

# NO.09-0224

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IN THE SUPREME COURT OF TEXAS

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**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.**

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

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## **REPLY TO RESPONSE TO PETITION FOR REVIEW**

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner described several issues that are important to the jurisprudence of the state and merit review, including the court of appeals' misapplication of the *Robinson/Gammill* and *Coastal* standards for reviewing, respectively, the admissibility and legal sufficiency of expert testimony and the threat that loosening these standards raises to the statutory protections provided to Texas retailers. Plaintiffs' response fails to negate Petitioner's arguments of importance, instead further highlighting the fundamental flaws in the intermediate court's interpretation of these related, but independently significant, inquiries.

**I. The response makes the same mistakes as did the court of appeals: misconstruing the relationship between this Court's standards for reviewing expert testimony and glossing over the substantive shortcomings of Plaintiffs' causation evidence.**

Petitioner established that the causation opinion of Plaintiffs' expert, Craig Beyler, was both inadmissible under *Robinson/Gammill* and legally insufficient to support judgment under *Coastal*,<sup>1</sup> demonstrating *inter alia* that Beyler (1) provided no reasoned analysis for his conclusion that flying bulb shards from an exploding halogen lamp caused the fire, and (2) failed to adequately eliminate other potential sources of ignition (most notably, smoking materials established by officials' testimony to have been present in the area of origin and throughout the house). PFR at 9-14. Petitioner also showed that the court of appeals erroneously labeled Wal-Mart's appellate challenge to the reliability of Beyler's testimony as a waived attack on his methodology. PFR at 9-12; *see Merrell v. Wal-Mart*, 276 S.W.3d 117, 127 (Tex. App.—Texarkana 2009, pet. filed) (characterizing Wal-Mart's trial court objection to admission of Beyler's opinion as a non-*Robinson* challenge). Because Beyler's

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<sup>1</sup> *Coastal Transp. Co., Inc. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227 (Tex. 2004); *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713 (Tex. 1998); *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex.1995).

testimony largely applied his knowledge, training, and experience to the underlying data and his “methodology” was not easily tested by objective criteria such as identifiable scientific formulas, the threshold reliability of his opinion was not properly measured by a *Robinson*-factor analysis, but rather by *Gammill’s* “analytical gap” test—which it failed. PFR at 9-10; *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 578-79 (Tex 2006).

In response, Plaintiffs suggest that Beyler’s opinion was reliable because his “10-page affidavit had a 20-page report and 40 pages of exhibits attached to it.” PFR Resp. at 7, Ex. A. But volume does not equal substance. And all of Beyler’s voluminous attachments go only to the conclusion that halogen lamps *may*, under certain circumstances, cause fires, not that one did so here. PFR Resp. at 8 n.3. Plaintiffs further argue that Beyler relied on the same methodology and professional standards as Wal-Mart’s experts and shares similar credentials. PFR Resp. at 9. But unlike Wal-Mart’s experts, Beyler paid only lip service to fire investigation Standard 921 (merely reciting the steps one *should* take under that regime), and did not, in fact, apply any discernable methodology at all in reaching his conclusion. PFR at 9-12. Moreover, Petitioner does not question Beyler’s credentials, but the analytical gap between the materials cited by Plaintiffs and their expert’s conclusion as to causation was too large to be bridged by the *ipse dixit* of their expert, no matter how qualified he was.

Plaintiffs assert that this case is “not like *Mack Trucks* . . . where a fire expert failed to cite any studies to support his conclusion, and did not try to rule out other theories of ignition.” PFR Resp. at 10. In fact, this case is very much like *Mack Trucks*, where—as appellate counsel for Plaintiffs in this case successfully argued to this Court in his representation of Mack Trucks—the trial court properly excluded expert testimony as to what caused a post-accident fire that completely destroyed a truck and burned the driver because the expert failed to rule out alternative causes of the fire using accepted methodologies. 206

S.W.3d at 572; PFR of Mack Trucks at 21 ( “[Plaintiffs’ expert] never ruled out the cargo as the cause of the fire. He totally ignored the [data] and charted his own course, which was to merely conclude that the fuel system was the cause of the fire.”). Here, Beyler likewise provided no direct evidence of the fire’s cause and origin, ignored the data which favored smoking materials as the most likely ignition source, and failed to adequately exclude other potential causes of the fire (particularly smoking materials) through any objective methodology. PFR at 11-13.

In order for Beyler’s testimony on causation to be reliable, he was required to present some methodology that reliably supported his opinion that flying bulb shards were the source of ignition. *Mack Trucks*, 206 S.W.3d at 581. He did not do so. Beyler testified that he had read and relied on studies on the general subject of halogen lamp-caused fires, but did not specify any studies that supported his conclusion as to the specifics involved in the Merrell house fire. Plaintiffs needed to provide more than mere evidence of potential ignition scenarios to survive summary judgment on their theory that the fire was caused by a defect in the design and manufacture of the allegedly present halogen lamp. *Id.* at 582; *see also Gen’l Motors Corp. v. Iracheta*, 161 S.W.3d 462, 470 (Tex. 2005); *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600-01 (Tex. 2004). The mere fact that a halogen lamp *could* have started a fire is not sufficient evidence that the purported halogen lamp in Charlie Merrell’s house did so. *Mack Trucks*, 206 S.W.3d at 580. Because Beyler did not (and could not) inspect the specific lamp that allegedly caused the fire, and neither performed nor reviewed reconstruction analysis, he cannot simply conclude that the lamp was the source of the fire and then reverse engineer an opinion based on mere “factors” and selectively-considered “facts.” *Id.*

Further, although Plaintiffs assert that Beyler ruled out other possible causes, including smoking materials, PFR Resp. at 14, Petitioner demonstrated that he did so in conclusory and speculative fashion, PFR at 11-13. Beyler failed to set out any process by which he excluded smoking materials, offering no analysis as to *why* he concluded that the complete consumption of the recliner by fire was not at least as consistent with ignition by smoking materials as with his opinion that the source of ignition was flying bulb shards from an exploding halogen lamp. In short, he offered nothing to suggest that what he believed could have happened actually did happen; his belief was little more than unsupported speculation. *Mack Trucks*, 206 S.W.3d at 581; *Gammill*, 972 S.W.2d at 728.<sup>2</sup>

The court of appeals essentially ignored the lack of connective reasoning and focused almost exclusively on Beyler's regurgitation of general information about the heat generated by halogen lamps and his bald assertions that he had used recognized and accepted procedures in forming his opinion. *Merrell*, 276 S.W.3d at 128-30. *Robinson*, *Gammill*, and *Coastal* plainly require more. That Beyler merely recites well-regarded fire investigation standards and consumer reports as the basis for his report does not ameliorate the conclusory nature of his ultimate opinion. *City of San Antonio v. Pollock*, 284 S.W.3d 809, 817 (Tex. 2009). Indeed, the court of appeals' opinion spotlights the glaring gap left between the studies cited by Beyler (reflecting that burning halogen bulbs can ignite combustibles in close proximity) and his conclusion that flying bulb shards ignited the recliner, with the court

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<sup>2</sup> See also *Bryte ex rel. Bryte v. American Household, Inc.*, 429 F.3d 469 (4th Cir. 2005) (state fire investigator's expert testimony that allegedly defective electric throw caused fatal fire was properly excluded in products liability action against throw's manufacturer, given investigator's failure to exclude all or even most other possible sources of fire); *Lanza v. Poretti*, 537 F.Supp 777 (E.D. Pa. 1982) (holding that causation opinion of fire investigator properly excluded where all but two possibilities—including careless cigarette disposal—were eliminated).

improperly supplying its own “expert” analysis to bridge the void. *Merrell*, 276 S.W.3d at 128 (“Using scientific studies, [Beyler] illustrated that combustibles within two or three inches from the bulb pose a serious risk of igniting. Logically if the bulb itself, or fragments, come into direct contact with a combustible, the risk of igniting would be even greater.”)

During oral argument before the court of appeals, Plaintiffs’ counsel argued that the trial court’s admission of Beyler’s testimony automatically rendered that testimony sufficient evidence to defeat summary judgment. Plaintiffs continue that theme here, suggesting that, because Wal-Mart contended the failure to exclude smoking materials and candles as a fire source “was a basis for throwing out Dr. Beyler’s opinion altogether,” any challenge on that ground was lost in the trial court. PFR Resp. at 14. But in the context of expert testimony, admission does not equal legal sufficiency—that is the very essence of *Coastal* and its progeny. *Iracheta*, 161 S.W.3d 462; *Volkswagen of Am. Inc. v. Ramirez*, 159 S.W.3d 897 (Tex. 2004); *Coastal*, 136 S.W.3d 227. And Plaintiffs’ response makes the same mistake as did the court of appeals—failing to recognize that there is some inherent overlap between the *Robinson/Gammill* and *Coastal* inquiries. PFR 6-7.

After this Court adopted gate-keeping standards for expert testimony, evidence that failed to meet reliability standards was rendered not only inadmissible, but incompetent as well. *City of Keller v. Wilson*, 168 S.W.3d 802, 813 (Tex. 2005). Expert testimony which does not meet basic reliability standards is incompetent, and incompetent evidence is insufficient to support a judgment, even if admitted without objection. *Id.* at 812-13. Where, as here and in *Gammill*, an expert employs no testable methodology, Plaintiffs’ proposed rule—that a party may challenge the legal sufficiency of conclusory and speculative expert testimony if it completely fails to object to that testimony in the trial court, but is precluded from bringing a legal sufficiency challenge if its overruled trial court objection attacked the

same unsupported speculation—turns *Coastal* on its head. Accepting the court of appeals’ similar misguided interpretation condones the precise ill that *Robinson*, *Gammill*, and *Coastal* intended to alleviate: allowing proof of causation to rest solely on the mere *ipse dixit* of a credentialed expert.

**II. Plaintiffs’ response to the threat posed to a retailer’s ability to obtain statutory indemnification does nothing to palliate the seriousness of this issue.**

Petitioner demonstrated that the court of appeals’ loosening of the standards for expert testimony in this case presents a threat to the ability of retailers in Wal-Mart’s position to obtain statutory indemnification from multiple potentially liable manufacturers. PFR at 7-8. Plaintiffs first suggest that their failure to supply the allegedly defective fire-scene lamp—or any specific information that might reveal the lamp’s maker—presents no such problem because Wal-Mart itself identified in discovery a manufacturer who provided it such lamps. PFR Resp. at 6, quoting 1 CR 611 (“[Wal-Mart] would show that lamps **similar to the one in the possession of Plaintiffs** were distributed by Holmes Group, Inc. and was [sic] sold at the three stores in question, during the time period in question.”) (emphasis added). But the lamp Wal-Mart referred to in the cited discovery response was the fake lamp, which Plaintiffs maintained through nearly four years of litigation was *the* lamp that started the fire. PFR, 4. The fact that the phony lamp was possibly manufactured by Holmes is completely immaterial to the question of who manufactured the *actual* pole lamp alleged to have caused the fire in Charlie Merrell’s house and does nothing to aid Wal-Mart in seeking the statutory indemnity to which it is entitled. Although Plaintiffs characterize Petitioner’s discussion of the fake lamp as a mere “attention-getting label,” PFR Resp. 6, this misguided argument illustrates the degree to which the fake lamp saga has, in fact, permeated this case.

Plaintiffs further suggest that Wal-Mart is not entitled to statutory indemnification because it is not an “innocent” seller, having sold the allegedly defective lamp without a retrofit wire mesh guard or warnings. PFR Resp. at 4-5. That is incorrect. To begin, Plaintiffs did *not*, as their Response represents, plead that the lamp they allegedly purchased from Wal-Mart lacked a wire mesh guard. PFR Resp. at 4 (citing 2 CR 486-88, excerpt from deposition of Charles Merrell, Sr., which makes no reference to the presence or absence of a wire mesh guard on the lamp he allegedly purchased). The only guard-related claim Plaintiffs pleaded was against named defendant the Holmes Group for failing to design the lamp with a guard or shield. CR12. Plaintiffs’ petition makes no claim against Wal-Mart for selling a lamp absent a wire mesh retrofit. CR 13-16. In fact, as Plaintiffs’ Response clearly illustrates, their “missing” wire mesh guard argument was raised for the first time in their summary judgment response. *See* PFR Resp. at 12, citing 2 CR 460-65 (Plaintiffs’ Resp. to Motion for Summary Judgment). That argument was thus not before the trial court and was not properly before the court of appeals in reviewing the grant of a no-evidence summary judgment in favor of Petitioner. *See Barrick v. CRT Disaster Servs.*, No. 14-06-00853-CV, 2007 WL 2790386 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (mem. op.).

Moreover, Plaintiffs’ allegations that Wal-Mart was independently negligent in selling a lamp without proper warnings or a mesh guard cannot, alone, negate Wal-Mart’s entitlement to statutory indemnification. The products liability statute does provide an exception to a manufacturer’s duty to indemnify in case of a loss caused by a seller’s independent negligence or misconduct. Tex. Civ. Prac. & Rem. Code § 82.002. However, this Court has recognized that a seller’s reasonable cost to defend an unsuccessful negligence claim, asserted independently of the products liability claim, is included within the manufacturer’s indemnity duty and that a plaintiff’s pleadings are *not* sufficient to invoke the

negligent-seller exception to that duty (which requires an actual finding that the seller's independent conduct was a cause of the plaintiff's injury). *Meritor Auto., Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86, 87, 91 (Tex. 2001). Because the manufacturer bears the burden of proof to avoid the duty to indemnify, the maker of the allegedly defective lamp must prove Wal-Mart's independent culpability in order to escape paying defense costs. *Id* at 91. Thus this case indeed raises the troubling question contemplated by the dissent in *Owens & Minor, Inc. v. Ansell Healthcare Products, Inc.*: in a *multiple*-manufacturer case, where plaintiffs provide neither the allegedly injury-causing product nor sufficient evidence to attribute it to a particular manufacturer, on whom is placed the "impossible burden" of showing a manufacturers' product was the one involved? 251 S.W.3d 481, 492 (Tex. 2008) (O'Neill, J., dissenting). If, as the *Owens* dissent suggests, the practical weight of that task falls to the seller, permitting such sketchy product liability claims to also proceed on incompetent causation testimony seriously undermines the Legislature's intent that innocent retailers be protected.

### **PRAYER**

Plaintiffs' expert causation testimony is lacking in both the fundamental reliability required for admission and the competency necessary to support judgment under the standards set forth by this Court. The court of appeals reaches a different conclusion only by both blurring the distinctions between and relaxing the *Robinson/Gammill* and *Coastal* standards. Because this case presents issues of substantial importance, 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.

Respectfully submitted,  
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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 July 28, 2009:

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