

24-916(L), 24-2360(CON), 24-1121(CON), 24-2594

United States Court of Appeals *for the* Second Circuit

TIFFANY RUTLEDGE, individually and as mother, general guardian of, *et al.*,
KRISTOPHER WHITE, BRIDGET MCCONNELL, ALEXANDER HOLLAND,
CHRISTINE HOLLAND,

Plaintiffs-Appellants,

— v. —

WALGREEN CO., COSTCO WHOLESALE CORPORATION, CVS HEALTH
CORPORATION, CVS PHARMACY, INC., SAFEWAY, INC., WALMART INC.,
a Delaware Corporation, RITE AID CORPORATION, FAMILY DOLLAR INC.,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF ATLANTIC LEGAL FOUNDATION AS *AMICUS* *CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE JOHNSON & JOHNSON CONSUMER INC. AND PETITION FOR REHEARING AND/OR REHEARING *EN BANC*

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BIG LOTS, GIANT FOOD LLC, ALBERTSON'S, HARRIS TEETER LLC,
DOLGENCORP, LLC,

Defendants-Appellees.

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TILLOTSON, MICHELLE BROWN,

Plaintiffs-Appellants,

— v. —

WALGREEN CO., JOHNSON & JOHNSON CONSUMER INC.,
WALMART INC.,

Defendants-Appellees.

CORPORATE DISCLOSURE STATEMENT

Amicus curiae Atlantic Legal Foundation is a nonprofit, nonpartisan, public interest law firm. It has no corporate parent, and since it issues no stock, no publicly held corporation owns 10% or more of its stock.

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INTEREST OF THE *AMICUS CURIAE*

Established in 1977, the Atlantic Legal Foundation (“ALF”) is a national, nonprofit, nonpartisan, public interest law firm.¹ ALF’s mission for the past five decades has been to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, former government officials, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, ALF pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. *See* atlanticlegal.org.

¹ No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amicus curiae*, its supporters, or its counsel made any monetary contribution to fund its preparation or submission.

Nationally recognized for its advocacy of sound science in the courtroom, and consistent with its strong commitment to serve the public interest, ALF has submitted amicus briefs on behalf of renowned scientists such as Nicholaas Bloembergen (a Nobel laureate in physics) and Bruce Ames (one of the world’s most frequently cited scientists) in each of the “*Daubert* trilogy” of cases—*Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). In *Daubert*, the Court quoted ALF’s brief on the meaning of “scientific . . . knowledge” as used in Federal Rule of Evidence 702. *See Daubert*, 509 U.S. at 590 (“Indeed, scientists do not assert that they know what is immutably ‘true’ — they are committed to searching for new, temporary[] theories to explain, as best they can, phenomena.”) (quoting Brief for Nicholaas Bloembergen, *et al.* at 9).

* * *

ALF takes no position on the underlying scientific merits of the causation issues in this case, leaving that subject to the parties and courts. Instead, ALF submits this brief in support of Defendant-Appellee Johnson & Johnson Consumer Inc. and Petition for Rehearing and/or

Rehearing *En Banc* because the Second Circuit panel misapplied Federal Rule of Evidence 702 and its 2023 amendments in two key respects:

- (1) The panel disregarded amended Rule 702(d), finding that the district court abused its discretion by applying “its own judgment” to determine whether plaintiffs’ experts had reliably applied scientific principles and methods in reaching their opinions, and
- (2) The panel ignored *Daubert*’s admonition about the difference between science in the laboratory and science in the courtroom, repeatedly citing to out-of-court scientific inquiry as a proxy for in-court reliability.

ARGUMENT

I. The District Court’s ruling that plaintiffs’ experts had not met their admissibility burden is consistent with the recent amendments to Rule 702

The panel’s opinion that the district court abused its discretion in holding plaintiffs’ experts to their admissibility burden must be reviewed in light of the recent amendments to Federal Rule of Evidence 702. Rule 702 was amended on December 1, 2023 in response to detailed findings that courts were misapplying the rule by misstating, ignoring, or relaxing its admissibility standard. *See* Fed. R. Evid. 702 advisory committee’s notes to 2023 amendments; *see also* Nat’l Academies Scis., Eng’g, & Med. and Fed. Jud. Ctr., Reference Manual on Scientific Evidence at 13 (4th ed. 2025) (recognizing that amended Rule 702 was “designed to correct misapplications of the rule”). As the Advisory Committee bemoaned:

“[M]any courts have held that the critical questions of the sufficiency of an expert’s basis, and the application of the expert’s methodology, are questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a).”

Id.

This problem was brought to the attention of the Advisory Committee on Evidence Rules (“Advisory Committee”) after scholarship showed that “many courts continue to resist the judiciary’s proper

gatekeeping role, either by ignoring Rule 702's mandate altogether or by aggressively reinterpreting the Rule's provisions."² The Advisory Committee's Reporter, Daniel J. Capra, thereafter identified a pervasive problem of "wayward case law" in which federal courts had become "far more lenient about admitting expert testimony than any reasonable reading of the Rule would allow."³ Capra concluded that courts had "defied the Rule's requirements" and that the Evidence Rules were being "disregarded by courts."⁴ And Advisory Committee Chair, the Hon. Patrick J. Schiltz, explained that "[c]ircuit court language at odds with the language of Rule 702" presented a serious concern justifying the amendment.⁵

To correct this pervasive problem, Rule 702 was amended to reemphasize the trial court's obligation to reach separate determinations

² David E. Bernstein & Eric G. Lasker, *Defending Daubert: It's Time to Amend Federal Rule of Evidence 702*, 57 Wm. & Mary L. Rev. 1, 8-9, 48 (2015).

³ Advisory Comm. on Evidence Rules, Mem. from Daniel J. Capra, Rep., to Advisory Comm. on Evidence Rules, at 262 (Oct. 21, 2016), <https://tinyurl.com/9x9jk6ff>.

⁴ *Id.* at 268, 271.

⁵ Advisory Comm. on Evidence Rules, Minutes of the Meeting of Nov. 13, 2020, at 5, <https://tinyurl.com/yc59b94b>.

that proffered expert testimony met each of the requirements in the four subsections of the Rule by a preponderance of the evidence. The Advisory Committee instructed trial courts that they must closely scrutinize not only the reliability of the general methodology applied by the expert, but also the reliability of the factual bases for the expert’s opinion and the reliability of the expert’s application of the methodology employed.⁶ See Fed. R. Evid. 702(d), as amended.

The Advisory Committee was explicit about the gatekeeping obligation the rule imposes on all district judges. It explained that the “trial judge [must] make a finding by a preponderance of the evidence on the admissibility requirements before allowing the expert to testify,” and that “it would be error to permit the testimony if the judge is not satisfied that the expert’s basis is sufficient.”⁷ This understanding is reflected in

⁶ Hon. Patrick J. Schiltz, *Report of the Advisory Comm. on Evid. Rules*, at 6 (May 15, 2022), <https://tinyurl.com/yu6f299b>.

⁷ Advisory Comm. on Evidence Rules, Minutes of the Meeting of April 26-27, 2018, at 11-12, <https://tinyurl.com/5n7p9jdm> (addressing hypothetical where an expert “rejects 7 of 10 seminal studies in an area and [relies] on the 2 or 3 minority studies in the field as the basis for his opinion” and concluding the opinion should be excluded).

the amended text of Rule 702, the accompanying advisory committee notes, and the Advisory Committee’s deliberative materials.⁸

II. The panel failed to properly apply Rule 702(d) in ruling that the District Court abused its discretion by excluding Plaintiffs-Appellants’ experts

In concluding that the district court had abused its discretion, the panel repeatedly—and unjustifiably—criticized that court for reaching its own judgments as to the reliability of the reasoning applied by the plaintiffs’ experts. *See, e.g., Rutledge v. Walgreen Co.*, Nos. 24-916(L); 24-2594, Slip Op. at 44, n.25 (2d Cir. July 13, 2026) (trial court should take a “hard look” at the evidence but not substitute its own judgment); *id.* at 50 (trial court “frequently overstepped its gatekeeping function by

⁸ This Court has repeatedly relied upon Advisory Committee notes to interpret the federal rules. *See, e.g., Hoffer v. Tellone*, 128 F.4th 433 (2d Cir. 2025) (relied on advisory committee notes to Fed. R. Civ. P. 37(e)(2) to reject prior case law authorizing adverse inference instructions based on negligence); *Sorensen v. City of New York*, 413 F.3d 292 (2d Cir. 2005) (relied on advisory committee notes to Fed. R. App. P. 4(a)(4) (1993) for the rule that a premature notice of appeal becomes effective upon the disposition of a post-trial motion); *In re Grand Jury Subpoena*, 103 F.3d 234 (2d Cir. 1996) (relied on advisory committee notes to 1983 Amendment to Federal Rule of Criminal Procedure 6(e) to interpret the scope of grand jury secrecy provisions); *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977) (relied on advisory committee notes to Fed. R. Evid. 803 and 804 to interpret hearsay exceptions).

substituting its own judgments”). But this is exactly what amended Rule 702(d) requires.

As the Advisory Committee explained, and consistent with *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), amended Rule 702(d) “more clearly empowers the court to pass judgment on the conclusion that the expert has drawn from the methodology” because “the methodology must not only be reliable, it must be reliably applied.”⁹ Indeed, in *Joiner* the Supreme Court expressly approved the type of study-by-study analysis that the district court conducted in this case—an analysis which involved the same reliability concerns about expert conclusions from confounded epidemiology, statistically insignificant findings, and proxy reasoning identified here. *See* 522 U.S. at 144-46.

Based on its improper conclusion that flaws in the expert’s analyses could be resolved by the jury, the panel also repeatedly discounted the district court’s reliability findings. *See, e.g.*, Slip Op. at 30, n.15 (stating that factfinder is capable of deciphering the expert’s multiple-outcomes analysis); 36 (stating that the jury can consider the lack of an identified

⁹ Schiltz, *supra* n.6, at 6.

mechanism of causation when assigning weight to expert testimony). But, again, this argument disregards amended Rule 702(d).

The Advisory Committee note explains that the judicial gatekeeping responsibility imposed by Rule 702(d) “is essential because just as jurors may be unable, due to lack of specialized knowledge, to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors may also lack the specialized knowledge to determine whether the conclusions of an expert go beyond what the expert’s basis and methodology may reliably support.” *See* Fed. R. Evid. 702 advisory committee’s notes to 2023 amendments. Following the 2023 amendments, a district court may not “*kick difficult Rule 702 questions to the jury.*”¹⁰ Instead, it must perform its gatekeeping responsibility “to determine whether the conclusions of an expert go beyond what the expert’s basis and methodology may reliably support.” *Id.*

¹⁰ Advisory Comm. on Evidence Rules, Minutes of the Meeting of Nov. 13, 2020, at 4 (emphasis added), <https://tinyurl.com/yc59b94b>.

III. The panel improperly relied on the use of scientific inquiry outside the courtroom as a proxy for reliability inside the courtroom

In place of a proper Rule 702(d) reliability analysis, the panel repeatedly concluded that the plaintiffs' expert's methodology must be reliable because the same methodologies are used by scientists outside the courtroom. For example, the panel erroneously concluded that:

- The district court's criticism of plaintiffs' expert's methodology in lumping disparate outcomes into a single Bradford Hill analysis was erroneous because it is a "methodology that epidemiologists routinely use." Slip Op. at 30.
- Plaintiffs' expert's approach in finding biological plausibility despite his inability to identify the physiological process by which acetaminophen could cause ADHD and ASD was reliable because it "finds support in the practices of other epidemiologists outside the courtroom." *Id.* at 36.
- The district court's criticism of the plaintiffs' expert for cherry-picking studies and exceeding the conclusions

reached by the authors of the studies upon which he relied was “inconsistent with how scientists practice.” *Id.* at 40.

- The district court’s reliability findings with respect to plaintiffs’ expert’s disregard of the adverse findings in a negative control in the Ystrom study were improper because “these are arguments and counter-arguments of the sort that scientists can and do make when engaging in professional academic debates about contested scientific questions.” *Id.* at 43-44.
- Plaintiffs’ expert’s failure to account for inconsistency in the findings in studies looking at prenatal acetaminophen use and ASD was acceptable because other scientists “outside the courtroom” agreed with his opinion. *Id.* at 48.

This overreliance on the mere existence of any similar practice of science *outside* the courtroom as proxy for in-court reliability is fundamentally flawed. As the Supreme Court explained in *Daubert*:

[T]here are important differences between the quest for truth in the courtroom and the quest for truth in the laboratory.

Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly. The scientific project is advanced by broad and wide-ranging consideration of a multitude of hypotheses, for those that are incorrect will eventually be shown to be so, and that in itself is an advance. Conjectures that are probably wrong are of little use, however, in the project of reaching a quick, final, and binding legal judgment—often of great consequence—about a particular set of events in the past.

509 U.S. 579 at 596-97. “The courtroom is not the place for scientific guesswork, even of the inspired sort. Law lags science; it does not lead it.”¹¹ *Rider v. Sandoz Pharm. Corp.*, 295 F.3d 1194, 1202 (11th Cir. 2002) (citation omitted).

¹¹ Circuit courts around the country and district courts in this circuit agree. *See, e.g., Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir. 1996) (“[T]he courtroom is not the place for scientific guesswork, even of the inspired sort. Law lags science; it does not lead it.”); *Madej v. Maiden*, 951 F.3d 364, 375 (6th Cir. 2020) (same); *Hendrix ex rel. G.P. v. Evenflo Co.*, 609 F.3d 1183, 1194, 1203 (11th Cir. 2010) (same); *Wells v. SmithKline Beecham Corp.*, 601 F.3d 375, 381 n.33 (5th Cir. 2010) (same); *Goebel v. Denver & Rio Grande W. R. Co.*, 346 F.3d 987, 1002 (10th Cir. 2003) (same). *See also In re Mirena IUD Prods. Liab. Litig.*, 169 F.Supp.3d 396, 431 (S.D.N.Y. 2016) (finding that, because “[l]aw lags science,” expert’s opinion must “constitute ‘scientific knowledge,’ as opposed to hypothetical speculation”); *Colon v. Abbott Lab’s*, 397 F. Supp. 2d 405, 416, 418 (E.D.N.Y. 2005) (excluding expert because “[l]aw lags science” and “the trial court is no place for pure theory, hypothesis, or even sincerely held opinion”); *Colon ex rel. Molina v. BIC USA, Inc.*, 199 F. Supp. 2d 53, 75-76 (S.D.N.Y. 2001) (excluding expert because “[l]aw lags science” and the courtroom is “not the place for scientific guesswork, even of the inspired sort.”); *Golod v. La Roche*, 964 F. Supp.

Using the purported existence of scientific debate outside the courtroom or the practices of other scientists in the field as a proxy for in-court reliability would effectively gut Rule 702. It will rarely be the case that a litigation expert will proffer an opinion as to which no other scientists would agree or seek to defend his opinion with reasoning that no other scientist applies. Scientific knowledge is driven by the exploration of novel hypotheses and the questioning of established methodologies. But scientific speculation is not admissible evidence. If the mere existence of scientific debate and differing uses of scientific methodologies were sufficient, virtually every opinion proffered by a qualified expert would be admissible.

The fact that scientists are searching for answers in the outside world does not mean that they have reached reliable conclusions that are admissible in court. Rule 702 requires more.

CONCLUSION

The panel's conclusion that the district court abused its discretion fails to properly apply amended Rule 702 and relies upon reasoning that

841, 860-61 (S.D.N.Y. 1997) (finding that, because “[l]aw lags science,” expert’s theory, while biologically plausible, did not constitute “scientific knowledge”).

is directly rejected in *Daubert*. The petition for rehearing and/or rehearing *en banc* should be granted.

Dated: September 17, 2026

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 29(b)(4), Rule 29(a)(4)(G), and Rule 32(g) of the Federal Rules of Appellate Procedure and Rule 32.1 of the Local Rules of the Second Circuit, the Atlantic Legal Foundation certifies that the foregoing brief complies with the applicable type-volume and spacing requirements. According to the word count feature on the word processing system used to prepare the brief, the brief, including text, footnotes, headings, and quotations (but excluding the parts exempted by Fed. R. App. P. 32(F)), contains 2,530 words.

Dated: September 17, 2026

Respectfully submitted,

/s/ Lawrence S. Ebner

Lawrence S. Ebner

CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2026, the foregoing motion and its attached brief was served on all parties or their counsel of record through the Court's CM/ECF system.

/s/ Lawrence S. Ebner

Lawrence S. Ebner