General Electric Co. v. Joiner: Lighting Up the Post-*Daubert* Landscape?

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The U.S. Supreme Court considered an appeal by the defendant, General Electric Co., in a products liability action. The appeal resulted from the ruling by the Court of Appeals for the Eleventh Circuit that overturned the district court's exclusion of evidence of cancer causation. The Supreme Court held that questions of the admissibility of such evidence are reviewable under the same standard—abuse of discretion—as are other decisions regarding evidentiary issues and are not subject to a more stringent standard of review. The Court further held that whether or not the evidence is excluded or is dispositive of the case does not change this standard of review. The Court then examined and upheld the decision by the trial court rather than remanding the action to the circuit court for reconsideration in light of the decision. Coupled with a series of recent circuit court of appeals decisions, the case establishes some guidance for the basis and methodology to be used to admit social science evidence in future cases.

The U.S. Supreme Court, on December 15, 1997, issued its opinion in the case of *General Electric Co. v. Joiner*.[1] The Court ruled that the standard of review for the admissibility of expert testimony in federal cases is abuse of discretion, the same standard as used in reviewing other evidentiary decisions. The ruling resolved a split among the circuit courts on this issue. The Court held that evidence admitted under the standard announced in *Daubert v. Merrell Dow Pharmaceuticals Inc.*[2] is not subject to more stringent review. Neither the nature of the evidence, a decision to exclude rather than admit the evidence, nor an evidentiary ruling that determines the outcome of the action requires a different or higher standard of appellate review.

Chief Justice Rehnquist delivered the opinion for the unanimous Court with respect to Parts I and II of the decision, which discuss the standard of review, and for the eight to one majority for Part III, which examined and approved of the decision by the trial court to exclude the evidence. Justice Breyer filed a concurring opinion with respect to Part III, and Justice Stevens filed an opinion concur-

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ring in part and dissenting in part with respect to Part III.

Case Background

The respondent, Robert Joiner, an electrician in the Water & Light Department of Thomasville, GA, filed suit in state court, alleging that his small-cell lung cancer had been caused by on-the-job exposure, beginning in 1973, to polychlorinated biphenyls (PCBs) contained in the coolant of electrical transformers. The petitioners General Electric and Westinghouse Electric manufactured transformers and the dielectric fluid used as a coolant. The petitioner Monsanto manufactured PCBs whose production and sale had been banned by Congress, with limited exception, in 1978.

Joiner alleged in his complaint that his development of cancer was linked to his exposure to PCBs and their derivatives, polychlorinated dibenzofurans (furans) and polychlorinated dibenzodioxins (dioxins). The suit alleged that the exposure to PCBs "promoted" his cancer, and had it not been for the exposure, his cancer would not have developed for many years if at all. Joiner was a smoker with a family history of smoking and a family history of lung cancer.

The petitioners removed the action to federal court and moved for summary judgment, contending that (1) there was no evidence that Joiner suffered significant exposure to PCBs, furans, or dioxins, and (2) there was no admissible scientific evidence that PCBs promoted Joiner's cancer. Joiner responded that the disputed factual issues required resolution by a jury. He supported his opposition to the summary judgment motion with the deposition testimony of expert witnesses who testified that PCBs alone can promote cancer and furans and dioxins can also promote cancer. They opined that Joiner's exposure to these compounds was likely responsible for his cancer.

The district court ruled that a genuine issue of material fact existed as to whether Joiner had been exposed to PCBs. The court granted the summary judgment motion however, finding that (1) no genuine issue existed as to whether Joiner had been exposed to furans and dioxins, and (2) the testimony of Joiner's experts failed to show a link between PCB exposure and small-cell lung cancer. The court found the expert testimony linking PCB exposure to small-cell lung cancer inadmissible because the testimony did not rise above "subjective belief or unsupported speculation."[3]

The Court of Appeals for the Eleventh Circuit reversed, holding that "[b]ecause the Federal Rules of Evidence governing expert testimony display a preference for admissibility, we apply a particularly stringent standard of review to the trial judge's exclusion of expert testimony."[4] The Court of Appeals found two fundamental errors in the district court's decision to grant summary judgment. On the first issue of excluding the expert testimony, the Court of Appeals opined that the district court should limit its role to determining the "legal reliability of proffered expert testimony, leaving the jury to decide the correctness of competing expert opinions." The district court had excluded the testimony because the court "drew different conclusions from the re-

search than did each of the experts."[5] The Court of Appeals also found that regarding the second issue concerning Joiner's exposure to furans and dioxins, there existed testimony in the record to support the proposition that he had been exposed to both agents. Thus, the district court erred in holding that no genuine issue of material fact existed regarding exposure to furans and dioxins.

Decision of the U.S. Supreme Court

The U.S. Supreme Court held that the Court of Appeals erred in applying a "particularly stringent" standard of review to the exclusion of Joiner's expert testimony. The Court found that the proper standard of review of all evidentiary decisions is abuse of discretion.[6, 7] The Court disagreed with Joiner's assertion that the phrase "particularly stringent" announced no new standard of review, but simply acknowledged a need for appellate courts to devote more resources to analyzing district court decisions that are dispositive of the entire litigation. The Court found that whether a ruling was "outcome determinative" did not affect the standard of review for evidentiary rulings. Unlike motions for summary judgment in which disputed issues of fact are resolved against the moving party, the admissibility of expert testimony is not an issue of fact, but rather a matter of law, and is reviewable under the abuse of discretion standard.

The Court also rejected the assertion by the Court of Appeals that the decision in *Daubert*[8] somehow altered the general rule regarding the standard of review in the context of a district court's decision to exclude scientific evidence. The general rule, first announced in *Spring Co. v. Edgar*,[9] that "cases arise where it is very much a matter of discretion with the court whether to receive or exclude the evidence; but the appellate court will not reverse in such a case, unless the ruling is manifestly erroneous," remains the standard today. The Court then cited as comparisons *Beech Aircraft Corp. v. Rainey*,[10] applying an abuse of discretion review to a decision to exclude evidence and *United States v. Abel*,[11] applying an abuse of discretion review to a decision to admit evidence. The Court noted that *Daubert* did not address the standard of appellate review for evidentiary rulings. The decision in *Daubert* did leave in place the "gatekeeper" role of the trial judge in screening all scientific testimony or evidence to ensure that it is not only relevant, but also reliable.[12]

Supreme Court Examines District Court Decision

In Part III of the decision, Chief Justice Rehnquist writing for the majority examined the trial judge's decision and upheld it, rather than remanding the question to the Court of Appeals for reconsideration in light of the Court's holding. The Court supported the trial court's decision that the animal studies Joiner's experts relied on were too unrelated to the facts of the case to be a proper foundation for the opinion offered. The Court noted that, at the hearing, Joiner failed to respond to the criticism offered as a challenge to his experts' conclusions. "Rather than explaining how and why the experts could

have extrapolated their opinions from these seemingly far-removed animal studies, respondent chose 'to proceed as if the only issue [was] whether animal studies can ever be a proper foundation for an expert's opinion.'"[13] In the view of the Court, "whether animal studies can ever be a proper foundation for an expert's opinion was not the issue. The issue was whether these experts' opinions were sufficiently supported by the animal studies on which they purported to rely."[14] The Court then found that in this case the studies were so dissimilar to the facts presented in the litigation that it was not an abuse of discretion for the district court to have excluded the testimony.

Joiner next contended that the language of *Daubert,* that the "focus, of course, must be solely on principles and methodology, not on the conclusions that they generate,"[15] supports the Court of Appeals reversal of what he deemed to be the district court's error. The Supreme Court found that, "conclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. Nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit*[16] of the expert." A court's conclusion that there is simply too great an analytical gap between the data and the opinion proffered is not in the Court's opinion an abuse of discretion.[17]

The Court concluded its opinion by noting that the petitioner's had not challenged the Court of Appeals reversal of the district court's finding of "no genuine issue" regarding exposure to furans and dioxins. Therefore, if such exposure can be shown to exist, the question of expert testimony regarding the effect of such exposure on Joiner remains open for consideration at trial. The matter was remanded for proceedings consistent with the opinion.

Justice Breyer's Concurring Opinion

Justice Breyer in his concurring opinion cited approvingly the call by the *New England Journal of Medicine* in its *amicus* brief that: "[A] judge could better fulfill this gatekeeper function if he or she had help from scientists. Judges should be strongly encouraged to make greater use of their inherent authority. . . to appoint experts. . . Reputable experts could be recommended to courts by established scientific organizations, such as the National Academy of Sciences or the American Association for the Advancement of Science. . ."[18]

He noted that the Federal Rules of Evidence authorize judges to appoint their own experts. The "offer of cooperative effort from the scientific to the legal community" would make a judge's gatekeeping task under *Daubert* "not. . . inordinately difficult to implement."

Justice Stevens' Dissenting Opinion

Justice Stevens, concurred in the judgment, but filed a dissenting opinion with respect to Part III of the Court's opinion. He noted that: "*Daubert* quite clearly forbids trial judges from assessing the validity or strength of an expert's scientific

conclusions, which is a matter for the jury. Because I am persuaded that the difference between methodology and conclusions is just as categorical as the distinction between means and ends, I do not think the statement that 'conclusions and methodology are not entirely distinct from one another,' *ante*, at 519, is either accurate or helps us answer the difficult admissibility question presented by this record."[19]

He then notes that, "..it bears emphasis that the Court has not held that it would have been an abuse of discretion to admit the expert testimony." He emphasizes that the point of the holding is that the "abuse of discretion standard of review applies whether the district judge has excluded or admitted evidence." Nothing in either "*Daubert* or the Federal Rules of Evidence requires a district judge to reject an expert's conclusions and keep them from the jury when they fit the facts of the case and are based on reliable scientific methodology."[20]

Discussion

Much is being made of the implication of Chief Justice Rehnquist's decision to review the district court's findings in Part III of the Joiner decision.[21] It is important to focus on the language in the opinion, and the degree to which it addresses the issue properly before the Court on appeal from the Eleventh Circuit. The issue before the Court was whether the Court of Appeals applied the correct standard of review to the trial court's decision on the admissibility of the expert testimony. The debate over the standards of admissibility of expert testimony is ongoing. Neither science, nor medicine, nor law stand still. They continue to evolve as disciplines and in relationship to one another. As has been noted, "The difficulty that the courts and litigants confront is that science does not exist for law, but justice frequently depends on science. Redress of injury for harmful products cannot stand still for the completion of broad, double-blind studies that can take decades. Neither courts nor plaintiffs can wait, especially when most statutes of limitation require that suits be filed in one to three years."[22]

In 1923, *Frye*[23] began by outlining the problem, "Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in the twilight zone the evidential force of the principle must be recognized." Then, announcing the test that would remain the standard until *Daubert,* the Frye Court held that ". . . [w]hile courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained *general acceptance* [emphasis added] in the particular field in which it belongs."[23]

The value of the *Joiner* decision is its assertion that although *Daubert* overruled the general acceptance test of *Frye*, it did not alter the underlying principles developed by the Federal Rules of Evidence. Those who seek to offer expert opinions to "assist the trier of fact to understand the evidence or to determine a fact in issue"[24] must remember that the facts or data upon which the expert bases his opinion must be "of a type reasonably

relied upon by experts in the particular field in forming opinions or inferences upon the subject."[25] Further, *Daubert* directs trial courts to conduct preliminary hearings not only to assess whether the reasoning or methodology underlying the testimony is scientifically valid, but also to determine whether the reasoning or methodology can properly be applied to the facts in issue.[26] The Court in *Joiner* pointed out that the respondent made no effort to demonstrate that the studies the experts relied on could be applied to the facts of the case before the court.[27] In analyzing the district court's findings in the *Joiner* case, Justice Rehnquist was making the point clear for all who follow that trial courts have broad discretion to reject proffered expert opinions if they are inadequately supported by the data. By pointing out the evidentiary flaws with the proffered opinions in the *Joiner* action, he also established an outline for the types of decisions the appellate courts could consider to be an abuse of discretion.

The Supreme Court in Joiner did not directly address the issue of whether distinctions need to be made with respect to the admissibility of non-scientific (opinion based on skill or experience) as opposed to scientific (opinion based on the application of scientific principles) expert testimony. It is clear however, that the standard of review will be the same. Trial judges now have broad discretion (at least in federal trials) to admit or reject evidence that is proffered based on the experience or training of the expert in a particular field. Recent Court of Appeals decisions have accepted *nonscientific* expert testimony based on the experience of the expert in the areas of clinical medicine,[28] mechanical and metallurgical engineering with respect to product design,[29] and tire design failure.[30]

Another important element of the *Daubert* assessment of admissibility is the consideration of reliability. In *Moore v. Ashland Chemical, Inc.*,[28] the Fifth Circuit explained that when a treating physician is testifying to matters of causation with respect to the course of treatment he might prescribe, he relies on statements by patients and relatives, reports and opinions of nurses, technicians, and other doctors, hospital records, and x-rays to make "life-and-death decisions." Although Federal Rules of Evidence, Rule 703 does not require that such facts and data be admissible in evidence, it nonetheless permits reliance on the data, as these are the types of data reasonably relied upon by experts in the particular field in forming opinions on the subject.

The Court in *Joiner* pointed out that no effort had been made to explain "how experts could have extrapolated their opinions from these seemingly far-removed animal studies."[29s] The necessary partnership between trial counsel and expert witness appears to have been lacking in *Joiner*. The basis and the evidentiary value of the experts' opinions never got before the finder of fact. Any support that may have existed in the literature and in the scientific community for the theories advanced seems also not to have been presented in the *Joiner* hearing. The experts failed to adequately relate the facts of the *Joiner* case to the elements of their opinions as to causation. Without the link

to form the basis upon which to assess reliability, the evidence would be of little assistance to the jury to resolve the complex issues of causation. It is not the conclusion of an expert that has value to the jury, but the ability to relate the conclusion to the elements of the case at hand. The assertion by Justice Stevens that the *Joiner* brief points out that the Environmental Protection Agency uses the "weight of the evidence" methodology adopted by Joiner's experts is of little value if that information was not, as the record seems to suggest, also presented to the trial judge. The need to satisfy the trial court is now all the more important, since evidentiary decisions by district courts will only be overturned if an abuse of discretion can be demonstrated.

References

1. 118 S. Ct. 512 (1997)
2. 509 U.S. 579 (1993)
3. 118 S. Ct. at 516, citing 864 F.Supp. 1310, 1326 (ND GA 1994)
4. 118 S. Ct. at 516, citing 78 F.3d 524, 529 (11th Cir. 1996)
5. 118 S. Ct. at 516, citing 78 F.3d at 533
6. 118 S. Ct. at 517, citing Old Chief v. United States, 519 U.S. 172, n.1 (1997) and United States v. Abel, 469 U.S. 45, 54 (1984)
7. "A discretion exercised to an end or purpose not justified by and clearly against reason and evidence. Unreasonable departure from considered precedents and settled judicial customs, constituting error of law." Beck v. Wings Field, Inc., 122 F.2d 114, 116, 117 (3d Cir. 1941)
8. 509 U.S. 579 (1993)
9. 99 U.S. 645, 658 (1879)
10. 488 U.S. 153, 172 (1988)
11. 469 U.S. at 54
12. 118 S. Ct. at 517, citing 509 U.S. at 589 (footnote omitted)
13. 118 S. Ct. at 518, citing General Electric v. Joiner, 864 F.Supp. at 1324
14. 118 S. Ct. at 518
15. 118 S. Ct. at 518, quoting 509 U.S. at 595
16. An assertion whose authority is based solely upon the individual who made it and not upon precedent
17. 118 S. Ct. at 519, citing Turpin v. Merrell Dow Pharmaceuticals, Inc., 959 F.2d 1349, 1360 (6th Cir.), cert. denied 506 U.S. 826 (1992)
18. 118 S. Ct. at 520
19. 118 S. Ct. at 523
20. 118 S. Ct. at 523
21. See Nat'l L.J., Dec. 29, 1997–Jan. 5, 1998, at A10
22. Scientific law of unintended consequences, Nat'l L. J., Jan. 19, 1998, at A22
23. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)
24. Fed. R. Evid. 702
25. Fed. R. Evid. 703
26. 509 U.S. at 592
27. 118 S. Ct. at 518
28. Moore v. Ashland Chemical Corp., 126 F.3d 679 (5th Cir. 1997)
29. McKendall v. Crown Control Corp., 122 F.3d 803 (9th Cir. 1997)
30. Carmichael v. Samyang Tire, Inc., 131 F.3d 1433 (11th Cir. 1997)