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## Gating the Gatekeeper: *Tamraz v. Lincoln Electric Co.* and the Expansion of *Daubert* Reviewing Authority

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# GATING THE GATEKEEPER: *TAMRAZ v. LINCOLN ELECTRIC CO.* AND THE EXPANSION OF *DAUBERT* REVIEWING AUTHORITY

**Abstract:** On September 8, 2010, in *Tamraz v. Lincoln Electric Co.*, the U.S. Court of Appeals for the Sixth Circuit held that a neurologist's expert testimony was speculative and therefore inadmissible under Rule 702 of the Federal Rules of Evidence. In so holding, the Sixth Circuit departed from its traditional deference to Rule 702 rulings of district court judges. This Comment argues that, although the Sixth Circuit's decision is consistent with the requirements set forth by the 1993 U.S. Supreme Court decision *Daubert v. Merrell Dow Pharmaceuticals*, the Sixth Circuit opened the door to more aggressive review of *Daubert* rulings.

## INTRODUCTION

In 2010, in *Tamraz v. Lincoln Electric Co.*, a panel of the U.S. Court of Appeals for the Sixth Circuit reversed the U.S. District Court for the Northern District of Ohio.<sup>1</sup> It decided that the district court abused its discretion by admitting a physician's testimony that the plaintiff suffered from manganese-induced parkinsonism.<sup>2</sup> Specifically, the Sixth Circuit held that the physician's testimony did not satisfy the requirement of Rule 702 of the Federal Rules of Evidence that experts testify to "scientific knowledge."<sup>3</sup> In so doing, the court relied primarily on the 1993 U.S. Supreme Court decision *Daubert v. Merrell Dow Pharmaceuticals*.<sup>4</sup> Yet, in its effort to implement *Daubert's* underlying policy, the *Tamraz* court may have exceeded its authority to review Rule 702 rul-

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<sup>1</sup> 620 F.3d 665, 667–68 (6th Cir. 2010).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 667; see FED. R. EVID. 702. Rule 702 governs testimony by experts:

If scientific, technical, or other specialized knowledge will assist the trier of fact 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.

<sup>4</sup> 509 U.S. 579, 589–90 (1993); *Tamraz*, 620 F.3d at 677–78.

ings for abuse of discretion.<sup>5</sup> As a result, *Tamraz* may open the door for other appellate courts to review the admission of expert testimony more aggressively.<sup>6</sup>

Part I of this Comment provides a background of the expert testimony at issue in *Tamraz* and summarizes the Sixth Circuit's ruling.<sup>7</sup> Then, Part II discusses the Supreme Court's landmark *Daubert* ruling and subsequent cases interpreting the requirements of Rule 702 of the Federal Rules of Evidence.<sup>8</sup> Finally, Part III discusses the two competing interests in the case—adherence to the proper standard of review and guarding against inadmissible testimony.<sup>9</sup> Further, it argues that, although the Sixth Circuit likely applied *Daubert* correctly, the court's de novo-like review may open the door for appellate courts to review Rule 702 rulings more thoroughly, thus potentially usurping the gatekeeping role properly left to the trial court judge.<sup>10</sup>

### I. TAMRAZ: THE SIXTH CIRCUIT REVERSES ON DAUBERT GROUNDS

*Tamraz* was selected as a test case of a consolidated group of ongoing multidistrict litigation regarding welding fume products liability.<sup>11</sup> The plaintiff, Jeffrey Tamraz, worked as a welder for roughly twenty-five years, from 1979 to 2004.<sup>12</sup> He began experiencing symptoms of parkinsonism around 2001.<sup>13</sup> In 2004, he and his wife sued several manufacturers of welding supplies, alleging that their products caused his parkinsonism and that the manufacturers failed to warn him of the danger.<sup>14</sup> The jury found for the plaintiffs on the strict liability and negligent failure to warn claims and awarded them \$20.5 million in damages.<sup>15</sup>

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<sup>5</sup> See *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (holding that appellate courts should review a district court's decision to admit or exclude scientific evidence for abuse of discretion); *Tamraz*, 620 F.3d at 677–78.

<sup>6</sup> See *Tamraz*, 620 F.3d at 671–72.

<sup>7</sup> See *infra* notes 11–42 and accompanying text.

<sup>8</sup> See *infra* notes 43–92 and accompanying text.

<sup>9</sup> See *infra* notes 93–121 and accompanying text.

<sup>10</sup> See *infra* notes 93–121 and accompanying text.

<sup>11</sup> See *Tamraz*, 620 F.3d at 667 (citing generally *In re Welding Fume Prods. Liab. Litig.*, 245 F.R.D. 279 (2007)).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* His symptoms included tremors, drooling, a “masked face,” and impaired coordination on his right side. *Id.*

<sup>14</sup> *Id.* The case went to trial on three theories of relief: strict liability failure to warn, negligent failure to warn, and fraud by concealment. *Id.*

<sup>15</sup> *Id.* The defendants filed motions to overturn the verdict under Rule 50 of the Federal Rules of Civil Procedure. *Id.* (citing FED. R. CIV. P. 50). The district court denied the

The manufacturers appealed, arguing that the district court had abused its discretion by permitting the testimony of Dr. Walter Carlini.<sup>16</sup> At trial, Dr. Carlini testified that the manufacturers' products triggered "manganese-induced parkinsonism" in the plaintiff.<sup>17</sup> Yet, according to the manufacturers, that testimony failed to meet the requirements of Rule 702 of the Federal Rules of Evidence.<sup>18</sup>

Parkinsonism encompasses a family of movement disorders that may have different causes and different, but overlapping, symptoms.<sup>19</sup> The expert testimony in this case concerned two forms of parkinsonism—Parkinson's Disease and manganism.<sup>20</sup> Parkinson's Disease is the most common type of parkinsonism and its cause is often unknown.<sup>21</sup> Manganism is a form of parkinsonism defined by its cause—overexposure to manganese.<sup>22</sup>

In *Tamraz*, no one disputed that the plaintiff suffered from a form of parkinsonism.<sup>23</sup> The dispute concerned the type and cause.<sup>24</sup> Dr. Carlini testified that the plaintiff suffered from manganese-induced

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defendants' motion for judgment as a matter of law, in which the defendants contended that there was insufficient evidence of overexposure to welding fumes to sustain the jury verdict. *Tamraz v. BOC Grp., Inc.*, No. 1:04-CV-18948, 2008 WL 2796726, at \*6–8, \*25 (N.D. Ohio July 18, 2008), *rev'd*, 620 F.3d 665 (6th Cir. 2010). The district court explained that it examined much of the evidence regarding manganese exposure during its assessment of admissibility under the standards set out in *Daubert* and found it sufficient. *Id.* at \*8 & n.58 (citing *Daubert*, 509 U.S. at 597; *In re Welding Fume Prods. Liab. Litig.*, No. 1:03-CV-17000, 2005 WL 1868046, at \*28–31 (N.D. Ohio Aug. 8, 2005)).

<sup>16</sup> *Tamraz*, 620 F.3d at 667–68.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*; see FED. R. EVID. 702.

<sup>19</sup> *Tamraz*, 620 F.3d at 668 (citing James Parkinson, *An Essay on the Shaking Palsy* (1817), reprinted in 14 J. NEUROPSYCHIATRY & CLINICAL NEUROSCIENCES 223, 223–36 (2002)). The symptoms of parkinsonism generally include tremors, instability, and slowness and rigidity of movement. *Id.*

<sup>20</sup> *Id.* at 668.

<sup>21</sup> See *id.* The typical Parkinson's Disease patient suffers from a gradual loss of motor function and a tremor when at rest, both usually on one side of the body. *Id.* The disease is often described as being "idiopathic" because the medical community does not know what caused a given individual's disease. *Id.* When the cause can be determined, however, the disease is often named by the cause—for example, "drug-induced parkinsonism" or "toxin-induced parkinsonism." *Id.*

<sup>22</sup> See *id.* The symptoms of manganism overlap with Parkinson's Disease, but include an action tremor instead of a rest tremor, symmetry of symptoms, and a distinct gait known as a "cock walk." *Id.* The typical manganism patient also suffers from neuron deterioration in a different part of the brain than the typical Parkinson's Disease patient. *Id.*

<sup>23</sup> *Id.* at 669.

<sup>24</sup> *Tamraz*, 620 F.3d at 669.

parkinsonism.<sup>25</sup> Yet, the defendants contended that “factors other than exposure to manganese” caused the plaintiff’s parkinsonism.<sup>26</sup>

Dr. Carlini concluded that exposure to manganese may have triggered the plaintiff’s parkinsonism by following a series of inferences.<sup>27</sup> First, Dr. Carlini noted that Tamraz was exposed to welding fumes that presumably contained manganese.<sup>28</sup> Scientists have identified genetic factors that cause some forms of otherwise “idiopathic” Parkinson’s, and some literature has hypothesized that toxins combined with genetics may cause other types of Parkinson’s Disease.<sup>29</sup> Tamraz developed the symptoms of Parkinson’s Disease (but not those of manganism).<sup>30</sup> Thus, because manganese is known to cause manganism, Dr. Carlini hypothesized that manganese might trigger Parkinson’s Disease as well.<sup>31</sup> Next, he theorized that Tamraz may be genetically predisposed to get Parkinson’s Disease (although Tamraz had no family history of it).<sup>32</sup> Finally, Dr. Carlini concluded that manganese may have triggered these genes and caused Tamraz’s Parkinson’s Disease.<sup>33</sup>

On appeal, the circuit court found that this opinion exceeded the boundaries of Rule 702 and remanded the case for a new trial.<sup>34</sup> According to the court, this testimony was no more than a hypothesis; it was not “knowledge” or “based upon sufficient facts or data” under Rule 702.<sup>35</sup> First, the court observed that the doctor’s testimony was “speculative three times over.”<sup>36</sup> Furthermore, the court noted that, even if it accepted that manganese *could* cause Parkinson’s Disease, that assumption did not conclusively show that it caused *this* plaintiff’s Parkinson’s Disease.<sup>37</sup> Although Dr. Carlini explained that he suspected that manganese caused Tamraz’s Parkinson’s Disease, evidenced by the dis-

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<sup>25</sup> *Id.*

<sup>26</sup> *See id.*

<sup>27</sup> *Id.* at 670.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Tamraz*, 620 F.3d at 670.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 678.

<sup>35</sup> *Id.* (citing FED. R. EVID. 702).

<sup>36</sup> *Tamraz*, 620 F.3d at 670. The court explained that there were speculative jumps in the chain of causation. *Id.* Dr. Carlini described the literature hypothesizing a link between environmental toxins and genetic Parkinson’s as “theoretical.” *Id.* Dr. Carlini also conceded that he knew of no studies finding a link between manganese and Parkinson’s disease. *Id.* In addition, he stated that “speculation” led him to guess that the plaintiff had an underlying predisposition to Parkinson’s Disease, even despite a lack of family history. *Id.*

<sup>37</sup> *See id.* at 670–71.

ease's early onset, the court was not satisfied that this established the necessary foundation to show that manganese could cause Parkinson's Disease and did cause it in this specific case.<sup>38</sup>

Thus, the circuit court concluded that nothing in Dr. Carlini's testimony established the sort of knowledge that Rule 702 requires.<sup>39</sup> The court acknowledged that Rule 702 does not require certainty and that the district court enjoys broad discretion to determine what is admissible.<sup>40</sup> Yet, the Sixth Circuit determined that Dr. Carlini's testimony exceeded the bounds of Rule 702 because it contained not just one, but a string of speculations.<sup>41</sup> Further, although Dr. Carlini's hypothesis might eventually turn out to be correct, at the time of trial, it was nothing more than a hypothesis.<sup>42</sup>

## II. DAUBERT AND ITS PROGENY: EXCLUDING "JUNK SCIENCE"

### A. Supreme Court Jurisprudence: Imposing a "Gatekeeping" Duty Through the Daubert Trilogy

Three cases establish the framework under which a party may challenge the admissibility of expert witness testimony.<sup>43</sup> Previously, however, the 1923 U.S. Supreme Court decision, *Frye v. United States*, guided

<sup>38</sup> See *id.* at 671. The court explained that roughly ten percent of people with Parkinson's develop symptoms before age fifty; according to the court, this did not create an inference that something particularly unusual must have caused it in the plaintiff (who was between forty-one and forty-four at the onset of his symptoms). *Id.*

<sup>39</sup> *Id.*; see FED. R. EVID. 702. Speculation is generally inadmissible. *Tamraz*, 620 F.3d at 671; *Goebel v. Denver & Rio Grande W. R.R.*, 215 F.3d 1083, 1088 (10th Cir. 2000) ("It is axiomatic that an expert, no matter how good his credentials, is not permitted to speculate.").

<sup>40</sup> See *Tamraz*, 620 F.3d at 671–72 (citing *Joiner*, 522 U.S. at 146) (explaining that an expert purporting to make a finding "with a reasonable degree of medical certainty" is not alone sufficient to permit the admission of an opinion); see also *Daubert*, 509 U.S. at 590 (explaining that the word "knowledge" in Rule 702 "connotes more than subjective belief or unsupported speculation").

<sup>41</sup> *Tamraz*, 620 F.3d at 672.

<sup>42</sup> *Id.* at 670, 677. In addition, the court reasoned that, as a policy matter, permitting testimony on speculation would be unfair. *Id.* at 677–78. The court noted that, in breast implant litigation—after billions of dollars in settlements and the bankruptcy of a major manufacturer—no evidence was found to tie breast implants to health problems. See *id.* at 678 (citing Gina Kolata, *Panel Confirms No Major Illness Tied to Implants*, N.Y. TIMES, June 21, 1999, at A1).

<sup>43</sup> David S. Caudill & Lewis H. LaRue, *Why Judges Applying the Daubert Trilogy Need to Know About the Social, Institutional, and Rhetorical—and Not Just the Methodological—Aspects of Science*, 45 B.C. L. REV. 1, 13–14 (2003); see *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141–53 (1999); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 139–47 (1997); *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 579–98 (1993).

the inquiry.<sup>44</sup> Under the *Frye* test, testimony was properly admissible if it concerned a scientific subject that had gained “general acceptance.”<sup>45</sup> In 1975, however, Congress passed the Federal Rules of Evidence, including Rule 702 that governed the admissibility of testimony concerning “scientific, technical, or other specialized knowledge.”<sup>46</sup>

In 1993, in *Daubert v. Merrell Dow Pharmaceuticals*, the U.S. Supreme Court examined Rule 702 of the Federal Rules of Evidence.<sup>47</sup> Specifically, the Court considered whether the adoption of the Federal Rules of Evidence superseded the *Frye* test.<sup>48</sup> The *Daubert* Court concluded that the *Frye* test was incompatible with the Federal Rules of Evidence and that Rule 702 governed the admissibility of expert opinion in federal trials.<sup>49</sup>

Having concluded that Rule 702 governed the admission of expert testimony, the Court went on to clarify Rule 702’s requirements.<sup>50</sup> Ultimately, it concluded that the Rules require that an expert’s testimony be reliable and relevant, both in theory and methodology.<sup>51</sup> First, the Court reasoned that Rule 702’s use of the word “scientific” required “a grounding in the methods and procedures of science,” and that “knowledge” connoted “more than subjective belief or unsupported speculation.”<sup>52</sup> Therefore, to be admissible, testimony must be supported by appropriate validation—that is, “good grounds.”<sup>53</sup> Second, the testimony must also be relevant to the case.<sup>54</sup> Further, the Court concluded that Rule 702 requires trial court judges to act as gatekeepers to evaluate

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<sup>44</sup> See *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), *superseded by rule as stated in Daubert*, 509 U.S. 579 (1993); Rhoda B. Billings, *Expert Testimony to Accommodate the Frye, Daubert, and Kumho Tire Standards of Admissibility*, 54 OKLA. L. REV. 613, 615 (2001).

<sup>45</sup> *Frye*, 293 F. at 1014.

<sup>46</sup> Billings, *supra* note 44, at 615–16; see FED. R. EVID. 702.

<sup>47</sup> 509 U.S. at 579–98; FED. R. EVID. 702.

<sup>48</sup> *Daubert*, 509 U.S. at 585–86.

<sup>49</sup> *Id.* at 589; *Frye*, 293 F. at 1014; FED. R. EVID. 702.

<sup>50</sup> *Daubert*, 509 U.S. at 589–98.

<sup>51</sup> See *id.* at 589; see also G. Michael Fenner, *The Daubert Handbook: The Case, Its Essential Dilemma, and Its Progeny*, 29 CREIGHTON L. REV. 939, 941–42 (1996) (explaining the two-prong test required by Rule 702 in which the trial judge must assess both the reliability and methodology of the general scientific theory and the theory as applied to the facts of the case).

<sup>52</sup> *Daubert*, 509 U.S. at 590. “In short, the requirement that an expert’s testimony pertain to ‘scientific knowledge’ establishes a standard of evidentiary reliability.” *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 591. Rule 702 requires that the evidence “assist the trier of fact to understand the evidence or to determine a fact in issue.” FED. R. EVID. 702. This requirement has been described as a consideration of “fit”—that is, the evidence must have a valid scientific connection to the pertinent inquiry. See *Daubert*, 509 U.S. at 591; Fenner, *supra* note 51, at 964.

whether proffered expert testimony meets these requirements.<sup>55</sup> In addition, *Daubert* set out a non-exclusive checklist for trial courts to assess the applicability of scientific expert testimony.<sup>56</sup> The Court made it clear that this list was neither definitive nor exhaustive and that courts may consider these and other factors when appropriate.<sup>57</sup>

Nonetheless, this relaxation of the *Frye* general acceptance standard was not meant to allow for the admission of all expert testimony.<sup>58</sup> Nor was the trial court's gatekeeping function intended to replace the adversary system.<sup>59</sup> Under *Daubert*, the Court observed that the traditional methods for attacking shaky but admissible evidence were still available, including "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof."<sup>60</sup>

Two subsequent Supreme Court decisions refined and clarified *Daubert's* interpretation of Rule 702.<sup>61</sup> In 1997, in *General Electric Co. v. Joiner*, the Supreme Court granted certiorari to determine the standard of review an appellate court should apply in reviewing a decision to admit or exclude expert testimony.<sup>62</sup> The Court held that the proper standard for review of evidentiary rulings is abuse of discretion.<sup>63</sup> Two years later, in 1999, the Supreme Court in *Kumho Tire Co. v. Carmichael* provided further guidance on the application of *Daubert*.<sup>64</sup> In *Kumho Tire*, the Supreme Court emphasized the flexibility of the *Daubert* stan-

<sup>55</sup> See *Daubert*, 509 U.S. at 592.

<sup>56</sup> See *id.* at 593–94; FED. R. EVID. 702 advisory committee's note. The *Daubert* factors are: (1) whether the expert's technique or theory can be or has been tested, (2) whether the expert's technique or theory has been subjected to peer review and publication, (3) whether there is a known or potential rate of error for a particular technique and whether there are standards or controls for that technique, and (4) whether the theory or technique has been generally accepted in the scientific community. See *Daubert*, 509 U.S. at 593–94.

<sup>57</sup> See *Daubert*, 509 U.S. at 593 ("Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test."). Some other factors that courts have found relevant include: (1) whether the research was conducted independent of the litigation, (2) whether the expert unjustifiably extrapolated from an accepted premise to reach an unfounded conclusion, (3) whether the expert accounted for obvious alternative explanations, (4) whether the expert employed the same level of intellectual rigor that characterizes the practice of an expert in the field, and (5) whether the relevant field of expertise was known to reach reliable results for the relevant type of expert opinion. See FED. R. EVID. 702 advisory committee's note.

<sup>58</sup> See *Daubert*, 509 U.S. at 595–96.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* (citing *Rock v. Arkansas*, 483 U.S. 44, 61 (1987)).

<sup>61</sup> See *Kumho Tire*, 526 U.S. at 141–53; *Joiner*, 522 U.S. at 139–47.

<sup>62</sup> 522 U.S. at 138–39.

<sup>63</sup> *Id.* at 139.

<sup>64</sup> See 526 U.S. at 150.



dard and said that trial court judges should have considerable leeway in deciding how to assess and apply the relevant *Daubert* factors to the facts of the case.<sup>65</sup> Thus, the Court reaffirmed that a district court judge has considerable discretion to evaluate expert testimony.<sup>66</sup>

In sum, these three cases—*Daubert*, *Joiner*, and *Kumho Tire*—establish the standard for evaluating expert testimony under the Federal Rules of Evidence.<sup>67</sup> In *Joiner*, the Supreme Court made it clear that the standard of appellate review is abuse of discretion.<sup>68</sup> Nonetheless, the circuits are not always consistent in how they apply the abuse of discretion standard.<sup>69</sup>

### B. Sixth Circuit Jurisprudence on the Abuse of Discretion Standard

When reviewing a district court's *Daubert* decision, appellate courts must consider (1) whether the district court judge used the *Daubert* factors and other relevant questions to assess reliability and (2) whether the judge's application of those factors to the expert's proposed testimony was reasonable or appropriate.<sup>70</sup> Typically, appellate courts agree that if the district court completely fails to perform a reliability analysis, it abuses its discretion.<sup>71</sup> Yet, beyond this basic requirement—that the court must evaluate expert testimony to some extent—the circuits differ in how aggressively they scrutinize the trial court judge's application of the *Daubert* factors to the facts of the case.<sup>72</sup> Some appellate courts apply abuse of discretion “with teeth,” closely examining the key factors the trial court used in making its Rule 702 ruling.<sup>73</sup> Other appellate

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<sup>65</sup> See *id.* at 152.

<sup>66</sup> See *id.*

<sup>67</sup> See *Kumho Tire*, 526 U.S. at 150; *Joiner*, 522 U.S. at 139; *Daubert*, 509 U.S. at 590.

<sup>68</sup> *Joiner*, 522 U.S. at 146.

<sup>69</sup> See Victor E. Schwartz & Cary Silverman, *The Draining of Daubert and the Recidivism of Junk Science in Federal and State Courts*, 35 HOFSTRA L. REV. 217, 262, 265 (2006).

<sup>70</sup> *Id.* at 264.

<sup>71</sup> See, e.g., *Elsayed Mukhtar v. Cal. State Univ.*, 299 F.3d 1053, 1066 (9th Cir. 2002); see Schwartz & Silverman, *supra* note 69, at 265.

<sup>72</sup> See Schwartz & Silverman, *supra* note 69, at 263–64.

<sup>73</sup> See Schwartz & Silverman, *supra* note 69, at 265–66 & n.294 (explaining that courts that review Rule 702 rulings “with teeth” closely examine whether the district court made an error in judgment—such as ignoring a material factor or improperly relying on a factor—or made a serious mistake in weighing the factors); see, e.g., *Kempner Mobile Elecs., Inc. v. Sw. Bell Mobile Sys.*, 428 F.3d 706, 712 (7th Cir. 2005); *Foster v. Mydas Assocs.*, 943 F.2d 139, 143 (1st Cir. 1991).

courts give more substantial deference to trial courts when applying the abuse of discretion standard.<sup>74</sup>

The Sixth Circuit, prior to its ruling in *Tamraz*, applied a highly deferential abuse of discretion standard when reviewing district courts' Rule 702 rulings.<sup>75</sup> Under that standard, the Sixth Circuit reviewed whether the trial court performed its gatekeeping role de novo, but reviewed the trial court's decision to admit expert testimony and its decisions about how to determine admissibility for abuse of discretion.<sup>76</sup> Generally, as long as the trial court performed its *Daubert* gatekeeping role and evaluated the factors appropriately, the Sixth Circuit deferred to the trial court's *Daubert* analysis.<sup>77</sup>

The abuse of discretion standard of review does not permit an appellate court to substitute its own judgment for that of the district court.<sup>78</sup> For example, in 2001, the Sixth Circuit, in *Hardyman v. Norfolk & Western Railway Co.*, explained that the abuse of discretion standard of review is highly deferential.<sup>79</sup> The court explained, "[A]n appellate court may overturn a lower court's ruling only if it finds that the ruling was *arbitrary, unjustifiable, or clearly unreasonable.*"<sup>80</sup> Furthermore, in sub-

<sup>74</sup> See Schwartz & Silverman, *supra* note 69, at 266 & nn.295–96 (explaining that appellate courts that conduct more limited review tend to focus on whether the trial court made a reasonable Rule 702 evaluation and do not evaluate whether the testimony should have been admitted); see, e.g., *Bonner v. ISP Techs., Inc.*, 259 F.3d 924, 929–30 (8th Cir. 2001); *Hardyman v. Norfolk & W. Ry. Co.*, 243 F.3d 255, 267 (6th Cir. 2001).

<sup>75</sup> See *Ky. Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing, Inc.*, 588 F.3d 908, 915–18 (6th Cir. 2009); *Early v. Toyota Motor Corp.*, 277 F. App'x 581, 585–86 (6th Cir. 2008); *Hardyman*, 243 F.3d at 267.

<sup>76</sup> *Tharo Sys., Inc. v. Cab Produkttechnik GMBH & Co. KG*, 196 F. App'x 366, 373–74 (6th Cir. 2006) (finding no abuse of discretion when the district court fulfilled its gatekeeping role).

<sup>77</sup> See, e.g., *Ky. Speedway*, 588 F.3d at 915; *Early*, 277 F. App'x at 585–86.

<sup>78</sup> See *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 528 (6th Cir. 2008); *Hardyman*, 243 F.3d at 267.

<sup>79</sup> See 243 F.3d at 267. In *Hardyman*, the Sixth Circuit concluded that the district court abused its discretion, explaining that "the rationale of the district court did not justify exclusion of Plaintiff's expert testimony." See *id.* The circuit court found that the district court judge had first determined that the experts' proffered method of testimony, differential diagnosis, was an acceptable method of determining causation. *Id.* at 261. Despite the fact that the experts were testifying using an acceptable method, the district court excluded their testimony, insisting on more specific studies. See *id.* at 265. Upon review, the circuit court concluded that this requirement would essentially foreclose plaintiffs from recovering from their employers unless their specific job had been the subject of a national, epidemiological study. See *id.* Thus, the Sixth Circuit concluded that the district court abused its discretion by essentially rejecting the well-established diagnostic method of differential diagnosis without reason. See *id.* at 261–67.

<sup>80</sup> *Id.* at 267 (emphasis added) (quoting *Plain Dealer Publ'g Co. v. City of Lakewood*, 794 F.2d 1139, 1148 (6th Cir. 1986)).

sequent opinions, the Sixth Circuit adhered to this highly deferential abuse of discretion standard.<sup>81</sup>

Generally, the Sixth Circuit would uphold a district court's Rule 702 decision if the court made its decision after carefully reviewing the record and the evidence proffered, determining whether the district court performed a gatekeeping function by conducting a reasonable *Daubert* inquiry.<sup>82</sup> If it was satisfied that the trial court had conducted a careful *Daubert* review and rendered a decision based on reasonable factors, the Court of Appeals would not conduct a more specific review of the record to determine whether the trial court judge had made the correct decision.<sup>83</sup> For example, in 2008, in *Early v. Toyota Motor Corp.*, the Sixth Circuit noted that the standard of review was highly deferential and that it would only find an abuse of discretion when it was firmly convinced that a mistake had been made.<sup>84</sup> In *Early*, the court upheld the district court's decision excluding an expert's opinion as unreliable because it noted that the district court "carefully considered" some of the relevant *Daubert* factors, such as the lack of testing and specific expertise underlying the expert's opinion.<sup>85</sup> Therefore, the appellate court concluded that the district court had properly fulfilled its gatekeeping function.<sup>86</sup>

A district court abuses its discretion, however, if it bases its ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence.<sup>87</sup> The Sixth Circuit articulated this standard in 2009, in *Kentucky Speedway, LLC v. National Association of Stock Car Auto Racing*, when it again affirmed the highly deferential abuse of discretion standard.<sup>88</sup> Because the district court assessed the evidence with reference to several of the *Daubert* factors, the *Kentucky Speedway* court held that the district court did not abuse its discretion.<sup>89</sup>

Thus, the Sixth Circuit had long established a highly deferential abuse of discretion standard in reviewing district courts' evidentiary rulings.<sup>90</sup> In its review, the Sixth Circuit focused primarily on the trial court's actions in conducting a *Daubert* review to determine whether it

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<sup>81</sup> See, e.g., *Ky. Speedway*, 588 F.3d at 915–18; *Early*, 277 F. App'x at 585–86.

<sup>82</sup> See, e.g., *Ky. Speedway*, 588 F.3d at 915–18; *Early*, 277 F. App'x at 585–86.

<sup>83</sup> See *Ky. Speedway*, 588 F.3d at 915, *Early*, 277 F. App'x at 585–86.

<sup>84</sup> See 277 F. App'x at 585.

<sup>85</sup> *Id.* at 586.

<sup>86</sup> See *id.*

<sup>87</sup> *Id.*

<sup>88</sup> See 588 F.3d at 915.

<sup>89</sup> See *id.* at 918.

<sup>90</sup> See *Plain Dealer Publ'g Co.*, 794 F.2d at 1148.

performed its gatekeeping role.<sup>91</sup> Once the appeals court was satisfied that the trial court fulfilled its gatekeeping function, it would affirm the trial courts' decision on whether or not to admit an expert's testimony.<sup>92</sup>

### III. TAMRAZ: THE SIXTH CIRCUIT STRETCHES THE ABUSE OF DISCRETION STANDARD

In *Tamraz*, the Sixth Circuit arguably reached the correct decision in holding that Dr. Carlini's testimony did not meet the requirements of scientific knowledge under Rule 702.<sup>93</sup> Yet, in its effort to correctly apply the *Daubert* requirements to Dr. Carlini's testimony, the court stretched the bounds of its reviewing authority.<sup>94</sup> Further, in doing so, the court may have opened the door for appellate courts to review district courts' evidentiary rulings more aggressively.<sup>95</sup> Thus, to adhere to their proper role when reviewing Rule 702 rulings, appellate courts should be aware of the inherent tension between ensuring compliance with the Rules of Evidence and remaining within their reviewing authority.<sup>96</sup>

#### A. *The Sixth Circuit's Decision Is Consistent with the Policy of Daubert*

The Sixth Circuit's holding in *Tamraz*—that Dr. Carlini's testimony was speculative and thus did not satisfy Rule 702—was consistent with both the law and policy behind *Daubert*.<sup>97</sup> First, in *Daubert*, the Court explained that Rule 702 requires that the foundation of an expert's testimony be “knowledge.”<sup>98</sup> And, knowledge “connotes more than subjective belief or unsupported speculation.”<sup>99</sup> Furthermore, in *Joiner*, the Supreme Court affirmed a district court's exclusion of evidence on grounds that it was too speculative.<sup>100</sup> A court may do so if “there is

<sup>91</sup> See *Ky. Speedway*, 588 F.3d at 915–16.

<sup>92</sup> See *id.* at 915; *Early*, 277 F. App'x at 585; *Hardyman*, 243 F.3d at 267.

<sup>93</sup> See *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665, 678 (6th Cir. 2010); see also FED. R. EVID. 702.

<sup>94</sup> See *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 590 (1993); *Tamraz*, 620 F.3d at 669–72.

<sup>95</sup> See *Daubert*, 509 U.S. at 590; *Tamraz*, 620 F.3d at 669–72.

<sup>96</sup> See *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (holding that appellate courts must review Rule 702 rulings for abuse of discretion); *Daubert*, 509 U.S. at 597 (explaining that the district court judge must function as a gatekeeper); FED. R. EVID. 702.

<sup>97</sup> See *Daubert*, 509 U.S. at 597; *Tamraz*, 620 F.3d at 675–76.

<sup>98</sup> *Daubert*, 509 U.S. at 590.

<sup>99</sup> *Id.* Furthermore, the advisory committee's note to Rule 702 explains that the trial judge must ensure that the proffered expert testimony is not speculative. See FED. R. EVID. 702 advisory committee's note.

<sup>100</sup> See 522 U.S. at 146.

simply too great an analytical gap between the data and the opinion proffered.”<sup>101</sup>

In addition, to fulfill the underlying purpose of *Daubert*—to establish a standard of evidentiary reliability for expert testimony—experts should not be allowed to speculate as to the cause of a plaintiff’s disease.<sup>102</sup> Speculative expert testimony has the propensity to mislead a jury and lead to unfair results.<sup>103</sup> Although medical experts may be well qualified to diagnose a disease, they may not have a sound basis to give an opinion about causation.<sup>104</sup> As the Supreme Court in *Daubert* explained, “Conjectures . . . are of little use, however, in the project of reaching a quick, final, and binding legal judgment—often of great consequence—about a particular set of events in the past.”<sup>105</sup> Thus, the requirement that experts not be permitted to speculate is well-established, and the district court in *Tamraz* arguably did abuse its discretion by admitting a doctor’s hypothesis that was not sufficiently tested or grounded in scientific knowledge.<sup>106</sup>

### B. *The Sixth Circuit Opens the Door for More Aggressive Review of Daubert Rulings*

Although the Sixth Circuit furthered the policy behind *Daubert*, the *Tamraz* court may have exceeded its authority to review the district court’s Rule 702 ruling by failing to explain the precise manner in which the district court abused its discretion.<sup>107</sup> In prior cases, the Sixth Circuit would typically review *Daubert* rulings with great deference.<sup>108</sup> Under that deferential standard, the court only reversed a district court

<sup>101</sup> See *id.* (explaining that district courts may properly decline to admit opinion evidence that is connected to existing data only by the unproven assertion of the expert).

<sup>102</sup> See *Daubert*, 509 U.S. at 590; Schwartz & Silverman, *supra* note 69, at 251.

<sup>103</sup> See *id.*

<sup>104</sup> See Schwartz & Silverman, *supra* note 69, at 251.

<sup>105</sup> *Daubert*, 509 U.S. at 597 (explaining that, although open debate is essential to scientific analysis, scientific conjectures are not appropriate in the law, which must resolve disputes quickly and finally).

<sup>106</sup> See *Daubert*, 509 U.S. at 590; *Tamraz*, 620 F.3d at 670–72; *Goebel v. Denver & Rio Grande W. R.R.*, 215 F.3d 1083, 1088 (10th Cir. 2000).

<sup>107</sup> *Tamraz*, 620 F.3d at 680; *Tamraz v. BOC Grp., Inc.*, No. 1:04-CV-18948, 2008 WL 2796726, at \*8 n.58 (N.D. Ohio July 18, 2008), *rev’d*, 620 F.3d 665 (6th Cir. 2010) (“The Court does not recite in this opinion all of the substantial evidence supporting the proposition that exposure to manganese in welding fumes can, at least in some circumstances, cause Manganese-Induces Parkinsonism . . .”).

<sup>108</sup> See, e.g., *Ky. Speedway, LLC v. Nat’l Assoc. of Stock Car Auto Racing, Inc.*, 588 F.3d 908, 915–18 (6th Cir. 2009); *Early v. Toyota Motor Corp.*, 277 F. App’x 581, 585–86 (6th Cir. 2008); *Hardyman v. Norfolk & W. Ry. Co.*, 243 F.3d 255, 267 (6th Cir. 2001).

when it clearly erred as a matter of law or failed to conduct appropriate *Daubert* hearings or reviews.<sup>109</sup>

Yet, in *Tamraz*, the Sixth Circuit reversed the district court, even though the district court had conducted extensive hearings, spending three weeks assessing the reliability and methodologies of the proffered expert opinion testimony.<sup>110</sup> The district court chose to admit Dr. Carlini's testimony, explaining that, in its view, his testimony satisfied the requirements of *Daubert*.<sup>111</sup> Prior to trial, the judge explained, "I see nothing about [Dr. Carlini's] methodology that is either flawed or inconsistent with the very diagnostic methods that the other experts in this case, both the plaintiffs' and the defendants' experts alike, have used and have described as appropriate diagnostic methods."<sup>112</sup> Furthermore, as the dissent argued in *Tamraz*, Dr. Carlini's testimony about the connection between manganese and Parkinson's Disease was the subject of valid scientific debate at the time.<sup>113</sup> Therefore, Dr. Carlini's testimony satisfied at least one *Daubert* factor.<sup>114</sup>

Accordingly, the district court's finding was not "arbitrary, unjustifiable, or clearly unreasonable."<sup>115</sup> Indeed, the circuit court engaged in a de novo-like standard of review, holding that testimony offered was not scientific evidence because it was too speculative, yet failed to point out exactly *how* the district court abused its discretion.<sup>116</sup> Accordingly, in reversing the district court's decision to admit Dr. Carlini's testimony, the Sixth Circuit broadened the abuse of discretion standard, allowing appellate courts to take a more active role in evaluating expert testimony.<sup>117</sup>

<sup>109</sup> See, e.g., *Ky. Speedway*, 588 F.3d at 915–18; *Early*, 277 F. App'x at 585–86; *Hardyman*, 243 F.3d at 267; see also *supra* notes 72–85 and accompanying text (presenting an overview of the Sixth Circuit's jurisprudence on the abuse of discretion standard).

<sup>110</sup> See *Tamraz*, 620 F.3d at 678; Petition for Writ of Certiorari at 8, *Tamraz*, 620 F.3d 665 (No. 10–1122), 2011 WL 882177, at \*8.

<sup>111</sup> See *Tamraz*, 620 F.3d at 679 (Boyce, J., dissenting) (referring to the district court judge's denial of defendants' motion to exclude parts of the testimony).

<sup>112</sup> *Id.* (discussing the extensive trial record and noting testimony given at trial). The district court judge further noted that the defendants would have fair grounds to attack Dr. Carlini's fairly unusual diagnosis, but she explained that that goes to the weight, not the admissibility, of his testimony. *Id.*

<sup>113</sup> *Tamraz*, 620 F.3d at 683.

<sup>114</sup> *Id.* One of the *Daubert* factors is "whether the theory or technique has been subjected to peer review and publication." 509 F.3d at 593.

<sup>115</sup> *Hardyman*, 243 F.3d at 267; see *Tamraz*, 620 F.3d at 680–81 (Boyce, J., dissenting).

<sup>116</sup> See *Tamraz*, 620 F.3d at 679 (Boyce, J., dissenting) ("Unfortunately, while paying lip service to the correct standard, the majority actually applies a de novo standard of review.").

<sup>117</sup> See *id.* at 684 (arguing that when the state of the science is difficult to determine, appellate courts should defer to the district court, which heard the evidence and can make decisions in context); *Hardyman*, 243 F.3d at 267.

*Daubert* imposes on trial courts a duty to ensure that any expert testimony admitted in a case is reliable and relevant.<sup>118</sup> Trial court judges must carefully screen all proffered expert testimony because such testimony can strongly influence juries.<sup>119</sup> As the Supreme Court recognized in *Daubert*, expert evidence can be both powerful and misleading because it is often difficult for a lay juror to evaluate.<sup>120</sup> Because experts, unlike lay witnesses, are permitted to reach conclusions on the ultimate issue in the case, it is crucial that district court judges be allowed to fulfill their duties as gatekeepers to ensure that experts' conclusions flow reasonably from their methodologies.<sup>121</sup>

### CONCLUSION

In *Tamraz*, the Sixth Circuit held that the district court had abused its discretion in permitting a physician's testimony that manganese exposure caused the plaintiff's parkinsonism. Although the court likely arrived at the proper decision in this case, by failing to articulate the specific manner in which the district court abused its discretion, the court opened the door for it and other appellate courts to take a more aggressive role in evaluating the admissibility in expert testimony. Nonetheless, trial courts, because they enjoy the benefit of the full evidentiary record, remain in the best position to make admissibility determinations. Therefore, circuit courts should adhere to an abuse of discretion standard of review. If a reviewing court finds that a district court abused its discretion, the court should carefully explain how the district court judge's decision was arbitrary or unreasonable.

ELLEN MELVILLE

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<sup>118</sup> *Daubert*, 509 U.S. at 597.

<sup>119</sup> See Schwartz & Silverman, *supra* note 69, at 220 (explaining that evidence that purports to be "expert" can overwhelm or mystify the jury if there is not a reliable basis for an expert's opinion).

<sup>120</sup> See *Daubert*, 509 U.S. at 592, 595.

<sup>121</sup> See Schwartz & Silverman, *supra* note 69, at 238.