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WLF Asks Appeals Court to Affirm District Court Decision Correctly Applying *Daubert* Standard

(In re Zolof Products Liability Litigation)

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—Cory Andrews, WLF Senior Litigation Counsel

WASHINGTON, DC—Washington Legal Foundation today asked the United States Court of Appeals for the Third Circuit to affirm a district court decision that carefully and reasonably applied *Daubert*’s admissibility standard. WLF’s brief urges affirmance of the decision in *In re Zolof Products Liability Litigation* to ensure that reliability remains a threshold question for the court, not the jury. The brief argues against depending on “cross-examination” as a cure-all while permitting ill-equipped juries to decide how much “weight” to give to unreliable testimony.

The appeal arises from a Multi-District Litigation (MDL) consolidating more than 300 lawsuits alleging that maternal exposure to Zolof caused cardiac birth defects in Plaintiffs’ children. After extensive briefing and a three-day *Daubert* hearing, the district court found that an expert’s opinion that Zolof can cause cardiac birth defects was inconsistent with well-accepted epidemiological standards. Absent clearly enforced thresholds for admitting reliable expert evidence on general causation, drug manufacturers would face unwarranted liability and have to raise prices significantly or exit the market altogether—reducing access to important therapies.

To see that such a scenario is plausible, one need only consult recent history. An avalanche of successful lawsuits alleging birth defects—made possible by “expert” testimony purporting to re-interpret existing epidemiological data—ultimately prompted the manufacturer of Bendectin to remove it from the market. Absent the only available drug prescribed to alleviate morning sickness during pregnancy, hospitalizations for severe cases of nausea and vomiting during pregnancy more than doubled, while the incidence of birth defects never decreased. Thirty years later, that drug is finally back on the market. The unreliable evidence notoriously employed in the Bendectin litigation led directly to the landmark ruling in *Daubert v. Merrell Dow*, which imposed the vital gatekeeping duty on district courts that the court below upheld so faithfully.

After filing its brief, WLF issued the following statement by Senior Litigation Counsel Cory Andrews: “Permitting flimsy, unscientific association to serve as the basis for imposing massive tort liability on drug manufacturers would undoubtedly dis-incentivize the continued development of live-saving drugs. Because the plaintiffs’ expert testimony in this case failed to satisfy threshold reliability standards, the appeals court should affirm the district court’s well-reasoned decision to keep junk science out of the courtroom.”

WLF is a national, public-interest law firm that calls on courts to prevent “junk science” from reaching the jury by faithfully applying the rules governing the admissibility of expert testimony.

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