No. 14-CV-1350

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

BRIEF OF *AMICI CURIAE* BUSINESS AND MEDICAL COALITION IN SUPPORT OF PETITIONERS

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CORPORATE DISCLOSURE

Pursuant to Rule 28(a)(2)(b) of the Rules of the District of Columbia Court of Appeals, *Amici* state that none of the members of the *Amici* Business and Medical Coalition have a parent corporation or subsidiary corporation and that no publically held corporation owns 10% or more of its stock.

I. STATEMENT OF INTEREST

Amici Curiae the Chamber of Commerce of the United States of America, the Medical Society of the District of Columbia, the American Medical Association, the Business Roundtable, the National Association of Manufacturers, Pharmaceutical Research and Manufacturers of America (PhRMA), the Association of Corporate Counsel ("ACC"), the National Federation of Independent Business Small Business Legal Center, and the International Association of Defense Counsel (collectively "*Amici*") submit this brief urging this Court to join the overwhelming majority of States that have adopted the reliability and relevance requirements set forth in Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993), and its progeny, as the governing rule for admissibility of expert testimony in the District of Columbia.

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, including the District of Columbia.

The Medical Society of the District of Columbia is a society of over 2,800 physicians, mostly from the District of Columbia and surrounding counties. The American Medical Association (AMA) is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all American physicians, residents and medical students are represented in the AMA's policy-making process. AMA members practice and reside in all States and in the District of Columbia. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health. The AMA and the Medical Society of the District of Columbia join this brief on their own behalves

and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each State, plus the District of Columbia, whose purpose is to represent the viewpoint of organized medicine in the courts.

The Business Roundtable is an association of chief executive officers of leading U.S. companies working to promote sound public policy and a thriving U.S. economy.

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 Pharmaceutical Research and Manufacturers of America (PhRMA) represents the country's leading innovative biopharmaceutical research companies, which are devoted to discovering and developing medicines that enable patients to live longer, healthier, and more productive lives.

The Association of Corporate Counsel ("ACC") represents the perspective of in-house lawyers who advise corporate clients on the full range of legal issues that arise in the course of day-to-day business. ACC has over 37,000 individual members who are in-house lawyers employed by more than 10,000 organizations in more than 85 countries.

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

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.

Amici and their members have a significant interest in the standards governing the admissibility of expert testimony in the District. 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 antiquated *Frye* approach inhibits the ability of courts in the District of Columbia to serve as gatekeepers against the admission of scientifically unreliable expert testimony and, thus, places D.C. businesses and healthcare professionals at a significant disadvantage in comparison to those in the vast majority of other States that have adopted *Daubert*.

As this court has noted, "[i]n the past three decades, the use of expert witnesses has skyrocketed" causing "[s]ome commentators [to] claim that the American Judicial hearing is becoming a trial by expert."[2] Purported expert testimony often is the necessary linchpin for tort claims seeking sizable monetary damages. Under *Daubert*, however, businesses and healthcare practitioners have greater assurance that such claims can proceed only if grounded in reliable scientific evidence. Without such protection, however, business owners and physicians face greater pressure to settle unmeritorious cases backed by scientifically dubious but seductive theories that might appeal to a lay jury.[3] This calculus is particularly daunting for small

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

[2] *Girardot v. United States*, 92 A.3d 1107, 1114 (D.C. 2014) (citation omitted).

[3] *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.")

businesses, for which the costs of defending a questionable lawsuit through trial can be ruinous. And for physicians, the risk from scientifically-unfounded medical malpractice claims leads to excessively high insurance premiums and pressure to practice defensive medicine that increases the costs of providing healthcare to District residents without any corresponding health benefit.

II. ARGUMENT

Amici fully support the arguments presented in the Petitioners' Opening Brief in support of this court's adoption of Federal Rule of Evidence 702 and *Daubert* as the evidentiary standard for the admission of expert testimony. As *Amici* explained in their earlier brief urging the court to accept review of this case, the *Daubert* framework fits well with this court's prior pronouncements on the judicial role in policing the admissibility of expert testimony,[4] and it is far better suited for the assessment of expert testimony in modern litigation than the antiquated *Frye* Rule.

Amici write separately to explain how the gatekeeping function set forth in Rule 702 and *Daubert* fits within the broader context of D.C. courts' well-established role as gatekeepers against the admission of all types of unreliable evidence. As Judge Fisher recently noted, "[o]ne undoubtedly legitimate interest of evidentiary rules is to exclude unreliable evidence." *McCorkle v. United States*, 100 A.3d 116, 126 (D.C. 2014) (Fisher, J. concurring) (citing *United States v. Scheffer*, 523 U.S. 303, 309 (1998) (providing as examples Rules 702, 802, and 902)). The *Daubert* rule against admission of unreliable expert testimony is itself premised upon three

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[4] *See* Business Coalition *Amici Curiae* Brief in Support of Combined Application at 7-8 (filed Oct. 24, 2014); *see also e.g. In re Melton*, 597 A.2d 892, 903 (D.C. 1991) (trial courts should "function as the gatekeepers for expert testimony," and "may not abdicate [their] independent responsibilities to decide if the bases [for expert testimony] meet minimum standards of reliability as a condition of admissibility") (citation omitted).

general evidentiary protections against unreliable evidence that are each firmly entrenched in D.C. law. First, courts are required to preliminarily assess the admissibility of evidence, even where such assessment turns on questions of fact. Second, courts must be particularly wary of evidence that is not based upon firsthand knowledge because such evidence lacks a basic safeguard of reliability. Third, courts should apply additional reliability screens on certain types of evidence that may have an especially powerful impact on a jury.

Each of these principles is routinely applied in D.C. courts in connection with a variety of evidentiary rules, including rules governing hearsay, percipient witness testimony, the content of writings and recordings, the identification of criminal suspects, and demonstrative evidence. As such, the adoption of *Daubert* would not mark a break from the District's traditional evidentiary rules but, to the contrary, would subject expert testimony to the same type of judicial scrutiny that has long been applied to other evidence that raises similar reliability concerns.

A. *Daubert* Is Consistent With D.C. Law Regarding A Court's Obligation To Make Preliminary Admissibility Determinations.

The trial court's gatekeeping role under *Daubert* is founded upon Federal Rule of Evidence 104(a),[5] which sets forth the procedure that courts in District of Columbia courts generally follow as well in addressing the admissibility of evidence.[6] Rule 104(a) states that "[t]he court *must* decide any preliminary question about whether a witness is qualified, a

[5] *Daubert*, 509 U.S. at 592-93.

[6] *See Jenkins v. United States*, 80 A.3d 978, 991 (D.C. 2013) (explaining that Rule 104(a) "accurately states the rule of evidence we generally follow"); *Roberson v. United States*, 961 A.2d 1092, 1096 & n.11 (D.C. 2008) (applying Rule 104(a)); *Butler v. United States*, 481 A.2d 431, 439 (D.C. 1984) (same); *see also, e.g., Foreman v. United States*, 792 A.2d 1043, 1052 (D.C. 2002) ("the judge must make a [threshold] determination" whether a statement is admissible as an adoptive admission).