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STATE OF MICHIGAN

IN THE SUPREME COURT

LYNDA DANHOFF and DANIEL DANHOFF,

Plaintiffs-Appellants,

v

DANIEL K. FAHIM, M.D., MICHIGAN HEAD & SPINE INSTITUTE,

Defendant-Appellees,

and

DANIEL K. FAHIM, M.D., P.C., KENNETH P. D'ANDREA, D.O., and WILLIAM BEAUMONT HOSPITAL, d/b/a BEAUMONT HOSPITAL – ROYAL OAK, Jointly and Severally,

Defendants.

Supreme Court No. 163120

Court of Appeals No. 352648

Ingham County Circuit Court
Case No. 18-166129-NH

____/

AMICUS CURIAE **BRIEF OF LAWYERS FOR CIVIL JUSTICE (LCJ)**

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STATEMENT OF INTEREST

Lawyers for Civil Justice ("LCJ") is a national coalition of defense trial lawyer organizations, law firms, and corporations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For over 35 years, LCJ has advocated for procedural reforms that (1) promote balance in the civil justice system; (2) reduce the costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation. Working through the Rules Enabling Act process, LCJ often urges proposals to reform aspects of the Federal Rules of Civil Procedure and Federal Rules of Evidence.

LCJ has specific expertise on the meaning, history, and application of Federal Rule of Evidence 702, drawing on both its proposal to amend Rule 702 that resulted in the amendment that went into effect on December 1, 2023, its own research efforts undertaken during the recent rulemaking process and the collective experience of its members who are involved in litigation in state and federal courts, including in Michigan. LCJ has submitted several extensive comments including original research to the Judicial Conference Advisory Committee on Evidence Rules.[1] LCJ's analysis revealed the widespread misunderstanding of the prior version of Rule 702's requirements (the pre-amendment version of Rule 702

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[1] E.g., *Clarity and Emphasis: The Committee's Proposed Rule 702 Amendment Would Provide Much-Needed Guidance About the Proper Standards for Admissibility of Expert Evidence and the Reliable Application of an Expert's Basis and Methodology*, Comment to Advisory Committee on Evidence Rules (Sept. 1, 2021); http://www.regulations.gov/comment/USC-RULES-EV-2021-0005-0007; *Why Loudermill Speaks Louder than the Rule: A "DNA" Analysis of Rule 702 Case Law Shows that Courts Continue to Rely on Pre-Daubert Standards Without Understanding that the 2000 Amendment Changed the Law*, Comment to the 2020 Proposal); http://www.uscourts.gov/sites/default/files/20-ev-y_suggestion_from_lawyers_for_civil_justice_-_rule_702_0.pdf

matched the current Michigan rule) and purposeful shifting of the expert admissibility standard away from the test set forth in the pre-amendment version of Rule 702 by some courts. The problems that LCJ observed and studied in the federal courts are illuminating when considering the issues before this Court and serve to underscore the importance of this Court retaining the trial court's rigorous gatekeeping obligation. Michigan's longstanding interpretation jives with the federal rules drafters' reading of the language and is consistent with their clarifying amendment, which just took effect.

LCJ and its members have an interest in ensuring that the rules of evidence be correctly and consistently interpreted across the nation, particularly on the burden of production and the reliability criteria set forth in Rule 702 and state rule counterparts. That standard, and not variations that modify or remove elements or alter the Rule's explicit admissibility requirements, reflects the result of the Rules Enabling Act's rulemaking process and is the governing federal law. Likewise, LCJ believes that these admissibility requirements are encompassed in Michigan's rule 702 and in its statute, MCL 600.2955.

Departures from Rule 702's requirements were so prevalent in the federal courts that based on the proposal submitted by LCJ, the Committee on Rules of Practice and Procedure recommended an amendment to clarify that application of an even-handed preponderance of the proof test, not an outcome-focused preference for admissibility, is required. 86 Fed Reg 41087, 41088 (July 30, 2021). This amendment was designed to align the disparate practice in federal courts to the original intent of Rule 702 and the gatekeeping requirement of federal judges, which requires the court to find that the opinion actually proceeds from a reliable application of the methodology to the facts of the

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case. Hon. Patrick J. Schiltz, Report of the Advisory Committee on Evidence Rules (May 15, 2022) at 6, in Committee on Rules of Practice and Procedure June 2022 Agenda Book 866 (2022). That amendment to Rule 702 became effective in federal courts on December 1, 2023. A comparable amendment is pending before this Court to keep the Michigan rule aligned with the federal one.

Unlike the pervasive problems in the federal courts, Michigan has a history of requiring its trial courts to carefully evaluate expert testimony to enforce the criteria in MRE 702 and MCL 600.2955, criteria which help maintain fair and balanced jury trials in Michigan courts. LCJ believes that this Court's affirmance will help assure that it continues to enforce its rule and statute in a manner that protects the integrity of the jury trial.

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ARGUMENT I

THE TRIAL COURT'S ROLE AS GATEKEEPER IS CRUCIAL TO PRESERVING THE INTEGRITY OF THE JURY TRIAL IN MICHIGAN AGAINST JUNK SCIENCE AND THE TESTIMONY OF UNRELIABLE PARTISAN PROFESSIONAL WITNESSES

The civil jury, a "fundamental and sacred" feature of American jurisprudence, uniquely preserves public participation in our civil justice system. *Jacob v City of New York*, 315 US 752, 752-753 (1942). Blackstone called the jury the "sacred bulwark of the nation." *People v Beck*, (Viviano, J, concurring), 504 Mich 605, 638; 939 NW2d 213 (2019), quoting 4 Blackstone, Commentaries on the Laws of England, p 350. The court rules governing the admissibility of evidence protect the integrity of the jury trial and preserve the public's faith in the outcome of those trials.

Allowing unreliable expert testimony into evidence threatens this integrity and undermines confidence in the jury's verdict. In today's world, with the jury under attack from many quarters, enforcement of the rules barring junk science is critical. History abounds in times when junk science was allowed to pervert the outcome of trials. See, e.g., *Ege v Yukins*, 485 F3d 364, 376-378 (CA 6, 2007) (concluding that expert testimony that bite mark evidence showed that only this single criminal defendant could have made a mark on the victim's cheek amounted to prejudicial error requiring reversal of the conviction for first degree murder). Plaintiffs-Appellees and their amici try to cabin their proposed interpretation of MRE 702 and MCL 600.2955 by emphasizing that this appeal involves standard-of-care expert testimony in a medical malpractice case. But neither MRE 702 nor MCL 600.2955 differentiate between types of expert testimony. Both offer requirements that apply to all expert opinions and criteria that must be considered in each case.

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Scientific, statistical, and technological data are increasingly important in today's litigation. The need for and reliance on witnesses with scientific, technical, or other specialized knowledge has increased commensurately with the complex factual matters jurors are being asked to resolve. Expert evidence can be both powerful and misleading because, by definition, it is beyond the layperson's experience and understanding. Expert testimony is often difficult to evaluate and deceptively enticing. Unfortunately, the observation that there is nothing that cannot be proved by a so-called expert is more noticeable than ever. These truths raise the stakes here. A decision permitting ipse dixit expert testimony, even if issued in the context of this medical malpractice case, will inevitably undermine rigorous gatekeeping in criminal law, family law, trusts and estates, and other areas of litigation.

A. PROBLEMS WITH UNRELIABLE EXPERT TESTIMONY PERSIST, PARTICULARLY IN THE AREA OF FORENSIC SCIENCE, CAUSING UNJUST CRIMINAL CONVICTIONS, UNFOUNDED TORT AND CONTRACT JUDGMENTS, AND HORRIFIC OUTCOMES IN THE CONTEXT OF FAMILY LAW

Judge Posner pointed out that experts are often professional witnesses whose testimony is bought and paid for but entirely lacking in reliability. *Chaulk v Volkswagen of America*, 808 F2d 639, 644 (CA 7, 1986) (Posner, J, dissenting). The expert who testified had been involved in automotive door latch design thirteen years before the trial, had gone to work for an insurance company, and then became a professional witness against automotive companies in cases involving door latches. Judge Posner characterized the expert's testimony as that "either of a crank or, what is more likely, of a man who is making a career out of testifying for plaintiffs in automobile accident cases in which a door may have opened; at the time of trial he was involved in 10 such cases." *Id*. Citing an 1899

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Minnesota Supreme Court decision, Judge Posner recognized the "age-old problem of expert witnesses who are 'often the mere paid advocates or partisans of those who employ and pay them, as much so as the attorneys who conduct the suit.'" *Id*.

It is all too true that "there is hardly anything not palpably absurd on its face, that cannot now be proved by some so-called 'experts.'" *Chaulk*, 808 F3d at 644 quoting *Keegan v Minneapolis & St Louse R R*, 76 Minn 90, 95; 78 NW 965 (1899). If experts who would say anything for money was a problem in 1899, it is even more of a problem today. Judge Posner issued a clarion call about the effect of such testimony: "Ours is not a system of people's justice, where six laymen are allowed to condemn an entire industry on the basis of absurd testimony by a professional witness." *Chaulk,* 808 F3d at 645.

These problems are not limited to tort litigation or medical malpractice. The same problem in criminal cases prompted the Federal Rules Advisory Committee to adopt the clarifying revisions to Federal Rule of Evidence 702, which took effect December 1, 2023.[2] The Committee's attention was drawn to problems with expert evidence by the criminal defense bar and the National Academy of Sciences. See *Symposium on Forensic Expert Testimony, Daubert, and Rule 702*, 86 Fordham Law Review 1463 (2018). Also see National

[2] The revised language includes clarifying changes intended by the drafters to signal to certain courts that they have been misapplying Federal Rule of Evidence 702. The comment and revised language, which is up for consideration by the Michigan Supreme Court in 2024, clarify three points. First, the trial court, acting as gatekeeper, must decide admissibility before allowing expert testimony to be presented to the trier of fact. Second, the proponent of the evidence must satisfy Rule 702's criteria by a preponderance. Third, the trial court's "gatekeeping" responsibility is ongoing – that is, the trial court must require the expert to satisfy the rule's criteria (reliable methods and principles reliably applied to the facts) throughout the proceedings. See Comment Notes to 2023 Amendment to FRE 702. Also see Michigan Supreme Court ADM File No. 2022-30, Order re Proposed Amendments of Rules 702 and 804 of the Michigan Rules of Evidence, October 25, 2023. Also see Michigan Supreme Court ADM File No. 2021-10, Amendments of Michigan Rules of Evidence, Order, September 20, 2023.

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Research Council, *Strengthening Forensic Science in the United States: A Path Forward* (2009), https://www.ncjrs.gov.pdffiles1/nij/grants/228091.pdf[https://perma.cc/CLW3-Y6VQ]. The symposium discussed concerns that forensic feature-comparison evidence "is seen by jurors as highly probative." Fordham Symposium, at 1446. Studies showed that jurors believed that the feature comparisons were so powerfully accurate that the chances of someone besides the criminal defendant having the same feature were "like one in a million." *Id.* Yet, as one scholar explained, feature comparison evidence "can't be independently evaluated by lay jurors because it requires knowledge of the complex methods and knowledge of databased." *Id*. Conclusions about whether two fingerprints are indistinguishable can only be drawn with knowledge that lay jurors don't know have. *Id*. So the admission of forensic evidence was "not a theoretical problem solely," it led to "wrongful convictions." *Id*. The error rate in testimony "of cases matching fingerprints, bite marks, firearms, and so forth" is considerable with many of these methodologies. *Id*. at 1494. Participants in the symposium recognized that many forensic experts expressed their conclusions in much stronger terms than reliable methods and data could support. *Id*. Often, these expert witnesses exaggerated their conclusions beyond what empirical evidence showed was the probative value of any similarity or match between the evidentiary sample and the source sample. *Id*. at 1496. In practice when the testimony is not carefully evaluated before it is admitted, the expert often ends up exaggerating the strength of the conclusions he draws. *Id*. This is hugely consequential and dangerous because data on wrongful convictions shows that "approximately 60 percent of [wrongful convictions] involve a faulty forensic-science conclusion." *Id*. at 1511.

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This Court, in adopting MRE 702, and the Michigan Legislature, in enacting MCL 600.2955 provided a framework to protect the integrity of jury trials by excluding these kinds of problematic experts' opinions. The issues before this Court implicate the heart of the rule and statute – and require this Court to reaffirm the trial court's gatekeeping obligation at all times during litigation.

B. TO PREVENT QUALIFIED EXPERTS FROM GIVING UNRELIABLE BUT HIGHLY PERSUASIVE TESTIMONY TO A JURY, THE RULES REQUIRE THE TRIAL COURT TO MAKE SURE THAT ANY OPINIONS OFFERED RESULT FROM RELIABLE PRINCIPLES AND METHODS RELIABLY APPLIED TO THE FACTS

Traditionally, judicial limitations on expert testimony focused on whether the witness had sufficient qualifications or credentials to be considered an expert on a particular subject. The initial question remains part of an inquiry into whether expert testimony is admissible. But MRE 702 and MCL 600.2955 require more.

Equally important, the court must evaluate whether the expert's opinion testimony stems from reliable principles and methods, is based on sufficient facts or data, and the expert has reliably applied the principles and methodology to the particular facts and data. In other words, the court's gatekeeping obligation encompasses evaluation of the reliability of the principles and methods used to arrive at a conclusion, the facts or data to which the expert purportedly applied the analysis, and to how the expert applied the principles and methods to the facts and data of the case.

These criteria are increasingly important because the greater risk today lies in a trial in which a highly credentialed expert relies on methodology or principles that are unreliable. Or misapplies methodology or principles to the facts or assumes facts and data that are unavailable. In other words, in today's jury trials, the problems arise most often

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when, as here, an expert seeks to offer an ipse dixit opinion that is not reliable. These partisans can readily throw up clouds of confusion. Yet their testimony is not based on reliable scientific principles or methodology reliably applied to the facts. Indeed, such experts may and often do offer unfounded conclusions that no one outside the courtroom who understood the area would agree was reliable.

When jurors are presented with complex information beyond their ability to understand, "they rely more on external cues such as the expert's credentials" to evaluate the testimony. Jonathan J Koehler, et al., *Science, Technology, or the Expert Witness: What Influences Juror's Judgments About Forensic Science Testimony?*, Psychology, Public Policy, and Law, Vol 22, No 4, 401-413 (2016). When confronted with difficult technical or scientific information that they cannot understand, jurors look to the expert's credentials or other peripheral cues – such as the expert's likeability - as the basis for evaluating their testimony. Consequently, placing a credentialled expert before the jury and allowing that expert to offer unreliable expert testimony, particularly about complicated medical or scientific or technical information, undermines the jury system. Because the jury defaults to the expert's credentials or likeability to evaluate the testimony, it may and often does reach an erroneous result. This undermines the fairness that the rules are intended to guarantee. See, e.g., *Daubert v Merrell Dow Pharm., Inc.,* 509 US 579; 113 S Ct 2786 (1993); *Gilbert v DaimlerChrysler Corp,* 470 Mich 749, 781; 685 NW2d 391 (2004).

The appeal before this Court arises in this context and offers this Court the chance to reiterate its past rulings and clarify once again that the proponent of an expert must show that the expert's opinions satisfy the criteria in the rule and Michigan's statute.

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ARGUMENT II

MRE 702 AND MCL 600.2955 REQUIRE THE PROPONENT OF EXPERT TESTIMONY TO SHOW THAT A QUALIFIED EXPERT WILL TESTIFY ONLY TO OPINIONS RESULTING FROM RELIABLE PRINCIPLES AND METHODS RELIABLY APPLIED TO RECORD FACTS

Witnesses, parading as experts, can hide behind a veil of jargon and statistics, to undermine or entirely vitiate the integrity of the jury trial. MRE 702 and MCL 600.2955, like Federal Rule of Evidence 702, are designed to prevent this. They do so by requiring several things. First, MRE 702 and MCL 600.2955 impose on the trial court the obligation to serve as gatekeeper. Second, they make clear that the proponent of expert testimony bears the burden of showing by a preponderance of evidence that the expert testimony satisfies both MRE 702 and MCL 500.2955. See MRE 104. This includes a showing that the expert is qualified. And most important here, it means that the expert's opinion must be based on reliable methodology that is reliably applied to the facts of the case.

The language in the statutes and court rules governing expert testimony provide the starting point for analysis of proffered expert testimony. The main goal to interpreting statutes and court rules is to give effect to the Legislature or rule drafter's intent by examining the plainly expressed language. *People v Propp*, 508 Mich 374, 382; 976 NW2d 1 (2021); *People v Traver*, 502 Mich 23, 31; 917 NW2d 260 (2018). The most reliable evidence of that intent is to be found in the language of the statute or rule. *Fairley v Department of Corrections*, 497 Mich 290, 296-297; 871 NW2d 129 (2015). If the language is unclear, this Court has recognized the benefit of using legislative history. *Rouch World, LLC v Department of Civil Rights*, 510 Mich 398, 410; 987 NW2d 501 (2022).

A. MRE 702 REQUIRES THE PROPONENT OF EXPERT TESTIMONY TO SHOW THAT IT SATISFIES THE CRITERIA IN THE RULE

MRE 702 governs testimony by expert witnesses and provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

MRE 702. The language in the rule makes clear that expert testimony is admissible only if a qualified expert offers testimony based on sufficient facts or data, results from reliable principles and methods, and the witness has reliability applied the principles and methods to the facts of the case. MRE 702.

Since MRE was amended to strengthen the requirements for expert testimony, Michigan courts have required a searching inquiry into whether proffered expert testimony is reliable. See, e.g., *People v Thorpe*, 504 Mich 230, 235-266; 934 NW2d 693 (2019); *Elher v Misra*, 499 Mich 11, 23; 878 NW2d 790 (2016); *Edry v Adelman*, 486 Mich 634, 642; 786 NW2d 567 (2010); *Gilbert v DamilerChrysler Corp*, 470 Mich 749, 779-791; 685 NW2d 391 (2004). Michigan courts have long held that a court considering whether to admit expert testimony under MRE 702 acts as a gatekeeper and has a fundamental duty to ensure that the proffered expert testimony is both relevant and reliable. Gilbert, supra at 780 (recognizing that MRE 104(a) requires the trial court to decide preliminary questions about a person's qualifications to be a witness); *People v Kowalski*, 492 Mich 106, 119; 821 NW2d 14 (2012). Michigan courts have also long held that the party proffering the expert bears the burden of persuading the trial court that the expert has specialized knowledge

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that will aid the fact-finder in understanding the evidence or determining a fact in issue, *People v Smith*, 425 Mich 98, 112; 387 NW2d 814 (1986), and that the opinion is based on a recognized field and methodology, *Craig v Oakwood Hosp*, 471 Mich 67, 80, 83; 684 NW2d 296 (2004). The preliminary determination of the qualification of an expert is an issue for the court to decide. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004).

B. PLAINTIFFS-APPELLEES' EXPERT HERE FAILED TO SATISFY THE CRITERIA - HIS OPINION IS NOT BASED ON RELIABLE PRINCIPLES AND METHODS RELIABLY APPLIED TO THE RECORD FACTS

Plaintiffs-Appellees' expert failed to satisfy the criteria in the rule. The expert satisfied the initial question –that he is qualified as an expert by knowledge, skill, experience, training, or education – but he failed to meet the other criteria. This Court held that the court's "gatekeeper role applies to *all stages* of expert analysis." *Gilbert*, 470 Mich at 409. According to this Court, "MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data." *Id*. This Court held that the opinion must be based on "data viewed as legitimate in the context of a particular area of expertise (such as medicine)." *Id*. And the "proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology." *Id*. This Court embraced the statement in *General Electric Co v Joiner*, 522 US 136, 142; 118 S Ct 512 (1997) that expert testimony that is "connected to existing data only by the ipse dixit of the expert" is not admissible. *Gilbert*, 470 Mich at 783 quoting Joiner. When a "yawning analytical gap" exists, this Court warned that "ostensibly legitimate data may serve as a Trojan horse that

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facilitates the surreptitious advance of junk science and spurious, unreliable opinions." *Id*. quoting *Joiner*, 522 US at 142.

The ipse dixit conclusion of Plaintiffs-Appellees' expert, that the bowel injury must have resulted from a breach of the standard of care, should have been excluded. Plaintiffs-Appellees' belated effort to point to statistics about the rarity of bowel injuries during this type of surgery represents exactly the kind of Trojan horse that the *Gilbert* court cautioned against. No reliable scientific principles or methods connect the expert's conclusion that the standard of care was breached with the statistics concerning the rarity of this type of injury

In fact, Plaintiffs-Appellees do not offer any connecting principles or methods – just an unsupported personal belief by a hired expert supporting the party that hired him. Under the plain language in Michigan's court rule, this testimony is inadmissible.

C. MCL 600.2955 REQUIRES THE PROPONENT OF EXPERT TESTIMONY TO SHOW THAT IT SATISFIES THE CRITERIA IN THE STATUTE

MCL 600.2955 likewise requires the proponent of expert testimony to show that the testimony satisfies the statute's requirement that it be "reliable and will assist the trier of fact." MCL 600.2955(1). The statute provides:

> (1) In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making that determination, the court shall examine the opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert, and shall consider all of the following factors:
> (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
> (b) Whether the opinion and its basis have been subjected to peer review publication.
> (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.

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(d) The known or potential error rate of the opinion and its basis.
(e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.
(f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
(g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.
(2) A novel methodology or form of scientific evidence may be admitted into evidence only if its proponent establishes that it has achieved general scientific acceptance among impartial and disinterested experts in the field.
(3) In an action alleging medical malpractice, the provisions of this section are in addition to, and do not otherwise affect, the criteria for expert testimony provided in section 2169.

MCL 600.2955. The statute explicitly requires the trial court to "examine the opinion and the basis for the opinion, which basis includes the facts, techniques, methodology, and reasoning." *Id*. Michigan's Legislature imposed this requirement to ensure that trial court's acting as gatekeepers evaluate not only an expert's qualifications to testify but the "facts, techniques, methodology, and reasoning" that provide the underpinnings for any conclusions that the expert intends to offer to the factfinder. Michigan's Legislature also identified a list of factors that the court "shall consider." *Id*. To make its meaning plain, the Legislature specified that the court "shall consider all of" the factors listed in the statute. *Id*.

This list is more specific and more comprehensive than the language in MRE 702. But both impose a gatekeeping obligation on the trial court. And both require the proponent of expert testimony to show that the testimony is – in fact – reliable because it is based on reliable methodology reliably applied to the facts.

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ARGUMENT III

EDRY AND *ELHER* CORRECTLY INTERPRETED AND APPLIED THE RULE AND STATUTE TO BAR THE PROFFERED EXPERT TESTIMONY

This Court has asked whether *Edry v Adelman*, 486 Mich 634; 786 NW2d 567 (2010) and *Elher v Misra*, 499 Mich 11; 878 NW2d 790 (2016) correctly described the role of supporting literature in determining the admissibility of expert testimony on the standard of care in a medical malpractice case. The answer is yes.

Plaintiffs-Appellants and amici supporting Plaintiffs-Appellants mount various challenges to these decisions. But none justifies this Court's backing away from the principles announced in its earlier opinions. First, Plaintiffs-Appellees contend that *Edry* and *Elher* impose an unequivocal requirement for supporting literature in offering an opinion on the standard of care in medical malpractice cases. Plaintiffs-Appellants' Brief on Appeal, pp 21-28; Proposed Brief Amicus Curiae On Behalf of the Michigan Association of Justice, pp 6-13. Not so.

The decisions reflect the language in MRE 702 and MCL 600.2955, both of which require expert testimony to be reliable and helpful to the trier of fact. Neither *Edry* nor *Elher* make supporting literature the sine qua non[3] of expert testimony about the standard of care in a medical malpractice case. Both correctly recognize supporting literature as a key and potentially dispositive factor in evaluating whether the opinion satisfies the criteria and is admissible.

Since ipse dixit testimony is rejected under the plain language of both MRE 702 and MCL 600.2955, a proponent of standard of care testimony must explain how scientific or

[3] Sine qua non means "[a]n indispensable condition or thing; something on which something else *necessarily* depends." *Black's Law Dictionary* (10th ed).

technical principles or methods connect the facts to the expert's conclusion. *Edry* and *Elher* correctly rejected testimony that has a huge analytical gap with no more than an expert's ipse dixit to connect the conclusory opinion with the facts. That approach is not controversial and has been consistently accepted in decisions from this Court and the Court of Appeals. See Defendants-Appellees' Brief on Appeal, pp 40-45; Amicus Curiae Brief of Michigan State Medical Society and American Medical Association, pp 10-26.

Second, Plaintiffs-Appellees point to selected aspects of *Daubert v Merrell Dow Pharms, Inc, 809 US 579; 113 S Ct 2786 (1993)* while ignoring *Kumho Tire Co v Carmichael*, 526 US 137, 119 S Ct 1167 (1999), *General Electric Co v Joiner*, 522 US 136; 118 S Ct 512 (1997) and the amendments to both the federal and Michigan rule. See generally Thomas D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 Notre Dame L Rev 2039, 2060 (2020). The drafting history of FRE 702 and later Supreme Court decisions confirm that the proponent of evidence must show more than an ipse dixit conclusion based on an expert's personal assumptions or experience.

Plaintiffs-Appellees' problematic reasoning is exacerbated by their failure to discuss the concrete requirements of MCL 600.2955, which must be read as additional criteria for evaluating admissibility. A correct interpretation of FRE 702 (and MRE 702 and MCL 600.2955) mandates that opinion testimony must be "based on sufficient facts or data" and thus the court must decide the adequacy of an expert's factual foundation, the use or reliable principles and methods, and the reliable application of the methodology to the facts of the case. See Memorandum from Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules, *Forensic Evidence, Daubert and Rule 702* (April 1, 2018) at 43, in Advisory Committee On Evidence Rules April 2018 Agenda Book 49 (2018).

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Unlike in Michigan, where this Court correctly decided *Edry* and *Elher*, some courts around the country have ignored the text of Rule 702 and held that critical questions of the sufficiency of an expert's basis for an opinion are questions of weight, not admissibility. This is an incorrect application of Rules 702 and 104(a) as the Federal Advisory Committee on Evidence Rules explained in its notes about the rule. Federal Rule of Evidence 702, Committee Note to the 2023 amendment; Advisory Committee on Evidence Rules, Committee Note Proposal to Supreme Court, April 2022. The Committee advised adoption of the pending change to Rule 702 to "emphasize that the court must focus on the expert's opinion and must find that the opinion actually proceeds from a reliable application of the methodology." *Id*. at p 0254, Excerpt from the May 15, 2022 Report of the Advisory Committee on Evidence Rules. The report explained that this change pointed to longstanding gatekeeping requirements, which some courts have incorrectly failed to apply. The 2023 amendment to Rule 702 is not a change in the Rule's requirements, but is a statement intended to change court practices by clarifying that the proponent of expert evidence must establish by a preponderance of the evidence that both the expert's methodology and the expert's conclusions are reliable. *Id. at 0255*.[4]

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[4] Lawyers for Civil Justice has offered comments and prepared studies of federal judicial opinions that support the conclusion that Rule 702 requires a court to evaluate expert testimony both as to the reliability of the methods or principles on which the expert relies and as to the reliable application of these methods and principles to the facts of the case. See Lawyers for Civil Justice, *Clarity and Emphasis: The Committee's Proposed Rule 702 Amendment Would Provide Much-Needed Guidance About the Proper Standards for Admissibility of Expert Evidence and the Reliable Application of an Expert's Basis and Methodology*, Comment to Advisory Committee on Evidence Rules (Sept 1, 2021); https://www.regulations.gov/comment/USC-RULES-EV-2021-0005=0007); Lawyers for Civil Justice, *Why Loudermill Speaks Louder than the Rule: A "DNA" Analysis of Rule 702 Case Law That Shows that Courts Continue to Rely on Pre-Daubert Standards Without Understanding that the 2000 Amendment Changed the Law*, Comment to the Advisory Committee on Rules of Evidence and Rule 702 Subcommittee (Oct 20, 2020);

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The arguments offered by Plaintiffs-Appellants and amici supporting them fall within those squarely rejected by this Court in correctly decided past opinions. Plaintiffs-Appellants advance the same problematic and now-explicitly-rejected interpretations of the rule prompted the Advisory Committee on Evidence Rules to adopt clarifying changes and a lengthy committee note explaining past errors in interpretation and application of the rule. The Advisory Committee on Evidence Rules noted the ongoing disregard for Rule 702's requirements and emphasized that judges must determine that the proponent of expert evidence has shown that the rule's requirements are met by a preponderance of the evidence.

Yet Plaintiffs-Appellants here urge a holding that would undermine Michigan courts' longstanding enforcement of key gatekeeping requirements. Careful review of Plaintiffs-Appellants' brief reveals no reliable principles or methods supporting their proffered opinion testimony. Rather, they urge a holding that would allow an expert to testify to an opinion with no explanation of the scientific or technical principles or methods and no showing that those methods or principles have reliably connected the facts to the conclusion. If this approach is accepted, the Court will be giving its imprimatur to ipse dixit testimony – and reviving the decades of junk science that marred litigation before the rules were strengthened.

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https://www.uscourt.gov/sites/fefault/files/20-ev-y_suggestion_from_lawyers_for_civil_justice_rule_702_0.pdf; Lawyers for Civil Justice, Federal Rule of Evidence 702: A One-Year Review and Study of Decisions in 2020, submitted to Advisory Committee on Evidence Rules (Sept 30, 2021), https://www.regulations.gov/comment/USC-RULES-EV-2021-0005-0008.

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RELIEF

WHEREFORE, Lawyers for Civil Justice respectfully urges this Court to hold that the proffered expert failed to meet the standards for showing the reliability of expert testimony, and is not qualified to testify as an expert under MRE 702 or MCL 600.2955 and that this Court's prior decisions in *Edry* and *Elher* correctly described the role of supporting literature in determining the admissibility of expert witness testimony on the standard of care in a medical malpractice case.

Respectfully submitted,

PLUNKETT COONEY

By: */s/Mary Massaron*

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Dated: January 2, 2024

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WORD COUNT CERTIFICATE

MARY MASSARON, being first duly sworn, certifies and states the following:

1. She is a shareholder with the firm Plunkett Cooney, and is in principal charge of the above-captioned cause for the purpose of preparing the attached *Amicus Curiae* Brief;

2. The brief prepared by her office complies with the print type requirements;

3. Plunkett Cooney relies on the word count of their word processing system used to prepare the brief, using Cambria size 12 font; and

4. The word processing system counts the number of words in the brief as 5,468.

/s/ Mary Massaron
MARY MASSARON

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STATE OF MICHIGAN

IN THE SUPREME COURT

LYNDA DANHOFF and DANIEL DANHOFF,

Plaintiffs-Appellants,

v

DANIEL K. FAHIM, M.D., MICHIGAN HEAD & SPINE INSTITUTE,

Defendant-Appellees,

and

DANIEL K. FAHIM, M.D., P.C., KENNETH P. D'ANDREA, D.O., and WILLIAM BEAUMONT HOSPITAL, d/b/a BEAUMONT HOSPITAL – ROYAL OAK, Jointly and Severally,

Defendants.

Supreme Court No. 163120

Court of Appeals No. 352648

Ingham County Circuit Court
Case No. 18-166129-NH

______________________________________/

PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE

STATE OF MICHIGAN)
)SS
COUNTY OF OAKLAND)

SHARON L. PAVELEK, being duly sworn, deposes and says that she is an employee of the law firm of Plunkett Cooney, and that on January 2, 2024, she caused to be served a copy of the *Amicus Curiae* Brief of Lawyers for Civil Justice (LCJ), Word Count Certificate, and this Proof of Service/Statement Regarding E-Service as follows:

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