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IN THE

SUPERIOR COURT OF PENNSYLVANIA

PAUL GILL AND DIANE GILL, H/W,

– v. –

EXXON MOBIL CORP., ET AL.,

APPEAL OF EXXON MOBIL CORP.

AMICUS CURIAE BRIEF BY THE ATLANTIC LEGAL FOUNDATION

On Appeal from the Judgment of The Court of Common Pleas of Philadelphia County, Pennsylvania, No. 200501803

(Hon. Carmella G. Jacquinto)

Eric G. Lasker, Esquire
HOLLINGSWORTH LLP
1350 I Street, NW
Washington, DC 20005
Telephone: (202) 898-5800

Of Counsel
Pro hac vice pending

Lawrence S. Ebner, Esquire
ATLANTIC LEGAL FOUNDATION
1701 Pennsylvania Avenue, NW
Washington, DC 20006
Telephone: (202) 729-6337

Of Counsel
Pro hac vice pending

Steven M. Coren, Esquire
(PA ID No. 32140)
Matthew R. Williams, Esquire
(PA ID No. 91820)
COREN & RESS, P.C.
Two Commerce Square
Suite 3900
2001 Market Street
Philadelphia, PA 19103
Telephone (215) 735-8700

Counsel for The Atlantic Legal Foundation

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Established in 1977, the Atlantic Legal Foundation ("ALF") is a national, nonprofit, nonpartisan, public interest law firm. Its mission is to advance the rule of law by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, ALF pursues its mission by participating as *amicus curiae* in carefully selected appeals before state appellate courts, federal courts of appeal, and the U.S. Supreme Court. *See* https://atlanticlegal.org.

ALF has long been one of the nation's foremost advocates for ensuring that courts fulfill their duty to admit into evidence, or otherwise consider, only expert testimony that reflects sound science. For example, on behalf of esteemed scientists, such as Nicholaas Bloembergen (a Nobel laureate in physics) and Bruce

Ames (one of the world's most frequently cited biochemists), ALF submitted amicus briefs in high-profile cases where, as here, ALF advocated for the trial court's duty to admit only expert testimony based on sound science.

This case similarly affords this Court an important and timely opportunity to reinforce the current understanding of Pennsylvania Rule of Evidence 702, as most recently elucidated by the Pennsylvania Supreme Court in *Walsh v. BASF Corp.*, 234 A.3d 446 (Pa. 2020).

Here, Plaintiff-Appellee Paul Gill claims that his exposure to multiple benzene-containing products over several decades, including a relatively brief exposure to gasoline while working at a Mobil service station from 1975-1979, caused him to develop acute myeloid leukemia ("AML"). His spouse brings a derivative claim.

Plaintiffs initially asserted causes of action related to benzene-containing products against numerous defendants, but the case went to the jury only on negligence, strict liability design defect, and failure to warn claims against Defendant-Appellant

Exxon Mobil Corporation ("ExxonMobil"). The jury found in favor of Plaintiffs and returned a $725,500,000 compensatory damages verdict.

This grossly excessive verdict results largely from multiple errors by the Court of Common Pleas ("trial court") in assessing the admissibility of Plaintiffs' expert evidence. Specifically, the trial court did not fulfill its responsibility under Rule 702 to ensure that the "jury receives scientific opinion that is the result of sound research," *Walsh*, 234 A.3d at 459, and results from a generally accepted methodology applied in the conventional manner. *Id.* at 456; *Betz v. Pneumo Abex, LLC*, 44 A.3d 27, 53 (Pa. 2012).

In accordance with Pennsylvania Rule of Appellate Procedure 531(b)(1)(i), ALF submits this brief as *amicus curiae* in support of ExxonMobil. This amicus brief seeks to assist the Court in its analysis of the trial court's obvious failure to fulfill its responsibilities under Rule 702, which, applied correctly, required the exclusion of testimony from Plaintiffs' medical causation expert witnesses.

Pursuant to Rule 531(b)(2), ALF certifies that no counsel for any party authored this brief in whole or in part and no entity or person, aside from ALF, its members, and counsel, made any monetary contribution to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The trial court abused its discretion when it failed to properly apply Pennsylvania Rule of Evidence 702, as well as the standards for the admissibility of expert testimony set forth in *Frye v. United States*, 293 F. 1013 (D.C. 1923), which has been adopted in Pennsylvania. *See, e.g.*, *Pennsylvania v. Topa*, 369 A.2d 1277 (Pa. 1977); *Grady v. Frito-Lay, Inc.*, 839 A.2d 1038, 1046 (Pa. 2003) ("the admission of expert scientific testimony is an evidentiary matter for the trial court's discretion and should not be disturbed on appeal unless the trial court abuses its discretion"). Here, the trial court failed to carry out its duty under Rule 702 in two different ways.

First, the trial court inappropriately relied only on evidence from Plaintiffs' experts and failed to consider any evidence from

ExxonMobil's experts in denying ExxonMobil's motion for a new trial. This requires reversal under *Walsh.* *See* 234 A.3d at 458 ("the trial court must be guided by scientists in the relevant field, including the experts retained by the parties in the case…"); *id*. at 459 (instructing that the determination of whether a methodology is generally accepted "must be guided by the experts"); *id*. at 460 ("A focus on [an expert's] methodology would have included consideration of both [that expert's] deposition testimony as well as that of the [opposing party's] experts.").

Second, the trial court failed to carry out its duty under Rule 702(b) and (c) to assess whether the methodology Plaintiffs' experts claimed to use was generally accepted and applied "in a conventional fashion in reaching his or her conclusions." *Betz*, 44 A.3d at 53. As a result, the trial court admitted extensive testimony regarding the wrong product (benzene) and failed to determine whether an association existed between the actual product at issue (gasoline) and the alleged injury. The trial court's errors tainted the entire proceeding in an unfair and highly prejudicial manner requiring reversal. *See, e.g., Buttaccio v. Am.*

Premier Underwriters, Inc., 175 A.3d 311, 321 (Pa. Super. Ct. 2017) (finding it was not harmless for counsel to "repeatedly inject[] [a different] issue into the case," which "drew attention to a theory that the jury never should have heard and invited the jury to decide the case on an improper basis") (internal quotations omitted).

ARGUMENT

Under Pennsylvania Rule of Evidence 702, expert testimony regarding scientific issues is admissible at trial if "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue" and "the expert's methodology is generally accepted in the relevant field." Pa. R. Evid. 702 (b) and (c).

In deciding whether the expert used a generally accepted scientific methodology, trial courts must determine whether the specified methodology is, in fact, generally accepted and whether the expert applied that methodology in a conventional fashion. *See Walsh*, 234 A.3d at 456 ("The proponent of the admission of expert scientific evidence bears the burden of establishing all of

the elements supporting its admission, including the general acceptance of the methodology employed in the relevant scientific community.") (citations omitted); *Betz*, 44 A.3d at 53 (generally accepted methodology must be applied in the "conventional fashion").

The Pennsylvania Supreme Court has described the role of the trial court in this process as assessing the propriety of the "expert's method, not his conclusions." *Walsh*, 234 A.3d at 456 (quoting *Grady*, 839 A.2d at 1047). This standard "restricts the scientific evidence which may be admitted" by ensuring "the proffered evidence results from scientific research which has been conducted in a fashion that is generally recognized as being sound, and is not the fanciful creations of a renegade researcher." *Id.* (quoting *Blum v. Merrell Dow Pharms.*, 764 A.2d 1, 9 (Pa. 2000) (Cappy, C.J., dissenting)).

Proper implementation of this standard is not optional and the failure to do so is reversible error. Litigation involving complex issues, such as the scientific and medical causation issues in this case, should not be based on bait and switch

tactics. Looking not just at what methodology the expert says he used, but also whether he applied that methodology in a conventional fashion, is a crucial function of the trial court. Jurors will not have background knowledge of the legal, scientific, or technical issues to make these assessments for themselves. If the trial court does not ensure the experts' opinions result from the proper application of a generally accepted methodology, the integrity of the trial falls apart, grossly excessive jury verdicts are more likely, and justice is not served. The $725.5 million-dollar verdict returned here is an egregious example of such a failure.

I. THE TRIAL COURT DID NOT FULFILL ITS DUTY TO ADDRESS EXXONMOBIL'S COMPETING EXPERT EVIDENCE ON MEDICAL CAUSATION WHEN DETERMINING WHETHER PLAINTIFFS' CAUSATION EXPERTS SATISFIED RULE 702(c)'S REQUIREMENTS.

The Pennsylvania Supreme Court has provided trial courts with clear instructions regarding how to evaluate whether scientific evidence is admissible under Rule 702. As the majority stated in *Walsh*, the "trial court's proper function [is] to ensure that the expert has *applied* a generally accepted scientific methodology to reach his or her scientific conclusions[,]" and to

"fulfill this function, the trial court must be guided by scientists in the relevant field, *including the experts retained by the parties in the case*." *See Walsh*, 234 A.3d at 458 (emphasis added).

As Justice Wecht noted in his concurring opinion, the need to consider all the evidence when assessing admissibility is not trivial or optional. Reversal of the trial court's decision in *Walsh* based on Rule 702(c) was required because the trial court's written opinion "never cited anything but its own independent survey of Plaintiff's expert evidence as a basis for excluding that evidence." *Id.* at 472 n.13 (Wecht, J., concurring). Consequently, this "calls into question the degree to which the trial court concerned itself with the competing evidentiary showings on general acceptance, and it is not an appellate court's function to fill that critical void in the trial court's account of its own reasoning." *Id*.

Here, the trial court's Opinion was guided by only one set of experts – Plaintiffs' experts. In its 362-page Opinion denying ExxonMobil's post-trial motions, the trial court included 269 pages of Plaintiffs' experts' trial testimony verbatim. In contrast,

the trial court included no references to the defense experts' opinions and no excerpts from their testimony. *See generally* Opinion, May 8, 2025.

Not surprisingly, the defense experts' testimony identified meaningful gaps and omissions in Plaintiffs' experts' methodology, including that the scientific evidence does not establish an association between exposure to gasoline and the development of AML. *See, e.g.,* Trial Tr., May 6, 2024, Morning Session at 33:7-10 (Dr. Spencer asserting that "gasoline is not associated with causing cancer in humans"); Trial Tr., May 6, 2026, Afternoon Session at 55:8-13 (Dr. Alexander testifying that gasoline is a "classic example" of a compound showing no association with the outcome of interest, i.e., cancer, and that "there's no increased risk of cancer").

The defense experts also called into doubt whether Plaintiffs' experts used a generally accepted scientific methodology and applied that methodology in a conventional fashion. *See, e.g.,* Trial Tr., May 6, 2024, Morning Session at 46:10-46:12 (Dr. Spencer explaining the "multiple mistakes" in Dr. Laumbach's

methodology in assessing Mr. Gill's exposure); Trial Tr., May 6, 2024, Afternoon Session at 52:15-53:2 (Dr. Alexander explaining Dr. Laumbach's causal opinion was improperly focused on benzene instead of gasoline despite numerous studies showing exposure to gasoline does not increase the risk of developing AML); *id.* at 61:5-18 (Dr. Alexander asserting that for those who call for the abolishment of p-value or statistical significance, such as Dr. Shallis, one needs to "question their point of view, methodology, the information that would give rise to such a statement."); Trial Tr., May 7, 2024, Morning Session at 25:21-26:3 (Dr. Alexander asserting that Dr. Laumbach "cherry-picked" data from the Wong study and ignored the "relevant, more sophisticated analysis, the higher validity analysis" from that same study which showed no association for benzene or gasoline and AML); *id*. at 34:16-22 (Dr. Alexander testifying that he saw "no evidence" that Drs. Laumbach and Shallis conducted a "comprehensive review of the question can gasoline cause AML").

Requiring the trial court to address ExxonMobil's competing evidence on causation is not a credibility determination or the

type of "overly expansive" analysis, *Walsh*, 234 A.3d at 459, that would run afoul of Rule 702(c). Instead, it is the baseline threshold that courts must consider when assessing whether the requirements of Rule 702 are fulfilled in each case. *See id.* at 460 (the trial court in its written opinion should have "included consideration of both [the plaintiff's causation expert's] deposition testimony as well as that of [the opposing parties'] experts."); *see also id.* at 472, n.13 (Wecht, J., concurring) (trial court's analysis under Rule 702 must "be channeled by the adversarial presentations of the parties' *Frye* experts, not limited only by the scope of the trial court's intellectual ambition and willingness to pursue the matter independently.").

That threshold was not met here. Given the trial court's decision to ignore ExxonMobil's experts' testimony and instead to simply copy and paste directly into its Opinion hundreds of pages of trial testimony only from Plaintiffs' experts, there is no basis to conclude or infer that the trial court conducted the proper analysis in determining whether Plaintiffs' experts' opinions on causation were admissible.

The trial court's dereliction of its Rule 702(c) duty to consider and address the competing relevant and material evidence could not be clearer. In Pennsylvania, the guidance from *Walsh* must be properly implemented as a matter of due process. Here, it was not, and reversal is required. *See Pennsylvania v. Soto*, 202 A.3d 80, 07 (Pa. Super. Ct. 2018), *appeal denied*, 207 A.3d 291 (Pa. 2019) (new trial is required "where the course pursued represents not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill-will.").

II. THE TRIAL COURT DID NOT SATISFY ITS DUTY TO ENSURE THAT PLAINTIFFS' MEDICAL CAUSATION EXPERTS APPLIED A GENERALLY ACCEPTED SCIENTIFIC METHODOLOGY IN THE CONVENTIONAL MANNER AS REQUIRED BY RULE 702.

Prior to admitting expert testimony, the trial court must determine that the methodology the expert uses is generally accepted in the relevant scientific field and that the expert is applying that methodology in a generally accepted way. *Betz*, 44 A.3d at 53.

This is a very different inquiry than deciding if an expert's conclusions are correct, which would be impermissible under Pennsylvania law. Instead, akin to a student being required to show his work in math class to prove an understanding of the process, the trial court must determine and explain what generally accepted methodology is being used and how/why that methodology is being employed in the conventional manner. *See id*. at 53. Testimony from experts who say they use a certain methodology and then do something else is not admissible.

Here, both of Plaintiffs' medical causation experts stated that they used the "Bradford Hill" criteria to reach their conclusions. The Bradford Hill criteria used by epidemiologists and other scientists requires the user to assess whether an association between the exposure and the disease exists, and if so, nine criteria are then applied to determine if the association is causal. *See Walsh*, 234 A.3d at 451 (Bradford Hill criteria only apply "[a]fter an association between agent and disease has been identified"); *Porter v. Smithkline Beecham Corp.,* No. 3516 EDA

2015, 2017 WL 1902905, at *6 (Pa. Super. Ct. May 8, 2017) (same), *appeal denied*, 176 A.3d 845 (Pa. 2017).

Both steps are important. Using a hypothetical example, it is possible that bicyclists who wear helmets are found to have higher rates of head injuries than those who do not wear helmets, thus creating a potential positive association between helmet use and head injuries. Once that association exists, the Bradford Hill criteria would then be applied to determine whether wearing helmets causes the increased risk of injury or whether something else (e.g., riding in more dangerous conditions or at higher speeds) is the real cause. Without the association, there would be no reason to conduct a causal inquiry. If applied correctly, the Bradford Hill methodology helps experts and jurors assess the strength of evidence for a causal relationship between an exposure and an outcome.

Courts cannot assume, however, that an expert who purports to use the Bradford Hill methodology is following the steps in the methodology or applying the steps in the generally accepted manner. Instead, the court must conduct its own

evaluation into whether these criteria are met based on the expert's testimony. *See In re: Zoloft (Sertraline Hydrochloride) Prods. Liab. Litig.,* 858 F.3d 787, 796 (3d Cir. 2017) (noting that any Bradford Hill analysis must be conducted as the methodology intends to be helpful and admissible).

Thus, even though "as a general matter" Bradford Hill analyses are "standard practice in epidemiology" and can be a reliable methodology, "the reality is that every case-specific application" of the Bradford Hill criteria "is distinct and should be analyzed for reliability." *In re Zantac (Ranitidine) Prods. Liab. Litig.*, NO. 2924, 2022 WL 17480906, at *126 (S.D. Fla. Dec. 6, 2022) (citation omitted).

A. The Trial Court Did Not Make Any Effort to Determine Whether Plaintiffs' Experts Properly Selected and Applied the Bradford Hill Methodology.

Here, the trial court should have evaluated whether the Bradford Hill methodology is generally accepted in cases like this one and whether Plaintiffs' experts applied that methodology in a "conventional fashion," *i.e.,* in a way that is generally accepted in the scientific community. *See Betz*, 44 A.3d at 53.

The trial court's failure to conduct its own analysis of whether Bradford Hill is a generally accepted methodology is an error, but ultimately a harmless one. Amici agrees that proper implementation of the Bradford Hill criteria is a generally accepted way of assessing causation.

What is not and cannot be harmless error is the trial court's failure to assess whether Plaintiffs' experts appropriately applied the Bradford Hill criteria in a conventional manner. It is once again telling that the trial court's Opinion mentions Bradford Hill — the key methodology at issue — only 14 times. All those references are from testimony by Plaintiffs' experts. *See, e.g.,* Opinion at 148 (Dr. Shallis describes his use of the Bradford Hill "considerations"); *id*. at 163 (Dr. Shallis explains that he used "some Bradford Hill considerations" as part of his methodology); *id*. at 45 (Dr. Laumbach explains generally the Bradford Hill criteria); *id.* at 115-116 (Dr. Laumbach discusses only three of the nine criteria).

Instead of conducting an analysis of whether the Bradford Hill methodology was applied in a generally accepted manner as

required by *Betz,* 44 A.3d 27, 53, the trial court concluded that "it cannot be said that [Plaintiff's retained experts] used non-generally accepted methodologies to reach their opinions and conclusions when all they did is what an ordinary expert witness would do," noting that Plaintiffs' experts read studies and medical records in reaching their opinions. Opinion at 341. The trial court then pronounced that the experts' "methodologies" were generally accepted. Opinion at 342.

B. The Trial Court's Failure to Conduct the Required Assessments Under Rule 702 Requires Reversal.

This analysis is insufficient under Pennsylvania law. Had the trial court conducted the required analysis, it would have seen two fundamental errors in Plaintiffs' experts' purported use of the Bradford Hill methodology.

First, to be applied in a generally accepted manner in a case, the Bradford Hill analysis must mirror the actual product at issue in that case. *See In re: Zoloft*, 858 F.3d at 796.

Despite the obvious nature of this requirement, the trial court failed to recognize that the vast majority of Plaintiffs' experts' testimony focused on the wrong product: benzene, not

gasoline. The only potential basis for liability in this case is that exposure to ExxonMobil's gasoline caused Mr. Gill to develop AML. Albeit in a different context, the trial court's Opinion correctly notes that to establish the proximate cause necessary to support Mr. Gill's negligence claim, "'plaintiff must show that (1) *the product at issue* is capable of causing the alleged injury (general causation), and (2) *the product* did in fact cause the plaintiff's alleged injury (specific causation).'" Opinion at 12-13 (citing *Schrecengost* v. Coloplast Corp., 425 F. Supp. 3d 448, 461 (W.D. Pa. 2019) (citing *Soldo v. Sandoz Pharms. Corp.*, 244 F. Supp. 2d 434, 525 (W.D. Pa. 2003) (applying Pennsylvania law))) (emphasis added).

Yet, the trial court repeatedly allowed Plaintiffs' experts to overwhelm the jury with testimony regarding benzene. For example, in his direct examination trial testimony, Dr. Laumbach mentioned benzene over 290 times when questioned by Plaintiffs' counsel, most often in the context of identifying it as a carcinogen to the jury. In comparison, he passingly mentioned gasoline about a dozen times. Similarly, Dr. Shallis referenced benzene as

a known carcinogen over 120 times when questioned by Plaintiffs' counsel.

Second, neither of Plaintiffs' medical causation experts demonstrated an epidemiological association between gasoline and AML existed. Until his trial testimony, Dr. Laumbach never opined that gasoline is a human carcinogen, including in his report in this case. Trial Tr., April 30, 2025 Afternoon 6:15-20 ("Q. Now, Doctor, in your report, you do not write any sentence, I'd like you to confirm this, any sentence anywhere in this 62-page report that says gasoline is recognized as a human carcinogen; is that correct? A. That's correct."). Dr. Laumbach also conceded at trial that benzene is distinct from gasoline and that gasoline itself has not been considered a carcinogen by many scientific regulatory bodies. Trial Tr., April 30, 2025 Afternoon 7:18-19 ("Q. Is gasoline the same as benzene? A. No, they're different."); *id.* at 17:17-21 (conceding that the Agency for the Toxic Substances and Disease Registry ("ATSDR") has determined there is "no evidence that exposure to gasoline causes cancer in humans"); *id.* at 20:17-21 (conceding that the National

Toxicology Program ("NTP") has not listed gasoline as either a human carcinogen or as reasonably anticipated to be a human carcinogen).

Even more telling, Dr. Shallis agreed that prior to his trial testimony in this case, he believed that there was no scientifically supported association or causal link between gasoline exposure and AML. *See* Trial Tr., May 2, 2025 Afternoon at 64:14-21 ("Q. All right. Dr. Shallis, the question was, do you remember the particulars about gasoline exposure for the other person for whom you give an opinion that gasoline exposure caused his or her AML, AND your full answer was what? A. I can read it. I apparently said, in that case, it was not my opinion that gasoline exposures caused AML.").

The Opinion reflects no assessment of these issues or the methodology behind them. The trial court failed to provide any support for its apparent conclusion that Plaintiffs' experts could focus on one component of a complex mixture (benzene) instead of the actual product at issue (gasoline) to establish the

association needed before applying the Bradford Hill factors to assess causation.

Both errors are highly prejudicial. The mere fact that gasoline contains benzene as one ingredient cannot bridge this methodological gap. Even putting aside the obvious fact that mixtures routinely have characteristics and effects that are distinct from their individual ingredients, Pennsylvania courts have repeatedly noted that when addressing exposure issues, the "dose makes a thing not a poison." *See, e.g., Trach v. Fellin*, 817 A.2d 1102, 1113 (Pa. Super. Ct. Feb. 11, 2003), *appeal denied*, 577 Pa. 725 (Pa. 2004); *Betz,* 44 A.3d at 53. It is both possible and, in some cases, likely that a component which has carcinogenic properties at a high dose does not present the same risk at lower doses as a component of a formulated product. The trial court's decision to allow Plaintiffs' medical causation experts to offer extensive testimony regarding a product not at issue (pure benzene) did not help the trier of fact understand the evidence to determine a fact in issue as required by Rule 702. *See, e.g., Buttaccio*, 175 A.3d at 321 ("By repeatedly injecting [a

different] issue into the case, counsel drew attention to a theory that the jury never should have heard and invited the jury to decide the case on an improper basis. . . . . [T]he sheer number of counsel's improper references prejudiced Appellants; they were too numerous to be harmless.") (internal quotations omitted).

CONCLUSION

A new trial is warranted when an erroneous evidentiary ruling "causes prejudice." *Aldridge v. Edmunds*, 750 A.2d 292, 298 (Pa. 2000); *see also Bucchianeri v. Equitable Gas. Co.*, 491 A.2d 835, 838 (Pa. Super Ct. 1985) ("When improperly admitted testimony may have affected a verdict, the only correct remedy is the grant of a new trial.") (citation omitted).

The need for a new trial is amplified when the erroneously admitted testimony is offered by expert witnesses. Jurors may view expert testimony as being more credible or carrying more weight than the testimony of other witnesses. *See Masgai v. Franklin*, 787 A.2d 982, 985 (Pa. Super. Ct. 2001) (expert testimony "may in some instances assume a posture of mystic infallibility in the eyes of a jury of laymen") (quoting *Topa*, 369

A.2d at 1282); *Pennsylvania v. Hopkins*, 231 A.3d 855, 876 (Pa. Super. Ct. 2020) ("Expert witnesses can have an extremely prejudicial impact on the jury, in part because of the way in which the jury perceives a witness labeled as an expert.") (citation omitted), *appeal denied*, 242 A.3d 908 (Pa. 2020).

That is the case here. The trial court's Opinion falls woefully short of Rule 702's requirements and the standards set in *Walsh*, *Betz*, and other Pennsylvania precedents and therefore must be reversed.

/s/ Steven M. Coren
Steven M. Coren, Esquire
(PA ID No. 32140)
Matthew R. Williams, Esquire
(PA ID No. 91820)
COREN & RESS, P.C.
Two Commerce Square
Suite 3900
2001 Market Street
Philadelphia, PA 19103
Telephone (215) 735-8700

Counsel for The Atlantic Legal Foundation

Eric G. Lasker, Esquire
HOLLINGSWORTH LLP
1350 I Street, NW
Washington, DC 20005
Telephone: (202) 898-5800

Of Counsel
Pro hac vice pending

Lawrence S. Ebner, Esquire
ATLANTIC LEGAL FOUNDATION
1701 Pennsylvania Avenue, NW
Washington, DC 20006
Telephone: (202) 729-6337

Of Counsel
Pro hac vice pending

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 2135, I certify the following:

This brief complies with the type-volume limitation of Rule 2135 and Rule 531; this brief contains **3625** words excluding the parts of the brief exempted by this rule.

/s/ Steven M. Coren
Steven M. Coren, Esquire

CERTIFICATE OF COMPLIANCE – PUBLIC ACCESS POLICY

I, Steven M. Coren, Esq., hereby certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Date: June 23, 2025

/s/ Steven M. Coren
Steven M. Coren, Esquire

Attorney for The Atlantic Legal Foundation

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Exxon Mobil Corporation et. al.
----------X

I, Elissa Diaz, swear under the pain and penalty of perjury, that according to law and being over the age of 18, upon my oath depose and say that:

on June 23, 2025

I served the **Amicus Curiae Brief by the Atlantic Legal Foundation** within in the above captioned matter upon:

Appellant Exxon Mobil Corporation
Mountain, Chad David
Maron Marvel Bradley Anderson & Tardy, LLC
1717 Arch St Ste 3710
Philadelphia, PA 19103
(215) 231-7100

Hickok, Dorothy Alicia
DLA Piper LLP (US)
1650 Market St Ste 5000
Philadelphia, PA 19103
(215) 656-3345

Folino, Theresa Ann
Dickie, McCamey & Chilcote, P.C.
1650 Arch St Ste 2110
Philadelphia, PA 19103
(215) 925-2289

Clement, Paul D.
Xi, James
Lawrence, Andrew C.
Clement & Murphy PLLC
708 Wolfe Street
Alexandria, VA 22314
(202) 742-8900

Appellee Gill and Diane Gill, h/w, Paul

DuPont, Andrew John
Wallace, Sharice Cummings
Locks Law Firm
601 Walnut St Ste 720 E
Philadelphia, PA 19106
(215) 893-3425

Becker, Charles Lyman
Kline & Specter, PC
1525 Locust St 19th Fl
Philadelphia, PA 19102
(215) 772-1000

Williamson, Nicholas James
Emmanuel Law Firm
1500 JFK Blvd Ste 605
Media, PA 19063
(267) 307-2707

Woods, Corrie Allen
Kline & Specter PC
1300 Fifth Ave
Pittsburgh, PA 15219
(412) 851-3600

Laidacker, Ruxandra Maniu
Kline & Specter, PC
1525 Locust St Fl 19
Philadelphia, PA 19102
(215) 772-1452

Collins, Kimberly M.
Kline & Specter PC
1525 Locust St Fl 19
Philadelphia, PA 19102
(215) 772-1000

Wigle, Patrick J.
Waters, Kraus, & Paul
3141 Hood Street
Dallas, TX 75219

Appellee Gill and Diane Gill, h/w, Paul
Mittal, Rajeev Kumar
Waters Kraus Paul & Siegel
11601 Wilshire Blvd.
Suite 1900
Los Angeles, CA 90025
(800) 226-9880

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Robyn Cocho
Notary Public State of New Jersey
No. 2193491
Commission Expires January 8, 2027 Job # 381486