

Court of Appeals
of the
State of New York

RACHEL GAGLIARDI,

Plaintiff-Respondent,

– against –

AMERICAN SUZUKI MOTOR CORPORATION and
SUZUKI MOTOR CORPORATION,

Defendants-Appellants.

**MOTION OF THE CHAMBER OF COMMERCE OF
THE UNITED STATES FOR LEAVE TO FILE A BRIEF
AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS**

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**COURT OF APPEALS OF THE
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RACHEL GAGLIARDI,

Plaintiff-Respondent,

NOTICE OF MOTION FOR
LEAVE TO FILE BRIEF AS
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OF APPELLANTS

-against-

Index No: 05574-97

AMERICAN SUZUKI MOTOR
CORPORATION and SUZUKI MOTOR
CORPORATION,

Appellate Division No.:
2002-02466

Defendants-Appellants.

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the annexed motion and brief, the Chamber of Commerce of the United States, through its attorney, Arnon D. Siegel, who is a member in good standing of the bar of the State of New York, will respectfully move this Court for an order granting it leave to file the brief as *amicus curiae* in support of the motion of Appellants to appeal the order of the Appellate Division, Second Department, dated March 31, 2003, at the Court of Appeals Hall on October 6, 2003.

PLEASE TAKE FURTHER NOTICE, that responding papers, if any, must be served on or before October 6, 2003.

Dated: Washington, D.C.
September 22, 2003

Respectfully submitted,

By: _____

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AMERICAN SUZUKI MOTOR
CORPORATION and SUZUKI MOTOR
CORPORATION,

Appellate Division No.:
2002-02466

Defendants-Appellants.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Section 500.11(e) of the Rules of Practice of the Court of Appeals, the Chamber of Commerce of the United States (“the Chamber”) respectfully moves for permission to file the annexed brief as *amicus curiae* in support of Appellants’ motion for leave to appeal. As we explain below, this case raises two issues of substantial importance to the Chamber’s membership. The proposed *amicus* brief brings to this Court’s attention certain points and arguments not made by the parties and, we submit, will “be of special assistance” (§ 500.11(e)) to this Court in determining whether further review is warranted. Accordingly, the Court should grant the Chamber’s motion for leave and accept the annexed *amicus* brief for filing.

1. The Chamber, a nonprofit corporation organized under the laws of the District of Columbia, is the world’s largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in

every industry section, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

2. This case raises two such issues. *First*, it presents the question of what standards should govern the admissibility of expert engineering testimony in the courts of this state. In the past decade, the law governing the admissibility of expert testimony in the *federal* courts has been transformed – with highly beneficial results for the quality and predictability of civil justice – by the Supreme Court's decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Company v. Carmichael*, 526 U.S. 137 (1999). Many states, in turn, have followed the United States Supreme Court's lead by adopting the *Daubert* framework as the standard by which the admissibility of expert testimony will be judged in the state courts. This trend reflects an increasing awareness not only of the need to prevent the use of “junk science” and other unreliable “expert” methodologies from marring the fairness and accuracy of the litigation process, but also of the inherent limitations and ambiguities associated with the so-called “*Frye* test” – a test developed 80 years ago as a means of assessing the admissibility of new or “novel” scientific methodologies. See *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

This case presents this Court with a valuable opportunity to clarify whether the *Frye* test, or *Daubert*, or some combination of the two approaches, should be applied in a large and important category of litigation in the New York courts: cases in which expert engineering testimony is offered to prove that a product was (or was not) defectively designed or manufactured. Moreover, the

importance of this case goes well beyond engineering experts to other types of experts who arguably do not rely on “novel scientific” theories but instead apply scientific, technical or other specialized knowledge drawn from such “mature” fields as accounting, psychology, and economics. There is substantial confusion in the New York courts over how to conduct the admissibility inquiry for experts who do not purport to rely on novel scientific methodologies.

In opining that an unspecified manufacturing defect must have existed in the product, plaintiff’s engineering expert in this case purported to rely on his overall “experience” as an engineer. For that reason, this case is also an excellent vehicle for clarifying the important and recurring issue of how courts should evaluate the reliability and admissibility of experience-based expert opinions (an issue that arises not just in engineering cases but also with respect to a wide range of experts). The Supreme Court in *Kumho Tire*, and the lower federal courts, have grappled with this issue in applying the *Daubert* framework; and this case offers the Court a valuable chance to reexamine and clarify New York law on that subject in light of this recent, and highly informative, federal experience. The Second Department’s apparent view that any expert opinion that purports to rest upon the expert’s “experience” is, if it relies on facts in the record, automatically admissible without regard to the reliability of the expert’s technique threatens to eviscerate the gatekeeping responsibilities of trial judges.

3. This case also presents a *second* issue of importance to the Chamber’s members concerning the proper legal framework governing proof of manufacturing defect claims under New York law. Because of the difficulty in certain cases of showing that a product was in a defective condition at the time it left the manufacturer’s control, New York law allows the factfinder, initially, to draw an inference that a defect existed based on “the circumstances of the accident and proof that

the product did not perform as intended.” *Brown v. Borruso*, 238 A.D. 2d 884, 885 (4th Dept. 1997). If the manufacturer then comes forward “with any evidence that the accident was not necessarily attributable to a defect,” however, the plaintiff is required to “produce *direct* evidence of a defect” in order to carry her burden of proof. *Winckel v. Atlantic Rental & Sales*, 159 A.D. 2d 124, 127 (2d Dept. 1990) (emphasis added). Reflecting the importance of this evidentiary framework and the “direct evidence” rule, this Court recently granted leave to appeal to consider it in *Speller v. Sears, Roebuck & Co.*, 100 N.Y.2d 38 (2003). But this Court’s decision in *Speller* leaves open several important questions concerning the meaning – and proper application – of the direct evidence rule. For example, it remains unclear after *Speller* whether the direct evidence rule operates to bar recovery where, as in this case, the product that is claimed to have been defectively manufactured (here, the seatback of a vehicle) was not destroyed in the accident giving rise to the plaintiff’s injury but instead remains available for inspection and evaluation as to whether it contains any manufacturing defect. This case presents the Court with an excellent opportunity to address this and other questions concerning the scope of the “direct evidence” rule after *Speller*, and thus to provide further clarification in this important area of law.

4. The Chamber believes that it brings a special perspective to both of these issues and is uniquely well-situated to explain to this Court why their resolution is important to a wide array of business litigants (and not just to the parties involved in this case). The Chamber has participated as *amicus curiae* in all three of the seminal Supreme Court cases involving expert testimony – *Daubert*, *Joiner*, and *Kumho Tire* – as well as in other federal and state cases raising important questions concerning the admissibility of expert testimony. See, e.g., *Bonnette v. Conoco, Inc.*, 837 So.2d 1219 (La. 2003) (involving expert causation evidence in toxic torts case). In addition, the

Chamber has experience with the special problems that arise when courts allow testimony by experts who disavow reliance on *any* principle or methodology of their discipline (such as engineering science) and purport to rely instead on their overall “experience” or “training.” See, e.g., Br. for the Chemical Manufacturers Ass’n and the Chamber of Commerce of the United States As *Amici Curiae* in Support of Petitioners, *Subaru v. Compton*, No. 96-645 (U.S. Supreme Court, filed Nov. 22, 1996). Because its members include thousands of product manufacturers, the Chamber also has a substantial interest in ensuring that courts – especially in important jurisdictions such as New York (where large quantities of nationally distributed products are consumed) – apply fair ground rules governing the proof of manufacturing defect claims. And the Chamber frequently has participated as *amicus* in cases raising significant questions concerning the ground rules applicable in product liability cases.

5. The annexed *amicus* brief easily satisfies the requirements of Section 500.11(e) of the Rules of Practice of the Court of Appeals because it brings to the Court’s attention certain points and arguments not made by the parties and, if accepted for filing, will “be of special assistance” to the Court in determining whether leave to appeal should be granted. Among other things, the brief covers new ground by (a) explaining the broader significance to the business community of the issues presented by this case; (b) describing the confusion in the lower New York courts over how to evaluate the admissibility of expert testimony and evidence that arguably does not rest upon a novel scientific theory; (c) explaining why the experience of the federal courts under *Daubert* (and recent academic commentary) sheds valuable light on how trial judges in this state should carry out their “gatekeeping” responsibilities in this setting; and (d) explaining why this Court’s reasoning in *Speller* suggests that a plaintiff may *not* prevail on a manufacturing defect claim without any direct

evidence of a defect in a case where, as here, the relevant product has not been lost or destroyed but remains available to be analyzed and tested.

For the foregoing reasons, the Chamber's motion for leave to file the annexed brief as *amicus curiae* should be granted.

Dated: Washington, D.C.
September 22, 2003

Respectfully submitted,

By: _____

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States (“the Chamber”), a nonprofit corporation organized under the laws of the District of Columbia, is the world’s largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry section, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation’s business community. This case presents two such questions: (1) what standards should govern the admissibility, in the New York courts, of expert engineering testimony (and other types of expert testimony that arguably do not rest on a “novel” scientific technique, or are vaguely predicated on the expert’s generalized “experience” in the relevant field, or both); and (2) the proper scope of the “direct evidence” rule, which governs the proof of manufacturing defect claims brought under New York law, following this Court’s decision in *Speller v. Sears, Roebuck & Co.*, 100 N.Y.2d 38 (2003). The Chamber’s interest in this case – and in the proper resolution of these two issues – is set forth in greater detail in the annexed motion for leave to file this brief.

STATEMENT OF FACTS

In the interest of judicial economy, the Chamber adopts the statement of facts that is set forth in the motion for leave to appeal of Appellants American Suzuki Motor Corporation and Suzuki Motor Corporation (“Suzuki”).

ARGUMENT

The case is an excellent vehicle for clarifying two recurring questions of New York law whose proper resolution is important to business litigants (and especially to manufacturers and

distributors that are named as defendants in product liability actions). *First*, it presents the question of how trial judges should evaluate the admissibility of expert engineering testimony concerning product defects. More broadly, it raises the issue whether the “general acceptance” test originating in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and long used by this Court in assessing the admissibility of new or “novel” scientific methodologies, is applicable to experts who purport to apply scientific, technical, or other specialized knowledge drawn from such “mature” fields as accounting, psychology, engineering and economics. If the *Frye* test is inapplicable to such experts, should admissibility be evaluated under the framework adopted by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), or (as the lower court inexplicably ruled) not evaluated for reliability at all?

In the past decade, the law governing the admissibility of expert testimony in the *federal* courts has been transformed – with highly beneficial results for the quality and predictability of civil justice – by the Supreme Court’s decisions in *Daubert*, *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Company v. Carmichael*, 526 U.S. 137 (1999). (We examine this trilogy in considerable detail below, see pages 12-19). Many states, in turn, have followed the Supreme Court’s lead by adopting the *Daubert* framework. This trend reflects an increasing awareness not only of the need to prevent the use of “junk science” and other unreliable “expert” methodologies from marring the fairness and accuracy of the litigation process, but also of the inherent limitations and ambiguities associated with the so-called “*Frye* test” – a test developed 80 years ago by the D.C. Circuit as a means of assessing the admissibility of new or “novel” scientific methodologies.

This case is ideal for clarifying the admissibility standards governing engineering experts because the plaintiff’s expert relied not only on a particular (but highly idiosyncratic) “method” of

failure analysis but also on his overall engineering “experience” in formulating his opinion that some unspecified manufacturing defect must have existed in Suzuki’s product. Because of this feature of the expert’s testimony, this case presents the Court with an opportunity to clarify the recurring issue of how courts should evaluate such vague invocations of “experience” in resolving admissibility issues (again, not just in engineering cases but also with respect to a wide range of experts). The lower federal courts have grappled with that issue in applying the *Daubert* framework, and the Supreme Court addressed it head-on in *Kumho Tire*. This case presents an opportunity for this Court to reexamine and clarify New York law in light of this recent and illuminating federal experience.

This case also presents a *second* issue of importance to the Chamber’s members relating to the proper legal framework governing the proof of manufacturing defect claims under New York law. Because of the difficulty in certain cases of showing that a product was in a defective condition at the time it left the manufacturer’s control, New York law allows the factfinder, initially, to draw an inference that a defect existed based on “the circumstances of the accident and proof that the product did not perform as intended.” *Brown v. Borruso*, 238 A.D. 2d 884, 885 (4th Dept. 1997). If the manufacturer then comes forward “with any evidence that the accident was not necessarily attributable to a defect,” however, the plaintiff is required to “produce *direct* evidence of a defect” in order to carry her burden of proof. *Winckel v. Atlantic Rental & Sales*, 159 A.D. 2d 124, 127 (2d Dept. 1990) (emphasis added). Reflecting the importance of this evidentiary framework and the “direct evidence” rule, this Court recently elected to review a decision applying the rule. See *Speller v. Sears, Roebuck & Co.*, 100 N.Y.2d 38 (2003). But this Court’s decision in *Speller* leaves open several important questions concerning the meaning – and proper application – of the direct evidence

rule. Thus, if leave to appeal were granted, this Court could also provide needed clarification in this important area of law.

I. The Court Should Grant Leave To Appeal To Clarify The Standards Governing The Admissibility Of Expert Testimony

The judgment in this case necessarily rested on a determination by the jury that there was a manufacturing defect in the Suzuki X-90 vehicle that plaintiff Rachel Gagliardi crashed into her parents' house while driving backwards at midnight down a steep driveway. Specifically, plaintiff's claim of manufacturing defect – the only claim presented to the jury – was predicated on the theory that the seatback on the driver's side collapsed while Gagliardi was backing down the driveway but before the vehicle hit the building. According to Gagliardi's testimony, after the seatback collapsed she mistakenly pressed the accelerator rather than the brake, thus causing the vehicle to veer out of control and hit the house.¹

Gagliardi's manufacturing defect claim rested on the testimony of Dino Rossini, a purported "expert" called by her to establish that the driver's side seatback was defective. Although the essence of a manufacturing defect claim is the failure of the product to conform to the manufacturer's specifications, see *RESTATEMENT OF THE LAW (THIRD) OF TORTS: PRODUCTS LIABILITY* § 2(a) & cmt. c (1998), Rossini never bothered to examine those specifications – much less offered any testimony of how the seatback deviated from them – in forming his opinion that a manufacturing defect existed. Instead, Rossini merely relied on the plaintiff's own testimony that

¹ The jury awarded \$700,000 in compensatory damages to Gagliardi but reduced that amount by \$150,000 based on her failure to wear a seatbelt. At trial, Gagliardi repeatedly testified under oath that she had been wearing a seatbelt at the time of the accident. The jury, however, obviously disbelieved this testimony (which Suzuki's expert also demonstrated was untrue). See Suzuki Memorandum of Law, at 4, 10-11 & n.3.

the seatback had broken prior to the impact; on his own, selective and limited inspection of the seatback in question (without, however, comparing it to an exemplar seatback or running any tests on it); and on his overall “experience” in the field of engineering.

Despite Suzuki’s repeated challenges to the reliability of Rossini’s “methodology” (see Suzuki Memorandum of Law, at 16 n.8), the trial court admitted the testimony and subsequently denied Suzuki’s post-trial motion challenging the testimony’s admissibility. On appeal in the Second Department, Suzuki renewed its argument that Rossini’s testimony was inadmissible because it flunked the “general acceptance” standard of *Frye* as well as the methodological reliability requirements of *Daubert*. See Suzuki App. Br. to the Appellate Division, at 26-36. In response, Gagliardi argued, among other things, that “New York does not follow the gatekeeping standards of *Daubert*” and the *Frye* test – which she acknowledged “New York does apply” in some circumstances – was inapplicable because Rossini’s testimony “involved investigative techniques rather than novel scientific theories.” Gagliardi App. Br. to the Appellate Division, at 32. Under New York law, Gagliardi argued, Rossini’s testimony was admissible so long as it was based on other facts and materials in evidence (including Gagliardi’s “description of how the accident occurred”), on Rossini’s limited inspection of the vehicle, and on “his general knowledge” of engineering and safety standards (including his awareness “that a seatback is designed to stay locked in an upright position while driving”). *Id.* at 31-32. As long as those minimum requirements were satisfied, Gagliardi argued below, the trial court “was not required to conduct *any further inquiry*” under New York law into either the reliability or general acceptance of Rossini’s methodology. *Id.* at 32 (emphasis added).

In affirming, the Second Department dispatched Suzuki's arguments without even mentioning the *Frye* or *Daubert* standards concerning admissibility – much less explaining how those standards could possibly have been satisfied in this case. The Second Department's terse explanation was as follows:

[T]he trial court properly admitted the testimony of the plaintiff's expert, as it was based upon facts and material in evidence, as well as his experience in the subject area (see *Dougherty v. Milliken*, 163 N.Y. 527, 533, 57 N.E. 757; *Commercial Cas. Co. v. Roman*, 269 N.Y. 451, 456-457, 199 N.E. 658).

757 N.Y.S.2d 581, 582. Thus, the Second Department credited Gagliardi's argument that no inquiry under *Frye* or *Daubert* was necessary in this case because Rossini's testimony was based on other record evidence as well as on his professional "experience" in the field of engineering.²

As we next explain, this Court should grant review in order to clarify the proper approach to determining the admissibility of expert testimony that (a) arguably does not involve a "novel scientific" theory, and/or (b) is purportedly based, at least in part, on the expert's overall "experience" in the relevant field. This category of expert testimony is exceedingly large. Many if not most expert witnesses rely, at least in part, on the application of scientific, technical, or other

² In opposing Suzuki's motion for leave to appeal in this Court, Gagliardi maintains that Suzuki failed to preserve the *Frye/Daubert* argument in the trial court. Mem. in Opp. 6-7. That contention, however, was soundly refuted by Suzuki below. See Suzuki Reply Br. to the Appellate Division, at 10-14. Equally baseless is Gagliardi's suggestion that the Second Department somehow *credited* her waiver argument in affirming the judgment. As the language quoted in text makes clear, the Second Department rejected Suzuki's reliance on *Daubert* and *Frye* on the ground that those cases were inapplicable to experience-based expert testimony that did not involve a "novel scientific" methodology. Nor is Gagliardi correct in now suggesting (Mem. in Opp. 7 n.1) that her interpretation of the Second Department's decision draws support from its passing reference to and rejection of Suzuki's "remaining contentions" at the very end of its opinion (following a discussion of the "excited utterance" issue). The Second Department's rejection of Suzuki's "remaining" arguments on the ground that they were "either unpreserved * * * or without merit" (757 N.Y.S.2d at 582 (emphasis added)) plainly does not include arguments that had *already* been rejected (such as whether "the trial court properly admitted the testimony of plaintiff's expert" (*ibid.*)).

specialized knowledge drawn from established fields such as engineering, accounting, economics, and psychology (even if, as here, they fail to follow methodologies that are reliable or generally accepted as valid within those fields). In addition, virtually *any* expert (even one employing a truly novel scientific methodology) can make the claim that his opinion rests in whole or in part on his general “experience” in the field. If experts who vaguely invoke their generalized “experience” or who apply scientific, technical or other specialized knowledge from established disciplines are completely exempted from gatekeeping scrutiny under the *Frye* test, or under *Daubert*, then many verdicts will be tainted by their dependence on “junk science” and the reliability of the civil justice system will suffer greatly.

A. The New York Courts Are Confused Over How To Determine The Admissibility Of The Testimony Of Expert Witnesses Who Arguably Do Not Rely On Novel Scientific Methodologies

The lower courts in this state have struggled in recent years to determine whether *Frye* or *Daubert* should be applied to experts such as Rossini. Some, like the Second Department in this case, have even held that *no* inquiry into the reliability or general acceptance of the expert’s underlying methodology is required. This case is an excellent vehicle for addressing these issues, which are of surpassing importance to business entities and other litigants. This Court should take this opportunity to update and clarify New York law concerning the admissibility of expert testimony in light of the valuable lessons that can be gleaned from the federal experience of the past decade.

For decades, the New York courts have applied the “long-recognized rule” of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), in evaluating the admissibility of expert testimony and evidence that is based on “novel scientific” techniques. *People v. Wesley*, 83 N.Y.2d 417, 422-23 (1994); see also *People v. Wernick*, 89 N.Y.2d 111, 115-16 (1996). Under the *Frye* test, expert

testimony that is “based on scientific principles or procedures is admissible but only after a principle or procedure has ‘gained general acceptance’ in its specified field.” *Wesley*, 83 N.Y.2d at 422 (quoting *Frye*, 293 F. at 1014). Thus, in *Wesley*, this Court upheld the admissibility of novel DNA profiling evidence based on an application of the *Frye* test. At the same time, the Court rejected the argument that it should evaluate the reliability of the DNA profiling technique not under *Frye* but under the standards that had recently been outlined by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). See *Wesley*, 83 N.Y.2d at 423 n.2. But rather than say that *Daubert* was inconsistent with or contrary to New York law, this Court in *Wesley* was careful to say only that it was “not applicable here” (83 N.Y.2d at 423) – *i.e.*, that *Frye* rather than *Daubert* was the proper test to apply to new or novel scientific techniques. See also *Wesley*, 83 N.Y.2d at 435 (Kaye, C.J., concurring) (“The Court agrees unanimously that where the scientific evidence sought to be presented is novel, the test is that articulated in *Frye* * * * .”); Schlissel, ‘*Frye*’ and ‘*Daubert*’ Questions Crop Up in the Family Law Arena, N.Y. L.J., July 1, 2003, at 16 (“[I]t would seem that the Court of Appeals has not rejected *Daubert* but, instead, has not yet come across a situation wherein *Daubert* would apply.”).

In the past decade, the lower New York courts have struggled with the question of how to evaluate the admissibility of expert testimony that does not (or arguably does not) hinge on a novel scientific technique or theory. Even before *Daubert*, New York judges had described as “an open question” whether “the *Frye* test should apply to ‘soft’ scientific evidence.” *People v. Burton*, 590 N.Y.S.2d 972, 976 (Sup. Ct., Bronx Cty. 1992). Since *Daubert*, New York courts have taken divergent approaches. Some have applied the *Frye* test to such experts. See, *e.g.*, *Collins v. Welch*, 678 N.Y.S.2d 444 (Sup. Ct., Tompkins Cty. 1998) (applying *Frye* rather than *Daubert* to exclude

physician's testimony relating to medical diagnosis and causation); *People v. Philips*, 692 N.Y.S.2d 915 (Sup. Ct., Queens Cty. 1999) (applying *Frye* to testimony of psychologist on reliability of confessions obtained during police interrogations). Still others have held that *Daubert*, not *Frye*, applies to expert testimony that is not based on a novel scientific technique. See, e.g., *Wahl v. American Honda Motor Co.*, 693 N.Y.S. 2d 875, 877-78 (Sup. Ct., Suffolk Cty. 1999) (applying *Daubert* to engineering testimony concerning design defect) ("Where * * * the evidence is not scientific or not novel, the *Frye* analysis is not applicable * * * . Inasmuch as the testimony in the case at bar is that of an engineer, and inasmuch as the testimony is based upon, according to the witness, recognized technical or other specialized knowledge, the Court finds that the stricter general acceptance standard of *Frye* is not applicable. The Court will apply the reliability standard as derive[d] from *Daubert* and *Kumho Tire*.").

Faced with this uncertainty, some New York courts have applied both *Daubert* and *Frye* (in order to avoid choosing between them, where the result is the same under each). See, e.g., *Stanley Tulchin Assocs., Inc. v. Grossman*, 2002 WL 31466800 (Sup. Ct., Nassau Cty. Oct. 10, 2002) (accountant's testimony as to amount of damages); *Clemente v. Blumenberg*, 183 Misc.2d 923, 934 (Sup. Ct., Richmond Cty. 1999) (biomedical engineer's testimony on injury causation). And finally, some New York courts – like the Second Department in this case – have held that expert testimony that is not based on a novel scientific technique is admissible without any need to conduct an inquiry into either its general acceptance (under *Frye*) or its reliability (under *Daubert*). See 757 N.Y.S.2d 581, 582 (upholding admission of Rossini's testimony on ground that it was based on other evidence in the record as well as on his professional "experience" in the relevant field); see also *People v. Reynolds*, 749 N.Y.S.2d 687, 693 (County Ct., Essex Cty. 2002) (no *Frye* hearing is necessary for

accident reconstruction testimony because “it is based upon the laws of physics and mathematical calculations neither of which are ‘novel’”). See generally Graham, *Abandoning New York’s “General Acceptance” Requirement: Redesigning Proposed Rule of Evidence 702(b) After Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 BUFFALO L. REV. 229, 250-54 (1995) (discussing other cases).

This confusion in the New York courts has been widely noted by commentators. See, e.g., Graham, *supra*, 43 BUFFALO L. REV. at 251 (“careful study” shows trend “away from *Frye* in both trial and appellate courts in the state”); Relihan, *Considering The ‘Frye’ Rule in New York Justice*, N.Y. L.J., Sept. 15, 2000, at 1. It has also been duly noted by lower-court judges. See, e.g., *People v. Legrand*, 747 N.Y.S.2d 733, 738 (Sup. Ct., N.Y. Cty. 2002) (“there is an energized debate, among various courts and commentators, as to whether we will one day adopt the *Daubert* approach”) (citing cases); *Stanley Tulchin Assocs.*, 2002 WL 31466800 (same). And, as noted above, this Court’s decisions have not ruled out the possibility that *Daubert* might be applicable to certain types of experts. See also *People v. Mooney*, 76 N.Y.2d 827, 829 n.1 (1990) (Kaye, J., dissenting) (noting “dissatisfaction” with *Frye* test and questioning whether it “is applicable” to certain testimony by expert psychologists).

This confusion is no doubt compounded by the fact this Court’s cases have repeatedly endorsed a slight variation of the *Frye* test – and one that is itself strongly suggestive of *Daubert*’s central focus on ensuring the *reliability* of an expert’s underlying technique. Although the precise question posed in *Frye* was whether a novel or new scientific technique was “generally accepted” within the relevant scientific community, this Court has on numerous occasions indicated that in New York “the test is * * * whether a particular procedure * * * is generally acceptable *as reliable*.”

People v. Middleton, 54 N.Y.2d 42, 49 (1981) (emphasis added); see also *Wesley*, 83 N.Y.2d at 423 (same); *People v. Jeter*, 80 N.Y.2d 818, 820 (1992) (same); *People v. Magri*, 3 N.Y.2d 562, 566 (1958) (noting that x-rays, electrocardiograms, speedometer readings, and other types of scientific methods, are “freely accepted in our courts for their *general reliability*”) (emphasis added). See generally Graham, *supra*, 43 BUFFALO L. REV. at 234 n.22 (discussing these and other New York cases in which the concept of reliability is used). The *reliability* of expert testimony, of course, is a central concern of the *Daubert* inquiry. It is perhaps no wonder, then, that the lower courts in this state are confused – and in need of further guidance from this Court – on how to evaluate the admissibility of expert testimony that does not hinge on novel scientific techniques.

B. This Court Should Now Clarify The Gatekeeping Responsibilities Of Trial Judges By Drawing On The Lessons Of The Federal Experience

The time is ripe for this Court to dispel the confusion in this vitally important area of New York law. Substantial developments have occurred in recent years – including, not least, the U.S. Supreme Court’s trilogy of cases involving expert witnesses (*Daubert*, *Joiner*, and *Kumho Tire*) – that have shed new light on the proper approach of trial judges to evaluating the admissibility of expert testimony in cases where the expert does not claim to be relying on a novel scientific technique. At the same time, academic commentators and judges in other states have provided new insights into suitability of using the *Frye* test in this setting. Beyond that, the experience of the lower federal courts in applying the *Daubert* framework – and the Supreme Court’s decision in *Kumho Tire* – have highlighted the special dangers that arise if experts are allowed to escape gatekeeping scrutiny altogether through the simply expedient of invoking their general “experience” in the relevant field (as Rossini did here). Because of the nature of Rossini’s testimony, this case is an ideal vehicle for addressing these issues.

1. *Daubert*, *Joiner*, and *Kumho Tire*. The Supreme Court’s trilogy of expert witness cases has provided fresh insights into the problems of unreliable expert testimony and provided a compelling alternative approach to the *Frye* test for evaluating admissibility issues. To see why this is so, it is necessary to review these decisions briefly.

Daubert involved a lawsuit alleging that several children were born with birth defects because their mothers had ingested Bendectin, a prescription anti-nausea drug, during pregnancy. At issue was the admissibility of certain expert scientific testimony concerning the causal connection between the drug and the birth defects. The drug manufacturer’s expert, a physician and epidemiologist, had reviewed the extensive epidemiological literature on Bendectin — including more than 30 published studies involving 130,000 patients — and concluded that no study had found Bendectin to be a risk factor for human birth defects. The plaintiffs did not dispute this characterization of the published record concerning Bendectin. They did, however, seek to introduce in response the testimony of eight “impressive[ly] credentialed” experts who proposed to testify based not on the published epidemiological studies but rather on the basis of: (1) “‘in vitro’ (test tube) and ‘in vivo’ (live) animal studies that found a link between Bendectin and malformations”; (2) “pharmacological studies of the chemical structure of Bendectin that purported to show similarities between the structure of the drug and that of other substances known to cause birth defects”; and (3) “the ‘reanalysis’ of previously published epidemiological (human statistical) studies.” 509 U.S. at 583. *Daubert* involved the admissibility of this evidence offered by the plaintiffs.

The Supreme Court’s decision had two aspects. First, the Court rejected the *Frye* test as the standard for evaluating admissibility issues in the federal courts, explaining that *Frye* had been

superseded in 1975 by the adoption of the Federal Rules of Evidence, and in particular by Rule 702, which then provided:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

FRE 702. “Nothing in the text of this Rule,” the Court explained, “establishes ‘general acceptance’ as an absolute prerequisite to admissibility.” 509 U.S. at 588. In rejecting *Frye*’s “general acceptance” standard as “the exclusive test for admitting expert scientific testimony,” the Court criticized the standard as “rigid” and “at odds with the ‘liberal thrust’ of the Federal Rules.” *Id.* at 589 (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988)).

The second aspect of the Court’s opinion was its identification of the district court’s obligation to “ensure that *any and all scientific testimony or evidence* admitted is not only *relevant*, but *reliable*.” 509 U.S. at 589 (emphasis added). The rules of evidence, the Court explained, “clearly contemplate[] some degree of regulation of the subjects and theories about which an expert may testify.” *Ibid.* Under Rule 702, “[t]he subject of an expert’s [scientific] testimony” must be “more than subjective belief or unsupported speculation” – it must be “ground[ed] in the methods and procedures of science.” *Id.* at 590; see also *id.* at 590 n.9 (“In a case involving scientific evidence, *evidentiary reliability* will be based upon *scientific validity*.”) (emphasis in original). Under Rule 702, then, an expert’s opinion must “have a reliable basis in the knowledge and experience of his discipline.” *Id.* at 592.

In addition to reliability, the Court discussed the separate requirement that expert testimony or evidence must “assist the trier of fact” (FRE 702), which “goes primarily to relevance.” 509 U.S. at 591. This consideration, the Court added, “has been aptly described * * * as one of ‘fit.’” *Ibid.*

“‘Fit’ is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes.” *Ibid.* In sum, Rule 702 “requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.” *Id.* at 592.³

To assist the lower court on remand, the Court then proceeded to offer some “general observations” about how a federal district judge should go about determining whether an expert “is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.” 509 U.S. at 592. Without purporting to offer a “definitive checklist or test,” the Court identified four factors that bear on “whether the reasoning or methodology underlying the testimony is scientifically valid and * * * properly can be applied to the facts in issue.” *Id.* at 592-93.

The Court first noted that “[o]rdinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested.” 509 U.S. at 593. A second consideration, the Court continued, “is whether the theory or technique has been subject to peer review or publication.” *Ibid.* “[S]ubmission to the scrutiny of the scientific community is a component of ‘good science,’ in part because it increases the likelihood that substantive flaws in methodology will be detected.” *Ibid.*

³ The Supreme Court pointed out, in a footnote, that in addition to “scientific * * * knowledge,” Rule 702 refers to “technical, or other specialized knowledge.” 509 U.S. at 590 n.8. “Our discussion,” the Court stated, “is limited to the scientific context because that is the nature of the expertise offered here.” *Ibid.* In a later footnote, however, the Court added that “[a]lthough the *Frye* decision itself focused exclusively on ‘novel’ scientific techniques, we do not read the requirements of Rule 702 to apply *specially or exclusively* to unconventional evidence.” *Id.* at 592 n.11 (emphasis added). In a dissenting opinion joined by Justice Stevens, Chief Justice Rehnquist expressed concern that the majority opinion might spawn uncertainty and confusion in the lower courts over how, if at all, its analysis should be applied to experts who rely not on “scientific” techniques but rather on “technical or other specialized knowledge.” *Id.* at 600 (dissent).

Third, a district court “ordinarily should consider the known or potential rate of error * * * and the existence and maintenance of standards controlling the technique’s operation.” *Id.* at 594. Fourth and finally, “‘general acceptance’ can yet have a bearing on the inquiry.” *Ibid.* “Widespread acceptance can be an important factor in ruling particular evidence admissible, and a known technique which has been able to attract only minimal support within the community * * * may properly be viewed with skepticism.” *Ibid.* (internal quotations omitted). The district judge’s inquiry into the “scientific validity — and thus the evidentiary relevance and reliability — of the principles that underlie a proposed submission,” the Court stressed, “is a flexible one” that must focus “solely on principles and methodology, not on the conclusions that they generate.” *Id.* at 594-95.

In *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), the Supreme Court revisited the subject of expert witnesses, holding that a district court’s ruling excluding (or admitting) expert testimony under *Daubert* is properly reviewed on appeal for abuse of discretion. Equally important, however, the Court went on to explain why the expert testimony sought to be presented by the plaintiffs in that case had been properly excluded by the trial judge. In so doing, the Court reemphasized the critical importance — and stringent nature — of the trial court’s gatekeeping role under *Daubert*.

The plaintiffs in *Joiner* were an electrician and his wife who alleged that the electrician was exposed to PCBs and other chemicals by transformers manufactured by General Electric and Westinghouse, and that this exposure “promoted” his development of small cell lung cancer. Relying on *Daubert*, the district court had excluded the testimony of the plaintiffs’ medical causation experts, which was based on animal studies and on four epidemiological studies, because it “did not

rise above ‘subjective belief or unsupported speculation.’” 522 U.S. at 140 (quoting 864 F. Supp. 1310, 1326 (N.D. Ga. 1994)).

With respect to the animal studies, the Supreme Court noted that they “involved infant mice” that had developed cancer after having “massive doses” of PCBs injected directly into their stomachs. 522 U.S. at 144. The plaintiff’s occupational exposure to PCBs, in contrast, was much less extensive and the type of cancer he developed was different from that suffered by the infant mice. “No study,” moreover, demonstrated either “that adult mice developed cancer after being exposed to PCBs” or that PCBs caused cancer in “any other species.” *Ibid.* The Court faulted plaintiff for “fail[ing] to reply to this criticism” by “explaining how and why the experts could have extrapolated their opinions from these seemingly far-removed animal studies.” *Ibid.*

Next, the Court carefully reviewed the four epidemiological studies. The first study had concluded that there were apparently no grounds for associating the higher rate of lung cancer deaths among workers at a factory with exposure to PCBs at the plant. “Given that [the authors] were unwilling to say that PCB exposure had caused cancer among the workers,” the Court explained, “their study did not support the experts’ conclusion that Joiner’s exposure to PCBs caused his death.” 522 U.S. at 145. The Court noted that the increase in mortality rate from lung cancer reported in the second study was not statistically significant and the study’s authors “did not suggest a link between [it] * * * and the exposure to PCBs.” *Ibid.* “The third and fourth studies were likewise of no help,” because the third study made no mention of PCBs and instead involved exposure to a certain mineral oil, and the fourth study involved subjects who “had been exposed to numerous potential carcinogens, including toxic rice oil that they had ingested.” *Id.* at 145-46.

Based on this exacting inquiry into the reliability and fit of the data relied upon by the plaintiffs' experts, this Supreme Court affirmed the district court's exclusion of the experts' testimony. In so doing, the Court also rejected the plaintiffs' contention that in excluding the expert testimony, the trial court had impermissibly relied on its disagreement with the experts' "conclusions" instead of focusing exclusively on the experts' "methodology" (as plaintiffs claimed was required under *Daubert*). The Court explained: "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." 522 U.S. at 146. *Joiner* thus confirmed — and demonstrated by example — the careful scrutiny that must be given to the reliability of expert testimony by federal district judges.

Kumho Tire Company v. Carmichael, 526 U.S. 137 (1999), involved a product liability suit brought against a tire manufacturer. To prove their claim that an accident was caused by a manufacturing or design defect in a tire that blew out, the plaintiffs relied on the testimony of an engineer who claimed to be an expert in failure analysis. The trial judge, however, excluded the engineer's testimony as unreliable. In *Kumho Tire*, the Supreme Court resolved a conflict that had developed in the federal courts over whether the reliability factors described in *Daubert* were limited to "scientific" (and perhaps to *novel* scientific) expert testimony. See note 3, *supra*. The Court held that *Daubert*'s "gatekeeping" obligation applies not just to scientific experts but also to experts who rely on technical or other specialized knowledge. *Id.* at 147. "[I]t would prove difficult, if not impossible," the Court explained, "for judges to administer evidentiary rules under which a

gatekeeping obligation depended upon a distinction between ‘scientific’ knowledge and ‘technical’ or ‘other specialized’ knowledge.” *Id.* at 148. The Court reasoned:

There is no clear line that divides the one from the others. Disciplines such as engineering rest upon scientific knowledge. Pure scientific theory itself may depend for its development upon observation and properly engineered machinery. And conceptual efforts to distinguish the two are unlikely to produce clear legal lines capable of application in particular cases.

Ibid.

The Court went on to explain that trial judges *may* consider the *Daubert* factors in assessing the reliability of *any* expert, including an expert who relies on technical or other specialized knowledge. But the Court was quick to point out that the *Daubert* factors “do *not* constitute a ‘definitive checklist or test.’” 526 U.S. at 150 (quoting *Daubert*, 509 U.S. at 593) (emphasis in *Kumho Tire*). “We can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence.” *Ibid.* Lack of peer review, for example, would be less indicative of the reliability of the testimony at issue if the subject “may never previously have interested any scientist.” *Id.* at 151. Similarly, “general acceptance” is less probative if the discipline itself lacks reliability, like astrology or necromancy. *Ibid.* The point of the gatekeeping requirement, the Court affirmed, 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.” *Id.* at 152.

Based on an application of the *Daubert* (and other) reliability factors, the Supreme Court in *Kumho Tire* upheld the district court’s decision to exclude the engineer’s testimony. As an initial matter, the Court drew a sharp distinction between the expert’s *qualifications* – which were impressive and “included a masters degree in mechanical engineering, 10 years’ work at Michelin

* * * , and testimony as a tire failure consultant in other tort cases” – and his *methodology*, which the Court next examined in detail (and found to be unreliable). 526 U.S. at 153. The Court proceeded to examine the specific theory and methodology employed by the expert to determine if a tire failure was caused by abuse. The Justices looked closely at the limited sources of the expert’s data as well as the expert’s curious ability to give a specific analysis of the “defect,” but not of other characteristics of the tire. See *id.* at 154-57. The Court was particularly skeptical about the subjectivity of the expert’s mode of analysis. *Id.* at 155. The *Daubert* factors also came into play: there was “no indication in the record that other experts in the industry use [the expert’s] test.” *Id.* at 157. “Nor, despite the prevalence of tire testing, does anyone refer to any articles or papers that validate [the expert’s] approach.” *Ibid.*

2. *This Court Should Reexamine The Admissibility Standards In New York In Light Of The Federal Experience Under Daubert And Other Developments.* Taken together, the Supreme Court’s decisions in *Daubert*, *Joiner*, and *Kumho Tire* provide a viable, alternative legal framework to the *Frye* test for evaluating admissibility issues. The federal courts (and some state courts) have now had a decade of experience in applying the *Daubert* framework, including in many product liability actions involving expert engineering testimony. See generally Owen, *A Decade of Daubert*, 80 DENVER U.L. REV. 345 (2002). In *Kumho Tire* itself, the Supreme Court has powerfully demonstrated how the reliability inquiry can be conducted when evaluating the methodology of an engineering expert. The time is accordingly ripe for this Court to consider – and clarify – the extent to which New York law should apply the *Daubert* principles to experts who do not purport to rely on novel scientific techniques. Of course, if leave to appeal were granted the Court would also remain free to revisit whether *Daubert* should replace the *Frye* test in New York in all cases.

As Suzuki correctly points out, a substantial majority of states now apply the *Daubert* framework. Even in the minority of jurisdictions that continue to use the *Frye* test, there have been some modifications of *Frye* to account for the teachings of *Daubert* and its progeny. See Stolfi, *Why Illinois Courts Should Abandon Frye’s General Acceptance Test for the Admission of Novel Scientific Evidence*, 78 CHICAGO-KENT L. REV. 861, 875-76 (2003) (discussing the “Modified-*Frye*” jurisdictions of Alabama, Minnesota, and New Jersey); Bernstein, *Frye, Frye, Again: The Past, Present, and Future of the General Acceptance Test*, 41 JURIMETRICS J. 385, 394 (2001) (noting that as a consequence of *Daubert* “the general acceptance test is expanding its reach in *Frye* jurisdictions”). There is also a substantial body of case law – and academic commentary – setting forth the pros and cons of *Frye* and *Daubert*. See, e.g., Stolfi, *supra*, 78 CHICAGO-KENT L. REV. at 886-98; Bernstein, *supra*, 41 JURIMETRICS J. at 404-07; Jensen, *Frye v. Daubert: Practically the Same?*, 87 MINN. L. REV. 1579, 1582-84 (2003). There is no reason why New York law should not reflect the insights and analysis contained in this body of case law and scholarship.

3. *Several Features Of This Case Make It An Ideal Vehicle For Addressing The Frye/Daubert Debate And Clarifying The Admissibility Standards Relating To Expert Testimony.* This case is an especially good vehicle for two reasons: (a) it involves an engineering expert, and (b) the expert here vaguely invoked his “experience” as the basis for his opinion.

a. That this case involves engineering evidence is quite helpful not only because such evidence is very common (especially in product liability cases) but also because courts in New York and in other jurisdictions that still apply *Frye* have struggled with how to apply that test (if at all) in this setting. The use of the *Frye* test in some but not all cases involving expert witnesses necessarily gives rise to a host of questions concerning where *Frye* leaves off and other approaches begin. When

is a technique “scientific” and when is it “nonscientific” or “technical”? When is a scientific technique “novel” – and does that term include well-settled techniques (such as failure analysis in engineering science) that are materially altered in ways that make them unrecognizable to experts in the field?⁴ In the lower court, plaintiff Gagliardi successfully argued that “New York does not follow the gatekeeping standards of *Daubert*” and the *Frye* test – which “New York does apply” in some circumstances – was inapplicable because Rossini’s testimony “involved investigative techniques rather than novel scientific theories.” Gagliardi App. Br. to the Appellate Division, at 32. But that argument – which the Second Department accepted – reflects a misunderstanding of the proper scope of the *Frye* test. If *Frye* is the exclusive test in New York, then plainly it should be applied to an expert such as Rossini.

As conducted by engineers, failure analysis involves scientific knowledge and qualifies as a scientific technique within the meaning of *Frye*. “Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified * * *.” *Daubert*, 509 U.S. at 593. “Much of the scientific process is similar to the problem solving done by engineers, which is not surprising since engineering education places heavy emphasis on science.” J. ADAMS, FLYING BUTTRESSES, ENTROPY, AND O-RINGS 132 (1991). Engineers “apply aspects of * * * ‘the scientific method’”; they, like scientists, use “theory and experiment in the search of understanding.” *Id.* at 40; see H. PETROSKI, TO ENGINEER IS HUMAN: THE ROLE OF FAILURE IN SUCCESSFUL DESIGN 40 (1992) (engineering designs “must be analyzed by the engineer as scientist in as rigorous an

⁴ In addition to those uncertainties, many “courts have yet to resolve the [other] ambiguities inherent in the *Frye* test, such as how to determine the relevant field, whether ‘general acceptance’ requires a consensus, a majority, or a significant minority, and whether the quality as well as the quantity of the majority and minority’s views should be taken into account.” Bernstein, *supra*, 41 JURIMETRICS J. at 407.

application of the scientific method as any scientist must make”). The “scientific-engineering” method “includes an attempt to quantify when possible and to keep accurate records so that experiments can be reproduced and results verified.” J. ADAMS, *supra*, at 40.

Failure analysis, or “forensic engineering,” is a well-recognized discipline within engineering. J. ADAMS, *supra*, at 38; see, e.g., A. VILLEMEUR, RELIABILITY, AVAILABILITY, MAINTAINABILITY AND SAFETY ASSESSMENT (1991) (textbook on techniques of engineering failure analysis). Indeed, failure analysis has been described as being “at the heart of the engineering method.” H. PETROSKI, DESIGN PARADIGMS 184 (1994). Failure analysis, like engineering generally, relies on the scientific method of obtaining knowledge. The American Society of Civil Engineers, for example, publishes guidelines for forensic engineers that describe failure analysis in terms that any scientist would find familiar: the creation of “hypotheses [that] will be proven or disproven, resulting in a failure hypothesis that can be supported by the * * * investigator.” TASK COMMITTEE ON GUIDELINES FOR FAILURE INVESTIGATION, GUIDELINES FOR FAILURE INVESTIGATION 157 (1989). A forensic engineer obtains “knowledge” like a scientist; he formulates a hypothesis and measures it against test results and observations.

An engineer conducting a failure analysis, like a scientist, should “[a]void speculation, rationalization, intuition, and inferences based upon lack of information.” C. WITHERELL, MECHANICAL FAILURE AVOIDANCE: STRATEGIES AND TECHNIQUES 55 (1994). To obtain knowledge of how and why things fail requires rigorous application of the scientific method. Allowing a jury to hear expert forensic engineering testimony that had not been verified through the rigors of the scientific method permits decisions to be based on untested, unreliable testimony, stamped with the imprimatur of “expert knowledge.” See, e.g., *Target Mktg. Publ’g, Inc. v. Advo, Inc.*, 136 F.3d

1139, 1143 (7th Cir. 1998) (court not obliged to submit to jury testimony by qualified astronomer that, “based on lengthy and careful observation,” “the sun revolves around the earth”).

To the extent the lower court concluded that *Frye* should not be applied because Rossini’s engineering methodology was not “novel,” that too was error. There is no earthly reason – none – why New York courts applying the *Frye* test should exclude a new scientific technique that has not been generally accepted within the relevant scientific community while at the same time allowing experts drawing on more established fields to make radical departures from accepted techniques. In either case, the technique is equally “novel.” Put differently, even if failure analysis is not a novel scientific technique as it is practiced by most engineers, it still may be novel as applied or used by a particular expert. And radical departures from accepted methods may result in there being no general acceptance of the method within the relevant expert community. Thus, insofar as the Second Department was of the view that *Frye* does not apply to Rossini’s testimony, it was mistaken. There was no showing in this case by plaintiff that Rossini’s failure analysis adhered to the generally accepted practices and methods used by other engineers.

Because of the nature of Rossini’s technique, this case is an especially good vehicle to address the widespread confusion in the lower courts. It also offers a valuable opportunity to clarify the nature and reach of the *Frye* test, should the Court conclude that *Frye* rather than *Daubert* is the exclusive test for admissibility in New York. Further guidance on this subject would be beneficial. See Baggett, *The Standards Applied To The Admission of Soft Science Experts in State Courts*, 26 AM. J. TRIAL ADVOCACY 149 (Summer 2002) (discussing divergent treatment of “soft” science testimony by the state courts).

b. That Rossini vaguely invoked his general “experience” as the basis for his failure analysis opinion also makes this an attractive vehicle for addressing the *Frye/Daubert* debate. In *Kumho Tire*, the Eleventh Circuit had held that an expert engineer’s testimony concerning tire failure analysis was completely exempt from the *Daubert* inquiry because the expert “ma[de] no pretense of basing his opinion on any scientific theory of physics or chemistry” or on engineering science, but instead relied “on his experience in analyzing failed tires.” *Carmichael v. Samyang Tire, Inc.*, 131 F.3d 1433, 1436 (11th Cir. 1997), rev’d, 526 U.S. 137 (1999). “After years of looking at the mangled carcasses of blown-out tires,” the Eleventh Circuit explained, the expert “claims that he can identify telltale markings revealing whether a tire failed because of abuse or defect.” *Id.* at 1436. Such expert testimony based upon “experience,” the Eleventh Circuit concluded, should ordinarily be admitted. *Ibid.*

In reversing, the Supreme Court squarely rejected this analysis. And with good reason: a rule that would permit any expert who invokes his general “experience” as the basis for his opinion to thereby avoid all scrutiny as to the reliability of his opinion would be an obvious means of circumventing the district court’s gatekeeping obligation and the *Daubert* framework. The same exception, moreover, could be used to circumvent the *Frye* rule. Indeed, it is difficult to imagine *any* kind of expertise that could not be recast as experienced-based. Thus, a DNA expert could avoid criticisms of his methodology by explaining that his opinion is in fact based on his “experience” in identifying genetic linkages; or a damages expert in a contract case could present an opinion that departs substantially from the prevailing standards of property valuation by nebulously invoking his “experience” in “the real estate market”; or a medical doctor could opine that a person’s condition

was caused by a certain chemical by alluding to his “experience” viewing hundreds of patients with similar conditions. That cannot be the law.

Notably, the lower federal courts’ experience prior to *Kumho Tire* had already revealed the problems with recognizing a broad “experience” exception to *Daubert* and demonstrated the special abuses associated with such a theory in product liability cases. In *Compton v. Subaru of America, Inc.*, 82 F.3d 1513 (10th Cir.), cert. denied, 519 U.S. 1042 (1996), for example, an engineer was allowed to testify that a car’s roof should have been designed to meet a strength standard that the district court described as “preposterous” and “more applicable to a Sherman tank than to any vehicle which the ordinary consumer would drive.” *Id.* at 1516; Petition for a Writ of Certiorari, *Subaru v. Compton*, No. 96-645, at 6 (“No. 96-645 Pet.”). The expert was permitted to offer that opinion based on his “experience,” even though he failed to consider whether the increased weight or strength of the roof would have rendered the vehicle unstable, reduced the operator’s field of vision, or caused more severe injuries at lower speeds — all factors that an engineer actually designing a roof would have assessed and tested. No. 96-645 Pet. 14, 26-27. But an engineer’s “experience” and “training” establish expert status, if at all, only because the engineer has applied reliable engineering methods to a particular issue based on facts presented in the case. To allow an engineer to testify about manufacturing or design defects without employing appropriate engineering techniques leaves “too great an analytical gap” for such testimony to be submitted to a jury. See *Joiner*, 522 U.S. at 519.⁵

⁵ Not surprisingly, commentators sharply criticized the decision in *Compton*. See, e.g., Schofield, *A Misapplication of Daubert: Compton v. Subaru of America Opens the Gate For Unreliable and Irrelevant Expert Testimony*, 1997 B.Y.U.L REV. 489, 508 (*Compton* permits litigants to “circumvent” *Daubert*); Hoenig, *New Cases on Experts After “Daubert,”* N.Y. L.J., May 13, 1996, at 6 (*Compton* “creates an escape hatch by which *Daubert*’s reliability factors can be

Part of the difficulty, of course, lies in the ambiguity inherent in the word “experience,” which reflects a range of meanings. It is defined as:

The process or fact of personally observing, encountering, or undergoing something; as, to have *experience* in teaching; * * * knowledge or practical wisdom gained from what one has observed, encountered, or undergone * * *.

NEW WEBSTER’S DICTIONARY OF THE ENGLISH LANGUAGE 346 (1984) (emphasis in original). Thus, in ordinary parlance, “experience” can mean one’s *past personal observation*, or it can signify more generally all that one has personally “encountered” or “undergone” in life. Yet “experience” in the latter sense can be invoked by *any* type of expert witness, including an expert whose testimony is indisputably premised on a novel scientific method. Scientists, after all, accumulate “experience” with their methodologies and disciplines over time. The critical question is not whether an expert relies on his “experience” but whether his technique conforms to standards and methods used outside the courtroom by those engaged in the same discipline.

Because the Second Department upheld the admission of Rossini’s testimony largely because it was based on his “experience” in this broader sense, this case is an excellent vehicle for making clear that the gatekeeping responsibilities of trial judges cannot be so easily circumvented as well as for clarifying how the trial courts in New York should handle experience-based experts. As the Supreme Court’s decision in *Kumho Tire* makes clear, a vague invocation of one’s “experience” should not provide a free pass to any expert. Instead, courts can – and should – ensure that *all* expert testimony is reliable by scrutinizing such testimony for reliability.

bypassed”).

C. Ensuring The Reliability Of Expert Testimony Is Of Surpassing Importance

In recent decades, there has been an “enormous increase in the use of scientific evidence” in litigation in the state and federal courts. *Developments in the Law: Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV. 1481, 1485 (1995). The use of experts has vastly increased as questions involving “science and technology have intruded into nearly every aspect of * * * litigation.” C. WRIGHT & V. GOLD, FEDERAL PRACTICE AND PROCEDURE § 6262, at 181 (1997). New York courts have been called upon to adjudicate a wide array of complex new disputes, including mass tort, product liability, and environmental litigation, whose outcomes depend in no small measure on the presentation of expert testimony. The increased use and importance of expert testimony has, in turn, prompted public “[c]oncerns with the abuse of the litigation process” to be “voiced ever more loudly.” *Braun v. Lorillard Inc.*, 84 F.3d 230, 233 (7th Cir.) (Posner, C.J.), cert. denied, 519 U.S. 992 (1996). Peter Huber’s 1991 book, *Galileo’s Revenge: Junk Science in the Courtroom*, raised public awareness of this problem and spurred public and judicial debate. The Supreme Court’s decisions in *Daubert*, *Joiner*, and *Kumho Tire* have resulted in important innovations and insights aimed at enhancing the reliability of all expert testimony in the federal courts.

The growing use of expert testimony – and the importance of ensuring its reliability – has been noted by many. For example, Justice Breyer recently explained:

Scientific issues permeate the law. Criminal courts consider the scientific validity of, say, DNA sampling or voiceprints, or expert predictions of defendants’ “future dangerousness,” which can lead courts or juries to authorize or withhold the punishment of death. Courts review the reasonableness of administrative agency conclusions about the safety of a drug, the risks attending nuclear waste disposal, the leakage potential of a toxic waste dump, or the risks to wildlife associated with the building of a dam. * * * And, of course, tort law often requires difficult determinations about the risk of death or injury associated with exposure to a chemical ingredient of a pesticide or other product.

The importance of scientific accuracy in the decision of such cases reaches well beyond the case itself. A decision wrongly denying compensation in a toxic substance case, for example, can not only deprive the plaintiff of warranted compensation but also discourage other similarly situated individuals from even trying to obtain compensation and encourage the continued use of a dangerous substance. On the other hand, a decision wrongly granting compensation, although of immediate benefit to the plaintiff, can improperly force abandonment of the substance. Thus, if the decision is wrong, it will improperly deprive the public of what can be far more important benefits – those surrounding a drug that cures many while subjecting a few to less serious risk, for example. The upshot is that we must search for law that reflects an understanding of the relevant underlying science, not for law that frees companies to cause serious harm or forces them unnecessarily to abandon the thousands of artificial substances on which modern life depends.

Breyer, *Introduction*, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 1, 3-4 (2d ed. 2000).

For these reasons, the admissibility questions raised by this case are of great public importance – and clearly merit this Court’s attention. As Judge Learned Hand noted more than a century ago, the use of expert testimony gives rise to a number of “serious practical difficulties.” Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 50 (1901). Among those “difficulties” is the risk that an expert frequently ends up “confusing” jurors and effectively “take[s] the jury’s place if they believe him.” *Id.* at 52, 53; see also Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word “Expert” Under the Federal Rules of Evidence in Civil and Criminal Jury Trials*, 154 F.R.D. 537, 541 (1994) (stating that jurors often “abdicate their fact-finding obligation” and simply “adopt[.]” the expert’s opinion). See generally *Ake v. Oklahoma*, 470 U.S. 68, 81 n.7 (1985) (“[T]estimony emanating from the depth and scope of specialized knowledge is very impressive to a jury. The same testimony from another source can have less effect.”) (quotation omitted). It is common knowledge, moreover, that jurors “perform much less well when they sit in judgment on technology,” P. HUBER, *LIABILITY: THE*

LEGAL REVOLUTION AND ITS CONSEQUENCES 14 (1988); they tend to “get lost in the labyrinth of concepts.” *Guillory v. Domtar Indus., Inc.*, 95 F.3d 1320, 1331 (5th Cir. 1996).⁶

Accordingly, it is all the more important today that trial courts carry out their gatekeeping responsibilities vigorously to ensure that the litigation process is not compromised through the admission of “expert” testimony based on unreliable methodologies. The Court should grant leave to appeal to address this subject and provide greater clarity to the lower courts.

II. The Court Should Grant Leave To Appeal To Clarify The Scope Of The “Direct Evidence” Rule After *Speller*

Further review is also warranted to provide greater guidance to the lower courts and to litigants concerning the meaning, and applicability, of the “direct evidence” rule in manufacturing defect cases. Under that rule, a plaintiff ordinarily must present direct evidence that a product was not manufactured in accordance with the manufacturer’s plans and specifications in order to prevail on a manufacturing defect claim under New York law. Because it may be difficult in certain cases to show that a product was in a defective condition at the time it left the manufacturer’s control, however, New York law permits the factfinder to draw an inference that a manufacturing defect existed based on “the circumstances of the accident and proof that the product did not perform as intended.” *Brown v. Borruso*, 238 A.D. 2d 884, 885 (4th Dept. 1997); see also in *Halloran v. Virginia Chemicals, Inc.*, 41 N.Y.2d 386, 388 (1977). But if the manufacturer then comes forward “with any evidence that the accident was not necessarily attributable to a defect,” the plaintiff is required to “produce *direct* evidence of a defect” in order to carry her burden of proof. *Winckel v.*

⁶ Studies have confirmed that jurors routinely believe the testimony of expert witnesses. See *Expert Witnesses Found Credible By Most Jurors*, NATIONAL L.J., Feb. 22, 1993, at S-4 (poll of nearly 800 jurors found that 89% thought testifying experts were credible and 71% said expert testimony made a difference in their verdicts).

Atlantic Rental & Sales, 159 A.D. 2d 124, 127 (2d Dept. 1990) (emphasis added). In *Speller v. Sears, Roebuck & Co.*, 100 N.Y.2d 38 (2003), this Court recently examined the “direct evidence” rule, but its decision left open certain questions that are squarely presented for review in this case.

At the trial of this case, the plaintiff presented no direct evidence that the seatback in the Suzuki X-90 vehicle contained a specific manufacturing defect. Indeed, plaintiff’s expert made no attempt to identify any aspect of the seatback – which, notably, remained available to be inspected and evaluated following the accident – that deviated in any way from the manufacturer’s specifications and engineering plans. Nor did plaintiff’s expert even bother to examine the manufacturer’s specifications and design drawings – a necessary prerequisite to identifying a manufacturing defect in the seatback. Instead, Gagliardi sought to prove the existence of an unspecified manufacturing defect circumstantially – through her own testimony that the seatback spontaneously broke as she was backing down the driveway, but before the vehicle hit her parent’s home. The fact that the seatback broke in this circumstance, Gagliardi thus contended, supported an inference that it “must” have contained some manufacturing defect.

Suzuki countered plaintiff’s allegations by showing, through the testimony of its own engineering expert, that the physical evidence of duress, deformation and damage in the seatback itself and in the reclining mechanism flatly refuted plaintiff’s suggestion that the seatback had spontaneously broken prior to the vehicle’s impact with the house. The physical evidence, Suzuki’s expert demonstrated, was impossible to square with the plaintiff’s story – *i.e.*, only if the seatback had collapsed when the vehicle hit the house would the seat and its structures bear the unmistakable signs it did of impact with the rear seat. Thus, Suzuki urged the jury to reject plaintiff’s account (just

as, Suzuki successfully argued, the jury should reject her false testimony that she was wearing a seatbelt at the time the accident occurred).

Under New York law, Suzuki's showing brought the "direct evidence" rule into play and thus shifted the burden to Gagliardi to "produce *direct* evidence of a defect" in order to carry her burden of proof. *Winckel*, 159 A.D. 2d at 127 (emphasis added). This she failed to do. In affirming the judgment despite that failure on plaintiff's part, the Second Department offered the following terse, but entirely unenlightening explanation: "Contrary to the defendants' contention, the jury verdict was based on a valid line of reasoning, which could lead rational people to a similar conclusion that the defendants' product was defective and that the defect was a substantial factor in causing the plaintiff's accident[.]" 757 N.Y.S.2d at 582.

As Suzuki correctly notes, this case presents the Court with the chance to clarify the scope of the "direct evidence" rule in the aftermath of this Court's decision in *Speller*. At issue in *Speller* was whether a kitchen fire had been caused by a defective refrigerator manufactured by the defendant (as the plaintiff claimed) or instead by a grease fire in an adjacent stove (as the defendant claimed). In opposing the defendant's motion for summary judgment, which was supported by evidence that the fire had begun in the stove, the plaintiff in *Speller* presented "excerpts from the depositions of two experts and an affidavit from a third, as well as other materials" in support of her claim that "the fire was caused by defective wiring" in the upper right-hand quadrant of the refrigerator. 100 N.Y.2d at 40. The statements of all three of plaintiff's experts "refuted" the evidence of an alternative cause presented by the defendant (suggesting that the fire had begun in the stove); all three opined that "the fire started in the upper right quadrant of the refrigerator." *Ibid*. This Court reversed the grant of summary judgment in favor of the manufacturer, reasoning that plaintiff's presentation of "detailed,

nonconclusory expert depositions and other submissions which explained the bases for the opinions” were enough to avoid summary judgment in the manufacturer’s favor. *Id.* at 44. The Court also rejected the manufacturer’s argument that, in order to avoid summary judgment, the plaintiff was “foreclosed from establishing a product defect circumstantially” and was required “to produce evidence of a specific defect,” explaining that this argument “misinterprets the court’s role in *adjudicating a motion for summary judgment.*” *Ibid.* (emphasis added). The Court also noted that because the relevant part of the refrigerator “had been consumed in the fire,” it was “impossible to examine or test the wiring to determine the precise nature of the defect.” *Id.* at 41.

This case would allow the Court to clarify several aspects of the “direct evidence” rule after *Speller*. Here, in contrast to *Speller*, the allegedly defective product feature (the X-90’s driver-side seatback) was not destroyed; it remained fully available for the plaintiff’s expert to examine and analyze in his efforts to support plaintiff’s claim that the seatback included a manufacturing defect. Plaintiff’s expert, however, never identified any respect in which the seatback deviated from the manufacturer’s specifications and plans (indeed, the expert *never bothered even to look at those specifications*). Under these circumstances, it is far from clear that New York law permits a plaintiff to rely exclusively on circumstantial evidence in advancing a claim of manufacturing defect. In *Speller*, this Court specifically noted that the “direct evidence” rule in New York is “consistent with” the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 3 (1998). See 100 N.Y.2d at 41-42. The RESTATEMENT, however, makes clear that a plaintiff’s reliance on purely circumstantial evidence “without proof of a specific defect” (RESTATEMENT § 3) *presupposes* the unavailability of the product (because it has been either lost or destroyed):

Frequently, the plaintiff is able to establish specifically the nature and identity of the defect and many proceed directly under [RESTATEMENT] § 2(a) [which provides that a product

“contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product”]. But *when the product unit involved in the harm-causing incident is lost or destroyed in the accident*, direct evidence of specific defect may not be available. *Under that circumstance*, this Section may offer the plaintiff the only fair opportunity to recover.

RESTATEMENT § 3 cmt. b (emphasis added). In endorsing the RESTATEMENT’s position, this Court in *Speller* strongly suggested that New York law would not permit a plaintiff to rely solely on an inference of defect to be drawn from the accident itself – without any direct evidence of a specific defect – in a case where the product was *not* destroyed or lost but remained fully available for examination by the plaintiff. To clarify this aspect of the “direct evidence” rule, this Court’s review is warranted.⁷

This case also differs from *Speller* because it does not involve a motion for summary judgment but rather a judgment following trial, and because here (unlike in *Speller*) the plaintiff never countered Suzuki’s detailed, competent expert testimony concerning alternative causation (or the physical evidence supporting it). To clarify whether the “direct evidence” rule permits a plaintiff to prevail *at trial* on the basis of such shaky and unresponsive testimony, leave to appeal should be granted.

* * * * *

While each of these issues independently merits this Court’s review, the fact that the Second Department resolved *both* against Suzuki threatens to create serious unfairness to manufacturers whose products are alleged to include manufacturing defects. Under the decision below, a plaintiff

⁷ It is no answer to say, as plaintiff does in opposing further review (Mem. in Opp. 4) that this Court in *Speller* “drew no distinctions between cases where the product has been destroyed (as in *Speller*) or where it still exists at the time of trial (as was the case here).” Because that distinction was irrelevant in *Speller*, there simply was no reason for this Court to “tailor[] its holding to the former situation.” Mem. in Opp. 4.

may prevail on a manufacturing defect theory without ever identifying any way in which the product deviated from the manufacturer's specifications and plans – even if the product still exists and is available to be examined and tested. Indeed, the plaintiff is fully entitled to ignore the manufacturer's plans and specifications altogether, and proceed based on an “inference” of defect drawn from the fact of the accident itself. And, of course, the plaintiff may do so by calling an expert witness to testify whose methodology has never been examined by the trial judge for reliability – and never been determined to be generally accepted within the engineering community. As this case amply demonstrates, that is a recipe for unfairness and flawed verdicts if ever there was one.

Conclusion

For the foregoing reasons, Suzuki's motion for leave to appeal should be granted.

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Respectfully submitted,

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