

FIRE SCIENCE AND THE TEXAS SUPREME COURT

By Richard Schulte

In other articles, it has been argued that the field of fire protection is more of an art than a science. The excerpts which follow address this topic from a legal standpoint.

The excerpts are from legal briefs filed in an appeal to the Supreme Court of Texas in a wrongful death (product liability) lawsuit, referred to as Merrell v. Wal-Mart Stores, Inc. The appeal was developed by attorneys Susan S. Vance and Douglas W. Alexander of Alexander Dubose & Townsend, LLP, Austin, Texas and Jeffrey A. Cox and Edward A. Davis of Hartline, Dacus, Barger, Dreyer, & Kern, LLP, Dallas, Texas in 2009.

“Charles (“Charlie”) Merrell, Jr., and his girlfriend Lutosha Gibson died as a result of smoke inhalation from a fire that occurred at their rented home. CR 250-51. Charlie Merrell’s parents brought wrongful death and survival claims against Wal-Mart under various theories of products liability, contending the fire was caused by a halogen torchiere lamp that Charles Merrell, Sr. alleged he purchased from Wal-Mart for his son.”

“Petitioner established that the causation opinion of Plaintiffs’ expert, Craig Beyler, was both inadmissible under Robinson/Gammill and legally insufficient to support judgment under Coastal, demonstrating inter alia that Beyler (1) provided no reasoned analysis for his conclusion that flying bulb shards from an exploding halogen lamp caused the fire, and (2) failed to adequately eliminate other potential sources of ignition (most notably, smoking materials established by officials’ testimony to have been present in the area of origin and throughout the house). . . Because Beyler’s testimony largely applied his knowledge, training, and experience to the underlying data and his “methodology” was not easily tested by objective criteria such as identifiable scientific formulas, the threshold reliability of his opinion was not properly measured by a Robinson factor analysis, but rather by Gammill’s “analytical gap” test—which it failed.”

“In response, Plaintiffs suggest that Beyler’s opinion was reliable because his “10-page affidavit had a 20-page report and 40 pages of exhibits attached to it.” PFR Resp. at 7, Ex. A. But volume does not equal substance. . . .”

“In response, Plaintiffs suggest that Beyler’s opinion was reliable because his “10-page affidavit had a 20-page report and 40 pages of exhibits attached to it.” PFR Resp. at 7, Ex. A. But volume does not equal substance. . . But unlike Wal-Mart’s experts, Beyler paid only lip service to fire investigation Standard 921 (merely reciting the steps one should take under that regime), and did not, in fact, apply any discernable methodology at all in reaching his conclusion. . . but the analytical gap between the materials cited by Plaintiffs and their expert’s conclusion as to causation was too large to be bridged by the ipse dixit of their expert, no matter how qualified he was.”

“Here, Beyler likewise provided no direct evidence of the fire’s cause and origin, ignored the data which favored smoking materials as the most likely ignition source, and failed to adequately exclude other potential causes of the fire (particularly smoking materials) through any objective methodology.”

“The mere fact that a halogen lamp could have started a fire is not sufficient evidence that the purported halogen lamp in Charlie Merrell’s house did so.”

“In order for Beyler’s testimony on causation to be reliable, he was required to present some methodology that reliably supported his opinion that flying bulb shards were the source of ignition. Mack Trucks, 206 S.W.3d at 581. He did not do so. Beyler testified that he had read and relied on studies on the general subject of halogen lamp-caused fires, but did not specify any studies that supported his conclusion as to the specifics involved in the Merrell house fire. . . The mere fact that a halogen lamp could have started a fire is not sufficient evidence that the purported halogen lamp in Charlie Merrell’s house did so. Mack Trucks, 206 S.W.3d at 580. Because Beyler did not (and could not) inspect the specific lamp that allegedly caused the fire, and neither performed nor reviewed reconstruction analysis, he cannot simply conclude that the lamp was the source of the fire and then reverse engineer an opinion based on mere “factors” and selectively considered “facts.” Id.

“Further, although Plaintiffs assert that Beyler ruled out other possible causes, including smoking materials, PFR Resp. at 14, Petitioner demonstrated that he did so in conclusory and speculative fashion, PFR at 11-13.”

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“But in the context of expert testimony, admission does not equal legal sufficiency—that is the very essence of Coastal and its progeny.”

“Expert testimony which does not meet basic reliability standards is incompetent, and incompetent evidence is insufficient to support a judgment, even if admitted without objection.”

“Plaintiffs’ expert causation testimony is lacking in both the fundamental reliability required for admission and the competency necessary to support judgment under the standards set forth by this Court.”

The following are excerpts of the ruling of the Supreme Court of Texas on the appeal:

“Expert testimony which does not meet basic reliability standards is incompetent, and incompetent evidence is insufficient to support a judgment, even if admitted without objection.”

“When police officers arrived, they found in the living room a badly burned recliner, a damaged pole-style floor lamp, and other furniture covered in soot and smoke. There were candles, melted wax, an ashtray. . . on the table next to the recliner, as well as smoking paraphernalia throughout the house, including ash trays. . . Two photographs were taken of the scene. The fire marshal declared the fire accidental and of unknown origin. The property owner discarded the burnt household items after authorities concluded their investigation.”

Editor’s Note: References to drugs and drug paraphernalia in the Supreme Court ruling have been edited out of the paragraph above.

“Charles Merrell, Sr., testified that he bought the lamp at Wal-Mart for his son, but could not produce a receipt.”

“Merrell’s expert, Dr. Craig Beyler, attributed the fire to “nonpassive failure’ of the lamp igniting the recliner below.”. . .Beyler concluded that nonpassive failure of the lamp was “consistent with the facts of this case and . . . wholly consistent with our knowledge of fire science.”

“. . .Beyler concluded that nonpassive failure of the lamp was “consistent with the facts of this case and . . . wholly consistent with our knowledge of fire science.”

“Wal-Mart moved for summary judgment, asserting, among other things, that there was no evidence of any element of Merrell’s causes of action, no evidence that the pole-style floor lamp was a halogen lamp (as opposed to an incandescent one), and no evidence that it was ever purchased at Wal-Mart.”

“Overruling Wal-Mart’s objection, the trial court admitted Dr. Beyler’s expert testimony but granted Wal-Mart’s motion for summary judgment. The court of appeals reversed, holding that Merrell produced evidence on each challenged element of their cause of action.”

“Specifically, Wal-Mart contends that Beyler’s testimony constitutes no evidence that the lamp was more likely to have caused the fire than any other obvious potential sources.

No evidence challenges to allegedly conclusory expert testimony require us to examine the record on its face to determine whether the evidence lacks probative value. Id. at 233. In Coastal Transportation, we explained that “[o]pinion testimony that is conclusory or speculative is not relevant evidence, because it does not tend to make the existence of a material fact ‘more probable or less probable.’” Id. at 232 (quoting TEX R. EVID. 401). “[S]uch conclusory statements cannot support a judgment even when no objection was made to the statements at trial.” Id.

“Similarly, Dr. Beyler did not say why a burning cigarette could not have caused the fire. . . If, by “area of origin” Beyler was referring to the recliner itself, he failed to address how he ruled out smoking materials on the basis of not having found evidence of burnt cigarettes there, when there was likewise no evidence of charred or exploded glass (either in the recliner or anywhere else in the house) to support his own theory.”

“An expert’s failure to explain or adequately disprove alternative theories of causation makes his or her own theory speculative and conclusory.”

“In Coastal Transportation, we explained that “[o]pinion testimony that is conclusory or speculative is not relevant evidence, because it does not tend to make the existence of a material fact ‘more probable or less probable.’”

“. . . his specific causation theory amounted to little more than speculation. Evidence that halogen lamps can cause fires generally (assuming that the lamp here was a halogen lamp) does not establish that the lamp in question caused this fire.”

“Most importantly, while Beyler laid a general foundation for the dangers of halogen lamps, his specific causation theory amounted to little more than speculation. Evidence that halogen lamps can cause fires generally (assuming that the lamp here was a halogen lamp) does not establish that the lamp in question caused this fire.”

“Dr. Beyler may be qualified in fire research, but his testimony in this case lacks objective, evidence-based support for its conclusions. See Coastal, 136 S.W.3d at 232 (“[I]t is the basis of the witness's opinion, and not the witness's qualifications or his bare opinions alone, that can settle an issue as a matter of law; a claim will not stand or fall on the mere ipse dixit of a credentialed witness.” (quoting Burrow v. Arce, 997 S.W.2d 229, 235 (Tex. 1999))). Because Beyler’s testimony was legally insufficient to support causation, we do not reach Wal-Mart’s remaining issues.”

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“Without hearing oral argument, we reverse the court of appeals’ judgment and render judgment that Merrell take nothing.”

Discussion

To quote “Dirty Harry” [Inspector Harry Callahan (Clint Eastwood), *Magnum Force*, 1973], “a man has got to know his limitations.” You might think that “Dirty Harry” was referring to the legal case discussed above, but he was more than likely really referring to this article. Since this writer is not an attorney, it would be outside the realm of my expertise to comment on a Texas Supreme Court ruling.

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“Dirty Harry”, Magnum Force, 1973

Just to reiterate two statements from the Texas Supreme Court’s ruling:

“[I]t is the basis of the witness's opinion, and not the witness's qualifications or his bare opinions alone, that can settle an issue as a matter of law; a claim will not stand or fall on the mere ipse dixit of a credentialed witness.”

“Dr. Beyler may be qualified in fire research. . .”

Note that in the second excerpt, the Supreme Court did not take a position on whether or not Dr. Beyler was actually qualified as an expert in this case.

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