No. 13-_____

IN THE

# Supreme Court of the United States

ESTATE OF HENRY BARABIN;
GERALDINE BARABIN, personal representative,
*Petitioners,*

*v.*

ASTENJOHNSON, INC. AND
SCAPA DRYER FABRICS, INC.,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI


ALAN R. BRAYTON
GILBERT L. PURCELL
JAMES P. NEVIN
BRAYTON PURCELL LLP
222 Rush Landing Road
Novato, CA 94948
(415) 898-1555

KENNETH CHESEBRO
*Counsel of Record*
1600 Massachusetts Ave., No. 801
Cambridge, MA 02138
kenchesebro@msn.com
(617) 661-4423

*Attorneys for Petitioners*


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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

## QUESTION PRESENTED

The federal harmless-error statute, 28 U.S.C. § 2111, restricts the jurisdiction of federal appellate courts to grant new trials, to cases in which "errors or defects . . . affect the substantial rights of the parties." Any error must have a "substantial and injurious effect or influence in determining the jury's verdict" before a new trial may be granted. *Kotteakos v. United States*, 328 U.S. 750, 776 (1946).

In this case the U.S. Court of Appeals for the Ninth Circuit, sitting en banc, reversed a civil jury verdict and ordered a new trial because the district judge admitted important expert testimony without making detailed *Daubert* findings. The Ninth Circuit acknowledged that the expert testimony heard by the jury may have been free from substantive error, but nonetheless concluded it was obliged to order a new trial based on the procedural gatekeeping error.

The question presented is whether, in a federal jury case, a district judge's procedural failure to make detailed *Daubert* findings regarding important expert testimony requires the appellate court to order a new trial, regardless of whether there was actually any substantive error in the expert testimony heard or not heard by the jury.

## PARTIES TO THE PROCEEDING

Petitioners, the Estate of Henry Barabin and Geraldine Barabin, were plaintiffs in the district court and appellees in the Ninth Circuit. Respondents, AstenJohnson, Inc., and Scapa Dryer Fabrics, Inc., were defendants in the district court and appellants in the Ninth Circuit.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners, the estate of a paper mill worker occupationally exposed to asbestos who died of mesothelioma, and his wife, respectfully submit this petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

The en banc decision of the U.S. Court of Appeals (App., *infra*, 1a-27a) is reported at 740 F.3d 457. The order granting en banc review (App., *infra*, 28a-29a) is unpublished. The panel decision (App., *infra*, 30a-43a) is reported at 700 F.3d 428. The district court's decision denying a new trial, from which appeal was taken (App., *infra*, 44a-48a), is unpublished but available at 2010 WL 5137898.

## JURISDICTION

The Ninth Circuit issued its en banc decision on January 15, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTE AND RULES INVOLVED

28 U.S.C. § 2111 states:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Rule 59(a)(1) of the Federal Rules of Civil Procedure states, in relevant part:

> **Rule 59. New Trial; Altering or Amending a Judgment**
>
> (a) IN GENERAL.
>
> (1) *Grounds for New Trial*. The court may, on motion, grant a new trial on all or some of the issues — and to any party — as follows:
>
> (A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court . . . .

Rule 61 of the Federal Rules of Civil Procedure states:

> **Rule 61. Harmless Error**
>
> Unless justice requires otherwise, no error in admitting or excluding evidence — or any other error by the court or a party — is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

## STATEMENT OF THE CASE

### A. Statutes and Rules Restricting the Power of Federal Appellate Courts to Grant New Trials

Exercising its power under art. I, § 8, cl. 18 "to enact laws carrying into execution the powers vested in other departments of the Federal Government," *Kaiser Aetna v. United States*, 444 U.S. 164, 172 n.7 (1979), Congress has put in place (both directly and through rules promulgated pursuant to enabling statutes) various restrictions on the power of federal appellate courts to grant new trials, especially in jury cases.

Section 17 of the Judiciary Act of 1789 conferred on federal courts the "power to grant new trials, in cases where there has been a trial by jury," but only "for reasons for which new trials have usually been granted in the courts of law." Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 73, 83 (repealed 1948). This restriction continues in force in civil cases via Fed. R. Civ. P. 59(a)(1)(A). 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2801, at 41 (2d ed. 1995) ("WRIGHT").

By the early twentieth century, a "widespread and deep conviction" developed that appellate courts were too frequently granting new trials in criminal cases based on technicalities. *Kotteakos v. United States*, 328 U.S. 750, 759 (1946). In response, Congress enacted the first harmless-error statute, Section 391 of the Judicial Code, which mandated that all federal courts (in both criminal and civil cases) disregard errors "which do not affect the substantial rights of the parties." 28 U.S.C. § 391 (1946) (Act of March 3, 1911, ch. 231, § 269, 36 Stat. 1163; Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181).

Section 391 "was repealed in the 1948 revision of the Judicial Code on the ground that its substance was adequately covered by Civil Rule 61 and Criminal Rule 52(a)." 11 WRIGHT, *supra*, § 2881, at 442. In part because doubts (albeit "insubstantial" ones) arose concerning whether these rules were binding on appellate courts, *id.*, a new statute was enacted, modeled on old Section 391 and applicable explicitly to appellate courts. 28 U.S.C. § 2111 (Act of May 24, 1949, c. 139, § 110, 63 Stat. 105). Thus, both rules and current Section 2111 closely match the original harmless-error restriction enacted a century ago in Section 391. *O'Neal v. McAninch*, 513 U.S. 432, 441 (1995). *See also Brecht v. Abrahamson*, 507 U.S. 619, 631 n.7 (1993) (describing Section 391 as Section 2111's "statutory predecessor"); *United States v. Lane*, 474 U.S. 438, 444 (1986) (noting Fed. R. Crim. P. 52(a) is similar to Section 2111).

Under all three provisions, following a jury trial, generally speaking the test for whether the "substantial rights" of the verdict loser have been violated, enabling a federal court to grant a new trial, is whether the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos*, *supra*, 328 U.S. at 776. *See also Brecht*, *supra*, 507 U.S. at 631-32 & note 7.

"Only in rare cases has this Court held that an error is structural, and thus requires automatic reversal." *Washington v. Recuenco*, 548 U.S. 212, 218 (2006). To date, this Court's automatic-reversal holdings have been limited to criminal cases involving constitutional violations which affect the framework of the trial itself. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-49 (2006) (summarizing jurisprudence and listing examples).

### B. The Ninth Circuit's *Mukhtar* Rule

Fourteen years ago, the U.S. Court of Appeals for the Tenth Circuit invented a special rule under which automatic reversal, and a new trial, must be ordered in cases in which important expert testimony favoring the eventual verdict winner was admitted without supporting *Daubert* findings. Under this rule, the remedy for a district court's failure to make *Daubert* findings is not a remand to permit such findings (with the verdict upheld if the expert testimony turns out to satisfy *Daubert*). Rather the remedy is an outright new trial — even if all the expert testimony heard by the jury turns out to have been properly admitted. According to the Tenth Circuit, this automatic-reversal rule applies not just in criminal cases, *United States v. Velarde*, 214 F.3d 1204, 1211-12 (10th Cir. 2000), but in civil cases. *Goebel v. Denver and Rio Grande Western R.R. Co.*, 215 F.3d 1083, 1088-89 (10th Cir. 2000).

Eleven years ago, over the dissent of eleven judges who urged en banc review, a panel of the U.S. Court of Appeals for the Ninth Circuit followed the Tenth Circuit's lead and applied this rule to a civil employment discrimination case. The panel ordered a new trial as the remedy for the district court's failure to make *Daubert* findings prior to allowing a key expert to testify. *Mukhtar v. California State University*, 299 F.3d 1053, 1065-68 (9th Cir. 2002), *amended by* 319 F.3d 1073, 1074 (9th Cir. 2003).

The operating premise of this automatic-reversal rule is that appellate courts "cannot trust a district court not to succumb to 'post-hoc rationalization.'" App. 43a. The *Mukhtar* panel was explicit on this point, in explaining why a district court cannot be permitted to reinstate a verdict on remand even if it determines that all the testimony heard by the jury satisfied *Daubert*:

"A post-verdict analysis does not protect the purity of the trial, but instead creates an undue risk of post-hoc rationalization." 319 F.3d at 1074.

### C. The District Court Proceedings Below

Henry Barabin worked at a paper mill in the State of Washington for 33 years, often in close proximity to drying machines whose felts (which hold wet paper against the hot drying surface) contained asbestos. His duties included removing and replacing the felts, and regularly cleaning them employing compressed air. Respondents Asten-Johnson, Inc., and Scapa Dryer Fabrics supplied felts to the paper mill. App. 5a-6a.

In 2006 Mr. Barabin was diagnosed with mesothelioma. App. 6a. Mr. Barabin and his wife, Geraldine, filed suit against AstenJohnson and Scapa, among other defendants, in Washington state court. The suit was removed to the U.S. District Court for the Western District of Washington, which had diversity jurisdiction pursuant to 28 U.S.C. § 1332.

No one doubts "that asbestos exposure from inhaling respirable fibers can cause mesothelioma." App. 6a. What the parties contested at trial is whether the asbestos-laden felts sold by AstenJohnson and Scapa to Mr. Barabin's employer *substantially contributed* to his mesothelioma, the relevant causation standard under controlling Washington law.[1] This necessarily boiled down to "a battle of the experts." App. 6a.

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[1] *E.g., Lockwood v. AC & S, Inc.*, 744 P.2d 605, 612-13 (Wash. 1987); *Sharbono v. Universal Underwriters Ins. Co.*, 161 P.3d 406, 426 (Wash. Ct. App. 2007); *Mavroudis v. Pittsburgh-Corning Corp.*, 935 P.2d 684, 687-89 (Wash. Ct. App. 1997).

AstenJohnson and Scapa challenged the admissibility of the Barabins' expert testimony under the principles explicated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), now embodied in Fed. R. Evid. 702. They filed timely motions *in limine* and made timely oral objections at trial, all of which the district judge ultimately denied. App. 6a-8a, 46a-48a; see also note 2, *infra*.

Following an eight-day trial and four days of deliberation, the jury returned a verdict for the Barabins. AstenJohnson and Scapa timely renewed their evidentiary objections in a motion for a new trial, which the district judge denied. App. 8a-9a, 45a-47a.

### D. The Ninth Circuit's Panel Decision

On appeal to the Ninth Circuit, despite the district court's post-trial order setting out the *Daubert* test and holding that the Barabins' expert testimony satisfied it (Pet. App. 46a-48a) and its various other written rulings and oral statements regarding *Daubert*,[2] AstenJohnson and Scapa argued (among other things) that the district court had been insufficiently specific in its analysis of the scientific validity of the methodology used by the Barabins' experts. Joint Opening Brief of Appellants (May 19, 2011), at 15-17, 28-34. Relying heavily on *Mukhtar*, *id*. at 2, 29, 31, 33, they emphasized that a district court "has no discretion to abdicate

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[2] *E.g.*, Tr. of Proceedings, Aug. 24, 2009, at 6; Order Regarding Oral Argument, Sept. 11, 2009, at 1; Tr. of Proceedings, Sept. 16, 2009, at 4-7, 11-13, 20, 22-28, Order on Motions in Limine, Sept. 18, 2009, at 3-6, 10-14 (reproduced at App. 48a-53s, *infra*); Trial Tr., Oct. 26, 2009, at 11-12; Trial Tr., Oct. 29, 2009, at 565-67, 602-04, 630-32; Trial Tr., Nov. 3, 2009, at 882-88; Trial Tr., Nov. 5, 2009, at 1146, 1150, 1300-10; Trial Tr., Nov. 6, 2009, at 1316-19.

its responsibility to" determine "whether an expert's testimony is reliable . . . ." *Id.* at 31. "The court did not act as a gatekeeper," they concluded. *Id.* at 33.

The Ninth Circuit panel agreed with this analysis, holding that "the district court neglected to perform its gatekeeping role" under *Daubert* to, "'on the record, make *some* kind of reliability determination'" regarding each expert's testimony. App. 39a-40a (*quoting Mukhtar*, 299 F.3d at 1066). It then held that "*Mukhtar* dictates that a new trial be provided in this circumstance." App. 41a.

In a concurrence, two of the three panel members criticized *Mukhtar*'s automatic-reversal rule:

> . . . On remand, the district court dutifully will make a new *Daubert* determination. If the court finds that the expert testimony is, indeed, reliable, what purpose is served by empaneling a new jury and conducting another lengthy trial the outcome of which likely will be identical to the one already concluded? *Mukhtar* answers that query by holding that we cannot trust a district court not to succumb to "post-hoc rationalization." 319 F.3d at 1074. But we routinely trust district courts to reassess their earlier judgments in matters of more consequence than disputes over money. *See, e.g., United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005) (en banc). Regardless, I do not share *Mukhtar's* lack of faith in our district courts.
>
> Were it not for *Mukhtar*, I would conditionally vacate the judgment and remand to the district court with instructions to make a new *Daubert* determination. If the expert testimony is reliable, then the original judg-

> ment should be re-entered. If the expert testimony is not reliable, then the court should preside over a new trial. *See Mukhtar*, 319 F.3d at 1077 (Reinhardt, J., dissenting from denial of reh'g en banc).

App. 43a (Graber, Circuit Judge, with whom Tashima, Circuit Judge, joins, concurring).

### E. The Ninth Circuit's En Banc Decision

The Barabins then petitioned for rehearing en banc, arguing that the *Mukhtar* rule is inconsistent with U.S. Supreme Court and prior Ninth Circuit precedent, and arguing that *Mukhtar*'s premise that district judges are untrustworthy is not warranted. Petition for Rehearing and Rehearing *En Banc* (Nov. 30, 2012), at 11-14. AstenJohnson and Scapa opposed en banc review, arguing among other things that the distrust of district judges reflected in *Mukhtar* — the concern that if entrusted with a remand for further *Daubert* findings, they will engage in post-hoc rationalization — *is* warranted. Joint Answer to Petition for Rehearing and Rehearing *En Banc* (Dec. 21, 2012), at 9-13.

A majority of the 27 active judges on the Ninth Circuit voted to reconsider *Mukhtar* en banc. App. 29a. However, a majority of the thirteen judges randomly selected to serve on the "mini-en banc" court (which excluded the author of the panel concurrence criticizing *Mukhtar*) left the automatic-reversal rule of *Mukhtar* in place. By an 8-to-5 vote the Ninth Circuit upheld the panel's new trial order based on *Muhktar*. App. 14a-20a.

The dissenting judges insisted that "a remand to the district court for a *Daubert* analysis is the proper

course," App. 23a, with the district court empowered to reinstate the jury's verdict if it determines that "the disputed expert testimony was admissible pursuant to the requirements of Rule 702 and *Daubert*." App. 27a (Circuit Judge Nguyen, with whom Judges McKeown, W. Fletcher, Bybee, and Watford join, concurring in part and dissenting in part). They criticized the majority's fixation on mere "gatekeeping error," App. 27a, which by itself, they insisted, cannot be enough to demonstrate actual prejudice: "If the expert testimony was admissible, then the jury simply reached a verdict based on evidence it was properly permitted to consider, despite the district court's error." App. 25a. In that event, "despite the district court's failure to fulfill its gatekeeping function, then no harm, no foul." App. 23a.

This petition seeking relief from *Mukhtar*'s automatic-reversal rule follows.

## REASONS FOR GRANTING THE PETITION

### I. The Ninth Circuit's En Banc Ruling is Wrong and Irreconcilable With This Court's Precedent

The special automatic-reversal rule for *Daubert* cases, invented by the Tenth Circuit and now adopted by the Ninth Circuit sitting en banc, is wrong.

For a federal appellate court automatically to reverse a jury verdict and order a new trial merely because a district judge may have committed "gatekeeping error," App. 27a, concerning important expert testimony — its mere omission to make detailed *Daubert* findings — cannot be squared with the plain language of 28 U.S.C. § 2111. Specifically directed at federal appellate courts, Section 2111 denies jurisdic-

tion to grant new trials based on "errors or defects which do not affect the substantial rights of the parties."

The en banc dissenters are correct. Mere gatekeeping delay cannot be said to "affect the substantial rights of the parties." Under aspects of the Ninth Circuit en banc decision not challenged by the Barabins, upon proper motion federal court litigants are entitled to detailed *Daubert* findings regarding their opponent's expert testimony. App. 11a-13a. This means that at *som*e point before a judgment can be enforced, (1) procedurally, the district judge must make the required findings; and (2) substantively, the district judge must hold *Daubert* satisfied (and this holding must be affirmed on any appeal). Yet as long as the outcome of Stage 2 is that, substantively, all expert testimony heard by the jury was proper, nothing essential turns on the timing of Stage 1. As the en banc dissenters emphasized, if a court of appeals orders a remand to cure mere gatekeeping error, and it turns out on remand that "the expert testimony was admissible, then the jury simply reached a verdict based on evidence it was properly permitted to consider," App. 25a — "no harm, no foul." App. 23a.

This Court's harmless-error jurisprudence supports the analysis of the en banc dissenters. In *Chapman v. California*, 386 U.S. 18 (1967), this Court observed that Section 2111, and similar federal and state statutes and rules, are designed to block reversals "for small errors or defects that have little, if any, likelihood of having changed the result of the trial." *Id.* at 22. *See also Bruno v. United States*, 308 U.S. 287, 294 (1939) (the harmless-error statute "was intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict.").

By definition, the procedural gatekeeping error by the district judge in this case had *zero* likelihood of affecting the result of the trial if, as the en banc dissenters assume might be the case (and the en banc majority likewise assumes, App. 19a), it turns out on remand that all the expert testimony heard by the jury was properly admitted.[3] Thus, it is impossible in this

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[3] The eleven judges who dissented from the denial of rehearing en banc in *Mukhtar* described the complete absence of reversible error as follows:

> The error cannot be prejudicial if the testimony of the expert witness consisted of evidence that the jury could properly have heard, had the court announced the reasons for its ruling. The district court's alleged failure to provide an explanation does not, *in itself*, injure the opposing party in any way or affect the verdict. Under the harmless error standard, reversible error could occur only if the jury heard evidence that the district judge did not have the discretion to let it hear. In short, the fact that the court may have erred with respect to the procedure by which it decided to admit Dr. Wellman's testimony cannot constitute *reversible* error. The district court's "error" could have affected the verdict in a way that was prejudicial to the [defendant] *only* if the testimony the jury heard could not have been admitted by means of a proper procedural ruling. In the absence of a determination that the expert testimony did not qualify for admission under *Daubert*, its admission cannot be deemed to have constituted "harmful" error or to have affected the substantial rights of the parties.

*Mukhtar v. California State University*, 319 F.3d 1073, 1076 (9th Cir. 2003) (Reinhardt, Circuit Judge, with whom Circuit Judges Pregerson, Hawkins, Tashima, Thomas, McKeown, Wardlaw, W. Fletcher, Fisher, Paez, and Berzon join, dissenting from denial of rehearing en banc.)

case for AstenJohnson and Scapa to make the showing required under this Court's harmless-error decisions: that the district judge's mere gatekeeping error had a "substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos v. United States*, 328 U.S. 750, 776 (1946). *See also Brecht v. Abrahamson*, 507 U.S. 619, 631-32 & note 7 (1993).

The only remaining way of justifying the *Mukhtar* rule under this Court's jurisprudence is to argue that the situation triggering it — a district judge's procedural gatekeeping error — is one of those "rare cases" in which the "error is structural, and thus requires automatic reversal" regardless of whether it can be shown to have ultimately affected the verdict. *Washington v. Recuenco*, 548 U.S. 212, 218 (2006). Of course, to apply the structural-error doctrine to a garden-variety civil case would be extraordinary, given that to date each of this Court's decisions finding structural error has involved a *criminal* case and a *constitutional* violation affecting the framework of the trial itself. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-49 (2006) (summarizing jurisprudence and listing examples).

But that is precisely the logic of the Ninth Circuit's *Mukhtar* rule, which reads this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), as imposing a structural "gatekeeping" requirement under which automatic reversal is required if important expert testimony is admitted based on insufficiently detailed *Daubert* findings:

> To remand for an evidentiary hearing post-jury verdict undermines *Daubert*'s requirement that *some* reliability determination must be made by the trial court *before* the jury is permitted to hear the evidence. Otherwise,

> instead of fulfilling its mandatory role as a gatekeeper, the district court clouds its duty to ensure that only reliable evidence is presented with impunity. A post-verdict analysis does not protect the purity of the trial, but instead creates an undue risk of post-hoc rationalization.

*Mukhtar v. California State University*, 319 F.3d 1073, 1074 (9th Cir. 2003) (order amending opinion).

This rationale is deeply flawed on several levels. First, there is nothing in the Federal Rules of Evidence, or in this Court's *Daubert* jurisprudence, to warrant interpreting Rule 702 as imposing a special automatic-reversal rule which forces wasteful new trials merely because procedural gatekeeping error has occurred. In enacting the Federal Rules of Evidence as a statute in 1975, Congress directed that claims of error in the admission or exclusion of evidence are permitted "only if the error affects a substantial right of the party . . . ." Rule 103(a). The theory that Rule 702 should be construed to force wasteful new trials based merely on the timing of a district judge's *Daubert* findings conflicts with Rule 102, which directs that the Rules "should be construed so as to . . . eliminate unjustifiable expense and delay . . . ." This Court's decision in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), rejected the idea that *Daubert* rulings, even when they are outcome determinative, should be reviewed differently than other evidentiary rulings. *Id.* at 141-43.

Second, where no constitutional violation is involved, it is impermissible for appellate judges to rely on policy concerns to create exceptions to the plain language of Section 2111, which permits reversals only where it can be shown that "substantial rights" have

been impacted. To the degree this Court's structural-rights doctrine operates to create an exception to Section 2111, it can be justified as an aspect of this Court's power to create constitutional common law. *E.g.*, Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1, 19-34 (1994). But appellate judges' policy concerns about the possible partiality of district judges who commit gatekeeping error can supply no basis for creating an exception to Section 2111, the very point of which is to demarcate the power of appellate courts to grant new trials (at least where constitutional concerns are absent).

"A statute affecting federal jurisdiction 'must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes.'" *Kucana v. Holder*, 558 U.S. 233, 252 (2010) (quoting *Cheng Fan Kwok v. INS*, 392 U.S. 206, 212 (1968)). "[I]n construing a definite procedural provision," Justice Frankfurter advised, "we do well to stick close to the text and not import argumentative qualifications from broad, unexpressed claims of policy." *Utah Junk Co. v. Porter*, 328 U.S. 39, 44 (1946). In creating the *Mukhtar* rule requiring automatic reversal based on a policy concern that all district judges who commit gatekeeping error are afflicted by bias, thereby threatening the "purity of the trial," 319 F.3d at 1074, the Ninth Circuit did the opposite.

The policy concern articulated by the Ninth Circuit is hardly the only one to be weighed. Another is the concern, articulated by this Court in reversing a court of appeals' unwarranted grant of a new trial, that "[t]rials are costly, not only for the parties, but also for the jurors performing their civic duty and for society which pays the judges and support personnel who manage the trials" — which is why "[t]he harmless-error rules adopted by this Court and Congress" direct

courts to "ignore errors that do not affect the essential fairness of the trial." *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 553 (1984). Rather than engage in judicial policymaking in an effort to rewrite Section 2111, the Ninth Circuit should limit itself to the faithful application of Section 2111 as written, and as authoritatively construed by this Court.

Third, the premise of *Mukhtar* that appellate courts "cannot trust a district court not to succumb to 'post-hoc rationalization,'"App. 43a, is questionable. This Court has never regarded abstract concerns about possible judicial bias as a reason to relax harmless-error standards. In the habeas corpus context, this Court has mandated that federal judges defer to state judges, although many are popularly elected, lack life tenure, and thus are subject to political pressure to rule against criminal defendants. They can nonetheless generally be trusted to rule appropriately, this Court has stated, because they take the same constitutional oath taken by federal judges. *Sumner v. Mata*, 449 U.S. 539, 549 (1981). Rejecting hypothetical concerns, this Court has been unwilling to relax harmless-error standards in the habeas corpus context "[a]bsent affirmative evidence that state-court judges are ignoring their oath . . . ." *Brecht v. Abrahamson*, 507 U.S. 619, 636 (1993). Obviously at least as much trust is owed federal district judges, who not only take the same oath as do federal appellate judges (in part, to "administer justice without respect to persons," and "faithfully and impartially discharge" one's duties, 28 U.S.C. § 453), but who are selected through the same rigorous process, and enjoy the same life tenure and salary protection, as federal appellate judges.

Fourth and finally, even if possible judicial bias were a legitimate concern and appellate judges had leeway to make exceptions to Section 2111 if there were

no other available solution, here there *are* other solutions, supplied by Congress and well-accepted judicial practice, to resolve bias concerns in *particular* cases without mandating new trials in *all* cases involving gatekeeping error.

Under 28 U.S.C. § 455(a), every federal judge has a mandatory duty to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." If a district judge who committed gatekeeping error by not making sufficiently detailed *Daubert* findings would have difficulty impartially ruling on the matter again, the judge should be trusted to recuse.[4]

To the degree that appellate judges need a method of direct control, to assuage serious concerns about the ability of a particular judge to impartially rule in a particular case on remand, they "can reassign a case away from a trial court judge whom they have concluded is too likely to err on remand." Toby J. Heytens, *Reassignment*, 66 STAN. L. REV. 1, 6 (2014). "[R]eassignment can operate as a work-around for narrow recusal rules" when appellate judges conclude "it would be implausible to expect a trial judge to be able to put her previously expressed views out of her mind." *Id.* at 7. *See also id.* at 10, 34-36, 42-47.

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[4] Indeed, that is exactly what the district judge in this case did. Unprompted by any party, once the case was remanded from the Ninth Circuit he issued this order: "Judge Lasnik recuses himself in the above entitled action and this case is reassigned in rotation to the Honorable James L. Robart." Minute Order, Case No. C07-1454RSL (W. Dist. Wash.), March 6, 2014. Because the *Daubert* issues are now in the hands of a district judge with no prior exposure to the case, it is clear that *Mukhtar*'s automatic-dismissal rule has forced a completely unnecessary retrial of a case which has already been tried over eight days, to a conscientious jury which spent four days in deliberations.

The Ninth Circuit has ordered reassignment at least 108 times over the past half century. *Id*. at 18. *E.g.*, *In re Vasquez-Ramirez*, 443 F.3d 692, 701 (9th Cir. 2006) (Kozinski, J.) (in remand order addressing sentencing, ordering reassignment away from a district judge who had resisted the prosecution's plea deal as too lenient, observing: "The district judge who denied Vasquez's guilty plea has already viewed Vasquez's criminal history report and has expressed strong views about its contents."). With such a well-established surgical tool for addressing possible bias in particular cases, there was never any need for the Ninth Circuit to adopt the blunderbuss *Mukhtar* rule, requiring new trials in all cases in which district judges commit gatekeeping error involving important expert testimony.

## II. The Ninth Circuit's En Banc Ruling Conflicts With Well-Settled General Practice Followed in Other Circuits

Review of the automatic-reversal rule for mere *Daubert* gatekeeping error, invented by the Tenth Circuit and now adopted by the Ninth Circuit sitting en banc, is further warranted because these rulings conflict with the law of other circuits.

Under the Federal Rules of Evidence, when a district judge has admitted or excluded evidence and it is unclear on abuse-of-discretion review whether the correct legal test was applied, the general practice is for the appellate court to remand the case so that the district judge can exercise discretion under the proper legal test. *See generally* 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 4.02, at 4-16 to 4-18 (4th ed. 2010). As Judge Posner put this general point (in another context), if a district

judge has failed to apply the proper legal test, the decision "cannot be defended as an exercise of discretion. It is an abuse of discretion not to exercise discretion." *Nightingale Home Healthcare, Inc. v. Anodyne Therapy, LLC*, 589 F.3d 881, 883 (7th Cir. 2009).[5]

The well-settled general rule that an improper exercise of discretion is cured by a remand to the district court to permit the proper exercise of discretion is illustrated by this Court's decision in *Sprint/United Management Co. v. Mendelsohn*, 552 U.S. 379 (2008), involving an appeal by an unsuccessful age-discrimination plaintiff. In *Mendelsohn*, without detailing its reasons, the district court excluded plaintiff's "me too" testimony from five other employees who claimed age discrimination at the hands of company supervisors unconnected to plaintiff. *Id.* at 381-83. The Tenth Circuit reversed, holding that the district court had excluded the testimony based on a

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[5] However, the law outside the Ninth and Tenth Circuits is hardly uniform. The doctrinal complexity and confusion in this area, and the need for guidance from this Court, is illustrated by the unusual approach, analyzed by Childress and Davis, applied by the Third Circuit. Whereas most circuits remand for further clarification when the district judge has been insufficiently detailed in evidentiary rulings, and the Ninth and Tenth Circuit grant a new trial (at least on *Daubert* issues), on at least some evidentiary issues the Third Circuit asserts authority to decide the evidentiary issue *de novo*. 1 CHILDRESS & DAVIS, *supra*, § 4.02, at 4-17 to 4-18. *E.g.*, *Becker v. ARCO Chemical Co.*, 207 F.3d 176, 181 (3d Cir. 2000) (where "district court fails to explain its grounds" for its Rule 403 ruling, "we need not defer to the district court's ruling, and we may undertake to examine the record and perform the required balancing ourselves."); *Ansell v. Green Acres Contracting Co.*, 347 F.3d 515, 525 (3d Cir. 2003) (same); *United States v. Agnew*, 407 F.3d 193, 197-98 (3d Cir. 2005) (applying same principle to review of Rule 609(b) ruling, as an alternative ground).

prohibited *per se* rule. Applying the legally correct balancing test, it then held the evidence admissible, and granted a new trial. *Id.* at 383.

This Court unanimously reversed the Tenth Circuit. It noted that the district court's decision was "unclear," *id.* at 383, and "ambiguous," regarding whether an impermissible *per se* rule had been employed. *Id.* at 386; *see also id.* at 388 ("there is no basis in the record for concluding that the District Court applied a blanket rule."). After suggesting that the Tenth Circuit should have remanded the case to permit "the district court to clarify its order," *id.* at 386, and should not have conducted "its own balancing" to decide whether the evidence was admissible, *id.* at 387, this Court "remand[ed] the case with instructions to have the District Court clarify the basis for its evidentiary ruling under the applicable Rules." *Id.* at 388.

Further confirming the aberrant nature of the automatic-reversal rule for *Daubert* gatekeeping errors applied by the Ninth and Tenth Circuit, it appears from a review of federal appellate precedent that no other circuit applies such a rule in the context of expert testimony. Rather, it appears that other circuits, on review of a district court decision excluding or admitting expert testimony where the district court failed to make *Daubert* findings, or at minimum it is unclear whether a proper legal test was applied, simply remand the case in line with this Court's *Mendelsohn* decision. For example, in *Deputy v. Lehman Brothers, Inc.*, 345 F.3d 494 (7th Cir. 2003), the Seventh Circuit reversed because the district court excluded expert testimony without conducting a *Daubert* analysis. But it emphasized that its reversal "does not mean" that the "testimony must be admitted. Rather, on remand, the district court must properly function as a

gatekeeper pursuant to *Daubert* . . . ." *Id.* at 509. Similarly, in *United States v. Belyea*, 159 Fed.Appx. 525 (4th Cir. 2005), on review of a criminal conviction, the Fourth Circuit reversed the district court for excluding expert testimony proffered by defendant without conducting a *Daubert* analysis. *Id.* at 530. Of course, this omission did not in itself require that a new trial be granted — the Fourth Circuit held merely that it must "remand the case to the district court for a more complete analysis . . . ." *Id.*

Even before *Daubert*, Judge Becker held, in a criminal case, that when a district court applies a flawed legal test to exclude defendant's expert testimony, on remand for a determination under the proper legal test "a new trial is required only if the district court determines that the proffered testimony is admissible." *United States v. Downing*, 753 F.2d 1224, 1243-44 (3d Cir. 1985) (citing *Waller v. Georgia*, 467 U.S. 39, 49 (1984)). Defendants in a civil case, such as AstenJohnson and Scapa in this case, who complain of procedural *Daubert* gatekeeping error have no greater claim than criminal defendants to be granted a new trial where it turns out that the procedural error had no substantive effect on the trial, because a proper legal analysis under *Daubert* reveals that all the expert testimony admitted at trial was properly admissible under *Daubert*.

## CONCLUSION

When rehearing en banc was denied in *Mukhtar* eleven years ago, *Mukhtar*'s automatic-reversal rule for *Daubert* gatekeeping errors was criticized by eleven of the 24 active Ninth Circuit judges — two short of the number needed for en banc review. The grant of en banc review below suggests that most of the 27 active

Ninth Circuit judges (at least fourteen) were inclined to jettison the *Mukhtar* rule. However, a majority of the thirteen judges randomly selected to serve on the "mini-en banc" court (which excluded the author of the panel concurrence criticizing *Mukhtar*) reaffirmed *Mukhtar* in its essential aspects, by a 8-to-5 vote. It is apparent that absent this Court's prompt intervention, the fundamentally flawed *Mukhtar* rule will continue to control for the foreseeable future in litigation affecting nearly a fifth of the Nation's population, and many of its most important business enterprises. The petition for a writ of certiorari should be granted.

Respectfully submitted.

ALAN R. BRAYTON
GILBERT L. PURCELL
JAMES P. NEVIN
BRAYTON PURCELL LLP
222 Rush Landing Road
Novato, CA 94948
(415) 898-1555

KENNETH CHESEBRO
*Counsel of Record*
1600 Massachusetts Ave., No. 801
Cambridge, MA 02138
(617) 661-4423
kenchesebro@msn.com

*Attorneys for Petitioners*

April 15, 2014

# APPENDIX

## TABLE OF APPENDICES

**APPENDIX A**

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

| | | |
|---|---|---|
| ESTATE OF HENRY BARABIN; GERALDINE BARABIN, personal representative, *Plaintiffs-Appellees*, | ) | No. 10-36142 |
| | ) | D.C. No. 2:07-cv-01454-RSL |
| v. | ) | |
| ASTENJOHNSON, INC., *Defendant-Appellant*. | ) | |

| | | |
|---|---|---|
| ESTATE OF HENRY BARABIN; GERALDINE BARABIN, personal representative, *Plaintiffs-Appellees*, | ) | No. 11-35020 |
| | ) | D.C. No. 2:07-cv-01454-RSL |
| v. | ) | |
| ASTENJOHNSON, INC., *Defendant*, | ) | OPINION |
| and | ) | |
| SCAPA DRYER FABRICS, INC., *Defendant-Appellant*. | ) | |

Appeal from the United States District Court
for the Western District of Washington
Robert S. Lasnik, District Judge, Presiding

Argued and Submitted En Banc
June 25, 2013 — Seattle, Washington

Filed January 15, 2014

Before: Alex Kozinski, Chief Judge, and
Diarmuid F. O'Scannlain, M. Margaret McKeown,
William A. Fletcher, Richard C. Tallman,
Johnnie B. Rawlinson, Jay S. Bybee,
Milan D. Smith, Jr., N. Randy Smith, Jacqueline
H. Nguyen and Paul J. Watford, Circuit Judges.

Opinion by Judge N.R. Smith;
Partial Concurrence and Partial Dissent
by Judge Nguyen

## SUMMARY*

### Expert Testimony

The en banc court vacated the district court's judgment, and remanded for a new trial based on its determination that the district court failed to make findings of relevancy and reliability before admitting into evidence certain expert testimony, and that this error resulted in prejudice to the defendant.

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The en banc court held that the district court abused its discretion by failing to make appropriate gateway determinations under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), and Federal Rule of Evidence 702, when it admitted expert testimony at trial. The en banc court conducted harmless error review by asking if erroneously admitting or excluding the evidence affected the outcome of the trial. The en banc court held that the error was prejudicial because the erroneously admitted evidence was essential to the defendants' case.

The en banc court held that a reviewing court has the authority to make *Daubert* findings based on the record established by the district court, and overruled *Mukhtar v. California State University*, 299 F.3d 1053, 1066 n.12 (9th Cir. 2002), *amended by* 319 F.3d 1073 (9th Cir. 2003), to the extent that it required that *Daubert* findings always be made by the district court. The en banc court concluded that the record before the en banc court was too sparse to determine whether the expert testimony was relevant and reliable, and remanded for a new trial.

Judge Nguyen, joined by Judges McKeown, W. Fletcher, Bybee, and Watford, concurred in part and dissented in part. Judge Nguyen concurred in Part I of the majority's opinion, which concluded that the district court failed to fulfill its gatekeeping function with regard to the expert testimony at issue, and agreed that the court was unable to determine on the current record whether the expert testimony was admissible. Judge Nguyen dissented with the majority's application of harmless error review, and would conditionally vacate the judgment and remand with instructions to conduct a *Daubert* analysis in the first instance.

## COUNSEL

Michael B. King (argued) and Emilia L. Sweeney, Carney Badley Spellman P.S., Seattle, Washington, for Defendant-Appellant AstenJohnson.

Mary H. Spillane and Daniel W. Ferm, Williams, Kastner & Gibbs PLLC, Seattle Washington, for Defendant-Appellant Scapa.

Cameron O. Carter, Brayton Purcell LLP, Portland, Oregon; Philip A. Talmadge (argued) and Sidney Tribe, Talmadge/Fitzpatrick PLLC, Tukwila, Washington; and Alan R. Brayton, Gilbert L. Purcell, Lloyd F. LeRoy, James P. Nevin, and Richard M. Grant, Brayton Purcell LLP, Novato, California, for Plaintiffs-Appellees.

## OPINION

N.R. SMITH, Circuit Judge:

This case requires us to once again consider the district court's admission of expert testimony at trial. We review the admission of expert testimony at trial for an abuse of discretion. *Primiano v. Cook*, 598 F.3d 558, 563 (9th Cir. 2010). If the district court improperly admitted the expert testimony, we apply harmless error review to determine whether its decision must be reversed. *United States v. Laurienti*, 611 F.3d 530, 547 (9th Cir. 2010). When we find the erroneous admission of evidence actually prejudiced the defendant, such that the error was not harmless, the appropriate remedy is a new trial. *See United*

*States v. 4.85 Acres of Land*, 546 F.3d 613, 620 (9th Cir. 2008). Applying this well-settled precedent to the facts of this case, we vacate the judgment and remand for a new trial.[1]

## FACTS

Henry Barabin worked at Crown-Zellerbach paper mill from 1968 until his retirement in 2001. In the mill, Crown-Zellerbach shredded logs into chips and then exposed the chips to corrosive chemicals and high pressure to create paper slurry. Paper slurry is ninety-nine percent water and one percent pulp fiber. The mill produced paper by removing water from the paper slurry. As part of that process, machines pulled the paper through dryers. Dryer felts held the paper against the dryers, so that the paper would dry properly. AstenJohnson, Inc. and Scapa Dryer Fabrics, Inc. supplied the mill with dryer felts that contained asbestos.

Barabin had a variety of jobs during the time he worked at the mill. He started as a paper sorter, working in a different building than where the dryers were located. He then moved to the technical department, where he worked as a pulp tester and a paper tester. On occasion, he worked at a test station that was about twenty feet from the dryers. After working in the technical department, he went to work on the paper machines. Part of his job was to clean the dryers. However, these jobs were not his only exposure

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[1] Because we find the erroneous admission of expert testimony warrants a new trial, we do not address the merits of the other arguments raised by AstenJohnson and Scapa.

to the dryer felts; he also took pieces of dryer felt home to use in his garden.

In 2006, Barabin was diagnosed with pleural malignant epithelial mesothelioma ("mesothelioma"). Mesothelioma is a rare cancer that affects the tissue surrounding the lungs. Alleging that this occupational exposure to asbestos from the dryer felts caused his mesothelioma, Henry Barabin and Geraldine Barabin, his wife, brought suit against AstenJohnson and Scapa.

All parties agree, and the science makes clear, that asbestos exposure from inhaling respirable fibers can cause mesothelioma. At trial, the parties argued over whether exposure to the dryer felts (provided by AstenJohnson and Scapa) substantially contributed to Barabin's mesothelioma. Of necessity, the case was to be a battle of the experts. Both parties had experts who were prepared to testify in support of their arguments.

Two of the Barabins' experts were Kenneth Cohen and Dr. James Millette. Mr. Cohen had been employed in the industrial hygiene field for several decades. He had also taught industrial toxicology courses at a university. Dr. Millette had been involved in asbestos related research since 1974. He published a number of articles dealing with asbestos, including an article dealing with asbestos fiber release from dryer felts.

Prior to trial, AstenJohnson and Scapa filed motions *in limine* to exclude Mr. Cohen and Dr. Millette as expert witnesses. AstenJohnson argued that Mr. Cohen was not qualified to testify as an expert and that his theory was not the product of scientific methodology. AstenJohnson and Scapa argued that Dr. Millette's tests were unreliable, because his methodology was not generally accepted in

the scientific community. They also argued that the disparity between his tests and the conditions at the mill was so great that his testimony would not help the jury. The motions also sought to exclude testimony from any expert regarding the theory that "every asbestos fiber is causative."

After receiving the motions, and without a *Daubert*[2] hearing, the district court excluded Mr. Cohen as a witness because of his "dubious credentials and his lack of expertise with regard to dryer felts and paper mills." The district court also had concerns with Dr. Millette's testimony. Specifically, the district court was "troubled by the marked differences between the conditions of Dr. Millette's tests and the actual conditions at the [mill]." Nonetheless, the district court ruled that Dr. Millette could testify provided the jury was informed his tests were "performed under laboratory conditions which are not the same as conditions at the [mill]."

As to the "every exposure" theory, the district court found "a strong divide among both scientists and courts" on whether it is relevant in asbestos cases. However, "[i]n the interest of allowing each party to try its case to the jury," the district court allowed the testimony.

The Barabins then filed a motion to request a pretrial Daubert hearing regarding Mr. Cohen. At a pretrial conference, the district court rejected the Barabins' request for a *Daubert* hearing. Instead, it reversed its decision to exclude Mr. Cohen's testimony. The district court's only explanation for why it reversed its decision was that the Barabins "did a much better job" in their motion "of presenting . . . the

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[2] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

full factual basis behind Mr. Cohen testifying and his testimony in other cases."

At trial, numerous experts testified. Both Mr. Cohen and Dr. Millette testified. Dr. Brodkin, another expert, also testified for the Barabins. Part of Dr. Brodkin's testimony was about the "every exposure" theory. As each of these experts testified, AstenJohnson and Scapa objected to their testimony. The district court overruled the objections.

## PROCEDURAL HISTORY

After the Barabins presented their case at trial, AstenJohnson and Scapa filed motions for judgment as a matter of law. AstenJohnson and Scapa believed they were entitled to judgment as a matter of law, because the Barabins had failed to show that their companies had manufactured the dryer felts to which Barabin had been exposed. In the alternative, they argued that the Barabins had failed to demonstrate a causal link between the dryer felts and Barabin's mesothelioma. The district court denied the motions. AstenJohnson and Scapa renewed their motions after closing arguments. The district court denied the motions again.

After deliberations, the jury found in favor of the Barabins and awarded damages totaling $10,200,000. The district court granted AstenJohnson's and Scapa's motions to vacate the judgment and scheduled a reasonableness hearing. The district court found the damages award to be reasonable, offset the judgment

by a total of $836,114.61,[3] and entered judgment in favor of the Barabins in the amount of $9,373,152.12.

Both Scapa and AstenJohnson then filed motions for a new trial or, in the alternative, for a remittitur. One of the grounds on which Scapa and AstenJohnson sought a new trial was the improper admission of expert testimony. The district court denied the motions in their entirety.

AstenJohnson and Scapa filed timely notices of appeal. A three-judge panel consolidated the appeals. It unanimously held that the district court abused its discretion by failing to make the necessary relevancy and reliability findings under *Daubert*. The panel remanded for a new trial pursuant to *Mukhtar v. California State University*, 299 F.3d 1053 (9th Cir. 2002), *amended by* 319 F.3d 1073 (9th Cir. 2003). The Barabins petitioned this Court to rehear the case en banc, and a majority of non-recused active judges voted to rehear the case.

## STANDARDS OF REVIEW

"A district court's evidentiary rulings should not be reversed absent clear abuse of discretion and some prejudice." *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1202 (9th Cir. 2013) (internal quotations and citation omitted). However, we review de novo the "construction or interpretation of . . . the Federal Rules of Evidence, including whether particular evidence falls within the scope of a

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[3] The Barabins had previously settled with a number of third parties. Washington law requires the court to offset the judgment by the amount of such settlements, unless the settlements were unreasonable. *See* Wash. Rev. Code § 4.22.060(2).

given rule." *United States v. Durham*, 464 F.3d 976, 981 (9th Cir. 2006) (citations omitted). A ruling on a motion for new trial "will be overturned on appeal only for abuse of discretion." *Kode v. Carlson*, 596 F.3d 608, 611 (9th Cir. 2010) (citation omitted).

## DISCUSSION

### I.

Rule 702 of the Federal Rules of Evidence governs admission of expert testimony in the federal courts:

> 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, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702 (2010).[4] We have interpreted Rule 702 to require that "[e]xpert testimony . . . be both relevant and reliable." *United States v. Vallejo*, 237 F.3d 1008, 1019 (9th Cir. 2001). Relevancy simply requires that "[t]he evidence . . . logically advance a

[4] The trial in this case took place before the Federal Rules of Evidence were restyled in 2011.

material aspect of the party's case." *Cooper v. Brown*, 510 F.3d 870, 942 (9th Cir. 2007).

The issue here is reliability: whether an expert's testimony has "a reliable basis in the knowledge and experience of the relevant discipline." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149 (1999) (citation and alterations omitted). The "*evidentiary reliability* [is] based upon scientific validity." *Daubert*, 509 U.S. at 590 n.9. We are concerned "not [with] the correctness of the expert's conclusions but the soundness of his methodology." *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010) (citations and quotations omitted). The duty falls squarely upon the district court to "act as a 'gatekeeper' to exclude junk science that does not meet Federal Rule of Evidence 702's reliability standards." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011).

The reliability inquiry is "a flexible one." *Kumho Tire*, 526 U.S. at 150. The Supreme Court has suggested several factors that can be used to determine the reliability of expert testimony: "1) whether a theory or technique can be tested; 2) whether it has been subjected to peer review and publication; 3) the known or potential error rate of the theory or technique; and 4) whether the theory or technique enjoys general acceptance within the relevant scientific community." *United States v. Hankey*, 203 F.3d 1160, 1167 (9th Cir. 2000) (citing *Daubert*, 509 U.S. at 592-94). However, whether these specific factors are "reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine." *Kumho Tire*, 526 U.S. at 153.

The trial judge also has broad latitude in determining the appropriate form of the inquiry. *See United States v. Alatorre*, 222 F.3d 1098, 1102 (9th Cir. 2000) ("Nowhere . . . does the Supreme Court mandate the form that the inquiry into relevance and reliability must take."). While pretrial "*Daubert* hearings" are commonly used, see, e.g., *United States v. Lukashov*, 694 F.3d 1107, 1112 (9th Cir. 2012), they are certainly not required, *United States v. Jawara*, 474 F.3d 565, 582 (9th Cir. 2006).

Nevertheless, Rule 702 "clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify." *Daubert*, 509 U.S. at 589 (emphasis added). Applying these principles to the facts before us, we find the district court abused its discretion by failing to make appropriate determinations under *Daubert* and Federal Rule of Evidence 702.

The district court first excluded Mr. Cohen's testimony based on his "dubious credentials and lack of expertise." The district court's only explanation for reversing its decision, without a *Daubert* hearing or findings, was, "I think the plaintiffs did a much better job of presenting to me the full factual basis behind Mr. Cohen testifying and his testimony in other cases." Absent from the explanation is any indication that the district court assessed, or made findings regarding, the scientific validity or methodology of Mr. Cohen's proposed testimony. Therefore, the district court failed to assume its role as gatekeeper with respect to Mr. Cohen's testimony.

The district court also failed to act as gatekeeper for Dr. Millette's testimony. After acknowledging various arguments as to whether the testimony was admissible, the district court concluded that it could be

admitted, so long as the jury was informed of the "marked differences" between conditions of the tests and the actual conditions of the mill. Rather than making findings of relevancy and reliability, the district court passed its greatest concern about Dr. Millette's testimony to the jury to determine.

The district court took the same approach with respect to expert testimony regarding the "every exposure" theory:

> There is obviously a strong divide among both scientists and courts on whether such expert testimony is *relevant* to asbestos-related cases. *In the interest of allowing each party to try its case to the jury*, the Court deems admissible expert testimony that every exposure can cause an asbestos- related disease.

(emphasis added). Just as the district court cannot abdicate its role as gatekeeper, so too must it avoid delegating that role to the jury.

Here, the district court delegated that role by giving each side leeway to present its expert testimony to the jury. Before allowing the jury to hear the expert testimony, the district court should have first determined that the "expert meets the threshold established by Rule 702," *Primiano*, 598 F.3d at 564-65; that is the entire purpose of *Daubert*. The district court abused its discretion by admitting the expert testimony without first finding it to be relevant and reliable under *Daubert*.

## II.

When we conclude evidence has been improperly admitted, "we consider whether the error was harmless." *United States v. Bailey*, 696 F.3d 794, 802-03 (9th Cir. 2012). We treat the erroneous admission of expert testimony the same as all other evidentiary errors, by subjecting it to harmless error review. *See United States v. Rahm*, 993 F.2d 1405, 1415 (9th Cir. 1993). We reverse "only if the error affect[ed] a substantial right of the party." Fed. R. Evid. 103(a). "In other words, we require a finding of prejudice." *Obrey v. Johnson*, 400 F.3d 691, 699 (9th Cir. 2005).

"[T]he burden [is] on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment." *Id*. at 700 (citation omitted). Thus, "we begin with a presumption of prejudice. That presumption can be rebutted by a showing that it is more probable than not that the jury would have reached the same verdict even if the evidence had not been admitted." *Jules Jordan Video, Inc. v. 144942 Canada Inc.*, 617 F.3d 1146, 1159 (9th Cir. 2010) (citation and internal quotations omitted).

As the beneficiaries of the erroneously admitted evidence, the Barabins fail to rebut the presumption of prejudice. Indeed, they admit they cannot win without this expert testimony.[5] Prejudice is at its apex when

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[5] At least twice during the en banc oral arguments the Barabins admitted they did not have a case without this expert testimony. First, the Barabins' counsel stated that, if the district judge found the expert testimony inadmissible (specifically the testimony of Dr. Millette), the result would be "a judgment in favor of the defendants." Second, in response to this Court's suggestion that without expert testimony it was "game over" for

the district court erroneously admits evidence that is critical to the proponent's case. The improper admission of the expert testimony severely prejudiced AstenJohnson and Scapa because the Barabins' claim depended wholly upon the erroneously admitted evidence. Given these circumstances, there is no doubt the error was not harmless.

The dissent contends that we must decide whether the evidence would be admissible before engaging in harmless error review. Dissent at 23 [Pet. App. 23a-24a]. However, the dissent is reading a non-existent step into our evidentiary-error case law.

The dissent cites only two cases addressing the use of harmless error review in these circumstances.[6] They both support our decision. *See 4.85 Acres of Land*, 546 F.3d at 620; *Simpson v. Thomas*, 528 F.3d 685, 691 (9th Cir. 2008). In *4.85 Acres of Land*, we found that the district court abused its discretion by excluding all post-taking sales from consideration without first

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the Barabins, counsel stated "I think that's right." Our review of the record confirms the wisdom of this concession.

[6] All of the other cases cited by the dissent do not address this issue. They are not cases in which the district court failed to answer a threshold question of admissibility. Instead, in each of those cases (unlike the case at hand), we were tasked with determining whether evidence was admissible in order to decide if the district court abused its discretion. *See Bailey*, 696 F.3d at 804-05; *Jules Jordan Video, Inc.*, 617 F.3d at 1157-59; *Laurienti*, 611 F.3d at 547-49; *United States v. Cohen*, 510 F.3d 1114, 1127 (9th Cir. 2007); *Rahm*, 993 F.3d at 1415-16; *United States v. Echavarria-Olarte*, 904 F.2d 1391, 1398 (9th Cir. 1990). Here, our inquiry into whether the district court abused its discretion ends with our determination that it abdicated its gatekeeping responsibility. However, to the extent that these cases apply, they support our decision to conduct harmless error review after finding the district court abused its discretion.

making any findings regarding the comparability of the excluded sales to the condemned property. 546 F.3d at 620. Despite being asked to do so, we refused to address on appeal whether "some of the post-taking comparable sales would have been admissible." *Id.* Instead, we engaged in harmless error review, found that the error was not harmless, and remanded for a new trial. *Id.*

In *Simpson*, we found that the district court abused its discretion when it admitted three prior convictions that were more than ten years old without engaging in proper balancing under rule 609(b) of the Federal Rules of Evidence. 528 F.3d at 690-91. The district court identified the correct rule, but it abused its discretion when it inverted the requirement of the rule, failed to offer specific facts to support its conclusion, and did not find that the probative value *substantially* outweighed the prejudice. *Id.* at 690. We did not engage in 609(b) balancing on appeal to determine whether the prior convictions would have been admissible. Instead, we went straight to harmless error review, found the evidence to be prejudicial, and remanded for a new trial. *Id.* at 690-91.

As both *4.85 Acres of Land* and *Simpson* illustrate, when the district court abdicates its responsibility to answer a threshold question of admissibility, we need not determine whether the evidence would have been admissible before we determine the district court abused its discretion and proceed to harmless error review. In both cases we engaged in harmless error review, as we always do, by asking if erroneously admitting or excluding the evidence affected the

outcome of the trial.[7] *See 4.85 Acres of Land*, 546 F.3d at 620; *Simpson*, 528 F.3d at 691. We reject the dissent's attempt to insert a new step into our review of evidentiary errors.

## III.

When the district court has erroneously admitted or excluded prejudicial evidence, we remand for a new trial. *See, e.g.*, *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1109 (9th Cir. 2002). We do so even if the district court errs by failing to answer a threshold question of admissibility. *See, e.g., 4.85 Acres of Land,* 546 F.3d at 620 (excluding other sales without determining comparability); *Simpson*, 528 F.3d at 691 (admitting convictions without Federal Rule of Evidence 609(b) balancing). We have no precedent for treating the erroneous admission of expert testimony any differently.

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[7] The dissent cites *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998 (9th Cir. 2004), to support its idea of what constitutes an appropriate "harmless error inquiry when a district court fails to fulfill its gatekeeping function." Dissent at 26. This case is inapposite; the district court in *Hangarter* did not fail to fulfill its gatekeeping function. We specifically held that the district court "did not abuse its discretion in finding [the expert's] testimony reliable based on his knowledge and experience" and that "the district court's inquiry was sufficient to comply with its gatekeeping role." *Id*. at 1018.

Instead, in *Hangarter*, we reviewed for harmless error the district court's statement that *Daubert* did not apply. *Id.* ("While the district court erred in stating that *Daubert* did not apply to Caliri's non-scientific testimony, that error was harmless."). It is difficult to imagine a *Daubert* case that is less on point: In *Hangarter*, the district court said *Daubert* did not apply but went on to make *Daubert* findings. Here, the district court said that Daubert did apply but failed to make *Daubert* findings.

For seventy years prior to *Daubert*, the dominant standard for determining admissibility of novel scientific evidence was the "general acceptance" test. *Daubert*, 509 U.S. at 585-86 (citing *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)). Under *Frye*, we required the proponent of novel scientific evidence to "lay a proper foundation" by demonstrating "general acceptance" of the evidence "in the particular field in which it belong[ed]." *United States v. Boise*, 916 F.2d 497, 503 (9th Cir. 1990).

In *Daubert*, the Supreme Court set "the standard for admitting expert scientific testimony in a federal trial" by holding that the Federal Rules of Evidence superseded the *Frye* test. *Daubert*, 509 U.S. at 582, 586–87. *Daubert* continues to require that the proponent of expert testimony lay a proper foundation, but now laying a proper foundation means establishing relevancy and reliability rather than mere general acceptance. *Id.* at 597.

Initially, in grappling with the effects of *Daubert*, we remanded two cases to district courts to conduct post-hoc *Daubert* hearings. *See United States v. Cordoba*, 104 F.3d 225, 229 (9th Cir. 1997); *United States v. Amador-Galvan*, 9 F.3d 1414, 1418 (9th Cir. 1993).[8] After the dust of *Daubert* had settled, we held that an erroneous admission of expert testimony,

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[8] These are not cases in which the district court simply failed to conduct a *Daubert* hearing. In *Amador- Galvan*, the trial took place before *Daubert* had been decided, 9 F.3d at 1416, so it would have been impossible for the district court to make *Daubert* findings. *Cordoba* dealt with an issue of first impression: "whether our per se rule excluding the admission of unstipulated polygraph evidence was effectively overruled by *Daubert*." 104 F.3d at 227. After deciding it was, we remanded to the district court to conduct a *Daubert* hearing in the first instance. Id. at 229.

absent a showing the error was harmless, requires a new trial. *See Mukhtar*, 299 F.3d at 1066-67. To the extent *Mukhtar* requires anything more, it is overruled.

AstenJohnson and Scapa contend that a reviewing court should have the authority to make *Daubert* findings based on the record established by the district court. We agree and overrule *Mukhtar* to the extent that it required that *Daubert* findings always be made by the district court. *See Mukhtar*, 299 F.3d at 1066 n.12. If the reviewing court decides the record is sufficient to determine whether expert testimony is relevant and reliable, it may make such findings. If it "determines that evidence [would be inadmissible] at trial and that the remaining, properly admitted evidence is insufficient to constitute a submissible case[,]" the reviewing court may direct entry of judgment as a matter of law. *Weisgram v. Marley Co.*, 528 U.S. 440, 446-47 (2000).

Citing *Weisgram*, AstenJohnson and Scapa argue we should enter judgment in this case. We decline their invitation. In Weisgram, the Eighth Circuit found, based on a fully developed record, that the expert testimony was not reliable. *Weisgram v. Marley Co.*, 169 F.3d 514, 517-18 (8th Cir. 1999). We cannot speak to the admissibility of the expert testimony at issue here because the record before us is too sparse to determine whether the expert testimony is relevant and reliable. We can only say with certainty that the district court erred by failing to make that determination.

The Barabins and the dissent argue that we should remand for a post-hoc *Daubert* hearing. Even assuming that a limited remand is available post-*Mukhtar*, see 319 F.3d at 1074, it would not be

appropriate under the circumstances here, where the district court abused its discretion by erroneously admitting expert testimony, and the evidence was prejudicial. We therefore remand for a new trial.

## CONCLUSION

The district court failed to make findings of relevancy and reliability before admitting into evidence the expert testimony of Mr. Cohen and Dr. Millette and expert testimony regarding the theory that "every asbestos fiber is causative." The district court's failure to make these gateway determinations was an abuse of discretion. The error was prejudicial because the erroneously admitted evidence was essential to the Barabins' case. Due to the district court's abdication of its role as gatekeeper and the severe prejudice that resulted from the error, the appropriate remedy is a new trial. We vacate the judgment and remand for a new trial.

**VACATED and REMANDED**.

The parties shall bear their own costs on appeal.

Circuit Judge **NGUYEN**, with whom Judges **McKEOWN**, **W. FLETCHER**, **BYBEE**, and **WATFORD** join, concurring in part and dissenting in part:

I concur in Part I of the majority's opinion, which concludes that the district court failed to fulfill its gatekeeping function with regard to the expert testimony at issue. I also agree with the majority that we are unable to determine based on the record before

us whether the expert testimony is admissible. *See* Maj. Op. at 19 [Pet. App. 19a] ("We cannot speak to the admissibility of the expert testimony at issue here because the record before us is too sparse to determine whether the expert testimony is relevant and reliable."). Further, to the extent the majority overrules *Mukhtar v. California State University*, 299 F.3d 1053 (9th Cir. 2002), *amended by* 319 F.3d 1073 (9th Cir. 2003), I am in accord. There is no reason to require a new trial whenever a district court fails to conduct a *Daubert* analysis, regardless of whether on remand the district court would determine that disputed expert testimony is relevant and reliable.

I part ways with the majority, however, in its application of harmless error review. The majority's analysis is seriously flawed because it conflates a district court's gatekeeping error with a district court's erroneous determination of admissibility. Here, assuming *inadmissibility* — a question we cannot answer at this juncture — the majority applies harmless error review and concludes that a new trial is needed because the "*improper admission* of the expert testimony severely prejudiced [defendants]." Maj. Op. at 14 [Pet. App. 15a] (emphasis added). The majority thus unnecessarily burdens both the parties and the judicial system by ordering a new trial without having a sufficient basis to determine whether the disputed expert testimony was admissible. Further, the majority's approach undercuts its effort to open the door to a limited remand occasioned by overruling *Mukhtar*. Because I would conditionally vacate the judgment and remand with instructions to the district court to conduct a *Daubert* determination in the first instance, I respectfully dissent from Parts II and III of the majority opinion.

## I.

A district court must "ensure the reliability and relevancy of expert testimony" and "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." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999); *see also* Fed. R. Evid. 702. In short, a district court serves an essential "gatekeeping" function in evaluating proffered expert testimony. *Kumho Tire*, 526 U.S. at 141.

In this case, the district court abdicated its gatekeeping role by failing to evaluate the relevancy and reliability of the expert testimony at issue. Given this oversight, we must determine whether the district court's misstep resulted in the admission of evidence that should have been excluded. In the past, when the record before us was sufficient to make this determination, we have proceeded to evaluate whether the erroneous admission or exclusion of evidence was harmless. *See*, e.g., *United States v. Morales*, 720 F.3d 1194, 1197 (9th Cir. 2013) (district court's error "was harmless because the erroneously admitted hearsay did not materially affect the verdict"); *United States v. 4.85 Acres of Land*, 546 F.3d 613, 620 (9th Cir. 2008) (district court's error was not harmless because improper exclusion of evidence was prejudicial). This approach makes perfect sense—once we determine that inadmissible evidence was presented, or that admissible evidence was excluded, we can then analyze whether the error materially affected the verdict. *See United States v. Bailey*, 696 F.3d 794, 803 (9th Cir. 2012).

Here, however, we face a markedly different scenario. As the majority correctly concludes, "the admissibility of the expert testimony at issue" cannot be determined "because the record before us is too sparse." Maj. Op. at 19. Given this conclusion, harmless error review is simply not possible at the current juncture. Indeed, we cannot even say whether there was an "error" to "materially affect the verdict." If the disputed expert testimony was admissible pursuant to Rule 702 and *Daubert*, despite the district court's failure to fulfill its gatekeeping function, then no harm, no foul. On the other hand, if the testimony was inadmissible, then a harmless error analysis would be appropriate. Thus, in light of the outstanding question regarding the admissibility of the expert testimony at issue, a remand to the district court for a *Daubert* analysis is the proper course.

**II.**

The majority goes awry in adopting an approach that ignores this antecedent question of admissibility. In considering the district court's gatekeeping failure, the majority asserts that "[w]hen we conclude evidence has been improperly admitted, 'we consider whether the error was harmless.'" Maj. Op. at 13 (quoting *Bailey*, 696 F.3d at 802-03). Though innocuous at first glance, this remark harbors a grave oversight: it equates an incorrect determination of admissibility with a failure to conduct a *Daubert* analysis.

The distinction between the two is crucial. With the former, we know whether a party was wrongfully permitted or denied the opportunity to present certain evidence, and we can determine whether that error was prejudicial. With the latter, we cannot gauge prejudice

unless we are able to determine what the jury would have been permitted to hear had the district court properly discharged its gatekeeping duties.[1]

By skipping over the question of admissibility and heading straight for prejudice, the majority's analysis results in two key missteps. First, the majority dubs the Barabins "the beneficiaries of . . . erroneously admitted evidence." *Id*. at 14. But, as the majority acknowledges, we have no idea whether the expert testimony at issue was in fact "erroneously admitted." On a proper *Daubert* analysis — a task we decline to engage in on appeal — the testimony might indeed have been admissible. In this circumstance, the Barabins would merely be the beneficiaries of evidence they were entitled to present in the first place.

Second, in bypassing admissibility, the majority engages in a perplexing prejudice analysis that emphasizes the fact that the disputed expert testimony was "critical to the proponent's case."[2] *Id*. Indeed, based on its conclusion that "the Barabins' claim depended wholly upon the erroneously admitted evidence," the majority finds "no doubt the error was not harmless." *Id*. Not so. Even if the Barabins' claim depended on the expert testimony at issue, we have no idea whether the

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[1] The majority cites *United States v. Rahm*, 993 F.2d 1405 (9th Cir. 1993), for the proposition that "[w]e treat the erroneous admission of expert testimony the same as all other evidentiary errors, by subjecting it to harmless error review." Maj. Op. at 13. *Rahm*, however, only engaged in harmless error review after concluding that the testimony at issue was admissible and thus improperly excluded. *See Rahm*, 993 F.2d at 1416 (deeming the error not harmless where the district court "erroneously excluded . . . proffered expert testimony . . . [that] was admissible").

[2] It seems to me that it would be the rare case indeed where expert testimony was not "critical to the proponent's case."

testimony was "erroneously admitted," let alone whether any error "materially affect[ed] the verdict." *Morales*, 720 F.3d at 1197. If the expert testimony was admissible, then the jury simply reached a verdict based on evidence it was properly permitted to consider, despite the district court's error.

The flaw in the majority's logic is highlighted by the fact that not a single case it cites supports the type of harmless error analysis it applies. Rather, in each case, we engaged in harmless error review only *after* we determined that evidence had been improperly deemed admissible or inadmissible.[3] Indeed, this is true of *Simpson v. Thomas* and *United States v. 4.85 Acres of Land* — two cases specifically discussed by the majority in support of its decision. Contrary to the majority's assertion, neither case involved merely a situation

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[3] *See, e.g., Bailey*, 696 F.3d at 805 (not harmless error where trial court wrongfully admitted a civil complaint); *Jules Jordan Video, Inc. v. 144942 Canada, Inc.*, 617 F.3d 1146, 1158-59 (9th Cir. 2010) (harmless error where district court improperly permitted counsel to read 716 requests for admissions to the jury); *United States v. Laurienti*, 611 F.3d 530, 548 (9th Cir. 2010) (harmless error where district court abused its discretion by sustaining certain government objections to expert testimony); *Simpson v. Thomas*, 528 F.3d 685, 691 (9th Cir. 2008) (not harmless error where district court improperly admitted prior convictions); *4.85 Acres of Land*, 546 F.3d at 620 (not harmless error where district court improperly excluded post-taking sales in a condemnation action); *Cohen*, 510 F.3d at 1127 (not harmless error where district court wrongfully excluded expert testimony); *Obrey v. Johnson*, 400 F.3d 691, 702 (9th Cir. 2005) (not harmless error where district court abused its discretion in excluding testimony); *Rahm*, 993 F.2d at 1415 (not harmless error where district court erroneously excluded expert testimony); *United States v. Echavarria-Olarte*, 904 F.2d 1391, 1398-99 (9th Cir. 1990) (harmless error where district court improperly admitted expert testimony on drug cartel).

where a "district court abdicate[d] its responsibility to answer a threshold question of admissibility." Maj. Op. at 16. Rather, in both cases, we found *actual error by the district court* in deeming evidence admissible or inadmissible before proceeding to harmless error review. *See Simpson*, 528 F.3d at 689 ("The district court erred in admitting the evidence of Simpson's three prior felony convictions."); *4.85 Acres of Land*, 546 F.3d at 620 ("[T]he [district] court simply excluded all post-taking sales based on 'the erroneous premise . . . that evidence of subsequent sales is never proper for consideration in arriving at fair market value.'" (quoting *United States v. 1,129.75 Acres of Land*, 473 F.2d 996, 999 (8th Cir. 1973)) (final alteration in original)).

In fact, our case law suggests a notably different harmless error inquiry when a district court fails to fulfill its gatekeeping function. For example, in *Hangarter v. Provident Life & Accident Insurance Co.*, 373 F.3d 998 (9th Cir. 2004), the district court incorrectly concluded that Daubert was inapplicable to the non-scientific testimony of an independent consultant. *Id.* at 1015-16, 1018. We found the error harmless because "the [district] court's probing of [the consultant's] knowledge and experience was sufficient to satisfy its gatekeeping role under *Daubert*." *Id.* at 1018. In short, the district court's failure to analyze the expert testimony pursuant to *Daubert* was harmless because the analysis it nonetheless conducted satisfied *Daubert* and the testimony was thus correctly admitted. This was a proper application of harmless error review – where the error identified on appeal pertains to the

gatekeeping function, the reviewing court should consider whether *the gatekeeping error* was harmless.[4]

In contrast, the majority here finds a gatekeeping error, but embarks on a prejudice inquiry that focuses on how crucial the disputed expert testimony was to the prevailing party's success. In doing so, the majority effectively treats the testimony as *inadmissible*, even as it professes to reserve judgment on the question. The majority cannot have it both ways.

## III.

I would conditionally vacate the judgment and remand to the district court with instructions to determine whether the disputed expert testimony was admissible pursuant to the requirements of Rule 702 and *Daubert*. If the testimony is determined to be admissible, the district court may reinstate the verdict. If, however, the testimony is inadmissible, the district court should ascertain whether the wrongful admission of that expert testimony prejudiced the defendants and, if so, order a new trial. In the former case, the system will not be unreasonably burdened with a retrial. In either case, the parties retain their right to appeal. This solution makes practical and legal sense.

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[4] The majority characterizes *Hangarter* as "inapposite," describing it as a case where the district court "did not fail to fulfill its gatekeeping function." Maj. Op. at 16 n.7. I disagree. It is hard to imagine a more clear gatekeeping error than a district court choosing not to analyze proffered expert testimony under *Daubert* because it mistakenly found *Daubert* inapplicable.

## APPENDIX B

## FOR PUBLICATION

## UNITED STATES COURT OF APPEALS
## FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| ESTATE OF HENRY BARABIN; GERALDINE BARABIN, personal representative, *Plaintiffs-Appellees*, | ) | No. 10-36142 |
| | ) | D.C. No. 2:07-cv-01454-RSL |
| v. | ) | |
| ASTENJOHNSON, INC., *Defendant-Appellant.* | ) | |

| | | |
|---|---|---|
| ESTATE OF HENRY BARABIN; GERALDINE BARABIN, personal representative, *Plaintiffs-Appellees*, | ) | No. 11-35020 |
| | ) | D.C. No. 2:07-cv-01454-RSL |
| v. | ) | |
| ASTENJOHNSON, INC., *Defendant*, | ) | ORDER |
| and | ) | |
| SCAPA DRYER FABRICS, INC., *Defendant-Appellant.* | ) | |

Filed March 25, 2013

**ORDER**

KOZINSKI, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a) and Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit.

Judge Christen did not participate in the deliberations or vote in this case.

**APPENDIX C**

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

| | | |
|---|---|---|
| ESTATE OF HENRY BARABIN; GERALDINE BARABIN, personal representative, *Plaintiffs-Appellees*, | ) | No. 10-36142 |
| | ) | D.C. No. 2:07-cv-01454-RSL |
| v. | ) | |
| ASTENJOHNSON, INC., *Defendant-Appellant.* | ) | |

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|---|---|---|
| ESTATE OF HENRY BARABIN; GERALDINE BARABIN, personal representative, *Plaintiffs-Appellees*, | ) | No. 11-35020 |
| | ) | D.C. No. 2:07-cv-01454-RSL |
| v. | ) | |
| ASTENJOHNSON, INC., *Defendant*, | ) | OPINION |
| and | ) | |
| SCAPA DRYER FABRICS, INC., *Defendant-Appellant.* | ) | |

Appeals from the United States District Court
for the Western District of Washington
Robert S. Lasnik, District Judge, Presiding

Argued and Submitted
January 11, 2012 — Seattle, Washington

Filed November 16, 2012

Before: A. Wallace Tashima, Susan P. Graber,
and Johnnie B. Rawlinson, Circuit Judges.

Opinion by Judge Rawlinson;
Concurrence by Judge Tashima;
Concurrence by Judge Graber

**SUMMARY**[*]

The panel vacated the district court's judgment and remanded for a new trial because the district court failed to fulfill its obligations under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

The panel held that the district court abused its discretion when it failed to conduct a *Daubert* hearing or otherwise make relevance and reliability determinations regarding expert testimony. The panel held that the court's decision in *Mukhtar v. California State University*, 299 F.3d 1053 (9th Cir. 2002), *amended by* 319 F.3d 1073 (9th Cir. 2003) (order), dictated that a new trial be provided in this circumstance.

[*] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Judge Tashima concurred in all aspects in the majority opinion, and wrote separately to address an issue not addressed by the majority. Judge Tashima stated that it would be helpful if the district court would articulate whether there is an impeachment exception to the Washington collateral source rule.

Judge Graber, joined by Judge Tashima, concurred fully in the majority opinion, but wrote separately to express her disagreement with the rule in *Mukhtar*, requiring the court to vacate and remand for a new trial. Judge Graber would conditionally vacate the judgment and remand with instructions to make a new *Daubert* determination, and only if the expert testimony was deemed not reliable should the district court preside over a new trial.

## COUNSEL

Michael B. King (argued) and Emilia L. Sweeney, Carney Badley Spellman, P.S., Seattle, Washington, for AstenJohnson, Inc.

Mary H. Spillane and Daniel W. Ferm, Williams, Kastner & Gibbs, PLLC, Seattle, Washington, for Scapa Dryer Fabrics, Inc.

Cameron O. Carter, Brayton Purcell, LLP, Portland, Oregon; Philip A. Talmage (argued), and Sidney Tribe, Talmadge/Fitzpatrick, PLLC, Tukwila, Washington; Alan Brayton, Brayton Purcell, LLP, Novato, California, for Henry and Geraldine Barabin.

## OPINION

RAWLINSON, Circuit Judge:

AstenJohnson, Inc. (AstenJohnson) and Scapa Dryer Fabrics, Inc. (Scapa), appeal the district court's entry of judgment in favor of Henry and Geraldine Barabin following a jury trial resolving Henry Barabin's claim that his mesothelioma was caused by occupational exposure to asbestos. AstenJohnson and Scapa manufactured dryer felts that contained asbestos and that were installed on paper machines used in the paper mill where Henry Barabin worked. As now relevant, AstenJohnson and Scapa contend that the district court abused its discretion by improperly admitting expert evidence.

We have jurisdiction pursuant to 28 U.S.C. § 1291. Because the district court failed to fulfill its obligations under *Daubert*,[1] we vacate the judgment and remand for a new trial.[2]

## I. BACKGROUND

### A. Pre-trial motions and trial proceedings

Henry Barabin was exposed to asbestos from 1964 through 1984. He was employed from 1968 until his retirement in 2001 at the Crown-Zellerbach paper mill, which used dryer felts containing asbestos supplied by AstenJohnson and Scapa. During his employment, Henry worked in various jobs that exposed him to the

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[1] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

[2] Because of our determination that a new trial is warranted on this basis, we do not address the other issues raised on appeal.

dryer felts that AstenJohnson and Scapa provided. Henry also took pieces of dryer felt home to use in his garden.

In November, 2006, Henry was diagnosed with pleural malignant epithelial mesothelioma.[3] It is undisputed that exposure to respirable asbestos causes mesothelioma.

AstenJohnson filed a motion *in limine* to exclude Drs. Cohen[4] and Millette as expert witnesses. The district court excluded Dr. Cohen as an expert because of his "dubious credentials and his lack of expertise with regard to dryer felts and paper mills. . . ." Additionally, the district court limited Dr. Millette's testimony requiring disclosure to the jury that Dr. Millette's tests were "performed under laboratory conditions which are not the same as conditions at [Henry's workplace]." This limitation significantly diminished the strength of Dr. Millette's prospective opinion.

During a pre-trial conference, the district court reversed its decision to exclude Dr. Cohen's testimony. The district court explained that in the Barabins' response to the motions *in limine*, the Barabins clarified Dr. Cohen's credentials, including that he had testified in other cases. The district court did not hold a *Daubert* hearing. *See Daubert*, 509 U.S. at 589 (setting forth the trial judge's gatekeeping obligation to ensure that prospective expert testimony is reliable).

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[3] Pleural malignant mesothelioma is a rare cancer that affects the tissue surrounding the lungs. See http://www.mayoclinic.com (last visited Nov. 6, 2012).

[4] There was some dispute as to whether Dr. Cohen was legitimately referred to as a "doctor." We give him the benefit of the doubt because his correct title is not dispositive.

### B. Procedural history

After presentation of Plaintiffs' case, AstenJohnson and Scapa filed motions for judgment as a matter of law, which were denied. After closing arguments and before the verdict, AstenJohnson and Scapa renewed their motions for judgment as a matter of law. The district court again denied the motions.

The jury found in favor of the Barabins and awarded damages totaling $10,200,000. The district court granted AstenJohnson's and Scapa's motions to vacate the judgment and scheduled a reasonableness hearing. After the hearing and after ruling that the damages award was reasonable, the district court applied an offset of $836,114.61 for previous settlements,[5] ultimately awarding $9,373,152.12, plus $9,266.73 in costs, to the Barabins.

Scapa then filed a motion for a new trial or, in the alternative, for remittitur, and also incorporated AstenJohnson's motion for a new trial. AstenJohnson and Scapa sought a new trial based on, among other things, improper admission of expert testimony. The district court denied the motions in their entirety.

After entry of judgment in favor of the Barabins, AstenJohnson and Scapa filed timely notices of appeal. We consolidated these two appeals.

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[5] Washington law provides that if a plaintiff receives a settlement from another party, an offset occurs for the next tortfeasor unless the first settlement was unreasonable. *See* WASH. REV. CODE § 4.22.060(2).

## II. STANDARDS OF REVIEW

Evidentiary rulings are reviewed for abuse of discretion; however, we review a district court's interpretation of the Federal Rules of Evidence *de novo*. *See United States v. Urena*, 659 F.3d 903, 908 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1608 (2012).

We review a district court's denial of a motion for new trial for abuse of discretion. *See United States v. Montes*, 628 F.3d 1183, 1187 (9th Cir.), *cert. denied* 131 S. Ct. 2468 and 132 S. Ct. 52 (2011).

## III. DISCUSSION

### The district court abused its discretion when it failed to conduct a *Daubert* hearing or otherwise make relevance and reliability determinations regarding expert testimony.

In its role as gatekeeper, the district court determines the relevance and reliability of expert testimony and its subsequent admission or exclusion. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011). Admission or exclusion under *Daubert* rests on the scientific reliability and relevance of the expert testimony. *See id.* The expert's opinion must be deduced from a "scientific method" to be admissible. *Id.* (citation omitted). "The test under *Daubert* is not the correctness of the expert's conclusions but the soundness of his methodology . . . ." *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010), *as amended* (footnote reference and alteration omitted).

*Daubert* provided the following non-exhaustive factors for consideration in assessing the reliability of proffered expert testimony:

> (1) whether the scientific theory or technique can be (and has been) tested, (2) whether the theory or technique has been subjected to peer review and publication, (3) whether there is a known or potential error rate, and (4) whether the theory or technique is generally accepted in the relevant scientific community.

*Mukhtar v. Cal. State Univ.*, 299 F.3d 1053, 1064 (9th Cir. 2002) (citations omitted).

After the district court's ruling resolving AstenJohnson's motion *in limine* by excluding Dr. Cohen from testifying as an expert witness, the Barabins filed a Motion for Pre-Trial *Daubert* Hearing seeking reconsideration of the district court's ruling. Included within the motion was information describing Dr. Cohen's use as an expert in the Washington state courts and in other courts. After considering the information contained in the Barabins' motion, the district court declined to hold a *Daubert* hearing. Rather, the district court simply reversed its prior exclusion of Dr. Cohen's testimony. The extent of the court's explanation was: "I think plaintiffs did a much better job of presenting to me the full factual basis behind Mr. Cohen testifying and his testimony in other cases. . . ."

Unfortunately, because no *Daubert* hearing was conducted as requested, the district court failed to assess the scientific methodologies, reasoning, or principles Dr. Cohen applied. None of the *Daubert* factors was considered. Instead, the court allowed the

parties to submit the experts' unfiltered testimony to the jury.

It is notable that the district court's order originally addressing AstenJohnson's motion *in limine* expressed concerns with Dr. Millette's testing procedures and excluded Dr. Cohen's testimony altogether, due to its concerns regarding his credentials and expertise. Only after the Barabins provided additional information that Dr. Cohen had testified in other state court proceedings did the district court allow Dr. Cohen to testify as an expert.[6]

In federal courts, the admission of expert testimony is governed by Federal Rule of Evidence 702, as elucidated by the Supreme Court in *Daubert*. At the time of the trial in this case, Rule 702 provided:

> 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, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied

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[6] It is unlikely that the Washington state courts where Dr. Cohen testified used the *Daubert* standard in assessing the admissibility of Dr. Cohen's testimony. *See State v. Sipin*, 123 P.3d 862, 867 (Wash. Ct. App. 2005) ("In Washington, the *Frye* test is used to determine the admissibility of novel scientific evidence. . . .") (citation omitted); *see also Daubert*, 509 U.S. at 587 ("[T]he *Frye* test was superseded by the adoption of the Federal Rules of Evidence.") (footnote reference omitted).

> the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702 (2010).

Compliance with Rule 702 is gauged by the district court's assessment of the reliability of the proffered expert testimony. *See Daubert*, 509 U.S. at 589. Specifically, the district court is charged with determining whether the proffered expert testimony is trustworthy. *See id.* at 590 n.9. "In a case involving scientific evidence, *evidentiary reliability* will be based upon *scientific validity*." *Id.* (emphases in the original). Scientific validity is, in turn, assessed in large part by the degree to which the theories propounded by the expert have been subjected to and survived scrutiny in the relevant scientific community. *See Mukhtar*, 299 F.3d at 1063-64.

As we observed in *Mukhtar*, the decision to admit or exclude expert testimony is often the difference between winning and losing a case. *See id.* at 1067-68 (noting that once the challenged expert testimony was excluded no evidence of discrimination remained). The potentially significant influence of expert testimony underscores the importance of assiduous "gatekeeping" by trial judges.

Once presented with the additional information in the Barabins' response to the motion *in limine*, at a minimum the district court was required to assess the scientific reliability of the proffered expert testimony. *See Ellis*, 657 F.3d at 982 ("Under *Daubert*, the trial court must act as a 'gatekeeper' to exclude junk science that does not meet Federal Rule of Evidence 702's reliability standards . . .") (citation omitted). In failing to do so, the district court neglected to perform its gatekeeping role. *See Mukhtar*, 299 F.3d at 1066

("*Kumho* [*Tire Co. v. Carmichael*, 526 U.S. 137 (1999),] and *Daubert* make it clear that the court must, on the record, make *some* kind of reliability determination.") (citation omitted) (emphasis in the original).

Rather than making the required determinations, the district court left it to the jury to determine the relevance and reliability of the proffered expert testimony in the first instance. In its order, the district court wrote:

> There is obviously a strong divide among both scientists and courts on whether such expert testimony is *relevant* to asbestos-related cases. *In the interest of allowing each party to try its case to the jury*, the Court deems admissible expert testimony that every exposure can cause an asbestos-related disease.

(Emphases added).

Under our precedent, the district court's decision to allow presentation of the expert testimony to the jury without making any gateway determinations regarding relevance and reliability constituted an abuse of discretion requiring a new trial. *See id.* at 1063 (noting the "trial court's 'special obligation' to determine the relevance and reliability of an expert's testimony") (citation omitted); *see also id.* at 1068 (remanding for a new trial where the expert's testimony was admitted "without the proper reliability determination" and the error was not harmless).[7]

The district court committed reversible error when it failed to assess the proferred expert testimony for

---

[7] The Barabins do not argue that any error in admitting Dr. Cohen's testimony was harmless.

relevance and reliability. *See id.* Our decision in *Mukhtar* dictates that a new trial be provided in this circumstance. *See id.* Accordingly, the district court abused its discretion when it denied AstenJohnson's and Scapa's motions for a new trial. *See Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007) (explaining that we may reverse the denial of a motion for a new trial when the district court has "made a mistake of law") (citation omitted).

**JUDGMENT VACATED and CASE REMANDED for a new trial. Each party shall bear its own costs on appeal.**

TASHIMA, Circuit Judge, concurring:

I concur in all respects in the majority opinion, as well as in Judge Graber's concurring opinion. I write separately briefly to address another issue raised in this appeal, which the majority does not address, because it is likely to arise again on retrial.

At the trial, plaintiff Geraldine Barabin, Henry Barabin's wife, testified that she wanted to be able to maintain her health, continue caring for Henry, and be able to pay for Henry's necessary medications. She further testified that she did not "want to be left destitute," implying that she would be so left without a recovery from defendants. On cross-examination, defendants sought to impeach Mrs. Barabin's credibility regarding her fear of financial destitution by reference to collateral source evidence. The district court sustained plaintiffs' objection to this line of inquiry without extended discussion, citing the collateral source rule, which generally bars such evidence.

But no reported Washington case appears to have confronted the question of whether evidence of collateral source payments can be used for impeachment. Other jurisdictions, however, recognize an impeachment exception to the collateral source rule. *See, e.g., Corsetti v. Stone Co.*, 483 N.E.2d 793, 802 (Mass. 1985) ("Our cases have long recognized that in some circumstances, evidence of collateral source income may be admissible . . . 'as probative of a relevant proposition . . . *or credibility of a particular witness.*'" (emphasis in original)); *McKinney v. Cal. Portland Cement Co.*, 117 Cal. Rptr. 2d 849, 855-56 (Ct. App. 2002) ("There are exceptions to the [collateral source] rule of exclusion, for example, where the defendant is allowed to introduce otherwise inadmissible evidence . . . to impeach self-serving testimony . . . ."). Similarly, the Supreme Court has recognized that even evidence excludable under the *Miranda* rule is admissible for impeachment. *See Harris v. New York*, 401 U.S. 222, 224-25 (1971).

The district court appears not to have considered whether the Washington Supreme Court would, if so confronted, recognize an impeachment exception to the collateral source rule, but relied only on the "well-established" general rule. Because there appear to be good grounds to recognize an impeachment exception to the Washington collateral source rule, and because of the lack of controlling Washington case law, should the issue arise again on retrial, it would be helpful on appeal if the district court would articulate the reasons for its ruling on this issue.

GRABER, Circuit Judge, with whom TASHIMA, Circuit Judge, joins, concurring:

I concur fully in the majority opinion. The district court failed to explain adequately its reasons for admitting the expert testimony, and the error was not harmless. Accordingly, the judgment cannot stand.

I write separately, however, to express my disagreement with the rule that, pursuant to *Mukhtar v. California State University*, 299 F.3d 1053 (9th Cir. 2002), *amended* by 319 F.3d 1073 (9th Cir. 2003) (order), we must vacate the judgment and remand *for a new trial*. On remand, the district court dutifully will make a new *Daubert* determination. If the court finds that the expert testimony is, indeed, reliable, what purpose is served by empaneling a new jury and conducting another lengthy trial the outcome of which likely will be identical to the one already concluded? *Mukhtar* answers that query by holding that we cannot trust a district court not to succumb to "post-hoc rationalization." 319 F.3d at 1074. But we routinely trust district courts to reassess their earlier judgments in matters of more consequence than disputes over money. *See, e.g., United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005) (en banc). Regardless, I do not share *Mukhtar's* lack of faith in our district courts.

Were it not for *Mukhtar*, I would conditionally vacate the judgment and remand to the district court with instructions to make a new *Daubert* determination. If the expert testimony is reliable, then the original judgment should be re-entered. If the expert testimony is not reliable, then the court should preside over a new trial. *See Mukhtar*, 319 F.3d at 1077 (Reinhardt, J., dissenting from denial of reh'g en banc).

## APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

| | | |
|---|---|---|
| HENRY BARABIN and GERALDINE BARABIN, | ) | No. C07-1454 RSL |
| Plaintiffs, | ) | ORDER DENYING DEFENDANTS' |
| v. | ) | MOTIONS FOR A NEW TRIAL OR, |
| ASTENJOHNSON, INC. and SCAPA DRYER FABRICS, INC., | ) | IN THE ALTERNATIVE, REMITTITUR |
| Defendants. | ) | |

## I. INTRODUCTION

This matter comes before the Court on defendants' motions for a new trial or, in the alternative, for remittitur (Dkt. ## 386,396), and defendants' motion for an evidentiary hearing regarding potential juror misconduct (Dkt # 497). Defendants AstenJohnson, Inc. ("Asten") and Scapa Dryer Fabrics, Inc. ("Scapa") move for a new trial on essentially the same grounds: (1) juror misconduct, (2) improper evidentiary rulings, (3) incorrect jury charges, (4) improper and inflammatory argument by plaintiffs' counsel, (5) insufficient evidence to support the verdict, and (6) the unconstitutionality of Washington State tort law. Defendants request remittitur in the alternative to a new trial. Having heard oral argument on these issues

and having reviewed the submissions of the parties, the Court DENIES defendants' motions for a new trial and DENIES their alternative motions for remittitur. The Court also DENIES defendants' motion for an evidentiary hearing on potential juror misconduct.

* * *

**[2]**

## II. DISCUSSION

Defendants present a plethora of arguments, often summarily, in their motions for a new trial. Some arguments are raised for the first time, such as juror misconduct and inflammatory argument by counsel. Several other arguments – for instance, as to the sufficiency of the evidence presented, the Court's pervious evidentiary rulings, and the proper construction of Washington tort law – ask the Court to revisit questions extensively briefed and ruled upon in previous motions. This Order will focus primarily on the former category of arguments.

* * *

**[10]**

### B. Evidentiary Rulings

Defendants next move for a new trial on the basis of many of the Court's evidentiary rulings. "The trial court may grant a new trial, even though the verdict is supported by substantial evidence, if the verdict is contrary to the clear weight of the evidence, or is based upon evidence which is false, or to prevent, in the

sound discretion of the trial court, a miscarriage of justice." *United States v. 4.0 Acres of Land*, 175 F.3d 113, 1139 (9th Cir. 1999) (internal quotations omitted). "While the trial court may weigh the evidence and credibility of witnesses, the court is not justified in granting a new trial merely because it might have come to a different result from that reached by the jury." *Roy v. Volkswagon of Am., Inc.*, 896 F.2d 1174, 1176 (9th Cir. 1990) (internal quotations omitted). It is not "the courts' place to substitute our evaluations for those of the jurors." *Union Oil Co. V. Terrible Herbst, Inc.*, 331 F.3d 735, 743 (9th Cir. 2003) (reversing district court's grant of a new trial where the "case was an eight-day jury trial and involved several different environmental **[11]** pollutants and conflicting testimony."). For the reasons that follow, the Court finds no basis to order a new trial.

### 1. *Plaintiffs' Experts*

Defendants again challenge the admissibility of the testimony of almost every expert presented by the plaintiffs. Because these issues were briefed and decided previously through motions *in limine***,** the Court will only briefly address them here.

Rule 702 of the Federal Rules of Evidence provides for the admissibility of expert testimony if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. "Faced with a proffer of expert scientific testimony, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact

to understand or determine a fact in issue." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 U.S. 579, 592 (1993). This process requires the Court to make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id*.

Before trial, the Court scrutinized the credentials and proposed testimony of each of plaintiffs' experts and found that their testimony qualified as scientific, technical, or specialized knowledge which would help the jury to better understand the evidence and to determine facts at issue. The Court had initially excluded the testimony of industrial hygienist Kenneth Cohen because plaintiffs did not present sufficient evidence and argument to prove Mr. Cohen's expertise and the relevance of his testimony. Upon further motion (Dkt. #267), wherein plaintiffs presented, *inter alia*, Mr. Cohen's extensive experience and qualifications as an industrial hygienist and further noted that Mr. Cohen's testimony had been recently admitted under the more restrictive *Frye* standard in a case against the same defendants in Washington State court, the Court reconsidered its preliminary ruling and found Mr. Cohen's testimony **[12]** admissible under Fed. R. Evid. 702. *See Coulter v. AC & S, Inc. et al.*, King County Superior Court Cause No. 01-2-34675-0SEA. *See also Emrick v. AC &S, Asten Group, Inc., et al.*, Multnomah County (OR) Circuit Court Case No. 0002-02019 (Mr. Cohen testifying in similar dryer felt asbestos matter). Agreeing with the sound reasoning of Judge Armstrong in *Coulter*, the Court placed certain limits on plaintiffs' experts testimony, which they did not exceed. Defense counsel vigorously cross-examined plaintiffs' experts and

presented their own experts to the jury. The jury weighed the evidence presented and ultimately found for plaintiffs. There is no basis for a new trial here.

* * *

**[24]**

## III. CONCLUSION

For all the foregoing reasons, the Court DENIES defendants' motions for a new trial, or in the alternative, remittitur (Dkt. ## 386, 396), and motions for evidentiary hearing (Dkt # 497). The Clerk of the Court is directed to enter judgment in favor of plaintiffs Henry and Geraldine Barabin and against defendants AstenJohnson, Inc., and Scapa Dryer Fabrics, Inc. in the amount of $9,373,152.12, which reflects the $10.2 million jury verdict, less the offset in reasonable settlements of $836,114.61 (Dkt. # 539), with interest under 28 U.S.C.§ 1961 at the rate of 0.28 percent per annum as of February 2, 2010 (Dkt. # 452). The judgment shall be entered *nunc pro tunc* as of November 20, 2009, the date of the initial judgment. The Court urges the parties to resolve the issues raised in defendants' motion for continuance of temporary stay under Rule 62(d) (Dkt. # 540) and motion to apportion the supersedeas bond (Dkt. # 541). This Order supersedes the Court's prior Order entered on September 13, 2010. Dkt. # 539.

DATED this 10th day of December, 2010.

[signed]
Robert S. Lasnik
United States District Judge

## APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

| | | |
|---|---|---|
| HENRY BARABIN and GERALDINE BARABIN, | ) | No. C07-1454 RSL |
| Plaintiffs, | ) | ORDER ON MOTIONS |
| v. | ) | IN LIMINE |
| ALBANY INTERNATIONAL CORP., *et al.*, , | ) | |
| Defendants. | ) | |

## I. INTRODUCTION

This matter comes before the Court on plaintiffs' and defendants' various motions *in limine*. Plaintiffs allege that Henry Barabin developed mesothelioma as a result of his exposure to defendants' asbestos-containing products during his career at a Washington paper mill. Trial is scheduled for October 26, 2009 with AstenJohnson, Inc. ("Asten") and Scapa Dryer Felts, Inc. ("Scapa") as the two remaining defendants.

## II. DISCUSSION

Plaintiffs and defendants present a number of motions *in limine*, some of which the Court resolved from the bench at the oral argument held on

September 16, 2009. The Court addresses all of the motions below. The Court notes that the findings and conclusions in this order, like all **[2]** rulings *in limine*, are preliminary and can be revisited at trial based on the facts and evidence as they are actually presented. *See, e.g.*, *Luce v. United States*, 469 U.S. 38, 41-42 (1984) (explaining that a ruling *in limine* "is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the . . . proffer. Indeed even if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous *in limine* ruling."). Subject to these principles, the Court issues this ruling for the guidance of the parties.

## A. Plaintiffs'Motions *in limine*

* * *

**[3]**

### 2. Substantial Factor Causation

Plaintiffs' second motion *in limine* asks the Court to "clarify in advance of trial that the substantial factor standard of causation applies." Dkt. # 180 at 3. While there is no dispute that plaintiffs must demonstrate that each defendant's product was a substantial factor in causing Mr. Barabin's condition, *see* Dkt. # 205 at 3, the parties are sharply divided on how best to define the substantial factor standard. Plaintiffs contend that every occupational exposure is a substantial factor in contributing to Mr. Barabin's asbestos-related injury, Dkt. # 180 at 3, and that therefore they "need only to establish that defendants' exposures were part of the total dose of asbestos, and

need not apportion individual causal responsibility among defendants," *id*. at 4. According to plaintiffs, the substantial factor standard is qualitative, not quantitative, and the question is whether the exposure complained of was "important and material, and not insignificant." *Id*. at 5. Defendants, on the other hand, maintain that plaintiffs must prove that exposure from each defendant's product has met a specific, quantitative threshold at which exposure becomes significant. Dkt. # 205 at 5. According to defendants, "[a]n indicia of whether a particular activity or product was an important or material factor is whether that activity or product alone would be sufficient to cause the alleged condition." Dkt. # 204 at 6.

As the Court noted in its previous order, the Washington Supreme Court has not established how the substantial factor causation standard is to be applied in asbestos-injury cases. In *Mavroudis v. Pittsburgh-Corning Corp*., 86 Wn.App. 22 (1997), the Court of Appeals analyzed *Hue v. Farmboy Spray Co., Inc*., 127 Wn.2d 67 (1995), a pesticide case in which the Washington Supreme Court found that "the plaintiff only needed to show that a portion of a defendant's pesticide became part of the total cloud of pesticide that caused the damage."86 **[4]** Wn.App. 1 at 30. "[T]he *Hue* court certainly implied that asbestos-injury plaintiffs need not prove or apportion individual causal responsibility but need only show that the defendant's asbestos products were among those in the plaintiff's work environment when the injurious exposure occurred." *Id*. However, *Mavroudis* did not reach the issue since it found that the plaintiff had shown that exposure to the defendant's product, "standing alone, would have been sufficient to cause Mr. Mavroudis's injury." *Id*. at 31. The court based its determination on

the fact that the defendant's product was one of only three asbestos-containing products during the time of exposure, that the defendant's product gave off very substantial amounts of asbestos when cut, and that as little as ten percent of the asbestos exposure the plaintiff received would have been sufficient to cause his mesothelioma. *Id*.

Defendants cite several cases from Texas requiring plaintiffs to meet a quantitative standard. *See Borg-Warner Corp. v. Flores*, 232 S.W.3d 765 (Tex. 2007); *Georgia-Pacific Corp. v. Stephens*, 239 S.W.3d 304 (1st Dist. Tex. 2007). In *Borg-Warner*, the Texas Supreme Court held that plaintiffs must prove "that asbestos fibers were released in an amount sufficient to cause [the plaintiff's] asbestosis[.]" 232 S.W.3d at 772. The Texas Court of Appeals for the First District later interpreted *Borg-Warner's* holding: "To prove substantial-factor causation, a plaintiff must show both frequent, regular, and proximate exposure to the product *and* reasonable quantitative evidence that such exposure increased the risk of developing the asbestos-related injury. It is not adequate to simply establish that 'some' exposure occurred." *Georgia-Pacific*, 239 S.W.3d at 312 (citing *Borg-Warner*, 232 S.W.3d at 769-72, 773) (emphasis in original). Other states, on the other hand, apply a much more relaxed standard of causation. *See Ingram v. AC&S, Inc.*, 977 F.2d 1322, 1343-44 (9th Cir. 1992) ("Oregon has discarded the concepts of proximate cause and legal cause. . . . Under Oregon law, once the plaintiff presents evidence that the defendant's asbestos was present in the workplace, it is the jury's task to determine if the presence of that asbestos played a role in the occurrence of the plaintiff's **[5]** injuries.").

There is no question that under Washington law it is plaintiffs' burden of proof to demonstrate that each defendant's asbestos-containing product was "an important or material factor and not one that is insignificant." *Mavroudis*, 86 Wn.App. at 28. Plaintiffs must prove that Mr. Barabin was exposed to defendant's product and that the product was a substantial factor in bringing about the asbestos-related disease. Plaintiffs need not meet some quantitative threshold in order to establish causation. Nor must they establish that defendant's product was *the* cause of plaintiff's mesothelioma or could alone have caused the disease.[1] Whether a defendant's product was a substantial factor will depend on a number of factors, including the number of asbestos sources and their relative contributions, and the jury will ultimately decide whether a defendant's asbestos-containing product was a substantial factor, i.e., an important and material factor, in causing plaintiff's disease.

The Court believes that this articulation of the standard comports with the Washington Supreme Court's analysis in *Lockwood v. AC&S, Inc.*, 109 Wn.2d 235 (1987). The *Lockwood* court found that the evidence presented by plaintiff created a reasonable inference that he was exposed to defendant's product. "When this is combined with the expert testimony that all exposure to asbestos has a cumulative effect in contributing to the contraction of asbestosis, it would be reasonable for a jury to conclude that [the

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[1] Although whether a particular product would alone be sufficient to cause the injury may very well be "[a]n indicia of whether a particular activity or product was an important or material factor," Dkt. # 204 at 6, it is by no means necessary in order to establish substantial factor causation.

plaintiff's] exposure to [the defendant's] product was a proximate cause of his injury." *Id.* at 247-48. The *Lockwood* court did not require the plaintiff to establish that the defendant's product alone would have caused the **[6]** plaintiff's injury.[2] Nor did it hold that there is no such thing as a *de minimis* contribution. Rather, it noted "a number of factors" a jury may consider in determining whether causation has been established. *Id.* at 248. In keeping with *Lockwood*, defendants are free to provide evidence that, for example, their particular "type[] of asbestos products," *id.*, was not a significant contributor to the total dose of asbestos to which plaintiff was exposed. *See* Dkt. # 204 at 4.

In sum, the Court finds that the substantial factor causation standard is a qualitative one that does not require hard and fast numerical absolutes tracing each defendant's asbestos fibers to the plaintiff's lungs. The standard articulated by the Court permits each party to make its case regarding what the jury should consider "substantial."

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[2] *Cf. Mavroudis*, 86 Wn.App. at 29 n.3 ("Lockwood was a challenge to the sufficiency-of-the-evidence case and not an instructional-error case. However, the court's ruling that where the evidence showed exposure to the defendant's product and an expert testified that all exposure to asbestos has a cumulative effect in contributing to the contraction of asbestosis, the jury could reasonably find that exposure to the defendant's product was a proximate cause is consistent with the giving of the substantial factor instruction.") (citing *Lockwood*, 109 Wash.2d at 247).

**[10]**

**B. Testimony that Every Exposure is Causative**

Asten's motion *in limine* "to exclude testimony that every asbestos fiber is causative," Dkt. # 188, and Scapa's motion *in limine* No. 14 "to preclude plaintiffs' expert from testifying that every asbestos fiber is a substantial contributing factor," Dkt. # 194, both seek to preclude expert testimony that each and every inhalation of asbestos operated as a substantial factor causing Mr. Barabin's disease. Defendants contend that this theory cannot meet the *Daubert* admissibility standard because it is unsupported in the relevant scientific community.

The admissibility of expert testimony is governed by Fed. R. Evid. 702. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court held that when faced with a proffer of scientific expert testimony, the trial judge must undertake "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue," *id*. at 592-93. The Court identified four possible factors a trial judge might use in conducting this assessment: "[1] whether the theory or technique employed by the expert is generally accepted in the scientific community; [2] whether it's been subjected to peer review and publication; [3] whether it can be and has been tested; and [4] whether the known or potential rate of error is acceptable." *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1316(9th Cir. 1995) (citing *Daubert*, 509 U.S. at 593-94).

Defendants present a host of cases from around the country holding that the theory that any exposure is a substantial factor causing asbestos-related injury is either inadmissible or insufficient to support causation. *See* Dkt. # 194 at 4. While plaintiffs offer several cases **[11]** suggesting otherwise, Dkt. # 217 at 5-6, they primarily rely on an amicus brief written by Dr. Laura S. Welch, Dkt. # 218, Ex. 2. However, while plaintiffs describe the brief as "the medical and scientific community's last and best word on the fundamental principles of asbestos medicine," Dkt. # 217 at 3, they cite no authority supporting this grand statement about the brief's reliability. To be sure, Dr. Welch's brief does assert that "[t]he mainstream scientific community has long recognized and continues to recognize today that there is no 'safe' level of exposure to asbestos," Dkt. # 218, Ex. 2 at 319. However, the Court recognizes that this brief is an advocacy piece intended to persuade the Michigan Supreme Court, not an independent, peer-reviewed study. Plaintiffs also rely on an article summarizing the Helsinki study, a consensus report published after a convening of various scientists and experts on asbestos and associated disorders. Dkt. # 218, Ex. 3. The report generally concludes that "[a]n occupational history of brief or low-level exposure should be considered sufficient for mesothelioma to be designated as occupationally related," *id*. at 26, while noting that "very low background environmental exposures carry only an extremely low risk," *id*., suggesting that there are *de minimis* exposures which are not causative of asbestos-related disease. Plaintiffs have also presented the opinions of some influential agencies and organizations, *see, e.g.*, Dkt. # 218, Ex. 4 (World Health

Organization concludes that "there is no safe threshold level of exposure").

There is obviously a strong divide among both scientists and courts on whether such expert testimony is relevant to asbestos-related cases. In the interest of allowing each party to try its case to the jury, the Court deems admissible expert testimony that every exposure can cause an asbestos-related disease.

**C. James Millette Testimony**

Asten's motion *in limine* to exclude certain testimony of James Millette, Dkt. # 192, and Scapa's motion *in limine* No. 12 to the same effect, Dkt. # 178, seek to exclude testimony from plaintiffs' expert James Millette regarding tests he performed in 1998 and 2003 on dryer felt **[12]** materials. Defendants contend that Dr. Millette's tests fail to meet the *Daubert* standard. Specifically, they maintain that the tests are unreliable because they are not generally accepted in the scientific community and irrelevant because they will not be helpful to the factfinder given the disparity between his testing conditions and the actual conditions at the Camas Mill. Asten also points the Court to a recent King County case in which Judge Sharon Armstrong circumscribed Dr. Millette's testimony by requiring the plaintiff to acknowledge that his tests were performed under laboratory conditions which are not the same as the conditions at the mill. Dkt. # 237, Ex. A at 24. According to plaintiffs, defendants' claims that Dr. Millette did not follow a generally accepted protocol are misleading in light of Dr. Millette's understanding that "there is no standard method for the analysis of dryer felt textiles." Dkt. # 216 at 23. Plaintiffs note that Dr. Millette's

1998 test did result in publication, Dkt. # 215 at 5 ("Dr. Millette's 1998 study on dryer felts is the only such study that has been published on the topic in the peer-reviewed literature."), but seem to concede that the conditions of Dr. Millette's tests do not exactly replicate the conditions at the Camas Mill, *id*. at 6. According to plaintiff, the disparities in water content, angle of airflow across the dryer felt, and ventilation "go to the weight the jury should accord the evidence, not its admissibility." *Id*.

The Court is troubled by the marked differences between the conditions of Dr. Millette's tests and the actual conditions at the Camas Mill. The Supreme Court has found that a trial judge did not abuse his discretion by rejecting an expert's reliance on studies that "were so dissimilar to the facts presented in th[e] litigation." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 144-45 (1997). In view of this concern, the Court generally finds that Dr. Millette's tests and corresponding testimony are admissible with the restrictions imposed by Judge Armstrong in the previous case, i.e., plaintiffs must acknowledge to the jury that Dr. Millette's tests were performed under laboratory conditions which are not the same as conditions at the Camas Mill.

**D. Kenneth Cohen [13]**

Asten seeks to exclude plaintiffs' expert witness Kenneth Cohen. Dkt. # 186. Asten contends that Mr. Cohen fails to meet the *Daubert* standard because he is not qualified to testify as an expert witness and because his "reentrainment" theory, stating that asbestos released within a building will be disturbed and re-deposited allowing for re-exposure, Dkt. # 187,

Ex. D at 16-17, is not based on accepted scientific methodology and has not been subject to peer review.

Fed. R. Evid. 702 allows a witness "qualified as an expert by knowledge, skill, experience, training, or education," to testify as an expert if "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

Asten points to several notable deficiencies in Mr. Cohen's credentials. Although Mr. Cohen claims a doctorate in occupational health from California Western University, he does not have a masters degree, he received his Ph.D via mail within nine months of acceptance to the university, there was neither an Occupational Health Department nor a professor of occupational health at the university at the time he obtained his degree, and California Western University was not accredited by the State of California to issue industrial hygiene degrees. Dkt. # 186 at 2- 3. Plaintiffs' response does little to alleviate these concerns with Mr. Cohen's credentials. Plaintiffs merely emphasize Mr. Cohen's 27-year experience in the field of Industrial Hygiene, Dkt. # 213 at 1, and assert that "the witness need not possess academic credentials to be an expert," *id*. at 2. But the case cited by plaintiffs, *Ma'ele v. Arrington*, 111 Wn.App. 557 (2002), does not stand for plaintiffs' proposition that "training in a related field may alone be sufficient to qualify someone as an expert witness," Dkt. # 213 at 2. In *Ma'ele*, the court found that the expert in question was qualified to testify that a car crash like the one at issue did not cause injuries even though he was not a medical doctor. "Tencer has a Ph.D in engineering, teaches at a reputable medical school, and does

federally funded research. His education and experience qualified him as an expert." 111 Wn.App. at 563. Moreover, plaintiffs' assertion that Mr. **[14]** Cohen's training qualifies him as an expert is devoid of any citations to the record supporting this claim.

Asten further notes that because Mr. Cohen's testimony is not based on any evidence regarding dryer felts at paper mills, it is "untethered" to the facts of this case and therefore irrelevant and likely to mislead the jury. Dkt.# 186 at 10. Plaintiffs respond only with a citation to Fed. R. Evid. 703 and a vague assertion that "Mr. Cohen's opinion testimony will be based on facts or data reasonably relied upon by experts in his field." Dkt. # 213 at 3-4. Plaintiffs do not so much as mention what these elusive facts are let alone how an opinion based on these facts is relevant to the circumstances of this case.

Because of his dubious credentials and his lack of expertise with regard to dryer felts and paper mills, plaintiffs' expert Kenneth Cohen is excluded.

* * *

**[30]**

## III. CONCLUSION

The Court's order hereby addresses all of the motions *in limine* submitted by the parties.

DATED this 18th day of September, 2009.

[signed]
Robert S. Lasnik
United States District Judge