FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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

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

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

Filed January 15, 2014

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

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

SUMMARY*

Expert Testimony

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

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

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

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

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

COUNSEL

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OPINION

N.R. SMITH, Circuit Judge:

This case requires us to once again consider the district court's admission of expert testimony at trial. We review the admission of expert testimony at trial for an abuse of discretion. *Primiano v. Cook*, 598 F.3d 558, 563 (9th Cir. 2010). If the district court improperly admitted the expert testimony, we apply harmless error review to determine whether its decision must be reversed. *United States v. Laurienti*, 611 F.3d 530, 547 (9th Cir. 2010). When we find the erroneous admission of evidence actually prejudiced the defendant, such that the error was not harmless, the appropriate remedy is a new trial. *See United States v. 4.85 Acres of Land*, 546 F.3d 613, 620 (9th Cir. 2008). Applying

this well-settled precedent to the facts of this case, we vacate the judgment and remand for a new trial.[1]

FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

PROCEDURAL HISTORY

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

After deliberations, the jury found in favor of the Barabins and awarded damages totaling $10,200,000. The district court granted AstenJohnson's and Scapa's motions to vacate the judgment and scheduled a reasonableness hearing. The district court found the damages award to be reasonable, offset the judgment by a total of $836,114.61,[3] and entered

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

judgment in favor of the Barabins in the amount of $9,373,152.12.

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

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

STANDARDS OF REVIEW

"A district court's evidentiary rulings should not be reversed absent clear abuse of discretion and some prejudice." *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1202 (9th Cir. 2013) (internal quotations and citation omitted). However, we review *de novo* the "construction or interpretation of . . . the Federal Rules of Evidence, including whether particular evidence falls within the scope of a given rule." *United States v. Durham*, 464 F.3d 976, 981 (9th Cir. 2006) (citations omitted). A ruling on a motion for new trial "will be overturned on appeal only for abuse of discretion." *Kode v. Carlson*, 596 F.3d 608, 611 (9th Cir. 2010) (citation omitted).

DISCUSSION

I.

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

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702 (2010).[4] We have interpreted Rule 702 to require that "[e]xpert testimony . . . be both relevant and reliable." *United States v. Vallejo*, 237 F.3d 1008, 1019 (9th Cir. 2001). Relevancy simply requires that "[t]he evidence . . . logically advance a material aspect of the party's case." *Cooper v. Brown*, 510 F.3d 870, 942 (9th Cir. 2007).

The issue here is reliability: whether an expert's testimony has "a reliable basis in the knowledge and experience of the relevant discipline." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149 (1999) (citation and

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

alterations omitted). The "*evidentiary reliability* [is] based upon *scientific validity*." *Daubert*, 509 U.S. at 590 n.9. We are concerned "not [with] the correctness of the expert's conclusions but the soundness of his methodology." *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010) (citations and quotations omitted). The duty falls squarely upon the district court to "act as a 'gatekeeper' to exclude junk science that does not meet Federal Rule of Evidence 702's reliability standards." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011).

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

The trial judge also has broad latitude in determining the appropriate form of the inquiry. *See United States v. Alatorre*, 222 F.3d 1098, 1102 (9th Cir. 2000) ("Nowhere . . . does the Supreme Court mandate the form that the inquiry into relevance and reliability must take."). While pretrial "*Daubert* hearings" are commonly used, *see, e.g.*, *United States v. Lukashov*, 694 F.3d 1107, 1112 (9th Cir. 2012), they

are certainly not required, *United States v. Jawara*, 474 F.3d 565, 582 (9th Cir. 2006).

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

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

The district court also failed to act as gatekeeper for Dr. Millette's testimony. After acknowledging various arguments as to whether the testimony was admissible, the district court concluded that it could be admitted, so long as the jury was informed of the "marked differences" between conditions of the tests and the actual conditions of the mill. Rather than making findings of relevancy and reliability, the district court passed its greatest concern about Dr. Millette's testimony to the jury to determine.

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

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

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

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

II.

When we conclude evidence has been improperly admitted, "we consider whether the error was harmless." *United States v. Bailey*, 696 F.3d 794, 802–03 (9th Cir. 2012). We treat the erroneous admission of expert testimony the same as all other evidentiary errors, by subjecting it to harmless error review. *See United States v. Rahm*, 993 F.2d

1405, 1415 (9th Cir. 1993). We reverse "only if the error affect[ed] a substantial right of the party." Fed. R. Evid. 103(a). "In other words, we require a finding of prejudice." *Obrey v. Johnson*, 400 F.3d 691, 699 (9th Cir. 2005).

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

As the beneficiaries of the erroneously admitted evidence, the Barabins fail to rebut the presumption of prejudice. Indeed, they admit they cannot win without this expert testimony.[5] Prejudice is at its apex when the district court erroneously admits evidence that is critical to the proponent's case. The improper admission of the expert testimony severely prejudiced AstenJohnson and Scapa because the Barabins' claim depended wholly upon the erroneously admitted evidence. Given these circumstances, there is no doubt the error was not harmless.

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

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

The dissent cites only two cases addressing the use of harmless error review in these circumstances.[6] They both support our decision. *See 4.85 Acres of Land*, 546 F.3d at 620; *Simpson v. Thomas*, 528 F.3d 685, 691 (9th Cir. 2008). In *4.85 Acres of Land*, we found that the district court abused its discretion by excluding all post-taking sales from consideration without first making any findings regarding the comparability of the excluded sales to the condemned property. 546 F.3d at 620. Despite being asked to do so, we *refused* to address on appeal whether "some of the post-taking comparable sales would have been admissible." *Id.* Instead, we engaged in harmless error review, found that the error was not harmless, and remanded for a new trial. *Id.*

In *Simpson*, we found that the district court abused its discretion when it admitted three prior convictions that were more than ten years old without engaging in proper balancing

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

under rule 609(b) of the Federal Rules of Evidence. 528 F.3d at 690–91. The district court identified the correct rule, but it abused its discretion when it inverted the requirement of the rule, failed to offer specific facts to support its conclusion, and did not find that the probative value *substantially* outweighed the prejudice. *Id.* at 690. We did not engage in 609(b) balancing on appeal to determine whether the prior convictions would have been admissible. Instead, we went straight to harmless error review, found the evidence to be prejudicial, and remanded for a new trial. *Id.* at 690–91.

As both *4.85 Acres of Land* and *Simpson* illustrate, when the district court abdicates its responsibility to answer a threshold question of admissibility, we need not determine whether the evidence would have been admissible before we determine the district court abused its discretion and proceed to harmless error review. In both cases we engaged in harmless error review, as we always do, by asking if erroneously admitting or excluding the evidence affected the outcome of the trial.[7] *See 4.85 Acres of Land*, 546 F.3d at

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

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

620; *Simpson*, 528 F.3d at 691. We reject the dissent's attempt to insert a new step into our review of evidentiary errors.

III.

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

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

In *Daubert*, the Supreme Court set "the standard for admitting expert scientific testimony in a federal trial" by holding that the Federal Rules of Evidence superseded the

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not apply but went on to make *Daubert* findings. Here, the district court said that *Daubert* did apply but failed to make *Daubert* findings.

Frye test. *Daubert*, 509 U.S. at 582, 586–87. *Daubert* continues to require that the proponent of expert testimony lay a proper foundation, but now laying a proper foundation means establishing relevancy and reliability rather than mere general acceptance. *Id.* at 597.

Initially, in grappling with the effects of *Daubert*, we remanded two cases to district courts to conduct post-hoc *Daubert* hearings. *See United States v. Cordoba*, 104 F.3d 225, 229 (9th Cir. 1997); *United States v. Amador-Galvan*, 9 F.3d 1414, 1418 (9th Cir. 1993).[8] After the dust of *Daubert* had settled, we held that an erroneous admission of expert testimony, absent a showing the error was harmless, requires a new trial. *See Mukhtar*, 299 F.3d at 1066–67. To the extent *Mukhtar* requires anything more, it is overruled.

AstenJohnson and Scapa contend that a reviewing court should have the authority to make *Daubert* findings based on the record established by the district court. We agree and overrule *Mukhtar* to the extent that it required that *Daubert* findings always be made by the district court. *See Mukhtar*, 299 F.3d at 1066 n.12. If the reviewing court decides the record is sufficient to determine whether expert testimony is relevant and reliable, it may make such findings. If it "determines that evidence [would be inadmissible] at trial and that the remaining, properly admitted evidence is insufficient

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

to constitute a submissible case[,]" the reviewing court may direct entry of judgment as a matter of law. *Weisgram v. Marley Co.*, 528 U.S. 440, 446–47 (2000).

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

The Barabins and the dissent argue that we should remand for a post-hoc *Daubert* hearing. Even assuming that a limited remand is available post-*Mukhtar*, *see* 319 F.3d at 1074, it would not be appropriate under the circumstances here, where the district court abused its discretion by erroneously admitting expert testimony, and the evidence was prejudicial. We therefore remand for a new trial.

CONCLUSION

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

the error, the appropriate remedy is a new trial. We vacate the judgment and remand for a new trial.

VACATED and REMANDED.

The parties shall bear their own costs on appeal.

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

I concur in Part I of the majority's opinion, which concludes that the district court failed to fulfill its gatekeeping function with regard to the expert testimony at issue. I also agree with the majority that we are unable to determine based on the record before us whether the expert testimony is admissible. *See* Maj. Op. at 19 ("We cannot speak to the admissibility of the expert testimony at issue here because the record before us is too sparse to determine whether the expert testimony is relevant and reliable."). Further, to the extent the majority overrules *Mukhtar v. California State University*, 299 F.3d 1053 (9th Cir. 2002), *amended by* 319 F.3d 1073 (9th Cir. 2003), I am in accord. There is no reason to require a new trial whenever a district court fails to conduct a *Daubert* analysis, regardless of whether on remand the district court would determine that disputed expert testimony is relevant and reliable.

I part ways with the majority, however, in its application of harmless error review. The majority's analysis is seriously flawed because it conflates a district court's gatekeeping error with a district court's erroneous determination of

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

I.

A district court must "ensure the reliability and relevancy of expert testimony" and "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999); *see also* Fed. R. Evid. 702. In short, a district court serves an essential "gatekeeping" function in evaluating proffered expert testimony. *Kumho Tire*, 526 U.S. at 141.

In this case, the district court abdicated its gatekeeping role by failing to evaluate the relevancy and reliability of the expert testimony at issue. Given this oversight, we must determine whether the district court's misstep resulted in the admission of evidence that should have been excluded. In the

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

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

II.

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

The distinction between the two is crucial. With the former, we know whether a party was wrongfully permitted or denied the opportunity to present certain evidence, and we can determine whether that error was prejudicial. With the latter, we cannot gauge prejudice unless we are able to determine what the jury would have been permitted to hear had the district court properly discharged its gatekeeping duties.[1]

By skipping over the question of admissibility and heading straight for prejudice, the majority's analysis results in two key missteps. First, the majority dubs the Barabins "the beneficiaries of . . . erroneously admitted evidence." *Id.*

---

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

at 14. But, as the majority acknowledges, we have no idea whether the expert testimony at issue was in fact "erroneously admitted." On a proper *Daubert* analysis—a task we decline to engage in on appeal—the testimony might indeed have been admissible. In this circumstance, the Barabins would merely be the beneficiaries of evidence they were entitled to present in the first place.

Second, in bypassing admissibility, the majority engages in a perplexing prejudice analysis that emphasizes the fact that the disputed expert testimony was "critical to the proponent's case."[2] *Id.* Indeed, based on its conclusion that "the Barabins' claim depended wholly upon the erroneously admitted evidence," the majority finds "no doubt the error was not harmless." *Id.* Not so. Even if the Barabins' claim depended on the expert testimony at issue, we have no idea whether the testimony was "erroneously admitted," let alone whether any error "materially affect[ed] the verdict." *Morales*, 720 F.3d at 1197. If the expert testimony was admissible, then the jury simply reached a verdict based on evidence it was properly permitted to consider, despite the district court's error.

The flaw in the majority's logic is highlighted by the fact that not a single case it cites supports the type of harmless error analysis it applies. Rather, in each case, we engaged in harmless error review only *after* we determined that evidence

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

had been improperly deemed admissible or inadmissible.[3] Indeed, this is true of *Simpson v. Thomas* and *United States v. 4.85 Acres of Land*—two cases specifically discussed by the majority in support of its decision. Contrary to the majority's assertion, neither case involved merely a situation where a "district court abdicate[d] its responsibility to answer a threshold question of admissibility." Maj. Op. at 16. Rather, in both cases, we found *actual error by the district court* in deeming evidence admissible or inadmissible before proceeding to harmless error review. *See Simpson*, 528 F.3d at 689 ("The district court erred in admitting the evidence of Simpson's three prior felony convictions."); *4.85 Acres of Land*, 546 F.3d at 620 ("[T]he [district] court simply excluded all post-taking sales based on 'the erroneous premise . . . that evidence of subsequent sales is never proper for consideration in arriving at fair market value.'" (quoting

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

United States v. 1,129.75 Acres of Land, 473 F.2d 996, 999 (8th Cir. 1973)) (final alteration in original)).

In fact, our case law suggests a notably different harmless error inquiry when a district court fails to fulfill its gatekeeping function. For example, in *Hangarter v. Provident Life & Accident Insurance Co.*, 373 F.3d 998 (9th Cir. 2004), the district court incorrectly concluded that *Daubert* was inapplicable to the non-scientific testimony of an independent consultant. *Id.* at 1015–16, 1018. We found the error harmless because "the [district] court's probing of [the consultant's] knowledge and experience was sufficient to satisfy its gatekeeping role under *Daubert*." *Id.* at 1018. In short, the district court's failure to analyze the expert testimony pursuant to *Daubert* was harmless because the analysis it nonetheless conducted satisfied *Daubert* and the testimony was thus correctly admitted. This was a proper application of harmless error review—where the error identified on appeal pertains to the gatekeeping function, the reviewing court should consider whether *the gatekeeping error* was harmless.[4]

In contrast, the majority here finds a gatekeeping error, but embarks on a prejudice inquiry that focuses on how crucial the disputed expert testimony was to the prevailing party's success. In doing so, the majority effectively treats the testimony as *inadmissible*, even as it professes to reserve

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

judgment on the question. The majority cannot have it both ways.

III.

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

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs ..... ***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED Each Column Must Be Completed				ALLOWED To Be Completed by the Clerk			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			TOTAL:	$

* Costs per page may not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page.

Form 10. Bill of Costs - *Continued*

I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HENRY BARABIN and GERALDINE BARABIN, Plaintiffs-Appellees, vs. ASTENJOHNSON, INC. and SCAPA DRYER FABRICS, INC., Defendants-Appellants.	Nos. 10-36142 and 11-35020 D.C. No. 2:07-cv-01454-RSL Western District of Washington, Seattle JOINT MOTION OF APPELLANTS FOR ACCEPTANCE OF OVERLENGTH JOINT OPENING BRIEF

1. Identity of Moving Party. Appellants AstenJohnson, Inc. ("Asten"), and Scapa Dryer Fabrics, Inc. ("Scapa") (collectively "Appellants"), move for the relief designated below.

2. Statement of Relief Requested. Appellants move, under Circuit rule 32-2, for acceptance of their proposed Joint Opening Brief of 15,985 words, which exceeds the 14,000 word limit for an opening brief by 1,985 words.

3. Statement of Material Facts. The material facts are set forth in the Declaration of Michael B. King attached to this motion.

4. Grounds for Relief and Argument. This appeal arises out of a judgment on jury verdict of $9,373,152.12 in a toxic tort case, involving a claim of

mesothelioma arising out of occupational asbestos exposure. As more fully described in the subjoined Declaration of Michael B. King, counsel have been working diligently to reduce an initial draft brief of over 24,000 words, and have reduced that brief to its present 15,985 words -- a reduction of nearly 1/3. This followed an initial issue selection process, which resulted in focusing the appeal on a set of *Daubert* expert witness issues (supporting a request for reversal and remand with directions to dismiss Plaintiffs' case with prejudice) and a set of new trial issues (juror misconduct, and matters supporting a claim of cumulative error).

This Court will accept a brief that exceeds the word count limits, upon a showing of diligence and substantial need. Circuit Rule 32-2. Appellants submit that the size of the record, the complexity of the scientific expert witness issues raised by this toxic tort case, and the substantiality of the alternate new trial relief request, establish substantial need. Appellants also submit that appellate counsel has been working with diligence to effect significant reductions in the length of the brief, and that further reductions would unfairly compromise Appellants' ability to present their case for relief.

5. Conclusion. This Court should accept Appellants' proposed Joint Opening Brief of 15,985 words.

Respectfully submitted this 19th day of May, 2011.

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Counsel for Appellant AstenJohnson, Inc.

DECLARATION

1. My name is Michael B. King. I am appellate counsel in this case for Appellant AstenJohnson, Inc. I make this declaration from personal knowledge, and am otherwise competent to testify to the matters set forth herein.

2. I have been working with Mary Spillane, appellate counsel for Appellant Scapa Dryer Fabrics, Inc., and together we have responsibility for our respective clients for the Joint Opening Brief of Appellants, which we are submitting along with this motion requesting the Court to accept the brief at its present length of 15,985 words.

3. This appeal arises out of a judgment on jury verdict of $9,373,152.12 in favor of Plaintiffs Henry and Geraldine Barabin. The docket had 586 entries at the time preparation of the brief began. The transcripts cover two pre-trial hearings, 15 days of trial, and one post-trial hearing, for a total of 2,351 pages. 14 Witnesses testified live, including 7 experts; several other witnesses testified by deposition.

4. Counsel have worked diligently to cull the issues to be raised, and to focus solely on issues common to both Appellants. The result is the issue selection reflected in the proposed brief.

a. In support of their request for the relief of reversal and remand with directions to dismiss with prejudice, Appellants have raised an issue concerning the admission of expert testimony in compliance with *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). Plaintiffs' case involves claims arising out of occupational exposures to asbestos, and as such implicates several complex scientific questions that can only be resolved through expert testimony. Appellants' *Daubert* issue involves a challenge to the admission of testimony in three of those areas, and requires analysis of trial testimony from 7 experts, and of an extensive record developed during pre-trial motion *in limine* proceedings.

b. In support of their request for the alternative relief of a new trial, Appellants have raised three issues. The first is a juror misconduct issue, which requires analysis of the record on *voir dire*, and related post-judgment proceedings. The second two involve an evidentiary issue (collateral source rule) and misconduct of counsel, which are advanced in support of a cumulative error issue. Each requires analysis of salient portions of the trial record, and related post-judgment proceedings.

5. The proposed brief has been subject to an extensive drafting process over a period of two months involving multiple participants since the completion of the initial draft, designed to reduce it to the minimum number of words that in counsel's judgment allows Appellants to fully and effectively present their clients

case for appellate relief. After an issue selection process that resulted in discarding several points that had been the subject of Appellants' post-trial motions, an initial draft totaling 24,032 words has been cut down to the present 15,985 words -- a reduction of nearly 1/3. Appellants requested a single extension of time of 34 days, in part to facilitate this process, and are submitting their proposed brief on the requested due date.

6. Under Circuit Rule 28-4, parties in the position of Appellants may receive an extension of 21 days for the submission of a joint opening or answering brief. That rule authorizes an additional 1,400 words for such a brief, for a total of 15,400 words. Appellants' proposed brief exceeds that limit by 585 words.

I swear the foregoing to be true under penalty of perjury under the laws of the State of Washington.

Executed at Seattle, Washington, this 19th day of May, 2011.

/s/ *Michael B. King*
Michael B. King

CERTIFICATE OF SERVICE

I hereby certify that on May19, 2011, I caused to be electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED this 19th day of May, 2011.

CARNEY BADLEY SPELLMAN, P.S.

By ***s/ MICHAEL B. KING***
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No. 10-36142

(consolidated with No. 11-35020)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HENRY BARABIN and GERALDINE BARABIN,

Plaintiffs-Appellees,

v.

ASTENJOHNSON, INC., and SCAPA DRYER FABRICS, INC.,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
No. C07-1454 RSL
(Hon. Robert S. Lasnik)

JOINT OPENING BRIEF OF APPELLANTS

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Counsel for Appellant Scapa Dryer Fabrics, Inc.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 Defendants-Appellants AstenJohnson, Inc., and Scapa Dryer Fabrics, Inc., hereby submit the following Corporate Disclosure Statements:

ASTENJOHNSON, INC.

AstenJohnson, Inc., hereby certifies that its stock is not publicly traded and the stock of its parent company, AstenJohnson Holdings, Ltd. is not publicly traded.

/S/ Michael B. King
Michael B. King
Counsel for Appellant AstenJohnson, Inc.

SCAPA DRYER FABRICS, INC.

Scapa Dryer Fabrics, Inc., hereby certifies that it is 100% owned by a non-publicly traded company called Porritts & Spencer Ltd., which is in turn 100% owned by Scapa Group, PLC, which is a publicly traded company.

/S/ Mary H. Spillane
Mary H. Spillane
Counsel for Appellant Scapa Dryer Fabrics, Inc.

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I.

STATEMENT OF JURISDICTION

Plaintiffs Henry and Geraldine Barabin (collectively "Barabin" or "Plaintiffs") sued, among others, Defendants AstenJohnson, Inc. ("Asten"), and Scapa Dryer Fabrics, Inc. ("Scapa") (collectively "Defendants"), in Washington State; the suit was removed to the Western District of Washington, which had diversity jurisdiction under 28 U.S.C. § 1332. CR 1, 7.[1] Final judgment was entered on December 10, 2010, CR 552 (ER 1); Defendants timely appealed. *Compare* CR 554 (ER 105-7) *and* CR 565 (ER 101-4) *with* Fed. R. App. Pro. 4(a)(1)(A). This Court has jurisdiction under 28 U.S.C. § 1291.

II.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Admission of Expert Testimony. Does a District Court err when it does not determine if expert evidence satisfies the requirements of scientific reliability and relevance established by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 584 (1993), and instead admits the evidence and leaves those issues for the jury to resolve "[i]n the interest of allowing each party to try its case to the jury"? (CR 248) (ER 70).

[1] To keep the Excerpts of Record manageable, Defendants will not reproduce matters pertaining to undisputed procedural facts.

2. Juror Misconduct. Does a District Court err in denying a new trial on grounds of juror misconduct where a juror, in response to a voir dire question about experience with cancer, failed to disclose she had a terminal brain tumor, and then interjected into deliberations that she had one, knew what it was like to have a terminal condition, and said no amount of money makes it any easier?

3. Cumulative Error. Did the cumulative prejudicial effect of the erroneous admission of expert testimony, the juror's misconduct, the exclusion of collateral source evidence after Mrs. Barabin testified to fearing being left destitute, and plaintiff's counsel's misconduct in closing argument deprive Defendants of a fair trial?

If this Court answers "yes' to Issue 1, it should reverse the judgment and direct dismissal of Plaintiffs' complaint with prejudice. If this Court determines that, notwithstanding any erroneously admitted expert testimony, Plaintiffs proffered sufficient testimony to create a jury question on causation, this Court should reverse and remand for a new trial.

The admissibility of scientific evidence under Federal Rule of Evidence 702, other evidentiary rulings, the denial of a new trial on grounds of alleged juror misconduct, and the district court's control of closing arguments are all reviewed for abuse of discretion. *Mukhtar v. California State University*, 299 F.3d 1053, 1063 (9th Cir. 2002), *as amended by* 319 F.3d 1073 (9th Cir. 2003) (admissibility

of scientific evidence); *Wicker v. Oregon Bureau of Labor*, 543 F.3d 1168, 1173 (9th Cir. 2008) (evidentiary rulings); *Sea Hawk Seafoods v. Alyeska Pipeline Serv. Co.*, 206 F.3d 900, 911 n.19 (9th Cir. 2000) (denial of new trial for juror misconduct); *Larez v. Holcomb*, 16 F.3d 1513, 1520-21, (9th Cir. 1994) (control of closing arguments). "Abuse of discretion occurs when a decision is based 'on an erroneous view of the law or a clearly erroneous assessment of the facts.'" *Fargo v. Comm'r of Int'l Rev.*, 447 F.3d 706, 709 (9th Cir. 2006) (citations omitted).

III.

STATEMENT OF THE CASE

Plaintiffs sued 23 defendants, including asbestos-containing product manufacturers, fabricators, distributors and trusts, alleging damages arising out of Mr. Barabin's mesothelioma caused by occupational exposure to asbestos. Defendants Asten and Scapa manufactured "dryer felts," woven textile products installed on paper machines in paper mills. Paper machines make paper by removing large quantities of water from paper "slurry." Slurry is 99% water-1% fiber, while paper is 5-8% water (the remainder serving as a binding agent). RT 1533:17-20 (ER 169). Dryer felts, located in a paper machine's dryer section, assist water removal by holding the paper sheet against hot dryer cans. The sheet is 50-60% water when it enters the dryer section, RT 1541:23-25 (ER 175), and the heat removes most of the water as the sheet travels through that section. RT

1542:3-5 (ER 176). Mr. Barabin worked at a paper mill in Camas, Washington. Some dryer felts Defendants supplied to the mill contained asbestos; most did not. Ex. 696[2] (ER 414-6), Ex 697 (ER 411-3).

Barabin offered expert testimony to prove (1) the asbestos-containing dryer felts released asbestos fibers, (2) Mr. Barabin breathed them in, and (3) this exposure was a substantial contributing factor to his mesothelioma. Defendants objected by motions *in limine* (CR 178, 192; 186; 188, 194), at the close of Barabin's case (RT 1300-1310:10) (ER 237-47), and at the close of all the evidence (RT 1990:6-9; 2138:8-11) (ER 123; 129), that this testimony was inadmissible under *Daubert*.

The District Court overruled Defendants' objections. Refusing to exclude testimony that any exposure to asbestos should be deemed a substantial contributing factor to Mr. Barabin's mesothelioma, the court stated:

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

CR 248 (ER 70) (Order at 11:18-21) (emphasis added). The court did not determine whether the testimony was scientifically reliable and relevant, leaving

[2] No CR references are provided for exhibits because the Western District returns them to the parties.

the jury to sort out those issues. During questioning of Dr. James Millette, whose laboratory testing failed to replicate actual mill conditions, the court stated that Dr. Millette:

> …can try to do something that he may feel helps him extrapolate from that [i.e., from his laboratory results]. The other side will say why they disagree with that. *You ultimately decide what to do*.

RT 1150:7-11 (ER 212) (emphasis added).

The jury found against Defendants, awarding Henry Barabin $8,700,000 and Geraldine Barabin $1,500,000. CR 354 (ER 58). Defendants renewed their motions for judgment as a matter of law, and moved for a new trial (or alternatively remittitur). CR 386, 388, 390, 392. After the verdict, evidence came to light that a juror failed during *voir dire* to answer a question about her personal experience with cancer (a terminal brain tumor), then injected that experience into deliberations. Defendants raised this as another ground for new trial, and requested an evidentiary hearing to examine jurors under oath. CR 396, 408.

The District Court declined to hold such a hearing, and denied Defendants' motions for judgment as a matter of law, new trial, and remittitur. CR 550 (ER 26-31), CR 551 (ER 2-25). After deducting $836,114.61 for settlements, the court entered final judgment of $9,373,152.12. CR 552 (ER 1).

IV.

STATEMENT OF FACTS

Henry Barabin has mesothelioma, a cancer of the lung's lining (the "pleura"); asbestos exposure from inhaling respirable fibers is a cause. RT 858:23-859:22 (ER 252-253). It is undisputed that Mr. Barabin was exposed to fibers from asbestos insulation products while employed from 1964 to 1968 at a Texaco Refinery in Texas; the medical experts agreed this exposure was a substantial contributing factor to his mesothelioma. Also undisputed is that Mr. Barabin was again exposed to fibers from insulation products from 1968 through 1984 at the Camas Mill; the medical experts agreed this exposure was another substantial contributing factor. The parties dispute whether Mr. Barabin was exposed to fibers from Defendants' dryer felts, and whether any such exposure was yet *another* substantial contributing factor.

A. Factual Background.

1. Asbestos and Toxicity.

The aphorism "the dose makes the poison" refers to the scientific principle that all substances are harmful if the dose is high enough, and not if too low. Federal Judicial Center, *Reference Manual on Scientific Evidence* 403 (2d ed. 2000). In science and law, "[t]he individual must have been exposed to a sufficient amount of the substance in question to elicit the health effect in

question." Dr. David L. Eaton, *Scientific Judgments and Toxic Torts -- a Primer in Toxicology for Lawyers and Judges*, 12 J.L. & Pol'y 5, 39 (2003). Asbestos is no exception; there is asbestos in the air we all breathe, yet mesothelioma is extremely rare in the general population. RT 874:7-25 (ER 254).

Background -- or "ambient" -- exposures to asbestos typically range between undetectable and 0.02 fibers per cubic centimeter ("cc"). RT 1345:6-25 (ER 204). Dr. Carl Brodkin, Barabin's "main causation witness" (RT 727:22-728:8, ER 290-291), agreed low levels of asbestos exposure have no significant biological effect. RT 934:4-11 (ER 267). Testifying that exposures contributing to a cumulative lifetime dose are substantial factors in the development of asbestos disease (RT 936:25-937:5, ER 269-270), Brodkin agreed that an exposure must be significantly above ambient range to contribute to such a dose. RT 937:6-9 (ER 270).

There are two main commercial asbestos types: Serpentine and Amphibole. (RT 590:9-12) (ER 284). Chrysotile is the main form of Serpentine asbestos. (RT 590:21-24) (ER 284). Chrysotile was a component of some yarns in some dryer felts Defendants supplied to the Camas Mill. Amosite and Crocidolite, the two major commercial forms of Amphibole asbestos, were components of the insulation products to which Mr. Barabin was exposed at the Texas Refinery and the Camas Mill. RT 678:17-23 (ER 289); Ex. 5109 (ER 399).

It was undisputed that Chrysotile is less potent than Amphibole, RT 952:6-8 (ER 271); 1347:7-14 (ER 205); 1455:11-19 (ER 157); 1796:7-1797:6 (ER 132-3), although the degree of difference was disputed. Crocidolite, the form of Amphibole used in asbestos insulation products such as Limpet, RT 678:22-23, ER 289), is more potent than Chrysotile, with estimates ranging as high as 1,000 to 1. RT 1796: 7-11 (ER 133).

There is no evidence that ambient-range levels of Chrysotile increase the risk for mesothelioma. RT 954:4-8 (ER 272).

2. Mr. Barabin's Substantial Exposures to Asbestos From Insulation.

At the Texaco Refinery, Mr. Barabin for a time did clean-up work, RT 420:11-421:6 (ER 293-4), cleaning up thermal insulation, RT 421:7-25 (ER 294), and debris from asbestos-containing pipe, block and Limpet spray insulation. RT 1527:7-13 (ER 165). The experts agreed these exposures were a substantial contributing factor to his mesothelioma. RT 978:12-979:3 (ER 273-4), 989:11-990:13 (ER 277-8) (Brodkin); RT 1365:16-1366:9 (ER 206) (Roggli); RT 1447:17-1448:10 (ER 154-5) (Hammar); RT 1758:20-25 (ER 131) (Crapo).

At the Camas Mill from 1968 through 1984,[3] Mr. Barabin was exposed to asbestos while walking past asbestos-insulated wood chip "digesters," opening and closing valves, and observing workers in his vicinity remove, install and disturb a variety of asbestos-containing insulation products. RT 423:20-424:11 (ER 295-6); RT 1527:14-25 (ER 165). These exposures were another substantial contributing factor to his mesothelioma. RT 987:11-990:13 (ER 275-8) (Brodkin); RT 1366:22-1367:4 (ER 206-7) (Roggli); RT 1448:20-1449:1 (ER 155-6) (Hammar); RT 1758:13-25 (ER 131) (Crapo).[4]

3. Mr. Barabin's Paper-Making Work At The Camas Mill.

Mr. Barabin's first job was sorting and packaging paper towels. RT 431:12-17 (ER 300). He then worked as a pulp and paper tester. RT 431:24-432:8 (ER 300-1). He started working on paper machines in 1974, RT 442:11-25, becoming a "fifth hand" on Machine 7 in June 1975. Ex. 2167, Barabin 00040-41 (ER 409-10).

[3] Mr. Barabin had no exposure from 1984, when he went to work on Machine 20, located in a building separate from the other machines. Ex. 696 (ER 416).

[4] Mr. Barabin's exposures to asbestos from insulation at the Refinery and Mill were each sufficient, standing alone, to cause his mesothelioma. RT 1449:9-18 (ER 156) (Hammar).

Paper machines at the Mill[5] made paper by removing large quantities of water from paper slurry, converting it into paper. *See* RT 424:12-426:20 (ER 296-8). Shredded and digested pulp was advanced to a machine where consistency was adjusted, often by adding more water. RT 1535:18-1536:7 (ER 170-1); 1538:2-20 (ER 172). This mixture -- "slurry" -- was then conveyed to the "head box," at the beginning of the paper machine. RT 1538:23-25 (ER 172).

Machine 8, on which Mr. Barabin worked, was the Mill's smallest -- 20 feet wide, 1½ blocks long, and 2½ stories tall. RT 427:11-14 (ER 299). From the machine's head box, the slurry was spread over a moving screen (the "fourdrinier" wire) to form a nascent sheet of paper, RT 1538:23-1539:11 (ER 172-3), that was picked up by "wet" felts and rolled through running fabric presses to squeeze out water. RT 1540:9-24 (ER 174). Dryer felts -- Defendants' products at issue -- then pulled the sheet against the dryer "cans" -- large steam-pressurized cylinders -- to drive off and evaporate most of the remaining water. RT 1541:4-1542:5 (ER 175-6).

To make 54 tons of paper a day (the projected production for Machine 8), 216,000 pounds of water -- 26,000 gallons -- had to pass through the dryer felts

[5] A color chart showing the layout of a mill comparable to the Camas Mill was shown to the jury, RT 554:17-22 (ER 317), and is included in the Excerpts, ER 427.

and be removed from the dryer section. RT 1550:18-1552:12 (ER 179-81). The nascent paper would not have dried sufficiently, however, without powerful ventilation pulling the moisture out of the air up through roof vents. RT 1891:8-22 (ER 138). It required 72,000,000 cubic feet of air, moving at 50,000 cubic feet per minute, to remove the water vapor and steam from the dryer section of Machine 8 each day. RT 1551:13-25 (ER 180).

Paper sheets sometimes broke, RT 443:1-10 (ER 308), and on the machine would use poles to reach in and pull out the larger pieces, then use high pressure air hoses to blow remaining paper fragments out of the dryer cans before reattaching the paper sheet. RT 443:7-14 (ER 308).[6] Workers would also conduct a more extended "blow-down" when the machine was shut down for maintenance and repair. RT 1662:15-21 (ER 150).

Dryer felts were replaced approximately every two months. RT 441:10-18 (ER 306). The removed felt would be rolled up and hooked to a forklift, then dragged away for final disposal (a process lasting 15-20 minutes). RT 440:4-21 (ER 305). Mr. Barabin sometimes cut a piece of felt to use as weed barrier in his garden. RT 437:16-438:5 (ER 303-4).

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[6] The water contained chemicals and additives to give the pulp strength. RT 1544:18-1545:6 (ER 177-8). Some sloughed off as paper was being produced, RT 533:24-534:20 (ER 312-3), and workers used the hoses to blow away the resulting dust accumulation at the end of the daily shift. RT 452:14-18 (ER 309).

4. Dryer Felts at the Camas Mill.

Dryer felts are densely woven textiles. RT 1869:12-21 (ER 134). Defendants' asbestos-containing felts used Chrysotile as a component of the cross-machine direction or filling yarns. Ex. 696 (ER 416), Ex 697 (ER 413). Other components included cotton, synthetics, latex and resins. RT 1249:1-16 (ER 233). The yarns were resin-treated, as was the entire fabric after weaving was completed. Ex. 696 (ER 416), Ex. 697 (ER 413).

Between 1975, when assigned to Machine 7, and 1984, when he moved to Machine 20, Mr. Barabin worked primarily on Machines 7 and 8. Ex. 2167 (ER 401-10). Asten sold one Chrysotile-containing felt and 55 non-asbestos containing felts for use on Machine 7, and ten Chrysotile-containing felts and 40 non-asbestos felts for use on Machine 8. Ex. 696 (ER 415). Scapa sold 5 Chrysotile-containing felts and 3 non-asbestos-containing felts for use on Machine 7, and 19 Chrysotile-containing felts and 65 non-asbestos felts for use on Machine 8. Ex. 697 (ER 411-2).

Thus, while Mr. Barabin worked on these machines, *90%* of the Asten felts and *74%* of the Scapa felts that could have been installed on these machines contained no asbestos. Although Exhibits 696 and 697 established Asten and Scapa *sales* to the Mill, there was no evidence if, or when, any particular felt was *actually installed and run* on a machine. No witness testified Mr. Barabin worked

with or around, nor could he say whether he ever personally handled, an Asten or Scapa asbestos-containing felt. RT 551:15-19 (ER 316); RT 556:24-557:6 (ER 318-9).

5. Results of Tests Measuring Asbestos Release at the Camas Mill and Neighboring Mills.

Paul Carlson was regional industrial hygienist for Crown Zellerbach, which owned the Camas Mill, where Carlson officed from 1981 to 1986. RT 1499:5-23 (ER 161). His job included sampling to look for asbestos. RT 1500:18-1501:4 (ER 162-3).

Carlson used area and personal samplers[7] to test for airborne concentrations. RT 1530:24-1533:4 (ER 166-9). He conducted sampling on Machine 14, RT 1566:1-9 (ER 192), and found asbestos concentrations of 0.15 and .05 fibers per cc; there were never sales of Chrysotile-containing dryer felts for use on that machine. RT 1566:16-1567:2 (ER 192-3); Ex. 696 (ER 415); Ex. 697 (ER 412). Carlson determined the asbestos found around Machine 14 came from thermal insulation on the hood, of the same type present throughout the Mill. RT 1567:20-23 (ER 193). Insulation found on hoods contained 80% Crocidolite on one, 60%

[7] A personal sampler is worn on the lapel and air is drawn into a filter cassette by a battery-operated pump worn on the belt. RT 1531:3-25 (ER 167). The sampler captures any fibers in the air of the breathing zone. *Id.*

Amosite on another, and 70% Amosite on a third, all Amphibole-type asbestos. RT 1583:23-1585:2 (ER 195-7).

Carlson compared his results to those obtained by his predecessor in 1973, when Chrysotile-containing dryer felts were still in use, RT 1581:9-22 (ER 194), and found no difference in results. RT 1581:19-22 (ER 194). Carlson concluded that Chrysotile-containing felts contributed either nothing to the airborne asbestos levels in the Mill, or so little it could not be measured. RT 1554:7-1555:2 (ER 182-4).

These results agreed with those obtained at a nearby Weyerhauser paper mill. Joseph Wendlick, a certified industrial hygienist, RT 1650:5-9 (ER 140); RT 1652:10-19 (ER 142), oversaw hygiene and toxicology for Weyerhauser worldwide. RT 1651:5-10 (ER 141). Wendlick conducted air monitoring at the various Weyerhaeuser facilities, RT 1655:4-12 (ER 143); in April 1973 he tested for asbestos during an asbestos-containing dryer felt changeout on a machine at Weyerhaeuser's Longview, Washington mill. RT 1656:2-21 (ER 144); RT 1660:22-1661:3 (ER 148-9). Sampling was done while workers were cutting and attaching a new felt and removing an old felt. RT 1656:18-1657:7 (ER 144-5).

The workers' measured asbestos exposure was no more than ambient range levels over an 8-hour work day. RT 1658:23-1659:10 (ER 146-7). Wendlick did at least one such test in all Weyerhauser mills where asbestos-containing dryer

felts were used, RT 1661:10-16 (ER 149), and each yielded the same or better results. RT 1661:17-23 (ER 149).[8]

Wendlick also tested during blow-down procedures, RT 1662:2-1663:6 (ER 150-1), consistently obtaining results of less than one-tenth of a fiber per cubic centimeter, indistinguishable from ambient. RT 1663:7-13 (ER 151). Wendlick also tested the hallways and walkways around the machines, RT 1663:14-16 (ER 151), obtaining results indistinguishable from ambient *unless thermal insulation was present*. RT 1663:17-24 (ER 151). When it was, exposures exceeded OSHA's asbestos standard. RT 1660:14-21 (ER 148).

There was no evidence of any tests done with actual dryer felts in paper mills contradicting Carlson's and Wendlick's results.

B. Defense Motions *in Limine* to Exclude Expert Testimony.

Defendants sought to exclude testimony from any witness regarding dryer felt testing performed by Dr. Millette, CR 192, 178, who claimed his "glovebox" laboratory tests proved asbestos-containing dryer felts released fibers during paper making.

[8] Wendlick testified that the 15-20 minute process of used felt disposal would release some fibers if the felt contained asbestos, but did not quantify that amount. *See* RT 1678:10-13 (ER 152). No evidence was introduced that the release from this process, or from cutting a piece of felt for home gardening use, could have exceeded ambient range.

The District Court denied the motions. Without addressing whether the testimony satisfied *Daubert*'s reliability or relevance requirements, the court ruled:

> The Court is troubled by the marked differences between the conditions of Dr. Millette's tests and the actual conditions at the Camas Mill. ….In view of this concern, the Court generally finds that Dr. Millette's tests and corresponding testimony are admissible with the restriction…[that] plaintiffs must acknowledge to the jury that Dr. Millette's tests were performed under laboratory conditions which are not the same as conditions at the Camas Mill."

CR 248 (ER 71.) The court later instructed *the jury* to "decide what to do" with Millette's evidence. RT 1150:7-11 (ER 212).

Defendants also sought to exclude testimony from Kenneth Cohen, CR 186, CR 226, who opined that any release of asbestos fibers from dryer felts would have, by "reentrainment," exposed Mr. Barabin to those fibers in substantial quantities. The District Court initially granted Defendants' motions because of Cohen's "dubious credentials" and lack of expertise with dryer felts and paper mills, *see* CR 248 (ER 73), but reversed itself after Barabin submitted two court decisions allowing Cohen to testify. RT 11:8-16 (ER 324). The court never addressed whether Cohen's testimony met *Daubert*'s reliability or relevance requirements.

Finally, Defendants sought to prohibit witnesses from testifying to the theory that "any exposure" to asbestos is a substantial contributing factor to mesothelioma. *See* CR 188, CR 194. The District Court denied the motions. The

court did not determine for itself whether the literature on which the experts relied actually supported the theory, instead leaving it to *the jury* to resolve the issue:

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

CR 248 (ER 70) (emphasis added).

C. Juror Misconduct.

During *voir dire*, prospective jurors were told Mr. Barabin had mesothelioma, a form of cancer. RT 13:23-25 (ER 326). The subject first came up for Defendants during Scapa's questioning of Juror 1. When Juror 1 revealed a friend had cancer that asbestos might have caused, counsel asked:

> Is there anything about your situation with your friend that is going to make you say, well, I really feel bad for Mr. Barabin, I think he should get some money in this case just because he has cancer?

RT 113:22-25 (ER 327). Juror 1 answered "no." RT 114:1 (ER 328). When Juror 19 then revealed her family believed her father's best friend had died from mesothelioma due to occupational asbestos exposure, and counsel asked whether she felt she could still be unbiased, the District Court offered the jurors this thought about bias:

> I sometimes ask jurors, imagine that we are doing a trial involving child molestation. Nobody is in favor of child molestation, but nobody is in favor of convicting people who are not guilty either. You set aside your feelings about child molesters and you say, I am going to

> listen to the facts and the evidence and take the Court's instructions and make a decision. Some people who themselves may have been molested or it is something that hits so close to home, the emotions are going to cloud their ability to actually listen to the testimony and be able to hear the facts, because their own flood of feelings is going to overwhelm them.

RT 117:7-19 (ER 329).

After Juror 19 said she "hope[d]" she could be unbiased "in this kind of case," RT 117:24-118:1 (ER 329-30), counsel put the question to the entire panel:

> *I need to find out, just like I talked to Ms. Maghie* [Juror 19], *is there anybody here that has had any experience with cancer in your life?* I am not going to go into the details about it, but a close friend, a relative, perhaps yourself, has had an experience with cancer that you feel like, when you start hearing about someone suffering from cancer and getting chemotherapy, and having the symptoms and problems that go along with that, that you are going to be so overwhelmed, feeling for the plaintiff, that you are just going to say, I really feel like Mr. Barabin should get some money no matter what? Anybody have any experience like that? I am not going to pry, but just raise your hand and tell me.

RT 119:1-13 (ER 331) (emphasis added).

Jurors 3, 8, 9, 17, 23, and 33 raised their hands. *See* RT 119:14-122:10 (ER 331-4). Juror 8 disclosed two uncles had died of cancer, then said "I wouldn't say I would overwhelmingly sympathize with the plaintiff but that may play into it a bit." RT 119:14-22 (ER 331). The court then told the panel what counsel was "getting at":

> I think we have all had cancer in our families at one time or another. I think what Mr. Young is getting at is the same thing I was talking about with Ms. Maghie [Juror 19], sometimes *if you are actually*

> *going through it* with your mother, father, brother, sister, and you are seeing it *on a day-to-day basis, it can overwhelm your ability to sit and listen.*

RT 120:13-19 (ER 332) (emphasis added).

After Juror 8 answered "yes," the court called on Juror 3 who said his parents and mother-in-law had died of cancer, but he did not feel it would affect his decision. RT 120:20-25 (ER 332).

Juror 9 disclosed he "felt, given the question, I should mention that" he had been an oncology nurse and his father had died of cancer, but he could be fair. RT 121:10-19 (ER 333).

Juror 23 disclosed "[i]t is part of my daily job," but that she did not think it would "affect" her. RT 121:25-122:1 (ER 333-4).

Juror 17 disclosed her father had died of lung cancer but said it would not affect her. RT 122:3-7 (ER 334). Scapa's counsel then asked "Anybody else?" to which Juror 33 responded, "I had it, but I don't have it any more." RT 122:8-10 (ER 334).

The court granted Barabin's two "for cause" challenges and each Defendant's single such challenge, "not because I necessarily think you established complete cause, but I think it is important that the plaintiffs feel they have a jury that is selected in a manner that is fair and impartial, and likewise, so do defendants." RT 135:23-136:4 (ER 335-6). Although the record is unclear

regarding peremptory challenges, *see* RT 139:17-141:19 (ER 337-9), Juror 3, whose parents and mother-in-law died of cancer, RT 120:22-25 (ER 332), was among those excused. RT 140:21-22 (ER 338).

Juror 2 did not raise her hand and was selected to hear the case. According to another juror's subsequent unrebutted declaration, during deliberations Juror 2 told her fellow jurors that she had a *terminal brain tumor*, "knows what it's like to have a terminal condition" and that "no amount of money makes it easier." CR 395 (Sealed ER 476).

D. Mrs. Barabin's Testimony About Being "Left Destitute".

Plaintiffs' counsel asked Mrs. Barabin "what are your thoughts on looking forwards to the future?" She responded:

> My thoughts for the future are that I can keep my health and be able to take care of him, and be able to pay for the necessary medications and stuff, because this is not a cheap illness. It is very expensive. And I just hope that I just don't break down, and I am able to continue taking care of Henry and securing the proper things that I need to take care of him with. *And I just don't want to be left destitute*.

RT 578:6-15 (ER 283) (emphasis added). Defendants requested, CR 323, 324, to prove the Barabins have medical insurance and had received settlements from other defendants, arguing Mrs. Barabin's testimony opened the door to such "collateral source" evidence. RT 1111:11-1112:8 (ER 249-50). The District Court

denied permission, ruling "I don't believe the door has been opened." RT 1411:14-18 (ER 208).

E. Barabin's Counsel's Closing Arguments.

The District Court *in limine* prohibited "send a message" arguments by Barabin's counsel. CR 248 (ER 73-74).

In opening statement Barabin's counsel said Defendants "knew they were selling a deadly product that was going to kill people that use it." RT 218:1-2 (ER 321). No evidence was presented that other paper mill workers developed asbestos disease because of exposure to asbestos from dryer felts, much less felts made by Defendants.

In closing argument, Barabin's counsel asserted:

> Well, Mr. Carlson, [Scapa's] industrial hygienist, testified that, since the year 2000, he has consulted in approximately 100 cases where a paper mill worker has brought a claim [. . .] for asbestos disease or death. The Barabins are not some fluke, some random case that Scapa should be saying, what's going on? This is a legitimate case. They [the Barabins] are part of the many people that these defendants have been hurting and killing over the years, and they are no different.

RT 2013:14-22 (ER 124). Defendants moved to strike, RT 2013:23-2014:442 (ER 124-5), and the court stated:

> The jury should consider the law as I read it to you and the facts here. It is not fair to compare them to -- in the manner [Barabin's counsel] just did, and you should disregard that argument. Go ahead Counsel.

RT 2014:3-7 (ER 125). The court did not instruct the jury that there was no basis for an assertion that Defendants have been hurting and killing people over the years.

In rebuttal, Barabin's counsel likened Defendants to overserving bartenders and child abductors, and told the jury:

> You need to strike a blow for the good companies out there that have always spent the money and the resources to do the testing, to do what is right, to not put out hazardous products in the marketplace. A verdict for the Barabin family is not just for the Barabins, it is for all those good companies.

RT 2129:5-9 (ER 126). Defendants did not object to the "strike a blow" argument.

F. The Verdict and Post-Trial Proceedings.

Defendants moved for judgment as a matter of law at the close of Barabin's case and at the close of all the evidence. RT 1300-1310:10; 1990:6-9; RT 2138:8-11 (ER 237-47; 123; 129); *see* CR 335, 343, 345. The District Court denied the motions, and the case went to the jury. When the jury deadlocked 10-1, RT 2147:6-2148:4 (ER 120-1), the parties agreed to accept a non-unanimous verdict. RT 11/19/09 2:3-3:5 (ER 117-8). The jury found Defendants liable, and awarded Mr. Barabin $700,000 in economic damages and $8,000,000 in non-economic damages, and Mrs. Barabin $1,500,000 for loss of consortium. CR 354 (ER 58).

Defendants renewed their motions for judgment as a matter of law, and alternatively moved for new trial or remittitur. *See* CR 386, 388, 390, 392, 396. In

support of their latter motions, Defendants showed that the highest previous award in Washington to a living mesothelioma plaintiff was $1,700,000. CR 397 (ER 111-2). While Defendants' motions were pending, the District Court shared with counsel a letter from the dissenting juror, setting forth several observations about the trial and the deliberations. CR 395 (ER 478-82). Defendants' counsel received permission to contact the juror, who provided a declaration describing the conduct of Juror 2. CR 395 (ER 475-7). Defendants amended their new trial motions to add juror misconduct and requested an evidentiary hearing where jurors could be questioned. CR 396, 408, 465. Defendants also sought offsets for settlement payments. CR 372, 404.

The District Court vacated the judgment initially entered, and held a hearing on the jury misconduct and offset issues. *See* CR 468 (ER 52-5), CR 483 (ER 51). The court heard argument and took evidence on offsets, but did not hold an evidentiary hearing on misconduct. *See* RT (5/21/10). Several months later the court denied Defendants' motions, *see* CR 550 (ER 26-31), CR 551 (ER 2-25), granted an offset of $836,114.61, and entered final judgment of $9,373,152.12. *See* CR 539 (ER 32-48), CR 552 (ER 1).

V.

SUMMARY OF ARGUMENT

This case shows what can happen when a District Court fails in its gatekeeping responsibilities under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Henry Barabin has mesothelioma. He worked at an oil refinery where he was exposed to asbestos from insulation, which the experts agree was a substantial contributing factor to his disease. He also worked at a paper mill in Camas, Washington, where he was again exposed to asbestos from insulation, which the experts agree was another substantial contributing factor. Plaintiffs have received over $800,000 in settlements from those responsible for these exposures.

Defendants manufacture dryer felts used in making paper. Until the 1980s, some of their felts contained Chrysotile asbestos. Nothing in the scientific or medical literature links asbestos-containing dryer felts to mesothelioma. Dr. Richard Cohen, called by Plaintiffs to assess the historical literature on asbestos (RT 821:6-7, ER 280), reviewed more than 1,000 articles and could not recall one mentioning or focusing epidemiologically on dryer felts. RT 824:1-14 (ER 281). Arnold Brody, Ph.D., a cellular biologist called by Plaintiffs, similarly was not aware of any studies concluding that working with asbestos-containing dryer felts caused an increased incidence of mesothelioma. RT 335:5-12 (ER 322).

Plaintiffs nonetheless contended that exposure to asbestos from Defendants' Chrysotile-containing dryer felts should be deemed another substantial contributing factor to Mr. Barabin's mesothelioma, entitling them to millions in additional damages. Defendants contended that the comparatively few asbestos-containing felts they sold to the Camas Mill did not release fibers during paper making, and that any incidental exposure was insufficient to have been a substantial contributing factor.

Plaintiffs had to support their case with *Daubert*-admissible expert testimony. They failed on three critical points:

- Release. To prove asbestos-containing dryer felts released fibers during paper making, Barabin proffered Dr. James Millette, who opined that laboratory tests he designed and performed proved Chrysotile-containing felts released fibers, and in substantial quantities, during paper making. Millette failed to comply with established scientific protocols for testing for asbestos fiber release. His tests also failed to approximate actual mill conditions, biasing them towards finding a release of fibers and exaggerating the amount of any such release. A replication of his tests, correcting for his failure to approximate mill conditions, found no release of fibers above "ambient" -- the range to which *everyone* is exposed, and which is insufficient to cause mesothelioma. This result was confirmed by testing conducted at a facility designed to reproduce actual mill

conditions, and by field testing at the Camas and neighboring mills when they still used asbestos-containing felts.

- Exposure. To prove Mr. Barabin was exposed to fibers released from dryer felts, Plaintiffs proffered Kenneth Cohen. Asserting expertise based on experience as an industrial hygienist, Cohen claimed any release of fibers from felts would become "reentrained" in the mill environment, exposing Mr. Barabin to an additional and substantial inhalation risk. Cohen, however, relied on Millette's testing as foundation for his opinion. Cohen could point to no epidemiological studies linking asbestos fiber release from dryer felts to mesothelioma amongst paper mill workers; no such studies exist. And Cohen's claims were contradicted by the field test results from the Camas and neighboring mills showing no evidence of asbestos fibers in the paper making area except fibers traceable to *insulation*.

- Causation. To prove asbestos exposure from Defendants' dryer felts was a substantial contributing factor to Mr. Barabin's disease, Plaintiffs proffered Dr. Carl Brodkin. Brodkin asserted that, because no level of occupational exposure has been proven safe, no occupational exposure can be ruled out as a cause of mesothelioma and therefore any such exposure -- even if no greater than ambient range -- should be *deemed* a substantial contributing factor to the disease. Brodkin's "theory" was nothing more than a *hypothesis* that ignored we *all* are exposed to ambient range levels of asbestos, and these levels are known not to

cause mesothelioma. Brodkin's causation approach lacked any support in the scientific literature, and impermissibly shifted the burden to Defendants to prove their products did *not* substantially contribute to Mr. Barabin's mesothelioma.

Such was Barabin's "expert" case. Yet when Defendants moved to exclude this evidence as inadmissible under *Daubert*, the District Court denied their motions. The District Court did not do so because it was persuaded the evidence met *Daubert*'s reliability and relevance standards. The District Court *never made any findings on reliability or relevance*. Instead, it accepted what these experts said at face value, admitted their evidence "[*i*]*n the interest of allowing each party to try its case to the jury*," (CR 248, ER 70), and told *the jury* to "decide what to do" with these "expert" proofs. RT 1150:7-11 (ER 212). Plaintiffs' "expert" evidence should not have been admitted, and because the verdict cannot be upheld without it, the judgment should be vacated with directions to dismiss Plaintiffs' case with prejudice.

Should this Court conclude Defendants are not entitled to judgment as a matter of law, this Court should grant Defendants a new trial. Despite a series of questions from counsel and clarifications from the District Court during *voir dire* which left no doubt about what was being asked, one juror failed to disclose she was suffering from a terminal brain tumor. She then interjected this fact into the deliberations, producing a "Golden Rule" moment that no counsel would ever be

allowed during closing argument. Yet, instead of conducting an evidentiary hearing or simply ordering a new trial, the District Court presumed to excuse the actions of the juror as innocent -- a conclusion that cannot be reconciled with the actual course of *voir dire*. Moreover, other errors that, standing alone, might not justify ordering a new trial -- allowing Mrs. Barabin to plead fear of "destitution" while barring Defendants from offering evidence of settlements and medical insurance, and misconduct by Plaintiffs' counsel during closing argument -- cumulatively worked to deprive Defendants of a fair trial.

VI.

ARGUMENT

A. Under *Daubert*, the District Court Must Determine the Reliability and Relevance of Expert Testimony, and Support its Determinations With Specific Findings. The District Court Erred in Failing to Do So.

The role of the district court as the gatekeeper of expert testimony is long established. For more than 70 years, such testimony was admissible if the principle upon which it was based was "generally accepted" in the relevant scientific community. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 584 (1993), citing *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). In *Daubert*, the Supreme Court held the *Frye* standard had been superseded by Federal Rule of Evidence 702, under which the district court must now ensure that expert testimony (1) qualifies as "scientific knowledge," i.e., is "*reliable*," and (2)

will "assist the trier of fact to understand the evidence or to determine a fact in issue," i.e., is "*relevant*." *Id*. at 587-88, 589-91 & 592.

As this Court has recognized, a district court's "special obligation" to determine reliability and relevance of an expert's testimony is vital to ensure accurate and unbiased decision-making. *Mukhtar v. California State Univ.*, 299 F.3d at 1063. The aura expert witnesses exude can lead juries to give more weight to their testimony than warranted, and fulfilling the gatekeeping obligation ensures "junk science" does not sway the jury's decision. *Id*. at 1063-64. While gatekeeping can be burdensome, "the Supreme Court has obviously deemed this less objectionable than dumping a barrage of questionable scientific evidence on a jury, who would likely be even less equipped than the judge to make reliability and relevance determinations and more likely than the judge to be awestruck by the expert's mystique." *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1310 (11th Cir. 1999).[9]

[9] Although the *Daubert* standard is sometimes characterized as more flexible than the *Frye* standard, it in fact is more rigorous, which is why evidence is not "grandfathered" from *Daubert* scrutiny merely because it was previously admitted under *Frye*. *U.S. v. Williams*, 506 F.3d 151, 162 (2d Cir. 2007); *see also Daubert v. Merrell Dow Pharms., Inc.* ("*Daubert II*"), 43 F.3d 1311, 1315 (9th Cir. 1995) (describing *Daubert* gatekeeping as "daunting" compared with *Frye*'s "relatively simple" analysis).

1. A District Court Must Find Proffered Expert Evidence is Reliable and Relevant.

To aid district courts in determining reliability, the Supreme Court in *Daubert* provided a nonexhaustive list of four factors: (1) whether the theory or technique the expert employed can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) whether it is generally accepted in the scientific community; and (4) whether the known or potential error rate is acceptable. *Daubert*, 509 U.S. at 593-94. This Court has made clear that the expert's "bald assurance of validity" is never sufficient to establish reliability; the party proffering the expert must present "objective, independent validation of the expert's methodology." *Daubert II*, 43 F.3d at 1316 (9th Cir. 1995).

There are two principal ways to establish reliability. First, testimony based directly on legitimate, preexisting research unrelated to litigation provides the most persuasive basis for concluding the expert's opinions were properly derived by the scientific method. *Daubert II*, 43 F.3d at 1317. Where the expert's opinions are made suspect by testing performed entirely within litigation confines, the proffering party must come forward with other objective, verifiable evidence showing the testimony is based on "scientifically valid principles." *Id.* at 1317-1318. One such means is evidence that conclusions have been subjected to normal scientific scrutiny through peer review and publication; but, as this Court has cautioned, publication itself must have been subject to a "bona fide process of peer

review." *Id*. at 1318 n.6; *see also Daubert*, 509 U.S. at 593 (publication is but one element of peer review "and does not necessarily correlate with reliability").

Although the district court has discretion in determining whether an expert's testimony is reliable, it has no discretion to abdicate its responsibility to do so. *Claar v. Burlington N. R. R. Co.*, 29 F.3d 499-502 (9th Cir. 1994) ("[T]he district court was affirmatively required to find that the experts' conclusions were based on scientific knowledge") (affirming defendant's summary judgment in toxic exposure case, where plaintiffs' expert opinions on causation "lacked 'the foundation and reliability necessary to support expert testimony'" (citation omitted)); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 158-59 (1999) (Scalia, J., concurring) (the majority opinion "makes clear that the discretion it endorses…is not discretion to abandon the gatekeeping function"). "The objective of [*Daubert*'s gatekeeping requirement] is to…make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire*, 526 U.S. at 152. The district court therefore must make its reliability determination on the record, supported with specific findings. *Mukhtar*, 299 F.3d at 1066 ("[w]e agree with the Tenth Circuit that 'some…reliability determination must be apparent from the record' before we can uphold a district court's decision to admit expert testimony"

(quoting *U.S. v. Velarde*, 214 F.3d 1204, 1210 (10th Cir. 2000)); *see also Dodge v. Cotter Corp.*, 328 F.3d 1212, 1223 (10th Cir. 2003) ("A natural requirement of the gatekeeper function is the creation of a 'sufficiently developed record in order to allow a determination of whether the district court properly applied the relevant law'" (citation omitted)).

Relevance under *Daubert* is not the liberal standard of relevance of Rule 401. *Daubert II*, 43 F.3d at 1321 n.17. It is shorthand for the requirement that expert testimony "assist the trier of fact to understand the evidence or to determine a fact in issue." *Daubert*, 509 U.S. at 591 (quoting Rule 702). The requirement is one of "fit" between the testimony and an issue in the case, demanding "a valid scientific connection to the pertinent inquiry as a precondition to admissibility." *Id*. at 591-92. A key reason for this requirement is that "scientific expert testimony carries special dangers to the factfinding process as it 'can be both powerful and quite misleading because of the difficulty in evaluating it.'" *Daubert II*, 43 F.3d at 1321 n.17, quoting *Daubert*, 509 U.S. at 595, quoting Weinstein, *Rule 702 of the Federal Rules of Evidence Is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991).

Federal judges therefore must exclude proffered scientific evidence "unless they are convinced that it speaks clearly and directly to an issue in dispute…, and that it will not mislead the jury." *Daubert II*, 43 F.3d at 1321 n.17. As with

reliability, the court must make a determination of relevance on the record, supported by adequate findings. *Mukhtar*, 299 F.3d at 1066 n.9 (noting district court's failure to determine whether proffered expert testimony "would be helpful to the jury").

2. The District Court Erred When It Failed to Determine Reliability or Relevance, and Instead Delegated These Determinations *to the Jury*.

The District Court adopted a philosophy of giving each side maximum leeway in presenting its case to the jury. Regarding expert testimony supporting Barabin's "any exposure" theory of causation, the court stated:

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

CR 248 (ER 70) (emphasis added). The court did not act as a gatekeeper, *declining to decide* whether proposed expert evidence was reliable and relevant and instead leaving it *to the jury* to decide "what to do" with Barabin's experts and their opinions. RT 1150:7-11 (ER 212) (instructing jury to decide "what to do" with Dr. Millette's evidence).

A district court's determination after an appropriate *Daubert* analysis is reviewed for abuse of discretion because appellate courts need to give trial courts some leeway to decide complex scientific issues. Here the court declined to

exercise that discretion and decide those issues, instead delegating them to the jury. This was unquestionably error, for *Daubert* neither gives federal trial judges discretion to skip the correct analysis, nor grants them discretion to allow the jury to hear unscientific testimony so each side has maximum leeway to present its case.

B. Because Plaintiffs' Expert Testimony on Release, Exposure and Substantial Factor Causation Failed the *Daubert* Requirements for Admissibility, and the Balance of Plaintiffs' Evidence Cannot Sustain the Judgment, this Court Should Reverse and Direct Dismissal of Plaintiffs' Claims with Prejudice.

Under the "harmless error" standard applicable in this Circuit, this Court applies a rebuttable presumption that an error is prejudicial, shifting the burden to the appellee to show the error more probably than not was harmless. *Obrey v. Johnson*, 400 F.3d 691, 699-700 (9th Cir. 2005). Because Barabin cannot meet that burden, the question becomes the scope of relief to which Defendants are entitled. In *Weisgram v. Marley Co.*, 528 U.S. 440 (2000), the Supreme Court affirmed the Eighth Circuit's decision to reverse a judgment for the plaintiff and remand with directions to enter dismissal with prejudice, where the exclusion of erroneously admitted expert testimony left the plaintiff without sufficient evidence to sustain the verdict. The Court held that, because it was "implausible," post-*Daubert*, to suggest parties would present less than their best evidence at trial, a plaintiff should not be given a "second chance" to do so. 528 U.S. at 455-56.

This Court should emulate the Eighth Circuit in *Weisgram*. Had the District Court fulfilled its gatekeeping obligations, Barabin's expert proof on release, exposure, and causation would have been excluded. Because the remainder of Barabin's evidence is legally insufficient to support a finding that exposure to asbestos from Defendants' dryer felts was a proximate cause of Mr. Barabin's mesothelioma, this Court should reverse and remand for dismissal of Barabin's claims with prejudice.

1. Dr. Millette's Laboratory Test Results, Used to Establish that Defendants' Dryer Felts Released Asbestos Fibers During Paper Making, and In Quantities Substantially In Excess of Ambient Range, Should Have Been Excluded As Unreliable and Irrelevant.

Barabin relied on Millette's laboratory "glovebox" testing to prove Defendants' Chrysotile-containing dryer felts released asbestos fibers during paper making, and in quantities substantially exceeding ambient range. Millette's testing was scientifically unreliable and lacked the "fit" necessary to assist the factfinder.

a. Millette's Evidence Was Not Reliable.

(1) The Testing Did Not Follow Established Scientific Protocols.

Dr. Millette failed to follow the protocol the Environmental Protection Agency has established for measuring asbestos release. The EPA protocol mandates a four-step process for verification of test results:

> (1) performing glove box experiments of asbestos release rates to develop and verify consistent fiber generation and sampling analytical procedures;
>
> (2) developing a mathematical model that accounts for the environmental field parameters and predicts asbestos breathing zones concentration in the field using glove box release rate data;
>
> (3) performing full room tests (in a standard test room) simulating field conditions in an attempt to calibrate the field model; and
>
> (4) conducting field experiments to verify the usefulness of the model in predicting asbestos breathing zone concentrations in the field from glove box asbestos release data.

See RT 1199:16-1200:8 (ER 230-1); CR 179 (ER 346-7). Millette made no effort to satisfy more than the protocol's first step. He did not develop a mathematical model to account for environmental field parameters and predict asbestos breathing zone concentrations. RT 1199:25-1200:2 (ER 230-1). He did not verify his glovebox results in a standard test room simulating field conditions. RT 1200:3-5 (ER 231). He did not conduct field tests to verify whether his results would be replicated under actual mill conditions. RT 1200:6-8 (ER 231).

Millette's failure to follow the complete protocol means Barabin had no scientifically reliable basis for extrapolating Millette's laboratory results to what occurs during actual mill operations.[10] Millette's results therefore should have

[10] Millette's failure to follow the protocol's third and fourth steps is particularly mystifying, given he has done field tests with other materials (e.g., valve packing) to determine asbestos release. RT 1183:3-1184:2 (ER 222-3).

been excluded as a scientifically unreliable basis for finding Defendants' Chrysotile-containing dryer felts released fibers during paper making. *Schudel v. General Electric Co.*, 120 F.3d 991, 996-997 (9th Cir. 1997) (error to admit expert causation opinion in toxic tort case involving exposure to cleaning solvents, because expert extrapolated from studies "and there was no showing that the necessary extrapolation was scientifically acceptable" (footnote omitted)).[11]

(2) Millette's Testing Was Not Subjected to True Peer Review.

Millette testified to his initial testing in 1998, and his somewhat modified testing in 2003. RT 1149:19-25 (ER 211); RT 1151:4-1152:3 (ER 213-4). Millette did not conduct independent research, asbestos litigation plaintiff lawyers commissioned him to conduct his laboratory tests of dryer felts, RT 1178:25-1180:10 (ER 219-21), which casts presumptive doubt on the reliability of his results. *See Daubert II*, 43 F.3d at 1317.

[11] This Court in *Schudel* remanded for a new trial, considering itself constrained to adhere to Circuit precedent under which the reviewing court had to give weight to erroneously admitted expert evidence in deciding whether an appellant was entitled to judgment as a matter of law. *See* 120 F. 3d at 995 (citing authorities). The Supreme Court abrogated this portion of *Schudel* in *Weisgram*, 528 U.S. at 453-54, leaving this Court free to grant the relief requested here.

Millette's 1998 results were published in the journal *Microscopy*, and Barabin will argue this is sufficient to sustain admitting Millette's evidence.[12] Research "accepted for publication in a reputable scientific journal after being subjected to the usual rigors of peer review is a significant indication that it is taken seriously by other scientists, i.e., that it meets at least the minimal criteria of good science." *Daubert II*, 43 F.3d at 1318. As this Court observed, "[s]crutiny of the scientific community is a component of 'good science'" and "[i]f nothing else, peer review and publication 'increase the likelihood that substantive flaws in methodology will be detected.' " *Id.*, quoting *Daubert*, 509 U.S. at 593. However, this Court made clear it was referring to "publication in a generally-recognized scientific journal that conditions publication on *a bona fide process of peer review*." *Daubert II*, 43 F.3d at 1318 n.6 (emphasis added). Moreover, publication in such a journal is not conclusive but only "establish[es] a prima facie case as to admissibility under Rule 702." *Id*. at 1319 n.10.

In *Valentine v. Pioneer Chlor Alkali Co., Inc.*, 921 F. Supp. 666 (D. Nev. 1996), one of the few decisions to address peer review in detail, the court distinguished between "editorial" and "true" peer review. 921 F. Supp. at 675, citing Effie J. Chan, Note, *The "Brave New World" of Daubert: True Peer*

[12] Barabin made no showing the 2003 results were published, or even submitted for publication.

Review, Editorial Peer Review, and Scientific Validity, 70 N.Y.U.L.REV. 100 (1995). The court reasoned that "editorial" peer review (the process by which articles are selected and reviewed for publication) is of much narrower scope than "true" peer review (the rigorous process by which members of the relevant discipline, often *after* publication, validate scientific claims):

> Because the scope of editorial peer review is necessarily narrower than true peer review, it is a serious error to conflate the two processes, and, by extension, to assume that because an article is accepted for publication, even in a prestigious scientific journal, that the science it contains is therefore valid.

921 F.Supp. at 675. The court concluded that, under *Daubert*, a court is required to "look behind the fact that [an expert's methodology and results were published] and to examine for itself the method [the expert] employed in reaching his conclusions." *Id*. at 675-76, citing *Claar*, 29 F.3d at 501.

Barabin did not establish Millette's 1998 testing results underwent true peer review. Barabin provided no evidence regarding the degree of pre-publication peer review those results underwent besides Millette's own assertion that *Microscopy* is a "peer-reviewed journal" and that his article would have been subject to review before publication by "somebody who has done asbestos analysis." RT 1147:8-17 (ER 210); *see Valentine*, 921 F. Supp. at 676 n.32 (refusing to admit testimony based solely upon expert's word that his article was subjected to pre-publication editorial review). Moreover, the *prima facie* case for admissibility can be rebutted by

showing the expert "failed to assiduously follow an otherwise sound protocol," *Daubert II*, 43 F.3d at 1319 n.10, and Millette admittedly failed to follow the four-part EPA protocol.

b. Millette's Evidence Was Not Relevant.

The District Court found Millette's tests were not conducted under conditions approximating paper making at a commercial paper mill. CR 248 at 12:1-24 (ER 71). The differences between Millette's tests and actual paper-making conditions biased his tests towards producing a release of fibers from the felts he tested and exaggerating the quantity of fibers released:

- The dryer felt samples Millette obtained were from different manufacturers, and in different conditions. RT 1162:8-18 (ER 215). Some were unused; some had been used as long as 190 days -- more than three times longer than felts were used at the Camas Mill. RT 1162:18-19 (ER 215). Some had "little bits" of coating, others did not, RT 1162:19-20 (ER 215), in marked contrast to the felts at issue here, for which resin-coated asbestos yarns were tightly woven into a felt with other yarns, and the resulting felt coated with resin again. RT 1888:23-1890:13 (ER 135-6).

- During paper making at the Camas Mill, compressed air was blown *across* -- parallel to -- the felt to remove paper particles from the felt surface; blowing *perpendicular* to the felt would have embedded rather than dislodged the

paper. RT 1558: 15 – 1559:1. Millette admitted that directing compressed air parallel to the felt would have released few or no asbestos fibers. RT 1192:17-23 (ER 228). Yet his 1998 tests directed the compressed air up to 90 degrees -- perpendicular -- to the felt surface, thereby admittedly releasing more asbestos than actual mill operations would have. RT 1191:8-16 (ER 227).

- Millette admitted that adding amended water to a dryer felt, as was done at the Camas Mill, would reduce the potential for fiber release -- yet he added no water in his testing. RT 1185:9-22 (ER 224). He also admitted that increased humidity would reduce a worker's potential for exposure, yet he did not regulate or measure humidity during his 1998 testing. RP 1187:11-1188:8 (ER 225-6).

- During paper making at the Camas Mill, 72,000,000 cubic feet of air moving at 50,000 cubic feet per minute was ventilated up and out through roof vents, resulting in several air exchanges *each day*. RT 1551:13-25 (ER 180). Millette admitted that such ventilation would lower the amount of any asbestos in the air, yet he failed to account for ventilation in his tests. RT 1185:18-22 (ER 224); RT 1187: 11-17 (ER 225). Instead, he confined the released fibers to the glovebox, increasing the concentration of fibers/cc above what would have occurred in mill operations, where any fibers would have been dispersed into a larger space, then extracted by ventilation and air exchange.

- Millette admitted his method of blowing on a six inch square of felt for up to 5 minutes would have required workers to take *10,000 hours* to complete a *single* blowdown. RT 1202:14-20 (ER 232).

Thus, Millette's laboratory testing did not approximate conditions of a working paper mill. It was biased to *increase* the likelihood that fibers would be released and in quantities well above ambient range levels. Other studies confirmed Millette's results reflect biased testing methods:

- R.J. Lee conducted glovebox testing of asbestos-containing dryer felts similar to Millette's testing, but with two differences designed to reflect actual mill conditions: Lee dampened the felts with amended water, RT 1613:3-10 (ER 199), and blew compressed air parallel to the felts. RT 1613:19-22 (ER 199). Lee's tests found no release of asbestos above ambient range. RT 1625:22, 1628:14-19 (ER 201, 202).

- A field study of asbestos release from dryer felts was conducted at Western Michigan University for 30 days in 2000, using a pilot paper mill producing paper on *uncoated*, asbestos-containing felts. RT 1561:20-1562:10 (ER 187-8). A plastic enclosure was constructed around the mill, and testing was conducted within the enclosure. RT 1562:17-1563:3 (ER 188-9). Ventilation was provided, but at levels *below* those found in commercial paper mills. RT 1564:16-1565:24 (ER 190-1). The study found that, when blow-downs were conducted as

done at commercial mills, the asbestos released from uncoated dryer felts was *below* ambient range. RT 1564:10-15 (ER 190).[13]

- Millette's test results were contradicted by the in-the-field tests at the Camas and Weyerhaeuser mills, which showed that during plant operations release of fibers, if any, from Chrysotile-containing dryer felts did not exceed ambient range. *See* § IV.A.5 (discussing Carlson and Wendlick results).

Millette's is precisely the sort of "expert" evidence that risks a jury's bedazzlement, with its aura of white-gloved laboratory precision. Had the District Court fulfilled its gatekeeping responsibility, it would have recognized this aura masked pseudo-science at its worst, and excluded Millette's results. Without those results, Barabin had no evidence to show Defendants' asbestos-containing dryer felts ever released fibers above ambient range.[14] *All* Barabin had left was

[13] Millette conducted further testing in 2003. He changed the angle of his compressed air blow from 90 degrees, but did not measure the new angle. RT 1192:9-16 (ER 228). He also increased the humidity in the glove box to 48 percent (on the assumption it may have been that humid somewhere in a mill), but did not raise it to the 100 percent humidity found under the dryer hood at the Camas mill. RT 1557:8-1558:13 (ER 184-5). He still did not wet the felts, or provide ventilation, RT 1187:11-17 (ER 225), and again failed to conduct field tests. Millette's 2003 test design thus continued to bias results towards finding the release of asbestos fibers from dryer felts, and in amounts substantially in excess of ambient.

[14] Millette reported asbestos fiber releases between 35 and 75 fibers per cc from his glove box tests. RT 1164:10-1165:21, 1170:4-12 (ER 216-7, 218). He also testified to so-called "Post-It Note" and "Finger" tests, but admitted that neither

Footnote continued on next page.

testimony that, when the occasional asbestos-containing dryer felt was replaced, it produced a short-term release that did not exceed ambient range.[15] And as Barabin's "main causation" witness, Dr. Brodkin, admitted, an exposure to asbestos must be significantly greater than ambient range to constitute a risk factor for mesothelioma. RT 936:25-937:9 (ER 269-70).

2. Kenneth Cohen's "Reentrainment" Testimony, Used to Establish Exposure, Should Have Been Excluded as Unreliable.

Kenneth Cohen postulated that every asbestos release in an occupational setting, regardless of the initial amount or condition of release, will eventually be "reentrained" and result in significant levels of exposure.[16] He testified that any asbestos released within a building will be disturbed in a manner that will "resuspend or reentrain it back into the air" for whatever period of time turbulence keeps it there, "remain[ing] to be breathed[.]" RT 612:201-23 (ER 285).

Cohen's reentrainment theory was based on no empirical data. Although Cohen referred to epidemiological studies showing paper mill workers generally

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was intended to determine airborne levels of released Chrysotile fibers. RT 1196:11-16 (ER 229).

[15] Barabin offered no evidence quantifying the release of fibers occurring during the few minutes when used felts were dragged away for disposal, or when employees cut off pieces to take home for use in gardens, much less showing such activities resulted in releases greater than ambient range.

[16] With one exception -- Cohen did not opine that the practice of employees, including Mr. Barabin, of cutting pieces of used felts to take the pieces home for garden use, resulted in reentrainment.

were exposed to asbestos at hazardous levels, none showed dryer felts contributed to the asbestos found in those mills, let alone at levels exceeding ambient range. RT 632:25-633:21, 675:17-22 (ER 286-7, 288).[17] Cohen's approach to reentrainment, and its use to determine asbestos exposure in a workplace, was not shown to have been published anywhere, let alone subjected to peer review. Moreover, his theory was directly refuted by the testing done at the Camas and Weyerhaeuser mills, which established the absence of Chrysotile asbestos dust in the paper making areas of both plants. If Cohen's reentrainment theory had any validity, there should have been residual Chrysotile contamination in those areas, yet none was found. RT 1554:7-1555:2, 1567:11-23 (ER 182-3, 184).[18] Cohen's reentrainment testimony was junk science, and the jury should never have been allowed to base its decision on it.

[17] Cohen also relied on Millette's test results, but if those results should not have been admitted because they were scientifically unreliable, the same would hold true for any opinion based on those results

[18] The District Court initially ruled *in limine* that Cohen's "dubious credentials and his lack of expertise with regard to dryer felts and paper mills" precluded him from providing expert testimony. CR 248 (ER 73). The court later reversed itself, but not through any *Daubert* review and findings; the court simply followed the lead of two other trial courts, without conducting its own analysis. CR 551 (ER 12-13).

3. Plaintiffs' "Any Exposure" Causation Theory Fails the Requirements of Good Science Laid Down in *Daubert*.

Typically in a toxic tort case, a plaintiff must prove not only exposure to the substance but exposure to *enough of a dose* to reach a causative threshold. This dose concept is widely recognized as the foundation of causation and underlies numerous decisions, including by this Court, rejecting claims for damages for a variety of toxic substance exposures.[19]

Barabin's principal causation expert, Dr. Brodkin, admitted that not all asbestos doses cause mesothelioma, and in particular that ambient range levels to which everyone is exposed are not a clinically important risk, even though these

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[19] *See, e.g.*, *Abuan v. General Electric Co.*, 3 F.3d 329, 332-34 (9th Cir. 1993) (affirming defendant's summary judgment) (PCBs) ("In cases claiming personal injury from exposure to toxic substances, it is essential that the plaintiff demonstrate that she was, in fact, *exposed to harmful levels* of such substances" (citation and quotation omitted) (emphasis added by the court)); *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1241 (11th Cir. 2005) (reversing judgment for plaintiff) (ephedrine) ("In toxic tort cases, '[s]cientific knowledge of the harmful level of exposure to a chemical, plus knowledge that the plaintiff was exposed to such quantities, are minimal facts necessary to sustain the plaintiffs' burden'") (quoting *Allen v. Pennsylvania Eng'g Corp.*, 102 F.3d 194, 199 (5th Cir. 1996)); *Wintz v. Northrop Corp.*, 110 F.3d 508, 513 (7th Cir. 1997) (affirming defendant's summary judgment) (bromide) (plaintiff must offer evidence from which factfinder could conclude "the dose to which the plaintiff was exposed was sufficient to cause the disease" complained of) (quoting *Federal Reference Manual on Scientific Evidence*); *Wright v. Willamette Indus., Inc.*, 91 F.3d 1105, 1107 (8th Cir. 1996) (reversing plaintiff's judgment) (formaldehyde) ("At a minimum, we think there must be evidence from which the factfinder could conclude that the plaintiff was exposed to levels of that agent that are known to cause the kind of harm that the plaintiff claims to have suffered") (citing *Abuan*).

exposures can place millions of asbestos fibers in a person's lung. RT 934:4-24 (ER 267). To evade the resulting toxicological challenge posed by Defendants' evidence showing Mr. Barabin was never exposed to levels of asbestos from their dryer felts in excess of ambient range, Brodkin advanced a theory of causation under which every occupational exposure, including those not above ambient range, should be deemed a substantial factor contributing to -- and thus a proximate cause of -- Mr. Barabin's mesothelioma.

All parties agree that a person can be exposed to asbestos at ambient range levels every hour of every day without increasing that person's risk of mesothelioma. But according to Brodkin's theory, if that person is later *diagnosed* with mesothelioma, and had occupational exposures to asbestos, every one of those exposures -- even those that did not exceed ambient range -- should be *deemed* a substantial factor contributing to that person's disease. While such a theory[20] of causation conveniently allows asbestos plaintiffs to establish liability against a

[20] Although Defendants use the term "theory" to describe Brodkin's claims, Defendants do not mean to suggest those claims rise to the level of a scientific theory. What Brodkin advanced is only an *hypothesis*, not validated by scientific proof.

multitude of defendants in any given case, its alchemical approach to causation cannot survive *Daubert*'s test for scientific reliability.[21]

Brodkin admitted that the body contains protective mechanisms that remove the majority of inhaled asbestos from the body and otherwise protect it from asbestos-related disease from routine (ambient range level) exposure. RT 935:10-16 (ER 268). Because these mechanisms must be overcome to increase the risk of developing an asbestos-related disease, Brodkin further admitted that exposure to ambient range levels of asbestos do not increase the clinical risk of mesothelioma. RT 934:4-24 (ER 267). Yet Brodkin also testified that, once a person develops mesothelioma, no effort should be made to distinguish between causative and noncausative occupational exposure -- *all* such exposures should be treated as causative. *See* RT 909:1-910:15 (ER 261-2).

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[21] Brodkin offered the supposed results of what he called "simulation studies" (plural) as an additional basis for his opinion that exposure to asbestos fibers from Defendants' felts was a substantial contributing factor to Mr. Barabin's mesothelioma. *See* RT 897:19-898:16 (ER 259-60). But the only "simulation study" to which Brodkin could specifically point was *Millette*'s glovebox study. Brodkin at one point also seemed to claim that several epidemiological studies involving paper mills (he mentioned five by name) provided another basis for his opinion, *see* RT 888:16-891:9 (ER 255-8) (discussing studies by IARC, Korhonen, WHO/IPCS, Hueper, and Teschke), but under further examination Brodkin backtracked and admitted these studies "just look at the area around the paper machine" and "*are not looking at a specific material*" (RT 897:19-24) (ER 259) (emphasis added), leaving only the "simulation studies" and in actuality only the *single* "simulation" study done by Millette. RT 897:25-898:1 (ER 259-60) ("THE COURT: … And that is the Millette study? The WITNESS: Correct").

Brodkin tried to justify this claim through a semantic sleight-of-hand. He testified that, after a person is diagnosed with mesothelioma, one no longer need evaluate risk factors because the risk is now 100 percent. RT 909:25-910:4 (ER 261-2). He then leapt to the conclusion that every occupational exposure, regardless of whether it actually increases the risk of the disease, should be deemed causative -- a substantial contributing factor -- in a diagnosed case of mesothelioma. Asserting that no individual occupational exposure can be excluded because there supposedly is no known "safe" level of occupational exposure, Brodkin then turned this proposition on its head by concluding that every occupational exposure must be *affirmatively deemed* a substantial contributing factor. RT 910:5-15 (ER 262). This conclusion is not supported by simple rules of logic, much less verified by scientific method. Just because something *cannot be theoretically excluded* as a cause does not mean that it *was in fact* a cause.

Brodkin's testimony confirms the absurdity of his "deemed to be a substantial factor" approach to causation. Brodkin testified that only asbestos exposures contributing to a person's lifetime cumulative dose can be substantial factors in the development of asbestos disease. RT 936:25-937:5 (ER 269-70). He also testified that asbestos exposures that are not significantly greater than ambient range levels do not contribute to a person's lifetime cumulative dose. RT 937:6-9 (ER 270). Brodkin thus admitted that dose is important, and that establishing

causal responsibility for Mr. Barabin's mesothelioma requires proof that an exposure resulted in a meaningful dose (presumably significantly greater than ambient).[22]

Given these admissions, it makes no sense to turn around and presume to deem any occupational exposure, *no matter the amount*, a substantial contributing factor, just because a person has been diagnosed with mesothelioma; yet that is precisely what Brodkin told the jury it should do here. *See* RT 910:5-911:3; 914:20-915:10 (ER 262-3, 264-5). The Supreme Court has cautioned against the admission of expert opinion "connected to existing data only by the *ipse dixit* of the expert." *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). Here, Brodkin's "deem it causal" *ipse dixit* was connected to no data whatsoever; its only "support" was the fact that the District Court allowed its proponent to testify to it under the reassuring aura of "expertise."

[22] The record does not establish exposure from dryer felts in the paper mill setting above ambient range levels, and thus Brodkin's opinion falls on its sword. In fact, Barabin had to demonstrate more than this, because even exposures above ambient or background cannot be considered causative without evidence (1) of the dose received, and (2) that such a dose has produced mesotheliomas in a statistically significant excess in worker populations exposed to similar fiber types and doses; this is the "rigour" that would be required of scientists in the toxicology and occupational medicine fields. *See, e.g.*, Dr. David L. Eaton, *Scientific Judgments and Toxic Torts: a Primer in Toxicology for Lawyers and Judges*, 12 J.L. & Pol'y 5, 39 (2003). There is no such evidence, and the District Court erred when it failed to require Brodkin to measure up to the standards of the profession by failing to require such a demonstration.

Had the District Court engaged in the rigorous analysis required by *Daubert* instead of delegating that task to the jury, it should have concluded that Brodkin's "deem any occupational exposure causal" approach to causation was not good science and excluded it. That is what the district court did in *Lindstrom v. A-C Prod. Liability Trust*, 424 F.3d 488 (6th Cir. 2005), rejecting the opinion of the plaintiffs' expert that "[e]ach of [plaintiff's] occupational exposures to asbestos aboard a ship to a reasonable degree of medical certainty were a substantial contributing factor to his development of mesothelioma." *Id*. at 493 (quoting affidavit). The Sixth Circuit affirmed that decision as a proper application of *Daubert*, observing that "a holding to the contrary would permit imposition of liability on the manufacturer of any product with which a worker had the briefest of encounters":

> Minimal exposure to a defendant's product is insufficient. Likewise, a mere showing that defendant's product was present somewhere at plaintiff's place of work is insufficient. Rather, where a plaintiff relies on proof of exposure to establish that a product was a substantial factor in causing injury, the plaintiff must show a high enough level of exposure that an inference that the asbestos was a substantial factor in the injury is more than conjectural.

Id.

The scientific deficiency in Barabin's causation approach is not limited to asbestos cases. In *Henricksen v. ConocoPhillips Co*., 605 F. Supp. 2d 1142 (E.D. Wash. 2009), Judge Quackenbush of the Eastern District of Washington

confronted the same issue: Should a jury be allowed to hear a theory that "any exposure" to a toxin is causative of injury regardless of level, when it is otherwise conceded that ambient range exposure does not cause an increased risk of that injury? In *Henricksen*, the plaintiff claimed his acute myelogenous leukemia (AML) was caused by occupational exposures to benzene-containing products, including defendant ConocoPhillips' gasoline. 605 F. Supp. 2d at 1148. Conoco moved to exclude the testimony of plaintiff's expert, who opined that, because there was no known dose below which benzene could be deemed safe, any exposure must be deemed a cause of the plaintiff's AML. *Id*. at 1165.

Judge Quackenbush undertook the required *Daubert* analysis and concluded the testimony was not scientifically reliable. First the court took note of the conceded fact that (as with asbestos) ambient range levels of benzene have no proven association with disease:

> The parties agree that scientific studies provide clear evidence of a causal relationship between occupational exposure to benzene and benzene-containing solvents and the occurrence of AML. Benzene exists in the environment everywhere and humans are exposed to benzene on a daily basis. …. *Benzene exists in air, water, soil, and in our food. Low exposures to which every human being is subjected, is often, and alternatively, referred to as "background exposure" or "ambient exposure". No one, including the Plaintiffs' experts, proffers an opinion that this level of exposure creates an increased risk of the development of AML.* Everyone, including the Plaintiffs' experts, agrees that something greater is required. *The argument in this Daubert challenge, in part, revolves around the question of how much greater quantity of exposure is necessary to*

> *permit the causal attribution of AML to a particular benzene exposure*.

Id. at 1150-51 (emphasis added). Then the court analyzed, and rejected, the claim that any occupational exposure to benzene should be deemed a substantial contributing factor to the plaintiff's injury just because there is "no known safe dose of benzene":

> The use of the no safe level or linear "no threshold" model for showing unreasonable risk "flies in the face of the toxicological law of dose-response, that is, that 'the dose makes the poison,' which refers to the general tendency for a greater dose of a toxin to cause greater severity of responses in individuals, as well as greater frequency of response in populations." Federal Judicial Center, Reference Manual on Scientific Evidence 475 (2d ed. 2000). Other courts have similarly rejected expert opinions that are based on the "no-threshold" model. As one court explained in excluding the plaintiffs' experts using the same no threshold theory, "[t]he linear non-threshold model cannot be falsified, nor can it be validated. To the extent that it has been subjected to peer review and publication, it has been rejected by the overwhelming majority of the scientific community. It has no known or potential rate of error. *It is merely an hypothesis*." *Whiting v. Boston Edison Co.*, 891 F. Supp. 12, 25 (D. Mass. 1995).

Id. at 1165-66 (emphasis added).

Had the District Court here engaged in the required *Daubert* analysis as Judge Quackenbush did, the outcome should have been the same. Barabin will claim that Brodkin's "theory" is generally accepted by the "mainstream scientific community," *see* CR 217 (ER 342), based on a "paper" by Dr. Laura Welch entitled "The Scientific Community is in Consensus that Even Brief and Low-level

Exposure to Asbestos Can Cause Mesothelioma." *See* Ex. 650 (ER 417-26); *see also* RT 927:4-11 (ER 266). Dr. Welch's "paper," however, was an *amicus brief* submitted to the Michigan Supreme Court, signed by litigation experts who routinely testify for plaintiffs in asbestos cases. And while the Welch brief was later re-published verbatim in a journal, it remains a work of advocacy and not a peer-reviewed contribution to the scientific literature on asbestos.[23]

The fundamental legal defect in the various "any exposure" causation theories pressed by Barabin and other toxic tort plaintiffs is they cannot be reconciled with the basic tort law requirement that causation must be *proven*, not *assumed*. The Texas Supreme Court addressed this issue in *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765 (Tex. 2007), which involved a claim for asbestosis brought against brake pad manufacturers. Flores worked for 35 years as a brake mechanic, exposing him to asbestos from brake pads including Borg-Warner's. Applying the substantial factor causation test,[24] the court quoted with approval from Restatement (Second) of Torts Section 431, comment a:

> The word "substantial" is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable

[23] The District Court correctly dismissed the Welch brief as an advocacy document. CR 248 (ER 69-70).

[24] Washington, whose substantive law governs here, also adheres to the substantial factor causation test for asbestos cases. *See Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 744 P.2d 605 (1987).

> men [sic] to regard it as a cause, using that word in a popular sense, in which there always lurks the idea of responsibility, rather than in the so-called "philosophic sense," which includes everyone in the great number of events without which any happening would not have occurred.

Flores, 232 S.W.3d at 770 (citation omitted). The court then turned to the question of whether Flores' proof of asbestos exposure from Borg-Warner's product was sufficient to allow a jury to find that such exposure was a substantial contributing factor to Flores' asbestosis:

> Th[e]…record…reveals nothing about how much asbestos Flores might have inhaled. He performed about fifteen to twenty brake jobs a week for over thirty years, and was therefore exposed to "some asbestos" on a fairly regular basis for an extended period of time. …*[A]bsent any evidence of dose*, the jury could not evaluate the quantity of respirable asbestos to which Flores might have been exposed or whether those amounts were sufficient to cause asbestosis. Nor did Flores introduce evidence regarding what percentage of that indeterminate amount may have originated in Borg-Warner products.

232 S.W.3d at 771-72 (emphasis added).

Flores concluded this failure of proof foreclosed allowing a jury to find that Borg-Warner's product was a substantial contributing factor. Discussing Flores' expert causation testimony, the court observed:

> Dr. Bukowski acknowledged that asbestos is "plentiful" in the ambient air and that "everyone" is exposed to it. If a single fiber could cause asbestosis, however, "everyone" would be susceptible. No one suggests this is the case. Given asbestos's prevalence, therefore, some exposure "threshold" must be demonstrated before a claimant can prove his asbestosis was caused by a particular product.

Id. at 773.[25] Here, Brodkin presumed to go further than Bukowski. Whereas Bukowski asserted any occupational exposure was a substantial contributing factor, Brodkin asserted such causation should be assumed if a specific exposure *could not be affirmatively excluded* as a substantial contributing factor. This *shifts the burden of proof to Defendants to disprove* that their products were a substantial contributing factor -- even if any exposure to asbestos fibers from their products was within the ambient range to which *everyone* is exposed, and which Brodkin conceded is not sufficient to be a risk factor for mesothelioma.

Brodkin's approach to causation ignores advances in toxicology establishing that a significant exposure threshold must be reached before causation can be inferred. *See* Dr. David L. Eaton, *Scientific Judgments and Toxic Torts -- a Primer in Toxicology for Lawyers and Judges*, 12 J.L. & POL'Y 5, 39 (2003). Brodkin would declare the release of asbestos fibers during the disposal of a used Chrysotile-containing dryer felt to be a substantial contributing factor to Mr. Barabin's mesothelioma just because Mr. Barabin has been diagnosed with mesothelioma, even though no evidence showed these occasional releases ever

[25] The Texas appellate courts have since applied *Flores* to dismiss mesothelioma claims. *See, e.g., Georgia-Pacific Corp. v. Stephens*, 239 S.W.3d 304, 306 (Tex. App. 1st Dist. 2007) ("Following the Texas Supreme Court's decision in *Borg-Warner v. Flores*, we conclude that the expert testimony presented in this case is legally insufficient to support the jury's causation findings….We therefore reverse and render").

exceeded the ambient range. The jury should never have been allowed to consider basing its verdict on such evidence.[26] Because the balance of Barabin's evidence cannot sustain the judgment, this Court should exercise its authority under *Weisgram* and reverse with directions that Barabin's complaint be dismissed with prejudice.

C. In the Alternative, Defendants Are Entitled to a New Trial.

If this Court were to accept some but not all of Defendants' *Daubert* challenges, it should order a new trial. Barabin will not be able to show that the jury more likely than not would have rendered the same verdict if, for example, Millette's test results should have been excluded but Brodkin had still been

[26] Defendants anticipate Barabin will argue waiver, based on a claim that defense expert Dr. Samuel Hammar gave evidence under cross-examination supposedly similar to Brodkin's, something the District Court made much of in its order denying Defendants' motion for judgment as a matter of law. *See* CR 551 (ER 16-17). First, Barabin's counsel was acting under the District Court's clear and unambiguous motion *in limine* ruling when cross-examining Dr. Hammar on the point, and Defendants were under no obligation to object to that line of inquiry given the District Court's prior ruling. *E.g.*, *U.S. v. Varela-Rivera*, 279 F.3d 1174, 1177-1178 (9th Cir. 2002) (reversing judgment on jury verdict based on erroneous admission of expert testimony) (holding error was not waived when objection to expert was not renewed at trial, where pre-trial *in limine* ruling allowing expert was "definitive"); Fed. R. Ev. 103 (as amended 2000) (party has no obligation to renew objection at trial where *in limine* ruling is definitive). Second, when cross-examined on the point, Dr. Hammar was asked to assume levels of fiber release substantially greater than ambient range, based on Millette's test results. RT 1466:4-11 (ER 158). Hammar's ultimate opinion remained that exposure to asbestos from Defendants' dryer felts was not a substantial contributing factor to Mr. Barabin's mesothelioma. RT 1486:16-1487:17 (ER 159-60).

allowed to testify to his "any exposure" theory. Also, this Court should order a new trial because of juror misconduct and cumulative other errors discussed below.

1. Defendants Were Prejudiced by Juror 2's Failure to Disclose Her Terminal Brain Tumor During *Voir Dire*, and Her Subsequent Interjection of Her Condition During Deliberations.

According to the dissenting juror's unrefuted declaration, Juror 2, despite being told the case was about a *terminal cancer*, listening to a number of other jurors discuss cancer, *and* being asked specifically about cancer, concealed her own *terminal brain tumor* during *voir dire*. Juror 2 was chosen for the jury, sat through the three-week trial where the central issues were causation of terminal cancer and resulting damages, and waited until deliberations to reveal her own *terminal brain tumor*, telling her fellow jurors she "knows what it's like to have a terminal condition" and "no amount of money makes it easier." CR 395 (Sealed ER 476). Had that information been conveyed in *voir dire*, Defendants could have determined whether to challenge her for cause or peremptorily. Because Juror 2 did not convey the requested information, Defendants lost that opportunity.

In assessing claims of juror misconduct for withholding information during *voir dire*, this Court employs a two-part test: "(1) whether 'a juror failed to answer honestly a material question on *voir dire*'; and (2) whether a correct answer would have provided a valid basis for a challenge for cause." *See, e.g.*, *Price v. Kramer*, 200 F.3d 1237, 1254 (9th Cir. 2000) (quoting *McDonough Power Equip., Inc. v.*

Greenwood, 464 U.S. 548, 556 (1984)). Both criteria are met here. Juror 2 knew that, like Mr. Barabin, she had a terminal disease, but failed to answer truthfully questions about personal experiences with such a disease. Had she revealed her experience, it would have been grounds for a challenge for cause.

The District Court concluded that the first requirement was not satisfied because the *voir dire* question at issue was compound, supposedly calling for an answer only if the juror had a personal or family history of cancer *and* felt that history would make them unable to be fair. CR 551 (ER 9-10). The court conclude it was plausible that Juror 2 remained silent because she felt she could be fair despite having a terminal brain tumor, such that the court could not conclude that she failed to answer honestly. *Id.*

This reasoning is doubly flawed. First, at least six other jurors understood the question to call for disclosure of a personal or family history of cancer, with the question of effect to be explored through follow-up questions. Second, the court itself told the jury that what Defendants were "getting at" was the potential impact of living right now with a terminal illness -- *exactly* what Juror 2 was experiencing. RT 120:13-19 (ER 332). Juror 2 did not disclose her terminal brain tumor after seeing and hearing other jurors answer questions or after the court's clarification of

Defendants' supposedly compound question left no doubt she should have spoken up.[27]

Juror 2's silence deprived defendants of the opportunity to challenge her for cause. The deprivation was not harmless. To illustrate, in *Gainesville Radiology Group v. Hummel*, 428 S.E.2d 786 (Ga. 1993), a case in which the plaintiff sued for negligent failure to diagnose her breast cancer, the Georgia Supreme Court reinstated a defense verdict where a juror had failed in *voir dire* to disclose his wife had died of breast cancer. But it did so because the plaintiff could not show either that a truthful response would have led the plaintiff to strike the juror or that the juror had cited his wife's illness in advocating during deliberations. Here, it is inconceivable that Defendants would not have challenged Juror 2 for cause had she disclosed her terminal tumor, given Plaintiffs were seeking substantial damages for

[27] Because there certainly existed at least a possibility of dishonesty by Juror 2, the District Court abused its discretion in failing to conduct an evidentiary hearing. *Hard v. Burlington N. R.R.*, 812 F.2d 482, 484 (9th Cir. 1987) ("While we agree with the court that the reporter's transcript fails to demonstrate dishonesty by Fraser, when it is considered in light of the juror affidavits there exists a possibility of dishonesty which is sufficient to make the failure to have conducted an evidentiary hearing an abuse of discretion").

terminal cancer.[28] And Juror 2 *did* cite her terminal cancer in advocating for the Barabins in deliberations.

A defendant is entitled to a new trial not only for a juror's material nondisclosure, but also "when the jury obtains or uses evidence that has not been introduced during trial if there is a '*reasonable possibility* that the extrinsic material *could* have affected the verdict.'" *U.S. v. Keating*, 147 F.3d 895, 900 (9th Cir. 1998) (emphasis added) (citing *Dickson v. Sullivan*, 849 F.2d 403, 405 (9th Cir. 1988) (quoting *Marino v. Vasquez*, 812 F.2d 499, 504 (9th Cir. 1987)). The law presumes prejudice from a jury's exposure to extra-record evidence, *see*, *e.g.*, *Remmer v. United States*, 347 U.S. 227, 229 (1954), in civil cases as well as criminal cases. *Rinker v. City of Napa*, 724 F.2d 1352, 1354 (9th Cir. 1983).

Here, the District Court chose to classify Juror 2's remarks during deliberations as permissible references to "personal experience." But Juror 2's personal experience was no ordinary "take it from me" sharing. It was immediate and current, making her a surrogate for Mr. Barabin. Placing her terminal condition on the table for deliberations surely put her fellow jurors in the uncomfortable position of having to decide on a damages amount for the Barabins

[28] That a challenge would have been granted is evident from the District Court's decision to allow all challenges for cause by all parties. RT 135:24-136:4 (ER 335-6).

knowing they were, at the same time, implicitly valuing Juror 2's pain and suffering.

The District Court had ruled *in limine* that plaintiffs "may not ask the jurors to put themselves in plaintiff's position," CR 248 (ER 87), yet Juror 2 during deliberations claimed to *be* in Mr. Barabin's position and that "no amount of money makes it easier." Juror 2 effectively made a "Golden Rule" argument that no counsel properly could have made in closing argument. *See, e.g.*, *Spray-Rite Service Corp. v. Monsanto*, 684 F.2d 1226, 1246 (7th Cir. 1982), *aff'd*, 465 U.S. 752 (1984). Defendants in terminal illness cases should not have to accept a record damages award rendered by a jury that, unbeknownst to them, included someone with a terminal illness who cited that illness in advocating for the terminally ill plaintiff.

2. Defendants Are Also Entitled to a New Trial Because of Other Prejudicial Events That Cumulatively Tainted the Jury's Liability and Damages Findings.

"In some cases, although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant." *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996) (ordering new trial due to cumulative error). This is such a case.

a. After Mrs. Barabin Testified That She Feared Being "Left Destitute" Because of Her Husband's Mesothelioma, the District Court Abused Its Discretion in Refusing to Admit Evidence That the Barabins Have Health Insurance and Received Settlements Totaling Hundreds of Thousands of Dollars.

When Plaintiffs' counsel asked Geraldine Barabin "what are your thoughts on looking forwards to the future?" she launched into a litany of concerns about medical and other expenses, concluding "I just don't want to be left destitute." RT 578:9-15 (ER 283). Defendants then sought permission to prove the Barabins have medical insurance and had entered into substantial settlements with other defendants, arguing Mrs. Barabin's testimony opened the door to what would otherwise be collateral source evidence. CR 323, 324; RT 1111-12 (ER 249-50). The District Court refused: "I don't believe the door has been opened." RT 1411 (ER 208). The jury never learned the Barabins have medical insurance or received over $800,000 in settlements.

What occurred here was a *classic* instance of testimony falsely implying lack of money, health insurance coverage, or ability to pay, opening the door to collateral source evidence. The jury was given the misleading impression that a damages award was all that could forestall destitution for the Barabins, when in fact they have medical insurance and settlements totaling over $800,000. Courts have consistently recognized that, when a party creates such a false impression of financial hardship, that party's adversary is entitled to present evidence refuting it

that would otherwise be barred by the collateral source rule.[29] The District Court erred when it concluded Mrs. Barabin's testimony had not opened the door to such evidence.

When Defendants renewed the issue in moving for new trial, CR 386, CR 396, the court ruled Defendants had waived the issue because they failed to object to Mr. Barabin's "left destitute" testimony. CR 551 (ER 14-15). Yet there was no way for Defendants to know that Mrs. Barabin would respond to her counsel's question by pleading a fear of destitution, and no rule or court decision requires a party to attempt to close a door its adversary has opened before proceeding to impeach. The District Court also noted that Defendants received setoffs against the award for the Barabins' settlements. CR 551 (ER 15). But evidence of

[29] *E.g.*, *Fitzgerald v. Expressway Sewerage Const., Inc.*, 177 F.3d 71, 76 (1st Cir. 1999) (where plaintiff's mother's testimony created false impression that medical expenses were causing financial hardship, trial court properly admitted evidence that family had insurance, because plaintiffs, having opened the door, "are hard put to complain that the defendants passed through the portal."); *Gladden v. P. Henderson & Co.*, 385 F.2d 480, 483 (3rd Cir. 1967) (for trial court to have forbidden defendant from asking plaintiff on cross-examination whether he had received financial assistance, after plaintiff explained his failure to seek medical care for lack of money "would have conferred on plaintiff the unparalleled right to give testimony on direct examination with immunity from inquiry on cross-examination"); *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 46 (Minn. 1997) (when a plaintiff "falsely conveys to the jury that he or she is destitute or in dire financial straits" collateral source payments received by the plaintiff are admissible").

settlements was also relevant to impeach Mrs. Barabin's credibility, because it directly contradicted her claimed fear of poverty.

b. Inflammatory Statements Made by Plaintiffs' Counsel Denied Defendants a Fair Trial.

Plaintiffs' counsel told the jury in closing that this case came as no surprise to Defendants because Plaintiffs are only two of the "many people" whom Defendants "have been hurting and killing over the years[.]" 2013:14-22 (ER 124). There was no excuse for such a statement. No evidence had been presented that other paper mill workers have developed asbestos disease because of exposure to asbestos from dryer felts, much less Defendants' dryer felts. Nor did Plaintiffs' counsel stop there, in rebuttal likening Defendants to "overserving bartenders" and "child abductors" and telling the jury that a verdict for the Barabins would "strike a blow for the good companies" that "do what is right" and don't "put out hazardous products in the marketplace," RT 2129 (ER 126), despite a specific *in limine* ruling forbidding "send a message" arguments.[30]

Defendants appreciate that the District Court instructed the jury to disregard counsel's assertion about "the many people that these defendants have been hurting

[30] Defendants raised the issue of Plaintiffs' counsel's improper closing argument in their motions for new trial. CR 396, 460, 408, 465. The court agreed the argument "was an improper appeal to the jury's passions," noted other improprieties in Plaintiffs' closing, *see* CR 551 (ER 20), but held it did not justify a new trial. CR 551 (ER 20-21).

and killing over the years," that defense counsel did not object to the "strike a blow" argument, and that such misconduct by plaintiffs' counsel, standing alone, might not warrant a new trial. Defendants also appreciate that, when an appellant cites unobjected-to statements in closing argument as stand-alone bases for reversal, this Court reviews such arguments under the "plain error" standard and requires they be of a "flavor" that "'sufficiently permeates an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict.'" *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1192 (9th Cir. 2002) (quoting *Kehr v. Smith Barney*, 736 F.2d 1283, 1286 (9th Cir. 1994)).

Such remarks and misconduct did permeate the trial here. Plaintiffs' counsel told the jury in opening statement that Defendant "knew that they were selling a deadly product that was going to kill people that use it," RP 218:1-2 (ER 321); his closing argument reference to "the many people that these defendants have been hurting and killing over the years," was a similar gratuitous smear. The District Court had entered an order *in limine* (CR 248, ER 73-4) prohibiting "send a message" arguments by plaintiffs, but that did not stop counsel from asking the jury to "strike a blow for the good companies out there." When considered cumulatively with Mrs. Barabin's unimpeached plea of fear of poverty, as well the juror who did not disclose her terminal illness in *voir dire* and then made a "Golden Rule" argument during deliberations, and the District Court's abdication

of "gatekeeping" responsibilities for expert testimony, the conclusion can only be that the trial here was not fair.

VII.

CONCLUSION

This Court should reverse the judgment on jury verdict and remand with directions to dismiss Barabin's claims with prejudice. In the alternative, this Court should vacate the judgment and remand for a new trial.

RESPECTFULLY SUBMITTED this 19th day of May, 2011.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellants represent that they are now aware of any related case pending in this Court.

/S/ Michael B. King
Michael B. King
Counsel for Appellant AstenJohnson

Dated: May 19, 2011.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(C), I certify that this brief is proportionately spaced with one inch margins on all four corners with a total of 15,985 words.

/S/ Michael B. King
Michael B. King
Counsel for Appellant AstenJohnson

Dated: May 19, 2011.

CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2011, I caused to be electronically filed the foregoing **Joint Opening Brief of Appellants** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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I certify under penalty of perjury under the laws of the United States and the State of Washington that the foregoing is true and correct.

Signed at Seattle, Washington this 19th day of May, 2011.

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