NO. 09-0224

IN THE SUPREME COURT OF TEXAS

WAL-MART STORES, INC.

Petitioner,

v.

CHARLES T. MERRELL, SR., AS WRONGFUL DEATH BENEFICIARY OF CHARLES THOMAS MERRELL, II, DECEASED, AND AS REPRESENTATIVE OF THE ESTATE OF CHARLES THOMAS MERRELL, II AND JANE CEVERNY, AS WRONGFUL DEATH BENEFICIARY OF CHARLES THOMAS MERRELL II, DECEASED,

Respondents.

On Petition for Review from the
Sixth Court of Appeals at Texarkana, Texas

PETITION FOR REVIEW

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STATEMENT OF THE CASE

Nature of the Case and Parties:	Products liability suit by parents of fire victim against retailer, claiming that a defective halogen lamp allegedly purchased from retailer caused fatal house fire.
Trial Court:	Hon. Jim. D. Lovett, 336th Judicial District, Fannin County.
Trial Court's Disposition:	Granted summary judgment to Wal-Mart.
Court of Appeals:	Sixth Court of Appeals; opinion by Justice Carter, joined by Justices Morris and Moseley. *Merrell v. Wal-Mart Stores, Inc.*, 276 S.W.3d 117 (Tex. App.—Texarkana 2008, pet. filed). App. 2.
Court of Appeals' Disposition:	Reversed and remanded.

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction over this case under Government Code section 22.001(a)(6).

ISSUES PRESENTED

1. Did the court of appeals err in holding that expert testimony that was unreliable, conclusory, and speculative was some evidence of product defect and causation?

2. Plaintiffs provided neither the allegedly defective product nor competent evidence of its purchase or model. Does the court of appeals' loosening of the *Robinson* and *Coastal* requirements in this case threaten to undermine the Legislature's protections for innocent retailers?

3. Where the admissibility of the testimony of Plaintiffs' first expert, David Dallas, was not an issue before the court of appeals, did the court err in holding that counsel's response to questions about the appellate court's ability to consider that testimony constituted a stipulation that Dallas's testimony was inadmissible? (unbriefed issue)

STATEMENT OF FACTS

Charles ("Charlie") Merrell, Jr., and his girlfriend Lutosha Gibson died as a result of smoke inhalation from a fire that occurred at their rented home. CR 250-51. Charlie Merrell's parents brought wrongful death and survival claims against Wal-Mart under various theories of products liability, contending the fire was caused by a halogen torchiere lamp that Charles Merrell, Sr. alleged he purchased from Wal-Mart for his son. CR 5-24.

Immediately after the fire, police officers who investigated the scene found candleholders with melted wax and smoking materials (ashtrays and remnants of marijuana cigarette butts) on a table next to a recliner in the area they believed to be the "hot spot" of the fire. CR 383-84, 392, CR 404-05, 411-12. Evidence of marijuana smoking—including several joints, pipes, and a bong—was found throughout the house. CR 384-85, 405. Ms. Gibson's cigarette smoking habit was later reported by friends and co-workers, and toxicology reports revealed marijuana in the systems of both victims, indicating they had smoked during the evening hours before their deaths. CR 208, 214, 416-17.

The officers saw, but did not recover, a pole-style lamp still standing in the living room. CR 382. At some point, two fuzzy photographs of that lamp, disassembled and leaning against the living room wall, were taken, presumably by the State Fire Marshal during his on-scene investigation four days after the fire. CR 235, 236. The Fire Marshal did not investigate the floor lamp to make a determination as to whether it was a halogen or incandescent fixture. CR 699-700. He ultimately determined that the fire was accidental and, based on the severity of damage, originated in the living room with the area of origin pointing to the recliner, which was completely destroyed. CR 247, 698-99. The Fire Marshal later testified that the type of fire damage he observed was consistent with a cigarette, ashes,

or a joint inadvertently dropped on or near the chair (CR 701) but officially concluded that the exact cause of the fire could not be determined. CR 247, 698-99.

Within a few days of the fire, the landlord hired retiree J.M. Bershirs to clean out the house. CR 130-31. Bershirs placed the debris from the house into two local dumpsters. CR 131. Bershirs removed and discarded two lamps (including a pole-style lamp) from the house, but neither of the lamps he later described fit the description of the halogen lamp Mr. Merrell claimed to have purchased at Wal-Mart.[1] CR 132-34, 137, 152. Failing to find the lamp in the dumpsters Bershirs used, Mr. Merrell offered a $500 reward to Bershirs and local handyman, Joe Williams, if either could produce the pole lamp that had been removed from the house. CR 135, 166, 194. Williams later brought a burned halogen lamp to Mr. Merrell, which he claimed to have found in one of those same dumpsters. CR 167-68. Mr. Merrell inspected the lamp and confirmed its authenticity as the same lamp in the rental house before he paid Williams the reward money for finding it. CR 113, 169.

Plaintiffs initially designated David Dallas as their fire origin-and-cause expert. After inspecting the "Williams" lamp provided to him by Plaintiffs' counsel, Dallas opined that a bulb from a 500-watt halogen torchiere floor lamp caused interior ceiling tiles to melt, drop into the bowl of the halogen lamp, then ignite, causing the fire. CR 299-354. In support of this theory, Dallas ruled out the point of origin of the fire as the recliner because he identified a much higher point of ignition. CR 347. Wal-Mart retained two fire cause-and-origin experts, Richard Dyer, the Fire Chief of Kansas City, Missouri, and forensic chemist John

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[1] Bershirs stated that the pole lamp he removed, unlike the lamp described by Mr. Merrell, had no "bowl" on top of it. CR 134. He described the fixture as a tension or spring lamp, as depicted in the drawing at CR 152. CR 137. Unlike the "slender" tube-like bulb Mr. Merrell described in the lamp he allegedly purchased (CR 486), Bershirs described the bulbs in the lamp he removed as flat on the surface, then round at the front like a flood lamp, as exhibited in the sketch at CR 153. CR 137.

Lentini, both of whom have served for many years on the National Fire Protection Associations Committee and with the NFPA 921 Committee (which produces *The Guide for Fire and Explosions Investigations*, considered the preeminent manual for fire investigation in the United States). CR 206-38, 355-67. Both Chief Dyer and Lentini agreed with the State Fire Marshal that the fire must be classified officially as "undetermined." *Id.*

Chief Dyer found no evidence to indicate a halogen lamp was in the room or capable of starting a fire and stated that the characteristics of the cone-shaped components of the lamp in the fire-scene photographs pointed to an incandescent, rather than a halogen, fixture. CR 361. Chief Dyer noted that because no thorough fire scene investigation was conducted—resulting in a number of missing elements of key evidence—a significant amount of other information would have to be known by those analyzing a fire after the structure had been repaired to arrive at any other classification than undetermined. CR 366-67.

Lentini likewise found no physical evidence of a halogen lamp ever being in the house. CR 208. He identified the only lamp-related evidence remaining (the two photographs of a light fixture believed to have been taken by the Fire Marshal) as an incandescent fixture—not a halogen fixture. CR 209. Lentini nonetheless tested the ceiling-tile theory proffered by David Dallas and determined that it simply would not work. CR 213-14. Lentini investigated other potential sources for the fire and determined that two other probable sources of ignition—candles and smoking materials could not be ruled out. Based on the findings of smoking materials at the fire scene, cannabis in the decedents' blood, and Ms. Gibson's smoking habit, Lentini concluded that careless disposal of smoking materials was the more likely cause of the fire. CR 208, 214, 416-17.

Additionally, Wal-Mart's experts reported that the condition of the lamp retrieved by Williams was inconsistent with a lamp that had been in a room fully engulfed by fire; rather, it was more consistent with a lamp that had been burned intentionally or held over a fire. CR 212-14. Chief Dyer concluded that the lamp in the fire scene photographs was not the same as the "Williams" lamp (pictured at CR 104), and Lentini's testing revealed gasoline residue on the lamp. CR 220, CR 362.

Throughout years of discovery, Plaintiffs maintained that the lamp Williams found was *the* lamp the Merrells bought at Wal-Mart and *the* lamp that started the fire. CR 103-04, 111. Williams initially stuck to his story that he found the lamp in the dumpster. CR 168-69, 181. But when confronted with questions about how gasoline could have ended up on the lamp, Williams admitted that he and a friend had acquired a used undamaged halogen torchiere lamp, burned it in a tire filled with gasoline, then presented it to Mr. Merrell and collected the reward money. CR 102-107, 176, 180-81. After that testimony, fire destroyed the offices of Plaintiffs' counsel, including the fabricated lamp. CR 445.

Wal-Mart moved for no-evidence and traditional summary judgment, on grounds that Plaintiffs had produced no or insufficient evidence to show that the lamp was purchased from Wal-Mart, that the lamp was defective, and/or that the lamp caused the fire. CR 29-435. After that motion was filed and just seven days before the summary judgment hearing, Plaintiffs abandoned expert David Dallas, who had failed to identify the Williams lamp as a fake, and designated Craig Beyler as their origin-and-cause expert. By affidavit and report, which Wal-Mart objected to as conclusory and based on unreliable data (Supp. CR I. 20-22), Beyler set forth an altogether new theory and conclusion: that the bulb in a now-missing halogen torchiere lamp exploded and the shards of hot glass ignited the recliner. CR 639-55.

The trial court did not exclude Beyler's testimony, but granted summary judgment in favor of Wal-Mart. CR 736 [App.1]. The Texarkana Court of Appeals reversed and remanded. App. 2.

SUMMARY OF THE ARGUMENT

The court of appeals' opinion reflects confusion over proper application of the standards this Court has established for the threshold reliability required for admission of expert testimony (under *Robinson* and *Gammill*) and the sufficiency of expert testimony required to create a question of fact to defeat summary judgment (under *Coastal*). This Court should grant review to clarify because the importance of guarding against unreliable and speculative expert testimony in a case such as this—where plaintiffs provide neither the allegedly defective product nor proof of its model or purchase—is heightened because the statutory protection afforded to innocent retailers is thwarted.

The causation opinion testimony of Plaintiffs' expert Craig Beyler is not supported by any scientific analysis or methodology; it is merely unsupported speculation and should therefore have been excluded. Even if properly admitted, Beyler's testimony is legally insufficient because it is internally inconsistent, reflects a selective consideration of the factual evidence, and provides no factual substantiation on specific causation in this case. Beyler's defect testimony is likewise insufficient because it is conclusory and provides neither evidence of a safer alternative design nor proper risk-utility analysis. Because the court of appeals erroneously concluded that Beyler's testimony either falls outside of the *Coastal* inquiry or survives it, the court erred in failing to affirm the trial court's grant of summary judgment.

ARGUMENT

I. The Court should take this case to illuminate the proper relationship between the *Robinson* and *Coastal* analyses and safeguard the statutory protections afforded to innocent retailers.

In *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex.1995), this Court identified nonexclusive factors to be considered in making the initial "gatekeeper" determination whether an expert's testimony is based on reliable methods and research and thus admissible. The Court has recognized that a reasoned application of experience to the facts may provide a sufficient basis for an expert's testimony unless there is "too great an analytical gap between the data and the opinion proffered." *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 727-28 (Tex. 1998) (an impermissible analytical gap exists if an expert "has offered nothing to suggest that what he believes could have happened actually did happen," because in that case "[h]is opinions are little more than 'subjective belief or unsupported speculation.'") (quoting *Robinson*). This threshold standard of reliability must also be met when a party relies on expert testimony as summary judgment evidence. *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999) (excluding affidavit of expert offered as summary judgment evidence as conclusory). Although an objection to the admission of expert testimony is required to preserve a reliability challenge requiring evaluation of the underlying methodology, technique, or foundational data, this Court has held that a party may challenge on appeal the legal sufficiency of expert testimony that is conclusory or speculative on its face even if the admissibility of the expert's testimony was not challenged in the trial court. *Coastal Transport Co. v. Crown Cent. Petroleum*, 136 S.W.3d 227 (Tex. 2004).

The court of appeals' opinion misapplied the *Coastal* analysis and failed to recognize that there is some inherent overlap between the *Robinson/Gammill* and *Coastal* inquiries

(because neither will tolerate conclusory, unsupported speculation). As further evidenced by the Texarkana's court's opinion in *Pilgrim's Pride Corp. v. Smoak*, 134 S.W.3d 880 (Tex. App.—Texarkana 2004, pet. denied), the lower courts continue to struggle with the interplay between *Robinson* and *Coastal*: that is, that expert testimony may be minimally reliable (or unchallenged) so as to make it through the *Robinson/Gammill* threshold "gate," but may nonetheless ultimately be found, as here, insufficiently probative on its face to support judgment under *Coastal*. *City of San Antonio v. Pollock*, --- S.W.3d ---, 2009 WL 1165317 at *3-6 (Tex.); *General Motors v. Iracheta*, 161 S.W.3d 462 (Tex. 2005). The lower courts' continued confusion on this relationship warrants the Court's intervention.

Moreover, the importance of this case is heightened by the overlay of section 82.002 of the Civil Practices and Remedies Code, which entitles an innocent seller to indemnity for loss (including defense costs) arising out of a product liability action from the manufacturer of a product alleged to be defective. Here, Plaintiffs do not have the allegedly defective lamp and can neither identify the specific product they contend was purchased at Wal-Mart nor provide any documented proof of purchase.[2] Thus, Wal-Mart is faced with huge costs and potential liability, but no clear manufacturer to turn to for statutory indemnity.

This case squarely presents the predicted "impossible burden" on sellers in Wal-Mart's position: to obtain indemnification from multiple potentially liable manufacturers where the

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[2] Mr. Merrell has no receipt or written proof of purchase, no cancelled check or credit card record, no box, instructions or other documentation that might provide evidence of the make or model (CR 63-64, 108, 186), and does not remember the specific store where he bought the lamp (but thinks it was one of the three Wal-Mart stores in Bonham, Paris, or Sherman, the last being 42 miles away from his home). CR 61, 108. Plaintiffs do not know the brand name or model number of the lamp (CR 62, 66, 125), the color of the lamp (CR 62, 125), nor the wattage of the bulb in the lamp (CR 63), important because Plaintiffs' serial causation theories hinge on the presence of a high-wattage bulb. (Mr. Merrell testified only that he had been in the home one time when the lamp was on and that it was "very bright." CR 59). Plaintiffs have no pre-fire photographs of the lamp they allegedly purchased to show it was in the house. CR 124.

retailer cannot link the allegedly injury-causing product to a particular manufacturer. *See Owens & Minor, Inc. v. Ansell Healthcare Prods., Inc.*, 251 S.W.3d. 481, 492 (Tex. 2008) (O'Neill, J., dissenting). Allowing a products liability claim to proceed on tissue-thin evidence of purchase of an absent product, coupled with speculative causation testimony, invites plaintiffs to simply throw away evidence and circumvent section 82.002—particularly if the retailer is a deep pocket. This result—which has the effect of punishing rather than protecting innocent retailers—cannot be what the Legislature intended. The Court should step in to clarify the evidentiary burden in a manner consonant with the Legislature's statutory scheme.

II. Because Plaintiffs failed to produce legally sufficient competent evidence that the purported halogen lamp was defective and caused the fire, summary judgment was properly granted.

All of Plaintiffs' theories of liability against Wal-Mart are products liability actions governed by Chapter 82 of the Civil Practice and Remedies Code. Tex. Civ. Prac. & Rem. Code § 82.001(2). Each of those theories was founded on Plaintiffs' allegation that all halogen torchiere lamps are defectively designed and unreasonably dangerous. CR 13-14. A claimant in any products liability action based on design defect must prove that (1) there was a safer alternative design; and (2) the defect was a producing cause of the personal injury, property damage, or death for which the claimant seeks recovery. Tex. Civ. Prac. & Rem. Code § 82.005(a). Whether an alleged design defect renders a product unreasonably dangerous also requires the five-factor risk-utility analysis set forth in *American Tobacco Co. v. Grinnell*, 951 S.W.2d 420 (Tex. 1997). Plaintiffs presented no evidence of these statutory and common law elements.

A. The court of appeals erroneously characterized Wal-Mart's challenge to Beyler's testimony—which was unreliable and inadmissible—as a waived attack on his methodology.

All of Plaintiffs' evidence related to defect and causation relies on the affidavit and report of expert Craig Beyler, which was included over Wal-Mart's proper objections. Supp. CR I. 20-22. In a cross-point on appeal, Wal-Mart argued that Beyler's testimony should not have been admitted at all because it was unreliable under *Robinson* and *Gammill*. Br. of Appellees 11-18. The court of appeals characterized Wal-Mart's trial court objection to the expert testimony of Craig Beyler as a non-*Robinson* challenge, holding that Wal-Mart failed to raise any complaint about Beyler's methodology in the trial court and therefore waived any attack on the reliability of Beyler's opinion testimony. App. at 126-27.

But Wal-Mart *did* challenge the admissibility of Beyler's testimony as unreliable in the trial court, particularly on the basis of his foundational data. Supp. CR I. 10-24. Although the *Robinson* factors were not cited, Wal-Mart objected to Beyler's "conclusory, speculative, and unsupported statements" (Supp. CR I. 21), hallmarks of an impermissible "analytical gap" under *Gammill*. Wal-Mart did not per se challenge Beyler's methodology in the trial court—and did not do so on appeal—because he employed none.

Rather, Beyler simply cobbled together general information on halogen lamps, including the Consumer Product Safety Commission's four possible "fire initiation scenarios" for such lamps: (1) ignition of combustibles in close proximity of the lamp (such as curtains, bedding, wall or ceiling materials), (2) ignition of combustibles by exploding lamp fragments, (3) electrical short circuits, and (4) tip-over of the torchiere fixture resulting in ignition of combustibles. CR 641-42, 651. Then—without reasoning or testing—Beyler picked as the "most likely mechanism" the only one of those scenarios not absolutely ruled out by the

evidence: an exploding bulb.[3] CR 655. That determination affords no "methodology" to evaluate, but rather a classic example of an analytical gap.

Under *Robinson* and *Gammill*, the expert's opinion must be based on the methods and procedures of science or reasoned application of experience to the facts, rather than on subjective belief or unsupported speculation. Beyler's theory that the recliner was ignited by glass shards from an exploding halogen bulb was not supported by any scientific analysis or methodology. Beyler conducted no tests to demonstrate that hot glass shards could have ignited the recliner—pointing only to tests that show that fabrics in contact or close proximity to a *burning* halogen bulb may ignite. CR 650, 652-53. Further, Beyler reaches his conclusion without key supporting facts because the record contains no evidence of remnants of a shattered halogen bulb affixed to the pole lamp found at the fire scene, nor of any bulb shards nearby or in the area of origin. Thus, Beyler's opinion is "little more than subjective belief or unsupported speculation." *Gammill*, 972 S.W.2d at 727; *see also Wolfson v. BIC Corp.*, 95 S.W.3d 527 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (testimony of plaintiffs' expert witness who had over 20 years of experience investigating fires caused by lighters was not admissible in products liability action against manufacturer of butane lighter because expert did not observe or perform any test which may have been duplicated or which

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[3] Although Beyler devotes a good bit of his report to regurgitating scholarly ignition data for various materials (CR 652-53), Plaintiffs concede that there is no evidence of (and do not contend that the fire was the result of) anything being draped over the top of or laying on the bulb or shade of a halogen floor lamp. CR 118. Plaintiffs do not contend that the fire was the result of inadequately insulated wiring or defective switches or components or any other electrical cause (CR 116-18, 654), and admit there is no evidence that the fire was caused by the lamp being knocked over or having fallen over (CR 115). Indeed, Plaintiffs also "conditionally" admitted that there was no evidence that the fire was caused by the bulb in a halogen floor lamp exploding (because their first expert, David Dallas, opined that the fire started higher up), but if the fire was determined to have been started in the recliner, then they contend it was the exploding bulb. CR 115-16.

verified alleged malfunction in type of lighter used by consumer; instead expert relied heavily on his own subjective assumptions that debris entering lighter caused it to explode).

In the absence of any reliable tests, Beyler may not rely on his bald assertion that "the halogen lamp as the source of ignition in this fire is consistent with . . . our knowledge of fire science." CR 642. *See Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897 (Tex. 2004) (finding unreliable and inadequate to prove causation expert's opinion based on the "laws of physics," where no studies or tests explained his theory). Moreover, because Beyler did not (and could not) inspect the lamp that allegedly caused the fire, he cannot simply conclude that the lamp was the source of the fire and then reverse engineer an opinion. *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 719 (Tex. 1997) (finding that such post hoc reasoning renders expert opinion unreliable); *see also Wolfson*, 95 S.W.3d 527 (where essential lighter components were never recovered for examination, expert's reverse-engineered opinion properly excluded, summary judgment properly granted to manufacturer).

Most importantly, Beyler failed to adequately exclude other potential causes for the fire. *Havner*, 953 S.W.2d at 720. Beyler makes a cursory explanation of why he excludes candles as an ignition source (CR 655), but does nothing to adequately explain away smoking materials. He states:

> In this fire, the halogen torchiere lamp was within the area of origin. The candle holders with melted wax were within the area of origin. **There is no evidence of lit smoking materials in the area of origin during the night before the fire**. The mere fact that occupants may be smokers and may have smoked somewhere during the hours before the fire does not provide data relevant to the investigation of causes available in the area of origin. These may be cues to look for data related to the area of origin, but they are not themselves data. As such, a fire initiated by smoking materials does not even give rise to the level of a hypothesis. **The condition of the recliner after the fire is in no way indicative of ignition of the recliner by a cigarette.**

CR 654 (emphasis added).

Beyler's bald statement that there is no evidence of smoking materials in the area of origin is inconsistent with the testimony of the police officers who investigated the scene, both of whom testified that smoking materials (ashtrays and remnants of marijuana cigarette butts) were found on the table next to the recliner. CR 383-85, 392, 404-05, 412. Further, Beyler offers no explanation at all as to why the condition of the recliner—which was completely destroyed—rules out smoking materials as the source of ignition.

B. Because Plaintiffs' required expert testimony is conclusory and speculative on its face and therefore constitutes no evidence under *Coastal*, the court of appeals erred in reversing the trial court's summary judgment in favor of Wal-Mart.

Even if Beyler's expert testimony was properly admitted, it constitutes no evidence of defect or causation because it offers an opinion with no factual substantiation and therefore is conclusory and speculative. Speculative or conclusory statements of an expert witness are insufficient to create a question of fact to defeat summary judgment. *IHS Cedars Treatment Ctr. of DeSoto, Tex. Inc. v. Mason*, 143 S.W.3d 794, 803 (Tex. 2004).

1. Beyler's testimony constitutes no evidence of causation because it is conclusory and speculative on its face.

Beyler engaged in a wholly unsupported and conclusory leap from the *possibility* that a halogen lamp bulb could explode to the opinion that it did so here—and that the resulting shards ignited the recliner—without any factual evidence of that scenario whatsoever. Further, Beyler's testimony is internally inconsistent and conclusory with respect to his exclusion of smoking materials as the potential cause for the fire. As discussed above, Beyler concludes that "[t]here is no evidence of lit smoking materials in the area of origin during the night of the fire," yet his own report mentions the testimony of the investigating police

officers (who found smoking materials next to the recliner and throughout the house). CR 649, 654. Additionally, Beyler's inaccurate statement that there was no physical evidence of lit cigarettes in the area of origin is self-defeating—neither was there any physical evidence of flying bulb shards.

The court of appeals concluded that Beyler's testimony was not conclusory or speculative under *Coastal* because his testimony sufficiently bridged the "analytical gap" between the presence of various potential sources of ignition and the Merrell house fire. App. 130. But in doing so, the court of appeals points to the *most* speculative and conclusory of Beyler's statements—"that there is no evidence that smoking materials caused the fire and that '[t]he condition of the recliner after the fire is in no way indicative of ignition of the recliner by a cigarette.'" App. at 129. Indeed, the latter declaration is the *epitome* of a conclusory and speculative opinion: Beyler makes no explanation whatsoever as to how a completely destroyed recliner is consistent with having been ignited by a bulb shard, but inconsistent with ignition by a smoldering cigarette.

Beyler's bare conclusions regarding the source of ignition as hot glass shards from an exploding halogen bulb amount to no more than nonprobative speculation and therefore do not constitute any evidence. Beyler provided no direct evidence of the fire's cause and origin, nor did he adequately eliminate other possible causes. The fact that he suspects a halogen lamp was the cause of the fire is not enough for Plaintiffs to avoid summary judgment. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598 (Tex. 2004).

2. Beyler's testimony constitutes no evidence of defect because it is conclusory and speculative on its face and fails to meet the statutory and common-law proof requirements for a design defect claim.

Generally stating that halogen lamp temperatures "are in excess of ignition temperatures of common materials," and that "proximity of combustibles to halogen torchiere lamps is a significant fire initiation scenario," Beyler jumps immediately to the conclusion that halogen lamps "are highly dangerous and defective." CR 650. In short, Beyler concludes that halogen lamps are defective and unreasonably dangerous because they generate more heat than other types of lamps. However, evidence of increased risk from a product is not sufficient to show either a defect or unreasonable dangerousness. *Caterpillar, Inc. v. Shears*, 911 S.W.2d 379, 381 (Tex. 1995).

Moreover, Beyler's testimony fails to provide evidence of a safer alternative design, a statutory proof requirement in a design defect claim (*see* Tex. Civ. Prac. & Rem. Code Ann. § 82.005), and lacks evidence necessary for a proper risk-utility analysis, required under *Grinnell* to establish a defective design rendering a product unreasonably dangerous. With respect to the statutory requirement, both Beyler and the court of appeals' opinion point to the availability of incandescent lamps as evidence of a safer alternative design. CR 465, App. 134. But this conflates two separate inquiries. The availability of a *substitute* product that would meet the same need is one of the factors to be considered in the *Grinnell* risk-utility analysis. The safer alternative design inquiry should properly have been directed to whether a safer alternative design for a *halogen* lamp existed. Beyler presented no such evidence.

As to the five *Grinnell* factors, Beyler's report pays lips service to only three. The first factor requires weighing "the utility of the product to the user and to the public as a whole" against "the gravity and likelihood of injury from its use," *Grinnell*, 951 S.W.2d at

432. Beyler does not discuss the utility of halogen lamps at all. Halogen lamps produce a brighter, cleaner light but Beyler makes no attempt to weigh this benefit against any increased risk from higher-temperature bulbs. Obliquely addressing the second *Grinnell* factor—"the availability of a substitute product which would meet the same need and not be unsafe or unreasonably expensive," *id*.—Beyler merely recites that other types of lamps rely on lower-temperature filaments (CR 650) without discussion of whether they produce comparable light.

Beyler's report does not address the third *Grinnell* factor— "the manufacturer's ability to eliminate the unsafe character of the product without seriously impairing its usefulness or significantly increasing its costs," *id*.—at all. As to the fourth factor—"the user's anticipated awareness of the dangers inherent in the product and their avoidability because of the general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions," *id*.— Beyler makes conclusory statements that are not supported by any facts. CR 651. ("[T]he public is not aware of the hazards associated with exploding halogen bulbs."). With respect to the fifth factor—"the expectations of the ordinary consumer," *id*.—Beyler makes broad conclusory statements about what the public is "accustomed to" (CR 651), but his report presents no relevant data to support his conclusions.

PRAYER

This Court should grant review, reverse the judgment of the court of appeals, and render the judgment rendered by the trial court—that Plaintiffs take nothing against Petitioner. Petitioners also pray for all other relief to which they may be entitled.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served in accordance with the Texas Rules of Civil Procedure by service listed to the following parties on May 8, 2009:

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