

SUPREME COURT OF NEW JERSEY

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Andrew McCarrell,

Plaintiffs-Respondents,

vs.

Hoffmann-La Roche Inc. and Roche  
Laboratories Inc.

Defendants-Petitioners.

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: DOCKET NO. 64,031  
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: Civil Action  
:  
: ON APPEAL FROM THE SUPERIOR  
: COURT OF NEW JERSEY, APPELLATE  
: DIVISION DOCKET NO. A-32B-07T1  
:  
: Sat Below:  
: Hon. Rudy. B. Coleman, J.A.D.  
: Hon. Jack M. Sabatino, J.A.D.  
: Hon. Marie P. Simonelli, J.A.D.  
:  
: On Appeal from Superior Court  
: Law Division, Atlantic County  
: Docket No. ATL-L-1951-03  
:  
: Sat Below:  
: Hon. Carol E. Higbee, P.J.Cv.  
:

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**BRIEF OF THE NEW JERSEY LAWSUIT REFORM ALLIANCE AS AMICUS CURIAE  
IN SUPPORT OF DEFENDANTS-PETITIONERS HOFFMANN-LA ROCHE INC. AND  
ROCHE LABORATORIES INC.'S PETITION FOR CERTIFICATION**

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**PRELIMINARY STATEMENT & STATEMENT OF INTEREST**

The New Jersey Lawsuit Reform Alliance ("NJLRA") submits this memorandum in support of Hoffmann-La Roche Inc. and Roche Laboratories Inc.'s (collectively "Roche") petition for certification of the Appellate Division's recent opinion, which if left to stand will erode New Jersey's standards for admitting and reviewing the reliability of proposed expert testimony to nothing more than a rubber stamp. The NJLRA has a strong interest in the clear, predictable, and fair application of New Jersey's standards for the admissibility of expert testimony. Currently, our law recognizes a myriad of often inconsistent tests for the admissibility of expert testimony -- including "general acceptance" and "net opinion" -- depending on the type of case and expert opinion being proffered. Under this ad hoc approach, our courts far too often fail to fulfill their gatekeeping responsibilities and allow unreliable expert testimony to reach the jury. This improperly admitted expert testimony poses grave risks to the integrity of the trial process.

The decision below is emblematic of these problems and undermines this state's long standing precedence of ensuring the scientific validity of a proposed expert's methodology and reasoning. In light of the confusion the Appellate Division's decision will likely have on the lower courts, the NJLRA urges

that certification be granted so this Court can: (1) pierce through the 4 different standards currently recognized in our state's jurisprudence and finally adopt a single comprehensible standard for admitting expert testimony; (2) make certain that only reliable expert testimony be admitted at trial and that all trial courts faithfully fulfill their obligations as gatekeepers; and (3) ensure that our courts do not become the nation's top destination for litigation tourism and junk science.

The NJLRA is a statewide, bipartisan group of individuals, businesses, and organizations dedicated to improving New Jersey's civil justice system. As an amicus in the proceedings below, it submits this brief as of right under R. 1:13-9. The NJLRA believes that a balanced civil justice system fosters public trust and motivates professionals, sole proprietors, and businesses to provide safe and reliable products and services, while ensuring that truly injured people are compensated fairly for their losses. Such a system is critical to ensuring fair and open courts, maintaining and attracting jobs, and fostering economic growth in New Jersey. For these reasons, the NJLRA urges that certification be granted to ensure that New Jersey law regarding the admissibility of expert testimony is applied with clarity, predictability, and fairness in all of our state's courts.

At no time in recent history have the citizens and businesses of New Jersey faced the dramatic economic and

competitive challenges they now confront. It is imperative that our judicial system not further stymie our state's businesses and citizens by permitting unreliable opinion testimony soundly rejected elsewhere. We therefore respectfully submit that clarification of the rules and procedures governing admissibility of expert testimony will provide the necessary guidance to courts as well as counsel and will establish comprehensive and comprehensible guidelines for resolution of expert testimony issues in the future. In light of the stage of the case, the NJLRA's discussion on the merits is brief, but the NJLRA would welcome the opportunity to supplement this brief more fully and elaborate on its concerns at oral argument if the appeal for certification is granted.

#### **REASONS WHY CERTIFICATION SHOULD BE GRANTED**

This is a case of great public importance to our state's citizens, businesses, and product manufacturers. Putting aside the various tests that currently exist regarding expert testimony, if left to stand, the decision of the Appellate Court below would all but eliminate the requirement that judges faithfully review expert testimony to ensure that the methodology employed by the expert is properly supported by the science at issue. This would essentially allow experts to self authenticate their own theories, in contravention of this state's longstanding public policy that only reliable evidence reach the jury. If experienced experts are allowed to pick and

choose evidence supporting causation without demonstrating that the underlying methodology or approach is recognized in the scientific community, our rules of evidence will be effectively immaterial.

The guidance of this Court will also help to ensure that our state's overburdened courts do not become inundated with cases based on junk science and conjecture. If experts are allowed to pick and choose evidence without a proper scientific foundation or recognized methodology, judicial gatekeeping will be immaterial as all testimony, regardless of its reliability, will be admissible so long as the expert offering it is well qualified. This state is already a magnet for mass tort lawsuits involving out-of-state plaintiffs and this decision, which validates expert testimony identical in every respect to testimony that was soundly rejected as junk science in other jurisdictions, will only encourage more plaintiffs to bring their cases to New Jersey, further harming the fragile economy of our state.

#### **QUESTIONS PRESENTED**

We adopt and incorporate by reference the "Questions Presented" relating to this appeal as set forth in Defendants / Petitioners' Petition For Certification dated April 13, 2009.

#### **PROCEDURAL HISTORY & STATEMENT OF FACTS**

We adopt and incorporate by reference the "Procedural History and Statement of Facts" relating to this appeal as set forth in Defendants / Petitioners' Petition For Certification dated April 13, 2009.

**ARGUMENT AND COMMENTS ON THE APPELLATE DIVISION'S OPINION**

**POINT I**

**This Court must restore New Jersey's clear jurisprudence that only reliable expert testimony be admitted at trial and that all courts must faithfully fulfill their obligations as gatekeepers**

If allowed to stand, the Appellate Division's interpretation of this state's jurisprudence regarding the admissibility of expert testimony will have adverse effects, not merely on the membership of the NJLRA, but on all New Jersey businesses and the public at large. First, the NJLRA urges this Court to certify this case for further appeal, as this case illustrates the need to clarify and strengthen New Jersey's law regarding the admissibility of expert testimony in civil cases and for this Court to reiterate the importance of judiciary's gatekeeping responsibilities. Over the past few years alone, our case law has cited to a myriad of different (and sometime inconsistent) tests in civil cases for admissibility of expert testimony - all of which are referenced in the opinion below:

1. Whether the opinion of the expert is generally accepted within the scientific community; Frye v. United States, 293

F. 1013 (D.C. Cir. 1923); Hisenaj v. Kuehner, 194 N.J. 6, 17 (2008);

2. Whether the scientific community generally accepts "the process" by which the expert arrived at his/her opinion as a process "that is sound with scientific principles." Rubanick v. Witco Chemical Corp., 125 N.J. 421, 449 (1991); Landrigan v. Celotex Corp., 127 N.J. 404, 413-414 (1992);
3. Whether the opinion of the expert is based upon sufficient facts or data, is the product of reliable principles and methods, and whether the expert has applied the principles and methods reliably to the facts of the case. Kemp v. State, 174 N.J. 412, 430-31 (2002);<sup>1</sup> Daubert v. Merrill Dow Pharmaceuticals, 509 U.S. 579 (1993); Fed. R. Evid. 702; and
4. Whether the opinion is a "net opinion" that is just bare conclusions unsupported by factual evidence. Buckelew v. Grossbard, 87 N.J. 512, 514 (1981); Creanga v. Jardal, 185 N.J. 345, 360 (2005).

Four different rules and standards for the admissibility of expert testimony does not make sense. Different rules governing the admissibility of expert testimony in civil cases -- depending on the type of case involved -- does not lead to uniformity, and is difficult for trial courts and the trial bar to apply. Indeed, it is not difficult to imagine a case in which different standards would govern the admissibility of experts in the same case. For instance, in a case in which the plaintiff sues a physician for medical malpractice and also sues a pharmaceutical manufacturer for selling a defective product, it is conceivable that one standard governing the admissibility of the opinion

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<sup>1</sup> In Kemp the Supreme Court did not adopt Daubert per se (noting that N.J.R.E. 702 had not yet been amended to incorporate the 3-factor test for the admissibility of expert testimony under Daubert (see Kemp, 174 N.J.424 (note 3)) but nevertheless favorably cited to Daubert and applied a similar multi-part test

testimony of experts on the medical malpractice issues would be a different standard than would apply governing the testimony of experts on whether the medicine was defective, and whether it caused plaintiff's damages. In short, there should be a single standard governing the admissibility of expert testimony.

The Appellate Division's interpretation of this state's admissibility of expert testimony is illustrative of this problem and also ignores the central goals of the court's gatekeeping responsibility, which is reliability. After all, in many, if not most cases, the testimony of the experts is the most significant testimony the jury will consider in coming to its conclusions, and there is a significant risk to the fact finding process if jurors hear opinion testimony from experts -- on subjects that are often extremely complex and which jurors have no knowledge -- which are not reliable.

In light of the special risks associated with expert testimony, this Court has made clear that scientific, medical, and technical evidence must be sufficiently reliable in order to be admissible. Kemp, 174 N.J. at 424; see also, Rubanick, 125 N.J. at 447; Langrigan, 127 N.J. at 414. It is well accepted that there must be some consensus that the methodology used is supported and recognized by other experts in the field, not just that the expert be well qualified. Whether it be other experts, journals, symposia, or other judicial opinions, support for the

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for the admissibility of expert testimony. Kemp, 174 N.J. at



expert's methodology can not come from the expert alone. It is the court's responsibility "to distinguish scientifically sound reasoning from that of the self-validating expert." Landrigan, 127 N.J. at 414-15.

It is essential to the well being of our state's citizens and businesses that this Court ensure that these principles are abided by in a clear and predictable manner. The Appellate Court's ruling would greatly expand the admissibility of unreliable expert testimony, essentially allowing experts to self-authenticate their own theories. The decision, if it becomes generally recognized as the law in New Jersey, will obliterate our state's long standing history of upholding the importance of the court's gatekeeping function.

#### POINT II

**The decision below, if permitted to stand, will further encourage out-of-state plaintiffs with claims rejected elsewhere to bring their lawsuits to New Jersey.**

Certification is imperative for the health of New Jersey businesses because the decision below encourages plaintiffs to file suit in New Jersey since our courts will permit, even encourage, the most tenuous and unsupported of causation theories, so long as the expert is sufficiently qualified. Indeed, under the Appellate Court's ruling, our courts will permit evidence specifically rejected by other courts as junk science, just as occurred in this case. Overturning the

Appellate Court's decision will eradicate the notion that New Jersey's jurisprudence and Rules of Evidence are somehow more advantageous than those of other jurisdictions.

As this court observed in Rowe v. Hoffmann-LaRoche, Inc., our state's judicial system is awash in out-of-state mass tort plaintiffs. 189 N.J. 615, 621 (2007). Today, the share of New Jersey claims brought by "mass tort carpetbaggers" stands at a chilling 93%. Foreign plaintiffs are attracted to New Jersey for its perceived plaintiff-friendly legal environment. Beth S. Rose & Steven R. Rowland, Preference for New Jersey Law in Products Liability Claims Draws Out-of-State Plaintiffs, 184 N.J.L.J. 363 (May 1, 2006). In fact, plaintiffs already consider New Jersey expert admissibility standards lax. For example, the plaintiffs' law firm of Weitz & Luxenberg, in connection with the Vioxx litigation, actively promoted a more lax application of the standards of admissibility for scientific evidence, thus making New Jersey a "better venue" for cases that might otherwise not withstand a Daubert or Frye analysis in other jurisdictions. See Weitz & Luxenberg Letter, dated December 29, 2004, attached hereto as Exhibit A.

New Jersey and its citizens cannot afford to have their courts clogged with out of state plaintiffs who sue here because they do not have reliable expert testimony that would be admissible in their home state. This case, and the flood of Accutane cases also filed in New Jersey, are perfect examples of this

disturbing phenomenon. In a "well-reasoned opinion", which was affirmed by the Eleventh Circuit Court of Appeals, the Federal Court sitting over the Accutane MDL held that virtually the exact same expert opinions and theories offered in this case were inadmissible because they were not reliable. In re Accutane Products Liab., Litig., No. 07-13884, slip op. (11th Cir. Aug. 26, 2008) (PET00170-176). This MDL expert relied on the same core group of materials and reached the same conclusion as the expert in this case. See Plaintiffs' Fed. R. App. P. 28(j) Letter, In re Accutane Prods. Liab. Litig., No. 07-13884 (11th Cir. Feb 18, 2008) (PET00205). Yet, our state courts have now permitted this very same unreliable testimony to reach the jury. This sends a strong signal to future plaintiffs that New Jersey courts are receptive to any claim, even those rejected elsewhere. Regardless of the experience and Curriculum Vitae of the messenger, the science behind the opinion testimony must withstand the appropriate judicial scrutiny.

This Court has already sent a clear message that the public policy of New Jersey "is not to encourage tort recoveries." Rowe, 189 N.J. at 626. Likewise, in Kemp and Landrigan, this Court reiterated the importance of the judicial gate-keeping function in regards to the admissibility of expert testimony. Courts must ensure that experts demonstrate a sound factual basis and scientifically supported methodology before permitting any

testimony. Kemp, 174 N.J. at 412, 427. As Justice Poritz noted in her dissenting opinion in Kemp, if courts fail to perform this basic "gatekeeper role ... we have no standard at all." Id. at 434.

By ensuring our state's admissibility standards are as strengthened and thorough as those used in federal court and other states, this Court would once and for all eliminate any perceived incentive that a litigant, whose claims rest on nothing but unsupported and selective methodology, may have to file a cause of action in our already overburdened state court system.

#### **CONCLUSION**

If left unreviewed, the Appellate Division's decision will impose a severe penalty not just on New Jersey's diminishing pharmaceutical industry, but on all of our state's citizens. The decision unfairly allows a domestic corporation to be subject to claims that are unsupported by theories and methodologies recognized in the scientific community. It thus deprives New Jersey businesses of both the certainty on which business depends and the ability to shape their conduct to protect themselves against lawsuits. For all the foregoing reasons, and the reasons set forth in Roche's moving papers, this Court should grant certification and the decision below should and must be reversed.

Respectfully submitted,

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Dated: April 13 2009

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