No. 14-CV-1350

DISTRICT OF COLUMBIA COURT OF APPEALS

MOTOROLA, INC., et al.,

Appellants,

v.

MICHAEL PATRICK MURRAY, et al.,

Appellees.

On Initial Hearing En Banc of Appeal from
the Superior Court of the District of Columbia (Civil Division)

BRIEF FOR THE TRIAL LAWYERS ASSOCIATION OF METROPOLITAN WASHINGTON, D.C., AS AMICUS CURIAE IN SUPPORT OF APPELLEES AND AFFIRMANCE

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STATEMENT OF DISCLOSURE

In addition to the parties, intervenors, amici curiae, and their counsel identified in the other briefs filed in this appeal, the Trial Lawyers Association of Metropolitan Washington, D.C. ("TLA-DC") is participating as amicus curiae in support of Appellees and affirmance of the order under review. TLA-DC is a Section 501(c)(6) nonprofit corporation affiliated with the American Association for Justice. Counsel for TLA-DC is John Vail of the firm John Vail Law PLLC.

These representations are made to enable the judges of this Court to consider possible recusal.

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

The Trial Lawyers Association of Metropolitan Washington, D.C. ("TLA-DC") is a voluntary association of more than 400 trial lawyers practicing throughout Metropolitan Washington, D.C. Founded in 1955, TLA-DC is an incorporated, nonprofit affiliate of the American Association for Justice. The mission of TLA-DC is, among other things, to: seek justice for all; preserve the constitutional right to trial by jury; prevent injury from occurring; promote and protect the public good through concerted efforts to secure safe products, safe workplaces, a clean environment, and quality health care; champion the cause of those who deserve redress for injury to person or property; further the rule of law and the civil-justice system; and advance the common law and the finest traditions of jurisprudence. TLA-DC members primarily represent the injured victims of tortious misconduct and frequently engage, examine, and cross-examine expert witnesses.

On this appeal, the issues are whether the scope of admissible expert testimony should be broadened and whether the role of judges as gatekeepers of evidence should be expanded. Resolution of these issues could affect the rights of many tort victims. It is of obvious importance to the members of TLA-DC, who represent those victims.

All parties consented to the filing of this amicus brief.

SUMMARY OF ARGUMENT

This Court's precedents recognize the constitutional primacy of the jury as factfinder, setting a default of admissibility of evidence and demanding sound justification for barring evidence from the jury's consideration. Appellants, in the

context of one dispute involving atypically complex scientific evidence, propose overturning precedent and creating a new general rule of exclusion. They offer no factual basis to believe either that jurors are incapable of giving the relevant evidence appropriate weight or that tools already available to trial judges do not suffice to exclude it.

The power of judges to keep evidence from juries at all is exceptional, existing in tension with the jury's constitutional role as factfinder. The power was vested in reaction to the overzealousness of lawyers in propounding voluminous evidence and not because jurors were incapable of evaluating evidence. Use of the power to keep evidence from the jury must remain exceptional.

Appellants urge reduction in the power of the jury on the basis of an assumption largely untested in the case law: that judges are better than juries at evaluating scientific evidence. Available evidence strongly suggests that the opposite is true. The case for further empowering judges to exclude evidence from juries is weak and should not be indulged here.

The standard that Appellants advance was propounded as a rule of wider admissibility, permitting new scientific methodologies that have not had time to be evaluated by the scientific community, but that bear sound markers of reliability, to be considered by juries. Any consideration of the proposed standard should be limited to that use, vesting trial judges with discretion to include such evidence, confident that juries will afford it appropriate weight.

ARGUMENT

I. Juries are constitutionally preeminent factfinders, and the power of judges to exclude evidence from their consideration is and should be circumscribed.

The Constitution establishes the jury as the primary body for adjudicating facts. U.S. CONST. art. III, § 2; *id.* amends. VI, VII. "The Constitution's guarantee of a jury trial is widely perceived as a hallmark of the fairness, integrity and public acceptance of judicial proceedings." *Wheeler v. United States*, 930 A.2d 232, 248 (D.C. 2007). "Judges 'have no power to weigh the evidence or to pass upon the credibility of witnesses. That is the function of the jury.'" *Id.* at 249 (quoting *V.E.M. Hotel Serv., Inc. v. Uline, Inc.*, 190 A.2d 812, 813 (D.C. 1963)).

Accordingly, this Court's precedents display a deep-seated reluctance to exclude relevant evidence. The Court adheres to the general "policy promoting the admission of as much relevant evidence as reasonably possible." *Johnson v. United States*, 683 A.2d 1087, 1099 (D.C. 1996) (en banc). "'Probative evidence should not be excluded because of crabbed notions of relevance or excessive mistrust of juries.'" *Id.* at 1100 (quoting *Allen v. United States,* 603 A.2d 1219, 1224 (D.C. 1992) (en banc)).

This Court has applied this salutary principle to the admission of expert testimony. *See In re Melton*, 597 A.2d 892, 903-04 (D.C. 1991) (en banc) ("The assumptions which form the basis for the expert's opinion, as well as the conclusions drawn therefrom, are subject to rigorous cross-examination. Juries are intelligent enough, in light of the availability of such cross-examination, to ignore what is unreliable or unhelpful. In most cases, therefore, objections to the reliability of out-of-court material relied upon by [an expert] will be treated as affecting only the weight,

and not the admissibility, of the evidence."). "In general, although an [expert's] opinion rises no higher than the level of the evidence and the logic on which is it predicated, it is for the jury, with the assistance of vigorous cross-examination, to measure the worth of the opinion." *District of Columbia v. Bethel*, 567 A.2d 1331, 1333 (D.C. 1990) (citations omitted); *accord Drevenak v. Abendschein*, 773 A.2d 396, 417 (D.C. 2001); *Bahura v. S.E.W. Investors*, 754 A.2d 928, 945 (D.C. 2000).

Appellants here seek to vest greater power in judges to exclude relevant evidence by overturning *Dyas v. United States,* 376 A.2d 827, 832 (D.C. 1977) (setting forth qualifications governing admissibility of expert testimony). But before expanding a power that came into being only recently in the history of the jury and that has, in respect of the jury's preeminent role, been circumscribed, "[t]he court should act prudently and with restraint." *Carl v. Children's Hosp.*, 702 A.2d 159, 180 (D.C. 1997) (en banc) (Schwelb, J. et al., concurring); *see also M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971).

Jurors originally were called because of their special knowledge of a case, and courts had power to control jurors, when judges believed that the jurors were not adhering to evidence, through conviction for attaint. JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 160-63 (1898), *available at* https://archive.org/details/cu31924017931712 (last visited March 12, 2015). But eventually jurors were called simply to weigh evidence adduced by others, and attaint no longer made sense. This transition to the modern, independent jury was marked in 1670 by Bushel's Case, (1670) 124 Eng. Rep. 1006 (C.P.), which reversed the convictions for attaint of jurors who had acquitted William Penn of taking part in

unlawful assembly. *Ex parte Siebold*, 100 U.S. 371, 376 (1879); THAYER, *supra*, at 166-68. The court found that jurors, no longer called because of their knowledge of events, were free to judge the credibility of witnesses unhindered by judicial control. THAYER, *supra*, at 166-68. The case established that "[t]he jury are judges of evidence." *Id.* at 168.

In the decades following the decision in Bushel's case, "judges showed scant disposition to filter evidence from the jury." John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 301 (1978). Other methods of judicial control of juries — composition; experience of jurors; the power of the judge to dismiss a case, subject to refiling, if the judge found evidence lacking; the lack of lawyers to check judicial power — could have rendered exclusion of evidence unnecessary. *Id.* at 272-300. Regardless, "for two centuries after the medieval self-informing jury had been replaced by the jury of passive lay triers no law of evidence was required." *Id.* at 306 (footnote omitted). The rise of the modern law of evidence was not attributable to a need to control uncomprehending jurors but rather to a need to control the lawyers who had become fixtures of the trial process. *Id.*

Rules of evidence arose in the nineteenth century and "serve to exclude from the jury's consideration much that is relevant to the issues to be adjudicated [and] have arguably deprived the jury of some of the power that it traditionally exercised. Judges are able to keep from the jury evidence that might change the outcome of the adjudicatory process were the jury allowed to receive it." Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 450 (1997). Judge Weinstein, a leading scholar on the law of

evidence, has observed as to Federal Evidence Rule 403 that trial courts vested with discretion "properly are reluctant to exclude relevant evidence unless there is a powerful and compelling reason to do so." *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1223, 1255 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987). This reluctance arises from recognition of the preeminent role of the jury. In any rare instance in which such powerful and compelling reasons exist to exclude scientific evidence, this Court already has vested in trial judges the necessary power to exclude it. *See Johnson*, 683 A.2d at 1099 (adopting the formulation of FED. R. EVID. 403); *Reed v. United States*, 584 A.2d 585, 591 (D.C. 1990) (permitting use of FED. R. EVID. 403 to exclude expert testimony).

II. Available evidence strongly suggests that juries are at least as well equipped as judges to evaluate the reliability of scientific testimony.

Underlying the proposed adoption of *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993),[1] is an assumption that scientific evidence can confuse jurors and, importantly, that jurors will not be as able to ascertain the worth of the evidence as well as a trial judge:

> While meticulous *Daubert* inquiries may bring judges under criticism for donning white coats and making determinations that are outside their field of expertise, the Supreme Court has obviously deemed this less objectionable than dumping a barrage of questionable scientific evidence on a jury, who would likely be even less equipped than the judge to make reliability and relevance determinations and more likely than the judge to be awestruck by the expert's mystique.

[1] Ironically, the standard sought for adoption here to exclude evidence was announced by the Supreme Court as a method to further include evidence. *Daubert*, 509 U.S. at 588 ("a rigid general acceptance requirement would be at odds with the liberal thrust of the Federal Rules [of Evidence] and their general approach of relaxing the traditional barriers to opinion testimony") (internal quotation marks and citations omitted).

Allison v McGhan Med. Corp., 184 F.3d 1300, 1310 (11th Cir. 1999). After *Daubert* was decided, scholars examined this assumption and suggested it was unwarranted. Neil Vidmar, *Are Juries Competent to Decide Liability in Tort Cases Involving Scientific/Medical Issues? Some Data from Medical Malpractice*, 43 EMORY L.J. 885, 888-89 (1994); Joseph Sanders, *The Merits of the Paternalistic Justification for Restrictions on the Admissibility of Expert Evidence*, 33 SETON HALL L. REV. 881, 930, 939 (2003) (suggesting judges may use *Daubert* to avoid juries). To the extent the assumption has been tested, it does not fare well.

Texas analyzed the capacity of its judges to assess scientific information. Honorable Cynthia Stevens Kent, *Daubert Readiness of Texas Judiciary: A Study of the Qualifications, Experience, and Capacity of the Members of the Texas Judiciary to Determine the Admissibility of Expert Testimony Under the Daubert, Kelly, Robinson, and Havner Tests*, 6 TEX. WESLEYAN L. REV. 1, 11-12 (1999). The author surveyed all 685 Texas judges, with 331 responding, "an excellent return rate of 48 percent of the total population of judges, and the returns certainly were a representative cross-section of the Texas judiciary." *Id.* at 12. The "vast majority" — 92% — of responding judges reported having some exposure to scientific method in their undergraduate course work, but another vast majority — 83% — reported having no further exposure in law school. *Id.* at 14. Twenty-eight of the responding judges, or 8.5%, reported having some relevant instruction during master's degree or Ph.D. studies. *Id.* The author concluded that greater experience with scientific method was desirable. *Id.* at 28.

Exposure to scientific method of a District of Columbia jury will be, on average, greater than that of a judge in the survey. Eighty-seven per cent of citizens of the

District of Columbia — persons who compose District juries — hold high-school diplomas. U.S. Census Bureau, *Educational Attainment in the United States: 2009*, 11 (Feb. 2012), http://www.census.gov/prod/2012pubs/p20-566.pdf (last visited March 6, 2015). That is the same percentage as of the surveyed judges who reported exposure to scientific method in high school. Kent, *supra,* at 13-14. Forty-eight and one-half per cent of District jurors have undergraduate degrees. U.S. Census Bureau, *supra*, 11. Extrapolating from the surveyed judges' experience of 92% reporting undergraduate exposure to scientific method, 45% of District jurors can be expected to have undergraduate exposure to scientific method. While that leaves any given juror only half as likely as any given judge to have such exposure, each case has one judge and between six and twelve jurors. In any given twelve-member jury, one would expect to see 5.4 persons who had such exposure, 2.7 persons on a six-member jury.

Twenty-eight of the 331 reporting judges, or about 8.5%, reported further exposure during master's degree or Ph.D. studies. Kent, *supra,* at 14. In the District, 21% of the population holds a master's degree or higher. Meghan McNally, Brookings Greater Washington Research Program, *Washington: Number One in College Degrees*, 4 (June 2003), http://www.brookings.edu/~/media/research/files/reports/2003/7/washington-mcnally/education.pdf (last visited March 6, 2015). That would yield 2.5 persons per twelve-member jury, 1.25 persons per six member jury, of that educational attainment. The collective scientific experience of an average jury again will be greater than that of the average judge surveyed.

Another survey of state-court judges yielded analogous results. Sophia I. Gatowski et al., *Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-Daubert World*, 25 LAW & HUM. BEHAV. 433 (October 2001). The authors surveyed 400 judges, about evenly divided between jurisdictions that had adopted *Daubert* and ones that had not. *Id.* at 441-42. The surveyed judges split about evenly over whether their educations had prepared them to make assessments under *Daubert*, 52% saying yes, 48% saying no. *Id.* at 442. Most of the judges said they had had some exposure to scientific method post-high school, 85% reporting some course work in the social sciences, 77% in the physical sciences, and 67% in the biological sciences. *Id.* Ninety-six percent of the judges reported that in continuing legal education courses "they had not received instruction about general scientific methods and principles." *Id.* One cannot derive the total percentage exposed to scientific methods, to compare it directly with the 92% in the Texas study, but even if it were 100%, a twelve-member jury in the District would be likely to have more than five persons at least as educationally equipped as the judge to evaluate scientific method, 2.5 persons on a six member jury. The authors concluded that although judges generally thought it appropriate for jurists to serve as gatekeepers under *Daubert*, "the extent to which judges understand and can properly apply the [*Daubert*] criteria when assessing the validity and reliability of proffered scientific evidence was questionable at best." *Id.* at 452.

Duke Professor and distinguished jury scholar Neil Vidmar notes, in a peer-reviewed paper, that the key issue is comparing the performance of jurors with "how legally trained persons respond to the same types of tasks." Neil Vidmar, *Expert*

Evidence, the Adversary System, and the Jury, 95 AM. J. PUB. HEALTH 137, 140 (2005), *available at* http://ssrn.com/abstract=849587 (last visited March 12, 2015). For example, judges performed "at approximately the same level as laypersons" on a set of tasks testing ability "to make probability inferences from basic statistical data." *Id.* Federal magistrate judges were "asked to make judgments about five types of situations in which laypersons and many professionals have been shown to make cognitive judgment errors by relying on the mental shortcuts that psychologists call 'heuristics.' The judges were susceptible to these errors in all five situations, and on three out of the five they performed no better than laypersons and persons from other professions." *Id.* at 140-41. Again, the performance of any one judge must be tested against the collective knowledge of "between six and twelve persons who can pool their perspectives and insights." *Id.* at 141.

Noting that the cited studies "give a generally positive picture of the ability of juries to deal with expert testimony," *id.*, Vidmar discusses his own research, the landmark Arizona Jury Project, "a unique study that videotaped the jury room discussions and deliberations of 50 actual civil juries." *Id.* Jurors were permitted to submit written questions, through the judge, to experts. *Id.* The jurors' questions indicated a keen understanding of expert testimony and a well-developed capability of assessing it.[2] Vidmar's conclusions are worth quoting at length:

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[2] For example:

> In one case, the plaintiff asserted severe back and leg pain from an injury. He had pre-existing injuries and health problems. The treating physician and another physician testified for him regarding tests performed and prescribed treatment. Jurors asked the following questions of a medical expert:

> Why no medical records beyond the two years prior to the accident? What tests or determination besides subjective patient's say so determined [your diagnosis of] a migraine? What exact symptoms did he have regarding a migraine? Why no other tests to rule out other neurological problems? Is there a measurement for the amount of serotonin in his brain? What causes serotonin not to work properly? Is surgery a last resort? What is indothomiacin? Can it cause problems if you have prostate problems?

In an automobile injury case, an overweight plaintiff alleged injury to her knee that required surgery. Her diagnostic radiologist testified and so did an accident reconstruction expert. The radiologist was asked the following questions by jurors:

> Did you see the tears in the meniscus? Do you see degeneration in young people and what about people of the plaintiff's age? Is a tear in the meniscus a loosening, lack or gash in the cartilage? Can you tell the age of a tear due to an injury? Can you see healed tissue in an MRI? Do cartilage tears heal by themselves? Can healed tears appear younger than they really are?

A defense medical expert in the same case was asked the following:

> Could the plaintiff have sustained a blunt meniscal tear during the accident? Could one tear cause another tear?

Questions to the plaintiff's accident reconstruction expert in that case included the following:

> Not knowing how she was sitting or her weight how can you be sure she hit her knee? Would these factors change your estimate of 15 ft/sec travel speed? If a body in motion stays in motion and she was continuing motion from prior to the impact, how did this motion begin and what do you base this on? How tall is the person who sat in your exemplar car to reconstruct the accident and how heavy was he? What is the error in your 10 mph estimate? Is the time of 50-70 milliseconds based on an estimate of the size of the dent? Do you conclude that the Olds was slowed and pushed to the left by the Lincoln and [if so] how would the plaintiff move to the right and forward?

Vidmar, *supra*, 95 AM. J. PUB. HEALTH at 142 (footnotes omitted).

> Critics also tend to ignore the reality that problems in understanding the evidence often lie with the experts who present that evidence or with the lawyers who provide the experts and orchestrate their testimony before and during trial. Criticisms of juries downplay the fact that, despite their legal training and experience, judges—the alternative to juries—may lack the scientific training to understand certain evidence and may be susceptible to the same biases. Juries, composed of between six and twelve persons, have the advantage of collective perspectives and evaluation of the evidence.
>
> This leads to a final observation. Critics of the jury system, including those who claim scientific expertise and objectivity in their own professional realms, have relied exclusively on anecdotes and appeals to "common sense" rather than on systematically collected data in making their assertions that juries cannot competently deal with expert evidence. More research needs to be conducted on the subject, and it may well turn out that juries may not perform as optimally as a judge with respect to some types of expert testimony. Nevertheless, the existing body of research, and it is a substantial body, indicates that juries do generally perform the assigned tasks well and that the claims that juries simply defer to experts are without foundation.

Id. at 142.

The latest empirical analysis of related issues acknowledges supporting a fear expressed by Vidmar, *supra*, Sanders, *supra*, and others that *Daubert* would lead, without warrant, to more gatekeeping decisions by judges and more exclusion of relevant evidence. Professor Andrew Jurs surveyed 158 state high-court judges in six states equally divided between states that had and had not adopted *Daubert*. Andrew Jurs, *Gatekeeper With A Gavel: A Survey Evaluating Judicial Management Of Challenges To Expert Reliability And Their Relationship To Summary Judgment*, 83 MISS. L.J. 325, 339-43 (2014). Judges from *Daubert* states were much more likely than judges from states that follow *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), to believe that *Daubert* is a more restrictive standard. Jurs, *supra* at 365-66, 368-69.

Those results are consistent with earlier empirical research showing that, after *Daubert*, the likelihood of evidence being found unreliable increased markedly. *Id.* at 330-31.

The frequency of challenges under *Daubert* is much higher than under *Frye*, and the number that are handled by motion *in limine* has increased radically, from 32% of challenges to 72%. *Id.* Such motions feature a judge evaluating evidence when there is little reason to believe that the judge can weigh the evidence more appropriately than a jury. If the judge decides to admit the evidence, trial can feature much of the same examination and cross-examination that took place at the hearing, adding layers of cost and delay to litigation.

This Court should preserve a strong presumption of admissibility of evidence, entrusting the evaluation of evidence to the jurors constitutionally assigned with the task. The Court in *Daubert* noted, "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Id.* at 596. Borderline expertise will remain subject to cross examination, "the 'greatest legal engine ever invented for the discovery of truth,'" *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 J. Wigmore, Evidence § 1367 (3d ed. 1940), before a jury at least as capable, on average, as a judge to assess its worth. Vesting the jury with powers analogous to those vested in juries studied in the Arizona Jury Project would be likely to produce better evaluations of scientific evidence than those provided by judges and would be more consonant with the constitutional pre-eminence of juries than a rule expanding the powers of judges as gatekeepers.

CONCLUSION

For all these reasons, the judgment of the Superior Court of the District of Columbia should be affirmed.

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This certifies that on this 13th day of March, 2015, a copy of the foregoing Brief for The Trial Lawyers Association of Metropolitan Washington, D.C. as Amicus Curiae in Support of Appellees and Affirmance was served by United States mail, first-class postage prepaid, on:

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