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DAUBERT, JOINER, KUMHO TIRE, and WEISGRAM **What These Cases Stand For**

By: Michael J. Warshauer

Daubert, Joiner, Kumho Tire, and Weisgram are the four wicked horsemen of an apocalyptic change from the days when juries decided complex cases, to a time when trial judges and even appellate judges have taken over that role. The first was born in 1993 with the *Daubert v. Merrell Dow Pharmaceuticals, Inc.* opinion. *Daubert* was initially welcomed as an important change in the rules of evidence, in that it broadened the range of credible scientific opinion evidence - from the “general acceptance” test of *Frye* to a more liberal admission consistent with the FRE’s standards. It was not long before it was discovered that *Daubert* was a Trojan Horse.

Only months after *Daubert*, a trial judge used the opinion to end a plaintiffs’ case before it even started. The Supreme Court affirmed extended *Daubert* in *General Electric v. Joiner*, allowing trial judges to exclude scientific opinions without any real appellate recourse.

Two additional horsemen joined soon thereafter. First, *Kumho Tire Company, Ltd. v. Carmichael* was decided; and, most recently, *Weisgram v. Marley Company*. The four cases constitute an evil posse that empowers trial judges to exclude every kind of expert, and permits courts of appeal to enter judgment for the losing corporate wrongdoer if the trial court does not exclude the evidence in the first place.

I. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹

***Daubert* is supposed to stand for the proposition that the FRE favor a liberal admission of evidence and that trial judges act only as gatekeepers to exclude scientific opinion testimony that it is not founded on accepted methodology. In reality, *Daubert* stands for the proposition that any expert**

¹ 509 U.S. 579, 113 S.Ct. 2786 (1993).

evidence that is not acceptable to the trial court, or a subsequent reviewing appellate court, should be excluded whenever possible.

Daubert was initially thought to be helpful to plaintiffs. After all, the Supreme Court did vacate an opinion of the Ninth Circuit² and revived, at least temporarily, a case in which a plaintiff's scientific evidence had been excluded. In *Daubert*, two children alleged that Bendectin cause them to be born with "limb reduction birth defects." Plaintiffs relied on eight very qualified experts. Summary judgment was granted because "scientific evidence is admissible only if the principle upon which it is based is 'sufficiently established to have general acceptance in the field to which it belongs.'"³ The 9th Circuit affirmed.⁴ The Supreme Court remanded.⁵

Cert was granted to consider the proper standard for the admission of expert testimony. The Court held that "the *Frye* test was superseded by the adoption of the Federal Rules of Evidence." FRE 402 was to be read literally as admitting all relevant evidence - a standard of relevance that the Court called "a liberal one."⁶ Having acknowledged the "baseline" rule in FRE 402, the Court looked to FRE 702, which speaks directly to the issue of scientific evidence. FRE 702 does not require "general acceptance" as an absolute prerequisite to admissibility.

The Court still had to consider to what extent FRE 702, "which clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify,"⁷ places limitations on the admission of scientific evidence. "[T]he subject of an expert's testimony must be 'scientific . . . knowledge.'" "Scientific," according to the Court, connotes "a grounding in the methods and procedures of science." Similarly, the term "knowledge" implies ideas gleaned from accepted facts. In other words, the "[p]roposed testimony must be

² Ninth cir cite here zxzxzxzx

³ 727 F. Supp. 570, 572 (S.C. Cal. 1989).

⁴ 951 F.2d 1128, 1131 (9th Cir. 1991).

⁵ 509 U.S. 597-598.

⁶ *Id.* at 587.

⁷ *Id.* at 589.

supported by appropriate validation -- i.e., 'good grounds,' based on what is known." Requiring an expert's testimony to pertain to "scientific knowledge," establishes a standard of "evidentiary reliability."⁸

FRE 702 also requires that the proposed testimony be relevant to assist the trier of fact to understand the evidence or determine a fact in issue. The crux of the opinion is thus as follows:

Faced with a proffer of expert scientific testimony, then, the trial just must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.⁹

Although not intending to present a "definitive checklist or test," the Court then undertook to describe some of the facts that will bear on the trial court's inquiry - an inquiry that was to focus on methodology. It is at this point that the Court turned a neat ruling that tended to favor the admissibility of expert testimony, into one that would serve to limit admission of evidence in cases involving complex issues and expert testimony.

The Court answered the question before it in first section of the opinion; but Justice Blackmun went further and listed "general observations" on how trial courts were to assess scientific testimony: (1) whether the "theory or technique . . . can be (and has been) tested," (2) whether it "has been subjected to peer review and publication," (3) "the known or potential rate of error," and (4) "general acceptance." These "observations" recreated the very problem that the first part of the decision seemed to resolve. As Chief Justice Rehnquist pointed out in his partial dissent, "'general observations' by this Court customarily carry great weight with lower federal courts; "however, those offered by the majority were "flawed" because they are too general and too

⁸ *Id.* at 589-590.

⁹ *Id.* at 592-593.

abstract.¹⁰ Justice Rehnquist's comments concerning the inevitable confusion the decision would create has proved quite telling.

Questions arise simply from reading this part of the Court's opinion, and countless more questions will surely arise when hundreds of district judges try to apply its teaching to particular offers of expert testimony. Does all of this dicta apply to an expert seeking to testify on the basis of "technical or other specialized knowledge" - the other types of expert knowledge to which Rule 702 applies - or are the "general observations" limited only to "scientific knowledge"?

Daubert explicitly precluded a return to the "general acceptance" test the Court considered too strict, but only offered "general observations" as to what actually constitutes the test. The *Frye* test has been replaced with a constantly moving, impossible to satisfy, test of whatever pleases a particular trial or appellate court.

II. *General Electric Co. v. Joiner*¹¹

***Joiner* is supposed to stand for the proposition that evidentiary rulings of trial courts relating to the admissibility of expert testimony can only be reversed where there is a manifest abuse of discretion - regardless of the effect of that ruling on the outcome of the case. In reality, *Joiner* stands for the proposition that a trial court is authorized to not only consider the methodology used by the expert but also assess the credibility of the conclusions.**

In *General Electric Co. v. Joiner*, the Supreme Court was faced with a rather simple issue concerning appellate courts' review of *Daubert* rulings. The plaintiff in *Joiner* was an electrician with a city Water & Light Department. Joiner sued General Electric, Westinghouse, and Monsanto, alleging that his exposure to their PCBs and related chemicals "promoted" and accelerated his lung cancer.

The defendants filed a joint motions for summary judgment contending that (1) there was no evidence that Joiner suffered significant exposure to PCB's, furans, or dioxins, and (2) there was no admissible scientific

¹⁰ *Id.* at 598 (Rehnquist, J., dissenting in part).

¹¹ 522 U.S. 136, 118 S.Ct. 512 (1997)/

evidence that PCB's promoted Joiner's cancer. The *Daubert* decision was issued before the MSJ was filed; and in his response, Joiner tracked the language of *Daubert* and his experts described using the same methodology followed by the defendants' experts.

The District Court first analyzed the conclusions reached by the plaintiffs' experts and excluded their testimony. Then, with the record bereft of the struck evidence, granted the defendants' motions. Although it held that there was an issue as to whether Joiner had been exposed to PCB's; the court found that (1) the testimony of the plaintiff's experts failed to show that there was a link between exposure to PCB's and Joiner's cancer, and (2) Joiner had not been exposed to furans and dioxins. The trial court reviewed the studies relied on by plaintiff's experts, and determined the opinions to be merely subjective and speculative and therefore inadmissible.¹²

The 11th Circuit reversed.¹³ Consistent with what appeared to be the holding in *Daubert*, it emphasized the intent of the FRE's "preference for admissibility," and therefore applied "a particularly stringent standard of review to the trial judge's exclusion of expert testimony."¹⁴ The particularly close look was necessary because the trial court's "evidence" rulings actually served to guarantee summary judgment.

The Supreme Court granted cert "to determine what standard an appellate court should apply in reviewing a trial court's decision to admit or exclude expert testimony under *Daubert*."¹⁵ GE argued that the 11th Circuit should have applied the traditional "abuse of discretion" standard of review. Joiner agreed, but maintained that abuse of discretion was the standard actually applied by the appellate court and the "particularly stringent" language referred to the attention devoted to outcome determinative rulings; but did not establish a new standard.

Although the FRE allow the admission of scientific testimony not admissible under the *Frye* test, in the Supreme Court's view, a court still has to act as the "gatekeeper" to screen such evidence. The trial court is

¹² 864 F. Supp. 1310 (N.D. Ga. 1994).

¹³ 78 F.3d 524 (11th Cir. 1996).

¹⁴ *Id.* at 529.

¹⁵ 522 U.S. at 138-139.

given a great deal of discretion. "A court of appeals applying 'abuse of discretion' review to such ruling may not categorically distinguish between rulings allowing expert testimony and rulings disallowing it."¹⁶ Simply because the granting of summary judgment based on those rulings will be "outcome determinative" does not subject the trial court's discretionary ruling to a more "searching" standard of review. Evidentiary rulings are to be reviewed in isolation, even if the effect of the ruling is guarantees MSJ, which is reviewed under a higher *de novo* standard.

The Supreme Court condoned a legal sleight of hand in *Joiner* that allows a trial court to avoid reversal of MSJ rulings by first striking the evidence that supports the plaintiff's case. More disturbing than approving this sleight of hand is that instead of remanding the case for further consideration under the correct standard of review, the Court conducted its own review of the evidence. This approach blatantly contradicted its direction in *Daubert* that courts are to look to methodology and not become junior scientists themselves.

Ignoring *Daubert's* direction to liberally allow expert opinion testimony based on proper methodology, the Court rejected argument that the district court erred by disagreeing with the expert's *conclusions* instead of focusing on the *methodology* employed in reaching those conclusions. The Court sidestepped *Daubert's* direction that the "focus, of course, must be solely on the principles and methodology, not on the conclusions that they generate," and held that "conclusions and methodology are not entirely distinct from one another," and "a court may conclude that there is simply too great an analytical gap between the data and the opinion offered."¹⁷

Justice Stevens agreed with the standard of review, but disagreed with the Court's evaluation of the evidence and the method utilized to do so. Stevens felt the record was inadequate to consider the methodology or the conclusions of the experts, and the Court should not do so. He thought the Court failed to explain why its holding was consistent with FRE 702. Stevens was similarly critical of the method employed by the district court and accepted by the Supreme Court. "The District Court, however, examined the studies one by one and

¹⁶ *Id.*

¹⁷ *Id.* at 146.

concluded that none was sufficient to show a link between PCB's and lung cancer. [cit] The focus of the opinion was on the separate studies and the conclusions of the experts, not on the experts' methodology."¹⁸ In contrast, the Court of Appeals had expressly decided that a "weight of evidence" methodology was scientifically acceptable. Notably, Justice Stevens pointed out that the petitioner's own experts had used the same methodology.¹⁹ How then, could the evidence have been properly excluded? As Justice Stevens put it, "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

III. *Kumho Tire Company, Ltd. v. Carmichael*²¹

***Kumho Tire* is supposed to stand for the proposition that trial courts have the power to use *Daubert* and *Joiner* to exclude expert opinions that are based on technical knowledge. In reality, *Kumho Tire*, along with *Joiner*, stands for the proposition that a trial court is authorized to assess the expert's conclusions regardless of the methodology used.**

In *Kumho*, the Court considered whether *Daubert* standards also apply to nonscientific testimony by experts of the kind who rely on "skill- or experience-based observation." This question was just what Justice Rehnquist noted would be inevitable following *Daubert*. The plaintiffs in *Kumho* alleged they were injured when a defective tire blew out. Plaintiffs' relied, in large part, on the testimony of their tire expert, Carlson. Carlson considered certain characteristics of the tire that were not in dispute, took into consideration the tire's age and history, inspected the tire and concluded that a defect in the manufacture or design of the tire caused the blow-out.

¹⁸ *Id.* at 153. (Stevens, J., dissenting in part). Justice Stevens noted that *Daubert* "quite clearly forbids trial judges to assess the validity or strength of an expert's scientific conclusions, which is a matter for the jury." *Id.* at 154.

¹⁹ *Id.* at 154.

²⁰ *Id.* at 155.

²¹ 526 U.S. 137, 119 S.Ct. 1167 (1999).

Kumho Tire moved to exclude Carlson's testimony because his methodology failed FRE 702's reliability requirement. The District Court accepted the role of "gatekeeper" even though the testimony was "technical" rather than "scientific." It assessed Carlson's proposed testimony by looking at four factors suggested as guidelines by the Supreme Court in *Daubert*:

Whether the expert's technique or theory may be tested or refuted.

Whether the technique or theory has been a subject of peer review or publication.

The known or potential rate of error of a technique.

The degree of acceptance of a theory or technique within the relevant scientific community.

The court then excluded the testimony, and with nothing to support plaintiff's claims granted MSJ.

The 11th Circuit reversed, holding that the *Daubert* factors apply only to testimony based on the "application of scientific principles" and did not apply to Carlson's testimony based on "skill- or experience-based observation."²² Although agreeing that the laws of physics and chemistry are implicated in the tire's failure, the 11th Circuit said Carlson's testimony was not scientific because it was based on his "experience" in "looking at the mangled carcasses of blown-out tires" and identifying markings that reveal tire abuse or defect.

The Supreme Court granted certiorari to determine "whether, or how, *Daubert* applies to expert testimony that might be characterized as based not upon 'scientific' knowledge, but rather upon 'technical' or 'other specialized' knowledge."²³ The Justices all basically agreed that the district court's basic gate keeping obligation applies to all expert testimony pursuant to FRE 702; but the issue was to what extent the *Daubert* factors should be considered. While *Daubert* only referred to scientific testimony, the *Kumho* Court concluded that was simply due to the fact that scientific knowledge was at issue in that case. *Daubert* made clear that it is the FRE's focus on "knowledge" that establishes the standard of evidentiary reliability, and it found no need to

²² 131 F.3d 1433, 1435-1436 (11th Cir. 1997). The Eleventh Circuit reviewed the trial court's legal decision to apply *Daubert* de novo. *Id.* at 1435.

²³ 526 U.S. 137, 146. Justice Stevens dissented to Part III of the opinion, which went beyond the question presented. *Id.* at 159.

differentiate between various types of "specialized knowledge." Furthermore, it would be nearly impossible for judges to make a distinction between "scientific, "technical" or "other specialized" knowledge.

The Court also considered which specific factors discussed in *Daubert* should be used to evaluate this kind of expert testimony. Noting that "there are many different kinds of experts, and many different kinds of expertise," the Court recognized that all criteria would not apply to all testimony. The Court emphasized that *Daubert* makes clear that the court's gate keeping function must be tied to the facts of a particular case and therefore the factors identified in *Daubert* may or may not apply, "depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony."²⁴ The Court declined to articulate specifically the inquiry; "[r]ather, we conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable."²⁵ In other words, the Court is allowing a trial court to invent whatever criteria are necessary to support its decision to exclude the evidence!

Consistent with *Joiner*, the Court again confirmed that the appellate court is to apply an abuse-of-discretion standard when reviewing a trial court's decision to admit or exclude expert testimony.²⁶ The trial court has "broad discretion" in these proceedings, the purpose of which is to avoid unjustifiable expense and delay in the search for truth.²⁷ However, once again ignoring its direction in *Daubert* that courts should look to methodology and not conclusions, the Court went on to consider the factual basis of Carlson's opinions and found no abuse of discretion in excluding Carlson's testimony. "[T]he doubts that triggered the District Court's initial inquiry here were reasonable, as was the court's ultimate conclusion."²⁸ Despite the expert's qualifications, his methodology was flawed in the Court's view.

While *Daubert*, *Joiner* and *Kumho Tire* emphasize the discretionary nature of the trial court's determination as to the admissibility of expert testimony, the Court's next decision on the issue seems to espouse the complete opposite approach. In *Joiner* and *Kumho Tire*, the Court was faced with a situation where

²⁴ *Id.* at 150.

²⁵ *Id.* at 152.

²⁶ *Id.* (citing *Joiner*, 522 U.S., at 138-139, 118 S.Ct. 512).

²⁷ *Id.* at 152-153 (citing FRE 102).

²⁸ *Id.* at 153.

the trial court had *excluded* certain expert testimony that gutted the plaintiffs'. However, in the first case in which the issue on appeal was whether the trial court abused its discretion by *admitting* the expert testimony, the Supreme Court's professed deference to the trial court was abandoned in favor of a rule that says this: If the trial court favors the corporate defendant then it is entitled to great deference; if the trial court and a jury favor the plaintiff then the trial court's and jury's findings can be totally ignored.

IV. *Weisgram v. Marley Company*²⁹

***Weisgram* is supposed to stand for the proposition that appellate courts may direct entry of judgment as a matter of law for a verdict loser upon determining that the evidence upon which the verdict rests was improperly admitted. In reality, *Weisgram* stands for the proposition that the professed deference to evidentiary rulings enunciated in *Joiner* and *Kumho Tire* should be ignored if necessary to protect the assets of a corporate wrongdoer.**

Bonnie Weisgram died in a home fire that was allegedly caused by a defective baseboard heater. At trial, Weisgram introduced the testimony of three expert witnesses who opined that the fire was Marley's fault. Marley objected to the evidence before and during the trial, maintaining that the testimony did not meet *Daubert's* reliability standards. The trial court overruled the objections and allowed the expert testimony to go to the jury. Marley moved for JNOV at the close of the plaintiff's evidence and at the close of all of the evidence. Despite appropriate motions, the trial court entered judgment for the plaintiff. The 8th Circuit reversed.³⁰

A unanimous Supreme Court affirmed. The Court considered "the respective authority of federal trial and appellate courts to decide whether, as a matter of law, judgment should be entered in favor of a verdict loser."³¹ Specifically, the Court considered whether FRE 50 requires the appellate court to remand for further consideration by the trial court. The Court held that FRE 50(d) does permit an appellate court to enter judgment when it concludes that evidence was erroneously admitted at trial and the remaining, competent evidence is

²⁹ 528 U.S. 440, 120 S.Ct. 1011 (2000).

³⁰ 169 F.3d 514 (8th Cir. 1999).

³¹ 120 S.Ct. 1011, 1014.

insufficient. While it is up to the exercise of an appellate court's "informed discretion" to enter judgment, a new trial, or remand,³² the court emphasized that since *Daubert*, "parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet."³³ Of course, the testimony had been analyzed under that standard and admitted as reliable. This should have been sufficient, since *Joiner* and *Kumho Tire* suggested that the trial court's ruling would be respected by the appellate courts. However, the *Weisgram* Court suggested that relying on the trial court's ability to exercise its gate keeping role is not enough, finding it "implausible to suggest" that post-*Daubert* parties would initially present less than their best expert evidence in the expectation of a second chance should their first effort fail.³⁴ Where the party offering the testimony is aware of the opposition's objection "every step of the way," there is ample opportunity to protect the record before appeal.³⁵

Despite the rulings in *Joiner* and *Kumho* giving broad discretion to the trial court for its evidentiary rulings, and the difficulty in reversing a ruling absent clear abuse of discretion, the *Weisgram* decision suggests that litigants should find no comfort in the event a trial judge allows expert testimony. Instead, the lesson of this case is that parties should reinforce their expert testimony with additional support (that will pass *Daubert* scrutiny as well) in the event the admission of evidence is later overruled. "[A] litigant's failure to buttress its position because of confidence in the strength of that position is always indulged in the litigant's own risk."³⁶

But what is truly amazing about *Weisgram* is what the Court did *not* say. When it served the Court's needs in *Joiner* and *Kumho* to carefully analyze excluded testimony to bolster its affirmance of the exclusions, it did so. Apparently, however, such an analysis is not necessary where the evidence is admitted. In the *Joiner* and *Kumho Tire* opinions the reader is given all kinds of detail about the experts' opinions; but in *Weisgram*, despite a complete trial record (the previous decisions were decided at summary judgment), we are provided with no factual information whatsoever as to why the trial court abused its discretion in admitting the expert's

³² *Id.*

³³ *Id.* at 1021.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

testimony. Furthermore, no reference is given to the fact that not only did the trial judge consider the admissibility of the testimony, but the experts in the case were also subjected to cross examination, and a jury judged their methodology and conclusions as per the 7th Amendment.

The Supreme Court offered no guidance as to how much "reinforcement" will be necessary for a litigant to have any level of confidence about a trial court's rulings. Certainly, this ruling flies in the face of the original goal of the gatekeeper function, which was to avoid undue expense and delay in litigation. Despite having previously acknowledged that courts of appeal should always be concerned with the trial judge's first hand knowledge of what went on at the trial, and give considerable consideration to that fact, it also noted that courts of appeals also must remember that they have the authority to make the final decision.³⁷ In the Court's view "appellate authority . . . is no less when the evidence is rendered insufficient by the removal of erroneously admitted testimony than it is when the evidence, without any deletion, is insufficient."³⁸

That *Daubert*, *Joiner*, *Kumho Tire*, and *Weisgram* are the four horsemen of a Supreme Court bound and determined to put the interests of corporate citizens over the interests of human beings is evident from Justice Breyer's concurrence in *Joiner*. Justice Breyer made clear that he viewed the district judge's "gate keeping" role to be one with the goal toward preserving economic progress. Although scientific advances may prove to be detrimental, more detrimental, in Justice Breyer's view, would be stifling growth.

Yet modern life, including good health as well as economic well being, depends upon the use of artificial or manufactured substances, such as chemicals. As it may, therefore, prove particularly important to see that judges fulfill their *Daubert* gate keeping function so that they help assure that the **powerful engine of tort liability**, which can generate strong financial incentives to reduce, or to eliminate, production, points toward the right substances and does not destroy the wrong ones.³⁹

³⁷ *Id.* at 1019 (citing *Neely v. Martin K Eby Construction Co.*, 386 U.S. 317, 87 S.Ct. 1072 (1967)).

³⁸ *Id.* at 1015.

³⁹ *Id.* at 148-149. (Breyer, J., concurring) (emphasis added).

In *Daubert*, *Joiner*, *Kumho Tire* and *Weisgram* we find a quartet of horrible horsemen who will do Justice Breyer's bidding to insure that the powerful engine of tort liability does not make the world a safer, better, and healthier place to live.