SUPREME COURT OF MISSISSIPPI

2006-CA-01128

Milton Watts
Appellant

v.

Radiator Specialty Company and
United States Steel Corporation
Appellees

Appeal from the Circuit Court of
Smith County, Mississippi
Cause No. 2002-364

APPELLEES' RESPONSE TO MOTION FOR REHEARING

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RESPONSE TO MOTION FOR REHEARING

Appellant's Motion for Rehearing should be denied. The Issue on Rehearing, as framed by Appellant in his Motion, mischaracterizes the majority opinion in this case. The Appellant incorrectly suggests that the majority declared that the trial court could choose one side's science over the other; that the majority misstates *Daubert's*[1] primary holding; that the majority improperly relied upon *Joiner*[2]; and that the majority shifted the admissibility analysis from the *Daubert* standard to the predecessor *Frye*[3] standard.

In fact, the majority opinion correctly concluded that the trial court did not abuse its discretion in performing its gatekeeping obligation and excluding the opinion testimony of Dr. Barry Levy. The trial court did not exclude Dr. Levy's opinion testimony because the epidemiologic studies on which he relied were not conclusive, as Appellant suggests. Instead, Dr. Levy's testimony was excluded because the findings in those epidemiologic studies do not support the opinions that he offered, even after Dr. Levy mischaracterized the findings of several of the studies. Dr. Levy's testimony that benzene exposure can cause non-Hodgkin's lymphoma and that benzene contained in Liquid Wrench caused Appellant's small cell lymphocytic lymphoma, based on his review of eighteen epidemiologic studies that do not support either hypothesis, is the very type of unreliable and unscientific testimony that Rule 702, the *Daubert* standard, and the *Joiner* refinement were designed to preclude.

The trial court made the right call in excluding Dr. Levy's opinion testimony, this Court made the right call in affirming the trial court's judgment, and the Motion for Rehearing should be denied.

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[1] *Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579 (1993).
[2] *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997).
[3] *Frye v. United States*, 293 F. 1013

ARGUMENT

I. APPELLANT'S "ISSUE ON REHEARING" MISCHARACTERIZES THE MAJORITY OPINION

Appellant says that the majority concluded that the trial court excluded plaintiff's expert testimony "simply because the epidemiology is not conclusive." (Mot. Reh., p. 1). That was not the basis for the majority opinion, and it was not the basis for the trial court's decision. Therefore, the asserted basis for Appellant's Motion for Rehearing is not actually present in this case.

What the majority opinion *said* is actually directly contrary to the suggestion made by Appellant:

> At no point do we suggest that experts must rely on studies that explicitly support their testimony. *The fact that none of the studies relied upon by Dr. Levy finds a conclusive link between benzene exposure and non-Hodgkin's lymphoma is just one of the many problems with the studies cited by the trial court.*

Slip. Op., at 9 (emphasis added). The majority opinion identified several of those other problems with the studies at pages 7 and 8. Moreover, the majority found that Dr. Levy's testimony was properly excluded not because of any lack of conclusiveness in those epidemiology studies, but because there was too great an analytical gap between that opinion testimony and the studies. Slip. Op., at 13. That was the correct result under *Joiner* for, as the majority so aptly described it, "The leap across the chasm from the data in the studies to Dr. Levy's proffered opinion was more than the trial court could allow." Slip. Op., at 13.

Since the "Issue on Rehearing" formulated by Appellant does not actually exist in the record or in the majority opinion, the Motion for Rehearing should be denied.

II. APPELLANT'S ARGUMENTS WITH THE MAJORITY OPINION ARE WITHOUT MERIT

Appellant presents four arguments against the majority opinion but, for the reasons set forth below, none has merit.

A. Whether Daubert relaxed the expert opinion admissibility standard is irrelevant, since the trial court correctly applied the standard.

Appellant invites the court to set aside its opinion "and apply the relaxed *Daubert* standard to Dr. Levy's testimony."[4] (Mot. Reh., at 5). He suggests that remedy based on his contention that this Court somehow erred by holding that "it did not 'lower the bar' for admittance of expert testimony when it adopted the *Daubert* standard." Slip. Op., at 13. But there is nothing in the record in this case to suggest that the trial court did not properly apply the *Daubert* standard, and there is certainly nothing in *Daubert* or in Rule 702 that would permit, as Appellant seems to request, *this* Court, rather than the trial court, to apply the *Daubert* standard. There is no reason for the Court to revisit its analysis in this regard.

B. The majority properly relied on the Joiner decision.

Appellant argues that the majority should not have relied upon the *Joiner* decision, and should not have evaluated the analytical gap between Dr. Levy's opinions and the epidemiologic data upon which he claimed to base those opinions. Appellant's effort to

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[4] This is not the case for adjudication of the question whether the *Daubert* standard is actually a more relaxed or a less relaxed standard than the *Frye* standard. But it cannot be disputed that, since *Daubert* was decided, the judicial examination of expert testimony has become more rigorous. *See* David G. Owen, *A Decade of Daubert*, 80 DENVER UNIV. L. REV. 345, 362 (2002) ("Post-*Daubert*, the federal district courts, exercising their newly appointed 'gatekeeper' function, have scrutinized expert testimony more closely, often holding rigorous pre-trial '*Daubert* hearings"—that are often outcome determinative—to determine the admissibility of proffered expert testimony."). In addition, a Federal Judicial Center survey of federal judges taken just prior to *Daubert* and again five years after *Daubert* found that "[j]udges were more likely to scrutinize expert testimony before trial and less likely to admit expert testimony" after *Daubert*. MOLLY TREADWAY JOHNSON, ET AL., FED. JUDICIAL CTR., EXPERT TESTIMONY IN CIVIL TRIALS: A PRELIMINARY ANALYSIS 1 (2000). *See also*, LLOYD DIXON & BRIAN GILL, RAND INST. FOR CIV. JUST., CHANGES IN THE STANDARDS FOR ADMITTING EXPERT EVIDENCE IN FEDERAL CIVIL CASES SINCE THE *DAUBERT* DECISION 29 (2001), available at http://www.rand.org/publications/MR/MR1439/MR1349.pdf (finding that "[s]tandards for reliability tightened in the years after the *Daubert* decision" and that "the success rate for challenges rose.").

distinguish *Joiner* from this case fails, however, because that effort is based on mischaracterizations of the epidemiologic studies, and because the analytical gap between Dr. Levy's causation opinions and his claimed epidemiologic support is precisely the type of problem about which the Supreme Court warned in *Joiner*.

First, the mischaracterizations. Appellant states: "Dr. Levy relied upon 18 studies that addressed benzene specifically, and benzene-containing solvents, generally." (Mot. Reh., at 7). In fact, only four of the nine cohort studies, and only two of the nine case-control studies, specifically addressed benzene. Pl.'s Exhibits. 11 and 12; attached as Exhibits A and B to Appellee Radiator Specialty Company's Appendix. Next, Appellant avers that: " . . . it is undisputed all 18 of the studies relied upon by Dr. Levy found some correlation between benzene exposure and non-Hodgkin's lymphoma." (Mot. Reh., at 8). In fact, twelve of the studies did not address benzene exposure,[5] and two of the studies did not address non-Hodgkin's lymphoma.[6] Finally, and perhaps most egregiously, Appellant states: "These [cohort] studies demonstrated a significant excess risk in people exposed to benzene in the workplace. . . ." (Mot. Reh. at 9). In fact, only two of the nine cohort studies were found to have statistical significance (a third was borderline statistically significant). *None* of the authors of any of the nine cohort studies concluded that a causal association exists between benzene exposure and non-Hodgkin's lymphoma.[7] Certainly if Appellant's argument in support of his Motion for Rehearing had merit, he would not believe it necessary to mischaracterize the study findings.

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[5] The *Vianna Lagorio, Pukkala, Raabe, Consonni, Wong* (2000), *Olsson, Delzell, Massoudi, Tatham, Nilsson, and Rego* studies did not address benzene exposure specifically.

[6] The *Vianna* and *Olsson* studies did not address non-Hodgkin's lymphoma.

[7] In *Joiner*, the Supreme Court concluded that an item of scientific literature is properly excluded as a basis for scientific knowledge if the authors of the study do not conclude that a causal relationship existed between the subject agent and the subject disease. *Joiner*, 522 U.S. at 145.

Second, the majority opinion's reference to *Joiner's* "analytical gap" language was particularly appropriate in this case. None of the studies on which Dr. Levy relied conclude that benzene exposure causes non-Hodgkin's lymphoma, but Dr. Levy testified that the studies supported *his opinion* that benzene exposure does cause non-Hodgkin's lymphoma. Many of the studies did not contain ultimate findings that supported Dr. Levy's opinion, so he cherry-picked pieces of data that he presumed to support his conclusions, while ignoring findings in the same studies that were inconsistent with his hypothesis. Most importantly, *none* of the studies on which Dr. Levy relied involve individual exposure similar to that experienced by Appellant; moreover, the specific disease with which Appellant has been diagnosed is not mentioned in *any* of the studies.[8] Dr. Levy's opinion that benzene exposure can cause non-Hodgkin's lymphoma, and that exposure to Liquid Wrench in fact caused Appellant's small cell lymphocytic lymphoma, is connected to the existing data by nothing more than the *ipse dixit* of Dr. Levy. His opinions were properly excluded by the trial court.

As a final matter, Appellant unfairly criticizes the majority opinion when he states that "the majority simply declares some of the studies relied upon as too weak and refuses to address the other studies. . ." (Mot. Reh., at 10). Appellant incorrectly assumes that it was this Court's responsibility to review every study for sufficiency, in a *de novo* reconsideration of the evidentiary call made by the trial court. To the contrary, it is the gatekeeping responsibility of the *trial court* to review each study to determine whether, individually or collectively, the

[8] In this particular regard, Dr. Levy's testimony failed to meet the "fit" (or relevancy) requirement announced in *Daubert*. *See, e.g., Amorgianos v. National R.R. Passenger Corp.*, 303 F.3d 256, 270 (2d Cir. 2002)(finding analytical gap too great between causation opinion and underlying data in chemical exposure case); *Heller v. Shaw Indus., Inc.*, 167 F.3d 146, 158 (3d Cir. 1999)("while the district court may not reject an expert's conclusion simply because the court finds it wanting, it is surely within the court's province to ensure that the conclusion, particularly a medical expert's ultimate conclusion on causation, 'fits' with the data alleged to support it."); *Hoffman v. Monsanto Co.*, 2007 WL 2984692, *3-5 (S.D. W. Va. 2007)(citing *Joiner*, stating that "[a]lthough [plaintiff's expert] begins with hard data in the form of measurements conducted by the defendants, he ends with conclusions that are unjustifiably extrapolated from the premise with which he begins.").

studies support the expert opinion. This Court correctly concluded that the trial court in this case properly carried out that responsibility. Appellant's *Joiner*-based arguments are without merit.

C. The majority opinion does not shift the admissibility standard for expert testimony.

Appellant argues that the majority opinion reinvigorates the *Frye* standard in Mississippi by ignoring the *Daubert* standard and "endors[ing] the defendants' argument that Dr. Levy's opinions were not generally accepted in the scientific community." (Mot. Reh., at 12). Appellant, however, misperceives or mischaracterizes the Court's opinion, when he asserts that it was based solely on the general acceptance factor and not upon any other *Daubert* factors. Indeed, the majority opinion specifically rejects this very argument, also made by the dissent:

> The dissent also makes the assertion that this Court's decision will effectively resurrect the *Frye* standard requiring an expert's opinion to be generally accepted in the specific community. . . . Quite to the contrary, this case is a perfect example of how courts should apply *Daubert* and its progeny."

Slip. Op., p. 12 (citation omitted). The majority opinion recognizes that the lack of general acceptance of Dr. Levy's opinions in the fields of hematology, oncology, and epidemiology was properly considered by the trial court as a *Daubert* factor, although it was certainly not the only basis for the exclusion of that testimony. The trial court excluded Dr. Levy's testimony not simply because his causation opinions are not generally accepted; it *also* found that the gap between those opinions, on the one hand, and the claimed epidemiological support for them, on the other, was far too large. As the Supreme Court stated in *Joiner*, "conclusions and methodology are not entirely distinct from one another." 522 U.S. at 146. The suggestion that

the majority opinion pushes the expert admissibility standard away from *Daubert* and toward *Frye* is without merit.

D. The majority opinion does not confuse weight of testimony with admissibility of testimony.

Appellant's final contention is that the majority, by holding that Dr. Levy's testimony might have misled the jury and that his explanation of the studies could have been more explicit, incorrectly concluded that his causation opinions are not relevant. (Mot. Reh., at 14). Once again, in his haste to challenge the majority opinion, Appellant has mischaracterized it.

What the majority opinion said was this: "A review of the case studies supports the trial court's finding that Dr. Levy's testimony as to the content of the studies and their relevance to the facts of this case could have easily misled the jury."[9] Slip. Op., at 6. The majority did not hold that Dr. Levy's opinion might have misled the jury; instead, it held that the trial court did not abuse its discretion in concluding that such testimony might have done so.

Similarly, the majority opinion did not criticize the explicitness of Dr. Levy's explanation of the studies. Instead, it questioned whether those studies were sufficient as a basis for Dr. Levy's opinions. Slip. Op., pp. 7-8. The majority opinion did not confuse testimonial weight with admissibility. To the contrary, the majority opinion makes it clear that, because Appellant never demonstrated that Dr. Levy's opinions were admissible, those opinions had *no* evidentiary weight.

In summary, none of Appellant's criticisms of the majority opinion has merit. The trial court properly performed its gatekeeping responsibility under *Daubert* and this Court's prior decisions, and this Court properly reviewed that performance under the appropriate standard of

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[9] The study review was a critical component of the gatekeeping task because "ostensibly legitimate data may serve as a Trojan Horse that facilitates the surreptitious advance of junk science and spurious, unreliable opinions." *Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391, 409 (Mich. 2004).

review to conclude that the trial court did not abuse its discretion. Accordingly, the Motion for Rehearing should be denied.

III. APPELLANT'S REQUESTED RELIEF IS INAPPROPRIATE.

Appellant requests the Court to reverse the trial court's grant of judgment to Defendants and render judgment on the jury's verdict. (Mot. Reh. p. 17). In seeking this relief, Appellant disregards the full effect of the lower court's ruling.

The trial court's Order on Post-Trial Motions (1) granted Defendants' motions for judgment notwithstanding the verdict based on the erroneous admission of Dr. Levy's testimony; (2) conditionally granted the Defendants' alternative motions for new trial; and (3) reserved the right to rule on the other dispositive issues raised by Defendants prior to conducting any new trial. The Order states, in part:

> **Order Conditionally Granting Motions for New Trial.** Pursuant to MRCP 50(c), the Court also is obliged to rule upon Defendants' motions for new trial. To the extent that the Court's Order granting the motions for judgment notwithstanding the verdict is reversed or vacated on appeal, the Court conditionally grants the motions for new trial; provided, however, that the Court reserves the right to reach the additional issues raised by Defendants (including statute of limitations, pre-emption, and failure to prove defect) in their motions for judgment notwithstanding the verdict, prior to allowing such a new trial to proceed.

R. at 2490.

In other words, even if this Court were to grant Appellant's Motion for Rehearing, the trial court's order provides that it will, in that event, consider the other issues raised by Defendants in support of their JNOV motions. Several alternate grounds, which the trial court was not required to reach initially, also sustain the trial court's judgment in the Defendants' favor. As the Defendants have pointed out in their briefs on the merits, even aside from the inadmissibility of Dr. Levy's testimony, Appellant's claims also fail for a number of other

reasons: they are barred by the applicable statute of limitations, are preempted by the Federal Hazardous Substances Act, and are inadequate under the Mississippi Products Liability Act.

With respect only to the first alternate ground, that the statute of limitations bars Appellant's claims, both the Fifth Circuit and the Southern District of Mississippi have recently recognized this Court's rule that, in cases involving latent diseases, the applicable statute of limitations begins to run upon diagnosis of the latent illness. *Barnes ex rel. Estate of Barnes v. Koppers*, -- F.3d --, 2008 WL 2568825 (5th Cir. June 30, 2008) (reversing jury verdict in favor of plaintiff, where plaintiff failed to file within three years of diagnosis, despite plaintiff's claim she was unaware of causal link between diagnosis and defendants' actions when diagnosed) (citing *Owens-Illinois, Inc. v. Edwards*, 573 So. 2d 704, 709 (Miss. 1990); *Romano v. United States of America*, 1:07cv00656-LG-JMR (S.D. Miss. July 14, 2008) (granting summary judgment to defendants where plaintiff failed to file within three years of diagnosis of disease, regardless of when plaintiff alleged she discovered the disease's cause) (citing *Edwards*). Likewise, the other grounds raised by Defendants in support of their JNOV motions also are sufficient to support an identical ruling by the trial court.

Appellant has not challenged the provision of the trial court's order that conditionally grants Defendants' motion for new trial. Thus, in the event that this Court grants Appellant's motion for rehearing and reverses the trial court's order granting judgment for Defendants, the trial court's order granting Defendants a new trial will become effective. Appellant's request that this Court reverse the trial court's ruling and render judgment on the jury's verdict in his favor is without merit.

CONCLUSION

The trial court correctly excluded Dr. Levy's testimony because that testimony is not supported by the epidemiologic studies upon which Dr. Levy claimed to rely. This Court properly concluded that the trial court did not abuse its discretion. The Motion for Rehearing should be denied. This Court's majority opinion is not, as Appellant says, "flatly wrong." To the contrary, the majority opinion gets it right; and the errors claimed by Appellant do not exist. Even in the unlikely event that this Court determines, on rehearing, that it should remand the case to the trial court for further proceedings, the trial court's order provides that in that event, it will consider the various alternative grounds upon which Defendants' JNOV motions may be granted. Those alternative grounds are also sufficient to support entry of judgment for Defendants.

For all of the foregoing reasons, the Motion for Rehearing should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on July 28, 2008, served a copy of the foregoing on plaintiffs counsel by placing same in the United States Mail, first class postage prepaid and properly addressed thereto and by copy of the letter to clerk to all known defense counsel of record by placing same in the United States Mail, first class postage prepaid and properly addressed thereto.

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