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CIVIL EVIDENCE

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I. INTRODUCTION

THE most significant cases in the area of Civil Evidence during the Survey period involved issues of privileges and expert testimony. The major development in expert testimony was the amendment to the Federal Rules of Evidence. In order to be timely, the authors included the discussion of those changes in last year's Survey, so they are only briefly discussed in this article.[1] Other than these changes to the federal rules, federal courts were rather quiet on the issue of expert testimony. In the one case of note, Judge Jack of the Southern District of Texas provided a thoughtful and well-reasoned example of when it is proper to apply the *Daubert* factors to determine reliability. State courts provided some guidance on the issue of expert testimony during this Survey period, but they also provided some examples of very poor reasoning that resulted in substantial injustice. A few state judges sometimes fail to remember that Rule 702 and the court's gatekeeping function under *Robinson* require a flexible analysis tied to the facts of the case and that cross-examination remains the best way to test shaky expert testimony.

Privileges is another area of evidence in which there are significant decisions this Survey period. The San Antonio Court of Appeals held that a defendant in a personal injury case may hire the plaintiff's doctor to testify against the plaintiff, despite such arrangements being contrary to the policies behind Rule 509.[2] The Texas Supreme Court supplied guidance on the analysis of medical peer review privilege,[3] and Judge Buchmeyer of the Northern District of Texas recognized a father-son privilege in Texas, but only if the son is a CPA.[4] Finally, the Beaumont Court of

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1. For a more detailed discussion of the changes to the Federal Rules of Evidence, see Michael W. Shore & Kenneth E. Shore, *Civil Evidence*, 54 SMU L. REV. 1167, 1168-76 (2001).

2. Rios v. Tex. Dep't of Mental Health & Mental Retardation, 58 S.W.3d 167 (Tex. App.—San Antonio 2001, no pet.).

3. *In re* Univ. of Tex. Health Ctr., 335 S.W.3d 822 (Tex. 2000).

4. Nat'l Converting & Fulfillment Corp. v. Bankers Trust Corp., 134 F. Supp. 2d 804 (N.D. Tex. 2001).

Appeals held that an assignment of a *Stowers* claim does not automatically waive the attorney-client privilege.[5]

There are two cases of interest in other areas of evidence. In the first of these cases, the First District Court of Appeals in Houston explains that a document clearly created for the litigation in response to an attorney's request cannot fall under the Business Records exception to the hearsay rule.[6] In the second, the Tyler Court of Appeals, in an opinion in which the court was obviously looking for any possible way to overrule the appellant's point of error, reveals the panel's outcome-oriented approach to jurisprudence.[7]

This article cannot encompass every development in Civil Evidence, nor can it include every interesting case. The authors hope, however, that it provides some guidance as to the significant developments and trends in this area of the law—with particular regard to the rules governing expert testimony and privileges.

II. EXPERT TESTIMONY

A. Federal Cases

Beginning with a brief summary of the changes to the Federal Rules of Evidence related to expert testimony, Rule 701 now states that if a witness is not testifying as an expert, his opinion cannot be "based on scientific, technical, or other specialized knowledge within the scope of Rule 702."[8] The Advisory Committee Note explains that the change was made "to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing."[9] Rule 702 was also amended. It now states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact issue, a witness qualified to testify as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[10]

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5. *In re* Cooper, 47 S.W.3d 206 (Tex. App.—Beaumont 2001, orig. proceeding).

6. Freeman v. Am. Motorists Ins. Co., 53 S.W.3d 710 (Tex. App.—Houston [1st Dist.] 2001, no pet. h.).

7. Lively v. Blackwell, 51 S.W.3d 637 (Tex. App.—Tyler 2001, pet. denied).

8. The former version of Rule 701 stated:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

FED. R. EVID. 701 (amended Dec. 1, 2000).

9. FED. R. EVID. 701 advisory committee notes.

10. The former version of Rule 702 stated:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact issue, a witness quali-

The Advisory Committee Notes state that "this amendment is not intended to provide an excuse for an automatic challenge to the testimony of every expert."[11] The committee also explained that it was not attempting to set forth procedural requirements for *Daubert* proceedings and emphasized that trial courts have broad discretion in fashioning their own proceedings.[12]

There were few federal cases of note during the Survey period, and there are no reported cases in which a federal court identified any significant changes in the analysis of the admissibility of expert testimony due to the changes in Rule 702. This reinforces the view that the changes were merely a codification of the *Daubert/Kumho Tire* relevance and reliability analysis.

The only federal case on expert testimony discussed in this year's Survey is *Brumley v. Pfizer, Inc.*[13] In *Brumley*, the plaintiffs, who were the wrongful death beneficiaries of Earnest Brumley, sued Pfizer after Brumley died of heart complications two hours after taking Viagra and having sex. In order to prove causation, the plaintiffs sought to introduce the testimony of Dr. Gerald Polukoff who proposed to testify that Viagra causes "a marked increase in sympathetic activation," which is "associated with myocardial ischemia, myocardial infarction, malignant and fatal arrhythmias and sudden death."[14] Therefore, in Polukoff's opinion, "Mr. Brumley would have survived sex were it not for his ingestion of Viagra on the night of his death."[15]

Pfizer challenged Polukoff's opinion as unreliable under *Daubert*. At his deposition, Polukoff testified that he relied on a report published by Brady Phillips in the journal *Circulation* that demonstrated that Viagra caused catecholamine levels to rise. Catechlomines, according to Polukoff, are "clearly known to alter cardiovascular outcome . . . adversely."[16] But the rise in catecholamine levels indicated in the study

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fied to testify as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

FED. R. EVID. 702 (amended Dec. 1, 2000).

11. FED. R. EVID. 702 (2000 Committee Notes) (citing Kuhmo Tire Co. v. Carmichael, 526 U.S. 137, 153 (1999) (noting that the trial court has discretion "both to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual and more complex cases where causes for questioning the expert's reliability arises")).

12. *See id.*; *see also Kuhmo Tire*, 526 U.S. at 152 ("That [abuse of discretion standard] applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion."); Michael W. Shore, *Civil Evidence*, 53 SMU L. REV. 699, 701-03 (2000) ("As long as the trial court uses a method that is not arbitrary or capricious in reviewing the expert testimony for relevancy and reliability, the trial court's decision on admissibility should stand on appeal."); Daniel J. Capra, *The Daubert Puzzle*, 32 GA. L. REV. 699, 766 (1998) ("Trial courts should be allowed substantial discretion in dealing with *Daubert* questions; any attempt to codify procedures will likely give rise to unnecessary changes in practice and create difficult question for appellate review.").

13. 200 F.R.D. 596 (S.D. Tex. 2001).

14. *Id.* at 598.

15. *Id.*

16. *Id.* at 599.

were no higher than that experienced by anyone engaged in physical activity and there were no studies to which Polukoff could point that discussed what level of catecholamines is normal or abnormal. The study concluded by saying that "it is reasonable to assume, first, that increased sympathetic drive may contribute to the initiation of cardiovascular events, and second, that cardiovascular events, particularly arrhythmias and myocardial infarction, that occur in the setting of a high level of sympathetic activation are likely to have poorer outcomes."[17] But the report did not conclude that the increase catecholamine levels caused by taking Viagra actually have a detrimental effect on diseased cardiovascular systems. It merely suggested that this is an important area for future study.

In its opinion, the court first noted that while *Daubert*'s four-part test "is not the only means to examine expert testimony,"[18] it was appropriate to use in evaluating Polukoff's opinions. Polukoff's opinion, however, did not make it past even the first *Daubert* factor—"whether the theory or technique in question can be and has been tested."[19] The testability factor is really in two parts: (1) can the theory be tested, and (2) has it actually been tested. As to the first part, testability, this "is a threshold requirement aimed at excluding pseudoscience from the courtroom."[20] If a theory is not testable, it is not falsifiable "and of no practical use in the courtroom."[21] The court concluded that Polukoff's theory was testable, but the analysis of this *Daubert* factor could not end simply because it was determined that the theory was testable. "[T]o stop the analysis at testability would allow in any theory, even one universally recognized as wrong, merely because it is testable."[22]

While Polukoff's theory was testable, no one had actually tested it. The plaintiffs, therefore, argued that Polukoff's theory was a valid extrapolation of the data in the Phillips' report. The court, however, noted that while the Phillips report demonstrated that Viagra raised the levels of catecholamines, there was no evidence that the increased level of catecholamines were unsafe. Extrapolation was, therefore, not possible without some other evidence to fill this "analytical gap."[23] The court explained that a study cannot be used "to support a conclusion that the study itself does not make,"[24] and the "strong temporal relationship between Mr. Brumley's first use of Viagra and his sudden death, without more, does not make Dr. Polukoff's opinion any more reliable."[25] The

17. *Id.* at 599.
18. *Brumley*, 200 F.R.D. at 601.
19. *Id.*
20. *Id.* at 602.
21. *Id.* (citing KENNETH R. FOSTER & PETER W. HUBER, JUDGING SCIENCE, SCIENTIFIC KNOWLEDGE AND THE FEDERAL COURTS ch. 3 (MIT Press 1997)).
22. *Id.*
23. *Brumley*, 200 F.R.D. at 602 (citing Moore v. Ashland Chem., Inc., 151 F.3d 269, 277 (5th Cir. 1998)).
24. *Id.* (citing Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997) and *Moore*, 151 F.3d at 278-79).
25. *Id.* (citing Curtis v. M&S Petroleum, Inc., 174 F.3d 661, 670 (5th Cir. 1999)).

court, therefore, concluded that Polukoff's opinion "simply is not supported by any real world observations or experimental scrutiny" and was, therefore, not admissible.[26]

While the ultimate decision to exclude Polukoff's testimony was correct, Judge Jack's analysis was wrong in one important aspect. It is possible to extrapolate the findings from a study to support an expert's opinion,[27] but there must be some other evidence to fill any "analytical gaps" between the two. In *Brumley*, that other evidence was missing. Polukoff could not state that Viagra raised the level of catecholam to a level that was abnormal. Proponents of expert testimony must be prepared to present to the court a logically sound basis for the expert's opinions, filling in all analytical gaps. And in cases where scientific testimony is needed for causation, and the *Daubert* factors are thus well-suited for analyzing the testimony, the proponent of the expert testimony should have peer-reviewed studies supporting each step of the analysis.

B. Texas Cases

Federal Rule 702 is now slightly different from Texas Rule of Evidence 702, but the analysis under the rules remains similar. Texas Rule of Evidence 702 states: "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." Two years after the United States Supreme Court decided *Daubert*, the Texas Supreme Court in *E.I. du Pont de Nemours & Co. v. Robinson*[28] adopted *Daubert*'s reliability and relevancy requirements for determining the admissibility of scientific expert testimony under Texas Rule of Evidence 702. In *Robinson*, the Texas Supreme Court listed six factors that trial courts should consider when determining the admissibility of expert testimony:

(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.[29]

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26. *Id.*
27. Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997) ("Trained experts commonly extrapolate from existing data.").
28. 923 S.W.2d 549 (Tex. 1995).
29. *Id.* at 557.

The court noted that a particular case may require a trial court to consider other factors to determine scientific reliability.[30] Thus, *Robinson*'s factors are not exclusive.

In *Gammill v. Jack Williams Chevrolet, Inc.*,[31] the Texas Supreme Court held that "Rule 702's fundamental requirements of reliability and relevance are applicable to all expert testimony offered under that rule"—not just scientific expert testimony.[32] The difference between scientific and non-scientific evidence is that the former is based upon scientific principles that can be readily tested under the *Robinson* factors, while the latter is based upon technical or other specialized knowledge acquired through experience or observation.[33]

Under *Gammill*, when a party seeks to introduce non-scientific expert testimony, the test for admissibility is whether "there is simply too great an analytical gap between the data and the opinion offered."[34] In applying this test, Texas courts have conducted detailed analysis of the basis for the expert's opinions and how the expert's conclusions reasonably relate to the facts of the case.

A. Expert Testimony Generally

Politically-minded trial and appellate courts in Texas are often creative in the ways in which they deny injured Texans their rights through the exclusion of expert testimony. An example of this sad fact is found in *Pack v. Crossroads, Inc.*,[35] in which the Fort Worth Court of Appeals upheld the trial court's exclusion of *facts* from a Texas Department of Human Services (TDHS) investigation on the grounds that these *facts* somehow constituted expert opinion testimony by a lay witness.[36]

Six months after undergoing hip surgery, James Watson was admitted to Watson Memorial Nursing Home. The opinion does not describe Watson's condition when he entered the nursing home other than saying that he had "health problems."[37] It does, however, describe his condition thirty-seven days later when Watson was transferred to Harris Methodist Hospital: "There, doctors noted Watson's physical condition: tongue coated with a thick membrane; dry mucous membranes; fecal matter on perineum and legs; cloudy urine; gangrene on the right foot; and decubiti on the heels of his feet and his right hip."[38] Watson died a week after he

30. *Id.*
31. 972 S.W.2d 713 (Tex. 1998).
32. *Id.* at 726.
33. *See id.* at 727; *see also* State Farm Lloyds v. Mireles, 63 S.W.3d 491, 497-98 (Tex. App.—San Antonio 2001, no pet. h.) (holding the *Robinson* factors inapplicable to a foundation engineer's testimony); Ford Motor Co. v. Aguiniga, 9 S.W.3d 252, 263 (Tex. App.—San Antonio 1999, pet. denied) (holding the *Robinson* factors inapplicable to mechanical engineer's testimony).
34. *Gammill*, 972 S.W.2d at 727.
35. 53 S.W.3d 492 (Tex. App. — Fort Worth 2001, pet. denied).
36. *See id.* at 500.
37. *Id.* at 498.
38. *Id.*

was admitted to the hospital.

The plaintiffs in the wrongful death and survival action that followed sought to introduce TDHS records from investigations of Watson Memorial from 1992 to 1995. In describing these records, the court simply stated that they "reflected certain conditions of care of several residents prior to and contemporaneous with Watson's residency at Watson Memorial."[39] The documents contained examples of patients who suffered conditions similar to Watson's. Plaintiffs argued therefore, that Watson Memorial was aware that conditions in the nursing home could lead to injuries like those suffered by Watson. Watson Memorial objected to the documents as irrelevant and unduly prejudicial under Rules 401 and 403. The trial court sustained the objection, and the plaintiffs were not allowed to present the evidence at trial.

On appeal, the Fort Worth Court of Appeals in an opinion by Justice Sam Day, upheld the trial court's ruling. The appellate court's reasoning is dubious at best. The court correctly noted that expert testimony is generally required in a medical malpractice case to prove the standard of care, breach of that standard, and causation.[40] The court then noted that "[l]ay witness testimony about negligence and proximate cause has no probative force in a medical malpractice case"[41] and then held that since the TDHS reports did not constitute expert testimony, they could not be used "to prove that Watson Memorial could foresee that its omission would injure Watson."[42] There is no indication in the court's opinion that the reports contained any lay opinions as to negligence and proximate cause, but merely descriptions of the conditions in the nursing home and injuries to other patients. These are *facts* that the TDHS is required by law to report, and licensing authorities rely on these factual investigations in deciding whether nursing homes will be allowed to continue operating. These admissible facts can and should be introduced into evidence along with appropriate expert opinion testimony regarding their significance.[43]

The court also held that due to the "slight probative nature of these documents, their admission would have been overly prejudicial" and exclusion was appropriate under Rule 403.[44] How could the fact that other patients in the same nursing home suffered similar injuries have only a "slight probative nature"? Furthermore, what is "overly prejudicial"? Any advocate who introduces evidence in support of his or her client's

39. *Id.* at 499-500.

40. *Id.* at 500 (citing Hood v. Phillips, 554 S.W.2d 160, 165-66 (Tex. 1977); White v. Wah, 789 S.W.2d 312, 315 (Tex. App. — Houston [1st Dist.] 1990, no writ); Shook v. Herman, 759 S.W.2d 743, 747 (Tex. App. — Dallas 1988, writ denied)).

41. *Id.* (citing Flores v. Ctr. For Spinal Evaluation & Rehab., 865 S.W.2d 261, 264 (Tex. App.—Amarillo 1993, no writ); Tilotta v. Goodall, 752 S.W.2d 160, 163 (Tex. App.—Houston [1st Dist.] 1988, writ denied)).

42. *Id.*

43. The defendant did not make a hearsay objection to the TDHS reports, and the court did not discuss the hearsay. These records would presumably fall under the public records and reports exception to the hearsay rule found in Texas Rule of Evidence 803(8).

44. *Pack*, 53 S.W.3d at 500.

case hopes that the evidence is "overly prejudicial." The test under Rule 403 is whether the prejudice is "unfair."[45] Unfair prejudice means that it tends to persuade the jury to decide the case on an emotional or irrational basis.[46] When a court excludes evidence on Rule 403 grounds, it should articulate the danger the court sees of the jury misusing the evidence. Courts should not simply note that the evidence is extremely prejudicial and exclude it without explaining why the prejudice is "unfair." Rule 403 is not an "exclude the best evidence" rule.

B. EXPERT QUALIFICATIONS

The party offering expert testimony is required to establish that the expert has knowledge, skill, experience, training, or education regarding the specific issue before the court.[47] The appellate courts will not disturb the trial court's determination of whether an expert is qualified to testify unless the trial court abuses its discretion.[48] Several cases during the Survey period discussed expert qualifications and reaffirmed that this too is a flexible analysis focusing on the "fit" between the subject matter about which the expert proposes to testify and the expert's special knowledge, training, or experience in that specific subject matter — not necessarily the expert's occupation, title, or level of education.[49]

In *Schindler Elevator Corp. v. Anderson*,[50] the Fourteenth Court of Appeals held that the plaintiffs' expert was qualified to testify about the alleged escalator design defect, a safer alternative design, and causation despite not having an engineering degree or having ever designed or maintained an escalator.[51] *Anderson* involved an unusually gruesome injury to a four-year-old boy, Scooter Anderson. Scooter was with his father at his father's downtown Houston office. As they were riding down the elevator together, Scooter's foot got caught between a widening gap between the escalator step and the side skirt. As the elevator continued

45. *See* COCHRAN, TEXAS RULE OF EVIDENCE HANDBOOK (4th ed. 2001), at 215-16; Dollar v. Long Mfg., N.C., Inc., 561 F.2d 613, 618 (5th Cir. 1977) (stating that "unfair prejudice" does not mean evidence that is merely detrimental to the opposing side's case).

46. *See* Cochran, *supra*; McDonald v. State, 829 S.W.2d 378, 380 (Tex. App. — Texarkana 1992, no writ) (defining unfair prejudice as "an undue tendency to suggest decision on an improper basis, commonly an emotional one.").

47. *See* Broders v. Heise, 924 S.W.2d 148, 153 (Tex. 1996).

48. United Blood Servs. v. Longoria, 938 S.W.2d 29, 30-31 (Tex. 1997).

49. *Broders*, 924 S.W.2d at 153; *see also* Spivey v. James,1 S.W.3d 380 (Tex. App.—Texarkana 1999, pet. denied) (concluding that the trial court had abused its discretion in excluding an expert's testimony based upon the fact that he did not practice in the same field as the defendant without considering the expert's other background, training, and experience); Blan v. Ali, 7 S.W.3d 741 (Tex. . App.—Houston [14th Dist.] 1999, no pet.) (holding that a trial court abused its discretion when it excluded the affidavit of the plaintiff's neurology expert after the trial court concluded that the neurologist was not qualified to testify as the standard of care for a cardiologist or an emergency room physician when, in fact, the expert was offering an opinion as to the standard of care that would apply to any physician treating a patient with the plaintiff's particular condition—regardless of the physician's particular area of expertise).

50. No. 14-98-01286-CV, 2001 WL 931177 (Tex. App.—Houston [14th Dist.] Aug. 16, 2001, no pet.).

51. *Id.* at *5.

downward, Scooter's shoe, the skin on his foot, and three toes were torn off. The Andersons sued Schindler, which was under contract to maintain the escalator. The jury found Schindler negligent, grossly negligent, and strictly liable for the escalator's design and marketing defects and awarded substantial damages.[52]

At trial the Andersons introduced the expert testimony of Carl White. White is not an engineer, or for that matter, a college graduate. He, however, completed a one-year course on escalator construction, maintenance, and mechanics in 1957, is a licensed master in escalator installation and maintenance, and has forty years of experience working in the industry – mostly as an installer and consultant. He is also a member of numerous industry organizations and has presented seventeen speeches and seven industry papers on escalator safety. Finally, he holds two patents on a safety device called a "side-step safety plate."[53] White testified about the escalator's design defects, proper escalator maintenance, risk reduction, and causation.[54]

Schindler attacked White's testimony on three grounds: (1) he is not an engineer; (2) he has never personally maintained an escalator or installed or maintained his safety device; and (3) he is not trained in accident reconstruction or causation analysis.[55] The court held that White's extensive experience in the industry, his license, and his knowledge on safety issues qualified him to testify.[56] The court gave several reasons for rejecting Schindler's arguments. First, "a witness need not have to have a college degree to qualify as an expert."[57] Second, an expert need not be a designer to testify about safety.[58] As in this case, safety issues are often related to proper maintenance as well as design.[59] Third, even though White had never maintained an escalator, it was sufficient that he had a master license to do so.[60] Finally, there is no requirement that an expert have any specific training in accident reconstruction to testify about causation.[61]

In another case, *Keeton v. Carrasco*,[62] the San Antonio Court of Appeals reminded us that in medical malpractice cases, an expert need not be in the same exact field or specialty as the defendant to be qualified to testify. In *Keeton*, the plaintiff had a spinal cord stimulator implanted. After the procedure, the plaintiff developed severe pain and inflamma-

52. *Id.* at *3.
53. *Id.* at *4.
54. *Id.*
55. *Schindler Elevator*, 2001 WL 931177 at *5.
56. *Id.*
57. *Id.*; *see also* Glasscock v. Income Prop. Serv., 888 S.W.2d 176, 180 (Tex. App.—Houston [1st Dist.] 1994, writ dism'd by agr.).
58. *Anderson*, 2001 WL 931177 at *5.
59. *Id.* In this case, the plaintiffs alleged that due to improper maintenance, the gap on either side of the escalator step had been allowed to widen to 1/4 inch, at least double the 1/16 to 1/8 inch that it was designed to have. *Id.* at *2.
60. *Id.* at *5.
61. *Id.*
62. 53 S.W.3d 13 (Tex. App.—San Antonio 2001, pet. denied)

tion in his back and hand. The plaintiff was first misdiagnosed as having an allergic reaction to the material in the stimulator. However, when the wound on his back burst open, it was discovered that he had a staph infection and that the pain in his hand was due to a migratory embolus resulting from the implantation of the stimulator. As a result, the plaintiff sued the two orthopedic surgeons who had treated him and failed to detect the infection.

In opposition to a no-evidence summary judgment motion, the plaintiff submitted the affidavit of his expert, Dr. Greenspan. Dr. Greenspan is not an orthopedic surgeon, but he focuses his practice on "physical medicine, rehabilitation, and pain management."[63] He stated in his affidavit that the field of physical medicine includes the treatment of back pain and that he often works with orthopedic surgeons who implant spinal cord simulators on matters of post-operative care. He further stated that "[t]he duty to recognize and aggressively treat post-operative infections is not peculiar to any specialty, but is common to all physicians."[64] Despite this testimony, the trial court struck Dr. Greenspan's affidavit based, in part, on the defendant's argument that he was not qualified to testify as to the standard of care for an orthopedic surgeon.[65]

The appellate court reversed, holding that the trial court abused its discretion in striking the affidavit.[66] The court, citing *Broders v. Heise*,[67] reaffirmed that it is not the expert's particular field of medicine that is the focus of the analysis—it is "the condition underlying the claim and the standard of care the defendant doctor is required to exercise with regard to *that condition*."[68] In this case, the condition was a staph infection resulting from the implantation of the stimulator. Dr. Greenspan had often consulted with physicians who implant spinal cord simulators and had been involved in their post-operative treatment. He was familiar with the standard of care and that standard required close monitoring for post-operative infection. Therefore, Dr. Greenspan was qualified to testify, and the trial court abused its discretion in striking his affidavit.[69]

The final case discussing qualification of experts is *Morton Interna-*

63. *Id.* at 22.

64. *Id.*

65. *Id.* at 22-23.

66. *Id.* at 26.

67. 924 S.W.2d at 151-53 (holding that the party offering the expert's testimony must show that the expert has expertise, training, education or knowledge "regarding the specific issue before the court which would qualify the expert to give an opinion on that particular subject").

68. *Keeton*, 53 S.W.3d at 25 (citing *Blan*, 7 S.W.3d at 746).

69. *Id.* at 26; *see* Roberts v. Williamson, 52 S.W.3d 343, 348 (Tex. App.—Texarkana 2001, pet. granted) (rejecting the defendant physician's argument that a pediatrician was not qualified to testify regarding a newborn infants neurological injuries because the pediatrician was not a board certified neurologist). *But see* Dukatt v. United States, No. EP-99-CA-339-DB, 2000 WL 33348770 (W.D. Tex. Dec. 8, 2000) (excluding the testimony of a doctor specializing pain management who proposed to testify as to the standard of care provided by an orthopedic surgeon during surgery).

tional v. Gillespie.[70] *Morton* teaches that lawyers can avoid having their experts stricken by limiting their testimony to their area of "scientific, technical, or other area of specialized knowledge."[71] *Morton* was an appeal from a judgment for damages based on severe facial injuries Jacqueline Gillespie sustained when the airbag on her Dodge minivan deployed and struck her face. At trial, the plaintiffs introduced the testimony of Dr. David Renfroe, a mechanical engineer and professor of vehicular dynamics at the University of Arkansas. Before Dr. Renfroe testified, the defendant's attorney took him on *voir dire* and demonstrated that Dr. Renfroe had very little specialized knowledge related to airbags. Based on the testimony elicited during that *voir dire* examination, the defendant moved to strike Dr. Renfroe's testimony. The trial court refused, and the appellate court affirmed that decision.

In its analysis of Dr. Refroe's qualifications and his testimony, the Texarkana Court of Appeals noted that while Dr. Renfroe did not meet the requirements under Rule 702 to testify about airbag technology, he "never exceeded the scope of the testimony for which he was offered as an expert."[72] Other experts in the case, both for the plaintiff and defendant, had testified that the airbag at issue was designed to fully inflate within 50 milliseconds. Dr. Renfroe's testimony, based on his specialized skill and training in vehicular dynamics, was simply offered to prove that it was impossible for Mrs. Gillespie to reach the "knock-out zone" within that short time, and thus, the airbag must have had a delayed deployment, which caused Mrs. Gillespie's injuries.[73] The court, therefore, concluded "that based on Dr. Renfroe's education and experience, he was qualified to give expert opinion testimony to these aspects of airbag deployment and delayed deployment as it affected Mrs. Gillespie's movement."[74]

C. Relevance and Reliability

In *Jarrell v. Park Cities Carpet & Upholstery Cleaning, Inc.*,[75] the Dallas Court of Appeals held that the trial court had abused its discretion in excluding the plaintiff's causation experts. The plaintiff in *Jarrell* claimed that she suffered airway and nervous system disorders after Park Cities cleaned cigarette smoke out of the offices where she worked. Park Cities had used two chemicals called Unsmoke Thermo 55 and Unsmoke 9-D-9. Both products had safety sheets warning that early reoccupancy could cause eye, throat, and respiratory irritation and that acute exposure could cause headaches.[76]

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70. 39 S.W.3d 651 (Tex. App.—Texarkana 2001, pet. denied).
71. Tex. R. Evid. 702.
72. *Morton*, 39 S.W.3d at 655.
73. *Id.* at 656.
74. *Id.*
75. 53 S.W.3d 901 (Tex App.—Dallas 2001, pet. filed)
76. *Id.* at 902 n.3.

To prove causation, the plaintiff proffered several epidemiological studies dealing with the components of Thermo 55 and 9-D-9, as well as the testimony of a toxicologist. Park Cities did not contest the validity of the studies. Rather, Park Cities argued that "no epidemiological study is admissible . . . unless it specifically names Thermo 55 and 9-D-9, the two registered trademarks of the solutions at issue."[77] The trial court agreed and excluded the studies and the testimony of the toxicologist as unreliable.

The Dallas Court of Appeals wisely reversed, stating: "A manufacturer could make slight variations in chemical solutions, apply different trade names, and then assert there was no study on the variant solution. Such an application reduces the *Robinson/Havner* analysis to a matter of semantics, not science."[78]

There were also some unwise decisions during the Survey period. One such opinion was the San Antonio Court of Appeals' opinion in *Helm v. Swan*.[79] In *Helm*, the court held that the plaintiffs' experts' opinions were not reliable even though they were testifying to the rather common sense notion that withholding the standard treatment for a patient's infection for thirteen hours can cause the results of the infection to be more severe that they otherwise would have been. This case demonstrates that lawyers must know the difference between expert testimony based on clinical experience and that based on scientific evidence and know how to get both admitted. It also shows once again the injustice that can result when courts cling to the *Robinson* factors to analyze expert testimony even when use of those factors may not be appropriate.

A review of the facts of *Helm* shows the terrible injustice that the patient's family suffered at the hands of the court. On May 12, 1995, Dr. Delbert Chumley performed an "endoscopic retrograde cholangiopancreatography ('ERCP') with sphincter of Oddi manometry and sphincterotomy" on Thomas Helm.[80] Afterwards, Chumley admitted Helm to Methodist Hospital of San Antonio for observation and prescribed oral pain medication (Darvocet) and medication for nausea (Phenergan) to be given as needed. Shortly after admission, Helm began showing signs that something was wrong. At 2:30 p.m., Thomas ate two trays of food and vomited. He also complained of pain. In response, the nurses administered the Darvocet and Phenergan, but the symptoms continued. At 5:00 p.m., the nurses phoned Dr. Thomas Swan, who was on call for Chumley, and informed him that Thomas was continuing to have pain and nausea despite the medications.

Despite the fact that Helm was admitted to the hospital to be monitored for signs of pancreatitis, a well-known potential complication of ERCP, Swan simply prescribed an even stronger pain medicine,

77. *Id.* at 903.
78. *Id.*
79. 61 S.W.3d 493 (Tex. App.—San Antonio 2001, pet. denied).
80. *Id.* at 494.

Demerol, without visiting the patient. The nurses administered the Demerol at 5:00 p.m. and 8:45 p.m. At 9:27 p.m., Helm again complained of abdominal pain and vomited, and continued to suffer pain and vomiting over the next *twelve hours*. The nurses, however, did not notify the doctors of his symptoms again until 8:00 a.m. By that time, Helm had become severely hypovolemic and developed necrotizing pancreatitis. And the necrotizing pancreatitis had progressed to such a state that permanent damage to his body was assured.

When Dr. Swan learned of his patient's condition at 8 a.m., he ordered laboratory tests and began IV fluid resuscitation. According to the medical literature cited in the case, fluid resuscitation in patients suffering from pancreatitis is "an essential component of treatment" to correct "intervascular volume loss."[81] It also helps prevent "hypotension and renal insufficiency," protect the "microcirculation of the pancreas," and counteract "shock and renal failure."[82] Yet Thomas Helm was denied this standard treatment for thirteen hours. As a result, Thomas Helm suffered "renal failure, adult respiratory distress syndrome, multiple infections, many surgical interventions, amputation of the fingers on his right hand, tracheotomy, splenectomy, partial pancreatectomy, enterocutaneous fistulas, acute myocardial infarction secondary to thrombosis, and multiple small bowel fistulas."[83]

In the subsequent lawsuit against Chumley, Swan, and the hospital, the Helm family argued that the thirteen hour delay in instituting aggressive fluid therapy substantially increased the severity of Thomas Helm's complications. In support of their claim, they sought to introduce the opinions of two medical experts, Dr. Chris Yiantsou and Dr. Myles Keroack, who proposed to testify that the hospital staff's failure to notify Swan of Thomas Helm's persistent pain fell below the standard of care and caused the complications. In addition, Dr. Keroack criticized Swan for failing to suspect the possibility of pancreatitis when the nurses first contacted him at 5:00 p.m. and for failing to aggressively institute fluid resuscitation at that time.

The defendants filed motions to exclude the testimony of both of these experts as unreliable. They also filed motions for summary judgment claiming that the Helms did not have any expert testimony to prove breach of the standard of care or causation if Yiantsou's and Keroack's testimony were stricken. The trial court struck the expert witnesses and granted the summary judgments.

The appellate court upheld the trial court's decision on three grounds. First, the court found that since the experts could not rule out the possibility that Helm would have developed his complications even if the defendants had treated him timely, the experts' opinions were merely that

81. *Id.* at 496.
82. *Id.*
83. *Id.* at 495.

Helm "was deprived his only chance" to avoid his complications.[84] Since Texas courts do not recognize the lost chance doctrine, the testimony was not relevant or reliable. Second, the court held that the testimony that prompt fluid resuscitation would have likely prevented the complications was not supported by the medical literature. Finally, the court noted that the plaintiffs' expert testimony was not admissible because the experts were not able to exclude the possibility that even with prompt fluid resuscitation, Thomas Helm would have suffered the same complications. None of these holdings survive scrutiny under the law or common sense.

Since the trial court initially characterized the plaintiffs' experts' testimony as merely supportive of a "lost chance" theory, it held that it was not relevant. In *Kramer v. Lewisville Memorial Hospital*,[85] the Texas Supreme Court held that the Wrongful Death Act and the Survival Statute do not allow recovery for lost chance of survival or cure in a medical malpractice action.[86] In doing so, the court recognized that "reasonable medical probability" requires a plaintiff to show that it is "more likely than not" that the ultimate harm or condition resulted from the defendant's negligence.[87] The court stated that "the ultimate standard of proof on the causation issue is whether, by a preponderance of the evidence the negligent act or omission is shown to be a substantial factor in bringing about the harm and without which the harm would not have occurred."[88] The Texas Supreme Court then concluded that "[t]he effect of these standards is to bar recovery where the defendant's negligence deprived the tort victim of only a 50% or less chance of avoiding the ultimate harm."[89] This is merely the common sense application of traditional causation principles.

Kramer was clearly not applicable in *Helm*. While both plaintiffs' experts made statements that the failure to timely treat Helm deprived him of his "only chance" to avoid the complications and that some patients will develop severe necrotizing pancreatitis no matter how quickly they are diagnosed and treated, they both agreed that early hydration would have altered Thomas's course with a "reasonable degree of medical probability."[90] Dr. Yiantsou also testified that if the pancreatitis had been diagnosed within 1-2 hours after the ERCP, Thomas Helm would have had a "*sixty to seventy percent* chance of responding."[91] The plaintiffs' other expert, Dr. Keroak, agreed, saying that if Thomas Helm would have received "timely, aggressive fluid therapy in reasonable medical probability he would have done much better."[92]

84. *Helm*, 61 S.W.3d at 497.
85. 858 S.W.2d 397 (Tex. 1993).
86. *Id.* at 398.
87. *Id.* at 400.
88. *Id.*
89. *Id.*
90. *Helm*, 61 S.W.3d at 497.
91. *Id.* (emphasis added).
92. *Id.* at 496.

If all of the experts agreed that aggressive fluid therapy was the standard treatment in this case, and the plaintiffs' experts testified that, based on their clinical experience, there was a greater than 50 percent chance that Thomas Helm would have done much better had he been treated according to the standard of care, that should have ended the Rule 702 analysis and allowed the Helm family their day in court.[93] Instead, the appellate court next misapplied the *Robinson* factors to hold that the plaintiffs' experts' opinions were not supported by the medical literature. While the court noted that "[t]he medical literature supports, *and all of the experts agree,* that fluid resuscitation is a support measure that should be given to patients with pancreatitis,"[94] there were no studies indicating "that an eight or thirteen hour delay in giving fluid therapy prevents or lessens the complications of severe necrotizing pancreatitis."[95] The court also noted that "since *all patients* are given the support measure when pancreatitis is diagnosed," and "no medical professional would intentionally delay providing the fluid therapy" to "test the effect of the delay," there is no support for the proposition that a thirteen hour delay in giving this treatment could increase the severity of the complications.[96]

But a trial court's analysis is not so limited under *Robinson* and *Gam-*

93. It is well-established that a physician's testimony on causation can be based upon his clinical experience. *See, e.g.*, McCullock v. H.B. Fuller Co., 61 F.3d 1038, 1043 (2d Cir. 1995) (noting that a doctor was qualified under *Daubert* to give expert opinion on cause of throat ailment based on experience as medical doctor and certification in field of otolaryngology); Westberry v. Gislaved Gummi AB, 178 F.3d 257, 263-266 (4th Cir. 1999) (holding that a physician's testimony on cause of plaintiff's sinus problem, which was based on differential diagnosis and temporal relationship between events, was admissible under *Daubert*); Moore v. Ashland Chem. Inc., 126 F.3d 679, 703 (5th Cir. 1997) (noting in the context of a medical opinion based on clinical evidence that "simply because a non-scientific expert's testimony touches on evidence that theoretically could be tested by Newtonian science, *Daubert* should not be interpreted as to permit an advocate to put his or her opponent to the burden of establishing hard scientific reliability-validity on demand") (quoting 2 GRAHM, HANDBOOK OF FEDERAL EVIDENCE § 702.5, at 79 (4th ed. 1996)); Carroll v. Morgan, 17 F.3d 787, 790 (5th Cir. 1994) (holding that a doctor was qualified under *Daubert* to give an expert opinion on standard of medical care based on thirty years of experience as a practicing, board-certified cardiologist and his review of medical records); Laski v. Bellwood, No. 96-2188, 1997 WL 764416, at *3 (6th Cir. Nov. 26, 1997) (holding that the district court erred under abuse of discretion standard by not admitting opinion testimony from treating physician on issue of causation); Cantrell v. GAF Corp., 999 F.2d 1007, 1014 (6th Cir. 1993) ("Nothing . . . prohibits an expert witness from testifying to confirmatory data, gained through his own clinical experience, on the origin of a disease or the consequences of exposure to certain conditions"); Hopkins v. Dow Corning Corp., 33 F.3d 1116, 1125 (9th Cir. 1994) (holding that the district court properly admitted expert testimony under *Daubert* that was based on, among other things, the doctor's clinical experience and review of the medical records); Becker v. Nat'l Health Prods., Inc., 896 F. Supp. 100 (N.D.N.Y. 1995) (admitting one expert's opinion based, in part, on over 30 years experience as a physician, and a second expert's opinion based, in part, on "clinical experience with 10,000 patients, solely in gastroenterology"). While many of these opinions interpret the pre-December 1, 2000 version Federal Rule of Evidence 702, that rule is the same as Texas Rule of Evidence 702, and a court's gatekeeper functions under *Daubert* and *Robinson/Gammill* are the same.

94. *Helm*, 61 S.W.3d at 497 (emphasis added).

95. *Id.*

96. *Id.* (emphasis added).

mill.[97] The Texas Supreme Court has repeatedly stated that ultimately, the trial court must determine the best way to assess reliability, and the method chosen is reviewed based on an abuse of discretion standard.[98] The Fort Worth Court of Appeals used this common sense approach in the context of a medical expert in another case decided during the Survey period, *J.C. Penney Life Insurance Co. v. Baker*.[99] In *Baker*, J.C. Penny argued that Baker's expert's "testimony should have been excluded because it could not meet any of the factors set forth in *Robinson*."[100] After discussing the expert's testimony and qualifications, the Forth Worth appellate court held that the expert's "opinions are clearly not the type of testimony that can be easily evaluated under the *Robinson* factors."[101] Applying *Gammill*'s "analytical gap" analysis, the court then found that the expert's opinions were reliable.[102] This is the type of flexible analysis intended under *Robinson/Gammill*. Courts must never forget that "[t]he trial court's gatekeeping function under Rule 702 does not supplant cross-examination as 'the traditional and appropriate means of attacking shaky but admissible evidence.'"[103]

In *Helm*, the plaintiffs' experts were testifying based on their own clinical experience. Furthermore, there are obvious clinical and physiological reasons why fluid therapy is applied in *every case* as soon as the diagnosis of pancreatitis is made. But since there were no specific studies showing that a thirteen hour delay in giving this standard treatment results in more severe complications, the San Antonio Court of Appeals held that an expert opinion on that point is unreliable. Thus, if a person within the Fourth Appellate District lays in a hospital bed in severe pain for thirteen hours being denied the standard treatment for his condition and this neglect results in crippling disabilities that the person likely would not have suffered but for the negligence of the hospital and physician that the person trusted for his care, the person has no remedy. And

97. *Gammill*, 972 S.W.2d at 726 ("[I]t is equally clear that the considerations listed in *Daubert* and in *Robinson* for assessing the reliability of scientific evidence cannot always be used with other kinds of expert testimony.").

98. *See id.* at 727; Helena Chem. Co., v. Wilkins, 47 S.W.3d 486, 499 (Tex. 2001) (reminding Texas judges that when the *Robinson* factors do not apply, "there still must be some basis for the opinion offered to show its reliability, and, ultimately, the trial court must determine how to assess reliability").

99. 33 S.W.3d 417 (Tex. App.—Fort Worth 2000, no pet.).

100. *Id.* at 427.

101. *Id.* at 428.

102. *Id.*

103. *Gammill*, 972 S.W.2d at 728 (quoting *Daubert*, 509 U.S. at 596); *see also* Alice Leasing Corp. v. Castillo, 53 S.W.3d 433, 446 (Tex. App.—San Antonio 2001, pet. denied). In *Castillo*, the defendant attacked the plaintiff's expert's use of a videotaped demonstration claiming that "the demonstration was not substantially similar to the conditions of the accident." *Castillo*, 53 S.W.3d at 446. Before the tape was shown to the jury, the defendant's counsel asked to take the expert on *voir dire* to show that the device depicted in the tape was not substantially similar to that used in the accident. The trial court refused, and its decision was upheld on appeal. The San Antonio Court of Appeals, in an opinion written by Justice Alma Lopez, who was not on the panel in *Helm*, noted that the defense counsel's opportunity to vigorously cross-examination the expert was the proper method of testing the evidence. *Id.*

under the San Antonio Court of Appeals' reasoning, there will not be a remedy for such injuries until some sadistic doctor intentionally delays giving his patients the universally-accepted treatment for pancreatitis in order to publish a study showing the effect of that delay.

The *Helm* court was not finished misinterpreting the law. It next held that since the plaintiffs' experts were not able to "exclude the possibility" that even with prompt fluid resuscitation, Thomas Helm would have suffered the same complications, the experts' testimony that the complications were caused by the delay in fluid resuscitation was "mere speculation."[104] In support of this, the court cited *Robinson*[105] and its own opinion in *Weiss v. Mechanical Associated Servs.*[106] This is also a misinterpretation of the law. *Robinson* does not say that an expert must rule out completely other potential causes. It merely says that the expert must "carefully consider alternative causes" and rule them out within a reasonable degree of probability, *i.e.* there is a more than a 50% chance that it was the actions of the defendant that caused the injury in question.[107] The plaintiffs' experts in *Helm* obviously satisfied this requirement. The court's opinion and its analysis in this case are shameful.

The issue of medical testimony based on clinical experience also arose in *Pack v. Crossroads, Inc.*[108] discussed in section II above. The plaintiffs sought to introduce the hospital admission records, which stated that the doctors and nurses on duty at the time James Watson was admitted to Harris Methodist Hospital suspected from the nature of the injuries that they were the result of elder abuse and neglect. The plaintiffs wanted to supplement the evidence contained in those records with the live testimony of the doctor on duty at the time of the admission. The trial court, however, required the references to abuse and neglect to be redacted from the records and prohibited the doctor from testifying that he suspected that the injuries resulted from abuse and neglect.[109]

The trial court based its decision to exclude this evidence on the fact that the doctor and staff at the hospital did not know at the time of James Watson's admission the length of time that he had lived at the nursing home, the conditions from which he suffered before he entered the nursing home, or the physician's orders for James Watson while he stayed at the nursing home. Because they did not have this information, the trial court concluded, and the appellate court agreed, that any opinion that James Watson suffered from abuse and neglect must be purely speculative. Yet the fact that the hospital's doctors and staff did not have this information would not have changed their diagnosis. They proposed to testify that based on their medical training and clinical experience there was a reasonable medical probability that James Watson's injuries were

104. *Helm*, 61 S.W.3d at 497-98.
105. *Id.* at 497 (citing *Robinson*, 923 S.W.2d at 559).
106. 989 S.W.2d 120, 125-26 (Tex. App.—San Antonio 1999, pet. denied).
107. *Robinson*, 923 S.W.2d at 559.
108. 53 S.W.3d at 500-01.
109. *Id.* at 501.

the result of neglect or abuse. Other testimony was available to establish where and over what period of time that abuse occurred.

The fact that these doctors and nurses did not know that James Watson had lived at the nursing home for thirty-seven days or his condition when he entered the nursing home would have had no effect on those opinions and should have been simply matters for cross-examination. In fact, the evidence that James Watson had lived in the nursing home so long actually supported the medical opinion that his condition at the time he entered the hospital resulted from the neglect he received while living there. And the court did not state what his condition was before admittance to the nursing home except that he suffered from "health problems" after hip surgery. His actual condition at the time of admission to the nursing home may have also supported the doctor's and nurses' opinion that Watson was abused and neglected. The problem is that the court did not discuss those issues. It simply ignored them and excluded the testimony by concluding that it was speculative without any real analysis as to why.

The court should have analyzed this testimony under *Robinson/Gammill.* What type of training and clinical experience did these medical professionals have with these types of injuries? What were the other potential causes of James Watson's injuries besides neglect? Did the doctor and nurses consider other potential causes as required under *Robinson*? All expert opinion testimony is speculative to some degree. Courts should not side-step their gatekeeping duties under Rule 702 by simply calling opinion testimony speculative and excluding it without conducting a proper analysis.[110]

III. PRIVILEGES

A. PHYSICIAN-PATIENT PRIVILEGE

Texas Rules of Evidence 509(c)(1) protects confidential communications between a patient and her physician.[111] The only case of note on this subject during the Survey period is *Rios v. Texas Department of Mental Health and Mental Retardation.*[112] Tereso and Rose Rios were struck in a car accident by a MHMR employee in July 1993. In April 1994, Dr. Garza-Vale examined Tereso Rios to give him a second opinion concerning his back injury suffered in the accident and advised against surgery at that time. The Rios couple filed their suit in September 1994. The suit dragged on for several years, then, in 1998, the defendant's attorney hired Dr. Garza-Vale as an expert for the defense. The plaintiffs ob-

110. The trial and appellate courts also demonstrated their complete lack of understanding of Rule 403 by further justifying exclusion of this evidence because it was "very inflammatory," *i.e.* very probative. *Pack*, 53 S.W.3d at 501. Rule 403 is not a means by which courts can exclude probative evidence simply because it makes it more likely that doctors, insurance companies, and corporations will lose.

111. TEX. R. EVID. 509(c)(1) (stating: "Confidential communications between a physician and a patient, relative to or in connection with any professional services rendered by a physician to the patient are privileged and may not be disclosed").

112. 58 S.W.3d 167 (Tex. App.—San Antonio 2001, no pet.).

jected, arguing that this arrangement was improper both because it violates the physician-patient privilege and because "it conflicts with a physician's fiduciary duty of loyalty to his patient and invites improper influence that threatens the relationship of trust [and] confidence."[113]

The court first addressed the privilege argument. The litigation exception to the physician-patient privilege states that communications or records relating to a particular condition are no longer privileged when the patient relies upon the condition as part of his claim or defense.[114] Tereso Rios was suing to recover damages for the back injury he suffered in the accident. Dr. Garza-Vale's testimony concerning that injury was, therefore, not covered by the privilege.

The issue concerning the defense hiring a treating physician as an expert was more troubling. In a long footnote, the appellate court discusses the potential problems with such an arrangement.[115] The plaintiffs relied on *Horner v. Rowan Companies* from the Southern District of Texas to support their argument that such arrangement should be deemed improper.[116] The *Horner* opinion only deals with the issue of *ex-parte* communications with treating physicians. But the *Horner* court's concerns with such communications are obviously greater when the party opposing the patient is paying the treating physician to testify.

In *Horner*, the court was mainly concerned that *ex-parte* communications would spill over into areas that remain privileged:

> When a treating physician is interviewed *ex parte* by defense counsel, there are no safeguards against the revelation of matters irrelevant to the lawsuit and personally damaging to the patient, and the potential for breaches in confidentiality can have a chilling effect upon the critically important underlying relationship. Such interviews also create situations which invite questionable conduct. They may disintegrate into a discussion of the adverse impact the jury award may have on the rising cost of medical insurance rates. They may result in attempts to dissuade the doctor from testifying. They may result in defense counsel abusing the opportunity to interrogate the physician by privately inquiring into facts or opinions about the patient's mental and physical health or history which might neither be relevant to the law suit nor lead to the discovery of admissible evidence.[117]

Such discussions can clearly lead to violations of the Rule 509 privilege because without the patient's counsel present, the physician and opposing counsel are left to determine what information is subject to the privi-

113. *Id.* at 169.

114. TEX. R. EVID. 509(e)(4) (stating that an exception to the privilege exists "as to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as part of the party's claim or defense").

115. *Id.* at 171 n.1.

116. 153 F.R.D. 597 (S.D. Tex. 1994); *see also* Perkins v. United States, 877 F. Supp. 330, 333 (E.D. Tex. 1995).

117. *Horner*, 153 F.R.D. at 601 (citations omitted).

lege—a determination that the doctor is not qualified to make.[118] The *Horner* court stated that "[r]equiring the contact with treating physicians to occur only in the context of formal discovery . . . protects any information still privileged by assuring plaintiff's representative will be in a position to timely assert the privilege where appropriate."[119] The court concluded that formal discovery "is simply the fairest and most satisfactory means of obtaining discovery from a treating physician."[120]

The arrangement in *Rios* goes beyond the court's concerns in *Horner.* In *Rios*, the treating physician was an expert for the defense. While the arrangement caused the appellate court some concern, the court concluded that "[i]t is not the role of this intermediate court to craft a new rule where none currently exists."[121] But Rule 509 is based on a state policy to encourage a relationship of trust and confidence between a doctor and his or her patient. Allowing a doctor to be paid to serve as an expert witness in an adversarial proceeding against a former patient violates that policy. The rule proposed by the court in *Horner* is a logical extension of Rule 509 and would serve to promote the state's policies by protecting the physician-patient relationship. It would also eliminate the possibility of the awkward situation created in *Rios.* As the court in *Horner* pointed out, a rule prohibiting *ex-parte* communications with treating physicians would not affect the substance of what information would be discoverable or what evidence would be admissible at trial, it would only regulate how counsel "may obtain information from a treating physician."[122]

B. Peer Review Privilege

In determining if the peer review privilege exists, focus should be placed on the actual existence of the committee as a functioning body for the evaluation of medical services so as to limit any potential abuse of using a committee to hide discoverable evidence. During the Survey period, the Texas Supreme Court demonstrated the way courts should analyze questions of peer review privilege in *In re University of Texas Health Center.*[123]

The committee at issue in *In re University of Texas Health Center* was the hospital's Infection Control Committee. In order to determine whether that committee fell within the statutory privilege, the court first examined whether it fell within the statutory definition of a peer review committee.[124] Section 151.002(a)(8) of the Texas Occupation Code defines "Medical peer review committee" or "professional review body" as:

118. *Id.*
119. *Id.* at 601-02.
120. *Id.* at 602.
121. *Rios*, 58 S.W.3d at 170.
122. *Horner*, 153 F.R.D. at 602.
123. 33 S.W.3d 822 (Tex. 2000).
124. *Id.* at 824-25.

> a committee of a health care entity, the governing board of a health care entity, or the medical staff of a health care entity, that operates under written bylaws approved by the policy-making body or the governing board of the health care entity and is authorized to evaluate the quality of medical and health care services or the competence of physicians.[125]

Thus, to receive the protections afforded by the statute, a committee must be properly formed under the entity's by-laws and be vested with the authority to review the quality of the health care services provided by the facilities physicians and staff. UT Health Center demonstrated that its by-laws provided for the establishment of the Infection Control Committee and authorized it to review the quality of its health care services.[126] Therefore, the Infection Control Committee fell within the statutory definition of a medical peer review committee and would be afforded privilege in the appropriate situations.

The court next examined whether the Infection Control Committee actually performed "peer review" functions as defined under the relevant statute.[127] Section 151.002(a)(7) of the Texas Occupation Code defines "Medical peer review" or "professional review action" as

> the evaluation of medical and health care services, including evaluation of the qualifications of professional health care practitioners and of patient care provided by those practitioners. The term includes evaluation of the: (A) merits of a complaint relating to a health care practitioner and a determination or recommendation regarding the complaint; (B) accuracy of a diagnosis; (C) quality of the care provided by a health care practitioner; (D) report made to a medical peer review committee concerning activities under the committee's review authority; (E) report made by a medical peer review committee to another committee or to the board as permitted or required by law; and (F) implementation of the duties of a medical peer review committee by a member, agent, or employee of the committee.[128]

It was undisputed in the trial court that all the documents at issue were "created by or at the request" of the Health Center's Infection Control Committee and solely in connection with the evaluation of the medical care received by patients contracting infections.[129] The court concluded that the documents sought were properly protected by the peer review privilege and were off limits barring a written waiver in accordance with the statute.[130]

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125. TEX. OCC. CODE § 151.002(a)(8) (Vernon 2000).

126. 33 S.W.3d at 825.

127. *Id.* at 825.

128. TEX. OCC. CODE § 151.002(a)(7) (Vernon 2000).

129. 33 S.W.3d at 825-26.

130. *Id.* at 826 (holding that voluntary disclosure through interrogatory answers of recommendations made within the committee's privileged documents did not constitute a waiver of the peer review privilege; the information was disclosed but the documents remained protected as a waiver must be made in writing and in accordance with the statutory provisions).

In applying this two-step process, trial courts must pay close attention to the actual function of the committee receiving the reports and the committee's actual use of the reports. Hospitals must not be able to hide business records, incident reports, and other documents created in the normal course of business that are not created exclusively for use by a peer review committee in conducting peer review by using pre-printed buzzwords on the documents or by merely sending a copy to a body authorized to conduct peer review under the facility's by-laws. By following this function/use analytical approach, courts can ensure that the peer review privilege is not abused.

C. ATTORNEY-CLIENT PRIVILEGE

In *National Converting & Fulfillment Corp. v. Bankers Trust Corp.*,[131] Judge Buchmeyer framed the issue as follows: "The Court must decide whether a person who is not an employee of a corporation, but who is the close relative of the owner of such corporation and who is given substantial authority to speak on behalf of the corporation, may be considered the 'representative of the client' under Texas Rule of Evidence 503(a)(2)."[132]

Randall Riecke is the son of Melvin Riecke who owns two of the plaintiff corporations. Randall is a licensed attorney in Texas, but he works primarily as a CPA, not an attorney, and he had advised his father's business in that capacity. Occasionally, Melvin Riecke would discuss legal issues with his son and then ask his son to discuss these issues with the company lawyer, Bill Smith. Magistrate Judge Sanderson held that "to the extent that Melvin Riecke used Randall as a representative to seek legal advice from counsel, . . . such communications . . . are protected by Texas Rule of Evidence 503(a)(2)(A)."[133] The defendants objected to Judge Sanderson's order, and the matter came before Judge Buchmeyer.

Judge Buchmeyer held that Randall's statements to the company lawyer fell under 503(a)(2)(A), which defines "representative of the client" as "(A) a person having authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of the client or (B) any person who, for the purpose of effectuating legal representation of the client, makes or receives a confidential communication while acting in the scope of employment for the client."[134] Rule 503(a)(2)(A) represents the "control group test," which extends the attorney-client privilege to "state-

131. 134 F. Supp. 2d 804 (N.D. Tex. 2001).
132. *Id.* at 805.
133. *Id.* at 807.
134. *Id.* at 805; *see also* TEX. R. EVID. 503(a)(2)(B). Rule 503(a)(2)(B) extends this definition to also include "any person who, for the purpose of effectuating legal representation of the client, makes or receives a confidential communication while acting in the scope of employment for the client." This is the "subject matter" test, which protects statements by lower level employees acting within the scope of their employment. The Texas Supreme Court added this sub-section in 1998 to align the privilege in Texas to that adopted by the United States Supreme Court in *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

ments made by employees in a position to control or even take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney."[135] Judge Buchmeyer found that the language of Rule 503(a)(2)(A) "does not require on its face that the representative of the client be an employee. . . ."[136] While noting that *National Tank* could be read to require the representative to be an employee, the court was addressing a situation where *employees* had made the allegedly privileged statements.[137] Thus, Buchmeyer concluded, the opinion naturally discussed only what type of *employee* could fall under the privilege and does not stand for the proposition that only communications by an actual employee can be protected. Judge Buchmeyer then noted that Randall (1) had been granted authority to speak to the attorney on the company's legal issues, (2) "had the ability to shape the course of action that companies would take," and (3) was entrusted to relay the attorney's advice back to Melvin.[138] Thus, Judge Buchmeyer agreed with Judge Sanderson and held that Randall's discussion with the attorney was privileged.

There are some problems with Judge Buchmeyer's opinion, however. The opinion never states the basis for the conclusion that Randall could actually shape the course of the companies' response other than the fact that Randall was Melvin's son and a CPA. Randall merely had authority to relate the legal advice back to his father who was the person with the actual authority. There is no general family communication privilege in Texas, nor are communications to a CPA privileged. One must also consider the language in *National Tank* that Buchmeyer noted could be construed to extend the privilege only to employees. The Texas Supreme Court stated in *National Tank* that the control group test "reflects the distinction between the corporate entity and the individual *employee* and is based on the premise that only an *employee* who controls the actions of the corporation can personify the corporation."[139] Randall was not an employee, and to the extent he could shape any action based upon legal advice, it was simply as his father's advisor. It was the father who controlled the actions of the corporation. In reality, Judge Buchmeyer recognized a new privilege in Texas—the "my-son-the-CPA" privilege.

Compare Judge Buchmeyer's analysis to that of Judge Rakoff of the Southern District of New York in *Calvin Klein Trademark Trust v. Wachner*,[140] which was also decided during the Survey period. In rejecting David Boies's argument that his discussions with a public relations firm relating to the way in which Calvin Klein wanted to spin the case in the media were privileged, Judge Rakoff noted that "it must not be forgotten that the attorney-client privilege, like all evidentiary privileges, stands in

135. Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 197 (Tex. 1993) (citations omitted).
136. *Nat'l Converting*, 134 F. Supp. 2d at 806.
137. *Id.* (emphasis in orig.)
138. *Id.*
139. *Nat'l Tank*, 851 S.W.2d at 197.
140. 198 F.R.D. 53 (S.D.N.Y. 2000).

derogation of the search for truth so essential to the effective operation of any system of justice."[141] Thus, the privilege "must be narrowly construed."[142] Even if the PR firm's advice aided the attorney in formulating his legal advice to the client, "the privilege protects communications between *a client and an attorney*, not communications that prove important to an attorney's legal advice to a client."[143]

In *In re Cooper*,[144] the Beaumont Court of Appeals held that an assignment of a defendant's *Stowers* claim against its insurer does not automatically waive the defendant's attorney-client privilege.[145] Harold Joseph obtained a judgment at trial against David Cooper in a case that arose from a car wreck. The judgment was in excess of Cooper's insurance coverage, and Cooper assigned his claims against his insurer to Joseph. Joseph then sued the insurance company for negligent failure to settle the claim and requested that Cooper's attorneys turn over their files from that previous lawsuit. The trial court found that Cooper had waived his attorney/client privilege when he assigned his claims and ordered Cooper's attorneys to produce their files. Cooper filed a writ of mandamus seeking protection from the discovery order.

The trial court concluded that the assignment necessarily included a waiver because it was "part and parcel of the deal" and without it there would not be an effective assignment.[146] Texas Rule of Evidence 511(1) provides that the privilege is waived if the client holding the privilege consents to disclosure, but the Beaumont Court of Appeals reasoned that the consent must be explicit. It cannot be implied from the assignment.[147] While noting that such an assignment "could and, perhaps, should include such a waiver,"[148] this one did not. Therefore, Cooper did not waive his attorney-client privilege, and the trial court abused its discretion in ordering his attorneys to produce their files. The court's reasoning is sound. In the future, attorneys should include an express waiver of the assignor's attorney-client privilege in any assignment of a *Stowers* claim.

IV. OTHER INTERESTING CASES

A. HEARSAY

In *Freeman v. American Motorists Insurance Co.*,[149] the plaintiff argued that the statute of limitations was tolled because he was legally disabled under section 16.001(a)(2) of the Civil Practice & Remedies Code, which

141. *Id.* at 55.
142. *Id.*
143. *Id.* at 54.
144. 47 S.W.3d 206 (Tex. App.—Beaumont 2001, orig. proceeding).
145. *Id.* at 209.
146. *Id.* at 208.
147. *Id.*
148. *Id.* n.2.
149. 53 S.W.3d 710 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

states that a person is legally disabled if they are of "unsound mind."[150] The defendants moved for summary judgment on the grounds that there was no evidence of a legal disability. In response to the motion for summary judgment, the plaintiff submitted a letter from his physician written ten years after the accident and ten days before the summary judgment hearing. The letter stated that plaintiff "did not have the appropriate judgment and the mental capacity to comprehend his circumstances and therefore did not pursue litigation."[151]

The defendant objected to the letter as hearsay. The plaintiff responded that it fell under the business records exception found in Rule 803(6), which states that a report of a diagnosis made at or near the time of record by a person with knowledge is not excluded under the rule if it was the regular practice of that business to make the report.[152]

In rejecting the plaintiff's argument, the court noted that to fall under this exception, a doctor's note must "qualify as a routine entry in the [patient's] medical history."[153] The court then stated that the time that the letter was written—ten years after the accident and ten days before the summary judgment motion—indicated a lack of trustworthiness. Instead of a routine entry in the medical record, the letter appeared to be written "solely in response to a request from Freeman's attorney."[154] The court stated that the letter "'on its face,' is 'an attempt to convey an opinion which has been elicited by an outside interested source.'"[155] In that case, the letter is not admissible under Rule 803(6).

B. Spoliation of Evidence

The Tyler Court of Appeals in *Lively v. Blackwell*[156] reaffirmed that the issue of spoliation of evidence is a fact issue for the jury—not the court. However, the court then applied an outcome-oriented analysis to deny the plaintiff a fair trial on the issue.

In *Lively*, the plaintiff underwent a diagnostic laproscopy procedure to evaluate an ovarian cyst. After the procedure, the patient developed severe complications as a result of internal bleeding. In the subsequent lawsuit, the issue was whether the physician was negligent in closing the surgical wound when he knew or should have known that the patient was still bleeding internally.

During the procedure, a video camera projected images from the procedure onto a monitor in the operating room. The defendant doctor testified that from his view on the monitor, there was no bleeding. But the nurse anesthetist who attended the surgery testified that the monitor

150. *Id.* (citing Tex. Civ. Prac. & Rem. Code Ann. § 16.001(a)(2) (Vernon Supp. 2001)).
151. *Id.* at 714 (quoting the letter from plaintiff's doctor).
152. *Id.* (citing Tex. R. Evid. 803(6)).
153. *Id.*
154. *Freeman*, 53 S.W.3d at 715.
155. *Id.* (quoting *Sauceda*, 636 S.W.2d at 499).
156. 51 S.W.3d 637 (Tex. App.—Tyler 2001, pet. denied).

showed "misting of blood" just before the incision was closed.[157] The defendant doctor admitted that if there had been significant bleeding and he failed to stop it before he closed the incision, he would have been negligent. The procedure was also supposed to have been videotaped. It was clear that a videotape of the procedure would have shown if that bleeding was, in fact, present. When the plaintiff received a copy of the videotape through discovery, however, it was blank.

In response to receiving this blank tape, plaintiffs sought to introduce at trial evidence that the doctor had erased the tape, and thus spoliated the evidence. At a hearing outside the presence of the jury, the plaintiff showed that the hospital charged her for a tape, a video camera, a VCR, and a drape to cover the monitor. She also introduced expert testimony showing that the tape would be part of the hospital's records and if a doctor removed it, he or she would be responsible for it.

The doctor testified in response that he kept the tape at his office and turned it over to his lawyer without viewing it. He also introduced testimony of a hospital employee designated as the person knowledgeable of videotape procedures who testified that of the forty procedures that were videotaped the year of the plaintiff's procedure, two, including the one at issue, ended up blank. The defendant argued that this could have been caused by the equipment not being connected properly.

After the hearing, the defendant argued, incorrectly, that whether spoliation of evidence had occurred was a question of law for the court to decide, and since the plaintiff had "failed to make a 'prima facie' showing that the procedure was actually recorded and that [the defendant] had intentionally or negligently destroyed evidence," the plaintiff should be prevented from introducing any evidence of the circumstances surrounding the tape.[158] The trial court agreed with the defendant's argument despite the strong circumstantial evidence that the doctor erased the tape.

On appeal, the Tyler Court of Appeals first noted that the defendant's assertion that spoliation is a question of law for the court was incorrect.[159] Whether spoliation of evidence has occurred is a question of fact for the jury.[160] Since that was the defendant's only objection, the appellate court assumed the trial court's basis for excluding the evidence was also incorrect. However, the trial court's decision will be upheld if there was any proper ground for the ruling,[161] and in a decision that could only be described as outcome-oriented, the Tyler Court of Appeals found one.

The appellate court determined that the evidence of spoliation could be excluded on Rule 403 grounds.[162] The analysis used to reach that conclusion would have earned an F on any law school Evidence exam. The

157. *Id.* at 638.
158. *Id.* at 640.
159. *Id.*
160. *Id.* at 640-41; *see* Malone v. Foster, 977 S.W.2d 562, 563 (Tex. 1998).
161. *Lively*, 51 S.W.3d at 641; *see* State Bar of Texas v. Evans, 774 S.W.2d 656, 658 n.5 (Tex. 1989).
162. *Lively*, 51 S.W.3d at 642.

appellate court noted that the plaintiff has proven "(1) an attempt was made to record the procedure, (2) [the defendant] maintained the tape at his office, and (3) the tape was blank when it was produced in discovery."[163] This, along with the testimony that of the forty procedures taped that year, only this tape and one other turned out blank, was strong circumstantial evidence that the doctor erased the tape. Strangely, the appellate court then noted in the same sentence that the plaintiff "did not prove the procedure was actually recorded onto the videotape or that [the defendant] destroyed the videotape if the procedure was recorded."[164] Had the court not just held that that was the ultimate question for the jury?

While the plaintiff's circumstantial evidence was compelling, the court favored the hospital employee's testimony that it was *possible* that the video equipment was hooked up incorrectly.[165] The court then mused that to accept the plaintiff's argument, one would have to "assume" that the procedure was actually recorded.[166] The patient paid to have the procedure recorded, the equipment was set up in the operating room, and the procedure was displayed on the monitor. Yet the defendant wanted the court to *assume* that the equipment was hooked up incorrectly.

In its conclusion, the appellate court stated that since the plaintiff's evidence of spoliation was based on merely "speculation and conjecture and a reasonable explanation for the missing evidence exists," an accusation of spoliation of evidence "can unfairly taint the juror's perception of the alleged spoliator as one who is dishonest and deceitful."[167] Therefore, it would have been proper to exclude the evidence on Rule 403 grounds.

As every student of Evidence learns in law school, all evidence is prejudicial. If it were not, the offering party would have no reason to present it. Rule 403 allows a trial court to exclude otherwise admissible evidence if its "probative value is *substantially outweighed* by the danger of *unfair* prejudice."[168] In the face of the strong circumstantial evidence of spoliation in *Lively*, Rule 403 could not possible justify the exclusion of the plaintiff's evidence. The appellate court noted that the videotape had the "potential . . . to resolve a pivotal issue"—whether the plaintiff was bleeding when the incision was closed.[169] This evidence thus had an extremely high probative value. This was not a Rule 403 analysis. This was the Tyler Court of Appeals deciding to believe the doctor's lame excuse that it was "possible" that the video equipment was not hooked up correctly and then effectively granting the defendant summary judgment on

163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Lively*, 51 S.W.3d at 642.
168. TEX. R. EVID. 403 (emphasis added). "Unfair prejudice" is usually defined as evidence that would tempt the jury to make its decision on emotional or irrational grounds. *McDonald*, 829 S.W.2d at 380.
169. *Lively*, 51 S.W.3d at 642.

the spoliation claim through a back door the court found in its twisted application of the rules of evidence. The plaintiffs had enough evidence for their spoliation accusation to make it to the jury. And the doctor could have presented his excuse to them. The jury, not the court, has the job of determining whether the spoliation actually occurred.

CONCLUSION

The cases from the Survey period teach several things. First, attorneys must know the difference between expert testimony based on science and that based on experience or specialized knowledge. They must know the predicate for getting both admitted and present the court with a well-organized argument detailing the expert's knowledge and experience and how it relates to the facts of the case, thus filling the analytical gap. In turn, judges must remember to be flexible in their analysis of expert testimony and must trust juries to sort out the good from the bad as our founding fathers intended.

Second, while privileges obstruct the pursuit of the truth and must therefore be narrowly construed, courts should not ignore the important policies behind them when analyzing whether they apply in particular situations. Peer review is an important function that hospitals and doctors must perform to ensure the safety of patients. They should be able to conduct this peer review without the threat of increased exposure to liability. However, the peer review privilege must be narrowly construed to include only documents created specifically for qualified peer review committees and actually used in the peer review process. The privilege must not be a means to hide business records or other documents created outside this process. The physician-patient privilege also serves to promote an important state policy. Allowing doctors that serve as paid witnesses in cases against their own patients clearly violates that policy, and Texas courts should fashion a rule to prohibit the practice. Lastly, the attorney-client privilege is essential to effective representation. However, when courts expand the privilege beyond communications between an attorney and her actual client, they cheapen the very privilege they seek to protect.

Finally, several of the cases from this Survey period teach us that some Texas judges appear willing to sacrifice common sense to please their political constituents—a continuing by-product of partisan judicial elections. Therefore, Texas attorneys who represent the injured and helpless must be ever-vigilant in protecting their clients' rights.