

No. 23-CV-0700



IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

Clerk of the Court
Received 03/22/2024 04:17 PM
Resubmitted 03/22/2024 04:35 PM
Filed 03/22/2024 04:35 PM

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

BRIEF FOR APPELLEES

ORAL ARGUMENT REQUESTED

¹ This 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 Commc’ns 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 Telecomms. America, LLC*, Case No. 2011 CA 008854 B.

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Amicus Curiae - N/A

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AT&T Corp. has no publicly traded subsidiaries, and AT&T Inc., a publicly traded corporation, owns 10 percent or more of its stock.

AT&T Mobility LLC does not issue stock. Its ultimate parent corporation is AT&T Inc.

AT&T Wireless Services, Inc. n/k/a New Cingular Wireless Services, Inc. has no publicly traded subsidiaries, and no publicly traded corporation owns 10 percent or more of its stock. Its ultimate parent corporation is AT&T Inc.

Audiovox Communications Corporation does not have any subsidiaries, and the only publicly held company that owns 10 percent or more of the stock of Audiovox Communications Corporation is Voxx International Corporation (formerly known as Audiovox Corporation).

Bell Atlantic Mobile, Inc. (“BAM”) was the managing general partner of Cellco Partnership d/b/a Verizon Wireless from July 1994 until April 2000, but is no longer an active entity.

Cellco Partnership d/b/a Verizon Wireless (“Cellco”) is a general partnership formed under the laws of the State of Delaware. Cellco has three partners, which include Bell Atlantic Mobile Systems LLC, a Delaware limited liability company; GTE Wireless LLC, a Delaware limited liability company; and Verizon Americas LLC, a Delaware limited liability company. Cellco is a subsidiary of Verizon Communications Inc., a publicly traded company. No publicly held corporation owns 10 percent or more of Verizon Communications Inc.’s stock.

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Cellular One Group, n/k/a Cellular One, LLC has no subsidiaries and no publicly traded company owns 10 percent or more of its stock. Cellular

One, LLC is a limited liability company formed under the laws of the State of Nevada and is owned by PN Cellular, Inc. d/b/a Trilogy Partnership.

Cricket Wireless, LLC (f/k/a Cricket Communications, Inc.) On February 28, 2015, Cricket Communications, Inc. converted to a Delaware limited liability company under the name Cricket Communications, LLC. Effective as of October 1, 2017, Cricket Communications, LLC was merged with and into Cricket Wireless LLC. Cricket Wireless LLC has no publicly traded subsidiaries, and no publicly traded corporation owns 10 percent or more of its stock. Its ultimate parent corporation is AT&T Inc.

CTIA-The Wireless Association, sued in these cases as “Cellular Telecommunications & Internet Association” and “Cellular Telecommunications Industry Association,” has no parent corporation or subsidiaries, and no publicly held corporation owns 10 percent or more of its stock.

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Microsoft Mobile Oy (formerly Nokia, Inc.) a Finland corporation, is a wholly-owned subsidiary of Microsoft Luxembourg USA Mobile S.a.r.l, a Luxembourg corporation, which is a wholly-owned subsidiary of Microsoft Luxembourg International Mobile S.a.r.l, a Luxembourg corporation, which is a wholly-owned subsidiary of Microsoft Corp., a publicly held company incorporated in Washington, United States. Microsoft Mobile Oy has no publicly traded subsidiaries.

Motorola Mobility LLC; Motorola Solutions, Inc. f/k/a Motorola Inc.; and Motorola Inc. On January 4, 2011, Motorola Mobility, Inc. was separated from Motorola, Inc., and Motorola, Inc. was renamed Motorola Solutions, Inc. There is no parent corporation or other publicly held company that owns 10% or more of Motorola Solutions, Inc. stock. On June 22, 2012, Motorola Mobility, Inc. became Motorola Mobility LLC. Motorola Mobility LLC is a Delaware limited liability company. Motorola Mobility LLC is a wholly-owned subsidiary of Motorola Mobility Holdings LLC. Motorola Mobility Holdings LLC is indirectly a wholly-owned subsidiary of Lenovo Group Limited. Legend Holdings Corporation owns 5% or more of Lenovo Group Limited’s stock.

Qualcomm Incorporated has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Samsung Telecommunications America, LLC Effective January 1, 2015, Appellant Samsung Telecommunications America, LLC (“STA”) merged with and into Samsung Electronics America, Inc. (“SEA”), and therefore STA no longer exists as a separate corporate entity. The combined entity, SEA, is a wholly-owned subsidiary of Samsung Electronics Co., Ltd. (“SEC”), a publicly held corporation organized under the laws of the Republic of Korea. No publicly held corporation owns 10% or more of SEC.

Sony Electronics Inc. is a Delaware corporation with a principal place of business in San Diego, California. Sony Electronics Inc. is a wholly-owned subsidiary of Sony Corporation of America. Sony Corporation of America is a wholly-owned subsidiary of Sony Group Corporation, which is a Japanese corporation whose common stock trades principally on the Tokyo Stock Exchange and whose American Depositary Receipts related to its common stock are traded on the New York Stock Exchange. No public company owns more than 10% of Sony Group Corporation’s stock.

On July 10, 2013, **Sprint Nextel Corporation** changed its name to Sprint Communications, Inc., and on December 31, 2021, Sprint Communications, Inc. changed its name to Sprint Communications LLC.

On March 31, 2021, **Sprint Spectrum L.P.** changed its name to Sprint Spectrum LLC. Sprint Spectrum LLC is a direct subsidiary of SprintCom LLC. SprintCom LLC is a direct subsidiary of Sprint Communications LLC. Sprint Communications LLC is a direct subsidiary of Sprint LLC, and Sprint LLC is a direct subsidiary of T-Mobile USA, Inc.

T-Mobile USA, Inc., T-Mobile USA, Inc., a Delaware corporation, is a wholly-owned subsidiary of T-Mobile US, Inc., a Delaware corporation. T-Mobile US, Inc. (NASDAQ: TMUS) is a publicly traded company listed on the NASDAQ Global Select Market of NASDAQ Stock Market LLC (“NASDAQ”). Deutsche Telekom Holding B.V., a limited liability company (besloten vennootschap met beperkte aansprakelijkheid) organized and existing under the laws of the Netherlands (“DT B.V.”), owns more than 10% of the shares of T-Mobile US, Inc.

DT B.V. is a direct wholly-owned subsidiary of T-Mobile Global Holding GmbH, a Gesellschaft mit beschränkter Haftung organized and existing under the laws of the Federal Republic of Germany (“Holding”). Holding is in turn a direct wholly owned subsidiary of T-Mobile Global Zwischenholding GmbH, a Gesellschaft mit beschränkter Haftung organized and existing under the laws of the Federal Republic of Germany (“Global”).

Global is a direct wholly-owned subsidiary of Deutsche Telekom AG, an Aktiengesellschaft organized and existing under the laws of the Federal Republic of Germany (“Deutsche Telekom”). The principal trading market for Deutsche Telekom’s ordinary shares is the trading platform “Xetra” of Deutsche Börse AG. Deutsche Telekom’s ordinary shares also trade on the Frankfurt, Berlin, Düsseldorf, Hamburg, Hannover, München and Stuttgart stock exchanges in Germany. Deutsche Telekom’s American Depositary Shares (“ADSs”), each representing one ordinary share, trade on the OTC market’s highest tier, OTCQX International Premier (ticker symbol: “DTEGY”).

Additionally, Softbank Group Corp., through its wholly-owned subsidiary, Delaware Project 6 L.L.C., beneficially owns approximately 3.4% of shares of T-Mobile US, Inc. common stock outstanding.

Masayoshi Son owns more than 10% of SoftBank Group Corp.

Telecommunications Industry Association is a not-for-profit corporation. It has no parent corporation or subsidiaries, and no publicly held corporation owns 10 percent or more of Telecommunications Industry Association’s stock.

United States Cellular Corporation is a Delaware corporation, the parent and affiliate of which is Telephone and Data Systems, Inc. (“TDS”). TDS is the only publicly held corporation that owns 10% or more of U.S. Cellular’s stock.

Verizon Wireless Inc. is no longer an active entity. It was merged with and into Bell Atlantic Mobile Systems LLC effective August 28, 2015.

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INTRODUCTION

This is the third time these cases have been before this court. On two previous occasions, the court faced legal issues reviewed *de novo*: preemption in 2009 and the standard for admitting expert testimony in 2016. This time, the court reviews a different set of questions, all of which revolve around the Superior Court's exercise of discretion in applying Rule 702 and managing this extremely lengthy and complex litigation. Plaintiffs ask the court to overrule nine instances of the Superior Court's careful exercise of its broad discretion over matters of evidence, procedure, fairness, prejudice, and orderly case management. The court should affirm.

JURISDICTIONAL STATEMENT

The court has jurisdiction under D.C. Code § 11-721(a)(1) because Plaintiffs appeal from a final order of summary judgment disposing of all parties' claims.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Superior Court act within its broad discretion to exclude Plaintiffs' general causation expert testimony under Federal Rule of Evidence 702 and *Motorola Inc. v. Murray*, 147 A.3d 751 (D.C. 2016) (en banc)?
2. Did the Superior Court act within its broad discretion to manage discovery by permitting specific additional discovery consistent with the original case management order after this court adopted Rule 702 and remanded?

STATEMENT OF THE CASE AND RELEVANT FACTS

The procedural history of the thirteen *Murray* Cases goes back more than twenty years. Plaintiffs filed the first of these nearly identical lawsuits in the District of Columbia in 2001. Each plaintiff claimed to have a brain tumor, ultimately identified as either glioma or acoustic neuroma. App'x 492-493. Plaintiffs alleged that radiofrequency radiation (RF) emitted from cell phones caused their tumors. *Id.* They sued essentially the entire cell phone industry, including manufacturers, service providers, and trade associations. No other lawsuits asserting that cell phones cause brain tumors remain in any other state or federal court, and no state or federal court has found that RF from cell phones caused or contributed to the development of brain cancers.

Between 2001 and 2004, the original six cases were filed, removed to federal court, transferred to a multidistrict litigation, and subsequently remanded to the Superior Court. While those cases were in the MDL, the MDL judge applied Federal Rule of Evidence 702 in another case to exclude expert testimony that cell phones could cause brain cancer. *See Newman v. Motorola, Inc.*, 125 F. Supp. 2d 717 (D. Md. 2002), *aff'd*, 78 F. App'x. 292 (4th Cir. 2003). On remand from the MDL, the Superior Court dismissed the six cases as preempted by the FCC's RF safety standards. On appeal, this court largely affirmed, holding that Plaintiffs' claims about the safety of FCC-certified cell phones "conflict with the FCC determination

that wireless phones that do comply with [the FCC's] RF standards are safe for use by the general public and may be sold in the United States.” *Murray v. Motorola, Inc.*, 982 A.2d 764, 777-78 (D.C. 2009) (citation and internal quotation marks omitted). The court held that conflict preemption would not bar claims challenging the safety of non-compliant phones. *Id.* at 789. On remand, Plaintiffs alleged in amended complaints that their phones did not comply with FCC standards, and the cases proceeded.

Phase I CMO. In 2011, Superior Court Judge Burgess held a hearing to discuss case management with the parties to what were then thirteen cases. Plaintiffs identified general causation as a threshold issue that applied to all cases and proposed that the court determine first the admissibility of Plaintiffs’ general causation expert testimony, with that ruling applying to all cases. App’x 1658-1660, 1670-1671. Plaintiffs embraced the efficiency of a single proceeding across “all the cases” in which the experts “would not change.” *Id.* at 1659, 1671. Plaintiffs represented that for “Phase I,” “we would have the same group of experts to opine on [general causation] and provide expert reports,” and “defendants would have their same group of experts.” *Id.* at 1659. Plaintiffs further represented that if the court reviews their experts’ opinions and “says no, their testimony is no good and strikes the witnesses, then most of this is over with.” *Id.* at 1703.

Judge Burgess agreed to focus first only on general causation. The court explained that if it decided in Defendants' favor on general causation, an extensive discovery process "never would have to happen" and Defendants "would be out of the case." *Id.* at 1734. The court entered an initial Phase I case management order (CMO) that required Plaintiffs to disclose all their general causation expert witnesses with reports containing "a complete statement of all opinions the witness[es] will express on general causation and the basis and reasons for them." *Id.* at 342. The CMO also set forth deadlines for those expert disclosures and for depositions. *Id.* at 341-342. Plaintiffs have not appealed the CMO.

Nine months later, Plaintiffs made their first attempt to expand Phase I discovery, which Judge Burgess denied. *Id.* at 447. In that context, the court and parties further defined the scope of Phase I. Plaintiffs confirmed that Phase I "would focus on general causation solely leading up to a *Frye* hearing on general causation." *Id.* at 350. Plaintiffs again emphasized efficiency, stating that they "would only need one *Frye* hearing," the result of which "would apply to all the cases . . . because the issues are the same in terms of general causation across the board." *Id.* Plaintiffs again invoked "the efficiency" of Phase I, which they described as their "one shot for general causation," because if they did not present experts with admissible general causation testimony, "we're done . . . and then we don't go back." *Id.* at

387-388. Judge Burgess agreed that Plaintiffs would get only one shot at general causation with *one* set of experts:

[W]e're not going to have a *Frye* hearing about Mr. Smith and Mr. Jones and Mr. Brown, finish it, and then later on you have Mr. Jamison come in or Ms. Jamison come in and say I have got another expert that I, and now we have got to go through, who has some other methodologies we want to test out and we're going to have another *Frye* hearing.

Id. at 389. Plaintiffs have not challenged Judge Burgess's 2012 oral rulings.

***Dyas/Frye* Hearing.** Under the CMO, Plaintiffs proffered nine experts on general causation (one was later withdrawn). Defendants moved to exclude their testimony under this court's *Dyas/Frye* test. Judge Weisberg, who had taken over the case from Judge Burgess, "reviewed pre-hearing briefs, four weeks of expert testimony, thousands of pages of exhibits, post-hearing briefs, various treatises on expert testimony and admissibility, and dozens of trial court and appellate decisions [decided under both *Frye* and *Daubert*]" before issuing a 76-page order (*Dyas/Frye* order). App'x 505 n.22.

Judge Weisberg began the *Dyas/Frye* order by finding that there is "not . . . enough evidence for *any* scientist" to give a general causation opinion in this case "with the requisite degree of scientific certainty":

Can cell phones cause brain cancer? If that were the question confronting the court at this phase of the case, the answer would be relatively clear. Although there are a few isolated strands of data pointing in the direction of causation, ***the court could not conclude, based on the present record, that there is enough evidence for any scientist to answer the question "yes" with the requisite degree of scientific certainty.***

Id. at 491 (emphasis added). Judge Weisberg noted, however, that the issue before him was whether Plaintiffs’ experts should be permitted under *Dyas/Frye* to express their opinions to a jury. *Id.* at 492. He ruled that some of Plaintiffs’ experts satisfied *Dyas/Frye*, but two he excluded under Rule 403. Nevertheless, Judge Weisberg emphasized that all the experts’ proffered opinions “would almost certainly be excluded under *Daubert*.”² *Id.* at 512. Plaintiffs have not challenged that order.

Judge Weisberg subsequently amended that order to permit an application for interlocutory appeal for this court to consider whether to “discard the antiquated *Frye* test” and “adopt[] Federal Rule 702.” *Id.* at 565. Noting Plaintiffs’ “protestations about needing additional discovery on general causation,” Judge Weisberg found that “[t]he record on general causation is about as well developed as it is ever going to be.” *Id.* at 567. He also advised that after remand, if the standard changed, “[t]he court could then allow whatever additional discovery might be necessary to place Plaintiffs in a fair position to litigate that issue.” *Id.* Plaintiffs have not challenged the certification order.

This court granted the application and accepted the appeal en banc. Highlighting that it had been “presented with a developed record” and praising Judge Weisberg for “his learned discussion of the underlying science,” the court unanimously adopted Rule 702 to replace *Dyas/Frye*. *Motorola, Inc. v. Murray*, 147

² *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

A.3d 751, 752, 758 (D.C. 2016) (en banc). The court remanded for the Superior Court to re-evaluate whether the general causation opinions were admissible under the new standard.

Post-Remand Supplemental Discovery. On remand, Plaintiffs made their second demand to expand Phase I discovery. Plaintiffs argued that the changed standard “opens up the door to new experts and expanded discovery,” App’x 570, and that “the general causation landscape [] has changed dramatically.” 01/17/2017 Plfs.’ Mot. for Addt’l Disc. Mem. at 2. Plaintiffs sought to “name additional experts to address new science and studies,” including “a replacement epidemiologist,” and at least 10 new experts. *Id.* at 4-11. They also asked to have their remaining experts “reassess their prior expert opinions and redraft their reports.” *Id.* at 2.

Judge Weisberg rejected that attempt to redo Phase I discovery. In a March 2017 order (supplemental discovery order), he ruled that the “initial case management order for Phase I discovery required Plaintiffs to produce *all* of their experts on general causation, with a report from each expert setting forth a ‘complete statement of the expert’s opinions.’” App’x 574 (emphasis in original). He also ruled that (1) “the question identified in the court’s case management orders has not changed: do Plaintiffs have admissible expert testimony on the general causation issue in these cases”; (2) Plaintiffs’ experts’ opinions “would not change simply because the legal standard for admissibility has changed,” and (3) the “change from

Dyas/Frye to Rule 702 does not change the court’s plan for the management of” these cases. *Id.* at 572-573.

After reviewing the record, Judge Weisberg could not “see any basis to start all over with new experts and new discovery.” *Id.* at 575 n.2. But consistent with his previous order that he could allow Plaintiffs additional discovery to place them in a “fair position to litigate,” Judge Weisberg permitted Plaintiffs’ remaining experts to submit supplemental reports limited to:

- (1) addressing any relevant studies or peer reviewed publications that have been added to the scientific literature since February 2013 [the date of their initial expert reports], and
- (2) revising the way they express their opinions to account for the change in the evidentiary standard from *Dyas/Frye* to Federal Rule 702, provided they explain why the change in the evidentiary standard necessitates a change in the way they articulate their opinion.

Id. at 576.

Before Plaintiffs’ experts submitted supplemental reports, Judge Josey-Herring (who next presided over these cases) issued an April 2017 order agreeing with Judge Weisberg’s reasons for denying Plaintiffs’ requests to add new experts and reiterating the two grounds on which Plaintiffs’ experts could prepare supplemental reports. Judge Josey-Herring emphasized that “***there is no occasion for new experts to be named*** and the scope of discovery is not to be expanded.” *Id.* at 580 (emphasis added). Plaintiffs have not challenged the April 2017 order.

Despite clear direction from both judges, Plaintiffs attempted to restart Phase I discovery for a third time by submitting supplemental expert reports that greatly expanded the scope of their original reports (often doubling them in length) and in some cases introduced entirely new general causation opinions. The supplemental reports violated the Superior Court's first directive by citing large numbers of studies published before 2013, which were available but not relied on in the expert's original report. The supplemental reports violated the second directive by adding new opinions not presented in the original reports and revising prior opinions without explaining why the change in standard necessitated the change. Defendants moved to strike the offending portions.

In a November 2017 order, Judge Josey-Herring ordered Plaintiffs to provide an annotated list of the post-February 2013 studies cited by each expert and to "explain why each of their six experts needs to revise the way in which they previously expressed their opinions in their original reports." App'x. at 583. She reminded Plaintiffs in bold-face type that "**Judge Weisberg's order did not authorize, nor does this Court authorize, a re-do of expert discovery in this case.**" *Id.* at 584. Plaintiffs have not challenged the November 2017 Order.

After Plaintiffs again failed to meet the court's requirements, Judge Josey-Herring gave Plaintiffs yet another chance. In January 2018, she ordered Plaintiffs to justify every study published since February 2013 that was contained in each

supplemental expert report, including with a description of “how each study or publication, relied on by each expert in their supplemental report, is relevant to and falls under the scope of that expert’s original report.” January 23, 2018 Order at 7. Plaintiffs have not challenged the January 2018 order.

After three rounds of briefing, Judge Josey-Herring entered a 61-page order (strike order, and with the related orders discussed below, strike orders) largely granting Defendants’ motion to strike. App’x 585-645. She described the extensive briefing covering Plaintiffs’ attempt to explain: (1) “the relevant studies or peer reviewed publications added to the scientific literature since February 2013 that each of the Plaintiffs’ experts relied on in their supplemental report;” (2) “how each study or publication listed related to or fell under the scope of each expert’s original report;” (3) the “page and line citation to the specific section(s) of that expert’s report that the new study or publication was meant to supplement;” and (4) the “justification for why each of their six experts needed to revise the way in which they previously expressed their opinion in their original reports.” *Id.* at 586.

After reciting that her previous order required Plaintiffs to provide “a detailed explanation for why each of the Plaintiffs’ experts seeking to revise their opinion(s) needed to do so based on the change in the evidentiary standards from *Dyas/Frye* to Rule 702,” Judge Josey-Herring found that “Plaintiffs failed to do so.” *Id.* She struck Plaintiffs’ experts’ new opinions, including Plaintiffs’ attempt to convert two

of their experts, Drs. Plunkett and Liboff—who both disclaimed causation opinions in 2013—into causation witnesses, stressing that the “supplementation [process] was not intended to permit the Plaintiffs to elicit new opinions not previously raised” or otherwise be used to gain “an unfair opportunity to counter the Court’s previous evidentiary findings after the fact.” *Id.* at 586-589, 592.

Judge Josey-Herring also analyzed “each expert in turn” and found that Plaintiffs were unable to tie many of their experts’ newly cited studies to opinions that fell within the scope of the original reports. The court also struck the added pre-2013 studies “that a Plaintiffs’ expert could have – but didn’t – cite to or reference in their original report.” *Id.* at 636-637.

At the same time, Judge Josey-Herring gave Plaintiffs another opportunity to defend two of their experts’ supplemental reports. For Dr. Mosgoeller, she allowed further briefing for Plaintiffs to demonstrate that recent developments in the science were “so groundbreaking” that they warranted his inclusion of a new opinion outside the scope of his original report. *Id.* at 644. After briefing, she held that Plaintiffs failed to demonstrate that there was any groundbreaking science warranting the new opinion and struck it from Dr. Mosgoeller’s supplemental report. *Id.* at 646-648.

For Dr. Belyaev, she held an evidentiary hearing to determine whether nine new sections and six subsections in his supplemental report were “(1) truly new science that was unavailable to Dr. Belyaev at the time he compiled his original

report; and (2) necessary given the change in the evidentiary standard.” *Id.* at 662. Dr. Belyaev testified for a full day, and after post-hearing briefing, the court issued a 19-page order finding that none of the sections or subsections were new science and that “Plaintiffs have failed to adequately justify that any of the newly included sections or studies were necessitated by the change in the evidentiary standard from *Dyas/Frye* to *Daubert*.” *Id.* at 679.

Plaintiffs moved to reconsider, but Judge Josey-Herring found their arguments “either unpersuasive or without merit.” *Id.* at 654. She ruled that allowing the additional expansion of discovery would give Plaintiffs “an unfair tactical advantage” and re-confirmed that she had “explicitly limited the scope of permissible expert report supplementation to—among other things—avoid the credible prejudice that would occur if the Court allowed for the wholesale reopening of Phase I discovery.” *Id.* at 654-656.

The parties then: (1) completed supplemental expert discovery (supplemental reports from Defendants’ experts and depositions of all experts); and (2) briefed Defendants’ Motion to Exclude Plaintiffs’ experts under Rule 702. A Rule 702 evidentiary hearing was scheduled for 2020 but was postponed for the COVID-19 pandemic. The hearing was rescheduled to begin in July 2021.

In March 2021, Plaintiffs made their fourth attempt to bypass the CMO and the court’s prior rulings, by seeking to add a new expert, Dr. Portier. Judge Irving,

who now presided over the cases, denied the request, echoing the reasoning of three prior judges. App’x 682-685 (Portier order). Judge Irving ruled that after “years debating the issue and having received multiple decisions finding in their favor, Defendants would be greatly prejudiced were the court to issue an order directly circumventing Judge Weisberg’s and Judge Josey-Herring’s prior orders.” *Id.* at 686-687. In addition, the court noted that “allowing Dr. Portier’s testimony four months before the *Daubert* hearing is scheduled to begin” would interfere with the court’s management of the case. *Id.* at 687.

After the pandemic again prevented the Rule 702 hearing, the court held a January 2022 status hearing to discuss potential dates for the Rule 702 hearing. During that hearing, Plaintiffs made their fifth attempt to reopen Phase I discovery, orally requesting the court to reconsider its Portier order. App’x 701-03. Judge Irving denied that request “for the reasons already articulated.” *Id.* at 701.

Rule 702 Hearing and Decision. In September 2022, Judge Irving conducted a three-week Rule 702 hearing during which he heard extensive testimony from Plaintiffs’ experts and two of Defendants’ experts. App’x 4431 *et seq.* Throughout the hearing, Plaintiffs repeatedly challenged the strike orders and sought to elicit barred testimony.

In April 2023, Judge Irving issued an 83-page order excluding the general causation testimony of all Plaintiffs’ experts (Rule 702 order). *Id.* at 1284. He first

excluded the testimony of epidemiologist Dr. Kundi, the only expert witness who offered a causation opinion specific to glioma and acoustic neuroma, because he failed to “provide sufficient facts and data to support his opinions” and “there was simply too great an analytical gap between the data and opinion offered.” *Id.* at 1311-1321. Judge Irving excluded Dr. Belyaev, a cancer research scientist, because Dr. Belyaev admitted he could not testify “to a reasonable degree of scientific certainty that cell phone use” causes glioma or acoustic neuroma, thus he did not provide an opinion that “fits this case.” *Id.* at 1324-1347. Judge Irving also ruled that Dr. Belyaev failed to “show how he reliably applied [his] methodology to reach his opinion” and that his opinions are “not supported by sufficient facts and data and he failed to apply reliable principles and methods to the facts of the case.” *Id.* at 1327-1332.

Judge Irving excluded Drs. Mosgoeller, Liboff, Panagopoulos, and Plunkett because, like Dr. Belyaev, they did not provide an opinion that RF from cell phones causes glioma or acoustic neuroma, and therefore their opinions did not “fit the issues in this case.” *Id.* at 1334, 1344, 1349, 1355-1356. Judge Irving also excluded their opinions because they (a) contained “analytical gaps,” (b) failed to reflect a “systemic review of the literature,” (c) were not “based on sufficient facts and data, the product of reliable principles and methods” that were reliably applied to the facts of this case, (d) improperly used “cherry-picked studies to support pre-determined

results,” and/or (e) were irrelevant or cumulative. App’x 1337, 1341-42, 1348, 1351-55. Plaintiffs agreed to entry of summary judgment to pursue this appeal. App’x 1362.

STANDARD OF REVIEW

Plaintiffs bear an “appellant’s heavy burden to show an abuse of discretion” for each of the discovery and Rule 702 orders they challenge. *Hill v. Bonded Adjustment Assoc.*, 398 A.2d 16, 17 (D.C. 1979); *see also* Pls.’ Br. 9 (citing discretion standard). Although Plaintiffs have also appealed the order entering summary judgment, they agree that summary judgment is proper if this court leaves the discovery and Rule 702 orders undisturbed. App’x 1362.

SUMMARY OF ARGUMENT

1. The court should reject any appeal based on the Superior Court’s Rule 702 order for two independent reasons:

(A) Plaintiffs failed to present adequate appellate argument required under D.C. App. R. 28(a)(10) to explain how Judge Irving abused his discretion in excluding Plaintiffs’ experts’ opinions. In addressing each expert’s exclusion, Plaintiffs’ brief merely describes the expert’s qualifications and provides bullet points purporting to summarize his or her testimony. Nowhere in their expert-specific discussions do Plaintiffs address Judge Irving’s grounds for excluding each expert, cite any legal authorities to support reversal, or otherwise provide

contentions and reasons to explain how the trial court abused its discretion. Absent such argument, Plaintiffs' challenge of the Rule 702 order is inadequate and therefore waived. *See infra* Section I.A.

(B) To the extent this court considers the challenge of the Rule 702 order at all, it should hold that order is a proper exercise of the Superior Court's broad discretion. Indeed, Judge Irving's Rule 702 order is a model of evidentiary gatekeeping, exhibiting rationality and fairness. The order presents detailed and careful analysis of the procedural history of the cases and the scientific record (established in two admissibility hearings covering more than seven weeks of testimony) and applies relevant Rule 702 case law, including this court's *Motorola* opinion, to make well-reasoned and well-supported rulings on the reliability and relevance of each expert's proffered opinions. The Rule 702 jurisprudence overwhelmingly supports Judge Irving's exclusion of Plaintiffs' experts based on his rulings that their opinions (a) did not "fit" the facts and circumstances of this case, (b) suffered from "analytical gaps" between the data and opinions reached, (c) had "insufficient facts or data" to support them, (d) did not reflect a repeatable systemic review of the literature, and/or (e) improperly cherry-picked studies to support a pre-determined result. *See infra* Section I.B.

2. For two independent reasons, Plaintiffs are not entitled to any relief on appeal based on the Superior Court's discovery orders.

(A) Plaintiffs fail to meet their appellate burden to demonstrate prejudice, which is required to support the relief they seek here. While Plaintiffs pay lip service to prejudice generally, they provide nothing more than a perfunctory argument. They do not explain, for example, how any specific opinion that was stricken—or that they were denied the opportunity to disclose—would have satisfied the standard for admissibility under Rule 702. *See infra* Section II.A.

(B) The Superior Court properly exercised its broad discretion in issuing its discovery orders. Generally, the court below did not abuse its discretion by enforcing prior orders and not permitting Plaintiffs to re-do expert discovery after remand of interrupted proceedings. Specifically, (1) Judge Weisberg’s supplemental discovery order providently held that *Motorola*’s change in admissibility standard did not warrant a complete “re-do” of discovery from scratch including all new experts. Judge Weisberg permitted specific supplementation to allow Plaintiffs’ experts to update their reports with new science and explain any changes necessitated by the new standard. (2) When Plaintiffs’ experts submitted supplemental reports that violated those guideposts, Judge Josey-Herring acted well within her discretion by enforcing Judge Weisberg’s order, finding that allowing Plaintiffs to violate the order and re-do discovery would prejudice Defendants. And (3) when Plaintiffs again sought to add a new expert and introduce evidence precluded in Judge Josey-Herring’s orders, Judge Irving was well within his

discretion to enforce both Judge Weisberg’s and Judge Josey-Herring’s orders, finding that to rule otherwise would prejudice Defendants. *See infra* Section II.B.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING THE GENERAL CAUSATION TESTIMONY OF ANY EXPERT WITNESS.

A. Plaintiffs’ Challenge to the Rule 702 Order Fails to Make Adequate Appellate Arguments.

Any challenge to the Rule 702 order fails at the outset because Plaintiffs have failed to present adequate appellate argument. An adequate argument must include “the appellant’s contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies.” D.C. App. R. 28(a)(10).³ Adequate arguments also “must address the trial court’s analysis and explain how it erred.” *SEC v. Hallam*, 42 F.4th 316, 327 (5th Cir. 2022) (“[Appellant] failed to do that. So we do not consider his position.”) (citations and internal quotation marks omitted). Appellate courts routinely hold that a party “waived its argument . . . by failing to adequately address the district court’s analysis.” *E.g., United States v.*

³ *See also L & A Contracting Co. v. S. Concrete Servs., Inc.*, 17 F.3d 106, 113 (5th Cir. 1994) (argument lacking cite to authority deemed abandoned under similar federal appellate court Rule 28).

Walker, 918 F.3d 1134, 1154 (10th Cir. 2019).⁴ The need to address the trial court’s analysis is particularly acute under an abuse of discretion standard. *See Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697, 716 (D.C. 2013) (rejecting argument where appellant “fails to explain” how ruling was an abuse of discretion).

It is well established that “[i]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.” *McFarland v. George Washington Univ.*, 935 A.2d 337, 351 (D.C. 2007) (citations and internal quotation marks omitted). Although waiver occurs most frequently through an appellant’s failure to raise an issue at all, “[t]his briefing-waiver rule applies equally to arguments that are inadequately presented in an opening brief.” *Sawyers v. Norton*, 962 F.3d 1270, 1286 (10th Cir. 2020) (citation omitted). Supplementing an inadequate argument in a reply brief does not correct that deficiency. *Comfort v. United States*, 947 A.2d 1181, 1188 (D.C. 2008) (“elaboration in the reply brief comes too late”).

⁴ *See also Ford v. Anderson Cty.*, 90 F.4th 736, 766 (5th Cir. 2024) (“Because Plaintiffs did not address the district court’s analysis and explain how it erred . . . , we consider these claims abandoned on appeal due to inadequate briefing.”) (citing *Hallam*; internal quotation marks omitted); *accord Johnson v. Riviana Foods, Inc.*, No. 17-5265, 2017 U.S. App. LEXIS 24525, at *8-9 (6th Cir. Dec. 4, 2017).

Plaintiffs’ attempt to argue the Rule 702 issues in Section III of their brief is facially inadequate, and therefore their assertion of error is waived. For each excluded expert, Plaintiffs start with two short paragraphs of procedural summary and then offer multi-page lists of single-spaced, bullet points describing testimony that each expert gave at the Rule 702 hearing or purportedly would have given but for the strike orders. But Plaintiffs fail to “engage with the [trial] court’s findings or reasoning regarding any expert and fail[] to explain how the [trial] court abused its discretion.” *United States v. Bauer*, 82 F.4th 522, 534 (6th Cir. 2023) (citation omitted).⁵

Take, for example, Plaintiffs’ discussion in subsection III.A titled, “Dr. Michael Kundi, Ph.D., Med Habil (Epidemiology, Biostatistician, Cell Biology).” Pls.’ Br. 28. Dr. Kundi was Plaintiffs’ most important expert because he was the only witness who attempted to causally connect RF from cell phones to the tumor types at issue, glioma and acoustic neuroma. App’x 1308. But Plaintiffs treated the dispositive Rule 702 exclusion of that critical testimony in the same cursory fashion as all the other experts with two summary paragraphs and then pages of single-spaced bullet points.

⁵ *Accord Brinkmann v. Dallas Cnty Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987) (appeal that fails to address the merits of the trial court’s opinion is abandoned).

Plaintiffs also fail to confront any of the specifics of Judge Irving’s well-reasoned analysis of Dr. Kundi’s methodology. They never mention Judge Irving’s finding that Dr. Kundi’s methodology “consist[ed] of three steps,” or Judge Irving’s careful description and assessment of each step. App’x 1415. They never mention his reliance on long passages from the *Daubert* hearing transcript in which Dr. Kundi admitted fatal flaws in his reasoning. *Id.* at 1418-20. They never mention, much less attempt to distinguish, the case law on which he relied, including a Seventh Circuit opinion advising that “an expert must do more than just state that she is applying a respected methodology; she must follow through with it.” App’x 1423. Plaintiffs fail to explain why that analysis does not apply precisely to Dr. Kundi.

Plaintiffs’ conclusory assertion that Judge Irving “erroneously excluded Dr. Kundi under Rule 702(b)-(d)” is insufficient. Pls.’ Br. 28. *See Ruffin v. United States*, 219 A.3d 997, 1010 n.58 (D.C. 2019) (argument “forfeited where [pleading] ‘did nothing more than give a barebones recitation of the relevant standard’ and ‘then conclusorily state that it was met’ with no explanation of ‘how or why’” that was so) (quoting *Williams v. Dieball*, 724 F.3d 957, 962 (7th Cir. 2013)). They offer no cogent legal argument to support their assertion. The only legal authority cited regarding Dr. Kundi explicitly supports *Defendants* for the principle that a “[c]ourt has broad discretion on which factors are most informative to reliability in context of a case.” Pls.’ Br. 31 n. 100. Plaintiffs fail to tie the cases cited in the short

Section III umbrella paragraph (Pls.’ Br. 28) to the rulings on Dr. Kundi (or any other excluded expert).

For Dr. Kundi, Plaintiffs have not developed an adequate appellate argument. The same is true for the other excluded experts. That is enough for the court to refuse to grant any relief from the Rule 702 order.

B. The Rule 702 Order Falls Well Within the Superior Court’s Broad Discretion.

Even if Plaintiffs had adequately addressed the Rule 702 order under the proper abuse of discretion rubric, they could not come close to meeting their high burden to show that Judge Irving abused his wide discretion in excluding the experts’ testimony. *United States v. Pon*, 963 F.3d 1207, 1219 (11th Cir. 2020) (“It is not easy to persuade a court of appeals to reverse a district court’s judgment on *Daubert* grounds.”) (citation omitted). This court has long recognized that “[t]he concept of ‘exercise of discretion’ is a review-restraining one,” and that “[t]he appellate court[’s] role in reviewing ‘the exercise of discretion’ is supervisory in nature and deferential in attitude.” (*James) Johnson v. United States*, 398 A.2d 354, 362 (D.C. 1979) (citations omitted).

Consequently, when the primary focus of the trial court’s role shifts from the facts and law to the sound exercise of judgment, the appellate court . . . examines the record and the trial court’s determination for those indicia of *rationality and fairness* that will assure it that the trial court’s action was proper.

Id. (emphasis added). This court “reviews the admission or exclusion of expert

testimony for abuse of discretion,”⁶ under which “[t]he trial judge ‘has wide latitude in the admission or exclusion of expert testimony, and his or her decision with respect thereto should be sustained unless it is manifestly erroneous.’”⁷

The court’s adoption of Rule 702 did not change that. *See Motorola Inc. v. Murray*, 147 A.3d 751, 755 (D.C. 2016) (“The abuse of discretion standard of review applies, regardless of whether the trial court decided ‘to admit or exclude scientific evidence.’”). If anything, it made appellate review even more deferential: “The deference [appellate courts] show trial courts on evidentiary rulings is especially pronounced in the *Daubert* context, where the abuse of discretion standard places a ‘heavy thumb’ — ‘really a thumb and a finger or two’ — on the trial court’s side of the scale.” *United States v. Pon*, 963 F.3d 1207, 1219 (11th Cir. 2020).⁸ That highly deferential standard applies “for a number of reasons”:

The [trial] court occupies the best position to rule on *Daubert* issues **given its familiarity with the procedural and factual details of the trial**, which it presides over and is immersed in. The rules that control the admission of expert testimony must be applied in case-specific evidentiary circumstances that often defy generalization. And deference maintains the importance of the trial and discourages appeals of rulings about expert witness testimony. As a result, the task of evaluating the reliability of expert testimony is uniquely entrusted to the district court,

⁶ *Haidak v. Corso*, 841 A.2d 316, 322 (D.C. 2004).

⁷ *Coulter v. Gerald Family Care, P.C.*, 964 A.2d 170, 189-90 (D.C. 2009) (quoting *Hawes v. Chua*, 769 A.2d 797, 801 (D.C. 2001)).

⁸ Where, as here, Superior Court rules are identical to federal rules, this Court “look[s] to cases interpreting the federal rule for guidance on how to interpret our own.” *Estate of Patterson v. Sharek*, 924 A.2d 1005, 1010 (D.C. 2007).

and we must grant the district court considerable leeway in the execution of its duty.

Pon, 963 F.3d at 1219 (citations and internal quotation marks omitted) (emphasis added). *Daubert* gatekeepers also have “‘broad latitude’ and ‘considerable leeway’ in deciding *how to go about making* the preliminary assessment of the reliability of proffered expert testimony.”⁹

The flexibility of the *Daubert* analysis and the deferential review of [trial] court decisions in this realm derive from the same general policy: allowing [trial] courts, which are **much more intimately familiar with the individual facts and needs of a particular case**, to manage their dockets and counsels’ time to provide the most efficient and just resolution of issues.

United States v. Ware, 69 F.4th 830, 846 (11th Cir. 2023) (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999)) (emphasis added).

Those well-established principles counsel the court to defer to Judge Irving’s Rule 702 rulings. See *United States v. Tsarnaev*, 595 U.S. 302, 142 S. Ct. 1024, 1040 (2022) (“Deference is the ‘hallmark of [the] abuse-of-discretion review’ applicable to . . . evidentiary decisions.”) (quoting *Gen. Elec. Co. v. Joiner*, 522 U. S. 136, 143 (1997)). Judge Irving presided over a three-week evidentiary hearing, received hundreds of pages of briefing and spent months processing that extensive record. He then issued an eighty-three-page opinion which is a model of rationality and fairness,

⁹ *Lewis v. United States*, 263 A.3d 1049, 1060 (D.C. 2021) (quoting *Motorola*, 147 A.3d at 755) (emphasis added).

presenting detailed and careful analysis of the scientific record and expert testimony, and faithfully applying the relevant Rule 702 case law on what constitutes relevant and reliable opinion testimony. *See Taylor v. United States*, 661 A.2d 636, 646 (D.C. 1995) (question for reviewing court is whether trial court’s discretionary decision was rational and fair “under the circumstances presented”) (citing *(James) Johnson*, 398 A.2d at 362). The opinion first summarized Judge Weisberg’s 2014 findings on the state of the science, which governed then and (unchallenged here) govern now.¹⁰ App’x 1285-90. Judge Weisberg found there was not “enough evidence for any scientist” to give an admissible general causation opinion “with the requisite degree of scientific certainty.” *Id.* at 491. He found that the primary epidemiologic studies on which Plaintiffs’ experts relied “are of such limited probative force and reliability that a reasonable expert could not infer causation based solely on those sources.” *Id.* at 524. He further found that “the incidence data do not show any significant increase in overall brain tumor rates, despite the widespread and ever-increasing use of cell phones.” *Id.* at 500.¹¹ And after hearing

¹⁰ *See Langon v. Reilly*, 802 A.2d 951, 953 (D.C. 2002) (“The trial court’s factual findings are binding upon this court unless they are clearly erroneous.”) (citation and internal quotation marks omitted); *see also Rutland Court Owners, Inc. v. Taylor*, 997 A.2d 706, 708 (D.C. 2010) (“As appellant ‘takes no issue with the Superior Court’s findings of fact,’ we adopt those findings and set them forth here.”).

¹¹ Confirming Judge Weisberg’s findings, Plaintiffs now admit to this court that their experts had “incomplete epidemiology and incidence opinions.” Pls.’ Br. 19.

four weeks of testimony from these same six experts, Judge Weisberg reasoned that Plaintiffs' general causation opinions "would almost certainly be excluded under *Daubert*." *Id.* at 512.

Judge Irving reached the same conclusion by evaluating each expert's opinions under Rule 702 and applicable case law, identifying key testimony and applying that testimony to the relevant general causation issues and facts. App'x 1307-58. For example, he pointed to Dr. Belyaev's testimony admitting that he did not "provide a general causation opinion as to acoustic neuroma and glioma to a reasonable degree of scientific certainty." *Id.* at 1324-26. Judge Irving thus held that Dr. Belyaev did "not provide a causation opinion that fits this case." *Id.* at 1326-27, 1432-33 (citing Rule 702 authority, including U.S. Supreme Court precedent); *see, e.g., McDowell v. Brown*, 392 F.3d 1283, 1299 (11th Cir. 2004) (noting "there is no fit where a large analytical leap must be made between the facts and the opinion," such as proffering animal studies concerning a type of cancer in mice to establish a different cancer in humans (citing *Joiner*, 522 U.S. at 146)).¹²

But because "of the breadth of the record and the lengthy procedural history of the case," Judge Irving went further to address Dr. Belyaev's admissibility "under each prong of Rule 702 even if the expert would not pass muster under any single

¹² *Seaman v. Seacor Marine L.L.C.*, 326 F. App'x 721, 726 (5th Cir. 2009) (excluding expert who "makes no connection between [substance at issue] and bladder cancer specifically").

one of them.” App’x 1307 n.5, 1433-1438. Judge Irving examined Dr. Belyaev’s claim that he applied the “IARC methodology” in reaching his opinions. After comparing the IARC methodology to Dr. Belyaev’s methodology, Judge Irving found that Dr. Belyaev “merely asserts that he used” the IARC methodology without actually “evaluating the data” according to the IARC’s criteria. *Id.* at 1434-36. Judge Irving cited case law to support his conclusion that Dr. Belyaev’s failure to “show how he reliably applied the [IARC] methodology to reach his opinion” disqualifies Dr. Belyaev as an expert under Rule 702(c)-(d). *Id.* at 1436. Further, Judge Irving quoted Dr. Belyaev’s testimony that he would “not reach scientific conclusions based on studies that have not been replicated by other scientists,” and then found that Dr. Belyaev “relied upon studies that were either not replicated or failed to be replicated to support his opinion.” *Id.* at 1436-38. Judge Irving properly ruled, with supporting Rule 702 authority, that Dr. Belyaev’s opinions failed Rule 702(b)-(c) because they were “not supported by sufficient facts and data and he failed to apply reliable principles and methods to the facts of this case.” *Id.* at 1438.

Judge Irving analyzed each of Plaintiffs’ experts in the same deliberate, detailed, thoughtful and legally supported fashion. He held that Drs. Mosgoeller, Liboff, Panagopoulos, and Plunkett all failed Rule 702(a) because they did not provide opinions that RF from cell phones can cause glioma or acoustic neuroma. *Id.* at 1440-42, 1450-51, 1455-56, 1463. And each of their opinions, in addition to

Dr. Kundi's, failed Rule 702(b)-(d) because they (i) suffered "analytical gaps" between the data and opinions reached, (ii) provided "insufficient fact or data to support" their opinions, (iii) failed to apply a "systemic review of the literature that can be replicated by another scientist," and/or (iv) improperly used "cherry-picked studies to support pre-determined results." *Id.* at 1415-60. In his analysis of each expert's opinion, Judge Irving demonstrated a proper exercise of discretion by relying on the extensive factual record, including lengthy *Daubert* hearing transcript excerpts from the excluded experts themselves. He also cited applicable Rule 702 case law (especially *Motorola*), to support his holdings as to each expert. *Id.* at 1422, 1427, 1444, 1447-48, 1454, 1456, 1458-61, 1463-64.

Judge Irving's well-reasoned rulings are facially a proper exercise of his wide discretion as the evidentiary gatekeeper under Rule 702. As in other cases in which appellate courts summarily affirmed the exclusion of general causation testimony under this deferential standard, the Superior Court here "carefully and completely explained its reasons for excluding the testimony of Appellant[s'] causation expert[s,] . . . [i]t properly conducted the *Daubert* hearing, applied the correct legal standard, and made no clearly erroneous findings of fact." *Magistrini v. One Hour Martinizing Dry Cleaning*, 68 F. App'x 356, 356 (3d Cir. 2003). Plaintiffs have not argued otherwise.

Without pointing to any particular part of the Rule 702 order, Plaintiffs complain generally that the order “focused on general acceptance . . . and the conclusions generated by Plaintiffs’ experts . . . instead of focusing ‘solely on principles and methodology.’” Pls.’ Br. 28. But Plaintiffs’ objection to “general acceptance” ignores *Motorola*’s guidance (from *Daubert*) that “‘general acceptance’ can yet have a bearing on the [admissibility] inquiry.” *Motorola*, 147 A.3d at 754 (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 594 (1993)). Thus, the Superior Court “was well within its discretion to consider whether plaintiffs’ experts’ conclusions were generally accepted by the scientific community.” *Coning v. Bayer Pharma AG (In re Mirena IUS Levonorgestrel-Related Prods. Liab. Litig.)*, 982 F.3d 113, 124 (2d Cir. 2020). And Plaintiffs’ criticism of Judge Irving’s consideration of their expert’s conclusions misconstrues *Motorola*, in which this court explained that “the Supreme Court refined its analysis” by “acknowledging that ‘conclusions and methodology are not entirely distinct from one another.’” *Motorola*, 147 A.3d at 755 (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)). *Motorola* also explicitly authorized Judge Irving to consider that Plaintiffs’ experts “present conclusions that are shared by no other scientist,” which “raise[s] a red flag” regarding methodologies that are not scientifically valid. *Id.* at 758 (quoting *Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594, 598 (9th Cir. 1996)).

Plaintiffs' experts were certainly on an island here, as both Judge Weisberg and Judge Irving found. App'x 496 (Weisberg, J.), 1337 (Irving, J.).

Simply put, Plaintiffs below did not meet “the exacting standards” that Rule 702 imposes. *Weisgram v. Marley*, 528 U.S. 440, 455 (2000). Having failed even to attempt to meet their burden of showing an abuse of discretion—or indeed make any appellate argument at all—Plaintiffs are not entitled to any relief on appeal based on the Rule 702 order.

II. PLAINTIFFS HAVE NOT ESTABLISHED ANY BASIS TO DISTURB THE DISCOVERY ORDERS.

Plaintiffs' appeal fares no better when it comes to Judge Weisberg's supplemental discovery order, Judge Josey-Herring's strike orders, and Judge Irving's orders rejecting Plaintiffs' demand to add a new expert, Dr. Portier. Plaintiffs make no attempt to show prejudice from those rulings, and the rulings do not represent an abuse of discretion in any event.

A. Plaintiffs Do Not Attempt to Demonstrate Any Prejudice from the Various Orders.

Plaintiffs' appeal of the Superior Court's discovery orders fails as a threshold matter because Plaintiffs do not address a fundamental element necessary for relief on appeal—prejudice. *Arnold v. United States*, 436 A.2d 1302, 1303 (D.C. 1981) (“An appellant has the burden on appeal to demonstrate error and prejudice.”) (citation omitted). As this court explained:

[T]he appellate court makes two distinct classes of inquiries when reviewing a trial court's exercise of discretion. It must determine, first, whether the exercise of discretion was in error and, if so, whether the impact of that error requires reversal. It is when **both** these inquiries are answered in the affirmative that we hold that the trial court “abused” its discretion.

(*James*) *Johnson*, 398 A.2d at 367 (emphasis added).¹³ Thus, arguing only error is inadequate. Plaintiffs must also show why “the impact of that error requires reversal.” (*James*) *Johnson*, 398 A.2d at 367; accord *Arnold*, 436 A.2d 1303; *Pearson v. Soo Chung*, 961 A.2d 1067, 1079 (D.C. 2008) (denying reversal where “[i]n any event, [appellant] cannot possibly show prejudice”). But nowhere in their brief do Plaintiffs acknowledge, let alone address, their burden to demonstrate that the challenged orders prejudiced them. Thus, their challenges to the discovery orders are inadequate. *Adams v. Austal, U.S.A., L.L.C.*, 754 F.3d 1240, 1259 (11th Cir. 2014).¹⁴

Plaintiffs challenge Judge Weisberg’s supplemental discovery order denying their “request for new experts and additional discovery” (Pls.’ Br. 13) without ever contending that the testimony of any “new experts” would have been admissible under Rule 702 to prevent summary judgment. *See, e.g., McMunn v. Babcock &*

¹³ *See also Harris*, 828 A.2d 203 at 205 (appellant must establish both that a discovery ruling is “clearly erroneous” and that any evidence not admitted would “have made a difference to [the] decision on summary judgment”).

¹⁴ *Accord (Akande) Johnson v. United States*, 980 A.2d 1174, 1186-87 (D.C. 2009).

Wilcox Power Generation Grp., Inc., 869 F.3d 246, 274 (3d Cir. 2017) (affirming because “Plaintiffs have failed to show any prejudice” from alleged district court error). Nor do they explain how “additional discovery” would have cured the defects in their experts’ excluded testimony or otherwise moved the Rule 702 needle. Far from trying to establish prejudice from the order, Plaintiffs make arguments (attempting to establish error) that establish a *lack* of prejudice. Plaintiffs assert that “there was an avalanche of new scientific research” and that “prior discovery in the Murray Cases had been solely governed by the narrow *Frye/Dyas* standard.” Pls.’ Br. 14. But they admit that Judge Weisberg *granted* additional discovery on those topics. Pls.’ Br. 13.

Plaintiffs also fail to make an adequate prejudice argument to preserve their challenge to Judge Josey-Herring’s various strike orders and subsequent attempts at “reconsideration.” Pls.’ Br. 27. Most of Plaintiffs’ discussion of the strike orders in their Section II is merely a summary of procedural history, rather than an appellate argument. In the section’s last sentence, Plaintiffs assert that the allegedly “erroneous rulings prevented Plaintiffs from accessing the full body of scientific evidence.” Pls.’ Br. 27. But that is not sufficient to preserve a request for reversal. Plaintiffs had to assert—and show with record citations and legal authorities—that “accessing the full body of scientific evidence” would have fixed the many methodological problems that Judge Irving later found, including the analytical gaps

between the data and their opinions. *See, e.g.*, App’x 1311. They never did that. Thus, Plaintiffs waived their argument for relief on appeal based on the strike orders.

Finally, Plaintiffs challenge Judge Irving’s refusal to let them add Dr. Portier at the last minute, but they never show that his testimony would have been admissible under Rule 702 and that allowing him to testify would have prevented summary judgment. Plaintiffs offer one sentence asserting that “[p]recluding Dr. Portier was clear error and severely prejudiced Plaintiffs and ultimately resulted in incomplete epidemiology and incidence opinions . . . where Dr. Portier would have presented additional epidemiology and incidence opinions.” Pls.’ Br. 19. But other than that perfunctory statement, Plaintiffs never attempt to show that Dr. Portier’s reliance on epidemiology and incidence data closed the analytical gap or otherwise fixed the flaws that caused Judge Irving to exclude other experts’ testimony under Rule 702. Nor could they, given Judge Weisberg’s findings that the epidemiology was inherently flawed and biased and that the incidence data was stable and inconsistent with increased risk. App’x 522, 524, 500; *see also id.* at 1314-15 (Judge Irving’s similar findings on epidemiology and incidence data).

B. The Superior Court Properly Exercised Its Discretion In Issuing Its Discovery and Case Management Orders.

1. The Superior Court’s Orders Collectively Reflect Proper Discretion to Enforce Prior Orders and Refuse a General Causation “Re-do.”

The Superior Court discovery orders, which all deal with the proper scope of Phase I discovery, were proper exercises of broad trial court discretion. *See Weakley v. Burnham Corp.*, 871 A.2d 1167, 1179 (D.C. 2005) (The court “review[s] discovery orders for abuse of discretion.”). These orders were faithful to prior orders and prevented a do-over of discovery many years into the litigation. There is no conceivable basis to upset them. *See Harris v. Ladner*, 828 A.2d 203, 205 (D.C. 2003) (applying both principles).

First, each Superior Court judge properly premised their post-remand proceedings on fidelity to prior court orders, going back to the foundation of Judge Burgess’s 2011 Phase I case management order (“Phase I CMO”) that all parties agreed to and that Plaintiffs have not challenged. In his supplemental discovery order, Judge Weisberg relied on and enforced the Phase I CMO, ruling that it required Plaintiffs to identify “all of their experts on general causation” and submit expert reports that contained “a complete statement of all opinions the witness will express on general causation and the basis and reasons for them.” App’x 574. Judge Josey-Herring’s strike orders in turn relied on and enforced Judge Weisberg’s supplemental discovery order. App’x 585-645. Judge Irving’s Portier order enforced

Judge Weisberg’s supplemental discovery order. And Judge Irving’s evidentiary rulings during the Rule 702 hearing depended on and enforced all those orders. In each instance, the Superior Court reviewed the prior orders, explained the basis and rationale for those orders, applied the current facts and circumstances to those orders, and found no rational basis for deviating from them.

Those independent determinations by three different Superior Court judges are consistent with this court’s recognition that “[e]xcept in a truly unique situation, no benefit flows from having one trial judge entertain what is essentially a repetitious motion and take action which has as its purpose the overruling of prior action by another trial judge.” *United States v. Davis*, 330 A.2d 751, 755 (D.C. 1975). In *Davis*, this court reversed a subsequent trial court judge who reached a different decision from a prior fellow judge when that subsequent judge “was entertaining a motion which was basically similar to those denied earlier.” *Id.* at 755. Far from abusing their discretion by following prior orders, “it [was] highly desirable that [each subsequent judge in this case] show respect for prior rulings made by another judge in the same case, and should not [have] lightly depart[ed] from them.” *Id.* (quoting *Dist. of Columbia v. Faison*, 278 A.2d 688, 690 (D.C. 1971)).¹⁵

¹⁵ *Accord Carlson v. Bos. Sci. Corp.*, 856 F.3d 320, 325 (4th Cir. 2017) (“[W]here, as here, the order was entered by one judge and then reviewed by another, courts have held that the latter judge should be hesitant to overrule the earlier determination.”) (citation and internal quotation marks omitted).

Plaintiffs fail to contend with those well-established principles of orderly and wise judicial management. Instead, they castigate Judge Irving as having “‘slavishly’ held to” prior orders (Pls.’ Br. 26), ignoring his careful rationale for enforcing those orders. Although Defendants agree generally that subsequent judges have *the power* to change a prior ruling (*id.*), that does not mean the judges below abused their discretion by *following* prior rulings: “there is a difference between not being bound by [a prior ruling] and being prohibited from applying it.” *Allied Erecting & Dismantling Co. v. United States Steel Corp.*, No. 22-3585, 2023 U.S. App. LEXIS 21767, at *15 (6th Cir. Aug. 18, 2023).

Second, the orders are all grounded in fairness and maintaining the integrity of the Phase I case management ground rules established in the Phase I CMO and related hearings. The CMO required Plaintiffs to disclose their experts on general causation, including all their opinions and the basis for those opinions. Plaintiffs agreed that this would be their “one shot” with one set of experts. App’x 387-389. The parties conducted full discovery and engaged in a multi-week evidentiary hearing in 2013-2014 on the science, leading to Judge Weisberg’s *Dyas/Frye* order. Before Judge Weisberg subsequently certified this case for interlocutory appeal of the expert admissibility standard in 2016, he determined that Plaintiffs’ six designated experts “would almost certainly be excluded under *Daubert*.” App’x 512.

After this court adopted Rule 702 and remanded, Plaintiffs improperly peppered the Superior Court over six years with serial motions seeking new experts, new opinions, and other new discovery. The constant theme of those motions was that Plaintiffs should get a post-remand Phase I expert discovery do-over. But the Superior Court properly rejected Plaintiffs' various "re-do" requests because it would be unfair to allow Plaintiffs to use the change in the evidentiary standard to try and fix the deficiencies in their case. App'x 588, 663.

The Superior Court's was well within its discretion in rejecting Plaintiffs' serial attempts to start over. In *Harris*, 828 A.2d at 205, this court held that the Superior Court does not abuse its discretion by adhering to prior orders of a coordinate judge and refusing to fully "reopen discovery" following remand from another court while a motion was pending. Similarly, federal appellate courts in the *Daubert* context routinely refuse to permit expert witness do-overs. See *In re Onglyza (Saxagliptin) & Kombiglyze (Saxagliptin & Metformin) Prod. Liab. Litig.*, 93 F.4th 339, 349-350 (6th Cir. 2024) (affirming district court's refusal to "reopen expert discovery" after "expert discovery and motions were already done").¹⁶

¹⁶ See also *Weisgram*, 528 U.S. at 455-56 (affirming appellate court refusal to remand for expert witness do-over because "it is implausible to suggest . . . that parties will initially present less than their best expert evidence in the expectation of a second chance should their first try fail"); *Winters v. Fru-Con Inc.*, 498 F.3d 734, 743 (7th Cir. 2007) (holding that Rule 702 "does not include a dress rehearsal or practice run for the parties," so "[t]he district court was not required to give

2. Each of the Discovery Orders Independently Reflects Rationality and Fairness.

a. Plaintiffs Fail to Show That Judge Weisberg Erred in the Supplemental Discovery Order.

When Judge Weisberg certified the expert admissibility standard for interlocutory appeal, he indicated that, should this court adopt Rule 702, he would “allow whatever additional discovery might be necessary to place Plaintiffs in a fair position to litigate that issue.” *Motorola*, 147 A.3d at 758. On remand, his first order of business was to hold a hearing and solicit briefing on that precise issue.

Judge Weisberg issued his careful eight-page supplemental discovery order that provided a rational basis for denying Plaintiffs’ request for “additional discovery” in the form of broad party discovery. Judge Weisberg reviewed the history and purpose of Phase I, which was to isolate the general causation expert admissibility question “and answer it, before launching these complex toxic tort cases into very expensive and time consuming litigation that could be avoided if Plaintiffs are unable to get over that first hurdle.” App’x 572. Judge Weisberg also relied on Judge Burgess’s 2012 order (not challenged here) denying Plaintiffs’ identical request for broader discovery, which Judge Burgess also ruled was inconsistent with the narrow scope of Phase I. *Id.* at 571-72.

[plaintiff] a ‘do over’ and therefore we find that the district court did not abuse its discretion.”).

The supplemental discovery order also provided a rational basis for denying “new experts” by relying on “the court’s initial case management order for Phase I discovery [that] required Plaintiffs to produce *all* of their experts on general causation, with a report from each expert setting forth ‘a complete statement of all opinions the witness will express on general causation and the basis and reasons for them.’” *Id.* at 574. Judge Weisberg explained that the change to Rule 702 did not affect the court’s case management plan because the CMO “was entered without regard to the applicable standard on the admissibility of expert testimony in this jurisdiction, and was the same language that would have been used in a comparable order from a federal district court operating under Rule 702.” *Id.*

In any event, as Plaintiffs acknowledge, Judge Weisberg *did* allow for post-remand discovery on the science: “Judge Weisberg permitted Plaintiffs’ general causation experts to submit supplemental expert reports to account for the new standard and new scientific research occurring from February 2013 to March 2017.” Pls.’ Br. 13. Plaintiffs do not attack the supplemental discovery that Judge Weisberg allowed, but instead complain that they should have gotten more, asserting that Judge Weisberg “erroneously denied Plaintiffs’ requests for new experts and additional discovery.” *Id.*

Yet, Plaintiffs do not explain why Judge Weisberg’s grant of supplemental authority was an abuse of discretion. Nor could they. Judge Weisberg provided the

parties with full briefing and a full hearing. And he issued an opinion that addressed the parties' respective arguments, analyzed those arguments within the history of the case, and explained his rationale for why his decision was more consistent with the "court's management of these complex toxic tort cases" than Plaintiffs' request to "start all over with new experts and new discovery," which he found was a request without "any basis." App'x 575 n.2 (citing *Weisgram*, 528 U.S. at 455).

Plaintiffs' brief fails to identify any grounds to support reversal. For example, Plaintiffs do not show that Judge Weisberg abused his discretion by relying on Judge Burgess's prior denial of Plaintiffs' identical request in 2012. *See Hallam*, 42 F.4th at 327 ("To be adequate, a brief must address the district court's analysis and explain how it erred."). Nor can they because, as discussed above, Judge Weisberg properly relied on prior case management orders in this complex expert admissibility proceeding. And their admission that Judge Weisberg allowed post-remand discovery negates the two arguments they do make: (1) "prior discovery in the Murray Cases had been solely governed by the narrow *Frye/Dyas* standard regarding general acceptance," and (2) "there was an avalanche of new scientific research and studies that had been published after 2013." Pls.' Br. 14. Plaintiffs admit that Judge Weisberg permitted supplemental discovery to address those concerns, allowing their previously disclosed experts "to account for the new standard and new scientific research occurring from February 2013." Pls.' Br. 13.

Plaintiffs base their challenge to Judge Weisberg’s finding that the Phase I CMO was entered without regard to the applicable expert admissibility standard solely on a misrepresentation of the record. Judge Burgess never said, “put *Daubert* aside.” Pls.’ Br. 14 and n.39. Moreover, as Judge Weisberg noted in support of this finding, the Phase I CMO used “the same language that would have been used in a comparable order from a federal district court operating under Rule 702.” App’x 574. Plaintiffs’ two pages of citations to cases permitting broader discovery “in bifurcated and other mass tort cases” do not show that Judge Weisberg abused his wide discretion as a Rule 702 gatekeeper to permit something different here. *See Halstead v. Espinoza*, No. 21-13356, 2023 U.S. App. LEXIS 5529, at *4-5 (11th Cir. Mar. 8, 2023) (appellant does not establish abuse of discretion for denying relief by “providing examples of cases in which district courts” granted relief).

b. Judge Josey-Herring’s Strike Orders Were Well Within the Court’s Discretion.

Similarly, in striking Plaintiffs’ improper supplementation reports, Judge Josey-Herring acted well within the “wide latitude of a trial judge in overseeing discovery and the trial process. *Sowell v. Walker*, 755 A.2d 438, 446 (D.C. 2000) (citation omitted). Plaintiffs have appealed four strike orders that Judge Josey-Herring issued in response to Defendants’ Motion to Strike Unauthorized Portions

of [Plaintiffs'] Supplement Expert Reports.¹⁷ But Plaintiffs have not met their burden to establish an abuse of discretion. As with the rest of the brief, Section II offers only editorialized procedural summary, not legal argument. Plaintiffs nowhere confront Judge Josey-Herring's careful analysis of the legal and factual issues, granting some of Defendants' challenges and denying others. And Plaintiffs do not challenge the extensive process that Judge Josey-Herring implemented. Nor could they because Judge Josey-Herring went to extraordinary lengths to give Plaintiffs ample opportunity to show that their experts' supplemental reports complied with the clear rules for supplementation.

For example, after the parties briefed Defendants' Motion, Judge Josey-Herring issued an order directing Plaintiffs to provide specific information in a chart and to submit a brief demonstrating that the experts' supplementation complied with Judge Weisberg's 2017 Order. App'x 582-84. When Plaintiffs failed to follow that directive, Judge Josey-Herring gave them yet another chance, allowing Plaintiffs to "resubmit their brief" with specific information detailed in the order. January 23, 2018 Order at 7. And then, Judge Josey-Herring gave Plaintiffs yet another opportunity for more briefing with respect to Dr. Mosgoeller and an evidentiary

¹⁷ Plaintiffs purport to challenge "*generally*" Judge Irving's enforcement of those orders during the Rule 702 hearing. App'x TOC 5; App'x 1364. But Plaintiffs provide no argument as to any particular ruling by Judge Irving, relying solely on their challenge of the strike order themselves. Pls.' Br. 26-27.

hearing and additional briefing with respect to Dr. Belyaev. App’x 611 (Belyaev); App’x 637 (Mosgoeller). Plaintiffs do not assert that Judge Josey-Herring failed to give them adequate notice and opportunity to be heard before limiting their experts’ supplemental reports. Instead, Plaintiffs raise three equally baseless arguments against the strike orders, saying they are contrary to (a) Judge Weisberg’s supplemental discovery order; (b) this court’s *Motorola Inc.* decision, and (c) Rule 26(e).

First, Judge Josey-Herring’s strike orders dutifully followed the supplemental discovery order. Judge Weisberg allowed the parties to produce supplemental reports with “relevant studies or peer reviewed publications” added to the literature since Plaintiffs served their initial expert reports in February 2013. Judge Weisberg also permitted the parties’ experts to revise “the way they express their opinions to account” for the change to Rule 702, provided that they “explain why the change in the evidentiary standard necessitates a change in the way they articulate their opinion.” App’x 576. That is precisely what Judge Josey-Herring tested in requiring Plaintiffs to list, for each expert, the post-February 2013 “studies or peer reviewed publications” that each expert “relied on in their supplemental expert report.” App’x 583. Because “Judge Weisberg’s order did not authorize . . . a re-do of expert discovery in this case” (*id.* at 584), Judge Josey-Herring required Plaintiffs to describe how “each study or publication is relevant to or falls under the scope of

each expert's original report" and identify with a page and line citation the specific section of the original report "that the new study or publication was meant to supplement." *Id.* at 583. Judge Josey-Herring also required Plaintiffs to explain, for each new opinion, why the change in the evidentiary standard required the expert's new opinion. *Id.* Then Judge Josey-Herring went expert-by-expert, analyzing whether Plaintiffs' explanations satisfied the supplemental discovery order.

Plaintiffs' problem is not that Judge Josey-Herring failed to follow Judge Weisberg's order. Rather, Plaintiffs themselves failed to follow Judge Weisberg's order. Judge Josey-Herring held that, although Plaintiffs were required "to provide the Court with a detailed explanation" for why Plaintiffs' experts' new opinions were necessary "based on the change in the evidentiary standard," as Judge Weisberg's order required, "Plaintiffs failed to do so." App'x 586. Given that failure, Plaintiffs cannot now complain that Judge Josey-Herring "refused to allow the experts to revise the way they expressed even a single opinion." Pls.' Br. 25. Plaintiffs also failed to follow the court's direction to ground new studies in each expert's original report. For example, she found that Dr. Liboff cited new studies relating to brain tumor incidence data, but neither page Plaintiffs cited in his original report to support that supplementation "contains a referent to or discussion of" incidence data. App'x 595-96. Indeed, to justify Dr. Belyaev's citation of 94 new studies, Plaintiffs cited to a blank line in Dr. Belyaev's original report. App'x 606-609. Plaintiffs

cannot now complain that the court erred by striking those studies from Dr. Belyaev's supplemental report. Pls.' Br. 25. Those are just two examples. Judge Josey-Herring fully documented Plaintiffs' insufficient arguments with respect to each expert's improper supplemental reports.

Moreover, while Plaintiffs' assert that supplemental opinions "are not to be excluded by the court in the absence of credible prejudice," Pls.' Br. 24, Judge Josey-Herring specifically applied the "credible prejudice" standard to reject Plaintiffs' effort to misuse supplementation under Rule 26, ruling that Plaintiffs' improper supplementation would "upend the discovery process" and give Plaintiffs "an unfair tactical advantage." App'x 654-55.¹⁸

Second, nothing in *Motorola* comes close to Plaintiffs' claim that this court "recognized the experts' right to supplement their reports with pre-February 2013 scientific studies." Pls.' Br. 22. This court did not weigh in on what supplementation would be appropriate. Rather, the court simply acknowledged Judge Weisberg's statement that if the court adopted Rule 702, he "could then allow whatever additional discovery might be necessary to place Plaintiffs in a fair position to litigate that issue." *Motorola*, 147 A.3d at 757-758. Moreover, Judge Josey-Herring *permitted* Plaintiffs' experts to supplement with pre-2013 studies "as necessary for

¹⁸ See also App'x 592 ("Discovery in this case cannot be a moving target."); App'x 586 (supplementation was not intended "to give the parties an unfair opportunity to counter the Court's previous evidentiary findings after the fact.").

purposes of context[,]” but Plaintiffs had “the burden of justifying” why that context “is required.” January 23, 2018 Order at 7; App’x 679. They failed to do so below and trying to do so now is too late. Pls.’ Br. 22, n.64.

Third, Plaintiffs’ reliance on Rule 26 is misplaced. As Judge Josey-Herring correctly held, Rule 26 does not give Plaintiffs “the unfettered ability to supplement their expert reports.” App’x 654. The Rule requires supplementation (1) under certain circumstances “or [(2)] as ordered by the court.” D.C. Super. Ct. R. Civ. P. 26(e)(1). Here, Judge Weisberg’s supplemental discovery order “explicitly ordered the Plaintiffs to supplement their experts’ reports in a specific and precise manner.” *Id.* at 655. Thus, Plaintiffs’ reliance on Rule 26 is “without merit.” *Id.*

c. Judge Irving’s Portier Order Was Well Within the Court’s Discretion.

Finally, Plaintiffs have not identified any abuse of discretion in Judge Irving’s order denying Plaintiffs’ request to add Dr. Portier as a new expert, which came eight years after the expert disclosure date and four years after Judge Weisberg and Judge Josey-Herring rejected a request for new experts. Judge Irving issued a written order with a rational basis setting forth his careful reasoning based on several grounds, including those controlling prior orders. He specifically addressed Plaintiffs’ *Abell* factors argument, properly holding that they did not apply. *Abell v. Wang*, 697 A.2d 796 (D.C. 1997). And then Judge Irving conducted a provisional analysis of the factors even if they were to apply. App’x 681-87. Far from an abuse, it was a

textbook example of the thoughtful exercise of trial court discretion.

As with their other arguments, Plaintiffs fail to confront Judge Irving's analysis, much less demonstrate that he abused his discretion. Most egregiously, just as they did below, Plaintiffs (in Judge Irving's words) "fail . . . to present the request within the context of Judge Weisberg's and Judge Josey-Herring's admonition that the scope of Phase I discovery was not to be expanded and that 'there is no occasion for new experts to be named.'" App'x 686 (quoting App'x 580). That context is fatal here because, as discussed above, those prior orders confirm that Judge Irving did not abuse his wide discretion.

The arguments Plaintiffs make do not show an abuse of discretion. Plaintiffs' primary argument—an inappropriate *de novo* effort to satisfy some, but not all, of the *Abell* factors—fails. Pls.' Br. 18-20. *First*, Plaintiffs never argue that Judge Irving was wrong to find the factors "wholly unnecessary." App'x 686. Nor could they. As a matter of law, the *Abell* factors did not apply. That doctrine arises out of sanctions cases in which a plaintiff violated scheduling orders for the submission of expert evidence, and the evidence was excluded as a sanction, effectively leaving plaintiffs with no expert, and subject to summary judgment. *See Dada v. Children's Nat'l Med. Ctr.*, 715 A.2d 904, 909 (D.C. 1998) (identifying *Abell* factor "precedents [as] involving discovery sanctions"). Judge Irving did not exclude any expert evidence as a sanction, but instead denied Plaintiffs' request to add a cumulative

seventh expert to the six already disclosed on identical topics—long after the deadline to do so and despite the fact that the court previously denied that request in several prior orders. Thus, Judge Irving found that the *Abell* factors were irrelevant.

Second, and in any event, Judge Irving did analyze the *Abel* factors in this case and Plaintiffs do not engage his reasoning. Judge Irving relied primarily on Plaintiffs’ “failure to acknowledge and distinguish the prior court rulings” in this case and found that Defendants “would be greatly prejudiced” if he departed from those orders. App’x 686-87. Specifically, adding a new expert would prejudice Defendants by having the existing Phase I record upended and having to start over with a new expert after litigating the disclosed experts since 2013. Judge Irving’s reliance on prior orders and prejudice to Defendants fits neatly into the *Dada* factors of “the orderliness and efficiency of . . . the court’s overall handling of the case,” and “the reasonableness of the [requesting] party’s explanation for failing to meet the deadline, as well as any pattern of noncompliance.” *Dada*, 715 A.2d at 910. Plaintiffs failed to address those factors below and fail to address them here as they relate to Judge Irving’s proper exercise of discretion.

Plaintiffs assert that adding Dr. Portier would not have prejudiced Defendants “since the *Daubert* hearing did not begin until 19 months after Plaintiffs’ 2021 motion and 8 months after their 2022 renewed request.” Pls.’ Br. 20. That argument mischaracterizes the record. Plaintiffs first requested to add Dr. Portier in

March 2021, just four months before the hearing was scheduled to begin in June 2021. App’x at 685. When Plaintiffs sought reconsideration in January 2022, the parties and the court were exploring rescheduling the hearing in May 2022—again just four months later. App’x at 703.

Plaintiffs close their challenge to the Portier order with a perfunctory one-sentence reference to Rule 26(e) requiring “supplementation” with a lengthy footnote that gains them nothing. Pls.’ Br. 20; n. 58. Consistent with the scope of Rule 26(e)(1), the cases Plaintiffs cite involve a party seeking to supplement existing experts’ testimony or disclosures, not the addition of a wholly new expert. *See, e.g., Ferrell v. Rosenbaum*, 691 A.2d 641, 647-48 (D.C. 1997); *City of Pomona v. SQM N. Am. Corp.*, 866 F.3d 1060, 1066 (9th Cir. 2017). In addition, as discussed above, Rule 26 permits disclosure “[u]nless otherwise stipulated or ordered by the Court” and requires supplementation “as ordered by the court.” Rule 26(e)(1)(B). Thus, because Judge Burgess issued a specific CMO governing the disclosure of experts, and Judge Weisberg issued a specific order establishing the boundaries of expert report supplementation in his discovery order, those orders controlled over the Rule 26 general supplementation rules. Rule 26(e)(1)(B).

CONCLUSION

For all these reasons, Plaintiffs have not established any basis to disturb the Superior Court's Rule 702 and discovery orders on appeal. As a result, they have not shown any basis to disturb the judgment either. This court should affirm.

Dated: March 22, 2024

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Certificate Of Service

I hereby certify that on the 22nd day of March, 2024, a true copy of the foregoing Brief on Appeal was served on counsel of record.

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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
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 - 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;
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 - (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.



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Case Number(s)

3/22/24

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