IN THE SUPREME COURT
STATE OF GEORGIA

ARVIN RITCHEY MASON and CLAUDIA MASON, Appellants, v. THE HOME DEPOT U.S.A., INC. and THE FLECTO COMPANY, INC., Appellees.	)	CASE NO. S07A1486

BRIEF OF *AMICUS CURIAE* GEORGIA DEFENSE LAWYERS' ASSOCIATION

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STATEMENT OF INTEREST

The Georgia Defense Lawyers' Association ("GDLA") is an association of Georgia lawyers who engage in litigation, primarily for the defense, and is dedicated to supporting and improving the civil defense bar. It consists of approximately 650 attorneys, including sole practitioners and members of law firms of all sizes throughout the state of Georgia.

The GDLA has a direct interest in upholding the adversary system and preserving the pursuit of fair and just resolutions in civil litigation in Georgia through the allowance of relevant, admissible and reliable evidence. Its members frequently represent clients litigating cases in Georgia courts involving the presentation of expert testimony. GDLA and its members therefore have a strong interest in the application of clear and meaningful standards of admissibility of expert opinions that ensure that those opinions are both reliable and relevant.

INTRODUCTION

Appellants challenge the constitutionality of O.C.G.A. § 24-9-67.1, which provides certain foundational requirements for the admissibility of expert opinions in civil cases. *Amicus curiae* briefs have been submitted by four different groups in support of Appellants. Those arguments have been ably addressed in Appellees' Brief and Supplemental Brief. GDLA will not attempt to address each of the arguments raised by Appellants and their *amici* here. Instead, GDLA will address the following matters: (1) the adoption and application of clear standards for the

admissibility of reliable expert opinions for civil cases in Georgia courts was urgently needed; (2) the application of O.C.G.A. § 24-9-67.1 in civil cases only is a rational approach by the legislature to address concerns arising from the lack of such clear standards for the admissibility of expert evidence in civil cases and does not infringe upon the constitutional rights of criminal defendants in light of Georgia's historical application in criminal cases of the *Harper*[1] standard of verifiable certainty; (3) O.C.G.A. § 24-9-67.1(b)(3) does not interfere with litigants' rights to a jury trial in civil cases; and (4) Georgia judges, like their federal counterparts, are capable of properly applying O.C.G.A. § 24-9-67.1 to ensure that expert evidence admitted in Georgia courts meets appropriate standards of reliability and relevance, promoting confidence in the fair administration of justice in this state.

ARGUMENT AND CITATION OF AUTHORITY

I. The Lack of Clear Standards for the Admissibility of Expert Evidence in Civil Cases was a Significant Concern

Under Georgia law, "[t]he object of all legal investigation is the discovery of truth. The rules of evidence are framed with a view to this prominent end, seeking always for pure sources and the highest evidence." O.C.G.A. § 24-1-2. The legislative enactment of O.C.G.A. § 24-9-67.1, which is based on Federal Rule of Evidence 702 advances this goal by providing certain basic foundational

[1] *Harper v. State*, 249 Ga. 519 (1982).

requirements for the admission of expert opinions in civil cases to ensure the reliability of such opinions before they are presented to the jury.

By definition, expert evidence is "outside the realm of an ordinary juror's scope of knowledge." V. Schwartz and C. Silverman, "The Draining of Daubert and the Recidivism of Junk Science in Federal and State Courts," 35 Hofstra L. Rev. 217, 220 (Fall 2006), citing Fed. R. Evid. 702; *see also Jones v. State,* 232 Ga. 762 (1974). While some expert testimony will aid in the discovery of truth, courts have long recognized that other expert testimony can "create a substantial danger of undue prejudice or of confusing the issues or of misleading the jury . . . because of its aura of special reliability and trustworthiness." *See United States v. Amaral*, 488 F.2d 1148, 1152 (9th Cir. 1973). As noted commentator Judge Weinstein has explained:

> An expert can be found to testify to the truth of almost any factual theory, no matter how frivolous, thus validating the case sufficiently to avoid summary judgment and forc[ing] the matter to trial. At the trial itself an expert's testimony can be used to obfuscate what would otherwise be a simple case. . . . Jurors and judges can be, and sometimes are, misled by the expert-for-hire.

Jack B. Weinstein, *Improving Expert Testimony*, 20 U. Rich. L. Rev. 473, 482 (1986). *See also Stoleson v. United States*, 708 F.2d 1217, 1222 (7th Cir. 1983) ("there is not much difficulty in finding a medical expert witness to testify to virtually any theory of medical causation short of the fantastic").

In *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 589 (1993), the Supreme Court adopted the requirement that the trial judge act as a "gatekeeper" to "ensure that any and all scientific testimony or evidence is not only relevant, but reliable." In support of the standard, the Court noted the power and potential of expert evidence to mislead a jury. *Id.* at 595 ("'[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it'"(quoting Jack B. Weinstein, "Rule 702 of the Federal Rules of Evidence is Sound; it Should Not be Amended," 113 Fed. R. Evid. 631, 632 (1991)).

In his concurring opinion in *General Elec. Co. v. Joiner*, 522 U.S. 136, 148-49 (1997), Justice Breyer explained the particular importance of judges carefully exercising their gatekeeping role in civil cases. In reference to the tort case then before the Court, Justice Breyer wrote:

> The plaintiff in today's case says that a chemical substance caused, or promoted, his lung cancer. His concern, and that of others, about the causes of cancer is understandable, for cancer kills over one in five Americans...[cit. omitted] Moreover, scientific evidence implicates some chemicals as potential causes of some cancers...[cit. omitted] Yet modern life, including good health as well as economic well-being, depends upon the use of artificial or manufactured substances, such as chemicals. And it may, therefore, prove particularly important to see that judges fulfill their *Daubert* gatekeeping function, so that they help assure that the powerful engine of tort liability, which can generate string financial incentives to reduce, or to eliminate, production, points toward the right substances and does not destroy the wrong ones. It is, thus, essential in this science-related area that courts administer the Federal Rules of Evidence in order to achieve the "end[s]" that the Rules themselves set forth, not only so that proceedings may be "justly determined," but also so "that the truth may be ascertained." Fed. Rule Evid. 102.

Joiner, 522 U.S. at 148-49.

In an article published in the journal "Science" shortly after the *Joiner* decision, Justice Breyer elaborated on the significance of scientific accuracy in the resolution of civil litigation:

> The importance of scientific accuracy in the decision of such cases reaches well beyond the case itself. A decision wrongly denying compensation in a toxic substance case, for example, can deprive not only the plaintiff of warranted compensation but can discourage other similarly situated individuals from even trying to obtain compensation and can encourage the continued use of a dangerous substance. On the other hand, a decision wrongly granting compensation, although of immediate benefit to the plaintiff, through the strong financial disincentives that accompany a finding of tort liability, can improperly force abandonment of the substance. Thus, if the decision is wrong it will improperly deprive the public of what can be far more important benefits – those surrounding a drug that cures many while subjecting few to far less serious risk, for example. **The upshot is that we must search for law that reflects an understanding of the relevant underlying science**, not for law that frees companies to cause serious harm or forces them unnecessarily to abandon the thousands of artificial substances on which modern life depends.

Stephen G. Breyer, "The Interdependence of Science and Law," 4/28/98 Science 537, 1998 WL 4370245 at p.2 (emphasis added).

In addition to the risks of misleading a jury, other concerns raised by the admission of unreliable expert evidence include unduly prolonging litigation and the waste of judicial time and resources. D. Faigman, et al., "How Good is Good Enough? Expert Evidence Under Daubert and Kumho," 50 Case W. Res. L. Rev. 645, 648 (Spring 2000).

Courts increasingly are confronted with cases involving scientific and technical evidence, heightening the need for evidentiary standards designed to ensure the reliability of that evidence. *Id.* Breyer, 1998 WL 4370245 at p. 1 ("the law itself increasingly requires access to sound science. This need arises because society is becoming more dependent for its well-being on scientifically complex technology, so, to an increasing degree, this technology underlies legal issues of importance to all of us"). Georgia courts are similarly facing proffers of scientific evidence far more frequently than in past years. Richard W. Creswell, "Georgia Courts in the 21st Century, the Report of the Supreme Court of the Georgia Blue Ribbon Commission on the Judiciary", 53 Mercer L. Rev. 1, 31 (Fall 2001) (Special Contribution).

II. O.C.G.A. § 24-9-67.1 is a Rational Approach to Address the Problem of the Introduction of Unreliable Expert Evidence in Civil Cases

The Georgia legislature enacted Senate Bill 3 ("SB3"), which is now codified as O.C.G.A. § 24-9-67.1, in part, to address the problems arising from a lack of clear standards governing the admissibility of expert evidence in civil litigation in Georgia. *See* O.C.G.A. § 24-9-67.1, Editor's notes Ga. L. 2005, p. 1, §1 "The General Assembly further finds that certain needed reforms affect not only health care liability claims but also other civil actions and accordingly provides such general reforms in this Act."

Appellants, *Amicus Curiae* University Professors and Research Scholars ("Professors"), Neil Vidmar, et al. ("Vidmar") and the Georgia Trial Lawyers Association ("GTLA") argue that it is irrational and therefore unconstitutional to apply the requirements of O.C.G.A. § 24-9-67.1 to civil cases and not criminal cases. But they ignore the historical context of the development and application of standards for the admissibility of expert evidence in Georgia and are simply incorrect.[2] Their arguments rely upon an overly broad reading of O.C.G.A. § 24-9-67 that completely ignores or inappropriately downplays the existence and application of *Harper v. State*, 249 Ga. 519 (1982).

While O.C.G.A. § 24-9-67 provides that "in criminal cases, the opinions of experts on any question of science, skill, trade, or like questions shall always be

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[2] It is interesting to note that two of the *amicus curiae* Professors, Prof. Berger and Prof. Saltzburg, submitted an *amicus* brief in the United States Supreme Court case of *Kumho Tire Co. v. Carmichael* in which they urged the Court not to apply *Daubert* standards to testimony from experts who rely heavily on their experience and subjective judgment based on that experience (such as many types of forensic evidence). In support of this position, they argued that application of Daubert's "gatekeeping standard to all experts would have a 'staggering' impact on the 'admissibility of expert testimony from a wide variety of fields such as the forensic sciences, even though such testimony has been routinely accepted in federal and state courts.'" D. Faigman, et al., "How Good is Good Enough? Expert Evidence Under Daubert and Kumho," 50 Case W. Res. L. Rev 645, 666, quoting Brief of *amicus curiae* for Respondents at 5-6, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (No. 97-1709). That position seems to be at odds with their argument here the premise of which is that forensic evidence is often unreliable and should be subject to a *Daubert* analysis.

admissible...,"[3] the statute is not applied as it might appear on its face, particularly in criminal cases. Since 1982, trial courts have been required to evaluate the admissibility of expert evidence under that section in accordance with the standards set forth by this Court in *Harper*. In that case, this Court rejected the "general acceptance" rule set forth in *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923) in favor of a standard that required the trial judge to determine whether the proffered expert evidence had reached a "scientific stage of verifiable certainty." *Harper*, 249 Ga. at 525.

The *Harper* "verifiable certainty" standard is grounded in scientific reliability. This Court in *Harper* concluded that the method or procedure relied upon by the expert must be "an **accurate** and **reliable** means of ascertaining" the facts in issue. *Harper*, 249 Ga. at 526 (emphasis added). The Court further noted that "we do not read [the opinion in *Jenkins v. State*, 156 Ga. App. 387, 274 S.E.2d 618 (1980), as does defendant, to mean that an expert may give an opinion based on the results of a procedure that has not been proved reliable." *Harper*, 249 Ga. at 526, 292 S.E.2d at 396 n.10. *Harper's* emphasis on a judicial determination of reliability is similar to the standard adopted by the United States Supreme Court in

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[3] The phrase "in criminal cases" was added by the legislature in 2005 at the time of adoption of O.C.G.A. § 24-9-67.1. The previous version of that section applied to both civil and criminal cases.

Daubert and the 2000 amendments to Fed. R. Evid. 702 (upon which O.C.G.A. § 24-9-67.1 is based).

Appellants and their *amici* completely ignore cases showing that Georgia courts have consistently applied *Harper* to exclude unreliable expert evidence in criminal cases. Georgia courts applying *Harper* have excluded a variety of types of expert evidence, including various types of "forensic evidence" such as: results of polygraph tests, *Butts v. State,* 273 Ga. 760,767 (2001); expert testimony based on a "dog alert" detecting the presence of accelerants, *Carr v. State,* 267 Ga. 701, 702 (1997) *overruled on other grounds*, *Clark v. State*, 271 Ga. 6 (1999); results of a genetic test for violent and impulsive behavior, *Mobley v. State,* 265 Ga. 292 (1995); testimony based on so-called "sleep-talk," *Godfrey v. State,* 258 Ga. 28, 29 (1988); "Widmark" blood alcohol content test, *Evans v. State,* 253 Ga. App. 71, 77-78 (2001); penile plethysmograph test results, *Leftwich v. State,* 245 Ga. App. 695, 696 (2000) and *Gentry v. State,* 213 Ga. App. 24, 25 (1994); "ontrack" urinalysis drug test, *Hubbard v. State,* 207 Ga. App. 703, 704 (1993).

The assertion by Appellants and their *amici* that the adoption of differing expert admissibility standards was somehow intended to benefit the state and prejudice criminal defendants is not supported by the reported decisions in Georgia, as courts have applied O.C.G.A. § 24-9-67 and *Harper*, to exclude prosecution forensic evidence that lacks verifiable certainty. *See, e.g., Carr,* 267

Ga. at 702; *Godfrey,* 258 Ga. at 29; *Gentry,* 213 Ga. App. at 25; *Hubbard,* 207 Ga. App. at 704.

In contrast, Georgia courts have shown a reluctance to apply the *Harper* standards to expert opinions offered in civil cases. *See, e.g., Home Depot, U.S.A., Inc. v. Tvrdeich,* 268 Ga. App. 579, 583 (2004), *cert. denied* October 25, 2004; *Orkin Exterminating Co. v. Carder,* 258 Ga. App. 796, 799-800 (2002) *cert. granted* S03G0650 (2002), *cert. vacated* Sept. 8, 2003; *J.B. Hunt Transp., Inc. v. Brown,* 236 Ga. App. 634, 635 (1999); *Orkin Exterminating Co. v. McIntosh,* 215 Ga. App. 587, 592 (1994).

The Georgia legislature's decision to adopt a separate standard of admissibility of expert evidence invoking a reliability and relevance standard in civil actions is a rational approach when viewed in the context of the historical application of O.C.G.A. § 24-9-67 and the *Harper* standard in civil cases as compared to criminal cases in Georgia.

III. O.C.G.A. § 24-9-67.1(b)(3) Does Not Violate Civil Litigants' Right to a Jury Trial

The application of the foundational requirements for the admission of expert evidence under O.C.G.A. § 24-9-67.1 by the trial judge does not infringe upon a litigant's right to a jury trial.[4] The arguments of Appellants, GTLA, and the

[4] In their Brief and Supplemental Brief, Appellees have addressed persuasively the grounds upon which this argument by Appellants should be rejected. GDLA

Professors suffer from several fundamental flaws that have been persuasively addressed by Appellees. GDLA will address two of those critical flaws here. First, subsection (b)(3) essentially amounts to a relevance or "fit" requirement, not some broad license to disregard conclusions with which the trial court disagrees, as suggested by Appellants and their *amici*. As such, the resolution of this evidentiary foundation by the trial judge does not improperly invade the province of the jury. Second, subsection (b)(3) is identical to requirements under Fed. R. Evid. 702 and *Daubert* and its progeny that do not violate the broader right to trial by jury under the U.S. Constitution.

A. Subsection (b)(3) establishes a relevance requirement that may be decided by the trial judge without violating the right to jury trial.

Appellants correctly do not assert that the provisions of O.C.G.A. § 24-9-67.1(b)(1) and (2) infringe upon their right to a jury trial. *See* Reply Brief of Appellants ("Reply Br."), p. 15. They concede that a judge's determination of the first two foundational requirements – that the testimony is based on "sufficient facts or data" and that "the testimony is the product of reliable principles and methods" – do not violate their right to a jury trial. Appellants and their *amici* have shown no valid basis for distinguishing the third subsection, which requires

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supports Appellants' position and will not address those arguments at length but will instead focus on certain inaccurate assumptions that underlie the arguments of Appellants and *amici* GTLA and the Professors.

the trial judge to determine whether "the witness has applied the principles and methods reliably to the facts of the case." O.C.G.A. § 24-9-67.1(b)(3).

Appellants' argument that subsection (b)(3) invades the province of the jury is based on an overly broad and faulty analysis of the plain language of the statute, Fed. R. Evid. 702, and the Supreme Court's rulings in *Daubert* and *Joiner* and the cases decided thereunder.

Contrary to Appellants' assertions, the Supreme Court's decision in *Joiner* is not the sole origin of the requirement set forth in Fed. R. Evid. 702(3) (or its "mirror image" as described by Appellants, O.C.G.A.§ 24-9-67.1(b)(3). Consideration of the plain language of subsection (3) indicates that it flows directly from the *Daubert* decision's relevancy requirement. *Daubert* established a two-pronged approach addressing both relevance and reliability. 509 U.S. at 589. The Court explained that the trial court's analysis "entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and **whether that reasoning or methodology properly can be applied to the facts in issue.**" *Id.* at 592-93 (emphasis added). That relevance, or "fit," requirement under *Daubert* arises out of the Fed. R. Evid. 702 requirement that the expert evidence "assist the trier of fact to understand the evidence or determine a fact in issue." *Id.* at 591.

In describing the relevance requirement, the *Daubert* Court cited a Third Circuit opinion, using language that is echoed in amended Rule 702 and O.C.G.A. § 24-9-67.1(b)(3): "'[a]n additional consideration under Rule 702 – and another aspect of relevancy – is whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.'" *Id.* at 591, quoting *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985).

The argument of Appellants and GTLA that *Joiner's* elaboration on the "fit" requirement improperly requires the trial judge to assess the weight and credibility of the expert's testimony is simply incorrect. *Joiner* did not hold, as Appellants and GTLA suggest, that a trial court may exclude an expert's opinions merely because the court disagrees with them. Rather, the court simply held that a judge may exclude an expert's opinion when "there is too great an analytical gap between the data and the opinion proffered." *Joiner*, 522 U.S. at 146. The Court stated:

> conclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.

Id. In other words, in evaluating the "fit" between an expert's methodology or data and the facts of the case, the court is not required to take the expert's word for it,

but may require the expert to offer an explanation for how he or she got from the data or method to the conclusion. *See id.* at 144.[5]

As explained in detail by Appellees, the Georgia constitution does not prohibit the legislature from enacting rules of evidence that require trial judges to determine whether the evidentiary foundation has been met. *E.g., Ambles v. State,* 259 Ga. 406 (1989); *Crowell v. Akin,* 152 Ga. 126 (1921).

Appellants and GTLA ignore the fact that the long-standing *Harper* standard for evaluating expert evidence permits an evaluation of the application of scientific methods or principles similar to the requirements of O.C.G.A. §24-9-67.1. *See Caldwell v. State*, 260 Ga. 278 (1990). In that case, the Court was asked to determine whether criticisms about the way in which DNA identification (an admittedly valid technique) was **performed** in a particular instance went to the admissibility or merely to the weight to be given to the evidence.[6] The Court held that an expert opinion claiming huge powers of identification from DNA matching

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[5] The Court particularly emphasized the fact that, in the face of a challenge to admissibility, the plaintiffs' experts did not attempt to explain "how and why" the data they relied upon supported their opinions. *Id.* at 144.

[6] The Court said, "There is no real dispute [that DNA identification techniques can produce reliable results]. The dispute centers on the techniques and procedures followed (or not followed) by Lifecodes in this case. Initially, then, we need to decide whether such concerns go merely to weight or whether they implicate admissibility also." *Caldwell*, 260 Ga. at 286, 393 S.E.2d at 441.

(one in twenty-four million) should not be admitted after the Court identified a faulty underlying assumption utilized by the expert.[7] *Caldwell*, 260 Ga. at 289.

B. Identical standards to those adopted in O.C.G.A. § 24-9-67.1 do not violate the broader right to jury trial under the Seventh Amendment of the United States Constitution.

The identical admissibility requirements under Fed. R. Evid. 702, *Daubert* and *Joiner* satisfy the requirements of the Federal Constitution and therefore O.C.G.A. § 24-9-67.1 could not violate the more limited rights provided by the Georgia constitution. The Supreme Court has concluded that the *Daubert* standard does not violate the Seventh Amendment right to a jury trial in the U.S. Constitution. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2512 n.8 (2007); *see also Amorgianos v. Nat'l R.R. Pasenger Corp.*, 303 F.3d 256, 269 (2d Cir. 2002) (trial court's exclusion of expert evidence due to lack of "fit" between expert's opinions and scientific literature "did not impinge upon the jury's function"). Similarly, the advisory committee notes to the 2000 amendments to Fed. R. Evid. 702 explicitly state that Rule 702 "is not intended to limit the right to jury trial."

In an article published in *Science*, Justice Stephen Breyer acknowledged that efforts to improve the quality of science in the courtroom must respect the right to

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[7] The Court found that the expert had made unsupported assumptions about the existence of something called "Hardy-Weinberg equilibrium." *Caldwell*, 260 Ga. at 290, 393 S.E.2d at 444.

a trial guaranteed by the Seventh Amendment. Breyer, 1998 WLNR 4370245, p.3. He went on to explain, specifically with respect to the recently-decided *Joiner* decision, that "our Court recently made clear that the law imposes on trial judges the duty, with respect to scientific evidence, to become evidentiary gatekeepers. The judge, without interfering with the jury's role as trier of fact, must determine whether purported scientific evidence is 'reliable' and will 'assist the trier of fact....'" *Id.*

Appellants acknowledge that O.C.G.A. § 24-9-67.1(b)(3) "mirror[s]" Fed. R. Evid. 702 and is founded upon the principles set forth in *Daubert, Joiner* and *Kumho* (the "*Daubert* trilogy"). *See* Reply Brief of Appellants, p. 17. The right to a jury trial assured by the Georgia constitution is not as broad as that found in the Seventh Amendment of the U.S. Constitution. *Swails v. State*, 263 Ga. 276, 278 (1993). It is therefore difficult to conceive how Appellants' jury trial arguments could survive.

IV. The Fact That the Application of O.C.G.A. § 24-9-67.1 May be Challenging Does Not Justify Overriding the Legislature's Policy Decision.

The argument raised in Section III of the Professors' Amicus Brief is illogical, at best, and disrespectful of Georgia's judicial system, at worst. The argument provides no grounds for rejecting application of the requirements of O.C.G.A. in civil cases.

This argument, boiled down to its essence, seems to be that evaluation of the reliability and relevance of scientific evidence can be difficult and time consuming for judges, and therefore it is irrational to apply such a standard in civil cases without also applying the same standard in criminal cases. Yet, in earlier sections of the Brief, the Professors seem to take the position that a more rigorous, *Daubert*-type standard should be applied in criminal cases. Those seemingly contradictory positions do not provide any basis for concluding that O.C.G.A. § 24-9-67.1 is unconstitutional.

Further, the fact that implementation of the statute may be challenging does not provide a basis for the Court to reject it. The Professors offer no support for *their* assumption that "[t]he Legislature apparently made another assumption in deciding to require courts to strictly scrutinize experts in civil cases to screen out junk science: that Georgia courts could do so easily, quickly, and cheaply and that imposing such requirements on trial judges created no risk of overburdening already crowded dockets and already impoverished courts." Professors' Brief at p. 17-18. Even if the Legislature did make such an assumption, the appropriate forum to raise any contradictory policy arguments is with the Legislature, not as grounds for a constitutional challenge to the statute.

Furthermore, the Professors' premise is not consistent with the experiences of GDLA's members, who have not observed court dockets overburdened with

challenges to expert evidence. Georgia judges also have demonstrated, at least in criminal cases, that they are capable of conducting hearings and evaluating the reliability and scientific verifiability of expert evidence under *Harper*. *See, e.g., Carr,* 267 Ga. at 702; *Caldwell*, 260 Ga. at 289. Federal court judges also have shown a remarkable capacity to digest and understand complex technical and scientific issues in ruling on *Daubert* challenges. *See, e.g., Siharath v. Sandoz Pharms. Corp.,* 131 F.Supp. 2d 1347 (N.D.Ga. 2001), *aff'd sub nom. Rider v. Sandoz Pharms. Corp.,* 295 F.3d 1194, 1197 (11th Cir. 2002). There is no reason to believe that our trial judges will be unable to follow suit.

GDLA also notes the numerous commentators and judges whose less pessimistic views of the application of *Daubert* and its contribution to the fair and effective administration of justice are cited in the *amicus curiae* brief of The Coca-Cola Company; Delta Air Lines, Inc.; Georgia-Pacific Corporation; Georgia Power Company; Mueller Water Products, Inc.; Newell Rubbermaid Inc.; Rollins, Inc.; and United Parcel Service, Inc.

In summary, the Professors' suggestion that this Court reject O.C.G.A. § 24-9-67.1 because it may be difficult for judges to implement is misguided. GDLA shares the views of Justice Breyer, who wrote, "[d]espite the difficulties [of efforts to improve the quality of science presented in the courtroom], I believe there is an increasingly important need for law to reflect sound science. I remain optimistic

about the likelihood that it will do so." Breyer, "The Interdependence of Science and the Law," 4/24/98 *Science* 537, 1998 WLNR 4370245, p. 3.

Application of the *Daubert* standards has improved the quality of expert evidence in federal courts. *Rider v. Sandoz Pharms. Corp.*, 295 F.3d 1194, 1197 (11th Cir. 2002) ("The *Daubert* trilogy, in shifting the focus to the kind of empirically supported, rationally explained reasoning required in science, has greatly improved the quality of the evidence upon which juries based their verdicts"). Similarly, in assessing the impact of *Daubert* after a decade in practice, Professor David G. Owen concludes:

> By requiring experts to provide reasoned bases for their opinions, and by requiring that such opinions be relevant to the legal issues in the case and grounded in reliable methodology, the reliability and relevancy principles of Daubert, used properly, provide a firm foundation for the fair and rational resolution of the scientific and technological issues which lie at the heart [of much civil litigation].

D. Owen, "A Decade of Daubert," 80 Denver U. L. Rev. 345, 373 (2002). GDLA submits that O.C.G.A. § 24-9-67.1 is a step in the right direction toward the achievement of these same goals in Georgia courts and respectfully requests that the decision of the trial court be affirmed.

Respectfully submitted, this 7th day of December, 2007.

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CERTIFICATE OF SERVICE

This is to certify that I have this date served opposing counsel in the foregoing matter with a true and correct copy of Brief of Amicus Curiae Georgia Defense Lawyers' Association by placing a copy of same in the U.S. Mail with adequate postage attached thereon to the following:

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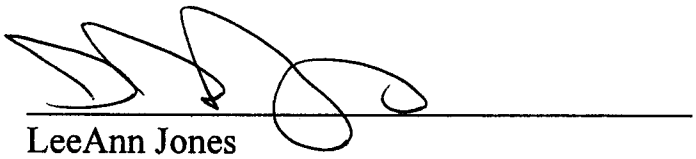

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