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THE SUPREME COURT OF THE UNITED STATES

CAPTION: BEECH AIRCRAFT CORPORATION, Petitioner v. JOHN C. RAINEY, ETC., ET AL.; and BEECH AEROSPACE SERVICES, INC. Petitioners v. JOHN C. RAINEY, ETC., ET AL.

CASE NO: CONSOLIDATED 87-981 and 87-1028

PLACE: WASHINGTON, D.C.

DATE: October 4, 1988

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Washington, D. C. 20001
(202) 628-9300
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IN THE SUPREME COURT OF THE UNITED STATES

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BEECH AIRCRAFT CORPORATION : CONSOLIDATED

PETITIONER :

V. : No. 87-981

JOHN C. RAINEY, ETC., ET AL.; :

BEECH AEROSPACE SERVICES, INC. :

PETITIONERS :

V. : No. 87-1028

JOHN C. RAINEY, ETC., ET AL. :

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Washington, D.C.

Tuesday, October 4, 1988

The above-titled matter came on for oral argument before the Supreme Court of the United States at 11:53 o'clock a.m.

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APPEARANCES:

JOSEPH W. WOMACK,

Miami, Florida,

on behalf of the Petitioner

DENNIS K. LARRY,

Pensacola, Florida,

on behalf of the Respondent

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1 (11:53 a.m.)

2 P R O C E E D I N G S

3 CHIEF JUSTICE REHNQUIST: Mr. Womack, you may
4 proceed whenever you're ready.

5 ORAL ARGUMENT OF JOSEPH W. WOMACK
6 ON BEHALF OF THE PETITIONERS

7 MR. WOMACK: Mr. Chief Justice, and may it
8 please the Court, these petitions respectfully ask you
9 to consider two of the Federal rules of evidence. The
10 first is 803, having to do with the use of Government
11 reports.

12 The second is a different rule, namely 106,
13 concerning contemporaneous publication of documents.
14 This, as the Court will know, is essentially a
15 codification of Dean Wigmore's completeness formulation.

16 Implicit in the second point, if the Court
17 please, is also a different, a third rule, namely, 801,
18 and I say implicit because it is triggered by a footnote
19 in the panel opinion of the Eleventh Circuit.

20 With regard to 803, namely, the Government
21 report rule, a moment or two, please, of background. In
22 mid-July of 1982, a tragic accident involving the loss
23 of a Navy trainer, sadly, we lost a pilot and a
24 student. The following day, the squadron commander
25 convened separate investigations. The one in question

1 here is the JAG investigation commenced pursuant to the
2 Judge Advocate General's manual.
3 Subsequently suits were filed, diversity suits
4 were filed, in the Northern District of Florida,
5 consolidated for handling discovery and trial of
6 bifurcated proceedings. With trial in mid-July of 1984,
7 it was during that trial that I offered, as an exhibit
8 for the jury, certain portions of the JAG officer's
9 report.
10 Historically, I think I had brought that
11 matter to the District Judge's notice several months
12 before the trial, at least four months before trial.
13 The Court considered the matter, brief were filed, it
14 was considered orally and in memoranda. The Court
15 ultimately concluded that of the 31 factual findings in
16 the JAG report, that it would admit or allow me to use
17 four. Of the nine conclusions or opinions contained in
18 the JAG report, the District Judge admitted one.
19 For convenience, I think the full text of the
20 total report, that is, the factual findings and the
21 conclusions, are set out in the Beech petition. And I
22 raise this purely as a matter of clarify, because the en
23 banc opinion and the panel opinion below both say -- and
24 I think respectfully, erroneously, assume -- that all of
25 the report was admitted, and that's not correct.

1 So if you take the joint appendix, you have
2 what the Court assumed to have been admitted, and you
3 take the petition and you have the exact document that
4 was admitted.
5 Actually, after the Court's ruling, I simply
6 had it retyped, so as not in the heat of trial to admit
7 anything that the Court didn't want admitted and use it
8 as a blow-up exploded exhibit for the jury.
9 The specific bone of contention, if I may put
10 it that way, is a statement by the JAG officer in his
11 conclusions that the probable cause of this tragedy was
12 the pilot's failure to maintain proper interval. And by
13 that he means, of course, a violation of the distances
14 required by pattern integrity and not touch and go
15 pattern with training squadron.
16 At the time of the accident, parenthetically,
17 there were six airplanes in the pattern. Immediately
18 before there had been five, and when the sixth airplane
19 entered the pattern, this tragedy occurred.
20 The Court of Appeals of my Circuit -- the
21 panel took it away from me, took the verdict away from
22 me.
23 QUESTION: The District Court admitted the
24 evidence?
25 MR. WOMACK: Yes, sir, yes, your Honor.

1 The panel reversed. There was a special
2 concurrence by second Judge Frank Johnson, suggesting
3 that the Court take it en banc. We petitioned, the
4 Court recalled the panel opinion, ordered new briefs
5 filed, and ultimately considered the case further
6 without argument, but on new briefs.
7 The en banc Court split six-six on the issue
8 of whether or not the conclusion of the JAG officer
9 classified or called, denominated, if you will, an
10 opinion. Relying, if the Court please, on a borrowed
11 case -- and I say borrowed because it relied on a Fifth
12 Circuit case which had been decided prior to the
13 creation of the Eleventh Circuit.
14 QUESTION: Do you concede that part of the
15 memorandum is admissable under 803(6)?
16 MR. WOMACK: I think both parts are
17 admissible, your Honor. I continue.
18 QUESTION: Do all parties concede that 803(6)
19 is applicable to at least part of the document?
20 MR. WOMACK: 803 (6)?
21 QUESTION: Yes. Is that the section you're
22 relying on?
23 MR. WOMACK: I had contended that they --
24 QUESTION: It's (8)?
25 MR. WOMACK: -- were admissible under

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1 Section (8).

2 QUESTION: Was there any contention it was

3 admissible under (6)?

4 MR. WOMACK: Not to my knowledge, sir.

5 QUESTION: All right.

6 MR. WOMACK: That section, of course, does

7 deal with opinion --

8 CHIEF JUSTICE REHNQUIST: We'll resume there

9 at one o'clock.

10 (Whereupon, at 12:00 o'clock p.m., the Court

11 was recessed, to reconvene at 1:00 o'clock p.m., this

12 same day.)

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1 AFTERNOON SESSION

2 12:59 o'clock p.m.

3 CHIEF JUSTICE REHNQUIST: You may continue,

4 Mr. Womack.

5 MR. WOMACK: Mr. Chief Justice, and may it

6 please the Court, just before the recess, I had

7 suggested that the Court of Appeals had made an

8 erroneous assumption, and so that the Court will not

9 think that I am making that assumption, that's what the

10 Court says in the en banc opinion.

11 In one of the footnotes, you'll notice that

12 Judge Tjoflat says that they did not have the exhibits

13 before them. Why the appellant didn't send them up, or

14 why the Court didn't call for them, I cannot tell you.

15 I simply say that that's what he says in the opinion,

16 and that accounts for the discrepancy in what was

17 admitted, what the jury saw, versus what the Court of

18 Appeals thought had been put in evidence.

19 Lastly, just before the recess, I suggested

20 that the Court had borrowed a Fifth Circuit case. This,

21 of course, is Smith v. Ithaca, and unless this Court

22 says otherwise, that is the law of our Circuit, as we

23 come here today.

24 My mission, as I understand it, is to

25 respectfully seek your approval to use these types of

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conclusions or opinions. I make that request to you, provided they are trustworthy. In this case, please consider that my opponents had four months' notice. They filed documents with the Court suggesting that they wanted to challenge the trustworthiness of the JAG investigator. I agreed at the conference before the Court that they might add additional witnesses if they needed to do that, to challenge the trustworthiness of it, and His Honor twice indicated that he would consider any precautionary instruction which they wished to hand up.

Nothing was done. No discovery was taken, no motion to continue, and no witness was called. In those circumstances --

QUESTION: No discovery of the circumstances under which the investigation was conducted?

MR. WOMACK: None whatsoever, your Honor.

Now it may be that in a symbolic way, we as lawyers are not laying the right predicates on trustworthiness. In that --

QUESTION: As I read the text of the rule at any rate, Mr. Womack, it says, section (8) says, certain stuff shows the "factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances

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1 indicate lack of trustworthiness."

2 That would sound almost like the burden is on

3 the person who wants to show that they're not

4 trustworthy.

5 MR. WOMACK: I submit that I make the

6 threshold showing that it's legitimate, authentic, done

7 in the course and scope of the officer's duties, and so

8 forth. And then, if they wish to challenge it, it should

9 shift to them.

10 And I would be the first to encourage every

11 precaution or every right be given them to do all of the

12 things that they wish to challenge. The fact is, in

13 this case, none of those things were done.

14 If I could move to another point, please, I

15 think that we as lawyers are not focusing on the right

16 thing. I suggest methodology, experience, training of

17 the investigator, the content of the reports, the

18 intended use, perhaps, institutional bias if that

19 exists, probative weight, and lastly, prejudice, undue

20 prejudice, that might inure. And those things, rather

21 than the agency or scope of employment of the Government

22 investigator, would give a more trustworthy foundation

23 for the District judge.

24 Moving quickly, if I may, to the generic

25 issue, whether this Court will permit us to use probable

1 cause conclusions, I ask your approval for that use.
2 And I ask you to consider several reasons.
3 First, they are certainly not binding on
4 anybody in a judicial sense. The committee recommends
5 their use, most of the circuits permit their use, and
6 indeed in the Fifth and the Second Circuit, while there
7 are cases going in both directions, they are permitted
8 there.
9 Most of the evidence professors say that we
10 should be able to use them. Gainsaid, that's not
11 binding on this Court, obviously. But there are some
12 very good policy reasons for doing so, quite aside from
13 what the evidence professors might have to say.
14 Some cases of necessity cost -- the sheer
15 volume of paperwork generated by business and Government
16 today is just overpowering, and so I submit in the most
17 respectful terms that we, who try cases, need to be able
18 to use in some form some portions of Government
19 documents. However strict the Court might feel on
20 trustworthiness before you allow us to use them, that's
21 a matter for the Court, and not for us. But there is an
22 overriding need for our use of these documents.
23 In a practical sense, please consider also
24 that if you allow a conclusion or an opinion that's
25 probable cause, and doesn't go past the line to the

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1 fixation of liability or legal conclusions, if you just
2 let us use probable cause, I submit to you that the
3 District Judges deal with this on a daily basis. The
4 cautionary charges can be given almost from rote. The
5 trial lawyers know how to handle them without any
6 difficulty.

7 And Lastly, and I think perhaps importantly,
8 the jurors deal with economic probabilities,
9 mathematical probabilities, medical probabilities, on a
10 daily basis. So I submit there's nothing exotic or
11 esoteric about allowing a fact-finder to have those
12 kinds of conclusions, provided there are ample, indeed,
13 even stringent terms going to probabilities, to
14 trustworthiness, excuse me.

15 QUESTION: Well, we're really just not
16 discussing this in the abstract, are we? I mean, it's
17 not up to us.

18 There is a rule that we're supposed to be
19 following here. And what content would you give to the
20 limitation that appears in the rule, to factual
21 findings? If this assessment that in all probability,
22 or it's probable that rollback was the cause if that's
23 factual finding, what isn't a factual finding?

24 MR. WOMACK: I think if the JAG officer had
25 gone further and tried to attach liability for the

1 accident, that that would have been going too far, both
2 as a matter of law, and it would be contrary to the JAG
3 manual itself, which forbids such a conclusion.

4 QUESTION: Well, never mind the JAG manual.
5 But why would that be any less a factual finding? It
6 was probable that the cause was rollback, you say,
7 that's a factual finding, but it's probable that it was
8 the pilot's fault would not be a factual finding.

9 MR. WOMACK: For my part, your Honor, I
10 thought the JAG officer's finding in this case was a
11 factual evaluation. But it is denominated in this
12 report as a conclusion or opinion, because the catalog,
13 the protocol of the JAG manual requires them to be set
14 out under certain headings.

15 Now, if your Honor's question, the reach of
16 the Court's question is, was this JAG officer's
17 terminology, his verbiage in this case, consistent only
18 with my theory of the case, the answer is no, sir.

19 Was it compatible with the Respondent's case
20 below? The answer is yes. For two weeks, they
21 litigated the case below, that the airplane got from
22 point A to point B and behaved as it did
23 aerodynamically, because of an engine problem. To be
24 sure, I litigated with every fiber of my being pilot
25 error. But the jury, according to their verdict, never

1 got that far.

2 QUESTION: I think you mistake my problem.

3 I'm not concerned whether the report calls that a

4 conclusion or not. You can have a factual conclusion,

5 quite possibly, which would be a factual finding.

6 MR. WOMACK: Yes, sir.

7 QUESTION: But where do you want us to draw

8 the line between what is a factual finding, and what is

9 not a factual finding?

10 MR. WOMACK: I would ask you --

11 QUESTION: Do you think a finding that the

12 pilot was negligent would not be a factual finding?

13 MR. WOMACK: I think a finding that the pilot

14 was negligent would be too close to a legal

15 conclusion. I think if you give the fact-finder the

16 bit of evidence that this is a probable cause, and then

17 let them defend against that, that that's proper.

18 QUESTION: Well, what about the pilot failed

19 to push the stick to the right when he should have?

20 Would that be a factual finding?

21 MR. WOMACK: If the JAG officer says that the

22 probable, a probable cause, or the probable cause, was

23 the pilot's failure to input aileron, I think that that

24 would be a factual finding that they should be able to

25 consider. And to answer the bottom line question of

1 your Honor, I would ask you to consider drawing the
2 line, if the Court chooses to draw a line, just on the
3 other side of probabilities and just this side of legal
4 conclusions and fixation of legal liability.
5 QUESTION: Well then, Mr. Womack, what do you
6 think the converse of factual finding, what do you think
7 the rulemakers meant to exclude when they said factual
8 findings shall be admissible? Do you think it was legal
9 conclusions?
10 MR. WOMACK: I thought they intended to
11 exclude legal conclusions or fixation.
12 QUESTION: What do you mean "fixation"?
13 MR. WOMACK: Legal determinations of legal
14 responsibility. And I submit to your Honor that most of
15 the evidence writers, and most of the circuits have said
16 that this type of conclusion, opinion, finding, or
17 however denominated, is really a specie of factual
18 findings.
19 QUESTION: Surely the law of evidence has been
20 kind of confused for many years by efforts to
21 distinguish between fact and opinion? We don't want to
22 get into that here.
23 MR. WOMACK: Well, Judge Weinstein, a
24 much-loved authority on evidence, makes the very point
25 that the District Judge should not be put in the

1 position of drawing what he calls "hairsplitting
2 conclusions" or factual evaluations. It's almost
3 impossible to do, according to His Honor's view, and
4 it's better to admit it under caution, under tight
5 restraints of trustworthiness, with cautionary
6 instructions.
7 Now, that's the majority view, but as I said
8 to your Honor before, it's certainly not binding on this
9 Court.
10 QUESTION: Mr. Womack, may I ask one other
11 question?
12 I'm just a little unclear on part of the
13 record. I don't recall it that well. One of the -- the
14 judge did let in part of the report? He let in the
15 section that says the most probable cause of the
16 accident is the pilot's failure to maintain proper
17 interval. That did go in, didn't it?
18 MR. WOMACK: Yes, sir.
19 QUESTION: But he did not let in the number
20 (6), although the above sequence of events is the most
21 likely to have occurred, this does not change the
22 possibility that rollback did occur.
23 MR. WOMACK: No, sir.
24 QUESTION: Am I right in that?
25 Why did he let -- how did that happen, that

1 only the stuff favorable to one side got in?

2 MR. WOMACK: If I may paraphrase His Honor, he

3 said that was a possible scenario. In other words, to

4 his eye, a possibility was not reliable enough for him.

5 That's the way I read --

6 QUESTION: Would you, would you think he was

7 correct in that? I mean, that's that's -- why is one --

8 the possibility that a rollback occurred, which is

9 consistent with the Plaintiff's theory --

10 MR. WOMACK: Justice Stevens, --

11 QUESTION: -- can't get in, but a probability can?

12 MR. WOMACK: I offered the entire JAG report. I

13 wanted them all in.

14 QUESTION: Well, I would have thought that

15 would be the right answer myself; that you either put it

16 in, or you don't put it in.

17 MR. WOMACK: That's what I urged for four

18 months, in writing, and in every way that I could. His

19 Honor did not agree with me. He considered the matter

20 for a long period of time. Ultimately -- changed his

21 ruling once, and ultimately edited the report himself.

22 QUESTION: Did the Plaintiff object to that

23 editing of the report?

24 MR. WOMACK: The Plaintiff objected to the

25 conclusion, as I recall.

QUESTION: Well, I understand. He objected, of course, to number (6) going in or to number (7), going in.

MR. WOMACK: Number (7), yes, sir, he did.

QUESTION: He didn't take a position if (7) goes in, then the rest ought to go in, too?

MR. WOMACK: I don't think he did, your Honor.

QUESTION: That's puzzling.

MR. WOMACK: I don't mean to speak for him, and Mr. Larry will certainly know. You may rely on what he says that --

QUESTION: Now the second question in your petition, as you doubtless know, Mr. Womack --

MR. WOMACK: If your Honor please, the next has to do with what I call the paper rule -- this is 106, which says in substance that if one offers part of a document or transcript or letter, that type of thing, and the advisory or opponent of the document wishes the other parts offered, it must be done at that time. As I read it, it says "contemporaneously." As I've indicated to you, Dean Wigmore and Professor McCormick, Judge Weinstein and other authors interpret it that way.

In this situation, the Eleventh Circuit, with all due respect, if their opinion stands, they have

1 converted Rule 106 to a substantive evidence rule, and
2 that rule would run along the theme that 106 is
3 converted to a theme of one's case doctrine, or that one
4 can give unqualified opinions, so long as they are
5 consistent with one's trial stance or one's trial theory.
6 QUESTION: Is it your position that Rainey
7 could not get this document in, or that he just failed
8 to do so in a proper way?
9 MR. WOMACK: I think that the subject of an
10 engine opinion, the technical opinion which he was
11 asked, or which he tried to express, was a professional
12 opinion.
13 Now, if they thought that they could qualify
14 that flier as an expert, then they should have tried to
15 lay that predicate, or perhaps put him on in their case
16 if they wanted to, or call him in rebuttal. They could
17 have made the effort.
18 I would not agree that he was qualified to do
19 that, and I make that suggestion to your Honor because
20 they called Dr. Craig as an aerodynamicist, and they
21 called Mr. Hall as their engine expert.
22 QUESTION: In other words, you put it on
23 whether or not he's an expert. And your position, I
24 take it, is simply because you asked him whether he
25 made a statement, and read from a document, that you're

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1 not introducing the document?

2 MR. WOMACK: That's ground one.

3 And ground two, please consider, that if they

4 had questions to ask of Rainey which were related to

5 generic question subject matter that we had opened up,

6 then I think they could have gotten in other parts of

7 that letter, whatever its status as hearsay.

8 For example --

9 QUESTION: Well, isn't that what happened?

10 MR. WOMACK: I say that --

11 QUESTION: On cross, they asked him about the

12 document. I thought your position would be that since

13 the document wasn't admitted, and there was no way that

14 he either could or did ask for the document to be

15 admitted and that's the end of it.

16 MR. WOMACK: Well, that Court of Appeals says

17 what we did was tantamount to offering. I don't agree

18 with that, but that's what the Court said and I'm bound

19 by it, as I understand it.

20 QUESTION: Why are you bound by something that

21 the the Court of Appeals --

22 MR. WOMACK: Well, maybe that's the wrong word

23 to use.

24 QUESTION: Well, you're not bound by their

25 decision. You're petitioning for certiorari and asking

1 us to reverse it.

2 MR. WOMACK: Yes, yes. I thought that the use

3 of the letter, if at all, if I may put it that way, must

4 have been invoked at that time, treated at that time,

5 and had to be related to the subject matter which we had

6 opened up.

7 QUESTION: Thank you.

8 MR. WOMACK: I did not think that you could

9 change subject matter, or bring in new subject matter,

10 much less professional opinions about spool turbines.

11 QUESTION: But is it your opinion that if he

12 had asked for the admission of the letter at that time,

13 when you first brought the letter in, that the trial

14 judge would have had to admit the letter? I want to

15 know the answer to that.

16 MR. WOMACK: Yes, sir.

17 If he had triggered 106, and told the trial

18 judge at that time that he was doing that, then the

19 Court would have taken the letter, looked at what we

20 asked, then looked at what was said, and made a ruling

21 based on 106.

22

23 QUESTION: And you're telling us that the

24 ruling would have been that it should be admitted?

25 MR. WOMACK: If it was germane to the subject

1 matters opened up.

2 QUESTION: But, your argument, Mr. Womack, as

3 I understand your brief, is that Rule 106 is

4 inapplicable anyway, because he never mentioned it or

5 raised it. Isn't it?

6 MR. WOMACK: That's --

7 QUESTION: Have you abandoned that argument?

8 MR. WOMACK: No, sir, I have not.

9 The first citing of 106 was in the post-trial

10 motions, and I'm saying to the Court that that's not

11 timely. It's too late. You've got -- you ought to be

12 required to warn the District Judge, so that he can

13 compare and make a reasoned ruling, not catch him by

14 surprise on post-trial motions.

15 QUESTION: To get more specific, as I

16 understand it, the writing -- you didn't introduce the

17 writing, did you?

18 MR. WOMACK: No, your Honor.

19 QUESTION: You just read from it?

20 MR. WOMACK: No, your Honor. I can't envision

21 any circumstance under which I would put an adversary's

22 investigatory letter into evidence.

23 QUESTION: Well, then how could he have raised

24 106? Do you concede that 106 does not require that the

25 writing or recorded statement be introduced in evidence?

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1 MR. WOMACK: In my awkwardness, I'm not
2 getting my point across, and that's my fault.
3 I didn't think that 106 was usable at all,
4 under the circumstances.
5 QUESTION: Because you didn't introduce the
6 document itself, you just read from it?
7 MR. WOMACK: That's right. But the Court of
8 Appeals says that my point is not well taken.
9 Now, if you assume that I am wrong, and if
10 they were going to allow its use as a 106 proposition --
11 QUESTION: Then he should --
12 MR. WOMACK: If I have any time, I would like
13 to reserve it, your Honor.
14 QUESTION:: Very well, Mr. Womack.
15 Mr. Larry, now we'll hear from you.
16 ORAL ARGUMENT OF DENNIS K. LARRY
17 ON BEHALF OF THE RESPONDENT
18 MR. LARRY: Mr. Chief Justice. May it please
19 the Court, Rule 803(8)(c) has been variously described
20 by the Courts in these ways: first and foremost as a
21 mighty litigation tool. I believe that the issue before
22 this Court is for it to decide how mighty will be the
23 litigation tool found in 803(8)(c).
24 It has been termed by the Advisory Committee
25 as a controversial rule. It has been called by courts a

1 complex rule.

2 And how to interpret factual findings, was

3 obviously, as the brief set forth, a matter on which the

4 House and the Senate could not agree.

5 The point of Rainey and Knowlton at this

6 proceeding, is that while that rule was intended to make

7 available to the jury factual findings that could be

8 helpful to that jury, that were reached by an

9 investigator in the course of an investigation, that

10 that rule was never intended by the framers to permit

11 the garden variety, pure expert opinion, that normally

12 comes in through witnesses who are qualified as experts,

13 who are revealed in the discovery process as experts,

14 who are routinely deposed prior to trial as experts, and

15 who must be qualified by the Court --

16 QUESTION: Mr. Larry, I guess some courts in

17 applying the rule have read it to mean that so long as

18 an official report contains some factual findings, that

19 then the entire report is admissible, unless it is

20 lacking in trustworthiness.

21 Some courts have taken that view, I take it?

22 MR. LARRY: Justice O'Connor, the only case I

23 know of, other than Judge Tjoflat, who wrote a

24 concurring opinion in this case, that discuss that at

25 all was Zenith v. Matsushita.

1 It may have been discussed in others, but my
2 recollection of what the Court there said was that one
3 could read it that way.
4 QUESTION: And one could, I guess, read the
5 rule that way.
6 MR. LARRY: Yes, ma'am. Yes, Justice.
7 However, the Court goes on in the same case to
8 say, however, it appears clear that what was intended
9 was only to admit them to the extent of their factual
10 findings, and that's the construction that we urge here.
11 QUESTION: Aren't we then just embroiled in
12 the traditional distinction of 50 or 60 years ago, the
13 difference between fact and opinion?
14 MR. LARRY: Justice Rehnquist, I believe that
15 this Court, I believe that courts, can see a difference,
16 and can distinguish between what an investigator finds
17 as a fact, based upon his evaluation of evidence, and
18 what is pure opinion.
19 QUESTION: Surely anyone trained as a lawyer
20 would be able to see things at either end of that
21 spectrum. But the difficulties come in the middle,
22 where very competent trial judges, very competent
23 lawyers may see things differently.
24 And do we want reversals of trials because the
25 trial judge saw it one way, rather than the other, in

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1 the middle of the spectrum?

2 MR. LARRY: your Honor, what we want is for
3 the trial judge to make a determination as to whether
4 the report qualifies under the rule, and not simply let
5 the entire report in just because in some cases, it may
6 be difficult to distinguish between opinion and fact.

7 I think that what we have here is a rule that
8 carefully used words, "findings of fact," and never used
9 the word "opinion" in any of the Advisory Committee
10 notes.

11 QUESTION: Would you settle for the trial
12 judge setting up, "these are my findings of fact, a, b,
13 c, d, e; the rest are opinion?"

14 MR. LARRY: I think the judge, when the report
15 is offered, has to decide whether the report sets forth
16 more than findings of fact. And the cases, and the
17 Advisory Committee notes, do offer a helpful guide to
18 the judge in determining the kind of finding of facts
19 that was envisioned by the framers.

20 The Advisory Committee note to rule 803(6) --
21 and this gets into, of course, the analysis of Smith v.
22 Ithaca, but it's relevant to your point, Justice -- if
23 803(6) recognized that prior to the Federal rules of
24 evidence, opinions simply didn't come in in most courts,
25 or at least in many federal courts, and they took care

1 in the note to say, "Because we recognize that courts
2 have turned away records to the extent of their
3 opinions, we want it to be specifically clear here that
4 opinions and diagnoses are included."

5 Moving on to 803(8)(c), the very same hearsay
6 exception, but there is a slightly different
7 subdivision, they recognize, again, evaluative reports
8 have become controversial. Yet they never reach the
9 point of saying, and we simply want to open up the door
10 to all opinion.

11 What they do is analyze the kinds of
12 evaluative reports that statutorily had been permitted
13 -- for example, Secretary of Agriculture findings as to
14 the true grade of grain, recognizing that that kind of
15 an opinion, by the Secretary, or that kind of a
16 statement by the Secretary, to some extent involves some
17 conclusory process.

18 A finding or a certificate that a ship was
19 sanitary enough to accept a cargo of beans -- admissible
20 under statute -- far different from a probable cause
21 opinion, nevertheless slightly more than simply factual.

22 And the Advisory Committee looks to those
23 statutory exceptions and says, "this is our helpful
24 guide in deciding the kinds of reports we think ought to
25 be admitted." They call them evaluative findings, or

1 evaluative reports.

2 QUESTION: Where in the briefs is the advisory

3 committee language that you're referring to? If you

4 don't know, don't bother.

5 MR. LARRY: I have the Advisory Committee note

6 in front of me.

7 QUESTION: Well, it would help. What I would

8 like to do is get it in front of me.

9 MR. LARRY: Well, your Honor, I don't have the

10 page handy. I'm sorry.

11 The JAG investigator was bound by a JAG

12 manual, which coincidentally required him to reach

13 findings of fact separately from opinions and

14 conclusions. And interestingly, also, it defined a

15 finding of fact as the investigator's evaluation of

16 evidence, but not his opinion or his inference as to

17 what all of the evidence might mean -- in this case, in

18 terms of causation.

19 The JAG manual, by its terms, contemplates

20 that the findings of fact would be evaluative, but it

21 takes care to separate that from opinion.

22 I think that if the Court examines the JAG

23 investigation in this case, it well illustrates the

24 distinction between the kinds of findings that this

25 Advisory Committee intended, and the opinions which we

1 contend this Court should not permit to become a tool
2 for litigators.
3 In the report, a lot of historical facts are
4 recited -- for example, the date, the time and the place
5 of the accident -- facts with which there is no
6 evaluation process at all.
7 He then moves on to such things as was the weather
8 a factor, and as a factual finding, he concludes that
9 because the winds and the temperatures and all were not
10 out of the ordinary, that for a pilot, weather couldn't
11 have been a factor.
12 And he makes that a finding of fact. He
13 doesn't say "it's my opinion, but it's possible it
14 was." He simply says, factually, weather wasn't a
15 factor.
16 He goes on to say that --
17 QUESTION: Is his degree of certainty what
18 determines it? I mean, suppose he had said, well,
19 actually, it's a close question whether the weather had
20 any effect or not. The winds were almost at the level
21 where they might have had an effect, and the clouds were
22 almost low enough -- but in my opinion, it wasn't a
23 factor.
24 Then that would no longer be a factual finding?
25 MR. LARRY: In that sense, he is telling the

1 reader of his report that it simply isn't a factual
2 finding of his.
3 QUESTION: But it seems to me that he's done
4 the same thing in both situations. It's only his
5 opinion in both situations.
6 In one case he's more certain than he is in
7 the other, but it's obviously just his judgment in each
8 case, isn't it?
9 MR. LARRY: It is true that when an
10 investigator makes a finding or an evaluation by factual
11 determination, he is injecting a judgment process, which
12 is involved in opinion, and gets more and more involved
13 the more you get into the kind of opinion that was
14 admitted here.
15 QUESTION: Right.
16 Suppose in the clear case that you first
17 posited, where it was clear that the weather wasn't
18 effected, he simply expressed himself by saying, it is
19 my firm opinion that weather was not a factor. Would
20 that be a factual point?
21 MR. LARRY: The court could very well
22 determine that although he called it an opinion, he
23 simply made a finding of fact. I don't think we can
24 turn on what the investigator called it.
25 QUESTION: I hope not. But I don't know what

1 we're turning on, if we're not turning on that. What
2 are we turning on?
3 MR. LARRY: What I'm suggesting to the Court
4 is that as the Advisory Committee evaluated or reveiwed
5 the kinds of reports that have been previously admitted
6 by statute, and still were preserved, that this is the
7 kind of report that may contain some conclusory, may
8 tend toward the conclusory, but which nevertheless is
9 the investigator's statement of fact that that's what it
10 was.
11 The case of Zenith v. Matsushita, which was
12 cited in all the briefs, makes that statement that
13 factual findings is a term broad enough to encompass any
14 statement of fact that represents a conclusion on the
15 part of the investigator.
16 Now, Lieutenant Commander Morgan after going
17 beyond the findings of fact then lists his opinions, and
18 makes it clear in his scenario of the opinions that it
19 is impossible for him to know for a fact how the
20 accident happened, why it happened.
21 If I may quote from number five, "Because both
22 pilots were killed in the crash, and because of the
23 nearly total destruction of the aircraft by fire, it is
24 impossible -- almost impossible -- to determine exactly
25 what happened."

1 He goes on to engage in what he calls a
2 possible scenario, which is what he later calls his
3 probable cause opinion: he sets up the scenario that the
4 pilot, surprised by the presence of another aircraft,
5 made a hard right turn and put the aircraft in stall.
6 He then goes on to say that the most probable cause was
7 just that possible scenario that I've just cited, and
8 states also, "I can't rule out the possibility that
9 rollback occurred."
10 And to address the question that was raised
11 during Beech's presentation, the judge initially ruled,
12 and had ruled in his pre-trial order up until the day
13 after jury selection and the day before the first
14 witness, that only what Lieutenant Commander Morgan had
15 called his factual findings would come into evidence.
16 He said that opinions would have no place in the
17 courtroom.
18 Then he reversed that, and as Beech pointed
19 out, we were given the opportunity for that short period
20 of time to try to do what we could to attack
21 trustworthiness, which we had made clear we thought was
22 an issue with respect to opinions. He stated, "I will
23 not allow all opinions in, only to the extent they're
24 couched in the terms of probability," because in
25 Florida, and I think in other States, experts are not

1 entitled to opine on what they think possibly could have
2 happened, only what they think probably happened.
3 QUESTION: In your view, Mr. Larry, does the
4 admissibility of opinion in this sort of a report turn
5 on whether it's trustworthy or not, or even if it's very
6 trustworthy, is it nonetheless not admissible?
7 MR. LARRY: Justice Rehnquist, our contention
8 is that before trustworthiness is ever reached as an
9 issue, the findings, the factual findings, have to meet
10 the requirements of the rule, and that, unless it is
11 determined that what is offered is a factual finding,
12 you never get to trustworthiness, with respect to
13 attacking the opinions.
14 I would like to point out that some time was
15 taken in pointing out the various purposes that are
16 served by allowing investigative findings of fact into
17 evidence, and the suggestion that our contention would
18 somehow disserve those policy reasons for allowing the
19 report.
20 One of the reasons given that these reports
21 should be admissible is because the officer who does it
22 comes on the scene early. That purpose is nowhere
23 offended by our position.
24 Other investigators hired by the parties are
25 partial. No quarrel with that. The investigator by the

1 time of the trial may have a dim recollection of what he
2 did -- again, no quarrel with that. His factual
3 findings, to the extent that they are factual, will
4 still be there, for them to come into evidence, in lieu
5 of his dim recollection.

6 Points that the cases, and the commentators
7 point to the fact that the investigator can interview
8 witnesses before the parties have pulled them to one
9 side or another. Again, that doesn't offend his
10 findings of fact. That simply says that that's why this
11 investigator's findings may be something that we should
12 admit, and oftentimes the officer is trained in doing
13 this kind of investigation.

14 But none of these purposes speak to and
15 encourage that this factual findings language should be
16 extended to include all opinion, and simply leave it up
17 to the opponent to say, well, if the opinion's not
18 trustworthy. I think the wording has to have some
19 meaning other than everything in the world of opinion
20 comes in.

21 QUESTION: May I ask you a question, Mr.
22 Larry? Do you -- am I correct in understanding you
23 place a great deal of emphasis on how the author of the
24 report characterizes the material in the report. The
25 fact that he calls something a possibility and another

1 thing a probability makes a big difference. The fact
2 that he calls something a finding of fact, and something
3 else an opinion -- am I correct that --

4 MR. LARRY: Justice, you're not completely
5 correct in that point.

6 I am saying in this case that Lieutenant
7 Commander Morgan took care to place certain things in
8 his Findings of Fact section, but I don't believe that
9 this Court should adopt a rule that draws a bright line
10 to be determined by what the investigator calls it.

11 QUESTION: You see because --

12 MR. LARRY: Because one investigator here
13 could have said, "I find as a fact that Lieutenant
14 Commander Rainey stalled this aircraft and caused her
15 own death."

16 QUESTION: But one of the things that puzzles
17 me is that the judge left out all the parts of the
18 possible scenario, in paragraph (5)(a)(b)(c)(d) and
19 (e). And of course, if it's just a possibility, maybe
20 it's opinion, it shouldn't go in.

21 But some of the effects that are described in
22 that possible scenario are really quite factual. I
23 mean, some -- that the airplane entered the pattern,
24 with a certain person at the controls, and I guess, you
25 know -- some of the things you would really consider to

1 be factual, even though the whole picture is a possible
2 scenario.
3 MR. LARRY: Your Honor, the judge found in
4 that case, and we agreed with him, that there wasn't
5 really any way for that investigator to know a lot of
6 those things that he was talking about were possible,
7 who was -- whether the student overpowered the
8 instructor, or whether the --
9 QUESTION: No, but for example, whether the
10 student could have obstructed the visibility of the
11 instructor in certain attitudes, and the like, those are
12 fairly factual, I would think.
13 MR. LARRY: Well, there weren't any finding --
14 if I'm not mistaken, there were no factual findings in
15 those respects. I believe that's why the Court felt
16 that was simply too much of a possible scenario for him
17 to say that comes in. But interestingly enough, once
18 the Lieutenant Commander Morgan stopped calling it a
19 possible scenario, and then called it his probable cause
20 opinion, then that did it.
21 QUESTION: Well, that's right. And it seems
22 to me that it is a matter of fact -- that one could
23 easily say it's a matter of fact that there is a
24 possibility that rollback occurred. I mean, I -- you
25 know -- in other words, that does not rule out that

1 one possibility. I know -- really I don't know what the
2 line is.
3 MR. LARRY: If that expert had been on the
4 stand, I could have asked him, "Sir, you have to agree
5 with me, don't you, that you can't rule out that
6 rollback happened?" Now, that's something that would
7 occur in a courtroom.
8 But the court was unwilling to do anything
9 except allow, once he had decided opinions would come
10 in, to allow anything but probable cause, probability
11 opinions. No more than I could put an expert on the
12 stand and ask this expert his opinion as to the
13 possibility of the cause was. I don't think I'd be
14 permitted to do that. That's impeachment kind of
15 questioning, but it's not what you could do on direct.
16 QUESTION: All probable opinions can get in,
17 then? Is that the line you're drawing?
18 MR. LARRY: Your Honor, that's the line that
19 the judge drew as to why that opinion would come in and
20 not the possible scenarios.
21 QUESTION: I see. And you wouldn't allow any
22 opinion to come in?
23 MR. LARRY: He did allow opinion to come in.
24 QUESTION: I say you would not allow any
25 opinion to come in?

1 MR. LARRY: That's correct.

2 QUESTION: And you define opinion as what?

3 MR. LARRY: I would ask the parties to bring

4 the experts who want to express those opinions to court.

5 QUESTION: What do you do with something like

6 -- I have a report that said, makes a finding that the

7 brake was applied -- the brakes were applied 200 feet

8 before the impact, in an automobile accident.

9 MR. LARRY: If that was based upon a skid mark

10 -- QUESTION: Yes, it was.

11 MR. LARRY: That was 200 feet long, then

12 you've entered into the realm of where an investigator

13 can tend toward the conclusory, but still establish it

14 as a fact.

15 If he can establish that the skidmark belonged

16 to that automobile -- it's what one of the cases talks

17 about is the kind of a conclusion that all persons

18 skilled in the art would likely agree with. I believe

19 that was the language from Skogen.

20 When you get into the causation issues, like

21 we have here, where nobody knows the cause, and the

22 opinions from experts go both ways, and where the

23 evidence -- much of it -- is destroyed, in the sense

24 that the aircraft burns up -- you can't have the kind of

25 opinions that this Court or any trial judge could say,

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1 "This is the kind of opinion all persons skilled would
2 likely agree with."
3 I think the Advisory Committee intended to
4 encompass maybe that much, but stay clear of saying that
5 this kind of garden variety expert opinion, that we take
6 great pains --
7 QUESTION: What if you seek to offer into
8 evidence a weather forecast? They predict for the next
9 24 hours high winds and heavy rain. Is that admissible
10 under this section?
11 MR. LARRY: That would not be a factual
12 finding reached by an investigator pursuant to law.
13 That wouldn't come under 803(8)(c). No.
14 QUESTION: So you say that that doesn't depend
15 on opinion at all, because it's that kind of opinion is
16 not governed by this?
17 MR. LARRY: Well, 803(8)(c) speaks only to
18 reports of investigations containing factual findings,
19 and I don't think that that's what that would be.
20 QUESTION: Well, what you're trying to do in
21 your lawsuit is to prove the cause of the accident.
22 MR. LARRY: That's correct.
23 QUESTION: Of the accident. So is it all that
24 difficult? I guess it is.
25 MR. LARRY: Is it all that difficult to prove

1 the cause?

2 QUESTION: But it's not impossible, or you

3 wouldn't have brought the lawsuit.

4 MR. LARRY: That's correct. But it becomes a

5 matter of very hotly contested expert opinion, as this

6 record amply demonstrates.

7 QUESTION: Yes.

8 MR. LARRY: It was a very, very -- and the

9 sole issue, really, for the jury, whether you call it a

10 legal conclusion --

11 QUESTION: Well, because experts differ is

12 some reason for not allowing in this report?

13 MR. LARRY: I'm sorry, I missed the first part.

14 QUESTION: The fact that experts may differ,

15 is that a reason for not allowing this report in?

16 MR. LARRY: Your Honor -- no.

17 The reason for not allowing this report in is

18 because this opinion -- not the findings of fact -- is

19 because it's not a finding of fact and the investigator

20 signals that --

21 QUESTION: So your submission is that if

22 somebody makes a finding of cause, that's opinion?

23 MR. LARRY: If it is -- if it goes beyond a

24 normative -- if it goes beyond --

25 QUESTION: Well, the investigator -- looks

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1 around, looks at the evidence available to him and says
2 that the cause of this accident was pilot error.
3 MR. LARRY: That's opinion and doesn't come in
4 under this rule. That's our contention.
5 QUESTION: What if you're wrong? What if you
6 say that cause is a finding of fact? Then it's in,
7 under this rule?
8 MR. LARRY: If the investigator calls it --
9 calls cause a finding of fact, I don't think that
10 changes that it is --
11 QUESTION: You say that that kind of a
12 statement by an expert after examining a crash is always
13 supposed to be considered an opinion?
14 MR. LARRY: Well, I think that's true.
15 QUESTION: But, you wouldn't say that, if you
16 apply the test you gave me earlier, whether everybody
17 would reach that conclusion.
18 Suppose the investigator based that conclusion
19 upon the fact that he had an eyewitness who was in the
20 cockpit, who said that the pilot hit the stick with his
21 elbow, accidentally, causing the plane to swerve and
22 crash -- base it on the live testimony of someone who
23 was in the cockpit.
24 There would be no doubt -- every reasonable
25 person would say that the cause was pilot error.

1 MR. LARRY: Well, in your example, I think
2 that I would differ with that, because I don't think
3 that part would be enough to answer the whole question.
4 But I agree with your Honor, there are cases
5 in which it could be established as a fact -- for
6 example, in a case of a shooting death. One could
7 conclude as a fact that death resulted from a bullet
8 wound in the heart.
9 QUESTION: Why isn't that opinion?
10 MR. LARRY: Well, it is -- that again gets
11 into that area that is called the kind of opinion, the
12 kind of conclusion that all persons similarly skilled
13 would reach.
14 It is very apparent that the people skilled in
15 the art of forensics and medical examiner training would
16 agree on.
17 QUESTION: So if they agree on it, it's not
18 opinion? Is that your point?
19 MR. LARRY: Your Honor, I'm making two points.
20 First, under Smith v. Ithaca, which is a very
21 strict construction approach which we urge on this
22 Court, any opinion doesn't come in.
23 The second point which has become -- I've
24 allowed it to become kind of confused, and I apologize
25 -- is that even if you adopt the Senate view, the

1 Advisory Committee view, that evaluative reports come
2 in, that they even suggest there should be some limit on
3 the kind of opinion, call it opinion, that should come
4 in as a factual finding. And that's why I pointed the
5 Court to the kinds of things the Advisory Committee said
6 should be a helpful guide, and they talk about some very
7 easy-to-resolve questions of would this be the kind of
8 thing that anyone would really disagree with, is what I
9 suggest.

10 If they had intended for this rule to be a
11 vehicle to place in this kind of opinion -- pure opinion
12 -- then I think that they should have said that, and I
13 think that this Court, as the Supreme Court of this
14 land, ought to be cautious in, by implication of a rule
15 or a statute, extending it to the point that very
16 important rights of cross-examination are cut off.

17 And that's what Beech is urging this Court to
18 do, is to take this rule of factual finding --

19 QUESTION: You could have deposed this fellow,
20 you could have called him as an adverse witness.

21 MR. LARRY: Your Honor, the only choice that
22 we had to do that was to seek a continuance. We did not
23 do that, and for that reason we cannot here complain
24 that we're entitled to a new trial because we were
25 surprised.

1 QUESTION: You can't really complain that your
2 right of cross-examination was cut off.
3 MR. LARRY: Well, your Honor, even under this
4 rule, if I had deposed him, I still can't cross-examine
5 him in front of the jury. I can cross-examine him in
6 the deposition, but just because I've taken this
7 deposition doesn't prevent Beech from bringing that
8 report in and just simply putting it in. And before
9 that jury, I may not cross-examine it. I have to read a
10 deposition that I took in Iowa, or someplace, some
11 months before the trial.
12 Now we readily concede that if we thought
13 surprise entitled us to a new trial, we forgave that
14 right, forewent that right. But I made some discussion
15 in the briefs addressing the circumstances under which
16 this change in ruling was announced, in order to draw
17 attention to the fact that we never conceded that the
18 opinions were trustworthy. We didn't sit around not
19 caring whether they came in.
20 We had a ruling from a Federal District Judge
21 in writing saying they wouldn't come in, and granted
22 Beech continued to press the point. We didn't
23 anticipate the Judge would change the ruling.
24 That's again, not mentioned that to say we're
25 entitled to a new trial for that reason, but to let this

1 Court know, and not be under the mistaken assumption
2 that we simply conceded it and now complain about it.
3 That is not the case, and the joint appendix contains
4 the transcript of the hearing before the judge when he
5 did change his mind, and we made it clear, Mr.
6 Hardington made it clear in that hearing, that we did
7 not concede the trustworthiness of those opinions.
8 QUESTION: On what basis did you want the
9 Plaintiffs' letter in?
10 MR. LARRY: Your Honor, the letter we wanted
11 in because Beech had introduced Rainey's letter.
12 QUESTION: Had they? They had asked him
13 questions about the letter.
14 MR. LARRY: They did --
15 QUESTION: They had not introduced the letter.
16 MR. LARRY: They introduced the letter, not
17 the document. But by the verbatim reading from it, with
18 the letter in front of them, saying "Mr. Rainey, did you
19 not say as follows," reading verbatim what he said.
20 QUESTION: Reading verbatim from the letter or
21 the document?
22 MR. LARRY: From the letter, the document
23 itself.
24 QUESTION: Is there a separate document? When
25 you say the document are you referring to the letter?

1 MR. LARRY: I'm referring to the letter.

2 The letter was part of the JAG composite. All

3 the enclosures included that Lieutenant Commander Rainey

4 had written to the JAG a letter concerning what his

5 investigation, although not an eyewitness --

6 QUESTION: And you want us to say that when a

7 counsel reads from a document and asks the witness if he

8 made the statement, that that's introducing the document?

9 MR. LARRY: Yes, your Honor. I do ask you to

10 say that, because in effect what they did was avoid

11 putting it in, by reading it.

12 But it came to the jury with the very same

13 wording that was in the letter. And all we asked to do,

14 immediately following that, on redirect, was to say,

15 you've been asked these questions that support, we

16 didn't say these words, but supported Beech's theory of

17 the case. Did you not also say, in your letter? And I

18 began to read verbatim from that.

19 QUESTION: So you didn't ask for it to be

20 introduced, either?

21 MR. LARRY: I asked for the opportunity to

22 read it in the same way Beech had done.

23 QUESTION: But not to put the letter in? And

24 I gather, also, not ever referring, for the benefit of

25 the trial court, to Rule 106?

1 MR. LARRY: Your Honor, I never mentioned the
2 rule to the judge, but he had the benefit of my
3 thinking, which really went to the substance of 106.
4 What I said to the judge was, "your Honor, he
5 has had the ability", this is at page 77 of the joint
6 appendix, and Mr. Toothman for Beech said: "I object to
7 him arguing."
8 I said to the judge, "May I be heard on this?"
9 The Court said, "Yes, sir, go ahead."
10 Whereupon I said, "On the basis that this letter
11 constitutes an admission by Commander Rainey, he has
12 been asked to answer every single question Mr. Toothman
13 had, respecting" and I was then cut off by the judge.
14 QUESTION: Well, but surely there are
15 countless rules of evidence. By number, you can't think
16 that a statement like that is like saying this should
17 come in under Rule 106.
18 MR. LARRY: Your Honor, it is true that I
19 didn't use those words, and I don't believe that the
20 prevailing authority requires that at that time, I cite
21 a rule of evidence.
22 I think that what it requires is that I make
23 known to, under 103, make known to the judge what the
24 substances of the testimony I want to elicit from the
25 witness is. That, the Eleventh Circuit found, I did, by

1 the way in which the question was framed.

2 QUESTION: What were you referring to as the

3 prevailing authority? A case from this Court?

4 MR. LARRY: There are, no, there are a number

5 of cases cited in the briefs, going to the 106 issue,

6 and the only case that I found that held that the party

7 not only had to tell the judge what the substance was,

8 but also why -- whether a specific rule had to be

9 mentioned -- was the case of Tate v. Robbins & Meyers,

10 which is a First Circuit case in 1986, found at 709 F

11 2nd 10. And that was the only case that I found cited.

12 QUESTION: Thank you, Mr. Larry. Your time has

13 expired. Mr. Womack, you have two minutes remaining.

14 REBUTTAL ARGUMENT BY MR. WOMACK:

15 MR. WOMACK: With the Court's permission, I

16 made the decision to call Mr. John Rainey as an adverse

17 party, since he had not testified at all, called for the

18 purpose of getting him to make admissions against

19 interest, which I thought were contained in the letter

20 which he had written.

21 The witness was shown two documents. One wa a

22 statement from the Marine captain named Guthrie, the

23 other was the letter which he, Mr. Rainey, had written,

24 and which he and Mrs. Knowlton had signed. That is the

25 one that's in issue here.

1 QUESTION: Well, you objected to the jury
2 hearing the statement by Rainey that he didn't think it
3 was pilot error?
4 MR. WOMACK: I objected to his making the
5 statement that the cause of the accident was rollback
6 which is a technical term.
7 QUESTION: And not pilot error?
8 MR. WOMACK: Yes, sir.
9 QUESTION: And why did you object to that?
10 MR. WOMACK: Why did I object to it? Because
11 he was not qualified.
12 QUESTION: So he's not qualified as an
13 expert? Is that it?
14 MR. WOMACK: Yes, sir. He was not qualified.
15 QUESTION: But the investigator, the JAG
16 investigator, was an expert?
17 MR. WOMACK: That comes in under the -- a
18 separate route, if I may put it that way, under the rule
19 as we understood it.
20 But you don't take a lay witness --
21 QUESTION: Well, I know but --
22 MR. WOMACK: -- and guess him to fall into the
23 same category.
24 QUESTION: I know but why did he have to be an expert to
25 testify as to a fact --

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1 MR. WOMACK: Because the engine testimony --

2 QUESTION: And rather than an opinion, was

3 this opinion what you were objecting to?

4 MR. WOMACK: Opinion, yes sir.

5 QUESTION: You mean this was -- the cause --

6 his statement about the cause of the accident was an

7 opinion?

8 MR. WOMACK: Yes, sir.

9 QUESTION: Just like that was in the JAG

10 expert, it was an opinion? Not a fact?

11 MR. WOMACK: Yes, your Honor, but one was

12 qualified under the rule, and one was not, in my

13 judgment.

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr.

15 Womack. The case is submitted.

16 (Whereupon, at 1:50 o'clock p.m., the case in

17 the above-titled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#87-981 - BEECH AIRCRAFT CORPORATION, Petitioner V. JOHN C. RAINEY, ETC., ET AL.

#87-1028 - BEECH AEROSPACE SERVICES, INC., PETITIONERS V. JOHN C. RAINEY, ETC., ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Judy Freilicher

(REPORTER)

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