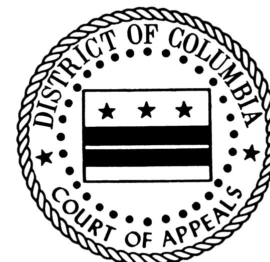

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CASE NO. 23-CV-0700

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

MICHAEL PATRICK MURRAY, *et al.*,[1]

Appellants,

v.

MOTOROLA INC., *et al.*,

Appellees,

ON APPEAL FROM THE SUPERIOR COURT OF
THE DISTRICT OF COLUMBIA CIVIL DIVISION

APPELLANTS' CONSOLIDATED REPLY BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED

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[1] This Reply Brief relates to *Murray* and the following twelve related cases (collectively, the "Murray Cases"): *Agro v. Motorola, Inc.,* Case No. 2002 CA 001368 A; *Cochran v. Audiovox Communications Corp.,* Case No. 2002 CA 001369 A; *Schwamb v. Qualcomm, Inc.,* Case No. 2002 CA 001370 A; *Schofield v. Motorola, Inc.,* Case No. 2002 CA 001371 A; *Keller v. Nokia,* Case No. 2002 CA 001372 A; *Marks v. Motorola, Inc.,* Case No. 2010 CA 003206 B; *Kidd v. Motorola, Inc.,* Case No. 2010 CA 007995 B; *Prischman v. Motorola, Inc.,* Case No. 2011 CA 002113 B; *Bocook v. Motorola, Inc.,* Case No. 2011 CA 002453 B; *Brown v. Nokia, Inc.,* Case No. 2011 CA 006710 B; *Solomon v. Motorola, Inc.,* Case No. 2011 CA 008472 B; *Noroski v. Samsung Telecomm America, LLC,* Case No. 2011 CA 008854 B.

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INTRODUCTION

Rather than address the substance of Plaintiffs' arguments, Defendants focus on mischaracterizing Plaintiffs' principal Brief ("Plaintiffs' Brief") as not even arguing abuse of discretion or prejudicial effect. Yet, this is precisely the focus of Plaintiffs' Brief, where the Superior Court's abuse of discretion is manifest in each clear error described by Plaintiffs, and at every turn resulting prejudice is explained again and again. Defendants apparently resort to this tactic as a deflection because the clear errors and prejudice discussed are so egregious.

Defendants focus on Judge Burgess' 2011 Case Management Order (CMO), yet the CMO was specifically geared to *Frye/Dyas*. The parties were directed by Judge Burgess to put *Daubert* aside for general causation discovery, expert reports and the *Frye/Dyas* evidentiary hearing,[2] and the bulk of Plaintiffs' experts passed Defendants' *Frye/Dyas* challenge. Defendants did not appeal or challenge the substance of Judge Weisberg's *Frye/Dyas* ruling; instead petitioning this Court to change the expert standard. Nevertheless, Judge Irving's rulings are in large part inconsistent with Judge Weisberg's findings, which Defendants did not appeal.

Defendants seize upon gratuitous *in dicta* comments made by Judge Weisberg in his *Frye/Dyas* Opinion pondering whether Plaintiffs' experts would

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[2] Apx., 1683 ("…you said *Daubert* uses *Frye*. Put that aside."), 1693, 1694 ("Let's have the expert report due with respect to *Frye*"), 1700, 1701, 1708-1712 ("I'm saying a *Frye* hearing, a hearing under *Frye* to see whether or not plaintiffs can satisfy *Frye* and go on from there."), 1715, 1717, 1721, 1724.

pass *Daubert* review and whether the state of the science was sufficient for an expert to opine with scientific certainty regarding whether cell phone radiation can cause brain tumors. But these issues were not even addressed during discovery, in the *Frye/Dyas* expert reports or the *Frye/Dyas* evidentiary hearing because Judge Burgess had directed the parties not to address these issues at all.

Defendants also ignore that this Court expressly directed the Superior Court in the post-*Frye/Dyas* appellate opinion changing the expert standard from *Frye/Dyas* to *Daubert*/Rule 702 to provide protections "in order to prevent prejudice and unfairness to Plaintiffs" in light of the 2016 evidentiary standard change and remand.[3] Nevertheless, the Superior Court's post-remand rulings not only failed to provide any such protections, but in fact caused unfairness and severe prejudice to Plaintiffs at every turn. Years had passed during which an explosion of scientific research directly related to the general causation issues in these cases took place, but Judge Weisberg denied Plaintiffs' renewed requests for discovery relating to the *Daubert*/Rule 702 factors after remand even though Judge Burgess had denied these same categories of discovery years earlier because the *Daubert* factors were deemed to be irrelevant to the *Frye/Dyas* inquiries and the parties were directed to put *Daubert* aside. At the same time, Judge Weisberg also denied Plaintiffs' request after remand to add experts who had formed new

[3] Plaintiffs' Brief, 4, 11-14, 19, 21. Apx., 758, 3390, 3399-3400.

opinions based on the new scientific studies. Although Judge Weisberg did allow the experts who had been listed years earlier before the explosion of scientific research to supplement their reports to account for the new scientific studies, each successor Judge after remand misapplied Judge Weisberg's rulings and refused to allow Plaintiffs' existing experts to fully supplement their reports with the new scientific studies and precluded each of the them from testifying to any new opinions that they had formed based on the new scientific studies alone or when considered in conjunction with pre-existing scientific studies. The effect of the Superior Court's post-remand rulings was to preclude: (1) Plaintiffs' experts from considering and relying on the explosion of scientific research that occurred after the experts had submitted their reports and testified in connection with *Frye/Dyas* years earlier; (2) Plaintiffs' experts from forming new opinions or adjusting their existing opinions based on the explosion of scientific research alone or in conjunction with pre-existing studies; and (3) Plaintiffs from naming additional or new experts who formed opinions based on the explosion of scientific research alone or in conjunction with pre-existing scientific studies.

Defendants unfairly attempt to cast Plaintiffs' attempt to make use of the current state of the science which exploded after Plaintiffs' experts issued reports and testified at a Frye/Dyas hearing, as seeking a complete re-do. Defendants' characterization distorts and ignores the unusual circumstances of these cases

where an explosion of science directly related to the general causation issues involved in these cases occurred during the years when Defendants petitioned this Court to change the expert admissibility standard after Plaintiffs' experts already had passed Defendants' *Frye/Dyas* challenge. Plaintiffs are entitled to have the general causation issues decided based on the current state of the science in these cases which involve important public health issues and with experts who have been able to consider and form opinions based on such scientific studies.

ARGUMENT

I. The Superior Court's *Daubert* Order Is Clearly Erroneous.

Despite Defendants' repeated attempts to deflect from the substance and merit of Plaintiffs' arguments, Plaintiffs' Brief fully comports with D.C. App. R. 28.[4] Plaintiffs properly provide a comprehensive and concise description of review standards for summary judgment and *Daubert* rulings, and explaining the *Daubert* inquiry and its factors along with relevant citations including cases decided by this Court and in this very case.[5] Plaintiffs devote an additional 21 pages (nearly half the page limit, p. 27-48) to address in detail the exclusion of each of Plaintiffs' experts separately, citing to cases and specific parts of the record to explain why

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[4] Defendants cite D.C. App. R. 28(a)(10) but omit half its language. Subsection (a)(10)(b) (which Defendants omit) states: "for each issue, [the brief is to contain] a concise statement of the applicable standard of review which may appear in the discussion of the issues or under a separate heading placed before the discussion of the issues."

[5] Plaintiffs' Brief, 7-11.

each exclusion is clearly erroneous (which constitutes an abuse of discretion),[6] why Judge Irving's *Daubert* rulings clearly violate *Daubert's* gatekeeping duties by unduly focusing on general acceptance of conclusions, gutting Plaintiffs' experts' reports to eliminate opinions and support for opinions based on the explosion of scientific research that was published after the *Frye/Dyas* rulings, refusing to allow Plaintiffs' experts to testify at the *Daubert* evidentiary hearing about their full opinions or support for their opinions and refusing to allow general causation discovery involving the *Daubert* factors that previously had been disallowed because *Daubert* was deemed irrelevant and put aside during the time period when *Frye/Dyas* had been the prevailing expert standard.

As summarized in each expert's section with citations to the 2014 *Frye/Dyas* and 2023 *Daubert* rulings, Plaintiffs specifically explain why Judge Irving's 2023 findings are clearly erroneous and an abuse of discretion by relevant examples of hearing testimony and expert reports in as much concise detail as practicable (several pages per expert) given a 50-page limit for Plaintiffs to brief challenges to nine lengthy Orders related to over two decades of complex case history.[7]

[6] *See, Shatsky v. PLO*, 955 F.3d 1016 (D.C. 2020) (Abuse of discretion to apply wrong legal standard, rely on clearly erroneous factual findings, or make an error of law); *citing; Koon v. U.S.*, 518 U.S. 81, 100 (1996). *See also, Am. Council of Blind v. Mnuchin*, 977 F.3d 1, 8 (D.C. 2020); *citing; U.S. v. Kpodi*, 888 F.3d 486, 491 (D.C. Cir. 2018) (Abuse of discretion to violate mandate of Court of Appeals.

[7] Notably, the parties *each* filed 100-page post-hearing *Daubert* briefs in the Superior Court arguing the *Daubert* motion alone.

Defendants focus heavily on Dr. Kundi, no doubt concerned by his important causation opinions. Plaintiffs explained that Judge Irving's findings ignored, disregarded and refused to consider Dr. Kundi's opinions, support and published peer reviewed scientific studies involving: (1) incidence trends, tumor promotion, the impact of evolving phone technology and usage on gliomas, acoustic neuromas, promotion and genotoxic effects; (2) animal, co-carcinogenicity, epidemiological and *in vitro* studies showing "a real causal relationship of long term cell phone use, tumors arising in the heavily exposed region of the brain, and larger ipsilateral ulcerations;" and (3) cancer epidemiology precedents, Dr. Kundi's performances of his own meta-analysis and structured Bradford Hill analysis.[8]

Defendants also misstate that Plaintiffs "did not argue otherwise" regarding several erroneous *Daubert* rulings regarding Dr. Belyaev.[9] To the contrary, Plaintiffs explain how Dr. Belyaev has consistently testified and opined since 2005 that cell phone radiation more probably than not causes cancer including glioma and acoustic neuroma; as "supported by [his] own studies and by literature studies in different fields, including epidemiology, animal and *in vitro* studies, and consideration of [IARC] viewpoints."[10] Plaintiffs explain that Dr. Belyaev was wrongly *prohibited* from testifying about animal studies, epidemiology or Bradford

[8] Plaintiffs' Brief, 28-32.
[9] Apx., 541, 543, Apx., 1329.
[10] Plaintiffs' Brief, 32-33.

Hill by Judge Irving; and Dr. Belyaev did attest to "using IARC carcinogenicity methodology and IARC-adopted Bradford Hill criteria, evaluating all available peer-reviewed studies, including epidemiology, animal studies, *in vitro* studies and his own replicated published experiments, and arriving at conclusions consistent with IARC."[11] Indeed, Dr. Belyaev has been called upon to do the same type of evaluation as one of 30 scientists selected worldwide based on expertise and credentials to participate on IARC's Working Group. Dr. Belyaev considered biological plausibility, from his own studies and from literature that shows in the majority of published peer-reviewed studies that cell phone radiation induces reactive oxygen species, including in brain cells.[12] Plaintiffs also explain how Judge Irving wrongly *precluded* Dr. Belyaev from explaining and testifying about replication studies that support his opinions, even though Dr. Belyaev relied upon such studies as part of IARC's replication guidelines he applied during his evaluation.[13] Dr. Belyaev also reiterated the widely accepted axiom that while strict replication may not be possible or attained, consistency of results from different

[11] *Id*., 33-34.
[12] Apx., 6154-6155 [*Daubert* Hrg., 52:16-53:1 (Sept. 29, 2022 AM)]. Dr. Belyaev echoed IARC's conclusion that the strongest evidence came from the case control studies of Hardell and INTERPHONE, showing "increased risk of glioma and acoustic schwannoma in mobile phone users." Apx., 6144-6145 [*Daubert* Hrg., 42:22-43:20 (Sept. 29, 2022 AM)]; IARC Monograph (2013), 411 (GX1524).
[13] Apx., 1332. Plaintiffs' Brief, 34-35.

experiments can be relied on as evidence of causation.[14] He accounts for replication studies including "the NTP findings along with recent replicated animal studies from Germany…which supplemented other studies and provided sufficient evidence for carcinogenicity of cell phone exposure in animals."[15]

Plaintiffs also address Judge Irving's clearly erroneous findings that Drs. Mosgoeller, Liboff, Panagopoulos and Plunkett "did not provide opinions that RF from cell phones can cause glioma or acoustic neuroma." Plaintiffs explain that Dr. Mosgoeller's scientific opinion remained constant from 2013 to 2022 that cell phone radiation causes increased risk of cancer,[16] Dr. Liboff's 2017 scientific opinion is that cell phone radiation causes adverse health effects including cancer, gliomas and acoustic neuromas; Dr. Panagopoulos' scientific opinion is that cell phone radiation can cause "severe DNA damage, thereby increasing the risk of cancer" which he is well qualified to opine about as an expert in generally accepted methodologies for determining exposures causing DNA damage (the main cause of cancer) and if an exposure causes human brain cancer; and Dr. Plunkett "expanded [her] 2013 methodology related opinions to a general causation opinion in 2017

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[14] Apx., 2723 [*Frye* Hrg., 598:14-19 (Dec. 4, 2013 PM)].

[15] Apx., 3622; Apx., 2723 [Frye Hrg., 598:14-19 (Dec. 4, 2013 PM)].

[16] Dr. Mosgoeller further testified that cell phone cancer risk specifically entails glioma and acoustic neuroma when the brain is exposed and that his opinion has strengthened since 2013 due to subsequent peer reviewed scientific studies. Apx., 4492 [Daubert Hrg., 61:12-16 (Sept. 12, 2022 AM)], Apx., 4591-4593 [25:19-27:12 (Sept. 12, 2022 PM)], Apx., 4672-4673, 4677 [54:17-55:12, 59:6-12 (Sept. 13, 2022 AM)]; Apx., 2850 [Frye Hrg., 726:4-13 (Dec. 9, 2013)].

due to 'a variety of new peer-reviewed studies that provide additional scientific support for a biologically plausible mechanism for RFR-induced tumor formation, specifically brain tumors and acoustic neuromas in humans.'"[17]

Defendants assert that Plaintiffs object to general acceptance playing any part in a *Daubert* review, but it is Judge Irving's *undue focus* on general acceptance of conclusions to which Plaintiffs object as it is well settled that *Daubert* removed any "rigid general acceptance requirement," instead focusing on reliability.[18] Defendants argue that Judge Irving's focus on the conclusions of experts is proper because Plaintiffs' experts' conclusions are supposedly shared by no other scientist. But the only supposed support for such an assertion is Judge Irving's misplaced reference to Dr. Mosgoeller's 2018 testimony that he was unaware of any government, health and safety or regulatory body to have posited that cell phone radiofrequency causes cancer in humans.[19] Dr. Mosgoeller specifically explained that his answer was "within the understanding [that these groups require] *proof beyond any doubt.*"[20] *Daubert* does not require such a high level of proof, nor does

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[17] Plaintiffs' Brief, 36, 40, 43, 47.

[18] Plaintiffs' Brief, 28, 36 ("Judge Irving focused on whether there is widespread acceptance of Dr. Mosgoeller's opinions (not a *Daubert* requirement)." *Motorola Inc. v. Murray*, 147 A.3d 751, 758 (D.C. 2016) (en banc); *citing; Daubert v. Merell Dow Pharm., Inc.*, 509 U.S. 579, 594 (1993).

[19] Apx., 1337, 3396-7 (*Murray*, 147 A.3d at 754; *citing; Daubert*, 509 U.S. at 587).

[20] Apx., 4493-4496 [*Daubert* Hrg., 62:21-63:4, 64:10-65:4 (Sept. 13, 2022 AM)].

scientific certainty which is to a reasonable degree of probability.[21] Moreover, Defendants' contention that Plaintiffs' experts are "on an island" is factually wrong inasmuch as Plaintiffs' experts' scientific opinions are shared by many renowned scientists and published peer-reviewed scientific studies, many of which Judge Irving, in clear error, refused to consider or allow Plaintiffs' experts to address.

For example, in 2020 in what is widely considered to be the largest and best designed animal study to date, the NTP scientists within the NIH tested 3,000 rats and mice for a 10-year period and found that cell phone radiation was associated with "clear evidence" of cancerous heart schwannoma tumors in male rats and RFR related biological effects relevant to carcinogenesis including heart schwannomas (comparable to acoustic neuromas), brain gliomas and DNA damage.[22] Europe's Ramazzini Institute echoed NTP's results in a similar study reporting heart schwannomas and malignant brain tumors.[23] Continued attention to

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[21] "The only limitation…is that expert opinion upon causation must be expressed to a reasonable degree of scientific certainty." Apx., 1326. *See*; Apx., 3933-3935; Apx., 1840-1841; Apx., 3526-3527; Apx., 6140-6141 [*Daubert* Hrg., 38:12-39:14 (Sept. 29, 2022 AM)]. Apx., 3461-3462; Apx., 4221-4223 [Liboff *de bene esse* Dep., 121-124, 126-127 (Jan. 9, 2019)]; Apx., 4225-4226, 4246-4227 [156-157, 162-166, 304-306 (Jan. 10, 2019)]; Apx., 5211-5215 [*Daubert* Hrg., 15:16-19:10 (Sept. 20, 2022 AM)]; Apx., 1780-1781; Apx., 3788-3789; Apx., 2989-2990, 3061 [*Frye* Hrg., 1211:16-1212:7, 1283:17-23 (Dec. 12, 2013 PM)]; Apx., 3430.

[22] NIH.gov. Stampfer, 140:23-141:9 (May 2019); Laterra, 42:22-45:7 (May 2019); Wyde, et al. (2016) (GX2442), Apx., 4772-4776 [*Daubert* Hrg., 33:2-14, 34:3-14, 36:14-37:2 (Sept. 14, 2022 AM)]; Apx., 4216-4217 [Liboff *de bene esse* Dep., 101:11-102:7, 106:9-107:24 (Jan. 9, 2019)].

[23] Falcioni (2018) (GX1252); Apx., 4751 [*Daubert* Hrg., 12 (Sept. 14, 2022 AM)].

this serious public health issue include Japan/Korea's NTP-like animal study on carcinogenesis of cell phone RFR and the WHO's commission of ten systematic reviews on RF health for publication, including human cancer.[24] Another important 2020 study analyzed statistical results from case control studies in 16 countries, finding significant evidence a person can increase chances of brain cancer by 60% from using a cell phone for 1,000 hours, equivalent to 17 minutes per day for ten years.[25] These recent studies and others triggered a plan by IARC to re-evaluate its

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[24] https://www.microwavenews.com/short-takes-archive/korean-briefing-%E2%80%98ntp-lite%E2%80%99; Verbeek, et al. (2021).

[25] Choi Y-J, et al., Cell phones and cancer: New UC Berkeley study suggests cell phones sharply increase tumor risk (ktvu.com) These findings are not surprising given the results of an extensive year-long study published in 2019 by the Chicago Tribune revealing that the iPhone 7 (one of the most popular smartphones ever sold) exceeded the SAR legal safety limit for RFR body absorption and was more than twice Apple's reports to federal regulators. Several other models of Apple and other makers also exceeded the limits - 5 times higher for the Samsung Galaxy S8. https://www.chicagotribune.com/investigations/ct-cell-phone-radiation-testing-20190821-72qgu4nzlfda5kyuhteiieh4da-story.html This is precisely what Plaintiffs have been alleging all along, that Defendants' cell phones exceed SAR and emit dangerous levels of radiation. Apx., 275-340 (adverse health effects including glioma and acoustic neuroma arising out of the use of cell phones manufactured prior to 1996 and manufactured after Aug. 1, 1996 which exceeded FCC mandated SAR.) The Tribune's revelations inspired in Canada a recently authorized class action lawsuit against Apple and Samsung for overexposure of cell phone users since September 2016, a lawsuit projected to implicate millions of consumers. https://phonegatealert.org/wp-content/uploads/2022/09/500-06-001018-197-JG-Arial-et-als-c.-Apple-Canada-inc.-et-als-22-09-2022.pdf In late 2023, Apple's SAR rate problems reemerged after French authorities banned iPhone 12 sales after the device was shown to exceed Europe's SAR limits when in contact with the body. https://www.anfr.fr/liste-actualites/actualite/temporary-withdrawal-from-the-market-of-the-iphone-12-for-non-compliance-with-eu-regulation

Group 2B possibly carcinogenic classification of cell phone RFR exposure; and the UN, WHO and national governments received a worldwide EMF Scientist Appeal from cell phone radiation researchers (259 EMF scientists from 44 nations and 15 other scientists from 11 nations) to develop stronger regulatory standards for cell phone radiation in light of studies showing adverse health effects including increased cancer risk.[26] Similarly, an international group of scientists, engineers and doctors are backing Italy's 6 V/m RF exposure standard, one of the strictest in the world, continuing a 2023-2024 appeal initiated by 59 worldwide scientists,

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Most consumers (even Defendants' experts) are unaware that inside most of today's cell phones lie deeply hidden instructions (sometimes through after-purchase system updates) cautioning users to hold the phone a specific distance away from the body or head. *See*, Apple iPhone RF Exposure Warning (General>About>Legal>RF Exposure.) *See also*, Schlesselman Dep., 121 (Apr. 4, 2019); McClatchy DC Bureau (2018) ("Finding [the instructions] requires knowing where to look, wading through several steps and then making sense of the technical jargon.") Nevertheless, cell phone manufacturers have admitted that the specific minimum separation distance from the body to reduce human health injury must be as much as 1 inch (2.5 cm). The FCC recommends cell phone user manuals note that a minimum separation distance of 20 centimeters must be maintained to comply with RF exposure limits and the majority of manuals now include such a statement, as opposed to many years at issue in this case.
https://transition.fcc.gov/Bureaus/Engineering_Technology/Documents/bulletins/oet65/oet65c.pdf at 5 While Defendants represented to consumers for years the safety of cell phones at any level, as their counsel has assured in Superior Court hearings, manufacturers now include warnings in their user manuals. Apx., 4482-4483 [*Daubert* Hrg., 51:16-52:19 (Sept. 12, 2022 AM)]; Apx., 421 [Hrg., 78:20-21 (Sept. 20, 2012)] (Defendants' lead counsel, Terrence J. Dee, proclaimed assuredly: "at no level does RF radiation from cellphones cause adverse health effects.") Laterra Dep. 25:5-9; 26:6-25; 27:1-25; 28:1-10 (May 15, 2019); Motorola V195 User Manual, 71; iPhone 4 User Manual https://www.apple.com/legal/rfexposure/;

[26] https://www.EMFscientist.org

citing potential "long-term effects of electromagnetic radiation that are of public health concern [i]gnored by ICNIRP [g]uidelines for limiting RFR exposures."[27]

Recent peer-review studies in line with Plaintiffs' experts' scientific opinions also include Dr. Lai's updated review of the 361 studies published through January 2021 on EMF's genetic effects, particularly RF and ELF-EMFs, showing that the majority of studies reported genetic and genotoxic effects, most commonly DNA strand breaks, micronucleus formation and chromosomal structural changes.[28] A major review from China was published in March 2024 on electromagnetic radiation and biological systems with over 230 references, observing cumulative influence of long-term EMR exposure from epidemiology and animal exposures, including "behavioral or functional changes, clinical symptoms and diseases."[29] Even Defendants' own general causation expert, Dr. Christopher Davis, proclaimed at a 2020 5G workshop (proposed by CTIA outside this litigation) that, "for most people, the largest RF exposure they ever get is from putting their mobile phones up to their ears."[30] Additionally, Dr. Portier authored his 2021 Expert Report in

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[27] https://icbe-emf.org/wp-content/uploads/2023/08/3-ENGL-Italian-APPEAL.August-2023.pdf

[28] Lai (2021).

[29] Liu, et al. (2024).

[30] Farragut Planning Commission 5G Workshop with cellular industry funded speaker Christopher Davis - YouTube (33:01-33:13). This is a significant update emphasizing the evolution of science, especially considering the CDC statement that "RF radiation is much higher frequency than ELF radiation and therefore is potentially more harmful [to humans]."

light of forming his own new opinions based on recent published peer-reviewed scientific research, concluding to a high probability that RF exposure causes gliomas and neuromas, but Judge Irving twice erroneously refused to allow Dr. Portier to serve as an expert.[31]

II. The Superior Court's Clear Error Resulted In Severe Prejudice To Plaintiffs.

Plaintiffs' Brief repeatedly shows the substantial harm resulting from the Superior Court's failure to protect Plaintiffs from prejudice and unfairness in light of the 2016 evidentiary standard change and remand.[32] Expanded general causation discovery was necessary and warranted in 2017 as a result of the retroactive change to *Daubert* and its focus on reliability of principles and methods regarding scientific studies and the expert opinions submitted by both sides' experts in these cases.[33] Plaintiffs suffered severe prejudice from the Superior Court's refusal to allow Plaintiffs to use additional and new experts who formed opinions based on the explosion of scientific research that occurred after the *Frye/Dyas* rulings.[34] The Superior Court's refusal precluded Plaintiffs from supporting their general causation claims based on the current state of the science; instead forcing Plaintiffs

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https://www.farragutpress.com/articles/2020/07/9760
https://www.cdc.gov/nceh/radiation/factsheets/224613_FAQ_Cell-Phones-and-Your-Health.pdf

[31] Apx., 4255-4430.

[32] Plaintiffs' Brief, 4, 11-14, 19, 21. Apx., 758, 3390, 3399-3400.

[33] Plaintiffs' Brief, 13-16.

[34] *Id*., 16-20.

to rely upon the science from years before as if the explosion of scientific research had not even taken place at all. And, not allowing Dr. Portier's newly formed expert opinions and testimony resulted in Judge Irving only considering incomplete epidemiology and incidence opinions, which exacerbated Judge Josey-Herring's prior strike rulings gutting Plaintiffs' experts' reports and opinions in these areas inasmuch as Dr. Portier would have presented additional epidemiology and incidence opinions, including that the epidemiological evidence supports a strong association between cell phone use and glioma and acoustic neuroma risk.[35] Dr. Portier's Expert Report contains 92 scientific studies published from 2017-2021 (and 444 studies in total), and had Dr. Portier been allowed he could have supplemented his Report with post-March 2021 studies as well.[36] Additionally, many epidemiological studies were wrongly stricken from Plaintiffs' 2017 Supplemental Reports and *Daubert* testimony; and Dr. Portier thoroughly evaluated the epidemiological body of work.[37]

Plaintiffs were severely harmed by Judge Josey-Herring ignoring this Court's directives to protect Plaintiffs from prejudice and unfairness, most markedly by misapplying Judge Weisberg's Discovery Order by only permitting Plaintiffs' experts to supplement their 2013 Reports to address post-2013 scientific

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[35] *Id*.
[36] *Id*., 19-20.
[37] Apx., 4275-4282, 4285, 4294-4295, 4298-4299, 4305, 4310-4316, 4320, 4322, 4324, 4326 (22 tables addressing numerous critical exposure and tumor variables).

studies to the extent necessary to address the new evidentiary standard.[38] Important portions of each expert's 2017 Supplemental Reports were stricken regarding recent epidemiology and incidence data[39] and many other material scientific opinions, methodologies and studies.[40]

III. The Superior Court's Rulings Premised On Fidelity To Outdated, Obsolete or Erroneous Rulings Were Clearly Erroneous.

Defendants try to defend the erroneous rulings of the Superior Court as

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[38] *Id.*, 23-27.

[39] The Strike Order especially prejudiced Plaintiffs by striking epidemiology and incidence trend opinions on the clearly erroneous grounds that no new opinions could be proffered even if based on the new and evolving science. Judge Josey-Herring struck from each of Plaintiffs' 2017 Supplemental Reports entire opinions and scientific studies related to critical topics: Dr. Kundi: recall and selection bias, confounding, epidemiology, dose response, NTP study, specificity, biological gradient and his own meta-analysis. Apx., 599-604, 3907-3911, 3918-3933; Dr. Belyaev: all post-2013 studies, animal studies, 142 human and animal studies, epidemiology, Bradford Hill, latency brain cancer, brain cancer time trends, and protein conformation. Apx., 583, 608-611, 668-677, 3985-3986, 4108-4810; Dr. Mosgoeller: his co-carcinogenicity opinion and opinions 6 and 7. Apx., 626-635, 648, 3462; Dr. Liboff: epidemiology, interfacial water model, and his opinion that cell phone radiation can cause adverse health effects, Apx., 590-598, 3852-3854, 3859-3860; Dr. Panagopoulos: his opinions on polarization, real v. simulated exposure, and positive v. negative results, and tumor promotion studies. Apx., 612-623, 3809, 3815-3821; Dr. Plunkett: her general causation opinion. Apx., 587-590.

[40] Plaintiffs' Brief, 12-13. In addition to the gutting of Plaintiffs' experts' 2017 Supplemental Reports, many recent important findings were excluded from the *Daubert* hearing, including the 2020 Choi epidemiological meta-analysis finding that heavier, long-term cell phone use was associated with significantly increased tumor risk; and Lai's updated 2021 review which found that the majority of studies reported genetic and genotoxic effects from EMF. Lai has since published another important review (2023) discussing cellular stress response mechanism pointing "to EMF acting as both an initiator and promotor in cancer development as observed in brain cancer risk related to cell phone [r]adiation exposure."

"premised on fidelity to prior orders going back to Judge Burgess's 2011 CMO requiring a complete statement of all opinions the witness will express on general causation and the basis and reasons for them." Defendants further ignore that Judge Burgess directed the parties to put *Daubert* aside.

First, Judge Burgess' "complete statement" language is taken from Rule 26 of the D.C. Rules of Civil Procedure governing the requirements of expert report submissions, which also places a strict duty on litigants to properly supplement their reports as opinions and the bases for those opinions may change over time.[41] In the unusual circumstances of these cases where an explosion of scientific research occurred after *Frye/Dyas* proceedings had been completed and then there was a change of the expert standard, Plaintiffs' experts not only had the absolute right to supplement their opinions based on the new science and different standard, but they had the duty to do so under Rule 26. Second, Judge Burgess clearly instructed the parties to put *Daubert* aside and strictly focus on the *Frye/Dyas* general acceptance standard.[42]

Defendants also contend that Judge Josey-Herring's 2018 Strike Order relied on and enforced Judge Weisberg's 2017 Discovery Order which supposedly

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[41] *See,* Super. Ct. R. Civ. P. 26 (identical to Fed. R. Civ. P. 26), and subsection (e).
[42] Apx., 1683 ("…you said *Daubert* uses *Frye*. Put that aside."), 1693, 1694 ("Let's have the expert report due with respect to *Frye*"), 1700, 1701, 1708-1712 ("I'm saying a *Frye* hearing, a hearing under *Frye* to see whether or not plaintiffs can satisfy *Frye* and go on from there."), 1715, 1717, 1721, 1724.

addressed Plaintiffs' concerns regarding new scientific evidence and the changed evidentiary standard, and that Judge Irving's 2023 *Daubert* rulings depended on and enforced prior rulings by Judges Weisberg and Josey-Herring. Such assertions merely highlight the injustice to Plaintiffs where each ruling premised on fidelity to prior erroneous rulings ignored significantly changed circumstances and mounting prejudice to Plaintiffs despite the absolute right and duty of each Judge to deviate from and correct a manifestly unjust course that had been based on clear error. It is precisely this unjustifiable deference to prior rulings that enlarged the prejudice at every stage, where Judge Josey-Herring's misapplication of Judge Weisberg's Discovery Order and gutting of Plaintiffs' 2017 Supplemental Reports effectively erased any attempt by Judge Weisberg to permit Plaintiffs to address the new scientific evidence and changed evidentiary standard. Likewise, Judge Irving's unabashed adherence to Judge Josey-Herring's clearly erroneous Strike Order (apparently because she was serving as the Chief Judge at the time) further exacerbated Plaintiffs' prejudice by leading to the erroneous denial of Plaintiffs' 2021-2022 requests to add Dr. Portier as an expert. Consequently, each subsequent ruling stacked error upon error all the way to the 2023 exclusion of Plaintiffs' experts and dismissal.

Each case cited by Defendants underscores the duty of a successor Judge to depart from prior rulings that are erroneous or undermined by developing

litigation, facts and arguments.[43] Likewise, the cases Defendants cite refusing groundless requests for discovery "re-do's" are a stark contrast to the circumstances in these cases. And, Defendants' argument is merely a red herring that Judge Irving was not wrong to assess whether "prejudice [would be] caused by delay to the overall administration of justice" if Dr. Portier was added, rather than weighing the *Abell* factors.[44] Plaintiffs do not contest evaluation of this issue based on the overall administration of justice. Rather, Plaintiffs specify in detail why the overall administration of justice would be served by the addition of Dr. Portier as an expert, why precluding Dr. Portier "was clear error and severely prejudiced Plaintiffs," why "Defendants could not have been prejudiced if Dr. Portier was added," and why "the totality of the circumstances overwhelmingly favors allowing Plaintiffs to add Dr. Portier as an expert."[45] Defendants' attempt to invalidate the cases cited by Plaintiffs' as involving requests to supplement existing expert testimony rather than add a new expert is a meaningless distinction where each cited case illustrates abuse of discretion in denying supplemental expert

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[43] *See*, *U.S. v. Davis*, 330 A.2d 751, 755 (D.C. 1975) ("The ultimate responsibility rests on the Judge to whom the case is assigned" who is not bound to follow a clearly erroneous ruling). *Carlson v. Bos. Sci. Corp.*, 856 F.3d 320, 325 (4th Cir. 2017) (Judge has "broad flexibility to revise interlocutory orders before final judgment as the litigation develops and new facts or arguments come to light.") *Harris v. Ladner*, 828 A.2d 203, 205 (D.C. 2003) (Refusal to alter orders upon remand proper where Superior Court "was given no substantial reason" to do so.)

[44] *French v. Levitt*, 997 A.2d 701 (2010); *Dada v. Children's Nat'l Med. Ctr.,* 715 A.2d 904, 910 (D.C. 1998); Abell v. Wang, 697 A.2d 796 (D.C. 1997).

[45] Plaintiffs' Brief, 18-20.

testimony caused by new information where appellant would suffer harm by exclusion, and appellee had adequate time to meet the new testimony.[46] Likewise, Defendants miss the mark in asserting that Rule 26's allowance of supplementation is somehow nullified by the discovery rulings in this case. To the contrary, the Superior Court's clearly erroneous discovery rulings are an abuse of discretion in ignoring the clear goals, mandates and guidelines of Rule 26 supplementation to the severe prejudice of Plaintiffs.

CONCLUSION

For the foregoing reasons and those set forth in Plaintiffs' Brief, Plaintiffs respectfully request this Honorable Court to reverse and render each underlying order appealed herein upon which the August 1, 2023 Final Judgment Order is based (dated April 25, 2023, January 6, 202, April 21, 2021, July 3, 2019, July 3, 2019, November 14, 2018, August 28, 2018, and March 16, 2017, and reverse and render the resulting August 2023 Summary Judgment Order.

Dated: April 12, 2024

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[46] Plaintiffs' Brief, 24-27.

Certificate of Service

I hereby certify that on the 12th day of April 2024, a true copy of the foregoing Brief on Appeal was served on counsel of record.

/s/ Cherie Morganroth
Cherie Morganroth

No. 23-CV-700

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Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

Cherie Morganroth
Signature

23-CV-0700
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