EXPERT WITNESSES

A. The Standard of Expert Testimony

(i) Federal Standard

The Federal case that established the standard of expert testimony admissibility is *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). The United States Supreme Court in *Daubert*, rejected the *Frye* "general acceptance" requirement for the admission of scientific evidence and instead adopted a flexible standard that enables trial courts as "gatekeepers" in determining the admissibility of such evidence.[1] In *Daubert*, parents brought a products liability suit against a prenatal drug manufacturer alleging that the mother's ingestion of Bendectin caused their children's birth defects. *Id.* at 582. The parents proffered the testimony of experts, who, after analyzing the results of animal, pharmacological, and epidemiological studies, concluded Bendectin caused the birth defects. *Id.* The trial court applied the *Frye* test and excluded the testimony because it was not based on principles "generally accepted" by the scientific community. *Daubert v. Merrell Dow Pharms., Inc.*, 727 F. Supp. 570, 572 (S.D. Cal. 1989). The Ninth Circuit affirmed the trial court's exclusion and the Supreme Court, in reviewing the trial court's analysis, held that *Federal Rule of Evidence 702* supersedes the *Frye* test. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 587 (1993).

In comparing the heavy burden imposed by the *Frye* test with the requirements of Rule 702, the Court opined that Rule 702 requires a screening of expert evidence for relevance and reliability, during which "general acceptance" is one of the factors, rather than a prerequisite, to admissibility. *Id.* at 588-89. In endeavoring to do so, trial courts are instructed by Daubert to consider the following factors:

(1) whether the theory or technique used by the expert can (and has been) tested;

(2) whether the technique has been subjected to peer review and publication;

(3) the theory or techniques potential rate of error, and whether there are standards controlling the technique's operation; and

(4) whether the technique is generally accepted in the relevant scientific community. *Id.* at 593-94. The Court emphasized that trial courts should remain flexible in adapting the analysis to fit each case's special circumstances. *Id.* at 593-94

[1] The Frye test admits scientific expert testimony when "the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." *Frye v. United States*, 293 F. 1013 (1923).

With the four-pronged analysis adopted in *Daubert*, the Court shifted the burden of assessing the validity of the scientific methodology from the relevant scientific community to trial judges. Thus, "neither the difficulty of the task nor any comparative lack of expertise can excuse the judge from exercising the gatekeeper duties that the Federal Rules of Evidence impose" when determining the reliability of expert testimony.

(ii) Texas Standard

In 1995, the Texas Supreme Court reconsidered its interpretation of Texas Rule of Evidence 702, and adopted the *Daubert* "gatekeeper" framework for the analysis of scientific expert testimony in *E.I. DuPont de Nemours and Co., Inc. v. Robinson,* 923 S.W.2d 549, 554-57 (Tex. 1995). *Robinson* was a products liability case that involved whether the tree fungicide, Benlate, damaged a pecan orchard. *Id.* at 551-52. In order to prove that Benlate caused the damage, the Robinsons proffered the testimony of an expert, who used a methodology called "comparative symptomology" in which he compared the symptoms exhibited in the Robinsons' pecan trees to other plants treated with allegedly contaminated Benlate. *Id.* After the manufacturer challenged the reliability of comparative symptomology, the trial court ruled that because the methodology employed by the expert was unreliable, his testimony was inadmissible. *Id.* at 552. The Fort Worth Court of Appeals reversed, holding the trial court invaded the jury's right to determine credibility when it questioned the reliability of the expert's methodology. *Id.* at 557.

On review, the supreme court reversed, and held that a proponent of scientific expert testimony must demonstrate (i) that the expert witness is qualified, and (ii) that his or her opinion is both relevant and reliable. *Id.* at 556-57. See also Texas Rule of Evidence 702.[2] To prevent juries from being confused by "junk scientists," the court concluded that trial courts should act as gatekeepers, preliminarily excluding opinions based on unreliable methodologies. *Id.* The six factors that the Robinson court adopted to guide the trial courts are as follows:

(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;

[2] "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."

(5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and

(6) the non-judicial uses which have been made of the theory or technique.

Three years later, the Texas Supreme Court held that the "fundamental requirements" of reliability and relevance where applicable to all expert testimony offered not just scientific. *See Gammill v. Jack Williams Chevrolet, Inc.,* 972 S.W.2d 713, 726 (Tex. 1998). Thus, in *Gammill,* the court acknowledged that the Robinson factors might not always be applicable in a case where an expert is not basing opinions on scientific research or theories, but instead is relying on his or her knowledge and experience in a particular field.

B. Discovery with Experts

Courts are encouraging litigants to make their Robinson challenges early in the litigation. *Maritime Overseas Corp. v. Ellis,* 971 S.W.2d 402, 414 (Tex. 1998)(Gonzalez, J., concurring); *Hose v. Chicago Northwest Transportation Co.,* 70 F.3d 968, 973 (10th Cir. 1994); *Webster v. Fulton County,* 85 F. Supp. 2d 1375, 1376 (N.D. Ga. 2000)(Daubert challenge made at trial was not timely); *Leaf v. Goodyear Tire and Rubber Co.,* 590 N.W.2d 524, 534 (Iowa 1999); *DiPetrillo v. Dow Chemical Co.,* 729 S.2d 677, 687 (R.I. 1999).

With the increased use of Daubert/Robinson challenges, it may be more feasible to use interrogatories to begin laying the groundwork for responding to challenges to expert witnesses. Interrogatories can be used to identify witnesses and opinions which an opponent may challenge.

e.g.

Interrogatory No.
Please list those expert witnesses (if any) identified by whom you contend are not qualified to render opinions under the standard set forth in *Robinson v. E.I. Dupont Denemours,* 923 S.W.2d 549 (Tex.1995), or in any subsequent opinion by the Supreme Court of Texas which you contend extends the holdings of Robinson.

Interrogatory No.
If you contend that any opinion rendered by Dr._____in his/her deposition is not "reliable" within the meaning of *Robinson v. E.I. Dupont Denemours,* 923 S.W.2d 549 (Tex.1995), or any subsequent opinion by the Supreme Court of Texas which you contend extends the holdings of Robinson, please state the substance of that opinion and describe the basis for your contention.

C. Qualified Experts Denied the Opportunity to Testify at Trial

Shutz v. State, 957 S.W.2d 52, 59 (Tex. Crim. App. 1997)
(Explaining that expert testimony constituting a direct opinion on the truthfulness of a child complainant's allegations does not assist the trier of fact.)

Yount v. State, 872 S.W.2d 706, 710 (Tex. Crim. App. 1993)
(Holding that experts, such as psychologists, are not experts on the credibility of witnesses and do not assist the trier of fact in such capacity.)

Puente v. A.S.I. Signs, 821 S.W.2d 400, 402 (Tex. App.—Corpus Christi 1991, writ denied)
(Explaining that Rule 704 "is not authority for permitting an expert to give an opinion or state a legal conclusion regarding a question of law. Such questions are not 'an ultimate issue to be decided by the trier of fact.' Questions on duty are for the court.")

Askanase v. Fatjo, 130 F.3d 657, 673 (5th Cir. 1997)
("Whether the officers and directors breached their fiduciary duties is an issue for the trier of fact to decide. It is not for [the expert] to tell the trier of fact what to decide.")

D. Recent Supreme Court Case

Cooper Tire & Rubber Co., v. Mendez, --- S.W.3d ---, 2006 WL 1652234 (Tex.2006)

The Texas Supreme Court reversed the judgment of the court of appeals and held that the testimony on theory that wax contamination caused tire failure was legally insufficient to establish manufacturing defect in product liability action;

(1) there was no scientific testing or peer-reviewed studies confirming theory that wax contamination caused radial tire belts to separate,

(2) expert conducted no quantitative analysis of wax contamination and had not done any type of mathematical calculations with respect to anything in this case,

(3) potential rate of error was unknown because no testing of wax contamination theory was done,

(4) there was no evidence of acceptance in scientific community that wax contamination was cause of tire failure, and

(5) no proof that outside world of litigation, industry and expert community recognized wax contamination as cause of belt separation.