
NO. 08-0175

In the Supreme Court of Texas

WHIRLPOOL CORPORATION,

Petitioner,

v.

MARGARITA CAMACHO, ET AL.,

Respondents.

PETITIONER'S REPLY TO RESPONDENTS' RESPONSE TO
PETITION FOR REVIEW

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RESPONSE TO PLAINTIFFS' STATEMENT OF FACTS

In the timeline of events *consistently described by Mrs. Camacho in discovery responses, deposition testimony and interviews with Plaintiffs' experts* there is a two-hour gap between Mrs. Camacho's opening the dryer door (with no sign of fire) and the 1:26 a.m. report of the fire. Pet. at 1; RR7:179; RR8:175-76; RR10:33-34; CR2:426-27. Plaintiffs argue, based on Mrs. Camacho's hazy memory at trial (RR7:170, 178-79), that the jury could disregard this evidence. Resp. at 1. They are wrong.

First, Plaintiffs' experts based their theories on the same timeline Plaintiffs now disavow. RR10:33-34; RR8:174-75. *Second*, the "new" timeline shortens, but does not cure, the critical "gap" under *either* version of Mrs. Camacho's story. Clayton conceded a ¼ inch piece of lint could ignite and travel into the dryer drum (if at all) *only* with the dryer running and the heating element on. RR9:171-72. It is undisputed that the heating element shut off at the start of the ten minute cool-down cycle; thus, any "lint ember" would have tumbled among the tee shirts with no heat source for those ten minutes. RR10:34; RR8:175. The shirts admittedly did not ignite (if at all) until some time after Mrs. Camacho opened the dryer door. At trial she said that period was "not too long of a time," but it was at least long enough that she "sat [herself] to sleep" on the living room sofa. RR7:154. Thus, significant time elapsed between when the lint supposedly ignited in the heater box, traveled to the drum, endured tumbling throughout the cool-down cycle, lay smoldering in the tee shirts, and caused the tee shirts to burst into flames (without being consumed). Whether it took two hours or twenty minutes, Plaintiffs presented *no evidence whatever* to support such an implausible scenario.

ARGUMENT AND AUTHORITIES

I. The Corpus Court's opinion dramatically lowered the bar for assessing the reliability of expert testimony in the context of a legal sufficiency challenge.

A. *Daubert/Robinson* testing requirements must be applied if applicable.

Plaintiffs admitted at trial that critical aspects of their design defect theory could have been but were not tested. Pet. at 8; RR9:38, 173-74, 177-78. Now they argue the Corpus Court could overlook this failure by applying the “flexible” *Gammill* analytical gap test instead of the *Robinson* test because (1) Whirlpool invited any error and (2) this Court's opinion in *Mack Trucks v. Tamez*, among others, authorized the Corpus Court to circumvent the *Robinson* factors in these circumstances. Resp. at 10-11. The notion that Whirlpool insufficiently briefed the *Robinson* factors is wrong from both a factual and a legal perspective. Pet. at 6 n.6. So is the notion that this Court has sanctioned an end-run around *Robinson*. In *Tamez*, this Court specifically held that “a trial court should consider the factors mentioned in *Robinson* when doing so will be helpful in determining reliability of an expert's testimony, regardless of whether the testimony is scientific in nature or experience-based.” 206 S.W.3d 572, 579 (Tex. 2006). Here, application of certain of the *Robinson* factors – particularly “the extent to which the theory has been or can be tested,” “acceptance in the scientific community” and “the extent to which the technique relies upon the subjective interpretation of the expert” – would have revealed the patent unreliability of Plaintiffs' expert testimony. The Corpus Court had no excuse for avoiding this analysis. Should its opinion stand, experts will be allowed to testify based on speculative “hunches” and will have no incentive to test their theories.

B. Plaintiffs' experts failed to validate their *ipse dixit* opinions.

Plaintiffs point to various pieces of "evidence" in support of their assertions that their expert testimony was based on more than *ipse dixit*. Resp. at 7-10, 13. None of this so-called evidence survives even a cursory inspection or compensates for Clayton's failure to test the eminently testable assumptions of his design defect theory.

CPSC Report. Disregarding the CPSC Report's warning that it is "not [to] be used to suggest that current clothes dryers are unsafe or defective," CR3:859, 861, Plaintiffs cite the report as proof that Whirlpool's design causes lint to accumulate, escape into the dryer cabinet and ignite. Their argument rests in part on the erroneous claim that the 433M model the CPSC studied is the "same design" as the Easy Clean 100. Pet. at 7. But Whirlpool showed these models have very different air-flow characteristics and handle lint very differently. RR10:207-08, 235. Undisputed evidence showed the Easy Clean 100 is far less likely to accumulate lint in its base and is 50% more efficient in removing lint from the air stream. RR10:235. Further, as the trial court noted, the CPSC Report does not support Clayton's assertion that lint in the cabinet base could become airborne and be sucked into the heater box. RR9:143. At most, the CPSC tests show only that lint can accumulate in the base of a dryer model that is much more prone to lint accumulation than the Camacho dryer.

According to Plaintiffs, the CPSC Report also proved that ignited lint can "ignite material downstream ... in the dryer drum." Resp. at 13. But they ignore the contrived nature of the CPSC tests. Because the tests used a much slower airflow than the Easy Clean 100's, they offer no proof that a ¼ inch piece of lint can ignite when it travels

across the heating element in .0037 second. RR10:118-21. Also, the “material” ignited in the tests was more lint, not dense cotton clothing. The tests are no evidence that a tiny, fast moving piece of lint could ignite, survive 10 minutes inside a cooling load of tumbling clothes, and retain enough heat energy to ignite the clothing. RR10:111-14.¹

Examination of Camacho dryer. Clayton’s finding of “burnt lint” in the Camacho dryer does not support Plaintiffs’ theory because Clayton admitted that (1) he never tested the material to determine if it *was* lint, and (2) it could have burned as a *result* of the fire, rather than being the cause. RR10:48-49. Clayton’s unsupported opinion that the material “certainly had the appearance of lint” has no evidentiary value. And Plaintiffs’ other expert, Sanchez, found no burnt lint in the dryer. RR9:37-38.

Examination of the exemplar dryer. Plaintiffs do not address Whirlpool’s point that the exemplar dryer used by Plaintiffs’ expert was not even remotely comparable in use or maintenance to the Camacho dryer. Pet. at 3 n.3.

Testing of the heating element. Plaintiffs cite a test where Clayton dropped large tufts of lint as big as two inches long directly onto a horizontally-positioned, energized heating element. Resp. at 9. Even the Corpus Court did not rely on this “test,” which proved only that large tufts of lint exposed to high heat can burn. And Clayton conceded the test’s inapplicability, agreeing the tufts of lint were so large they could not possibly have been sucked into the heater box in an operational dryer. RR9:175-78.²

¹ Among other critical differences between the CPSC tests and an operational Easy Clean 100 dryer, the CPSC tests were conducted with critical safety features disabled. RR10:39-43; RR11:59-60, 63-64; CR3:873, 946-61.

² The method of dropping the lint directly onto the heating element completely ignored the standard airflow in an operational Easy Clean 100 dryer – at least 900 feet per minute – which expressly prevents such contact. RR9:176-77. Also unlike an operational Easy Clean 100 dryer, with its vertically

ATF Agent report. Plaintiffs do not address the facts that the ATF agent's report was not introduced at trial, the agent lacked any "cause and origin" fire training, and the agent did not conclude that the fire started in the dryer drum. Pet. at 6 n.5.

Eyewitness testimony. Plaintiffs also rely on testimony from the Camachos, who testified, inconsistently with their earlier testimony, that they saw fire emanating from the dryer.³ Even taken at face value, this lay testimony cannot support a design defect claim. Proof that a product is defective, i.e., "unreasonably dangerous," requires reliable *expert* testimony, because it involves technical matters beyond a jury's general experience.⁴

Sanchez's inspection of fire scene. Plaintiffs point to Sanchez's testimony that the fire originated in the dryer. But Sanchez's opinion, based on an exemplar that was *not* comparable in use or maintenance to the Camacho dryer, had no proper foundation. RR8:113-14. Sanchez also admitted he had no expertise in dryer design or mechanics and based his opinion on Clayton's implausible and unreliable theories. RR8:102-03, 137. His testimony about the burn patterns on the floorboards is similarly unreliable.⁵

positioned heating element enclosed in a metal box, the heating element in Plaintiffs' test was fully exposed and positioned horizontally to maximize the potential for contact with the lint. RR9:175-76.

³ This testimony was impeached. Santos Camacho admitted in deposition he saw fire only in the hallway and could not see the dryer. RR10:80. Salvador Gonzalez admitted he could not see the dryer at all. RR10:65-66. Mrs. Camacho said she saw fire coming from inside the dryer *and* the "rear part of the dryer." RR7:155. That testimony was consistent with Whirlpool's evidence, including tests showing the presence of gasoline on the clothes, that the fire began under the trailer and was transferred into the drum by the chimney effect created by the Camachos' venting the dryer through the floor of their trailer. RR12:9-10, 14, 43-55; RR11:134-35; DX 91.

⁴ See *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 807 (Tex. 2006) (evidence was legally insufficient absent reliable *expert* testimony establishing manufacturing defect); *Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131, 137 (Tex. 2004) (proof of product defect requires competent *expert* testimony); *Sigurdson v. Ford Motor Co.*, 2006 WL 417502, at *2 (S.D. Tex. Feb. 21, 2006) (expert testimony is necessary to establish defect design and causation).

⁵ Sanchez's opinion rested on photos of a sub-floor heating/ventilation duct showing fire damage on the top, supposedly consistent with a "top fire" burning down. RR8:119-22. But the photos did not accurately depict the duct's position *at the time of the fire*, because flooring covering the duct *had been*

Burn patterns. Clayton's testimony on burn patterns also fails to establish the fire's origin. Clayton did not test whether a drum fire would replicate the burn patterns on the Camacho dryer; thus, his testimony is mere speculation. In fact, the absence of a V-shaped burn pattern on the face of the dryer and the lack of other expected burn patterns inside the drum and on the dryer door proved the fire did not originate in or escape from the drum. Pet. at 3, 5.

Lack of alternative explanation. Plaintiffs claim that Whirlpool offered no alternative explanation for *how the fire could have originated in the drum*. Pet. at 13. But, despite no burden to do so, Whirlpool presented compelling evidence to support its theory that the fire started *not* in the dryer drum but under the laundry room floor, RR6:106, 109-10, 114; RR11:43, 134-35; RR12:9-10, 14-31, 37, 40-45, including evidence of gasoline vapors under the floor and on the remains of the tee shirts. RR11:81; DX70. As Whirlpool can show in merits briefing, its effort to prove alternative causation was irreparably impaired by Plaintiffs' spoliation of the fire scene.

C. Plaintiffs' defense of the Corpus Court's abuse of discretion standard misreads the court's opinion and Whirlpool's challenge below.

Plaintiffs incorrectly insist that "Whirlpool raised both evidentiary and legal sufficiency complaints" below, and the court correctly applied an "abuse of discretion" standard to the former and the legal sufficiency standard to the latter. Resp. at 12. *First*, Whirlpool challenged only the legal sufficiency, not the admissibility, of Plaintiffs'

removed by Plaintiffs' experts. PX141, 142; RR12:17-23. Because that flooring was not burned through and was still in place after the fire, the burning of the duct could not have been caused by "fall down" from above, as Sanchez alleged. RR12:17-23. Rather, the duct would have been burned by radiant heat from a fire *below* the mobile home that was trapped by the flooring. RR12:24-26.

expert testimony.⁶ Thus, the Corpus Court unquestionably applied the abuse of discretion standard to Whirlpool's *Daubert/Robinson*-based legal sufficiency challenge. *Second*, the court of appeals' discussion and application of the "abuse of discretion" standard of review plainly falls under the heading, "II. Legal Sufficiency." Op. at *4. The court cited the legal sufficiency standard only in its discussion of Whirlpool's sub-issue regarding the conclusiveness of its scientific evidence. Op. at *7. *Finally*, while Plaintiffs contend that adopting the *de novo* standard of review would "change Texas law" (Resp. at 4), their counsel, in other cases, has argued for the application of that standard in identical circumstances, citing many of the same cases Whirlpool cites here.⁷

II. Clayton's safer alternative design testimony rests on mere *ipse dixit*.

Clayton cites no industry data, publication, or test to support his claim that a smooth lint transport tube is *safer* than a corrugated tube. Instead, Plaintiffs argue that Clayton's "safer alternative design" is supported by the exemplar dryer and "common sense." Resp. at 14. An inspection of the exemplar, which has a corrugated tube, could not shed any light as to whether a smooth tube is *safer* or could withstand the rigors of consumer use – assertions that Plaintiffs failed to validate through testing. Nor did Plaintiffs' inspection of the exemplar lend any support to threshold question of whether a corrugated tube is unsafe, particularly in a properly installed and maintained dryer, because, despite improper installation and gross misuse, the exemplar's corrugated tube

⁶ Tab A. The "Table of Contents" and "Issues Presented" pages from Whirlpool's appellate brief confirm that Whirlpool's *Daubert/Robinson* challenges rest on legal insufficiency, not inadmissibility grounds.

⁷ See Reply Br. of Appellees, *Scott Bader, Inc. v. Sandstone Products, Inc.*, No. 01-05-00940-CV (Tex. App.—Houston [1st Dist.], filed Jan. 20, 2007), available at 2007 WL 904739 ("When expert testimony is challenged as constituting no evidence, 'an appellate court considers whether the expert testimony is reliable under a *de novo* standard of review.'" (citations omitted)).

never caused a fire and to Whirlpool's knowledge, this Easy Clean 100 model has never caught fire. Finally, Plaintiffs' reference to "common sense" is an implicit admission that Clayton's opinion *is* pure *ipse dixit* and flies in the face of the Easy Clean 100's impeccable safety record. Pet. at 2.⁸

Plaintiffs' focus on the testimony of Whirlpool's engineer, Mr. Zimmerle, ignores their own burden to prove that a smooth tube is safer and would not substantially impair the dryer's utility or create, under other circumstances, an equal or greater risk of harm. *Honda of Am. Mfg., Inc. v. Norman*, 104 S.W.3d 600, 605 (Tex. App.—Houston [1st Dist.] 2003, pet. denied). Viewed in context, Zimmerle's testimony showed that the switch from a smooth to corrugated tube was due to the smooth tube's tendency to disconnect from the blower housing. RR10:224-25, 228. Further, Zimmerle did not testify, as Plaintiffs claim, that the disconnection problem was solved by adding a clamp and screws to the connection. Resp. at 15. This "rework" was used for models already in distribution, but the switch to the semi-corrugated tube in new Easy Clean models was part of a permanent fix for the disconnection problem. RR10:226-28.

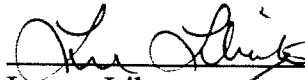
CONCLUSION AND PRAYER

The Court should grant Whirlpool's petition for review.

⁸ Expert testimony based on "common sense" is not admissible. See *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000); *Birge v. Dollar Gen. Corp.*, 2006 WL 5175758, at *5 (W.D. Tenn. Sept. 28, 2006) (expert's reliance on "common sense" did not assist the trier of fact to determine a fact in issue as required under *Daubert*); *Ziegler v. Fisher-Price, Inc.*, 2003 WL 25686840, at *10 (N.D. Iowa July 1, 2003) (common-sense deductions are not scientific opinions). In any event, in light of the fact that the Easy Clean 100 model *has never had a fire* and in the absence of any non-*ipse dixit* evidence of the dangers of a corrugated tube, common sense compels the conclusion that Plaintiffs failed to prove a safer alternative design.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with the Texas Rules of Appellate Procedure, I hereby certify that a true and correct copy of *Petitioner's Reply to Respondents' Response to Petition for Review* has been sent to the following counsel of record on this 9th day of May, 2008:

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