IN RE: ACCUTANE® LITIGATION	SUPREME COURT OF NEW JERSEY Docket No.: 079958 SUPERIOR COURT OF NEW JERSEY APPELLATE-DIVISION Docket No. A-4698-14T1 Docket No. A-1910-16T1 Sat Below: Hon. Susan L. Reisner, P.J.A.D. Hon. Ellen L. Koblitz, P.J.A.D. Hon. Thomas W. Sumners, Jr., P.J.A.D. On Appeal From Superior Court, Law Division, Atlantic County Case No. 271 Sat Below: Hon. Nelson C. Johnson, J.S.C. Civil Action

BRIEF OF AMICUS CURIAE DRI - THE VOICE OF THE DEFENSE BAR

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PRELIMINARY STATEMENT

The civil jury, a "fundamental and sacred" feature of American jurisprudence, uniquely preserves public participation in our civil justice system. Jacob v. City of New York, 315 U.S. 752, 752-753; 62 S.Ct. 854; 86 L.Ed 1166 (1942). But allowing unreliable expert testimony into evidence threatens the very integrity of the jury system. In today's world, with the jury system under attack from many quarters, the perception or reality that reliable and just outcomes are not reached undermines confidence in the civil justice system and its cornerstone, the jury trial.

The rules governing civil procedure and evidence were created to preserve and protect the system's truth-finding functions, and its fairness to litigants. N.J.R.E. 102 ("These rules shall be construed to secure fairness in administration" so that "truth may be ascertained and proceedings justly determined."). The Federal Rules of Civil Procedure and the Federal Rules of Evidence likewise exist for these very purposes. See Fed.R.Civ.P. 1 (These rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."); Fed.R.Evid. 102 ("These rules should

be construed...to administer every proceeding fairly...to the end of ascertaining the truth and securing a just determination."). The exclusion of unreliable evidence, including scientific, statistical, and technological data, is a principal objective.

Scientific, statistical, and technological data is increasingly important in today's litigation. The need for and reliance upon witnesses with scientific, technical, or other specialized knowledge has increased commensurately with the complex factual matters jurors are being asked to resolve. But expert evidence can be both powerful and misleading because, by definition, it is beyond the layperson's experience and understanding. Expert testimony can be difficult to evaluate and deceptively enticing. And unfortunately, the observation that there is nothing that cannot be proved by a so-called "expert" is more noticeable than ever. Chaulk v. Volkswagen of America, Inc., 808 F.2d 639, 644 (7th Cir. 1986) (Posner, J., dissenting) (the expert's testimony "was the testimony either of a crank or, what is more likely, of a man who is making a career out of testifying for plaintiffs in automobile accident cases in which a door may have opened...[h]is testimony illustrated the age-old problem of expert witnesses who are 'often the mere paid advocates or partisans of those who employ and pay them, as much

so as the attorneys who conduct the suit. There is hardly anything, not palpably absurd on its face, that cannot now be proved by some so-called 'experts.'"). Witnesses, parading as experts, can hide behind a veil of jargon and statistics, to undermine or entirely erase the integrity of the jury trial.

Traditionally, judicial limitations on expert testimony were focused on excluding individuals lacking in the basic qualifications or credentials to be deemed an "expert" on a particular subject. But today, the greater risk to the civil justice system today lies in the opposite situation: a jury trial in which a highly credentialed-expert relies on underlying methodology that is scientifically unreliable. These partisans throw up clouds of confusion and yet their testimony may be given credence, not because they have a well-founded methodology, but because they have presented as scientific something that no one outside of a courtroom would agree is scientific to justify their unfounded conclusion.

Psychologists agree that when jurors are presented with complex information beyond their ability to understand, "they rely more on external cues such as the expert's credentials" to evaluate the testimony. Jonathan J. Koehler, et al., Science, Technology, or the Expert Witness: What Influences Juror's Judgments About Forensic Science Testimony?, Psychology, Public

Policy, and Law, Vol 22, No. 4, 401-413 (2016). Thus, when confronted with complex technical information that they cannot understand, jurors will look to an expert's credentials or other peripheral cues - such as the expert's "likeability" - as the basis for evaluating their testimony. Accordingly, placing credentialed, but still unreliable expert testimony before a jury, particularly in cases such as this one involving complex scientific and statistical principles, undermines the jury system and the inherent fairness that the rules are intended to guarantee. Rubanick v. Witco Chemical Corp., 125 N.J. 421, 433; 593 A.2d 733 (1991) ("[w]e have recognized the dangers of allowing the jury to consider expert testimony the reliability of which has not been sufficiently demonstrated.").

The Appellate Division's decision in this case underscores the need for greater judicial control of expert testimony. While undoubtedly the jury is the final arbiter charged with resolving disputed issues of material fact, including the credibility of witnesses, it is incorrect to conclude that once a witness is qualified as an expert, he or she is free to testify to anything related to the area of his or her expertise. Yet without correction of the Appellate Division's decision by this Court, litigants will be free to present testimony by experts who are credentialed yet espouse opinions based on scientifically

unreliable methodologies, rather than on generally accepted methodologies employed within their discipline. Meaningful gatekeeping requires more. Kemp ex rel. Wright v. State, 174 N.J. 412, 427 (2000) (requiring the expert to "identify the factual basis for his conclusion, explain his methodology, and demonstrate that both the factual basis and underlying methodology are scientifically reliable."); Rubanick, supra, at 451 ("[t]he critical determination is whether comparable experts accept the soundness of the methodology, including the reasonableness of relying on this type of underlying data and information.").

"Indeed, the exclusion of unreliable evidence is a principal objective of many evidentiary rules," including both New Jersey Rule of Evidence 702 and Federal Rule of Evidence 702. U.S. v. Scheffer, 523 U.S. 303, 310; 118 S.Ct. 1261; 140 L.Ed.2d 413 (1998). In Rubanick, this Court instructed that "the proponent of an expert opinion must demonstrate that the data or information used were soundly and reliably generated and are of a type reasonably relied on by comparable experts in the particular field[.]" 125 N.J. at 447 (1991). Similarly, in order to prevent unreliable or unsound testimony from reaching the jury, the United States Supreme Court instructed in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589; 113 S.Ct.

2786; 125 L.Ed.2d 469 (1993) that trial courts must act as "gatekeepers" to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." The time has now come for New Jersey courts to either adopt Daubert, as most of its sister states have done, or clarify the standards for evaluating expert testimony. Specifically, the testimony of even a well-credentialed expert will only be admissible at trial when based on a sound and reliable methodology reliably applied to the facts of the case.

STATEMENT OF INTEREST

Amicus curiae DRI - The Voice of the Defense Bar, is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. See http://www.dri.org/About. Because of this commitment, DRI seeks to promote the role of defense attorneys, to address issues germane to defense attorneys and their clients, and to promote a fair and balanced civil justice system.

DRI's members believe in the jury system as a means of finding the truth. But DRI's members know that for the system to work, the courts must ensure the integrity of juries and trials. To promote these objectives, DRI participates as amicus curiae

in cases that raise issues important to its membership, their clients, and the judicial system. This is one of those cases.

DRI's interest in the important issues presented here stems from its members' extensive involvement in civil litigation, including mass tort actions. DRI therefore has a unique vantage point to help this Court understand the importance of the role of trial courts in performing their "gatekeeper" function to ensure that only expert testimony based on reliable methodologies, reliably applied to the facts of the case, is presented to the jury. DRI's members are regularly called upon to defend their clients in mass tort and other lawsuits involving the use of expert testimony, and have witnessed firsthand how proper gatekeeping of expert testimony can curb systemic abuses by plaintiffs and protect the integrity of a trial. Conversely, DRI's members have also witnessed how the admission of unreliable expert testimony can drastically change the course of litigation and oftentimes force defendants into an unfair settlement or result in an unjust verdict, which is difficult to correct on appeal. For these reasons, DRI is well-suited to speak on the issue before this Court not only from a legal standpoint, but also from practical and economic standpoints as well.

If the decision below is affirmed, plaintiffs and defendants alike may use the Appellate Division's "relaxed" interpretation of New Jersey Rule of Evidence 702 and the standard for admissibility of expert evidence in mass tort cases to place before the jury well-credentialed experts whose testimony falls far short of satisfying the appropriate prerequisites for admissibility. In re Accutane Litigation, 451 N.J. Super. 153, 193-195 (2017). In complicated cases beyond a lay jury's understanding, the expert's credentials and presentation style may be the sole basis for evaluating the evidence and rendering a verdict. DRI has a strong interest in ensuring that the standard employed by the New Jersey courts is one capable of consistent application and will result in the admission of only expert testimony derived from reliable scientific methodologies which are reliably applied to the facts of the case. Indeed, this should be the interest of all.

ARGUMENT

A. Expert testimony has the potential to unduly influence jurors evaluating complex scientific and technical issues in litigation

The jury's search for truth oftentimes requires assistance from those possessing expert knowledge. "Economic, statistical, technical, and natural and social scientific data are becoming increasingly important in both routine and complex litigation."

Judicial Conference of the United States, Report of the Federal Courts Study Committee 97 (April 2, 19990); General Elec. Co. v. Joiner, 522 U.S. 136; 118 S.Ct. 512; 139 L.Ed.2d 508 (1997) (Breyer, J., concurring); C. Wright and V. Gold, Federal Practice and Procedure, § 6266, p. 625 (1996) (noting "modern courts have been confronted with a huge amount of expert testimony, some based on cutting-edge breakthroughs and some based on what has been called 'junk science.'"). One study noted that 86% of civil trials included expert testimony. Joel Cooper and Isaac M. Neuhaus, The "Hired Gun" Effect; Assessing the Effect of Pay, Frequency of Testifying, and Credentials of the Perception of Expert Testimony, Law and Human Behavior, Vol. 24, No. 2 (2000).

The increasing reliance on expert testimony is a product of lay jurors being asked to resolve increasingly complicated issues generally beyond their experience and knowledge. Indeed, expert testimony is permissible only when an intelligent evaluation of the facts requires expertise and knowledge not possessed by the jury: "[T]here is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained man would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a

specialized understanding of the subject involved or the dispute." Advisory Committee Notes, Fed. R. Evid. 702 (1972) (quoting Ladd, Expert Testimony, 5 Vand. L. Rev. 414, 418 (1952)). But, in our adversary system, where the litigants themselves select and finance expert witnesses, incentives exist that can encourage the use of unfounded expert opinions and sacrifice the truth-seeking process. In today's high-stakes litigation environment, the adversary system has generated a large and highly specialized industry of expert witnesses who are not only willing, but eager, to testify to whatever is necessary to assure the success of their side. Seventh Circuit Judge Richard A. Posner specifically observed this finance-driven motivation of experts to "bend their science" in favor of the party financing their testimony: "[m]any experts are willing for a generous (and sometimes for a modest) fee to bend their science in the direction from which their fee is coming." Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Ltd. Partnership, 34 F.3d 410, 415 (7th Cir. 1994), abrogated on other gds, Advanced Tactical Ordnance Systems, L.L.C. v. Real Action Paintball, Inc., 751 F.3d 976 (7th Cir. 2014).

"[S]tudies have shown that expert testimony influences a juror's decision more often than not." Miles J. Vigilante, Screening Expert Testimony After Kuhmo Tire Co. v. Carmichael, 8

J.L. & Pol'y 543 (2000). A decade before he authored the United States Supreme Court's opinion in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 595, 113 S.Ct. 2786, 2798, 125 L.Ed.2d 469 (1993), Justice Blackmun recognized the "obvious" and powerful effect of scientific evidence on lay jurors:

> Scientific evidence impresses lay jurors. They tend to assume it is more accurate and objective than lay testimony. A juror who thinks of scientific evidence visualizes instruments capable of amazingly precise measurement, of findings arrived at by dispassionate scientific tests. In short, in the mind of the typical lay juror, a scientific witness has a special aura of credibility.

Barefoot v. Estelle, 463 U.S. 880, 928 n. 8; 103 S.Ct. 3383; 77 L.Ed.2d 1090 (1983) (Blackmun, J., dissenting) (quoting E. Imwinkelried, Evidence Law and Tactics for the Proponents of Scientific Evidence, 33, 37 (E. Imwinkelried ed. 1981)). Commentators agree, voicing concerns that jurors are likely to defer to the presentation of expert testimony even when the expert's reliability is called into question:

> [E]xpert opinion can undermine the ability of the trier of fact to decide issues correctly if the trier of fact is incapable of critically evaluating the reliability of that opinion. In addition, experts present themselves as people with special qualifications. As a consequence, there is a significant danger that a jury may view the

> expert as surrounded by an 'aura of infallibility.' Thus, even where the trier of fact has some basis for questioning the expert's reliability, it may be disinclined to do so. In an era where the opinions of professional witnesses are available for purchase in virtually every field of science and technology, a jury's unquestioning deference to expert opinion may seriously jeopardize accurate factfinding.

Wright & Gold, Federal Practice and Procedure § 6262, pp. 182-183 (underlining added).

"Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." Daubert, 509 U.S. at 595 (quoting Weinstein, Rule 702 of the Federal Rules of Evidence Is Sound: It Should Not Be Amended, 1991, 138 F.R.D. 631, 632). See also, Charles Richey, Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Civil and Criminal Jury Trials, 154 F.R.D. 537, 545 (July 1994) ("No one seriously questions the proposition that so-called expert witnesses' can add an aura of authority to any asserted opinion."). If not properly controlled by the courts, this phenomenon threatens the just resolution of disputes.

B. Psychological studies show that jurors may view a credentialed expert as surrounded by an "aura of infallibility" even where that expert's methodologies are scientifically unsound and unreliable

DRI recognizes that jurors face a difficult task. A recent

publication from the American Psychological Association perhaps best summarizes the burden placed on jurors to evaluate complex evidence:

> Legal decision-making is difficult. In courtroom trials, untrained jurors possess an array of unfamiliar and often contradictory items of evidence (Saks & Spellman, 2016). In most jurisdictions, jurors hear instructions, evidence, and arguments with little or no opportunity to ask clarifying or substantive questions. Moreover, expert testimony is often complex and presented in technical language.

Jonathan J. Koehler, et al., Science, Technology, or the Expert Witness: What Influences Juror's Judgments About Forensic Science Testimony?, Psychology, Public Policy, and Law, Vol 22, No. 4, 401-413 (2016). Psychologists have observed that despite jurors' efforts to understand the evidence, when the evidence is too difficult, jurors "fall back" on an expert's credentials as the basis to evaluate it:

> The task that awaits jurors is capable of pulling them in opposite psychological directions. On the one hand, their role would motivate them to want to understand the evidence and seek correct answers. In fact, research indicates that jurors are focused on the substantive content of the evidence, including expert testimony (Diamond & Rose, 2005; Vidmar & Diamond, 2001). But as the testimony becomes complex or draws on techniques whose validity is unknown or difficult to understand, jurors may rely more on external cues such as the expert's credentials (Cooper & Neuhaus,

> 2000) or use of language (McKimmie, Newton, Schuller, & Terry, 2013) to evaluate the testimony.

Id. (underlining added). This approach is "consistent with social psychological theory," which shows that people "rely more on peripheral cues when they lack the ability or expertise to focus on content." Id.; Joel Cooper and Isaac M. Neuhaus, The "Hired Gun" Effect; Assessing the Effect of Pay, Frequency of Testifying, and Credentials of the Perception of Expert Testimony, Law and Human Behavior, Vol. 24, No. 2 (2000). The presentation skills of a credentialed advocate-witness make it even more difficult for non-scientifically trained lay people to assess scientific methodology in a courtroom setting. "For example, the credentials or the appearance of the communicator may determine the persuasiveness of a particular message." Id. Studies show that a jury is "more strongly influenced by the expertise of the source making the argument rather than the content of the message itself." Id.

In one study of mock jurors exposed to highly complex scientific testimony in a civil case, the verdicts and beliefs about the issues were functions of the experts' credentials. "Despite identical testimony, a scientist from a highly prestigious university whose degree was also from a prestigious university was significantly more effective in convincing a jury

than a scientist whose credentials were more moderate." Id. Another study noted that jurors "relied heavily on a scientific expert's credentials when weighing the expert's testimony...when the testimony was linguistically complex." Koehler, supra, at 403.

DRI does not make light of an expert's qualifications, which comprise a critical component of whether an expert should be permitted to offer opinion testimony at trial. Evaluation of the expert's knowledge, skill, experience, training or education is a vitally-important first step of the analysis. Rubanick, 125 N.J. at 449; Fail-Safe, L.L.C. v. A.O. Smith Corp., 744 F. Supp. 2d 870 (E.D. Wisc. 2010). But impressive and extensive qualifications, and the conviction with which an expert presents his or her opinions at trial, is not a substitute for analysis. As the Seventh Circuit aptly observed, even a "supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are based upon some recognized scientific method and are reliable and relevant under the test set forth by the Supreme Court in Daubert." Clark v. Takata Corp., 192 F.3d 750, 759 n. 5 (7th Cir. 1999). This Court has also aptly observed this point. Rubanick, supra, at 449 ("[t]he expert must possess a demonstrated professional capacity to assess the scientific significance of the underlying data and

information, to apply the scientific methodology, and to explain the bases for the opinion reached."). Given the body of research by psychologists into the grounds on which jurors reach their conclusions, including jurors' tendencies to default to an expert's credentials when faced with overwhelmingly complex testimony, a very real risk exists when an expert's credentials alone permit that expert's unreliable opinions to reach the jury.

While the risks from admitting unqualified expert testimony are apparent and significant, DRI believes those risks are even greater when a highly credentialed expert, whose underlying methodology is not scientifically reliable, is permitted to testify. In the former situation, an expert's lack of qualifications is typically apparent, and the jury is able to properly discard the individual's testimony. In the latter situation, however, the unreliability of an expert's opinions and his or her unsound methodologies may be lost in the weeds of an expert's impressive resume and the scientific-sounding jargon and numbers he or she throws up in an effort to satisfy the party paying for the testimony.

There is a great risk that jurors will give inordinate weight to the testimony an expert, even where the expert's

methodology is not accepted, so long as the expert is credentialed and qualified. Even the most credentialed expert can offer unreliable testimony. As the Eleventh Circuit aptly observed, an expert's qualifications or credentials are not a guarantor of reliability:

> Of course, the unremarkable observation that an expert may be qualified by experience does not mean that experience, standing alone, is a sufficient foundation rendering reliable *any* conceivable opinion the expert may express. As we observed in *Quiet Technology*, "while an expert's overwhelming qualifications may bear on the reliability of his proffered testimony, they are by no means a guarantor of reliability.... [O]ur caselaw plainly establishes that one may be considered an expert but still offer unreliable testimony." 326 F.3d at 1341-42. Quite simply, under Rule 702, the *reliability* criterion remains a discrete, independent, and important requirement for admissibility.

United States v. Frazier, 387 F.3d 1244, 1261 (11th Cir. 2004) (underlining added).

To guard against this risk - exemplified in this case through the Appellate Division's allowance of testimony by two experts who are credentialed but whose methodology is speculative and unreliable - this Court should reaffirm that that an expert seeking to offer testimony at trial must first demonstrate that his or her methodology is scientifically sound and that such methodology is reliably applied to the facts of the case. This two-step inquiry is essential to protect the

integrity of the trial.

The complex epidemiological studies that form the heart of causation proofs here are unquestionably matters of expert testimony. A number of studies show the lack of a correlation between Accutane use and an increased risk of Crohn's disease and IBD. This data has been combined into published meta-analyses, which allow experts to offer a more precise risk estimate. To evaluate these studies requires an understanding of what constitutes a valid epidemiological study and of the complex statistical methodology used to determine the existence or non-existence of a causal link. Most jurors lack the necessary expertise to evaluate the reliability of epidemiology studies or the reliability of advanced statistical models and conclusions without expert help. Yet the Appellate Division has permitted experts to testify in contradiction to overwhelming scientific and statistical evidence without using methodology or reasoning that would be accepted as valid and reliable in their fields. As the trial court noted, if these experts offered critiques based on generally accepted scientific and statistical methods, that would be one thing. But to offer experts without requiring grounds for doing so that are consistent with the methods and usages of their scientific community is another - and one that should be disallowed. Landrigan v. Celotex Corp.,

127 N.J. 404, 417 (1992) ("[w]e agree with defendants that when an expert relies on such data as epidemiological studies, the trial court should review the studies, as well as other information proffered by the parties, to determine if they are of a kind on which such experts ordinarily rely. The court should then determine whether the expert's opinion is derived from a sound and well-founded methodology that it is supported by some expert consensus in the appropriate field."); Braun v. Lorillard Inc., 84 F.3d 230, 234 (7th Cir. 1996) (Judge Richard Posner noting that "[t]he scientific witness who decides to depart from the canonical methods must have grounds for doing so that are consistent with the methods and usages of his scientific community."). Regardless of whether an expert is offering his or her opinion directly or to attack other experts' opinions, the basis of the testimony must be grounded in the accepted methodology of the discipline.

C. By clarifying that an expert must present a sound methodology to ensure reliability of the opinions he or she intends to offer at trial, this Court will eliminate the risk that jurors will rely on an expert's credentials alone to evaluate expert testimony

The Appellate Division's published decision allows a credentialed expert to offer opinion testimony as long as the expert claims to have reviewed the evidence. It eliminates the

requirement that an expert show that his or her methodology is scientifically sound or reliable. As long as experts articulate some basis for their opinions, no matter how unreliable, their testimony can be presented to the jury.

Reversal of the trial court's exclusion of the testimony of plaintiffs' experts, Madigan and Kornbluth, resulted in the introduction of unreliable studies and case reports, and rejection of multiple thousand-person studies refuting any link between Accutane and Crohn's disease. If left intact by this Court, the Appellate Division's decision is likely to extend much further, even beyond the widespread mass tort litigation in New Jersey. See Darren Whyte, Top 10 biggest life science employers in New Jersey, ProClinical Life Sciences Recruitment Blog, May 24, 2017, available at https://blog.proclinical.com/top-10-biggest-life-science-employers-in-new-jersey (last visited Feb. 13, 2018)(noting that in 2015, 50% of new FDA approvals came from companies that have a base in the New Jersey region). It will be used by opportunistic plaintiffs as a roadmap for allowing New Jersey trial courts to abandon their gatekeeping responsibilities in a variety of civil actions, ranging from products liability to intellectual property - essentially, any case where expert testimony is required.

In mass tort and other complex cases, large amounts of money are at stake. The costs of a major lawsuit can sound the death knell for new companies and those suffering under today's economic climate. Bradley J. Bondi, Facilitating Economic Recovery and Sustainable Growth Through Reform of the Securities Class-Action System: Exploring Arbitration as an Alternative to Litigation, 33 Harv. J.L. & Pub. Pol'y 607, 612 (Spring 2010). Accordingly, a trial court's ruling that expert testimony (even though derived from an unsound methodology and/or unreliably applied to the facts of the case) is admissible at trial can coerce corporate defendants into paying a ransom settlement to avoid the uncertainty of trial and the risk that jurors will be persuaded by outlandish expert testimony on the basis of peripheral cues, such as his or her credentials. The strain this places on the businesses that DRI's members are regularly called on to defend cannot be overstated.

To eliminate this unfairness, and to restore the just resolution of disputes, this Court should reverse the decision of the Appellate Division and clarify that under New Jersey's gatekeeping directives, unreliable testimony like that presented by plaintiffs' experts here has no place in New Jersey courtrooms. The issues this Court is asked to consider here

mirror the issues the United States Supreme Court had to consider when deciding Daubert and Kumho. In fact, it was precisely this need for a clear and consistent explication of proper implementation of Federal Rule of Evidence 702 that resulted in Daubert. The same result should issue here in the context of New Jersey Rule of Evidence 702.

Adoption of the Daubert standard for admissibility of expert testimony in a civil case - a standard established in the federal courts nearly 25 years ago and now adopted by approximately 75% of the nation - would further clarify New Jersey's gatekeeping rules. In Daubert, the United States Supreme Court held that Federal Rule of Evidence 702 (which closely mirrors New Jersey Rule of Evidence 702) requires district courts to ensure that expert scientific testimony "both rests on a reliable foundation and is relevant to the task at hand." 509 U.S. at 597, Thus, Rule 702 imposes a "gatekeeping" duty on district courts, which must exclude unreliable and irrelevant evidence. See, e.g., Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768, 792 (6th Cir.2002). In Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152; 119 S.Ct. 1167; 143 L.Ed.2d 238 (1999), the Supreme Court expanded Daubert to cover expert

testimony based upon "technical" and "other specialized knowledge."

Whether this Court adopts Daubert or announces its own formulation, preservation of the integrity of jury trials makes essential a test that requires New Jersey's trial courts to determine that an expert's proffered opinion is based on "recognized scientific, technical, or other specialized knowledge" and that both the factual basis and underlying methodology employed by the expert are scientifically reliable. N.J.R.E. 702; Kemp, 174 N.J. at 427. A clear rule, capable of consistent application, will enhance the integrity of the fact-finding process by avoiding juror confusion due to a well-credentialed expert who presents nothing more than personal opinion or untested and speculative conclusions that deviate from analysis and opinions drawn from accepted scientific or technical methods of inquiry. A trial court must consider whether the proffered expert's field is reliable – astrology or necromancy, for example, are not. See Kumho Tire, supra. But that does not end the required inquiry; the trial court must also evaluate the conclusions of the expert to determine whether they are derived from a reliable foundation. See, e.g., General

Elec. Co. v. Joiner, 522 U.S. 136; 118 S.Ct. 512; 139 L.Ed. 2d 508 (1997).

The problem with the Appellate Division's relaxed "let-it-all-in legal theory" is that it creates the opportunity for a "credulous jury [to] transform scientific dust into gold." Peter W Huber, Galileo's Revenge: Junk Science in the Courtroom, p. 3 (Basic Books, 1993). N.J.R.E. 702, like its federal counterpart, provides a vehicle for preventing such an outcome. But the strictures of the rule were ignored by the Appellate Division. Unless this Court gives further guidance to the New Jersey bench and bar, the textual requirements of N.J.R.E. 702 will lack meaningful content and juries will continue to deliberate on the basis of unreliable testimony.

CONCLUSION

When a well-credentialed expert departs from the sound and well-accepted methodologies of his or her discipline or purports to apply them in the absence of necessary record facts, that expert's testimony impedes the jury's search for truth. This, in turn, leads to incorrect decisions and the decline of public confidence in our civil justice system. DRI urges the Court to reverse the Appellate Division's decision and clarify that New

Jersey courts should not allow such unreliable testimony to damage the jury process.

Respectfully submitted,

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