No. 18-50120

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff–Appellee,

v.

PATRICK JOHN BACON

Defendant–Appellant.

On appeal from the United States District Court
for the Central District of California, No. 5:17-cr-00159-PA-1
Honorable Percy Anderson

AMICI BRIEF OF FEDERATION OF DEFENSE AND CORPORATE COUNSEL, ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL, AND ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA IN SUPPORT OF APPELLANT BACON

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ALL PARTIES CONSENT TO FILING

[9th Cir. Rule 29-2(a)]

Both appellant Patrick John Bacon and appellee the United States have consented to the filing of this amicus brief.

IDENTITY OF AMICI AND THEIR INTERESTS

[FRAP 29(A)(4)(D)]

Identify of amici curiae.

FDCC. The Federation of Defense and Corporate Counsel (FDCC) is a not-for-profit corporation with a national and international membership of 1,400 leading defense and corporate counsel working in private practice, as in-house counsel, and as insurance claims representatives. Members are peer selected through a rigorous process evaluating both competence and commitment to the judicial system. The FDCC constantly strives to protect the American system of justice. Its members have established a strong legacy of representing the interests of civil defendants, including publicly and privately-owned businesses, public entities and individual defendants. The FDCC seeks to assist courts in addressing issues of importance to its membership that concern the fair and predictable administration of justice. FDCC members routinely face *Daubert* issues in district and appellate courts.

The FDCC's membership is able to provide both scholarly and practical insight into the effect of *Daubert* issues and error in civil cases. Through its broad membership and nationwide perspective, FDCC is uniquely qualified to address the *Daubert* error remedy question posed in this case as it will impact civil cases.

ASCDC and ADC. The ASCDC and ADC are two of the nation's largest and preeminent regional organization of lawyers who specialize in defending civil actions. Together they have over 2,000 attorney members throughout California and Nevada, among whom are many of the leading trial and appellate lawyers of the civil defense bar. Its members regularly practice in Ninth Circuit United States District Courts and in the Ninth Circuit. ASCDC and ADC are actively involved in assisting courts on issues of interest to their members, often, has here, in conjunction with each other. In addition to representation in amicus appellate matters, ASCDC and ADC provides their members with professional fellowship, specialized continuing legal education, representation in legislative matters, and multifaceted support, including a forum for the exchange of information and ideas. ASCDC's and ADC's members regularly confront *Daubert* issues in defending civil cases, including on appeal.

Amici curiae's viewpoint. The *Daubert* error remedy issue here is presented in the context of a criminal case. But *Daubert*

applies as much to civil cases as to criminal ones. This Court's prior en banc precedent on the *Daubert* error remedy issue is a civil asbestos case, *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457 (9th Cir. 2014) (en banc), of the type that many FDCC, ASCDC, and ADC members routinely try. The FDCC, ASCDC, and ADC express no opinion regarding the effect of *Daubert* error in criminal cases, but have relevant insight as to how such error should be remedied on appeal in civil cases and on whether *Estate of Barabin* should be reaffirmed in the civil context.

Source of authority to file. This brief is being filed with the consent of the parties to bring the additional perspective of civil litigants. (FRAP 29(a)(2) & (a)(3)(B).)

STATEMENT REGARDING AUTHORSHIP

[FRAP 29(A)(4)(E)]

This brief is wholly the work of counsel for amici. No party or party's counsel and no person other than amici curiae contributed money intended to fund preparation and submission of this brief, and no party or its counsel have authored this brief in whole or in part.

INTRODUCTION

In *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457 (9th Cir. 2014) (en banc), cert. denied, 574 U.S. 815 (2014), this Court held that vacating the judgment and remanding for a new trial, not a conditional vacating of the judgment and remand for a new evidentiary decision and potential reinstatement of the judgment, was the proper remedy for a threshold evidentiary error. *Estate of Barabin* was a civil trial where the district court erred by admitting expert testimony without performing the necessary Federal Rule of Evidence 702/*Daubert* gatekeeping analysis, *see Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579 (1993), and the admission of the expert evidence was prejudicial. *Estate of Barabin* reached the correct holding as to the appellate remedy for *Daubert* error in improperly admitting expert testimony in a civil case and it should be reaffirmed.

A. *Estate of Barabin*'s reasonable conclusion.

Estate of Barabin was a personal injury asbestos exposure action. The plaintiff presented two experts to support his claims of exposure and causation. The experts, according to the district court, had dubious credentials to opine on the particularities of the case and relied on scientific tests under markedly different conditions than those at issue and a controversial scientific theory. The district court, nonetheless, allowed them to testify without a *Daubert* analysis or

hearing. 740 F.3d at 461-62. Plaintiffs admitted that they had no case without these experts' testimony. *Id.* at 465 n.5. The *Estate of Barabin* majority held that, in line with substantial precedent, "when the district court abdicates its responsibility to answer a threshold question of admissibility," *id.* at 466, and the admission of the evidence is otherwise prejudicial, the correct appellate result is a reversal and a retrial.[1]

The Tenth Circuit has cogently explained why:

- "First, the trial took place over two years ago. Deciding the [threshold admissibility] issue now would require the district court to travel back in time and speculate how it would have ruled over two years ago, before hearing the trial evidence."
- "Second, remanding for consideration of the motion in limine would create a dilemma for the district court, which would have an overwhelming temptation to rationalize the exclusion of the

[1] The Sixth Circuit suggests that *Estate of Barabin* relieves an appellant of the burden of showing prejudice. *A. K. By & Through Kocher v. Durham Sch. Servs., L.P.*, 969 F.3d 625, 630 n.4 (6th Cir. 2020). Not so. *Estate of Barabin* requires an appellant to show error *and* prejudice—a significant chance of a different verdict. *Thereafter*, if an appellee wishes to argue that the evidence would have been admitted or excluded for a reason not relied on by the district court *that* is the appellee's burden.

> [evidence]. *See Dodge v. Cotter Corp.*, 328 F.3d 1212, 1229 (10th Cir. 2003) ('We decline to entertain the possibility of a remand to the district court to make specific findings relative to these experts, for we think no district court would be well positioned to make valid findings given the overwhelming temptation to engage in post hoc rationalization of admitting the experts.').)"

United States v. Tony, 948 F.3d 1259, 1265 (10th Cir. 2020) (citing *Estate of Barabin* and *Ruiz-Troche v. Pepsi Cola of Puerto Rico Bottling Co.*, 161 F.3d 77, 88 (1st Cir. 1998) (deciding that "the fairest course," when evidence of the victim's cocaine use was improperly excluded, was to order a new trial rather than remand for consideration of other evidentiary objections)); *accord Adamscheck v. Am. Family Mut. Ins. Co.*, 818 F.3d 576, 590 (10th Cir. 2016) (civil case *Daubert* error; quoting *Dodge*, 328 F.3d at 1229 (*Daubert* error)) *see Mukhtar v. California State Univ., Hayward,* 319 F.3d 1073, 1074 (9th Cir. 2003), overruled on other another ground in *Estate of Barabin*, 740 F.3d at 467 (civil case *Daubert* error; "[t]o remand for an evidentiary hearing post-jury verdict undermines *Daubert*'s requirement that *some* reliability determination must be made by the trial court *before* the jury is permitted to hear the evidence. Otherwise, instead of fulfilling its mandatory role as a gatekeeper, the

district court clouds its duty to ensure that only reliable evidence is presented with impunity. A post-verdict analysis does not protect the purity of the trial, but instead creates an undue risk of post-hoc rationalization. This is hardly the gatekeeping role the Court envisioned in *Daubert* and its progeny," original italics.)

Both points that the Tenth Circuit makes are well taken.

B. The district court delay in revisiting the decision.

The reality is that an appellate reversal will take place years after the evidentiary ruling at issue. The district court will have handled scores upon scores of other cases in the interim. It cannot possibly be in position to recall the context. Yet, under *Daubert*, context is critical, *e.g.,* does the purported scientific protocol match up with the issues in the particular case? *See Estate of Barabin*, 740 F.3d at 461 (*Daubert* issue included whether laboratory tests were a reliable indicator of employment locale conditions). Nor can it be that the remand order should depend on whether the district judge who ruled initially is available to revisit the case.

C. The post hoc rationalization problem.

Likewise, knowing the conclusion of the trial, a district court faces the real problem of post hoc rationalization in making an evidentiary decision. This is not a knock on the integrity of district

court judges; it is the reality that one cannot unring the bell. *Daubert* and Rule 702 admissibility determinations are forward-looking decisions. To be objective, they should not be colored by knowing what the outcome will be based on the ruling made. A district court judge may not even be aware that he or she is engaging in such post hoc rationalization. But instinctively the psychological incentives are to make an after-the-fact evidentiary decision that will justify (and not require to be retried) a result that the judge may think was fair, but that at least one party may be disappointed in.

And it is not just the threat of *actual* post hoc rationalization that matters. The perceptions by litigants and outside observers may well be that any decision years after the fact to stick with the initial ruling just on a different ground that has the effect of leading to a known result (i.e., reinstating the judgment) is simply post hoc rationalization. That undermines confidence in the judicial system, something that is as important as, if not more important than, judicial efficiency.

D. The parties are free to make a better district court record.

The party prevailing in the district court is not left powerless by the *Estate of Barabin* rule. The party prevailing on one of several evidentiary grounds can ask the district court to reach the alternative

grounds. And, failing that, the party prevailing in the district court can make a full record of any alternative basis for the evidentiary ruling and argue that alternative ground on appeal. The issue in *Estate of Barabin* was that the record on appeal did *not* suffice to justify a definitive *Daubert* outcome. *See* 740 F.3d at 467 ("We cannot speak to the admissibility of the expert testimony at issue here because the record before us is too sparse to determine whether the expert testimony is relevant and reliable"); *id*. at 468 (Nguyen, J., concurring in part) ("I also agree with the majority that we are unable to determine based on the record before us whether the expert testimony is admissible").

But *Estate of Barabin* holds that this Court *can* make such a determination in the first instance *if* an adequate record has been made by the parties in the district court. *Id.* Certainly, the party prevailing in the district court can argue on appeal why the same evidentiary decision made by the district court can be justified *on the already existing record*. As *Estate of Barabin* holds, "a reviewing court should have the authority to make *Daubert* findings based *on the record established by the district court*. We agree …." *Id*. at 467 (italics added). The solution is not for the appellate courts to make exceptions that may allow parties to make a *new* record and then

immediately return on appeal in particular instances, it is for the parties to make their record in the district court in the first place.

E. The downside of abandoning *Estate of Barabin*.

There is no logical reason why a contra-*Estate of Barabin* rule would be limited to *Daubert* determinations. Presumably, it would open the gates for "conditional vacating" of judgments whenever a district court errs with regard to a threshold evidentiary admissibility question. And, per the *Estate of Barabin* concurrence, there could be conditional remands for the district court to decide in the first instance whether the admission of inadmissible evidence (or presumably the exclusion of admissible evidence) was prejudicial. 740 F.3d at 471 (Nguyen, J., concurring in part).

If so, why should not *all* cases finding evidentiary error on appeal remand for the district court to decide in the first instance whether its error was prejudicial? That would completely disrupt appellate review as we know it and substantially lengthen the appeal process with an appeal, a conditional remand, and an almost inevitable appeal of the district court's new decision. Determining *prejudice* flowing from an error found on appeal is an *appellate* function.

Conceptually, it is possible that the decision might be left to each individual appellate panel in each separate appeal with no one-

size-fits-all rule. *See* 28 U.S.C. § 2106. But that just would create a randomness on appeal that is the antithesis of the certainty and predictability that are beneficial to litigants and courts. We can identify no test by which such a sometimes conditional remand, sometimes retrial rule could be consistently applied. Likewise, arguably, a distinction might be made between errors in admitting evidence (as in *Estate of Barabin*) and excluding evidence (as here), but again, we see no set of principles as to how to differentiate the two circumstances in application.

A conditional remand rule will substantially disrupt the system of orderly trial and appeal to allow a party a remand to seek to create a *new and different* record—either factual, legal argument, or judicial determination—than the one, in fact, presented on appeal. Logically, why would not a party be allowed a conditional remand to assert new evidentiary objections, not previously raised, that if sustained on remand would avoid a retrial on the same facts?

Nor would a conditional remand necessarily result in a quick resolution of the case. If the district court sticks with its prior ruling based on a new rationale, the losing party presumably would be entitled to a new appeal. *See* 740 F.3d at 471 (Nguyen, J., concurring in part). What would be created would be an iterative series of appeals at odds with the usual finality rules.

CONCLUSION

We express no opinion on how these rules should apply in criminal cases. Nor do we express any opinion about the facts of the particular case before this Court on en banc review.

But, consistent with appellant's position and contrary to the concurrence in the panel decision, we strongly urge this Court to reaffirm *Estate of Barabin* in its context: *Daubert* error leading to the admission of expert testimony that has not been vetted for reliability where the existing record does not allow an appellate determination in the first instance of the *Daubert* issue. In that context, the determination that *Daubert* error occurred and that it prejudiced the appellant should result in a reversal and remand for a new trial.

Dated: October 6, 2020

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CERTIFICATE OF COMPLIANCE WITH

FED. R. APP. P. 29(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains **2,490** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 365 in 14-point, Times New Roman font.

Dated: October 6, 2020

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CERTIFICATE OF SERVICE

[No. 18-50120]

I hereby certify that I electronically filed the foregoing **AMICI BRIEF OF FEDERATION OF DEFENSE AND CORPORATE COUNSEL, ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL, AND ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA IN SUPPORT OF APPELLANT BACON** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 6, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By: s/ Chris Hsu
Chris Hsu