

APPELLATE ISSUES ON EXPERTS

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APPELLATE ISSUES ON EXPERTS

I. INTRODUCTION

Unfortunately, preparing and arguing your motion to exclude expert testimony or responding to a motion to exclude your expert does not end the discussion with regard to *Daubert/Robinson* challenges. In either seeking to exclude or seeking to defend against a *Robinson* attack, it is important to know how the appellate courts are reviewing such expert challenges. This paper focuses on what issues appellate courts, particularly the Supreme Court of Texas, are concerned with in relation to trial court's exercising their gate keeping function to assess the reliability of expert testimony.

II. STANDARD OF REVIEW ON APPEAL

We begin, as any appellate court does, with the applicable standard of appeal. In adopting *Daubert* analysis as the appropriate standard for the admission of scientific expert testimony, the Texas Supreme Court in *E.I. du Pont de Nemours & Co. v. Robinson*, set forth the standard of review by which Texas appellate courts would review trial courts' application of *Daubert* -- which was abuse of discretion. 923 S.W.2d 549, 558 (Tex. 1995). Under long-standing Texas precedent, the test for abuse of discretion was whether the trial court acted without reference to any guiding rules or principles. *Id.* The Court also pointed out what the test for abuse of discretion was not -- it was not whether in the opinion of the reviewing court the trial court's decision was appropriate. In fact, that the reviewing court would have ruled differently is not an abuse of discretion. This is so because the "decision whether to admit evidence rests within the discretion of the trial court." *Id.*

Specific to this newly enunciated gate keeping function, the *Robinson* court stressed that even under these standards the jury would continue to assess the weight and credibility of the testimony:

The trial court's role is not to determine the truth or falsity of the expert's opinion. [citations omitted] Rather, the trial court's role is to make the initial determination whether the expert's opinion is relevant and whether the methods and research upon which it is based are reliable. There is a difference between the reliability of the underlying theory or technique and the credibility of the witness who proposes to testify about it. An expert witness may be very believable, but his or her conclusions may be based upon unreliable methodology. As DuPont points out, a person with a degree should not be allowed to testify that the world is flat, that the moon is made of green cheese, or that the Earth is the center of the solar system.

Id.; see also *TXI Transportation Co. v. Hughes*, 306 S.W.3d 230, 239 (Tex. 2010)("The court's

ultimate task, however, is not to determine whether the expert's conclusions are correct, but rather whether the analysis the expert used to reach those conclusions is reliable and therefore admissible.")

That remains the standard of review; an appellate court may not reverse for abuse of discretion merely because it disagrees with the decision of the trial court. Rather, the trial court has broad discretion in determining whether expert testimony is admissible and will be reversed only if that discretion is abused. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 578 (Tex. 2006)(citing *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 629 (Tex. 2002)). The focus of the reviewing court is not on the conclusion reached or generated by the expert; rather, the focus is on the validity of the principles and methodology underlying the testimony. *North Dallas Diagnostic Center v. Dewberry*, 900 S.W.2d 90, 95 (Tex. App.--Dallas 1995, writ denied). To admit expert testimony that does not meet the reliability requirements established in *Robinson* is to act without reference to guiding rules and thus is an abuse of discretion. *Guadalupe-Blanco River Authority v. Kraft*, 77 S.W.3d 805, 810 (Tex. 2002).

With regard to the qualification of an expert witness, the Supreme Court has reaffirmed that such is within the trial court's discretion, which will not be disturbed absent the clear abuse of acting without reference to guiding rules or principles. *Larson v. Downing*, 197 S.W.3d 303, 304-05 (Tex. 2006)(per curiam) (quoting *Broders v. Heise*, 924 S.W.2d 148, 151 (Tex. 1996)). In *Larson*, the trial court had granted the defendant's motion to exclude the testimony of a plastic surgeon on standard of care because he had not performed the surgery at issue in more than fifteen years. 197 S.W.3d at 303-04. A divided court of appeals had reversed and remanded. The Supreme Court reversed the court of appeals and affirmed the judgment of the trial court, concluding there was no abuse of discretion and reasoning:

Whether to exclude Bell's testimony is a close call on this record. Close calls must go to the trial court.

Id. at 304.

If you're defending the trial court's ruling on appeal, in your appellate brief you will want to emphasize this "abuse of discretion" standard of review that should give great deference to the trial court's decision on reliability. In addition, you need to demonstrate specifically how the trial court followed the guiding principles of *Robinson* and its progeny. If you're attacking the trial court's ruling, you will want to enumerate the specific *Robinson* principles that the court either failed to apply altogether or erroneously applied to the expert's testimony.

III. PRESERVATION OF A *DAUBERT/ROBINSON* ISSUE

A. Burden of Proof

Given the discretion afforded the trial court in its determination of reliability under the standard of review, it is important to make every effort to convince the trial court that your opponent's expert is unreliable and, conversely, to withstand an attack on your expert by demonstrating that expert's reliability.

Because the party sponsoring the expert bears the burden of showing that the expert's testimony is admissible, the burden of presenting to the trial court evidence that establishes reliability is on that party. *Mack Trucks*, 206 S.W.3d at 578. The burden remains on the proponent of the expert "regardless of the quality or quantity of the opposing party's evidence on the issue and regardless of whether the opposing party attempts to conclusively prove the expert testimony is wrong." *Whirlpool Corp. v. Camacho*, 298 S.W.3d 631, 639 (Tex. 2009). Thus, if you're seeking to have your expert withstand a *Robinson* challenge, you must make sure that the methodology of your expert is well supported and that there are no internal inconsistencies in that expert's testimony or contradictions among your experts. *See General Motors Corp. v. Iracheta*, 161 S.W.3d 462, 470-72 (Tex. 2005).

B. Methods of Preserving a *Robinson* Challenge

1. Summary Judgment Motion

One method of pursuing a *Robinson* challenge is to file a no-evidence and/or traditional summary judgment motion arguing that the expert's opinion is unreliable and thus a take-nothing judgment should be rendered because there is no evidence to support an essential element of the plaintiff's case. *See Merrill Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 708-09 (Tex. 1997); *In re R.O.C. Pretrial*, 131 S.W.3d 129, 131-32 (Tex. App.--San Antonio 2004, no pet). The summary judgment motion will elicit expert affidavits in response and thus the *Robinson* inquiry becomes a part of the summary judgment hearing.

If your *Robinson* objection is part of your summary judgment motion, you must adhere to the rules governing summary judgments. For example, evidentiary objections to summary judgment evidence must be made in writing in your response or reply or they are waived. *Washington v. McMillan*, 898 S.W.2d 392, 397 (Tex. App.--San Antonio 1995, no writ); *Roberts v. Friendswood Development Co.*, 886 S.W.2d 363, 365 (Tex. App.--Houston [1st Dist.] 1994, writ denied). The trial court's ruling on an objection to summary judgment evidence must also be reduced to writing and included within the record in order to be given effect on appeal. *Dolenz v. A.B.*, 742 S.W.2d 82, 83-84 n.2 (Tex. App.--Dallas 1987, writ denied).

If the expert fails to attach supporting documents to his affidavit and that failure is something that may have legal significance on appeal, you need to make a written evidentiary objection on that ground. While courts of appeal are split between whether such failure is a defect in form or in substance (the latter meaning it could be brought up on appeal for the first time), it is better to be safe than sorry and have waived that point. *See Robinson v. Texas Timberjack, Inc.*, 175 S.W.3d 528, 531 (Tex. App.--Texarkana 2005, no pet.); *Brown v. Brown*, 145 S.W.3d 745, 752 (Tex. App.--Dallas 2004, pet. denied).

2. Motion to Exclude the Expert's Testimony

Another procedural vehicle for preserving a *Robinson* point is a motion to exclude the testimony of the expert, arguing why the expert's opinion is unreliable. *Robinson*, 923 S.W.2d at 552. **Since many docket orders include deadlines for filing challenges to experts, be sure to comply with those deadlines in order to properly preserve your expert challenge.** Like the motion in *Robinson*, the motion must be specific about the basis for excluding the expert's testimony as unreliable and should identify those specific opinions that are challenged.

If your pre-trial motion to exclude or a summary judgment motion is denied, I would recommend rearguing the legal basis of your reliability objection and referencing the prior ruling before the expert testimony is offered. If your witness was struck, you have to make sure that the record contains the expert's testimony so that the appellate court can review the trial court's reliability decision. In *Robinson*, the proponent made an offer of proof by re-tendering the evidence during trial and asking the court to reconsider its ruling. It's a "belt and suspenders" approach, but one that can't harm you; and may help you. It gives the trial judge a chance to change his or her mind in light of the trial evidence. At the very least, it makes your record clear with regard to preservation of the *Robinson* challenge. (*See discussion at page 12*) For an excellent and more detailed discussion of preservation, see Judge Brown's article. Judge Harvey Brown, *Procedural Issues Under Daubert*, 36 HOUS. L. REV. 1133, 1133-70 (Winter 1999).

3. Objection During Trial Prior to the Expert's Testimony

Beginning with *Robinson*, it was assumed that the threshold inquiry as to an expert's qualifications and the reliability of his testimony was to be addressed pre-trial. However, three years later in *Maritime Overseas Corp. v. Ellis*, the Court announced that a party can either object "before trial or when the evidence is offered." 971 S.W.2d 402, 409 (Tex. 1998)(emphasis added). Thus, if there is no scheduling order requiring

such matters to be addressed pre-trial, the motion to exclude an expert's testimony can be made at the very latest right before the expert testifies before the jury.

CAUTION: Make sure your objection is specific. The Texarkana Court of Appeals held that the following objection offered at trial was too general to preserve error: Objection that the intoxilyzer evidence is inadmissible under Rule 702, Daubert, Kelly, and Hartman. *Scherl v. State*, 7 S.W.3d 650, 652 (Tex. App.--Texarkana 1999, pet. ref'd). The court reasoned that Texas Rule of Appellate Procedure 33.1 requires a party to state the specific grounds for the objection in order to preserve error. Here, the court concluded that the party had failed to inform the trial court how the predicate was deficient. However, in *Guadalupe-Blanco River Authority v. Kraft*, the Texas Supreme Court held that an objection that the expert's methodology did not meet the reliability standards articulated in *Gammill* was sufficient to preserve error. 77 S.W.3d 805, 807 (Tex. 2002). Nonetheless, it is always better to be specific about why admitting this witness's testimony would be erroneous in order to avoid risking an appellate court holding in a published opinion that you waived your appellate error.

4. Main Requirements for Preservation of Appellate Error

The main goals of any preservation of error effort are to: (1) timely ask the trial court for whatever relief you deem important enough to potentially complain of its denial on appeal; (2) make sure that the trial court is fully apprised of the "what" and "why" of the relief you're seeking; and (3) get a ruling, preferably in an order signed by the judge and filed with the clerk of the court or on the record, taken down by the court reporter such that it can be filed as part of the record in the appellate court. See *Wal-Mart Stores, Inc. v. McKenzie*, 997 S.W.2d 278, 280 (Tex. 1999) ("To preserve a complaint for appellate review, a party must present to the trial court a timely request, motion, or objection, state the specific grounds therefore, and obtain a ruling."); see also TEX. R. APP. P. 33.1(a)(1), (2). The key to preservation is: the appellate court is not going to give you any relief that you have not asked the trial court for and sufficiently explained why you're entitled to it. *Arkoma Basin Exploration Co. v. FMF Associates 1990-A, Ltd.*, 249 S.W.3d 380, 387-88 (Tex. 2008) ("the cardinal rule for preserving error is that an objection must be clear enough to give the trial court an opportunity to correct it"); TEX. R. CIV. P. 321 (motions for new trial must "briefly refer to that part of the ruling of the court . . . to be complained of, in such a way that the objection can be clearly identified and understood by the court").

Rule 33.1(a) states that to preserve a complaint for appellate review, the objection must be sufficiently

specific "to make the trial court aware of the complaint." TEX. R. APP. P. 33.1(a)(1), (2). An objection is sufficiently specific if it identifies the issue, allows the trial court to make an informed ruling, and gives the other party an opportunity to remedy the defect. *Osterberg v. Peca*, 12 S.W.3d 31, 40 (Tex. 2000); *McKinney v. National Union Fire Ins. Co.*, 772 S.W.2d 72, 74 (Tex. 1989).

C. Very Narrow Exception to the *Maritime Overseas* Rule When an Expert Changes His Opinion During Cross Examination

In 2004 and 2005, the Supreme Court recognized that there are times when the basis of a *Robinson* objection does not become apparent until the expert's testimony or on cross-examination. In such an instance, when there is no indication that an expert's reliability is subject to a *Robinson* objection prior to his testimony, then the motion to strike or attack on the expert's reliability can be raised immediately after the basis for the objection becomes apparent. *Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245, 252 (Tex. 2004); see also *General Motors Corp. v. Iracheta*, 161 S.W.3d 462, 471 (Tex. 2005).

However, this warrants a big **caution**. I've heard a number of seminar speakers say broadly that *Helton* and *Iracheta* open up the question of when you're required to make a *Daubert* objection and under those cases you could wait until the midst of the expert's testimony to object. That is absolutely wrong. The rule remains that which was announced in *Maritime Overseas*: object before trial or when the expert's testimony is offered.

Helton and *Iracheta* were very unique circumstances. In *Helton*, it was only upon cross examination that the expert admitted that production data from existing wells could not tell him what production for the hypothetical well would be -- which had been the stated basis of his opinion on damages. He also admitted that he had no factual basis for projecting such production -- contrary to the opinion he had given in his report and on direct. 133 S.W.3d at 250. Thus, the basis for the *Robinson* objection was not apparent until the expert changed his testimony. *Id.* at 252.

There was a similar situation in *Iracheta*. There, the fire expert changed his testimony at trial and offered an opinion that the fuel line had siphoned in the rear where the fire was. In other words, he offered an opinion on the defect, which he was not qualified to do. In cross-exam, he led General Motor's counsel to believe that the expert on siphoning had also changed his opinion that the line had siphoned in the front of the car. 161 S.W.3d at 466-67. However, during the cross-examination, it became clear that the siphoning expert had not changed his opinion. *Id.* at 469. Thus,

General Motors objected at the end of cross-examination. The Court held that the “utterly conflicting nature” of the fire expert’s testimony was not fully apparent until cross-examination; therefore, it rejected plaintiff’s argument that the *Daubert* objection was waived, stating that a party is not required to anticipate a deficiency before it is apparent. *Id.* at 471. Both these cases involved experts who changed their testimony at trial such that the opponent could not have anticipated their lack of reliability. In that circumstance, and in that rare circumstance alone, may you wait until the midst of an expert’s testimony to lodge a *Robinson* objection.

IV. WHAT HAPPENS ON APPEAL IF YOU FAIL TO TIMELY PRESERVE A *ROBINSON* OBJECTION TO RELIABILITY?

Not that anyone attending this seminar would ever fail to make a *Robinson* objection to reliability, but in the event you inherit such a case, all is not lost on appeal -- primarily because of the Supreme Court’s opinions in *Coastal Transport Co. v. Crown Central Petroleum Corp.*, 136 S.W.3d 227, 232-33 (Tex. 2004) and *City of San Antonio v. Pollock*, 284 S.W.3d 809 (Tex. 2009).

A. *Coastal Transport* and *Pollock* Hold That Absence of *Robinson* Objection Does Not Waive a No-Evidence Challenge on Appeal to the Conclusory and Speculative Nature of an Expert’s Opinion

In *Coastal Transport*, the Supreme Court of Texas clarified that there are two types of challenges to expert testimony, also noting the difference in preservation:

- (1) an attack on the scientific methodology, technique, or foundational data underlying the expert’s opinion, which requires a *Robinson* objection to the scientific reliability of the testimony; and
- (2) an attack on the legal sufficiency of the expert’s opinion as speculative or conclusory on the face of the record, for which no pre-verdict *Robinson* objection is required.

136 S.W.3d at 232-33. Thus, if there is no *Daubert* objection, a party cannot complain on appeal of the expert’s methodology, technique, or foundational data. See *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 769 n. 11 (Tex. 2007)(reiterating the *Coastal Transport* rule where there was no challenge to the reliability of the experts). There must be a timely objection asking the trial court to perform its gatekeeper function and giving it an opportunity to do so. However, a party can predicate error on “no evidence” or legal insufficiency

because the expert’s opinion is mere *ipse dixit*¹ and thus no evidence at all. *Pollock*, 284 S.W.3d at 816 (quoting *Coastal Transport*, 136 S.W.3d at 232). Because *Maritime Overseas* involved a methodology attack, an objection was required there. Because *Coastal Transport* and *Pollock* did not, the Court entertained and sustained the parties’ no-evidence challenges based on the conclusory nature of the experts’ opinions. Note that the Supreme Court in *Arkoma Basin* has pointed to the BLACK’S LAW DICTIONARY definition of “conclusory” as “[e]xpressing a factual inference without stating the underlying facts on which the inference is based.” 249 S.W.3d at 389 n.32.

B. Legal Background of *Coastal Transport* and *Pollock* Holdings

In both *Coastal Transport* and *Pollock*, the Court reasoned that it had long been the law in Texas that a claim cannot stand or fall on the mere *ipse dixit* of a credentialed witness -- a notion that pre-dates *Daubert/Robinson* analysis and is found in the *Rhone* and the *Dallas Railway & Terminal* cases cited in *Coastal Transport*. *Pollock*, 284 S.W.3d at 816; *Coastal Transport*, 136 S.W.3d at 232; see *Dallas Railway & Terminal Co. v. Gossett*, 156 Tex. 252, 294 S.W.2d 377, 380 (1956) (“It is well settled that the naked and unsupported opinion or conclusion of a witness does not constitute evidence of probative force and will not support a jury finding even when admitted without objection.”); *Casualty Underwriters v. Rhone*, 134 Tex. 50, 132 S.W.2d 97, 99 (1939) (holding that a witness’s statements were “but bare conclusions and therefore incompetent”; “the fact that they were admitted without objection add[ed] nothing to their probative force”). This is so because an expert’s testimony to constitute competent, probative evidence must be relevant under Texas Rule of Evidence 401 -- meaning that it makes the existence of a material fact more probable or less probable. And, under Texas Rule of Evidence 702, an expert’s testimony must assist the trier of fact. Non-probative or incompetent evidence does neither and therefore is no evidence. *Pollock*, 284 S.W.3d at 816.

As the Supreme Court recognized in *Volkswagen of America, Inc. v. Ramirez*, an expert’s opinion is unreliable if it is no more than a subjective belief with no support or there’s an analytical gap in the reasoning supporting the opinion. Appellate courts cannot ignore analytical gaps or assertions by experts that are simply

¹ The Supreme Court in *Arkoma Basin*, quoted BLACK’S LAW DICTIONARY definition of “*ipse dixit*” as Latin for “he himself said it,” meaning something asserted but not proved. 249 S.W.3d at 389 n.32.

incorrect. 159 S.W.3d 897, 911-12 (Tex. 2004). Whether you term it “unreliable” or “irrelevant,” bare, conclusory or speculative expert opinions have long been viewed by Texas appellate courts as having no probative value and thus offering no assistance to the trier of fact. In sum, they are no evidence. As *Coastal Transport* reiterated, the fact that they are admitted without objection adds nothing to their probative force. The absence of an objection cannot transform non-probative evidence into probative evidence.

Perhaps the best statement of this rationale is in the *Havner* opinion where the court posited that an expert who brings only his credentials and a subjective opinion to court, brings no evidence. Then the Court asked the question: “If for some reason such testimony were admitted in a trial without objection, would a reviewing court be obliged to accept it as some evidence? The answer is no.” 953 S.W.2d at 712.

C. Preservation of a No-Evidence Attack on an Expert

A no-evidence issue is preserved for appeal in one of five ways: (1) a motion for instructed verdict, (2) a motion for judgment notwithstanding the verdict, (3) an objection to the submission of the issue to the jury, (4) a motion to disregard the jury’s answer to a vital fact issue, or (5) a post-verdict motion. *Cecil v. Smith*, 804 S.W.2d 509, 510-11 (Tex. 1991). Whether you otherwise preserve your no-evidence attack on an expert’s testimony, you do need to make the argument fully in a post-verdict motion so that it is clear that your argument was presented to the trial court.

CAUTION: In order to survive the absence of a *Robinson* objection on appeal, you must in your post-verdict motions and appellate briefing be careful to frame your attack in terms of “on the face of the record, the expert’s opinion is without any basis and is therefore conclusory, speculative, and merely *ipse dixit*.” Do not frame your issue in terms of the reliability of the expert. In fact, you’re going to be using some of the *Robinson* reliability analysis, but you have to steer clear of anything that sounds like you’re challenging the expert’s methodology -- which on appeal requires a *Robinson* objection that you don’t have. This is one time that the use of “magic” words is important.

V. EXPERT WITNESS ISSUES IN RECENT TEXAS SUPREME COURT CASES

Attached to this paper at Appendix A is a list of recent significant cases on *Daubert/Robinson* expert issues, which reflects the type issues that the Court has been concerned with.²

A. Where Do You Draw the Line Between “Conclusory on Its Face” and an Attack on the Expert’s Methodology?

Coastal Transport concerned an expert’s opinion that certain conduct constituted gross negligence, which involved no scientific principles of causation and thus gives no guidance in such a case. However, *Pollock* did.

In *City of San Antonio v. Pollock*, the issue was whether the expert’s opinion that migrating benzene caused *in utero* acute lymphoblastic leukemia was conclusory and thus no evidence of causation. 284 S.W.3d 809, 815-16 (Tex. 2009). At oral argument, Justice Wainwright commented that he wasn’t sure just how bright the *Coastal Transport* line was. As the author of the majority opinion in *Volkswagen*, he noted that there were no studies offered in that case to support the expert’s opinion; and he inquired how the City would distinguish *Volkswagen* from *Pollock* where there were studies that the Court could examine -- the real question being whether without a *Robinson* objection the Court could look at the studies to determine if they support the expert’s opinion.

As counsel for the City, my response in briefing and at argument was that in a toxic tort case *Havner* sets the bar for what constitutes competent evidence of causation of a disease; thus, it would seem that in a no-evidence challenge the reviewing court necessarily has to apply that test to determine the competency of the causation testimony -- citing *Austin v. Kerr-McGee Refining Corp.*, 25 S.W.3d 280, 284 (Tex. App.--Texarkana 2000, no pet.), which held that the same test should apply to both the admissibility and the legal sufficiency of testimony that benzene caused chronic myelogenous leukemia. Therefore, the City argued that the *Coastal Transport* line in a scientific causation case like *Pollock* has to be that the appellate court applies *Havner*’s specific/general causation principles in its “no evidence of causation” review. Because the epidemiological studies were part of the record in *Pollock* and because they on their face did not support the expert’s benzene causation opinion, under *Coastal Transport* the Court could examine those studies. However, because the City had made no *Robinson* objection, it could not question the methodology of those studies or in any way utilize *Havner*’s statistical significance analysis. The City had to accept the studies at face value and could not attack them.

Here’s where the *Pollock* opinion drew the line:

When a scientific opinion is admitted in evidence without objection, it may be

going to the Supreme Court’s website, <http://www.supreme.courts.state.tx.us> and clicking on “Case Information” where you can then choose “oral arguments-audio recordings” or “electronic briefs.”

² You can listen to audio recordings of Supreme Court oral arguments and access petitions and briefs on the merits by

considered probative evidence even if the basis for the opinion is unreliable. **But if no basis for the opinion is offered, or the basis offered provides no support, the opinion is merely a conclusory statement and cannot be considered probative evidence,** regardless of whether there is no objection.

284 S.W.3d at 818. (emphasis added) Applying that reasoning to the two experts under attack, the Court concluded that both were conclusory opinions because neither had a basis. The exposure level expert had no basis for his opinion of exposure to 160 ppb because the measurement was taken from the bottom of a methane gas collection well and was unmixed with ambient air. Had Pollock been exposed to that exact reading unmixed with air, she would have suffocated; and there would have been an explosion. Therefore, there was no basis for the expert's exposure opinion. Second, the medical causation expert testified that the exposure to 160 ppb caused the *in utero* ALL. However, that was only 1/200th of the exposure in the studies upon which he based his opinion. Because of the large gap between exposure levels in the studies and Pollock's exposure level, the studies could provide no basis for the expert's causation opinion. *Id.* at 818-20. Without any basis in the record for either of the expert's opinions, both opinions were conclusory and thus constituted no evidence. *Id.* at 820.

PRACTICE TIP: The Supreme Court appears to have answered the question of whether *Havner* analysis of scientific causation applies in a no-evidence attack in a toxic tort case where there was no *Daubert* objection as to reliability of the experts. In *Borg-Warner Corp. v. Flores*, the Court examined causation in an asbestosis case with reference to *Havner*, but mainly focused on the issue of whether the exposure to asbestos was a "substantial factor" in plaintiff's asbestosis. 232 S.W.3d 765, 769-74 & n.11 (Tex. 2007). The main issue was whether there was legally sufficient evidence to establish that respirable asbestos fibers from grinding brake pads was a cause-in-fact of a mechanic's lung scarring when he was also a smoker for the years he installed asbestos brakes. The court of appeals distinguished the case from *In re R.O.C. Pretrial*, 131 S.W.3d 129 (Tex. App.--San Antonio 2004, no pet.). However, Justice Green, the author of *R.O.C.*, did not appear convinced by that at oral argument; and the Court cited *R.O.C.* in its opinion. The Court held that there was not legally sufficient evidence of causation because there was no evidence of the quantum or dosage of respirable asbestos to which Flores was exposed. *Borg-Warner*, 232 S.W.3d at 773-74.

B. Does Texas Rule of Evidence 705 Need to Be Amended in Light of *Coastal Transport*?

Justice Brister in both the *Pollock* argument and the *Arkoma Basin* argument questioned the defendants who were relying on *Coastal Transport* as to whether there was a conflict between TRE 705 and the rule announced in *Coastal Transport* because no objection was necessary during trial to preserve a no-evidence argument. Rule 705(a) provides that an expert can testify in terms of opinion and give the expert's reasons therefore without prior disclosure of the underlying facts or data; however, the court may require otherwise or the witness may be required on cross examination to disclose those underlying facts or data.

In *Arkoma Basin*, counsel responded to the question by arguing that there is a difference between admissibility, with which Rule 705(a) is concerned, and with no-evidence or legal sufficiency review, which *Coastal Transport* speaks to. In addition, the burden always remains on the proponent of the evidence to insure that it can withstand a sufficiency attack -- be it *Robinson* reliability or *Havner* cause-in-fact. Justice Brister's response was that he still thought Rule 705(a) misled parties as to what they needed to do. Pretty much the same colloquy between Justice Brister and the City's counsel was repeated in *Pollock* - although Justice Brister referred to TRE 702 there, which requires that an expert be qualified and of assistance to the trier of fact. However, his point was the same as Justice Hecht's in *Arkoma Basin* that the court is bothered by the fact there is no opportunity to fix the problem when the first no-evidence objection doesn't need to come until after trial. In addition, he was concerned by the fact that Rule 705(a) tells a party it does not need to introduce into evidence underlying data; yet no-evidence attacks are being sustained because the party did not do so. As Justice Brister commented in the *Pollock* argument: "We're just wasting time on 702. We just need a firm rule after *Havner* that says you have to do everything *Havner* says, plaintiffs, in every case. Period." He concluded, "In fact, you have to have all that stuff in every case or it's no evidence."

C. Must You Include the Studies the Expert Relied Upon in the Record?

Justice Brister answered his question in *Arkoma Basin* by concluding that the fact that the expert's foundational data was not in the appellate record would not alone support a legal sufficiency challenge because "experts are not required to introduce such foundational data at trial unless the opposing party or the court insists," citing Rule 705(a). 249 S.W.3d at 389-90 & n.34. Therefore, the fact that the court could not confirm that the cash off the expert's runs divided by mcf yielded the prices he calculated for damages

did not make the expert's testimony conclusory. Accordingly, the moral of that story is that if the foundational data will help illustrate the weakness or the strength of an expert -- depending on your position -- get it into the trial record so that you can argue it on appeal.

I recommend making sure that the underlying epidemiological studies or any other studies an expert relies upon to formulate his opinion are made a part of the record -- whether you are attacking an expert's opinion or defending your expert's testimony and whether or not you have a *Robinson* objection. In any event, you need evidence in the record to show the support or the absence of support for the expert's opinion whether it's a pure *Robinson* reliability inquiry or a no-evidence challenge. In *Pollock*, the epidemiological studies were a part of the record and were important to the no-evidence challenge because none of the studies concluded that benzene in the exposure levels present in *Pollock* caused acute lymphoblastic leukemia, as the expert opined. 284 S.W.3d at 820 (concluding there was no basis for the expert's opinion and it was therefore conclusory; and noting that *Exxon Corp. v. Makofski*, 116 S.W.3d 176 (Tex. App.--Houston [14th Dist.] 2003, pet. denied), had examined these same studies and concluded that they did not show a correlation which met the *Havner* standard of probative evidence).

In *Makofski*, which involved an expert's opinion that benzene caused ALL, the epidemiological studies had not been made a part of the trial record. Justice Brister, who at that time was on the Fourteenth Court of Appeals, ordered the parties on appeal to make the studies part of the record. There was a *Robinson* objection in that case; and the appellate court consequently was able to dissect those studies, applying *Havner* statistical significance analysis. Undoubtedly, that is what you need the appellate court to do if you have an attack on an expert's opinion or if you're defending your own expert. The studies can be an exhibit to the court, rather than one that goes to the jury if you prefer; but make them a part of the record for purposes of appeal.

D. Must You Reoffer at Trial an Expert's Testimony That Was Excluded at a Pretrial Hearing?

In the oral argument of *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32 (Tex. 2007), Justice Brister inquired where the excluded expert's testimony could be found in the record. Counsel replied that the expert had testified at the pretrial *Daubert* hearing on motions to exclude and the court excluded his testimony. Justice Brister then asked, "Do you have to reoffer it at trial?" -- commenting that pretrial motions do not preserve anything. Most of us have assumed that a

ruling on a *Daubert* motion even at pretrial preserves the issue and excluded testimony for the appellate record. However, given Justice Brister's question and comment, the safest thing to do with regard to preserving your appellate record is to reoffer the excluded expert, noting the Court's ruling. I would then offer as an exhibit to the court the transcription of the excluded expert's testimony at the pretrial hearing. Thus, you have made that excluded testimony a part of the trial record -- which should cure that potential problem. That means, of course, you should request a transcription of any pretrial *Daubert* hearing from the court reporter immediately after its conclusion so that you have it ready for trial. That issue did not make its way into the opinion (which was written by Justice Willett), but it is worth avoiding having it an issue against you in your next appeal.

VI. CONCLUSION

While most of the principles of *Daubert/Robinson* analysis in Texas have been well examined in the fifteen years since *Robinson* was decided, there are some lingering issues that bear watching and anticipating when you're presenting or challenging expert testimony.

APPENDIX A

SIGNIFICANT SUPREME COURT OF TEXAS
CASES ON EXPERTS

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| <p><i>TXI Transportation Co. v. Hughes</i> 306 S.W.3d 230 (Tex. 2010)</p> | <p>#07-0541 Argued 10/16/08 Decided 3/12/10 Majority Opinion by Justice Medina Opinion concurring in part and dissenting in part by Justice Wainwright</p> | <p>In this wrongful death case, TXI argued that the trial court had erred in allowing Plaintiff's accident-reconstruction expert to testify because his opinion was unreliable and therefore no evidence that TXI's driver had caused the collision. A timely objection was made to the expert's testimony. <i>Id.</i> at 234. In cases involving accident reconstruction testimony, the Court reiterates that in determining reliability it is appropriate to analyze whether the expert's opinion fits the facts of the case -- <i>i.e.</i>, whether there is an analytical gap. <i>Id.</i> at 235 (citing <i>Volkswagen</i>, 159 S.W.3d at 904-05). Reliability is demonstrated by the connection between the expert's theory and the underlying facts and data in the case. <i>Id.</i> at 239. The Court concluded that the expert's testimony was neither conclusory nor subjective because his observations, measurements, and calculations were tied to the physical evidence in the case; therefore, the opinion was reliable. <i>Id.</i> at 240.</p> |
| <p><i>Whirlpool Corp. v. Camacho</i> 298 S.W.3d 631 (Tex. 2009)</p> | <p>#08-0175 Argued 3/10/09 Decided 12/11/09 Opinion by Justice Johnson</p> | <p>In a products liability action, the jury found that a design defect in a Whirlpool clothes dryer caused a fatal fire. The design defect was that the dryer incorporated a corrugated lint transport tube as part of the air circulation system. Whirlpool challenged the testimony of plaintiff's expert on design defect as being legally insufficient to support the jury's verdict; it had also objected to the admission of his testimony as unreliable. <i>Id.</i> at 633-34, 636. The Court noted that experts always have "experience" in the field; but experience will not offer insulation from a reliability or analytical gap review. <i>Id.</i> at 639. Here, because the opinion rested on testing and the expert testified that some of his opinions had been peer-reviewed, the legal sufficiency review was a combination of <i>Robinson</i> factors and analytical gap. <i>Id.</i> at 639-40. The Court concluded that the expert's testimony was unreliable because it was subjective and conclusory in that no testing supported the expert's theory that lint from the tube passed through a filter into the dryer and ignited the clothes; therefore, it was no evidence. <i>Id.</i> at 643.</p> |
| <p><i>City of San Antonio v. Pollock</i> 284 S.W.3d 809 (Tex. 2009)</p> | <p>#04-1118 Argued 10/18/06 Decided 5/1/09 Majority Opinion by Justice Hecht Dissenting Opinion by Justice Medina,</p> | <p>Defendant made a no-evidence challenge to the conclusory opinion of Plaintiffs' experts that benzene migrating from a closed landfill caused <i>in utero</i> acute lymphoblastic leukemia during the first trimester of pregnancy of a nearby resident. One of the main issues was the application of the <i>Coastal Transport</i> rule to a toxic tort case and the decision where to draw the line in terms of <i>Havner</i> analysis of causation when there was no <i>Robinson</i> objection to the reliability of the experts' testimony. The Court drew the line at whether there was a basis on the face of the record for the expert's opinion. The Court held that the exposure level expert had no</p> |

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| | joined by Justice O'Neill | basis for his opinion of exposure to 160 ppb because the measurement was taken from the bottom of a methane gas collection well and was unmixed with ambient air. Had Pollock been exposed to that exact reading unmixed with air, she would have suffocated; and there would have been an explosion. Therefore, there was no basis for the expert's exposure opinion. Second, the medical causation expert testified that the exposure to 160 ppb caused the <i>in utero</i> ALL. However, that was only 1/200th of the exposure in the studies upon which he based his opinion. Because of the large gap between exposure levels in the studies and Pollock's exposure level, the studies could provide no basis for the expert's causation opinion. <i>Id.</i> at 818-20. Without any basis in the record for either of the expert's opinions, both opinions were conclusory and thus constituted no evidence. <i>Id.</i> at 820. |
| <i>In re GlobalSanteFe Corp.</i> 275 S.W.3d 477 (Tex. 2008)(orig. proceeding) | #07-0040 Argued 1/16/08 Decided 12/5/08 Opinion by Justice Willett | The Court holds that the Remedies Code Chapter 90 requirements to assure reliable expert confirmation of the existence of one of the medically recognized forms of silica-related illnesses are not preempted by the Jones Act. In addition, the failure to establish these criteria is a ground for rejecting expert testimony under <i>Daubert/Robinson</i> because "these requirements represent the Legislature's attempt to require a medically valid demonstration of silica-related disease as opposed to mere exposure to silica or some other substance or mere concern that a disease may develop in the future." <i>Id.</i> at 487-88. |
| <i>Arkoma Basin Exploration Co. v. FMF Associates 1990-A, Ltd.</i> 249 S.W.3d 380 (Tex. 2008) | #03-1066 Argued 12/1/05 Decided 1/25/08 Majority Opinion by Justice Brister Opinion concurring in part and dissenting in part by Justice O'Neill | Defendants made a no-evidence attack on plaintiff's damages expert's opinion based on calculation of lost reserves in a natural gas field. Plaintiff countered that it was not a no-evidence attack, but rather was an impermissible attack on the expert's methodology where there was no cross examination or objection to the admissibility of the expert's damages opinion. <i>Id.</i> at 388-89. During argument, the justices were concerned with application of <i>Coastal Transport</i> to an expert's opinion on damages calculation and how to draw the line between what is conclusory on its face versus a challenge to the expert's methodology. While also expressing concern that where there is no objection to the damages evidence at trial there is no opportunity to fix, Justice Hecht even referred to this issue as a "no man's land." However, the opinion determined that the expert's opinion was not conclusory; therefore, there was no need to draw that line. <i>Id.</i> at 388-89. |
| <i>Ford Motor Co. v. Ledesma</i> 242 S.W.3d 32 (Tex. 2007) | #05-0895 Argued 2/14/07 Decided 12/21/07 Opinion by Justice Willett | Ford argued that the trial court had erred in admitting the testimony of Plaintiff's two experts because both were unreliable. The Court did not reach the question as to one expert because it found that the evidence of one of the experts was sufficiently reliable and constituted some evidence that there was a manufacturing defect in the automobile that caused the right rear axle displacement, which resulted in Ledesma losing control of the vehicle. <i>Id.</i> at 39. The Court found that the expert based his |

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| | | <p>testimony on deviations between Ford’s specifications as to torque, alignment of the u-bolt, and tolerance for difference in u-bolt leg lengths and his findings as to the status of the u-bolt on the Ledesma vehicle. Therefore, this was a plausible theory of how the accident occurred and not too great an analytical gap between the data and the opinion offered. The jury was free to examine this evidence and weigh both the evidence and witness credibility. <i>Id.</i> at 39, 40. The Court concluded that Ford’s complaints about the expert’s testimony “go to its weight, not its admissibility.” <i>Id.</i> at 40-41.</p> <p>Caution: Justice Brister’s questioning in oral argument indicated that he does not think excluded expert testimony given at a pretrial <i>Daubert</i> hearing necessarily preserves the issue for appeal.</p> |
| <p><i>Borg-Warner v. Flores</i> 232 S.W.3d 765 (Tex. 2007)</p> | <p>#05-0189 Argued 9/29/06 Decided 6/8/07 Opinion by Chief Justice Jefferson</p> | <p>The main issue in the case is whether there was legally sufficient evidence to establish that respirable asbestos fibers from grinding brake pads was a cause-in-fact of a mechanic’s lung scarring when he was also a smoker for the years he installed asbestos brakes. The Supreme Court appears to have answered the question of whether <i>Havner</i> analysis of scientific causation applies in a no-evidence attack in a toxic tort case where there was no <i>Daubert</i> objection as to reliability of the experts. The Court examines causation in an asbestosis case with reference to <i>Havner</i>, mainly focusing on the issue of whether the exposure to asbestos was a “substantial factor” in plaintiff’s asbestosis. The court of appeals distinguished the case from <i>In re R.O.C Pretrial</i>, 131 S.W.3d 129 (Tex. App.--San Antonio 2004, no pet.). However, Justice Green, the author of <i>R.O.C.</i>, did not appear convinced by that at oral argument; and the Court cited <i>R.O.C.</i> in its opinion. The Court held that there was not legally sufficient evidence of causation because there was no evidence of the quantum or dosage of respirable asbestos to which Flores was exposed. <i>Id.</i> at 773-74.</p> |
| <p><i>Mack Trucks, Inc. v. Tamez</i> 206 S.W.3d 572 (Tex. 2006)</p> | <p>#03-0526 Argued 10/20/04 Decided 10/27/06 Opinion by Justice Johnson</p> | <p>Unless error is assigned on appeal as to the trial court’s exclusion of testimony, appellate court cannot consider the bill of exception expert testimony in determining reliability.</p> <p>Good summary of principles of <i>Robinson</i> reliability review.</p> <p>All expert did was set out facts of fuel leak consistent with his opinion; didn’t offer support for his opinion; showing fuel leak alone won’t establish causation; must rule out other causes and show defect which was source of ignition of fuel-fed fire; won’t accept opinion at face value because expert experienced.</p> |
| <p><i>Cooper Tire & Rubber Co. v.</i></p> | <p>#04-1039</p> | <p>Plaintiffs’ three experts to establish manufacturing defect in tire held to be unreliable because: (1) record devoid of</p> |

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| <p>Mendez 204 S.W.3d 797 (Tex. 2006)</p> | <p>Argued 1/24/06 Decided 6/16/06</p> <p>Opinion by Justice Willett</p> | <p>proof supporting expert's theory that wax contamination caused tread separation; (2) a second expert's scant defect testimony was purely subjective opinion; and (3) the third expert was not qualified to testify regarding wax migration or contamination. Therefore, \$11 million verdict reversed and rendered because no evidence of manufacturing defect that caused tire to fail.</p> |
| <p>Larson v. Downing 197 S.W.3d 303 (Tex. 2006)</p> | <p>#05-0155</p> <p>Decided 6/9/06</p> <p>Per Curiam opinion</p> | <p>Trial court excluded plaintiff's expert in medical malpractice case because it had been 15 years since he had performed the surgery upon which he was giving an opinion. A divided court of appeals reversed. Supreme Court reversed, holding that expert was not qualified -- finding that whether to exclude expert's testimony was a close call and concluding that "close calls must go to the trial court."</p> |
| <p>General Motors Corp. v. Iracheta 161 S.W.3d 462 (Tex. 2005)</p> | <p>#02-0932</p> <p>Argued 12/3/03 Decided 4/8/05</p> <p>Opinion by Justice Hecht</p> | <p>Because the "utterly conflicting nature" of the fire expert's testimony in a post-collision fuel-fed fire was not apparent until his cross-examination, Defendant's <i>Daubert</i> objection was timely. \$10 million judgment reversed and rendered because experts' opinions unreliable in that they fundamentally contradicted themselves and each other. Therefore, there is no evidence that a siphoning defect caused the second fire.</p> |
| <p>Kerr-McGee Corp. v. Helton 133 S.W.3d 245 (Tex. 2004)</p> | <p>#02-0356</p> <p>Argued 1/22/03 Decided 1/30/04</p> <p>Opinion by Justice Smith</p> | <p>Expert's failure to explain how various factors affected his calculations rendered his opinion unreliable. However, it was only upon cross examination that the expert admitted that he had no factual basis for projecting production data from existing wells -- which was contrary to what his opinion had been prior to that testimony. Because Defendant objected to the testimony immediately after the basis for the objection became apparent, it had not waived its motion to strike the expert as unreliable.</p> |
| <p>Volkswagen of America, Inc. v. Ramirez 159 S.W.3d 897 (Tex. 2004)</p> | <p>#02-0557</p> <p>Argued 4/23/03 Decided 12/31/04</p> <p>Opinion by Justice Wainwright</p> <p>Concurrence by Justice Hecht, joined by Justice Owen</p> <p>Dissent by Chief Justice Jefferson, joined by Justice O'Neill</p> | <p>Interprets <i>Coastal Transport</i> as drawing a line between challenges to: (1) reliability of expert testimony where court evaluates underlying methodology; and (2) no-evidence challenges to conclusory or speculative testimony that is non-probative on its face. Here, because Defendant did not object to the reliability of one of the Plaintiff's experts, it was confined to the face of the record in its evidentiary challenge. Because there was a fatal analytical gap as to the expert's opinion that the wheel stayed tucked in the wheel well as the vehicle crossed the median, the expert's opinion was conclusory on its face. A court is not required in no-evidence review to ignore fatal gaps or assertions that are simply incorrect. In addition, there was no support for the expert's opinion; rather, it was a bare opinion "based solely upon his subjective interpretation of the facts." <i>Id.</i> at 906.</p> <p>The Court in <i>TXI</i> commented that Ramirez's expert proposed the "laws of physics" explained his assumption, but he did not connect his theory to any physical evidence in the case or any tests or calculations to support his theory. 306 S.W.3d at 239.</p> |

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| <p><i>Coastal Transport Co., Inc. v. Crown Central Petroleum Corp.</i> 136 S.W.3d 227 (Tex. 2004)</p> | <p>#01-0301 Argued 12/4/02 Decided 5/14/04 Opinion by Justice Schneider</p> | <p>The main issue was whether Coastal’s failure to object to the admission of expert testimony as unreliable before or during trial waived any complaint that the testimony had no probative value. The answer is “No.” There must be a <i>Robinson</i> challenge in order for a court to undertake the gatekeeping function of evaluating the methodology underlying an expert’s testimony; however, such an objection is not necessary to preserve a “no evidence” objection to the conclusory, speculative, and unsupported nature of the expert testimony.</p> |
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