No. 14-DA-18

DISTRICT OF COLUMBIA COURT OF APPEALS

MOTOROLA, INC., et al.,

Applicants/Petitioners,

v.

MICHAEL PATRICK MURRAY, et al.,
Respondents.

APPEAL FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BUSINESS COALITION AMICI CURIAE BRIEF IN SUPPORT OF COMBINED APPLICATION FOR PERMISSION TO APPEAL ORDER ON EXPERT WITNESS ADMISSIBILITY AND PETITION FOR HEARING EN BANC

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I. INTRODUCTION AND STATEMENT OF INTEREST

Amici Curiae, the Chamber of Commerce of the United States of America, the International Association of Defense Counsel, the National Association of Manufacturers, and the National Federation of Independent Business submit this brief urging the Court to grant the Combined Application for Permission to Appeal Order on Expert Witness Admissibility and Petition for Hearing En Banc.

As explained in individualized detail in Appendix A, the amici have a significant interest in the issue before this Court: the standards governing the admissibility of expert testimony in District of Columbia courts. The District of Columbia is one of a vanishingly small number of jurisdictions that continues to follow a 1923 federal circuit court opinion on admissibility criteria for expert testimony. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).[1] The *Frye* court in 1923 could not have anticipated the nature and extent of expert testimony that now defines the modern practice of civil and criminal litigation. Today, "[s]cientific issues permeate the law,"[2] and the proper treatment of science in the courtroom is central to the fair adjudication of legal disputes. As the trial court below recognized, the continued adherence to the *Frye* rule in the District of Columbia – rather than the modern *Daubert* rule, *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993), followed in federal court and by forty-five States (in whole or in part) – is incompatible with core principles of justice and litigation management routinely espoused by this Court.

For the amici and their members, who are frequently the targets of litigation premised on expert testimony, the ability of trial courts to serve as gatekeepers to exclude unreliable expert

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[1] *See* Combined Application, Ex. C.

[2] Hon. Stephen Breyer, *Introduction*, in Federal Judicial Center, Reference Manual on Scientific Evidence 3 (3d ed. 2011).

evidence can help prevent excessive litigation costs and coercive settlements that are not warranted based on the scientific merits of plaintiffs' allegations. This case cleanly presents the opportunity to address this issue of great importance and warrants review by this Court.

II. ARGUMENT

Judge Weisberg's opinion below aptly lays out the dilemma confronting District of Columbia courts in their review of scientifically unreliable expert testimony. Unlike the federal courts and the vast majority of State courts that have adopted *Daubert*, District of Columbia courts currently lack the authority to ensure that scientific evidence presented to juries is reliable and grounded not only in sound methodology but also in the sound application of that methodology. The present case illustrates the problem. Because *Frye* is an antiquated tool for shielding jurors from expert testimony based on "bad science," Judge Weisberg was compelled to admit expert evidence that he concluded was unreliable and inadmissible under *Daubert*. The Court should grant review of the question certified by the trial court to determine whether District of Columbia judges should have the same gatekeeping authority exercised by their judicial colleagues in federal and State courts across the country.

A. Adoption of *Daubert* in Place of *Frye* Would Be Consistent With District of Columbia Law.

In opposing the motion for certification below, plaintiffs sought to portray the issue before the Court as a choice between District of Columbia and federal law. It is not. It is a choice between the past and the present. More specifically, it is a choice between two federal evidentiary standards: the first adopted more than ninety years ago by the D.C. Circuit in *Frye* and the second adopted for the modern litigation environment by the Supreme Court of the United States in *Daubert*.

The issues before the courts in *Frye* and *Daubert* highlight the vast historical chasm between the expert issues facing the courts in the 1920s and today. In *Frye*, the D.C. Circuit addressed the admissibility of a "systolic blood pressure deception test." 293 F. at 1013. The theory underlying the proposed expert evidence was that blood pressure increases when an individual lies and that honesty accordingly could be determined through a simple monitoring of blood pressure. The scientific analysis in applying this methodology – to the extent there was one – lay simply in measuring whether a subject's blood pressure rose and, if so, by what extent. In this historical context, *Frye*'s sole focus on the general acceptance of the methodology was understandable.

In sharp contrast, *Daubert* – like the present case – addressed causation testimony based upon sophisticated epidemiologic, toxicological and "in vitro" studies of a type that did not even exist in the 1920s. 509 U.S. at 583. *Joiner* addressed similar testimony. *See Gen. Electric v. Joiner*, 522 U.S. 136, 144 (1997). In crafting the modern rule of expert admissibility, the Supreme Court accordingly was informed by the far more challenging issues posed by expert testimony in today's courtrooms.

This Court also has rejected plaintiffs' suggestion that it should disregard federal evidentiary rules. To the contrary, the Court has held that it "will look to [federal evidentiary rules] for guidance."[3] In addition, "this [C]ourt has looked to the principles underlying the federal rules of evidence concerning expert testimony."[4] The Court's ruling in *Dyas* on the

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[3] *Smith v. United States*, 26 A.3d 248, 260 (D.C. 2011) (quoting *Goon v. Gee Kung Tong, Inc.*, 544 A.2d 277, 280 n. 9 (D.C. 1988)).

[4] *Eason v. United States*, 704 A.2d 284, 285 n.3 (D.C. 1997) (*en banc*).

admissibility of expert testimony relied on the then-existing federal standard.[5] And over the years, the Court has adopted much of Article VII of the Federal Rules of Evidence covering opinion and expert testimony.[6]

In sum, the District of Columbia is well positioned to take the next step and join the more than forty States that have adopted *Daubert* and the standards set forth in Federal Rule of Evidence 702 as proper guides for expert admissibility.

B. Adoption of *Daubert* Would Enable District of Columbia Courts to Serve as Gatekeepers Against Unreliable Expert Testimony.

It has been more than a dozen years since this Court noted that *Frye* "has been called 'an antiquated standard.'"[7] In the intervening thirteen years, numerous States have elected to update their own evidentiary rules to adopt *Daubert* or a similar standard.[8] This case presents the Court with the opportunity to join those sister jurisdictions – as well as the large majority of other States that already followed some version of *Daubert* – in adopting the modern standard of expert admissibility.[9]

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[5] *Dyas v. United States*, 376 A.2d 827, 831 (D.C. 1977) (citing to *Jenkins v. United States*, 307 F.2d 637 (D.C. Cir. 1962) and *United States v. Amaral*, 488 F.2d 1148 (9th Cir. 1973)).

[6] *See King v. United States*, 74 A.3d 678, 681 n.12 (D.C. 2013) (FRE 701); *Melton*, 597 A.2d at 901 (FRE 703); *Clifford v. United States*, 532 A.2d 628, 633 (D.C. 1987) (FRE 705); *Steele v. D.C. Tiger Market*, 854 A.2d 175, 181 (D.C. 2004) (FRE 704(a)); *see also Johnson v. District of Columbia*, 655 A.2d 316, 318 (D.C. 1995) (FRE 615 as applied to expert witnesses). *But see Gaines v. United States*, 994 A.2d 391, 402-03 (D.C. 2010) (rejecting FRE 704(b)).

[7] *Drevenak v. Abendschein*, 773 A.2d 396, 418 n.32 (D.C. 2001) (citing *Taylor v. United States*, 661 A.2d 636, 651-52 (D.C. 1995) (Newman J., dissenting)).

[8] *See generally*, Combined Application, Ex. C (state-by-state listing). Over the past sixteen months alone, three more states have moved to *Daubert*. *See State v. Slazar-Mercado*, 325 P.3d 996 (Ariz. 2014); Fla. Evid. Code § 90.702 (as amended effective July 1, 2013); Kansas Senate Bill 311 (effective July 1, 2014).

[9] *Cf. Pettus v. United States*, 37 A.3d 213, 217 n.4 (D.C. 2012) (noting that '[n]either party asks us to depart from the *Frye* test … in favor of *Daubert*").

The experience of federal courts and the *Daubert* State courts provides strong testament to the advantages of using some version of *Daubert* over *Frye* to screen expert testimony. Federal courts have recognized that "[t]he *Daubert* trilogy, in shifting the focus to the kind of empirically supported, rationally explained reasoning required in science, has greatly improved the quality of the evidence upon which juries base their verdicts."[10] For State courts that have adopted some version of *Daubert*, the experience has been similar. The Nebraska Supreme Court, for example, has described the *Daubert* framework as "a more effective means of excluding unreliable expert testimony than is the *Frye* test."[11] That is because, according to the Connecticut Supreme Court, "*Daubert*'s focus on scientific validity properly directs trial judges to the core issue that they should address as gatekeepers of scientific evidence. ... [S]cientific evidence is likely neither relevant nor helpful to the fact finder if it does not meet some minimum standard of validity."[12]

In addition to improving the quality of evidence presented to juries, "adopting *Daubert*" has given State courts access to an enormous well of precedent "for guidance on almost any likely set of facts."[13] In the present case, for example, Judge Weisberg had to assess the admissibility of expert causation testimony based upon epidemiology, which he concluded *Frye* was ill-suited to address. *See* Mem. Op. & Order on Witness Admissibility ("Order") at 28 (Ex. B to Combined Application). Unfortunately, because no D.C. court has considered the admissibility of epidemiologic-based expert testimony since the pre-*Daubert Oxendine* case in

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[10] *Rider v. Sandoz Pharm. Corp.*, 295 F.3d 1194, 1197 (11th Cir. 2002).

[11] *Schafersman v. Agland Coop.*, 631 N.W.2d 862, 873 (Neb. 2001).

[12] *State v. Porter*, 698 A.2d 739, 752 (Conn. 1997).

[13] *Scientific Evidence in the State Courts: Daubert and the Problem of Outcomes*, 44 No. 4 Judges' J. 6, 7 (2005).

the 1980s, the District of Columbia case law provides scant guidance on how to assess such evidence. In sharp contrast, federal case law assessing the admissibility of epidemiologic-based evidence is legion.[14] Thus, abandoning the antiquated *Frye* test and embracing *Daubert* would make the judicial task easier, by tapping into the wealth of analyses from other jurisdictions that apply *Daubert*.

Indeed, *Daubert* and its Supreme Court progeny provide trial courts with a clear roadmap by which to evaluate the reliability of expert testimony. In *Daubert*, the Supreme Court held that the subject of an expert's testimony must be "scientific knowledge" which "implies a grounding in the methods and procedures of science." 509 U.S. at 589-90. The Supreme Court explained that "the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of scientific reliability," which the Supreme Court further defined as "trustworthiness." *Id.* at 590 & n.9. And "in order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method" and "must be supported by appropriate validation." *Id.* at 590. Thus, under *Daubert*, litigants can be assured that "in a case involving scientific evidence, *evidentiary reliability* will be based upon *scientific validity*." *Id.* at 590 n.9 (emphasis in original).[15] *Daubert* accordingly provides a framework for District of Columbia courts to evaluate the admissibility of proffered expert testimony.

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[14] *See, e.g., Joiner*, 522 U.S. at 146 (excluding expert testimony based on epidemiology that was not statistically significant and subject to confounding); *Rider*, 295 F.3d at 1198 (explaining that epidemiologic evidence is "generally considered to be the best evidence of causation in toxic tort actions"); *Conde v. Velsicol Chem. Corp.*, 24 F.3d 809, 813-14 (6th Cir. 1994) (excluding expert testimony that failed to properly consider contrary epidemiology); *Arias v. DynCorp.*, 928 F. Supp. 2d 10, 24-25 (D.D.C. 2013) (granting summary judgment after excluding expert causation testimony based on cherry-picked epidemiologic literature), *aff'd* 752 F.3d 1011 (D.C. Cir. 2014); *Perry v. Novartis Pharm. Corp.*, 564 F. Supp. 2d 452, 465 (E.D. Pa. 2008) (excluding expert testimony based upon scientifically unsound assessment of epidemiologic evidence).

[15] *See also Joiner*, 522 U.S. at 146 ("[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to the existing data

Furthermore, the *Daubert* framework fits well with this Court's description of the judicial role in policing the admissibility of expert testimony. The Court already has recognized that trial courts should "function as the gatekeepers for expert testimony,"[16] and that trial courts "may not abdicate [their] independent responsibilities to decide if the bases [for expert testimony] meet minimum standards of reliability as a condition of admissibility."[17] The Court further has explained that "because expert or scientific testimony possesses an 'aura of special reliability and trustworthiness,' the proffer of such testimony must be carefully scrutinized."[18] Indeed, "[b]ecause of the authoritative quality which surrounds expert opinion, courts must reject testimony which might be given undue deference by jurors and which could thereby usurp the truthseeking function of the jury."[19] And the Court also has recognized the importance of the scientific reliability of expert testimony as an essential factor in the search for truth, pointing to the need to ensure "scientific reliability – to yielding consistently accurate and confirmable results."[20] The Court has stated that "there is good reason for courts to take steps to assure that reliable [expert] opinions are given" and noted that "[t]his is particularly important where the

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only by the *ipse dixit* of the expert."); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999) (directing that trial courts, as gatekeepers must, "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of the expert in the relevant field.").

[16] *Jung v. George Washington Univ.*, 875 A.2d 95, 104 (D.C. 2005); *see also Ventura v. United States*, 927 A.2d 1090, 1101 n.13 (D.C. 2007) (citing to trial court's "traditional discretion as the gatekeeper for admissible [scientific] evidence").

[17] *In re Melton*, 597 A.2d 892, 903 (D.C. 1991) (citation omitted).

[18] *Ibn-Tamas v. United States*, 407 A.2d 626, 632 (D.C. 1979); *see also Middleton v. United States*, 401 A.2d 109, 131 n.45 (D.C. 1976) (pointing to "the possible dominance of the jury by the expert witnesses" as a "source of potential prejudice").

[19] *Smith v. United States*, 389 A.2d 1356, 1359 (D.C. 1978).

[20] *Pettus v. United States*, 37 A.3d 213, 228 (D.C. 2012).

causation element is unclear."[21] Finally, the Court has stated that "expert testimony may be excluded when the expert is unable to show a reliable basis for their theory."[22]

As sister jurisdictions have observed, *Frye* is inadequate for the achievement of these judicial functions. *Frye* is concerned solely with whether the expert cited a "generally accepted" methodology in reaching an opinion. The expert's application (or misapplication) of that methodology is not part of the *Frye* inquiry, even if the expert grossly departs from scientific procedures necessary to reach a reliable opinion that could properly assist the jury. Thus, as the Supreme Court of Alaska has noted, "*Frye* is potentially capricious because it excludes scientifically reliable evidence that is not generally accepted, and admits scientifically unreliable evidence which, although generally accepted, cannot meet rigorous scientific scrutiny."[23] Likewise, the Mississippi Supreme Court has noted that "the *Frye* test can result in the exclusion of relevant evidence or the admission of unreliable evidence."[24] Indeed, the present case is yet another compelling example of *Frye*'s inadequacies. As Judge Weisberg explained, by focusing exclusively on the acceptance of a methodology rather than the reliability of its application in a given case, "under *Frye*, as applied in this jurisdiction, even if a new methodology produces 'good science,' it will usually be excluded, but if an accepted methodology produces 'bad science,' it is likely to be admitted." Order at 26.

Judge Weisberg accordingly believed he was compelled to admit the proffered expert testimony because his gatekeeping responsibility was sharply circumscribed by *Frye*. "The *Frye*

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[21] *Sponaugle v. Pre-Term, Inc.*, 411 A.2d 366, 368 (D.C. 1980).

[22] *Haidak v. Corso*, 841 A.2d 316, 327 (D.C. 2004) (citing *Hollander v. Sandoz Pharm. Corp.*, 289 F.3d 1193, 1208 (10th Cir. 2002)).

[23] *State v. Coon*, 974 P.2d 386, 393-94 (Alaska 1999).

[24] *Mississippi Transp. Comm'n v. McLemore*, 863 So.2d 31, 39 (Miss. 2003).

test does not ask – or even permit – the court to ascertain [the] scientific validity" of an expert's opinion. Order at 19. Judge Weisberg concluded, "[a]t least where the science is fraught with doubt as inferences of causation in epidemiology can be, *Frye* does not seem like the best way to insure a just result." *Id.* at 28.

It is vitally important for the Court to accept review so that it can address the proper standard of expert admissibility in the District of Columbia. The present case – with a fully-developed expert evidentiary record – is an ideal vehicle to do so.

C. Adoption of *Daubert* Would Create a Level Playing Field for District of Columbia Businesses.

The current inability of District of Columbia courts to serve as gatekeepers against scientifically unreliable testimony places D.C. businesses at a significant disadvantage in comparison to businesses in the vast majority of other States that have adopted *Daubert*. Purported expert testimony often is the necessary linchpin for tort claims seeking sizable monetary damages. Under *Daubert*, business defendants have the assurance that such claims can proceed only if grounded in sound science. Without such protection, however, business owners may see no option but to settle rather than taking their chances with a jury, even when there are real doubts about the science involved. *See* Margaret A. Berger, *The Admissibility of Expert Testimony*, in Federal Judicial Center, Reference Manual on Scientific Evidence 19 (3d ed. 2011) ("[A]n inability by the defendant to exclude plaintiffs' experts undoubtedly affects the willingness of the defendant to negotiate a settlement.").

For D.C. businesses – and for businesses considering whether to locate in the District – the risk of unwarranted tort liability and litigation expense based upon speculative science is demonstrable. As set forth in the Application, for example, the District of Columbia court's inability to screen out speculative science regarding the drug Bendectin resulted in an expensive

and prolonged litigation battle that stands in stark contrast to the experience in other jurisdictions, where Bendectin plaintiff experts' testimony was unanimously excluded.[25] The present case sends a similarly clear signal. As Judge Weisberg noted, "no American court has found that cell phones can cause brain tumors," Order at 5, and based upon his analysis as well, plaintiffs' claims here likewise "would almost certainly be excluded under *Daubert*." *Id.* at 25; *see also* Order Amending Aug. 8, 2014, Mem. Op. & Order To Include Certification For Interlocutory Appeal at 2 ("If the adoption of a new standard results in the exclusion of Plaintiffs' general causation experts, Plaintiffs do not have a case.") (Ex. A to Combined Application). Under *Frye*, however, Judge Weisberg concluded that he lacked authority to exclude plaintiffs' expert's unreliable testimony. If the testimony here is admissible, then other similarly meritless cases could flock to the District's courts.

Small business owners are particularly dependent on a proper standard of expert admissibility in the District of Columbia courts.[26] Lawsuits involving large corporations are relatively more likely to raise issues of federal law or involve parties in different States, and, in such cases, defendants can rely on a federal court to screen out frivolous lawsuits based upon speculative science. *See, e.g., Arias*, 928 F. Supp. 2d at 24-25. But small businesses with primarily local operations must look to the District of Columbia courts for such protection.

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[25] *See Raynor v. Merrell Pharm. Inc.*, 104 F.3d 1371, 1376 (D.C. Cir. 1997).

[26] While less likely to face mass tort claims, small businesses may be confronted with expert witness testimony in all manner of personal injury, property damage and business disputes. *See, e.g., Samaan v. St. Joseph Hosp.*, 670 F.3d 21 (1st Cir. 2012) (excluding expert testimony in medical malpractice claim against hospital); *Jazairi v. Royal Oaks Apt. Assoc.*, 217 Fed. Appx. 895 (11th Cir. 2007) (excluding expert testimony that mold in apartment caused injury); *Brady v. Elevator Specialists, Inc.*, 653 S.E.2d 59 (Ga. App. 2007) (excluding expert testimony that company failed to adequately maintain elevator); *Bailey Lumber & Supply Co. v. Robinson*, 98 So.3d 986 (Miss. 2012) (excluding expert testimony in slip-and-fall case, reversing $1 million judgment).

Moreover, for a small business, the costs of defending a questionable lawsuit through trial can be ruinous. The costs of tort litigation on small businesses are staggering. The tort liability price tag for small businesses in 2008 alone was $105.4 billion.[27] Small business owners also do not have in-house counsel to handle litigation and, in many cases, lack both the resources needed to hire an attorney and the time and energy required to fight a lawsuit. Thus, even if a small business defendant is convinced that a plaintiff's expert claims are frivolous, it may have no choice but to settle.

It is for these reasons that business groups – and, in particular, small business groups – across the country have pressed for uniform adoption of the *Daubert* standard.[28] This case provides the Court an opportunity to confront this issue and adopt a standard for expert admissibility in District of Columbia courts that provides D.C. businesses with fair and accurate determinations of legal liability based upon sound scientific testimony. The application for review should be granted.

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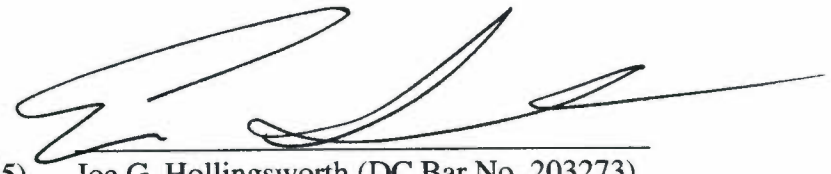
[27] *Tort Liability Costs for Small Businesses*, U.S. Chamber Institute for Legal Reform, at 11 (2010). http://www.instituteforlegalreform.com/resource/tort-liability-costs-for-small-business

[28] *See, e.g.*, Coalition in Support of the *Daubert* Standard (37 national and local associations supported adoption of *Daubert* in Arizona) https://www.phoenixchamber.com/sites/default/files/documents/legdocs/Daubert%20Fact%20Sheet%20(2-5-10).pdf

III. CONCLUSION

For the foregoing reasons, amici curiae respectfully urge that the Court grant the Combined Application for Permission to Appeal Order on Expert Witness Admissibility and Petition for Hearing En Banc.

Respectfully submitted,



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APPENDIX A

The following organizations join as *amici curiae* in this brief:

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country.

The International Association of Defense Counsel is an organization of corporate and insurance attorneys whose practice is concentrated on the defense of civil lawsuits. Since 1920, the IADC has been dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system.

The National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in Washington, D.C. and all 50 states.

The National Federation of Independent Business is the nation's leading small business association, representing members in Washington, D.C. and all 50 state capitals.

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2014, this brief was served by both electronic mail and first class mail, postage prepaid, to counsel of record:

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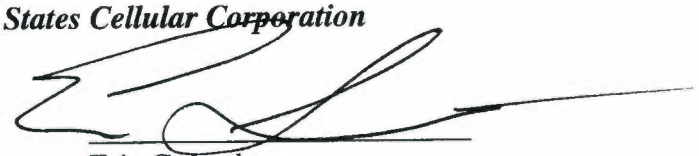

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