APPELLATE REVIEW STANDARD.

A. The U.S. Supreme Court Adopted an Abuse of Discretion Standard.

The abuse of discretion standard of review established by the U.S. Supreme Court in Joiner is based on the premise that trial judges are in a better position to evaluate the reliability of expert testimony than are appellate courts. It is the trial judge who sees and hears the witnesses, and who is in the best position to evaluate whether the experts are using the same intellectual rigor in coming to their opinion as would be expected from them in their real life as experts. The trial judge can appoint experts to assist the court in mastering complex evidence and can question experts at a hearing, while evaluating the reliability of their proposed testimony.

Appellate courts cannot do the same.¹¹

B. The Standard of Review in New Jersey in Civil Cases is Unclear.

This Court addressed the standard of review in Hisenaj v. Kuehner, 194 N.J. 6 (2008), when it applied the abuse of discretion standard in reviewing the expert testimony of a mechanical engineer under Rule 702. Id. at 9,12. Despite citing Hisenaj, the Appellate Division stated that "we owe somewhat less deference to a trial court's determination in a case of this type" and cited criminal cases in support of the statement. SCA57.

It is true that in criminal cases like State v. Harvey, 151 N.J. 117, 167 (1997), the Court distinguished expert testimony from other evidence on the ground that "[l]ike trial courts, appellate courts can digest expert testimony as well as review

¹¹ The importance of an abuse of discretion review for a trial court's gatekeeping determination was well-explained by the court in United States v. Brown, 415 F.3d 1257, 1265 (11th Cir. 2005) (quotations omitted):

Immersed in the case as it unfolds, a district court is more familiar with the procedural and factual details and is in a better position to decide Daubert issues. The rules relating to Daubert issues are not precisely calibrated and must be applied in case-specific evidentiary circumstances that often defy generalization. And we don't want to denigrate the importance of the trial and encourage appeals of rulings relating to the testimony of expert witnesses. All of this explains why the task of evaluating the reliability of expert testimony is uniquely entrusted to the district court under Daubert, and why we give the district court considerable leeway in the execution of its duty.

scientific literature, judicial decisions, and other authorities." But, Harvey and the criminal cases cited by the Appellate Division involved the general acceptance requirement for expert testimony, which is confined to criminal cases. It might be true that an appellate court is in as good a position as a trial court to assess general acceptance -- because the general acceptance question can be determined by a review of publications, essentially by "counting heads" in the field. But much more is required of trial courts by Rubanick and Kemp -- and, of course, by Daubert.¹² The Appellate Division offered no reason for departing from the Hisenaj abuse of discretion standard. Review of the Appellate Court's decision would enable this Court to clarify the differing standards of review in civil and criminal cases.

¹² See ABA Trial Evidence Committee, supra, listing the following states as adopting an abuse of discretion standard for expert testimony in cases such as this one: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Indiana, Iowa, Kansas (if the appellate court finds that the trial court performed its gatekeeper role), Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Nebraska (unless the trial judge completely abandoned the gatekeeper role), Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Wisconsin, and Wyoming. Hawaii, is listed as following the even more deferential standard of plain error.

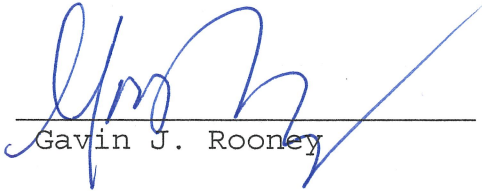
CONCLUSION

Amici believe that there are strong reasons for granting review in this case and have explained these reasons in Sections I through V. By granting review in this case, this Court can provide clarity to lower courts on the correct standard of admissibility of expert testimony in civil cases. Review would provide the Court an opportunity to decide that the Daubert standards for determining the admissibility of expert testimony should be explicitly adopted in New Jersey. Review would also provide the Court an opportunity to provide guidance and clarification on the differing requirements imposed by New Jersey Rules of Evidence 702 and 703 and on the standard appellate courts must use in reviewing trial court rulings on the admissibility of expert testimony.

The very different approaches to expert testimony by the trial court and the Appellate Division demonstrate the importance of using this case as a vehicle for clearly stating the standards that govern trial courts in ruling on the admissibility of expert testimony in civil cases and appellate courts in reviewing those rulings.

Respectfully submitted,

LOWENSTEIN SANDLER LLP
Attorneys for Amici Curiae

By: 
Gavin J. Rooney

Dated: September 22, 2017

Of Counsel and on the Brief:

DANIEL J. CAPRA
Philip Reed Professor of Law
Fordham University School of Law

STEPHEN A. SALTZBURG
Wallace and Beverly Woodbury Professor of Law
George Washington University Law School

Exhibit A: List of Amici Curiae

The amici curiae who submit this brief include:

Kenneth S. Broun, Henry Brandis Professor of Law Emeritus, University of North Carolina School of Law;

Daniel J. Capra, Philip Reed Professor of Law, Fordham University School of Law, and Reporter to the Judicial Conference Advisory Committee on Evidence Rules;

Joanne A. Epps, Executive Vice President and Provost, Temple University Beasley School of Law;

David L. Faigman, Chancellor and Dean, and John F. Digardi Distinguished Professor of Law, at the University of California Hastings College of Law;

Laird Kirkpatrick, Louis Harkey Mayo Research Professor of Law, George Washington University Law School;

Michael M. Martin, Distinguished Professor of Law, Fordham University School of Law;

Liesa Richter, William J. Alley Professor of Law and Thomas P. Hester Presidential Professor, University of Oklahoma College of Law; and

Stephen A. Saltzburg, Wallace and Beverley Woodbury Professor of Law, George Washington University Law School.