Expert Witnesses In Premises Liability Cases

ANDREW B. SOMMERMAN
SOMMERMAN & QUESADA, L.L.P.
3811 Turtle Creek Boulevard, Suite 1400
Dallas, Texas 75219-4461
(800) 900-5373

Special thanks to Heather Long

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Expert Witnesses in Premises Liability Cases

Expert Witnesses in Premises Liability Cases

Expert Witnesses in Premises Liability Cases

Expert Witnesses in Premises Liability Cases
By Andrew B. Sommerman

I. INTRODUCTION

Experts are expensive. After an expert is retained, briefed, wood-shedded, designated and deposed, they cost several thousand dollars. It would be a financial drain to any firm to have the expert disqualified just prior to trial and could spell disaster for a client's case.

An attorney that hires an expert must determine the admissibility of that expert's opinions. This paper will examine how the trial and appellate courts have recently treated experts in premises liability cases. It will also explore strategies for using experts in identifying potential parties, developing theories of liability, and through the discovery process. Finally, the paper includes a discussion on general strategies for keeping and excluding experts.

II. HIRING EXPERTS

A. Deciding to Hire an Expert

There are several things to consider when deciding whether or not to hire an expert in a premises liability case. Because experts are expensive, it is necessary to consider the overall potential cost of the expert when compared to your client's potential recovery. Also consider whether individuals who already have personal knowledge of the incident may be used instead of paying for a retained expert. Sometimes treating physicians, first responders (i.e., law enforcement) may have the requisite knowledge, skill, and expertise to provide expert testimony about the issues present in your case.

Finally, consider the nature of your case and the complexity of the issues at hand. The cost of an expert may not be justified when the issues before the potential jury are not complex. Remember, the rules of evidence set standards for expert admissibility — one of which is helpfulness to the jury. So, consider whether the issues in your case are ones a lay person could understand when presented with a clear presentation of the evidence. If there are complexities regarding policy, design, medical causation, or other areas outside general public knowledge, you probably need an expert.

B. So you Decide you Need Someone— Who do you get?

Once you decide you need an expert, you will need to determine what type of expert you need. To do this you will need a clear understanding of exactly what issues you are seeking expert testimony to prove. Once you have that understanding, start thinking about the educational skills, experience, and training an expert in that particular area would need. Remember, experts must be qualified by education, training, skill, experience, or knowledge in the area you seek to admit their testimony.

There are multiple places to locate experts and multiple things to consider when deciding who to hire. Some ways to locate potential experts include:

- Asking other professionals;
- Using an expert search service;
- Asking people in the applicable industry;
- Researching recent publications relevant to the subject matter at issue.

Here is a list of some general expert search web sites and services:

- www.jurispro.com
- www.hgexperts.com
- www.expertwitness.com
- www.expertpages.com

Once you have located potential experts,

you need to figure out who is best suited for the job. Consider logistics. Ask potential experts about their upcoming availability due to existing personal and professional commitments. You want to hire someone who is not already over burdened with other commitments to ensure accessibility. Also ask about costs, billing schedules, and previous experience as an expert in similar matters. Additionally, although not dispositive on the ultimate issue of admissibility, ask if the expert has ever had his/her opinions excluded by a court.

C. Now that You Know Who— What's Next?

Once you have located and retained an expert, you need to provide the expert with information on which to base his/her opinions. That information is going to come from the discovery and other evidence gathering you have done.

Talk to the expert and see what type of information he/she typically relies on to render opinions. If there is still time left before discovery expires, make sure to serve discovery on any area where you find gaps after speaking with the expert. Additionally, as evidence comes in over the course of litigation, make sure you continue to provide it to your expert.

D. Identifying Potential Parties

Experts can also be useful for identifying potential parties. For instance, an expert in a slip and fall at an airport may identify different people, employees, and companies who would have a presence in the area of the incident. That may include an independent cleaning company, and you may find through discovery the independent cleaning company has some culpability in the fall.

As a side note regarding slip and falls, should you find another customer was the source of a spill or other fall catalyst, you may want to assert a claim of general negligence against that person. Such a negligence claim would be in addition to, not lieu of, your claims in premises liability against the property owner, and you may be able to seek damages from an existing homeowner's insurance policy.

III. RECENT CASE LAW

A. Reliability

In *Bartosh v. Gulf Health Care Center-Galveston,* 178 S.W.3d 434, 438 (Tex. App.—Houston [14th Dist.] 2005, no pet.), a nursing home resident suffered dozens of fire ant bites on her legs and later died. The court upheld the trial court's exclusion of Bartosh's expert testimony because she did not establish that her expert's testimony was based on a reliable foundation. The court explained that the expert, while a large percentage of his patients were geriatric, had only treated 20 to 30 patients for fire ant bites and none of those patients were geriatric nor did any develop related infections, go into shock, or die from the attacks.

In *Goss v. Kellogg Brown & Root Inc.*, 232 S.W.3d 816, 818 (Tex. App.—Houston [14th Dist.] 2007, pet. denied), workers were injured by an explosion at a petroleum plant when a tank holding butadiene was closed off to be serviced without first removing the remaining butadiene from the tank. The workers offered expert testimony that a larger pressure relief valve would have prevented the explosion. The affirmed exclusion, finding the expert testimony was not sufficiently tied to the facts of the case to aid a jury in resolving factual dispute. The court explained that the facts of the case did not present the same circumstances as the expert's testimony because the pressure relief valve on the tank had been deliberately blocked by a closed block valve downstream.

In *Marathon Corp. v. Pitzner*, 106 S.W.3d 724 (Tex. 2003), an air conditioning repairman was found semi-conscious in the parking lot of dealership where he had been working on the air conditioners located on the roof of the dealership. He had apparently fallen from the roof, but had no memory of the incident. The court held expert testimony was not supported by evidence where experts "postulate[d]" that the repair man was electrocuted, stumbled backwards over a gas pipeline, and fell from the roof. It explained that expert opinions must be supported by facts in

evidence and not conjecture. The court argued a jury would only be able to speculate as to whether Pitzner did actually fall from the roof, whether he actually came into contract with a high-voltage wire on the roof, and whether and how possible acts or omissions of Marathon were a substantial factor in causing Pitzner's injuries.

In *Star Enterprise v. Marze*, 61 S.W.3d 449 (Tex. App.—San Antonio 2001, pet. denied), a truck driver fell and injured his knee while trying to get his truck weighed at a truck scale and died three years later from septic shock caused by knee surgery. The court found that expert testimony about the possible causes of infection was scientifically unreliable. It explained that the expert was board certified only in orthopedic surgery and had no special training in internal medicine or infectious diseases, therefore the expert's testimony was speculative and scientifically unreliable.

In *Ibarra v. National Const. Rentals, Inc.*, 199 S.W.3d 32, 34 (Tex. App.—San Antonio 2006, no pet.), a woman was injured when a skater fell while holding on to a temporary fence, causing the fence to fall on the woman. The court held expert testimony was insufficient to show that a failure to place sandbags to anchor the fence caused Ibarra's injuries. It reasoned that the expert testified during deposition that he did not have an opinion as to whether placing sandbags on the base of the fence panels would have actually prevented the accident and he did not conduct any testing to see if sandbags would have secured the fence. Accordingly, the court concluded his testimony created mere surmise and suspicion.

In *Burns v. Baylor Health Care System*, 125 S.W.3d 589, 592 (Tex. App.—El Paso 2003, no pet.), a woman was returning to her car in the parking garage when she fell from a curb that she was unable to see because the curb and the area in front of it were allegedly painted in such a manner as to create the illusion that there was no curb. The defendant moved to exclude Burns' expert on several grounds, including qualifications, relevance, helpfulness to the jury, and reliability. The trial court granted the motion, and the appellate court reversed. It held the expert's experience in the field of safety engineering and board certification as a safety professional along with specialized knowledge in premises safety and accident cause analysis demonstrated qualification and relevant specialized knowledge. The court further concluded the expert's opinions would have assisted the trier of fact to understand the evidence or determine a fact in issue because the expert possessed specialized knowledge of the human visual process which is not obviously within the common knowledge of jurors. The expert's affidavit provided background information on the accident process, provided general fall type accident statistics, described the human vision during the walking process, and discussed the core principles of safety engineering and cardinal rules of hazard control – all of which provided depth or precision to the trier of fact's understanding of a relevant issue in the case.

Finally, the court explained that the expert testimony had a clear relationship to the issues of premises liability and the safety of the curb disputed in the case. It found that the expert sufficiently demonstrated that his opinions were reliable. The court specifically noted that it was not for the trial court to determine whether the expert's conclusions were correct, but only whether the analysis used to reach them was reliable.

In *Grieve v. Red Roof Inns, Inc.*, No. 13-99-660-CV, 2001 WL 1003312 at *1 (Tex. App.—Corpus Christi August 31, 2001, pet. denied), a motel guest fell when she tripped over a step in the parking lot. The court found that the expert's training, background, and specialized knowledge made him qualified to give testimony regarding the step's height, compliance with building code, whether it was unsafe, and what alternate designs might have made the step safer. The court explained that the expert had acted as a compliance consultant for nearly 20 years before this case, had attended numerous conferences for training that included facilities assessment training, and co-authored a city's fair housing ordinance to bring it into compliance with handicap access standards.

It further held the expert's testimony was on matters that would be helpful to a jury because there were not within the average juror's common knowledge. The proffered testimony concerned

whether the step complied with the building code and whether a reasonable building owner would recognize that the step did not comply with the code and presented a danger. Likewise, the court held the expert's testimony met the *Robinson* reliability test. Specifically, the expert's theories that the step violated building code and could have easily and cheaply been made safer were readily testable, were subject to repetition and contradiction, were not reliant upon subjective interpretation, and the technique used was generally accepted by the scientific community.

B. Showing Knowledge

In *City of Dallas v. Thompson*, 210 S.W.3d 601, 602 (Tex. 2006), a woman tripped on the lip of an improperly secured metal expansion-joint cover plate and fell. The court found that expert testimony failed to show that the City knew of the dangerous condition even though the woman brought evidence of previous reported falls and knowledge the protrusion could arise suddenly. It somehow reasoned no knowledge existed even though the expert did show that employees were in the vicinity and walking over the cover plate in the hours prior to Thompson's fall. The court justified its conclusion by stating there was no evidence showing how long the protrusion had existed and, therefore, the proximity of the employees was not evidence of actual knowledge.

In *Akin v. Brookshire Grocery Co.*, No. 05-99-01067-CV, 2001 WL 88194 at *1 (Tex. App.—Dallas Jan. 26, 2001, no pet.), a store patron slipped and fell on a pink liquid located near the self-service drink fountain by the store's deli. The court found expert testimony that Brookshire knew or should have known of the spill because a person of normal height, five feet and five inches, or taller could have seen the spill from behind the deli counter was conclusory. The court explained that the expert's statements did not show that any of the Brookshire employees were tall enough to see over the counter or how long the spill had been on the floor, therefore the expert testimony failed to create a genuine issue of material fact.

C. Showing Proximate Cause

In *Price v. Ford*, 104 S.W.3d 331 (Tex. App.—Dallas 2003, pet. denied), a nightclub patron was assaulted by other nightclub patrons. The court of appeals found the expert's testimony that security guards inside the nightclub should have responded more quickly was not legally sufficient to prove proximate causation. It explained that the expert did not testify that the guards could in fact have responded faster, or that if they had responded faster, that Ford would not have been injured.

In *Reliable Consultants, Inc. v. Jaquez*, 25 S.W.3d 336 (Tex. App.—Austin 2000, pet. denied), a woman brought suit after falling at the defendant's store. Her expert testified the step at issue presented a "trip and fall hazard." The court of appeals upheld the admission of the testimony, finding the expert qualified based on his twenty years experience as an inspector and advisor on property safety issues.

D. Security and Criminal Acts of Third arties

In *Rivera v. South Green Ltd. Partnership*, 208 S.W.3d 12, 15 (Tex. App.—Houston [14th Dist.] 2006, pet. denied), an employee was robbed and assaulted when an unknown man came into her office. The court sustained Rivera's issue that the trial court erred in granting a motion for summary judgment on the duty element of the negligence claim. The court found that expert testimony showing an average of more than nine crimes per month within a one-mile radius of the premises precluded South Green from conclusively proving that it had no duty to use ordinary care to protect Rivera.

In *Gonzales v. Mobil Oil Corp.*, No. 05-98-01772-CV, 2001 WL 722564 at *1 (Tex. App.—Dallas June 28, 2001, no pet.), a man was shot while getting gas at the Mobil gas station. The court held there was no evidence to show that Mobil should have been on notice of the danger of criminal acts of third parties. The court explained that while there was a previous armed robbery, there was no showing of the time, date, or circumstances surrounding the robbery and

therefore no showing that the previous robbery was similar to the assault on Gonzales.

In *Del Lago Partners, Inc. v. Smith*, 206 S.W.3d 146 (Tex. App.—Waco 2006, review granted), a resort guest was injured in a bar brawl that broke out between a wedding party and Plaintiff's fraternity at the resort's bar. The court held the expert's testimony shoed evidence of causation where the bartenders allowed the two groups to exchange verbal insults and minor physical alterations prior to the brawl and failed to call security. The court explained that other witnesses' testimony that had a security officer been present the situation could have been avoided, that uniformed police officers can deter most problems, that had security officers been present they would have removed the intoxicated patrons engaging in the threatening behavior, and that had the security officers known what was going on the bar they would have made all efforts possible to resolve it all supported the expert's opinions that the bartenders' failure to request security caused Smith's injuries.

E. Premises Liability Claims Against Hospitals and Nursing Homes

In *Omaha Healthcare Center, L.L.C. v. Johnson*, 246 S.W.3d 278 (Tex. App.—Texarkana 2008, pet. filed), the decedent's estate brought suit against the nursing home she lived in after she died of a spider bite. The defendants argued the claim qualified as a health care liability claim which would require plaintiffs to file a Chapter 74 expert report. The court of appeals disagreed, holding the claims did not arise out of the nursing home's care or treatment, but instead arose out of its departure from safety standards (namely, failing to eradicate spiders).

In *Christus Health v. Beal*, 240 S.W.3d 282 (Tex. App.—Houston [1st Dist.] 2007, no pet.), a resident of a drug and alcohol treatment facility brought an action against the facility when the bed he was sleeping on collapsed. The court of appeals held the claim did note constitute a health care liability claim, and thus, no Chapter 74 expert report was necessary. It noted, in determining whether a claim is a premises claim or a health care liability, one consideration is whether proving the claim would require specialized knowledge of an expert.

In *Valley Baptist Medical Center v. Stradley*, 210 S.W.3d 770 (Tex. App.—Corpus Christi 2006, pet. denied), a retiree brought suit when the treadmill she was walking on unexpectedly accelerated and caused her to fall. The court noted: "[Stradley's claims] are personal injury claims of the most pedestrian nature. A jury could understand the evidentiary issues and negligence standards posed by Stradley's claims without the aid of a medical expert's report." *Id.* at 775-76. It held the claims were premises liability claims not requiring a Chapter 74 expert report.

IV. PATHS TO EXCLUDING EXPERTS AND KEEPING YOUR OWN

The following are just some of the many arguments for excluding expert testimony in light of *Daubert*, *Robinson*, and the rules of evidence. These approaches, while helpful in getting unreliable testimony excluded, are important considerations for protecting your own experts from disqualification.

A. Path One: Qualifications

An expert can be excluded based on his/her lack of qualifications in a specific field. As recognized by *Daubert* and its progeny, qualification is no longer the trial court's only primary focus. However, it is still a critical piece of the whole. The following cases explain the importance of locating the right expert for the issues in your case.

Under the common law approach, a witness' testimony was limited to facts of which the witness had first-hand knowledge and cannot be based solely on hearsay. *McMillan v. State*, 754 S.W.2d 422, 425 (Tex.App.—Eastland 1988, writ ref'd) (holding that a lay witness could not testify to the weight of a diamond that she herself had never weighed). The reason for this rule is to ensure that the witness has the requisite personal knowledge and is not relying upon hearsay. *Id*. Allowing a witness to testify based on hearsay and inferences would invade the province of the jury, and deny the jury of drawing its own conclusions. Rule 702 relaxed this requirement, providing experts "wide latitude"in offering opinions that are not based on first hand knowledge or observation. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993).

Rule 702 allowed expert testimony in scientific, technical, or other specialized areas, provided that the "witness [is] qualified as an expert by knowledge, skill, experience, training, or education." FED. R. EVID. 702. However, there are no "definite guidelines" for determining if the witness' knowledge, skill, experience, training, or education qualifies him as an expert witness. *James v. Hudgins*, 876 S.W.2d 418, 421 (Tex.App.—El Paso 1994, writ denied). The determination is left to the trial court's discretion. *Id*.

A person does not need to be a scientist or a professional to qualify as an expert. In fact, it has been determined that 702 does not require a college degree in order for a witness to be deemed an expert. *Glasscock v. Income properties Servs.*, 888 S.W.2d 176, 180 (Tex.App.—Houston [1st Dist.] 1994, writ dism'd by agr.) ("[A] college degree is not required by Rule 702 . . .").

Further, education in a particular field does not guarantee that the expert will qualify as an expert on all matters of that expert's field. *See State Office of Risk Management v. Escalante*, 162 S.W.3d 619, 625 (Tex.App.—El Paso 2005, reh'g overr.) (holding that a doctor is not qualified to testify as an expert on every medical question merely because he is a medical doctor).

In deciding if the witness' knowledge, skill, experience, training, or education is sufficient to deem the witness an expert, the court will focus on whether the witness' expertise "goes to the very matter" about which he is testifying. *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996). In *Broders*, an emergency room physician was permitted to testify in a malpractice case about the standard of care that the doctors and nurses should have exercised, that they failed to meet that standard, and that it is foreseeable that an untreated head injury could result in death. *Id.* at 150-51. The court did not, however, permit the physician to testify on causation. *Id.* at 151.

On appeal, the court reversed the trial court's ruling. *Heise v. Presbyterian Hosp. of Dallas*, 888 S.W.2d 264 (Tex.App.—Eastland 1994), *rev'd* 924 S.W.2d 148 (Tex. 1996). The court explained that under the "same school of practice" requirement, a medical doctor can testify as an expert if the defendant doctor is also a medical doctor. *Id*. at 266. It went on to note that the expert does not need to be a specialist in the particular area to which he is testifying as long as he possesses knowledge "not possessed by people generally," and that he is not a specialist merely went to his credibility with the jury. *Id*.

The Texas Supreme Court unanimously affirmed the trial court's exclusion of this witness' testimony. *Broders*, 924 S.W.2d 148. The court noted that a notion that every medical doctor is automatically qualified to testify as an expert on every medical issue "ignore[s] the modern realities of medical specialization." *Id.* at 152. Heise attempted to rely on *Hart v. Van Zandt*, 399 S.W.2d 791 (Tex. 1965), to support his claim that the doctor was an expert because they were of "the same school of practice." *Broders*, 924 S.W.2d at 152. However, the court said that Heise's argument was not supported by either the letter or

the spirit of *Van Zandt*. *Id.* While it is necessary for the expert to be either of the same school of practice or from a school in which the particular issue is "common to and equally recognized and developed," meeting this requirement is alone not sufficient to qualify as an expert. *Id*.

In *Pilgrim's Pride Corporation v. Smoak*, 134 S.W.3d 880, (Tex.App.—Texarkana 2004, pet. denied), the Texarkana Court of Appeals found an investigating officer's conclusion that the defendant's negligence caused an automobile accident to be no evidence. However, the officer's testimony concerning his own observations during the investigation were admissible. In this case Smoak brought personal injury action against Pilgrims Pride and its employee truck driver who collided with Smoak's vehicle while Smoak was making a right turn and the truck driver a left turn. At trial the investigating officer gave his opinion as to how the accident took place and who was at fault. The corporation failed to preserve error regarding the officer's qualifications. The corporation contended that, nonetheless, because the officer was not qualified as an expert to give his opinion on whose negligence caused the accident, his conclusion was no evidence to support a verdict and thus, no objection was required.

The court stated that no definite guidelines exist for determining whether a particular witness possesses the knowledge, skill, or expertise to qualify as an expert. The court found that the officer was not an accident reconstruction expert and therefore was not qualified to offer his opinion on whose negligence caused the accident. However, the court did find that the officer's opinion on causation was not based on any scientific, technical, or other specialized knowledge not generally posessed by a layperson. That was based on his own investigation and observations. Therefore, his opinion on causation was admissible.

National Freight, Inc. v. Snyder, 191 S.W.3d 416 (Tex.App.—Eastland 2006, no pet.), allowed a medical expert's reliance on a member of his staff to give an opinion of the future costs of his services. The Court of Appeals emphasized that Rule 703 allows an expert may base his opinion on facts or data that would not be independently admissible. TEX. R. EVID. 703.

B. Path Two: Helpfulness to the Jury

The subject matter of an expert's testimony must "assist the trier of fact." TEX. R. EVID. 702. Expert testimony is permitted in those situations in which "the expert's knowledge and experience on a relevant issue are beyond that of the average juror." *Dunnington v. State*, 740 S.W.2d 896, 898 (Tex. App. - El Paso 1987, pet. ref'd); *see also Jenkins v. Henningan*, 298 S.W.2d 905, 909 (Tex. Civ. App. - Beaumont 1957, writ ref'd n.r.e.) (Requiring that an expert have "knowledge superior to that possessed by the ordinary juror"). However, an expert may still testify about matters within the jury's experience, if the expert will aid the jury in understanding even familiar matters and the expert's experience or training provides a more thorough or refined understanding. *Swearingen v. Swearingen*, 578 S.W.2d 829, 832 (Tex. Civ. App. - Houston [1st Dist.] 1979, writ dism'd) (holding that a witness had sufficient knowledge to testify in a custody hearing because she had a "thorough knowledge [of the subject matter] not possessed . . . by persons in general"). Courts are not compelled to exclude expert testimony simply because it "cover[s] matters that are within the average juror's comprehension." *Tyus v. Urban Search Management*, 102 F.3d 256, 263 (7th Cir. 1996).

Courts have even maneuvered around hearsay limitations to allow experts to testify. *Toshiba Machine Co., America v. SPM Flow Control, Inc.*, 180 S.W.3d 761 (Tex.App.—Fort Worth 2005) *pet. granted, cause remanded51* (March 31, 2006), discussed an expert witness and his ability to rely upon hearsay. In this case, an expert, who was to testify about the damages suffered by one of the businesses, contacted various clients of the company. The expert's purpose was to determine for himself why these particular clients had decided not to do business with the company, and the expert used those clients' responses in formulating his damages model. The Court of Appeals affirmed the trial court's decision to allow the testimony even though it was based upon hearsay statements.

Affirming the judgment, the Court of Appeals noted "we cannot think of a more appropriate method to determine why sales were lost than to ask the customer."

Conversely, the court held in *Justice v. Carter*, 972 F.2d 951 (8th Cir. 1992), that an expert could not offer knowledge beyond that of an ordinary juror. The court affirmed the exclusion of expert testimony that was offered to explain the "workings, dynamics, on outcome of a hypothetical bankruptcy case" because such knowledge was not "beyond the grasp of the ordinary fact finder." *Id*. at 957. Further, the court noted, allowing the evidence to be admitted would lead to a "battle of the experts" that would waste resources and provide no enlightenment to the jury. *Id*. In *Rizzo v. Corning*, Inc., 105 F.3d 338, 341(7th Cir. 1997), the court excluded a materials engineer's testimony because "[m]erely testifying to what he saw through a microscope would not even be expert testimony-anyone can look through a microscope and describe what he sees."

Much of the discretion for determining whether to exclude an expert's testimony on issues that are within the jury's comprehension is left to the trial court. *See Ancho v. Pentek Corp.*, 157 F.3d 512, 519 (7th Cir. 1998). This discretion applies to the assessment of an expert's reliability, including what procedures the court uses to determine reliability, and in making the determination of reliability. *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1223 (10th Cir. 2003).

The question under Rule 702 is not whether the jurors know *something* about this area of expertise but whether the expert can expand their understanding of this area in any way that is relevant to the disputed issues in the trial.

C. Path Three: Reliability

Arkoma Basin Exploration Co., Inc., v. F. M. F. Associates, 1990-A, Ltd., __ S.W.3d __ (Tex. App.–2008)(January 25, 2008), affirmed the trial court's decision to allow testimony from an oilfield engineer. A "no evidence" challenge was raised based upon the expert's lack of calculation in his testimony. The Supreme Court affirmed the use of the testimony, holding that the testimony was adequately explained and not merely conclusory.

The Court stated that it is generally true that unless an appellant files a complete reporter's record (or a limited appeal), the court presumes the omitted portions are relevant and support the jury's verdict. But a complete record "does not include matters from other proceedings." *Exxon Corp. v. Makofski*, 116 S.W.3d 176 181 (Tex. App.–Houston [14th Dist.] 2003, pet. denied). Reinforcing this statement was the fact that the trial record made it clear that no evidence was presented at the pretrial *Robinson* hearing. *Exxon*, 116 S.W.3d 176. Also, since Exxon was not complaining about the pre-trial decision made on the admissibility of the expert testimony, but about the legal sufficiency of that testimony, the Court found that the record it had to review was sufficiently complete. *Exxon*, 116 S.W.3d 176 at 182.

The Austin appellate court in *Ford Motor Co. v. Ledesma***,** 173 S.W.3d 78 (Tex.App.—Austin 2005, pet. granted), found the testimony of two experts had been properly admitted and the testimony of the third had been properly excluded. Ledesma, the driver of a Ford F-350 truck who brought suit for damages when his truck collided with two parked cards, had two experts testify as to the way in which the rear axle on the truck dislodged due to a manufacturing defect. On appeal, Ford challenged the trial court's admission of testimony by Ledesma's experts, Geert Aerts and David Hall, and the exclusion of some of the testimony from Ford's own expert, Dan May.

Ford first argued the foundational data underlying Aerts' opinion was unreliable and that his methodology in arriving at his opinion was flawed. Aerts claimed the rear axle on Ledesma's truck and the driveshaft dislodged because a u-bolt in the rear leaf-spring and axle assembly was defectively manufactured and caused Ledesma to lose control of the vehicle. Aerts based his theory on measurements of u-bolts, Ford specifications, and his experience. Ford contended Aerts's opinion was "subjective belief and unsupported speculation because his foundational data was either suspect or absent, but the Austin appellate court found the trial court had not abused its discretion in admitting the testimony because

"Ford's attacks on Aerts's theory of *why* the nuts were not tightened sufficiently do not undermine his observation that the nuts on the u-bolt were insufficiently tightened in a way that allowed the u-bolt to fail. To prove a manufacturing defect, Ledesma need not prove that the manufacturing process is flawed, only that it produced a flawed product." Thus, there was not an analytical gap sufficient to show error on the part of the trial court.

The Austin court also found the testimony of David Hall was properly admitted. Hall was an accident reconstruction expert testifying mostly on the basis of photographs of the scene who stated the pavement marks and damage supported Ledesma's claims. Ford argued this testimony "contain[ed] too many assumptions and logical leaps to be reliable." But the Austin court stated that Ford's criticisms of Hall's testimony went to the credibility, not the reliability of Hall's theories, and these were subject to vigorous cross-examination regarding the accuracy of his opinions.

Finally, Ford argued the exclusion of the testimony of its expert, Dan May, was erroneous because, although May was not an accident reconstructionist, the law only required Ford's expert to possess special knowledge on the subject matter of his opinion. May was a mechanical engineer familiar with the design and manufacture of Ford trucks. The Austin court found no abuse of discretion in the exclusion of May's testimony regarding the *cause* of the axle displacement. May lacked any accident reconstruction training, and he could not explain certain inconsistencies and uncertainties in his theory that the impact of the vehicles caused the axle displace rather than the other way around. Thus, May was not qualified to testify as an expert, nor was his testimony sufficiently reliable.

In *Volkswagen of America, Inc. v. Ramirez*, 159 S.W.3d 897 (Tex. 2004), the Texas Supreme Court addressed the need for a qualified expert's explanation to close the analytical gap between the data relied on and the opinion offered. Ramirez (as a next friend) brought a negligence action against Volkswagen alleging that a defect in the Passat that Haley Sperling had been driving had caused Sperling to lose control of the car. Ramirez proffered the testimony of accident reconstruction expert Ronald Walker to prove that a bearing defect in the left rear wheel assembly of the vehicle driven by the victim caused the accident. Volkswagen contested that Walker's testimony was unreliable because he did not present any scientific support for his opinion regarding how the separated wheel had remained in the rear wheel well during the accident.

The Texas Supreme Court held that even though the *Robinson* factors for measuring reliability of scientific evidence cannot be used with certain kinds of expert testimony, there still must be some basis for the opinion offered to show its reliability. Walker's explanation for the retention of the wheel in the rear wheel well during the accident was "the laws of physics." *Id.* at 4. Walker did not conduct or cite any tests to support his theory on the accident and there were no other studies, publications or peer review to support his position. The Court found Walker's explanation – "the laws of physics"– did not close the analytical gap by explaining how the Passat's wheel could behave as he described.

Also at issue in *Volkswagen* was the testimony of Dr. Edward Cox. Volkswagen asserted that Cox was not offered to opine on causation and his brief opinion that a defect had caused the accident constituted no evidence to support the verdict. Cox had testified that because there was grass in the grease in the wheel hub, the left rear wheel assembly must have come off before the Passat entered the median and therefore caused the accident. Cox did not attempt to explain how the left wheel remained "tucked" in the left rear wheel well throughout the accident. The Court found that Cox's testimony was an unsupported conclusion and cited no testimony, tests, skid marks, or other physical evidence to support this opinion. This failure to explain how the "tucked" wheel stayed in the wheel well was "near fatal" to Ramirez's proffered opinions on causation.

Texas Mutual Insurance Company v. Lerma, 143 S.W.3d 172 (Tex.App.—San Antonio 2004, pet. denied), concerned an expert's inability to exclude other possible causes of a worker's

death. The deceased worker's wife brought a negligence action alleging her husband's death was causally related to the puncturing of her husband's arm with a barbed wire at work two months before his death. Texas Mutual asserted a "no evidence" challenge against Lerma's causation expert, Dr. Mulder. The San Antonio Court of Appeals agreed with Texas Mutual, stating that Dr. Mulder could not exclude other plausible causes of the tetanus infection with reasonable certainty and that Dr. Mulder's reasoning that Lerma's work-related wound caused his tetanus versus diabetes or dental problems or any other source was just an inference of causation amounting to no more than conjecture or speculation. *Id.* at 177. Thus, the court found that Dr. Mulder's testimony presented no evidence as to the cause of Lerma's death.

The Supreme Court of Texas in *FFE Transp. Services, Inc. v. Fulgham*, 154 S.W.3d 84 (Tex. 2004), concluded the standard of care for the proper inspection and maintenance of a refrigerated trailer is beyond the experience of the layman and must be established by expert testimony. Even though an ordinary person might be able to detect whether a visible bolt is loose or rusty, "determining when that looseness or rust is sufficient to create a danger requires specialized knowledge." *Id*. at 91. Since "the upper coupler assembly, kingpin, and base rail of a refrigerated trailer are specialized equipment," the layman cannot know when looseness or rust would create a danger to the driver of the truck and other drivers on the road – the standard of care was therefore outside of the knowledge of an ordinary person, and must have been established by expert testimony. *Id*. at 91.

In *Taylor v. American Fabritech, Inc.*, 132 S.W.3d 613 (Tex.App.—Houston [14th Dist.] 2004, pet. denied), defendant Fabritech challenged the reliability of Taylor's experts' testimony. The Houston Court of Appeals held that under *Gammill v. Jack Williams Chevrolet Inc.*, 972 S.W.2d 713 (Tex. 1998), the *Robinson* factors will not always be relevant, especially when the expert testimony is based not on science but on the expert's experience and knowledge in his or her field. *Taylor*, 132 S.W.3d at 619. If an expert's testimony is based on personal experience and knowledge, then the court must consider whether there is an "analytical gap" between the experts' opinions and the bases on which they were founded. *Taylor*, 132 S.W.3d 613. The Court of Appeals stated that the trial court did not abuse its discretion when it admitted the testimony of Stephen Estrin, a builder who testified regarding construction safety issues and OSHA requirements; Dr. Thomas Mayor, an economist who testified regarding Taylor's lost earning capacity and costs of care; Dr. Terry Winkler, an M.D. who testified about Taylor's "Life Care Plan;" and Dr. William Havins, a psychologist who testified about Taylor's nervous system injuries. Estrin's, Mayor's, Winkler's and Havins's testimony were admissible because they were based on their own experience and knowledge in each of their respective fields. The court found that the *Robinson* factors were not germane to the testimony proffered by these expert witnesses.

In *Cooper Tire and Rubber Co. v. Mendez*, 204 S.W.3d 797 (Tex. 2006), the plaintiffs sued Cooper Tire and Rubber Co. alleging a manufacturing defect caused tire failure. The plaintiffs' experts opined that the manufacturing defect was caused by wax contamination at the time the tire was manufactured. The Texas Supreme Court found this novel theory unreliable because the underlying data was unreliable when examined against the *Robinson* factors. *Id.* at 802-807. Consequently, the Court held expert testimony about the novel theory was "legally no evidence of a manufacturing defect." *Id.* at 807.

Mack Trucks, Inc. v. Tamez, 206 S.W.3d 572 (Tex. 2006), the Supreme Court of Texas held that the trial court properly excluded an expert's testimony regarding causation in a products liability. The expert alleged that the design of the fuel system at issue could result in fires caused by hoses separating. The Court, applying *Robinson*, found the expert's testimony unreliable because his methodology and analysis were unreliable. The expert, although experienced, only showed that the product's design could result in the hoses defectively separating. He failed to show by any reliable testing that the hoses had separated in the present case to cause the accident.

Paschal v. Great Western Drilling, 215

S.W.3d 437 (Tex.App.—Eastland 2006, no pet.), involved an expert's reliance on the "family expense method" of tracing the source of funds used to make payments on life insurance. The expert testified to multiple tracing methods, and explained that he used the family expense method because it was most equitable. The Court of Appeals noted that the type of testimony offered by a CPA analyzing financial records did not seem to be the type of expert testimony that the six *Robinson* factors would be helpful in determining reliability.

State Farm Lloyds v. Mireles, 63 S.W.3d 491 (Tex.App.—San Antonio 2001, no pet.), held expert's testimony was unreliable and irrelevant to the issue of whether a plumbing leak caused foundation damage six to eight feet away. The Court of Appeals found that the consulting engineer's opinion regarding leaks causing remote damage was "not amenable to a strict application of the *Robinson* factors." *Id*. at 499. However, applying *Gammill*'s analytical gap analysis, the Court found the expert unreliable and irrelevant because he failed to show any proof of his experiences with similar situations and could not rule out other related causes. *Id.* at 500.

By comparison, *State Farm Fire and Casualty Co. v. Rodriguez*, 88 S.W.3d 313 (Tex.App.—San Antonio 2002, pet. denied), held an expert's testimony that a plumbing leak caused foundation damage was reliable. The Court of Appeals commented that State Farm did not object to the expert's qualifications, data, or methodology. *Id.* at 319. Instead State Farm argued that the expert was inherently unreliable because he referenced one of his opinions as a "wild ass guess," and could not attribute 100% of the damage to the potential causes. *Id.* The Court noted that while the expert's "wild ass guess" comment did not help the Rodriguez's case, it did not make his opinion unreliable. *Id.* at 320. The Court evaluated the entire substance of the testimony rather than one phrase, and found there were not any analytical gaps. *Id.*

D. Path Four: Relevancy

Remember Texas Rules of Evidence 401, 402, and 403 are also applicable to expert testimony. Testimony must be relevant to be admissible. TEX. R. EVID. 401, 402. Irrelevant testimony— testimony that does not make the existence of a fact of consequence more or less probable— is inadmissible.

Further, Texas Rule of Evidence 403 applies even when expert evidence is found to be relevant and reliable. *Robinson*, 923 S.W.2d at 557 (If the proffered testimony is relevant and reliable, the trial court must then determine whether its 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 needless presentation of cumulative evidence," and should thus be excluded.). According to Rule 403, evidence is inadmissible if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, or cumulative evidence. TEX. R. EVID. 403.

E. Path Five: Conflicting Experts

In the products liability action *General Motors Corp. v. Iracheta*, 161 S.W.3d 462, (Tex. 2005), the grandmother of two boys killed in a car accident sued GM claiming the boys' death was caused by a design defect in the car which allowed gasoline to siphon from the fuel system. The jury found that one of the boys' deaths had been caused by the defect and awarded $10 million. On appeal, the Texas Supreme Court found there was no evidence that the second fire in the car was caused by a defect because proof of causation rested on the testimony of two unreliable experts. Iracheta's experts' testimonies conflicted with each other, and each stressed "both the extent and the limits of his own expertise and that of the other." *Id*. at 465. Furthermore, one expert was not qualified to testify as to where the siphoning occurred and his testimony "had no basis outside his own assertions, which were irreconcilably self-contradicting." *Id*. at 471. This conflict, along with the conflict between the two experts' testimonies, was "fatal to Iracheta's claim" and so there was "no evidence that siphoning at the front could have caused the second fire in the way every witness testified it occurred." *Id*. at 470. Thus, the Supreme Court of Texas reversed and rendered a take-nothing judgment: "[i]nconsistent theories cannot be manipulated in this way to form a hybrid for which no expert can offer support." *Id.*

F. Path Six: Material Change

Consistency is key for experts. Experts who change their opinions mid-litigation can be disqualified. Make sure your experts know this before they render their opinions.

"A last minute, material alteration in the expert's testimony is just as damaging as the complete failure to list an expert." *Collins v. Collins*, 904 S.W.2d 792, 801 (Tex.App.—Houston[1st Dist.] 1995) writ denied with per curiam opinion, 923 S.W.2d 569 (Tex. 1996) (citing *Exxon Corp. v. West Tex. Gathering Co.*, 868 S.W.2d 299, 304 (Tex. 1993)). An untimely supplementation of a material change in an expert's testimony should be excluded. *Norfolk S. Ry Co. v. Bailey*, 92 S.W.3d 577, 580 (Tex.App.—Austin 2002 no pet.). Preventing trial by ambush is a central purpose behind the discovery rules. *Cunningham*, 185 S.W.3d at 14 (citing *Alvarado*, 830 S.W.2d at 914). The rules require parties to disclose the substance of expert testimony to provide the opposing party with sufficient information about the expert's opinion to prepare a cross examination of the expert. *Collins*, 904 S.W.2d at 801.

In *Cunningham* the court held a non-designated expert's initial report, although previously filed, "[did] not prevent the opposing party from suffering unfair surprise or prejudice if that expert's testimony is then considered as evidence for summary judgment purposes." *Cunningham*, 185 S.W.3d at 14. The *Cunningham* case effectively illustrates the threshold for the unfair surprise or prejudice exception. *See id*. The court found that the defendant would be unfairly surprised and prejudiced by the late admission of an affidavit from a non-designated expert even though the defendant had a fair summary of the proposed testimony since ninety days after the claim was filed. *Cunningham*, 185 S.W.3d at 11-15 (citing former TEX. REV. CIV. STAT. ANN. art. 4590i, recodified with some amendments as Tex. Civ. Prac. & Rem Code § 74.000 *et al*).

V. OTHER RECENT CASES

A. Supplementation

State v. Target Corp., 194 S.W.3d 46 (Tex.App.—Waco, 2006 no pet.), discussing the trial court's erroneous exclusion of certain, untimely disclosed damage calculations from an expert's testimony. The Court of Appeals held that the opposition's opportunity to re-depose the expert about the subject alleviated any unfair surprise or prejudice.

Harris County v. Inter Nos, Ltd., 199 S.W.3d 363 (Tex.App.—Houston [14th Dist] 2006, no pet.), a party's failure to supplement disclosure responses resulted in the exclusion of its expert's testimony regarding those matters it failed to supplement. The rules governing discovery mandate exclusion of undisclosed evidence absent a showing of good cause, lack of unfair surprise, or unfair prejudice.

B. Timeliness of Objections

In *Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245 (Tex. 2004), a challenge was made after the cross-examination of an expert. The trial court overruled the challenge and on appeal, the parties argued that the challenge came too late. The Texas Supreme Court disagreed, holding the objection timely because it came immediately after cross-examination and explained the basis for reason for the objection. The offering party had a chance to respond to the objection at that time. Thus, the objection preserved the complaint; the Court ruled that the testimony should have been excluded because it was not reliable sue to the fact the expert did not explain how certain factors affected his calculations.

Similarly, in *Brookshire Bros. v. Smith*, 176 S.W.3d 30 (Tex.App.—Houston [1st Dist.] 2004, pet. denied), Smith contended that Brookshire had not preserved error in the trial court for its complaint that the scientific evidence offered by plaintiff Smith was unreliable. The Houston Court of Appeals found that since Brookshire had objected to the scientific reliability of the expert testimony both before the trial began and during trial (as the witness was testifying), Brookshire complied with timeliness requirements and there was no appeal by ambush.

Mobil Oil Corp. v. Bailey, 187 S.W.3rd 265 (Tex.App.—Beaumont 2006, pet. denied) (March 9, 2006), held that written objections "grounded in the standards discussed in *Havner*, *Robinson* and *Daubert*" were sufficient to preserve error even though a learned treatise was admitted with "no objection."

In Re Estate of Trawick, 170 S.W.3d 871 (Tex.App.—Texarkana 2005, no pet.). This involved a will contest where the contestants failed to properly object to an expert's qualifications. The Court of Appeals explained the contestants could have either objected to the expert before trial or objected to the expert testimony when it was offered. Instead, they offered a premature objection after the expert began his testimony, and failed to reurge their objections after the trial court overruled them. Further, the contestants failed to cross examine the expert on his qualifications, andonly moved to strike his testimony after the other side had rested. This was not sufficient to preserve error.

C. Epidemiological Issues

The San Antonio Court of Appeals in *In re*: *R.O.C.*, 131 S.W.3d 129 (Tex.App.—San Antonio 2004, no pet.), affirmed a lower court ruling that workers who alleged they contracted asbestosis as a result of their employment at an electric station and nuclear power plant **failed** to meet the burden of showing the materials they were exposed to were capable of causing injury from products supplied by the defendants. The court upheld the exclusion of expert testimony by the trial court and stated that the analysis regarding the reliability of scientific expert testimony does apply to asbestos torts. *See E.I. du Pont de Nemours & Co., Inc. v. Robinson*,

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

D. Subjective Tests

The Goodyear Tire & Rubber Co. v. Rios, 143 S.W.3d 107 (Tex.App.—San Antonio, 2004, pet. denied), concerned the testimony of two experts for Rios that established the existence of a manufacturing defect in a Goodyear tire. The first expert based his opinion on demonstrable facts that he collected through touch and vision, coming to the conclusion that the tire tread separated due to a manufacturing defect. This testimony was found to be unreliable because there was no evidence that other experts in the industry use this touch/vision method to differentiate a defect from normal use and abuse over time. In addition, the expert did not cite to any articles or publications that supported the method the expert used. The Court also held that the second witness was not qualified as an expert because, although his background qualified him to discuss adhesion failures in a general sense, he was not qualified to discuss whether this tire failed because at the time of manufacture an adhesion defect existed.

In *Bocanegra v. Vicmar Services, Inc*., 320 F.3d 581 (5th Cir. 2003), the trial court excluded two expert reports that addressed both the effect marijuana use and the cause of the accident. The trial judge opined the reports did not pass the Daubert test, did not prove causal connection between marijuana and the incident, and did not prove the driver was impaired because quantity and quality of marijuana was unknown. The Fifth Circuit reversed, holding that the trial court erred in excluding the report because the driver admitted he had ingested marijuana within a twelve hour period prior to the accident, the expert showed published and accepted studies that have demonstrated that marijuana use impairs cognitive functions for at least twelve hours, and due to the expert's knowledge and training in toxicology, his testimony would have been helpful to a fact finder. Concerning the quality or quantity of marijuana the driver used, the Court found that, while there are certain variables that will always be present (such as exact dosage), individuals smoke marijuana to get high, and a person who takes "five or six hits," as the driver did here, will be impaired. *Id.* at 589. The only question goes to the degree of impairment, which goes to the weight given to the testimony, not its admissibility. Thus, the Court of Appeals found the trial court's exclusion to be an abuse of discretion.

E. Probability v. Possibility

Bartosh v. Gulf Health Care Center-Galveston, 178 S.W.3d 434 (Tex.App.—Houston[14th Dist.] 2005, no pet.). The Court of Appeals upheld the trial court's exclusion of a medical expert's testimony. The expert "stated that he was hired to speculate on what may have caused [decedent's] health to deteriorate, that he gave his best speculation regarding possible causes, and that he was just offering an opinion on what might have happened." *Id.* at 442.

F. Standard of Review

The Supreme Court of Texas in *FFE Transp. Services, Inc. v. Fulgham*, 154 S.W.3d 84, 89 (Tex. 2004), announced that a trial court's determination as to whether expert testimony is necessary to establish negligence is a question of law and should be reviewed de novo (rather than for abuse of discretion) since whether expert testimony is necessary is "a question of what legal weight should be given to the non-expert evidence in the record." *Id.*

G. Opinion on Ultimate Issue

In *Paradigm Oil, Inc. v. Retamco Operating, Inc.*, __ S.W.3d __ (Tex.App.—San Antonio 2007, no pet. h.) (August 29, 2007), court of appeals reviewed the factual sufficiency of a damages award which was in part based on

an expert's opinion about the amount of damages sustained. The expert's testimony identified the information he reviewed and relied upon, summarized his general method of analysis, and rendered an opinion on the amount of damages. The court of appeals recognized Rules 704 and 705 permit an expert to testify to the ultimate issue and give opinions without disclosing the underlying facts or data. Even given this recognition, the court of appeals reversed holding the evidence was insufficient because the expert's testimony was speculative and conclusory.