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JURY EROSION: THE EFFECTS OF *ROBINSON*, *HAVNER*, & *GAMMILL* ON THE ROLE OF TEXAS JURIES

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Author's Note

The role of Texas juries has diminished in recent years.[1] *Although juries continue to sit for cases across the state, the judiciary and the legislature have taken steps to remove issues traditionally left to juries and place them in the hands of trial judges. This Article is the first of a two-part series focusing on three areas contributing to the erosion of the influence of Texas juries: (1) determinations of expert testimony reliability; (2) no-evidence summary judgments; and (3) statutory damages caps. This Article addresses the effects of empowering trial judges to assess the reliability of expert testimony before introducing such evidence to the jury. The second Article focuses on the effects of the no-evidence summary judgment and statutory caps.*

I. INTRODUCTION

Through a series of interwoven cases, the Texas Supreme Court has progressively facilitated the exclusion of expert testimony.[2] Traditionally, assessing credibility had rested exclusively within the

1. *See* Daniel J. Capra, *The* Daubert *Puzzle*, 32 GA. L. REV. 699, 701-02 (1998) (stating trial judges are required to "act as a gatekeeper" in evaluating expert testimony, thereby preventing the jury from considering many possible expert arguments); William V. Dorsaneo, III, *Judges, Juries, and Reviewing Courts*, 53 SMU L. REV. 1497, 1498 (2000) (recognizing the jury's province is easily invaded by trial judges assessing expert reliability); Lucinda M. Finley, *Guarding the Gate to the Courthouse: How Trial Judges Are Using Their Evidentiary Screening Role to Remake Tort Causation Rules*, 49 DEPAUL L. REV. 335, 335 (1999) (addressing the role of federal judges as gatekeepers); Chief Justice Phil Hardberger, *Juries Under Siege*, 30 ST. MARY'S L.J. 1, 8 (1998) (contending that judges prefer their own judgments over that of juries); Timothy D. Howell, *So Long "Sweetheart"*—State Farm Fire & Casualty Co. v. Gandy *Swings the Pendulum Further to the Right As the Latest in a Line of Setbacks for Texas Plaintiffs*, 29 ST. MARY'S L.J. 47, 59 (1997) (arguing that Texas reform has "taken a turn for the worse for Texas plaintiffs"); K. Isaac deVyver, Comment, *Opening the Door but Keeping the Lights Off:* Kumho Tire Co. v. Carmichael *and the Applicability of the* Daubert *Test to Nonscientific Evidence*, 50 CASE W. RES. L. REV. 177, 200-02 (1999) (commenting on the lack of standards for judges in determining the validity of expert testimony and how they are left in a precarious position).

2. *See* Gen. Motors Corp. v. Sanchez, 997 S.W.2d 584, 590-91 (Tex. 1999) (discussing the standard for evaluating expert testimony stemming from *Robinson*, *Havner*, and *Gammill*); Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 728 (Tex. 1998) (recognizing that the trial court should assess an expert's reliability); Mar. Overseas Corp. v. Ellis, 971 S.W.2d 402, 409 (Tex. 1998) (recognizing *Robinson*'s expansion in *Havner*); Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 710-11 (Tex. 1997) (finding no evidence when the expert is found unreliable); E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 557-58 (Tex. 1995) (establishing a non-exhaustive list of factors for trial judges to determine the admissibility of novel scientific evidence).

province of the jury. In *E.I. du Pont de Nemours & Co. v. Robinson*,[3] however, the supreme court declared jurors ill-equipped to assess the reliability of experts testifying about novel scientific theories and "junk science."[4] To solve this problem, the court established the *Robinson* challenge, permitting a party opposing expert testimony to request the trial court, rather than the jury, assess the reliability and methodology underlying the expert's opinion.[5] Embodying the theme "[l]aw lags science; it does not lead it,"[6] the *Robinson* court weathered criticism that trial judges were no more qualified than jurors to analyze issues upon which experts often disagreed.[7]

After establishing the *Robinson* challenge, the supreme court crafted the *Havner* challenge, a legal sufficiency challenge to expert evidence, in *Merrell Dow Pharmaceuticals, Inc. v. Havner*.[8] Due to the nature of the *Havner* court's two-part test, an opponent failing to exclude expert testimony during a *Robinson* challenge is provided a second bite at the "*Robinson* apple" and may attack the expert's reliability again during a *Havner* challenge. In considering whether the expert testimony constitutes "some evidence," the court disregards the traditional standard that requires the court to view the evidence in the light most favorable to the proponent of

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3. 923 S.W.2d 549 (Tex. 1995).

4. *See Robinson*, 923 S.W.2d at 557 (noting the importance of scientific expert testimony and the determination of relevance).

5. *Id. But see* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 600 (1993) (Rehnquist, C.J., dissenting) (noting that "[q]uestions arise simply from reading this part of the Court's opinion, and countless more questions will surely arise when hundreds of district judges try to apply its teaching to particular offers of expert testimony").

6. Rosen v. Ciba-Geigy Corp., 78 F.3d 316, 319 (7th Cir. 1996).

7. *Robinson*, 923 S.W.2d at 558 (discussing the advantages to having the judiciary, rather than jurors, assessing expert reliability). *See generally* Judge Harvey Brown, *Eight Gates for Expert Witnesses*, 36 HOUS. L. REV. 743, 823 (1999) (identifying that the courts have not listed the factors used to determine expert testimony data reliability); David L. Faigman et al., *Check Your Crystal Ball at the Courthouse Door, Please: Exploring the Past, Understanding the Present, & Worrying About the Future of Scientific Evidence*, 15 CARDOZO L. REV. 1799, 1816 (1994) (addressing the lack of standards in determining the "pertinent field" to review scientific evidence); Frederick B. Lacey, *Scientific Evidence*, 24 JURIMETRICS J. 254, 264-65 (1984) (focusing on *Frye* and the resulting standards used to determine admissibility of scientific experts); Note, *Navigating Uncertainty: Gatekeeping in the Absence of Hard Science*, 113 HARV. L. REV. 1467, 1479-80 (2000) (recognizing the difficulty an expert has in obtaining scientific certainty).

8. Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 712 (Tex. 1997) (requiring trial courts conducting a legal sufficiency review to assess the expert's reliability before giving weight to his testimony).

expert testimony.[9] Instead, the court independently assesses the expert's reliability.[10] Further, on appeal, the standards of review for *Robinson* and *Havner* challenges facilitate the reversal of rulings admitting expert testimony while hindering the reversal of rulings excluding expert testimony.

In establishing the *Robinson* challenge and creating the *Havner* legal sufficiency review, the Texas Supreme Court manifested its lack of confidence in the jury's ability to properly weigh novel scientific expert testimony.[11] A few years later, in *Gammill v. Jack Williams Chevrolet, Inc.*,[12] the supreme court went a step further, authorizing trial judges to assess the reliability of all expert testimony, regardless of whether the testimony concerns novel or accepted methodologies, or whether the testimony centers on scientific or nonscientific techniques.[13] The *Robinson/Havner/Gammill* trilogy constitutes a substantial shift in power from the jury box to the trial bench.[14] What began as a remedy to the jury's lack of sophistication to discern "junk science" from reliable methodology has evolved into a new area of Texas jurisprudence governing all cases involving expert testimony.[15]

This Article addresses the diminishing role of juries in cases involving expert testimony. Section II examines Texas's long history of preserving the right to trial by jury. Section III discusses the standard of admissibility for expert testimony before *Robinson.* Section IV discusses the landmark *Robinson* holding. Section V details supreme court precedent building upon *Robinson* and the

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9. *Id.* at 711-13.

10. *Id.* at 712.

11. *See id.* at 712-13; *see also* Rochelle Cooper Dreyfuss, *Is Science a Special Case? The Admissibility of Scientific Evidence After* Daubert v. Merrell Dow, 73 TEX. L. REV. 1779, 1796-97 (1995) (expressing potential influences scientific evidence has on juries' fact finding role); Wendy E. Wagner, Note, *Trans-Science in Torts*, 96 YALE L.J. 428, 428-29 (1986) (noting the scientific burden of extensive epidemiological research that is a prerequisite to satisfy the legal causation standard).

12. 972 S.W.2d 713 (Tex. 1998).

13. Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 721-23, 727 (Tex. 1998).

14. *See id.* at 722 (fearing "the proliferation and potential prejudice of expert testimony," the court heightened the trial judge's responsibility by expanding the *Robinson* standard to all scientific testimony).

15. *Compare* E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 557-58 (Tex. 1995) (discussing the complexities of new sciences and calling for the court to adopt a reliability standard), *with Gammill*, 972 S.W.2d at 722 (expanding *Robinson* to apply to all expert testimony).

expansion of the trial judge's authority to screen expert testimony as recognized in *Havner* and *Gammill.* Section VI critically examines the current effects and future implications of the *Robinson/Havner/Gammill* trilogy on Texas jurisprudence.

II. Historical Protection of the Right to Trial by Jury in Texas

The State of Texas enjoys a rich history of civil rights protection, including the right to trial by jury.[16] Before Texas's independence from Mexico, the Constitution of the State of Coahuila and Texas did not contain a right to trial by jury.[17] As one commentator noted, "[o]ne of the main complaints that caused the citizens of Texas to declare their independence from Mexico was the lack of trial by jury, and the failure of Mexico to protect the rights secured to citizens by English common law."[18]

Under the present state constitution, the right to trial by jury is protected by two separate provisions. Section 15 of the Texas Bill of Rights entitled "Right of trial by jury," specifically states that "[t]he right of trial by jury shall remain inviolate. The legislature shall pass such laws as may be needed to regulate same, and to maintain its purity and efficiency."[19] The Texas Constitution reiterates the right in Article 5, the section establishing a state judiciary. Specifically, Article 5, Section 10 states, "In the trial of all causes in the District Courts, the plaintiff or defendant shall, upon application in open court, have the right of trial by jury."[20] One court has recognized the state right to trial by jury as "greater than its federal counterpart," extending the right in all causes whether originating in statutory or common law.[21]

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16. *See generally* Crawford v. Standard Fire Ins. Co., 779 S.W.2d 935, 941 (Tex. App.—Beaumont 1989, no writ) (citations omitted) (emphasizing the sanctity of jury verdicts in Texas). The court stated that "[t]he jury's verdict, in Texas courts, has a special, significant sacredness and inviolability. The jury's verdict cannot be violated under our Texas Constitution. The purity of the right to trial by jury is to be maintained."

17. *See* Arvel (Rod) Ponton III, *Sources of Liberty in the Texas Bill of Rights*, 20 St. Mary's L.J. 93, 98-99 (1988) (citing the Const. of the State of Coahuila and Texas art. 181 (1827)).

18. *Id.* at 98.

19. Tex. Const. art. I, § 15; *accord* Trapnell v. Sysco Food Servs., Inc., 850 S.W.2d 529, 544 (Tex. App.—Corpus Christi 1992), *aff'd* 890 S.W.2d 796 (Tex. 1994).

20. Tex. Const. art. V, § 10; *accord Trapnell*, 850 S.W.2d at 544.

21. *Trapnell*, 850 S.W.2d. at 544.

No other state constitution "has two constitutional provisions protecting the right to trial by jury in a civil case."[22] The Texas Supreme Court's holding in *Robinson,* however, was the first in a series of cases significantly limiting the right to trial by jury. Before *Robinson* and its progeny, the right to a trial by one's peers in a case involving expert testimony was a matter of constitutional right because the jury, rather than the trial court, assessed the reliability of the underlying methodologies of an expert opinion.

III. ADMISSIBILITY OF EXPERT TESTIMONY BEFORE *ROBINSON*: HAVE QUALIFICATIONS, WILL TESTIFY

Originally, Rule 702 of the Texas Rules of Civil Evidence limited a trial court's authority to determine whether a witness was qualified to testify in an expert capacity.[23] Although trial courts determined the expert's qualifications, juries played the larger role of assessing expert testimony, determining both credibility and reliability.[24] Specifically, Rule 702 provided that if specialized knowledge will assist the jury in understanding a question of fact, a witness qualified by "knowledge, skill, experience, training or education" can testify as an expert.[25]

Before *Robinson*, the Texas Supreme Court had never addressed the scope of Rule 702.[26] Texas appellate courts interpreting Rule 702 limited the trial court's assessment to the expert's qualifications.[27] Additionally, trial courts could exclude a qualified expert's

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22. *Id.* at 544 n.12 *quoted in* 1 GEORGE D. BRADEN ET AL., THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 421 (George D. Braden ed. 1977).

23. *See* TEX. R. CIV. EVID. 702 (inferring the trial court possesses the authority to qualify an expert witness).

24. *See* Peterson v. Reyna, 908 S.W.2d 472, 477 (Tex. App.—San Antonio 1995), *modified*, 920 S.W.2d 288 (Tex. 1996) (citing Pilkington v. Kornell, 822 S.W.2d 223, 230 (Tex. App.—Dallas 1991, writ denied) (stating "[a]s a general rule, it is peculiarly within the province of the jury to weigh opinion evidence and the judgment of experts"); Vogelsang v. Reece Import Autos, Inc., 745 S.W.2d 47, 49 (Tex. App.—Dallas 1987, no writ) (stating "[t]he court only makes the threshold finding, that the witness possesses minimal qualifications as an expert."); *see also* Cortez v. Unauthorized Practice of Law Comm., 674 S.W.2d 803, 807-08 (Tex. App.—Dallas 1984), *rev'd on other grounds*, 692 S.W.2d 47 (Tex. 1985) (providing the weighing of an expert's credibility is within the province of the jury).

25. TEX. R. CIV. EVID. 702.

26. E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 554 (Tex. 1995).

27. *See, e.g.*, McKinney v. Nat'l Union Fire Ins. Co., 747 S.W.2d 907, 910 (Tex. App.—Fort Worth 1988), *aff'd*, 772 S.W.2d 72 (Tex. 1989) (providing that "we cannot say that the

testimony if the evidence failed to satisfy the Rule 401 relevancy requirement[28] or the Rule 403 balancing test.[29] In contrast to the trial court's role, the jury, acting as the trier of fact, determined both "the adequacy of the [expert's] qualifications and if the testimony should be believed."[30] Jury instructions further empowered juries as "the sole judges of the credibility of the witnesses and the weight to be given their testimony."[31]

Depending on which aspect of the expert determination was appealed, the standard of review varied. The reviewing court applied an abuse of discretion standard to trial court rulings on qualifications, relevance, and prejudicial balancing.[32] However, appellate courts subjected the jury's determination reliability and probative value to a factual sufficiency review.[33]

Vogelsang v. Reece Import Autos, Inc.[34] illustrates the analysis utilized to review the admission of expert testimony by both judge and jury before *Robinson*. In *Vogelsang*, a vehicle owner sued an automotive shop under the Texas Deceptive Trade Practices Act, alleging the shop defectively repainted his vehicle, and thus substantially diminished the car's value.[35] To prove damages, Vogelsang presented the expert testimony of a manager from a similar

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trial court abused its discretion in refusing to allow Dr. Blair to testify to a matter which he admitted was not within his knowledge"); Guentzel v. Toyota Motor Corp., 768 S.W.2d 890, 898 (Tex. App.—San Antonio 1989, writ denied) (stating "[t]he doctor's credentials demonstrate his knowledge, education, training, skill and experience"); *Vogelsang*, 745 S.W.2d at 49 (noting trial courts determine only the qualifications of experts); Gannett Outdoor Co. of Tex. v. Kubeczka, 710 S.W.2d 79, 89 (Tex. App.—Houston [14th Dist.] 1986, no writ) (concluding that "Rowley's testimony concerning the necessary repairs did not transcend the area of his expertise").

28. TEX. R. CIV. EVID. 401.

29. TEX. R. CIV. EVID. 403; *see* Dudley v. Humana Hosp. Corp., 817 S.W.2d 124, 126 (Tex. App.—Houston [14th Dist.] 1991, no writ) (noting that the trial judge has the ability to exclude any relevant evidence should the danger of unfair prejudice substantially outweigh the probative value).

30. *Vogelsang*, 745 S.W.2d at 49.

31. TEX. R. CIV. P. 226a, Approved Instructions III.

32. *See* Stanley v. S. Pac. Co., 466 S.W.2d 548, 551 (Tex. 1971) (finding no abuse of discretion when the trial court admitted expert testimony on industry standards); Bilderback v. Priestley, 709 S.W.2d 736, 741 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.) (indicating that abuse of discretion as the correct standard of review).

33. *See Vogelsang*, 745 S.W.2d at 49 (reiterating that a jury finding is reviewed under a factual sufficiency standard).

34. 745 S.W.2d 47 (Tex. App.—Dallas 1987, no writ).

35. *Vogelsang*, 745 S.W.2d at 48.

automotive shop.[36] Finding that the plaintiff presented no evidence of damages, the trial court granted a directed verdict.[37] Ultimately, the Dallas Court of Appeals reversed the trial court's finding that the expert testimony constituted no evidence:

> [W]e hold that the question of a witness' qualifications to give expert testimony is, in the final analysis for the jury. The court only makes the threshold finding, that the witness possesses minimal qualifications as an expert. Thereafter, it is the jury's province to decide the adequacy of the qualifications and if the testimony should be believed.[38]

This historical confidence in the jury's ability to evaluate expert testimony, weigh the evidence presented, and render a decision based on the credible evidence faded upon the issuance of *Robinson*.[39]

IV. *E.I. DU PONT DE NEMOURS & CO. V. ROBINSON*: ESTABLISHING THE TWO-PRONG TEST FOR THE ADMISSIBILITY OF SCIENTIFIC EXPERT TESTIMONY

"[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."[40]

In *Robinson*, a divided Texas Supreme Court turned a blind eye to the long line of precedent favoring the admissibility of expert testimony and empowered trial courts to exclude an expert opinion based on a preliminary reliability determination.[41] The *Robinson* court held that, upon challenge, the proponent of expert testimony must demonstrate not only that the expert is qualified, but also that the expert's opinion is based on a reliable foundation.[42] A party failing to satisfy this burden is denied the right to present the expert testimony to the jury. The court premised its holding largely on Supreme Court precedent regarding novel or "junk science,"

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36. *Id.*
37. *Id.*
38. *Id.* at 49 (citations omitted).
39. *See* Chief Justice Phil Hardberger, *Juries Under Siege*, 30 ST. MARY'S L.J. 1, 4 (1998) (declaring that "[j]ury verdicts became highly suspect and were frequently overturned for a variety of reasons").
40. E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 558 (Tex. 1995).
41. *Id.* at 566-67 (Cornyn, J., dissenting).
42. *Id.* at 558.

namely *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[43] Although *Robinson* diminished the traditional role of juries in assessing expert testimony, the *Robinson* court rejected the argument that a trial court's reliability determination invaded the province of the jury's exclusive right to determine credibility.[44]

In *Robinson*, the owners of a pecan tree orchard brought a products liability suit against the manufacturers of Benlate, a tree fungicide.[45] To prove causation, the owners proffered the testimony of Dr. Carl Whitcomb.[46] Using the methodology of "comparative symptomology,"[47] Dr. Whitcomb concluded the fungicide damaged the orchard.[48] DuPont filed a motion to strike, and the trial court excluded his testimony, finding the methodology unreliable.[49] Sub-

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43. *See Robinson*, 923 S.W.2d at 554-55 (establishing a standard for admissibility of expert testimony requiring the principle basis of an expert opinion be "generally accepted by the relevant scientific community"); *see also* Justin M. Welch, *From Epidemiological Studies to Beekeeping: Even After* Robinson *and* Havner, *There Is Still an Advantage in Characterizing Experts As Non-Scientific*, 18 REV. LITIG. 227, 229 (1999). Texas Rule of Evidence 702, which governs the admissibility of expert testimony, categorizes expert testimony into three types: (1) scientific; (2) technical; and (3) specialized knowledge. *Id.* Critics argue *Robinson* added a fourth category, experts testifying regarding novel or "junk" science. *Id.*

44. *Robinson*, 923 S.W.2d at 558. The Robinsons brought a constitutional challenge, claiming that permitting a trial judge to assess the reliability of expert opinion violated their constitutional right to a trial by jury. *Id.*; *see* U.S. CONST. amend. VII; TEX. CONST. art. V, § 10. Specifically, the Robinsons claimed a trial court determination of reliability infringed upon the jury's inherent authority to assess credibility and give weight to testimony. *Robinson*, 923 S.W.2d at 558. The *Robinson* court rejected this argument, claiming that "[t]he right to a jury trial 'was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details.'" *Id.* (citing Parklane Hosiery Co. v. Shore, 439 U.S. 322, 337 (1979) and quoting Galloway v. United States, 319 U.S. 372, 392 (1943)). The court opined that "under the standards enunciated today, the jury will continue to assess the weight and credibility of the proffered testimony." *Id.*

45. *Robinson*, 923 S.W.2d at 558.

46. *Id.*

47. *Id.* Dr. Whitcomb's comparative symptomology revealed that "because the Robinsons' pecan trees exhibited symptoms common to other plants treated with allegedly contaminated Benlate under dissimilar growing conditions, Benlate, the only common factor among all the plants, caused the damage." *Id.*

48. *Id.* at 551-52. Dr. Whitcomb arrived at his conclusion by analyzing: (1) the results of his inspection of the pecan orchard, where he dug up roots but did not conduct soil sampling; (2) a 1992 experiment where he applied different concentrations of Benlate to plants; (3) a laboratory analysis of ten boxes of Benlate; (4) reports regarding other plants treated with other herbicides; and (5) internal DuPont documentation referring to claims of contaminated Benlate. *Id.*

49. *Id.* at 552. The trial court found the expert testimony:

sequently, the trial court granted DuPont's directed verdict, and the Robinsons appealed.[50] The appellate court reversed, holding that although the trial court should determine whether the expert is qualified, questions of reliability were reserved for the jury.[51]

The supreme court granted DuPont's application for writ of error to determine the scope of the trial court's inquiry into the reliability of expert testimony.[52] Justice Gonzalez began the court's opinion by noting the availability of expert witnesses "to render an opinion on almost any theory, regardless of its merit."[53] According to the court, this increased availability, combined with the *super-credibility* afforded expert witnesses, leads to jury verdicts based on unreliable expert testimony.[54] The court emphasized the complexity of scientific expert testimony, reasoning that juries often face

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(1) was not grounded upon careful scientific methods and procedures; (2) was not shown to be derived by scientific methods or supported by appropriate validation; (3) was not shown to be based on scientifically valid reasoning and methodology; (4) was not shown to have a reliable basis in the knowledge and experience of his discipline (horticulture); (5) was not based on theories and techniques that had been subjected to peer review and publication; (6) was essentially subjective belief and unsupported speculation; (7) was not based on theories and techniques that the relevant scientific community had generally accepted; and (8) was not based on a procedure reasonably relied upon by experts in the field.

Id. at 552 (citation omitted).

50. *Robinson*, 923 S.W.2d at 552.

51. *Id.* at 557. Specifically, the appellate court used the following standard:

(1) A body of scientific, technical, or other specialized knowledge must exist that is pertinent to the facts in issue; (2) the witness must have sufficient experiential capacity in his field of expertise . . . . encompass[ing] knowledge, skill, experience, training, [and] education; and (3) the facts evaluated must be within the witness' field of specialized knowledge.

Id. (quoting Guentzel v. Toyota Motor Corp., 768 S.W.2d 890, 897 (Tex. App.—San Antonio 1989, writ denied)). Because DuPont had not challenged Dr. Whitcomb's qualifications, the appellate court held the trial court abused its discretion in excluding the expert testimony. *Id.* at 558. Although DuPont challenged the reliability of Dr. Whitcomb's opinion, the appellate court held the issue to be one for the jury. *Robinson*, 923 S.W.2d at 558 (citing First City Bank-Farmers Branch v. Guex, 659 S.W.2d 734, 739 (Tex. App.—Dallas 1983), *aff'd*, 677 S.W.2d 25 (Tex. 1984)).

52. *Id.*

53. *Id.*

54. *Id.* at 553 (stressing that "[e]xpert witnesses can have an extremely prejudicial impact on the jury, in part because of the way in which the jury perceives a witness labeled as an expert"). A witness "admitted by the trial court as an expert often appears inherently more credible to the jury than does a lay witness." *Id.*

questions experts have failed to resolve.[55] Moved by the abuses of the professional expert witness, the court adopted a reliability standard under Texas Rule of Evidence 702.[56]

The court began its rationale by recognizing this case as the first opportunity to interpret Rule 702's admissibility requirements.[57] Noting the different standards used by courts to determine the admissibility of expert testimony,[58] the court looked to the recent United States Supreme Court's holding that trial courts determine the qualifications, relevance, and reliability of expert testimony.[59]

A. *Analyzing Federal Precedent:* Daubert v. Merrell Dow Pharmaceuticals, Inc.

In 1993, the United States Supreme Court established the federal standard for the admissibility of scientific expert testimony in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[60] In *Daubert*, parents sued a drug manufacturer, alleging the mothers' ingestion of

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55. *Robinson*, 923 S.W.2d at 553; *see* Michael Dore, *A Commentary on the Use of Epidemiological Evidence in Demonstrating Cause-In-Fact*, 7 HARV. ENVTL. L. REV. 429, 431-35 (1983) (discussing the inability of epidemiological studies to prove causation); Steve Gold, *Causation in Toxic Torts: Burdens of Proof, Standards of Persuasion, and Statistical Evidence*, 96 YALE L.J. 376, 380 (1986) (discussing the complexity of expert testimony regarding epidemiological studies).

56. *Robinson*, 923 S.W.2d at 553-54 (citations omitted).

57. TEX. R. EVID. 702; *accord Robinson*, 923 S.W.2d at 554. Importantly, the court noted it had addressed the proper standard to review the legal sufficiency of expert testimony, but noted a legal sufficiency review fell outside the purview of Rule 702. *Robinson*, 923 S.W.2d at 554 (citing Duff v. Yelin, 751 S.W.2d 175, 176 (Tex. 1988)).

58. *Robinson*, 923 S.W.2d at 554. Although the San Antonio and Dallas Courts of Appeals agreed on the proper standard for expert testimony admissibility, the Houston and Eastland Courts of Appeals conflicted in their determinations. *Compare* Guentzel v. Toyota Motor Corp., 768 S.W.2d 890, 899 (Tex. App.—San Antonio 1989, writ denied) (limiting the trial court's inquiry to whether the expert is qualified), *and* Vogelsang v. Reece Import Autos, Inc., 745 S.W.2d 47, 49 (Tex. App.—Dallas 1987, no writ) (refusing to allow trial courts to examine whether an expert's testimony is based on a reliable foundation), *with* Gannett Outdoor Co. v. Kubeczka, 710 S.W.2d 79, 89 (Tex. App.—Houston [14th Dist.] 1986, no writ) (holding that trial courts must find the expert qualified to testify and his opinion reliable to admit the testimony), *and* Thompson v. Mayes, 707 S.W.2d 951, 956 (Tex. App.—Eastland 1986, writ ref'd n.r.e.) (extending the trial court review from qualification alone to the reliability of the opinion's foundation).

59. *See Robinson*, 923 S.W.2d at 555 (citing Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589-90 (1993)).

60. 509 U.S. 579, 597 (1993). *See generally* David E. Bernstein, *The Admissibility of Scientific Evidence After* Daubert v. Merrell Dow Pharmaceuticals, Inc., 15 CARDOZO L. REV. 2139, 2166 (1994) (summarizing the *Daubert* requirements for assessing the scientific validity of expert testimony).

Bendectin caused their children's birth defects.[61] The parents introduced the testimony of eight experts, who had interpreted the results of animal, pharmacological, and epidemiological studies and concluded the drug caused the birth defects.[62]

The trial court excluded the expert testimony, finding the opinions not based on principles "generally accepted" by the relevant scientific community.[63] Focusing on a test established by the D.C. Circuit in *Frye v. United States*,[64] the Ninth Circuit Court of Appeals affirmed the finding of the trial court.[65] Subsequently, the Supreme Court granted a writ of certiorari to consider the issue.[66]

In examining relevant precedent, the Supreme Court recognized the conflict between the restrictive nature of the *Frye* test and the liberal approach of the federal evidentiary rules.[67] Distinguishing the *Frye* test from Federal Rule of Evidence 702, the *Daubert* Court noted Federal Rule of Evidence 702 required: (1) the scientific expert testify as to "scientific knowledge"; and (2) the testimony assist the jury in understanding the evidence or determining a question of fact.[68] Explaining the requirements, the *Daubert* Court held that the testimony must be reliable to constitute "scientific knowledge" and must be relevant to be "helpful."[69]

The Court adopted four nonexclusive factors to guide trial courts when determining whether the expert testimony satisfied Federal Rule of Evidence 702: (1) whether a theory or technique can be and has been tested (falsifiability); (2) whether the theory or technique has been subjected to peer review and publication; (3) the technique's known or potential rate of error; and (4) the general acceptance of the theory or technique by the relevant scientific

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61. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 582 (1993).

62. *Id.* at 583.

63. *See* Daubert v. Merrell Dow Pharms., Inc., 727 F. Supp. 570, 572 (S.D. Cal. 1989) (granting summary judgment because the plaintiff's expert testimony was not generally accepted by experts in their field).

64. 293 F. 1013 (D.C. Cir. 1923).

65. *See* Daubert v. Merrell Dow Pharms., Inc., 951 F.2d 1128, 1131 (9th Cir. 1991) (applying the *Frye* test to admit expert testimony generally accepted by the scientific community).

66. *Daubert*, 509 U.S. at 585.

67. *Id.* (quoting Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 169 (1988)).

68. *Id.* at 588-89 (citing FED. R. EVID. 702).

69. *Id.* at 590-92. The Court stated scientific evidence is relevant if there is "a valid scientific connection to the pertinent inquiry as a precondition to admissibility." *Id.* at 592.

community.[70] After analyzing *Daubert,* the *Robinson* court noted that federal courts interpreting Texas Rule of Evidence 702 apply the *Daubert* standard. Next, the *Robinson* court discussed Texas precedent regarding expert testimony's admissibility, focusing on the standard adopted by its sister court.[71]

B. *Incorporating Texas Standards*

In *Kelly v. State*,[72] the Texas Court of Criminal Appeals addressed the reliability of DNA evidence. The trial court admitted expert testimony regarding DNA over the defendant's objection that the relevant scientific community did not generally accept DNA tests.[73] The appellate court affirmed the trial court's ruling,[74] and the Court of Criminal Appeals agreed, determining the evidence reliable so long as the underlying theory and technique are valid.[75] The *Kelly* court adopted a set of factors to guide trial courts in determining whether to admit expert testimony in criminal cases:

(1) the general acceptance of the theory and technique "by the relevant scientific community;"
(2) the expert's qualifications;
(3) publications supporting or rejecting the theory;
(4) the technique's potential rate of error;
(5) other expert's tests and evaluations of the technique;
(6) the ability to clearly explain the technique to the trial court; and

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70. *Id.* at 591-94. After the Supreme Court remanded the case back to the Ninth Circuit for a determination of whether the experts' testimony was relevant and based on a reliable foundation, the Ninth Circuit again affirmed the trial court's exclusion of the testimony. Daubert v. Merrell Dow Pharms., Inc., 43 F.3d 1311, 1322 (9th Cir. 1995). This time, the Ninth Circuit stated two grounds for exclusion: (1) the experts had conducted their research for the purposes of testifying, rather than independent of this case and (2) the expert's foundation lacked evidence of peer review or publication supporting their opinions. *Id.*

71. E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 556 (Tex. 1995) (noting that in *Kelly v. State*, the Court of Appeals held that scientific evidence "is reliable if the underlying theory and technique applying it are valid").

72. 824 S.W.2d 568 (Tex. Crim. App. 1992) (en banc).

73. Kelly v. State, 824 S.W.2d 568, 569 (Tex. Crim. App. 1992 (en banc)).

74. Kelly v. State, 792 S.W.2d 579, 585 (Tex. App.—Fort Worth 1990), *aff'd*, 824 S.W.2d 568 (Tex. Crim. App. 1992).

75. *Kelly*, 824 S.W.2d at 574.

(7) the skill and experience of the individual applying the technique to the data in question.[76]

Although the court designed the *Kelly* factors to guide trial courts when a party contested the admissibility of scientific evidence, the court hesitated to hold the factors replaced the jury's role in assessing reliability. The Texas Supreme Court expanded the rationale of the *Kelly* holding in *Robinson*.[77]

C. *Two-Prong Test for Admitting Scientific Evidence: Reliability and Prejudice*

Building upon *Daubert* and *Kelly*, the *Robinson* court established the test for the admissibility of scientific expert testimony.[78] The court held that Rule 702 requires the trial court to conduct a two-prong examination.[79] Initially, the trial court must determine whether the expert is qualified to testify,[80] whether the testimony is

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76. *Id.*

77. E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 556 (Tex. 1995) (relying on *Kelly* and *Daubert*, the court addressed the role of the trial court in determining questions of admissibility of evidence).

78. *Robinson*, 923 S.W.2d at 555-56. Although the *Robinson* court followed *Daubert*, several courts at the time refused to implement the *Daubert* factors in cases not regarding "junk science." *See, e.g.*, Vadala v. Teledyne Indus., 44 F.3d 36, 39 (1st Cir. 1995) (refusing to apply *Daubert* to cases involving an event as opposed to scientific law); Iacobelli Constr., Inc. v. County of Monroe, 32 F.3d 19, 25 (2d Cir. 1994) (limiting the application of *Daubert* to "junk science" cases); Lappe v. Am. Honda Motor Co., 857 F. Supp. 222, 228 (N.D. N.Y. 1994) (refusing to apply *Daubert* in a products liability case); State v. Bible, 858 P.2d 1152, 1183 (Ariz. 1993) (refusing to apply *Daubert* in a case where technology is still evolving); People v. Leahy, 882 P.2d 321, 331 (Ca. 1994) (en banc) (rejecting *Daubert* as the appropriate approach to assess the reliability of expert testimony); Fishback v. People, 851 P.2d 884, 889 (Colo. 1993) (en banc) (adopting Federal Rule Evidence 702 as the appropriate standard for rape trauma cases); Flanagan v. State, 625 So. 2d 827, 828-29 (Fla. 1993) (holding sex offender profile evidence was inadmissible because it failed the *Frye* test); People v. Wesley, 633 N.E.2d 451, 456 (N.Y. 1994) (adhering to the *Frye* test for establishing reliability of DNA evidence); State v. Cauthron, 846 P.2d 502, 505 (Wash. 1993) (en banc) (admitting DNA typing under *Frye*).

79. *Robinson*, 923 S.W.2d at 555-56 (discussing the qualifications of an expert witness). It is important to note the current standard for expert testimony in criminal and civil cases is virtually identical; both types of cases are governed by Texas Rules of Evidence 702 and 703. *See* TEX. R. EVID. 702, 703. In addition, civil and criminal cases often cite to each other during the analysis of the admissibility and sufficiency of expert testimony. *See, e.g.*, *Robinson*, 923 S.W.2d at 556 (illustrating that the standards for expert testimony in both civil and criminal cases are essentially interchangeable); Fowler v. State, 958 S.W.2d 853, 860-61 (Tex. App.—Waco 1998), *aff'd* 991 S.W.2d 258 (Tex. Crim. App. 1999) (en banc) (stating that civil and criminal rules of evidence are identical).

80. *Robinson*, 923 S.W.2d at 556.

relevant to the case,[81] and whether the opinion is based on a reliable foundation.[82] To aid the trial court in determining reliability, the *Robinson* court provided the following nonexclusive list of factors:

(1) the extent to which the theory has been . . . 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 which have been made of the theory or technique.[83]

If the expert testimony satisfies the first prong, the trial court moves on to the second prong, determining whether to exclude the evidence under a balancing analysis similar to that provided in Texas Rule of Evidence 403.[84] Specifically, the trial court determines whether the expert testimony's "probative value is outweighed by the 'danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or

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81. *Id.* The *Robinson* court stated the relevance determination made by trial courts with regard to scientific expert testimony incorporates the traditional relevance examination required by Texas Rules of Evidence 401 and 402. *Id.* The court noted that "[t]o be relevant, the proposed testimony must be sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." *Id.* (quoting United States v. Downing, 753 F.2d 1224, 1242 (3d Cir. 1985)). *See generally* Jordan v. State, 928 S.W.2d 550, 555 (Tex. Crim. App. 1996) (providing an extended discussion on the limitations of the relevancy ground for the exclusion of expert testimony).

82. *Robinson*, 923 S.W.2d at 556-57. Although the relevancy determination is nothing new to trial judges who have always been governed by the standards set forth by Texas Rules of Evidence 401 and 402, the determination of reliability is not as established in Texas evidentiary law. To determine the meaning of reliability in reference to scientific testimony, the court expounded, "[s]cientific evidence which is not grounded 'in the methods and procedures of science' is no more than 'subjective belief or unsupported speculation.'" *Id.* at 557 (quoting Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 590 (1993)).

83. *Id.* at 557. In crafting the nonexclusive list of six factors, the court combined the *Daubert* factors and the *Kelly* factors. *Compare Daubert*, 509 U.S. at 589-93, *with* Kelly v. State, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992) (en banc). Further, the *Robinson* court noted trial courts should "consider other factors which are helpful to determining the reliability of the scientific evidence." *Robinson*, 923 S.W.2d at 557.

84. TEX. R. EVID. 403.

needless presentation of cumulative evidence.'"[85] Significantly, although the *Robinson* court cited Rule 403 in establishing the second prong, the court altered the traditional balancing test. The court's altered test provides that to exclude the scientific evidence, the prejudicial factors must merely outweigh, rather than substantially outweigh, the probative value.[86]

After setting out the two-prong test, the *Robinson* court emphasized that the new admissibility standard turns on "a flexible inquiry focusing solely on the underlying principles and methodology, not on the conclusions they generate."[87] The court anticipated criticism that its standard placed trial judges in the "role of amateur scientist."[88] Nevertheless, the majority argued trial judges are better positioned than juries to determine the reliability of scientific evidence:

> Juries must depend mostly on listening to oral testimony, often mixed in with evidence about other issues. Judges, however, have the benefit of reviewing documents and briefs. . . . Over time, most judges will probably develop at least some facility for understanding science beyond the typical juror's level of understanding. Taking the time required to educate jurors and to present them with similarly detailed information could easily overwhelm the other issues in a case.[89]

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85. *Robinson*, 923 S.W.2d at 557 (quoting TEX. R. CIV. EVID. 403). It is important to note that in incorporating the balancing test provided in Rule 403, the *Robinson* court lowered the burden placed on the party opposing the admission of expert testimony.

86. *Compare Robinson*, 923 S.W.2d at 557 (stating that the trial court must exclude scientific evidence if the prejudicial effects *outweigh* the probative value), *with* TEX. R. EVID. 403 (stating that the trial court must exclude evidence if the prejudicial effects *substantially outweigh* the probative value). *See Daubert*, 509 U.S. at 595 (quoting the Federal Rules of Evidence stating "substantially outweighs"); Dudley v. Humana Hosp. Corp., 817 S.W.2d 124, 127 (Tex. App.—Houston [14th Dist.] 1991, no writ) (approving the trial court's determination that the prejudicial effect outweighed the evidence's probative value). *But see Kelly*, 824 S.W.2d at 572 (omitting "substantially" from the discussion of Rule 403).

87. *Robinson*, 923 S.W.2d at 557; *see* Christophersen v. Allied-Signal Corp., 939 F.2d 1106, 1111 (5th Cir. 1991) (stating the "nature of the expert's conclusion is generally irrelevant" to its admissibility if the expert's methodology is reliable).

88. *Robinson*, 923 S.W.2d at 553-54 (stating expert testimony has a prejudicial impact on jurors because they view the expert as more believable than a lay witness).

89. *Id.* at 557-58 (quoting Bert Black et al., *Science and the Law in the Wake of* Daubert*: A New Search for Scientific Knowledge*, 72 TEX. L. REV. 715, 788 (1994)). To explain that trial courts can understand the complexities of scientific testimony, the court was forced to indirectly support the argument of its critics. *Id.* The court states that "although the details of science may be complex, the characteristics of valid scientific knowl-

The court noted that the trial court's ability to question expert reliability facilitates a more efficient trial than one involving an opponent's extensive cross-examination of the expert in front of a jury.[90]

After adopting the two-prong admissibility test, the court addressed the Robinsons' argument regarding their right to trial by jury.[91] Specifically, the Robinsons argued the trial court, in assessing the expert's reliability, invaded the province of the jury to make credibility determinations.[92] Summarily dismissing the argument, the *Robinson* court stated "[t]here is a difference between the reliability of the underlying theory or technique and the credibility of the witness who proposes to testify about it."[93]

D. *Appellate Standard of Review for Scientific Expert Testimony Determinations*

Despite the unique problems faced by trial courts in determining admissibility, the *Robinson* court elected to treat the admissibility of scientific expert testimony the same as any general evidentiary determination made by the trial court, adopting an abuse of discretion standard of review.[94] Accordingly, the court held that the trial court did not abuse its discretion in assessing Dr. Whitcomb's methodology unreliable and striking his testimony.[95] In adopting

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edge and the kind of reasoning that produce it are not difficult to grasp." *Id.* (quoting Bert Black et al., *Science and the Law in the Wake of* Daubert: *A New Search for Scientific Knowledge*, 72 TEX. L. REV. 715, 753 (1994)). This premise contradicts the court's argument that scientific concepts are too difficult for jurors to understand.

90. *Robinson*, 923 S.W.2d at 558 (pointing out that cross-examination is not necessary when a judge can ask questions and evaluate the expert's testimony in a preliminary hearing).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*; *see* Minn. Mining & Mfg. Co. v. Atterbury, 978 S.W.2d 183, 188-89 (Tex. App.—Texarkana 1998, pet. denied) (enunciating several factors for determining the reliability of scientific techniques). The precise list of factors and the preliminary nature of the determination suggests a *de novo* standard of review. However, the court stressed the standard of review is still that of abuse of discretion. *Atterbury*, 978 S.W.2d at 189.

95. *Robinson*, 923 S.W.2d at 559-60 (focusing on the expert's failure to rule out other causes of the damage to the pecan orchard). The court noted that "[a]n expert who is trying to find a cause of something should carefully consider alternative causes." *Id.* Further, the court attacked the chronology of the expert's methodology, noting the expert came to a conclusion first and then researched to support his conclusion. *Id.* Stating that "scientists may form initial tentative hypotheses. However, 'coming to a firm conclusion first and then doing research to support to support it is the antithesis of this [scientific]

the abuse of discretion standard of review, the *Robinson* court reinforced the power afforded trial courts in their gatekeeping function.[96]

V. THE EXPANSION OF *ROBINSON*

"Whether the expert would opine on economic valuation [or] advertising psychology, . . . application of the [*Robinson*] factors is germane to evaluating whether the expert is a hired gun . . . "[97]

After *Robinson,* Texas trial courts settled into their newly expanded gatekeeping role, considering *Robinson* challenges pretrial and during trial.[98] A close reading of *Robinson* reveals the *Robinson* challenge arose as a solution to the perceived problem resulting from the jury's inability to sift the "junk science" from reliable methodology.[99] Notwithstanding that narrow rationale, a few years later in *Havner*, the supreme court required trial judges to disre-

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method." *Id.* (quoting Claar v. Burlington N. R.R., 29 F.3d 499, 502-03 (9th Cir. 1994)). *But see Daubert*, 509 U.S. at 593 (stating "[s]cientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry").

96. *Robinson*, 923 S.W.2d at 567 (Cornyn, J., dissenting); *see, e.g.*, Loftin v. Martin, 776 S.W.2d 145, 146 (Tex. 1989) (orig. proceeding) (providing the standard of review for abuse of discretion); Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241-42 (Tex. 1985) (applying the abuse of discretion test to the trial court's refusal to impose sanctions); Ginsberg v. Fifth Court of Appeals, 686 S.W.2d 105, 108 (Tex. 1985) (orig. proceeding) (holding the admission of medical records was clearly within the discretion of the trial court); Jones v. Strayhorn, 159 Tex. 421, 321 S.W.2d 290, 295 (Tex. 1959) (holding that the trial judge did not err when his opinion was supported by evidence).

97. Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 725 (Tex. 1998).

> [T]he considerations listed in *Daubert* and in *Robinson* for assessing the reliability of scientific evidence cannot always be used with other kinds of expert testimony. . . . [A] beekeeper need not have published his findings that bees take off into the wind in a journal for peer review, or made an elaborate test of his hypotheses. Observations of enough bees in various circumstances to show a pattern would be enough to support his opinion

Id. at 726; *see* Lisa M. Agrimonti, *The Limitations of* Daubert *and Its Misapplication to Quasi-Scientific Experts: A Two-Year Case Review of* Daubert v. Merrell Dow Pharmaceuticals, Inc., *113 S. Ct. 2786 (1993)*, 35 WASHBURN L.J. 134, 137 (1995).

98. *See* Honorable Cynthia Stevens Kent, Daubert *Readiness of Texas Judiciary: A Study of the Qualifications, Experience, & Capacity of the Members of the Texas Judiciary to Determine the Admissibility of Expert Testimony Under the* Daubert, Kelly, Robinson, *and* Havner *Tests*, 6 TEX. WESLEYAN L. REV. 1, 2-3 (1999) (commenting on the newfound powers of Texas trial judges).

99. *Robinson*, 923 S.W.2d at 553 (emphasizing the "extremely prejudicial impact" expert witnesses have on the jury and noting the compounding of that problem in the area of science not generally accepted by the relevant scientific community).

gard presumptions favoring proponents of expert testimony during legal sufficiency reviews.[100] In the year following *Havner*, the supreme court again dismissed the justifications for *Robinson* and extended trial court reliability determinations to all forms of expert testimony in *Gammill*.[101]

A. Merrell Dow Pharmaceuticals, Inc. v. Havner: *Blurring the Line Between Admissibility and Legal Sufficiency of Expert Testimony*

Two years after its landmark holding in *Robinson*, the Texas Supreme Court again shifted the balance in favor of excluding expert testimony from jury consideration. In *Merrell Dow Pharmaceuticals, Inc. v. Havner*, the supreme court held that in cases where expert testimony has been admitted and heard by the jury, a trial or appellate court reviewing the sufficiency of the evidence must first assess the reliability of the expert opinion before giving the evidence weight.[102] In crafting the *Havner* challenge, the supreme court adopted a standard that contradicts the traditional standard, which favors all nonmoving parties, including proponents of expert testimony.[103]

In *Havner*, the court faced the same issue confronted by the United States Supreme Court in *Daubert*, whether Bendectin causes birth defects.[104] The case centered on whether the plaintiffs' expert testimony founded upon epidemiological studies[105] consti-

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100. Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 710-11 (Tex. 1997).

101. *Gammill*, 972 S.W.2d at 728.

102. *Compare Havner*, 953 S.W.2d at 714 (providing trial courts must assess the reliability of expert testimony before determining what probative value it offers), *with* Assoc. Indem. Corp. v. Cat Contracting, Inc., 964 S.W.2d 276, 285-86 (Tex. 1998) (providing that in reviewing legal sufficiency, trial courts must view all of the proponent's evidence in the light most favorable to the proponent).

103. *See Havner*, 953 S.W.2d at 714 (adopting the *Robinson* factors in determining the sufficiency of expert testimony).

104. *Id.* at 709-11.

105. *Id.* at 715. Epidemiological studies used to prove causation require an inferential leap by the jury. *Id.* In certain cases, such as toxic tort cases, plaintiffs are unable to prove the substance did in fact cause their injuries. *Id.* at 714-15. Such plaintiffs rely on epidemiological studies, which survey the general population to determine whether exposure to a certain substance causes an increased risk of injury. *Id.* at 715. The plaintiff presents the study to the jury, asking the jury to find that because the general population had a greater risk of injury after exposure, the plaintiff's injury was "more likely than not" caused by exposure to the substance. *Id.*

tuted evidence of causation.[106] Before and during the trial, Merrell Dow repeatedly challenged the reliability of the Havners' causation experts.[107] The court overruled Merrell Dow's objections, denied its motion for directed verdict, and submitted the case to the jury, which returned a verdict in favor of the Havners.[108]

Merrell Dow appealed to the Corpus Christi Court of Appeals, arguing the causation evidence was legally insufficient to support the jury verdict.[109] The three-member panel agreed with Merrell Dow, reversing and rendering judgment in favor of the defendant.[110] Upon rehearing *en banc*, however, a majority of the appellate court disagreed, affirming the award of compensatory damages but reversing the punitive award.[111] On appeal to the supreme court, Merrell Dow challenged the legal sufficiency of the Havners' causation evidence and the trial court's admission of the Havners' expert testimony.[112]

Unlike Justice Gonzalez's *Robinson* opinion, which only four members of the court joined, Justice Owen's *Havner* opinion garnered more acceptance.[113] Addressing the legal sufficiency point first, the court discussed the ways federal courts have handled causation evidence in Bendectin litigation.[114] Recognizing most toxic

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106. *Id.* at 709.

107. *Id.* at 708-09.

108. *Havner*, 953 S.W.2d at 709. The jury awarded $3.75 million in compensatory damages and $30 million in punitive damages. *Id.* The amount of punitive damages was later reduced by the trial court to $15 million. *Id.*

109. *Id.*

110. *Id.*

111. Merrell Dow Pharms., Inc. v. Havner, 907 S.W.2d 535, 548, 564 (Tex. App.—Corpus Christi 1995) (en banc), *rev'd*, 953 S.W.2d at 717 (Tex. 1997).

112. *Havner*, 953 S.W.2d at 709.

113. *Compare Robinson*, 923 S.W.2d at 560 (reporting that four justices dissented), *with Havner*, 953 S.W.2d at 731, 732 (reporting that two justices concurred).

114. *Havner*, 953 S.W.2d at 709, 711. Federal courts have treated Bendectin causation testimony in differing ways. *Id.* Some courts have found the expert testimony legally insufficient to establish causation. *See, e.g.*, Elkins v. Richardson-Merrell, Inc., 8 F.3d 1068, 1073 (6th Cir. 1993); Turpin v. Merrell Dow Pharms., Inc., 959 F.2d 1349, 1360-61 (6th Cir. 1992); Brock v. Merrell Dow Pharms., Inc., 884 F.2d 166, 167 (5th Cir. 1989) (per curium); Richardson v. Richardson-Merrell, Inc., 857 F.2d 823, 832 (D.C. Cir. 1988). Other courts have ruled the expert testimony inadmissible. *See, e.g.*, Raynor v. Merrell Pharms., Inc., 104 F.3d 1371, 1377 (D.C. Cir. 1997); Daubert v. Merrell Dow Pharms., Inc., 43 F.3d 1311, 1322 (9th Cir. 1995); DeLuca v. Merrell Dow Pharms., Inc., 6 F.3d 778, 778 (3d Cir. 1993) (unpublished panel discussion); Lee v. Richardson-Merrell, Inc., 961 F.2d 1577 (6th Cir. 1992) (unpublished panel discussion); Lynch v. Merrell-Nat'l Labs., 830 F.2d 1190, 1197 (1st Cir. 1987).

tort cases turn on epidemiological studies, the *Havner* court adopted guidelines to assist trial courts determining the reliability of opinions based on epidemiological studies.[115] The court held that epidemiological studies failing to indicate that exposure more than doubled the risk of injury are unreliable.[116]

After establishing the reliability standard for opinions based on epidemiological studies, the *Havner* court moved into its legal sufficiency review of the Havners' evidence. The court noted that evidence is legally insufficient when: (1) there is a complete absence of a vital fact; (2) the trial court is prevented by legal rules from giving weight to the only evidence demonstrating a vital fact; (3) no more than a scintilla demonstrates the vital fact; and (4) opposing evidence conclusively disproves the existence of the vital fact.[117] The traditional legal sufficiency standard of review requires the reviewing court make all inferences in favor of the nonmoving party, which in most cases is the proponent of expert testimony.[118] The court emphasized, however, the unique situation presented when assessing the probative value of the expert testimony.[119]

The *Havner* court adopted a two-part legal sufficiency test to address the complexities involved in reviewing the sufficiency of expert evidence.[120] To consider a *Havner* challenge, the trial court conducts a second examination of the expert testimony's reliability, duplicating the reliability assessment conducted during the *Robinson* challenge.[121] To do so, the court independently applies the *Robinson* factors to the expert testimony in question.[122] Only upon

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115. *Havner*, 953 S.W.2d at 715-16.

116. *Id.* at 724-27. The concurring Justice Rose Spector gave more credence to the problems arising from the majority's expansion of *Robinson*:

> The Court today fails to heed its own warning that "the examination of a scientific study by a cadre of lawyers is not the same as its examination by others trained in the field of science or medicine." . . . [A]s a judge, and not a scientist, I am uncomfortable with the majority's ambitious scientific analysis and its unnecessarily expansive application of the *Daubert* standard.

Id. at 732 (Spector, J., concurring) (citation omitted).

117. *Id.* at 711 (citing Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 362-63 (1960)); Burroughs Wellcome Co. v. Crye, 907 S.W.2d 497, 499 (Tex. 1995) (citing Trans. Ins. Co. v. Moriel, 879 S.W.2d 10, 25 (Tex. 1994)).

118. *Havner*, 953 S.W.2d at 711.

119. *Id.*

120. *Id.* at 711-12.

121. *Id.* at 713.

122. *Id.* at 714.

finding the testimony reliable, the trial court moves to the second step, applying the traditional legal sufficiency standard of review and assessing the weight given to the expert testimony.[123]

This two-part standard requires the reviewing court to first ensure the reliability of the expert's testimony before assessing its probative value.[124] In so doing, the *Havner* court removed the "in the light most favorable to the nonmoving party" element of the traditional legal sufficiency review.[125] In addition, the court established the *Havner* challenge, which provides opponents a second opportunity to challenge an expert's reliability. After applying the two-part sufficiency standard to the Havners' evidence, the court found the expert testimony unreliable, and consequently, no evidence of causation.[126] As such, the *Havner* court sustained Merrell Dow's legal insufficiency point of error.[127]

B. Maritime Overseas Corp. v. Ellis*: Timeliness of* Robinson *Challenges Determines the Extent of Judicial Review*

Following *Havner*, opponents of expert testimony stood in line for their "two bites at the [*Robinson*] apple."[128] In some cases, opponents waived their right to file a *Robinson* challenge to exclude the expert testimony, opting to test the expert's reliability through a *Havner* challenge.[129] In *Maritime Overseas Corp. v. Ellis*,[130] however, the supreme court held that opponents must challenge an expert's reliability, either pretrial or during trial, to preserve the opponent's right to raise a *Havner* challenge.[131]

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123. *Havner*, 953 S.W.2d at 714.

124. *Id.* at 712. The court opined that using the traditional standard for legal sufficiency in cases regarding expert testimony reduces the standard of review for no evidence points to a "meaningless exercise of looking to see only what words appear in the transcript of the testimony, not whether there is in fact some evidence." *Id.*

125. *Id.* The court noted that "[w]hile Rule 702 deals with the admissibility of evidence, it offers substantive guidelines in determining if the expert testimony is some evidence of probative value." *Id.*

126. *Id.* at 714.

127. *Id.* (holding "the same factors may be applied in a no evidence review of scientific evidence").

128. Austin v. Kerr-McGee Ref. Corp., 25 S.W.3d 280, 285 (Tex. App.—Texarkana 2000, no pet. h.).

129. Mar. Overseas Corp. v. Ellis, 971 S.W.2d 402, 409 (Tex. 1998).

130. 971 S.W.2d 402 (Tex. 1998).

131. *Ellis*, 971 S.W.2d at 412.

In *Ellis*, the defendant failed to challenge the reliability of the plaintiff's five causation experts until the jury returned its verdict.[132] In its motion for new trial, Maritime cited *Havner* and argued Ellis's expert testimony was unreliable.[133] The trial court found Maritime waived its right to challenge the experts' reliability by failing to object pretrial or during trial.[134]

On appeal, Maritime raised a factual sufficiency point of error, asking the court to hold that because the expert testimony was unreliable, it constituted factually insufficient evidence to support the jury verdict.[135] The *Ellis* court, recognizing its expanded sufficiency review in *Havner*, held the trial court correctly refused to assess the experts' reliability before determining the sufficiency of the evidence.[136] In affirming the ruling, the *Ellis* court emphasized the *Havner* opponent had challenged the experts' reliability pretrial and during trial while the *Ellis* opponent had not.[137] The court firmly noted that "to prevent trial or appeal by ambush, we hold that the complaining party must object to the reliability of scientific evidence before trial or when the evidence is offered."[138]

C. Gammill v. Jack Williams Chevrolet, Inc.: *Extending the* Robinson *Factors to All Expert Testimony Determinations*

After establishing the two bites at the *Robinson* apple in *Havner*, the supreme court continued to reduce the role of Texas juries in

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132. *Havner*, 953 S.W.2d at 709.

133. *Ellis*, 971 S.W.2d at 409.

134. *See id.* at 411 (noting Maritime failed to object to Ellis's experts before or during trial, thus, waiving its right to challenge the expert's reliability on appeal).

135. *Id.* at 408.

136. *Id.*

137. *Compare Havner*, 953 S.W.2d at 708-09 (recognizing the opponent of expert testimony had objected repeatedly to reliability of testimony pretrial and during trial), *with Ellis*, 971 S.W.2d at 404, 410 (noting the opponent to expert testimony raised first objection after jury verdict).

138. *Ellis*, 971 S.W.2d at 409-10. The court further explained that permitting a party

> to challenge on appeal the reliability of [the proponent's] scientific evidence under *Daubert*, in the guise of an insufficiency-of-the-evidence argument, would give [the opponent] an unfair advantage. [The opponent] would be "free to gamble on a favorable judgment before the trial court, knowing that [it could] seek reversal on appeal [despite its] failure to [object pretrial or during trial]."

Id. at 409 (citations omitted).

Gammill v. Jack Williams Chevrolet, Inc.[139] In *Gammill*, the court made three important holdings: (1) the *Robinson* reliability standard applies to novel and existing scientific methodology; (2) the trial court must determine the reliability of both scientific and non-scientific expert testimony before admission; and (3) the *Robinson* factors are not the sole standard for reliability determinations, but rather assessment for reliability should "vary . . . depending on the nature of the evidence."[140]

Gammill addressed causation evidence presented in a products liability lawsuit.[141] After an automobile accident, Gammill sued the car manufacturer and retailer, claiming a malfunction in the seatbelt system increased the injuries suffered.[142] Gammill's expert, who tested and studied the vehicle restraint system, concluded the seatbelt did not function properly during the accident.[143] Jack Williams moved for summary judgment, claiming the expert's opinion scientifically unreliable.[144] The trial court granted the summary judgment, and the appellate court affirmed.[145]

In reviewing the case, the supreme court initially addressed the argument that application of the *Robinson* factors was limited to novel scientific evidence.[146] In rejecting the argument, the *Gammill* court stated "the rules governing admission of scientific evidence should not differ depending on whether the evidence is considered novel or unconventional."[147] Next, the court established the reliability standard for experts employing non-scientific methodologies, such as their own experience and training.[148] To explain the distinction, the *Gammill* court relied on an analogy crafted by the Sixth Circuit Court of Appeals:

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139. *See* Gammill v. Jack Williams Chevrolet, Inc., 972 S.W2d 713, 727 (Tex. 1998) (holding "the relevance and reliability requirements of Texas Rule 702 apply to all evidence offered under that rule"). At that same time, the Court of Criminal Appeals adopted the same expanded interpretation of *Robinson*. Nenno v. State, 970 S.W.2d 549, 560-61 (Tex. Crim. App. 1998).

140. *Gammill*, 972 S.W.2d at 727.

141. *Id.* at 715.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Gammill*, 972 S.W.2d at 718.

146. *Id.* at 720-21.

147. *Id.* at 721.

148. *Id.* at 722.

> [I]f one wanted to explain to a jury how a bumblebee is able to fly, an aeronautical engineer might be a helpful witness. Since flight principles have some universality, the expert could apply general principles to the case of the bumblebee. Conceivably, even if he had never seen a bumblebee, he still would be qualified to testify, as long as he was familiar with its component parts.
>
> On the other hand, if one wanted to prove that bumblebees always take off into the wind, a beekeeper with no scientific training at all would be an acceptable expert witness if a proper foundation were laid for his conclusions. The foundation would not relate to his formal training, but to his firsthand observations. In other words, the beekeeper does not know any more about flight principles than the jurors, but he has seen a lot more bumblebees than they have.[149]

Following in the tradition of *Robinson*, the *Gammill* court mirrored federal precedent in adopting a standard for determining the review of expert testimony which relies on non-scientific methodologies.[150] The *Gammill* court held that a trial court considering nonscientific methodologies should ask "whether 'there is simply too great an analytical gap between the data and the opinion proffered.'"[151] Once again, the supreme court noted the standard for reviewing such determinations is abuse of discretion.[152]

VI. *ROBINSON/HAVNER/GAMMILL* TRILOGY: EFFECTS OF THE SUPREME COURT'S LACK OF CONFIDENCE IN TEXAS JURORS

"The right to a jury trial 'was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details.'"[153]

With each step of *Robinson, Havner,* and *Gammill*, the Texas Supreme Court consistently facilitated an opponent's ability to ex-

149. *Id.* at 724-25 (quoting Berry v. City of Detroit, 25 F.3d 1342, 1349-50 (6th Cir. 1994) (emphasis omitted)).

150. *Gammill*, 972 S.W.2d at 727 (citing Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997)) (stating that the district court followed the test established in *Joiner*).

151. *Id.* (quoting Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997)); *see* Randolph N. Jonakait, *The Assessment of Expertise: Transcending Construction*, 37 SANTA CLARA L. REV. 301, 314 (1997) (arguing *Daubert* should be extended to all evidence offered under Rule 702).

152. *Gammill*, 972 S.W.2d at 727.

153. E.I. du Pont de Nemours v. Robinson, 923 S.W.2d 549, 558 (Tex. 1995) (quoting Parklane Hosiery Co. v. Shore, 439 U.S. 322, 337 (1979)).

clude expert testimony and, as such, made it less likely juries would hear such evidence.[154] Underlying this legal trend is the assumption that trial judges, not juries, best assess an expert's reliability.[155] Although the most substantial shift in power occurred when *Robinson* authorized trial courts to supplant the jury in reliability determinations, a series of smaller steps has consistently contributed to the erosion of jury influence in the courtroom.

By placing the burden on the proponent of expert testimony to prove reliability, rather than on the opponent to disprove reliability, *Robinson* encourages opponents to challenge expert testimony by requiring little initial effort, similar to the no-evidence motion for summary judgment.[156] Further, when courts consider whether an expert's testimony constitutes sufficient evidence to overcome a legal sufficiency challenge, the *Havner* review denies proponents of expert testimony the presumptions benefiting all other nonmoving parties defending against legal sufficiency challenges.[157] Most importantly, by virtue of the framework established by the differing standards of review, appellate courts are more likely to affirm the

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154. In cases where experts have relied on epidemiological studies, courts require the trial court, in determining the admissibility of the expert testimony, to apply not only the *Robinson* factors but also the *Havner* statistical-significance guidelines. Austin v. Kerr-McGee Ref. Corp., 25 S.W.3d 280, 287 (Tex. App.—Texarkana 2000, no pet. h.) (stating "a trial court's determination of admissibility requires application of the *Robinson* factors as well as application of *Havner*'s statistical-significance guidelines"). The current restrictions on the admissibility of expert testimony pose an additional problem for plaintiffs (especially those involved in toxic tort litigation) who already face the difficult task of proving causation. Susan R. Poulter, *Science and Toxic Torts: Is There a Rational Solution to the Problem of Causation*, 7 HIGH TECH. L.J. 189, 199-200 (1992). Because *Havner* was a toxic tort case, the standard adopted centered on whether causation could be established by statistical sampling. Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 715 (Tex. 1997). Critics argue that cases regarding matters other than toxic torts should not be held to the *Havner* reliability standard. Justin M. Welch, *From Epidemiological Studies to Beekeeping: Even After* Robinson & Havner, *There Is Still an Advantage in Characterizing Experts As Non-Scientific*, 18 REV. LITIG. 227, 238 (1999) (criticizing *Havner*'s bright-line rule regarding the reliability of epidemiological studies). Expert testimony in toxic tort cases is all but extinct because of plaintiffs' inability to overcome the hurdles necessary to introduce expert opinions founded upon epidemiological studies. Although scientific tests can demonstrate injury causation on the general population, it is virtually impossible to demonstrate conclusively injury causation on an individual. *Havner*, 953 S.W.2d at 715.

155. *Robinson*, 923 S.W.2d at 557-58.

156. *Id.* at 559.

157. *Havner*, 953 S.W.2d at 713.

exclusion of expert testimony than affirm the admission of expert testimony.[158]

A. *Compressing the Right to Trial by Jury*

In *Robinson*, the proponent of the expert testimony argued that the trial court's expanded gatekeeping function violates the right to trial by jury.[159] Specifically, the proponent argued the jury should determine credibility.[160] Currently, when a trial court examines the reliability of an expert's underlying methodologies, the court effectively supplants the jury in a credibility determination.[161]

The *Robinson* court narrowly interpreted the constitutional right to trial by jury. In his scathing *Robinson* dissent, Justice John Cornyn, currently serving as the Attorney General for the State of Texas, discussed the effect of the *Robinson* holding:

> Whether jurors will be permitted to hear testimony on an essential element of the plaintiffs' lawsuit, and accept or reject it, in whole or in part as they see fit, is the issue with which we are presented. It is not whether we as judges find such evidence credible or "reliable," to use the terminology adopted by the Court.[162]

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158. *Id.*

159. *Robinson*, 923 S.W.2d at 558 (holding the right a jury trial does not encompass "the great mass of procedural forms and detail" such as the reliability of expert testimony).

160. *Id.* at 557-58.

161. *Id.* at 558. Historically, the court moved toward allowing experts to rely upon more evidence, including that which was normally inadmissible. *Id.* at 562-63 (Cornyn, J., dissenting). Justice Cornyn discussed the precedent regarding whether experts could rely on hearsay evidence in forming an opinion. *Id.* at 563 (citing Moore v. Grantham, 599 S.W.2d 287, 289 (Tex. 1980)). When first presented with the issue, the supreme court held that experts could not rely solely on hearsay evidence because the basis of the opinion, the hearsay evidence, was untrustworthy. *Robinson*, 923 S.W.2d at 563 (citing *Moore*, 599 S.W.2d at 289). However, the court's adoption of the Rules of Evidence overruled *Moore*, allowing testimony based solely on hearsay evidence in certain circumstances. *Id.* Justice Cornyn noted that despite the fall of *Moore*, "the concern for the trustworthiness of the underlying basis for the expert's opinion did not evaporate. Instead, Rule 703 requires that if an expert intends to base an opinion solely on hearsay evidence, . . . it must be *of a type* reasonably relied upon by experts in the particular field". *Id.*

162. *Id.* at 560 (Cornyn, J., dissenting). Justice Cornyn was joined in his dissent by Justices Hightower, Gammage, and Spector. *Id.*; *see* G. Michael Fenner, *The* Daubert *Handbook: The Case, Its Essential Dilemma, & Its Progeny*, 29 CREIGHTON L. REV. 939 (1996) (arguing that courts adopting the *Daubert* standard are sent a mixed message regarding the jury's role in credibility determinations). It is important to note that although Justice Cornyn dissented in *Robinson*, he joined the majority in *Havner*, which affirmed and expanded the scope of *Robinson*. *Havner*, 953 S.W.2d at 708.

Currently, the success or failure of a party often turns on the admissibility of expert testimony to prove causation. Nevertheless, the Texas Supreme Court describes the exclusion of expert testimony to be within the "mass of procedural forms and details" falling outside the right to trial by jury.[163]

B. *Assuming Judges Are Better Positioned Than Juries to Determine Reliability*

The *Robinson/Havner/Gammill* standard requires trial judges to "assume the role of amateur scientist and independently evaluate the reliability of the methods employed by the expert."[164] The court adopted this standard despite former Justice Clinton's warning that "[t]rial judges are ill-equipped to make the determination whether a given theory or technique has been sufficiently 'tested in the crucible of controlled experimentation and study' that it can accurately be said to gauge the probability of existence, vel non, of the fact in issue."[165] The *Daubert* Court, relied upon by the supreme court in *Robinson*, struggled with this same concern regarding trial judges inability to properly determine expert testimony.[166]

Trial courts burdened with the task of examining the reliability of an expert utilizing an experiment must make the following determinations: (1) whether the experiment has the requisite confidence level to aid the jury; (2) whether the experiment contained compounding factors; (3) whether other experiments were more appropriate or would yield more reliable results; and (4) the relationship between the experiment and the facts in question.[167] Although scientists devote their careers to arriving at such

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163. *Robinson*, 923 S.W.2d at 558 (quoting Parklane Hosiery Co. v. Shore, 439 U.S. 322, 337 (1979)).

164. *Id.* at 564 (Cornyn, J., dissenting). *But see* Justin M. Welch, *From Epidemiological Studies to Beekeeping: Even After* Robinson & Havner, *There Is Still an Advantage in Characterizing Experts As Non-Scientific*, 18 REV. LITIG. 227, 237-38 (1999). The "rationale behind requiring a judge to sit in judgment of the credibility of a witness" rather than a jury "is found both in the prejudicial effect of dubbing a witness an expert, and the difficulty of debunking scientific opinions on cross-examination." *Id.*

165. *Kelly*, 824 S.W.2d at 576 (Clinton, J., concurring).

166. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593 (1993).

167. *Robinson*, 923 S.W.2d at 564; *see* Bert Black et al., *Science & the Law in the Wake of* Daubert*: A New Search for Scientific Knowledge*, 72 TEX. L. REV. 715, 726 (1994); Bert Black, *A Unified Theory of Scientific Evidence*, 56 FORDHAM L. REV. 595, 607-13 (1988) (contending the examination of the reliability of expert testimony should be limited to the scope necessary to determine the testimony's relevance).

conclusions, the supreme court empowers a trial judge to remove a case from a jury based on his or her amateur evaluation.[168]

The subjective standards used by trial judges to determine admissibility and sufficiency will continue to produce unpredictable and inconsistent results. Further, a recent survey argues that many Texas judges lack the qualifications and experience necessary to analyze scientific data.[169] Proponents of the current standard fail to justify how a Texas trial judge has the ability to ascertain the reliability of scientific methodologies. Although this same problem will likely result from jury determinations of expert reliability, less harm results because litigants would be provided an opportunity to present his entire case to the jury.

C. *Incremental Steps Toward Jury Erosion*

A close analysis of *Robinson* and its progeny reveals the methodical manifestation of the supreme court's lack of confidence in Texas juries. Procedurally, a *Robinson* challenge places the burden on the proponent, rather than the opponent, of expert testimony.[170] Further, the *Havner* challenge affords opponents a second bite at the *Robinson* apple.[171] The standards for reviewing the admission and sufficiency of expert testimony facilitate the reversal of rulings admitting expert testimony and hinder the reversal of rulings excluding expert testimony.

1. Burden Shifting and Balance Adjusting in Favor of Exclusion

In establishing the framework for an opponent to challenge expert testimony, the court provided three grounds for challenging the evidence: (1) qualifications of the expert; (2) relevance of the

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168. *Robinson*, 923 S.W.2d at 564; *see* Honorable Cynthia Stevens Kent, Daubert *Readiness of Texas Judiciary: A Study of the Qualifications, Experience, & Capacity of the Members of the Texas Judiciary to Determine the Admissibility of Expert Testimony Under the* Daubert, Kelly, Robinson, and Havner *Tests*, 6 TEX. WESLEYAN L. REV. 1, 9-10 (1999).

169. *See* Honorable Cynthia Stevens Kent, Daubert *Readiness of Texas Judiciary: A Study of the Qualifications, Experience, and Capacity of the Members of the Texas Judiciary to Determine the Admissibility of Expert Testimony Under the* Daubert, Kelly, Robinson, *and* Havner *Tests*, 6 TEX. WESLEYAN L. REV. 1, 13-14 (1999).

170. *Robinson*, 923 S.W.2d at 564.

171. Austin v. Kerr-McGee Ref. Corp., 25 S.W.3d 280, 285 (Tex. App.—Texarkana 2000, no pet. h.).

testimony; and (3) reliability of the underlying foundation for the testimony.[172] In raising a *Robinson* challenge, the court emphasized the opponent need only state the ground for inadmissibility.[173] Upon challenge, the burden shifts to the proponent to "prove up" the expert's qualifications, relevance, and reliability.[174] Resembling Texas's new no-evidence summary judgment, this burden-shifting framework requires little effort and cost.[175] As a result, opponents are encouraged to utilize the *Robinson* challenge.

In addition to the *Robinson* challenge's "opponent-friendly" burden of proof, the *Robinson* court incorporated a diluted model of the Rule 403 balancing test into the second prong of the *Robinson* examination. First, the *Robinson* balancing test eliminates the requirement that opponents make a separate objection under Rule 403.[176] Second, the *Robinson* balancing test omits the requirement that the prejudicial effect *substantially* outweigh the probative value; rather, the trial court may exclude the expert testimony if the prejudicial effects simply outweigh the probative value.[177] Although some courts have overlooked this distinction, other courts have noted the difference and interpreted the *Robinson* court's intent in omitting the term as applying a lower burden during the balancing test.[178]

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172. *Robinson*, 923 S.W.2d at 556.

173. *See* Mar. Overseas Corp. v. Ellis, 971 S.W.2d 402, 405 (Tex. 1998) (stating that "to preserve a complaint that scientific evidence is unreliable . . . a party must object to the evidence before trial or when the evidence is offered").

174. Broders v. Heise, 924 S.W.2d 148, 151 (Tex. 1996); *see* Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 718 (Tex. 1998).

175. TEX. R. EVID. 166a(i) (providing a party moving for a no-evidence summary judgment need not marshal proof, but rather, simply state the elements upon which the nonmoving party has no evidence).

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

177. *Compare id.* (stating the trial court must exclude scientific evidence if the probative value is *outweighed* by prejudicial factors), *with* TEX. R. EVID. 403 (stating the trial court must exclude evidence if the probative value is *substantially outweighed* by prejudicial factors).

178. Minn. Mining & Mfg. Co. v. Atterbury, 978 S.W.2d 183, 189 (Tex. App.—Texarkana 1998, pet. denied) (distinguishing the Rule 403 balancing test and the *Robinson* balancing test, stating "the court lowers the burden from 'substantially outweighed' to just 'outweighed'").

2. Providing Opponents Two Bites at the *Robinson* Apple

Under *Robinson* and *Havner,* a defendant has two bites at the same (*Robinson*) apple.[179] First, the opponent can make a *Robinson* challenge, requesting exclusion on the basis of qualifications, relevancy, or reliability.[180] Second, the opponent can challenge the legal sufficiency of the expert's testimony, asking the trial or appellate court to find the expert's testimony unreliable, and consequently, no evidence.[181] The opponent must challenge the expert's reliability either pretrial or during trial to challenge the sufficiency of the expert evidence.[182] If the opponent fails to object, the party waives the no-evidence complaint centering around the unreliability of the expert testimony.[183]

a. Encouraging *Robinson* Challenges Through the *Havner* Objection

In *Ellis*, the supreme court established the *Havner* objection, requiring opponents to object to expert testimony pretrial or during trial to preserve the right to raise a legal insufficiency complaint.[184] Since *Ellis*, appellate courts have strictly enforced the requirement.[185] The *Ellis* holding encourages opponents to attack expert testimony on admissibility grounds rather than strategizing a cross-examination attack on the expert before the jury.[186]

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179. Austin v. Kerr-McGee Ref. Corp., 25 S.W.3d 280, 285 (Tex. App.—Texarkana 2000, no pet. h.); *Atterbury*, 978 S.W.2d at 192.

180. *Atterbury*, 978 S.W.2d at 192.

181. *Id.*

182. *Id.*

183. *Id.*

184. Mar. Overseas Corp. v. Ellis, 971 S.W.2d 402, 409 (Tex. 1998).

185. *See, e.g.*, Huckaby v. A.G. Perry & Son, Inc., 20 S.W.3d 194, 205-06 (Tex. App.—Texarkana 2000, pet. denied); Weidner v. Sanchez, 14 S.W.3d 353, 366 (Tex. App.—Houston [14th Dist.] 2000, no pet. h.); Melendez v. Exxon Corp., 998 S.W.2d 266, 282 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (holding the appellant waived the sufficiency point of error for failure to object to the expert before or during trial); Gen. Motors Corp. v. Castaneda, 980 S.W.2d 777, 780 (Tex. App.—San Antonio 1998, pet. denied) (holding "[w]hile we agree that unreliable scientific evidence is not evidence, we are precluded from considering this argument because GM did not preserve it for our review") (citing Mar. Overseas Corp. v. Ellis, 971 S.W.2d 402, 409 (Tex. 1998)).

186. *See Ellis*, 971 S.W.2d at 409-10 (addressing the consequences of *Daubert-Robinson-Havner*).

In *Huckaby v. A.G. Perry & Son, Inc.*,[187] an appellate court faced whether a trial court's ruling during a *Robinson* challenge operated as an evidentiary ruling or a motion in limine in regard to preservation of error.[188] Noting the unprecedented nature of the issue, the *Huckaby* court recognized the Fifth Circuit, equating motions to strike with motions in limine. The Fifth Circuit held a motion to strike does not preserve error.[189] Juxtaposing federal precedent with *Ellis*, the *Huckaby* court interpreted *Ellis* to hold that a pretrial objection to expert testimony sufficiently preserves error.[190] In particular, the *Huckaby* court emphasized the *Ellis* court's use of the disjunctive "or" five times when holding opponents of expert testimony may object before trial *or* when the introducing party offers the evidence.[191] As such, the *Huckaby* court enforced the *Havner* objection requirement and held the opponent waived the

187. 20 S.W.3d 194 (Tex. App.—Texarkana 2000, pet. denied).

188. *Huckaby*, 20 S.W.3d at 206. The *Huckaby* court encouraged the Texas Supreme Court to provide guidance regarding whether Texas courts should consider the ruling in a gatekeeper hearing a motion in limine or an evidentiary ruling. *Id.* at 205-06; *see* MICHOL O'CONNOR, O'CONNOR'S TEXAS RULES: CIVIL TRIALS 268 (1999) (noting courts have yet to determine whether a "pretrial ruling on a gatekeeper motion is considered a ruling on a motion in limine or a ruling excluding evidence"); *see also Weidner*, 14 S.W.3d at 366. In *Weidner v. Sanchez*, the defendant moved for directed verdict on the ground that the plaintiffs failed to present sufficient evidence of reasonable and necessary medical expenses. *Id.* Specifically, the defendant claimed the plaintiff failed to separate medical expenses from a preexisting injury from those incurred for the injury allegedly caused by the accident the subject of the lawsuit. *Id.* The plaintiff's primary source of evidence on the issue of medical expenses was the expert testimony of a medical doctor, who had analyzed the plaintiff's medical treatment and past expenses. *Id.* Although the defendants did not object to the medical doctor's testimony at trial, on appeal, the defendants, citing *Havner*, argued that the doctor's expert testimony constituted "no evidence" because his underlying assumptions and methodologies were unreliable. *Id.* The *Weidner* court, in considering the defendants's argument, noted the requirement of an *Ellis* objection pretrial or during trial to preserve the complaint that expert testimony is no evidence because it is unreliable. *Id.* Explaining the record reflected no pretrial or trial objection to the expert's testimony, the *Weidner* court refused to determine whether the expert testimony was unreliable, and as a result, constituted no evidence. *Id.*

189. *Huckaby*, 20 S.W.3d at 206 (citing Tanner v. Westbrook, 174 F.3d 542, 545 (5th Cir. 1999)).

190. *Id.* at 205-06.

191. *Id.*; *see* Harvey Brown, *Procedural Issues Under* Daubert, 36 HOUS. L. REV. 1133, 1163 n.194 (1999). In examining whether error was preserved, the *Huckaby* court emphasized the experts were asked to give an opinion. *Huckaby*, 20 S.W.3d at 206. As such, the court held, the "pretrial hearing to exclude such evidence from the jury when it was not similar and therefore not relevant would be appropriate as a gatekeeper function. . . . [T]he trial court's ruling on the pretrial motion negates the argument by the appellees that error was not preserved because of a failure to object to [the expert's] testimony." *Id.*

right to challenge the reliability of expert testimony by failing to object pretrial or during trial.[192]

At first blush, the *Havner* objection merely imposes an additional procedural hurdle for opponents of expert testimony. Upon closer examination, however, a requirement of pretrial or trial challenges to an expert's reliability encourages opponents to move to strike experts rather than adopt the strategy of attacking expert testimony on cross-examination.[193] Clearly, a strategy of attacking the expert on cross-examination, rather than challenging admissibility, permits the jury rather than the trial judge to assess the expert's reliability.

General Motors Corp. v. Sanchez[194] illustrates the jury erosion effectuated by the *Havner* objection requirement.[195] In this products liability case, General Motors did not challenge the admissibility of the plaintiff's expert testimony. Instead, General Motors "adopted the strategy of discrediting [the expert's] theory on cross-examination."[196] Appealing the legal sufficiency of the evidence, General Motors argued the expert's testimony constituted no evidence of causation for lack of reliability.[197] The *Sanchez* court, citing *Ellis*, held General Motors waived this point on appeal by failing to object pretrial or during trial.[198] Consequently, courts penalize opponents of expert testimony for pursuing the strategy of foregoing pretrial and trial objections in favor of an attack by cross-examination.

b. Establishing an Opponent-Friendly Legal Sufficiency Standard

In *Havner*, the supreme court expanded legal sufficiency review of expert testimony to a two-part analysis.[199] Specifically, the *Havner* review makes reliability determinations a prerequisite to assessing the probative value of expert testimony in sufficiency

192. *Huckaby*, 20 S.W.3d at 206.
193. Gen. Motors Corp. v. Sanchez, 997 S.W.2d 584, 590-91 (Tex. 1999).
194. 997 S.W.2d 584 (Tex. 1999).
195. *Sanchez*, 997 S.W.2d at 590-91.
196. *Id.*
197. *Id.*
198. *Id.* (citing Mar. Overseas Corp. v. Ellis, 971 S.W.2d 402, 411 (Tex. 1998)).
199. Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 714 (Tex. 1997).

challenges.[200] This prerequisite reliability determination nullifies the presumption afforded the nonmoving party in cases involving expert testimony.[201] Traditionally, when a party moves for summary judgment, directed verdict, or appeals a legal sufficiency point, the reviewing court applies the same standard of review.[202]

For example, in a no-evidence review "all the record evidence must be considered in the light most favorable to the [nonmoving] party, . . . and every reasonable inference deducible from the evidence is to be indulged in that party's favor."[203] A court applying the aforementioned test in the context of expert evidence would not sit as a "thirteenth juror," re-assessing the witnesses' credibility. Rather, the court views the testimony "in the light most favorable" to the proponent and determines whether such testimony constitutes evidence raising an issue of fact.[204] Generally,

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200. *Id.* at 712.

201. *Id.* at 714.

202. Texas Rules of Civil Procedure provide two methods for an opponent of expert testimony to challenge the legal sufficiency of the evidence: (1) Rule 166a traditional summary judgment; and (2) Rule 166a(i) no-evidence summary judgment. TEX. R. CIV. P. 166a, 166a(i). Although a court addressing both summary judgments will apply the same standard of review, the burden placed on the moving and nonmoving party is different. TEX. R. CIV. P. 166a, 166a(i). A party moving for a traditional summary judgment must disprove one element of the nonmoving party's theory or conclusively establish every element of an affirmative defense. Benitz v. Gould Group, 27 S.W.3d 109, 113 (Tex. App.—San Antonio 2000, no pet. h.). If the moving party establishes its right to judgment as a matter of law, the burden shifts to the nonmoving party to present an issue of material fact precluding summary judgment. *Id.* A party moving for a no-evidence summary judgment, which is governed by Rule 166a(i), merely must show the deficiencies in the nonmoving party's case. TEX. R. CIV. P. 166a(i). To overcome a no-evidence motion for summary judgment, the nonmoving party must produce evidence raising a genuine issue of material fact as to each element of its cause of action. Weiss v. Mech. Assoc. Servs., 989 S.W.2d 120, 123 (Tex. App.—San Antonio 1999, pet. denied). A no-evidence summary judgment is improper if the nonmoving party demonstrates more than a scintilla of evidence. *Id.* When "evidence rises to the level that would enable reasonable and fair-minded people to differ in their conclusions," more than a scintilla exists. *Benitz*, 27 S.W.3d at 112 (citing Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex. 1997)). When "evidence is so weak as to do no more than create mere surmises or suspicion," it is a mere scintilla. *Id.*

203. Assoc. Indem. Corp. v. Cat Contracting, Inc., 964 S.W.2d 276, 285-86 (Tex. 1998); *accord* Formosa Plastics Corp. v. Presidio Eng'rs & Contractors, Inc., 960 S.W.2d 41, 48 (Tex. 1998); *Havner*, 953 S.W.2d at 711; $56,700 in U.S. Currency v. State, 730 S.W.2d 659, 662 (Tex. 1987); W. Wendell Hall, *Standards of Review in Texas*, 29 ST. MARY'S L.J. 351, 478-79 (1998). If opposing inferences are equally plausible, then the inference favorable to the prevailing party is not reasonable and is the legal equivalent of no evidence. Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 365 (1960).

204. TEX. R. CIV. P. 166a(i).

any admissible expert testimony tends to raise a fact issue regarding the relevant essential element.

The two-part *Havner* review disregards the presumptions favoring the proponents of expert testimony.[205] Only after the reviewing court determines the opinion reliable may that court determine what weight to give the opinion.[206] The *Havner* court explained that the expert opinion constitutes no evidence if: (1) the foundational data underlying the opinion is unreliable; or (2) despite sound underlying data, the expert bases conclusions from that data on flawed methodology.[207] Recognizing this expanded analysis contradicts the traditional standard requiring a review "in the light most favorable to the nonmoving party," the *Havner* court stated:

> It could be argued that looking beyond the testimony to determine the reliability of scientific evidence is incompatible with our no-evidence standard of review. If a reviewing court is to consider the evidence in the light most favorable to the verdict, the argument runs, a court should not look beyond the expert's testimony to determine if it is reliable.[208]

Finding it "too simplistic," the *Havner* court dismissed the concern, leaving proponents of expert testimony without the presumptions benefiting other nonmoving parties during a legal sufficiency review.[209]

3. Tilting Appellate Standards of Review in Favor of Affirming the Exclusion of Expert Testimony

Because a *Robinson* challenge triggers an abuse of discretion standard of review and a *Havner* challenge triggers a *de novo* standard of review, the appellate framework for expert testimony cases is skewed in favor of opponents of expert testimony. On the one hand, appellate courts will find it easier to affirm the trial court

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205. *Havner*, 953 S.W.2d at 714.

206. *Id.*

207. *Id.*; *see Weiss*, 989 S.W.2d at 124-25 (affirming exclusion of expert testimony because expert's theories had not and could not be tested and because the expert failed to rule out other potential causes of the injury); Minn. Mining & Mfg. Co. v. Atterbury, 978 S.W.2d 183, 190 (Tex. App.—Texarkana 1998, pet. denied) (excluding expert testimony because expert failed to rule out other potential sources of injury in arriving at his conclusion).

208. *Havner*, 953 S.W.2d at 712.

209. *Id.*

rulings excluding expert testimony under *Robinson*. On the other hand, appellate courts will find it more difficult to reverse the exclusion of expert testimony under *Havner*.

a. Affirming the Exclusion of Expert Testimony

If the trial court excludes expert testimony during a *Robinson* challenge, a reviewing court may not disturb a trial court's evidentiary ruling absent an abuse of discretion.[210] As such, an opponent succeeding in a *Robinson* challenge benefits from the following standard of review:

> The test for abuse of discretion is whether the trial court acted without reference to any guiding rules or principles. The test is not whether, "in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action." A reviewing court cannot conclude that a trial court abused its discretion if, in the same circumstances, it would have ruled differently or if the trial court committed a mere error in judgment. The decision whether to admit evidence rests within the discretion of the trial court.[211]

Consequently, in applying this strict standard, appellate courts are less likely to hold that the trial court erred in excluding the expert testimony.

b. Admission of Expert Testimony

If the trial court denies the opponent's *Robinson* challenge and admits expert testimony, the opponent may make a *Havner* challenge to the sufficiency of the evidence.[212] If the trial court also denies the opponent's legal sufficiency challenge, the appellate

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210. E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 558 (Tex. 1995); *accord* Loftin v. Martin, 776 S.W.2d 145, 146 (Tex. 1989); Downer v. Aquamarine Operators, Inc. 701 S.W.2d 238, 241-42 (Tex. 1985); Ginsberg v. Fifth Court of Appeals, 686 S.W.2d 105, 108 (Tex. 1985) (orig. proceeding); Jones v. Strayhorn, 159 Tex. 421, 321 S.W.2d 290, 295 (Tex. 1959).

211. *Robinson*, 923 S.W.2d at 558; *see* Richard T. Stilwell, Kuhmo Tire*: The Battle of the Experts Continues*, 19 REV. LITIG. 193, 206 (2000). "Because the particular factors used to determine the reliability of an expert's testimony are determined on a case-by-case basis, the Supreme Court explained that a trial judge would possess considerable leeway when deciding how to determine the reliability of the expert's opinions." Richard T. Stilwell, Kuhmo Tire*: The Battle of the Experts Continues*, 19 REV. LITIG. 193, 206 (2000). Courts review under the standard of abuse of discretion both: (1) the trial court's decision of how to determine reliability; and (2) the determination of reliability itself. *Id.*

212. *Havner*, 953 S.W.2d at 712-13.

court applies a *de novo* standard of review.[213] A *de novo* standard of review provides no deference to the trial court's ruling admitting the expert testimony. Furthermore, a *de novo* review of cases involving expert testimony disregards the presumption of "viewing the evidence in the light most favorable to the [proponent]."[214]

An appellate court applying the *de novo* standard independently reviews the expert's reliability and may arrive at a conclusion contrary to the trial court's reliability determination in the *Robinson* and *Havner* challenges. Unlike the restrictive abuse of discretion standard, the opponent-friendly *de novo* standard allows an appellate court to substitute its own judgment on the expert's reliability and the sufficiency of the expert evidence. Although it has been argued to the contrary,[215] this flexibility makes it more likely appellate courts will reverse trial court judgments admitting expert testimony.[216]

The San Antonio Court of Appeals correctly applied the framework established by the *Robinson/Havner/Gammill* trilogy in *Weiss v. Mechanical Associated Services*.[217] Weiss brought suit against a radiology group operating in a neighboring office, claiming injury from exposure to chemicals that migrated from the radiology office into hers.[218] The defendants filed *Robinson* and *Havner* chal-

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213. Mining & Mfg., Co. v. Atterbury, 978 S.W.2d 183, 192 (Tex. App.—Texarkana 1998, pet. denied) (stating "under the sufficiency of the evidence standard, the appellate court looks to the plaintiff's evidence in an almost *de novo* standard").

214. *Id.*

215. *See* Austin v. Kerr-McGee Refining Corp., 25 S.W.3d 280, 284 (Tex. App.—Texarkana 2000, no pet. h.). Although overlapping, in that both types of analysis examine the reliability of the evidence, in theory the admissibility and sufficiency reviews are distinct because they involve the resolution of different issues: Admissibility involves whether the evidence makes a fact more or less probable than would be without the evidence, whereas legal sufficiency involves whether the evidence amounts to more than a scintilla. However, *Havner* requires that both reviews be governed by the same test of reliability; therefore, the distinction between the two reviews has little practical effect. *Id.*

216. *See generally Havner*, 953 S.W.2d at 714 (creating and discussing the standard). The court stated that "[t]o raise a fact issue on causation and thus survive legal sufficiency review, a claimant must do more than . . . show a substantially elevated risk . . . . If there are other plausible causes of the injury or condition that could be negated, the plaintiff must offer evidence excluding those causes within reasonable certainty." *Id.* at 720 (citation omitted). While causation may be proved by expert testimony, the probability about which the expert testifies must be more than coincidence for the case to reach a jury. Weiss v. Mech. Assoc. Servs., 989 S.W.2d 120, 124 (Tex. App.—San Antonio 1999, pet. denied) (citing Schaefer v. Tex. Employers' Ins. Ass'n, 612 S.W.2d 199, 202 (Tex. 1980)).

217. 989 S.W.2d 120 (Tex. App.—San Antonio 1999, pet. denied).

218. *Weiss*, 989 S.W.2d. at 122-23.

lenges, claiming the expert testimony unreliable, and consequently, no evidence of causation. The trial court granted the *Havner* challenge, finding Weiss's evidence, including the expert testimony regarding the emission of chemicals, failed to raise a genuine issue of material fact.[219]

The trial court's judgment did not reflect whether the trial court admitted or excluded the expert testimony during its *Havner* review. As such, the *Weiss* court began its analysis by determining whether the trial court would have abused its discretion by excluding the expert testimony.[220] Applying the *Robinson* factors to Weiss's expert, the court concluded the trial court would not have abused its discretion in excluding the expert testimony.[221]

Alternatively, assuming the trial court had found the opinion reliable and admitted the expert testimony, the *Weiss* court conducted a *de novo* review of whether Weiss presented some evidence of causation. The court, in conducting the *Havner* review, independently examined the experts' methodologies independent of the trial court's assumed reliability determination.[222] Applying the *Robinson* factors, the *Weiss* court held the expert testimony unreliable, and consequently, no evidence of causation in accordance with *Havner*.[223] As such, the *Weiss* court affirmed the judgment of the trial court.

VII. CONCLUSION

Through a series of cases, the Texas Supreme Court shifted the balance of power from juries to trial courts in the assessment of expert testimony. What began as a concern regarding the jury's ability to sort through "junk science," has grown into an overall lack of confidence in jurors' qualifications to examine any expert testimony. As the Texarkana Court of Appeals lamented:

> [T]he Texas Supreme Court differed from the United States Supreme Court in the confidence that it has in the ability of the adver-

219. *Id.* at 123.

220. *Id.* at 124-25.

221. *Id.* at 125. Both experts, while acknowledging the chemical had not been detected in the building, stated they believed the chemical entered the workplace. *Id.* at 122-23. However, both experts conceded they had made assumptions in arriving at their conclusions and could not rule out other potential causes of the injuries. *Id.*

222. *Weiss*, 989 S.W.2d at 122-23.

223. *Id.* at 125-26.

> sarial system to present, and fair and impartial juries to consider, borderline evidence. . . . [T]he United States Supreme Court favored admission of evidence on the borderline because the jury should be able to ascertain the truth through "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof. . . ." However, the Texas Supreme Court apparently does not share this confidence in the adversarial system and the abilities of counsel.[224]

Influenced by this lack of confidence, the supreme court has consistently taken steps to encourage litigants to challenge expert testimony's admissibility and made it more likely that reviewing court's will exclude such evidence.

Regardless of the court's concern, a long line of precedent exists supporting and even celebrating the role of the jury in Texas courts. Indeed, the Texas Supreme Court's own words echo this sentiment. "The jury, not the court, is the fact finding body. The court is never permitted to substitute its findings and conclusions for that of the jury. The jury is the exclusive judge of the facts proved, the credibility of the witnesses and the weight to be given their testimony."[225] Fearing the influence of "professional experts," the court has disregarded the historical respect afforded juries and directed trial judges to supplant jurors of their primary function, determining credibility.

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224. Minn. Mining & Mfg. Co. v. Atterbury, 978 S.W.2d 183, 189 (Tex. App.—Texarkana 1998, pet. denied) (citations omitted).

225. Benoit v. Wilson, 239 S.W.2d 792, 796 (Tex. 1951).