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