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ADMISSIBLE EXPERT TESTIMONY AND SUMMARY JUDGMENT

RECONCILING *CELOTEX* AND *DAUBERT* AFTER *KOCHERT*

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INTRODUCTION

In 1985, Dr. Carolyn Kochert began practicing anesthesiology in Lafayette, Indiana,[1] a city that abuts West Lafayette, home of Purdue University.[2] Kochert, her husband, and their six children still live on a Lafayette farm and have deep ties to the Lafayette community.[3] Over the years, Kochert developed a reputation as a successful anesthesiologist and a passionate advocate for quality patient care,[4] serving in top-level positions in area hospitals and winning awards for community leadership.[5] Patients and surgeons grew to respect Kochert, and many specifically requested that she be their anesthesiologist.[6]

Between 1998 and 2001, a continuum of events forced Kochert and her anesthesiology group out of the market,[7] creating a monopoly for her group's

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[1] Kochert v. Greater Lafayette Health Servs., Inc., 463 F.3d 710, 712 (7th Cir. 2006). This article refers to this appellate court decision as *Kochert II*. Accordingly, it refers to the district court decision, Kochert v. Greater Lafayette Health Servs., Inc., 372 F. Supp. 2d 509 (N.D. Ind. 2004), that preceded it as *Kochert I*, and the Supreme Court denial of certiorari, Kochert v. Greater Lafayette Health Servs., Inc., 127 S. Ct. 1328 (2007), as *Kochert III*.

[2] Welcome to the City of West Lafayette, http://www.city.west-lafayette.in.us/home.html (last visited July 14, 2008).

[3] Brief and Appendix of Plaintiff-Appellant Carolyn G. Kochert, M.D. at 6, *Kochert II*, No. 05-1196 (7th Cir. Oct. 25, 2005).

[4] *Id*.

[5] *Id*.

[6] *Id*. at 14.

[7] *See id*. (discussing the exclusive contracts granted to her competitor); *id*. at 9 (discussing the merger of the only two hospitals in the Lafayette market as defined by Kochert's main expert economist, Dr. Bruce Seaman).

sole competitor[8] and archrival.[9] Kochert was unable to reenter the market in spite of her best efforts and strong reputation.[10] As a result, Kochert suffered substantial damages.[11] Most importantly, consumers suffered: the monopoly reduced the quality of anesthesia services; increased pricing beyond competitive levels; and created a surgery backlog that forced patients to delay their procedures by up to six weeks.[12] In 2001, Kochert sued the competitor anesthesiology group and the hospital that gave that group an exclusive contract,[13] alleging unlawful restraint of trade and unlawful monopolization of the relevant market.[14]

On February 20, 2007, after six years of litigation, the United States Supreme Court denied certiorari, allowing a summary judgment for the defendant hospital and anesthesiology group to stand.[15] This outcome is troubling because the district and appellate courts both failed to follow the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc*.[16] Specifically, the judges made credibility determinations, weighed the evidence, drew inferences from the facts, and ultimately made determinations as to the sufficiency of the evidence—all in contravention of binding precedent.[17] Ultimately, their errors cost Kochert her livelihood.[18]

In *Kochert*, the trial judge admitted the testimony of Kochert's experts, deeming that evidence both relevant and reliable.[19] The judge stated that the

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[8] Brief and Appendix, *supra* note 3, at 11-12 ("[Kochert's group] was the only anesthesiology group within an hour of Lafayette that could provide a competitive check on [the monopolist group]. . . . [The monopolist group] was the only anesthesiology group in the Lafayette market, other than [Kochert's group], that could provide anesthesia services for inpatient surgical and obstetrical procedures that required a greater than twenty-four hour hospital stay . . . . ").

[9] *Id*. at 8-10.

[10] *Id*. at 19-20.

[11] *Id*. at 44. Kochert's damages expert estimated that Kochert's anesthesiology group lost over $1.6 million as of 2005.

[12] *Id*. at 12, 17-18. Seventeen witnesses testified that, between 1997 and 2002, members of the sole remaining anesthesiology group often left the operating room for extended periods of time, leaving anesthetized patients unmonitored. *Id*. at 12. These physicians spent this time "purchas[ing] sandwiches from a local sandwich shop, eating in the lounge, watching television, reading newspapers, [and] ordering cakes from bakeries." *Id*. One physician even fell asleep during surgery.

[13] *See Kochert I*, 372 F. Supp. 2d at 509.

[14] Brief and Appendix, *supra* note 3, at 3.

[15] *Kochert III*, 127 S. Ct. at 1328.

[16] *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 597 (1993) ("[T]he Rules of Evidence—especially Rule 702—do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.").

[17] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Brief and Appendix, *supra* note 3, at 23 (citing Ritchie v. Glidden Co., 242 F.3d 713, 723 (7th Cir. 2001)).

[18] *See* Petition for Writ of Certiorari, *Kochert III*, No. 06-822, 2006 WL 3674264 (U.S. Dec. 12, 2006). (quantifying Kochert's lost income from 1998 through 2018) [hereinafter *Kochert III* Cert. Pet.].

[19] Memorandum and Order (admitting testimony of Dr. Bruce Seaman, Nov. 15, 2004), *Kochert III* Cert. Pet., *supra* note 18, at App. 35-46 [hereinafter Order Admitting Testimony of Seaman]; Memorandum

testimony would assist the jury in resolving key issues in the case.[20] The judge even called the testimony of Kochert's main expert economist "central" to resolving the pivotal economic issue of defining the appropriate product and geographic markets.[21] Yet, six weeks later, the same trial judge granted the defendants' motion for summary judgment, stating that no genuine issue of material fact existed regarding Kochert's claims.[22]

Because plaintiff presented far more than the barebones "scintilla of evidence" that might merit a denial of summary judgment[23]—and given the judge's previous acknowledgment of both the relevance and reliability of the expert evidence—this result was both surprising and contrary to law.[24] The Seventh Circuit upheld this error,[25] and the Supreme Court denied certiorari.[26] In so doing, the Court failed to resolve a direct conflict with Second Circuit precedent.[27] Ultimately, the lower courts decided *Kochert* incorrectly because they confused *Daubert*'s admissibility standard with summary judgment's sufficiency standard.

First, *Daubert*'s admissibility standard requires judges to evaluate the admissibility of all expert testimony.[28] Rule 702 of the Federal Rules of Evidence gives trial judges a special gatekeeping role to prevent unreliable testimony from being presented to the jury.[29] It requires judges to evaluate whether such testimony is both relevant and reliable.[30] If it is, the judge admits the evidence; if it is not, the judge excludes the evidence.[31]

Second, summary judgment's sufficiency standard requires judges to draw all reasonable inferences regarding disputed facts in favor of the

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and Order (admitting testimony of Dr. Stephen Minore, Nov. 15, 2004), *Kochert III* Cert. Pet., *supra* note 18, at App. 53-58 [hereinafter Order Admitting Testimony of Minore]; Memorandum and Order (admitting testimony of Paul Gertler, Nov. 15, 2004), *Kochert III* Cert. Pet., *supra* note 18, at App. 47-52 [hereinafter Order Admitting Testimony of Gertler]; Memorandum and Order (admitting testimony of Cornelius Hofman, Nov. 15, 2004), *Kochert III* Cert. Pet., *supra* note 18, at App. 59-63 [hereinafter Order Admitting Testimony of Hofman].

[20] *See, e.g.*, Order Admitting Testimony of Seaman, *supra* note 19, at App. 37 ("As Kochert was proffering the testimony of Dr. Seaman to aid in defining the relevant market in the antitrust claims, Seaman's testimony would assist the trier of fact in resolving this issue.").

[21] *Id.*

[22] *Kochert I*, 372 F. Supp. 2d at 519-20.

[23] Brief and Appendix, *supra* note 3, at 18-19. For instance, Seaman's testimony alone consisted of a 300-plus-page report and a 400-plus-page deposition transcript. *Id.*

[24] *See Daubert*, 509 U.S. at 597.

[25] *See Kochert II*, 463 F.3d at 719.

[26] *Kochert III*, 127 S. Ct. at 1328.

[27] *See In re* Joint E. & S. Dist. Asbestos Litig., 52 F.3d 1124 (2d Cir. 1995) (reversing a district court for invading the province of the jury by weighing the conflicting evidence and making witness credibility determinations).

[28] *Daubert*, 509 U.S. at 597.

[29] *See id.*

[30] *Id.*

[31] *Id.*

plaintiff.[32] Furthermore, a logical premise of such an analysis is that once expert testimony satisfies *Daubert*, that testimony is relevant and thus would assist a reasonable jury in deciding material facts.[33] As such, it is illogical to deem that same testimony insufficient for purposes of summary judgment.[34] Therefore, by weighing or otherwise ignoring admitted expert testimony that supported all the elements of antitrust standing, the judges in *Kochert* made impermissible findings of fact. If the judges had properly construed the disputed facts in Kochert's favor,[35] summary judgment could not, as a logical matter, have been granted.

Although *Daubert* gave judges a central role in assessing the admissibility of evidence, it did not disturb the jury's traditional role as fact finder.[36] In other words, after *Daubert*, judges still may not weigh the proffered evidence and make determinations about its sufficiency; they may make sufficiency determinations only when a plaintiff can muster no more than a "scintilla of evidence" to support its position.[37] Even then, the only sufficiency determination the judge may make is whether the overall quantum of expert evidence is inadequate to allow a reasonable juror to conclude that the nonmovant's claim must fail.[38] Only in such cases may the judge grant summary judgment, thereby ending the case and relieving the jury of its fact finding duties.[39] Otherwise, the jury assesses the sufficiency of the evidence.[40]

Consequently, a monumental problem occurs when a judge makes a sufficiency determination (the job of juries) under the guise of merely making

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[32] *See, e.g., Joint Eastern*, 52 F.3d at 1131 ("[D]rawing all reasonable inferences regarding the weight of the evidence and the credibility of the witnesses in favor of plaintiff, a reasonable jury could *only* have found for the defendants.") (emphasis added).

[33] *See Daubert*, 43 F.3d at 1315 ("Under *Daubert* . . . we must ensure that the proposed expert testimony is 'relevant to the task at hand,' . . . *i.e.*, that it logically advances a material aspect of the proposing party's case."); *see also* Norris v. Baxter Healthcare Corp., 397 F.3d 878, 884 n.4 (10th Cir. 2005) (citing *Daubert II*, 43 F.3d at 1315) ("Under the relevance prong of the *Daubert* analysis, the court must ensure that the proposed expert testimony logically advances a material aspect of the case.").

[34] *Id.*

[35] *See Joint Eastern*, 52 F.3d at 1131.

[36] *See Daubert*, 509 U.S. at 595 ("The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.").

[37] *Id.* at 596.

[38] *See* Margaret A. Berger, *Upsetting the Balance Between Adverse Interests: The Impact of the Supreme Court's Trilogy on Expert Testimony in Toxic Tort Litigation*, 64 L. & CONTEMP. PROBS. 289, 322 (2001). This means, from the judge's perspective, "sufficiency asks whether the collective weight of the evidence taken as a whole is adequate to support a judgment in a party's favor." Daniel R. Shulman, *The Sedona Conference Commentary on the Role of Economics in Antitrust Law*, 7 SEDONA CONF. J. 69, 103 (2006) (emphasis added).

[39] *Daubert*, 509 U.S. at 596.

[40] *See, e.g., Anderson*, 477 U.S. at 255 ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.").

an admissibility determination (the job of judges).[41] In doing so, a judge effectively steps beyond the court's evidentiary gatekeeping role, thereby directly treading on the jury's territory.[42] As such, the overlap of *Daubert*'s admissibility standard and summary judgment's sufficiency standard creates a serious logical dilemma. On one hand, the Supreme Court wishes to maintain the jury's exclusive fact finding role;[43] on the other hand, it allows judges to exclude evidence in a pretrial *Daubert* hearing, thus precluding the jury's weighing of that evidence entirely.[44] Given the stakes, it is surprising the Court has left so critical a question unanswered.

Section I presents an overview of the admissibility standard of *Daubert* and its successor cases, as well as the sufficiency standard of summary judgment since the landmark summary judgment decisions in 1986.[45] Section II presents the facts of *Kochert*, demonstrating how Kochert established each and every element of antitrust standing and examining how the lower courts impermissibly usurped the jury's fact finding role by weighing or otherwise ignoring Kochert's proferred expert testimony. Section III analyzes the Seventh Circuit's decision in *Kochert* and the Second Circuit's decision in *Joint Eastern*, concluding that the Seventh Circuit created a circuit split as to the admissibility-sufficiency distinction when it upheld the district court's assessment of the sufficiency of Kochert's admitted expert testimony.

Section IV concludes that the Supreme Court should resolve the circuit split by adopting the following standard: when expert testimony is found admissible by a preponderance of the evidence and such testimony supports all the elements of a claim, then that testimony creates a factual dispute, is material for a jury to consider, and is sufficient to overcome a motion for summary judgment.[46] Although this article discusses this issue in an antitrust context, the issue applies equally to all litigation in all federal courts, as well as to cases in those state courts that have adopted *Daubert*. As a result, its resolution is of critical national importance.

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[41] Lucinda M. Finley, *Guarding the Gate to the Courthouse: How Trial Judges Are Using Their Evidentiary Screening Role to Remake Tort Causation Rules*, 49 DEPAUL L. REV. 335, 337 (1999).

[42] *Id.*

[43] *See, e.g., Anderson*, 477 U.S. at 255 ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict."); *Daubert*, 509 U.S. at 595-96 (citing Rock v. Arkansas, 483 U.S. 44, 61 (1987)) ("[R]espondent seems to us to be overly pessimistic about the capabilities of the jury and of the adversary system generally. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.").

[44] *See Daubert*, 509 U.S. at 597 (holding that trial judges must play a gatekeeping role in which they prevent some expert testimony from reaching the jury).

[45] *See* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U.L. REV. 982, 1022 (2003).

[46] *See Kochert III* Cert. Pet., *supra* note 18, at 19.

I. BACKGROUND

A. *Daubert*'s Admissibility Standard

Antitrust litigation relies heavily upon expert testimony.[47] These experts' fields run the gamut from medicine to engineering to rocket science, but it is the expert economist who plays a particularly central role in an antitrust setting, carrying out important tasks such as defining markets and proving (or disproving) causal connections.[48] Antitrust lawsuits often boil down to the word of one economist against another.[49]

It is unsurprising, then, that a court's decision to admit or exclude such testimony bears heavily on a party's likelihood of success.[50] Losing a key expert by court order can prove fatal to one's case.[51] Accordingly, antitrust defendants have a substantial incentive to proactively attempt to short-circuit antitrust cases by challenging the admissibility of testimony put forth by the plaintiff's experts. Such *Daubert* challenges are practically automatic in modern antitrust cases.[52]

From 1923 until 1993, *Frye v. United States* set the leading standard for determining the admissibility of scientific evidence.[53] Under *Frye*, courts held that expert scientific testimony would be admitted when "sufficiently established to have gained general acceptance in the particular field in which it belongs."[54] The *Frye* "general acceptance" standard sought to save judicial resources by withholding potential pseudoscience from the jury.[55] Evidence that was perhaps reliable and scientifically sound was nevertheless excluded for want of an established track record.[56] The *Frye* court reasoned that the rule of law is best protected by deferring to science that is already established,

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[47] *See* John L. Solow & Daniel Fletcher, *The Antitrust Enterprise: Principle and Execution: Doing Good Economics in the Courtroom: Thoughts on* Daubert *and Expert Testimony in Antitrust*, 31 J. CORP. L. 489, 489 (2006).

[48] *Id.*

[49] *Id.*

[50] BARBARA JACOBS ROTHSTEIN, OPINION AND EXPERT TESTIMONY IN FEDERAL AND STATE COURTS, MANUAL FOR COMPLEX LITIGATION: EXPERT SCIENTIFIC EVIDENCE 192-93 (2006).

[51] Solow & Fletcher, *supra* note 47, at 489.

[52] *Id.* at 497. This is problematic insofar as it only serves to increase the friction between warring parties and their respective experts. *Id.* As Professor Solow puts it: "It is no longer sufficient to describe the conclusions reached by the opposing expert . . . as thoroughly misguided and utterly incorrect. It becomes obligatory to characterize them as completely unfounded, speculative, and bogus, and to accuse their author of academic fraud." *Id.* This state of affairs generally proves to be the rule rather than the exception. *See id.*

[53] *Daubert*, 509 U.S. at 585. Prior to *Daubert*, most state and federal courts followed the *Frye* test.

[54] Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

[55] *See* PAUL F. ROTHSTEIN ET AL., EVIDENCE IN A NUTSHELL 329 (4th ed. 2003) ("[T]he task is basically to insure that the real reliability of the evidence approaches that with which lay jurors are likely to endow it, considering their susceptibility to being 'snowed' by science.").

[56] *Id.*

proven, and accepted.[57] However, courts often applied the standard in a restrictive and conservative way.[58] This was problematic, as it delayed valid science from reaching the courtroom.[59]

Congress enacted the Federal Rules of Evidence in 1975.[60] Rule 702 presented a new standard for expert testimony: "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."[61] Rule 702 expanded the spectrum of admissible scientific evidence.[62] The comments to Rules 702 through 706 showed the drafters' intent to "increase receptivity of expert testimony and to widen the kinds of information experts may rely on and report."[63]

The *Frye* and Rule 702 standards coexisted for nearly two decades. Courts disagreed as to whether the Rule superseded *Frye*.[64] For instance, the Second Circuit held that the Rule trumped *Frye*, whereas the Fifth Circuit held that neither standard trumped the other and that both standards applied.[65]

In 1993, the United States Supreme Court resolved this conflict in *Daubert v. Merrell Dow Pharmaceuticals, Inc*.[66] Under the new *Daubert* standard, the trial judge became the gatekeeper, ensuring that all evidence proffered by experts was both reliable and relevant.[67] The new standard admitted "pertinent evidence based on scientifically valid principles."[68] This standard did not ask whether the expert's testimony was correct;[69] rather, it focused on "the principles and methodology employed."[70] It mandated a flexible inquiry whose chief aims were evidentiary relevance and reliability.[71]

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[57] *See id*.
[58] *Id*. at 356.
[59] *Id*.; Judith A. Hasko, Note, Daubert v. Merrell Dow Pharmaceuticals, Inc.: *Flexible Judicial Screening of Scientific Expert Evidence under Federal Rule of Evidence* 702, 1995 WIS. L. REV. 479, 482.
[60] Federal Rules of Evidence, Pub. L. No. 93-595, 88 Stat. 1926 (1975); *see* Berger, *supra* note 38, at 292 n.14.
[61] *Id*. The Rule retained this form from its inception in 1975 until its amendment in 2000. *Id*.
[62] *See* ROTHSTEIN, *supra* note 55, at 339 (citing United States v. Williams, 583 F.2d 1194 (2d Cir. 1978)).
[63] *Id*.
[64] *Daubert*, 509 U.S. at 587 n.5 (1993).
[65] *Id*. Likewise, legal commentators disagreed over whether the *Frye* general acceptance standard still applied.
[66] *Id*. at 589.
[67] *Id*. at 597.
[68] *Id*.
[69] Shulman, *supra* note 38, at 103-04 (citing *In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 744 (3d Cir. 1994) (indicating further that "[t]he focus of a *Daubert* inquiry is on the principles and methodology employed by the expert and not on the conclusions") (citing *Daubert*, 509 U.S. at 595).
[70] *Daubert*, 509 U.S. at 595.
[71] *Id*. at 594-95.

Finally, in 2000, the Advisory Committee amended Rule 702 to incorporate the rule set forth in *Daubert* and its progeny:[72]

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise *if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case*.[73]

1. Daubert *Demands that the Evidence Be Relevant*

First, *Daubert* demands that scientific evidence be relevant.[74] Testimony is relevant if it assists the trier of fact in understanding the evidence or in determining a fact at issue.[75] Rule 702's language incorporates Rule 401, which indicates that "relevant evidence" is evidence that has "any tendency" to make the existence of any potentially outcome-determinative fact more or less probable.[76] This prong ultimately asks whether the proffered expert testimony is adequately tied to the facts of the case to help the jury resolve the factual dispute.[77]

Daubert characterized the relevance inquiry as a matter of "fit."[78] Justice Blackmun offered an example to distinguish fit testimony from unfit testimony:

> "Fit" is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes. . . . The study of the phases of the moon, for example, may provide valid scientific "knowledge" about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of

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[72] ROTHSTEIN, *supra* note 50, at 194. The 2000 amendment took account of the entire *Daubert* trilogy, which includes General Elec. Co. v. Joiner, 522 U.S. 136 (1997) (holding that abuse of discretion is the proper standard of review of a district court's decision to admit or exclude expert scientific testimony) and Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999) (extending the *Daubert* standard to non-scientific testimony).

[73] FED. R. EVID. 702 (emphasis added). The italicized text reflects the 2000 amendment to Rule 702. Berger, *supra* note 38, at 320 n.188. The amendment took effect on December 1, 2000. *Id.*

[74] *Daubert*, 509 U.S. at 597.

[75] Masters v. Hesston Corp., 291 F.3d 985, 991 (7th Cir. 2002); *see Daubert*, 509 U.S. at 591 ("Rule 702 further requires that the evidence or testimony 'assist the trier of fact to understand the evidence or to determine a fact in issue.' This condition goes primarily to relevance.").

[76] FED. R. EVID. 401. Rule 402, in turn, establishes a baseline presumption in favor of admitting relevant evidence. *See* FED. R. EVID. 402. Rule 402 states: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." *Id.* The Supreme Court, in turn, has interpreted Rule 402 to bar courts from applying "any common-law doctrine which is more restrictive than the relevancy standard if it is not found in these sources." ROTHSTEIN, *supra* note 55, at 62.

[77] *Daubert*, 509 U.S. at 591 (citing United States v. Downing, 753 F.2d 1224, 1242 (3d Cir. 1985)).

[78] *Id.*; *see* ROTHSTEIN, *supra* note 55, at 315.

> fact. However . . . evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night. Rule 702's "helpfulness" standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.[79]

This was the only example *Daubert* provided to explain the concept of "fit."[80] In it, the Court seems to say that scientific testimony regarding the phases of the moon "fits" the facts of a case if the issue is whether a certain night was dark, whereas such testimony does not "fit" the facts of a case if the issue is whether a person acted like a werewolf on a certain night.[81] This distinction makes good intuitive sense: it effectively laughs out of court an "expert" who believes in werewolves, while admitting the testimony of an expert who has more serious and scientifically valid notions in mind.[82] As such, the issue of "fit" is a useful tool for excluding bad evidence.[83]

2. Daubert *Demands that the Evidence Be Reliable*

Second, *Daubert* demands that scientific evidence be reliable.[84] Testimony is reliable if the expert is qualified in the relevant field and the methodology underlying the expert's conclusions is trustworthy.[85]

First, the expert must be qualified in the relevant field.[86] Rule 702 indicates that an expert is qualified through "knowledge, skill, experience, training, or education."[87] Practically speaking, this means the expertise need not be tied to university degrees or professional titles.[88] For the purposes of Rule 702, bankers, farmers, police officers, business people, and homeowners can each be deemed qualified experts in their respective areas of experience.[89] The judge has broad discretion in determining whether an expert is qualified.[90] For

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[79] *Daubert*, 509 U.S. at 591-92.
[80] *See id.*
[81] ROTHSTEIN, *supra* note 55, at 341.
[82] Naturally, reasonable minds can disagree as to what constitutes "serious" science versus junk science. That said, Blackmun likely chose the moon example because, by 1993, reasonable minds would agree that werewolves were fictitious and that astrology, by extension, was hardly the stuff of expert scholarly study. Consequently, the proposition that the phases of the moon could affect a person's behavior seems to lie on the far-right end of the serious-to-junk spectrum.
[83] Nevertheless, in explaining the moon example in the context of relevance, Justice Blackmun arguably erred insofar as he seemed to be simultaneously evaluating the reliability of the testimony—which was supposedly intended to be an entirely separate prong of the two-part *Daubert* test. ROTHSTEIN, *supra* note 55, at 313. This mixing of the relevance and reliability prongs is part of what has made interpretation of *Daubert* so confusing for the trial judges charged with the difficult and consequential task of admitting or weeding out expert testimony.
[84] *Daubert*, 509 U.S. at 597.
[85] *Masters*, 291 F.3d at 991.
[86] *Id.*
[87] FED. R. EVID. 702.
[88] ROTHSTEIN, *supra* note 55, at 313.
[89] *Id.*
[90] *Id.*

instance, if the issue at hand is whether an item could be used as a burglary tool, both a burglar and a police officer who investigates burglaries could be deemed experts if the judge determines that their respective backgrounds are adequate.[91]

Second, the reliability standard further requires that the methodology underlying the expert's conclusions be trustworthy.[92] *Daubert* set forth the following several factors that trial judges could apply in determining whether testimony is valid.[93]

> (1) whether the theory or technique had been tested; (2) whether the theory or technique can be or has been peer reviewed or published; (3) the known or potential error rate; (4) the existence and maintenance of standards controlling the technique's operation; and (5) the general acceptance by the relevant scientific community and the testimony's degree of acceptance therein.[94]

These so-called "*Daubert* factors" inform a flexible inquiry that honors the liberal thrust and permissive backdrop of the Federal Rules of Evidence.[95] They are simply "considerations," and are "neither a checklist nor exhaustive."[96]

3. Clarifying and Extending Daubert

In 1997, the Supreme Court addressed the issue of which standard an appellate court should apply in reviewing a trial court's decision to admit or exclude evidence.[97] In the Court's first follow-up case to *Daubert*, *General Electric Co. v. Joiner* held that a district court's decision to admit or exclude expert scientific testimony is subject to abuse-of-discretion review.[98] In that case, the district court ordered the exclusion of testimony by Joiner's experts on the basis that it failed to "rise above 'subjective belief or unsupported speculation.'"[99] The appellate court reversed, and the Supreme Court reversed in turn, reinstating the district court's decision to exclude the evidence.[100]

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[91] *Id.*
[92] *Masters*, 291 F.3d at 991.
[93] *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. But some general observations are appropriate.").
[94] ROTHSTEIN, *supra* note 50, at 198.
[95] *Id.* at 198-99.
[96] *Id.* at 198. For a succinct example of an application of the *Daubert* factors, see Carmichael v. Samyang Tires, Inc., 923 F. Supp. 1514, 1520-21 (S.D. Ala. 1996). The Supreme Court upheld the district court's analysis in Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 145 (1999).
[97] General Elec. Co. v. Joiner, 522 U.S. 136, 138-39 (1997).
[98] *Id.* at 139.
[99] *Id.* at 140.
[100] *Id.* at 143.

The Court held that the district court is the gatekeeper and the appellate court must afford it "the deference that is the hallmark of abuse of discretion review."[101] The Court then ruled that the district court did not abuse its discretion in excluding the testimony.[102] *Joiner* thus reflected the Court's commitment to maintaining the *Daubert* gatekeeping framework: the trial judge would retain responsibility for ensuring that only relevant and reliable scientific evidence would be admitted.[103] The Court apparently suspected appellate courts might be tempted to apply a more stringent standard to rulings that excluded evidence than those that admitted evidence.[104] Consequently, the Court relegated the appellate court to overruling the district court only when the latter abused its discretion, and stated that appellate courts may not distinguish between rulings admitting and excluding evidence.[105]

In 1999, the Supreme Court extended the district court's gatekeeping duty to testimony based on "technical" and "other specialized" knowledge instead of scientific evidence exclusively.[106] In so doing, *Kumho Tire v. Carmichael* embraced the plain text of Rule 702.[107] In spite of this extension, pseudoscience remains unwelcome, and other hurdles still lie before a party in its quest to admit expert testimony.[108] As Justice Scalia's concurrence noted, the Court did not confer "discretion to abandon the gate keeping function," but rather "discretion to choose among *reasonable* means of excluding expertise that is *fausse* and science that is junky."[109]

As stated at the outset of this section, the *Daubert* trilogy plays a pivotal role in antitrust litigation.[110] Admission or exclusion of an expert's testimony can make or break an antitrust litigant's case.[111] *Daubert* and its successor cases do aid courts in reducing the amount of bogus expert testimony that

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[101] *Id.*

[102] *Id.*

[103] *Id.* at 142 (citing *Daubert*, 509 U.S. at 589).

[104] *See Joiner*, 522 U.S. at 142.

[105] *See id.* ("A court of appeals applying 'abuse of discretion' review to such rulings may not categorically distinguish between rulings allowing expert testimony and rulings which disallow it.").

[106] *Kumho Tire*, 526 U.S. at 141.

[107] Rule 702 was amended in the year following *Kumho Tire*. From its inception in 1975 until its amendment in 2000, Rule 702 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." Berger, *supra* note 38, at 292 n.14.

[108] Andrew I. Gavil, *After* Daubert: *Discerning the Increasingly Fine Line Between the Admissibility and Sufficiency of Expert Testimony in Antitrust Litigation*, 65 ANTITRUST L.J. 663, 688 (1997) ("Those concerned that this approach represents a diminution in the integrity of their heavily guarded gate should take heart that it represents but the first of many hurdles that will have to be overcome by the proponent of expert testimony.").

[109] *Kumho Tire*, 526 U.S. at 158-59 (Scalia, J., concurring) (emphasis in original). Justice Scalia continued: "Though, as the Court makes clear today, the Daubert factors are not holy writ, in a particular case the failure to apply one or another of them may be unreasonable, and hence an abuse of discretion."

[110] Solow & Fletcher, *supra* note 47, at 489.

[111] *See id.*

reaches the lay jury.[112] Still, these three cases are imperfect: they force judges to act as amateur scientists, increase the friction between battling parties by creating another issue for argument, increase the costs of litigation, and are "easiest to apply when least necessary."[113] After the *Daubert* trilogy, it is still difficult to argue categorically whether the new standard is actually more or less stringent than the *Frye* general acceptance standard.[114] Most critically, the law on admissibility of expert testimony remains difficult to apply at the intersection with the sufficiency standard of summary judgment.

B. Summary Judgment's Sufficiency Standard

Now more than ever, antitrust lawsuits are remarkably and uniquely prone to disposal by way of summary judgment.[115] In 1986, the Supreme Court issued three critical rulings regarding the summary judgment and judgment-as-a-matter-of-law standards: *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*; *Anderson v. Liberty Lobby, Inc.*; and *Celotex Corp. v. Catrett*.[116] All three cases advocated greater use of these summary procedures and all three were antitrust cases.[117] Together, the *Celotex* trilogy gave summary judgment an extreme makeover, changing it from "an infrequently granted procedural device to a powerful tool for the early resolution of litigation."[118]

Celotex made the motion for summary judgment easier to make, while *Matsushita* and *Anderson* made courts more likely to grant it.[119] First, *Matsushita* stated that the movant's evidence must be sufficient to render the non-movant's claim implausible.[120] Second, *Anderson* dictated that the trial court may enter judgment if the plaintiff's evidence is insufficient to persuade the judge that a reasonable jury could rule for plaintiff under the relevant standard of proof.[121] Third, *Celotex* essentially compelled the plaintiff to come forward with its case before trial upon defendant's motion.[122]

These three cases laid out the Court's interpretation of Rule 56 of the Federal Rules of Civil Procedure. Rule 56(c) states that summary judgment

> shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

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[112] *Id.* at 502.
[113] *Id.*
[114] *See* ROTHSTEIN, *supra* note 55, at 346 ("Strict and liberal interpretations can be made of both *Frye* and *Daubert* and it is over-simplistic to say the one test is stricter than the other.").
[115] Gavil, *supra* note 108, at 665-67.
[116] *Id.* The Court decided *Matsushita* on March 26, 1986. It decided *Anderson* and *Celotex* on June 25, 1986.
[117] *Id.*
[118] Miller, *supra* note 45, at 984.
[119] *Id.* at 1041.
[120] *Id.*
[121] *Id.*
[122] *Id.*

> genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.[123]

Further, Rule 56(e) in turn states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.[124]

In practice, "a fact is 'material' if it may affect the legal outcome under the governing law."[125] Moreover, an "issue of material fact is 'genuine' if, under the applicable evidentiary standard, a reasonable trier of fact could find for the nonmoving party on the issue, so that the issue cannot be decided absent trial."[126]

The means of obtaining a grant of summary judgment created by the *Celotex* trilogy and Rule 56 differ slightly depending on whether the party moving for summary judgment bears the burden of persuasion.[127] First, when the burden of persuasion for the claim rests on the movant, that party must set forth evidence making a *prima facie* showing on all elements of its case.[128] If the movant succeeds in making its affirmative evidentiary showing, the burden then shifts to the nonmovant.[129] If the nonmovant cannot contravene this showing, then the movant is entitled to judgment as a matter of law.[130]

In attempting to overcome the movant's showing, the nonmovant must go beyond its pleadings by submitting "significant probative evidence" showing the existence of a genuine dispute of material fact.[131] There are two ways of doing this: either showing that, even if uncontested, the movant's evidence is insufficient to establish at least one essential element of the movant's *prima facie* case, or affirmatively setting forth evidence that is sufficient to create a genuine issue of material fact on at least one essential element of the movant's *prima facie* case.[132]

Second, when the burden of persuasion for the claim instead rests on the nonmovant, the movant has two options for attaining a grant of summary judgment. The movant may show that the evidence set forth by the nonmovant

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[123] FED. R. CIV. P. 56(c).
[124] FED. R. CIV. P. 56(e).
[125] Shulman, *supra* note 38, at 248.
[126] *Id.* at 102 (citing *Anderson*, 477 U.S. at 248).
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.* (citing *Anderson*, 477 U.S. at 249).
[132] *Id.* (citing Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)); *see Anderson*, 477 U.S. at 256-57 (1986); First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 288-90 (1968).

is insufficient to establish at least one essential element of the nonmovant's claim, or may affirmatively set forth evidence that negates at least one essential element of the nonmovant's claim.[133] If the movant succeeds on either of these scores, the burden then shifts to the nonmovant to affirmatively set forth evidence that is sufficient to create a genuine issue of material fact on each of those elements of nonmovant's *prima facie* case that the summary judgment motion put in issue.[134]

The language in the 1986 trilogy cases is undeniably pro-summary judgment.[135] Since those cases, summary judgment is no longer a "disfavored procedural shortcut," but rather a crucial means of disposing of factually unsupported claims or defenses.[136] In *The Pretrial Rush to Judgment*, a seminal article on the use of summary judgment and judgment as a matter of law, Professor Arthur Miller argues at length that summary judgment now has a "powerful, dispositive effect."[137] It is a centerpiece of modern litigation that defendants aggressively pursue in an effort to short-circuit a plaintiff's case before it ever takes off.[138] Before the 1986 trilogy, summary judgment was applied inconsistently across the federal appellate courts.[139] After the trilogy, summary judgment not only is more attractive to seek, but also easier to get in the lower courts and to sustain in the appellate courts.[140]

Criticisms of the *Celotex* trilogy abound. The justices who dissented made clear their belief that the Court's rulings would effectively condone the weighing of evidence by judges during the summary judgment stage of a case.[141] Both *Matsushita* and *Anderson* provide helpful examples of this criticism.

First, in *Matsushita*, the Court held that to survive a summary judgment motion, a nonmovant would have to do more than set forth facts that, on their own, supported the inferences required for a ruling in his favor.[142] Rather, the inferences would have to be "reasonable in light of the entire record."[143] The pre-trilogy standard simply required that the inferences be reasonable in light of the portion of the record that was favorable to the nonmovant.[144] Justice

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[133] *Id.* at 103 (citing *Celotex*, 477 U.S. at 325, 327).

[134] *Id.* (citing M&M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc., 981 F.2d 160, 163 (4th Cir. 1993) (en banc)).

[135] Miller, *supra* note 45, at 1028.

[136] Shulman, *supra* note 38, at 102 (citing *Celotex*, 477 U.S. at 324) (indicating that in modern antitrust cases, summary judgment is commonly granted).

[137] Miller, *supra* note 45, at 1016.

[138] *Id.*

[139] *Id.* at 1026-27.

[140] *Id.* at 1029.

[141] *See* D. Theodore Rave, Note, *Questioning the Efficiency of Summary Judgment*, 81 N.Y.U. L. REV. 875, 880 (2006) (citing *Matsushita*, 475 U.S. at 599-601 (White, J., dissenting); *Anderson*, 477 U.S. at 255 (Brennan, J., dissenting)).

[142] Miller, *supra* note 45, at 1032.

[143] *Id.*

[144] *Id.*

White issued a vigorous dissent, arguing the Court was making "assumptions that invade the fact finder's province" by letting the district court determine whether the nonmovant's theory was plausible relative to the movant's theory.[145] Justice White argued the Court's "language [suggested] that a judge hearing a defendant's motion for summary judgment in an antitrust case should go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the plaintiff."[146] Naturally, this state of affairs raises serious concerns for antitrust litigants.

Second, Justice Brennan expressed similar frustration in *Anderson*.[147] He argued in dissent that the majority opinion was, on one hand, "replete with boilerplate language to the effect that trial courts are *not* to weigh evidence when deciding summary judgment motions," but on the other hand, "full of language which could surely be understood as an invitation—if not an instruction—to trial courts to assess and weigh evidence much as a juror would."[148]

Together, the White and Brennan dissents foreshadowed future disagreements over the fine line between throwing out frivolous lawsuits and invading the traditional fact-finding role of the jury by assessing the persuasive value of evidence.[149] Today, the intersection of the *Celotex* and *Daubert* trilogies presents serious problems for judges and litigators.[150]

II. THE FACTS, PROOFS, AND ANTITRUST STANDING ANALYSIS IN *KOCHERT*

A. The Facts of *Kochert*

In 1985, Dr. Kochert began practicing anesthesiology in Lafayette, Indiana.[151] Since that time, two hospitals have always served the Greater Lafayette area: Lafayette Home Hospital and St. Elizabeth's Medical Center.[152] For most of her career, Kochert was a member of Lafayette Anesthesiologists, a local medical group devoted exclusively to anesthesia services.[153] A second anesthesiology group, Anesthesiology Associates, provided the only competition in Greater Lafayette.[154]

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[145] *Id*. at 1034 (citing *Matsushita*, 475 U.S. at 599 (White, J., dissenting)).
[146] *Id*.
[147] *See Anderson*, 477 U.S. at 266 (Brennan, J., dissenting).
[148] *Id*. (emphasis added).
[149] *Compare Joint Eastern*, 52 F.3d at 1124 (reversing the district court for invading the province of the jury by weighing the conflicting evidence and making witness credibility determinations), *with Kochert II*, 463 F.3d at 710 (affirming the district court and thus allowing the judge to invade the province of the jury by weighing the conflicting evidence).
[150] *See id*.
[151] *Kochert II*, 463 F.3d at 712.
[152] *Id*.
[153] Brief and Appendix, *supra* note 3, at 8.
[154] *Kochert I*, 372 F. Supp. 2d at 513.

In the summer of 1994, the Home Hospital anesthesiology section met to discuss complaints regarding a lack of on-call and back-up anesthesiology coverage at the hospital.[155] Although the section members voted to provide back-up coverage, the president of Anesthesiology Associates, Dr. Kenneth Bochenek, voted against this additional coverage.[156]

On September 1, 1994, Home Hospital awarded Bochenek and Anesthesiology Associates an exclusive contract for anesthesia services.[157] Ironically, the board stated the purpose of this exclusive contract was to bolster "the availability, consistency, affordability, and dependability of anesthesia services to the greater Lafayette community."[158] The hospital's chief executive officer at the time, John Walling, did not provide advance notice to Home Hospital's board that such a contract was ever being considered.[159] Instead, Walling submitted the exclusive contract to the board, and the board accepted it without soliciting competing bids from anesthesiologists outside of Anesthesiology Associates.[160]

The exclusive contract dictated that each anesthesiologist outside of Anesthesiology Associates holding "current privileges" at Home Hospital could receive a subcontract from the group to provide anesthesia services there.[161] Anesthesiology Associates granted Kochert a subcontract to practice at Home Hospital.[162] She practiced under this subcontract until it expired on March 1, 1998.[163] During that time, Kochert served as the chair of Home Hospital's peer review committee for anesthesiology.[164]

In August of 1997, Bochenek approached the committee with a request to obtain privileges to perform pain management procedures that were not yet offered at Home Hospital.[165] Kochert and the committee considered the request, but the committee voted to table it until it knew more about the procedures.[166] That decision infuriated Bochenek, who did not place Kochert on the anesthesiology schedule during the entirety of October of 1997.[167] Officials warned Kochert that she would lose her job at Home Hospital if she failed to approve Bochenek's request for pain management privileges.[168] At a

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[155] Brief and Appendix, *supra* note 3, at 7.
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *See id.*
[160] *See id.*
[161] *Kochert I*, 372 F. Supp. 2d at 513.
[162] *Id.*
[163] Brief and Appendix, *supra* note 3, at 10.
[164] *Id.* at 8.
[165] *Id.* at 8-9.
[166] *Id.*
[167] *Id.* at 9.
[168] *Id.*

special meeting on December 3, 1997 that only Bochenek and two other board members attended, the Anesthesiology Associates board voted to not renew Kochert's subcontract.[169] Kochert requested an explanation for the termination of the subcontract, but Anesthesiology Associates declined to provide reasons.[170]

In 1998, Home Hospital and St. Elizabeth's merged, becoming Greater Lafayette Health Services (GLHS).[171] Prior to the merger, both anesthesiology groups practiced at both hospitals.[172] On November 30, 1998, shortly after the hospital merger, Anesthesiology Associates and Home Hospital agreed to assign their exclusive services contract for anesthesiology to GLHS.[173] Lafayette Anesthesiologists maintained its own exclusive contract with St. Elizabeth's that originated on June 1, 1998, so the group continued to practice after the merger.[174]

However, in November of 2000, St. Elizabeth's president Douglas Eberle told the president of Lafayette Anesthesiologists that the hospital did not approve of Lafayette Anesthesiologists' affiliation with Unity Healthcare, a multi-specialty physician practice and outpatient facility that GLHS deemed a competitor.[175] The Lafayette Anesthesiologists contract expired shortly thereafter; St. Elizabeth's opted not to renew it.[176] Subsequently, on June 1, 2001, St. Elizabeth's awarded the contract to Anesthesiology Associates.[177] The hospital later conceded that it made this decision exclusively for business and political reasons, not as a reflection of substandard care by Lafayette Anesthesiologists.[178]

B. Kochert Established All the Elements of Antitrust Standing

To have the merits of her substantive antitrust claims evaluated by a jury, Kochert needed to produce evidence supporting all the elements of antitrust standing.[179] Courts developed antitrust standing—and the antitrust

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[169] *Id*. at 9-10.
[170] *Id*. at 8.
[171] *Kochert I*, 372 F. Supp. 2d at 513.
[172] *Id*.
[173] Brief and Appendix, *supra* note 3, at 11.
[174] *Id*. at 8.
[175] *Id*. at 11.
[176] *Id*.
[177] *Id*.
[178] *Id*.
[179] Kochert sought to recover damages under section 4 of the Clayton Act for violations of sections 1 and 2 of the Sherman Antitrust Act. *Kochert I*, 372 F. Supp. 2d at 514 (citing 15 U.S.C. §§ 1, 2, 15). First, Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." Sherman Antitrust Act, 15 U.S.C. § 1 (2004). Second, Section 2 of the Sherman Act provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several

injury[180] and efficient enforcer[181] doctrines that are subsumed within it—to save judicial resources.[182] Whereas Article III (of the United States Constitution) standing simply requires "injury in fact plus redressability,"[183] antitrust standing presents private antitrust plaintiffs with additional requirements.[184] Courts consider six factors in determining whether a plaintiff has antitrust standing:[185]

> (1) [t]he causal connection between the alleged anti-trust violation and the harm to the plaintiff; (2) [i]mproper motive; (3) [w]hether the injury was of a type that Congress sought to redress with the antitrust laws; (4) [t]he directness between the injury and the market restraint; (5) [t]he speculative nature of the damages; (6) [t]he risk of duplicate recoveries or complex damages apportionment.[186]

In *Kochert*, the district court failed to even state the elements of antitrust standing.[187] Nevertheless, it proceeded to grant summary judgment against Kochert because she lacked antitrust standing.[188] The district court achieved this result by weighing some evidence and completely ignoring other evidence.[189]

States, or with foreign nations, shall be deemed guilty of a felony . . . ." *Id.* § 2. Third, Section 4 of the Clayton Act provides: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee." Clayton Act, 15 U.S.C. § 15 (1982). Section 4 requires plaintiffs to demonstrate antitrust standing. Greater Rockford Energy and Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 395 (7th Cir. 1993).

[180] Antitrust injury is the third antitrust standing factor (in other words, "[w]hether the injury was of a type that Congress sought to redress with the antitrust laws"). *See infra* text accompanying note 186.

[181] The efficient enforcer doctrine is the fourth antitrust standing factor (that is, "[t]he directness between the injury and the market restraint"). *See infra* text accompanying note 186. Courts will occasionally discuss the efficient enforcer doctrine as both a component and a result of meeting the other antitrust standing factors. *See, e.g., Kochert II*, 463 F.3d at 718 (discussing the efficient enforcer doctrine separately before listing the antitrust standing factors, one of which was the efficient enforcer doctrine).

[182] *See Kochert II*, 463 F.3d at 715. Interestingly, antitrust standing is so amorphous a concept that it does not even appear in legal dictionaries. *See, e.g.*, BLACK'S LAW DICTIONARY 104 (8th ed. 2004); *see also* LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 969 (2d ed. 2006).

[183] *Kochert II*, 463 F.3d at 714.

[184] *See id.* at 718 (citing Sanner v. Board of Trade of City of Chicago, 62 F.3d 918, 922 (7th Cir. 1995) (citing Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 537-46 (1983))).

[185] These factors are also referred to as "elements."

[186] *Kochert II*, 463 F.3d at 715 (citing *Sanner*, 62 F.3d at 922) (citing *Associated General Contractors*, 459 U.S. at 537-46).

[187] *See Kochert I*, 372 F. Supp. 2d at 514-15 (discussing antitrust standing, but failing to list the elements that constitute antitrust standing). The district court presumably failed to mention the elements of antitrust standing because it decided that Kochert did not satisfy one of its components, antitrust injury.

[188] *See Kochert II*, 463 F.3d at 713. To its credit, the Seventh Circuit caught this oversight and stated the aforementioned elements of antitrust standing. *See id.* at 718.

[189] The Seventh Circuit failed to correct these errors. Indeed, it compounded the district court's errors by repeating them. *See id.* at 716-19.

Kochert alleged a continuum of events from 1998 to 2001 forced her out of the market for anesthesia services.[190] First, in 1998, Anesthesiology Associates and GLHS used their power in their respective markets to exclude Kochert from practicing anesthesia at Home Hospital.[191] Second, in 1999, GLHS transferred its birthing unit from St. Elizabeth's to Home Hospital.[192] Third, in 2001, GLHS awarded Anesthesiology Associates an exclusive contract for anesthesia services at both GLHS hospitals.[193] Together, these three events formed the backbone of a continuum of events that forced Kochert out of the market for anesthesia services.[194]

To lay the foundation for this continuum of events, the plaintiff went to great lengths to produce expert testimony on all the elements of antitrust standing. Kochert put forth five experts. Bruce Seaman, Ph.D., testified regarding market definition and market share.[195] Stephen Minore, M.D., Paul Gertler, Ph.D., and Anthony Ivankovich, M.D., along with Seaman, testified regarding anticompetitive harm.[196] Specifically, Ivankovich and Minore opined on quality of care issues[197] and Gertler testified regarding contractual arrangements and their effect on pricing.[198] Additionally, Cornelius Hofman, M.B.A., testified regarding damages.[199] The district court found all this expert testimony relevant and reliable, and thus admissible under *Daubert*.[200]

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[190] Reply Brief of Plaintiff-Appellant Carolyn G. Kochert, M.D. at 1, *Kochert II*, 463 F.3d 710 (No. 05-1196) [hereinafter *Kochert II* Reply Brief].

[191] *Id*. Additionally, Home Hospital and St. Elizabeth's merged in 1998, forming GLHS.

[192] *Id*. at 24. This consolidation excluded Anesthesiology Associates' competitors from offering anesthesia services to obstetrical patients.

[193] *Id*. at 1.

[194] *Id*. In antitrust cases, courts will look at a sequence of events, rather than simply looking at each event in isolation, in ascertaining whether the defendants engaged in anticompetitive behavior. Brief and Appendix, *supra* note 3, at 33 (citing Aspen Highlands v. Aspen Skiing Co., 738 F.2d 1509 (10th Cir. 1984), *aff'd*, 472 U.S. 585 (1985) ("Plaintiff's evidence should be viewed as a whole. Each of the 'six [events]' viewed in isolation need not be supported by sufficient evidence to amount to a § 2 violation. It is enough that taken together they are sufficient to prove the monopolization claim.")) (other citations omitted).

[195] Petition for Rehearing en Banc, at 7, *Kochert II*, 463 F.3d 710 (No. 05-1196).

[196] *Id*.

[197] *See Kochert III* Cert. Pet., *supra* note 18, at App. 125-27; Order Admitting Testimony of Minore, *supra* note 19, at App. 53-58.

[198] *See* Order Admitting Testimony of Gertler, *supra* note 19, at 47-52.

[199] *Kochert III* Cert. Pet., *supra* note 18, at 9; *see* Order Admitting Testimony of Hofman, *supra* note 19, at App. 59-63.

[200] *See* Order Admitting Testimony of Seaman, *supra* note 19, at 46; Order Admitting Testimony of Minore, *supra* note 19, at 57; Order Admitting Testimony of Gertler, *supra* note 19, at 52; Order Admitting Testimony of Hofman, *supra* note 19, at 63.

The defendants also put forth five experts;[201] the district court admitted their testimony as well.[202] This was important, as the existence of admitted expert testimony on both sides created factual disputes.[203] If the judges had properly construed the disputed facts in Kochert's favor,[204] summary judgment could not have been granted.[205] Because Kochert presented far more than a mere "scintilla of proof," a jury—and not a judge—should have evaluated these factual disputes by assessing the sufficiency of each side's evidence.[206]

First, Kochert produced evidence of a causal connection between the alleged antitrust violation and the harm she suffered.[207] Kochert established this connection with expert testimony by Seaman and Hofman.[208] Seaman demonstrated that GLHS possessed a monopoly market share in anesthesia services beginning in 1998.[209] He did this by means of a 300-page report and a 400-page deposition.[210] In the former, Seaman's in-depth economic analysis demonstrated GLHS had the power to exclude competition from the relevant geographic market by means of exclusive contracts.[211] Hofman quantified Kochert's lost income caused by her exclusion from the market

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[201] *Kochert III* Cert. Pet., *supra* note 18, at 9-10. David M. Eisenstadt, Ph.D., and Edward Heiden, Ph.D., testified regarding antitrust standing, antitrust injury, and markets; Bryan Liang, M.D., J.D., Ph.D., testified regarding injury to competition, quality of care, and pricing; and David Barbara, M.D., testified regarding anesthesia practice and quality of anesthesia care at GLHS. *Id*. Gary G. Kleinrichert, C.P.A., testified regarding damages. *See, e.g*., Supplemental Expert Report of Gary G. Kleinrichert, Joint Appendix at Tab 64, at 2, Kochert v. Greater Lafayette Health Servs., Inc., 463 F.3d 710 (7th Cir. 2006) (No. 05-1196) [hereinafter Kleinrichert Report] ("In my opinion, Hofman's damage calculations are flawed and do not properly measure Kochert's damages as a result of the Defendants' actions.").

[202] *Kochert III* Cert. Pet., *supra* note 18, at 9-10.

[203] *See, e.g*., Kleinrichert Report, *supra* note 201, at 2; Expert Witness Report of Bryan A. Liang, Joint Appendix at Tab 65, at 1, Kochert v. Greater Lafayette Health Servs., Inc., 463 F.3d 710 (7th Cir. 2006) (No. 05-1196) ("In my opinion, none of those reports . . . demonstrate any injury to competition resulting from the exclusive service agreements that are at issue in this case."); *id*. ("My opinion is that the Plaintiff and her experts have failed to demonstrate any anti-competitive effects caused by the exclusive services agreements at issue in this case."); Expert Report of David M. Eisenstadt, Joint Appendix at Tab 53, at 3, Kochert v. Greater Lafayette Health Servs., Inc., 463 F.3d 710 (7th Cir. 2006) (No. 05-1196) ("[I]t is my opinion that plaintiff confuses harm to competitors with harm to competition.").

[204] *Joint Eastern*, 52 F.3d at 1131 (asking "whether, drawing all reasonable inferences regarding the weight of the evidence and the credibility of the witnesses in favor of plaintiff, a reasonable jury could *only* have found for the defendants") (emphasis added).

[205] *See Daubert*, 43 F.3d at 1315 ("Under *Daubert* . . . we must ensure that the proposed expert testimony is 'relevant to the task at hand,'. . . i.e., that it logically advances a material aspect of the proposing party's case."); *see also* Norris v. Baxter Healthcare Corp., 397 F.3d 878, 884 n.4 (10th Cir. 2005) (citing *Daubert*, 43 F.3d at 1315) ("Under the relevance prong of the *Daubert* analysis, the court must ensure that the proposed expert testimony logically advances a material aspect of the case.").

[206] *Daubert*, 509 U.S. at 596; *see also* discussion *infra* §§ III.B, III.C.1, III.C.2.

[207] *See* Order Admitting Testimony of Seaman, *supra* note 19, at 46; Order Admitting Testimony of Hofman, *supra* note 19, at 63.

[208] *See id*.

[209] Brief and Appendix, *supra* note 3, at 19.

[210] *Id*. at 18-19.

[211] *Id*. at 19.

for anesthesia services.[212] He estimated harm to the plaintiff of $1.6 million from 1998 to 2018: from the beginning of the defendants' anticompetitive conduct through the end of Kochert's working life.[213] This admitted expert testimony demonstrated the defendants' actions caused harm to Kochert.

Second, Kochert produced evidence of improper motive when Seaman established motive to monopolize.[214] Seaman established that Anesthesiology Associates and GLHS, two parties with monopoly control, excluded Kochert from competing in the market as early as 1998.[215] Seaman's testimony also demonstrated GLHS sought to reduce competition for anesthesia services at its hospitals, and that Anesthesiology Associates obtained the benefit of eliminating competition from other anesthesiologists by maintaining a lower standard of anesthesia care without a concomitant decrease in price.[216]

Finally, the exclusive contract failed to produce efficiencies, improved quality, and competitive pricing.[217] GLHS president Douglas Eberle testified that the defendants had not measured efficiencies that might accrue by means of the exclusive contracts.[218] This admitted evidence demonstrated the defendants possessed an improper motive in creating and maintaining their exclusive contract for anesthesia services at GLHS.

Third, Kochert produced evidence of an antitrust injury, namely, an injury of a type that Congress sought to redress with the antitrust laws.[219] Antitrust plaintiffs demonstrate antitrust injury by showing that defendants harmed competition.[220] Courts measure harm to competition by means of increased pricing above a competitive level, reduced quality of care, or

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[212] *See Kochert III* Cert. Pet., *supra* note 18, at App. 122-24.

[213] *Id*.

[214] *Id*. at 25; *see id*. at App. 73-75, 77-79, 83-88.

[215] *Kochert II* Pet. for Reh'g, *supra* note 195, at 11.

[216] *See Kochert III* Cert. Pet., *supra* note 18, at 25.

[217] Brief and Appendix, *supra* note 3, at 17. For instance, pricing increased 13% to 46% (excluding additional increases paid by consumers in the form of insurance premiums). *Id*.

[218] *Kochert III* Cert. Pet., *supra* note 18, at App. 87.

[219] Tri-Gen Inc. v. Int'l Union of Operating Engineers, Local 150, 433 F.3d 1024, 1031 (7th Cir. 2006) (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977)). The Seventh Circuit has held that "establishing antitrust injury involves complex questions of fact." Xechem, Inc. v. Bristol-Meyers Squibb Co., 274 F. Supp. 2d 937, 943 (N.D. Ill. 2003) (quoting Southwest Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n, 830 F.2d 1374, 1381 (7th Cir. 1987)); *see also* Retired Chicago Police Ass'n v. City of Chicago, 7 F.3d 584, 602 n.25 (7th Cir. 1993).

[220] *See Kochert II*, 463 F.3d at 715 (quoting *Associated General Contractors*, 459 U.S. at 538) ("The purpose of the Act is 'to assure customers the benefits of price competition.'"). Other purposes of the antitrust laws include "protecting the economic freedom of participants in the relevant market." *Id*. Additionally, the Seventh Circuit recognized that "[t]he principal purpose of the antitrust laws is to prevent overcharges to consumers." *Kochert II*, 463 F.3d at 715 (citing Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, Inc., 814 F.2d 358, 368 (7th Cir. 1987)).

diminished availability of services.[221] Kochert simply needed to demonstrate one of these markers of harm to competition;[222] ultimately, she established all three by means of expert testimony by Minore, Ivankovich, Gertler, and Seaman.[223] First, regarding pricing increases, Gertler testified that prices increased 13% to 26% because of the defendants' actions.[224] Second, regarding reduced quality of care, Ivankovich testified that when Bochenek and others in his group left patients unattended in the operating room for extended periods of time,[225] they violated the standards of the profession.[226] In so doing, their actions arguably constituted gross negligence.[227] Finally, regarding diminished availability of care, the record reflected that after the defendants forced Kochert out of the market, the unavailability of anesthesiologists required them to delay surgeries anywhere from several hours to six weeks.[228] This admitted evidence demonstrated that Kochert suffered an antitrust injury.

Fourth, Kochert produced evidence that she was an efficient enforcer of the antitrust laws; she demonstrated a direct relationship between the injury and the market restraint.[229] Courts grant standing to consumers or competitors who suffer direct injuries to their business or property.[230] Relying on his economic analysis, Seaman testified that as a competitor, Kochert was an efficient enforcer of the antitrust laws.[231] He stated that Kochert would be a

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[221] *See, e.g.*, Fox v. Good Samaritan Hosp., No. C-04-00874, 2007 WL 2938175, at *5-6 (N.D. Cal. Oct. 9, 2007); Lie v. St. Joseph Hosp., 964 F.2d 567, 570 (6th Cir. 1992).

[222] *Id.* at 570.

[223] Brief and Appendix, *supra* note 3, at 24.

[224] *Kochert III* Cert. Pet., *supra* note 18, at App. 108-09.

[225] *Supra* note 12 (citing Brief and Appendix, *supra* note 3, at 12, 17-18).

[226] *Kochert III* Cert. Pet., *supra* note 18, at App. 111. The American Society of Anesthesiologists drafted and adopted "Standard I" as a basic statement of the standard of care required in the anesthesiology profession: "Qualified anesthesia personnel shall be present in the room throughout the conduct of all general anesthetics, regional anesthetics and monitored anesthesia care." Expert Report of David M. Barbara, Joint Appendix at Tab 52, at 4, *Kochert II*, 463 F.3d 710 (7th Cir. 2006) (No. 05-1196).

[227] *Kochert III* Cert. Pet., *supra* note 18, at App. 111. Ivankovich offered an analogy to explain the gravity of the defendant anesthesiologists' actions: "For an anesthesiologist to not attend a patient continuously and be present in the operating room continuously while that patient is under a general anesthetic and then assert that the patient received quality anesthesia care from the anesthesiologist because the patient awoke from a surgery without complications is like saying that a pilot who lands a plane safely with passengers aboard though he was absent for part of the flight (for example, by being asleep in the pilot's seat) did not place in jeopardy the lives of those passengers while he was absent. In both situations, the conduct of both the doctor and pilot fell deeply below, and deviated from, standards governing their respective professions' standards of care."

[228] Brief and Appendix, *supra* note 3, at 17-18 (citing Corr. App. ¶¶ 104-10, at R. 324, *Kochert II*, 463 F.3d at 710). Anesthesia unavailability was "a significant factor in the management of the [operating room] schedule as late as 2-10-04."

[229] *See* Arista Records LLC v. Lime Group LLC, 532 F. Supp. 2d 556, 567-68, 573 (S.D.N.Y. 2007); Serfecz v. Jewel Food Stores, 67 F.3d 591, 598 (7th Cir. 1995) (citing *In re* Indus. Gas Antitrust Litig., 681 F.2d 514, 515 (7th Cir. 1982), *cert. denied*, 460 U.S. 1016 (1983)).

[230] *Kochert II* Pet. for Reh'g, *supra* note 195, at 4 (citing *Serfecz*, 67 F.3d at 598 (citing *Industrial Gas*, 681 F.2d at 515)).

[231] *Kochert III* Cert. Pet., *supra* note 18, at App. 93.

more efficient enforcer than anesthesia services patients would be.[232] This is because excluded competitors like Kochert are in a better position to "identify the potentially anticompetitive behavior and effects of particular contractual arrangements."[233] This admitted evidence demonstrated that Kochert was an efficient enforcer.

Fifth, Kochert produced evidence that the nature of the damages was not speculative. Hofman defined Kochert's economic loss with great specificity, detailing her projected losses from 1998 through 2018.[234] Hofman calculated Kochert's future lost income based upon her work-life probability; he then adjusted the figures to account for growth and inflation.[235] This admitted evidence demonstrated the nature of Kochert's damages was not speculative.

Finally, Kochert established that there was no risk of duplicate recoveries or complex damages apportionment. Hofman's aforementioned damages calculations demonstrated the defendants' actions caused damages specifically to Kochert and her business—thus negating the risk of complex damages apportionment.[236] Additionally, the four-year statute of limitations guaranteed there was no risk whatsoever of duplicate recoveries, as Kochert was the only plaintiff to have filed suit before the statute of limitations tolled.[237] This admitted evidence demonstrated there was no risk of duplicate recoveries or complex damages apportionment.

Thus, on each and every element of antitrust standing, Kochert produced admissible expert testimony that the district court deemed material to aid the jury in deciding whether Kochert met her burdens of proof.[238] For their part, the defendants responded that admissible expert testimony is not necessarily sufficient for purposes of summary judgment.[239] Additionally, they stated that the entire admissibility-versus-sufficiency dilemma was moot, as the trial judge in *Kochert* had included a disclaimer at the end of each of the four *Daubert* orders regarding Kochert's experts.[240] It is telling, however, that the

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[232] *Id*. at App. 80-81.

[233] *Id*. at App. 81.

[234] *Id*. at App. 122-24.

[235] *See* Order Admitting Testimony of Hofman, *supra* note 19, at App. 62 (district court approving of Hofman's methodology and deeming it reliable).

[236] *Kochert III* Cert. Pet., *supra* note 18, at App. 122-24.

[237] *See* Clayton Act, 15 U.S.C. § 15b (1982); Brunswick Corp. v. Riegel Textile Corp., 752 F.2d 261, 268 (7th Cir. 1984).

[238] *Kochert III* Cert. Pet., *supra* note 18, at 20.

[239] Brief in Opposition to Petition for Writ of Certiorari of the Respondent Anesthesiology Associates, P.C. at 8, Kochert v. Greater Lafayette Health Servs., Inc. (U.S. Jan. 11, 2007) (No. 06-822), 2007 WL 106746 [hereinafter AA Opp. to Cert. Pet.].

[240] *See, e.g*., Brief in Opposition to Petition for Writ of Certiorari of Respondents Greater Lafayette Health Servs., Inc. and John Walling at 11, Kochert v. Greater Lafayette Health Servs., Inc. (U.S. Jan. 16, 2007) (No. 06-822), 2007 WL 128604 [hereinafter GLHS Opp. to Cert. Pet.] ("It should be noted at the outset that the fact that the proffered evidence has passed muster under a *Daubert* analysis does not ensure or decide whether such evidence is ultimately persuasive.").

defendants' briefs are devoid of any references to their own admitted expert testimony; had they cited that testimony, they would have acknowledged there were genuine disputes as to material facts.[241] Because judges must draw all reasonable inferences regarding the weight of evidence and the credibility of witnesses in favor of the plaintiff, and because the defendants disputed material facts,[242] the admitted expert evidence should have been presented to a jury.[243]

On one hand, if admitted expert testimony is absent after the *Daubert* hearings, a judge would be justified in determining as a matter of law the petitioner's case could be decided without a trial, and that summary judgment is appropriate even if all facts were construed in favor of the moving party.[244] On the other hand, when the judge admits proofs on all elements of a claim, the sufficiency decision is, as a matter of fact, for the jury to make.[245] *Kochert* is the first reported case in which a court granted summary judgment after admitting expert testimony on all the elements of the plaintiff's claim.[246]

C. The Courts' Antitrust Standing Analysis in *Kochert*

Both the trial court and the three-judge appellate panel conducted an antitrust standing analysis replete with impermissible factual findings regarding the continuum of events that forced Kochert out of the market and harm to competition.[247] In a summary judgment analysis, the court must draw all reasonable inferences regarding disputed facts in favor of the plaintiff.[248] Furthermore, a logical premise of such an analysis is that once expert testimony satisfies *Daubert*, that testimony is relevant and thus would assist a reasonable jury in deciding material facts.[249] It is illogical to deem that same testimony insufficient for purposes of summary judgment.[250] Therefore, by weighing or otherwise ignoring admitted expert testimony that supported all the elements of antitrust standing, the judges in *Kochert* made impermissible findings of

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[241] *See supra* note 203 (listing examples of disputed material facts).
[242] *Id.*
[243] *See Kochert III* Cert. Pet., *supra* note 18, at 22; *see also* Ambrosini v. Labarraque, 101 F.3d 29, 132, 134 (D.C. Cir. 1996) ("[T]he expert's testimony, so long as it 'fits' an issue in the case, is admissible under Rule 702 for the trier of fact to weigh.").
[244] *See Kochert III* Cert. Pet., *supra* note 18, at 16, 22; *see also Norris*, 397 F.3d at 884 n.4.
[245] *Kochert III* Cert. Pet., *supra* note 18, at 22; *see also Ambrosini*, 101 F.3d at 29.
[246] *See Kochert III* Cert. Pet., *supra* note 18, at 5.
[247] *See Kochert I*, 372 F. Supp. 2d 509 (N.D. Ind. 2004); *Kochert II*, 463 F.3d at 710.
[248] *See, e.g., Joint Eastern*, 52 F.3d at 1131.
[249] *See supra* note 205.
[250] *Id.*

fact. If the judges had properly construed the disputed facts in Kochert's favor,[251] summary judgment could not have been granted.

On May 18, 2001, Kochert sued Anesthesiology Associates, GLHS, and GLHS's chief executive officer,[252] alleging unlawful restraint of trade and unlawful monopolization of the relevant market.[253] Kochert asserted that, because defendants possessing monopoly market power excluded her from the market, they prevented her from treating patients, causing her $1.6 million in damages.[254]

On December 29, 2004, Judge Allen Sharp of the United States District Court for the Northern District of Indiana granted the defendants' motion for summary judgment.[255] The judge considered the expert testimony that he had accepted as both reliable and relevant six weeks prior.[256] He proceeded to impermissibly weigh its merits, thus invading the province of the jury.[257] The court concluded there was no genuine issue of material fact, and the defendants were entitled to summary judgment.[258]

On September 12, 2006, a three-judge panel of the United States Court of Appeals for the Seventh Circuit upheld the trial judge's order granting summary judgment.[259] Like the district court, the Seventh Circuit impermissibly weighed the merits of the admitted testimony, thus invading the province of the jury.[260] Finally, on December 12, 2006, Kochert appealed to the United States Supreme Court.[261] On February 20, 2007, the Court denied certiorari, allowing a summary judgment for the defendant hospital and anesthesiology group to stand.[262]

1. Weighing the Evidence Establishing a Continuum of Events

First, the district court concluded that Kochert failed to demonstrate antitrust injury because she was "no longer in the business of providing anesthesia services" when GLHS granted its second exclusive contract to

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[251] *Joint Eastern*, 52 F.3d at 1131.

[252] *See Kochert I*, 372 F. Supp. 2d at 514.

[253] Brief and Appendix, *supra* note 3, at 3. Kochert sought to recover damages under § 4 of the Clayton Act for violations of §§ 1 and 2 of the Sherman Antitrust Act. *Kocher I*, 372 F. Supp. 2d at 514 (citing 15 U.S.C. §§ 1, 2, & 15).

[254] Brief and Appendix, *supra* note 3, at 44.

[255] *Kochert I*, 372 F. Supp. 2d at 519-20.

[256] *See, e.g.*, Order Admitting Testimony of Seaman, *supra* note 19, at App. 37.

[257] *See, e.g., Kochert I*, 372 F. Supp. 2d at 514-15 (concluding Kochert failed to demonstrate injury to competition only after ignoring Seaman's testimony regarding anticompetitive effects on the price, quantity, or quality of anesthesia services).

[258] *Id.* at 519-20.

[259] *Kochert I*, 463 F.3d at 712.

[260] *See, e.g., Kochert II*, 463 F.3d at 718 ("GLHS's anticompetitive behavior in 2001 did not injure Kochert's anesthesiology practice because it was nonexistent by [that] point.").

[261] *See id.*

[262] *Kochert III*, 127 S. Ct. at 1328.

Anesthesiology Associates in 2001.[263] This result was surprising because Kochert established that she was in the market from 1998 until August of 2000[264] and that she was ready, willing, and able to reenter the market from August of 2000 through 2003.[265] Thus, Kochert satisfied the Seventh Circuit's "intention and preparedness" test.[266] That test allows would-be competitors to collect damages when excluded from the market by demonstrating that they intended to enter it and were prepared to do so within a reasonable time.[267] Kochert satisfied this test by establishing she had the qualifications, licenses, physical presence in the market, and intention to practice anesthesia services full time in 2001 and thereafter.[268] She also did so by means of periodic written requests to GLHS to be placed on the schedule.[269] Kochert placed these letters in the record, but the court ignored them.[270]

Furthermore, the district court stated the starting point of the defendants' anticompetitive activity was 2001.[271] It reached that conclusion in spite of admitted expert testimony supporting Kochert's assertion that the defendants' anticompetitive behavior began in 1998 (when the defendants first exercised their monopoly power under the first exclusive contract),[272] and ended in 2001 (with the grant of the second exclusive contract).[273] This amounted to an impermissible finding of fact.

Moreover, even taking 2001 as the starting point, the court could only find for the defendants after ignoring admitted expert testimony indicating that: Kochert remained a competitor after August of 2000;[274] the defendants exercised market power;[275] and the defendants caused ongoing damages to Kochert's business once they possessed that market power.[276] Notwithstanding ample admitted expert testimony that was deemed, by a preponderance of the evidence, to be of assistance to a jury, the court concluded no reasonable juror could find for Kochert.[277] This conclusion was illogical and contrary to

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[263] *Kochert I*, 372 F. Supp. 2d at 514.
[264] *See id*.
[265] *Kochert III* Cert. Pet., *supra* note 18, at App. 137.
[266] *See* Grip-Pak, Inc. v. Ill. Tool Works, Inc., 694 F.2d 466, 475 (7th Cir. 1982).
[267] *Id*.
[268] *Kochert III* Cert. Pet., *supra* note 18, at 6.
[269] *Id*. at 8; App. 135-36.
[270] *See Kochert I*, 372 F. Supp. 2d at 514 (concluding Kochert had voluntarily left the market by August 1, 2000, without making any reference to the periodic letters she wrote to the defendants demonstrating they in fact forced her out, and that she remained ready, willing, and able to practice).
[271] *Id*.
[272] *Kochert III* Cert. Pet., *supra* note 18, at App. 135-37.
[273] *Id*.
[274] *Id*. at 8 & App. 137.
[275] *Id*. at 22.
[276] *Id*. at App. 135-37.
[277] *See Kochert I*, 372 F. Supp. 2d at 519-20 (granting summary judgment).

binding precedent.[278] Ultimately, the jury should have weighed the sufficiency of this evidence, not the judge.[279]

The Seventh Circuit compounded these errors in reaching two of its central conclusions: Kochert failed to demonstrate "that the events of 1998 actually were elements of a broader anticompetitive scheme";[280] and "GLHS's anticompetitive behavior in 2001 did not injure Kochert's anesthesiology practice because it was nonexistent by [that] point."[281] The court justified these conclusions by first stating the 1998 exclusive contracts were "simply staffing decisions made solely by parties without market control"[282] and, second, Kochert was practicing pain management full time as of August of 2000.[283]

The court made these findings in spite of abundant admitted expert evidence to the contrary—evidence that should have been weighed by a jury.[284] That evidence indicated the defendants: had market control;[285] possessed an improper motive to exclude a competitor from the market;[286] caused harm to competition;[287] and granted the exclusive contracts for political reasons.[288] Indeed, the record before the court made no reference to "staffing decisions"; rather, the court reached that conclusion by making impermissible inferences about the evidence.[289] Thus, the judges invaded the province of the jury by evaluating the sufficiency of admitted expert testimony and making inferences from them.[290]

Because the district court deemed this testimony relevant—meaning it would logically advance a material aspect of Kochert's case[291]—the appellate court could only have reached its conclusion by considering the persuasiveness of Seaman's testimony.[292] Critically, the court made these inferences with respect to a material (that is, outcome-determinative) fact, thus ending Kochert's case.[293] Had the Seventh Circuit construed the disputed facts in

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[278] *See supra* note 43.
[279] *Id.*
[280] *Kochert II*, 463 F.3d at 717.
[281] *Id.* at 718. Put differently, the court claimed Kochert was already eliminated from the market when Home Hospital awarded Anesthesiology Associates an exclusive contract on June 1, 2001, and that Kochert thus could not claim defendants' actions were a "but for" cause of her injuries three months later. *Id.*
[282] *Id.* at 717.
[283] *Id.* at 718.
[284] *See Anderson*, 477 U.S. at 255; *Daubert*, 509 U.S. at 595-96.
[285] *Kochert II* Pet. for Reh'g, *supra* note 195, at 11.
[286] *See Kochert III* Cert. Pet., *supra* note 18, at 25.
[287] *See id.* at 25-26.
[288] Brief and Appendix, *supra* note 3, at 11; *see supra* Section III.B (discussing this evidence in greater detail).
[289] *See Anderson*, 477 U.S. at 255.
[290] *See id.*
[291] *See Daubert*, 43 F.3d at 1315.
[292] *Kochert II* Pet. for Reh'g, *supra* note 195, at 10.
[293] *See Kochert II*, 463 F.3d at 719.

favor of the plaintiff, it could not have granted summary judgment for the defendants.[294]

2. Weighing the Evidence Establishing Harm to Competition

Second, the district court concluded that Kochert failed to demonstrate antitrust injury because she alleged injuries "to her as a competitor, not injuries to competition."[295] The court found Kochert was "unable to show direct anticompetitive effects on the price, quantity or quality of anesthesia services caused by the defendants."[296] To reach this conclusion, the court ignored admitted expert testimony indicating: prices increased 13% to 26% because of the defendants' actions (Gertler);[297] quality of care declined when Bochenek and others in his group left patients unattended in the operating room for extended periods of time,[298] thus violating the standards of the profession[299] and arguably constituting gross negligence (Ivankovich, Minore);[300] and availability of care declined when the unavailability of anesthesiologists required the defendants to delay surgeries anywhere from several hours to six weeks (Minore).[301] The court disregarded *Anderson*'s admonition that, when ruling on a summary judgment motion, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge."[302] Therefore, when the district court concluded that Kochert failed to demonstrate harm to competition, it invaded the province of the jury.

The Seventh Circuit once again compounded the district court's errors, concluding the record was "bereft of any credible evidence of the type of anticompetitive effects alleged by Kochert."[303] To get there, the court selectively quoted a single sentence from Seaman's 400-page deposition: "[T]here is no particular evidence on nominal rates that would suggest an

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[294] *See, e.g., Kochert II* Pet. for Reh'g, *supra* note 195, at 11 ("By allowing Seaman's testimony to go to a jury, Kochert would also have been able to show the causal connection between the anticompetitive scheme that commenced in 1998 . . . and her economic loss as a competitor excluded from the market.").

[295] *Kochert I*, 372 F. Supp. 2d at 515.

[296] *Id.*

[297] *Kochert III* Cert. Pet., *supra* note 18, at App. 108-09.

[298] *See* Brief and Appendix, *supra* note 3, at 12, 17-18.

[299] *See Kochert III* Cert. Pet., *supra* note 18, at App. 111.

[300] *Id.*

[301] *See* Brief and Appendix, *supra* note 3, at 17-18 (citing Corr. App., at ¶¶ 104-10, at R. 324, *Kochert II*, 463 F.3d at 710); *Kochert III* Cert. Pet., *supra* note 18, at 25. Anesthesia unavailability was "a significant factor in the management of the [operating room] schedule as late as 2-10-04." Principal Brief, *supra* note 3, at 18.

[302] *Anderson*, 477 U.S. at 255.

[303] *Kochert II*, 463 F.3d at 719.

exercise in market power."[304] Importantly, the court took Seaman's statement completely out of context, ignoring the testimony both before and after that statement.[305] In particular, Seaman explicitly stated that he was describing a hypothetical market, and that his statement was subject to a major three-part caveat.[306]

Having isolated the testimony in which it was most interested, the court concluded that Kochert produced "no evidence" prices had been affected by anticompetitive activity.[307] It reached this conclusion in spite of admitted expert testimony indicating that prices increased 13% to 26% because of the defendants' actions.[308] Likewise, the panel downplayed or otherwise ignored admitted expert testimony regarding reduced quality of care and diminished availability of care.[309]

The panel failed to give reasons specifically explaining how and why the testimony the court deemed admissible in the *Daubert* hearings was somehow not sufficient to survive summary judgment and proceed to trial.[310] This lack of explanation enabled the judges to encroach upon the jury's fact finding obligation by conflating the admissibility standard of Federal Rule of Evidence 702 with the sufficiency standard of Federal Rule of Civil Procedure 56. In so doing, both the district court and the appellate court played the role of jury, weighing evidence by considering the persuasive value of plaintiff's admitted expert testimony. Ultimately, when the Seventh Circuit affirmed the district court, it created a circuit split.[311]

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[304] *Id.*

[305] Brief and Appendix, *supra* note 3, at 50.

[306] *Id.* Seaman testified as follows:

> SEAMAN: I would simply tell you again, *if you focus solely on nominal rates, don't make any other adjustments for whether the rates should have been going down rather than up, and make no further adjustment for quality of care*, I would agree with you there is no particular evidence on nominal rates that would suggest an exercise in market power.
>
> *But I want to make sure the record is clear that I'm responding to your attempt and desire to keep this at a nominal rate level for the question* and that I do not believe that that would be sufficient evidence to simply say there is no possibility of having had anticompetitive consequences or any possible harm to consumers in the relevant market.

Id. (emphasis added).

[307] *Kochert II*, 463 F.3d at 719.

[308] *Kochert III* Cert. Pet., *supra* note 18, at App. 108-09.

[309] *See id.* As indicated in Section III.B, Kochert merely needed to establish one of the three markers of harm to competition. *See, e.g.*, Fox, *supra* note 221, at *5-6; Lie, *supra* note 221, at 570. Ultimately, she established all three by means of expert testimony by Minore, Ivankovich, Gertler, and Seaman. Appendix and Brief, *supra* note 3, at 24.

[310] *Kochert III* Cert. Pet., *supra* note 18, at 3.

[311] *Supra* note 149.

III. *KOCHERT* CREATED A CIRCUIT SPLIT AS TO THE ADMISSIBILITY-SUFFICIENCY DISTINCTION

A. *Kochert* Presented an Unresolved Issue

The Supreme Court has never spoken about the precise intersection of the admissibility and sufficiency standards. *Daubert* was not a sufficiency case, nor were its successor cases, *Joiner* and *Kumho Tire*.[312] The sufficiency trilogy came in 1986, and the admissibility trilogy followed between 1993 and 1999. It is surprising that, in spite of the closeness in time of these two sets of separate but related decisions, so central a question has been left unanswered. But, although the Court has not spoken directly to this question, there is ample reason for it to rule that expert testimony that is admitted—that is, deemed both relevant because it fits material issues of fact, and reliable because it is based on scientifically valid methods and principles—can never fall below the minimum threshold required for sufficiency under the summary judgment standard.[313]

The overlap of *Daubert*'s admissibility standard and summary judgment's sufficiency standard creates a serious logical dilemma. On one hand, the Court wishes to maintain the jury's exclusive fact finding role;[314] on the other hand, it allows judges to exclude evidence in a pretrial *Daubert* hearing—thus precluding the jury's weighing of that evidence entirely.[315] Courts expose this logical dilemma when they forget that the admissibility of evidence (under Federal Rule of Evidence 702) and the sufficiency of that evidence (under Federal Rules of Civil Procedure 50 and 56) are two "analytically separate and distinct" issues.[316]

Ultimately, *Kochert* created a clear split among the federal circuits regarding whether space exists between admissibility and sufficiency

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[312] Although *Daubert* was an admissibility case, it briefly spoke to sufficiency in the context of communicating a "tone of optimism about juries' abilities to sort out the veracity of competing scientific evidence." *Joint Eastern*, 52 F.3d at 1132. Respondent Merrell Dow contended in oral argument that adopting a standard more permissive than general acceptance under *Frye* "would permit 'shaky but admissible' evidence to be presented to 'befuddled juries . . . confounded by absurd and irrational pseudoscientific assertions.'" Gavil, *supra* note 108, at 685. In overruling *Frye*, the Court dismissed that claim as groundless cynicism regarding the abilities of lay jurors to weigh properly admitted evidence. *Daubert*, 509 U.S. at 595-96. Justice Blackmun declared the system would do best by erring on the side of admitting testimony for consideration by the jury. This would test the merits of the testimony by means of "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof." *Id*. at 596. These avenues, he insisted, were the proper means of ensuring that expert testimony satisfied Rule 702.

[313] *See* ROTHSTEIN, *supra* note 55, at 347 n.6 ("The minimum is usually articulated as 'evidence sufficient to support the proposition in the mind of a reasonable fact-finder' notwithstanding that the judge or other reasonable fact-finders would not so find.").

[314] *See Anderson*, 477 U.S. at 255; *Daubert*, 509 U.S. at 595-96.

[315] *See Daubert*, 509 U.S. at 597 (holding trial judges must play a gatekeeping role in which they prevent some expert testimony from reaching the jury).

[316] Shulman, *supra* note 38, at 103.

determinations—and if so, how much.[317] Specifically, the result in *Kochert* lies in direct contrast to the result in *Joint Eastern*.[318]

B. *Joint Eastern* Properly Resolved the Distinction

In *Joint Eastern*, the Second Circuit struck down a grant of judgment as a matter of law when the district court went beyond assessing methodology in making a long list of "independent assessments of witnesses' conclusions" in reaching its decision that petitioner's expert testimony was insufficient.[319] Unlike the Seventh Circuit, the Second Circuit properly resolved the admissibility-versus-sufficiency distinction: when trial judges use the gatekeeping duty to do more than make threshold determinations regarding relevance and reliability, they "impermissibly cross the line from assessing evidentiary reliability to usurping the role of the jury."[320]

Thus, *Joint Eastern* considered the extent to which a trial judge may assess the sufficiency, as opposed to admissibility, of scientific evidence.[321] The Second Circuit concluded that *Daubert* expanded the judge's role in assessing admissibility, but left the sufficiency role unchanged.[322] In *Joint Eastern*, a widow sued her husband's employer for asbestos exposure, claiming an asbestos spray caused his colon cancer and eventual death.[323] Because the scientific community was split as to whether a causal link existed between asbestos exposure and colon cancer, the trial court heard and admitted into evidence testimony from numerous scientific experts.[324] Plaintiff's experts testified, for instance, that a causal relationship existed between asbestos exposure and colon cancer.[325] On February 10, 1993, the jury considered that and other evidence and returned a verdict for the plaintiff.[326]

Nevertheless, on July 23, 1993, the district court conducted its own independent and detailed analysis of the epidemiological studies, ultimately concluding the experts' conclusions had no basis.[327] The trial judge set aside the jury verdict, granting judgment as a matter of law for the employer.[328] On appeal, the Second Circuit held the trial judge "overstepped the boundaries of the role contemplated by *Daubert* and inappropriately usurped the

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[317] ROTHSTEIN, *supra* note 50, at 202-03; *see also Kochert III* Cert. Pet., *supra* note 18, at 4.
[318] *See Joint Eastern*, 52 F.3d at 1124 (reversing district court for weighing evidence and thus usurping the role of the jury).
[319] *Id.* at 1133.
[320] *Id.* at 1131.
[321] *Id.* at 1126.
[322] *Id.* at 1132.
[323] *See id.* at 1126.
[324] *Id.*
[325] *Id.* at 1128.
[326] *Id.* at 1126.
[327] *Id.* at 1128.
[328] *See id.* at 1126.

role of the jury."[329] Accordingly, the Second Circuit reversed the trial court entry of judgment as a matter of law, reinstating the jury verdict for the plaintiff.[330]

The Second Circuit applied the proper standard in reviewing the employer's motion for judgment as a matter of law, namely, "whether, drawing all reasonable inferences regarding the weight of the evidence and the credibility of the witnesses in favor of plaintiff, a reasonable jury could only have found for the defendants."[331] The appellate court emphasized that when offered complex expert testimony, the question is not whether "some dispute" exists regarding the validity or force of a given study.[332] Rather, the court must ask "whether it would be unreasonable for a rational jury to rely on that study to find causation by a preponderance of the evidence."[333]

The Second Circuit acknowledged complex expert testimony makes the trial court's job particularly difficult, as such evidence lends itself to multiple interpretations.[334] Much like complex antitrust evidence, complex epidemiological evidence cannot promise easy and definitive answers for the fact finder.[335] As a result, trial courts must be especially scrupulous in cases involving complex expert testimony.[336] After all, epidemiology relies heavily on "statistical probabilities and the continual possibility of confounding causal factors."[337]

Accordingly, the Second Circuit reprimanded the trial court for crossing into the province of the jury, weighing the conflicting evidence, making witness credibility determinations, and replacing the jury's judgment with its own—all in violation of both *Anderson* and *Daubert*.[338] The trial court erred in deeming plaintiff's expert epidemiological and clinical evidence insufficient to support the earlier jury verdict finding causation.[339] That court did so by making independent scientific conclusions[340] and failing to draw all reasonable inferences for the plaintiff.[341] *Daubert*, the Second Circuit explained, did not change the traditional standard for sufficiency; it almost exclusively

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[329] *Id.*
[330] *Id.* at 1139.
[331] *Id.* at 1131.
[332] *Id.* at 1133.
[333] *See id.* at 1124.
[334] *Id.*
[335] *See id.*
[336] *Id.*
[337] *Id.*
[338] *Id.*; see Anderson, 477 U.S. at 255.
[339] *Joint Eastern*, 52 F.3d at 1137.
[340] *Id.*
[341] *Id.* at 1139.

concerned admissibility.[342] Thus, *Joint Eastern* stands for the proposition that admissibility and sufficiency are separate inquiries: admissibility takes place in a *Daubert* hearing independent of the trial on the merits, while sufficiency takes place "further down the litigational road."[343] Consequently, *Joint Eastern* was properly decided. *Kochert*, on the other hand, was not.

C. *Kochert* Improperly Ignored the Distinction

In *Kochert*, the district court fell prey to the admissibility-sufficiency conundrum, either weighing or ignoring the evidence properly admitted only six weeks prior in a two-day *Daubert* hearing[344] and concluding that it lacked persuasive value.[345] On appeal, the Seventh Circuit made a similarly startling mistake, evaluating the case on its merits rather than leaving the weighing of the expert testimony to the jury.[346] Finally, the Supreme Court denied Kochert's petition for certiorari, passing on the opportunity to resolve the tension between the Court's admissibility and sufficiency trilogies.[347] In the process, Kochert was denied her day in court even though the district court deemed testimony by her experts relevant and reliable,[348] meaning it would assist the trier of fact (the relevance inquiry) and was scientifically valid and put forth by experts qualified in their respective fields (the reliability inquiry).[349]

Kochert is compelling because it presents a case in which a court granted summary judgment after admitting expert testimony.[350] Incredibly, in the years since *Daubert*, only four reported cases have featured this unusual and unlikely state of affairs.[351] Most remarkably, all four of those cases are distinguishable from this one, as they were all afflicted with a lack of expert proof on one or more essential elements of the claim.[352] In *Kochert*, on each and every element of antitrust standing the plaintiff produced admissible expert testimony that

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[342] *See id.* at 1132 ("The issue of sufficiency was not squarely before the *Daubert* Court, but Justice Blackmun's opinion did briefly address the issue . . . . The passages in *Daubert* regarding sufficiency sounded a tone of optimism about juries' abilities to sort out the veracity of competing scientific evidence.").

[343] *Id.* at 1132.

[344] *Kochert III* Cert. Pet., *supra* note 18, at 3.

[345] *Id.*

[346] *Id.*

[347] *Kochert III*, 127 S. Ct. at 1328.

[348] *See, e.g.*, Order Admitting Testimony of Seaman, *supra* note 19, at App. 37 ("[T]he Court finds that the Testimony of Dr. Bruce Seaman is sufficiently relevant and reliable to meet the evidentiary standards set forth in Daubert and [sic] Kumho Tire. Therefore, the motions by defendants . . . to exclude the testimony of Dr. Bruce Seaman are DENIED.").

[349] *Kochert III* Cert. Pet., *supra* note 18, at 19.

[350] *Id.* at 5.

[351] *Id.* at 14; *see* Barnes v. The Kerr Corp., 418 F.3d 583 (6th Cir. 2005); Morgan v. United Parcel Serv. of Am., 380 F.3d 459 (8th Cir. 2004); Bailey v. Allgas, Inc., 284 F.3d 1237 (11th Cir. 2002); Rebel Oil Co. v. Atlantic Richfield Co., 146 F.3d 1088 (9th Cir. 1998).

[352] *Kochert III* Cert. Pet., *supra* note 18, at 14.

the district court deemed material to aid the jury in deciding whether Kochert met her burden of proof.[353]

The district court denied respondents' *Daubert* motions on November 15, 2004[354] and granted summary judgment on December 29, 2004.[355] By doing so, it impliedly set forth the analytically untenable assertion that evidence that is relevant (that is, evidence that "logically advances a material aspect of the proposing party's case")[356] can somehow not be sufficient (capable of creating "a factual dispute that is material for a jury to consider in a jury case").[357] The Seventh Circuit failed to correct the error, and the Supreme Court denied certiorari,[358] creating a conflict with the Second Circuit's decision in *Joint Eastern*.[359] The contradictory outcomes in *Joint Eastern* and *Kochert* demonstrate the need to resolve this novel and problematic issue.

IV. AFTER *KOCHERT*: A MODEL STANDARD

The lessons learned from *Kochert* will play a critical role in resolving the tension between the admissibility and sufficiency trilogies. In creating a circuit split, *Kochert* illustrates that courts should err on the side of admitting expert testimony at the margins and give reasons when they deem admissible evidence that creates material questions of fact on all the elements of a claim insufficient. Finally, taken together with *Joint Eastern*, *Kochert* demonstrates that the Supreme Court should resolve the circuit split by adopting the following standard: when expert testimony is found admissible and supports all the elements of a claim, then that testimony creates a factual dispute and is material for a jury to consider,[360] and hence is sufficient to overcome a motion for summary judgment.[361]

Kochert demonstrates that, at the margins, courts should err on the side of admitting expert testimony, followed by a jury trial characterized by "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof."[362] Indeed, this is precisely what *Daubert* directed.[363]

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[353] *Id.* at 20.
[354] *See, e.g.*, Order Admitting Testimony of Seaman, *supra* note 19.
[355] Kochert v. Greater Lafayette Health Servs., Inc., 372 F. Supp. 2d 509, 520 (N.D. Ind. 2004).
[356] *Norris*, 397 F.3d at 884 n.4 (citing *Daubert*, 43 F.3d at 1315).
[357] *See Daubert*, 43 F.3d at 1315.
[358] *Kochert III*, 127 S. Ct. at 1328.
[359] *See Joint Eastern*, 52 F.3d at 1124.
[360] *Daubert*, 43 F.3d at 1315; *see also Norris*, 397 F.3d at 884 n.4 (citing *Daubert*, 43 F.3d at 1315) ("Under the relevance prong of the *Daubert* analysis, the court must ensure that the proposed expert testimony logically advances a material aspect of the case.").
[361] *See Kochert III* Cert. Pet., *supra* note 18, at 19.
[362] *Daubert*, 509 U.S. at 596.
[363] *Id.*

In *Kochert*, plaintiff went to great lengths to produce expert testimony on all the elements of antitrust standing. The trial court found all this expert testimony relevant and reliable, and thus admissible under *Daubert*.[364] First, all four experts passed *Daubert*'s relevance test: their testimony could assist the trier of fact in understanding the evidence or determining a fact at issue.[365] Second, all four experts passed *Daubert*'s reliability test: they were experts in their fields and the methodology underlying their conclusions was trustworthy.[366] But, rather than allow a jury to weigh this relevant and reliable evidence, the district court claimed this role for itself.[367] Thus, although the court rightly erred on the side of admitting the evidence, it wrongly prevented a jury trial replete with "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof."[368]

Moreover, *Kochert* demonstrates courts should give litigants reasons when deeming admissible evidence that creates material questions of fact on all the elements of a claim insufficient. This is a critical and basic task that the district and appellate courts failed to do.[369] In *Kochert*, the district court found expert testimony admissible.[370] This means, by definition, that the trial court found the evidence relevant and reliable and that it would assist the trier of fact.[371] Hence, the testimony in *Kochert* created a factual dispute.[372]

The summary judgment standard dictates, however, that a summary judgment may only be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[373] Nonetheless, the trial judge granted defendants' motion for summary judgment six weeks after admitting the expert testimony.[374] This unexpected turn of events

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[364] *See* Order Admitting Testimony of Seaman, *supra* note 19, at 46; Order Admitting Testimony of Minore, *supra* note 19, at 57; Order Admitting Testimony of Gertler, *supra* note 19, at 52; Order Admitting Testimony of Hofman, *supra* note 31, at 63.

[365] *Daubert*, 509 U.S. at 591; *Masters*, 291 F.3d at 991. Kochert had a fifth expert, Karen Williams, M.D. *Kochert III* Cert. Pet., *supra* note 18, at 9. The defendants did not subject the testimony of Williams to a *Daubert* challenge.

[366] *See Masters*, 291 F.3d at 991 ("To gauge reliability, the district judge must determine whether the expert is qualified in the relevant field and whether the methodology underlying the expert's conclusions is reliable.").

[367] *Kochert III* Cert. Pet., *supra* note 18, at 28-29.

[368] *Daubert*, 509 U.S. at 596.

[369] *Kochert III* Cert. Pet., *supra* note 18, at 4, 11.

[370] *Id*. at 19.

[371] *See* FED. R. EVID. 702 ("If scientific, technical, or specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.").

[372] *Kochert III* Cert. Pet., *supra* note 18, at 19.

[373] FED. R. CIV. P. 56(c).

[374] *Kochert I*, 372 F. Supp. 2d at 519-20.

came about because the trial court weighed the evidence and made credibility determinations, much like the trial court in *Joint Eastern*, thus invading the province of the jury.[375] The Supreme Court should demand that courts give reasons when they deem admissible evidence that creates material questions of fact on all the elements of a claim insufficient.[376] This would save time, expense, and confusion.[377]

As stated earlier, taken together with *Joint Eastern*, *Kochert* demonstrates the Supreme Court should resolve the circuit split by adopting the following standard: when expert testimony is found admissible by a preponderance of the evidence and supports all the elements of a claim, that testimony creates a factual dispute and is material for a jury to consider, and is sufficient to overcome a motion for summary judgment.[378] This is because *Daubert*'s relevance requirement is fundamentally similar to summary judgment's materiality standard: the proposed testimony must be "relevant to the task at hand" such that it "logically advances a material aspect of the proposing party's case."[379] If proffered expert testimony fails to advance a material aspect of the party's case, that testimony is not relevant in the first place.[380] Consequently, as a logical matter, if expert evidence is admitted, it should always be deemed sufficient.[381]

When judges defy logic by deeming admitted expert evidence insufficient, they should explain how they arrived at that conclusion. Otherwise, the court denies the jury its exclusive role as fact finder—a role that entails making credibility determinations, weighing the evidence, and drawing inferences from the facts.[382]

CONCLUSION

The split between the circuits demands resolution lest the morass of conflicting precedent grows broader.[383] The *Kochert* case deserves special attention because it highlights the erroneous extension of the gatekeeping

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[375] *Kochert III* Cert. Pet., *supra* note 18, at 28.

[376] *Id*. at 4, 11.

[377] Reply in Support of Petition for Writ of Certiorari, at 4, Kochert v. Greater Lafayette Health Servs., Inc., 2007 WL 244978 (U.S. Jan. 25, 2007) (No. 06-822) [hereinafter *Kochert III* Reply in Support of Cert. Pet.].

[378] *See Kochert III* Cert. Pet., *supra* note 18, at 19.

[379] *Kochert III* Reply in Support of Cert. Pet., *supra* note 377, at 7-8; *Daubert*, 43 F.3d at 1315.

[380] *Kochert III* Cert. Pet., *supra* note 18, at 18.

[381] *Id*.

[382] *Anderson*, 477 U.S. at 255 (1986); Brief and Appendix, *supra* note 3, at 23 (citing Ritchie v. Glidden Co., 242 F.3d 713, 723 (7th Cir. 2001)).

[383] Dr. Kochert has paid a heavy price for this lack of clarity in the law regarding what is required to obtain a jury trial when courts make the serious and highly consequential error of mixing the admissibility and sufficiency inquiries. *Kochert III* Cert. Pet., *supra* note 248, at 12. The procedures she has complied with in her pursuit of a jury trial include the following: "(a) surviving Fed. R. Civ. P. 12(b)(6) challenges to

duty from threshold determinations of admissibility to active weighing of that evidence, in contravention of the Supreme Court's mandate that judges make legal determinations and juries make factual determinations.[384]

The 1986 summary judgment trilogy stressed that summary judgment and judgment as a matter of law are critical screening tools aimed at creating a more efficient judicial system.[385] That efficiency function is utterly defenestrated when endless confusion and appeals proliferate. Litigants have been left to sort out the space between admissibility and sufficiency without explicit instruction from the Supreme Court.[386] In its current state, the law is unclear regarding litigants' pretrial obligations and trial courts' gatekeeping responsibilities.[387] In turn, this lack of clarity makes it more difficult for appellate courts to efficiently and effectively review the bases for the decisions of trial courts.[388]

Given this state of affairs, it seems inevitable that the *Daubert* trilogy must soon become the *Daubert* tetralogy. *Kochert* is unique, insofar as it is the first reported case in which a court granted summary judgment after admitting expert testimony on all the elements of the plaintiff's claim.[389] Once *Kochert* created a direct and bona fide conflict with *Joint Eastern*, it became evident that the latter is the preferable approach in both its reasoning and conclusion. Admissibility and sufficiency are separate determinations—one for the trial judge, the other for the jury.[390] After *Kochert*, the admissibility-sufficiency conundrum is bound to worsen, making a Supreme Court intervention inevitable. As the author of *Daubert* wrote in another context: "The signs are evident and very ominous, and a chill wind blows."[391]

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her lawsuit; (b) having to identify and disclose expert witnesses to fortify her burdens of proof consistent with prevailing law; (c) filing multi-page memoranda in opposition to Respondents' motions to strike expert testimony pursuant to *Daubert* challenges; (d) filing a memorandum of law requested by the district court as to Seventh Circuit law on *Daubert*; (e) participating in two days of hearing pursuant to *Daubert* on Respondents' motions to strike testimony; and (f) overcoming *Daubert* challenges." *Kochert III* Cert. Pet., *supra* note 18, at 12 n.5.

[384] *Id.* at 29 (citing Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998) (reinforcing a Seventh Amendment right to a jury trial)).

[385] *See* Miller, *supra* note 45, at 984 ("In 1986, the now-famous Supreme Court 'trilogy'—Matsushita Electric Industrial Co. v. Zenith Radio Corp., Anderson v. Liberty Lobby, Inc., and Celotex Corp. v. Catrett—transformed summary judgment from an infrequently granted procedural device to a powerful tool for the early resolution of litigation.").

[386] *Kochert III* Cert. Pet., *supra* note 18, at 5.

[387] *Kochert III* Reply in Support of Cert. Pet., *supra* note 377, at 4.

[388] *Id.*

[389] *Kochert III* Cert. Pet., *supra* note 18, at 5.

[390] *See Joint Eastern*, 52 F.3d at 1132.

[391] Webster v. Reproductive Health Servs., 492 U.S. 490, 560 (1989).