

**In the Supreme Court of the  
State of Georgia**

ARVIN RICHEY MASON and	)	
CLAUDIA MASON,	)	
	)	<i>Appellants,</i>
	)	Case No. S07A1486
v.	)	
	)	
THE HOME DEPO U.S.A., INC. and	)	
THE FLECTO COMPANY, INC.,	)	
	)	<i>Appellees.</i>

**BRIEF FOR AMICUS CURIAE  
GEORGIA TRIAL LAWYERS ASSOCIATION**

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## Statement of Interest

GTLA is a voluntary membership organization composed of Georgia trial lawyers. GTLA is committed to preserving the jury system and representing those injured by the wrongdoing of others. GTLA submits this brief in order to preserve plaintiffs' constitutional rights to trial by jury regarding expert opinions.

### SUMMARY OF THE ARGUMENT

Under the Georgia Constitution, the legislature has the power to determine the rules of evidence “where not in conflict with the constitution or rights guaranteed by it.” Bell v. Austin, 278 Ga. 844, 846 (2005). O.C.G.A. § 24-9-67.1 conflicts in part with a civil litigant’s constitutional right to jury determinations of the reliability of expert testimony, a civil litigant’s right to equal treatment under the law with respect to expert testimony, and the right against retroactive application of the law after a party has detrimentally relied on prior law.

Before arguing those points, GTLA outlines the relevant legislative history. The ultimate choice of different rules for civil and criminal cases lacks the justifications argued by appellees. Instead, it was simply a matter of favoring prosecutors and disfavoring tort plaintiffs. This is significant because “[t]his Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation.”

Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975). “The justification must be genuine, not hypothesized or invented post hoc in response to litigation.”

United States v. Virginia, 518 U.S. 515, 533 (1996).

### Legislative History of Section 7 of S.B. 3

The original drafts of SB3<sup>1</sup> made no distinction between civil and criminal cases with respect to expert testimony. Only later did prosecution interests intervene, first to exempt themselves from some of the more rigorous requirements, then finally from all of them. Contrary to Appellees’ argument (at 7), SB3’s differing treatment of civil and criminal matters is not the result of some legislative perception of “societal repercussions” present uniquely in civil cases.

As initially introduced, Section 7 of the act treated expert testimony in civil and criminal cases identically.<sup>2</sup> This original version allowed the trial court to address the admissibility of any expert testimony before trial.<sup>3</sup>

The Senate Judiciary Committee’s substitute<sup>4</sup> preserved the new expert evidence rules for both civil and criminal cases, but changed one timing aspect of

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<sup>1</sup> The serial versions of SB3 are available online. <[http://www.legis.state.ga.us/legis/2005\\_06/sum/sb3.htm](http://www.legis.state.ga.us/legis/2005_06/sum/sb3.htm)> (last visited October 10, 2007).

<sup>2</sup> <[http://www.legis.state.ga.us/legis/2005\\_06/versions/sb3\\_As\\_introduced\\_LC\\_14\\_8923\\_2.htm](http://www.legis.state.ga.us/legis/2005_06/versions/sb3_As_introduced_LC_14_8923_2.htm)> (last visited October 10, 2007), at § 7.

<sup>3</sup> Id., proposing O.C.G.A. § 24-9-67 (d).

<sup>4</sup> <[http://www.legis.state.ga.us/legis/2005\\_06/versions/sb3\\_Committee\\_sub\\_LC\\_14\\_9017S\\_4.htm](http://www.legis.state.ga.us/legis/2005_06/versions/sb3_Committee_sub_LC_14_9017S_4.htm)> (last visited October 10, 2007), at § 7.

the procedure to accommodate prosecutors. In civil cases, upon motion, the trial court was obliged to (“must”) hold a pretrial hearing to determine admissibility of expert testimony,<sup>5</sup> but in criminal cases, the trial court “may” delay holding such a hearing until the witness is called to testify.<sup>6</sup>

This committee version passed the Senate on February 1, 2005.<sup>7</sup> In the floor debate on this part of the act,<sup>8</sup> Senator Preston Smith (Chairman of the Senate Judiciary Committee and the chief sponsor of SB3) explained the distinction thus:

In a criminal action, because we had GBI lab experts to come in at one time, *we’ve made concessions to the bill. We built in concessions* to allow for -- for experts in a criminal case to have that hearing with the judge and the other parties but outside the presence of the jury at the time they’re called to testify in a criminal case, and their testimony is based on evidence that either has been or will be admitted into evidence during the trial.

There is a significant strengthening of the expert witness standard. We believe this will go a long way toward limiting some of the junk science and frivolous lawsuits that are brought on strained legal theories and bad science.<sup>9</sup>

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<sup>5</sup> *Id.*, proposing O.C.G.A. § 24-9-67(d)(1).

<sup>6</sup> *Id.*, proposing O.C.G.A. § 24-9-67(d)(2).

<sup>7</sup> <[http://www.legis.state.ga.us/legis/2005\\_06/versions/sb3\\_As\\_passed\\_Senate\\_5.htm](http://www.legis.state.ga.us/legis/2005_06/versions/sb3_As_passed_Senate_5.htm)> (last visited October 10, 2007), at § 7.

<sup>8</sup> Televised floor debates on the Senate may be viewed by clicking links for the appropriate day at this site: <[http://www.georgia.gov/00/article/0,2086,48026107103\\_33091490,00.html](http://www.georgia.gov/00/article/0,2086,48026107103_33091490,00.html)>. The debates may be viewed with the RealPlayer, which is available for free download from <<http://www.real.com>>.

<sup>9</sup> Senate Floor Debates, Feb. 1, 2005, available on videoclip at <<http://mediar1.gpb.org/ramgen/leg/2005/sv020105.rm?usehostname>> (last visited Oct. 23, 2007) at 1:18:59 - 1:19:37 (emphasis added).

Senator Smith's remarks recognize parallel concerns for expert testimony in criminal as well as civil cases. They also show that special interests from prosecutors were lobbying for special relief.

The prosecutors received far greater relief in the House. The House Special Committee on Civil Justice Reform immediately<sup>10</sup> distinguished criminal cases, which would be governed by the traditional standards of O.C.G.A. § 24-9-67, from civil cases, which would be governed by the new O.C.G.A. § 24-9-67.1. No legislative history documents this special committee's work. The reasons for the split are not mentioned in floor debates in the House which passed its version of the act,<sup>11</sup> or later in the Senate which adopted the House version.<sup>12</sup> The clear pattern, however, shows that powerful special governmental interests continued to seek to exclude themselves from Daubert rigors, a pattern which extended to exclusion of appraisal witnesses in condemnation cases,<sup>13</sup> another area in which Daubert would greatly inconvenience governmental litigators. The legislative history reveals no hint that the General Assembly came to conclude, contrary to the Senate's initial

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<sup>10</sup> <[http://www.legis.state.ga.us/legis/2005\\_06/versions/sb3\\_LC\\_29\\_1667S\\_hss\\_7.htm](http://www.legis.state.ga.us/legis/2005_06/versions/sb3_LC_29_1667S_hss_7.htm)> (last visited October 10, 2007), at § 7.

<sup>11</sup> House Floor Debates, Feb. 10, 2005, available on videoclip at <<http://mediar1.gpb.org/ramgen/leg/2005/hv021005.rm?usehostname>> (last visited Oct. 10, 2007).

<sup>12</sup> Senate Floor Debates, Feb. 14, 2005, available on videoclip at <<http://mediar1.gpb.org/ramgen/leg/2005/sv021405.rm?usehostname>> (last visited Oct. 10, 2007).

<sup>13</sup> O.C.G.A. § 22-1-14(b).

position, that criminal cases lack what SB3’s proponents label “junk science.”

### ARGUMENT AND CITATION OF AUTHORITY

#### **1. O.C.G.A. § 24-9-67.1 violates the “inviolable” jury trial right.**

Georgia juries have always had the right and duty to determine fact issues about the basis and reliability of opinions of otherwise qualified experts. Until SB3, trial judges could not interfere with the jury’s consideration of such fact issues except in highly unusual cases. By giving parties *in every civil case* the right to require trial judges to pre-clear *every* expert’s testimony through making outcome-determinative rulings on those opinions, O.C.G.A. § 24-9-67.1 invades the province of the jury, in violation of the right to trial by jury guaranteed by Ga. Const., Art. 1, § 1, ¶ 11: “The right to trial by jury shall remain inviolable . . . .” “[I]n a case at common law, . . . [a party] has the constitutional right to have all questions of fact passed upon by a jury, and a legislative denial of that right is unconstitutional.” Williams v. Overstreet, 230 Ga. 112, 115 (1973).<sup>14</sup>

GTLA recognizes the traditional role of trial judges in deciding *certain* questions before admitting expert testimony. Judges properly decide whether the proposed subject of testimony is a matter of expert opinion, whether the witness

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<sup>14</sup> The right extends to all “cases as to which there existed a right to jury trial at common law or by statute at the time of the adoption of the Georgia Constitution in 1798.” Benton v. Ga. Marble Co., 258 Ga. 58, 66 (1988). The use of experts to prove facts in litigation goes back to Roman law. Henry W. Rogers, The Law of Expert Testimony § 2, at 4 (2d ed., Central Law Jnl. Co., 1891).

has sufficient qualifications to testify on the subject, and whether the subject is relevant to a material issue in the case. These traditional judicial powers co-existed with the right to jury trial at the time of our first constitution.

From the beginning, however, this Court and the Court of Appeals have held that it is for the jury to decide the weight of the expert's testimony, the truth of the reasons given for the expert's conclusions, the adequacy of the expert's knowledge of the facts, the sufficiency of the factual foundation for the expert's conclusions, whether the expert's tests were conducted properly, whether the expert's conclusions are or are not too speculative, whether the expert's thinking is logical, and whether the expert's methodology is persuasive, etc.

Thus, the subjects of O.C.G.A. § 24-9-67.1(b)(1), (2), and (3) are *normally* questions for the jury. In *unusual* cases, where there is no genuine issue of material fact, judges may decide such questions as a matter of law without violating a party's right to a jury trial, just as other fact issues may be decided on summary judgment or directed verdict. O.C.G.A. § 24-9-67.1 violates the right to trial by jury because it makes a judicial determination of these fact issues the *normal* rule. It changes the nature of the judicial inquiry from whether, as a matter of law, the expert's basis is insufficient to support the expert's conclusions to whether the judge finds the expert's thinking persuasive. It requires the proponent of expert evidence (most often the party with the burden of proof) to satisfy two fact-finders

rather than the one that the constitution specifies: the jury.

- a. **The constitutional right to jury determination of fact issues -- such as the reliability of expert testimony -- is a fundamental constitutional right.**

The right to trial by jury is “fundamental” in Georgia. Balbosa v. State, 275 Ga. 574, 575 (2002). “[N]o right . . . should be considered more sacred, . . . because upon the maintenance of this right depends the assertion or defense of every other right which the citizen enjoys.” Wright v. Davis, 184 Ga. 846, 852 (1937). Georgia is not alone in recognizing the crucial role of the jury.

The right of trial by jury is of ancient origin, characterized by Blackstone as “the glory of the English law” and “the most transcendent privilege which any subject can enjoy” (Bk. 3, p. 379); and, as Justice Story said (2 Story on the Constitution, § 1779), “. . . the Constitution would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms.” . . . Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Dimick v. Schiedt, 293 U.S. 474, 485-486 (1935).

Colonial Georgia experienced the same problems with concentrated judicial power that led other states and the United States to adopt the jury as a fundamental component of the justice system. The worst of the colonial judges were despotic and dictatorial. Warren Grice, The Georgia Bench And Bar, 32-34 (J.W. Burke

Co., 1930).<sup>15</sup> Private individuals who incurred judicial displeasure could be brought to trial (even capital trials) with the magistrate serving also as chief prosecuting witness or prosecutor. Id. at 22, 27-28. The magistrate could refuse jury verdicts and send the jury back for the desired verdict or to “mould” its verdict for the desired result. Id. at 22, 25. Judges were under political pressure. They could be dismissed for siding with dissidents or for opposing the royal governor. Id. at 32, 43-45. Judges were members of the Governor’s council. Id. at 40, 41. They were seen to be part of the oppressive government that necessitated disobedience. Jurors refused to be sworn for trial in order to stop the proceedings in civil debt collection matters. Id. at 52.

Georgia, together with all other states and the federal government, responded to such abuses by making the jury a fundamental part of its political framework. The Declaration of Independence even cites the king’s “depriving us, in many cases, of the benefits of trial by jury” as a reason for revolution. Guaranteeing a right to jury was a universal concern of the delegates to the constitutional convention. “The friends and adversaries of the plan of the convention, if they agree upon nothing else, concur at least in the value they set upon the trial by jury: Or if there is any difference between them, it consists of this; the former regard it as

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<sup>15</sup> The author was an Associate Justice of the Georgia Supreme Court, 1937-1945.

valuable safeguard to liberty, the latter represent it as the very palladium of free government.” Alexander Hamilton, The Federalist 83, at 602 (Franklin Library Edition 1977). “Judges, unincumbered [sic] by juries, have been ever found much better friends to government than to the people . . . upon the same principle that a large standing army is desirable [sic] to those who wish to enslave the people.” 3 The Complete Anti-Federalist, 46, 49 (Storing ed., 1981).

Tocqueville too noted the central role of the jury in the American polity:

The institution of the jury . . . places the real direction of society in the hands of the governed, . . . and not in that of the government . . . . [It] invests the people, or that class of citizens, with the direction of society.

. . . The jury system as it is understood in America appears to me to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage. They are two instruments of equal power, which contribute to the supremacy of the majority.

Alexis de Tocqueville, Democracy in America, 293-94 (Phillips Bradley ed., Vintage Books 1954) (footnote omitted).

The Supreme Court of the United States links the jury trial right to the proper functioning of our courts:

The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. . . . Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an inde-

pendent judiciary but insisted upon further protection against arbitrary action. . . . [T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power -- a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.

Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968). Likewise, Georgia's Chief Justice Lumpkin waxed effusive in describing the jury process as a school in which the juror "is educated into the citizen." "[B]y making every citizen a member of the Court, it saves the administrators of justice from that isolation from the people, which is the first step toward secret proceedings and arbitrary tribunals, like those which continental Europe is fast exchanging for public trial by jury." Flint River Steamboat Co. v. Foster, 5 Ga. 194, 205-06 (6) (1848).

As this brief survey shows, the jury is not a discretionary or arbitrary feature of our judicial system, but a fundamental constituent of Americanism. It not merely protects individuals from oppressive government, and from those wealthy or powerful enough to cause a government to enact unjust laws, but it also places decision-making authority in the hands of fellow ordinary citizens.

Georgia long ago decided that factual disputes, even complicated ones<sup>16</sup>

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<sup>16</sup> Comparable federal court decisions have almost uniformly rejected a "complexity" exception to the right to jury trial or held that, if one exists, the facts did not warrant its application. See, e.g., In re U.S. Financial Securities Litigation, 609 F.2d 411, 419-31 (9th Cir. 1979) (exhaustively treating of the history of the Seventh Amendment, considering and rejecting arguments for a complexity exception, and concluding that time is better spent finding ways to improve rather than erode the jury system); City of New York v. Pullman Inc., 662 F.2d 910, 919

involving expert testimony, should be decided by juries, not judges, as part of the political structure of the State.<sup>17</sup> “Experts in any science or trade may give their opinions on the trial of issues involving questions in respect to a particular science or trade.” Parker v. Chambers, 24 Ga. 518, 524 (1858). Judges may not interfere with, let alone control, the jury’s determination of the weight of expert evidence. Merritt v. State, 107 Ga. 675, 680-681 (1899); Baker v. Richmond City Mill Works, 105 Ga. 225, 227-228 (1898). For instance, juries “are to judge [the] value

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(2d Cir. 1981); Phillips v. Kaplus, 764 F.2d 807, 814 & n6 (11th Cir. 1985); SRI Int’l v. Matsushita Elec. Corp., 775 F.2d 1107, 1127-31 (Fed. Cir. 1985). A handful of courts created such an exception on the strength of a statement in Ross v. Bernhard, 396 U.S. 531, 538, n. 10 (1970), that identified “the practical abilities and limitations of juries” as an additional factor to be consulted in determining whether the Seventh Amendment confers a jury trial right, but the Supreme Court later clarified that this factor related to determining whether Congress could grant decision-making power to administrative agencies or specialized courts of equity. Granfinanciera, S. A. v. Nordberg, 492 U.S. 33, 42 n. 4 (1989).

<sup>17</sup> To the extent that there is a kernel of truth to the claim that juries have difficulty understanding complex cases, Daubert is not the best cure, and is certainly not the only cure, for this disease. Far better, and more consistent with our decentralization of power, are jury trial innovations that were discussed in Richard W. Creswell, *Georgia Courts in the 21st Century: The Report of the Supreme Court of Georgia Blue Ribbon Commission on the Judiciary*, 53 Mercer L. Rev. 1, 21-25 (2001), and presented at the “Georgia Jury Summit” of May 9-11, 2002. See B. Michael Dann, “*Learning Lessons*” and “*Speaking Rights*”: *Creating Educated and Democratic Juries*, 68 IND. L.J. 1229 (1993); Jury Innovation Pilot Study, Los Angeles Superior Court, Nov. 1999; Jury Trial Innovations (G. Thomas Munsterman, Paula L. Hannaford & G. Marc Whitehead, eds., 1997); Peter M. Lauriat, Jury Trial Innovations in Massachusetts (2000). With ingenuity and flexibility, the judge and lawyers in a case may present complex matters comprehensibly and in a manner consistent with our constitutionally mandated jury system.

[of tests and testimony] by any . . . competent chemist.” Jones v. Cordele Guano Co., 94 Ga. 14, 21 (1894). As between judges and juries, it is the jury’s “right and duty” to determine the truth of the facts on which the expert opinion is based. Flanagan v. State, 106 Ga. 109, 112 (1898). Even if a judge finds that the reason given for an expert’s opinion “is not really a good one, . . . the opinion and the reason ought to be considered, that the jury may give the opinion such weight as they think proper.” Ryder v. State, 100 Ga. 528, 534 (1897).

O.C.G.A. § 24-9-67.1’s shifting of fact-finding power from juries to judges violates this fundamental principle of Georgia constitutional law. It does so by giving the court the ultimate power to make outcome-determinative decisions about fact issues previously reserved for the jury alone: the sufficiency of a factual basis for the opinion (subsection (b)(1)),<sup>18</sup> the reliability of the expert’s principles and methods ((b)(2)),<sup>19</sup> and *especially* whether an expert witness has “applied the principles and methods reliably to the facts of the case” ((b)(3)), which is the very heart of the jury’s role as shown in Part 1c, below. By removing this important

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<sup>18</sup> As shown in cases in Part 1c, below, this fact issue could be decided by the court only where it could be said that the conclusions reached were “sheer speculation.”

<sup>19</sup> *New* principles and methods, like other principles or methods at or beyond the fringe of “science,” are subject to judicial review. See Harper v. State, 249 Ga. 519 (1982), and its progeny. *Accepted* principles and methods are routinely admitted by judicial notice. Lattarulo v. State, 261 Ga. 124 (3) (1991).

fact-finding responsibility from the jury,<sup>20</sup> that provision violates Georgia’s constitutional guarantee of the right to trial by jury.

**b. The meaning of “inviolable.”**

James Madison’s original proposal for jury rights protected by the constitution was almost identical to Georgia’s ultimate version: “In suits at common law between man and man, the trial by jury as one of the best securities to the rights of the people, *ought to remain inviolate.*” Veit, et al., Creating the Bill of Rights: The Documentary Record from the First Federal Congress, 13 (Johns Hopkins Univ. Press, 1991) (emphasis added). In Dane County v. McGrew, 699 N.W.2d 890 (Wisc. 2005), the Court held that this phrase “means that it shall remain as full

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<sup>20</sup> Jurors are competent to perform this function. R. Perry Sentell, Jr., conducted an empirical survey of judges and lawyers to determine their views of the competence of jurors, and the results showed that the most informed observers of the jury system agreed on the jury’s competence to perform its function. R. Perry Sentell, Jr., *The Georgia Jury and Negligence: The View from the Bench*, 26 Ga. L. Rev. 85, 112-115 (1991); R. Perry Sentell, Jr., *The Georgia Jury and Negligence: The View from the (Federal) Bench*, 27 Ga. L. Rev. 59, 81-83 (1992); R. Perry Sentell, Jr., *The Georgia Jury and Negligence: The View from the Trenches*, 28 Ga. L. Rev. 1, 35-42 (1993). These results squared with the results in national surveys of judges, Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 Va. L. Rev. 1055, 1066-67 (1964), and other empirical surveys. Neil Vidmar, *Scientific and Technological Evidence: Are Juries Competent to Decide Liability in Tort Cases Involving Scientific/Medical Issues? Some Data from Medical Malpractice*, 43 Emory L.J. 885 (1994). See further Neil Vidmar, *Expert Evidence, the Adversary System, and the Jury*, 95 Am. Jnl. Pub. Health S1 (2005) (available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=849587](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=849587)>); Thomas A. Eaton and Susette M. Talarico, *Another Brick in the Wall: An Empirical Look at Georgia Tort Litigation in the 1990’s*, 34 Ga. L. Rev. 1049, 1087-88 (2000).

and perfect as it was when the constitution was adopted and shall extend to all cases where the right existed at that time.”

Early definitions of “inviolate” confirm the exalted role of the jury trial in Georgia as envisioned by the framers. The Oregon Supreme Court reviewed language usage contemporaneous with the institution of the right to jury trials: “In 1828, the word ‘inviolate’ meant ‘unhurt; uninjured; unprofaned, unpolluted; unbroken.’ Noah Webster, *American Dictionary of the English Language*, Vol 1, p 113 (1828). . . . [I]n 1889 ‘inviolate’ meant ‘not violated; free from violation or hurt of any kind; secure against violation or impairment.’ *The Century Dictionary*, Vol. III, p. 3174 (1889).” Lakin v. Senco Products, Inc., 987 P.2d 463 (Ore. 1999).

Contemporary definitions of “inviolate” reaffirm the central protected position of the jury. “For . . . a right to remain inviolate, it must not diminish over time and must be protected from all assaults to its essential guaranties.” Moore v. Mobile Infirmary Assn., 592 So.2d 156 (Ala. 1991), *quoting* Sofie v. Fibreboard Corp., 112 Wash.2d 636, 656, 771 P.2d 711, 722 (1989). Sofie in turn quotes *Webster’s Third New International Dictionary* for the definition of “‘inviolate’ as ‘free from change or blemish: pure, unbroken . . . free from assault or trespass: untouched, intact . . .’ Applied to the right to trial by jury, this language indicates that the right must remain the essential component of our legal system that it has always been.”

**c. Reliability of expert testimony is a fact question for the jury.**

Contrary to O.C.G.A. § 24-9-67.1(b), and especially subsection (b)(3), Georgia law has always entrusted the jury to evaluate expert witnesses' premises, methodologies, assumptions, conclusions, and in general terms, reliability. See, e.g., the following cases:

\* Layfield v. Department of Transp., 280 Ga. 848, 851 (2006) (“if the expert’s opinion was based upon inadequate knowledge, this does not mandate the exclusion of the opinion but, rather, presents a jury question as to the weight which should be assigned the opinion.”) (punctuation and citations omitted).

\* Barrington Hills Condo. Ass’n v. Lewis, 277 Ga. App. 510, 511-512 (2006) (expert “opinion evidence requires a factual determination by a jury whether to accept it in whole or in part and what weight and credibility to give the opinion”).

\* Wilson v. Prudential Indus. Props, LLC, 276 Ga. App. 180, 181 (2005) (challenges to expert’s methodology are for the jury as trier of fact).

\* Butgereit v. Enviro-Tech Envntl. Servs., 262 Ga. App. 754, 759 (2003) (“If the . . . expert’s opinion was based upon inadequate knowledge, this does not mandate the exclusion of the opinion but, rather, presents a jury question as to the weight which should be assigned the opinion.”) (punctuation omitted).

\* Boswell v. State, 275 Ga. 689, 691 (2002) (“The jury also may decide

what credibility and weight to give the experts' opinions . . . .") (insanity defense).

\* Fayette Promenade, LLC v. Branch Banking & Trust Co., 258 Ga. App. 323, 326 (2002) (despite "a serious challenge" to the expert's methodology, the opinion was not "based on sheer speculation," and thus it was beyond the power of the court to "second guess").

\* Byrd v. Medical Center of Central Ga., Inc., 258 Ga. App. 286, 291 (2002) ("Once the plaintiff presented competent expert testimony . . . , the jury alone was responsible for deciding the weight to be given all the testimony presented.").

\* Ishola v. State, 251 Ga. App. 355, 355 (2001) (jury could disbelieve chemist about procedures needed to administer breathalyzer tests).

\* Orkin Exterm. Co. v. McIntosh, 215 Ga. App. 587, 593 (1994) ("Orkin does not challenge a particular scientific test or technique . . . ; Orkin challenges the conclusions drawn by those experts . . . . This determination is for the jury.").

\* Howard v. Howard, 258 Ga. 846, 847 (1989) ("until the jury makes the decision that the tests were properly conducted and the expert presenting the results testified truthfully, test results are not entitled to any greater deference than any other evidence").

\* Williamson v. Ward, 192 Ga. App. 857, 858 (1989) (jury could reject results upon finding test was not conducted properly).

\* Quality Rental Co. v. Grier, 187 Ga. App. 5, 5 (1988) (even if expert's

opinion as to speed based on data observed immediately after collision, such as skid marks, distances, and the positions of and damage to the vehicles turns out be based on inadequate knowledge, “this goes to the credibility of the witness rather than to the admissibility of the evidence”).

\* Cook v. Seaboard S. R., Inc., 184 Ga. App. 838, 841 (1987) (“any insufficiency in the factual foundation for the expert’s testimony would . . . affect only the weight of the evidence, not its admissibility”).

\* Georgia Power Co. v. Hinson, 179 Ga. App. 263, 265 (1986) (despite some speculation in expert testimony as to cause of a fire, “its weight, insofar as how speculative it may be, is to be determined by the jury”).

\* Department of Transp. v. Pilgrim, 175 Ga. App. 576, 579 (1985) (“Whether the two experts’ basis for valuation and assumptions was or was not entirely logical, the testimony was neither incompetent nor totally without evidentiary worth. . . . The credibility and weight of such evidence is then for the jury.”).

\* Jackson v. Jackson, 253 Ga. 576, 576 (1984) (jury may reject expert opinion on finding that tests and comparisons were not conducted properly).

\* Ponce de Leon Condos. v. DiGirolamo, 238 Ga. 188, 191 (1977) (jury could reject expert testimony that the “engineering design utilized by appellants could not in theory have resulted in the accumulation or discharge of surface waters onto appellee’s property”).

\* See further cases from the prior century noted above at pp. 10-12.

The jury function of assessing the reliability of an expert opinion, so deeply embedded in Georgia law,<sup>21</sup> is within the scope of the right to trial by jury that is to “remain inviolate.”

**d. The right to jury trial bars judicial gatekeeping for the reliability of expert opinions unless such an opinion is unreliable as a matter of law.**

“The province of the jury as the exclusive arbiters of facts is holy ground, not to be approached by the judge, even with bare feet and uncovered head.”

Taylor v. State, 2 Ga. App. 723, 729 (1907). SB3’s expert witness provisions usurp the constitutional role of the jury:

[I]t is preferable not to have a single trial judge stand in the shoes of the several men and women of various backgrounds who make up a jury and determine what inferences they may draw from the evidence. . . . Trial and appellate judges should not take such matters lightly, for what is at stake is of constitutional magnitude.

Service Merchandise, Inc. v. Jackson, 221 Ga. App. 897, 898-899 (1996). Where O.C.G.A. § 24-9-67.1 “would result in a judicial determination of the credibility of evidence[,] . . . there is no reason to have a trier of fact . . . .” Reynolds Const. Co. v. Reynolds, 218 Ga. App. 23, 25 (1995). Yet “facts are to be submitted to a jury,

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<sup>21</sup> A standard jury instruction -- that the jury is not bound by expert opinions -- corroborates that the jury decides the propriety of expert opinions. Suggested Pattern Jury Instructions, Council of Superior Court Judges of Georgia (Fourth Edition, 2004, updated 2006), ¶ 02.120.

who have the *exclusive* right to pass upon them.” Atlanta Comm. for the Olympic Games, Inc. v. Hawthorne, 278 Ga. 116, 117 (2004) (emphasis added).

The controlling constitutional standard is that issues of fact can be taken away from the jury and decided by the judge *only* where there is no material issue of fact to be decided. Harry v. Glynn County, 269 Ga. 503, 505 (1998) (use of summary judgment procedure does not violate the right to trial by jury only because “trial by jury in such cases presupposes an issue of fact; so if there be no such issue, there is nothing for a jury to pass on”); Tilley v. Cox, 119 Ga. 867, 870-871 (1904) (same, regarding directed verdicts).

The same constitutional limitation applies here: the judge may remove the issue of the reliability of an expert opinion from the jury only where there is no issue of fact about the expert opinion, or more specifically, where the judge finds that the expert’s principles, methodologies, and techniques are so completely unreliable that no reasonable juror could believe that they prove the expert’s conclusions. Reading O.C.G.A. § 24-9-67.1(b) as subordinate to the right to trial by jury comports with this Court’s prior decisions about the limited role of a trial judge in the pretrial screening of evidence:

[E]xcluding evidence suggests that there is no circumstance under which the evidence under scrutiny is likely to be admissible at trial. [Cit.] In light of that absolute, the grant of a motion in limine excluding evidence is a judicial power which must be exercised with great care.

Forsyth County v. Martin, 279 Ga. 215, 221 (2005), *citing* Andrews v. Wilbanks, 265 Ga. 555, 556 (1995). Therefore, a motion under O.C.G.A. § 24-9-67.1 should be denied unless “there is no circumstance” that would make the testimony admissible at trial.

Other states would read O.C.G.A. § 24-9-67.1 in this manner in order to square the statute with their constitutional provisions for jury trials. Most significant is Howerton v. Arai Helmet, Ltd., 597 S.E.2d 674, 684 (N.C. 2004) (rejecting a Daubert-Joiner standard, notwithstanding a rule of evidence parallel to Fed.R.Evid. 702). The court divided scientific expert testimony into that which has been held reliable, that held inherently unreliable, and that on subjects where there is no precedent. Id. at 687. The court focused on the third category. It rejected Daubert standards for the pragmatic reasons that imposing scientific gatekeeping obligations on trial courts drained human resources and was too onerous and impractical. Id. at 690-691. The court also observed the unfairness of federal praxis under Joiner in which judges use Daubert to make case-dispositive rulings against plaintiffs in cases where summary judgment would have been unlikely without Daubert, thus lightening their caseloads. Id. at 691-692. “[W]e are concerned that trial courts asserting sweeping pre-trial ‘gatekeeping’ authority under Daubert may unnecessarily encroach upon the constitutionally-mandated function of the jury to decide issues of fact and to assess the weight of the evidence.” Id. at

692. The court preserved its prior law, which more often avoided these problems.

Arizona also rejected Daubert-Joiner standards in Logerquist v. McVey, 1 P.3d 113 (Ariz. 2000). The court observed the one-sided anti-plaintiff, pro-corporate bias in Daubert praxis. Id. at 126. It noted the practical problems that trial judges lack the scientific abilities and time necessary for Daubert hearings. Id. at 129. But even if judges would handle scientific issues better than twelve jurors under conditions of fair trial, the Arizona court would still refuse to apply Daubert-Joiner tests because of the constitutional jury trial right:

Our constitution preserves the “right to have the jury pass upon questions of fact by determining the credibility of witnesses and the weight of conflicting evidence.” [Cit.] The framers’ intent does not contemplate giving judges the power to determine reliability and credibility of a qualified expert as a prerequisite to submission of the expert’s conclusions to a jury for its determination of the weight to be given to the testimony.

Id. at 130. The Daubert trilogy “crosses the line” dividing the traditional judicial role from the jury’s function of evaluating the credibility of the witnesses. Id. at 131. Because the Court “ha[s] faith in the jury system,” its rejection of Daubert-Joiner was “in keeping with our system of justice and its preference for trial by jury on issues of fact.” Id. at 134.

The wisdom of the constitutional right to trial by jury is in avoiding the concentration of power over matters affecting citizens’ rights into the hands of a single judge, whose power could then be used arbitrarily or discriminatorily

without effective review. See Part 1a, above. The real threat of lawless discretion under the Daubert-Joiner line of cases is evident in United States v. Brown, 415 F.3d 1257 (11th Cir. 2005), where the appellate court upheld a district court's discretion to admit the testimony of the state's chemist that it described as follows:

The visual assessment method used by the government's witnesses only *met one of the four Daubert factors*. [The state's experts] conceded that their method and conclusions were *not quantitative or testable by the scientific method*. Instead, they were based on visual comparisons of the molecular models combined with expert knowledge of chemistry. During cross-examination, [one expert] *characterized his opinion as being a "gut level thing" and based on intuition* [based on 30 years as a chemist]. The government produced no papers or studies in which the methodology or opinions of [the experts] were subjected to peer review. Their method did, however, meet the general acceptance factor. . . . Given the circumstances of this case, and given the heavy thumb -- really a thumb and a finger or two -- that is put on the district court's side of the scale, we conclude that it was not an abuse of discretion to admit the expert opinions of the two government witnesses in this case.

Id. at 1267, 1268 (emphasis added). By contrast, the district court applied a much more rigorous analysis in rejecting the defendants' expert's opinion, and under the same abuse-of-discretion standard of review, the appellate court upheld the exclusion of the testimony on Daubert grounds. Id. at 1269-1270. Without suggesting that anything improper took place there, Brown shows that a judge who wanted to discriminate against either side in a case could do so with impunity under Joiner.

Many state supreme courts have recently agreed with the conclusion of this argument: any ruling by a trial court that takes from the jury a question about the

reliability of an expert opinion is really a ruling on a point of law that should be reviewed as such. Cases applying de novo review to rulings on the validity of scientific testimony under a Frye standard include In re Commitment of Simons, 821 N.E.2d 1184, 1189-1190 (Ill. 2004); State v. Tankersley, 956 P.2d 486, 492 (Ariz. 1998); Castillo v. E.I. Du Pont De Nemours & Co., 854 So.2d 1264, 1268 (Fla. 2003); State v. Shively, 999 P.2d 952, 955 (Kan. 2000); Wilson v. State, 803 A.2d 1034, 1040 n. 5 (Md. 2002); State v. Bailey, 677 N.W.2d 380, 398 (Minn. 2004); State v. Harvey, 699 A.2d 596, 619 (N.J. 1997); State v. Gore, 21 P.3d 262, 271 (Wash. 2001). Cases holding that de novo review should be applied under Daubert standards include: State v. Dahood, 814 A.2d 159, 162 (N.H. 2002) (since reliability of theory would not vary from case to case, de novo review was appropriate); Jennings v. Baxter Healthcare Corp., 14 P.3d 596, 604 (Or. 2000) (similar). Georgia should likewise deny lawless discretion to trial judges to accept or reject expert testimony, and apply de novo review to any decision that would take a fact issue about the expert's opinion from the jury.

**2. Less restrictive standards for admitting expert testimony in criminal cases than in civil cases are unconstitutionally discriminatory.**

Applying the stringent limitations of O.C.G.A. § 24-9-67.1 only in civil cases is so irrational that it violates the equal protection and substantive due process provisions of Ga. Const. Art. 1, § 1, ¶¶ 1, 2. “Substantive due process

requires that the statute not be unreasonable, arbitrary or capricious, and that the means have a real and substantial relation to the object sought to be obtained. . . . The law must rationally relate to a legitimate end of government.” Hayward v. Ramick, 248 Ga. 841, 843 (1982). Equal protection requires that statutory classifications have the same justification. City of Atlanta v. Watson, 267 Ga. 185, 190 (1996). Both require greater scrutiny where, as here, the right is a fundamental one. See p. 7, above.

The stated purpose of O.C.G.A. § 24-9-67.1 is to prevent introduction of what SB3’s proponents pejoratively call “junk science” into evidence.<sup>22</sup> Assuming that such a problem actually existed, applying O.C.G.A. § 24-9-67.1 only in civil cases enacts a policy that “junk science” may be used to condemn people to death or lengthy imprisonment, or help the guilty escape punishment. That is an unconscionable consequence of SB3. “We find it hard to believe that evidence deemed admissible in prosecutions resulting in imposition of death or long terms of imprisonment should be held unreliable and therefore inadmissible in tort cases based on the same type of act that leads to many criminal prosecutions.” Logerquist v. McVey, 1 P.3d 113, 126 (Ariz. 2000).

As a matter of law, requiring higher standards of proof in civil cases than in criminal cases, as Section 7 of S.B. 3 does, is irrational, arbitrary and capricious.

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<sup>22</sup> Senate Floor Debates, n.9 above, at 1:17:52-1:18:01, 1:19:24-37.

There is no justification for this discrimination between civil and criminal litigants, who are all similarly situated for all relevant purposes of expert testimony, including the purpose of deciding whether the expert's reasons reliably support the expert's conclusions. Section 7 on its face addresses both criminal and civil cases, and the legislative history set out above shows only different treatment between favored and disfavored litigants, not a classification that provided real and substantial support for a legitimate goal of the government.

If any inequality could be justified, higher evidentiary standards should be required for the prosecution in criminal matters, not civil, because of the different burden of proof. Although civil liability may be decided on a preponderance of the evidence, criminal convictions require proof beyond a reasonable doubt. The higher criminal burden of proof, required by due process guarantees, serves as “a prime instrument for reducing the risk of convictions resting on factual error.” In re Winship, 397 U.S. 358, 363 (1970). This burden recognizes that far more important values are at stake in criminal cases, for the individual and for society, than in civil actions:

The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. . . . Moreover, use of the reasonable-doubt standard is

indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.

Id., 363-364 (referring to these as “transcending value[s]”).

Allowing prosecutors to use expert testimony that would be barred from civil cases is backwards, irrational and unconstitutional.

**3. O.C.G.A. § 24-9-67.1 May Not Be Applied Retroactively Where Plaintiff Has Relied Substantially on Prior Law in Procuring and Presenting Expert Evidence.**

Although legislation that changes evidentiary rules may operate retroactively *as a general rule*, there are exceptional circumstances in which the retroactive application of such a statute is forbidden. GTLA respectfully submits that this is one of them. The following argument first shows that exceptions to the general rule are possible, and it then justifies an exception in this case.

The general rule of retroactive application is subordinate to the constitution’s protection for vested rights against later legislation.

[E]ven statutes relating to procedure or legal remedies are undoubtedly within the general rule against retrospective construction where the effect of giving them a retroactive operation will be to disturb vested rights. If retroactive application of a procedural statute would divest any right of property that had already accrued, it should be construed to operate prospectively only.

Truckstops of Am. v. Engram, 229 Ga. App. 616, 617 (1997) (punctuation, internal quotations, and citations omitted). An act “which affects substantive rights

may operate prospectively only.” Hargis v. Department of Human Res., 272 Ga. 617, 617 (2000) (emphasis added; cit. omitted).

Two cases of statutory modifications of evidence law illustrate the point. In Jones v. Oemler, 110 Ga. 202 (1900), this Court rejected retroactive application of a statute that governed the evidentiary weight to be given to government charts. The statute in effect at the time of the litigants’ rights contract specified that charts of oyster beds prepared by the U.S. Geodetic Survey were “conclusive” evidence of the beds’ location. After the contract was executed, the legislature amended the rule, deleting the word “conclusive.” Jones held that the statute could not be considered a mere rule of evidence and therefore should not be applied retroactively.

As the Court explained:

*It is true that acts purely of a remedial nature, and even acts amending the law upon the subject of evidence and the competency of witnesses, etc., may often constitutionally have a retroactive effect, but this rule is made applicable only in such cases where such legislation does not have the effect of impairing any substantial right which had accrued and vested in a person . . . .*

Id. at 218 (emphasis added). This was not a casual aside. Rather, the Court stressed (at 219):

no respectable authority can be found in this country for the proposition that such a law, whether called a remedial statute, or a statute upon the admissibility of testimony in causes, could be retroactive, and could be so applied as to defeat the vested rights of a citizen.

Similarly, in Seaboard Air Line Ry. Co. v. Benton, 175 Ga. 491 (1932),

after a railroad employee was injured, a statute passed that treated an employee's proof of injury on the job as *prima facie* evidence of his employer's negligence. Id. at 496. Critically, this Court held that the determination of whether a statute can be applied retroactively depends on the ultimate effect of a statute, rather than the label it bears, such as "substantive" or "procedural." Thus, on the one hand, "[s]tatutes which simply declare a rule of evidence, *without* creating new rights nor *taking away vested ones*, are not within the rule against retrospective operation." Id. at 499. On the other hand, even "[s]tatutes relating to procedure or legal remedies *are undoubtedly within the general rule against retrospective construction where the effect of giving them a retroactive operation will be to impair the obligation of contracts or to disturb vested rights.*" Id. Because the defendant railroad could not un-ring the bell -- and could neither alter its conduct before some of its employees had been killed, nor its stance at trial after survivors' actions were filed, but before the legislature changed the evidentiary standard -- Seaboard held that the constitution prohibited giving the new law retroactive application. Id. at 500-501.

Although Jones and Seaboard were decided long ago, both decisions remain good law and both reflect the principle that it is "inherently unfair" to "chang[e] the rules mid-game."<sup>23</sup> Both reject the appellees' position that a characterization

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<sup>23</sup> North Fulton Med. Center v. Stephenson, 269 Ga. 540, 545, (1998). See also

of a law as “procedural” or “evidentiary” decides the retroactivity question.

This Court should recognize that substantial expenditures in obtaining competent and admissible expert testimony should give a litigant a vested right to present such testimony as against a later statutory change that would render the testimony inadmissible. This is an issue of the first impression in this Court, but this Court has applied the principle in other cases. See, e.g., Barker v. County of Forsyth, 248 Ga. 73 (2) (1981), and its progeny. Under these cases, if a landowner in good faith has “made a substantial change of position in relation to the land, made substantial expenditures, or . . . incurred substantial obligations” in reliance on a pre-existing right to develop land, the landowner acquires vested rights to develop the land that cannot be defeated by later zoning. Meeks v. City of Buford, 275 Ga. 585, 587 (2002). An individual’s right to continued use of existing law becomes vested if the individual has undertaken “*some* act in reliance upon that law.” Coastal Ga. Reg’l Dev. Center, 263 Ga. 827, 831 (1994) (emphasis added).

The present case stands on similar footing. Before the legislative change,

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Bay View, Inc. v. United States, 278 F.3d 1259, 1268 (Fed. Cir. 2001) (“it violates fundamental concepts of justice and fairness to change the rules after the game is played.”)(citing Eastern Enterprises v. Apfel, 524 U.S. 498, 529 (1998), and United States v. Security Indus. Bank, 459 U.S. 70, 73-74 (1982)). As Justice Scalia has explained, there is “timeless and universal human appeal” to the notion that “the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place.” Kaiser Alum. & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855 (1990) (Scalia, J., concurring).

the individuals in both sets of cases had a right to use their land or expert in accordance with existing law. Both sets initiated that use, either by substantial expenditures or by incurring substantial obligations, at a time when the law allowed them to bring the use to its intended conclusion. Both initiated the use in good faith. Arguendo, both sets of legislative bodies retained the right under their police powers to enact the legislation that prohibits the ultimate, intended use. The same result should obtain in both cases. Though the legislation may be valid prospectively, and valid in most *other* cases retroactively, it should not be applied retroactively in *this* case due to the party's substantial detrimental reliance on the prior state of the law.

### CONCLUSION

GTLA respectfully requests that the Court consider these arguments, preserve the right to trial by jury as intended by the framers of our government, require no higher standard for expert testimony in civil than in criminal cases, and protect these plaintiffs from substantial losses due to the later enactment of SB3.

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CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the foregoing BRIEF OF AMICUS CURIAE GEORGIA TRIAL LAWYERS ASSOCIATION upon all counsel of record by mailing the same with sufficient postage in a properly addressed envelope.

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