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Joiner v. General Electric: The Next Chapter in the Supreme Court's Handling of Expert Testimony

BY QUENTIN F. URQUHART, JR. AND BRETT A. NORTH

INTRODUCTION

In its coming term, the United States Supreme Court will hear argument in a case that will likely have a significant impact on the future standards for admissibility of expert witness testimony. Four years ago, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993), the Court held that "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." Pursuant to Federal Rule of Evidence 702, *Daubert* charged federal courts with the "gatekeeping role" of assessing proposed scientific evidence to determine: (1) *scientific reliability*—"whether that reasoning or methodology underlying the testimony is scientifically valid" and (2) *relevance* or *"fit"*—"whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-93.

In the years since *Daubert*, district judges have studiously undertaken their gatekeeping responsibilities. Hundreds of evidentiary hearings have been conducted pursuant to Federal Rule of Evidence 104(a) in which the district courts have made "preliminary assessment[s] of whether the reasoning or methodology underlying [proffered expert] testimony is scientifically valid and of whether that reasoning or methodolgy properly can be applied to the facts in issue." *Id.* The confidence that the Supreme Court expressed in the capacity of the district judges to undertake these responsibilities has been well placed. Since *Daubert*, there has been greater uniformity in the admission of scientific evidence by district courts. Although the Court did not set forth a standard for appellate review of these evidentiary rulings in *Daubert*, the federal courts of appeals, consistent with longstanding precedent, have generally supported the expanded role of the district judges by deferring to their rulings unless an "abuse of discretion" was evident.

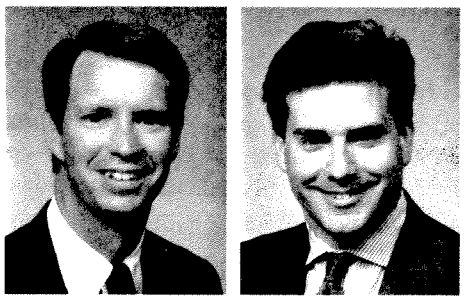
The progress which has been made in this area is now threatened by decisions from a minority of circuit courts which have adopted a "particularly stringent" standard of review when the *Daubert* gatekeeping function results in *exclusion* of expert testimony. The Supreme Court has granted certiorari to review the most recent of these decisions, *Joiner v. General Electric Co.*, 78 F.3d 524 (11th Cir. 1996).

This article will provide the reader with an overview of the district court ruling in *Joiner*, the decision of the appellate court reversing that ruling, and the petition for writ of certiorari filed with the United States Supreme Court. It will then address two fundamental questions put at issue by the Eleventh Circuit's decision in *Joiner*. First, what is the correct standard for review of district court decisions excluding expert testimony. Second, in performing its gatekeeping function, may the district court properly examine the analytical reasoning behind the expert's opinions. The answers to these questions will determine the extent to which *Daubert* will continue to act as a shield against "junk science" in the courtroom.

THE DISTRICT COURT'S *JOINER* RULING

In 1973, Robert Joiner began work as an electrician for the City of Thomasville, Georgia, a position which required him to maintain the city's electrical transformers. When a transformer was in need of repair, Joiner was required to stick his hands into the "dielectric" insulating fluid within the transformer and then "bake" the core of the transformer dry under high heat. In 1983 it was determined that about one-fifth of the city's 2,668 transformers contained dielectric fluid contaminated with polychlorinated biphenyls (PCBs).

In 1991, at the age of 37, Joiner was diagnosed with lung cancer. Although he had a history of smoking and apparently some genetic predisposition to lung cancer, he and his wife filed suit in state court against the manufacturers of the transformers and dielectric fluids on the theory that the early onset of his



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disease was caused by exposure to PCBs and their derivatives—polychlorinated dibenzofurans ("furans") and polychlorinated dibenzodioxins ("dioxins"). The suit was removed to the United States District Court for the Northern District of Georgia.

The defendants moved for summary judgment on two grounds: (1) Joiner was not significantly exposed to PCBs, furans, or dioxins; and (2) Joiner could not present credible, admissible scientific evidence that his small cell lung cancer was caused by exposure to dielectric fluid. *Joiner v. General Electric Co.*, 864 F.Supp. 1310, 1314 (N.D.Ga. 1994). The court found that a "genuine dispute" existed over whether Joiner was exposed to PCBs, but held that there was insufficient evidence to raise a genuine issue of fact concerning exposure to furans or dioxins. *Id.* at 1319. The district court was thus left with the issue of whether plaintiffs' expert testimony that Joiner's lung cancer was caused by exposure to PCBs was admissible under *Daubert*.

In performing its *Daubert* analysis the district court first found that the experts' opinions did not "fit" the facts of the case because they were inextricably "bound up" with the assumption that Joiner *was* exposed to furans and dioxins. *Id.* at 1320. After conducting a thorough review of the testimony from plaintiffs' experts, the court concluded (*id.* at 1322):

> The foregoing testimony makes it clear that Plaintiffs' experts assumed Joiner was exposed to furans and dioxins. Moreover, the assumption is an integral part of the foundation for the experts' opinions that PCBs contributed to Joiner's lung cancer. However, as discussed above, Plaintiffs have failed to show a genuine dispute over whether furans and dioxins were in the PCBs to which Joiner was exposed. Thus, the testimony of Plaintiffs' experts manifestly does not fit the facts of this case, and is therefore inadmissible.

The district court further held that the proffered opinions would be inadmissible even without the unfounded assumptions about furans and dioxins because they were not sufficiently reliable under *Daubert*. The court rejected the experts' reliance on mice studies as flawed because: (1) there were only two studies, (2) the studies obviously used massive doses of PCBs, and (3) one of plaintiffs' experts had implicitly admitted the preliminary nature of the findings. 864 F. Supp. at 1323. The court thus concluded that it did not have to reach the issue of whether the mice studies were themselves conducted in a "scientific" manner, for they simply did not support the experts' position that PCBs promoted Joiner's lung cancer. *Id.* at 1326. The trial court also rejected the experts' attempt to rely on four epidemiological studies as they were "either equivocal or not helpful to Plaintiffs." *Id.* at 1324.

In sum, the district court was "not persuaded" that the studies relied upon by plaintiffs' experts supported the "knowledge" that they purported to have, i.e., that PCBs, to a reasonable degree of medical certainty, promote small cell lung cancer in humans. *Id.* at 1326. Because the analytical gap between the evidence presented and the experts' ultimate conclusions on causation was "too wide," the court concluded that the proffered expert opinions did not "rise above subjective belief or unsupported speculation," and were not admissible. *Id.* Summary judgment was granted as to all of plaintiffs' claims.

THE ELEVENTH CIRCUIT'S REVERSAL

In a divided three member panel (one dissent and one concurrence), the United States Court of Appeals for the Eleventh

Circuit reversed the trial court. *Joiner v. General Electric Co.*, 78 F.3d 524 (11th Cir. 1996). Writing for the majority, Judge Rosemary Barkett held (*id.* at 529):

> Because 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.

Using this "particularly stringent standard of review," Judge Barkett conducted her own examination of the opinions of the plaintiffs' experts and concluded that the district court had "improperly assessed the admissibility of the proffered scientific expert testimony." *Joiner*, 78 F.3d at 528. She concluded that "each opinion proffered by the Joiners' experts as scientific knowledge was supported by the respective expert's specialized education, years of experience, physical examination of Joiner, and familiarity with the general scientific literature in the field." *Id.* at 531. She further accepted the experts' assertions that their methodology "has been the basis of diagnosis for hundreds of years" or was one "usually and generally followed by physicians and scientists." *Id.* at 532.

Judge Barkett was particularly critical of the district court for examining whether there was support in science for each link in the reasoning leading to the experts' conclusions, finding that the district court should have accepted the conclusions "viewed in their entirety." *Id.* at 532. Reexamining the entire record, including materials not cited by any party in the district court, the majority held that "the testimony of plaintiffs' experts was erroneously excluded and summary judgment should not have been granted." *Id.* at 534.

Judge Edward S. Smith, Senior Circuit Judge for the Federal Circuit and sitting by designation, dissented. Beginning with "a few basic ideas" he stated that as a "gatekeeper," the trial court must sift through expert testimony and "decide not only whether an expert may testify, but what portion of the expert's testimony is admissible." *Joiner*, 78 F.3d at 535. Noting that "a single expert may offer several opinions to reach his ultimate conclusion, and each opinion must be admissible under *Daubert*," he

Judges should be given the freedom to look behind an expert's facial assertion of "good science" in ruling on the admissibility of proffered expert testimony.

emphasized the role of the trial judge in ensuring that there is a proper analytical connection between the proffered "scientific opinions" and the expert's conclusions. *Ibid.* As aptly put, "an expert may not bombard the court with innumerable studies and then, with blue smoke and sleight of hand, leap to the conclusion." *Id.* at 537.

Based on these precepts, Judge Smith reasoned that the trial court must be vested with "broad discretion" in deciding whether the analytical gap between the expert's opinions and his ultimate conclusion had been properly bridged. 78 F.3d at 535. Citing many decisions from other circuits, the dissent determined that "[i]n applying the *Daubert* framework, the trial court's ruling on whether the expert opinion is (1) reliable (i.e., scientific knowledge grounded in the methods and procedures of science) and (2) relevant (i.e., "fits" the facts of the case) is reviewed for abuse of discretion." *Id.* at 536. The dissent concluded that "[t]he trial court properly applied *Daubert* and did not abuse its discretion in ruling certain expert testimony inadmissible." *Id.* at 540.

THE PETITION FOR WRIT OF CERTIORARI

Following denial of the defendant's request for rehearing and rehearing *en banc*, a petition for writ of certiorari was filed by the defendants with the United States Supreme Court. The question presented to the Court was: "What is the standard of review for trial court decisions excluding expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)?" In requesting certiorari, the petitioners emphasized a three-way split among the federal circuits as to the correct standard when reviewing a district court's exclusion of proffered expert testimony.

One group of courts of appeals (the First, Second, Fifth, Sixth, Seventh and Ninth Circuits) will reverse *Daubert* rulings only if "manifestly erroneous." A second group of appellate courts (the Fourth, Eighth, Tenth and D.C Circuits) apply an "abuse of discretion" standard of review. A minority of two circuits, illustrated by the Eleventh's Circuit's decision in *Joiner*, are not deferential and instead apply a "particularly stringent standard of review," called by the Third Circuit a "hard look" and "more stringent review." See *In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717, 749-50 (3d Cir. 1994), *cert. denied,* 115 S.Ct. 1253 (1995). The petitioners further stressed that the application of a "particularly stringent" standard of review was in conflict with decisions of the Supreme Court. *Salem v. United States Lines Co.*, 370 U.S. 31 (1962); *Spring Co. v. Edgar*, 99 U.S. 645 (1879).

In opposing the grant of certiorari, the plaintiffs attempted to avoid the question posited by the petitioners in its entirety. Instead, they argued that the "two sentences [articulating the particularly stringent standard of review] seized upon by petitioners have, in fact, nothing to do with this case" and that the appellate court had correctly decided the case under a *de novo* standard of review. On March 17, 1997, the United States Supreme Court granted the writ of certiorari. 117 S.Ct. 1243.

THE NEED FOR A DEFERENTIAL STANDARD OF REVIEW

The threshold question the Supreme Court should deal with in *Joiner* will be what is the correct standard in reviewing a trial judge's exclusion of expert testimony. Traditionally, decisions concerning the admissibility of evidence have been reviewed for an abuse of discretion. The reasons for this longstanding deference accorded to the district court are twofold: (1) the trial judge is in the best position to evaluate the proffered testimony in the context of the unique circumstances of each case; and (2) it would be impractical to formulate an evidentiary rule to cover each and every situation, given the "multifarious, fleeting, special, narrow facts that utterly resist generalization." Rosenberg, "Judicial Discretion of the Trial Court, Viewed from Above," 22 Syracuse L.Rev. 635, 662 (1971).

The employment of a deferential standard in reviewing a trial judge's decision to admit or exclude *expert testimony* is also well established. Over one hundred years ago, in *Spring Co. v. Edgar,* supra, the Supreme Court stated: "Whether a witness is shown to be qualified or not as an expert is a preliminary question to be determined in the first place by the court; . . . . Cases arise where it is very much a matter of discretion with the court whether to receive or exclude the [expert] evidence; but the appellate court will not reverse in such a case, unless the ruling is manifestly erroneous." 99 U.S. at 658. Later, in *Salem v. United States Lines Co.*, supra, the Court reaffirmed that "the trial judge has broad discretion in the matter of the admission or exclusion of expert evidence, and his action is to be sustained unless manifestly erroneous." 370 U.S. at 35.

Preservation of this deferential standard has generated a significant degree of interest. *Amicus curiae* briefs have been filed in support of the petitioners in *Joiner v. General Electric* by such diverse groups as the American Medical Association, the Chemical Manufacturers Association, the Pharmaceutical Research and Manufacturers of America, Dow Chemical Company, the Product Liability Advisory Council, the U.S. Chamber of Commerce, the National Association of Manufacturers, and Medmarc. The United States (through the office of the Solicitor General) has also filed an *amicus* brief, citing its "significant interest in the articulation of a clear, principled, and nationally applicable standard for appellate review of decisions to admit or exclude scientific evidence at trial in federal court." These briefs, combined with those filed by the petitioners, persuasively argue that the Supreme Court should adopt a deferential standard of review to ensure that the district courts have the freedom to properly fulfill their gatekeeping functions under *Daubert*. A summary of the most dominant arguments follows.

- ***Daubert* did Nothing to Change the Abuse of Discretion Standard**

The fundamental policies underlying the continued use of the

The assumption that an appellate court should apply a "particularly stringent" standard of review because the Federal Rules of Evidence display a "preference for admissibility" of expert testimony is simply incorrect.

abuse of discretion standard remain just as relevant today as they were one hundred years ago. The historical deference accorded to district court rulings has gained a renewed vitality in light of the specific findings which must be made when considering the admission of expert testimony under *Daubert*. Under the "reliability" prong of Rule 702 of the Federal Rules of Evidence, the trial judge may have to make a variety of determinations (509 U.S. at 593-94).

- Whether the expert's theory "can be (and has been) tested."
- Whether the expert's work "has been subjected to peer review and publication."
- What is "the known or potential rate of error."
- Are there standards "controlling the technique's operation."
- Whether the expert's theory has "widespread acceptance" in the "relevant scientific community."

Under the "relevance" prong of Rule 702, the district court must determine whether the conclusions reached by the expert will "assist the trier of fact to understand the evidence or to determine a fact in issue." *Daubert,* 509 U.S. at 591. This means the trial judge must determine whether the expert's proposed scientific testimony "fits" the specific facts of the plaintiff's case.

In addition to the determinations required by Rule 702, the district court "should be mindful of other applicable rules." *Daubert*, 509 U.S. at 595. Under Rule 703 the trial judge must determine whether the facts and data upon which the opinion are based are "of a type reasonably relied upon by experts in the particular field for forming opinions or inferences upon the subject." Under Rule 403 the court must determine whether the probative value of the testimony is "substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury."

Given the multiplicity of fact-sensitive determinations which must be made by the trial court under the Federal Rules of Evidence, it is not surprising to find that almost all the circuits have consistently adhered to a standard of deferential review in post-*Daubert* cases. See, e.g., *Bogosian v. Mercedes-Benz of North America, Inc.*, 104 F.3d 472, 476 (1st Cir. 1997);*McCullock v. H. B. Fuller Co.*, 61 F.3d 1038, 1042 (2d Cir. 1995); *Government of the Virgin Islands v. Sanes*, 57 F.3d 338, 341 (3d. Cir. 1995); *Cavallo v. Star Enterprise*, 100 F.3d 1150, 1153-54 (4th Cir. 1996)(specifically declining to follow *Joiner*); *Pedraza v. Jones*, 71 F.3d 194, 197 (5th Cir. 1995); *American & Foreign Insurance Co. v. General Electric Co.*, 45 F.3d 135, 137 (6th Cir. 1995); *Buckner v. Sam's Club, Inc,* 75 F.3d 290, 292 (7th Cir. 1996); *Pestel v. Vermeer Manufacturing Co.*, 64 F.3d 382, 384 (8th Cir. 1995) *Lust v. Merrell Dow Pharmaceuticals, Inc.*, 89 F.3d 594, 597-98 (9th Cir. 1996); *Duffee v. Murray Ohio Manufacturing Co.*, 91 F.3d 1410, 1411 (10th Cir. 1996)(specifically declining to follow *Joiner*); *Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549, 567 (D.C.Cir. 1993).

This widespread adherence to a deferential standard is rooted in the fact that the trial judge is simply better suited than an appellate court to marshal the pertinent facts and apply the fact-dependent legal standards mandated by the Federal Rules of Evidence. The Supreme Court's ruling in *Daubert* only served to reinforce the reasons why this deference should continue to be afforded to district court rulings on the admission of expert testimony.

- **The Eleventh Circuit's Premise was Incorrect**

In abandoning the abuse of discretion standard for a "particularly stringent" standard of review, the Eleventh Circuit in *Joiner* operated from an assumption that "the Federal Rules of Evidence governing expert testimony display a preference for admissibility." 78 F.3d at 529. In fact, there is nothing in the Rules expressing such a preference. Although the Rules were intended to do away with some of the more arcane and antiquated impediments to the use of expert witnesses (such as restricting the questioning of experts only through the use of hypothetical questions), this "liberalization" did not result in the creation of a bias in favor of admitting their testimony. The twin hallmarks of relevance and reliability under Rule 702 still exist. The trial judge must "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert*, 509 U.S. at 589.

Thus, while it is now easier to present *legitimate* conflicting views to a jury, the proponent of the evidence must first establish the legitimacy of the proposed testimony by demonstrating that "the reasoning or methodology underlying the testimony is scientifically valid" and "properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592-93. When viewed in this context, it becomes clear that the court of appeals' assumption in *Joiner* that it should apply a "particularly stringent" standard of review because the Federal Rules display a "preference for admissibility" of expert testimony was simply incorrect.

- **The Outcome Should not Determine the Standard of Review**

Perhaps the most aberrant aspect of the Eleventh Circuit's opinion in *Joiner* is its holding that the "particularly stringent" standard of review will apply only when the trial court *excludes* expert testimony. 78 F.3d at 529. This one-way, outcome dependent standard of review is contrary to the deference which, as detailed above, is ordinarily accorded trial court rulings on the admissibility of expert testimony. The standard for reviewing the correctness of a trial court's ruling on the admissibility of expert testimony should not depend on which party will be most affected by the court's ruling. Irrespective of what effect that evidentiary ruling will have on the ultimate disposition of the case, expert testimony must be excluded when it does not meet the standards

for admission under *Daubert*.

The adoption of an outcome-dependent standard of review was recently eschewed by the United States Supreme Court in *First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 1920 (1995). The plaintiffs in *Kaplan* had filed suit in federal district court to vacate an arbitration award. When the court confirmed the award they appealed to the Third Circuit, which set it aside. The appellate court exercised plenary review over the trial court's legal determinations, but to the extent factual findings were in dispute, the "scope of review [was] limited to whether those findings [were] clearly erroneous." *Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503, 1509 (3d Cir. 1994).

On *certiorari* to the Supreme Court, the defendant in *Kaplan* took the position that the federal policy favoring arbitration should have controlled and, as such, an especially lenient "abuse of discretion" standard should have applied "when reviewing district court decisions that confirm (but not those that set aside) arbitration awards." *Kaplan*, 115 S.Ct. at 1926. In rejecting the creation of such a variable outcome-based standard the Court stated (*id.*):

> [T]he reviewing attitude that a court of appeals takes toward a district court decision should depend upon the respective institutional advantages of trial and appellate courts, not upon what standard of review will more likely produce a particular substantive result.

The *Joiner* appellate court's adoption of a "particularly stringent" standard of review only when a trial judge excludes expert testimony is the mirror image of the outcome-based approach rejected in *Kaplan*. An appellate court reviewing evidentiary rulings on expert testimony should focus on whether the trial judge conducted an adequate inquiry into the reliability and relevance of the testimony, and should defer to the trial court's factual findings. As it did in *Kaplan*, the Supreme Court should set aside an attempt by the Eleventh Circuit to adopt a "special" standard of review for a purportedly disfavored class of district court rulings—namely, those that exclude expert testimony that fails to satisfy the reliability and relevance standards of the Federal Rules of Evidence.

EXAMINING THE REASONING BEHIND THE EXPERT'S OPINION

Perhaps even more fundamentally important than the standard applicable to review of *Daubert* rulings will be the guidance the Supreme Court may provide on the question of whether trial courts can properly examine the reasoning behind the expert's conclusions. To pass muster under the standard declared by the Eleventh Circuit in *Joiner*, it appears that the expert merely has to espouse her specialized education and experience, and then testify that her methodology has been "usually and generally followed by physicians and scientists." 78 F.3d at 532. The expert would not be required to prove, in a step-by-step process, how she got from "Point A" to "Point B" as a prerequisite to admissibility of her testimony. Rather, the court would only review the expert's conclusions "in their entirety." *Id.*

In charging the district courts with the responsibility to ensure that expert testimony is both relevant and reliable, the Supreme Court in *Daubert* could not have intended to restrict the district courts to such narrow areas of inquiry. By preventing the trial judge from examining the analytical reasoning behind the expert's conclusions, the Eleventh Circuit would effectively transform the district courts from being discriminating "gatekeepers" into mere "automatons" letting through all those who know the magic words.

The facts in *Joiner* particularly point out the need to provide district courts the freedom to review experts' reasoning. Dr. Robertson, one of plaintiffs' experts, proffered the opinion that PCBs are "promoting agents" and caused Joiner's small cell lung cancer. Dr. Robertson admitted that his opinion was based only on two studies of infant, suckling mice which: (a) used massive doses (100 percent concentration) of PCBs injected directly into body cavities; (b) promoted a different type of cancer (not small cell); (c) the cancer produced was dose dependent; and (d) he did not know if the same result would be produced in adult mice. *Joiner*, 864 F.Supp. at 1322-23. The district court excluded Dr. Robertson's opinion, concluding that the analytical gap between his inferences and the evidence presented to the district court was just too wide. *Id.* at 1326. However, under the Eleventh Circuit's rationale, these analytical gaps are to be ignored in favor of viewing the expert's opinions "in their entirety." 78 F.3d at 532.

Without the rigorous examination of each step in an expert's analysis, courts and juries would be forced to rely on the word of hired experts that their opinions constitute "scientific knowledge" and "fit" an issue in the case. It is well known that any chain is only as strong as its weakest link. If one or more links in an expert's chain of reasoning is broken then the opinion should fall. As was aptly stated by Judge Smith, in his dissent in *Joiner* (78 F.3d at 535):

> As a "gatekeeper," the trial court must sift through expert testimony to decide not only whether an expert may testify, but what portion of the expert's testimony is admissible. A single expert may offer several opinions to reach his ultimate conclusion, and each opinion must be admissible under *Daubert*. Further, an expert's testimony does not "assist" the trier of fact if the expert does not explain the steps he took to reach his conclusion. We should not require the trier of fact to accept blindly the expert's word to fill the analytical gap between proffered "scientific knowledge" and the expert's conclusions. Therefore, the trial court "gatekeeper" has broad discretion to decide whether a leap of faith across the analytical gap is so great that, without further credible grounds, the testimony is inadmissible.

This link-by-link analysis establishes the trustworthiness of the opinions submitted to the jury. Only after a linkage between the expert's opinions and his ultimate conclusions has been established does it then become the jury's role to determine the weight to be given to this evidence. It is only at this level that the traditional devices of "[v]igorous cross examination, presentation of contrary evidence, and careful instruction on the burden of proof" come into play as appropriate safeguards against shaky but admissible evidence. *Daubert*, 509 U.S. at 596.

CONCLUSION

Oral argument before the United States Supreme Court in *Joiner v. General Electric* is scheduled on October 14, 1997. The Court's decision will likely have a major impact on district courts when performing their functions as "gatekeepers" under *Daubert*. As this article suggests, district judges should be given the freedom to look behind an expert's facial assertion of "good science" in ruling on the admissibility of proffered expert testimony. Because these determinations are often highly complex, they should be accorded deference irrespective of whether the ultimate outcome is the admission or exclusion of the expert witness testimony.