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Civil Evidence

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CIVIL EVIDENCE

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I. INTRODUCTION

THE most significant civil evidence developments in 1999 again occurred in the field of expert testimony. Federal and state courts grappled with the vague gatekeeping standards for expert testimony created by *Daubert* and *Robinson*. Predictably, the cases decided during the survey period provided trial judges with few clear directions. Another area of important development was privileges. For the first time, the Texas Supreme Court addressed the scope of rule 507 (trade secret privilege) of the Texas Rules of Evidence. Other cases of note dealt with relevance and hearsay exceptions. This article cannot encom-

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pass every development in the area of civil evidence, nor include every interesting case, but I hope that it will give the reader some idea of the significant developments in civil evidence during the last survey period.

II. ADMISSIBILITY OF EXPERT TESTIMONY

A. *DAUBERT* AND *ROBINSON*

Daubert v. Merrell Dow Pharmaceuticals, Inc.[1] and its progeny again dominated the civil evidence landscape in 1999. In *Daubert*, the United States Supreme Court interpreted rule 702 of the Federal Rules of Evidence to "assign 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."[2] The *Daubert* court listed several factors that trial judges *may* consider when determining if the scientific testimony is reliable:

(1) whether the theory or technique has been scientifically tested;
(2) whether the theory or technique has been published or subject to peer review;
(3) the error rate of a particular technique; and
(4) acceptance of the theory in the scientific community.[3]

The *Daubert* court cautioned that these factors were not a "definitive checklist or test,"[4] and that the gatekeeping inquiry must be "tied to the facts" of a particular case.[5] By making the analysis extremely flexible, *Daubert* allows trial courts to decide what factors to consider on a case by case basis. This flexibility has led to as many interpretations of *Daubert* as there are trial judges, replacing the common sense of six or twelve jurors with that one judge.

Two years after the United States Supreme Court decided *Daubert*, the Texas Supreme Court, in *E.I. du Pont de Nemours & Co. v. Robinson*,[6] adopted *Daubert*'s reliability and relevancy requirements for determining the admissibility of scientific expert testimony under Texas Rule of Evidence 702. Justice Gonzalez stated in *Robinson* that the increasing use of experts and the potential prejudicial impact of their testimony on a jury gives the trial judge a "heightened responsibility to ensure that expert testimony show some indicia of reliability."[7] Citing *Daubert*, the *Robinson* court held that Texas rule 702 requires the proponent of expert testimony to show that the testimony is both scientifically reliable and relevant.[8]

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1. 509 U.S. 579 (1993).
2. *Id.* at 597. Rule 702 states: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702.
3. *See Daubert*, 509 U.S. at 593-94.
4. *Id.* at 593.
5. *Id.* at 591 (quoting United States v. Downing, 753 F.2d 1224, 1242 (3d Cir. 1985)).
6. 923 S.W.2d 549 (Tex. 1995).
7. *Id.* at 553.
8. *See id.* at 555-56.

The Texas Supreme Court, however, was not satisfied with *Daubert*'s four factors. It prescribed its own list of six non-exclusive factors trial courts should consider when determining the admissibility of expert testimony under Texas rule 702:

(1) the extent to which the theory has been or can be tested;
(2) the extent to which the technique relies upon the subjective interpretation of the expert;
(3) whether the theory has been subjected to peer review and/or publication;
(4) the technique's potential rate of error;
(5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and
(6) the non-judicial uses that have been made of the theory or technique.[9]

The court added that a particular case may require a trial court to consider other factors to determine scientific reliability.[10] Thus, *Robinson*'s factors are not exclusive.

The *Robinson* court added two factors that can also weigh against admissibility—the extent to which the theory or technique depends upon subjective interpretation and the non-judicial uses that have been made of the technique.[11] Thus, the *Robinson* test is more restrictive than *Daubert* and further diminishes the role of the jury.[12] The Texas Supreme Court appears to be telling judges that subjective expert interpretations are not to be trusted. Rarely is there only one reasonable conclusion to be drawn from the data examined by the experts in a case. Thus, almost all expert interpretations are to some extent subjective. Almost any time a case involves conflicting expert testimony, the conflict is based upon the subjective interpretation of data by the opposing experts. *Robinson* demonstrates that the Texas Supreme Court either ignores or misunderstands that reality.

During the survey period, both the federal and state courts issued opinions attempting to clarify *Daubert* and *Robinson*.

B. The Federal Decisions

While it was clear that *Daubert* applied to scientific testimony, jurisdictions were divided as to whether *Daubert* applied to the testimony of en-

9. *Id.* at 557.
10. *See id.*
11. *See id.*
12. *See* Honorable Robert McGrath & Paula R. Moore, *Taller and Better Looking Judges in Texas*, 3 TEX. WESL. L. REV. 367 (1997). Judge Robert McGrath, a State District Judge in Fort Worth, points out that the *Robinson* court adopted a middle-of-the-road approach, lying somewhere between the earlier rigid general acceptance standard set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and the liberal relevancy standard in *Daubert*. *See* 3 TEX. WESL. L. REV. at 387.

gineers and other experts who were not scientists.[13] The United States Supreme Court resolved this conflict in *Kumho Tire Co., LTD, v. Carmichael*.[14] In *Kumho Tire*, the Court held that *Daubert*'s "gatekeeping" duty applies to all expert testimony—including testimony based on "technical" and "other specialized" knowledge.[15]

The *Kumho Tire* court reemphasized that the reliability test is a flexible one[16] and the factors listed in *Daubert* may not be pertinent in assessing the reliability of a particular expert's testimony.[17] The trial judge should not, therefore, limit the analysis to *Daubert*'s list of factors. Instead, the judge should determine whether the expert testimony is both reliable and relevant, based upon a "*rational methodology*" specific to each case.[18] The Court emphasized that under *Daubert*, the district court's responsibility "is to make certain that an expert, whether basing testimony upon professional studies *or personal experience*, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[19] The inclusion of personal experience and subjective observation as non-suspect bases for expert testimony directly contradicts the Texas Supreme Court's more rigid position.

In *Kumho Tire*, the Court applied the abuse of discretion standard, which is used to review the trial judge's decision as to whether expert testimony is relevant and reliable, to the appellate court's review of the trial judge's method of making that determination.[20] The *Kumho Tire* opinion made it clear that appellate review should focus first on the method used for determining relevancy and reliability and then on the ultimate decision stemming from that method's application to the evidence. As long as the trial court uses a method that is not arbitrary or

13. The Fifth Circuit had already held that *Daubert* applies to all expert testimony. *See* Watkins v. Telsmith, 121 F.3d 984, 990-91 (5th Cir. 1997) (citing *Daubert*, 509 U.S. at 592-93) ("Not every guidepost outlined in *Daubert* will necessarily apply to expert testimony based on engineering principles and practical experience, but the district court's 'preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue' is no less important."). The Texas Supreme Court had also ruled in 1998 that the *Daubert/Robinson* relevance and reliability requirements apply equally to all types of expert testimony. *See* Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 726 (Tex. 1998) ("All expert testimony should be shown to be reliable before it is admitted.").

14. 526 U.S. 137 (1999).

15. *Id.* at 138.

16. *See id.* at 150.

17. *See id.* ("[*Daubert*] made it clear that its list of factors was meant to be helpful, not definitive.").

18. *See id.* at 149 ("And whether the specific expert testimony focuses on specialized observations, the specialized translation of those observations into theory, a specialized theory itself, or the application of such a theory in a particular case, the expert's testimony often will 'rest upon an experience confessedly foreign in kind to [the jury's] own.'").

19. *Id.* at 152 (emphasis added).

20. *See Kumho Tire*, 526 U.S. at 152. ("That [abuse of discretion] standard applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion.").

capricious in reviewing expert testimony for relevancy and reliability, the trial court's decision on admissibility should stand on appeal.

The Supreme Court refused to draw any distinctions between types of experts. It reversed the Eleventh Circuit Court's earlier holding that the trial judge should consider the *Daubert* factors only "where an expert 'relies on the application of scientific principles,' but not where an expert relies 'on skill or experienced-based observation.'"[21] The Court provided examples of instances in which *Daubert* factors might be relevant when assessing the reliability of experience-based testimony and concluded that it would be inappropriate to segregate expertise by type and prescribe certain factors to consider for each type.[22] "Life and the legal cases that it generates are too complex to warrant such a definitive match."[23]

The Fifth Circuit Court of Appeals decided several cases during the survey period clarifying the *Daubert* test as applied in the Fifth Circuit. In *Black v. Food Lion, Inc.*,[24] decided shortly after *Kumho Tire*, the Fifth Circuit explained how trial courts should apply *Daubert* to "non-scientific" evidence. The court, citing *Kumho Tire*, held that a proper *Daubert* analysis requires the trial court to first consider the *Daubert* factors, then consider "whether other factors, not mentioned in *Daubert*, are relevant to the case at hand."[25]

In *Black*, the plaintiff slipped and fell on a supermarket floor. The plaintiff presented the testimony of Dr. Mary Reyna, a board certified specialist in treating persistent pain. Dr. Reyna testified that the plaintiff suffered from fibromyalgia syndrome. Fibromyalgia syndrome is a condition characterized by generalized pain, poor sleep, an inability to concentrate, and chronic fatigue. After ruling out other possible causes of the plaintiff's fibromyalgia, Dr. Reyna determined that it was caused by "hormonal changes" resulting from the fall.[26] Based upon the evidence, including Dr. Reyna's testimony, the magistrate judge awarded the plaintiff nearly $300,000 in damages.

Because the magistrate misapplied the *Daubert* factors and failed to articulate any other factors it considered in carrying out its gatekeeper function,[27] the Fifth Circuit conducted its own *Daubert* analysis and concluded that the magistrate abused his discretion in admitting the expert's testimony. Dr. Reyna's theory failed under all four factors listed in *Daubert*. Her theory had not been tested or published, and thus, not peer reviewed. Furthermore, the medical literature contradicted her theory.

Under *Black*, therefore, a trial court that determines the *Daubert* factors are not appropriate in a particular case must carefully design a logi-

21. *Id.* at 146 (quoting Carmichael v. Samyang Tire, Inc., 131 F.3d 1433, 1435 (11th Cir. 1997)).
22. *See id.*
23. *Id.*
24. 171 F.3d 308 (5th Cir. 1999).
25. *Id.* at 312.
26. *Id.* at 309.
27. *See id.* at 312.

cally-supportable method to determine what non-*Daubert* factors it will consider regarding the reliability of expert testimony. Those factors must be clearly articulated in the record. The evidence must then be examined against those factors, with the trial court's conclusion as to reliability clearly explained.

Tanner v. Westbrook[28] is another Fifth Circuit case in which the trial court failed to articulate its methodology for determining reliability. *Tanner* teaches that when a lawyer's expert is challenged under *Daubert*, the lawyer should request the trial court to clearly articulate its gatekeeper analysis in the record.

In *Tanner*, the Fifth Circuit vacated a $3,200,000 jury verdict in favor of the family of a severely brain-damaged infant and remanded the case for a new trial. The court based its decision on the trial court's admission of expert testimony on causation. The plaintiffs' two experts testified that birth asphyxia, which began shortly before Jennifer Tanner's delivery, caused her cerebral palsy. The plaintiffs' experts also testified that the defendants failed to properly treat Jennifer's birth asphyxia and that their failure caused or at least contributed to her injury. The experts' opinions were based upon their personal knowledge, medical training, and medical literature. All parties conceded that the child suffered birth asphyxia. The only disputed issue was whether the birth asphyxia or an earlier event caused her brain injury.

The defendants requested a hearing under Federal Rule of Evidence 104(a)[29] in an effort to exclude the plaintiffs' experts' testimony.[30] In affidavits, the defendants' experts stated that the cerebral palsy-causing event occurred *in utero* some time before the child's birth. They supported their opinions with peer-reviewed medical literature stating that birth asphyxia rarely causes cerebral palsy and that doctors are unable to determine the cause of many cerebral palsy cases. The court also cited

28. 174 F.3d 542 (5th Cir. 1999).

29. Federal Rule of Evidence 104(a) states that "[p]reliminary 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." *See also Daubert*, 509 U.S. at 592 ("Faced with a proffer of expert testimony, . . . the trial judge must determine at the outset pursuant to FED. R. EVID. 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact at issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts at issue.").

30. The trial court denied the defendant's rule 104 motion and stated that it would pass on the experts' qualifications at trial. The court then overruled the defendant's objection to the experts' testimony at trial. Consequently, there were no specific findings as to the issue of the admissibility of the experts' testimony. The Fifth Circuit essentially undertook its own *Daubert* analysis based only on the materials submitted by both sides regarding the defendant's motion for a rule 104 hearing. The court did not review the evidence presented at trial. The Tenth Circuit criticized this approach in *Kinser v. Gehl Co.*, 184 F.3d 1259 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 985 (Jan. 24, 2000), stating that in cases where the appellate court has no findings to review, the court should look at the entire record, including testimony presented at trial, to determine whether the trial court abused its discretion.

medical literature stating that cerebral palsy caused by birth asphyxia is usually accompanied by organ damage, and no organ damage was present in this case. Finally, the defendants' experts testified that the child's symptoms demonstrated that congenital defects probably caused the child's cerebral palsy.

The plaintiffs' two experts submitted affidavits opposing the motion and stating that there was no evidence of a congenital defect, and as a result, they had eliminated such a defect as a possible cause of the cerebral palsy. The doctors also stated that the lack of damage to vital organs was consistent with their opinion that the child's brain injury occurred after birth. While the plaintiffs provided medical literature supporting their experts' conclusion that asphyxia can cause cerebral palsy—a fact that was not disputed—they did not provide medical literature supporting their experts' opinion as to the reason for the lack of organ damage.

The Fifth Circuit ruled that the trial court abused its discretion in admitting the testimony of one of the plaintiffs' experts, Dr. Nestrud. The court pointed out that Dr. Nestrud could not rule out the possibility of a genetic cause and that he lacked a background in the specific study of the causes of cerebral palsy. The plaintiffs presented the court with medical literature supporting Dr. Nestrud's opinion that birth asphyxia causes cerebral palsy, and the appellate panel did not find that admission of the plaintiffs' other expert's testimony to that fact was an abuse of discretion. The opinion concedes that birth asphyxia can cause cerebral palsy and that Dr. Nestrud is experienced in treating infants with birth asphyxia.[31] It is therefore not clear from the opinion why Dr. Nestrud's testimony—that with proper treatment the infant would not have suffered her injury—was unreliable and its admission by the trial court "manifestly erroneous."[32] *Tanner* seems to establish that an abuse of discretion is possible if the panel hearing the appeal merely disagrees with the trial court's ultimate decision, which is clearly not a proper application of the abuse of discretion standard.

The court seems to mix the issues of whether the trial court abused its discretion in admitting Dr. Nestrud's testimony with the issue of whether, if the court had abused its discretion, the error was harmful. The real difference between Dr. Nestrud's testimony and the testimony of the plaintiffs' other expert was the other expert's effectiveness. The court notes early in the opinion that Dr. Nestrud testified that if Jennifer had been properly treated, she "would not have the brain damage that she has now."[33] The other expert, however, merely stated that the child "would have done better"[34] if properly treated. The Fifth Circuit's determination of abuse of discretion, based in part on the effectiveness of the testimony,

31. *See Tanner*, 174 F.3d at 548.

32. *See* Watkins v. Telsmith, 121 F.3d 984, 988 (5th Cir. 1997) ("[T]he discretion of the trial judge and his or her decision will not be disturbed on appeal 'unless manifestly erroneous.'").

33. *Tanner*, 174 F.3d at 546.

34. *Id.* at 549.

reveals its outcome-oriented analysis. The abuse of discretion analysis should not reference the effectiveness of the evidence, only its reliability and relevance.

The Fifth Circuit reversed the trial court's *exclusion* of expert testimony in *Curtis v. M&S Petroleum, Inc.*[35] In *Curtis*, workers at a Mississippi refinery sued their employer and E.I. du Pont de Nemours and Company for damages that they claimed had resulted from overexposure to benzene at the refinery. The workers sought to introduce the testimony of Dr. Frank Stevens, a Ph.D. in environmental science, whose testimony linked the workers' symptoms to their benzene exposure. Despite Dr. Stevens's extensive experience in the areas of industrial hygiene, occupational safety, and toxicology, the trial court excluded his testimony, holding that it did not satisfy *Daubert*. The trial court agreed that an abundance of scientific and medical literature supported a causal connection between exposure to benzene and the workers' symptoms. Furthermore, during the hearing, the trial court heard evidence that the workers were directly exposed to benzene while working at the factory and that the amount of benzene in the air around the refinery was *at least* ten times the amount permitted by Occupational Health and Safety Administration (OSHA) regulations. The trial court, however, excluded Dr. Stevens's testimony because he had failed to demonstrate with sufficient certainty the exact amount of benzene to which the workers were exposed and to eliminate other possible causes for the workers' symptoms.[36]

The Fifth Circuit held that the trial court abused its discretion in excluding Dr. Stevens's testimony. The Fifth Circuit distinguished *Moore v. Ashland Chemical, Inc.*,[37] in which it held that because the plaintiffs' expert had only a "paucity of facts" concerning the level of Toluene to which the plaintiffs may have been exposed, his causation opinion was inadmissible. In *Curtis*, the Fifth Circuit pointed out that "the law does not require Plaintiffs to show the precise level of benzene to which they were exposed."[38] Dr. Stevens testified that the workers were exposed to levels of benzene several hundred times the level permitted by OSHA. This fact, combined with other evidence, gave Dr. Stevens much more than a mere "paucity of facts" to support his conclusion.[39]

In summary, *Curtis* provides guidance on the quantity of facts necessary to establish a reasonable basis for an expert's opinion in a toxic exposure case. Plaintiffs are not required to show the precise levels of a

35. 174 F.3d 661 (5th Cir. 1999).
36. *See id.* at 670.
37. 151 F.3d 269 (5th Cir. 1998).
38. *Curtis*, 174 F.3d at 671.
39. *See id.* at 670-72. The workers testified about direct exposure to benzene while working at the factory and about the close temporal connection between the exposure and the onset of symptoms. Dr. Stevens testified that the design of the factory, which was built to refine light sweet crude and not highly-toxic chemicals such as benzene, would result in exposure levels many times that allowed by OSHA.

harmful chemical to which they are exposed. Scientific knowledge about the level of exposure to a chemical that is harmful, plus knowledge that the plaintiffs were exposed to such levels, are sufficient facts to carry the plaintiff's burden.[40]

Attorneys can increase the chances that their expert's opinion will be admitted by carefully limiting the scope of the testimony. For example, in *Bartley v. Euclid, Inc.*,[41] five workers sued the manufacturer of a short-nosed hauler that the workers drove at their job. The workers claimed that the hauler's design caused excessive vibration and vertical movement of the cab, resulting in cumulative, repetitive compression fractures of the workers' spines. The manufacturer appealed the judgment, claiming, among other things, that the plaintiffs' radiology expert's causation testimony was erroneously admitted.

The Fifth Circuit upheld the trial court's decision to allow the testimony, noting that the radiologist did not testify that the haulers caused the injuries. He merely identified a pattern of injuries common to all of the drivers. The radiologist examined magnetic resonance images (MRIs) from the five plaintiffs as well as those of eighty-five other drivers of short-nosed haulers. From those MRIs, a common pattern of cumulative, repetitive compression fractures emerged. The radiologist compared this pattern of injuries to MRIs of other back patients, noting that the other back patients did not have the same type of multiple fractures. The radiologist concluded that this pattern was a "fingerprint" of the occupation. He did not testify about the haulers or whether they caused the workers' injuries. The Fifth Circuit concluded that the radiologist's testimony was merely a comparison of otherwise admissible findings and exhibits.[42] Therefore, the district judge did not abuse his discretion in its admission.[43]

Because the admissibility of an expert's testimony under *Kumho Tire* depends upon whether he employs the "same level of intellectual rigor that characterizes the practice of an expert in the relevant field,"[44] the field in which the expert practices is critical to the trial court's analysis. In *Skidmore v. Precision Printing & Packaging, Inc.*,[45] the plaintiff, who was suing her former employer for sexual harassment, introduced a psychiatrist's testimony that her headaches, vomiting, and nightmares resulted from post-traumatic stress disorder and depression stemming from the harassment. After a judgment for the plaintiff, the defendant appealed, complaining that the trial court abused its discretion in admitting the psychiatrist's testimony.

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40. *See id.* at 670 (citing Allen v. Pennsylvania Eng'g Corp., 102 F.3d 194, 199 (5th Cir. 1996)).

41. 180 F.3d 175 (5th Cir. 1999).

42. *See id.* at 179.

43. *See id.*

44. *Id.* (quoting *Kumho Tire*, 526 U.S. at 152.).

45. 188 F.3d 606 (5th Cir. 1999).

The defense claimed that the psychiatrist's testimony did not satisfy the factors listed in *Daubert*. Citing *Kumho Tire*, the Fifth Circuit explained that "whether the *Daubert* factors apply to any given testimony depends on the nature of the issue at hand, the witness's particular expertise, and the subject of the testimony. It is a fact specific inquiry."[46] The psychiatrist testified about his experience, the criteria under which he diagnosed the plaintiff, and the standard methods of diagnosis in his field. Because there was no indication that the psychiatrist's testimony amounted to "junk science" or that he did not employ the "same level of intellectual rigor that characterizes the practice of an expert in the relevant field,"[47] there was no abuse of discretion by the trial court. Experts in fields such as psychiatry are more likely to be able to give opinions based upon subjective criteria if those subjective determinations characterize the practice of an expert in that field.[48]

Another interesting point in *Skidmore* was the defendants' appeal of the trial court's decision to allow the psychiatrist to testify that he did not think the plaintiff had lied to him or fabricated her symptoms. The defendants argued that credibility assessments fall solely within the province of the jury. The Fifth Circuit, however, explained that the psychiatrist "in no way testified that [the plaintiff] was undoubtedly telling the truth; instead, he merely opined that her symptoms and recollection appeared to be genuine and that he felt that he had not been 'duped' by her."[49]

In the last federal case of note from the survey period, the Fifth Circuit stated that the reliability of tests proscribed by the legislature or a regulatory agency may not be challenged under *Daubert*. In *Rushing v. Kansas City Southern Railway Co.*,[50] homeowners sued the railway in state court for nuisance, claiming that a railway switchyard constructed fifty-five feet from their home produced excessive noise and vibration. The defendants removed the case to federal court, claiming that the Federal Noise Control Act preempted the state law claims. Regulations promulgated under that act set the maximum decibel level for train operations as well as the procedures to follow in conducting sound-level tests to determine regulatory compliance. The defendant's expert conducted sound tests at the plaintiffs' home as prescribed under the regulations and found that the decibel level did not exceed the allowed level. The defendants moved for partial summary judgment on the claims of excessive noise and vibration based upon the expert's tests. The district court granted the defendant's motion.

On appeal, the plaintiffs challenged the reliability of the testing used by the defendant's audiology expert. The Fifth Circuit, however, refused to

46. *Id.* at 618.
47. *Id.* (quoting *Kumho Tire*, 526 U.S. at 152).
48. *See id.*
49. *Id.* at 618.
50. 185 F.3d 496 (5th Cir. 1999).

entertain any objection to reliability of a test that was mandated by the relevant law:

> When applicable law mandates the use of a particular test, the proponent of the test's results should not have to establish its reliability. Even if the opponent could prove that it is unreliable, it would be unfair to the proponent to exclude his expert evidence based on the mandated technique. Rather, its reliability is irrebuttably presumed. Any other rule would place the proponent in the untenable position of being unable to prove compliance with applicable law because he could not introduce the results of the tests mandated by that same law.[51]

While the reliability of tests proscribed by the legislature or a regulatory agency may not be challenged, the *Rushing* court stated that opponents of the evidence may challenge the expert's compliance with the prescribed technique.[52] If the proponent's expert did not follow that technique, then the proponent would have the burden of establishing the reliability of any alternative technique under *Daubert*.[53]

Rushing is also important for its explanation of challenges to an expert's qualifications. While the defendant's expert had a Ph.D. in audiology and twenty-nine years of experience in conducting sound level measurements in industry and communities, he had little experience in conducting outdoor environmental tests of railroad sounds. The Fifth Circuit rejected the plaintiff's arguments that the expert was not qualified, though, stating "[a]s long as some reasonable indication of qualifications is adduced, the court may admit the evidence without abdicating its gate-keeping function."[54] "After that," the court added, "qualifications become an issue for the trier of fact . . . ."[55] *Rushing* appears to give great latitude to trial courts in determining qualifications of an expert who testifies as to basic scientific or technological principles, even if the expert has little experience in applying that science or technology to the specific area at issue.

C. The State Decisions

During the previous survey period, the Texas Supreme Court held in *Gammill v. Jack Williams Chevrolet, Inc.*[56] that "Rule 702's fundamental requirements of reliability and relevance are applicable to all expert testimony offered under that rule."[57] During the current survey period, the Texas appellate courts have published several opinions expanding upon *Gammill*.

Gammill and *Robinson* both state that the factors listed in *Robinson*

51. *Id.* at 507.
52. *See id.*
53. *See id.*
54. *Id.*
55. *Id.*
56. 972 S.W.2d 713 (Tex. 1998).
57. *Id.* at 726.

are not exclusive and may not apply to all types of expert testimony.[58] Furthermore, the trial court should base its analysis of reliability on the facts of the particular case.[59] When the *Robinson* factors cannot be applied to the testimony at issue, the trial court must still satisfy rule 702's reliability requirement. The test in such cases is whether "there is simply too great an analytical gap between the data and the opinion offered."[60] Therefore, in applying *Gammill* to expert testimony based upon experience or other specialized knowledge, Texas courts have conducted detailed analyses of the basis for the expert's opinions and how those opinions are tied to the facts of the case. It is important, therefore, that experts provide a detailed description of their experience, training, and methodology. Furthermore, non-scientific experts should walk the trial court through each fact or step used in their analysis.

There are two important differences between the Texas courts' *Robinson/Gammill* analysis and federal courts' *Daubert/Kumho Tire* analysis. The first stems from *Robinson*'s second factor, which is "the extent to which the technique relies upon the subjective interpretation of the expert."[61] This illogical *Robinson* factor seems to loom ominously over the admissibility of expert testimony based upon experience and non-scientific expertise, since all such testimony will be based in part on the expert's subjective interpretation. Yet Texas courts have not seized upon this factor in any recent decisions. It appears that at least some Texas intermediate appellate courts are more comfortable with the deferential federal standard for admissibility of expert testimony.

The second major difference deals with appellate court review of trial court determinations of reliability. Texas courts have tended to be less deferential than their federal counterparts. While the Fifth Circuit looks first to whether the trial court's methodology was arbitrary or capricious, Texas appellate courts focus directly on the trial court's ultimate conclusion. This stems from the Texas Supreme Court's lack of trust in trial court determinations. But despite the Texas Supreme Court's lead, many intermediate Texas appellate courts are also reviewing trial court reliability determinations based upon a more lenient federal-type analysis.

An example of the application of *Robinson* to experience-based testimony is the Austin Court of Appeals opinion in *Olin Corp. v. Smith*.[62] In *Olin Corp.*, the plaintiff shot himself in the leg as a result of a "hangfire," which is an unusually long delay between the time when the hammer strikes the ammunition and when the ammunition fires. Due to the injury

58. *See Robinson*, 923 S.W.2d at 557; *see also supra* notes 6-11 and accompanying text.

59. *See Robinson*, 923 S.W.2d at 557.

60. *Gammill*, 972 S.W.2d at 727 (quoting General Electric Co. v. Joiner, 522 U.S. 136, 146 (1997)).

61. *Robinson*, 923 S.W.2d at 557.

62. 990 S.W.2d 789 (Tex. App.—Austin 1999, pet. denied). *See also* City of Harlingen v. Sharboneau, 1 S.W.3d 282, 284 (Tex. App.—Corpus Christi 1999, pet. granted) (applying *Robinson* to the expert opinion of a real estate appraiser).

sustained in the accidental shooting, the plaintiff lost his leg below the knee. The jury awarded the plaintiff $5.7 million in actual damages.

During the trial, the plaintiff introduced the testimony of three experts: Bill Wiseman, the gunsmith for the U.S. Olympic Team and the U.S. Marines Corps rifle and pistol teams; Lester Roane, the chief engineer for the world's largest and oldest independent testing laboratory for guns and ammunition; and Reeves Jungkind, a retired firearms training officer with the Texas Department of Public Safety. All three of the experts testified that neither the plaintiff nor the gun itself could have caused the accident and that ammunition-related hangfires of the duration described by the eyewitnesses can and do occur with modern ammunition. The defendant challenged the admissibility of these experts' opinions as unreliable under *Robinson*.

Citing *Gammill*, the court noted that under Texas Rule of Evidence 702, the trial court must determine the relevance and reliability of all expert testimony before admitting it into evidence; however, the criteria for assessing relevance and reliability vary depending on the nature of the expert testimony being offered.[63] The factors set forth in *Robinson* "are nonexclusive and will differ with each particular case and the nature of the evidence offered."[64] While the *Robinson* factors apply specifically to scientific evidence, other factors may apply when the testimony is based upon "non-scientific" expert testimony.[65] When analyzing non-scientific testimony, the court should use factors that help it to determine whether the expert is a "professional witness" or a person whose opinion in the courtroom would withstand the scrutiny of his professional peers.[66]

The trial court heard extensive testimony on the plaintiff's experts' qualifications based on years of experience in manufacturing firearms, testing firearms, training others to use firearms, and actual observations of ammunition-related hangfires of the duration described by the fact witnesses. In light of the extensive evidence concerning the plaintiff's experts' experience with firearms, ammunition, and particularly hangfires, it was not shown that the trial court abused its discretion in admitting their testimony.

While the *Olin Corp.* court allowed expert testimony based upon the witnesses' experience with firearms, the Fourteenth District Court of Appeals held in *Houghton v. Port Terminal Railroad Ass'n* that "[g]eneral experience in a specialized field does not qualify a witness as an expert."[67] The proponent of the expert testimony must establish that the

63. *See Olin Corp.*, 990 S.W.2d at 795-96.

64. *Id.* at 795.

65. *See id.* at 789; *see also Gammill*, 972 S.W.2d at 726-27 (noting that experts may testify "about specific defects and design changes based upon years of experience with the product itself and others like it, a knowledge of the industry, and publications of the subject" when the bases for the testimony are shown to be reliable).

66. *Olin Corp.*, 990 S.W.2d at 789.

67. 999 S.W.2d 39, 46 (Tex. App.—Houston [14th Dist.] 1999, no pet. h.) (explaining that while the plaintiff's expert had a lengthy career working on a railroad, the plaintiff failed to show how the expert's experiences were connected to specific issues in the case).

expert has experience regarding the specific issue before the court.[68] This language indicates that Texas courts hold experts to a higher standard than the federal courts. *Houghton* conflicts with the Fifth Circuit's holding in *Rushing* that "[a]s long as some reasonable indication of qualifications is adduced,"[69] the trial court's gatekeeping function is satisfied. It is noteworthy that the plaintiffs' experts in *Olin Corp.* testified extensively about their experiences not only with guns and ammunition, but with hangfires specifically.

In *Honeycutt v. KMart Corp.*,[70] the Corpus Christi Court of Appeals took an approach more similar to the *Daubert/Kumho Tire* federal standard when it found that an expert witness may testify based upon experience only. In such a case, the court held that *Robinson*'s general requirements of relevance and reliability apply, but that its specific factors do not. Honeycutt was injured in KMart while in the checkout line next to the cart corral—the area where carts are kept near the front of the store. Normally there are two rails separating the checkout line from the carts, but on that day the upper rail was missing. Honeycutt was sitting on the lower rail when a KMart employee pushed some additional carts into the corral, causing the carts already there to move forward and hit Honeycutt.

Honeycutt sought to introduce the testimony of Dr. Wayne Johnston, a Ph.D. in industrial engineering with a specialty in human factors and ergonomics. Dr. Johnston planned to testify that the lack of a top rail was an invitation for customers to sit on the second rail and that the missing rail was therefore an unreasonable risk and the proximate cause of the accident. He would have further testified that KMart failed to properly train its employee in returning the carts and that the employee did not keep a proper lookout. Finally, the expert would have testified that KMart's failure to replace the top rail constituted negligence and that Honeycutt was not contributorily negligent. After a hearing on KMart's motion to strike, the trial court excluded Dr. Johnston's testimony.[71] The plaintiffs appealed the trial court's ruling and prepared a detailed bill of review.

The appellate court cited Justice Hecht's opinion in *Gammill*, stating that "all expert testimony, regardless of whether it can be analyzed using the specific factors set forth in *Robinson*, must satisfy the *Robinson* standard for reliability and relevance."[72] Therefore, under rule 702, the court must decide "(1) whether Dr. Johnston [is] qualified to testify, and (2) if

68. *See id.* (citing Broders v. Heiss, 924 S.W.2d 148, 153-54 (Tex. 1996)).
69. *Rushing*, 185 F.3d at 507.
70. 1 S.W.3d 239 (Tex. App.—Corpus Christi 1999, pet. filed).
71. *See id.* at 240-41. KMart raised three grounds for excluding Dr. Johnston's testimony. The trial court excluded his testimony without specifying on which ground it granted the motion. The appellate court, therefore, analyzed all three, including the *Robinson* challenge, since if any ground is supported by the evidence in such a situation, the appellate court will affirm the trial court. *See id.* (citing Ortiz v. Spann, 671 S.W.2d 909, 914 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.)).
72. *Id.* at 242.

qualified, whether his testimony [meets] the relevancy and reliability requirements of *Robinson*."[73]

The appellate court first noted that Dr. Johnston was qualified to testify. Not only was he a Ph.D. in industrial engineering, but he had been head of the safety engineering program at Texas A&M for twenty-four years. He was published in the field of occupational safety and had consulted with retail stores on safety. The court then turned to the issue of whether Dr. Johnston's testimony was relevant and reliable.

Johnston testified through the bill of review that his testimony was based upon his experience and expertise in the field and not on any scientific testing or experimentation. The court concluded that "[w]hile Dr. Johnston is qualified to testify as a scientific expert, it is obvious by his testimony that his opinions are based upon his 'experience.'"[74] The court discussed Dr. Johnston's extensive experience in identifying hazards and studying how humans act and react in certain situations. Due to Dr. Johnston's "training and experience," the court concluded that Dr. Johnston's opinions were admissible based upon "the general reliability principles of *Robinson* but not its specific factors."[75]

In *Kroger Co. v. Betancourt*,[76] the plaintiff, an employee of a Kroger vendor, injured his back when he tried to move a straddle jack owned by Kroger. A straddle jack is a device used to move pallets. Kroger provided the straddle jack to vendors to move products in the store. After the plaintiff loaded the straddle jack, he tried to move it and it would not budge. He gave it a push and herniated three discs in his back. Plaintiff and his family sued Kroger, claiming negligence and gross negligence.

Plaintiff offered the testimony of Ralph Cox, an engineering expert, who testified that: (1) the restraining rings on the straddle jack's axle come off periodically and need to be replaced; (2) when the restraining rings come off, the axle pin can become dislocated; (3) when the axle becomes dislocated, the wheel will not move; and (4) Kroger did not perform proper maintenance, which would have prevented the accident. Kroger appealed the trial court's admission of Cox's testimony based upon *Robinson*. Kroger asserted that Cox did not have any experience with this type of warehouse loader, did not perform a re-creation of the accident, had never operated a straddle jack, and did not know the history of the straddle jack in question. Therefore, Kroger claimed, Cox's testimony was not reliable.

When analyzing whether the trial court abused its discretion, the Fourteenth District Court of Appeals first noted that "in non-scientific cases, it is impossible to set out specific criteria for evaluating the reliability of expert testimony."[77] The court then stated that Cox was an engineer with

73. *Id.*
74. *Id.* at 243.
75. *Id.* at 244.
76. 996 S.W.2d 353 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).
77. *Id.* at 362 (citing *Gammill*, 972 S.W.2d at 726).

experience in mechanical equipment and that the axle and restraining ring at issue in this case were "very simple."[78] Cox had based his opinions on photographs of the straddle jack taken immediately after the lawsuit was filed, his inspection of the actual straddle jack and the facilities where it was located, his examination of the straddle jack's maintenance and operating manuals, his examination of the straddle jack's maintenance records, and his review of a number of depositions. Having discussed Cox's opinion and the data upon which he based his opinion, the court, without discussing any specific factors it considered, concluded that "there is not too great an analytical gap between the data and Cox's conclusion."[79]

The *Honeycutt* and *Kroger* courts took the federal *Daubert/Kumho Tire* view that juries can be trusted and that the trial court should allow experts to testify in all but the most obvious cases of unreliability. They seem to reject the Texas Supreme Court's view that appellate courts should micro-manage trial courts' admissibility determinations based upon *Robinson*'s more restrictive language.

Another example of a Texas appellate court applying what appears to be a more deferential analysis is *Lincoln Property Co. v. DeShazo*.[80] In *Deshazo*, the plaintiff sued the owner of a parking lot where the plaintiff was assaulted during a "college night" party at a bar on the premises. The plaintiff introduced the testimony of a former police officer and security guard who testified that at least five security guards were required in such a situation and that had there been five security guards, the plaintiff would not have been injured. He further testified that providing only one security guard was gross negligence. After a judgment for the plaintiff in the trial court, the defendant appealed the admission of the expert's testimony.

The *DeShazo* court acknowledged *Robinson*'s ruling that the requirement of the trial court to make an initial determination whether the expert opinion testimony is relevant and reliable applies to all expert testimony.[81] The court then stated that the *Robinson* factors are not an exclusive nor exhaustive list and that the trial court's method to determine reliability is "dependent upon the subject matter of the case."[82] Apparently applying the more deferential federal standard, the court held that the expert's opinions were reasonably reliable. The court then quoted *Daubert*, stating that "the trial court's gatekeeping function under Rule 702 has not replaced cross-examination as 'the traditional and appropriate means of attacking shaky but admissible evidence.'"[83] The appellate court agreed with the trial court that "Lincoln's contention about the extent of [the expert's] expertise [was] simply a topic fit for proper

78. *Id.*
79. *Id.* at 363.
80. 4 S.W.3d 55 (Tex. App.—Fort Worth 1999, pet. denied).
81. *See id.* at 58-59 (citing *Gammill*, 972 S.W.2d at 728).
82. *Id.* at 59 (citing *Robinson*, 923 S.W.2d at 557).
83. *Id.* at 59 (quoting *Daubert*, 509 U.S. at 596).

cross-examination . . . at the trial."[84] The appellate court's decision to uphold the admission of "shaky" evidence resulting from the use of the more lenient federal standards demonstrates respect for both the trial court and the jury.

In *Weiss v. Mechanical Associated Services, Inc.*,[85] the San Antonio Court of Appeals demonstrated how a rigid application of the *Robinson* factors can result in the denial of the right to a trial by jury. Maria Weiss and her coworkers began suffering chronic colds, watery eyes, nasal burning, and nose bleeds soon after South Texas Radiology Group (STRG) moved into the floor below the office where they worked. There was also a white dust throughout her office. The building management inspected the ventilation system and discovered that STRG had improperly vented its x-ray developer into the building's general exhaust system. The building management also discovered that the developer used acetic acid, sulfur dioxide, glutaraldehyde (a toxic substance), and ammonia in its development process. Soon afterward, the building management installed a dedicated exhaust system. Most employees' symptoms then improved. Weiss, however, did not experience the same improvement. After being diagnosed with immune system dysfunction and cognitive impairment, she sued STRG and Merry X-Ray Chemical Corporation, the supplier of the chemicals.

After Weiss filed suit, the building's management hired two certified industrial hygienists to conduct air quality surveys. The first hygienist tested STRG's offices and concluded that if the chemicals from the development process were *currently* in the air, they were at levels below that which could be detected. The hygienist performed these tests, however, after the new ventilation system had been installed. He also tested the white dust and concluded that it contained aluminum and that aluminum chloride precipitates during STRG's development process, thus linking the dust found in Weiss's office to STRG. The second hygienist focused on testing the building's exhaust system, noting unsealed gaps between the floors and leaks in the exhaust system. He concluded that there was a "very high probability" that STRG's x-ray developer contaminated Weiss's office.[86] This second hygienist also found high levels of mold and bacteria in the ventilation system.

Weiss retained two toxicologists as experts in the case. Both experts noted that Weiss's symptoms were consistent with low-level exposure to any of the four major chemical components of STRG's x-ray developer. Both experts also concluded that within a reasonable degree of scientific probability, Weiss's symptoms resulted from exposure to the chemicals from STRG's x-ray developer, particularly glutaraldehyde, the most toxic. Neither expert, however, could rule out the possibility that exces-

84. *Id.*
85. 989 S.W.2d 120 (Tex. App.—San Antonio 1999, pet. denied).
86. *Id.* at 122.

sive mold, fungi, and bacteria in the ventilation system caused Weiss's symptoms.

STRG filed a Texas Rule of Civil Procedure 166a(i) "no-evidence" motion for summary judgment, contending that there was no evidence that Weiss was exposed to glutaraldehyde or that Weiss's illness was caused by glutaraldehyde. Weiss responded with affidavits from the industrial hygienists and toxicologists. The trial court granted STRG's motion and rendered judgment. Weiss appealed to the San Antonio Court of Appeals, claiming that the trial court erred by not considering her experts' testimony.

For the purpose of review, the *Weiss* court assumed the trial judge based his opinion on a finding that Weiss's expert opinion evidence was inadmissible under *Robinson* and reviewed that decision for abuse of discretion. With rather illogical reasoning, the court then applied the *Robinson* factors to the toxicology experts' clinical diagnoses and concluded that the trial court did not abuse its discretion. Despite evidence that glutaraldehyde is a highly toxic substance, the experts' opinions that Weiss's symptoms were consistent with exposure to glutaraldehyde, and the close temporal proximity of the exposure and the onset of symptoms, the court found the toxicologists' clinical diagnoses to be unreliable.

Apparently treating the clinical diagnoses as scientific evidence, the *Weiss* court stated that the toxicologists did not rely "on any particular theories that had been or could be tested."[87] The court pointed out that the toxicologists assumed exposure when making their conclusion that glutaraldehyde caused Weiss's injuries. This assumption bothered the court, even though there was abundant evidence that such exposure had actually occurred, including an office covered with white dust linked to the development process by independent experts.

The *Weiss* court then attempted to apply the other *Robinson* factors, noting that neither toxicologist compared Weiss to the subjects of any epidemiological studies of the effects of glutaraldehyde and that neither expert demonstrated that their method of diagnosing Weiss as suffering from exposure to glutaraldehyde was generally accepted in the scientific community. Finally, the court noted that the potential rate of error seemed high because neither expert could rule out other causes of Weiss's illness.

This rigid application of *Robinson* is not unusual in Texas courts. Even *Gammill* clearly stated that although *Robinson*'s requirement that expert evidence must be reliable applies equally to all types of expert testimony, "the considerations listed in *Daubert* and in *Robinson* . . . cannot always be used with other kinds of expert testimony."[88] Furthermore, "clinical medicine necessarily evolves from a process of trial and error," and as such, "has traditionally been granted some leeway in a determination of

87. *Id.* at 125.
88. *Gammill*, 972 S.W.2d at 726.

admissibility."[89] No such leeway was given in the *Weiss* opinion, and Maria Weiss was denied her day in court.

Sears, Roebuck & Co. v. Kunze[90] is another example of a court applying the *Robinson* factors where they apparently were not appropriate. Because the standard of review is abuse of discretion, a trial court's exclusion of an expert's testimony will rarely be overturned on appeal when it applies the *Robinson* factors, even in situations where those factors may not have been the most appropriate method for determining reliability. In *Kunze*, the Beaumont Court of Appeals, citing *Gammill* and *Kumho Tire*, upheld the trial court's exclusion of an out-of-court test that the defendants contended showed that the accident could not have happened the way the plaintiff described. The plaintiff in *Kunze* sued Sears, Roebuck and Emerson Electric Company for amputation injuries he received while using a Craftsman ten-inch radial arm saw. The defendants offered the testimony of a consultant who claimed to have conducted a test under circumstances similar to those existing at the time of the accident as described by the plaintiff.

The *Kunze* court began its analysis by stating that a test regarding how the accident occurred is only admissible if "the trial court determines that there is a substantial similarity between the test conditions and the accident conditions."[91] The court then listed the factors from *Robinson* and the trial court's application of those factors, concluding that the trial court had not abused its discretion.

The defendants argued that the *Daubert* and *Robinson* factors did not apply to litigation testing and that they only needed to show the tests were conducted under circumstances substantially similar to those present at the time of the accident at issue. The court rejected the defendants argument. Citing *Kumho Tire*, the court stated that the trial court's gatekeeping function applies "not only to testimony based upon scientific knowledge, but also testimony based upon technical or other specialized knowledge."[92] The court went on to say that even if the *Robinson* factors may not have been the most appropriate method for determining reliability in such a situation, the abuse of discretion standard applies not only to the trial court's ultimate decision on reliability, but also to the way the court makes that decision.[93] A trial court abuses its discretion only if it acts without reference to any guiding principles.[94] In this case, the trial court's application of the *Robinson* factors was a "reasonable application of appropriate guiding principles"[95] and not an abuse of discretion.

89. Green v. Texas Workers' Comp. Ins. Facility, 993 S.W.2d 839, 844 (Tex. App.—Austin 1999, pet. denied).

90. 996 S.W.2d 416 (Tex. App.—Beaumont 1999, pet. filed).

91. *Id.* at 424.

92. *Id.* at 425.

93. *See id.*

94. *See id.*

95. *Id.*

III. PRIVILEGES

A. TRADE SECRET PRIVILEGE

In *In re Continental General Tire, Inc.*,[96] the Texas Supreme Court addressed for the first time the scope of Texas Rule of Evidence 507, which protects trade secrets from disclosure. Rule 507 states:

> A person has a privilege, which may be claimed by the person or the person's agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, if the allowance of the privilege will not tend to conceal fraud *or otherwise work injustice.* When disclosure is directed, the judge shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.[97]

The court held that "when a party resisting discovery establishes that the requested information is a trade secret, under rule 507 the burden shifts to the requesting party to establish that the information is necessary for a fair adjudication of its claim or defense."[98] If the requesting party satisfies that burden, then the trial court should order discovery of the information, subject to an appropriate protective order.[99] The court stated that rule 507 is a balancing test[100] between two competing interests.[101] First, the privilege recognizes that trade secrets are an important property interest worthy of protection. Second, the exception to the privilege to prevent fraud or injustice recognizes the importance of the fair adjudication of claims. "The trial court must weigh the degree of the requesting party's need for the information with the potential harm of disclosure to the resisting party."[102] Factors weighing against disclosure include the potential inadequacies of a protective order and any "fact-based grounds" for believing that the requesting party will violate the protective order.[103]

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96. 979 S.W.2d 609 (Tex. 1998) (orig. proceeding).

97. TEX. R. EVID. 507 (emphasis added).

98. *Continental Gen. Tire*, 979 S.W.2d at 610. The court also articulated the test for disclosure under rule 507 as information that is "material and necessary to the litigation and unavailable from any other source." *Id.* at 615 (quoting Automatic Drilling Mach., Inc. v. Miller, 515 S.W.2d 256 (Tex. 1974)).

99. *See id.* at 613.

100. *See id.* at 612-13.

101. *See id.* at 612.

102. *Id.* at 613. For an example of the balancing test being applied by the lower courts after *Continental Gen. Tire*, *see* In re Leviton Mfg. Co., 1 S.W.3d 898 (Tex. App.—Waco, 1999, orig. proceeding) (holding that the trial court abused its discretion because the requesting party did not meet its burden under rule 507 to show that the information was necessary to a fair adjudication of the claim); In re Frost, 998 S.W.2d 938 (Tex. App.—Waco 1999, orig. proceeding) (holding that it was not necessary for the fair adjudication of the plaintiff's claims in a contract dispute that the plaintiff have the defendant's customer list in order to discuss the defendant's "custom and trade and usage" with the defendant's customers).

103. *Continental Gen. Tire*, 979 S.W.2d at 614.

B. ATTORNEY-CLIENT PRIVILEGE

In *In re Marketing Investors Corp.*,[104] the Dallas Court of Appeals decided for the first time in Texas whether the attorney-client privilege applies against a former corporate officer who had access to the documents at issue while serving in that capacity. In *Marketing Investors*, the company fired its president and instructed him to leave the premises immediately. He left but returned the next day and removed company documents from his office. Five days later the company sued the former president under various fraud, negligence, and breach of contract claims. During discovery, the company discovered that the former president had privileged documents and requested that he return them. He refused, claiming that because he was allowed to possess and view the documents while president of the company, his current possession of them did not violate the privilege.[105]

The court stated that in a corporation's affairs, "there is but one client—the corporation,"[106] and "only the corporation may permit access to its attorney-client communications."[107] The court pointed out that the "[c]orporation is a separate legal entity and should not lose its valuable legal rights because it can only act though its employees."[108] The court then held that when "a former officer or director . . . seek[s] documents in a personal capacity, not a fiduciary capacity, [he] does not act as 'management' . . . [a]nd has 'no authority to pierce or otherwise frustrate the attorney-client privilege when such action conflicts with the will of management.'"[109] As such, when the company fired the president, he lost all rights to view or possess any of the company's privileged documents. Therefore, the trial court abused its discretion in not ordering the former president to return the documents.

In *In re Texas Farmers Insurance Exchange*,[110] the Texarkana Court of Appeals held that when an insurance company hires an attorney to conduct a routine claim investigation, the communication between the lawyer and insurance company about the results of the investigation do not fall under the attorney-client privilege.[111] The plaintiffs in *Texas Farmers* sued their insurance company to recover for fire damage to their house. Shortly after the plaintiffs made a claim, the insurance company hired a lawyer to take sworn statements from the plaintiffs and provide the insurance company with a summary of the statements and his recommenda-

104. No. 05-98-00535-CV, slip op., 1998 WL 909895 (Tex. App.—Dallas, Dec. 31, 1998, orig. proceeding).

105. *See id.* at *3. The former president also asserted the joint-defense privilege under Texas Rule of Evidence 503(d)(5). The court held that since there was nothing to indicate that any attorney of the corporation had represented the president personally, the joint-defense exception did not apply. *See id.* at *4.

106. *See id.*

107. *Id.* at *5.

108. *Id.*

109. *Id.* at *4 (quoting Milroy v. Hanson, 875 F. Supp. 646, 649-50 (D. Neb. 1995)).

110. 990 S.W.2d 337 (Tex. App.—Texarkana 1999, orig. proceeding).

111. *See id.* at 341.

tions. During discovery, the plaintiffs requested the attorney's deposition and all files, reports, and documents in his possession related to the case. The trial court concluded that the attorney had acted as an investigator and not as an attorney and ordered him to produce most of the documents.[112]

The appellate court upheld the trial court's conclusion that the attorney was acting as an investigator. The court held that communications between the insurance company and the attorney, while acting as an investigator, were not privileged. The court explained that if such communications between an attorney and an insurance company were privileged, "insurance companies could simply hire attorneys as investigators at the beginning of a claim investigation and claim privilege to all the information gathered."[113] The court noted, however, that if the attorney and the insurance company could demonstrate that the attorney made some of the communications in his capacity as an attorney, those communications would be privileged. This privilege would not extend to an analysis of the facts made by the attorney in his capacity as an investigator, but would extend to "legal strategy, assessments, and conclusions."[114]

C. PEER REVIEW PRIVILEGE

The Texas Health and Safety Code and the Texas Medical Practices Act both create a medical peer review privilege in Texas.[115] The Texas Health and Safety Code states that all "records and proceedings of a medical committee" are privileged.[116] The privilege extends to any documents created at the direction of the committee in order to conduct its review.[117] The Texas Medical Practices Act provides that "all proceedings and records of a peer review committee" are privileged.[118] Under the Medical Practices Act, a peer review committee is any committee acting pursuant to approved hospital bylaws to evaluate the "quality of medical and health-care services or the competence of a physician."[119] Neither privilege extends to documents that were gratuitously submitted to the committee "without committee impetus and purpose."[120] Thus, mere

112. *See* TEX. R. EVID. 503(a). Rule 503 only protects communication between a client and lawyer when the communication is made "for the purpose of facilitating the rendition of professional legal services." *Id.*

113. *Texas Farmers*, 990 S.W.2d at 341.

114. *Id.*

115. *See* TEX. HEALTH & SAFETY CODE ANN. § 161.032 (Vernon 2000); TEX. OCC. CODE ANN. § 160.007 (Vernon 2000).

116. *See* TEX. HEALTH & SAFETY CODE ANN. § 161.032(a) (Vernon 2000) ("[R]ecords and proceedings of a medical committee are confidential and are not subject to court subpoena.").

117. *See* Jordan v. Fourth Court of Appeals, 701 S.W.2d 644, 647-48 (Tex. 1985); *see also* TEX. HEALTH & SAFETY CODE ANN. § 161.032(b) (Vernon 2000).

118. TEX. OCC. CODE ANN. § 160.007(a) (Vernon 2000) ("Each proceeding or record of a medical peer review committee is confidential, and any communication made to a medical peer review committee is privileged.").

119. Memorial Hosp.—The Woodlands v. McCown, 927 S.W.2d 1, 8 (Tex. 1996).

120. *See Jordan*, 701 S.W.2d at 648.

consideration by a hospital peer review committee does not make a document privileged.[121] Also, the privilege does not apply to documents kept in the ordinary course of business.[122]

Peer review is an often-litigated privilege in medical malpractice cases. The information protected by the privilege is almost by definition relevant to the plaintiff's case. Defendants try to shoehorn as much information into the privilege as possible. The most litigated issue is whether the documents at issue were created at the direction of the peer review committee or simply reviewed by the peer review committee and thus not privileged.

In *In re WHMC d/b/a Columbia West Houston Medical Center*,[123] the plaintiffs were denied discovery of documents related to the hospital's "performance improvement project," which the hospital initiated to decrease the amount of time patients spent waiting in the emergency room. The plaintiffs sued West Houston Medical Center after their infant daughter died from dehydration. The plaintiffs contended that the four-hour wait in the emergency room before receiving treatment contributed to their daughter's death. The trial court granted the plaintiffs' motion to compel production.

The appellate court granted the hospital's writ of mandamus, holding that the documents requested were within the peer review privilege.[124] The hospital had submitted an affidavit by the hospital's risk manager, along with a copy of the hospital's bylaws, stating that an Emergency Room Special Care Committee and a Medical Executive Committee had been formed under the hospital's bylaws to evaluate health care services and improve patient care.[125] The affidavit went on to say that those committees directed the creation of all of the contested documents. Because the hospital's evidence established that the documents were privileged, the burden shifted back to the plaintiff to offer controverting proof. Since the plaintiffs had no such proof to offer, the appellate court concluded that the trial court abused its discretion by ordering the document production.

An example of a defendant trying to shoehorn all it can into the peer review privilege is the case of *In re Pack*.[126] In *Pack*, a nursing home defendant argued that investigation reports of the nursing home prepared by the Texas Department of Human Services (TDHS), the nursing home's response to that report laying out its plan to correct its deficiencies, and the testimony of TDHS employees who conducted the investigation, all fall under the peer review privilege.[127] The Fort Worth Court of Appeals disagreed.

121. *See* Texarkana Mem'l Hosp. v. Jones, 551 S.W.2d 33, 36 (Tex. 1977).
122. *See* TEX. HEALTH & SAFETY CODE ANN. § 161.032(c) (Vernon 2000).
123. 996 S.W.2d 409 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding).
124. *See id.* at 413.
125. *See id.*
126. 996 S.W.2d 4 (Tex. App.—Fort Worth 1999, orig. proceeding).
127. *See id.* at 5.

The underlying case was a wrongful death and survival action alleging that James Watson died as a result of neglect in the nursing home. Thirty-six days after he was admitted to the nursing home, Watson was transferred to a hospital where he later died. While he was in the hospital, two hospital employees who treated Watson notified TDHS about possible abuse and neglect by the nursing home. Two TDHS employees inspected the nursing home and prepared a report. The nursing home responded to the report with a plan of correction. After filing suit, the plaintiffs requested the trial court to compel the nursing home to produce TDHS records in response to a document request and filed deposition notices for the two investigating TDHS employees. The trial court denied the motion to compel, quashed the deposition notices, and ordered the plaintiffs not to use any of the TDHS documents, holding that the TDHS investigation fell under the peer review privilege.[128]

On mandamus review, the Fort Worth Court of Appeals held that the TDHS investigation did not fall under the peer review privilege. The Medical Practice Act provides in part: "*Unless disclosure is required or authorized by law*, a record or determination of or a communication to a medical peer review committee is not subject to subpoena or discovery and is not admissible as evidence in any civil judicial or administrative proceeding . . . ."[129] Under the Texas Administrative Code, licensed nursing homes are required to post TDHS licensing inspection reports, deficiency sheets, plans of correction, and TDHS summaries of inspection and complaint investigations "at the facility for public inspection."[130] These were the documents at issue. The appellate court held that these documents could not fall under the peer review privilege because their disclosure "is required or authorized by law."[131]

IV. MISCELLANEOUS DECISIONS OF NOTE

A. RELEVANCY

1. Relevancy in General

In *Green v. Texas Workers' Compensation Insurance Facility*,[132] the plaintiff alleged that he had become incapacitated as a result of chemical exposure on the job. The jury found that the plaintiff had contracted an occupational disease, but that he was not incapacitated. During trial, the plaintiff attempted to introduce the testimony of his primary treating physician, Dr. Rea, a board certified specialist in environmental medicine, on the issues of causation and incapacity. The defendant challenged the reliability of Dr. Rea's testimony, citing several sources that tended to discredit environmental medicine as a discipline and two fed-

128. *See id.* at 6.
129. TEX. OCC. CODE ANN. § 160.007(e) (Vernon 2000) (emphasis added).
130. 40 TEX. ADMIN. CODE §§ 19.1921(e)(3), (h) (1998).
131. TEX. OCC. CODE ANN. § 160.007(e) (Vernon 2000).
132. 993 S.W.2d 839 (Tex. App.—Austin 1999, pet. denied).

eral cases that rejected Dr. Rea's "multiple chemical sensitivity" theory as unreliable.[133] The trial court initially excluded only the causation testimony, but then expanded its ruling to exclude all testimony by Dr. Rea, including any testimony in his capacity as the plaintiff's treating physician.

The *Green* court assumed that the trial court did not abuse its discretion with respect to excluding Dr. Rea's expert testimony on causation.[134] But the court remanded the case for a new trial based upon the trial court's improper exclusion of Dr. Rea's testimony as a fact witness. As the plaintiff's treating physician, Dr. Rea regularly saw the plaintiff over a seven-year period. During that time, Dr. Rea regularly recorded the plaintiff's symptoms and discussed them with the plaintiff. Dr. Rea's testimony was therefore relevant to the issue of incapacity.[135] Due to the exclusion of Dr. Rea's testimony, there was no testimony of any doctor who treated the plaintiff after 1990—a seven-year gap between time of the last treatment in evidence and the trial. Therefore, the *Green* court held that the trial court had improperly excluded relevant evidence and that the exclusion of that evidence probably caused the rendition of an improper verdict.[136]

In *Household Credit Services, Inc. v. Driscol*,[137] the plaintiffs sued a debt collection agency for negligence, gross negligence, intentional infliction of emotional distress, and violation of the Texas Fair Debt Collections Practices Act. The action arose out of the defendant's employees calling the plaintiffs several times a day at odd hours and being abusive on the phone. After an $11.7 million verdict for the plaintiffs, almost all of which was punitive damages, the defendant appealed the trial court's decision to allow plaintiffs' counsel to ask Household's debt collection manager if he had knowledge of the $3 million in judgments against Household for abusive collection practices in California. The appellate court held that since the plaintiff alleged gross negligence, malice, and willful conduct, the manager's knowledge of the judgments, which would indicate that he had knowledge of the consequences of Household's actions, was relevant and admissible.[138]

133. *See id.* at 843 (citing Bradley v. Brown, 852 F. Supp. 690 (N.D. Ind. 1994), *aff'd*, 42 F.3d 434 (7th Cir. 1994) and Summers v. Missouri Pac. R.R. Sys., 897 F. Supp. 533 (E.D. Okla. 1995)).

134. While the appellate court apparently disagreed with the trial court's decision on the admissibility of Dr. Rea's causation testimony, the standard of review is whether the trial court abused its discretion. *See id.* at 842. The court noted that "clinical medicine necessarily evolves from a process of trial and error," and as such, "has traditionally been granted some leeway in a determination of admissibility." *Id.* at 844.

135. *See* TEX. R. EVID. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

136. *See Green*, 993 S.W.2d at 844-45.

137. 989 S.W.2d 72 (Tex. App.—El Paso 1998, pet. denied).

138. *See id.* at 96.

2. *Evidence of Insurance*

In *St. Joseph Hospital v. Wolff*,[139] the Austin Court of Appeals reviewed a trial court's decision to admit evidence of insurance. St. Joseph established an Integrated Surgical Residency Program with the Central Texas Medical Foundation, a nonprofit organization whose physicians treat patients at Brackenridge Hospital in Austin. Through the program, St. Joseph assigns its surgical residents to train at Brackenridge. Due to the negligence of one of these residents, Stacy Wolff suffered severe brain damage. All of the defendants in the case settled except St. Joseph, which the Wolff family sued under a theory of joint enterprise. The jury awarded Stacy Wolff $8 million and her parents each $750,000 for past and future damages.

Because the plaintiff pleaded that St. Joseph was a participant in a joint enterprise through the Integrated Program, the trial court admitted evidence that St. Joseph provided the resident with medical malpractice insurance that would cover incidents occurring while the resident was part of that program. The appellate court upheld the trial court's decision to admit the evidence of insurance.[140] "While insurance cannot be offered to prove that a person acted negligently, evidence of insurance is admissible 'when offered for another issue, such as proof of agency, ownership, or control.'"[141]

3. *Offers to Compromise*

In *Tarrant County v. English*,[142] the Fort Worth Court of Appeals discussed the admissibility of settlement offers for a purpose other than to prove liability. Under Texas Rule of Evidence 408, an offer to "compromise a claim which was disputed as to either validity or amount is not admissible to prove liability."[143] But rule 408 "does not require exclusion when the evidence is offered for another purpose."[144] In *English*, the court concluded that one such other purpose is to establish "that statements made during negotiations were misrepresentations."[145]

English sued Tarrant County for damages he suffered when diesel fuel migrated from the county's property and contaminated his land. The county conducted tests on its adjoining land in April 1991. Those tests revealed high levels of contamination. In May of that year, however, the county sent English a letter stating that test results on its property were "inconclusive," but offered to clear away any contaminated soil on En-

139. 999 S.W.2d 579 (Tex. App.—Austin 1999, pet. granted).

140. The trial court included the following limiting instruction: "Evidence that [the resident] was or was not insured against liability is not admissible on the issue of whether he acted negligently. It is admitted solely on the issue of right to control." *Id.* at 595.

141. *Id.* (quoting TEX. R. EVID. 411).

142. 989 S.W.2d 368 (Tex. App.—Fort Worth 1998, pet. denied).

143. TEX. R. EVID. 408.

144. *Id.*

145. *English*, 989 S.W.2d at 377.

glish's property in exchange for release of all claims.[146] At trial, English introduced the letter, over the county's objection, to show that the county had misrepresented its knowledge about the contamination on its own property by not telling him in the letter about the April test results. The appellate court held that the trial court did not abuse its discretion in admitting the settlement offer because it could have reasonably concluded that the county was trying to mislead English.[147]

B. HEARSAY

1. *Learned Treatise*

In *Kahanek v. Rogers*,[148] the plaintiffs' seven-year-old daughter, who had a history of heart problems, died as a result of an elevated level of an anti-seizure drug that caused a cardiac arrest. The plaintiffs sued the child's doctors for negligently failing to monitor the level of the drug in the child's blood. The Physician's Desk Reference (PDR) stated that the drug should not be given to heart patients until after a "critical benefit-to-risk appraisal."[149] The plaintiffs appealed the trial court's decision to classify the PDR as a learned treatise under Texas Rule of Evidence 803(18) instead of as a market report under rule 803(17).

The difference is significant. Under rule 803(18), a learned treatise may be read into evidence but may not be received as an exhibit.[150] In other words, the jury cannot take a learned treatise into the deliberation room. A learned treatise is only admissible in conjunction with an expert's testimony.

The San Antonio Court of Appeals upheld the trial court's classification of the PDR as a learned treatise. The court noted that the rule 803(17) market report exception applies when the information is "readily ascertainable and about which there can be no real dispute."[151] The court went on to say that "the compilation of drug information embodied by the [PDR] goes beyond objective information to items on which learned professionals could disagree in good faith."[152]

2. *Public Records*

Horizons/CMS Healthcare Corp. v. Auld[153] is another nursing home case dealing with TDHS inspection reports. In *Auld*, the plaintiffs filed a survival action alleging that the decedent died as a result of the negligence and gross negligence of the nursing home where the decedent was a bedridden resident. After the defense closed, the plaintiffs sought to

146. *Id.* at 378.
147. *See id.*
148. 12 S.W.3d 501 (Tex. App.—San Antonio 1999, no pet. h.).
149. *Id.* at 502.
150. *See id.* at 504.
151. *Id.* (citing 4 JACK B. WEINSTEIN ET AL., WEINSTEIN'S EVIDENCE § 803(17), at 803-360 (rev. ed. 1994)).
152. *Id.*
153. 985 S.W.2d 216 (Tex. App.—Fort Worth 1999, pet. granted).

introduce as rebuttal evidence thirteen survey reports prepared by the TDHS. These survey reports were created by "surveyors" during their inspections of the defendant's nursing home. The defendant objected based on hearsay and Texas Rule of Evidence 403. Specifically, the defendant alleged that the survey inspections were used to determine whether the nursing home complied with state licensing requirements and federal and state Medicaid requirements and not whether the nursing followed the proper standard of care.

The court first noted that the reports fell under the rule 803(8) public records exception to the hearsay rule. The factual findings in the reports resulted "from an investigation made pursuant to authority granted by law."[154] As to the complaint that the records were unduly prejudicial, the court held that the nursing home opened the door for the documents' admission. The trial court observed that the nursing home's witnesses testified that no patient ever failed to receive basic care. The survey reports listed incidents in which patients did fail to receive basic care. Moreover, the incident reports showed that the defendant had subjective knowledge that patient care was suffering. That subjective knowledge was relevant to the issue of gross negligence.[155] Thus, the survey reports were admissible.[156]

3. *Death Bed Videos*

In *Pittsburgh Corning Corp. v. Walters*,[157] Douglas Walters brought a product liability action against Pittsburgh Corning Corporation (PCC), alleging that when Walters was in the Navy working to build nuclear submarines in the 1960s, he was exposed to Unibestos, a substance containing asbestos manufactured by PCC. Walters was diagnosed with mesothelioma, a cancer caused by asbestos exposure, in 1994. He died later that year, ten days after filing suit. The trial court found PCC liable under theories of negligence and gross negligence for the production of an unreasonably dangerous product without sufficient warnings. The trial court awarded Walters's estate, wife, and parents a total of $8.8 million.

Plaintiffs introduced a "death-bed video" of Walters taken four days before he died. The video showed a gaunt and feeble Walters lying in bed and walking around the hospital supporting himself with an intravenous pole on wheels. Throughout the video, Walters described the agonizing pain he was suffering. The video was a four-and-a-half-minute edited compilation of the original video, which was an hour and a half long.

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154. TEX. R. EVID. 803(8)(C).

155. *See Horizon/CMS*, 985 S.W.2d at 227.

156. *See id.*; *see also* Brewer v. Capital Cities/ABC, Inc., 986 S.W.2d 636 (Tex. App.—Fort Worth 1998, no pet.) (holding that TDHS inspection reports of defendant's nursing homes were admissible under Texas Rule of Evidence 803(8) as public records and under rules 803 (1), (3), & (4) as present sense impressions relating to patients' then-existing mental, emotional, or physical conditions or statements made for the purpose of receiving medical care).

157. 1 S.W.3d 759 (Tex. App.—Corpus Christi 1999, no pet. h.).

PCC objected to the videotape's audio as hearsay and on Texas Rule of Evidence 403 grounds. The Corpus Christi Court of Appeals first overruled the defendant's point of error based on hearsay. The court stated that Walters's videotape testimony was admissible under the rule 803(3) exception to the hearsay rule. Rule 803(3) provides that a statement is not excluded as hearsay if the statement is of "the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, or bodily health)."[158] The court conceded that statements falling under this exception are usually spontaneous remarks made by the declarant while experiencing a sensation that is not readily apparent by a third party, but noted that this requirement is not stated in the rule's language.[159]

PCC also asserted that the responses Walters gave on the video were staged responses to the questions asked by Walters's lawyer and not spontaneous. Therefore, argued PCC, the statements on the video were inadmissible hearsay. The appellate court disagreed. It found that Walters was explaining the pain that he was enduring at the time of the video. He was thus describing his "then existing . . . physical condition."[160] Without his description, the jury would have seen Walters's poor physical condition, but would have been unaware of the extent of the pain he was suffering. The court stated that if it adopted PCC's assertion concerning the inadmissibility of staged responses, "any statement ever made in response to even the simplest question would immediately become inadmissible hearsay."[161]

The court then turned to PCC's rule 403 objection, explaining that while such testimony may arouse sympathy in the jury, Walters's condition prior to death was a necessary part of his wife's and the estate's case. Furthermore, the tape was Walters's only opportunity to tell the jury about his condition, since he died shortly after the tape was made. Therefore, the tape had sufficient probative value to outweigh any prejudicial effects.[162]

C. Opinion on Ultimate Issue

Also in *Pittsburgh Corning*, PCC appealed the admission of the plaintiffs' experts' opinions that the defendants were negligent and grossly negligent. The plaintiffs introduced the testimony of several physicians who testified about the dangers of asbestos, its established links in the

158. Tex. R. Evid. 803(3).

159. *See Pittsburgh Corning*, 1 S.W.3d at 771-72 (citing Ochs v. Martinez, 789 S.W.2d 949, 959 (Tex. App.—San Antonio 1990, writ denied)).

160. Tex. R. Evid. 803(3).

161. *Pittsburgh Corning*, 1 S.W.3d at 772.

162. *See id.* ("The fact that evidence has some prejudicial effect is insufficient to warrant its exclusion. Instead, there must be a demonstration that introduction of the evidence would be unfairly prejudicial to the objecting party. Moreover, to be excluded, 'evidence must not only create a danger of unfair prejudice, but such danger must substantially outweigh its relevance.'" (citing John Deere Co. v. May, 773 S.W.2d 369, 374 (Tex. App.—Waco 1989, writ denied)).

scientific community to mesothelioma, and the dangers of asbestos known in the 1960s. The appellate court overruled PCC's appeal of the trial court's admission of this expert testimony under rule 702. The court then took up PCC's appeal of the trial court's admission of expert opinions under rule 704 that PCC was negligent or grossly negligent.[163] The court noted that under rule 704, a witness may give testimony in the form of an opinion on a subject embracing an ultimate issue to be decided by the jury.[164] An expert may therefore give his or her opinion as to the defendant's negligence or gross negligence as long as the expert is provided with the proper legal standard as a predicate.[165] Since the witnesses in this case were given the proper legal standards before they testified that the defendant was negligent and grossly negligent, their opinions were admissible under rule 704.[166]

V. CONCLUSION

The developments in civil evidence over the survey period demonstrate the ongoing debate in our civil justice system over the role of juries in deciding complex issues in a structured setting. When the structure becomes the focal point for determining fairness instead of the jury's collective wisdom, the right to trial by jury erodes into irrelevance. Judicial activism protected by an abuse of discretion standard is now called by other names—*Daubert* and *Robinson*. Instead of privilege walls being scaled down by an enlightened judiciary and legislature, they are being reinforced in the name of commercial efficiency. More than ever, Texas citizens need judges that believe in the right to trial by jury and in the jury's ability to fairly weigh all the evidence within the context of our modern society against all its competing interests.

163. *See* TEX. R. EVID. 704 ("Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.").

164. *See Pittsburgh Corning*, 1 S.W.3d at 776-77.

165. *See id.* at 777.

166. *See id.*