

**Tenth Anniversary of the Supreme Court's Decision in  
*Daubert v. Merrell Dow Pharmaceuticals, Inc.*: The  
Respective Roles of Trial and Appellate Courts in  
*Daubert-Kumho* Rulings**

*The Honorable John J. Gibbons\**

The reason for this Symposium is the upcoming tenth anniversary of the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>1</sup> In *Daubert*, the Supreme Court resolved the division among the courts of appeals<sup>2</sup> over the question whether the general acceptance standard for the admission of expert opinion testimony announced in *Frye v. United States*<sup>3</sup> was applicable despite the codification, in 1975, of the Federal Rules of Evidence.<sup>4</sup> The Court, of course, held that the Federal Rules of Evidence displaced the *Frye* test. Interpreting Rule 702, the Court said that that Rule "assign[s] to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand."<sup>5</sup>

It is appropriate to keep in mind, however, that there have been other significant evidentiary milestones. On January 15, 1985, the Court of Appeals for the Third Circuit decided *United States v. Downing*,<sup>6</sup> an opinion by Judge Becker on which Justice Blackmun, in *Daubert*, placed great reliance.<sup>7</sup> And on December 5, 1983, the same

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<sup>1</sup> 509 U.S. 579 (1993).

<sup>2</sup> Compare, e.g., *United States v. Shorter*, 809 F.2d 54, 59-60 (D.C. Cir. 1987), with *DeLuca v. Merrell Dow Pharm., Inc.*, 911 F.2d 941, 955 (3d Cir. 1990).

<sup>3</sup> 293 F. 1013, 1014 (D.D.C. 1923).

<sup>4</sup> Rules of Evidence for United States Courts and Magistrates, Pub. L. No. 93-595, § 1, 88 Stat. 1937 (1975).

<sup>5</sup> 509 U.S. at 597.

<sup>6</sup> 753 F.2d 1224 (3d Cir. 1985).

<sup>7</sup> 509 U.S. at 591, 594.

court of appeals, in *In re Japanese Electronic Products Antitrust Litigation*,<sup>8</sup> interpreted Rules 702 and 703 as usually favoring the admissibility of expert opinion testimony.

I mention these rather old Third Circuit cases because they serve as a good starting point for the discussion of an issue that, perhaps reflecting my personal history, is of particular interest to me. That issue is the respective roles of trial courts and appellate courts with respect to the admissibility of evidence, and of expert opinion evidence in particular.

In *Japanese Electronic Products*, the case came before the Third Circuit Court of Appeals on an appeal from a grant of summary judgment in favor of defendants. Ordinarily, appellate courts reviewing a summary judgment or a directed verdict exercise plenary review.<sup>9</sup> No deference is afforded to the trial court's ruling. When, however, the summary judgment or directed verdict occurs after a trial court makes a preliminary ruling on the admissibility of evidence, the scope of appellate review becomes a bit more complicated. Rule 103(a) is the first source of complication. It addresses the scope of appellate review, providing, "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . ." This language suggests a sort of "harmless error" approach to evidentiary rulings. A second source of complication is Rule 104, dealing with trial court determinations of preliminary questions concerning "the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence . . ." <sup>10</sup> A third source of complication is the often-repeated statement in the case law that trial court evidentiary rulings are ordinarily reviewed only for abuse of discretion.<sup>11</sup>

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<sup>8</sup> 723 F.2d 238 (3d Cir. 1983) *rev'd on other grounds*, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1983).

<sup>9</sup> *See, e.g.*, *Childers v. Joseph*, 842 F.2d 689, 693 (3d Cir. 1988); *Equimark Commercial Fin. Co. v. C.I.T. Fin. Servs. Corp.*, 812 F.2d 141, 142 (3d Cir. 1987).

<sup>10</sup> Rule 104 provides, in part, as follows:

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

<sup>11</sup> *See e.g.*, *Knight v. Otis Elevator Co.*, 596 F.2d 84, 87 (3d Cir. 1979).

No thoughtful jurist would, I suggest, urge that trial courts have discretion to grant a summary judgment or a directed verdict, and that appellate review of either should therefore be by the deferential abuse of discretion standard. Where, however, a claim or defense in a civil case depends upon the admissibility of an expert's opinion testimony, it is quite possible for a trial court to put a finger on the scale in making a preliminary evidentiary ruling. That can happen in one of two ways: a ruling admitting the expert's opinion and making it possible for a case to go forward to trial and judgment, or a ruling excluding the opinion and thereby terminating the case.

Before granting summary judgment in *Japanese Electronic Products*, the district court excluded the expert opinions of several economists that had been tendered in an offer of proof, as required by Rule 103(a)(2). That court recognized that it must make a Rule 104(a) factual determination, and held that those opinions were excludable under both Rule 702 and Rule 703. In ruling on the Rule 703 requirement of reliance on facts or data "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject," the district court refused to consider the plaintiffs' experts' affidavits to the effect that the material they relied upon was of a type relied upon by experts in their respective fields.<sup>12</sup> Similarly, in ruling that Rule 702 was not satisfied, the court rejected the opinions because, among other reasons, they were not "beyond the jury's sphere of knowledge."<sup>13</sup>

Since the court of appeals was reviewing a summary judgment, the panel was confronted with the question whether these *in limine* evidentiary rulings should receive plenary review, or some more deferential standard such as the clearly erroneous standard applied under Fed. R. Civ. P. 52(a), or an abuse of discretion standard. The opinion of the court said,

In substituting its own opinion as to what constitutes reasonable reliance for that of the experts in the relevant fields the trial court misinterpreted Rule 703. The court's approach involved fundamental legal error because, as a matter of law, the district court must make a factual inquiry and finding as to what data experts in the field find reliable. There is no discretion to forbear from making this inquiry and finding. Insofar as the district court substituted its own views of reasonable reliance for those of the experts, therefore, we review for legal error.<sup>14</sup>

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<sup>12</sup> 505 F. Supp at 1325-26.

<sup>13</sup> *Id.* at 1333-34.

<sup>14</sup> 723 F.2d at 277.

In other words, the court of appeals exercised plenary review of the trial court's decision to exclude under Rule 703. In this respect, however, the opinion did not persuade Chief Judge Seitz, a panel member whose views were expressed in a footnote:

Chief Judge Seitz agrees with the result reached by the majority, but he believes that our review of the reliance determination under Rule 703 is for abuse of discretion rather than for error of law. In his view, improper application of the law is embraced within the abuse of discretion standard. . . .<sup>15</sup>

Since Chief Judge Seitz agreed that the district court's Rule 703 ruling could not stand, it would appear that in his view, abuse of discretion review permits rather vigorous scrutiny of a trial court's ruling to admit or exclude expert opinion testimony. That view is confirmed elsewhere in the *Japanese Electronic Products* opinion, which also rejects the district court's reliance on Rule 702.<sup>16</sup> That part of the opinion of the court, with which Chief Judge Seitz did not expressly disagree, says the following of the Rule 702 issue:

The court's role [under Rule 702] is to make the determination whether the proffered testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." Undoubtedly the court is clothed by Rule 702 with some degree of discretion in determining whether the opinion will be helpful, and we normally review only for abuse of discretion. *Knight v. Otis Elevator Co.*, 596 F.2d 84, 87 (3d Cir. 1979). But that review must be more discriminating if we believe that the court's exercise of discretion proceeded under a misapprehension as to the meaning of the governing rules. The court's misinterpretation of the reasonable reliance requirement of Rule 703 is in this respect significant.<sup>17</sup>

The case of *Knight v. Otis Elevator Co.*, which the court cited as authority for the abuse of discretion standard of review, is one of numerous cases making such a statement.<sup>18</sup> It involved an appeal from a directed verdict in a product defect case against an elevator manufacturer. The trial court excluded the opinion evidence of an engineer who was prepared to testify that unguarded elevator control buttons were a design defect, because the engineer, while familiar with other machinery control buttons, had never worked in the elevator industry. While paying lip service to an abuse of discretion standard of review, Judge Higginbotham in fact made what amounted

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<sup>15</sup> *Id.* at 277 n.43.

<sup>16</sup> *Id.* at 278-79.

<sup>17</sup> *Id.* at 278.

<sup>18</sup> 596 F.2d 84, 87 (3d Cir. 1979).

to a *de novo* decision that the expert's inexperience in the design and manufacture of elevators should go to the weight, and not the admissibility, of his opinion.<sup>19</sup> The trial court in *Knight* had no discretion to exclude an opinion that would have been sufficient to prevent a directed verdict, just as the trial court in *Japanese Electronic Products* had no discretion to exclude expert opinions that might be sufficient to avoid summary judgment.<sup>20</sup> The difference between abuse of discretion review and plenary review in these cases is imperceptible, as it should be.

By way of contrast, *United States v. Downing* arose in a different appellate setting: an appeal of a criminal conviction after a verdict against the defendant. The government's case depended heavily upon contested eyewitness identification. Defense counsel tendered the testimony of a psychologist who would testify to the unreliability of eyewitness identification testimony. The trial court excluded the evidence on the authority of Rule 702. The court of appeals reversed the defendant's conviction and conditionally ordered a new trial. Judge Becker wrote,

Judicial resistance to the introduction of this kind of expert testimony is understandable given its innovativeness and the fear of trial delay spawned by the spectre of the creation of a cottage industry of forensic psychologists. The logic of Fed. R. Evid. 702 is inexorable, however, and requires, as the [*United States v. Smith*, [*State v. Chapple* and [*People v. McDonald* courts recognized, that expert testimony on eyewitness perception and memory be admitted at least in some circumstances. We therefore conclude that the district court erred as a matter of law when it in effect decided that expert testimony on the subject is simply not admissible.<sup>21</sup>

"Erred as a matter of law" means, of course, plenary review, at least where a trial court categorically rules out a class or category of expert opinion testimony as unhelpful to the jury. But Judge Becker also recognized that since a new trial might occur, the trial court would still have to decide whether to admit the specific evidence proffered by the defendant.<sup>22</sup> Thus, the balance of the *Downing* opinion

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<sup>19</sup> *Id.* at 88.

<sup>20</sup> The Supreme Court in *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), did not address the admissibility of the expert opinion evidence. Instead, in the first of the trilogy of summary judgment opinions that enlarged the power of courts to grant summary judgment, it reversed the court of appeals decision that there was sufficient evidence of a predatory pricing conspiracy to go to the jury. See *infra* notes 44-45 and accompanying text.

<sup>21</sup> 753 F.2d at 1232 (footnote omitted).

<sup>22</sup> *Id.*

explains how Rule 702 should be applied, an exposition which Justice Blackmun found so persuasive in *Daubert*. Judge Becker recognized that the trial court had never made the “fit” determination required by Rule 702,<sup>23</sup> or the relevance determination required by Rule 403. But having ruled that categorical exclusions were legal errors, he went on to say, “The district court’s error will become harmless if on remand the district court, in the exercise of its Rule 702 or 403 discretion, decides that the proffered testimony is not admissible.”<sup>24</sup> Only if the trial court concluded, after an evidentiary hearing concerning the proffered expert opinion testimony, that the testimony was admissible was a new trial required.<sup>25</sup> But a judgment reinstating the verdict would be subject to further appellate review.<sup>26</sup>

A study of *Downing* for enlightenment on the scope of review of trial court rulings admitting or excluding expert opinion evidence leaves one with the distinct impression that scope of review is a truly complex problem. Written by a brilliant and extremely careful jurist, the opinion recognizes that some rulings, even in criminal cases, will be subjected to plenary review for legal error, while others will be subjected only to abuse of discretion or harmless error scrutiny. *Downing* was written in the context in which there is probably the greatest institutional interest or pressure to defer to rulings by a court of first instance: an appeal after a jury trial in a criminal case. Yet even in that context, the court recognized the necessity for avoiding a rule of undue deference.

Perhaps because Judge Becker’s *Downing* opinion sent somewhat mixed signals on the respective roles of trial and appellate courts in the admission of expert opinion testimony, Justice Blackmun in *Daubert* did not address that subject. Shortly after *Daubert* was handed down, however, Judge Becker had another occasion to deal with expert opinion testimony. The occasion was presented by a trial court’s second grant of summary judgment in a massive lawsuit growing out of the use of PCB in a rail yard in Paoli, Pennsylvania.<sup>27</sup> In a lengthy opinion dealing with expert witness efforts to link exposure to PCB with the plaintiffs’ illnesses, the court discussed “Standard of Review” extensively.<sup>28</sup> That part of the opinion is worth

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<sup>23</sup> *Id.* at 1242.

<sup>24</sup> *Id.* at 1243.

<sup>25</sup> *Id.* at 1244.

<sup>26</sup> *Id.* at 1244 n.28.

<sup>27</sup> The first summary judgment was reversed in *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829 (3d Cir. 1990) (Paoli I), *cert. denied*, 499 U.S. 961 (1991).

<sup>28</sup> *In re Paoli R.R. Yard PCB Litig.* (Paoli II), 35 F.3d 717, 749-50 (3d Cir. 1994).

quoting at some length, because it confirms what had by this time become obvious. The scope of review of Rule 702 and Rule 703 rulings by trial courts is not a simple matter. Judge Becker wrote,

A district court's ruling on admissibility of evidence is reviewed for abuse of discretion, "but to the extent the district court's ruling turns on an interpretation of a Federal Rule of Evidence our review is plenary." *DeLuca*, 911 F.2d at 944. The threshold rule is, of course, one of deference. However:

the justifications for committing decisions to the discretion of the court are not uniform, and may vary with the specific type of decisions. Although the standard of review in such instances is generally framed as "abuse of discretion," in fact the scope of review will be directly related to the reason why that category or type of decision is committed to the trial court's discretion in the first instance.

*United States v. Criden*, 648 F.2d 814, 817 (3d Cir.1981). In several other areas, we have applied a heightened abuse of discretion review. . . .

While evidentiary rulings are generally subject to a particularly high level of deference because the trial court has a superior vantage point to assess the evidence, *see Criden*, 648 F.2d at 818, evaluating the reliability of scientific methodologies and data does not generally involve assessing the *truthfulness* of the expert witnesses and thus is often not significantly more difficult on a cold record. Moreover, here there are factors that counsel in favor of a hard look at (more stringent review of) the district court's exercise of discretion. For example, because the reliability standard of Rules 702 and 703 is somewhat amorphous, there is a significant risk that district judges will set the threshold too high and will in fact force plaintiffs to prove their case twice. Reducing this risk is particularly important because the Federal Rules of Evidence display a preference for admissibility. *See Daubert*, \_\_\_ U.S. at \_\_\_, 113 S.Ct. at 2794.

. . . Moreover, the likelihood of finding an abuse of discretion is affected by the importance of the district court's decision to the outcome of the case and the effect it will have on important rights. *See Marroquin-Manriquez v. Immigration and Natur. Serv.*, 699 F.2d 129, 134 (3d Cir.1983) (abuse of discretion will only be found in discovery if there has been interference with a substantial right or fundamental unfairness at the trial has resulted.); *cf. Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976) (the procedural safeguards required by due process increase as the importance of the decision being made increases).

We acknowledge that there is arguably a tension between the substantial deference normally accorded to rulings where the trial court has a superior vantage point and the preference for admissibility of the Federal Rules of Evidence. We resolve any such tension by holding that when the district court's exclusionary evidentiary rulings with respect to scientific opinion testimony will result in a summary or directed judgment, we will give them a "hard look" (more stringent review, *cf. Brody v. Spang*, 957 F.2d at 1115) to determine if a district court has abused its discretion in excluding evidence as unreliable.<sup>29</sup>

The point Judge Becker makes is that categorizing an issue as reviewable for abuse of discretion is the beginning, not the end, of the appellate inquiry. In matters as complex as the performance of the gatekeeping functions imposed by Rules 702 and 703, as interpreted in *Daubert* and *Downey*, the term abuse of discretion is not particularly useful unless it is given content and context. And surely when a trial court's exclusionary rulings on expert opinion testimony result in a summary judgment or a directed verdict, Judge Becker is right in insisting that the appellate tribunal should give them a "hard look." Otherwise, as noted above, a trial court could put its finger on the scale and thereby frustrate the exercise of plenary review of such summary judgments or directed verdicts by appellate tribunals.

Indeed, a reasonable case can be made that the evidentiary ruling, as part of the record on summary judgment or directed verdict, should be subjected to the same plenary review as is applied to the rest of the record. This is my own view. It is not, I hasten to point out, the view of the United States Supreme Court.

Not long after the Court of Appeals for the Third Circuit filed Judge Becker's remarkable exegesis on the proper interpretation of Rules 702 and 703 in *Paoli II*, the Court of Appeals for the Eleventh Circuit was presented with a case in the same factual and procedural posture.<sup>30</sup> As in *Paoli II*, the trial court had granted summary judgment after excluding the plaintiff's expert's testimony on the link between PCB and his cancer.<sup>31</sup> A divided court of appeals reversed.<sup>32</sup> Writing for the majority, Judge Barket addressed scope of review as follows:

We review a grant of summary judgment de novo. *Fane v. Edenfield*, 945 F.2d 1514, 1516 (11th Cir.1991), *aff'd*, 507 U.S. 761,

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<sup>29</sup> *Id.* (emphasis in original) (footnotes omitted).

<sup>30</sup> *Joiner v. Gen. Elec. Co.*, 78 F.3d 524 (11th Cir. 1996).

<sup>31</sup> *Joiner v. Gen. Elec. Co.*, 864 F. Supp. 1310, 1327 (N.D. Ga. 1994).

<sup>32</sup> *Joiner*, 78 F.3d at 528.



113 S.Ct. 1792, 123 L.Ed.2d 543 (1993). Summary judgment is appropriate when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. The moving party bears the burden of showing that there is no issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553-54, 191 L.Ed.2d 265 (1986).

A district court's ruling on the admissibility of evidence is reviewed for abuse of discretion. *Ad-Vantage Tel. Directory Consultants, Inc. v. GTE Directories Corp.*, 37 F.3d 1460, 1463 (11th Cir.1994). 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. See, e.g., *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, \_\_\_\_, 113 S.Ct. 2786, 2794, 125 L.Ed.2d 469 (1993); *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 750 (3d Cir.1994). To the extent that the district court's ruling turns on an interpretation of a Federal Rule of Evidence, our review is plenary.<sup>33</sup>

Thus, the Eleventh Circuit majority endorsed the *Paoli II* approach to scope of review in the exclusion of evidence/summary judgment context. The dissenting judge, although disagreeing with the majority's analysis of the opinion, also endorsed the *Paoli II* "hard look" approach.<sup>34</sup> Indeed, the dissenting opinion of Senior Judge Smith went further than the majority in pointing out the complexity of the issues presented by an exclusionary ruling.<sup>35</sup>

The Supreme Court, of course, granted certiorari in the Eleventh Circuit case and reversed in *General Electric Co. v. Joiner*.<sup>36</sup> Although three Justices wrote opinions in *Joiner*, the entire Court agreed that the court of appeals erred in applying an overly stringent

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<sup>33</sup> *Id.* at 529 (some citations omitted).

<sup>34</sup> *Id.* at 535.

<sup>35</sup> The dissenting judge wrote:

Because understanding the scope of appellate review helps define the role of the trial court, I believe we should follow other circuits and present a more precise explanation of the standard of review. See, e.g., *Cook v. American Steamship Co.*, 53 F.3d 733, 738 (6th Cir.1995) (Three standards in reviewing admissibility of expert opinion: (1) trial court's factfinding is reviewed for clear error; (2) trial court's ruling whether opinion is scientific knowledge is question of law requiring plenary review; and (3) trial court's ruling whether opinion assists the trier of fact is reviewed for abuse of discretion); *Bradley v. Brown*, 42 F.3d 434, 436-37 (7th Cir.1995) (Plenary review of whether trial court applied Daubert framework, but trial court's findings not disturbed unless manifestly erroneous.).

*Id.*

<sup>36</sup> 522 U.S. 136 (1997).

review of the trial court's ruling to exclude Rule 702 opinion evidence. The standard of review of *all* evidentiary rulings, according to the Court, is pure, simple, unvarnished abuse of discretion. Moreover, said Chief Justice Rehnquist,

We likewise reject respondent's argument that because the granting of summary judgment in this case was "outcome determinative," it should have been subjected to a more searching standard of review. On a motion for summary judgment, disputed issues of fact are resolved against the moving party—here, petitioners. But the question of admissibility of expert testimony is not such an issue of fact, and is reviewable under the abuse of discretion standard.<sup>37</sup>

There are several remarkable features of the *Joiner* opinion that give one pause. The first is the authorities on which it relies for the proposition that all evidentiary rulings are reviewed only for abuse of discretion. The Court cited four cases,<sup>38</sup> all involving rulings made during the course of a trial. Only one of the four, *Spring Co. v. Edgar*, involved the admission of expert opinion evidence, and the denial of what would today be called a motion for a directed verdict. *Spring Co. v. Edgar* does refer to district court discretion to admit or exclude evidence,<sup>39</sup> although it was decided almost a century before Congress codified the Federal Rules of Evidence. By contrast, the *Joiner* discussion of scope of review does not even mention that admissibility of Rule 702 evidence may involve an interpretation of the Rule.

Although the other three cases cited in *Joiner* were decided after the codification of the Rules, none involved Rule 702. *Old Chief* concerned a Rule 403 relevancy ruling in which the majority found an abuse of discretion in admitting a criminal record rather than accepting defendant's stipulation as to an element of the offense. *Abel* involved the question whether Rules 608 and 610 should be construed to limit cross-examination of a fact witness for bias. The Supreme Court held that control of the scope of such cross-examination is governed by Rules 401 and 403.<sup>40</sup> *Rainey* did peripherally touch on opinions, but not Rule 702 opinions. The Court held that a report of investigation, offered as an exception to the hearsay rule on the authority of Federal Rules of Evidence 803(8)(c), was not excludable because it contained an opinion. Rule

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<sup>37</sup> *Id.* at 142-43.

<sup>38</sup> *Old Chief v. United States*, 519 U.S. 172, 174 (1997); *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988); *United States v. Abel*, 469 U.S. 45, 54 (1984); *Spring Co. v. Edgar*, 99 U.S. 645 (1879).

<sup>39</sup> 99 U.S. 645, 658 (1879).

<sup>40</sup> 469 U.S. at 54.

803(8)(c)'s qualification "unless the sources of information or other circumstances indicate lack of trustworthiness" was the statute's own safeguard against the admission of unreliable evidence.<sup>41</sup> Moreover, in *Rainey*, Justice Brennan's opinion on the Rule 803(8)(c) question is quite clearly an example of plenary review of what he identifies as an issue of statutory interpretation. And in making the door-opening interpretation of Rule 803(8)(c), Justice Brennan referred to "the Federal Rules' general approach of relaxing the traditional barriers to 'opinion' testimony."<sup>42</sup> The Court's discussion of abuse of discretion review in *Rainey* refers to the trial court's restriction of the scope of cross-examination, not to its Rule 803(8)(c) ruling.<sup>43</sup>

Finally, the Supreme Court's *Joiner* opinion is remarkable for a citation it did not include. There is no reference to Judge Becker's exegesis of Rule 702 in *Paoli II*, although in *Joiner*, the Eleventh Circuit relied upon it.

At this point, one may effectively compare what the Supreme Court did in *Joiner* with what it did in *Matsushita Elec. Indus. Co. v. Zenith Radio*.<sup>44</sup> That case was one of the summary judgment trilogy that proclaimed a change in the role of federal courts in passing upon motions for summary judgment.<sup>45</sup> Instead of discussing the Court of Appeals' reversal of the trial judge's ruling excluding expert opinion testimony of economists, the Supreme Court focused, as Professors Friedman, Mueller, and other participants in this Symposium suggest courts should, on sufficiency rather than admissibility. Exercising plenary review, the Supreme Court held that the entire record, including the expert opinion testimony, was legally insufficient to permit a federal antitrust claim to go to the jury.

The Supreme Court's vote was five to four. Furthermore, since the court of appeals' reversal of summary judgment was unanimous, seven of the ten Article III judges who looked at the summary judgment record voted for the question of sufficiency of evidence to go to the jury. That head count is, however, totally irrelevant. In a hierarchal appellate structure, it is the Supreme Court that has the ultimate responsibility for the meaning of federal statutes. In fact, the majority expressed no deference to the trial court or intermediate court rulings. Rather, it quite properly exercised

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<sup>41</sup> 488 U.S. at 167.

<sup>42</sup> *Id.* at 169.

<sup>43</sup> *Id.* at 175.

<sup>44</sup> 475 U.S. 574 (1983).

<sup>45</sup> The other two in the trilogy were *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

plenary review in deciding the *legal* question of what evidence is legally sufficient to go to the jury on a federal antitrust claim. On that legal question, the Justices did not agree.

The summary judgment trilogy was, I suggest, basically sound. The cases are sometimes described as relaxing the standards for granting summary judgment. A more accurate description, I think, is that the summary judgment trilogy admonished federal judges, and especially appellate judges, to take more seriously their obligation to make careful decisions on the legal question, or perhaps the mixed question of law and fact,<sup>46</sup> of what quantity and quality of proof suffices to take a question to the jury. Certainly, on federal law questions, the Court must be right about plenary review of the sufficiency of evidence.

But there is a countervailing consideration. The hardest cases for appellate tribunals are those over which they exercise plenary review. The judges in such cases do not enjoy the luxury of rules of deference to the original tribunal. *Matsushita* is a paradigm example. The summary judgment record was in an appendix of more than twenty volumes, occupying over eight feet of shelf space. In order to exercise plenary review over the legal question of sufficiency, the judges of the court of appeals and the Justices of the Supreme Court were obliged to, and I am sure did, familiarize themselves with that enormous quantity of material. That time-consuming task necessarily competed with other cases. Trial courts mostly have the advantage of working on one case at a time. But because of the pyramidal structure of courts, as a case is appealed and goes higher in that structure, the judicial time available for any one case contracts significantly. Thus, there are institutional pressures favoring rules on scope of review that permit greater deference toward initial decision makers.

In cases such as *Matsushita* presenting important federal law issues, the federal appellate courts ought to resist that institutional pressure. In cases in which the rule of law involved is a state law rule, the duty of the Supreme Court and the courts of appeals is, perhaps, less certain. Unless Congress decides to exercise Commerce Clause authority over tort law reform, final responsibility for defining the standards of sufficiency in, for example, mass tort cases will remain with the highest state courts. That distinction may tend to justify both what the Court did in *Matsushita* and what it did not do in *Joiner*. It may also arguably tend to justify the Supreme Court's rejection in

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<sup>46</sup> Cf. *Miller v. Fenton*, 474 U.S. 104 (1985) (holding that voluntariness of a confession is a mixed question of law and fact requiring plenary review).

*Joiner* of heightened scrutiny of *Daubert* rulings that result in summary judgments or directed verdicts in mass tort cases.

Maybe. I am not, however, persuaded by this argument, which I made up, because while mass tort cases mostly do not present federal substantive law *sufficiency* questions, they do involve other federal interests. That is so because those cases involve other very important federal law questions. In 1975, when Congress enacted the Federal Rules of Evidence, except for questions of privilege, it chose to federalize the entire law of evidence applied in the federal trial courts, both in federal substantive law cases, and in state substantive law cases.<sup>47</sup> A policy judgment by the Supreme Court that it would leave enforcement of that essentially procedural federal law to the courts of appeals, because more significant federal law issues like antitrust and the Fourteenth Amendment demanded its attention, would, as a matter of self-defense, be understandable. A policy judgment that it would require the more numerous judges of the courts of appeals to defer to the discretion of the trial courts, leaving the federal law of evidence in an abuse of discretion limbo, is not.

So, what the Supreme Court did in *Joiner* does not seem very defensible. What, then, do brief writers and courts of appeals judges do about a case that seems so wrong? That is not an easy question. The review system would become anarchic if judges lower down in the system failed to acknowledge the superior authority, if not the superior wisdom, of those who by the vagaries of the political appointive system are above them. Due respect must be paid. But *due respect* does not mean reading into a bad opinion all that it might mean, and not looking for ambiguities that leave room for interpretation. One can pick out sentences in *Joiner* that can be interpreted as requiring almost total deference to all trial court evidentiary rulings. On the other hand, one can find ambiguity in *Joiner* in the absence of a nuanced definition of abuse of discretion, a definition including legal error, procedural irregularity, disregard of evidence that should have been considered, and clearly erroneous factual determinations. Any one of these ought to lead to a statement that there was an abuse of discretion.

Ultimately, Rule 702 and Rule 703 require the determination of what, in many if not most cases, will be a mixed question of law and fact. The scope of review of such determinations should be at least as plenary as is required for summary judgments by *Matsushita*, *Liberty Lobby*, and *Celotex*. Such an approach by the courts of appeals would

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<sup>47</sup> See FED. R. EVID. 510. No Federal Rule of Civil Procedure or Federal Evidence Rule has been invalidated under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

not be anarchic, and might even persuade a majority of the Justices that *Joiner* should at least be restated.