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## Same Standard, Different Outcomes: A Critique on Daubert and Expert Admissibility Standards Through the Lens of the Talcum Powder Mass Tort Litigation

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# SAME STANDARD, DIFFERENT OUTCOMES: A CRITIQUE ON *DAUBERT* AND EXPERT ADMISSIBILITY STANDARDS THROUGH THE LENS OF THE TALCUM POWDER MASS TORT LITIGATION

## I. INTRODUCTION

For decades, scholars, commentators, and courts have debated the wisdom of the standards used for evaluating expert witnesses. With courts around the country grappling with the mass tort litigation concerning talcum powder (“talc litigation”), and as a result of using different standards to evaluate – and in some cases exclude – the same experts, the cases present a unique opportunity to consider the issue. The standard used for evaluating experts in federal courts, and some state courts, has developed through common law overtime and is codified in the Federal Rules of Evidence.<sup>1</sup> The expert admissibility standard, commonly known as the *Daubert* Standard, has long been critiqued by experts in the field. However, most of the examinations of the *Daubert* Standard are based on one-off cases.

The talcum powder mass tort litigation presents a unique view of the shortcomings of the *Daubert* Standard due to its widespread nature and presence in the media.<sup>2</sup> The litigation is based on the premise that the talc products – Johnson & Johnson Baby Powder and Shower to Shower – cause ovarian cancer.<sup>3</sup> There were more than 15,500 cases pending against Johnson &

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<sup>1</sup> See e.g., *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993); *GE v. Joiner*, 522 U.S. 136, 143 (1997); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). Federal Rule of Evidence 702.

<sup>2</sup> See e.g., Peter Loftus, *Johnson & Johnson’s Legal Challenges Mount*, The Wall Street Journal (Oct. 14, 2019), <https://www.wsj.com/articles/johnson-johnsons-legal-challenges-mount-11571055242>; Chad Terhune, *Johnson & Johnson CEO testified Baby Powder was safe 13 days before FDA bombshell*, Reuters (Oct. 22, 2019), <https://www.reuters.com/article/us-johnson-johnson-talc-ceo-insight/johnson-johnson-ceo-testified-baby-powder-was-safe-13-days-before-fda-bombshell-idUSKBN1X12GF>; Berkeley Lovelace Jr., *Johnson & Johnson earnings beat expectations despite legal challenges from opioids and talc*, CNBC (Oct. 15, 2019), <https://www.cnbc.com/2019/10/15/johnson-johnson-jnj-earnings-q3-2019.html>; Lauren Berg, *J&J Hit With \$40M Verdict In Calif. Talc Cancer Trial*, Law360 (Sept. 27, 2019), <https://www.law360.com/articles/1201417/j-j-hit-with-40m-verdict-in-calif-talc-cancer-trial>.

<sup>3</sup> Johnson & Johnson, Quarterly Report (Form 10-Q) at 31 (June 30, 2019).

Johnson talc products as of June 2019.<sup>4</sup> Due to the expansive nature of the talc litigation, the same experts have repeatedly been offered in different courts across the country.<sup>5</sup> This means the same expert can face multiple challenges to their credibility and methodology in *Daubert* Hearings as well as under other expert standards, such as the *Frye* Standard, in front of different judges in different jurisdictions. To trigger a *Daubert* Hearing, the opposing party moves to exclude an expert's testimony based on one of the five *Daubert* Factors. The pitfalls of the expert standard become evident when one court allows an expert to give opinions and findings while a different court excludes that same testimony.<sup>6</sup>

This comment will discuss the evolution of the *Daubert* Standard and the issues courts and litigants face in light of the expert admissibility standards using the talc litigation as a case study. Part II gives a brief history of the different standards adopted by federal and states courts through common law and the legislature. It further discusses some of the most substantial critiques of the *Daubert* Standard since the Supreme Court's holding more than two decades ago. Part III explores the talc litigation and gives a broad overview of its claims, nature, size, and presence in the media. Part IV presents a case study which looks at several experts whose testimony has been excluded in some courts while allowed in other courts based on the expert standard applied, whether *Daubert* or other admissibility criteria. Part V will discuss the shortcomings of the *Daubert* Standard as demonstrated through the case studies and review proffered solutions to the issue. In addition, this section acknowledges the issue of courts

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<sup>4</sup> Id.

<sup>5</sup> See e.g., *Carl v. Johnson & Johnson*, 2016 N.J. Super. Unpub. LEXIS 2102 (calling Dr. Colditz and Dr. Cramer as expert witnesses); *Ristesund v. Johnson & Johnson*, 22nd Judicial Circuit of Missouri, Case No. 1422-CC09012-01 (calling Dr. Colditz as an expert witness); *Blaes v. Johnson & Johnson*, No. 4:14CV213 RLW, 2016 U.S. Dist. LEXIS 6399 (E.D. Mo. Jan. 20, 2016) (calling Dr. Colditz as an expert witness); *Berg v. Johnson & Johnson*, 940 F. Supp. 2d 983 (D.S.D. 2013) (calling Dr. Cramer as an expert witness).

<sup>6</sup> Carrie Salls & John O'Brien, *In One State, Testimony 'Made For Litigation'; In Another, Part Of \$127M In Verdicts*, *Forbes* (Sept 21, 2016), <https://www.forbes.com/sites/legalnewsline/2016/09/21/in-one-state-testimony-made-for-litigation-in-another-part-of-127m-in-verdicts/#3d29425c8b50>.

applying different expert admissibility standards outside of *Daubert*, such as *Frye*, and reaching different conclusions about the same expert testimony.

## II. EVOLUTION OF THE EXPERT STANDARD

For seventy years, until the Supreme Court's holding in *Daubert v. Merrell Dow Pharmaceuticals*, the traditional standard for assessing expert admissibility was historically known as the *Frye* Standard, which originated in a 1923 District of Columbia Circuit case.<sup>7</sup> The *Frye* Standard was then largely used by state and federal courts until the Supreme Court developed the *Daubert* Standard in 1993.<sup>8</sup> The *Daubert* Standard was later clarified in 1997 and 1999 with regards to the appellate standard of review and the Standard's application to nonscientific expert testimony.<sup>9</sup> In 2000, Federal Rule of Evidence 702 was updated in response to *Daubert*.<sup>10</sup>

### A. The Expert Testimony Standard Developed from *Frye v. United States* Was an Attempt at Creating a Way to Assess Expert Credibility.

Under the *Frye* Standard expert testimony is necessary when the answer to a question lies outside the scope of a lay person's knowledge.<sup>11</sup> Unlike the modern standard, the *Frye* Standard did not set forth factors to weigh or analyze when determining the admissibility of expert testimony, rather it relied solely on whether or not an expert's opinion was generally accepted as reliable in the scientific community.<sup>12</sup> Although handed down in 1923, the *Frye* Standard was not actively used by the courts until the 1970s.<sup>13</sup> The *Frye* Standard was originally only used in

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<sup>7</sup> *Daubert*, 509 U.S. 579 (1993). *Frye*, 293 F. 1013, 1014 (D.C. Cir. 1923).

<sup>8</sup> *Daubert*, 509 U.S. 579 (1993).

<sup>9</sup> *GE v. Joiner*, 522 U.S. 136, 139 (1997); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150-51 (1999)

<sup>10</sup> FED. R. EVID. 702 Advisory Committee Notes.

<sup>11</sup> *Frye*, 293 F. 1013, 1014 (D.C. Cir. 1923).

<sup>12</sup> *Id.*

<sup>13</sup> Anjelica Cappellino, *Daubert vs. Frye: Navigating the Standards of Admissibility for Expert Testimony*, THE EXPERT INSTITUTE (July 17, 2018), <https://www.theexpertinstitute.com/daubert-vs-frye-navigating-the-standards-of-admissibility-for-expert-testimony/>

criminal trials, however it was later applied to most civil cases as well.<sup>14</sup> When evaluating expert testimony in toxic tort litigation, many different standards were applied.<sup>15</sup> While some courts applied *Frye* to the litigations, other courts used a stricter interpretation of the original Federal Rule of Evidence 702, while some even adopted a “let-it-all-in” philosophy.<sup>16</sup> As a result of the different interpretations and applications, the *Frye* Standard was often criticized as too vague, which eventually led to the development of the modern standard in *Daubert* in 1993.<sup>17</sup>

### **B. The Supreme Court Addressed the Concern Surrounding Expert Testimony and Developed the *Daubert* Standard.**

The *Daubert* Standard was handed down from the United States Supreme Court in 1993.<sup>18</sup> The case revolved around birth defects allegedly caused by drugs manufactured by the defendant and ingested by the mothers during pregnancy.<sup>19</sup> One of the plaintiffs experts in *Daubert* intended to testify to the alleged drug-caused birth defects, but his testimony was excluded by the district court.<sup>20</sup> The Ninth Circuit affirmed the district court’s decision citing the *Frye* Standard, which accepted testimony only if it was sufficiently established that the methods and findings were generally accepted.<sup>21</sup> The Ninth Circuit found the expert’s testimony was not generally accepted in the scientific community and thus was inadmissible.<sup>22</sup> On appeal, the Supreme Court reversed the lower court’s judgment finding the excluded evidence should have

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<sup>14</sup> *Id.*

<sup>15</sup> David E. Bernstein, *The Misbegotten Judicial Resistance to the Daubert Revolution*, 89 NOTRE DAME L. REV. 27, 35-40 (2013).

<sup>16</sup> David E. Bernstein & Eric G. Lasker, *Defending Daubert: It’s Time to Amend Federal Rule Of Evidence 702*, 57 WILLIAM & MARY L. REV. 1, 4 (2015); David E. Bernstein, *The Misbegotten Judicial Resistance to the Daubert Revolution*, 89 NOTRE DAME L. REV. 27, 40 (2013).

<sup>17</sup> David E. Bernstein & Eric G. Lasker, *Defending Daubert: It’s Time to Amend Federal Rule Of Evidence 702*, 57 WILLIAM & MARY L. REV. 1, 4 (2015); David E. Bernstein, *The Misbegotten Judicial Resistance to the Daubert Revolution*, 89 NOTRE DAME L. REV. 27, 40 (2013).

<sup>18</sup> *Daubert*, 509 U.S. 579 (1993).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 583-84.

<sup>21</sup> *Id.* at 584.

<sup>22</sup> *Id.* at 584.

been admissible.<sup>23</sup> In its decision, the Supreme Court relied on five factors, instead of the generally accepted standard from *Frye*.<sup>24</sup> The factors include whether there is: (1) a valid and repeatable scientific experiment; (2) a peer reviewed or published study, (3) a standard which controls the theory; (4) a known or potential rate of error; and (5) a widespread acceptance of the findings in the scientific community.<sup>25</sup> The five factors may be considered and weighed against one another, but they need not all be addressed if the situation does not warrant an element.<sup>26</sup> Because the factors are weighed under *Daubert* instead of solely relying on general acceptance in the scientific community, the *Daubert* Standard evaluates expert testimony more broadly and in theory allows in more expert testimony so long as other factors are sufficiently met.

Under the *Daubert* Standard, judges serve as gatekeepers in reviewing an expert's intended testimony, prior to allowing it at trial, to sort out "junk science."<sup>27</sup> The gatekeeper role stems from the idea a jury full of lay people may not be able to discern what complex scientific testimony is credible and what is not.<sup>28</sup> In its opinion the Supreme Court noted the *Daubert* Standard was meant to give more power to juries and that rigorous cross-examination of experts was a better alternative than excluding their testimony altogether.<sup>29</sup> However, the gatekeeping role in turn has created the assumption that judges are better suited to sort through complex scientific issues.<sup>30</sup> While the Supreme Court in its opinion intended the *Daubert* Standard to give more power to juries, its emphasis on the gatekeeping role has been at the forefront of the

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<sup>23</sup> *Daubert*, 509 U.S. 579, 598 (1993).

<sup>24</sup> *Id.* at 594.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 596-97; FED. R. EVID. 702 Advisory Committee Notes.

<sup>28</sup> *What Daubert Means For Product Liability Cases In Missouri*, Law360 (Jan. 22, 2018), <https://www.law360.com/articles/1004000/what-daubert-means-for-product-liability-cases-in-missouri>.

<sup>29</sup> *Daubert*, 509 U.S. 579, 596-97 (1993).

<sup>30</sup> See e.g., Jay P. Kesan, Note, *An Autopsy of Scientific Evidence in a Post-Daubert World*, 84 GEO. L.J. 1985, 1988 (1996).

Standard's application instead. Although the Supreme Court indicated the *Daubert* Standard and Federal Rule of Evidence 702 were meant to invoke a flexible inquiry into expert testimony, some courts have taken a different interpretation in finding *Daubert* is more strict and imposes a higher level of scrutiny than *Frye*.<sup>31</sup> As a result of this rift, courts' application of the *Daubert* Standard is vulnerable to a lack of uniformity, which can result in the same expert's testimony being admitted in one court and excluded in another.

### C. Other Cases Which Clarify the *Daubert* Standard

Although the *Daubert* Standard was created by the Supreme Court to clarify the previous expert admissibility standard, their opinion created new questions including what the standard of review on appeal is and how *Daubert* applies to nonscientific expert testimony. In *Kumho Tire Co. v. Carmichael*, the Supreme Court held the *Daubert* Standard should not be restricted to only evaluating scientific experts and should be used in determining the admissibility of any expert's testimony.<sup>32</sup> The Supreme Court also ruled in *General Electric Co. v. Joiner* that *Daubert* applies not only to the expert's methodology, but to their reasoning as well.<sup>33</sup>

It is important to note the standard of review on appeal regarding issues of expert admissibility. The issue was first addressed in general terms of evidentiary rulings.<sup>34</sup> The trial judge must determine that expert testimony, findings, and opinions are not only relevant, but also

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<sup>31</sup> *Daubert*, 509 U.S. 579, 594 (1993); *Hall v. Baxter*, No. 92-182, 1996 U.S. Dist. LEXIS 18960, 39 (D. Or. Dec. 18, 1996).

<sup>32</sup> The decision in *Kumho Tire* was a result of a circuit split where some courts only applied *Daubert* to scientific experts as specified in the previous version of Rule 702 while other courts applied *Daubert* to nonscientific experts as well like economists and psychologists. Anjelica Cappellino, *Daubert vs. Frye: Navigating the Standards of Admissibility for Expert Testimony*, THE EXPERT INSTITUTE (July 17, 2018), <https://www.theexpertinstitute.com/daubert-vs-frye-navigating-the-standards-of-admissibility-for-expert-testimony/>. The Eleventh Circuit reversed the district court finding the trial judge incorrectly applied the *Daubert* Standard to a nonscientific expert in tire failure. *Kumho Tire*, 526 U.S. 137, 141 (1999). The Supreme Court then reversed the circuit court's decision holding the *Daubert* Standard applied to both scientific testimony as well as technical or other specialized testimony from non-scientists. *Kumho Tire*, 526 U.S. 137, 150-51 (1999). *Id.*

<sup>33</sup> *GE*, 522 U.S. 136, 143 (1997).

<sup>34</sup> *GE*, 522 U.S. 136 (1997).

reliable.<sup>35</sup> The Eleventh Circuit in *General Electric* applied a standard of review greater than abuse of discretion because they believed under the *Daubert* Standard the evidence was admissible.<sup>36</sup> The Supreme Court clarified *Daubert* did not change or address the abuse of discretion standard that must be applied when assessing evidentiary rulings on appeal.<sup>37</sup> The appellate court may only overturn a decision under *Daubert* if there is abuse of discretion or plain error.<sup>38</sup> In other words, trial judges have broad discretion under *Daubert* in deciding what expert testimony is admissible and what testimony is excludable.<sup>39</sup> Since the accepted standard of review is abuse of discretion, appellate judges may not categorically distinguish between lower court rulings that allow expert testimony and those which exclude it.<sup>40</sup> Therefore, the appellate court must review exclusions and admissions of expert testimony in the same manner, with the same abuse of discretion standard.<sup>41</sup> In some cases this means two different judges can look at the same expert witness, testimony, and opinions and come to different conclusions and the different decisions will likely not be overturned on appeal due to the abuse of discretion standard.

#### **D. Most States Follow the *Daubert* Standard, While Others Remain on the *Frye* Standard or Their Own Unique Method of Assessing Credibility.**

While federal courts are required to apply the *Daubert* Standard under the doctrine of stare decisis, state courts are not similarly bound.<sup>42</sup> The state courts in Nevada, North Dakota,

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<sup>35</sup> Id.

<sup>36</sup> *Joiner v. GE*, 78 F.3d 524 (11th Cir. 1996).

<sup>37</sup> *GE*, 522 U.S. 136 (1997).

<sup>38</sup> *Kumho Tire*, 526 U.S. 137 (1999).

<sup>39</sup> Id.

<sup>40</sup> *GE*, 522 U.S. 136, 146 (1997).

<sup>41</sup> Id.

<sup>42</sup> *Stare Decisis*, *Black's Law Dictionary* (11th ed. 2019) (defining stare decisis as the doctrine of precedent where a court must follow earlier judicial decisions); David L. Shapiro, *State Courts and Federal Declaratory Judgments*, 74 NW. U. L. REV. 759, 771 (1979) (reiterating state courts are not bound by lower federal courts because “[lower] federal courts are no more than coordinate with the state courts on issues of federal law”).



and Virginia use their own standard for assessing the admissibility of expert testimony.<sup>43</sup> The state courts in California, Florida, Illinois, Maryland, New York, Pennsylvania, and Washington use the *Frye* Standard, or something very similar.<sup>44</sup> Florida state courts at one time applied the *Daubert* Standard, but recently returned back to the *Frye* Standard following a State Supreme Court decision in an attempt to reduce the confusion created by the *Daubert* Standard.<sup>45</sup> All other unlisted state courts have adopted the *Daubert* Standard in some fashion.<sup>46</sup> States have adopted the *Daubert* Standard in different ways. For example, New Jersey adopted the Standard through a landmark decision in the Accutane Litigation in 2018.<sup>47</sup> On the other hand, the Missouri State Legislature adopted the *Daubert* Standard by revising their state statute governing expert admissibility to mirror *Daubert* in 2017.<sup>48</sup>

### **1. New Jersey Adopted the *Daubert* Standard in a Landmark State Supreme Court Decision in 2018.**

The Supreme Court of New Jersey recently adopted a standard similar to *Daubert* in the Accutane Litigation in 2018.<sup>49</sup> The state stopped short of saying they adopted the full *Daubert* Standard, but the factors are now incorporated into how New Jersey courts are to assess expert

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<sup>43</sup> Michael Morgenstern, *Daubert v. Frye – A State-by-State Comparison*, THE EXPERT INSTITUTE (April 3, 2017), <https://www.theexpertinstitute.com/daubert-v-frye-a-state-by-state-comparison/>.

<sup>44</sup> *Id.*

<sup>45</sup> *DeLisle v. Crane Co.*, 258 So. 3d 1219 (Fla. 2018); Sean McDonough & Jacqueline Bertelsen, *Frye Is Now, and Once Again, the Standard for Expert Opinion Admissibility in Florida*, WILSONELSER (Oct, 25, 2018), <https://www.productliabilityadvocate.com/2018/10/frye-is-now-and-once-again-the-standard-for-expert-opinion-admissibility-in-florida/>.

<sup>46</sup> Michael Morgenstern, *Daubert v. Frye – A State-by-State Comparison*, THE EXPERT INSTITUTE (April 3, 2017), <https://www.theexpertinstitute.com/daubert-v-frye-a-state-by-state-comparison/>.

<sup>47</sup> *In re Accutane Litig.*, 234 N.J. 340 (2018) (adopting an expert admissibility standard that is effectively thought of as the *Daubert* Standard.).

<sup>48</sup> Mo. Rev. Stat. § 490.065 (removing “reasonably relied upon” criteria of the old statute replacing it with a heightened requirement where the court must find a series of factors mirroring the *Daubert* Standard).

<sup>49</sup> Tara L. Pehush, David A. Fusco & Jake Morrison, *Taking Out the “Junk”: New Jersey Supreme Court Adopts *Daubert* “Factors” in Landmark Decision on Scientific Evidence*, NAT. L. REV. (Feb., 21, 2019), <https://www.natlawreview.com/article/taking-out-junk-new-jersey-supreme-court-adopts-daubert-factors-landmark-decision>.

admissibility.<sup>50</sup> However, the state supreme court emphasized the importance of the gatekeeping role judges play in civil cases.<sup>51</sup> Prior to adopting the *Daubert* Standard, New Jersey courts followed a standard set forth in *Kemp v. State*.<sup>52</sup> The *Kemp* Standard and the *Daubert* Standard both had the same goal of keeping out “junk science,” but they differed on whether the judge or the jurors should decide the credibility of an expert’s testimony.<sup>53</sup> In the Accutane Litigation, the trial court excluded plaintiffs’ experts’ testimony, but the Appellate Division reversed the decision finding the more liberal *Kemp* Standard made the testimony admissible.<sup>54</sup> On appeal, the Supreme Court of New Jersey reversed the Appellate Division and affirmed the trial court all while adopting the new judge-driven standard.<sup>55</sup> New Jersey demonstrated one way courts have adopted the *Daubert* Standard through common law and the doctrine of stare decisis.

## **2. Missouri Adopted the *Daubert* Standard Through Legislation Signed into Law and Enacted in 2017.**

Missouri, like New Jersey, also adopted the *Daubert* Standard in 2017.<sup>56</sup> Unlike New Jersey, Missouri’s change in standard did not result from a state supreme court decision, instead

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<sup>50</sup> Timothy I. Duffy, Mark K. Silver, Joseph C. Amoroso, Joseph P. Fiteni, & Maryam M. Meseha, *New Jersey Supreme Court Embraces Use Of Daubert Factors To Determine Admissibility Of Expert Opinion*, COUGHLIN DUFFY (Aug. 2, 2018), <https://www.coughlinduffy.com/news-events/new-jersey-supreme-court-embraces-use-of-daubert-factors-to-determine-admissibility-of-expert-opinion>; Tara L. Pehush, David A. Fusco & Jake Morrison, *Taking Out the “Junk”*: *New Jersey Supreme Court Adopts Daubert “Factors” in Landmark Decision on Scientific Evidence*, NAT. L. REV. (Feb., 21, 2019), <https://www.natlawreview.com/article/taking-out-junk-new-jersey-supreme-court-adopts-daubert-factors-landmark-decision>.

<sup>51</sup> *In re Accutane Litig.*, 234 N.J. 340, 347-48 (2018).

<sup>52</sup> *Kemp v. State*, 174 N.J. 412, 427 (2002).

<sup>53</sup> Bill Wichert, *Roche May Test Liberal NJ Expert Standard In Accutane Battle*, LAW360 (Aug. 2, 2017), <https://www.law360.com/articles/950548/roche-may-test-liberal-nj-expert-standard-in-accutane-battle>.

<sup>54</sup> *In re Accutane Litig.*, 165 A.3d 832 (Super. Ct. App. Div. 2017); *In re Accutane Litig.*, 234 N.J. 340, 347-48 (2018).

<sup>55</sup> Bill Wichert, *Roche May Test Liberal NJ Expert Standard In Accutane Battle*, LAW360 (Aug. 2, 2017), <https://www.law360.com/articles/950548/roche-may-test-liberal-nj-expert-standard-in-accutane-battle>.

<sup>56</sup> Nicole C. Behnen, Aaron Chickos & Luke J. Mangan, *Missouri Adopts Daubert Standard Governing Admissibility of Expert Opinion Evidence*, NAT. L. REV. (Mar. 29, 2017), <https://www.natlawreview.com/article/missouri-adopts-daubert-standard-governing-admissibility-expert-opinion-evidence>.

the state passed legislation to update its existing expert admissibility statute.<sup>57</sup> The revised statute, Missouri Revised Statute § 490.065, lays out the *Daubert* Factors and reaffirms the judge’s gatekeeping role.<sup>58</sup> Prior to the revision, the relevant portion of the statute regarding expert admissibility read:

The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.<sup>59</sup>

Missouri’s updated expert admissibility statute removed the “reasonably relied upon” criteria and in its place are *Daubert* Factors.<sup>60</sup> The current version of the Missouri statute reads:

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.<sup>61</sup>

The Missouri legislature had tried to adopt the *Daubert* Standard in 2016, however the legislation was vetoed by then Governor Jay Nixon in 2016.<sup>62</sup> Missouri courts had previously

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<sup>57</sup> Nicole C. Behnen, Aaron Chickos & Luke J. Mangan, *Missouri Adopts Daubert Standard Governing Admissibility of Expert Opinion Evidence*, NAT. L. REV. (Mar. 29, 2017), <https://www.natlawreview.com/article/missouri-adopts-daubert-standard-governing-admissibility-expert-opinion-evidence>.

<sup>58</sup> Mo. Rev. Stat. § 490.065.

<sup>59</sup> Mo. Rev. Stat. § 490.065 (LexisNexis, Lexis Advance through 100th General Assembly, Legislation effective through August 28, 2019, and the first extra session).

<sup>60</sup> Nicole C. Behnen, Aaron Chickos & Luke J. Mangan, *Missouri Adopts Daubert Standard Governing Admissibility of Expert Opinion Evidence*, NAT. L. REV. (Mar. 29, 2017), <https://www.natlawreview.com/article/missouri-adopts-daubert-standard-governing-admissibility-expert-opinion-evidence>.

<sup>61</sup> Mo. Rev. Stat. § 490.065.

<sup>62</sup> Nicole C. Behnen, Aaron Chickos & Luke J. Mangan, *Missouri Adopts Daubert Standard Governing Admissibility of Expert Opinion Evidence*, NAT. L. REV. (Mar. 29, 2017), <https://www.natlawreview.com/article/missouri-adopts-daubert-standard-governing-admissibility-expert-opinion-evidence>.

been known as a plaintiff-friendly system.<sup>63</sup> One of the goals behind the new expert admissibility legislation was to reduce the “Judicial Hellhole” environment in Missouri, as noted by the American Tort Reform Foundation.<sup>64</sup> Critics of the *Daubert* Standard are worried the standard will require judges to decide complex scientific issues outside their area of expertise.<sup>65</sup> This issue will be further explored using the talc litigation as a case study.

### **E. Federal Rule of Evidence 702, Confusion Following the Amendment, and Courts Creating Their Own Standard.**

Federal Rule of Evidence 702 was amended seven years after *Daubert* was decided and outlines when an expert may testify.<sup>66</sup> The purpose of the amendment was to codify a more rigorous approach to evaluating expert testimony.<sup>67</sup> The current version of Rule 702 reads:

“A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.”<sup>68</sup>

In *Daubert*, the Supreme Court noted Rule 702 “requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.”<sup>69</sup> But at the time the *Daubert* decision was handed down, Rule 702 was different than it is today. Rule 702, at the time *Daubert* was

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<sup>63</sup> Maggie Hummel, *Missouri’s New Expert Witness Statute*, SAINT LOUIS UNIVERSITY L. J., <https://www.slu.edu/law/law-journal/online/2017-18/missouri-new-expert-witness-statute.php> (Nov. 2, 2019).

<sup>64</sup> American Tort Reform Foundation, *Judicial Hellholes 2016-2017*, <http://www.judicialhellholes.org/wp-content/uploads/2016/12/JudicialHellholes-2016.pdf>.

<sup>65</sup> Maggie Hummel, *Missouri’s New Expert Witness Statute*, SAINT LOUIS UNIVERSITY L. J., <https://www.slu.edu/law/law-journal/online/2017-18/missouri-new-expert-witness-statute.php> (Nov. 2, 2019).

<sup>66</sup> Report Of The Advisory Committee On Evidence Rules To The Standing Committee On Rules Of Practice And Procedure, 5-7 (May 1, 1999).

<sup>67</sup> *Id.* at 7.

<sup>68</sup> FED. R. EVID. 702.

<sup>69</sup> *Daubert*, 509 U.S. 579, 592 (1993).

handed down, read “If scientific, technical, or otherwise 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.”<sup>70</sup> As such, courts will occasionally use the old version of Rule 702 rather than the post-2000 amended rule.<sup>71</sup> In fact, some courts have disregarded the language of Rule 702 altogether in favor of their own interpretation of the *Daubert* Standard.<sup>72</sup>

For example, in litigation alleging contaminated baby formula, the district court excluded plaintiff’s expert’s testimony.<sup>73</sup> On appeal the Eighth Circuit adopted their own interpretation of Rule 702 by boiling it down to a three-part test:

First, evidence based on scientific, technical, or other specialized knowledge must be useful to the finder of fact in deciding the ultimate issue of fact. This is the basic rule of relevancy. Second, the proposed witness must be qualified to assist the finder of fact. Third, the proposed evidence must be reliable or trustworthy in an evidentiary sense, so that, if the finder of fact accepts it as true, it provides the assistance the finder of fact requires.<sup>74</sup>

This three-part test came from several cases which can be traced back to an evidence treatise authored by Margaret Berger.<sup>75</sup> Berger was a leading critic for stricter rules for expert admissibility, especially in toxic tort litigation.<sup>76</sup>

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<sup>70</sup> Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1937 (1975) (establishing the Federal Rules of Evidence).

<sup>71</sup> David E. Bernstein & Eric G. Lasker, *Defending Daubert: It’s Time to Amend Federal Rule of Evidence 702*, 57 William & Mary L. Rev. 1, 24 (2015).

<sup>72</sup> *Id.* at 19-24.

<sup>73</sup> *Johnson v. Mead Johnson & Co., LLC*, 754 F.3d 557 (8th Cir. 2014).

<sup>74</sup> *Id.* at 561; *Lauzon v. Senco Prods., Inc.*, 270 F.3d 681, 686 (8th Cir. 2001).

<sup>75</sup> *Johnson v. Mead Johnson & Co., LLC*, 754 F.3d 557, 561 (8th Cir. 2014) (citing *Polski v. Quigley Corp.*, 538 F.3d 836, 839 (8th Cir. 2008)) (citing *Lauzon v. Senco Products, Inc.*, . 270 F.3d 681, 686 (8th Cir. 2001)) (citing Jack B. Weinstein & Margaret A. Berger, *Weinstein’s Federal Evidence* § 702App.01 (Joseph M. McLaughlin ed., Matthew Bender & Co. 2d ed. 2015)).

<sup>76</sup> Margaret A. Berger, *What Has a Decade of Daubert Wrought?*, 95 AM. J. PUB. HEALTH (SUPPLEMENT I) S59, S59-61 (2005).

The Ninth Circuit also adopted its own interpretation of Rule 702.<sup>77</sup> It completely ignores Rule 702(d) which reads, “the expert has reliably applied the principles and methods to the facts of the case.”<sup>78</sup> In place of Rule 702(d) the Ninth Circuit held the judge as a gatekeeper must determine the reliability of the methodology, but leave the question of whether the expert reliably applied the methodology to the jury.<sup>79</sup>

The amended version of Rule 702 affirmed the idea the judge is a gatekeeper, but also required the judge take a more managerial role regarding expert admissibility.<sup>80</sup> The various interpretations courts are taking with regards to Rule 702 have created an atmosphere where expert admissibility standards are applied without uniformity. The lack of uniformity can result in an expert’s testimony being accepted by one court, while the same expert’s testimony may be rejected by another court.

### III. TALCUM POWDER LITIGATION

The talcum powder litigation, specifically regarding ovarian cancer, is based around talc products such as Johnson & Johnson Baby Powder and Shower to Shower.<sup>81</sup> The plaintiffs allege all claims are a “direct and proximate result of Defendants’ and/or their corporate predecessors negligent, willful, and wrongful conduct in connection with the design, development, manufacture, testing, packaging, promoting, marketing, distribution, labeling, and/or sale of the products.”<sup>82</sup> The named Defendants usually include Johnson & Johnson, Johnson & Johnson Consumer Companies, Inc., Imerys Talc America, Inc., and Personal Care

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<sup>77</sup> City of Pomona v. SQM N. Am. Corp., 750 F.3d 1036, 1047 (9th Cir. 2014)

<sup>78</sup> Id.; Fed. R. Evid. 702(d).

<sup>79</sup> City of Pomona v. SQM N. Am. Corp., 750 F.3d 1036, 1047 (9th Cir. 2014).

<sup>80</sup> See e.g. David L. Faigman, *The Daubert Revolution and the Birth of Modernity: Managing Scientific Evidence in the Age of Science*, 46 U.C. DAVIS L. REV. 893, 907 (2013).

<sup>81</sup> Complaint, Hogans v. Johnson & Johnson, Circuit Court of the City of St. Louis, (MO June 23, 2014), <https://www.beasleyallen.com/media/2016/02/Fox-complaint.pdf>

<sup>82</sup> Complaint at 8, Hogans v. Johnson & Johnson, Circuit Court of the City of St. Louis, (MO June 23, 2014), <https://www.beasleyallen.com/media/2016/02/Fox-complaint.pdf>

Products Council.<sup>83</sup> In the short form complaints filed by Plaintiffs in the Multidistrict litigation in New Jersey, there are up to twenty-three claims against the Defendants including failure to warn, manufacturers and design defects, breach of express warranty, and breach of implied warranty among others.<sup>84</sup> Imerys Talc America filed for Chapter 11 protection in February 2019 in light of the widespread litigation.<sup>85</sup> The Defendants maintain that the talc and talc products do not include asbestos and are not inherently dangerous.<sup>86</sup> Because the Plaintiffs and Defendants allege opposite scientific findings, they both have experts to support their claims. The experts all employ various scientific tests and statistical analyses to support their conclusions and are thus evaluated for credibility and reliable methodology during *Daubert* Hearings. The dispute is rooted in plaintiffs' experts asserting talc causes inflammation, which in turn causes ovarian cancer, and the presence of asbestos in talc; Defense experts maintain the exact opposite. Each expert usually develops a report based on their research, potential experiments, and conclusions in order to satisfy the *Daubert* Standard, or the expert admissibility standard used in the forum.<sup>87</sup> The opposing opinions, supported by science and statistical analyses, make *Daubert* Hearings even more complex.

#### **A. Johnson & Johnson's Talc Cases and Where They Are Being Filed**

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<sup>83</sup> Complaint at 7, *Hogans v. Johnson & Johnson*, Circuit Court of the City of St. Louis, (MO June 23, 2014), <https://www.beasleyallen.com/media/2016/02/Fox-complaint.pdf>

<sup>84</sup> Complaint at 5-6, *Hogans v. Johnson & Johnson*, 3:18-cv-5271 (Apr. 3, 2018).

<sup>85</sup> Tina Bellon & Tom Hals, *Johnson & Johnson supplier seeks bankruptcy over talc lawsuits*, REUTERS (Feb. 13, 2019), <https://www.reuters.com/article/us-imerys-bankruptcy/johnson-johnson-supplier-seeks-bankruptcy-over-talc-lawsuits-idUSKCN1Q22H7>.

<sup>86</sup> Tina Bellon & Tom Hals, *Johnson & Johnson supplier seeks bankruptcy over talc lawsuits*, REUTERS (Feb. 13, 2019), <https://www.reuters.com/article/us-imerys-bankruptcy/johnson-johnson-supplier-seeks-bankruptcy-over-talc-lawsuits-idUSKCN1Q22H7>.

<sup>87</sup> *Johnson & Johnson, About Daubert: Information on Federal Rules of Evidence*, FactsAboutTalc, [https://www.factsabouttalc.com/\\_document/about-daubert-information-on-federal-rules-of-evidence?id=0000016d-b710-d9c2-a17f-b7b199020000](https://www.factsabouttalc.com/_document/about-daubert-information-on-federal-rules-of-evidence?id=0000016d-b710-d9c2-a17f-b7b199020000) (Nov. 3, 2019)

Johnson & Johnson is one of many companies facing lawsuits as a result of its talcum powder products. The first high profile talc litigation involving Johnson & Johnson was an ovarian cancer suit in 2013.<sup>88</sup> According to Johnson & Johnson's second report released in June 2019, there are 15,500 cases pending in talc litigation.<sup>89</sup> To put the growth of the litigation into perspective, Johnson & Johnson's first quarter report in 2016 – just three years prior – included 1,400 cases pending in the talc litigation.<sup>90</sup> As of May 2014 there were two class action suits pending against the company in the United States District Court for the Eastern District of California and United States District Court for the Southern District of Illinois.<sup>91</sup> As of 2019, the cases filed in federal court have been organized into a multidistrict litigation in the United States District Court for the District of New Jersey.<sup>92</sup> Cases not filed in federal court are primarily being filed in Missouri, New Jersey, and California in addition to those filed outside the United States.<sup>93</sup>

## **B. The Talc Litigation's Appearance in the Media.**

The media has consistently reported on the massive litigation, with multiple articles being released every day.<sup>94</sup> The first highly publicized jury trial took place in early 2016 in St. Louis

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<sup>88</sup> Johnson & Johnson, *Facts About Talc*, FactsAboutTalc, <https://www.factsabouttalc.com/litigation> (Nov. 3, 2019).

<sup>89</sup> Johnson & Johnson, Quarterly Report (Form 10-Q) at 31 (June 30, 2019), <https://johnsonandjohnson.gcs-web.com/static-files/3c846c82-8c94-405c-a707-c32100438f42>

<sup>90</sup> Johnson & Johnson, Quarterly Report (Form 10-Q) at 19 (Apr. 3, 2016), <https://johnsonandjohnson.gcs-web.com/node/39761/html>.

<sup>91</sup> *Id.*

<sup>92</sup> Johnson & Johnson, Quarterly Report (Form 10-Q) at 32 (June 30, 2019), <https://johnsonandjohnson.gcs-web.com/static-files/3c846c82-8c94-405c-a707-c32100438f42>

<sup>93</sup> *Id.*

<sup>94</sup> *See e.g.*, Chad Terhune & Lisa Girion, *Exclusive: J&J's own expert, working for FDA, found asbestos in Baby Powder*, REUTERS (Oct. 30, 2019), <https://www.reuters.com/article/us-usa-health-j-j-expert-exclusive/exclusive-jjs-own-expert-working-for-fda-found-asbestos-in-baby-powder-idUSKBN1X9120>; Peter Loftus, *J&J Says Suspect Baby Powder Is Asbestos-Free*, WALL STREET JOURNAL (Oct. 29, 2019), <https://www.wsj.com/articles/j-j-says-suspect-baby-powder-is-asbestos-free-11572386665>; Tiffany Hsu, *Johnson & Johnson Says Recalled Baby Powder Doesn't Have Asbestos*, NY TIMES (Oct. 29, 2019), <https://www.nytimes.com/2019/10/29/business/johnson-baby-powder-asbestos.html>.



Missouri where a woman was awarded \$72 million in damages.<sup>95</sup> A Los Angeles court ordered Johnson & Johnson pay \$417 million in damages in August 2017.<sup>96</sup> In July 2018, a Missouri state court awarded a group of twenty-two women \$4.14 billion in punitive damages in addition to the \$550 million award for their ovarian cancer claims.<sup>97</sup> In May 2019, a New York state court ordered Johnson & Johnson to pay \$300 million in punitive damages to a single mesothelioma plaintiff on top of the \$20 million for pain and suffering.<sup>98</sup>

### **C. The Talc Litigation Requires Judges to Assess Many Different Types of Scientific and Non-Scientific Experts Along with Their Complex Analyses.**

As a result of the highly technical and scientific nature of the claims against the defendants, both the Plaintiffs' Steering Committee, a group of plaintiffs and their attorneys, who led the litigation, and the defendants have hired many experts. For example, in the District of New Jersey the talc multidistrict litigation had experts in fields such as cancer biology, gynecologic oncology, toxicology, epidemiology, and asbestos in talc.<sup>99</sup> In total, the Plaintiffs' Steering Committee had twenty-two experts and defendant Johnson & Johnson had seventeen experts.<sup>100</sup>

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<sup>95</sup> Reuters, *The \$72 Million Talc Verdict Against J&J May Not Set a Precedent*, FORTUNE (Feb. 26, 2016), <https://fortune.com/2016/02/26/jnj-verdict-talc/>.

<sup>96</sup> Jef Feeley & Margaret Cronin Fisk, *J&J's Risk From Tainted-Talc Lawsuits Only Gets Bigger in 2019*, BLOOMBERG (Dec. 21, 2018), <https://www.bloomberg.com/news/articles/2018-12-21/j-j-s-tainted-talc-risk-expands-as-cancer-trials-triple-in-2019>.

<sup>97</sup> Jonathan D. Rockoff & Sara Randazzo, *J&J Hit With \$4.7 Billion Jury Verdict in Baby Powder Suit*, WALL STREET JOURNAL (July 12, 2018), [https://www.wsj.com/articles/j-j-hit-with-550-million-jury-verdict-in-baby-powder-suit-1531435569?mod=article\\_inline](https://www.wsj.com/articles/j-j-hit-with-550-million-jury-verdict-in-baby-powder-suit-1531435569?mod=article_inline).

<sup>98</sup> Peter Loftus, *Johnson & Johnson Hit With \$300 Million in Punitive Damages in Talc Case*, WALL STREET JOURNAL (May 31, 2019), <https://www.wsj.com/articles/johnson-johnson-hit-with-300-million-in-punitive-damages-in-talc-case-11559339141>.

<sup>99</sup> Nicholas Malfitano, *Eight-Day Hearing On Viability Of Witnesses In Talc Lawsuits Set To Conclude*, PENN. RECORD (Jul. 31, 2019), <https://pennrecord.com/stories/512811144-eight-day-hearing-on-viability-of-witnesses-in-talc-lawsuits-set-to-conclude>

<sup>100</sup> Amanda Bronstad, *MDL Judge Reviews Expert Evidence Over Talc's Ties to Ovarian Cancer*, NJ L. J. (Jul. 24, 2019), <https://www.law.com/njlawjournal/2019/07/24/mdl-judge-reviews-expert-evidence-over-talcs-ties-to-ovarian-cancer/>.

Despite the large number of experts on both sides, the *Daubert* Hearings in the District of New Jersey were ultimately restricted to five Plaintiff experts and three Johnson & Johnson experts.<sup>101</sup>

A topic of constant discussion with the experts in the talcum powder litigation is the Bradford Hill Analysis.<sup>102</sup> The Bradford Hill Criteria, authored by Sir Austin Bradford Hill, consists of nine viewpoints to help ascertain if associations are causal.<sup>103</sup> The Criteria assess the strength of association, consistency, specificity, temporality, biological gradient, plausibility, coherence, experiment, and analogy of the observed experiment.<sup>104</sup> The Bradford Hill Criteria are just one way for an expert, and perhaps a court in *Daubert* hearings to assess the findings and opinions regarding association and causation. Causation is the key issue in the talc litigation. Plaintiffs' experts have alleged there is asbestos, a known carcinogen, in the talc which causes ovarian cancer.<sup>105</sup> Plaintiffs' experts also contend talc, on its own, causes ovarian cancer regardless of if asbestos is present in the mineral powder due to the nonasbestiform mineral fibers.<sup>106</sup> Meanwhile, Defendants' experts claim there is no association between talcum powder and the development of ovarian cancer.<sup>107</sup> In addition, Defendants' experts maintain there is no

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<sup>101</sup> Nicholas Malfitano, *Eight-Day Hearing On Viability Of Witnesses In Talc Lawsuits Set To Conclude*, PENN. RECORD (Jul. 31, 2019), <https://pennrecord.com/stories/512811144-eight-day-hearing-on-viability-of-witnesses-in-talc-lawsuits-set-to-conclude>.

<sup>102</sup> David Schwartz & Nathan Schachtman, *Presenting The Science Is Key In Talc Trials*, LAW360 (June 9, 2017), <https://www.law360.com/articles/932683/presenting-the-science-is-key-in-talc-trials>.

<sup>103</sup> Kristen M. Fedak, Autumn Bernal, Zachary A. Capshaw, & Sherilyn Gross, *Applying the Bradford Hill criteria in the 21st century: how data integration has changed causal inference in molecular epidemiology*, EMERGING THEMES IN EPIDEMIOLOGY (Sep. 30, 2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4589117/>.

<sup>104</sup> Kristen M. Fedak, Autumn Bernal, Zachary A. Capshaw, & Sherilyn Gross, *Applying the Bradford Hill criteria in the 21st century: how data integration has changed causal inference in molecular epidemiology*, EMERGING THEMES IN EPIDEMIOLOGY (Sep. 30, 2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4589117/>.

<sup>105</sup> Complaint at 49, *Hogans, et. al. v. Johnson & Johnson*, No. 1422-CC09012 (June 23, 2014), <https://www.beasleyallen.com/media/2016/02/Fox-complaint.pdf>.

<sup>106</sup> Complaint at 49, *Hogans, et. al. v. Johnson & Johnson*, No. 1422-CC09012 (June 23, 2014), <https://www.beasleyallen.com/media/2016/02/Fox-complaint.pdf>.

<sup>107</sup> Hillary Brueck, *Johnson & Johnson is being investigated by the SEC over fears its baby powder may cause cancer — here's how worried you should be*, BUSINESS INSIDER (Feb. 21, 2019), <https://www.businessinsider.com/does-baby-powder-cause-cancer-johnson-and-johnson-lawsuit-2018-7>; Peter Loftus, *J&J Says Suspect Baby Powder Is Asbestos-Free*, WSJ (Oct. 29, 2019), <https://www.wsj.com/articles/j-j-says-suspect-baby-powder-is-asbestos-free-11572386665>.

asbestos in the tested talc products.<sup>108</sup> The Bradford Hill Criteria, largely used in the field of epidemiology, are just one example of the highly technical landscape judges encounter in *Daubert* Hearings.

**D. The Talc Litigation Demonstrates the Difficulty Courts Have in Differentiating Between the *Daubert* Standard and the *Frye* Standard.**

The adoption of the *Daubert* Standard is not mandatory for state courts; while all federal courts follow the *Daubert* Standard, some state courts still follow the *Frye* Standard or their own expert admissibility standard.<sup>109</sup> The difference between the *Daubert* Standard and the *Frye* Standard was demonstrated recently in the talc litigation. New York State still uses the *Frye* Standard whereas the federal courts, like the United States District Court for the District of Columbia, follow the *Daubert* Standard.<sup>110</sup> One expert who has testified in the talc litigation in multiple courts is Dr. Ronald Gordon. Dr. Gordon, a pathologist and microscopist, has testified in federal and state courts on asbestos and talc related matters.<sup>111</sup>

On August 5, 2019 Judge Hogan of the District Court for the District of Columbia, using the *Daubert* Standard, excluded expert Dr. Gordon's testimony.<sup>112</sup> Judge Hogan cited Dr. Gordon's faulty research method, which failed to account for false positives, as the reasoning behind the exclusion.<sup>113</sup> A Georgia state court, also following the *Daubert* Standard, excluded Dr. Gordon's testimony as well once again citing his unorthodox methodology and issues with

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<sup>108</sup> Hillary Brueck, *Johnson & Johnson is being investigated by the SEC over fears its baby powder may cause cancer — here's how worried you should be*, BUSINESS INSIDER (Feb. 21, 2019), <https://www.businessinsider.com/does-baby-powder-cause-cancer-johnson-and-johnson-lawsuit-2018-7>; Peter Loftus, *J&J Says Suspect Baby Powder Is Asbestos-Free*, WSJ (Oct. 29, 2019), <https://www.wsj.com/articles/j-j-says-suspect-baby-powder-is-asbestos-free-11572386665>.

<sup>109</sup> Michael Morgenstern, *Daubert v. Frye – A State-by-State Comparison*, THE EXPERT INSTITUTE (April 3, 2017), <https://www.theexpertinstitute.com/daubert-v-frye-a-state-by-state-comparison/>.

<sup>110</sup> Sean R. v. BMW of N. Am., LLC, 26 N.Y.3d 801 (2016); *Daubert*, 509 U.S. 579 (1993).

<sup>111</sup> 34-13 Mealey's Litig. Rep. Asb. 10 (2019).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

replicability.<sup>114</sup> The judge in Georgia also alluded to issues with the expert's creditability referencing criminal activity in the 1990s involving drugs and money laundering.<sup>115</sup>

A New York State Supreme Court, on the other hand, allowed Dr. Gordon's same expert testimony, despite the Judge acknowledging another court in a *Frye* jurisdiction had excluded his testimony.<sup>116</sup> The other *Frye* court, a Pennsylvania state court, excluded Dr. Gordon's testimony in a *Frye* Hearing in 2017.<sup>117</sup> The Pennsylvania court excluded Dr. Gordon's testimony for the same reasons as the *Daubert* courts did: Dr. Gordon's faulty methodology and failure to follow an acceptable protocol for testing.<sup>118</sup>

The difference between the *Frye* Standard and *Daubert* Standard is difficult to discern as seen through the lens of Dr. Gordon testifying in the talc litigation. At first glance it appears the difference between the *Frye* and *Daubert* Standards is substantial enough that one standard allows testimony while the other excludes the same opinions and methodologies; however, because two states under the *Frye* Standard came to different conclusions about the same expert's testimony the boundaries are further blurred. Dr. Gordon's testimony indicates a larger issue with expert admissibility. The Supreme Court in *Daubert* noted the new expert admissibility standard was supposed to be more flexible, however the exclusion of Dr. Gordon's testimony under *Daubert* and not necessarily under *Frye* sends a different message.

#### IV. CASE STUDIES

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<sup>114</sup> Daniel Fisher, *Watch New York City For Crucial Talcum Powder Verdicts In 2019*, FORBES (Jan. 2, 2019), <https://www.forbes.com/sites/legalnewsline/2019/01/02/watch-new-york-city-for-crucial-talcum-powder-verdicts-in-2019/#4689ce402f9e>.

<sup>115</sup> Daniel Fisher, *Watch New York City For Crucial Talcum Powder Verdicts In 2019*, FORBES (Jan. 2, 2019), <https://www.forbes.com/sites/legalnewsline/2019/01/02/watch-new-york-city-for-crucial-talcum-powder-verdicts-in-2019/#4689ce402f9e>.

<sup>116</sup> *Cohen v. Am. Bilrite Inc.*, 2018 NY Slip Op 51895(U) (Sup. Ct. Aug. 27, 2018).

<sup>117</sup> *Brandt v. Bon-Ton Stores, Inc.*, 2017 WL 4271039, at 5-6 (Pa. Ct. Common Pleas Sept. 25, 2017); Emma Cueto, Pa. Judge Bars Experts In Tainted Talc Suit Against Colgate, LAW360 (Sept. 26, 2017), <https://www.law360.com/articles/967973/pa-judge-bars-experts-in-tainted-talc-suit-against-colgate>.

<sup>118</sup> Emma Cueto, Pa. Judge Bars Experts In Tainted Talc Suit Against Colgate, LAW360 (Sept. 26, 2017), <https://www.law360.com/articles/967973/pa-judge-bars-experts-in-tainted-talc-suit-against-colgate>.

The talc litigation provides a lens through which the issues with the *Daubert* Standard and other expert admissibility standards can be seen. A great level of public scrutiny is present in the talc litigation because of its constant presence in the media and the sheer number of cases filed nationwide. The disparity amongst courts concerning admissibility of expert testimony could result in disparate outcomes for plaintiffs and increase forum shopping by future claimants. This is exactly what happened in 2013 and 2016.<sup>119</sup> This section will discuss the admission and exclusion of expert testimony by Dr. Graham Colditz, an expert in cancer epidemiology, and Dr. Daniel Cramer, an expert in Obstetrics & Gynecology, Ovarian Cancer, Clinical Epidemiology, and Reproductive Sciences.<sup>120</sup>

**A. Dr. Colditz Attempted to Testify in Both Missouri and New Jersey in the Talcum Powder Litigation in 2016 Before Both States Adopted the *Daubert* Standard; New Jersey Excluded His Testimony While Missouri Allowed it.**

Dr. Colditz is an expert in cancer epidemiology from Australia.<sup>121</sup> Dr. Colditz served on numerous editorial boards for scientific journals, taught at universities including Harvard University and University of Queensland, and published many articles concerning cancer epidemiology.<sup>122</sup> Dr. Colditz testified for plaintiffs in the talc litigation in courts including the New Jersey Superior Court in Atlantic County and the Circuit Court of the City of St. Louis in

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<sup>119</sup> Carrie Salls & John O'Brien, *In One State, Testimony 'Made For Litigation'; In Another, Part Of \$127M In Verdicts*, FORBES (Sep. 21, 2016), <https://www.forbes.com/sites/legalnewsline/2016/09/21/in-one-state-testimony-made-for-litigation-in-another-part-of-127m-in-verdicts/#4550d8dd8b50>.

<sup>120</sup> Carrie Salls & John O'Brien, *In One State, Testimony 'Made For Litigation'; In Another, Part Of \$127M In Verdicts*, FORBES (Sep. 21, 2016), <https://www.forbes.com/sites/legalnewsline/2016/09/21/in-one-state-testimony-made-for-litigation-in-another-part-of-127m-in-verdicts/#4550d8dd8b50>.

<sup>121</sup> 2019 Curr. Vitae LEXIS 4462,

[https://advance.lexis.com/r/documentprovider/1s39k/attachment/data?attachmentid=V1,215,60827,00500000E95AF P,1&attachmenttype=PDF&attachmentname=OriginalSourceImage&origination=&sequencenumber=&ishotdoc=false&docTitle=.](https://advance.lexis.com/r/documentprovider/1s39k/attachment/data?attachmentid=V1,215,60827,00500000E95AF P,1&attachmenttype=PDF&attachmentname=OriginalSourceImage&origination=&sequencenumber=&ishotdoc=false&docTitle=)

<sup>122</sup> Id.

the State of Missouri.<sup>123</sup> At the time New Jersey followed the *Kemp* Standard for expert admissibility while Missouri followed its own state statute for expert admissibility.<sup>124</sup> Dr. Colditz testified in both Missouri and New Jersey expert admissibility hearings as to his epidemiological findings and opinions as they related to talc causing ovarian cancer.<sup>125</sup> In his testimony, Dr. Colditz relied on the Bradford Hill Criteria.<sup>126</sup> Dr. Colditz used the Bradford Hill Criteria to “prove cause and effect” calling it the “bread and butter” of epidemiologists.<sup>127</sup> Dr. Colditz noted that one study on its own will not prove causality, but a whole sequence of studies can such as the one Dr. Cramer, another plaintiffs’ expert, created in 1982.<sup>128</sup>

### **1. The New Jersey Superior Court Excluded Dr. Colditz’s Expert Testimony on September 2, 2016.**

Judge Nelson Johnson of the New Jersey Superior Court, Law Division, Atlantic County presided over the talc litigation involving lead plaintiffs Brandi Carl and Diana Balderrama.<sup>129</sup> Defendants Johnson & Johnson and Imerys Talc America filed a motion to exclude Dr. Colditz’s expert testimony and for summary judgment in the event the testimony was excluded.<sup>130</sup> The experts in the New Jersey case were evaluated under the *Kemp* Standard meaning Judge Johnson

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<sup>123</sup> Carrie Salls & John O’Brien, *In One State, Testimony 'Made For Litigation'; In Another, Part Of \$127M In Verdicts*, FORBES (Sep. 21, 2016), <https://www.forbes.com/sites/legalnewsline/2016/09/21/in-one-state-testimony-made-for-litigation-in-another-part-of-127m-in-verdicts/#4550d8dd8b50>.

<sup>124</sup> *Kemp v. State*, 174 N.J. 412 (2002); Mo. Rev. Stat. § 490.065 (LexisNexis, Lexis Advance through 100th General Assembly, Legislation effective through August 28, 2019, and the first extra session).

<sup>125</sup> *Carl v. Johnson & Johnson*, 2016 N.J. Super. Unpub. LEXIS 2102, 34-37; Courtroom View Network, *Clip of Talc Direct Examination by Allen Smith*, CVN, <https://pages.cvn.com/talc-litigation-iss-offer> (Nov. 3, 2019).

<sup>126</sup> David Schwartz, *Experts On The Experts: A Deep Dive Into The Make-Or-Break Scientific Testimony Deciding Talc Powder Trials*, INNOVATIVE SCIENCE SOLUTIONS (Mar. 9, 2017), <https://www.innovativescience.net/blog/experts-on-the-experts-a-deep-dive-into-the-make-or-break-scientific-testimony-deciding-talc-powder-trials/>.

<sup>127</sup> *Id.*; Courtroom View Network, *Clip of Talc Direct Examination by Allen Smith*, CVN, <https://pages.cvn.com/talc-litigation-iss-offer> (Nov. 3, 2019).

<sup>128</sup> Courtroom View Network, *Clip of Talc Direct Examination by Allen Smith*, CVN, <https://pages.cvn.com/talc-litigation-iss-offer> (Nov. 3, 2019).

<sup>129</sup> *Carl v. Johnson & Johnson*, 2016 N.J. Super. Unpub. LEXIS 2102.

<sup>130</sup> *Id.*

was required to evaluate whether the theory of causation was acceptable under the standard.<sup>131</sup> The *Kemp* Standard was more relaxed in that “a theory of causation that had not yet reached general acceptance in the scientific community ‘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.’”<sup>132</sup>

Judge Johnson found Dr. Colditz was qualified in terms of background and education, however the doctor failed to show the "data or information used were soundly and reliably generated and were of a type reasonably relied upon by comparable experts."<sup>133</sup> Judge Johnson was highly critical of the epidemiological expert and plaintiffs’ counsel stating it was as if they said “look at this, and forget everything else science has to teach us.”<sup>134</sup> Judge Johnson also criticized the heavy reliance on the idea of inflammation and inconsistencies among plaintiffs’ experts findings of inflammation and their relation to causation.<sup>135</sup> As a result of the evaluation of the experts under the *Kemp* Standard, Judge Johnson granted summary judgement in favor of the Defendants on September 2, 2016.<sup>136</sup> Judge Johnson later stated the testimony had the hallmarks of a “made-for-litigation presentation.”<sup>137</sup>

## **2. The Missouri Circuit Court Allowed Dr. Colditz’s Expert Testimony on April 12, 2016.**

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<sup>131</sup> Carrie Salls & John O’Brien, *In One State, Testimony 'Made For Litigation'; In Another, Part Of \$127M In Verdicts*, FORBES (Sep. 21, 2016), <https://www.forbes.com/sites/legalnewsline/2016/09/21/in-one-state-testimony-made-for-litigation-in-another-part-of-127m-in-verdicts/#4550d8dd8b50>.

<sup>132</sup> *Kemp v. State*, 174 N.J. 412, 425 (2002).

<sup>133</sup> *Carl v. Johnson & Johnson*, 2016 N.J. Super. Unpub. LEXIS 2102, 62 (quoting *Rubanick v. Witco Chem. Corp.*, 125 N.J. 421, 447 (1991)).

<sup>134</sup> *Id.* at 35.

<sup>135</sup> *Id.* at 36-37.

<sup>136</sup> *Id.*

<sup>137</sup> Courtroom View Network, *Clip of Talc Direct Examination by Allen Smith*, CVN, <https://pages.cvn.com/talc-litigation-iss-offer> (Nov. 3, 2019).

Missouri also saw a challenge to Dr. Colditz's testimony in the talc litigation.<sup>138</sup> Defendant Johnson & Johnson filed a motion to exclude the testimony of Dr. Colditz in the Gloria Ristesund case on March 10, 2016.<sup>139</sup> The court denied Johnson & Johnson's motion to exclude on April 12, 2016.<sup>140</sup> The expert admissibility standard used at the time allowed an expert to base his opinion on facts or data "reasonably relied upon by experts in the field" when forming opinions.<sup>141</sup> This flexible and minimal standard, when compared to *Daubert*, allowed many experts to testify including Dr. Colditz.<sup>142</sup> Dr. Colditz again relied on the Bradford Hill Criteria.<sup>143</sup> In his testimony, Dr. Colditz only emphasized and relied on those elements of the Criteria he found "key," which in total was three of the nine criteria.<sup>144</sup> Just as in New Jersey, Dr. Colditz identified inflammation as the biological mechanism which causes ovarian cancer.<sup>145</sup> The jury returned a verdict in favor of the plaintiffs and in the final judgment entered on May 17, 2016 the court awarded a total of \$5 million in compensatory damages and \$50 million in punitive damages.<sup>146</sup> While the trial court found Dr. Colditz's testimony was allowed under the Missouri expert admissibility standard, on appeal the appellants claimed the trial court erred in

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<sup>138</sup> Defendants Motion to Exclude the Testimony of Dr Graham Colditz with Respect to Plaintiff Gloria Ristesund, Ristesund v. Johnson & Johnson, 22nd Judicial Circuit of Missouri, Case No. 1422-CC09012-01 (Mar. 10, 2016).

<sup>139</sup> Defendants Motion to Exclude the Testimony of Dr Graham Colditz with Respect to Plaintiff Gloria Ristesund, Ristesund v. Johnson & Johnson, 22nd Judicial Circuit of Missouri, Case No. 1422-CC09012-01 (Mar. 10, 2016).

<sup>140</sup> Order Denying Defendants Motion to Exclude Testimony, Ristesund v. Johnson & Johnson, 22nd Judicial Circuit of Missouri, Case No. 1422-CC09012-01 (Apr. 12, 2016).

<sup>141</sup> Mo. Rev. Stat. § 490.065 (LexisNexis, Lexis Advance through 100th General Assembly, Legislation effective through August 28, 2019, and the first extra session).

<sup>142</sup> Emily Field, J&J Talc Suits Show Evidence Standards Vary Among Courts, Law360 (Sept. 7, 2016), <https://www.law360.com/articles/836544/j-j-talc-suits-show-evidence-standards-vary-among-courts>.

<sup>143</sup> Courtroom View Network, *Clip of Talc Direct Examination by Allen Smith*, CVN, <https://pages.cvn.com/talc-litigation-iss-offer> (Nov. 3, 2019).

<sup>144</sup> *Ristesund v. Johnson & Johnson*, 22nd Judicial Circuit of Missouri, Case No. 1422-CC09012-01.

<sup>145</sup> Carrie Salls & John O'Brien, *In One State, Testimony 'Made For Litigation'; In Another, Part Of \$127M In Verdicts*, FORBES (Sep. 21, 2016), <https://www.forbes.com/sites/legalnewsline/2016/09/21/in-one-state-testimony-made-for-litigation-in-another-part-of-127m-in-verdicts/#4550d8dd8b50>.

<sup>146</sup> Tina Bellon, *Missouri appeals court tosses \$55 million J&J talc-powder verdict*, REUTERS (June 29, 2018), <https://www.reuters.com/article/us-johnson-johnson-cancer-lawsuit/missouri-appeals-court-tosses-55-million-jj-talc-powder-verdict-idUSKBN1JP30Y>.



admitting the testimony.<sup>147</sup> The case was ultimately overturned on jurisdictional grounds following the Supreme Court decision in *Bristol-Myers Squibb Company v. Superior Court*.<sup>148</sup> As a result of the reversal based on jurisdiction, the appellate court did not respond to appellants' other twelve points raised on appeal, including the error in admitting Dr. Colditz's "cherry-picked" testimony made for litigation.<sup>149</sup>

While the testimony of Dr. Colditz was excluded in one state and included in another, both decisions were well within the bounds of the expert admissibility standards used at the time. Different standards for expert testimony present a tremendous issue when, in a factually and legally identical case, litigants can have a \$55 million judgement for plaintiff or a summary judgement for defendant depending on the standard used. In addition to the issues presented by different expert admissibility standards, there is still a possibility two courts which follow the *Daubert* Standard come to different conclusions. In fact, Dr. Colditz's testimony, while included by a Missouri state court, was excluded under the *Daubert* Standard in the United States District Court for the Eastern District of Missouri.<sup>150</sup> The next case study will examine another expert that was admitted and excluded in different courts while giving the same testimony.

**B. Dr. Cramer Attempted to Testify in the United States District Court for the District of South Dakota and a New Jersey Superior Court, the District Court Admitted his Testimony Under the *Daubert* Standard While New Jersey Excluded it Under the *Kemp* Standard.**

Dr. Daniel Cramer is another expert in epidemiology from Colorado who has testified in the talc litigation.<sup>151</sup> Dr. Cramer has been a professor in epidemiology as well as affiliated with

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<sup>147</sup> *Ristesund v. Johnson & Johnson*, 22nd Judicial Circuit of Missouri, Case No. 1422-CC09012-01.

<sup>148</sup> *Ristesund v. Johnson & Johnson*, 558 S.W.3d 77 (Mo. Ct. App. 2018).

<sup>149</sup> *Id.* at 79.

<sup>150</sup> *Blaes v. Johnson & Johnson*, No. 4:14CV213 RLW, 2016 U.S. Dist. LEXIS 6399 (E.D. Mo. Jan. 20, 2016).

<sup>151</sup> 2016 Curr. Vitae LEXIS 435, *Berg v. Johnson & Johnson*, 4:09-cv-04179-KES (Jan. 9, 2013), <https://advance.lexis.com/r/documentprovider/1sk1k/attachment/data?attachmentid=V1,215,60827,00500000AU7V>

multiple gynecologic cancer institutions for many years.<sup>152</sup> Dr. Cramer, like Dr. Colditz, testifies to the association between talc and ovarian cancer based on his understanding of inflammation-induced cancer in addition to the cohort and case control studies available.<sup>153</sup> Dr. Cramer has testified at cases across the country, including the United States District Court for the District of South Dakota where his testimony was admitted and the New Jersey Superior Court, Law Division, Atlantic County, where his testimony was excluded.<sup>154</sup>

**1. Dr. Cramer's Testimony was Admitted in the United States District Court for the District of South Dakota Under the *Daubert* Standard Following a *Daubert* Decision on April 12, 2013.**

Dr. Cramer was allowed to testify in the talc litigation the United States District Court for the District of South Dakota following a *Daubert* Decision on April 12, 2013.<sup>155</sup> The South Dakota District Court followed the *Daubert* Standard when evaluating Dr. Cramer's testimony.<sup>156</sup> Defendant's main argument to exclude Dr. Cramer's testimony regarded the reliability of the testimony and methodology.<sup>157</sup> The court noted the *Daubert* Standard only

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<sup>152</sup> 2016 Curr. Vitae LEXIS 435, Berg v. Johnson & Johnson, 4:09-cv-04179-KES (Jan. 9, 2013), [https://advance.lexis.com/r/documentprovider/1sk1k/attachment/data?attachmentid=V1,215,60827,00500000AU7V46,1&attachmenttype=PDF&attachmentname=OriginalSourceImage&origination=&sequencenumber=&ishotdoc=false&docTitle=.](https://advance.lexis.com/r/documentprovider/1sk1k/attachment/data?attachmentid=V1,215,60827,00500000AU7V46,1&attachmenttype=PDF&attachmentname=OriginalSourceImage&origination=&sequencenumber=&ishotdoc=false&docTitle=)

<sup>153</sup> David Schwartz, *Video Analysis Of Dr. Cramer Talc Testimony: Don't Let Plaintiff (Or Defense) Experts Play Fast And Loose With The Science*, INNOVATIVE SCIENCE SOLUTIONS (July 7, 2016), <https://www.innovativescience.net/blog/video-analysis-of-dr-cramer-talc-testimony-dont-let-plaintiff-or-defense-experts-play-fast-and-loose-with-the-science/>.

<sup>154</sup> Berg v. Johnson & Johnson, 940 F. Supp. 2d 983 (D.S.D. 2013); Carl v. Johnson & Johnson, 2016 N.J. Super. Unpub. LEXIS 2102.

Dr. Cramer's talc testimony was also admitted in Missouri state court and excluded in a California state court. Ristesund v. Johnson & Johnson, 22nd Judicial Circuit of Missouri, Case No. 1422-CC09012-01 (Mar. 10, 2016); In re Johnson & Johnson Talcum Powder Cases, No. BC628228, 2017 WL 4780572 (Cal. Superior Ct. Oct. 20, 2017) (granting defendant's JNOV for many reasons including they should have excluded the expert testimony of Dr. Cramer).

<sup>155</sup> Berg v. Johnson & Johnson, 940 F. Supp. 2d 983, 1004 (D.S.D. 2013).

<sup>156</sup> Id.

<sup>157</sup> Id. at 989.

allowed them to evaluate admissibility not sufficiency of the evidence to prove causation.<sup>158</sup> In admitting the testimony the court addressed Dr. Cramer’s alleged failure to rule out alternative causes of the cancer and Dr. Cramer’s allegedly unreliable methodology when analyzing odds ratios.<sup>159</sup> Ultimately the court admitted Dr. Cramer’s testimony using a fact-sensitive analysis after determining that Dr. Cramer did address alternative causes and the methods regarding the odds ratios were reliable enough to pass the *Daubert* threshold although defendant’s could certainly attack the reliability at trial.<sup>160</sup>

In utilizing the *Daubert* Standard, the court did not address the five factors laid out by the Supreme Court, instead the court used the three-part test employed by the Eighth Circuit.<sup>161</sup>

The three-part test as discussed earlier states

First, evidence based on scientific, technical, or other specialized knowledge must be useful to the finder of fact in deciding the ultimate issue of fact. This is the basic rule of relevancy. Second, the proposed witness must be qualified to assist the finder of fact. Third, the proposed evidence must be reliable or trustworthy in an evidentiary sense, so that, if the finder of fact accepts it as true, it provides the assistance the finder of fact requires.<sup>162</sup>

The three-part test is based on an evidence treatise authored by strict-standard-critic Margaret Berger.<sup>163</sup> This further demonstrates the inconsistencies and issues associated with the *Daubert* Standard’s flexible application.

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<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 989-93.

<sup>160</sup> *Berg v. Johnson & Johnson*, 940 F. Supp. 2d 983, 993 (D.S.D. 2013).

<sup>161</sup> *Daubert*, 509 U.S. 579, 594 (1993); *Johnson v. Mead Johnson & Co., LLC*, 754 F.3d 557, 561 (8th Cir. 2014); *Lauzon v. Senco Prods., Inc.*, 270 F.3d 681, 686 (8th Cir. 2001).

<sup>162</sup> *Lauzon v. Senco Prods., Inc.*, 270 F.3d 681, 686 (8th Cir. 2001). *Johnson v. Mead Johnson & Co., LLC*, 754 F.3d 557, 561 (8th Cir. 2014) (citing *Polski v. Quigley Corp.*, 538 F.3d 836, 839 (8th Cir. 2008)) (citing *Lauzon v. Senco Products, Inc.*, 270 F.3d 681, 686 (8th Cir. 2001)) (citing Jack B. Weinstein & Margaret A. Berger, *Weinstein’s Federal Evidence* § 702App.01 (Joseph M. McLaughlin ed., Matthew Bender & Co. 2d ed. 2015)); Margaret A. Berger, *What Has a Decade of Daubert Wrought?*, 95 AM. J. PUB. HEALTH (SUPPLEMENT I) S59, S59-61 (2005).

<sup>163</sup> *Lauzon v. Senco Prods., Inc.*, 270 F.3d 681, 686 (8th Cir. 2001). *Johnson v. Mead Johnson & Co., LLC*, 754 F.3d 557, 561 (8th Cir. 2014) (citing *Polski v. Quigley Corp.*, 538 F.3d 836, 839 (8th Cir. 2008)) (citing *Lauzon v. Senco Products, Inc.*, 270 F.3d 681, 686 (8th Cir. 2001)) (citing Jack B. Weinstein & Margaret A. Berger, *Weinstein’s*

## 2. Dr. Cramer's Testimony was Excluded in a New Jersey Superior Court Under the *Kemp* Standard Following a Decision on September 2, 2016.

Judge Nelson Johnson of the New Jersey Superior Court, Law Division, Atlantic County presided over the talc litigation involving lead plaintiffs Brandi Carl and Diana Balderrama.<sup>164</sup> Defendants Johnson & Johnson and Imerys Talc America filed a motion to exclude Dr. Cramer's expert testimony and for summary judgment in the event the testimony was excluded just as they did for Dr. Colditz.<sup>165</sup> The experts in the New Jersey case were evaluated under the *Kemp* Standard meaning Judge Johnson needed to evaluate whether the theory of causation was acceptable under the standard.<sup>166</sup> The *Kemp* Standard was considered more relaxed than the *Daubert* Standard in that "a theory of causation that had not yet reached general acceptance in the scientific community '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.'"<sup>167</sup>

Dr. Cramer's testimony also regarded general and specific causation of ovarian cancer.<sup>168</sup> Dr. Cramer, like Dr. Colditz, was one of plaintiffs' main experts and the court expressed disappointment with the evidence put forth claiming the witness was "dismissive of anything but epidemiological studies" and only used certain case-control studies.<sup>169</sup> The court did note how impressive Dr. Cramer's background is, pointing out the case-control studies the expert has

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*Federal Evidence* § 702App.01 (Joseph M. McLaughlin ed., Matthew Bender & Co. 2d ed. 2015)); Margaret A. Berger, *What Has a Decade of Daubert Wrought?*, 95 AM. J. PUB. HEALTH (SUPPLEMENT I) S59, S59-61 (2005).

<sup>164</sup> Carl v. Johnson & Johnson, 2016 N.J. Super. Unpub. LEXIS 2102.

<sup>165</sup> Id.

<sup>166</sup> Carrie Salls & John O'Brien, *In One State, Testimony 'Made For Litigation'; In Another, Part Of \$127M In Verdicts*, FORBES (Sep. 21, 2016), <https://www.forbes.com/sites/legalnewsline/2016/09/21/in-one-state-testimony-made-for-litigation-in-another-part-of-127m-in-verdicts/#4550d8dd8b50>.

<sup>167</sup> *Kemp*, 174 N.J. 412, 425 (2002).

<sup>168</sup> Carl v. Johnson & Johnson, 2016 N.J. Super. Unpub. LEXIS 2102, 7

<sup>169</sup> Id. at 35.

authored, but found his methodology problematic under the admissibility standard.<sup>170</sup> The court found Dr. Cramer disregarded certain studies that did not further his opinions and incorrectly utilized the Bradford Hill Criteria by ignoring unfavorable results.<sup>171</sup>

The exclusion of Dr. Cramer's testimony in one court and the inclusion of his testimony in another demonstrates the quantifiable issue with the different expert admissibility standards as well as the different ways the courts apply the *Daubert* Standard. While no damages were ultimately awarded in the South Dakota District Court Case, Dr. Cramer also testified in the Missouri state case that awarded the plaintiff \$55 million in damages.<sup>172</sup> The difference between a summary judgement motion, like in New Jersey, and a multimillion dollar verdict, like in other courts across the country, presents a puzzling issue that often stems from expert admissibility.

## V. CONCLUSION

There is another Talc Case pending in the District of New Jersey.<sup>173</sup> It is a multidistrict litigation overseen by Judge Freda Wolfson.<sup>174</sup> In July and August of 2019, both Plaintiffs' Steering Committee and Johnson & Johnson presented experts at *Daubert* Hearings.<sup>175</sup> The decision on the experts admissibility was not yet been released at the time this comment was written. The decision is expected to impact talc cases across the country but has much larger implications regarding the *Daubert* Standard.<sup>176</sup> Only eight of the thirty-nine experts challenged

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<sup>170</sup> Id. at 53.

<sup>171</sup> Id. at 54.

<sup>172</sup> Berg v. Johnson & Johnson Consumer Cos., 983 F. Supp. 2d 1151 (D.S.D. 2013); Ristesund v. Johnson & Johnson, 22nd Judicial Circuit of Missouri, Case No. 1422-CC09012-01.

<sup>173</sup> In Re: Johnson & Johnson Talcum Powder Products Marketing, Sales Practices and Products Liability Litigation (MDL No. 2738), No. 3:16-2738 (D.N.J. filed Oct. 4, 2016).

<sup>174</sup> Id.

<sup>175</sup> Amanda Bronstad, *MDL Judge Reviews Expert Evidence Over Talc's Ties to Ovarian Cancer*, LAW.COM NEW JERSEY LAW JOURNAL (July 24, 2019), <https://www.law.com/njlawjournal/2019/07/24/mdl-judge-reviews-expert-evidence-over-talcs-ties-to-ovarian-cancer/>.

<sup>176</sup> Peter Loftus & Sara Randazzo, *Johnson & Johnson Faces Key Test in Defense Against Talc-Safety Lawsuits*, WALL STREET JOURNAL (July 21, 2019), <https://www.wsj.com/articles/johnson-johnson-faces-key-test-in-defense-against-talc-safety-lawsuits-11563701400>.

testified during the eight-day *Daubert* Hearings.<sup>177</sup> Many of the experts have also been challenged, admitted, and testified in other talc cases across the country, such as Dr. William Longo.<sup>178</sup> Should the District of New Jersey decision exclude frequently used – and commonly challenged – experts like Dr. Longo, it would further cast light on the lack of uniformity when applying *Daubert* as well as other expert admissibility standards.

While it is beyond the scope of this comment to suggest a perfect solution for the issues surrounding the *Daubert* Standard and other expert admissibility standards, there are many suggestions floating around the legal profession. Suggestions include overturning *Kumho Tire*, hosting science days in court to aid the presiding judge and having access to a science panel among others.<sup>179</sup> Science days and panels however do not solve one of the main issues raised in this comment. Perhaps a lack of scientific understanding contributes to the expert admissibility, but the standards themselves should be held accountable before the judges employing them. Judges must work with what they are given through precedent and expert reports. As reflected in the case studies, each determination to admit or exclude an expert was well within the bounds of the expert admissibility standard employed. The issue is in the flexibility of the standards and the vastly different standards which exist between state courts and even among the circuit courts. As noted, the Eighth Circuit created its own take on the *Daubert* Standard and as a result the district courts within the Eighth Circuit have followed suit. In addition, because the *Daubert* Standard came before the amendment to Fed. R. Evid. 702, the door is still open for some courts

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<sup>177</sup> Amanda Bronstad, *MDL Judge Reviews Expert Evidence Over Talc's Ties to Ovarian Cancer*, LAW.COM NEW JERSEY LAW JOURNAL (July 24, 2019), <https://www.law.com/njlawjournal/2019/07/24/mdl-judge-reviews-expert-evidence-over-talcs-ties-to-ovarian-cancer/>.

<sup>178</sup> Daniel Fisher, *Johnson & Johnson says crucial expert for talc plaintiffs lied on stand*, LEGAL NEWSLINE (May 7, 2019), <https://legalnewsline.com/stories/512480634-johnson-johnson-says-crucial-expert-for-talc-plaintiffs-lied-on-stand>.

<sup>179</sup> Isabelle Tully, *The Courtroom Turned Classroom: A Model Procedure for Educating the Gatekeepers of Expert Evidence in Complex Toxic Tort Cases*, 40 CARDOZO L. REV. 2405, 2436 (2019).

to apply the old rule. The *Daubert* Standard was a step towards clarifying the gatekeeping role judges play but as seen in the talc litigation, the different standards and applications still need to be addressed. As evidenced by the talc litigation, a more guided approach to expert admissibility is necessary. That is not to say the standard must be stricter, however setting forth more guidelines judges are required to follow, rather than just factors that *may* be considered or *may* be weighed, would plausibly aid in reducing the drastically different outcomes seen in the talc litigation as a result of excluding and admitting the same expert testimony in different courts.