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CIVIL EVIDENCE

Luis G. Zambrano*

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I. INTRODUCTION

AS with past Survey periods, federal and state courts in Texas have discussed the scope and application of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹ and *E.I. du Pont de Nemours & Co. v. Robinson*² in a variety of factual scenarios. Texas courts during this Survey period have also continued to grapple with expert report requirements under Chapter 74 of the Texas Civil Practice & Remedies Code (TCPRC), prompting one court to bemoan the “cottage industry of expert report litigation” generated by Chapter 74.³ Separately, Texas courts continued to address issues regarding the assertion and waiver of the attorney–client and work-product privileges. Additional cases during this period discuss rules relating to hearsay, relevance, and authentication.

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1. 509 U.S. 579 (1993).

2. 284 S.W.3d 809, 812 (Tex. 2009).

3. *Philipp v. McCreedy*, 298 S.W.3d 682, 684 (Tex. App.—San Antonio 2009, no pet.).

II. ADMISSIBILITY OF EXPERT TESTIMONY

A. STATE *ROBINSON* CASES AND RULE 702

During this Survey period, courts in Texas have addressed expert qualification and reliability standards under Texas Rule of Evidence 702 and *Robinson*. Among the more interesting decisions is *City of San Antonio v. Pollock*.⁴ In *Pollock*, the Texas Supreme Court considered the reliability of expert reports submitted by the plaintiffs in connection with an allegation of harmful exposure to benzene from a nearby closed and covered landfill.⁵ The plaintiffs alleged that their daughter was exposed *in utero* to benzene from the landfill, resulting in the development of acute lymphoblastic leukemia diagnosed at age four.⁶ The leukemia resulted from massive chromosomal anomalies in the child's bone-marrow cells.⁷ The plaintiffs' "home backed up to an old limestone quarry that the City had used as a . . . landfill."⁸ Prior to the lawsuit, the City of San Antonio conducted methane tests around the landfill and determined that "pockets of methane gas, . . . some in potentially explosive concentrations," existed near the plaintiffs' home, and this methane could have potentially "serve[d] as a carrier for other landfill byproducts and volatile organic compounds, such as benzene."⁹ Over a period of years, the City of San Antonio discovered that benzene had accumulated in several pockets around the area of the plaintiffs' home, potentially as a result of seepage from the landfill.¹⁰

In 2000, the plaintiffs' expert analyzed samples taken in 1998 from a well that was dug seventy feet from their home and detected the presence of methane and benzene. Using an accepted method that was not disputed by the City of San Antonio, the expert concluded that, had the samples been obtained in 1993 through 1994 when the plaintiff was pregnant, the concentrations of benzene would have been approximately 160 parts per billion.¹¹ The expert then opined that the substance entered the plaintiffs' home "on a regular basis."¹² A second expert—an oncologist—testified that the plaintiff's exposure to benzene leaked from the landfill while she was pregnant caused her daughter's leukemia. According to the testimony, the oncologist had experience in diagnosing and treating the type of leukemia suffered by the young girl, but he had not personally done research on the link between her form of leukemia and the benzene in concentrations detected by the test well.¹³ Moreover, the studies reviewed by the oncologist involved concentrations of benzene of

4. 284 S.W.3d 809, 812 (Tex. 2009).

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 813.

9. *Id.* at 813-14.

10. *Id.*

11. *Id.* at 814.

12. *Id.*

13. *Id.* at 815.

31,000 parts per billion, significantly more than the concentrations detected near the plaintiffs' property by the other expert.¹⁴

The City of San Antonio argued that the plaintiffs' experts' testimony was conclusory; however, the City failed to object to the admission of the testimony at trial.¹⁵ The Texas Supreme Court held that an objection was not needed to preserve a no-evidence challenge to conclusory expert testimony.¹⁶ Thus, the supreme court drew a very fine line between conclusory expert opinions, which do not require an objection, and unreliable expert opinions, which do require an objection under Texas Rule 103 to preserve error.¹⁷ The supreme court then turned to the reliability challenge and concluded that the expert reports were unreliable because (1) there was no testimony linking exposure to 160 parts per billion (as opposed to higher concentrations in other epidemiological studies) and the development of leukemia *in utero*, and (2) there was no evidence that the prevalence of benzene at the test-well site seventy feet from the plaintiffs' home resulted in exposure in their home from "ambient air."¹⁸ Expressing discomfort with the majority's treatment of Texas Rule of Evidence 103, the dissent by Justice Medina, joined by Justice O'Neill, initially noted that Texas Rule of Evidence 103(a)(1) required an objection to the admission of evidence from the plaintiffs' experts.¹⁹ Because there was no objection to the reliability of the expert testimony, the dissent would have held that the objection was waived.²⁰ Importantly, the dissent observed that any "analytical gap" in the expert testimony could have been explained had the City of San Antonio timely objected to the admissibility of the testimony, which would have permitted the trial court to properly exercise its gatekeeper role.²¹ Finally, the dissent observed that the expert testimony at issue was "far removed from the 'bare conclusions' [the supreme court] rejected as conclusory in *Coastal Transportation Co. v. Crown Central Petroleum Corp.*"²²

The Texarkana Court of Appeals arguably applied a different standard to waiver of objections to expert reports. In *Merrell v. Wal-Mart Stores, Inc.*, the plaintiffs' son and his girlfriend died of smoke inhalation when a fire destroyed their home.²³ A subsequent (and apparently desultory) investigation by the fire department revealed that the fire had originated near a recliner that was adjacent to a halogen lamp allegedly purchased at Wal-Mart.²⁴ The critical evidentiary issue in the case was whether an expert affidavit adequately linked the cause of the fire to the halogen

14. *Id.*

15. *Id.* at 816.

16. *Id.* at 817.

17. *Id.*

18. *Id.* at 819.

19. *Id.* at 822.

20. *Id.*

21. *Id.* at 826-27.

22. *Id.* at 828.

23. 276 S.W.3d 117, 122 (Tex. App.—Texarkana 2008, pet. filed).

24. *Id.*

lamp.²⁵ The court of appeals concluded, relying on *Coastal Transportation*, that Wal-Mart failed to preserve its objection to the plaintiffs' expert report and, therefore, waived its objections.²⁶ The viability of this decision is unclear, however, in light of the Texas Supreme Court's distinction in *Pollock* between objections to conclusory reports and unreliable reports. Indeed, Wal-Mart's principal objection to the report was that there were no facts showing that the lamp was purchased at a Wal-Mart store, and the report failed to discount other possible causes, such as cigarettes. Such arguments might be construed as suggesting that the report was "conclusory" and not merely "unreliable" under the *Robinson* factors.²⁷ In any event, the case illustrates the difficulties in the supreme court's distinction between the two concepts.

Outside of the waiver context, courts have continued to wrestle with the *Robinson* reliability requirements. In *Hackett v. Littlepage & Booth*, the Austin Court of Appeals addressed the exclusion of an expert report tendered by the plaintiff regarding his medical condition after he used a drug called Celebrex.²⁸ The report was submitted as part of a legal malpractice action arising from the defendants' alleged failure to file a medical malpractice action; thus, the report was not subject to the requirements of Chapter 74 of the TCPRC, although it did seek to establish the injury flowing from the legal malpractice.²⁹ The court of appeals ultimately faulted the report for failing to establish a causal link between Celebrex and the kidney disease affecting the plaintiff.³⁰ For example, the court of appeals noted that the expert testified regarding the impact of other drugs that were in the same class of drugs as Celebrex, on the renal condition suffered by the plaintiff.³¹ The expert, however, conceded that, in his research, he did not find a case in which Celebrex was associated with the plaintiff's kidney condition where the drug was used for four and one-half months or less.³²

In *Lincoln v. Clark Freight Lines, Inc.*, the Houston First Court of Appeals considered whether an accident reconstruction, in a case involving an automobile accident, was "substantially similar" to the actual collision, such that the report was sufficiently reliable under the *Robinson* standards.³³ The dispute did not involve the methodology used by the defendant's expert (which involved the calculation of a coefficient of friction to determine the distance that the car traveled) but, rather, the conditions under which the accident reconstruction was performed. The general rule

25. *Id.* at 128.

26. *Id.* at 127 ("By failing to raise the issue in the trial court, Wal-Mart has failed to preserve its complaints about the methodology for review.").

27. See *E.I. du Pont de Nemours & Co. v. Robinson*, 248 S.W.3d 809, 812 (Tex. 2000).

28. No. 03-08-000560-CV, 2009 WL 416620, at *3 (Tex. App.—Austin Feb. 20, 2009, no pet.) (mem. op.).

29. *Id.* at *7.

30. *Id.* at *5.

31. *Id.* at *5 n.8.

32. *Id.*

33. 285 S.W.3d 79, 86 (Tex. App.—Houston [1st Dist.] 2009, no pet.)

for out-of-court experiments is that “there must be substantial similarity between the conditions existing at the time of the experiment and the actual event that is the subject of litigation.”³⁴ The court of appeals said, however, that “[t]he conditions do not need to be identical,” and that the trial court has discretion to determine whether any dissimilarities are minor or should result in exclusion.³⁵

In *Lincoln*, the plaintiffs argued that the test was too dissimilar because, among other things, (1) the reconstruction involved a “different year, make, and model vehicle,” (2) the test vehicle was an automatic rather than a manual-transmission vehicle, (3) the test vehicle used to perform skid and speed calculations was “a police ‘interceptor’ Camaro with a substantially more powerful engine,” (4) the test vehicle had a different braking system, and (5) the expert did not test the hardness of the tires in the test vehicle and the damaged vehicle but instead relied on a subjective view of the tires.³⁶ Despite what appear on the surface to be significant differences in the vehicle used for the reconstruction, the court of appeals held that these dissimilarities did not affect the reliability of the expert report.³⁷ The court of appeals noted that the expert was able to explain away the dissimilarities by stating that the coefficient-of-friction calculation was not impacted by differences in the vehicles.³⁸ Moreover, although the expert did not test the hardness of the tires, the court of appeals held that his subjective evaluation of the tires, based on his experience as an accident reconstruction expert, was sufficient to show that the tires in the test vehicle and accident vehicle had a similar consistency.³⁹

B. EXPERT REPORTS AND AFFIDAVITS UNDER CHAPTER 74

A related line of cases deals with the application of *Robinson* standards under Chapter 74 of the TCPRC, which generally governs the submission of expert reports in the context of medical malpractice actions. During the Survey period, the dominant theme in cases discussing expert requirements under Chapter 74 was the requirement in *Gammill v. Jack Williams Chevrolet, Inc.* that the expert report not have an “analytical gap” between the data relied on by the expert and the expert’s ultimate conclusions.⁴⁰ In the context of medical malpractice claims governed by

34. *Id.* at 84 (quoting *Fort Worth & Denver Ry. Co. v. Williams*, 375 S.W.2d 279, 281-82 (Tex. 1964)).

35. *Id.*

36. *Id.* at 87, 89.

37. *Id.* at 89.

38. *Id.*

39. *Id.* at 91.

40. 972 S.W.2d 713, 727 (Tex. 1998) (“The ‘analytical gap’ between the data in this case and Huston’s opinion was not shown to be due to his techniques in assessing the vehicle restraint system Rather, the ‘gap’ in Huston’s analysis was his failure to show how his observations, assuming they were valid, supported his conclusions that Jaime was wearing her seat belt or that it was defective. The district court was not required, in Joiner’s words, ‘to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert.’”).

Chapter 74, this issue typically arises when courts wrestle with whether causation has been adequately addressed by the expert. The opinions below also discuss whether the expert is sufficiently qualified under Texas Rule of Evidence 702. Typically, defendants objecting to expert reports proffered in these cases attempt to distinguish between generally applicable medical knowledge or expertise and the specific area of expertise that the defendant possesses, with mixed results.

In *St. Clair v. Alexander*, the Corpus Christi Court of Appeals discussed arguments by the plaintiff that the trial court abused its discretion by excluding expert testimony in support of her claim.⁴¹ The defendant's expert—Matthew T. Alexander—had testified that the plaintiff's expert—J. Martin Barrash—“was unqualified to offer standard-of-care testimony” because he was no longer a lead surgeon who performed the types of spinal procedures at issue. Rather, he characterized Barrash as just a “second opinion” doctor.⁴² The court of appeals discounted this testimony, observing that although Barrash did not hold the title of “lead surgeon,” he nevertheless continued to participate and assist in laminectomies and was therefore qualified under chapter 74 of the TCPRC.⁴³ Alexander also challenged the reliability of Barrash's testimony, which required the court of appeals to look at the factors for reliability of expert testimony in *Robinson* and the *Gammill* “analytical gap” analysis. Alexander testified that Barrash's expert analysis was not reliable because it was not based on medical records, was not supported by medical literature, and did not discount alternative causes of the injury.⁴⁴ The court of appeals, however, disagreed, noting that Barrash's expert report was based on a well-accepted methodology known as “differential diagnosis,” by which a doctor identifies the cause of a medical problem by eliminating possible causes through an analysis of patient history, doing physical examinations, and comparing symptoms to those of known diseases.⁴⁵ Moreover, the court of appeals noted that the expert stated in his report that he had reviewed the postoperative radiographic studies of the plaintiff as well as her medical records.⁴⁶ Finally, the expert sufficiently addressed and discounted alternative explanations.⁴⁷ The principal impact of *St. Clair* is in its suggestion that an expert may be sufficiently qualified by being actively involved with the medical procedures at issue, even if the expert does not play a lead role in such procedures.

41. No. 13-08-00218-CV, 2009 WL 3135812, *1 (Tex. App.—Corpus Christi Sept. 30, 2009, pet. filed) (mem. op.).

42. *Id.* at *2-3.

43. *Id.* at *3 (distinguishing *Larson v. Downing*, 197 S.W.3d 303, 305 (Tex. 2006), in which the Texas Supreme Court concluded that an expert was properly excluded where the expert had not performed the surgery at issue for more than 11 years).

44. *Id.* at *4-5.

45. *Id.* at *4.

46. *Id.*

47. *Id.*

Granbury Minor Emergency Clinic v. Thiel continues this line of reasoning by focusing on the extent of knowledge and experience of the physician proffering an expert report, even if the physician practices in a different area of medicine.⁴⁸ In *Thiel*, the Fort Worth Court of Appeals addressed a challenge to an expert report filed pursuant to Chapter 74 of the TCPRC. The defendant argued that (1) the expert was not qualified, and (2) the “report fail[ed] to adequately set forth the statutory expert report elements of standard of care, breach and causation.”⁴⁹ The court of appeals began its discussion by summarizing the requirements of an expert report under Chapter 74. Section 74.351 sets forth the procedural requirements for submitting an expert report in a medical malpractice claim.⁵⁰ An expert report must be dismissed if it does not represent an “objective good faith effort to comply with the definition of an expert report,” which is further defined to mean a written report that contains “a fair summary of the expert’s opinions . . . as to the applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between the failure and the injury, harm, or damages claimed.”⁵¹ Additionally, “[t]o constitute a good faith effort, the report must ‘discuss the standard of care, breach, and causation with sufficient specificity to inform the defendant of the conduct the plaintiff has called into question and to provide a basis for the trial court to conclude that the claims have merit.’”⁵²

The court of appeals first addressed whether the plaintiff’s expert—Dr. Spangler—was qualified to provide opinions in the case, in light of the fact that he was a board-certified emergency room physician, whereas the defendant doctor was a general family practitioner.⁵³ The Texas Rules of Evidence provide that a witness may be qualified as an expert by “knowledge, skill, experience, training, or education.”⁵⁴ Reviewing Dr. Spangler’s curriculum vitae, the court of appeals concluded that Dr. Spangler was sufficiently qualified because he was “licensed to practice medicine in the State of Texas and was practicing medicine at the time [the plaintiff’s] claim arose”; during his career as an emergency room physician, he knew the standards of care with respect to the treatment of abdominal disorders, including the appendicitis suffered by the plaintiff, and he was “board certified in emergency medicine and ha[d] practiced for over twenty years.”⁵⁵ Interestingly, the court of appeals discounted the fact that Dr. Spangler had a different medical specialty than the defendant,

48. 296 S.W.3d 261, 264 (Tex. App.—Fort Worth 2009, no pet.).

49. *Id.*

50. *Id.* at 265; see TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (Vernon Supp. 2008).

51. *Thiel*, 296 S.W.3d at 265 (quoting TEX. CIV. PRAC. & REM. CODE § 74.351(l), (r)(6)).

52. *Id.* (quoting *Am. Transitional Care Ctrs., Inc. v. Palacios*, 46 S.W.3d 873, 878 (Tex. 2001)).

53. *Id.*

54. TEX. R. EVID. 702.

55. *Thiel*, 296 S.W.3d at 267-68.

citing other court decisions for the proposition that “the statute does not require a medical expert be practicing in the exact same field as the defendant physician, but instead must only be actively practicing medicine in rendering medical care services relevant to the claim.”⁵⁶

At first blush, this decision would seem to run counter to the Texas Supreme Court’s decision in *Broders v. Heise*, in which the supreme court rejected an argument that a medical doctor was able to testify about “all medical matters.”⁵⁷ Indeed, the supreme court explained further that “given the increasingly specialized and technical nature of medicine, there is no validity, if there ever was, to the notion that every licensed medical doctor should be *automatically* qualified to testify as an expert on every medical question.”⁵⁸ *Thiel* can be read consistently with *Broders*, however, in that an expert may have a different specialty and still be able to testify if the expert has other knowledge, skill, experience, training or education that exists in the four corners of the expert report. In other words, the expert in *Thiel* was not “automatically” qualified by virtue of being a doctor in an unrelated specialty, but was qualified in other ways.

With respect to the reliability of the report, the *Thiel* court concluded that the expert report adequately set forth the standard of care and provided sufficient information linking the defendant’s purported breach of the standard of care to the plaintiff’s injury.⁵⁹ For example, the court of appeals noted with respect to the standard of care allegations that Dr. Spangler set forth two standard-of-care violations: (1) failure “to conduct an appropriate and thorough history and physical examination” of the plaintiff, and (2) failure “to refer [the plaintiff] to the hospital emergency department or to a surgeon to treat her appendicitis.”⁶⁰ Dr. Spangler’s report also identified a number of different diagnostic tests that would have been conducted under the appropriate standard of care.⁶¹ Likewise, the court of appeals noted that the expert report properly set forth causation by linking the defendant’s failure “to conduct any meaningful work-up to determine the cause of [the plaintiff’s] abdominal pain” to a delayed diagnosis of appendicitis that resulted in the plaintiff’s injuries.⁶²

Other courts agree with the conclusion in *Thiel* that an expert may be qualified to render an opinion even if he or she is not in the same medical specialty as the defendant. In *Estorque v. Schafer*, the Fort Worth Court of Appeals again visited the issue of expert qualification under Rule 702 and appeared to announce a somewhat broader rule: “When a party can show that a subject is substantially developed in more than one field, tes-

56. *Id.* (citing *Kelly v. Rendon*, 255 S.W.3d 665, 674 (Tex. App.—Houston [14th Dist.] 2008, no pet.)).

57. 924 S.W.2d 148, 152 (Tex. 1996).

58. *Id.* (emphasis added).

59. *Thiel*, 296 S.W.3d at 273-74.

60. *Id.* at 270.

61. *Id.*

62. *Id.* at 272.

timony can come from an expert in any of those fields.”⁶³ In *Estorque*, the defendant physicians argued that the plaintiff’s expert was not qualified “in the specialties of nephrology, urology and gynecology to render opinions” regarding kidney disorders and gynecological cysts.⁶⁴ The court of appeals disagreed and reiterated that “a physician does not need to be a practitioner in the same specialty as the defendant physician to qualify as an expert.”⁶⁵ Rather, the appropriate inquiry is the expert’s “familiarity with the issues involved in the claim before the court.”⁶⁶ Applying these standards, the court of appeals concluded that the expert, a board certified family physician, was qualified by virtue of his training, education, and experience treating patients with similar conditions.⁶⁷ Unlike in *Thiel*, however, the expert report in *Estorque* was unreliable because the report contained analytical gaps. Specifically, the report did not explain how the defendants’ failure to consult a urologist or gynecologist (the applicable standard of care suggested by the expert) worsened the plaintiff’s condition.⁶⁸ Similarly, the plaintiff’s expert failed to clarify how the injuries would have been avoided had the defendants consulted with a urologist or gynecologist earlier in the course of treatment.⁶⁹

In *Philipp v. McCreedy*, the San Antonio Court of Appeals also discussed expert qualifications under Chapter 74 and Texas Rule of Evidence 702.⁷⁰ The case involved an argument by the defendant doctor that, although the plaintiff’s expert was qualified to address the standard of care for emergency room treatment, he was not qualified to render opinions regarding complications arising after the plaintiff was seen by an orthopedic surgeon and later suffered injuries stemming from a post-operative ankle fracture.⁷¹ The court of appeals disagreed and noted that, although the plaintiff’s expert’s curriculum vitae did “not reflect any specific orthopedic training or experience,” his report did include statements regarding his familiarity with the type of treatment and injury at issue.⁷²

C. WAIVER UNDER CHAPTER 74

During the Survey period, one interesting case addressed whether there was a waiver of the ability to seek a dismissal of a defective expert report under Chapter 74 of the TCPRC.⁷³ In *Seifert v. Price*, the Dallas Court of Appeals addressed whether the defendants waived their right to seek the dismissal of an untimely filed expert report by waiting over two

63. 302 S.W.3d 19, 26 (Tex. App.—Fort Worth 2009, no pet.).

64. *Id.* at 26-27.

65. *Id.*

66. *Id.*

67. *Id.* at 27.

68. *Id.* at 28-29.

69. *Id.* at 29.

70. 298 S.W.3d 682, 686 (Tex. App.—San Antonio 2009, no pet.).

71. *Id.* at 687.

72. *Id.* at 688.

73. *Seifert v. Price*, No. 05-08-00655-CV, 2008 WL 5341045, *1 (Tex. App.—Dallas Dec. 23, 2008, pet. denied) (mem. op.).

years to seek relief.⁷⁴ Under section 74.352(a), a plaintiff has 120 days after filing a claim “to serve providers with an expert report and curriculum vitae.”⁷⁵ In *Seifert*, the plaintiff filed the required report roughly three months after the statutory deadline.⁷⁶ Nevertheless, the defendants did not attempt to dismiss the expert report until after conducting discovery, filing special exceptions, depositing five of nine witnesses (including the challenged expert) and filing many dispositive motions.⁷⁷ Despite the defendants’ conduct, the court of appeals held as a matter of law that their conduct did not constitute an intentional relinquishment of the right to seek dismissal based on a late-filed Chapter 74 expert report.⁷⁸ The court of appeals fell short of explaining at what point the defendants’ conduct would constitute a waiver under these circumstances, but the opinion suggests in dicta that waiver is possible in some circumstances—for example, after a jury trial or appeal.⁷⁹

D. FEDERAL *DAUBERT* CASES

Federal courts in Texas issued several opinions during the Survey period regarding *Daubert* and challenges to experts. Because these opinions provide some persuasive guidance in the application of Texas Rule 702, they are included in this article. In *Advanced Technology Incubator, Inc. v. Sharp Corp.*, the Eastern District of Texas considered a *Daubert* challenge to an expert report regarding U.S. Patent and Trademark Office procedures.⁸⁰ The defendants argued that the report should be struck because, among other things, it included improper legal opinions on patent law, and the opinions on patent office procedures were “irrelevant and unnecessary.”⁸¹ The court concluded that the majority of the report’s opinion on legal issues would not assist the trier of fact to understand the evidence and therefore was properly excluded under Federal Rule of Evidence 702.⁸² However, the opinions regarding the duty of good faith and fair dealing to the U.S. Patent and Trademark Office were admissible.⁸³

Some cases decided during the Survey period illustrate how the creative use of expert testimony can fail when the most basic requirements of *Daubert* are not met. In *Villegas v. City of Freeport*, the Southern District of Texas considered the remarkable claim that the failure of the city to

74. *Id.*

75. *Id.* at *2 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (Vernon Supp. 2008)).

76. *Id.* at *1.

77. *Id.*

78. *Id.* at *2-3 (“Attempting to learn more about the case through discovery does not demonstrate an intent to waive the right to dismiss, nor does the filing of motions for summary judgment on other grounds.”) (citing *Jernigan v. Langley*, 111 S.W.3d 153, 157 (Tex. 2003)).

79. *Id.* at *3.

80. No. 2:07-CV-468, 2009 WL 4668790, at *1 (E.D. Tex. Sept. 18, 2009).

81. *Id.*

82. *Id.* at *3.

83. *Id.*

train city law enforcement on how to treat a person with “excited delirium” resulted in a constitutional civil-rights violation.⁸⁴ In a footnote, the court opined that it was “highly unlikely” that an expert report regarding “excited delirium” would be admissible under *Daubert*.⁸⁵ Among other things, the expert had no medical training and only attended a one-week training class on “excited delirium” eight years before.⁸⁶ Moreover, his opinions were not subjected to peer review and were not “supported by a general consensus in the relevant scientific or professional communities.”⁸⁷ This result was predictable given the highly unusual nature of the expert testimony at issue.

Other cases, however, involved closer calls. In *Bro-Tech Corp. v. Purity Water Co. of San Antonio*, the Western District of Texas granted a motion to exclude an expert report on the basis that the report only posited “theories” about a manufacturing process that resulted in a defect in biodiesel fuel.⁸⁸ The defendants opposing the admission of the report argued that the expert “fails to ascribe a cause or conclusion as to which if any of the ascribed theoretical bases that could cause resin failure had in fact occurred, or whether the resin itself was defective.”⁸⁹ The court agreed, holding that the report should be excluded because the expert did not opine as to which particular cause of the defect in the biodiesel resin was more likely.⁹⁰ The court also took issue with the fact that the expert had qualified his report by stating that additional information and laboratory testing were needed to draw such conclusions.⁹¹ Citing the Fifth Circuit in *Burleson v. Texas Department of Criminal Justice*, the district court concluded that expert testimony is speculative and inherently unreliable when it “fails to show that a potential cause is more or less probable.”⁹²

The Southern District of Texas reached a somewhat consistent result regarding “speculative” opinions. *Schoenmann Produce Co. v. BNSF Railway Co.* dealt with the loss of thirty-three shipments of potatoes when the refrigeration units on the BNSF railcars stopped functioning.⁹³ The court considered an argument in a *Daubert* motion that the plaintiff’s expert’s report was unreliable because (1) it failed to link opinions regarding possible causes of the breakdown of refrigeration to the specific railcars that had an issue, (2) the expert was not an expert on potato physiology or the shipment of bulk potatoes, and (3) the expert’s opinions were potentially misleading to the jury.⁹⁴ The court discounted the

84. No. G-08-0151, 2009 WL 2567900 (S.D. Tex. Aug. 17, 2009).

85. *Id.* at *4 n.3.

86. *Id.*

87. *Id.*

88. No. SA-08-CV-0594-XR, 2009 WL 1748539, at *4 (W.D. Tex. June 19, 2009).

89. *Id.*

90. *Id.* at *8.

91. *Id.*

92. *Id.* (citing *Burleson v. Tex. Dep’t of Crim. Justice*, 393 F.3d 577, 587 (5th Cir. 2004)).

93. No. H-07-1776, 2009 WL 1546081, at *1 (S.D. Tex. May 29, 2009).

94. *Id.* at *2.

attack on the expert's qualifications, noting that he had "thirty years of experience in the handling, storage, and transportation of perishable products, including potatoes."⁹⁵ The court also permitted the expert to testify about his general knowledge regarding the operation of railway cars and the handling of bulk potatoes.⁹⁶ The court concluded, however, that the report was not sufficiently reliable to the extent that the expert testified that certain conditions caused problems in specific railway cars—for example, mud on the railway car floors or short cycling caused by improper loading of the product.⁹⁷ While *Schoenmann Produce* and *Bro-Tech* both illustrate that speculative opinions are not appropriate under *Daubert*, the *Schoenmann Produce* court expressed a greater willingness to allow the expert to offer general testimony about possible conditions that could have an effect.

Finally, one court addressed the issue of waiver under Federal Rule 103. In *Perdue v. Nissan Motor Co.*,⁹⁸ the defendant challenged the admission of expert testimony under *Daubert*; however, the defendant failed to specifically identify the challenged evidence and did not object at trial.⁹⁹ In marked contrast to the Texas Supreme Court's perspective on Texas Rule of Evidence 103 regarding preservation of objections, the Eastern District of Texas concluded that the defendant's objections in *Perdue* were waived under the equivalent Federal Rule of Evidence 103, which provides that error is preserved with a timely objection that states on the record the specific grounds of the objection.¹⁰⁰

III. PRIVILEGES

A. ATTORNEY-CLIENT PRIVILEGE AND ATTORNEY WORK PRODUCT

There have been a number of cases during the Survey period addressing the attorney-client privilege and the attorney work product doctrine. This article summarizes one of those cases involving a more exhaustive treatment of these two issues. In *In re Small*, the El Paso Court of Appeals considered the assertion of attorney-client privilege and attorney work product in the context of an oil-and-gas-lease dispute.¹⁰¹ The relators—Joe Small and Enerplus Resources (USA) Corporation (Enerplus)—filed a mandamus action to vacate a trial court order compelling the production of numerous documents that the relators asserted were privileged.¹⁰² Generally, the attorney-client privilege applies "to com-

95. *Id.*

96. *Id.*

97. *Id.*

98. No. 2:07CV546, 2009 WL 2460988 (E.D. Tex. Aug. 10, 2009).

99. *Id.* at *2.

100. *Cf. with City of San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex. 2009) ("Bare, baseless opinions will not support a judgment even if there is no objection to their admission in evidence.").

101. No. 08-08-00198-CV, 2009 WL 1620436, at *1 (Tex. App.—El Paso June 10, 2009, orig. proceeding).

102. *Id.*

munications which are intended to be confidential between the attorney and the client and which are made for the purpose of facilitating the rendition of legal services for the client.”¹⁰³ Furthermore, “a communication is ‘confidential’ if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.”¹⁰⁴

The discovery dispute over privileged material centered on five groups of documents listed on a privilege log: (1) emails between Enerplus representatives and an attorney, John Lee (Group “A”), (2) a fax document sent in May 2006 from an Enerplus landman (in this case, a third party retained to assist Mr. Small and Mr. Lee with respect to title issues) to an Enerplus land manager (Group “B”), (3) handwritten notes by an Enerplus vice president regarding discussions he had with attorney Lee (Group “C”), (4) a single document referred to as a “due diligence report,” which was created by Enerplus attorneys for Enerplus employee review (Group “D”), and (5) several emails sent from attorney Lee to Enerplus representatives concerning royalties from a well (Group “E”).¹⁰⁵ With respect to Groups “A” and “C,” the real party in interest, S.L.D.S. Energy, Inc. (S.L.D.S.), argued that the documents in these groups were not privileged, because they were prepared at a time when the attorney was not providing legal services, and thus the privilege was waived.¹⁰⁶ The court of appeals disagreed that the documents at issue were prepared while the attorney was not providing legal services, pointing to contrary evidence in the record.¹⁰⁷ More importantly, the court of appeals held that privilege was not waived with respect to communications between the third-party landman and Enerplus and its counsel because (1) the third party “understood that his communications . . . regarding the title work [were] confidential,” and (2) the emails and other disclosures were made in the furtherance of the attorney’s representation of Enerplus.¹⁰⁸

Regarding the Group “E” emails, S.L.D.S. argued that any privilege was waived as a result of the fact that the emails were disclosed to third parties and that one of the recipients of the email “reviewed the document while preparing to testify.”¹⁰⁹ The court of appeals disagreed, reiterating its conclusion that a privileged “communication is ‘confidential’ if it is not intended to be disclosed to third persons other than those persons to whom disclosure is made ‘in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the

103. *Id.* at *3 (citing TEX. R. EVID. 503(b)).

104. *Id.* (citing TEX. R. EVID. 503(a)(5)).

105. *Id.* at *1.

106. *Id.* at *3.

107. *Id.* at *4.

108. *Id.*

109. *Id.* at *5.

transmission of the communication.’”¹¹⁰ In this case, copies of the emails were sent to an Enerplus executive and third parties associated with Lyco Gas—the third-party entity which contracted with Enerplus to provide a professional landman in furtherance of the rendition of legal services. Thus, the court of appeals determined “there was no waiver of the attorney–client privilege” by virtue of emails sent to these individuals.¹¹¹ Further, the court of appeals disagreed that the privilege was waived as a result of the fact that one of the witnesses used the document to prepare for a deposition.¹¹² The court of appeals avoided the issue of whether Texas Rule of Evidence 612(2) applied, which would have required the production of documents used to refresh memory prior to testifying, and instead focused on evidence in the record showing that the witness reviewed only documents that referred to the emails and not the emails themselves.¹¹³ Nevertheless, this portion of the court’s opinion highlights the risks associated with using otherwise privileged documents in witness preparation.

With respect to the Group “D” documents, in particular, and several of the other categories of documents, S.L.D.S. asserted that they were discoverable under the “crime–fraud exception” of Rule 503.¹¹⁴ Group “D” included a due diligence review by attorneys at Andrews & Kurth, L.L.P., in conjunction with a merger between Enerplus and Lyco Energy Corporation.¹¹⁵ Under Texas Rule of Evidence 503(d)(1), material that is “otherwise protected by the attorney–client privilege is discoverable ‘if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud.’”¹¹⁶ Moreover, “mere allegations of fraud are not sufficient [and the] fraud alleged to have occurred must have happened at or during the time the document was prepared, and the document must have been created as part of perpetrating the fraud.”¹¹⁷ Applying these rules, the court of appeals disagreed that the crime–fraud exception was satisfied because (1) the fact that S.L.D.S. alleged fraud in its lawsuit was not sufficient to establish that the documents themselves constituted or reflected fraudulent conduct, (2) S.L.D.S.’s “blanket assertion” that the documents would establish the existence of fraud in obtaining the attorney’s services was insufficient, and (3) S.L.D.S. failed to establish a connection between the particular documents sought and the fraud alleged.¹¹⁸

110. *Id.* (citing TEX. R. EVID. 503(a)(5)).

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at *6.

115. *Id.*

116. *Id.* (citing TEX. R. EVID. 503(d)(1)).

117. *Id.* at *6 (citing *In re Siegel*, 198 S.W.3d 21, 28-29 (Tex. App.—El Paso 2006, orig. proceeding [mand. denied])).

118. *Id.* at *7.

Finally, the court of appeals addressed the assertion of attorney work product on the Group “B” document, which consisted of a fax from the third-party landman to an Enerplus land manager “created as part of a series of communications related to his investigation of [the real party in interest’s] claim that he was fraudulently induced to sign [a] release.”¹¹⁹ Generally, Texas Rule of Civil Procedure 192.5(b)(2) “precludes discovery of an attorney’s work product.”¹²⁰ Work product is defined as “material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, and indemnitors, insurers, employees, or agents.”¹²¹ Work product is also defined as “a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees or agents.”¹²² Core work product is material “that contains the mental impressions, opinions, conclusions, or legal theories” of the attorney or the attorney’s representative.¹²³ All other work product is non-core work product.¹²⁴ The work product doctrine “extends both to documents actually created by the attorney and memoranda, reports, notes, or summaries of interviews prepared by other individuals for the attorney’s use.”¹²⁵

In *In re Small*, S.L.D.S. did not dispute the categorization of Group “B” documents as non-core work product but argued instead that it was entitled to discovery of the documents based on “substantial need.”¹²⁶ The court of appeals noted that “[a] party does not establish a ‘substantial need’ for materials by showing a ‘substantial desire’ for them.”¹²⁷ The court of appeals concluded that S.L.D.S. failed to meet its burden of showing substantial need and undue hardship, because it merely stated conclusorily that “[i]nformation in the May 2006 fax may evidence the fraudulent scheme concocted and pursued by Enerplus to obtain the release.”¹²⁸ According to the court of appeals, this argument only demonstrated S.L.D.S.’s “desire” to obtain the document—not a substantial need for the document.¹²⁹

B. WAIVER

In *In re Certain Underwriters at Lloyd’s London*, the Beaumont Court of Appeals addressed the interplay between Texas Rule of Evidence 511—waiver of privilege by voluntary disclosure—and Texas Rule of

119. *Id.* at *8.

120. *Id.* (citing TEX. R. CIV. P. 192.5(b)(2)).

121. TEX. R. CIV. P. 192.5(a)(1).

122. TEX. R. CIV. P. 192.5(a)(2).

123. TEX. R. CIV. P. 192.5(b)(1).

124. TEX. R. CIV. P. 192.5(b)(2).

125. *In re Small*, 2009 WL 1620436, at *8.

126. *Id.* at *7.

127. *Id.*

128. *Id.*

129. *Id.*

Civil Procedure 193.3(d), the “snap-back provision.”¹³⁰ This original proceeding involved the inadvertent production of documents by the underwriters to insurance policyholders that was discovered a significant period of time after the production.¹³¹ The privileged material was encompassed in handwritten notes by an employee of a third-party adjusting company hired by the underwriters to perform an insurance investigation; the notes reflected extensive discussions between and among employees of the third-party adjuster, the underwriters, and counsel.¹³² Regarding the specific issue of waiver, the policyholder argued that Texas Rule of Civil Procedure 193.3(d) was, by its terms, limited to “parties” to the lawsuit.¹³³ Rule 193.3(d) provides:

*A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if—within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made—the producing party amends the response, identifying the material or information produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege.*¹³⁴

In this case, the policyholders argue, the documents containing the privileged material were produced by the third-party adjuster—not a party to the dispute—and therefore the inadvertent disclosure was governed by Texas Rule of Evidence 511 regarding the waiver of privilege.¹³⁵ The court of appeals disagreed that Texas Rule of Civil Procedure 193.3(d) could be construed narrowly.¹³⁶ For example, the Texas Rules of Evidence governing privileged material indicate that “the right to assert a privilege is not generally dependent upon physical possession of a document.”¹³⁷ Moreover, a restrictive reading of Rule 193.3(d) would “effectively negate the privilege holder’s enforcement rights when nonparties to the suit produce privileged information”; this is problematic when the rules permit the sharing of such privileged material with non-parties under certain circumstances.¹³⁸ Finally, the court of appeals noted that privileges like the work-product privilege are defined to extend beyond documents physically in a party’s possession.¹³⁹ While this reasoning seems to be consistent with the principles behind the Texas Rules of Civil

130. *In re Certain Underwriters at Lloyd’s London*, 294 S.W.3d 891 (Tex. App.—Beaumont 2009, orig. proceeding [mand. denied]).

131. *Id.* at 896-97.

132. *Id.* at 895-96.

133. *Id.* at 901.

134. *Id.* (emphasis added) (citing TEX. R. CIV. P. 193.3(d)).

135. *Id.* at 901-02.

136. *Id.* at 902.

137. *Id.*

138. *Id.* at 903.

139. *Id.* (citing TEX. R. CIV. P. 192.5(a)(1)).

Procedure, a related case decided by the Houston Fourteenth Court of Appeals in May 2008 reached the opposite conclusion and held that Rule 193.3(d) could not be used to remedy the production of privileged patient records by a non-party to the suit.¹⁴⁰

IV. MISCELLANEOUS DECISIONS OF NOTE

A. AUTHENTICATION

This Survey period saw several cases addressing the issue of authentication of evidence under the Texas Rules of Evidence. In *Lyons v. Lyons*, the San Antonio Court of Appeals considered whether business records accompanying a business-records affidavit were properly excluded under Texas Rule of Evidence 902(10) (authentication of business records) on the basis that the underlying business-records affidavit did not substantially comply with a sample affidavit under Texas Rule of Evidence 902(10)(b).¹⁴¹ Texas Rule of Evidence 902(10)(a) provides that any documents that would qualify as business records under Texas Rules of Evidence 803(6) and (7) are admissible as long as the custodian of records files a proper affidavit at least fourteen days prior to trial.¹⁴² Texas Rule of Evidence 902(10)(b) attaches a form affidavit consistent with the rules and states further that an affidavit is sufficient if it “substantially complies” with the form.¹⁴³ In *Lyons*, the court of appeals held that the business-records affidavit “failed to substantially comply with the form,” because it was not properly notarized.¹⁴⁴ This case shows that even a good-faith attempt to “substantially comply” may be insufficient. Counsel should consider simply using the form in the rules to avoid uncertainties of the “substantial compliance” test.

In *Nixon v. GMAC Mortgage Corp.*, the Dallas Court of Appeals addressed an issue regarding Texas Rule 901(b)(7) (authentication of public records).¹⁴⁵ In a motion for a new trial based on newly discovered evidence, the plaintiff attempted to offer an IRS record and an unsworn statement alleging that he received the record in the mail.¹⁴⁶ The Texas Rule of Evidence 901(b)(7) provides that “a public record [may] be authenticated by evidence that the document is ‘from a public office where items of this nature are kept.’”¹⁴⁷ The *Nixon* court concluded that Rule 901(b)(7) was “not a rule of self-authentication”; rather, additional extrinsic evidence was needed to establish that the purported IRS docu-

140. See *In re Ortuno*, No. 14-08-00227-CV, 2008 WL 2339800, at *2 (Tex. App.—Houston [14th Dist.] May 6, 2008, orig. proceeding [mand. denied]).

141. No. 04-08-00259-CV, 2009 WL 89728, at *1 (Tex. App.—San Antonio Jan. 14, 2009, pet. denied).

142. TEX. R. EVID. 902(10)(a).

143. TEX. R. EVID. 902(10)(b).

144. *Lyons*, 2009 WL 89728, at *2.

145. No. 05-08-00256-CV, 2009 WL 2973660, at *4 (Tex. App.—Dallas Sept. 18, 2009, no pet.).

146. *Id.*

147. *Id.* (citing TEX. R. EVID. 901(b)(7)).

ment did in fact come from the IRS.¹⁴⁸

B. HEARSAY

The only case identified during the Survey period addressing the Texas Rules of Evidence on hearsay focused on the business-records exception to the hearsay rule—Texas Rule of Evidence 803(6). In *Cano v. Nino's Paint & Body Shop*, the Houston Fourteenth Court of Appeals, addressed an argument by Cano that the district court improperly admitted under the business-records exception to the hearsay rule five documents submitted by Nino summarizing invoices and labor and materials costs.¹⁴⁹ Cano specifically argued that Nino failed to establish that the five documents were “(1) made and kept in the course of a regularly conducted business activity; (2) made at or near the time of the event that they recorded; and (3) reliable and trustworthy.”¹⁵⁰ The crux of Cano’s complaint was that the exhibits were “summaries of business records,” rather than the business records themselves, and that the exhibits “were compiled two days after Cano filed suit” and not at the time of the events.¹⁵¹ The court of appeals disagreed, noting that even summaries of underlying labor and materials records for work performed could be business-records, provided that an affidavit is submitted establishing the business records exception.¹⁵² In this case,

Nino testified that (1) the exhibit was maintained in the regular and ordinary course of business; (2) the exhibit was kept in the course of regularly conducted business activity; (3) the exhibit was completed or created at the time at which the events contained within it were occurring; and (4) he had personal knowledge of the facts contained within the document.¹⁵³

The fact that one of the exhibits was a compilation of events that occurred over a period of time did not faze the court.¹⁵⁴

C. RELEVANCE (RULES 401 AND 403)

In *Coastal Oil v. Garza Energy Trust*, the Texas Supreme Court addressed at length the rule of capture in a royalty and trespass dispute involving the use of subsurface hydraulic fracturing on property adjacent to that of the plaintiffs’, resulting in drainage of gas.¹⁵⁵ Of importance to this Article, however, is an animated discussion regarding the plaintiff

148. *Id.*

149. No. 14-08-00033-CV, 2009 WL 1057622, at *1-2 (Tex. App.—Houston [14th Dist.] Apr. 16, 2009, no pet.).

150. *Id.* at *5.

151. *Id.*

152. *Id.* at *5-6 (citing *McAllen State Bank v. Linbeck Constr. Corp.*, 695 S.W.2d 10 (Tex. App.—Corpus Christi 1985, writ ref’d n.r.e.); *Curran v. Unis*, 711 S.W.2d 290 (Tex. App.—Dallas 1986, no writ)).

153. *Id.* at *6.

154. *Id.*

155. 268 S.W.3d 1 (Tex. 2008).

landowners' use of an internal memorandum by Coastal Oil that referred to the owners of the tracts affected by the alleged trespass as "illiterate Mexicans."¹⁵⁶ Pursuant to Texas Rule 403, Coastal Oil argued that the district court abused its discretion by admitting into evidence the internal memorandum, which also contained a title opinion and a discussion regarding the uncertainties in establishing the owners' respective interests in the property.¹⁵⁷ Coastal Oil argued that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, because (1) the evidence was used "to inflame the all-Hispanic jury," (2) the evidence resulted in damage findings against Coastal in excess of the claims, and (3) the evidence resulted in a \$10 million punitive-damage award.¹⁵⁸

Justice Hecht's opinion focused largely on the probative value of the memorandum, and he noted that none of the title issues in the memorandum were involved in the dispute over the trespass caused by the hydraulic fracturing.¹⁵⁹ Moreover, at the time the memorandum was written, there was no dispute between the plaintiffs and the adjacent landowners regarding the boundary of their properties. On the contrary, the internal memorandum recommended drilling on the land owned by the plaintiffs, and a subsequent royalty dispute was resolved by agreed judgment that disposed of all issues regarding the royalties generated by the well drilled by Coastal Oil at that time.¹⁶⁰ Subsequent to the memorandum, however, a separate boundary dispute arose between the plaintiffs and the adjacent property holders that arguably influenced Coastal Oil's decision to drill on the adjacent land. The "long-since-resolved title problems" referenced in the earlier memorandum, however, had no probative value with respect to the later dispute.¹⁶¹ Balanced against this lack of probative value was the clear danger of unfair prejudice from the phrase "illiterate Mexicans," which "could be read as derogatory and not merely an unfortunate phrase included in describing the failure to maintain a clear record of title."¹⁶² Whether or not the phrase was indeed a mere "unfortunate phrase" is, of course, a conclusion fraught with uncertainty, and counsel for Coastal Oil spent considerable time attempting to downplay the phrase. But what is certain is that the plaintiffs' counsel was able to solicit testimony from one of the plaintiffs that he "[felt] infuriated, insulted because [his] ancestors were—are insulted in this memo, and it [made him] really, really mad."¹⁶³ This testimony raised the specter of unfair prejudice, because, as Justice Hecht noted, there were no other questions to the witness regarding title problems or development de-

156. *Id.* at 21-22.

157. *Id.*

158. *Id.*

159. *Id.* at 22.

160. *Id.*

161. *Id.*

162. *Id.* at 23.

163. *Id.*

lays—ostensibly the reason why the memorandum was offered into evidence.¹⁶⁴

Justice Johnson wrote a separate concurrence that highlighted the prejudicial nature of the memorandum. He agreed that the memorandum's admission was erroneous and harmful; however, he indicated that a harm analysis was not necessary with respect to the memorandum because its admission was an incurable error.¹⁶⁵ He noted that the unfair prejudice associated with the memorandum was enhanced by the fact that plaintiffs' counsel repeatedly emphasized the memorandum and did not refer to it without also mentioning the derogatory phrase.¹⁶⁶ In strong language, Justice Johnson stated:

The memorandum was intended to and did inject racial prejudice into the trial. The question we are bound to address related to our system of justice is how to best minimize the number of cases that appear to be or are tried under the cloud of mistrust that admission of this type of evidence engenders.¹⁶⁷

Justice Johnson emphasized that “it is not acceptable advocacy to inflame the jury with irrelevant evidence of or reference to such ‘hot-button’ matters as sex, race, ethnicity, nationality or religion.”¹⁶⁸ Thus, he would have held that harm was presumed under such circumstances and incurable. Justice Johnson's concurrence illustrates the care with which “hot-button” evidence should be offered, if at all. The problem with the evidence submitted in *Coastal Oil* was that the plaintiffs failed to link the derogatory comment to any evidence that was probative of the issues at hand. But if, for example, additional evidence showed that the defendants did in fact conceal a discriminatory view of the plaintiffs that resulted in its decision to drill on an adjacent property, it is possible that the burden-prejudice equation of Texas Rule of Evidence 403 might have had a different result.

D. PROPERTY OWNER RULE

The “Property Owner Rule” is an interesting twist on the rules governing witness testimony, including opinion testimony of lay witnesses under Texas Rule of Evidence 601. Under the Property Owner Rule, “a property owner who is familiar with the market value of his or her property may testify regarding that market value, even if he is not qualified or designated as an expert witness” under Texas Rule of Evidence 702.¹⁶⁹ In *Speedy Stop*, the Houston Fourteenth Court of Appeals, discussed this rule in the context of corporate property owners, addressing a growing

164. *Id.*

165. *Id.* at 42.

166. *Id.* at 48.

167. *Id.*

168. *Id.*

169. *Speedy Stop Food Stores, Ltd. v. Reid Rd. Mun. Util. Dist.*, 282 S.W.3d 652, 653 (Tex. App.—Houston [14th Dist.] 2009, pet. granted).

split in the courts of appeals.¹⁷⁰ At issue in the case was a decision by the district court to grant a no-evidence summary judgment motion in a condemnation case despite the fact that the business owner of Speedy Stop—a lay witness—gave testimony regarding the value of the property rights being condemned.¹⁷¹ Over a dissent by Judge Seymore, the majority concluded that “the Property Owner Rule applies to corporate entities owning property and [a corporate representative] familiar with the fair market value of the property may testify . . . as to the market value of the property without being designated as an expert witness.”¹⁷² The court of appeals reasoned that, much like individual owners, corporate property owners “ordinarily know the market value of their property and therefore have a sound basis for testifying as to its value.”¹⁷³ The dissent, on the other hand, argued that the “Property Owner Rule is predicated entirely on ownership,” and, because a corporation cannot testify except through an agent or an employee who is not the “owner,” the Property Owner Rule did not apply.¹⁷⁴ In light of an apparent split in the decisions of the courts of appeals, the lack of Texas Supreme Court authority, and the existence of a dissent, it is possible that the supreme court might consider granting review of the case.

V. CONCLUSION

While these cases represent a mixed bag of rulings regarding evidentiary issues, they do illustrate the care and attention with which such issues are resolved in Texas courts. In particular, courts continue to wrestle with issues regarding expert reports, including in particular, the impact of Chapter 74's requirements. Moreover, even with such staid concepts as relevance, hearsay, and authentication, decisions in this Survey period highlight the importance of ensuring compliance with the Texas Rules of Evidence.

170. *Id.* at 656 (comparing *Libhart v. Copeland*, 949 S.W.2d 783, 798 (Tex. App.—Waco 1997, no pet.), and *Taiwan Shrimp Farm Village Ass'n, Inc. v. U.S.A. Shrimp Farm Dev., Inc.*, 915 S.W.2d 61, 71 (Tex. App.—Corpus Christi 1996, writ denied) (holding that the Property Owner Rule does extend to corporate owners), with *Mobil Oil Corp. v. City of Wichita Falls*, 489 S.W.2d 148, 150 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.) (holding that the rule applies only to natural persons)).

171. *Id.* at 653.

172. *Id.* at 658.

173. *Id.* at 657-58.

174. *Id.* at 661 n.1.

