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## Civil Evidence

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# CIVIL EVIDENCE

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This Survey period has seen significant development in certain key areas of evidence law. First, the Texas and federal courts have continued to struggle with the standards relating to admissibility of expert testimony. Second, the Supreme Court has elaborated on its common law based privilege rules, recognizing that confidential communications between patient and psychotherapist are privileged. Finally, there has been the usual smattering of cases dealing with unique circumstances and rarely applied rules of evidence. While we make no claim that this Article encompasses every significant development of the past year, we hope it will give the reader an idea of some of the significant developments in the area of civil evidence.

## I. ADMISSIBILITY OF EXPERT TESTIMONY

In 1993, the United States Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>1</sup> holding that under Rule 702 of the Federal Rules of Evidence, scientific evidence is not admissible unless it is “scientifically valid” and “reliable.”<sup>2</sup> The *Daubert* Court rejected the long followed rule set out in *Frye v. United States*,<sup>3</sup> which held scientific evidence admissible when the offering party established that the technique or principle had “gained general acceptance in the particular field in which it belongs.”<sup>4</sup> Instead, the Court adopted a “flexible”<sup>5</sup> analysis, which included consideration of the following factors in determining “whether a theory or technique is scientific knowledge that will assist the trier of fact”:<sup>6</sup> (1) “whether it can be (and has been) tested”;<sup>7</sup> (2) “whether the

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1. 509 U.S. 579 (1993).
2. *Id.* at 597.
3. 293 F. 1013 (D.C. Cir. 1923).
4. *Id.* at 1014.
5. *Daubert*, 509 U.S. at 594.
6. *Id.* at 593.
7. *Id.*

theory or technique has been subjected to peer review and publication”;<sup>8</sup> (3) “in the case of a particular scientific technique . . . the known or potential rate of error”;<sup>9</sup> and (4) “general acceptance.”<sup>10</sup>

Because the federal and state rules governing the admissibility of expert testimony are identically worded,<sup>11</sup> it was not long before the Texas Supreme Court was faced with the same issue. In *E.I. Du Pont de Nemours & Co. v. Robinson*,<sup>12</sup> the Court followed in *Daubert*'s footsteps, holding that Rule 702 “requires the proponent to show that the expert’s testimony is relevant to the issues in the case and is based upon a reliable foundation.”<sup>13</sup> In determining the reliability of scientific evidence, the Court set out a list of non-exclusive factors it considered relevant to the inquiry:

- (1) the extent to which the theory has been or can be tested; (2) the extent to which the technique relies upon the subjective interpretation of the expert; (3) whether the theory has been subjected to peer review and/or publication; (4) the technique’s potential rate of error; (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.<sup>14</sup>

Last year, the courts decided three cases of note on the issue of the admissibility of expert testimony, two federal and one state. In the first, *Watkins v. Telsmith, Inc.*,<sup>15</sup> the Fifth Circuit addressed the issue of whether the *Daubert* standard applied to non-scientific evidence. The issue arose because *Daubert* itself involved the admissibility of novel scientific evidence, and at least one circuit has held that “application of the *Daubert* factors is unwarranted in cases where expert testimony is based solely upon experience or training.”<sup>16</sup> The *Watkins* court, however, rejected the Tenth Circuit’s approach and held that the *Daubert* factors are relevant to evaluating the admissibility of any expert testimony under Rule 702.<sup>17</sup>

Watkins sued Telsmith, Inc., alleging that Telsmith was responsible for the death of her husband, Eugene Watkins. Eugene was walking under a conveyor, manufactured by Telsmith’s predecessor, when a wire rope sup-

8. *Id.*

9. *Id.* at 594.

10. *Id.*

11. Compare FED. R. EVID. 702 with TEX. R. CIV. EVID. 702. Both rules state: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” *Id.*

12. 923 S.W.2d 549 (Tex. 1995).

13. *Id.* at 556.

14. *Id.* at 557 (citation and footnote omitted).

15. 121 F.3d 984 (5th Cir. 1997).

16. *Compton v. Subaru of Am., Inc.*, 82 F.3d 1513, 1518 (10th Cir.), *cert. denied*, 117 S. Ct. 611 (1996). The Ninth Circuit recently held that *Daubert* is inapplicable to a mechanical engineer’s testimony in a products liability case. See *McKendall v. Crown Control Corp.*, 122 F.3d 803, 806-07 (9th Cir. 1997).

17. See *Watkins*, 121 F.3d at 991.

porting the conveyor snapped. The conveyor fell on Eugene, and he died from his injuries the next day.

Watkins offered the testimony of an expert, Marcus Dean Williams, "that the conveyor was unsafe and that alternative designs were feasible."<sup>18</sup> Williams was a registered professional engineer. During World War II, he was a B-17 pilot and maintenance supervisor. He later worked for Boeing in facility engineering and tool design. His work experience also included a stint with the Army Corps of Engineers and the Mississippi Highway Department. Finally, Williams taught drafting, surveying, structural design, and engineering materials at a junior college. Williams' experience with conveyors included observing conveyors in use, although Williams was unable to remember exactly how many of those conveyors were supported by wire rope or the types or brands of the conveyors. Despite his work experience, Williams lacked a mechanical engineering background and his experience in machine design was "limited to a project he conducted in one of his engineering classes in which he designed the base of a chair."<sup>19</sup>

In preparation for testifying in the case, Williams had examined the reconstructed conveyor, reviewed the manufacturer's specifications for the conveyor, and studied photographs of the conveyor. Williams did not draw any alternative design and did not conduct any tests on proposed alternative designs. Notably, Williams admitted that he reached his conclusion that the conveyor design was unsafe and that alternative designs were feasible after only one day's work on the case.

The district court excluded Williams' testimony on the ground that it was inadequate under the *Daubert* standard. On appeal, Watkins argued that the standards set forth in *Daubert* applied only to "'scientific knowledge' and expert testimony based on 'novel' scientific evidence."<sup>20</sup> This case, Watkins claimed, presented no novelty, "but merely the application of Williams's experience and common engineering principles to evaluate the safety of this conveyor and envision alternative designs."<sup>21</sup> Declining to follow the Tenth Circuit case holding to the contrary,<sup>22</sup> and instead following the Seventh and Eighth Circuits,<sup>23</sup> the court rejected Watkins' arguments, holding that the standards set forth in *Daubert* applied to all expert testimony.<sup>24</sup>

Specifically, the court held that a district court must first examine the reliability of the expert's testimony.<sup>25</sup> In determining whether the opinion offered is reliable,

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18. *Id.* at 986.

19. *Id.* at 987.

20. *Id.* at 988.

21. *Id.*

22. *See supra* note 16.

23. *See Cummins v. Lyle Indus.*, 93 F.3d 362, 367 n.2 (7th Cir. 1996) (applying *Daubert* to all expert testimony); *Peitzmeier v. Hennessy Indus., Inc.*, 97 F.3d 293, 297 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1552 (1997) (same).

24. *See Watkins*, 121 F.3d at 990-91.

25. *See id.*

[n]ot every guidepost outlined in *Daubert* will necessarily apply to expert testimony based on engineering principles and practical experience, but the district court's 'preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue' is no less important.<sup>26</sup>

The court further held that "the nonexclusive list of factors relevant under *Daubert* to assessing scientific methodology—testing, peer review, and 'general acceptance'—are also relevant to assessing other types of expert evidence."<sup>27</sup> To hold otherwise would be to endorse the admissibility of testimony by an expert who purports "to rely on general engineering principles and practical experience" and who simply states his "conclusions were not reached by any particular method or technique."<sup>28</sup>

Applying the *Daubert* factors to Williams' testimony, therefore, the court of appeals agreed with the district court that Williams' opinions were not sufficiently reliable to render them of assistance to the fact finder.<sup>29</sup> First, the court found that the proper methodology for proposing alternative designs required more than mere conceptualization; testing the design—whether by the expert or by someone else—was vital.<sup>30</sup> Second, the court found that Williams' lack of direct experience with conveyors demonstrated an inadequate understanding of the machine.<sup>31</sup> Finally, the court noted that "Williams did not even make any drawings or perform any calculations that would allow a trier of fact to infer that his theory that the conveyor design was defective and that alternative designs would have prevented the accident without sacrificing utility were supported by valid engineering principles."<sup>32</sup>

Shortly after the Fifth Circuit decided *Watkins*, it issued another significant *Daubert* opinion in *Moore v. Ashland Chemical, Inc.*<sup>33</sup> In *Moore*, the court focused on the differences between evaluating the admissibility of expert testimony based on hard scientific evidence and expert testimony based on clinical medical knowledge. While reaffirming that the general *Daubert* principles did indeed apply to both hard science testimony and clinical medical testimony, the court found that the *Daubert* factors were simply inapplicable.<sup>34</sup>

In *Moore*, the plaintiff was exposed to a mixture of chemicals that had leaked from sealed drums carried inside his truck. At issue was whether the plaintiff's respiratory ailments were caused by exposure to the chemicals. At trial, the plaintiff offered the testimony of two clinical physicians

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26. *Id.* (citing *Daubert*, 509 U.S. at 592-93).

27. *Id.* at 991.

28. *Id.*

29. *See id.* at 992-93.

30. *See id.* at 992.

31. *See id.*

32. *Id.*

33. 126 F.3d 679 (5th Cir. 1997).

34. *See id.* at 688-89.

who had examined and treated him. The trial court excluded the testimony of one of the experts, but not the other. A divided panel reversed.

Judge Dennis, writing for the majority, first outlined the evidentiary principles relevant to determining the admissibility of expert testimony. Setting the stage for the rest of the opinion, Judge Dennis distinguished between "hard scientific knowledge" and "knowledge outside the realm of hard science."<sup>35</sup> Hard scientific knowledge, he stated, "is based on generating hypotheses and testing them to see if they can be falsified."<sup>36</sup> The discipline of clinical medicine, by contrast, does not rely on hard scientific knowledge.<sup>37</sup> Instead, the goals of a clinical physician include (1) the care and treatment of the individual patient and (2) an examination of the disease, the host, and the interaction between the disease and host.<sup>38</sup> The subject matter and conditions of a clinical physician's study are likewise different from those arising in the hard science field.<sup>39</sup> For instance, the hard scientist deals with animals, parts of a person, or an inanimate system and can initiate experiments on her own time.<sup>40</sup> The clinical physician, on the other hand, deals with an "intact human being" who initiates the treatment, "choosing the time, place, duration, and clinician."<sup>41</sup>

Based on these differences, the majority concluded that the expert opinion regarding causation offered by a clinical physician was admissible.<sup>42</sup> In support of its reliability finding, the court cited the following evidence relied upon by the expert in reaching his conclusion: (1) the expert personally examined the plaintiff; (2) the expert personally took a detailed medical history from the plaintiff; (3) the expert performed or supervised a series of tests on the plaintiff, including pulmonary function tests, a bronchial challenge test, a bronchodilator test, an allergy test, X-rays, and laboratory tests; (4) the expert reviewed tests, reports, and the opinions of other doctors who had examined the plaintiff; (5) the expert reviewed the chemical manufacturer's material safety data sheet, which revealed that the chemicals to which plaintiff was exposed could "cause drowsiness and irritate nose and throat" as well as "injure blood, liver, lungs, kidneys, and nervous system"; (6) the expert referred to medical literature on the properties of chemicals that cause the plaintiff's ailment; and (7) the expert utilized his admittedly extensive training and experience.<sup>43</sup> Judge Davis dissented, arguing that "medical causation testimony

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35. *Id.* at 685.

36. *Id.* (quoting Michael D. Green, *Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of Agent Orange and Benedectin Litigation*, 86 Nw. U. L. REV. 643, 645 (1992)).

37. *See id.* at 688.

38. *See id.* at 688-89.

39. *See id.* at 689.

40. *See id.*

41. *Id.* (citations and internal quotation marks omitted).

42. *See id.* at 694-705.

43. *Id.* at 693 n.3, 696-97.

by physicians is indeed 'scientific' expert testimony."<sup>44</sup> On November 12, 1997, the Fifth Circuit decided to hear the case *en banc*.

The Texas courts have also had their share of *Daubert*-type cases. In *Merrell Dow Pharmaceuticals, Inc. v. Havner*,<sup>45</sup> the Texas Supreme Court struggled with the issue of whether there was any evidence supporting a jury verdict against Merrell Dow finding that its drug, Bendictin, caused birth defects. In considering the no evidence point, the Court noted that the mere testimony that, to a reasonable degree of medical certainty, Bendictin caused the birth defects would not suffice—"the substance of the testimony must be considered."<sup>46</sup> Specifically, whether an expert's testimony rises to the level of evidence depends on whether the testimony is scientifically reliable.<sup>47</sup> An expert's "bald assurance of validity is not enough"; a court must objectively perform an independent validation of the expert's methodology.<sup>48</sup>

When evaluating the reliability of an expert's opinion in determining a no evidence point, the Court considered the factors set out in *Robinson*.<sup>49</sup> Under that analysis, expert testimony could be found unreliable in two different ways: (1) "[i]f the foundational data underlying opinion testimony are unreliable, an expert will not be permitted to base an opinion on that data because any opinion drawn from that data is likewise unreliable;"<sup>50</sup> (2) "an expert's testimony is unreliable even when the underlying data are sound if the expert draws conclusions from that data based on flawed methodology. A flaw in the expert's reasoning from the data may render reliance on a study unreasonable and render the inferences drawn therefrom dubious."<sup>51</sup>

Turning to the issue of the usefulness of epidemiological studies, the Court concluded that

properly designed and executed epidemiological studies may be part of the evidence supporting causation in a toxic tort case and that there is a rational basis for relating the requirement that there be more than a 'doubling of the risk' to our no evidence standard of review and to the more likely than not burden of proof.<sup>52</sup>

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44. *Id.* at 711.

45. 953 S.W.2d 706 (Tex. 1997).

46. *Id.* at 711.

47. *See id.* at 712, 714.

48. *Id.* at 712. Placing the court in the role of expert scientist has been criticized as unworkable. *See, e.g.,* Alexander Morgan Capron, *Daubert and the Quest for Value-Free "Scientific Knowledge" in the Courtroom*, 30 U. RICH. L. REV. 85, 97-105 (1996).

49. *See Havner*, 953 S.W.2d at 714; *supra* note 14 and accompanying text.

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

51. *Id.*

52. *Id.* at 717. Although an epidemiological study may provide some evidence of causation, it does not equate to causation. A study merely shows that there is a significant association between two events or occurrences. For example, "there is a demonstrable association between summertime and death by drowning, but summertime does not cause drowning." *Id.* at 724 (citation omitted).

While the doubling of the risk standard appears somewhat arbitrary and certainly not conclusive evidence that an agent caused a disease, the Court found it warranted because

the law must balance the need to compensate those who have been injured by the wrongful actions of another with the concept deeply imbedded in our jurisprudence that a defendant cannot be found liable for an injury unless the preponderance of the evidence supports cause in fact. The use of scientifically reliable epidemiological studies and the requirement of more than a doubling of the risk strikes a balance between the needs of our legal system and the limits of science.<sup>53</sup>

Though the Court accepted the use of qualifying epidemiological studies, it held that merely because the study might meet the litmus test, this does not make it legally sufficient evidence of causation.<sup>54</sup> The reason is that an epidemiological study shows only an association, not causation.<sup>55</sup> In order to draw a conclusion about causation, a number of criteria should be considered, including the strength of the association, the consistency of the association, the plausibility of the association, and possible bias.<sup>56</sup>

Moreover, before accepting the epidemiological study, a court must first satisfy itself that the study is reliable. In other words, the court must feel confident that the study accurately concludes that the relative risk is 2.0—i.e., there is “a doubling of the risk.”<sup>57</sup> The way this is done is to determine a “confidence interval.”<sup>58</sup> The Court adopted a ninety-five percent confidence level, which means that “if the study were repeated numerous times, the confidence interval would indicate the range of relative risk values that would result 95% of the time.”<sup>59</sup> The confidence interval would be acceptable unless it encompassed a relative risk factor of 1.0, which would mean the study was inconclusive.<sup>60</sup> In addition to the study’s confidence interval, the Court held that there were other factors to consider in evaluating a study’s reliability, including “but certainly not limited to, the sample size of the study, the power of the study, confounding variables, and whether there was selection bias.”<sup>61</sup>

Once the epidemiological study is deemed acceptable, a claimant must then prove she is similarly situated to those in the studies.<sup>62</sup> Evidence of this would include

proof that the injured person was exposed to the same substance, that the exposure or dose levels were comparable to or greater than

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53. *Id.* at 718.

54. *See id.*

55. *See id.*

56. *See id.* at 718 n.2, 719. The Court also listed factors such as specificity, temporality, biological gradient, coherence, experiment, and analogy as relevant to drawing the causal conclusion. *See id.* at 718 n.2.

57. *Id.* at 721.

58. *Id.* at 723.

59. *Id.*

60. *See id.*

61. *Id.* at 724.

62. *See id.* at 720.



those in the studies, that the exposure occurred before the onset of injury, and that the timing of the onset of injury was consistent with that experienced by those in the study.<sup>63</sup>

Moreover, "if there are other plausible causes of the injury or condition that could be negated, the plaintiff must offer evidence excluding those causes with reasonable certainty."<sup>64</sup>

Finally, the Court examined the sufficiency of the Havner's scientific evidence offered in support of causation in light of the *Robinson* factors. The Court rejected the epidemiological studies offered by the Havners and their experts on multiple grounds.<sup>65</sup> First, many of the studies encompassed a confidence interval of 1.0.<sup>66</sup> Others did not demonstrate that taking Bendectin during pregnancy doubled the risk of birth defects.<sup>67</sup> Still others did not disclose the confidence level used to determine the confidence interval.<sup>68</sup>

In addition to the statistical shortcomings of the studies, the Court found other reasons to reject the Havners' epidemiological data. First, none of the experts who testified had ever published their opinions in a peer-reviewed journal.<sup>69</sup> In fact, of the over thirty studies that had been published, none concluded that women who took Bendectin during pregnancy had an increased risk of limb reduction birth defects.<sup>70</sup> Second, the Court found the testimony of questionable reliability since the studies about which the experts were testifying were prepared only for use in litigation.<sup>71</sup>

In addition to their epidemiological evidence, the Havners also offered evidence of *in vivo* animal studies and *in vitro* studies in support of their contention that Kelly Havner's birth defects were caused by her mother's ingestion of Bendectin during pregnancy. The Court held that the animal studies were no evidence of causation because the experts who offered them could not extrapolate the high dosages required to produce the animal results into human terms.<sup>72</sup> The *in vitro* studies were likewise rejected as not providing a sufficiently concrete causal link between damage that may be caused by direct application of a substance to a single cell and damage that may be caused to a fetus by a mother's ingestion of Bendectin during pregnancy.<sup>73</sup>

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63. *Id.*

64. *Id.*

65. *See id.* at 724-30.

66. *See id.* at 725.

67. *See id.*

68. *See id.* at 726.

69. *See id.*

70. *See id.* at 708.

71. *See id.* at 726.

72. *See id.* at 729.

73. *See id.* at 730.

## II. PRIVILEGES

Unlike the Texas evidence rules, the federal rules do not give a laundry list of privileges. In fact, Congress rejected the Judicial Conference Advisory Committee's draft rules that had included a list of nine specific testimonial privileges and instead put the burden on the courts to glean from "reason and experience" appropriate evidentiary privileges.<sup>74</sup> As such, Rule 501 of the Federal Rules of Evidence provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.<sup>75</sup>

In an effort to apply "reason and experience," in *Jaffee v. Redmond*,<sup>76</sup> the United States Supreme Court recently decided whether to recognize a psychotherapist-patient privilege. Mary Lu Redmond, a police officer, shot and killed Ricky Allen. Following the shooting, Redmond received extensive counseling from Karen Beyer, a licensed clinical social worker. Allen's estate filed suit against Redmond and her employer, the Village of Hoffman Estates, Illinois, claiming that Redmond used excessive force. During discovery and at trial, the Allen estate sought access to Beyer's notes. Although the district court ruled the notes were not protected from disclosure, neither Beyer nor Redmond ever disclosed their contents. As a result, the district court instructed the members of the jury that they could presume that the contents of the notes would have been unfavorable, and the jury returned a verdict in favor of the Allen estate.

In deciding whether to recognize Redmond and Beyer's privilege claims, the Court first began with the general rule that testimonial privileges are disfavored because they hinder the search for the truth.<sup>77</sup> The Court held that privileges are recognized only when they protect private interests and serve public ends.<sup>78</sup>

The Court recognized that the psychotherapist-patient privilege serves private interests because effective therapeutic treatment depends on the patient's confidence and trust that the information disclosed during treatment will not be revealed.<sup>79</sup> The Court understood that disclosure could cause embarrassment or disgrace, and its mere possibility would inhibit the development of the confidential relationship necessary for successful treatment.<sup>80</sup>

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74. See *Jaffee v. Redmond*, 116 S. Ct. 1923, 1928 n.7 (1996).

75. FED. R. EVID. 501.

76. 518 U.S. 1 (1996).

77. See *id.* at 1928.

78. See *id.* at 1928-29.

79. See *id.* at 1928.

80. See *id.*

In addition to the strong private interests that would be served by the recognition of a psychotherapist-patient privilege, the Court held that recognition of the privilege would serve public ends.<sup>81</sup> Specifically, the Court found that a psychotherapist-patient privilege "serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance."<sup>82</sup>

Finally, the Court held that the benefits that would result from denying this privilege would be modest, at best.<sup>83</sup> The Court reasoned that were patients to know that the substance of their therapeutic sessions could be revealed, the development of the confidential relationship would be thwarted and patients would be far less forthcoming to their therapists.<sup>84</sup> As a result, there would be fewer admissions against interest.<sup>85</sup>

The Court then turned to whether "reason and experience" supported recognition of the privilege. Noting that all fifty states have recognized the privilege, the Court found that a federal court's decision otherwise would frustrate state legislative goals.<sup>86</sup> In other words, the Court wanted to avoid the result that disclosure in a state could vary depending upon the court in which a dispute happened to land.

Finally, the Court held that the psychotherapist-patient privilege included licensed social workers in their roles as therapists.<sup>87</sup> The Court found extension of the privilege beyond traditional psychiatrists and psychologists to be warranted given that social workers provide a significant amount of mental health treatment.<sup>88</sup>

While the general contours of the privilege are now recognized, the Court left unresolved at least one issue that is sure to present difficult issues for the lower federal courts in the years to come. First, the Court made it clear that recognition of the privilege was not to be made on a case by case basis, balancing the evidentiary need for disclosure with the patient's privacy interests.<sup>89</sup> Rather, that balance was struck when the Court decided the privilege does exist. However, the Court did state in a footnote at the end of its decision that "we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist."<sup>90</sup> Thus, while disavowing a case by case rebalancing, the Court at the same time suggested that there are situa-

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81. *See id.* at 1929.

82. *Id.*

83. *See id.*

84. *See id.*

85. *See id.*

86. *See id.* at 1930.

87. *See id.* at 1931.

88. *See id.*

89. *See id.* at 1932.

90. *Id.* at 1932 n.19.

tions in which the public interest is outweighed by the individual's privacy interests.

### III. MISCELLANEOUS DECISIONS OF NOTE

#### A. CONSULTING EXPERT PRIVILEGE

The Texas Supreme Court recently revisited the consulting expert privilege in *General Motors Corp. v. Gayle*.<sup>91</sup> The Delarosas sued General Motors (GM) after they suffered injuries as a result of a car crash, claiming that GM defectively designed the seat belts in the Delarosas' pickup. The trial court issued an order requiring GM to designate, before it conducted any crash tests, whether it was conducting the tests for evidentiary or consulting purposes. If the test was run for evidentiary purposes, then GM was ordered to permit the Delarosas to attend and videotape or photograph the test. If the test was for consulting purposes only, the Delarosas would not be permitted to attend. However, once GM ran a test for consulting purposes, it could not later run a similar test for evidentiary purposes. After an unsuccessful hearing before the court of appeals, GM petitioned for mandamus relief before the Texas Supreme Court.

The Texas Supreme Court held that the trial court's order undermined the consulting expert privilege.<sup>92</sup> Rule 166b of the Texas Rules of Civil Procedure, which sets out the privilege, provides:

The identity, mental impressions and opinions of an expert who has been informally consulted or of an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial or any documents or tangible things containing such information if the expert will not be called as an expert witness, except that the identity, mental impressions and opinions of an expert who will not be called to testify as an expert and any documents or tangible things containing such impressions and opinions are discoverable if the consulting expert's opinion or impressions have been reviewed by a testifying expert.<sup>93</sup>

The Court held that the purpose of the rule was to allow a party to develop case theories:

If the expert's conclusions support the consulting party's case, that expert may be designated as a witness for trial. If, on the other hand, the expert's conclusions do not support the party's case, the identity of the expert and his or her conclusions need not be revealed to the other side.<sup>94</sup>

The rule also prevents the other side from "receiving undue benefit from an adversary's efforts and diligence."<sup>95</sup>

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91. 951 S.W.2d 469 (Tex. 1997).

92. *See id.* at 476.

93. TEX. R. CIV. P. 166b(3)(b).

94. *Gayle*, 951 S.W.2d at 474.

95. *Id.* (quoting *Tom L. Scott, Inc. v. McIlhany*, 798 S.W.2d 556, 559 (Tex. 1990)).

The Court rejected the Delarosas' suggestion that the holding would permit GM to test a number of theories until it came up with a favorable test.<sup>96</sup> Instead, the Court pointed out that a crash test will only be admissible at trial if the test conditions are substantially similar to the accident conditions.<sup>97</sup> The Court also rejected the argument that the Delarosas should have access to the crash tests because they did not have adequate resources to perform their own tests, noting that "because the consulting expert privilege protects the very core of a party's thought processes and strategy regarding the litigation, there is no substantial hardship exception."<sup>98</sup>

#### B. EXPERT AFFIDAVITS

In *Guthrie v. Suiter*,<sup>99</sup> the Houston Court of Appeals addressed the admissibility of summary judgment evidence in a will contest. The testatrix's only living son, Guthrie, filed the contest after he learned he was excluded from his mother's will. Guthrie claimed his mother, who had undergone a frontal lobotomy before executing the will, lacked testamentary capacity. The executor moved for summary judgment, which the court granted. Although ultimately reversing the trial court's judgment, the court of appeals did affirm a few of the trial court's decisions disallowing some of Guthrie's evidence.

In response to the executor's motion, Guthrie offered the affidavit of Dr. Francis J. Pirozzolo, Ph.D., which stated that based on his review of "(1) letters from a Dr. Creed; (2) records from the Ohio Department of Mental Health; (3) the motion for summary judgment; and (4) the affidavits filed in support of the motion for summary judgment,"<sup>100</sup> he concluded that the testatrix "probably was not competent to make a will."<sup>101</sup> The executor objected to the affidavit on the ground that it did not attach the letters or mental health records. The trial court sustained the objection.

Rule 166a(f) of the Texas Rules of Civil Procedure provides, in relevant part, that

[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. *Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.*<sup>102</sup>

The court of appeals held that the trial court did not abuse its discretion in refusing to consider Dr. Pirozzolo's affidavit because neither the letters

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96. *See id.* at 475.

97. *See id.*

98. *Id.*

99. 934 S.W.2d 820 (Tex. App.—Houston [1st Dist.] 1996, no writ).

100. *Id.* at 824.

101. *Id.*

102. TEX. R. CIV. P. 166a(f) (emphasis added).

from Dr. Creed nor the records from the Ohio Department of Mental Health were attached to the affidavit.<sup>103</sup>

The mistake made in *Guthrie* probably resulted from reliance on Rule 703 of the Texas Rules of Evidence. Rule 703 states:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or reviewed by the expert at or before the hearing. *If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.*<sup>104</sup>

Normally during a trial, an expert will offer an opinion based on the review of documents that are not offered or admitted in evidence. This common trial practice, however, does not translate in the summary judgment setting, at least according to the Houston Court of Appeals.

In yet another decision involving the sufficiency of an expert affidavit, the San Antonio Court of Appeals refused to consider the conclusory affidavit testimony of an interested expert witness. In *Whittle v. Heston*,<sup>105</sup> Whittle sued Dr. Adrian Heston, a therapeutic optometrist, when Dr. Heston failed to diagnose a retinal tear, which led to a loss of vision in Whittle's left eye. Heston moved for summary judgment, claiming he complied with the standard of care. The trial court granted Heston's motion, and the court of appeals reversed.

The court of appeals first held that

the affidavit of an interested expert is sufficient to establish compliance with the standard of care if the witness: (1) states that he is familiar with the applicable standard of care, (2) states with specificity each examination and treatment performed, (3) states that the acts of the physician were consistent with the appropriate standard of care, and (4) states that there was no causal connection between the physician's acts and the plaintiff's injury.<sup>106</sup>

While Heston's affidavit stated he was familiar with the proper standard of care, it never articulated the particularities of the standard of care.<sup>107</sup> In addition, Heston failed to specify Whittle's complaints, the examination, or the treatment.<sup>108</sup> The court concluded that

[w]ithout a recital of these basic details, there is insufficient information to allow a fact finder to determine what the standard of care is and whether Dr. Heston met the standard. Under the circumstances, Dr. Heston's statement that he complied with the applicable standard of care is no more than the conclusion of an interested witness and does not support the summary judgment.<sup>109</sup>

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103. See *Guthrie*, 934 S.W.2d at 825.

104. TEX. R. CIV. EVID. 703 (emphasis added).

105. 954 S.W.2d 119 (Tex. App.—San Antonio 1997, no pet. h.).

106. *Id.* at 122.

107. See *id.*

108. See *id.*

109. *Id.*

#### IV. CONCLUSION

As has been the case in recent years, evidentiary developments have centered around expert testimony. Perhaps reflecting the increasing complexity of trial practices, these decisions teach that the courts are exercising an ever increasing gatekeeper role and that the unwary practitioner must pay careful attention to the sufficiency and reliability of the expert's testimony.