ORIGINAL

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PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: GENERAL ELECTRIC COMPANY, Petitioner v. ROBERT K. JOINER, ET UX.

CASE NO: 96-188 C.1

PLACE: Washington, D.C.

DATE: Tuesday, October 14, 1997

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IN THE SUPREME COURT OF THE UNITED STATES

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GENERAL ELECTRIC COMPANY, :

Petitioner : No. 96-188

v. :

ROBERT K. JOINER, ET UX. :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Tuesday, October 14, 1997

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

STEVEN R. KUNEY, Washington, D.C.; on behalf of the Petitioners.

LAWRENCE G. WALLACE, Deputy Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Petitioner.

MICHAEL H. GOTTESMAN, ESQ., Washington, D.C.; on behalf of the Respondents.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 96-188, the General Electric Company v. Robert K. Joiner.

Mr. Kuney.

ORAL ARGUMENT OF STEVEN R. KUNEY

ON BEHALF OF THE PETITIONERS

MR. KUNEY: Mr. Chief Justice, and may it please the Court:

This case arises out of a holding by the court of appeals that a particularly stringent standard of review, and not abuse of discretion or manifest error, should govern appellate review of district court decisions, excluding expert testimony under Rule 702 and this Court's Daubert opinion.

The factors that this Court has considered in its recent standard of review decisions all point to abuse of discretion as the appropriate standard here: the broad discretion given to trial courts under Federal Rules of Evidence 104(a) and 702, the consistent practice before the adoption of the Federal Rules of deferential appellate review of decisions admitting expert testimony, and the clear functional advantages of the trial courts in making these intensely fact-bound determinations.

Indeed, the conclusion that abuse of discretion is the appropriate standard for review of 702 decisions has been reached by no less than 10 courts of appeals.

Notwithstanding all these considerations, the court below embraced what it called particularly stringent review for decisions excluding, but not admitting, expert testimony, citing as authority its reading of this Court's Daubert opinion and the Third Circuit's opinion in Paoli, which had called for a, quote, hard look at exclusions of expert testimony that rejul -- result in summary judgment. In so doing, the court below articulated an expressly one-sided standard of review, whose precise scope and meaning are not clear and whose likely and perhaps intended effect seems to be to discourage the exercise of the discretion inherent in the gatekeeping function this Court outlined in Daubert.

QUESTION: Mr. Kuney, even if you're correct, that the abuse of discretion is the standard of review, the Respondents tell us that we still would have to affirm under an abuse of discretion standard, and it doesn't make any difference in this case. Are you going to address that argument?

MR. KUNEY: Yes, Justice O'Connor, I will. I think it makes a difference for a variety of reasons. I think that part of Respondents' argument, as I understand

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it, is that the court was merely ruling on a matter of law, and never had occasion to apply its novel standard of review.

I think if one looks at the text of the opinion of the court below, particularly at 10a and 11a of the -- of the appendix to our cert petition, and takes a look at the section that deals with the reliability of expert testimony, what one sees is the court really --

QUESTION: 10a and 11a --

MR. KUNEY: Yes, of the --

QUESTION: -- of the petition?

MR. KUNEY: -- petition to the -- the -- the appendix to the cert petition. That's where we attach the opinion of the court below.

QUESTION: Mmm-hmm.

MR. KUNEY: And the section really begins at the bottom of 10.

QUESTION: Mmm-hmm.

MR. KUNEY: What one sees in the court of appeals opinion is nothing that looks like abuse of discretion review. Rather, the court simply proceeds on its own to undertake its analysis; indeed, to declare in the first paragraph that the methods and procedures used by these experts were in fact reliable.

The court then proceeds to basically disagree

with what the district court had done with respect to animal studies and epidemiolog -- epidemiological data, but never to declare or find that the court abused its discretion in making the decisions that it had made.

QUESTION: When -- when you say abuse of discretion, as opposed to perhaps de novo review, Mr. Kuney, I take it that means that a -- a properly acting district court might have reached different -- different conclusions on the same evidence, and both would be affirmed on appeal?

MR. KUNEY: Mr. chief Justice, I believe that could happen, although I don't believe that could have happened in this case. I think, on the record here, there -- there would have -- there should have been only one possible ruling by the district court. But, as a general matter, it is absolutely correct that abuse of discretion suggests a range of decisions that district courts could reach.

QUESTION: And I suppose if you say it's de novo review on an evidentiary point, there would be a lot more reversals in courts of appeals, not just in any one kind of case, but across the board.

MR. KUNEY: I -- I believe that's the intention of those who articulated this standard -- in fact, was to invite greater appellate reversal of district court

decisions.

QUESTION: On evidentiary points.

MR. KUNEY: On these evidentiary points. I think, in particular, if you look at Judge Becker's explanation in the Paoli case, of why he embraced this hard look, he expresses the concern that district judges are going to get it wrong, and really calls for the necessity of greater appellate intervention for this -- with respect to this gatekeeping function.

QUESTION: Mr. Kuney, the -- the court of appeals -- the nub of -- of one of the court of appeals' points was that the district court had focused on the soundness of the results reached by the various studies in question rather than the methodology and the general acceptance of that methodology. If -- and you may want to comment on whether this is so or not -- but if the district court did not make it clear from its own exposition whether it was focusing on results rather than methodology -- if there is an ambiguity there -- would you agree that the court of appeals may resolve that ambiguity in, in effect, any reasonable way, and that the resolution of that ambiguity, in deciding whether the -- the lower court opinion should be read as focusing on result or on method, is -- is something that we should accept, so long as either resolution was -- was reasonable?

That itself would not be subject to an abuse of discretion standard, would it?

MR. KUNEY: Justice Souter, I don't believe this Court is obliged to accept the court of appeals' interpretation of what the district court was doing. In response to the first part of your question --

QUESTION: Though, of course, we wouldn't have taken the case just to review that.

MR. KUNEY: -- what -- what courts of appeals often do in -- in situations where there is abuse of discretion review, and they find that the record does not provide what the court of appeals believes is an adequate explanation of how the district judge exercised his or her discretion, then a remand for a better explanation from the trial court is often done.

QUESTION: Because there are -- there are -- there are two inadequacies that might be in question. One inadequacy might be the court of -- the district court didn't make it clear which prong, as it were, it was focusing on. The second inadequacy might be that, assuming it focused on the correct prong, the methodological one, it -- it simply did not do an adequate job of justifying its -- its position. And -- and you're saying, I guess, that there should be an abuse of discretion standard when the court of appeals reviews each

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of those two different kinds of questions?

MR. KUNEY: Yes, that's correct. That's correct.

I think, in -- in a number of cases, what this Court has said is that abuse of discretion as the standard of review really allows the appellate court full rein to do whatever is necessary. It can always correct errors of law under an abuse of discretion, and it provides the appropriate deference --

QUESTION: Mr. Kuney, the -- the 11th Circuit said that the standard of review it was applying was abuse of discretion. And then it went on -- this is on page 4a of your appendix -- a district court's ruling on the admissibility of evidence is reviewed for abuse of discretion. And then it gave two reasons for a heightened abuse of discretion. And one of them was the showstopper argument; that this is summary judgment, that you're out of court. This is not just that you -- you missed this piece of evidence, but you're out of court.

Now, isn't that just across the board, so that courts will look more closely at a ruling that puts a plaintiff out of court than one that -- that leads to summary judgment -- than one that is maybe a question of does a particular piece of evidence come in or out?

MR. KUNEY: I think courts of appeals inevitably

make judgments about how much of their time and attention to give to any particular question. I think the problem here, though, is that by suggesting -- by using language that suggests, in fact, some new standard, the 11th Circuit is suggesting, really, a different task for appellate courts. It, on the one hand, does embrace, as you pointed out, abuse of discretion, but then proceeds to say, we really need to do more than that.

QUESTION: But isn't it true, leaving -- leaving the field of expert testimony, as a general rule, that a court will look more closely -- a court of appeals -- at a district court ruling that ends a case than one that merely means that a particular piece of evidence won't come in?

MR. KUNEY: I -- I think the courts of appeals have not allowed that to lead to an altered standard of review. I think there are a variety of evidentiary decisions that can --

QUESTION: I thought that, in general, when you're faced with a summary judgment motion, the court -- both the district court and the court of appeals, look at it from the vantage point most favorable to the opponent of the motion.

MR. KUNEY: The summary judgment motion is reviewed de novo. There's no question about that. But

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when there are subsidiary evidentiary rulings that precede summary judgment, those, without regard to what rule of evidence may be implicated, are reviewed for abuse of discretion. Then, once the summary judgment record is established, then there's de novo review by the court of appeals of whether summary judgment was a -- was appropriate.

QUESTION: And all disputed issues of fact are taken in favor of -- of -- of the moving party?

MR. KUNEY: Once you're beyond -- yes, Justice Kennedy. Once you're beyond the evidentiary issue and to the summary judgment point, then there's de novo review if the --

QUESTION: Against the moving party in the court of appeals, yes.

But while you have the -- the appendix handy, could you look at Judge Birch's decision? It's at page 16a. And he has the first three or four sentences. He says: The role of the trial court, following Daubert, is to ensure that the conclusions reached by the scientific experts have some minimal level of reliability and probative value.

I take it you have no argument with that?

MR. KUNEY: That's correct.

QUESTION: Then -- then -- then he says: This

determination is accomplished by establishing that the predicate principles and methodology relied upon by the experts are valid and that they can be applied to the facts at issue.

And it seems to me that that is also in accord with your position?

MR. KUNEY: Yes.

QUESTION: And then he says: The sufficiency of the evidence and the weight of the evidence, however, are beyond the scope of the Daubert analysis.

Is -- is he mixing apples and oranges there, or -- or -- or is he correct in that statement, as -- as well? And it was his concern, I -- I think, that this was a sufficiency problem -- I assume, because that -- that's why he concurred.

MR. KUNEY: That's how I would read that, Your Honor -- that -- that he thought that perhaps what the district court had done was to slide from admissibility into sufficiency without clearly articulating that.

QUESTION: But -- but there's an element of sufficiency in the calculus that you want the district judge to apply, is there not?

MR. KUNEY: Well, you could use the word "sufficiency" if you want to. But I believe what this Court said is that there are minimum thresholds of

reliability and relevance that have to be met before the testimony is admissible. And -- and I --

QUESTION: But -- so we would say that "weight" and "sufficiency," as used here, are just terms of art, and in the sense that we usually use them, they do not apply to the district judge's determination?

MR. KUNEY: That's how I read Judge Birch -- Birch's concurrence; that he was recognizing two separate issues, and perhaps suggesting that there had been some confusion between the two.

QUESTION: Well, certainly, after -- after Daubert, the trial judge, the district court, is given authority to exclude evidence on the basis that it doesn't comply with the standards laid down in Daubert, I guess?

MR. KUNEY: Correct. Correct. And the court still has the ability, even if it determines that the evidence is admissible, to find it insufficient to avoid summary judgment. And that, I believe, is part of what this Court -- Court pointed out in Daubert -- was that the admissibility determination was not necessarily the end of the case.

QUESTION: Let -- let -- let's assume that -- that perfectly reliable scientific methodology was used, but that the issue is whether, given that methodology, what has been proven is sufficiently relevant to this

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case. That is, whether it comes close enough to establishing evidence of what the plaintiff wants to prove.

The district court could simply exclude that evidence, I suppose, if he thinks it isn't relevant enough.

MR. KUNEY: I believe that's correct, under the -- under the "fit" prong.

QUESTION: In which case you say -- in which case you say he'd be reviewed on an abuse of discretion standard.

MR. KUNEY: Correct.

QUESTION: He could, on the other hand, let it in, and -- and simply grant summary judgment to the defendant on the ground that not sufficiently relevant evidence has been produced to overcome the initial burden that the plaintiff has.

MR. KUNEY: Correct.

QUESTION: And that decision would not be reviewed on an abuse of discretion standard.

MR. KUNEY: That's correct.

QUESTION: But it's the same -- it's the same question.

MR. KUNEY: I -- I believe it's not the same question. I believe the standards that you have set --

this Court has set forth under Rule 702, for determining admissibility, are not identical to the standards that govern a sufficiency determination.

QUESTION: Well, relevance has -- has -- has -- I don't see how that can be. Whether -- whether what has been medically proven is relevant enough goes to both the -- the -- the Daubert determination and to the summary judgment determination.

MR. KUNEY: I would -- I would agree that it's pertinent to both. But I don't think it's clearly the case that the standard that a district court ought to use in making those decisions -- either decision -- is the same. I believe that the "fit" prong under Daubert does come very close conceptually to what sufficiency of the evidence seems to be about. I certainly would concede that. And I -- I believe that's, in effect, what you're pointing out --

QUESTION: Yeah, but that -- that's what troubles me about -- about this case. It seems to me things are getting unduly complicated, when -- when we have what is virtually the same determinations of two different standards of review, depending upon which rubric the district court chooses to use.

MR. KUNEY: I think that's really no different here than in any other area that -- where an evidentiary

ruling leads to summary judgment. In -- inevitably, you're left with, if the district court decides the evidentiary ruling adverse to the Plaintiff, and then the summary judgment decision really is nothing other than the -- the cupboard is bare, because there is no admissible evidence, then there is de novo review of summary judgment. And that, admittedly, is not a very intensive exercise.

But I think that's not a problem unique to the admissibility of expert testimony.

QUESTION: Is -- is it fairly common in -- in cases now to have these evidentiary questions of admissibility of expert testimony thrashed out in limine or be -- before the case goes to trial, and then have a motion for summary judgment based on the court's decision?

MR. KUNEY: Absolutely. The courts have -- have really developed a variety of procedural vehicles. In some circuits, they virtually require an evidentiary hearing. In other cases, it's simply done by motion. But, increasingly, judges are resolving these issues in advance of trial, both to decide whether summary judgment is appropriate and so that before the trial unfolds, the parties will know what evidence is going to be before the factfinder and what evidence is not.

QUESTION: And in that process -- in that

process, do they consider conflicting expert testimony, so the defense experts advise the judge of why they think the methodology is flawed, et cetera?

MR. KUNEY: The procedure typically involves a motion in limine to exclude and a motion for summary judgment. And in the course of that motion in limine to exclude, the party seeking the exclusion will put on whatever contrary evidence it has that it believes identifies the methodological flaws.

QUESTION: The Respondents said that the methodology that their experts used and that was rejected was the same methodology that your experts used. Is -- is the answer to that, that that may be true, but the methodology lead your experts to conclude that there was no cau -- causal link or -- I mean, I'm not quite -- quite sure how to respond to that --

MR. KUNEY: Justice Kennedy, I think the answer to that is no, the methodology used was not the same. There was testimony in the record before the district court from the defense experts about appropriate methodology with respect to interpretation of animal studies, about a recognized set of criteria that can be applied to a variety of epidemiological data to assess causation, and there is no overlap with respect to that methodology between the methodology that Defendants put

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forward and the methodology of Plaintiffs' experts.

Mr. Chief Justice, I'd like to reserve any remaining time for rebuttal.

QUESTION: Very well, Mr. Kuney.

Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE

FOR UNITED STATES, AS AMICUS CURIAE,

SUPPORTING PETITIONER

MR. WALLACE: Thank you, Mr. Chief Justice, and may it please the Court:

The gatekeeper role that this Court prescribed in Daubert, as we understand it and as the terms of Rule 702 suggest, applies to the testimony of the expert and whether that testimony should be allowed, not just to the question of what studies the expert can advert to -- and usually these are studies done by others, not by himself -- but what he can say about those studies. Part of the scientific methodology is scientific reasoning, what conclusions are scien -- scientifically, can be said to follow, or at least arguably to follow, from the premises one has.

Many scientists could be found who could describe published studies conducted by others, but the experts are selected by the parties on the basis of what's important in the case, what inferences they're willing to

draw from the published studies, and how they're willing to relate those inferences to the case. And what -- what counts in these cases, in the gatekeeping function, is to separate what is scientific reasoning and worthy of consideration under Rule 702 from what is not supported by scientific reasoning and relating published studies to the issues in the case, and therefore should not be submitted to the jury.

That is a question based on what is proper scientific reasoning rather than quite the same legal question that Justice Scalia was adverting to in what is sufficient evidence to support a judgement. And this, as Respondents concede, is a very contextual, fact-intensive question. We point out in foot -- footnote 8, on page 18 of our brief, that there are legal situations in which the question before the court is whether there is a risk to public health or a danger to the environment, including a danger to animal habitats, which would make certain studies relevant in inferences that can be drawn through scientific reasoning to the ultimate issue in the case; quite a different ultimate issue from what's involved here, which is not preventing conduct that may be harmful in a general sense, but trying to determine whether it is more probable than not that a particular person's injury was caused by the defendant.

QUESTION: Mr. Wallace, when you say more probable than not -- and we -- we have -- we do have a Seventh Amendment, we do have questions of fact that go to a jury -- so this gatekeeping function has to be on the law side, otherwise it trenches on the Seventh Amendment. So, now, when you talk more probable than not, that sounds like fact territory to me.

MR. WALLACE: Well, I -- I -- I'm not saying that -- that that is the question for the judge to decide in -- in determining admissibility. That is -- but that is the -- the question that is before the jury, if the case goes to the jury. And, therefore, in deciding whether there is a sufficient link between the foundation -- the premises on which the expert is to draw and the inferences that he is willing to draw from them and -- and put before the jury, one has to keep in mind what it is that scientific reasoning has to relate to. And --

QUESTION: Yes, but that goes to the summary judgment determination and not to the determination of whether it's properly admissible. I assume it is properly admissible if it -- if it goes even that far, even a little bit, to render -- to render the conclusion more probable than not.

MR. WALLACE: Well, the -- the --

QUESTION: And if it does that, it's admitted. But I -- I really don't understand your position that -- that somehow environmental cases are a favored class of cases and junk science is okay for environmental cases, but not for -- not for an ordinary tort suit.

MR. WALLACE: Well --

QUESTION: I mean, if it's good for one, it's good for both, it seems to me.

MR. WALLACE: Well, we're not -- I -- I wouldn't consider what I was referring to as junk science. It -- it -- it is whether there is a sufficient indication that a -- a danger to the public health should not be risked. That is quite a different question --

QUESTION: It's a summary judgment question, not the admissibility or inadmissibility question.

MR. WALLACE: Well, the -- but the logical extension of that is that so long as a study can be said to have been published and conducted so far as appears, according to scientific methodology, any study can be admitted in any case, as long as you can find a qualified expert who is willing to say that I would draw a conclusion from this study that relates to this -- to the issue before this case. There's -- there would be no gatekeeping at all to exclude studies. And -- and Daubert would be, essentially, overruled.

The -- the process of scientific reasoning in drawing inferences from studies and whether there is too great an analytical gap between the premises and the conclusions that that expert is going to testify to has to be part of the gatekeeping if it's to be meaningful.

QUESTION: Any other categories of cases besides public health cases and environmental cases -- they're one category -- and -- and private tort cases are another.

MR. WALLACE: No, not at all. But it -- it --

QUESTION: Are there a third, fourth and fifth categories?

MR. WALLACE: That's only part of the context. One could pose a -- a hypothetical in a tort case where there had been an epidemiological study that provided a basis for linking, in a -- in a -- the cause here to a human injury, and then these very same animal studies could be adverted to in the testimony. One could -- the counsel could ask the expert, well, do you know of any other studies relating to this substance? And he can -- could -- re -- refer to the animal studies, and then explain why he thinks the results are consistent with the conclusion that he draws from the epidemiological studies. It might not be very important evidence, but it would be -- but he couldn't draw the inference that the district court found not to be supported --

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QUESTION: I -- I --

MR. WALLACE: -- that these particular animal studies showed something about cause of a -- of a disease in humans.

QUESTION: May I ask --

QUESTION: I --

QUESTION: Well, go -- go --

QUESTION: I'll just take -- your last point was that a particular study might show, out of 2.2 million people who die every year, a thousand die of chem -- cancer caused by chemical X. That's the EPA study. That would be perhaps ground for limiting it.

It wouldn't be ground for saying that this person, 1 of 500,000 to die of cancer, died of chemical X. Is that the point?

MR. WALLACE: That -- that -- that -- that very well could be the point. You have to --

QUESTION: Well, it could not be the point. He is -- he is putting the summary judgment question. You are saying this is not the summary judgment question; it is the admissibility question. You would admit that -- that evidence in one case and you would not admit it in the other. Isn't -- isn't that what you're saying?

And it seems to me, the -- the evidence is just as solid scientific evidence in both cases.

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QUESTION: But it isn't helpful to the jury.

MR. WALLACE: Yes, it has to be evidence that would assist the jury, under the terms of Rule 702 --

QUESTION: Well, but let me -- let me -- let me ask another question --

MR. WALLACE: -- with the question that is before them. It's not just a question of whether it's scientific.

QUESTION: Supposing the -- the scientist test -- is willing to testify that exposure to PCP's for an hour is -- that 1 out of a thousand people will get cancer from that. Is -- that would be admissible under your view in the environmental case; would it be admissible in the causation case?

MR. WALLACE: Well, I -- I -- I think that's a hard question to answer.

QUESTION: Well, I do, too.

MR. WALLACE: That -- that -- and -- and certainly a much closer question than what was before the district court here, which was testifying about possible effects on humans from animal studies involving higher doses than -- than would have been involved in this case. There has to be some threshold --

QUESTION: But -- but if -- if -- if it's --

MR. WALLACE: -- where --

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QUESTION: -- well, is the threshold that there is -- there is no -- no probability that there is some causal connection or that the probability is -- is so re -- so remote, 1 out of 100,000 cases, then it doesn't come in, but for 1 out of a thousand it does; is that what you're saying?

MR. WALLACE: I would say that that, too, is a contextual question that has to be answered in light of the evidence. We happen to be dealing with a case here --

QUESTION: Well, I'm giving you the --

MR. WALLACE: -- in which there was strong evidence of other causative factors. And if you try to add in testimony about a particular chemical, where it's only 1 in --

QUESTION: You're suggesting, if there had been no evidence in this record that the man smoked or had any family history of cancer, then it might have been admissible?

MR. WALLACE: Well, certainly, a lower threshold would be appropriate there than where you've got a slim chance that the chemical caused it, and -- and a lot of evidence of other things.

QUESTION: Thank you, Mr. Wallace.

Mr. Gottesman.

ORAL ARGUMENT OF MICHAEL H. GOTTESMAN

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ON BEHALF OF THE RESPONDENTS

MR. GOTTESMAN: Mr. Chief Justice, may it please the Court:

There are certainly some serious disagreements between the parties here, but there are a number of areas of agreement. And I'd like to begin with those, because I think they may narrow the focus of the very questions the Court has been asking.

First of all, I -- I do want to make it clear, it's only a piece of the court of appeals reversal that is here. That is, the Plaintiffs contended that the Plaintiff was exposed to three chemicals. The court of appeals held as a triable issue a fact on that. That was not an iss -- a ruling that turned on the admissibility of scientific evidence. And, indeed, as Respondents acknowledge at page 20 -- I'm sorry -- as Petitioners acknowledge at page 20 of their reply brief, the district court has not ruled the expert testimony inadmissible with respect to all three chemicals. So --

QUESTION: I wondered about that. What I read the district court saying was -- he said, at a point in his opinion, assuming that Plaintiffs' experts have not made unfounded assumptions about furans and dioxins -- that, I take it, is on the assumption that he thought there were furans, that they thought there were -- you

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know, that there were furans and dioxins -- Defendants still persuade the court that Plaintiffs' expert testimony would not be admissible.

Now, he doesn't say some of it. He -- he says the expert testimony -- the experts who are going to testify about particular things. He says, assuming I'm wrong, says the judge, about furans and dioxins, still it would not be admissible.

I take him to mean what he said.

MR. GOTTESMAN: No, I don't think, Your Honor, respectfully, that that is what he meant. What he said was the experts assumed that all three chemicals were present and that Plaintiff was exposed to them. But assuming that I accepted their testimony as testimony about PCB alone, it would not be acceptable. That's --

QUESTION: But I didn't see any -- any words.

MR. GOTTESMAN: Well --

QUESTION: I just -- oh, the only words that I found relevant were the words that I read to you.

MR. GOTTESMAN: Yes.

QUESTION: Now, are there some other words there that are relevant?

MR. GOTTESMAN: Well, let me make clear, the -- the Defendants did not move to deny the expert's testimony on all three substances. Indeed, their very reason for

arguing that you can't claim cau -- that -- that there is a promotion of cancer by PCB alone is that the studies the experts were relying on included people who were exposed to furans and dioxins. And said they -- therefore, if we're right, that this Plaintiff was not exposed to furans and dioxins, then that testimony is not --

QUESTION: I'll go back and look again. I looked through the record.

MR. GOTTESMAN: Yes. But I -- I ask Your Honor --

QUESTION: And I just found a motion for summary judgment, a motion to exclude testimony, some answers to it, and I didn't see all these fine distinctions being made in those papers.

MR. GOTTESMAN: Well, I think, if you --

QUESTION: But I'll go back and read them again.

MR. GOTTESMAN: -- if Your Honor will just look at page 20 of Respond -- of Petitioner's reply brief, they expressly say the district court did not rule on the admissibility of the testimony with respect to three chemicals. And I tell you --

QUESTION: Well -- well, is there something to be -- to go the jury still?

MR. GOTTESMAN: Pardon -- well, absolutely. Because now the court of appeals has found there's a

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triable --

QUESTION: No, no, no. If -- if the court of appeals is reversed, and if the district judge's order is upheld, are there now issues to go to the jury?

MR. GOTTESMAN: Yes, indeed. Well, that's the point that I started out wanting to make. The portion of the court of appeals opinion that said that there is a triable issue, that the -- that Mr. Joiner was exposed to dioxins and furans, is not here. Respondent acknowledges that at page 20 of his brief. That's not here because that had nothing to do with it.

QUESTION: Well, but if -- if you can't show causation, why -- why go to the jury? I mean, you have to exposure, plus causation. And if he rules --

MR. GOTTESMAN: Well, of course --

QUESTION: -- that you cannot show causation based on this testimony, isn't that the end of the case?

MR. GOTTESMAN: But the district court has not ruled that the scientist's testimony is inadmissible if it is assumed that Mr. Joiner was exposed to all three chemicals. The district court --

QUESTION: The district -- the district court did grant summary judgment.

MR. GOTTESMAN: Yes.

QUESTION: And so there would have to be some

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sort of reversal by the court of appeals that would leave something left for the jury?

MR. GOTTESMAN: Of course. Yes, Your Honor.

QUESTION: And what is it on page 20 that -- of the Petitioner's brief that you say is -- where they agree with your position?

MR. GOTTESMAN: On their reply brief. They say -- this is in the first full paragraph -- the court of appeals added that it -- in its view, there was a genuine factual dispute over whether furans and dioxins could have been present in the fluid to which Mr. Joiner was exposed. It never reached the question of whether opinions of causation by furans or dioxins would be admissible, because the district court had not done so.

QUESTION: That doesn't strike me as crystal clear, but per -- perhaps, in context, it --

MR. GOTTESMAN: Well, let -- let me back up for a minute, because this is just terribly important to us, obviously.

They moved for summary judgment and they made two points. Contrary to the claims of the Plaintiffs, Mr. Joiner was not exposed to furans and dioxins. Therefore, they said, he was only exposed to PCB's. And the testimony of Plaintiffs' experts wou -- is not admissible on the basis of PCB exposure alone. They never

said that if Mr. Joiner was exposed to all three chemicals that the testimony would not be admissible.

QUESTION: But, I mean, normally, as a -- as a reviewing judge in a court of appeals, I'd look at the summary judgment, I'd look at what the motions were below, I'd look at what they actually argued. So if you want me, I'll go back and do that. I'm just saying, when I did it briefly, I didn't notice these fine distinctions being made.

MR. GOTTESMAN: Well, Your Honor --

QUESTION: And -- where, in other words, they're saying -- you -- you believe, if I look at those papers again, I'll find that they say, oh, no matter even if we win this in the court of appeals, we concede that we still have to go back and have a trial on the furans and dioxins; that they said that in those papers?

MR. GOTTESMAN: That the court of appeals expressly --

QUESTION: I don't know the court of appeals. I'm not talking about that. But I'm saying whether or not -- you're saying now that somehow this case, given the summary judgment, et cetera, they're conceding that they have to go back and have a trial on furans and dioxins, is that right?

MR. GOTTESMAN: That's correct.

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QUESTION: All right. And I'll find that in their papers before the court of appeals?

MR. GOTTESMAN: Yes. Well, you'll find it --

QUESTION: I haven't so far.

MR. GOTTESMAN: -- in their papers here.

QUESTION: And I -- I still find that hard to square with the language that I believe Justice Breyer quote -- quoted to you. And it's at the top of 58a of the appendix.

MR. GOTTESMAN: Yes.

QUESTION: It said, Defendants still persuade the court that Plaintiffs' expert testimony would not be admissible.

MR. GOTTESMAN: Yes.

QUESTION: Can you proceed to the trial without this expert testimony?

MR. GOTTESMAN: No. No.

QUESTION: But you're saying they -- they're conceding that it would be admissible in respect to furans and dioxins if there's an issue there, but not -- I mean, this is a fine distinction; that's why I looked at the papers -- and you're going to tell me now -- perhaps you have the citation -- where this was all argued before the court of appeals on this kind of hypothesis.

QUESTION: Isn't it even narrower than that --

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that the district judge has not yet ruled on whether the testimony would be admissible if the record showed all three chem -- chemicals?

MR. GOTTESMAN: That's correct, Your Honor.

QUESTION: So we don't know what ruling he might make.

MR. GOTTESMAN: Exactly. There is nothing --

QUESTION: So they haven't conceded you go to trial; they concede there need to be further proceedings in the district court.

MR. GOTTESMAN: Yes. That's --

QUESTION: Well, when I used to be on the court of appeals, if there was this complicated thing, the parties had to point it out. That's why, normally, I would just take the issue of unadmissibility to be it's inadmissible.

MR. GOTTESMAN: Well --

QUESTION: Now, if there is this distinction made, I want to be sure I focus on it in the court of appeals.

MR. GOTTESMAN: Well, Your Honor, as they acknowledged, the district court never ruled on the admissibility.

QUESTION: Did someone ask --

QUESTION: Do you object to summary judgment,

then? I mean, if -- if --

MR. GOTTESMAN: Of course. And --

QUESTION: On that ground?

MR. GOTTESMAN: Yes.

QUESTION: That -- that even assuming that the district court was right about the exclusion, that summary judgment still should not have been granted?

MR. GOTTESMAN: Yes.

QUESTION: In other words, you asked the judge this, the district judge --

MR. GOTTESMAN: I'm sorry --

QUESTION: -- and he didn't make a ruling on it, even though he was asked to make a ruling on it?

MR. GOTTESMAN: He was not asked to make a ruling, because they did not contend it was not admissible.

QUESTION: If he -- if he -- he granted summary judgment.

MR. GOTTESMAN: Yes.

QUESTION: He made a ruling of inadmissibility. That, I would think, would be the end of it normally. I don't hypothesize what -- what he would have done on something that nobody asked him to do.

MR. GOTTESMAN: That's -- well, he was -- he did not -- it's a she -- the district judge did not answer the

question of whether the testimony with respect to all three chemicals was admissible.

QUESTION: Mr. Gottesman, I think -- tell me if my understanding is correct. She said this man wasn't exposed to furans and dioxins.

MR. GOTTESMAN: Yes.

QUESTION: Was exposed to PCB, but not furans and dioxins. And that was her ruling and that's why she looked at the admission only with respect to PCB.

MR. GOTTESMAN: That's correct.

QUESTION: Then, on appeal, you got her reversed twice. You got her reversed for saying there wasn't enough evidence of the furans and dioxins.

MR. GOTTESMAN: Correct.

QUESTION: And then you got her reversed on the admissibility -- the threshold admissibility question.

MR. GOTTESMAN: That's right.

QUESTION: So you lost before her on the dioxins and furans.

MR. GOTTESMAN: Correct.

QUESTION: You appealed that and you prevailed on that.

MR. GOTTESMAN: Correct.

QUESTION: And that's the piece of this case that isn't before us, right?

MR. GOTTESMAN: That's correct, Your Honor. As is the testimony of the experts that exposure to those chemicals promoted the cancer that Mr. Joiner experienced -- a point that the district court had never itself ruled on.

QUESTION: But the district court, on remand, might say, all right, I was wrong about the Plaintiff not having been exposed to furans and dioxins; nonetheless, considering all three chemicals together, I still conclude that the expert testimony should not be admitted.

MR. GOTTESMAN: Well, that is a possibility. Of course, the Defendants have never argued to the district court that it would be inadmissible, assuming all three were there. But if they made such an argument and if the district court were willing to entertain a second motion, that would be possible there.

But the ruling that is up here is the portion of the court of appeals ruling that says, even if the Plaintiff was only exposed to PCB's; that is, even if the jury ultimately determined --

QUESTION: Yeah, but isn't --

MR. GOTTESMAN: -- that the Plaintiff was -- was exposed.

QUESTION: Mr. Gottesman, getting back to what is really the main of -- of the petition and your

response, I guess, if you -- if you look again at 4a of the petition, where the district -- which has been referred to by my -- some of my colleagues, the -- the court of appeals says, towards the bottom, 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.

Do you agree with that statement?

MR. GOTTESMAN: Not as it is precisely stated. And I want -- that's part of where I said there is some agreement between the parties that will narrow the issues.

We do not contend that there are two different tiers of abuse of discretion review. There is one standard of review; it is abuse of discretion. We also do not believe that it is a one-way factor whether a court takes a close look at a case. Just as Judge Becker and this Court have said, that when evidence in a Daubert-type proceeding is excluded, we ought to take a close look, Judges Higginbotham, in the Fifth Circuit, Judge Buckley in the D.C. Circuit, and a third court, as well, have said, because these are such important rulings, these rulings inevitably decide the fate of a case when it's a toxic tort case; because expert testimony is crucial to the existence or nonexistence of the case.

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These are not just ordinary rulings. These are really important rulings. They deserve more careful attention. And what we argue for is the formulation not of the sentence as stated by the majority, but actually the sentence as it is stated by the dissenting judge in this case, who, on this point, I'm not sure was disagreeing with the majority. What Judge Smith was saying -- and it's on page 18 of the appendix to the cert petition -- and I'll quote it, because this is all that we contend for as to the appropriate role of appellate courts: In applying a particularly stringent --

QUESTION: Whereabouts on the page are you, Mr. Gottesman?

MR. GOTTESMAN: Pardon?

QUESTION: Whereabouts on the page are you?

MR. GOTTESMAN: I'm sorry. This is the last paragraph on page 18a. It begins the paragraph. And on this point, we think Judge Smith is really just explaining. He says he's explaining what the standard is that the majority has asserted. In applying a particularly stringent review, we do not change the threshold of review, but conduct a searching review of the record -- that is, take a hard look -- while maintaining the proper standard of review.

QUESTION: Well, now, isn't that a certain

amount of gobbledy-goop?

(Laughter.)

MR. GOTTESMAN: I don't think so, Your Honor. I think what it is, is saying is there are some cases where we are going to devote more resources to analyzing the claim that a party has brought to us; that there has been an abuse of discretion --

QUESTION: But -- but you think, nonetheless, Judge Smith's view and the majority's view is that perhaps the -- the district court could have ruled either way and still be affirmed? That's, to me, what abuse of discretion means.

MR. GOTTESMAN: Well, in appropriate cases, that may be true.

QUESTION: Yes. Not always certainly.

MR. GOTTESMAN: But -- and, indeed, the court said this is not such a case. And I want to get to that for a moment.

QUESTION: But Judge Smith, of course, although you say you agree with the standard of review he espoused, said he would have affirmed the decision.

MR. GOTTESMAN: That's correct. And, obviously, we don't agree with that portion of the decision.

(Laughter.)

QUESTION: The phrase "hard luck" I -- I assume

is -- is taken from a whole line of D.C. Circuit cases involving review of administrative determinations which are supposed to be made on an arbitrary or capricious basis, equivalent to abuse of discretion probably.

MR. GOTTESMAN: Right.

QUESTION: And it was generally agreed among administrative law pra -- practitioners that "hard luck" meant not arbitrary and capricious, but -- but, indeed, a different standard.

MR. GOTTESMAN: Well, we are --

QUESTION: You almost never won the hard luck cases.

MR. GOTTESMAN: Okay.

We -- we think that that is -- that -- that -- we think this and only this: that this Court ought not to tell the appellate courts at this stage of the development of Daubert and its application that you should not look carefully at cases where these things come to you. We think it's important that they do look carefully.

QUESTION: Well, is this -- you're arguing -- arguing for a standard that is somewhat different than the ordinary review of a trial court's evidentiary rulings, aren't you?

MR. GOTTESMAN: Well, as the Chief Justice --

QUESTION: I mean, a trial judge has to sit on

the bench and make numerous rulings on the admissibility of evidence --

MR. GOTTESMAN: Of course.

QUESTION: -- as a trial proceeds.

MR. GOTTESMAN: Indeed.

QUESTION: And in the normal case, we apply an abuse of discretion standard to reviewing those judgments and decisions, which have to be made very quickly and --

MR. GOTTESMAN: Indeed.

QUESTION: -- it's a tough deal for the trial judge. And I think, in general, appellate courts have recognized that difficulty and have tended not to upset those rulings unless it's -- it's clearly an abuse of discretion. But you want some more searching review applied to the exclusion of expert testimony.

MR. GOTTESMAN: The exclusion or the admission when the admission also means that a trial will go forward that otherwise would not.

QUESTION: Right. Right.

MR. GOTTESMAN: That is --

QUESTION: Well, when you say "more searching review" -- when you say "devote more resources," would it comply with that if the judges on the appellate panel simply say, well, I'm really going to go over this record, you know, and I'm going to read it twice, perhaps --

(Laughter.)

QUESTION: -- and then simply apply the abuse of discretion standard?

MR. GOTTESMAN: That's all we're contending for, Your Honor.

QUESTION: Abuse of discretion, with teeth.

(Laughter.)

MR. GOTTESMAN: Well, I would say, with eyes, but yes.

(Laughter.)

QUESTION: And so we -- we could have hard luck cases and lick and a promise cases, right?

(Laughter.)

MR. GOTTESMAN: Well, I think, realistically, Your Honor --

QUESTION: I mean, this -- this -- this assumes that in other cases judges just sort of flip through the record, you know, fan the pages.

(Laughter.)

MR. GOTTESMAN: Well, Your -- Your Honor --

QUESTION: Shouldn't -- shouldn't we take a hard look in all cases? Why -- why limit a hard luck to -- to just these cases?

MR. GOTTESMAN: Well --

QUESTION: It seems to me one should be very

careful in every case.

MR. GOTTESMAN: Well, and -- and we wrote that in our brief, Your Honor.

QUESTION: Good.

MR. GOTTESMAN: And we said, in an ideal world, that's what appellate courts would do. But as --

QUESTION: We live in an ideal world here.

MR. GOTTESMAN: But as --

(Laughter.)

MR. GOTTESMAN: An ideal world, with limited resources, Your Honor.

As Justice O'Connor said, judges make a myriad of decisions every day, and they have to make them on the spot. And, understandably, courts of appeals are going to be quite deferential to those rulings. But this kind of a ruling is not made that way. This kind of a ruling is made on an elaborate record. Now, the judge, to be sure, did not hold a hearing here or even receive an argument from the lawyers, but the judge had very extended papers and wrote a full opinion. And this was something which was not just one of those snap decisions that judges have to make.

QUESTION: Mr. Gottesman, as you understand the hard look, it works for the defendants and the plaintiffs equally, whether it's admission or exclusion. But that's

not the way I read Judge Marquette's opinion. She -- she relies on the -- the presumption in favor of admissibility in the -- in her opinion.

MR. GOTTESMAN: Yes, I agree with that, Your Honor. And so we are not defending the notion that it should be limited to --

QUESTION: I see. So you don't defend her reason for the hard look?

MR. GOTTESMAN: No. We would put together the -- the views of Judge Becker on the Third Circuit and Judge Marquette, which is that when you exclude it in a case like this, it deserves the hard look --

QUESTION: And --

MR. GOTTESMAN: -- with the views of Judge Higginbotham and Judge Buckley and others that when you admit it in a case where it makes the whole difference between a trial or not, we should look at it more closely.

QUESTION: Oh, well, wait just a minute.

QUESTION: Well --

QUESTION: You do --

QUESTION: -- a -- a hard look -- it -- it's -- your hard look, then, is limited to summary judgment proceedings?

MR. GOTTESMAN: It's limited to evidentiary rulings which have a profound impact on the case. The

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most --

QUESTION: Well, what if -- what if it -- it -- it could have profound impact, I take it, even though -- supposing that the trial judge excludes important evidentiary testimony. Now, that doesn't result in his granting a judgment for the defendant at the end of the trial, but it has a significant effect on what you can argue to the jury. Does that kind of a ruling deserve a hard look?

MR. GOTTESMAN: I would think not. Certainly, it is not as strong a case for one as one where the judge says this case is over and it's over now; I'm granting summary judgment because of the ruling that I make. And I also think the fact that Daubert is a new and difficult enterprise for courts suggests some more room for appellate observation of what's happening and -- and elaboration.

And let me --

QUESTION: That's -- that's -- that's -- I'd just like to follow up on the Chief Justice's question, because that's what I wasn't certain about. Are you saying that a decision to exclude evidence or to admit evidence or a certain sort, an appellate court does the same job with it all the time, whether it's plaintiff's or defendant's, whether it's admitted or excluded prior to

trial or after trial, whether summary judgment is at stake or de novo is at stake, are all those to be the same in your mind, or are you saying that it's different, depending upon whether the trial would take place or the trial was over?

MR. GOTTESMAN: I think that I am saying something that's in between those. That is, that appellate courts should be free, when they feel a really -- a ruling was really important to the outcome of the case, to look closely at the claims of the parties.

QUESTION: All right. So that -- but there is not -- that's -- that you're saying is true whether there was a trial or wasn't a trial.

MR. GOTTESMAN: That's right.

QUESTION: It has nothing to do with summary judgment.

MR. GOTTESMAN: That's right.

QUESTION: It's just a fact of judicial mentality --

MR. GOTTESMAN: Exactly.

QUESTION: -- and not a rule of law.

MR. GOTTESMAN: What we are articulating is not a legal principle; it is a -- an observation about the allocation of appellate resources, which judges now, on five circuits, have felt it important to articulate.

QUESTION: Oh, well, that's the part I don't know about. Because once you articulate it in a rule of evidence or an opinion, it becomes a rule of law. And I don't know how you'd write such a thing into a rule of law. How -- do you have an idea for that?

MR. GOTTESMAN: I'm not sure that it should be written as a rule of law. That is, I think that these courts of appeal should be allowed to say this, and that you should not be offended that they say it.

QUESTION: Kind of harmless error?

MR. GOTTESMAN: Harmless error.

(Laughter.)

MR. GOTTESMAN: Not error. Not error. Harmless non-error, Your Honor.

Now, what I'd like to do --

QUESTION: It sounds like you want an abuse of discretion standard for our review of court of appeals decisions reviewing abuse of discretion at the trial level.

(Laughter.)

MR. GOTTESMAN: Well, let me address, Your Honor, the application in this case -- what it is that the court of appeals actually complained about that the district court did, which we believe is a ruling of legal error and, thus, not affected by that sentence. And the

Solicitor General, in -- in his brief, also said that the court of appeals believed that it had found a legal error.

To understand it, I have to spend 1 minute setting out what the methodology is that the experts were employing in this case, and then how the district court decided the case.

The experts were applying a methodology which is well established in the scientific method. It is known as the weight of evidence methodology. That is, in areas where science has not arrived at absolute certainty, how do we make probablistic estimates of whether something is causing or contributing to an injury or not?

And there are well-established protocols for this. They were developed initially by scientists at the EPA, and were then peer reviewed by university and industry scientists and, ultimately, published as the EPA's guidelines. There are similar guidelines for the World Health Organization, also developed by scientists. And there is a prescribed protocol that one uses in going about a weight of the evidence methodology.

If you look at the district court's opinion -- and this is what the court of appeals said about it -- nowhere does the district court acknowledge that the methodology being used here is weight of the evidence methodology. Nowhere does the district court said, it's

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wrong to use that methodology here. Nowhere does the district court said, well, it was right to use that methodology, but you didn't apply it properly here.

Instead, all that the district court did was say, bring on your individual pieces of evidence one at a time. I will look at each one under the microscope. I will decide whether you can go to a jury on a claim that this piece of evidence causes or promotes lung cancer in smokers. And if you look, for example, she started with the evidence of animal studies. And she discussed that at pages 58 to 62 in the appendix. And then she says, no, you can't find it from the animal studies, and she sweeps them off the table. We never hear about them again.

Then she starts with the epidemiological studies, the human epidemiological studies, at least two of which found statistically significant evidence of an increase of lung cancer from exposure to PCB's, and others of which found accelerated incidence of lung cancer, even though the sample sizes weren't large enough to find statistical significance. She critiques each of those, pushes it aside.

She ignores entirely other aspects of what the weight of evidence methodology requires.

QUESTION: But -- excuse me, before you go -- are you saying that if you have five studies that do not

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show a statistically significant difference, you can admit all five, although each one would not be admitted? Is that what the weight of evid --

MR. GOTTESMAN: Yes. And the weight of evidence methodology contemplates that. Statistical significance requires confidence at an extraordinarily high level. It does not correlate with the likelier than not burden of proof, which is what the law requires.

And so, scientists have written extensively -- we have a footnote in our brief, where we cite --

QUESTION: Well, and I take it the -- you presented all this argument to the district court, the -- the weight of the evidence and that sort of thing --

MR. GOTTESMAN: Yes.

QUESTION: -- that the -- the whole equals more than the sum of its parts, I take it?

MR. GOTTESMAN: Exactly. Exactly.

But the district court never acknowledges that that's even what's going on here. The district judge just goes through, one after another, the individual items of evidence. And then, at the end, says, the studies simply do not support the expert's position that PCB's, more probably than not --

QUESTION: All right. It sounds as if he's saying the studies -- I mean, I've written things like

that myself a lot. You go through seven pieces of evidence and you say the evidence doesn't support it. It means individually or -- individually or taken together.

MR. GOTTESMAN: Well, but that's a ruling on the sufficiency.

QUESTION: So the question would be, has he abused his discretion in saying, taken together, I don't think these studies will help the jury? That's what he said.

MR. GOTTESMAN: Well --

QUESTION: I don't think they'll help the jury enough to award -- to admit them.

MR. GOTTESMAN: Okay. Here's -- the court of appeals said two things about that. These were its rulings about how the district court proceeded. And, incidentally, the district court ignored much of the evidence that went into the weight of evidence thing, including, for example, that PCB's are ingested and the place in the body where they locate themselves is the lungs. That is where -- the lung tissue is where PCB's de -- deposit themselves. And that other chemicals that are similar to PCB's have been found to have high incidence of lung cancer.

The dis -- the district court ends with this statement that I just read. The court of appeals said two

things about that. Number one, said the court of appeals, you've just made a statement about the sufficiency of the evidence. You have not said that science -- the -- the scientific methodology is improper. You have not cited anything that suggests that scientists are not allowed to take this body of evidence and get to this conclusion. You've just said that you don't think you can get from this body of evidence to this conclusion.

And, indeed, that is exactly what did happen. Because the Defendants introduced no scientist who said that the Plaintiffs have taken steps, that it is impermissible, applying the proper scientific method, to take.

QUESTION: Well, was the -- was this a methodological conclusion or a relevance conclusion? Maybe the district court was saying the methodology is fine for what it purports to do. But it does not provide a sufficient predicate for use in reasoning to a conclusion about cause in humans. Maybe that's what the district court was doing. And if it was doing that, it seems to me, number one, that was not committing any legal error. And, number two, it was making a judgment, ultimately, about what the jury could find helpful that should be subject to abuse of discretion review.

Would you agree?

MR. GOTTESMAN: I think not, Your Honor. And let me suggest why. I think there are two problems with that. If the district court says there is scientific disapproval of this step. That is, the scientific methodology does not permit this step from these premises to that conclusion. That might be a -- a consideration of methodology. But the district court did not say that and could not say that, because there was no record made that suggested that this was not permissible scientific methodology.

QUESTION: That's fine. That -- that -- that shows that the district court was relying on relevance rather than methodology.

MR. GOTTESMAN: The district court was relying on sufficiency. The district court was saying, you can put your evidence on, but I don't believe it.

QUESTION: Well, do you --

QUESTION: Well --

QUESTION: -- do you agree that the -- do you agree that the district court must inquire both as to the adequacy, the soundness of the methodology, its predictability, and the relation of that methodology to the issues before the jury?

MR. GOTTESMAN: Yes.

QUESTION: All right. And the experts have to

show that link by their studies, do they not?

MR. GOTTESMAN: Yes.

QUESTION: And isn't all the district judge did here was to find that there was no link?

MR. GOTTESMAN: Well, the district court said there is no link; yes. But the district court did not --

QUESTION: And -- and that's within the purview of the district -- of the district court, if the district court is -- is -- is correct. If he -- he abuses his discretion, or her discretion, then we reverse. But that's within the discretion of the trial court, is it not?

MR. GOTTESMAN: That is where we would disagree, Your Honor. And that is where the court of appeals disagreed. The court of appeals said, as Daubert makes clear, the district court may not decide whether the experts' opinions are correct, but merely whether the bases supporting the conclusion are reliable.

QUESTION: But, Mr. Gottesman, it seems to me that -- that maybe the methodology prong is just a red herring. But if the weight of the evidence is an accepted methodology, it would always be passed that threshold if the expert just said, I considered everything and came to this conclusion.

MR. GOTTESMAN: Well, I -- we believe, Your

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Honor, that it can be encompassed within the methodology inquiry for the defendant to come forward with scientific evidence that says you can't get from A to B -- not just that I, the competing scientist, disagree -- because scientists disagree all the time -- but that the range of permissible scientific methodology, that which is regarded as good science, does not allow you to go from A to B.

QUESTION: But is there really much difference between the first and second position that you just described?

MR. GOTTESMAN: Yes. And let me give you one very good example of that. They point, in their reply brief, to the -- the testimony of some of their witnesses -- none of whom addressed the Plaintiffs' witnesses' testimony -- and say, see, this shows your methodology is bad. And they -- several of the examples, on page 12 of their reply brief, are the testimony of Dr. Waddell at deposition.

Dr. Waddell was asked at that definition with respect to the very testimony they're citing: Is the view that you're stating here widely accepted in the scientific community? This is on page 269 of the joint appendix. And his response was: There are a number of senior scientists who see it the same way I do. They probably, number-wise, are in the minority.

Now, that's their testimony: The view I'm expressing here is probably in the minority. That's what they're citing to show that our scientists were not following the scientific method.

QUESTION: Thank you, Mr. Gottesman.

Mr. Kuney, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF STEVEN R. KUNEY

ON BEHALF OF THE PETITIONERS

QUESTION: Would you mind telling us if there's something left here to be tried when it goes back and whether the district court has to then make a determination whether to admit expert testimony if it is found that furans and dioxides were part of the expos -- exposure?

MR. KUNEY: Yes, Justice O'Connor, I believe it is technically correct that in the motion for summary judgment, the only argument Defendants put forward about furans and dioxins was that there had been no exposure. So the district judge was not asked to rule upon whether opinions that accepted that exposure could meet the scientific requirements of Rule 702. So that issue is left before the district court.

And then, if there is a trial, if the district court decides that there are admissible opinions that go to that point, it will be a very different trial than

would otherwise take place. Because the Plaintiffs would essentially have to win in front of the factfinder the furans and dioxins exposure point or the case would be over.

QUESTION: Then are we -- we're supposed to assume for argument's sakes that there is inadmissible -- because one of the points you raised is that the court of appeals is wrong on its furans point -- there isn't any evidence here that -- that there were furans and dioxins.

MR. KUNEY: And -- and --

QUESTION: We're supposed to assume, for purposes of this case, that the court of appeals is right on that point. So the bottom line, in -- in your opinion, is we assume they're right, we remand to the court of appeals, and we ask the court of appeals to remand to the district court for consideration of furans and dioxins; is that the bottom line?

MR. KUNEY: That's correct. You -- you could in -- instruct the court of appeals that under of an abuse of discretion standard, which it should have applied, the district court's exclusion of the PCB opinions was clearly within the district court's discretion. And so there's a reversal, and that -- that opinion of the district court ought to be reinstated.

Since we did not technically challenge the

furans and dioxins exposure point, that would still be a matter appropriate for further proceedings.

QUESTION: I didn't see any evidence here on furans and dioxins on either side --

MR. KUNEY: Well, the -- the --

QUESTION: -- except whether they were there.

MR. KUNEY: -- the -- the -- the complication, Justice Breyer, is that the opinions of the experts, in fact, were necessary to the conclusions about whether there was exposure to furans and dioxins.

QUESTION: Mmm-hmm.

MR. KUNEY: That's part of what really was left up for grabs when and if the parties return to the district court.

QUESTION: I see.

MR. KUNEY: Let me just address a couple of points very briefly. First, the notion that we need a modified standard of review to tell courts of appeals when to pay attention. It -- I believe it does con -- convey the suggestion that somehow, under normal abuse of discretion, courts of appeals are not doing their job. We already have Federal Rule of Evidence 103, which, in effect, says that there are certain evidentiary rulings that don't have a -- an impact on a substantial right of the parties. And those ought not be the grounds for

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error.

It seems that that's sufficient, and that what this Court does not want to do is endorse the notion of the court of appeals that some kind of extra language or extra message needs to be given to courts of appeals in this area.

You con -- this Court considered, really, a very similar suggestion --

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Kuney.

MR. KUNEY: Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 11:02 a.m., the case in the above-entitled matter was submitted.)

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CASE NO: 96-188

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BY Ann Marie Fedrico

(REPORTER)