

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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

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

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

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

APPEARANCES:

MICHAEL B. KING, Seattle, Washington, for Appellants.

PHILIP L. TALMADGE, Tukwila, Washington, for Appellees.

1 [0:00]

2 **COURT STAFF:** The Court of Appeals for the Ninth Circuit is now in session.

3 **CHIEF JUDGE KOZINSKI:** Good afternoon. Please be seated. We're here for the en banc  
4 argument in *Barabin versus AstenJohnson*. Counsel ready?

5 **MR. KING:** May it please the Court. My name's Michael King. I'm here on behalf of the  
6 defendant and respondent Asten. Mr. Gilbreath [gesturing], who's with me at counsel table, is  
7 here on behalf of the defendant and respondent Scapa. I'll be doing the argument for both of our  
8 clients.

9 The three-judge panel correctly concluded that the district court abused its discretion by  
10 failing to do *Daubert* balancing but, evidently feeling constrained by this Court's decision in  
11 *Mukhtar*, the panel did not reach the merits and resolve those, but instead vacated, ordered a new  
12 trial, and sent the *Daubert* issues back for the gatekeeping that didn't happen the first time.

13 The question of [1:00] relief in this case is not controlled by *Mukhtar*. This Court may, and  
14 should, reach the *Daubert* merits. And we believe that when you do, you will be persuaded  
15 ultimately that the defendants are entitled to a judgment as a matter of law. I will address first the  
16 procedural issues presented by the *Mukhtar* question, and then deal with the *Daubert* merits.

17 Now, turning to the procedural issues. *Mukhtar* does not control this — the issue of relief in  
18 this case — because in *Mukhtar*, the defendant was seeking only a new trial. We are seeking  
19 judgment as matter of law. Now, the right of the circuit courts of appeals to grant judgment as a  
20 matter of law is firmly established and has been ever since the United States Supreme Court  
21 resolved that question in *Neely versus Martin* in 1967.

22 Thirty-three years later, the Supreme Court in *Weisgram* held that the circuit courts could  
23 grant such relief after having determined that the district court had erred in the admission of  
24 expert testimony. They were not required to remand the choice between judgment as matter of  
25 law and new trial back to the district court to decide. As the Supreme Court explained [2:00] in  
26 *Weisgram*, it's a question of exercising appellate discretion — asking yourself: "Is the district  
27 court in a superior position to resolve the question there, of the choice between judgment as a  
28 matter of law or new trial?"

29 **JUDGE RAWLINSON:** So counsel, are you asking us to actually engage in the *Daubert*  
30 analysis here on appeal?

1           **MR. KING:** Absolutely, I am your Honor. Because — and I will now address this point —  
2 this district court's not in a superior position here, and if it's not in a superior position here, I  
3 think that *Neely* and *Weisgram*, building on *Neely*, made clear that there's a powerful reason for  
4 you to do it now because —

5           **JUDGE FLETCHER:** Let me ask you this. Over here. [Gesturing.]

6           **MR. KING:** Thank you, your Honor.

7           **JUDGE FLETCHER:** Judge Fletcher. Let me ask it this way. We would — if there had  
8 been a *Daubert* hearing in the district court, we would review that for abuse of discretion. Is that  
9 right?

10          **MR. KING:** Yes, I —

11          **JUDGE FLETCHER:** In order for us to go, then, where you want us to go, we would have  
12 to conclude that if there *had* been a *Daubert* hearing, and if information had come out of which  
13 [3:00] we're not necessarily aware of at this time, it would have been abuse of discretion for the  
14 district judge to admit it. That's a pretty big jump for you to ask us to make.

15          **MR. KING:** I don't think so your Honor, because all I'm asking you to do is to take the  
16 *Neely* principle and *Weisgram* and apply it to this analysis. Just ask the question: "Is the district  
17 court now still in a superior position?" It presumptively was when the record was first being  
18 developed below, but the record's fully developed now. So is the district court in a superior  
19 position to do what it failed to do last time? No. There are three reasons.

20          **JUDGE WATFORD:** Counsel before you go.

21          **MR. KING:** Yes, your Honor.

22          **Court:** To the three reasons, can I just ask one question: Did you make this argument to the  
23 three-judge panel, or is this a rehearing [unintelligible]?

24          **MR. KING:** Oh yes, absolutely, this is in our briefs. I mean, our push was: District court  
25 didn't do *Daubert* balancing, and now we gotta deal with the issue; that's error; the burden's on  
26 them to establish harmlessness. And we laid out the case for why these experts shouldn't have  
27 been allowed, and we asked for judgment as a matter of law, and it was all laid out — it was  
28 based on *Weisgram*. I think Judge Rawlinson would confirm that.

29          **JUDGE RAWLINSON:** I was there, but this argument was not your main argument as I  
30 recall. But, in any event, [4:00] if we disagree with you that *Mukhtar* does not apply, where does  
31 that leave you?

1           **MR. KING:** Well, if *Mukhtar* doesn't apply, then I think you should do what the panel did.  
2 But if *Mukhtar* does apply, you should do what the panel did. But *Mukhtar* doesn't apply. First  
3 of all, you've got a record that is fully developed on this issue. There was a massive motion *in*  
4 *limine* exercise. Those two white notebooks [pointing] are the record that was developed. There  
5 is no indication — there's never been an indication from the plaintiffs — that they think, oh,  
6 “somehow it was an incomplete process and we need to go back to do more.” Second, the issues  
7 were thoroughly ventilated again during the course of the trial because we had to try the *Daubert*  
8 issues to the jury.

9           **JUDGE RANDY SMITH:** If you would, if you would, counsel —

10          **MR. KING:** Yes, Your Honor.

11          **JUDGE RANDY SMITH:** Would you go to *Mukhtar*. It seems to me that when I review  
12 the *Mukhtar* decision, it seems as if the *Mukhtar* panel said (a) there wasn't a decision made, and  
13 then went to a harmless-error review. And said, [5:00] “this is not harmless error and therefore  
14 we're gonna have a new trial.”

15          **MR. KING :** They did.

16          **JUDGE RANDY SMITH:** In other words, what they said was, “Well, we don't think they  
17 made a correct decision here. We don't think the district court ever said what they should have  
18 said, or ever gave it what it needed to do.” But then they went to the further analysis: “Well if the  
19 district court abused its discretion by *not* making a decision, then we have to determine if there's  
20 harmless error.”

21           Are you suggesting that that's what *we* should do? I mean, it seems to me that there are two  
22 ways to look at this. One is, should I engage in a *Daubert* review, which I'm not exactly anxious  
23 to do. [Chuckling amid audience.] But the second is, well, if the *Daubert* review was not done,  
24 should I then say: “Is there harmless error?” Because in [6:00] every *other* evidentiary decision  
25 that I make, if the decision is not done right — and it wasn't, or you're arguing that it wasn't, it  
26 seems to me they say it wasn't — then I go to harmless-error review and, therefore —

27          **MR. KING:** You look at the evidence.

28          **JUDGE RANDY SMITH:** Well, I say does this evidence — if this evidence sway the jury,  
29 or there is there enough evidence outside there otherwise that this didn't make any difference?

30          **MR. KING:** And this evidence is the plaintiff's case. It's just like in *Weisgram*.

1           **JUDGE RANDY SMITH:** You didn't answer my question. I'm not talking whether it is.  
2 Are you asking me to undertake harmless-error review? Are you asking me to take a *Daubert*  
3 analysis?

4           **MR. KING:** I'm asking you to do a harmless-error analysis, which means you will be  
5 looking at these experts and evaluating their admissibility under *Daubert*.

6           **JUDGE RANDY SMITH:** Well, just a minute. That's not exactly what, what a harmless-  
7 error review does! We're not talking then, in harmless-error analysis, with reliability. [7:00]  
8 We're not talking about whether they have relevance. We're saying: "Is it harmless given all that  
9 was in the case?"

10           **MR. KING:** The only thing that was in this case that got them to the jury were these  
11 experts. And it is *harmful*, and not harmless, because if the *Daubert* analysis is done — and that  
12 *is* the harmless-error inquiry that's triggered in this case. The analysis wasn't done, there wasn't  
13 gatekeeping. And *if* you do that analysis, you're perfectly well in a position to conclude that  
14 Millette shouldn't have come in, Cohen shouldn't have come in, Brodtkin shouldn't have come  
15 in, and we're done with this case.

16           Now, the reason *Mukhtar* doesn't apply, Your Honor, is because — and Judge O'Scannlain  
17 I think will recall this; I had to check the briefs to make sure — the defendant, appellant, in that  
18 case wasn't *asking* for judgment as a matter of law. It was *only* a question of new trial. Was it  
19 going to be ordered flat out by the circuit court, or was there going to be a remand for  
20 reconsideration of the evidence, and *possibly* an order [8:00] for a new trial? We are dealing  
21 with the *Neely, Weisgram* situation. We are asking for judgment as a matter of law. That *was* our  
22 first relief thrust, request in our briefing, which is before and which was before the panel.

23           **JUDGE TALLMAN:** But Mr. King, in *Mukhtar*, weren't we implicitly deciding that not  
24 only did the district court err in not conducting a *Daubert* analysis, had it done so it would have  
25 excluded the expert's testimony as unreliable, and therefore we granted the appellant's request  
26 for a new trial, which is what they asked for? Are you asking us to do exactly the same thing  
27 here?

28           **MR. KING:** No. I — in that case, there wasn't any *express* analysis that experts should've  
29 been included. There were concerns expressed about the expert, and the issue was sent back.

30           **JUDGE TALLMAN:** I agree with you. But how can we make a harmless-error analysis  
31 unless we decide that the evidence should never have come in? Otherwise, [9:00] it doesn't

1 make any sense to remand it for a new trial.

2 **MR. KING:** Your Honor, what's the material difference between the *Weisgram* situation,  
3 where the error was in doing the balancing, and here, where the error in the first instance is the  
4 balancing wasn't done at all? In answering Judge Fletcher's question, I was pointing out that in  
5 *Neely* you are balancing two considerations. One, is the superior court in the superior pos — is  
6 the district court in the superior position to make the call? And that's why I was saying: One, we  
7 have a thoroughly developed record here in the motion *in limine* process which was replicated at  
8 the trial. Two, nothing came out at the trial suggesting that the ultimate resolution of the *Daubert*  
9 issues is gonna be based on the feel for the credibility of these experts. And three, the defendants  
10 here have not suggested either that there's been a development in the science that might allow  
11 them to fill the *Daubert* gap nor, as a matter of a more straightforward *Neely* analysis, have they  
12 suggested "well now, [10:00] wait a minute, before somebody does judgment as a matter of law,  
13 there were some problems at the trial and we wanted opportunity to address that with the district  
14 court."

15 *They* have not suggested that. Their — the second page of their brief, the last page of the  
16 introduction of their brief, is just like the plaintiff in *Neely* who said: Properly instructed jury,  
17 fair trial, I wanna keep my judgment. So, all I'm saying is given that *Mukhtar* is a case where  
18 there was *only* a request for a new trial, given the jurisprudence the United States Supreme Court  
19 has laid down about the test that you apply as a circuit court of appeals when there is a JMOL  
20 request on the table from the appellant, you look at, well: There was error. Now, is the superior  
21 court in the — is the district court in the better position? Is there something we need to send back  
22 still before we choose the relief question?

23 **JUDGE TALLMAN:** But suppose *Mukhtar* had granted — there had been a JMOL, and  
24 that was the relief that they sought on appeal? Couldn't the panel have come out exactly the  
25 same way?

26 **MR. KING :** Yes. Doing a *Neely* analysis [11:00] in concluding that, you know, there was  
27 error, but there's something about the record here — and what *Neely* says is look to see whether  
28 the prevailing plaintiff is saying, oh, "Something happened down there that was wrong. I know  
29 we won, but there was evidence that was excluded. And you know, that changes the balance.  
30 And you're not familiar with that. We need go back to the district court and make the pitch that  
31 if we're gonna lose something, we lose our judgment, but we get a new trial." But as the United

1 States Supreme Court pointed out in *Neely*, when you've got a party who's not making any such  
2 suggestion — they're saying the case was properly tried, it was properly instructed, it was a fair  
3 proceeding we have no quarrel on our own that has fairness implications —

4 **JUDGE TALLMAN:** But your argument is the same argument that we heard in *Mukhtar*,  
5 which is that the district court's failure to conduct a *Daubert* hearing, which is more than a  
6 procedural error because the Supreme Court has said that that is an abuse of discretion [12:00]  
7 if it's not done —

8 **MR. KING:** Right. And it wasn't done —

9 **JUDGE TALLMAN:** — necessarily requires the Court on review to determine if that  
10 hearing had resulted in actual findings, the findings should have been that the expert's opinion  
11 should not have been admitted.

12 **MR. KING:** Yes.

13 **JUDGE TALLMAN:** And if the opinion had not been admitted, then what would the effect  
14 have been on the plaintiff's case? And I agree with you, if we exclude all the expert testimony in  
15 this case there's nothing left, as I understand —

16 **MR. KING:** Oh, if you exclude Dr. Millette, alone, there's not gonna be anything left.  
17 Because their causation expert has said: "Well, rule out the ambient range evidence." Dr.  
18 Millette is the only witness they put forward to demonstrate that our product caused releases in  
19 excess of ambient range, and Dr. Millette has massive reliability and relevance problems. He  
20 didn't even follow his own protocol. You don't have extrapolatibility established. In *Schudel*,  
21 you said that the absence of extrapolatibility, when you've got a question about a foundational  
22 scientific [13:00] basis for the opinion that doesn't match up with the facts of the case — so you  
23 gotta have a demonstration you can extrapolate — in *Schudel* you said if you've got that problem  
24 it's over. The expert's out. And that is, frankly, a demonstration — I don't think this is going to  
25 be such a big deal!

26 **JUDGE McKEOWN:** Mr. King, we've talked about two alternatives.

27 **MR. KING:** Yes, Your Honor.

28 **JUDGE McKEOWN:** Granting you judgment as a matter of law.

29 **MR. KING:** Yes.

30 **JUDGE McKEOWN:** A new trial, which is a possibility.

31 **MR. KING:** Yeah.

1           **JUDGE McKEOWN:** And then there's the middle ground, a different ground, and that  
2 would be a remand on the *Daubert* issue, so it it would then come back to us in the normal  
3 course of things. And I would appreciate your comment on why a limited remand for *that*  
4 purpose would not be appropriate.

5           **MR. KING:** Because it frustrates the policy identified in *Neely* and *Weisgram*, which is if  
6 the district court is not in the superior position, you can do the job yourself just as well. And —

7           **JUDGE McKEOWN:** But we're not mandated to do that.

8           **MR. KING:** No, but there was a test outlined in *Neely* and *Weisgram*. [14:00] You are  
9 balancing two competing interests. Justice Ginsberg's opinion about this is very, very clear.  
10 Because there's an, on the other hand, if the district court is *not* in the superior position and you  
11 send it back nonetheless — Your Honor, you just put your finger on the key here: And we'll be  
12 back. And that means extended proceedings and delay, and that is contrary to the plainly  
13 expressed policy, recognized in *Neely*, that we've got to also balance the imperative —

14           **MR. KING:** Yes, Your Honor.

15           **CHIEF JUDGE KOZINSKI:** Excuse me, when would you be back? Let's take the middle  
16 hypothetical.

17           **MR. KING:** Yes.

18           **CHIEF JUDGE KOZINSKI:** And you're now back. You go before the district court. And  
19 of course the district court says directed verdict, you get your JMOL, then that's then the case,  
20 and *they'll* come back.

21           **MR. KING:** Right.

22           **CHIEF JUDGE KOZINSKI:** Okay.

23           **MR. KING:** So that's how we'll get back that way.

24           **CHIEF JUDGE KOZINSKI:** I understand that. Let's say the district court says "I've done  
25 the balancing [15:00] and the *Daubert* experts are fine," then you're back that way. Right?

26           **MR. KING:** Yes.

27           **CHIEF JUDGE KOZINSKI:** But what if the district court says new trial?

28           **MR. KING:** Well, we're not gonna come back, and they can't come back, as a matter of  
29 right, so then there's going to be new trial.



1           **CHIEF JUDGE KOZINSKI:** Intervening trial, which would wash out this issue? Or would  
2 it? Would it?

3           **MR. KING:** Well, it's difficult to imagine.

4           **CHIEF JUDGE KOZINSKI:** Can you then take an appeal after the second trial,  
5 regardless, or does this issue die if we don't handle it now?

6           **MR. KING:** Well, if you don't handle it now and we go back, it's difficult to imagine if the  
7 court sided with *us* that there would be any other result than JMOL. I've just given you the basic  
8 core description why. If the district court *didn't* side with us and said Millette's fine, and  
9 Brodtkin's fine, and Cohen's fine, well, then, the district court will reinstate its judgment and  
10 we'll be up here saying it was an abuse of discretion.

11           **CHIEF JUDGE KOZINSKI:** I understand, that —

12           **MR. KING:** Now I'm [16:00] trying to imagine on this record some sort of middle ground  
13 where we end up going to a trial —

14           **CHIEF JUDGE KOZINSKI:** The district court says I made a mistake on *Daubert* —

15           **MR. KING:** Yes.

16           **CHIEF JUDGE KOZINSKI:** — and I'm not going to give you judgment, for whatever  
17 reason [unintelligible], but I will let you have a new trial.

18           **MR. KING:** Ah, well, then we will be coming back because, suppose we have a new trial  
19 and we lose anyway, and there's a verdict, we're gonna be coming back saying we should have  
20 gotten a JMOL because it was an abuse of discretion to say with these experts out they get to go  
21 to the jury anyway?

22           **CHIEF JUDGE KOZINSKI:** Will that issue be preserved after the second trial?

23           **MR. KING:** Yes, it will be preserved.

24           **CHIEF JUDGE KOZINSKI:** On summary judgment it's not, if —

25           **MR. KING:** No. But it will be preserved because — I think in this context, where you're  
26 sending back for a limited remand, and the district court says “on this evidence I'm gonna order  
27 a new trial, these experts shouldn't have come in, but I'm not gonna give you JMOL, I'm gonna  
28 order a new trial.” Now, you could avoid that by making your instructions very clear, the scope  
29 of the remand opinion saying, [17:00] “*if you conclude that these experts are out we see no*  
30 *rational basis for ordering a new trial.*”

1           **CHIEF JUDGE KOZINSKI:** My question was the issue would be preserved. I mean the  
2 answer to the question I asked is the issue would be preserved but at the cost of a new trial.

3           **MR. KING:** Yes. And that's why I wanted. And the inter —

4           **CHIEF JUDGE KOZINSKI:** That's your answer, okay.

5           **MR. KING:** I think — yes, that is my answer. And let me take that answer and go back to  
6 Judge McKeown's inquiry. Because Judge McKeown, you referred to "in the ordinary course."  
7 This is where *Neely* and *Weisgram* are very clear. Your discretion under *Neely* and *Weisgram* in  
8 dealing with the JMOL request, where you have decided that there was an error, it affects  
9 evidence, and you conclude it is not harmless because that evidence shouldn't have been heard.

10           Your discretion always is to balance, on the one hand: "Well, is the superior court in the  
11 position to make the call?" Superior — is the district court, sorry, in the superior position to  
12 make the call. Because if it's not, that kicks in the imperative of speedy and efficient litigation  
13 [18:00] and this whole business of saying we don't wanna do this. "Make the district court do  
14 the job, go back there, maybe you'll come back to us later" is contrary to the policy of *Neely* and  
15 *Weisgram*, which is: "Look, if the district court's not in a superior position, we need to do this  
16 now!" And I will —

17           **JUDGE McKEOWN:** Let me ask you about that. Because as I hear you, everything's in  
18 those two little notebooks on your desk.

19           **MR. KING:** For the motion *in limine* proceedings, correct.

20           **JUDGE McKEOWN:** And they're also on our I-Pads and wherever. But, is it clear that the  
21 *Daubert* hearing would be limited to that? That it would simply be on the pleadings, on the  
22 paper? Would there potentially be *some* testimony? In other words different district judges  
23 conduct these *Daubert* hearings differently. So I'm somewhat at a loss to completely buy into the  
24 argument that everything's in your two notebooks and that we're just gonna do exactly what the  
25 district court is going to do.

26           **MR. KING:** All right. Those two notebooks [19:00] are the motion *in limine* papers —

27           **JUDGE McKEOWN:** Well I — you know, as a metaphor, it's a metaphor.

28           **MR. KING:** And we've cited the trial transcript to demonstrate both that, you know, these  
29 issues were exhaustively presented. We had to try the factors to the jury. In this case I — we  
30 asked for a "*Daubert* hearing," and we were turned down. And they —

31           **JUDGE McKEOWN:** And now you don't want one!

1       **MR. KING:** Well, no. They didn't want a *Daubert* hearing unless they lost. And then they  
2 lost Kenneth Cohen. And they got him back. I'm saying, in your exercise of discretion, look at  
3 this record and ask yourself: "Where is any indication that a hearing with live testimony from  
4 these experts is needed now? Where is there any indication of one of those factors present here  
5 which argues for deferring to the superior position of a trial judge?" Nothing.

6       We have a thoroughly developed record. We developed it *in limine* and we developed it at  
7 trial. They have never suggested, oh, "there's new developments in the sciences." They have  
8 [20:00] never suggested, well — as you can always do when you're facing a JMOL demand, in  
9 your brief you can say — well, "if you decide you're on the verge of flushing us, send us back  
10 for a new trial, because here's this situation: there was this witness, or there's been this new  
11 development." Their statement in their briefing has been as definitive on this issue, as definitive  
12 as the statement of the plaintiff in *Neely*.

13       **JUDGE RANDY SMITH:** But if that's so counsel, why are you objecting so to this remand  
14 for a new trial?

15       **MR. KING:** Your Honor, I hit a triple in the front of the panel and I think that my clients  
16 are entitled to a home run.

17       **JUDGE RAWLINSON:** Not on the [unintelligible].

18       **JUDGE RANDY SMITH:** But just a minute. Just a minute. If, in fact, I suggest that the  
19 district court has abused its discretion by not ruling, and I find there's harmless error, then, as  
20 they did in the *Mukhtar* case, I remand for a new trial. At that point you have a chance to present  
21 all this good stuff to the DJ. Having been in your position a few times in Idaho, I'm sure that I  
22 can find there'd be some DJ [21:00] who *might* give them more chance to put on evidence, and  
23 with other witnesses, as best as your notebooks will suggest. I'm just saying to you, if I follow  
24 through the procedure, I'm wondering why it is at *this* point I have to say, well, "there's just  
25 nothing I can do except to decide *Daubert*." If I find harmful error, I can reverse and remand for  
26 a new trial, just as we've done before.

27       **MR. KING :** But the United States —

28       **JUDGE RANDY SMITH:** And at that point, well, I don't find any case law that suggests I  
29 *can't* do that!

30       **MR. KING:** Oh, I think *Neely* suggests that, you know, if you don't, if you cannot find the  
31 district court's in a superior position to evaluate the *Daubert* issues —

1           **JUDGE RANDY SMITH:** Well what — just a minute, I don't —

2           **MR. KING:** Then I think it is an abuse of appellate discretion.

3           **JUDGE RANDY SMITH:** — Just a minute; I don't have to! All I have to say is “they  
4 didn't make a correct decision,” as I do in every evidentiary decision I make, “they didn't make  
5 a correct decision [22:00] and it's not harmless; and therefore, send it back, it's a new trial.”

6           **MR. KING:** I disagree Your Honor. And —

7           **JUDGE RANDY SMITH:** What's my best case for what you're saying?

8           **MR. KING:** *Neely* and *Weisgram*.

9           **JUDGE RANDY SMITH:** *Neely* did not say that.

10          **MR. KING:** *Neely* did say that there is a policy imperative of speedy and efficient litigation.

11          **JUDGE RANDY SMITH:** That's your best argument?

12          **MR. KING:** *Weisgram* took it to the next level with the expert.

13          **JUDGE RANDY SMITH:** I do that every day with evidence. I constantly — if the  
14 evidence is not harmless, I send for a new trial, and *Neely* has never been something the Supreme  
15 Court has overturned me about.

16          **MR. KING:** *Weisgram* says if you find the expert witnesses are deficient, and that's the  
17 case, and there's not a superior position district court on the question of relief, you *should* grant  
18 JMOL. And I'm saying the situation here is a distinction without a difference!

19          **JUDGE TALLMAN:** Mr. King, let me ask you this question, and I'll pose the same to Mr.  
20 Talmadge when he gets up. [23:00] Is this kind of case you're — I'm looking at your notebook. I  
21 see about eight inches thick worth of paper in your two white notebooks. Is this a case where we  
22 conclude the district court committed error, we send it back, and Judge Lasnik says, “instead of  
23 just giving it to the jury I can't figure out whether this is or is not good science” —

24          **MR. KING:** Right.

25          **JUDGE TALLMAN:** — that the district court might want wish to appoint a court expert to  
26 assist it in reading your two eight-inch-thick notebooks and looking at the tran —

27          **MR. KING:** Your Honor, you know —

28          **JUDGE TALLMAN:** Let me finish the question. Looking at the transcripts, and then  
29 giving it his or her opinion to the district court as to whether this is admissible under *Daubert* or  
30 not?

1           **MR. KING:** All I'm asking is that this Court first look at this record and say: "Do we really  
2 have a situation where any of these hypotheticals are at all reasonably likely?" Because if you  
3 conclude that none of these hypotheticals about the district court might do this, and the district  
4 court might do [24:00] that, are reasonably likely, and if you conclude that the district court has  
5 no superior position over you, and you have a party who has never suggested, oh "we need more,  
6 we need to supplement the record, you know, before you do JMOL send us back for a new trial  
7 and give us the opportunity to supplement" — to nonetheless say, "I'm not gonna give you  
8 defendants a JMOL, I'm going to boot it back to the district court" — is to prolong a case  
9 unnecessarily, and I think that conflicts with *Weisgram*. And I see my —

10           **JUDGE TALLMAN:** But in response to my suggestion, the district court would still have  
11 the opportunity to grant you judgment if the court-appointed expert came back and said, "you're  
12 right, this is junk science, it should never have come in."

13           **MR. KING:** Why do we need to complicate a case with this if there is — if you do the  
14 threshold inquiry and conclude the district court isn't in a superior position to deal with this, it's  
15 thoroughly ventilated, and we can do this ourselves. And in fact, it's a quick one-two-three.  
16 Brodtkin, ambient range. [25:00] Millette, out. No evidence in excess of ambient range. Case  
17 closed. And if I may, I'll reserve my five minutes and a few seconds.

18           **CHIEF JUDGE KOZINSKI:** Okay you have got it. We'll hear from the other side.

19           **MR. TALMADGE:** Thank you, Your Honor. May it please the Court, Phil Talmadge here  
20 representing the estate of Henry Barabin and Geraldine Barabin. Joined at counsel table by  
21 Sidney Tribe from my office.

22           It's important, I think, for the Court to note that the late Henry Barabin died of  
23 mesothelioma, an invariably fatal asbestos-related cancer he contracted while working 33 years  
24 for Crown-Zellerbach, many of those years in direct contact with the papermaking machines that  
25 used defendants' asbestos-containing products. He cut those dryer felts, he dragged them across  
26 the floor, and that released asbestos into the air. He further blew out the machines, and that use  
27 of air caused the asbestos [26:00] to be in the air as well.

28           The issue that's before the Court now is the question of whether the district court conducted  
29 an appropriate *Daubert* analysis, and what the remedy is for that, if there was a problem with the  
30 district court's conduct of the *Daubert*-related hearing. We note here there was a fourteen-day  
31 trial and a verdict in favor of Mr. Barabin. We also note that when the defendants stand before

1 the Court and say, first of all, that there was a situation which the experts were called upon to  
2 testify that every single exposure was causative, or that the district court here punted on the idea  
3 of any kind of *Daubert* hearing, that's a misstatement to the Court.

4 **JUDGE RAWLINSON:** But counsel, didn't the court say that it was just going to let  
5 everything in and let the jury sort it out?

6 **MR. TALMADGE:** No, Your Honor. He did say that at one point. But I want to hasten to  
7 point out to the Court several things that were in this record. First of all, in the order dealing with  
8 the motions *in limine*, the court went through the *Daubert* analysis. [27:00] The court cited to  
9 *Daubert*, cited to reliability, went through the analysis, and decided that the expert testimony of  
10 Dr. Millette and the testimony of Mr. Cohen was something that he needed to address, and did.

11 **JUDGE RAWLINSON:** Will you point us in the record to where the district court made a  
12 reliability determination regarding the experts?

13 **MR. TALMADGE:** Specifically, Your Honor, Excerpt of Record page 12, in connection  
14 with the order denying a new trial, and specifically in connection with the motions *in limine*

15 **JUDGE RAWLINSON:** After the trial?

16 **MR. TALMADGE:** No this was before. This was in connection with the motions *in limine*.

17 **JUDGE RAWLINSON:** I thought you said the order denying a new trial.

18 **MR. TALMADGE:** He did as well there, and I was going to point out to the Court that's  
19 Excerpt of Record page 69, where he addressed Mr. — Dr. Millette and Mr. Cohen at length in  
20 the motion *in limine* order. He discussed Mr. — Dr. Millette's reliability at Excerpt of Record  
21 page 71, and specifically —

22 **JUDGE RAWLINSON:** What did he say about the reliability?

23 **MR. TALMADGE:** He mentioned reliability specifically [28:00] in connection with Dr.  
24 Millette. It was something that he addressed in that record and addressed in the context of Dr.  
25 Millette's testimony.

26 **JUDGE TALLMAN:** So Mr. Talmadge, are you reading — the troubling language to me is  
27 the ER 70, line 18.

28 **MR. TALMADGE:** Correct.

29 **JUDGE TALLMAN:** Where he notes that there's obviously a strong divide between both  
30 scientists and the courts on whether such expert testimony is *relevant* to asbestos-related cases,  
31 and then he says "in the interests of allowing each party to try its case to the jury the Court

1 deems admissible expert testimony that every exposure can cause an asbestos-related disease.”  
2 Now, I mean, you could, I suppose, read that as suggesting that the court has in fact done the  
3 *Daubert* analysis and has decided that it is relevant and it is reliable and I’m gonna let it in and  
4 the jury can decide which experts they believe.

5 **MR. TALMADGE:** And that’s our position, Your Honor. In fact, Judge Lasnik is an  
6 experienced trial judge. He’s been around the track both in the state courts and in federal court.  
7 [29:00] He’s a very experienced, well-regarded trial judge. You note in the motions *in limine*, he  
8 addressed the issue of *Daubert*, specifically citing the appropriate reliability analysis that he  
9 needed to go through in *Daubert* at Excerpt of Record page 69, and he did mention Dr. Millette’s  
10 reliability at ER 71.

11 **JUDGE RANDY SMITH:** I guess, counsel, I’m a little troubled, as evidently my colleague  
12 is, that when he talks about the Cohen decision he says, “I don’t think I need a *Daubert* hearing,  
13 but I’m gonna reverse myself on that and then allow Kenneth Cohen to testify. I think plaintiffs  
14 didn’t do as good a job as they should have done. But they’ve never had Cohen not be allowed to  
15 testify before and that got their attention. Under these circumstances I’m gonna let it in.” That  
16 doesn’t sound to me like he has, in any way, made a *Daubert* determination. He’s just said,  
17 “well, they didn’t do a good job, and the first time they were attacked they didn’t do a good job  
18 at all, and [30:00] I just think it’s fair to let it in.” That isn’t a *Daubert* determination.

19 **MR. TALMADGE:** Your Honor, it’s important to note that in connection with Mr. Cohen’s  
20 testimony, he was an industrial hygienist. His testimony related to the concept that formally is  
21 called in the record “reentrainment,” but it’s a very simple concept. That is, if you have fibers in  
22 the air, when you have further blowing around, the fibers *stay* in the air. This is something that is  
23 routinely testified to in Washington state courts, a point that of course defendants don’t want to  
24 talk about. They want to talk about the law of Texas. They want to talk about the law of Utah.  
25 But they don’t want to talk about Washington State law on causation, which doesn’t use the  
26 traditional “but for” causation analysis.

27 **JUDGE RANDY SMITH:** I can understand your argument. But again I’d like to see the  
28 district court say, hey, “based on Washington law, I think this is good enough for this expert to  
29 talk about cause.”

30 **Mr. Talmadge.** And he did —

1           **JUDGE RANDY SMITH:** — because having had to defend these cases and to present  
2 them, it seems to me one has to have an expert that says [31:00] “this causes,” and it seems to  
3 me that what the good judge is saying is: “One, they didn’t — the plaintiffs really didn’t know  
4 what they were getting into on Cohen, and if he’s the only cause expert I’m only just letting this  
5 in because they don’t have any other witness and I think they ought to get to the jury!”

6           **MR. TALMADGE:** Your Honor, I don’t think that’s what he did here, because the point I  
7 think I was striving to make was this. This issue of *Daubert*, the issue of the admissibility of  
8 these expert witnesses, was something that *permeated* this trial. It came up in the context of the  
9 order on motions *in limine*, it came up in the context of the post-trial motions, both the motion  
10 for judgment as matter of law as well as the motion for a new trial. And Judge Lasnik spoke to  
11 these issues. He spoke to the fact, for example, that Dr. Brodtkin, the doctor, the medical doctor  
12 who testified to causation, essentially testified in the same fashion as the defense medical expert  
13 on causation, Dr. Samuel Hammer. [32:00]

14           **JUDGE FLETCHER:** If I were to read something from Judge Lasnik, in which he had said  
15 explicitly, “I’m not going to allow Dr. Cohen to testify as an expert on very much, because of the  
16 reasons he gives in the *in limine* order about [unintelligible] mail order Ph.D and so on.”

17           **MR. TALMADGE:** Right, credentials.

18           **JUDGE FLETCHER:** But I am going to allow him testify on one thing as to which he may  
19 be an expert, irrespective of his Ph.D, and that’s whether or not once the asbestos is let loose in  
20 the mill, it tends to stay in the mill tends to move around, but it keeps — I guess the jargon is  
21 “reentrainment” — if I heard, or read, Judge Lasnik say that explicitly, and say why he thought  
22 he was sufficiently expert to testify on that, I’d be quite happy. But I haven’t read that.

23           **MR. TALMADGE:** Your Honor, Excerpt of Record pages 28 and 29, Judge Lasnik  
24 specifically noted that the reentrainment testimony from Mr. Cohen was never contradicted  
25 [33:00] by the defense. Never contradicted.

26           **JUDGE FLETCHER:** Yeah, yeah, but that doesn’t necessarily mean he’s an expert  
27 qualified to do it, nor have I heard, read, Judge Lasnik giving a very explicit notion as to, okay,  
28 “here is why under *Daubert* he’s competent to testify on this.”

29           **MR. TALMADGE:** My point, Your Honor, in bringing to the Court’s attention the fact that  
30 there was a whole train of orders that the judge decided, Judge Lasnik decided, was to point out I  
31 think ultimately why the *Mukhtar* rule is an inappropriate one and why the Court should adopt



1 the rule that was suggested by Judge Graber in her concurring opinion in this case. In this  
2 particular set of circumstances, the defense wants you to believe that this issue was one in which  
3 the judge absolutely punted on *Daubert*, that he didn't do *anything* to assess the validity of this  
4 science, the validity of these witnesses' testimony.

5 You look at the judge's order. He addressed these issues. He addressed the issues in the  
6 order on the motions *in limine*. He addressed it the post-trial motions [34:00] *at length*. And he  
7 addressed it in the context of Washington law, which I note does not require *quantitative*  
8 exposure to toxic materials. *Qualitative* exposure is sufficient to establish circumstantial  
9 evidence of exposure for purposes of causation under decisions of the Washington Supreme  
10 Court like *Lockwood*.

11 **JUDGE NUGYEN:** But if we find counsel, that the district court's *Daubert* analysis was  
12 inadequate, do you agree with the contention that the record is now complete, that the district  
13 court is in no better position to conduct an evaluation than we are?

14 **MR. TALMADGE:** No, I think Your Honor, in fact, the district court's involvement in this  
15 is important, because the district court had the opportunity to sit through the entirety of the trial.  
16 He saw these witnesses testify. He had the opportunity, certainly, to have some record, but the  
17 judge may decide that there might be an appropriate need for additional testimony on this record.  
18 And certainly Judge Tallman asked the question of Mr. King, and I answer it as well here, that if  
19 the judge thought [35:00] having a special master to further elaborate on the record was  
20 something that was appropriate, that's part of the judge's flexibility in deciding a *Daubert* issue,  
21 as this Court has stated over and over again in cases like *Alatorre* and others.

22 **CHIEF JUDGE KOZINSKI:** How would he do that? The jury is gone. Right? I mean, at  
23 most the court-appointed expert — the master — could help the judge determine the *Daubert*  
24 issue. But if, but [unintelligible] is that the *Daubert* — that the testimony doesn't meet *Daubert*,  
25 you can't, sorta, add, an expert. You'd have to have a whole new trial, right?

26 **MR. TALMADGE:** No, I don't think so, Your Honor. I think the suggestion from Judge  
27 Graber in her concurring opinion was that there should be a conditional vacation of the  
28 judgement, with a remand for further findings by the district court on the *Daubert* issue, and  
29 those further findings would decide whether or not the vacation of the judgment was something  
30 that was final, or whether the judgment stood.

31 **JUDGE RAWLINSON:** But we don't know, then, how [36:00] the jury would have ruled  
32 if, in fact, the *Daubert* finding had been made *prior* to the case going to the jury.

1           **MR. TALMADGE:** But I think the whole exercise we're having here, Your Honor, is a  
2 question about the gatekeeper function that the district court is supposed to be providing. If the  
3 district court thought it was doing the gatekeeping function appropriately and did not, is the  
4 appropriate remedy the elimination of a fourteen-day trial — the results of a fourteen day trial —  
5 or is the appropriate remedy, as a matter of policy, one in which we give the district court the  
6 opportunity to have the appropriate response to the evidence that the district court —

7           **JUDGE McKEOWN:** Let's see how it would play out as practical matter, if it were to go  
8 back for a remand on *Daubert* and the judge conducted more extensive *Daubert* hearing, and hit  
9 on all fours each of the criteria laid out in *Daubert*. If Judge Lasnik determines that these experts  
10 *are* admissible [37:00], then you'd be in exactly the same place that you were with the jury trial.  
11 Correct?

12           **MR. TALMADGE:** Correct. The result — the jury's result would stand.

13           **JUDGE McKEOWN:** And then Mr. King would be back here arguing that issue and others.  
14 If Judge Lasnik were to determine that he was *mistaken*, and that one or more of these witnesses  
15 should *not* have been at trial, then what do you think the result would be?

16           **MR. TALMADGE:** I think under the circumstances, if the judge were to conclude that — I  
17 think the key witness is probably Doctor Millette, whose testimony was as to the quantum of  
18 asbestos fibers that were in the air — if he were to conclude that Doctor Millette's testimony was  
19 inappropriate, that he was not something — he was not a witness whose testimony was somehow  
20 reliable — then it would probably result in the vacation of the judgment standing, Your Honor.

21           **JUDGE RAWLINSON:** And a new trial?

22           **MR. TALMADGE:** That would be the result.

23           **MR. TALMADGE:** Pardon?

24           **JUDGE RAWLINSON:** And a new trial, [38:00] or just judgment in favor of the  
25 defendants?

26           **MR. TALMADGE:** No, I think it would probably, in those circumstances, be a judgment in  
27 the favor of the defendant, but that would be something the district court —

28           **JUDGE McKEOWN:** Discovery's over, witnesses out, end of game?

29           **MR. TALMADGE:** The district court would order it. And you know, Mr. King is happy to  
30 talk with the Court —

31           **CHIEF JUDGE KOZINSKI:** Why not do it here?

1       **JUDGE McKEOWN:** Why not here?

2       **CHIEF JUDGE KOZINSKI:** Why not just do it here? I don't understand.

3       **MR. TALMADGE:** Because the —

4       **CHIEF JUDGE KOZINSKI:** It's one thing if you're answer, had been, at that point, to get  
5 the new trial — I'm not saying you should, but if that had been your answer — that's the answer  
6 I thought you would give — then I'd say, "well you know, there's reason." But if the answer is,  
7 "all the district court would do is what we can do here now," why not short-circuit a second  
8 appeal? Just do it!

9       **MR. TALMADGE:** But that's assuming, Your Honor, that the district court didn't feel that  
10 there was need for additional testimony, and that there might not be a need for a special master  
11 of something to assist in developing the validity of the scientific evidence. The point is, this is a  
12 matter that the district court should decide.

13       **CHIEF JUDGE KOZINSKI:** What is there to indicate — I mean, this is [39:00] a question  
14 of whether or not this expert is or is not qualified under *Daubert*. What reason is there to  
15 speculate that the judge might need a special master? I mean this is really quite unusual. Why  
16 isn't this the kind of thing we look at, and we say *we* don't need a special master. It's pretty  
17 clear. One way another, we decide, and bam! We're done. Why prolong the agony?

18       **MR. TALMADGE:** Because, Your Honor, we talked about the district courts conducting  
19 the gatekeeper function. The district courts having —

20       **CHIEF JUDGE KOZINSKI:** And if the [40:00] district court had done that, then you'd be  
21 in that situation. But, the district court — I mean, again, I'm not saying how we're gonna decide  
22 this, but assuming that we conclude the district court didn't do what it should have done —  
23 you're now no longer in the district court, you're now in the court of appeals. The district court  
24 didn't do what it could have done, and should have done, and had a chance to do. And why isn't  
25 the appropriate way given the current state of the record and the current state of the proceedings,  
26 for us to do it ourselves?

27       **MR. TALMADGE:** Because the district court's closer to the evidence. The district court is  
28 closer to having heard the trial testimony. The district court has had the benefit of that. That's —  
29 Mr. King, as I said, is —

30       **CHIEF JUDGE KOZINSKI:** What does that have to do with the *Daubert* issue?

31       **MR. TALMADGE:** Well, because it's something the United States Supreme Court in the

1 *Unitherm* case, in a footnote, made explicit with respect to *Neely* and *Weisgram*. That this is  
2 something that we should be cognizant of, that is, that the opportunity for the district court to  
3 have its input, even post-verdict, under circumstances like this being closer to the circumstances  
4 of the case.

5 **JUDGE O'SCANNLAIN:** Counsel, do you agree that the record is closed, so to speak, in  
6 terms of what the trial judge, Judge Lasnik, would do if we went *that* way? In which case we  
7 could also look at that same record and decide it ourselves. Is there a difference?

8 **MR. TALMADGE:** Your Honor, I don't know what the district court would say in terms of  
9 the evidence that was adduced. But my suspicion —

10 **JUDGE O'SCANNLAIN:** But isn't it too late to add additional evidence at this point?

11 **MR. TALMADGE:** Well, I mean on this gatekeeper function issue, I [41:00] don't think  
12 so. You don't have the benefit of the district court's complete rationale for the decision that the  
13 district court entered into —

14 **JUDGE RAWLINSON:** But isn't that the problem? That we don't have —

15 **MR. TALMADGE:** It is, but that's the validity of having a remand. That's why it's  
16 appropriate for a remand to occur. I mean —

17 **JUDGE NGUYEN:** It's not an all or nothing proposition, is it? Upon remand, the district  
18 court would then have the option to conduct the *Daubert* hearing anew, and he could say, "well  
19 under the factors set out by *Daubert*, I think this *portion* of the expert's testimony is sufficiently  
20 reliable, but yet there are other portions of his testimony that are without adequate foundation,  
21 so" —

22 **MR. TALMADGE:** Certainly —

23 **JUDGE NGUYEN:** — "now that I've conducted the hearing over again with regard to each  
24 witness, here's what they are and are not going to be allowed to testify to." I would think in that  
25 instance, unless he thinks that the evidence would be insufficient as a matter of law, that he  
26 would then permit a retrial and [42:00] the expert's testimony would then be narrowly  
27 circumscribed as the district court feels is appropriate."

28 **MR. TALMADGE:** I think that's exactly correct, Your Honor. And if I could point out, this  
29 Court has addressed these kinds of issues with —

30 **CHIEF JUDGE KOZINSKI:** I'm sorry, but that's not the answer you gave to Judge  
31 McKeown's question.

1       **JUDGE McKEOWN:** No you were . . .

2       **MR. TALMADGE:** Well, if the district court —

3       **JUDGE McKEOWN:** You said it would be over!

4       **JUDGE RANDY SMITH:** You said it'd be over.

5       **MR. TALMADGE:** If the district court found that there was insufficient evidence to  
6 support the jury's verdict as result of the district court's determination in *Daubert*, yeah, it would  
7 be over. But I think the question from Judge Nguyen was a question about whether the district  
8 court judge, under these circumstances, could — would — necessarily find absolutely this way  
9 or a particular way. The judge could come down on a number of ways on the four witnesses.

10       **JUDGE NGUYEN:** As I understand your testimony, counsel, this is a case where you're  
11 essentially conceding is dependent on expert testimony, so if we were to remand the case and  
12 Judge Lasnik decided [43:00] that he was wrong, and the testimony should *not* have been  
13 admitted, then that's game over.

14       **MR. TALMADGE:** I think that's right.

15       **JUDGE NGUYEN:** But if there were still portions of the expert's testimony that would be  
16 properly admissible upon a new review under *Daubert*, then *potentially* there could be a retrial.  
17 Correct?

18       **MR. TALMADGE:** I think that's correct. And the thing that —

19       **CHIEF JUDGE KOZINSKI:** Any reason we can't do that? We can't look at it and say:  
20 "Look, if all of it is out, it's out. If some of it stays in, we send it back for the district court to  
21 have a new trial if it choose to do that. Or we decide whether a new trial would be worthwhile."  
22 Any reason we can't do that?

23       **MR. TALMADGE:** Well, I think it's important to have those findings, Your Honor. The  
24 district court here went through a *Daubert* analysis.

25       **CHIEF JUDGE KOZINSKI:** What findings?

26       **MR. TALMADGE:** Pardon?

27       **CHIEF JUDGE KOZINSKI:** What findings?

28       **MR. TALMADGE:** The findings from the district court as to the district court's analysis or  
29 rationale for its determination with respect to the gatekeeper function as to these witnesses.

30       **JUDGE O'SCANNLAIN:** But if we have some concerns that the findings were not  
31 adequate, where does that leave us?

1           **MR. TALMADGE:** Well, [44:00] it leaves us in a position, or it leaves this Court in a  
2 position, Your Honor, where it needs to have some articulation from the district court as to how  
3 it arrived at its conclusion.

4           **JUDGE RANDY SMITH:** Why? Why can't we just automatically say: "Okay, you didn't  
5 give us enough; it's an abuse of discretion for failing to do it; and, therefore, we have a harmless-  
6 error review."? That's what we do in every other evidentiary decision.

7           **MR. TALMADGE:** Well, Your Honor, I don't think you do that in every other evidentiary  
8 decision.

9           **JUDGE RANDY SMITH:** When don't we?

10          **MR. TALMADGE:** *Cordoba*.

11          **JUDGE RANDY SMITH:** I read *Cordoba*. I'm still saying, when don't we? It seems to  
12 me that in every evidentiary decision, when we decide the district court has done it wrong, our  
13 next verse is not to send it back to have the district court tell us how they should have done it.  
14 Our next verse is to say: harmless error or not? And if it's harmless error, well, then we just  
15 affirm. If it isn't harmless error then we say, most generally, new trial, but since you say [45:00]  
16 we should grant judgment, we can grant judgment.

17          **MR. TALMADGE:** But in *Cordoba*, Your Honor, you have a circumstance where the court  
18 had a per se rule with respect to polygraph evidence. You had a district court that *should* have  
19 been aware of this Court's position in *Amador-Galvan* with respect to eyewitness testimony and  
20 *Daubert*. It wasn't. It didn't conduct a *Daubert* analysis *at all*, in *Cordoba*.

21          **JUDGE FLETCHER:** You, know I think there may be two possible layers of harmless-  
22 error analysis. One might be strictly confined to *Daubert*, that is to say, if there was an error in  
23 conducting the *Daubert* hearing, we remand, there's a new *Daubert* hearing, and the judge says,  
24 well, "I now conduct the hearing. The first error was that I didn't do it, didn't do my findings,  
25 but now after having done it, I find the evidence is properly admitted so it was a harmless error."  
26 The second layer of harmless error is that some of that *Daubert* expert testimony, or all of it,  
27 *shouldn't* have come in, and then question is whether *that* was harmless. But there are two  
28 variations on harmless here. [46:00]

29          **MR. TALMADGE:** I think that may be correct, Your Honor. This is difficult set of  
30 circumstances, with all due respect to Judge Smith, in circumstances where you have remands  
31 take place — let's take a series of determinations by a trial court with respect to attorney fees. In

1 many instances the court's gonna remand to the district court for the entry of findings of fact and  
2 conclusions of law, and the question of attorney fees, without invalidating the request made by  
3 the party for an award of attorney fees.

4 **JUDGE RANDY SMITH:** But I have never found that to be in a *Daubert* situation

5 **MR. TALMADGE:** It's not a *Daubert* situation, but it's analogous.

6 **JUDGE RANDY SMITH:** I don't know that it's analogous. *Daubert* is an evidentiary  
7 situation, not a situation where I'm determining whether there's attorneys fees or not. That's why  
8 I'm posing the question. I don't *know* what to do, frankly, and I want you to help me. But it  
9 seems to me that *Daubert* is evidentiary, and I don't understand why we don't deal with it like  
10 every other evidentiary. And if, in fact, the district court had *not* allowed the testimony, then at  
11 [47:00] that point there's no way I can say one way or another, and I send it back and the district  
12 court does something. But if in fact the district court allows the testimony, and they testify to the  
13 full extent, I can make a determination as easy as he can whether it was good or it wasn't, and  
14 whether it was harmful or whether it wasn't, can't I?

15 **MR. TALMADGE:** Well, in this particular case the judge did address a number of the  
16 elements of harmless error in any event. And the judge addressed, I would point out, not only the  
17 witnesses that were — the expert witnesses that were presented by the plaintiffs, but also  
18 considered the expert witnesses presented by the defense. And that's something the defense  
19 wants you to lose sight of in this particular case.

20 Dr. Samuel Hammer testified essentially to the same types of positions with respect to  
21 exposure as did Dr. Brodtkin, the expert that was presented by the plaintiffs. Under the  
22 circumstances — and Judge Lasnik recounted this in his post-trial orders — [48:00] under the  
23 circumstances, there was no harm to the evidence coming in. The defense keeps wanting to tell  
24 you that what was being done by the plaintiffs below was, “every single fiber is causative; every  
25 single fiber is causative,” and that's the nature of the testimony. Judge Lasnik specifically said  
26 no such testimony came in. Harmless error again, Your Honor.

27 But no such testimony came in. That was not the essence of the testimony presented by the  
28 plaintiffs' expert witnesses, nor by the defense expert witnesses in this case. Notwithstanding all  
29 the fuzzing of the record that's being done by the defendants here, that was the nature of the  
30 argument that was presented to the district court. I think it's important for the district court,  
31 being on the ground dealing with those kinds of issues and being familiar with those kinds of

1 matters, to have the opportunity to give a clearcut understanding of why the judge did what he  
2 did in connection with the four expert witnesses.

3 And I note for the record as well, we don't have a lot of argument that's been presented by  
4 the defense with respect to Dr. Brody, [49:00] who's the cellular biologist. That testimony is not  
5 — we don't have a lot of argument about *that*. We have Dr. Brodtkin, who testified essentially  
6 similarly to their own defense expert. The question was Dr. Millette, and the big argument is,  
7 “well did he conduct a laboratory test as opposed to a real-world test?”

8 And the trial judge in this case made a specific notation in the record, in the post-trial orders,  
9 that you couldn't do a real-world test, because in the mills you don't have asbestos in dryer felts  
10 anymore. You don't have the opportunity to do destructive testing. He was under a limitation as  
11 to what he could do. And the defense's own expert on these issues also presented testimony from  
12 a laboratory. So when you talk about the glove box testing and all that stuff that you've heard  
13 from the defense, that was what the nature of that testimony was below.

14 The point is. I think it's appropriate under the circumstances for the Court to give the district  
15 court here — [50:00] where the district court did an analysis under *Daubert*, if the Court  
16 concludes it was an inadequate analysis under *Daubert* — the opportunity to do the additional  
17 findings that would be appropriate for that analysis, and have that judge who's close to the  
18 record undertake that. That's the appropriate conclusion that the Court should have under these  
19 circumstances.

20 **JUDGE RANDY SMITH:** If you're through that issue, I'd like you to address one other  
21 issues, maybe.

22 **MR. TALMADGE:** Certainly, Your Honor.

23 **JUDGE RANDY SMITH:** And that is about the — allowing the defendants, or allowing  
24 the plaintiff, to suggest that she just hopes she didn't break down, she was able to continue  
25 taking care of Henry and securing the proper things that she needed to take care of him. She just  
26 didn't want to be left destitute. Now, it's my understanding there were motions *in limine*, number  
27 nine, you requested that the defendants be barred from referring in a way [51:00] to any  
28 collateral source of income received by your client. And he granted it. The defendants requested  
29 that all the parties be prohibited from referring to the financial circumstances of either party. You  
30 agreed and he granted it. And then she comes in and starts talking about, “I don't want to be left  
31 destitute.”



1 Now, I know what the judge said on that, and I also know it's an abuse of discretion. But I  
2 also know that now I have in front of me that the normal verdict in this case is not even close to  
3 what she got. Why is that not an abuse of discretion, when he's given two motions *in limine*, he  
4 said don't talk about source of income, and they then want to put in all the other income that she  
5 did get, and she argues I'm destitute.

6 **MR. TALMADGE:** Well, Your Honor, let me point out a couple of things, I think, for the  
7 record. And this is something again the defense has not talked about, of course. [52:00] First of  
8 all, they never objected to the testimony. No objection to the testimony. No request for a curative  
9 instruction from the district court. No cross-examination of Mrs. Barabin about these issues. So  
10 did they preserve the issue for review? I think not. In addition —

11 **JUDGE RANDY SMITH:** You're saying that because they put in a motion *in limine*, said  
12 you can't talk about it, and *you* put in a motion *in limine*, said nobody can talk about what she  
13 did get, and the court has already granted that, and that testimony came up, that it's error for the  
14 district then — that it's okay for the district court then, to say I don't think she's opened the  
15 door? And they can't appeal that after two motions *in limine*?

16 **MR. TALMADGE:** They didn't raise it, Your Honor, at the time.

17 **JUDGE RANDY SMITH:** They did, in the motion *in limine*!

18 **MR. TALMADGE:** But they didn't object at the time the testimony was had. They waited  
19 four days! Four days afterwards.

20 **JUDGE RANDY SMITH:** They asked to put in testimony on their own about that, because  
21 she'd broken the issue! [53:00]

22 **MR. TALMADGE:** They didn't cross-examine her. They didn't cross examine her. They  
23 didn't request a curative instruction. They didn't object. They waited four days post-testimony in  
24 which to raise the issue. And let me point out, as well, under Washington law — Washington has  
25 an unusual procedure where you have all these settlements that might take place as an offset to  
26 any verdict that might be had by the trier of fact. In this particular set of circumstances, there *was*  
27 a substantial offset to the jury's verdict from these prior settlements. So in effect what they  
28 wanted to do was have a double opportunity to reduce the jury's verdict. They got the benefit of  
29 the offsets for all the settlements that occurred, which was the genesis for this testimony about  
30 collateral source, *and* they wanted to have the opportunity to get the jury to reduce the verdict by  
31 saying, “well look what she did; she's already, you know, she's” —

1           **JUDGE RANDY SMITH:** It seemed to me that that was just — what you were taking  
2 advantage of as well, or at least your client — she was saying, “I didn’t get any money, even  
3 though there’ll be a reduction thereafter, [54:00] but I want a lot so that the reduction won’t take  
4 much out because I’m so destitute!”

5           **MR. TALMADGE:** Well I think the point here, Your Honor, is they had an obligation to  
6 preserve the error for review, they didn’t and they had —

7           **JUDGE TALLMAN:** In the face of your motion *in limine*, why wouldn’t a rational defense  
8 attorney have *not* cross-examined, because to do so would have violated the court’s ruling on  
9 your motion *in limine*?

10          **MR. TALMADGE:** Why wouldn’t a rational defense counsel have raised an objection  
11 immediately to the testimony, Your Honor?

12          **JUDGE McKEOWN:** It might have, but is it required?

13          **MR. TALMADGE:** I think it is Your Honor.

14          **JUDGE TALLMAN:** Under our caselaw —

15          **JUDGE McKEOWN:** Under our caselaw?

16          **MR. TALMADGE:** Even with a motion *in limine*.

17          **JUDGE McKEOWN:** Even with a motion *in limine*? So it’s like the motion *in limine* goes  
18 out the door?

19          **MR. TALMADGE:** No, I think you have an obligation — you have an obligation to raise  
20 that issue, to preserve the issue for review. But again, let me point out, when we talk collateral  
21 source here, they want a double opportunity. They want the opportunity to reduce the jury’s  
22 verdict *and* they want the opportunity to get the benefit of these offsets that Washington law  
23 affords, so it would be a double reduction that would be unfair.

24          **JUDGE FLETCHER:** Help me out a little here. Review the [unintelligible]. What was the  
25 question [55:00] that led her to say — or what was the question that preceded her saying — “I  
26 don’t want to be left destitute.” Was the question, “you want to be left destitute?”

27          **MR. TALMADGE:** No.

28          **JUDGE FLETCHER:** Or was it some other question? [Laughter.]

29          **MR. TALMADGE:** It was nothing, nothing that explicit, Your Honor. It was a very general  
30 question, and she volunteered the statement as I recall. I don’t have that with me right at the  
31 counsel — at the rostrum. It was something that was a very general question and she volunteered

1 that statement.

2 **CHIEF JUDGE KOZINSKI:** Okay, thank you.

3 **CHIEF JUDGE KOZINSKI:** You have about five minutes, Mr. King.

4 **MR. KING:** Thank you, Your Honor.

5 **CHIEF JUDGE KOZINSKI:** Five minutes and change.

6 **MR. KING:** Let me address this issue — the collateral source issue. Basically, you're told,  
7 "yeah, it's a problem, but we didn't raise it." That's not correct. I'm surprised. See page 63 of  
8 our brief. RT 111 and 1112. The ruling had been violated. The evidence was in. We asked to put  
9 in the counterevidence, you know, let's be fair here. And we were told, "no." Now — [56:00]

10 **JUDGE BYBEE:** Did you object at the time?

11 **MR. KING:** No.

12 **JUDGE BYBEE:** You didn't object contemporaneous with her statement.

13 **MR. KING:** Exactly. It's his wife. I mean my gosh. We're not going to do that! We're  
14 entitled to rely on a clear motion *in limine*, and so we then said, "okay look, it's in now give us  
15 this offset" and we're told, "no." The door had been opened and then it's slammed shut in our  
16 faces by the judge.

17 The key — I wanna quote something from counsel's argument, because you have an  
18 incredibly important admission here. The key witness is Dr. Millette. If he's not — if he's found  
19 not reliable, you're gonna vacate the judg — the district court's gonna vacate the judgment and  
20 grant judgment as a matter of law to the defendant. I think I've got that right. That is my point.

21 This is not so complicated a *Daubert* case. You have the fact that Dr. Brodtkin says you can't  
22 count exposures over ambient range. The only witness they offered to prove release in excess of  
23 ambient range was Dr. Millette. Dr. Millette is unreliable in his testimony. [57:00] Dr. Millette  
24 doesn't have fit with his testimony. Dr. Millette should never have been heard by this jury.

25 Now, Judge Kozinski, you then ask, well, why don't we just short circuit this and do it right  
26 here? Exactly right. And you did that in *Daubert*. We had related questions from Judge Nguyen  
27 and Judge O'Scannlain, and both of you asked a couple of different points —

28 **CHIEF JUDGE KOZINSKI:** I did a lot of things in — we did a lot of things in *Daubert*.  
29 [Laughter.]

30 **MR. KING:** You did a lot of things in *Daubert*, that's true! You did a lot of things in  
31 *Daubert*. Point made. I concede that!

1           **CHIEF JUDGE KOZINSKI:** Some right, some wrong . . . [Laughter.]

2           **JUDGE McKEOWN:** Don't go there. [Laughter.]

3           **MR. KING:** The question was asked —

4           **JUDGE RANDY SMITH:** All right; we were just *found* wrong!

5           **MR. KING:** Well, that was the first time around. On the remand, everything went fine.

6           Now, do you agree, you're asked, that the record is complete on these *Daubert* issues. You  
7 know, you never got told, "oh no there are gaps, there are problems, we need to go back, we  
8 need to do more things." You're told, "well, the judge might decide we need a special master."  
9 What is this about this that the judge might decide we need a special master? This is the case as  
10 Judge Nguyen, [58:00] you said, depended on the experts, and if they're out, it's game over. And  
11 he said yes to that, too! And then, so, we have the question again, "well why can't we do this?"  
12 You *can*, and it's not going to be that difficult, because it *is* going to be Dr. Millette. You decide  
13 Dr. Millette is out, this case is over! Now —

14           **JUDGE FLETCHER:** Dr. Millette is not the mail order Ph.D. Dr. Millette strikes me as a  
15 close question.

16           **MR. KING:** No, and here's why he's not. Because Dr. Millette was the developer of the  
17 very protocol he didn't follow, which means you don't have extrapolatibility. Not only that, the  
18 Michigan state tests and the RG — the Michigan state tests, which do it at a pilot plant, confirm  
19 it's not extrapolatable. This is the *Schudel* case. It's controlling. If you've got an opinion which is  
20 based on data which has extrapolation problems, and there is not a demonstration that it's  
21 appropriate to extrapolate, nonetheless, to the facts of the case at hand, it's out.

22           And Dr. Millette [59:00] has so many problems. He's got — he tests with dryer felts. He  
23 tests with a zero humidity environment. He blasts away at the poor felt piece at a rate a worker  
24 would — you know, if a worker did that in a blow down, it would be 10,000 hours! He does it at  
25 a perpendicular angle when you're supposed to shoot across it. And by the way, he admitted at  
26 trial that, "well yes if, you shoot across it, you're not going to release very much." He has so  
27 many problems. I don't think that's going to be a close call.

28           **JUDGE NGUYEN:** Why, why — you know, those problems are pretty typical in the battle  
29 of the experts.

30           **MR. KING:** I agree they're typical.

31           **JUDGE NGUYEN:** But why aren't those questions of weight, not admissibility?

1           **MR. KING:** Oh, no, they're reliability questions. Because they show that you can't  
2 extrapolate. The judge told the jury that this is not a replication of the mill environment. And  
3 then he said — and this, by the way goes to the notion that there was *Daubert* balancing going  
4 on here. Let's focus on the non-balancing with Millette. [60:00]

5           When it got to the time for the jury to hear the opinions, he says to the jury: "These tests  
6 don't replicate the mill environment. The plaintiffs will say you can still extrapolate. The  
7 defendants will dispute that. Ultimately you decide what to do." The only thing he didn't say  
8 was, "I'm giving the reliability issue to you." The reliability issue, the extrapolation issue, which  
9 is supposed to be decided by the court in the first instance.

10          I ask, why do we remand and delay a case further when you are in just as good a position in  
11 this case to decide the expert's issue? Send it back for a special master to consider new experts?  
12 That's just — that's guaranteeing a new trial, because we can't reconvene the jury, as at least  
13 two of you have pointed out. We can't do that.

14          **CHIEF JUDGE KOZINSKI:** I think I did it twice. [Laughter.]

15          **MR. KING:** Yes! Good one. One last point on harmless error. You're told, "oh, there's not  
16 a harmless — [61:00] this is harmless, there's no problem here." And as an example you're told  
17 we objected to evidence about every fiber, and that was excluded. Yeah, we won that one, but we  
18 lost the notion of opinions which say anything over ambient. And we had major challenges to  
19 that.

20          **CHIEF JUDGE KOZINSKI:** Thank you.

21          **MR. KING:** Your Honors, thank you for your time.

22          **CHIEF JUDGE KOZINSKI:** The argument stands submitted. We are adjourned.

23