

McCarter Plays Key Role in New Jersey Supreme Court's Landmark *In re: Accutane* Decision Regarding Expert Admissibility Standards

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08.10.2018

Until now, the perception that New Jersey law on expert admissibility was weaker than the *Daubert* standard used in federal courts and many other states—combined with New Jersey being home to so many pharmaceutical and medical technology companies—made New Jersey a magnet for mass tort litigation that was often based on unproven science and unreliable expert testimony. In a landmark decision, on August 1, 2018, the New Jersey Supreme Court adopted the *Daubert* factor-based approach for determining the reliability, and therefore admissibility, of expert opinion testimony in civil cases.

The *In re: Accutane Litig.*, No. A-25-17, 079958 (N.J. Aug. 1, 2018) ruling sends a clear message that New Jersey trial courts need to carefully exercise their gatekeeping responsibilities by scrutinizing the methodology and reliability of expert opinion testimony offered in our state courts. Using the *Daubert* factors, trial judges need to ensure that juries are presented only with expert testimony that is based on proven methodologies that have been applied by the expert in a manner that is reliable and scientifically sound.

The Court's groundbreaking decision followed extensive briefing and oral argument by, among others, McCarter as counsel for amici curiae the HealthCare Institute of New Jersey, the New Jersey Business and Industry Association, the Commerce and Industry Association of New Jersey, and the New Jersey State Chamber of Commerce.

In re: Accutane Litigation

The *Accutane* case involved nearly 2,100 plaintiffs who alleged that their ingestion of the prescription drug Accutane caused their Crohn's disease. Scientists have not yet been able to determine the cause of Crohn's disease; however, nearly all of the epidemiological studies performed to date have shown no causal connection between Accutane and the disease. Despite that evidence, plaintiffs in this mass tort litigation presented two expert witnesses who opined that causation is proven based on lower forms of evidence, such as case reports and animal studies. After a rigorous hearing, including extensive testimony from these proposed experts and an analysis of the scientific studies at issue,

the trial court excluded their testimony, finding that their opinions were unreliable. As a result, 2,076 claims were dismissed.

On appeal, the Appellate Division conducted a de novo review and reversed the trial court, finding that “the experts relied on methodologies and data of the type reasonably relied upon by comparable experts.” *In re Accutane Litig.*, 452 N.J. Super. 153, 199 (App. Div. 2017). While ordinarily an appellate court applies an abuse of discretion standard of review when analyzing a trial court’s evidentiary decision, the Appellate Division held that it owes “somewhat less deference to a trial court’s determination” regarding expert testimony. *Id.* at 206.

The New Jersey Supreme Court granted certification and reversed the Appellate Division’s decision. *In re: Accutane Litig.*, No. A-25-17 (Slip op. at 85). At the outset, the Court confirmed that an abuse of discretion standard must be applied when analyzing a trial court’s decision to admit or exclude expert testimony. (*Id.* at 70.)

The Court went on to explain that in exercising its critical gatekeeping responsibilities, the trial court must determine whether the proffered expert testimony is reliable by focusing on the methodology used. “When a proponent does not demonstrate the soundness of a methodology, both in terms of its approach to reasoning and to its use of data, from the perspective of others within the relevant scientific community, the gatekeeper should exclude the proposed expert testimony on the basis that it is unreliable.” (*Id.*)

Compared to the federal standard, the Court “perceive[d] little distinction between Daubert’s principles regarding expert testimony and our own, and believe[d] that [the Daubert] factors for assessing the reliability of expert testimony will aid our trial courts in their role as the gatekeeper of scientific expert testimony in civil cases.” (*Id.* at 5-6.) As such, the New Jersey Supreme Court adopted the following non-exhaustive list of “general factors” to determine the reliability of an expert’s methodology, and thus the admissibility of the expert’s testimony:

1. Whether the scientific theory can be, or at any time has been, tested;
2. Whether the scientific theory has been subjected to peer review and publication, noting that publication is one form of peer review but is not a “sine qua non”;
3. Whether there is any known or potential rate of error and whether there exist any standards for maintaining or controlling the technique’s operation; and
4. Whether there does exist a general acceptance in the scientific community about the scientific theory.

(*Id.* at 81-82.)

These factors are intended to provide trial courts in New Jersey with a practical guide to apply when determining the admissibility of expert testimony. (*Id.*)

What Happens Now?

Practically speaking, New Jersey has adopted Daubert as the governing standard for determining the admissibility of expert testimony in all civil cases. While the Court declined to officially declare New Jersey a “Daubert jurisdiction,” the Court has fully embraced the Daubert factors, and its insistence that, in addition to being well-qualified, an expert employ a proven methodology and apply that methodology in a scientifically sound and reliable manner.

This decision is a major step forward for civil justice in New Jersey and a significant victory for businesses defending against claims based upon novel, unproven science and unreliable expert testimony.

As always, McCarter attorneys are happy to answer any inquiries about the Court’s decision and, more broadly, its use in the defense of product liability and other litigation in New Jersey.

Please contact Edward J. Fanning, Jr.; [David R. Kott](#); or the McCarter attorneys with whom you normally work.