

IN THE COURT OF APPEALS OF GEORGIA

Case No. A26A1118

BECTON, DICKINSON AND COMPANY; and C.R. BARD, INC.,

Appellants,

v.

GARY WALKER,

Appellee.

***AMICUS BRIEF ON BEHALF OF THE PRODUCT LIABILITY
ADVISORY COUNCIL, INC., IN SUPPORT OF APPELLANTS***

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Curiae The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association of corporate members representing a broad cross-section of American and international manufacturers, including Appellant Becton, Dickinson and Company.¹ These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers and those in the supply chain. PLAC's perspective rests on the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred leading product-litigation defense attorneys are sustaining (non-voting) members of PLAC.

Since 1983, PLAC has filed more than 1,200 briefs as *amicus curiae* in both state and federal courts, including in this Court, on behalf of its members, while presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product risk management and the law governing the liability of product manufacturers and others in the supply chain. This brief is filed on behalf of PLAC and in support of

¹ PLAC's corporate members are listed at https://plac.com/web/Amicus_Program/Corporate_Membership.aspx.

Appellants Becton, Dickinson and Company and C.R. Bard, Inc. (collectively referenced as BD).

The trial court's rulings here are concerning to PLAC and its members. On general causation, the trial court did not apply the standard this Court recently adopted from the U.S. Court of Appeals for the Eleventh Circuit. And the trial court's application of "opening the door" risks chilling parties' exercise of their right to vigorously cross-examine opposing experts. The bench and bar would benefit from an opinion explaining why such rulings are reversible error.

INTRODUCTION

BD identifies five errors warranting reversal. PLAC focuses on two. Each resonates beyond this case.

First, the trial court erred by applying a relaxed standard for general-causation testimony; this Court has since established the correct standard. *See Sterigenics US LLC v. Mutz*, --- Ga. App. ---, 923 S.E.2d 176, 180–85 (Ga. Ct. App. 2025) (adopting standard of *McClain v. Metabolife International, Inc.*, 401 F.2d 1233 (11th Cir. 2005) and progeny). An expert who relies on a dose-response methodology to prove general causation must testify at what level the exposure becomes toxic. Courts across the country recognize this basic toxicological principle—"the dose makes the poison"—as the foundation of reliable, helpful expert testimony.

Here, the trial court permitted Appellee Gary Walker's general-causation witness, Dr. Salem, to opine that ethylene oxide (EtO) was toxic at any level above background exposure. This was reversible error. Consistent with its recent decision in *Mutz*, this Court should reject the trial court's ruling and reiterate that a general-causation expert relying on a dose-response methodology must offer a scientifically rigorous analysis of what dose makes the poison.

Second, the trial court erred in ruling that BD, by questioning Mr. Walker's causation expert, opened the door to highly prejudicial other-incidents evidence. For such evidence to be admissible, the proponent must show that the other incidents are substantially similar. The trial court, however, permitted Mr. Walker to offer in "rebuttal" *six lay witnesses* who merely lived near the facility and developed cancer. The "opening the door" metaphor cannot dispense with required foundation testimony for this highly prejudicial evidence.

The trial court's logic on "opening the door," if accepted, would force parties into a Hobson's choice: either forgo vigorous cross-examination of the other side's expert testimony on causation or face a flood of "rebuttal" evidence about lay witnesses' unscientific assertions that correlation equals causation. Neither outcome promotes a fair trial.

For both reasons, this Court should reject the trial court's application of the "opening the door" doctrine.

ARGUMENT

I. *Mutz* controls general causation in toxic-tort cases.

A. The dose makes the poison.

Begin with a few core principles. Georgia Rule of Evidence 702 embraces the federal *Daubert* standard. *Mutz*, 923 S.E.2d at 180–81 (citing O.C.G.A. § 24-7-702(b)). Trial courts must ensure, among other things, that expert testimony is the product of reliable scientific methods. *Id.* at 180. Jurors struggle to discern when a highly credentialed witness has done the work necessary to support the testimony offered. The trial court verifies that an expert sitting in the witness stand applies the same analytical rigor as in the laboratory. *Kumho Tire Co., Ltd. v. Camichael*, 526 U.S. 137, 152 (1999).

O.C.G.A. § 24-7-702(b) was amended in 2022 to correspond with the “federal standard of admissibility of expert testimony articulated in *Daubert* and its progeny.” *Evans v. State*, 921 S.E.2d 310, 315 n.3 (Ga. 2025). In 1993, when *Daubert* was decided, Federal Rule of Evidence 702 was about half its current length. The original 48 words remain mostly intact and are reflected in paragraph (b)(1) of O.C.G.A. § 24-7-702, much as they appear in the current federal rule. More recent amendments have added three explicit criteria: expert testimony must be “based upon sufficient facts or data” and “the product of reliable principles and methods,” and the expert’s opinion reflects a reliable application of the principles

and methods to the facts of the case. O.C.G.A. § 24-7-702(b)(2), (3), & (4). These subparts are connected with the conjunctive word “and,” so they must be applied together. *See Hankla v. Postell*, 293 Ga. 692, 696 (2013) (construing O.C.G.A. § 24-7-702(c)(2)).

Toxicologists’ testimony on general causation follows the principles articulated in O.C.G.A. § 24-7-702(b) and *Daubert*. The foundation of reliable toxicology testimony is what scientists have known since the days of Shakespeare: “the dose makes the poison.” Fed. Jud. Ctr., Reference Manual on Sci. Evid. 603 n.160 (3d ed. 2011) (attributing this insight to sixteenth-century medical scholar Paracelsus).² This is true even of typically benign compounds such as water and salt. “This relationship is the hallmark of basic toxicology because all substances potentially can be toxic” at a high-enough dose, while “[m]ost low dose exposures—even for many years—will have no consequences at all.” *In re Deepwater Horizon BELO Cases*, 119 F.4th 937, 941 (11th Cir. 2024) (brackets, internal quotation marks, and citations omitted).

This “dose-response relationship” is the “basic methodology that scientists use to determine causation.” *McClain*, 401 F.3d at 1242; *see Mutz*, 923 S.E.2d at 184. Courts across the country recognize that “dose matters.” *In re Lipitor*, 892

² This manual, a public record, is available at <https://www.fjc.gov/sites/default/files/materials/21/SciMan3D01.pdf>.

F.3d 624, 639 (4th Cir. 2018) (quoting *In re Bextra & Celebrex*, 524 F. Supp. 2d 1166, 1174 (N.D. Cal. 2007)); accord, e.g., *Helena Chem. Co. v. Cox*, 664 S.W.3d 66, 79 (Tex. 2023). True, the Eleventh Circuit holds that the dose-response relationship is not the *sole* reliable way to prove general causation. See *In re Deepwater Horizon*, 119 F.4th at 941. But any expert testimony purporting to show general causation must satisfy Rule 702 and the *Daubert* standard. See *Mutz*, 923 S.E.2d at 181–82; see also *In re Deepwater Horizon*, 119 F.4th at 942–47 (affirming general-causation experts’ exclusion under *Daubert* standard). And when an expert opines that a dose-response relationship supports general causation, the “expert’s failure to prove how much of the alleged toxin must be used for how long to increase the risk” warrants exclusion. *In re Deepwater Horizon*, 119 F.4th at 945 (internal quotation marks and citation omitted).

Dose also matters for industry. In manufacturing safe, useful products, companies sometimes employ substances that are not hazardous at the levels used, even if potentially hazardous at higher concentrations. The dose is the appropriate focus for analyzing toxicity.

B. The trial court repeated the error this Court rejected in *Mutz*.

It is rare for an intervening appellate decision to be this closely related to an appeal. *Mutz*, as here, involved eight plaintiffs who claimed their cancer or birth defects were caused by exposure to EtO released from a medical-sterilization

facility. 923 S.E.2d at 179. The *Mutz* plaintiffs hired Dr. Salem, the same expert retained by Mr. Walker, to offer a general-causation opinion: “EtO ‘exposure above background increases the risk of cancer’ in a manner ‘proportional to dose and duration,’ and ‘any exposure of ETO above background increases the risk of chromosomal aberrations and birth defects in a dose- and duration-dependent manner.’” *Id.* at 183 (brackets omitted). The *Mutz* defendant, in moving to exclude that testimony, contended that *McClain* governed. *Id.* The parties in *Mutz* disputed “whether the plaintiffs’ experts had to identify a threshold level or dose at which EtO is capable of causing the cancers and birth defects suffered by the plaintiffs.” *Id.* And, as here, the trial court admitted that testimony. *Id.*

This Court vacated and remanded. *Id.* at 185. Agreeing with the defendant, this Court held that the standard articulated in *McClain* governs general-causation testimony that relies on dose-response methodology. *Id.* The trial court erred by not “pay[ing] careful attention to the experts’ testimony about the dose-response relationship and whether the experts have identified a harmful level at which the [chemical] could cause the harms alleged.” *Id.* at 185.

As BD explains, the trial court’s order admitting Dr. Salem’s testimony here cannot survive *Mutz*. BD Br. at 27–29. Like the trial court in *Mutz*, the trial court here did not rigorously apply *McClain*’s two-part categorization. *See id.*; *Mutz*, 923 S.E.2d at 185. Nor, despite BD’s urging, did the trial court follow *McClain*’s

instruction that “experts who employ a dose-response methodology to prove general causation must identify a harmful level at which the toxin could cause the harm alleged.” *Mutz*, 923 S.E.2d at 185 (citing *McClain*, 401 F.3d at 1243); *see* BD Br. at 15, 28–29. To the contrary, the trial court permitted Dr. Salem to opine that *any* exposure to EtO above background causes cancer. *See Mutz*, 923 S.E.2d at 183 (discussing Dr. Salem’s general-causation testimony); BD Br. at 29 (discussing trial court’s ruling). Indeed, the trial court relied on one of the same cases (*Fouch v. Bicknell Supply Co.*, 326 Ga. App. 863 (2014)) that this Court found “misplaced” in *Mutz*. *See* 923 S.E.2d at 184; BD Br. at 29.

Mutz and its application of *McClain* control. Just as in *Mutz*, the trial court’s order admitting Dr. Salem’s general-causation testimony should be reversed.

C. *Mutz* applies broadly across all toxic-tort cases.

The similarity between *Mutz* and this case, while striking, should not mask *Mutz*’s proper scope. The bench and bar will benefit from this Court’s confirmation that *Mutz* (and its application of *McClain*) is not limited to EtO sterilization cases. *Mutz* is the law across toxic-tort cases.

To be clear, *Mutz* acknowledges its breadth. The issue in *Mutz*, as this Court stated it, was the lack of Georgia appellate precedent applying Rule 702’s “reliability requirement to opinions regarding general causation in toxic tort cases.” *Mutz*, 923 S.E.2d at 181. This Court sought guidance from *McClain*, which

involved a drug, not a chemical diffused into the environment—thus holding that the general-causation analysis this Court adopted is not limited to particular chemicals or methods of exposure. *See id.* at 181–82. This Court likewise recognized that Eleventh Circuit decisions applying *McClain* speak of the “dose-response relationship” as it relates to “toxic tort cases.” *Id.* at 182 (citing *In re Deepwater Horizon*, 119 F.4th at 945). Indeed, *In re Deepwater Horizon*, involving economic loss from an oil spill, recognizes that *McClain*’s holding concerns what a “toxic-tort plaintiff” must prove when offering a dose-response relationship to prove general causation. 119 F.4th at 945.

Given the significant factual overlap between *Mutz* and this case, however, PLAC anticipates attempts to persuade trial courts that the rule adopted in *Mutz* is limited to its factual context. It is not. Putting that misreading to rest now will equip trial courts to evaluate general-causation evidence in toxic-tort cases. Doing so will reduce costs and burdens for the judicial system.

This is also important to ensure fairness to all parties. *Mutz* is the law. But if a trial court were to misread *Mutz* as limited to a particular factual scenario, a trial—and the attendant settlement pressures, particularly following any adverse verdict—would ensue before an appeal could correct that legal error. This would cause substantial and undue prejudice. Nipping this issue in the bud here will prevent such unfairness.

II. “Opening the door” cannot justify the trial court’s admission of other-incidents evidence.

“Opening the door” is not “Open, Sesame.” It is a limited metaphor that exists amid other requirements to admit evidence, not a magical incantation that dispenses with those requirements. Nor should a party, whether plaintiff or defendant, face the stark, fundamentally unfair choice between undermining an opponent’s case on causation and keeping the metaphorical “door” shut.

The trial court here erred on both counts. It overread the “opening the door” metaphor as admitting highly prejudicial other-incidents evidence without the foundation that Georgia law requires. And its rationale would put parties to a Hobson’s choice on cross-examining opposing causation experts. Its reasoning should be rejected.

A. Mr. Walker had to lay the foundation for other-incidents evidence.

The Georgia Supreme Court has “cautioned” courts against expansive application of the “opening the door” “metaphor.” *Strother v. State*, 305 Ga. 838, 845 n.4 (2019). “[O]pening the door” is “not a freestanding evidence rule allowing a party to present to the jury otherwise inadmissible evidence.” *Id.* This Court recognizes the same. As it recently reiterated: “Suffice it to say, litigants and trial courts should take care to identify the *precise* basis in our Evidence Code for asserting that one side has ‘opened the door’ to allow the admission of otherwise

inadmissible evidence.” *Rubio v. State*, 919 S.E.2d 838, 840–41 n.2 (Ga. Ct. App. 2025) (citing *Smith v. State*, 299 Ga. 424, 430 n.5 (2016)).

A tried-and-true application is when a criminal defendant offers evidence that puts his character at issue. *See, e.g., Vickers v. State*, 352 Ga. App. 601, 603 (2019) (physical precedent only). Rule 404(a) generally excludes proof of a party’s character. *See* O.C.G.A. § 24-4-404(a). But Rule 404(a)(1) permits a criminal defendant to offer evidence of his or her character, which then “opens the door” for the prosecution to rebut the evidence. O.C.G.A. § 24-4-404(a)(1).

But the “opening the door” metaphor is not a justification for admitting evidence despite a lack of foundation. There is no basis in the Evidence Code, let alone a “*precise*” one, for dispensing with otherwise-required foundation testimony. *See Rubio*, 919 S.E.2d at 840–41 n.2. Rather, as with the criminal defendant’s character evidence, the metaphorical “door” that swings open is *relevance*. To continue the example of character evidence, the prosecution may offer evidence of the defendant’s character because it became relevant. But the prosecution still must satisfy the Evidence Code’s requirements for admitting that evidence. The prosecution cannot, for example, prove the defendant’s character through inadmissible hearsay or unauthenticated writings.

Although other-incidents evidence can be *relevant* to causation, as with character evidence, its strong potential for unfair prejudice requires judicial

scrutiny. “In order to limit the substantial prejudice that might inure to a party should these past occurrences or accidents be admitted into evidence, courts have developed limitations governing the admissibility of such evidence, including the ‘substantial similarity doctrine.’” *Heath v. Suzuki Motor Corp.*, 126 F.3d 1391, 1396 (11th Cir. 1997) (citation omitted). “This doctrine applies to protect parties against the admission of unfairly prejudicial evidence, evidence which, because it is not substantially similar to the accident or incident at issue, is apt to confuse or mislead the jury.” *Id.*

Georgia follows the rule of substantial similarity. *See* BD Br. at 31–33 (collecting cases); *see, e.g., Suzuki Motor of Am., Inc. v. Johns*, 351 Ga. App. 186, 196 (2019). The evidence’s *proponent* must show that the other occurrences are substantially similar to the claim at issue. *Cooper Tire & Rubber Co. v. Crosby*, 273 Ga. 454, 455 (2001). “The showing of substantial similarity *must include* a showing of similarity as to causation.” *Id.* (emphasis added). The proponent cannot merely identify “the barest hint of possible similarity between the prior occurrence and the occurrence at issue in litigation.” *Id.* Likewise, the rule of substantial similarity is not satisfied where “a jury would simply be left to guess” about the prior incidents’ relevance. *Forest Cove Apartments, LLC v. Wilson*, 333 Ga. App. 731, 737 (2015). If the proponent fails to show substantial similarity, “the evidence is irrelevant as a matter of law.” *Id.* at 736 (citation omitted).

Here, the trial court reversibly erred by admitting Mr. Walker's other-incidents evidence based on "opening the door." *See* BD Br. at 36 (discussing harm caused by error). If the witnesses' testimony satisfied the requirements for admissibility, they surely would have been presented in Mr. Walker's case-in-chief. They were not. Rather, the trial court permitted them to testify in "rebuttal" based on BD's cross-examination of one of Mr. Walker's expert witnesses. *See* BD Br. at 10–11. But that examination, by definition, did not and could not have dispensed with Mr. Walker's threshold burden to show substantial similarity. That burden comes from the Evidence Code and binding Georgia precedent. *See, e.g., Forest Cove Apartments*, 331 Ga. App. at 737. In other words, whatever new *relevance* the trial court found the other-incidents evidence had, that could not dispense with the threshold requirement of substantial similarity. This would be no different than the prosecution proving the defendant's character through inadmissible hearsay.

Mr. Walker did not carry his burden to show substantial similarity. Far from showing "similarity as to causation," *Cooper Tire*, 273 Ga. at 456, Mr. Walker offered no evidence that his six "rebuttal" witnesses had any particular amount of EtO exposure, or that such an exposure had caused their various cancers, *see* BD Br. at 9–11. To the contrary, Mr. Walker's briefing below confirms the lay witnesses' testimony was mere correlation or association: the witnesses lived

“within a similar radius” to the relevant facility “during overlapping periods of time, while breathing the same . . . air” he did. R31:19949. Causation requires scientifically rigorous evidence, not an association that could be nothing “more than a coincidence.” *In re Deepwater Horizon*, 119 F.4th at 942.

This is precisely the problem. Mr. Walker’s failure to show substantial similarity “left [the jury] to guess” about whether EtO exposure (at some unproven level) caused the six witnesses’ various cancers, or whether any number of other factors might have caused those injuries. *Forest Cove Apartments*, 333 Ga. App. at 737. Incanting “opening the door” cannot magically cure that failure.

An opinion on this issue will help explain concretely the principle that the Georgia Supreme Court and this Court have emphasized in the abstract: “opening the door” is not a freestanding rule of admission. It instead requires the proponent to show precisely how the evidence is admissible. *See Strother*, 305 Ga. at 845 n.4 (2019); *Rubio*, 919 S.E.2d at 840–41 n.2. The bench and bar will benefit from an opinion explaining how that limit applies to particular facts.

B. A party should not have to choose between impeaching an opposing causation expert and otherwise-inadmissible evidence.

The trial court ruled that BD’s questioning of Mr. Walker’s causation expert’s testimony “opened the door” to the six other-incidents witnesses who, absent that questioning, never would have testified. *See* BD Br. at 10–11, 34 (discussing trial court’s ruling). That expansive rationale should be rejected.

The plaintiff has the burden to prove causation, and a defendant has every right to vigorously question a plaintiff's proof. This plainly includes cross-examining the plaintiff's expert testimony on causation. So much so that (for expert testimony that satisfies Rule 702 and the *Daubert* standard) "vigorous cross-examination" and "presentation of contrary evidence" are the hallmarks of the "adversary system." *Emory Univ. v. Wilcox*, 355 Ga. App. 542, 544 (2020) (quoting *Quiet Tech. DC-8 v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1341 (11th Cir. 2003)).

The trial court's ruling, however, puts parties to a Hobson's choice: either forgo the "vigorous cross-examination" of the opposing expert that helps the jury understand the opinions' limits, *id.* (citation omitted), or risk "opening the door" to highly prejudicial evidence offered without foundation. That rationale, left uncorrected by this Court, risks a substantial chilling effect. Parties would have to weigh the benefits of vigorous cross-examination on causation opinions against the risk of the trial court permitting one or more—in this case, *six*—witnesses in "rebuttal" to testify about nothing more than a mere association. The result would either be jurors hearing less vigorous examination of experts or more unscientific lay testimony that courts recognize is "apt to confuse or mislead the jury." *Heath*, 126 F.3d at 1396. Neither outcome serves the truth-finding function of trial, and both create substantial unfair prejudice to the party opposing the evidence.

CONCLUSION

This Court should grant BD's requested relief in an opinion that rejects the trial court's rulings on general causation and "opening the door."

This submission does not exceed the word count limit imposed by Rule 24.

Respectfully submitted this 12th day of February, 2026.

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