

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

PETITIONER'S REPLY BRIEF ON THE MERITS

Susan S. Vance
State Bar No. 24036562
Douglas W. Alexander
State Bar No. 00992350
ALEXANDER DUBOSE
& TOWNSEND LLP
515 Congress Avenue, Suite 2350
Austin, Texas 78701
Telephone: (512) 482-9300
Telecopier: (512) 482-9303

Jeffrey A. Cox
Edward A. Davis
HARTLINE, DACUS, BARGER,
DREYER, & KERN, L.L.P.
6688 N. Central Expressway, Suite 1000
Dallas, Texas 75206
Telephone: (214) 369-2100
Telecopier: (214) 369-2118

COUNSEL FOR PETITIONER
WAL-MART STORES, INC.

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

INDEX OF AUTHORITIES..... ii

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. 1

II. This Court’s recent decision in *Whirlpool v. Camacho* further supports Wal-Mart’s position that the court of appeals failed to perform a proper legal sufficiency review..... 2

III. Plaintiffs’ response does nothing to shore up the tissue-thin evidence that a halogen lamp purchased at Wal-Mart was even present in the Merrell home. 6

IV. Plaintiffs’ response to the threat posed to a retailer’s ability to obtain statutory indemnification does nothing to palliate the seriousness of this issue..... 8

 A. Incredibly, Plaintiffs continue to rely on meaningless evidence about the manufacturer of the *fake* lamp to deflect attention from the feebleness of their case. 9

 B. Plaintiffs’ unplead “missing” wire mesh guard argument neither negates Wal-Mart’s entitlement to indemnity, nor diffuses the danger that loose standards pose to statutory protections. 10

CONCLUSION..... 11

CERTIFICATE OF SERVICE..... 13

INDEX OF AUTHORITIES

Cases

<i>City of Keller v. Wilson</i> , 168 S.W.3d 802 (Tex. 2005).....	2
<i>City of San Antonio v. Pollock</i> , 284 S.W.3d 809 (Tex. 2009).....	6
<i>Coastal Transport Co. v. Crown Cent. Petroleum</i> , 136 S.W.3d 227 (Tex. 2004).....	2
<i>E.I. du Pont de Nemours & Co. v. Robinson</i> , 923 S.W.2d 549 (Tex. 1995).....	2-4
<i>Gammill v. Jack Williams Chevrolet, Inc.</i> , 972 S.W.2d 713 (Tex. 1998).....	2, 5
<i>Owens & Minor, Inc. v. Ansell Healthcare Prods., Inc.</i> , 251 S.W.3d 481 (Tex. 2008).....	9
<i>Volkswagen of Am., Inc. v. Ramirez</i> , 159 S.W.3d 897 (Tex. 2004).....	3
<i>Whirlpool Corp. v. Camacho</i> , 298 S.W.3d 631 (Tex. 2009).....	1-6

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner Wal-Mart 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 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 Wal-Mart's arguments of importance, instead further highlighting the fundamental flaws in the intermediate court's interpretation of these related, but independently significant, inquiries. Moreover, the response acknowledges, but fails to reconcile this Court's intervening decision in *Whirlpool Corp. v. Camacho*, 289 S.W. 3d 631 (Tex. 2009), which further strengthens Wal-Mart's position that the court of appeals failed to conduct proper legal sufficiency review of Plaintiffs' expert evidence.

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.

Wal-Mart demonstrated that the expert testimony of Plaintiffs' origin-and-cause expert, Craig Beyler, was unreliable—and therefore both inadmissible and legally insufficient—because Beyler selectively considered the facts, performed no tests nor set out reasoned analysis to support his flying bulb shard theory, and failed to rule out other obvious potential causes for the fire. Pet. Br. 10-20. Wal-Mart also explained that the court of appeals erred, both by mischaracterizing Wal-Mart's challenge to the reliability of Beyler's expert testimony as a waived attack on his methodology, Pet. Br. 10-15, and by failing to independently evaluate the reliability of Beyler's testimony on legal sufficiency challenge, Pet. Br. 16-19.

Plaintiffs' response fails to account for any of these shortcomings, but instead merely recites lengthy excerpts of the court of appeals' flawed analysis and points repeatedly to the heft of Beyler's résumé and report. *See* Resp. Br. 5, 10 (suggesting that Beyler's opinion was reliable because his "10-page affidavit had a 20-page report and 40 pages of exhibits attached."); Resp. Br. 11, 17, 19 (arguing that Beyler relied on the "same methodology" and professional standards as Wal-Mart's experts and shares similar credentials).

Wal-Mart did not question Beyler's credentials. But mere recitation of standards is not a "methodology," *see* Pet. Br. 12, and the amount of ink in Beyler's report does not lend it substantive weight. And again, 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. *See* Resp. Br. 16 & n.7 (listing exhibits) & Ex. A. (Beyler's affidavit and report).

In short, Beyler did not apply his expertise to reasonably connect his materials to his conclusions, but rather made an impermissible leap between the two. *Coastal Transport Co. v. Crown Cent. Petroleum*, 136 S.W.3d 227 (Tex. 2004); *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 727-28 (Tex. 1998); *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995). Beyler's speculative, conclusory opinion is unreliable and thus both inadmissible and incompetent to support judgment. *City of Keller v. Wilson*, 168 S.W.3d 802, 813 (Tex. 2005).

II. This Court's recent decision in *Whirlpool v. Camacho* further supports Wal-Mart's position that the court of appeals failed to perform a proper legal sufficiency review.

After Wal-Mart filed its opening brief on the merits, this Court issued its opinion in *Whirlpool Corp. v. Camacho*, 298 S.W.3d 631 (Tex. 2009), which further supports Wal-Mart's position that the court of appeals failed to properly review the legal sufficiency

of Beyler's expert testimony. In *Whirlpool*, a products liability action against a clothes dryer manufacturer, the court addressed the question of whether the legal sufficiency of an expert's opinion that a defect in a dryer caused a fatal fire was required to be determined under the *Robinson* factors,¹ rather than merely under the analytical gap test. The Court reiterated that a party may assert on appeal, so as to be entitled to independent no-evidence standard of review, that unreliable scientific evidence or expert testimony is not only inadmissible, but also that its unreliability makes it legally insufficient to support a verdict. *Id.* at 638. (citing *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 903 (Tex. 2004)).

Similar to the facts in this case, the fire scene had been cleared and the allegedly defective dryer removed and thus was unavailable for inspection. *Whirlpool*, 298 S.W.3d at 634. The Camachos' expert, Judd Clayton, theorized that lint particles became clogged in a corrugated transport tube, migrated to the heater box (where they were ignited), and then into the dryer drum, causing the clothes therein to burst into flames. *Id.* at 635. Clayton did not personally test his theory, *id.* at 642, but relied on tests of other dryer ignition scenarios, including reports of dryer tests by the Consumer Products Safety Commission (CPSC), *id.* at 639.

Clayton (like Beyler) had extensive experience in fire investigation and testified that he relied on that experience in reaching his opinions. *Id.* at 639. However, because the basis of Clayton's opinion was a theory that could have been subject to testing, which corresponds

¹ *Robinson* set out six nonexclusive factors to determine whether an expert's testimony is reliable and thus admissible: (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 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. 923 S.W.2d at 557.

with the first *Robinson* reliability factor, the Court concluded that proper appellate legal sufficiency review required evaluating Clayton's testimony by considering both *Robinson*-type factors and examining for analytical gaps in his testimony. *Id.* at 639-40 (citing *Robinson*, 923 S.W.2d at 557).

The Camachos asserted that because there was legally sufficient evidence that the fire began in the dryer and there was testimony that other possible causes of the fire had been eliminated, testing was not required to prove that material in the drum could be ignited in the manner advanced by their expert. *Whirlpool*, 298 S.W.3d at 642. The Court noted "that testing is not always required to support an expert's opinion, but lack of relevant testing to the extent it was possible, either by the expert or others, is one factor that points toward a determination that an expert opinion is unreliable." Reasoning that, while Clayton referenced a CPSC report of lint ignition under different circumstances, he did not explain how the testing data supported his ultimate conclusion, the Court concluded that Clayton's theory was unsupported and unreliable and thus no evidence. *Id.*

In this case, the court of appeals drew an artificial line between reliability analysis as pertaining to admissibility and legal sufficiency review. *See* Pet. Br. 2-3, App. 2 at 126-27. Rather than conducting a fulsome examination of the reliability of Beyler's methodology and analysis, the court of appeals focused almost exclusively on Beyler's credentials and conclusions. Completely ignoring the lack of reasoning between those conclusions and the evidence, the court of appeals concluded that his testimony successfully bridged the "analytical gap." Pet. Br. 17-18; App. 2 at 130. Neither that approach, nor the result, can be squared with *Whirlpool*.

As Wal-Mart has demonstrated, Beyler's testimony completely fails the analytical gap test. Pet. Br. 10-15. But, notwithstanding Beyler's experience, given the facts in this case, the analytical gap test was not the only factor that should have been considered. As the Court recognized in *Whirlpool*, "[w]itnesses offered as experts in an area or subject will invariably have experience in that field." *Whirlpool*, 298 S.W.3d at 639. "If courts merely accept 'experience' as a substitute for proof that an expert's opinions are reliable and then only examine the testimony for analytical gaps in the expert's logic and opinions, an expert can effectively insulate his or her conclusions from meaningful review by filling gaps in the testimony with almost any type of data or subjective opinions." *Id.* (citing *Gammill*, 972 S.W.2d at 722). Thus, "[w]hen expert testimony is involved, courts are to rigorously examine the validity of facts and assumptions on which the testimony is based, as well as the principles, research, and methodology underlying the expert's conclusions and the manner in which the principles and methodologies are applied by the expert to reach the conclusions." *Whirlpool*, 298 S.W.3d at 637.

Here, as in *Whirlpool*, the evidence, including the CPSC report relied on by Beyler, highlights the extent to which Beyler's theory was subject to testing and examining for reliability. Here, as in *Whirlpool*, Beyler neither performed tests nor had tests performed to demonstrate that hot glass shards could have ignited the recliner, instead, pointing only to dissimilar tests that show fabrics in contact or close proximity to a *burning* halogen bulb may ignite. CR 650, 652-53. While Beyler referenced the CPSC report, he did not explain how the testing data supported his ultimate conclusion. (Indeed, that glaring gap was improperly filled with the court of appeals' own "expert" analysis). See Pet. Br. 18; App. 2 at 128. Thus, while Plaintiffs urge that "this is not even a case like *Whirlpool* . . . where relevant

testing was available but not used,” Resp. Br. 18, this case is very much like *Whirlpool*. Beyler could have, but did not, test his theory that bulb shards could have ignited the recliner fabric under similar conditions.

“It is incumbent on an expert to connect the data relied on and his or her opinion and to show how that data is valid support for the opinion reached.” *Whirlpool*, 289 S.W. 3d at 642. Beyler did not do so. When all the evidence is considered, as it must be in a proper legal sufficiency review, it must be concluded that the data on which Beyler relied does not support his opinions. *Id.* at 643. His opinions are subjective, conclusory, and are not entitled to probative weight. *Id.* (citing *City of San Antonio v. Pollock*, 284 S.W.3d 809, 817 (Tex. 2009)). Because his testimony is the only evidence that the alleged design defect—a shattering halogen bulb—caused the fire, there is no evidence to support a finding that a design defect in the pole lamp allegedly purchased at Wal-Mart caused the house fire.

III. Plaintiffs’ response does nothing to shore up the tissue-thin evidence that a halogen lamp purchased at Wal-Mart was even present in the Merrell home.

As Wal-Mart noted in its opening brief, 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. Pet. Br. 9 & n.2. The person who removed the pole lamp from the house and two experts who studied the fire-scene photos identified the characteristics of the lamp as consistent with an incandescent, rather than a halogen, fixture. Pet. Br. at 2 & n.1, 3.

In response, Plaintiffs devote nearly three pages of briefing to a recitation of testimony snippets purportedly demonstrating that the pole lamp in Charlie Merrell’s house was a halogen fixture. Resp. Br. 20-22. (underlining occurrences of the phrase “halogen lamp”).

But eight of the fourteen underlined occurrences of the words “halogen lamp” are contained in questions from Plaintiffs’ counsel.² That is, of course, not evidence. One of the underlined occurrences is contained in a response by Mr. Merrell as to his general knowledge of the difference between halogen and incandescent lamps. Resp. Br. 22 (quoting CR 487). And one of the cited occurrences is excerpted from the unsworn handwritten statement of Charlie Merrell’s neighbor, Jay Whitlock, (Resp. Br. 22, citing CR 704-06), which was admitted as summary judgment evidence over Wal-Mart’s hearsay objection and which the court of appeals ruled admissible *only* for the limited purpose of explaining the basis of Beyler’s opinion. Pet. Br. App. 2 at 125. Whitlock’s statement thus may not be independently relied upon for its substance and is not usable to establish facts underlying claims.

Finally, one of the cited underlined occurrences of the words “halogen lamp” is contained in a statement of rank—and demonstrably false—hearsay testimony offered by Mr. Merrell, Sr., stating that the Fire Marshal’s report said that “there was a heavily damaged halogen lamp” at the fire scene. Resp. Br. 21 (citing CR 484) (Plaintiffs’ emphasis). But the Fire Marshal investigator, Clint Williams, expressly testified that he did not inspect the floor lamp to make a determination as to whether it was a halogen or incandescent fixture because there was no indication that the lamp was the cause of the fire. CR 699-700. And the Fire Marshal’s report, in fact, states that the remains in the house included “a heavily damaged

² See, e.g., Resp. Br. 20-22, quoting and emphasizing attorney questions from CR 481 (“Q: Was the lamp you’re talking about, the halogen lamp, was it still there . . .?” “Q: Where in the house was the halogen lamp?”; “Q: Was the halogen lamp plugged in . . .?”; “Q: What did you see as far as the halogen lamp was concerned . . .?”); CR 483 (“Other than the halogen lamp, that we’ve been talking about, were there any other lamps . . .?”); CR 487 (“Q: Do you know the difference between a halogen and or an incandescent type lamp?”); CR 491 (“[W]as [the sofa] heavily damages on the end by the halogen lamp?”) (Plaintiffs’ emphasis in all).

floor lamp”—the report says nothing to indicate the fixture was a halogen lamp. CR 247 (emphasis added).

Incredibly, Plaintiffs also rely on inferences regarding a “halogen lamp” to be drawn from (1) the testimony of Joe Williams, who burned the phony lamp with gasoline to dupe Mr. Merrell out of the \$500 reward, then lied about it for four years (Resp. Br. 23, citing CR 176-66, 179-80) ; and (2) the fact that Wal-Mart “admitted” to selling lamps “similar to the one in Plaintiff’s [sic] possession” (which was, of course, the phony lamp) (Resp. Br. 23, citing CR 617).

This laundry list of “evidence” illustrates the frailty of Plaintiffs’ proof on the first two elements they must establish for all of their products liability claims: (1) that a defective halogen lamp (2) was purchased from Wal-Mart. Even if the evidence underpinning these two elements were more robust, Plaintiffs must still produce legally competent evidence of the crucial third element—that the defective halogen lamp *caused* the house fire—which they have fatally failed to do.

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

In its opening brief, Wal-Mart 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. Pet. Br. 21-25. Plaintiffs’ response does nothing to negate that argument, but instead merely points up the weakness of Plaintiffs’ case and the grave eroding effect that permitting such cases to proceed will have on statutory protections.

A. Incredibly, Plaintiffs continue to rely on meaningless evidence about the manufacturer of the *fake* lamp to deflect attention from the feebleness of their case.

As Wal-Mart has illustrated, allowing a products liability claim to proceed on wispy evidence of purchase of an absent product, coupled with speculative causation testimony, places an “impossible burden” on sellers in Wal-Mart’s position. *See* Pet. Br. 8-9; *Owens & Minor, Inc. v. Ansell Healthcare Prods., Inc.*, 251 S.W.3d 481, 492 (Tex. 2008) (O’Neill, J., dissenting). Specifically, how are such sellers to obtain indemnification from multiple potentially liable manufacturers where the retailer has no way to link the allegedly injury-causing product to a particular manufacturer? *See* Pet. Br. 23-25.

In response, Plaintiffs again 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. Resp. Br. at 14, 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 again, 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 allegedly started the fire. And again, the fact that the phony “Williams” lamp was possibly manufactured by Holmes is completely immaterial to the question of who manufactured the *actual* 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.

Plaintiffs persist in their rhetoric that any discussion of the fake lamp is a mere “attention-getting label.” Resp. Br. 14. Indeed, attention *should* be paid to the fact that, behind the four-year smoke-screen of the phony lamp—which imposed enormous litigation costs on Wal-Mart—Plaintiffs have no case. The trial court correctly recognized that and properly granted summary judgment.

B. Plaintiffs’ unplead “missing” wire mesh guard argument neither negates Wal-Mart’s entitlement to indemnity, nor diffuses the danger that loose standards pose to statutory protections.

Plaintiffs’ response repeats the suggestion 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. Resp. Br. 12. But as Wal-Mart explained in its opening brief, Pet. Br. 22, Plaintiffs’ petition did *not*, as their response represents, make any claim against Wal-Mart for selling a lamp absent a retrofit wire mesh. *See* Resp. Br. 12 (citing 2 CR 486-88, which is not Plaintiffs’ petition, but an excerpt from the 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); *see also* CR 5-24 (Plaintiffs’ First Amended Petition).

The only guard-related claim Plaintiffs pleaded was against named defendant the Holmes Group—which Plaintiffs sued as the likely manufacturer of the fake lamp—for failing to *design* the lamp with a guard or shield.³ As Plaintiffs’ response again clearly

³ Plaintiffs suggest that because the petition discusses a guard or shield in the section addressing Holmes’ liability, and because statements about defective design are “contained” in the section discussing Wal-Mart’s liability, that Wal-Mart should somehow have known that Plaintiffs were alleging that it was liable for selling a lamp without a retrofit guard. Resp. Br. 12 n.4. Neither Wal-Mart nor the courts are required to divine the Plaintiffs’ intentions and extrapolate causes of action that Plaintiffs clearly did not plead.

illustrates, their “missing” wire mesh retrofit argument was raised for the first time in their summary judgment response and was thus not before the lower courts. *See* Resp. Br. 23 (“The summary judgment response explained in great detail [allegations that Wal-Mart sold the lamp without a wire mesh guard]”) (citing 2 CR 460-65, Plaintiffs’ Resp. to Motion for Summary Judgment); Pet. Br. 22.

Moreover, even if properly pled, Plaintiffs’ naked allegations that Wal-Mart was independently negligent are insufficient to trigger the exception to manufacturer indemnity. As Wal-Mart has explained, that exception requires a manufacturer’s proof of Wal-Mart’s independent culpability. *See* Pet. Br. 22-23. And, because of Plaintiffs’ failure to provide or identify the allegedly defective lamp, no potentially liable manufacturers have stepped forward—which leads straight back to the indemnity conundrum raised by permitting such loosely supported claims to advance. Pet. Br. 23-25.

In sum, by reversing summary judgment and permitting this case to move forward on speculative expert testimony about an absent and unidentified product, the court of appeals’ opinion severely weakens the protections the Legislature intended for Texas retailers. To ensure that Wal-Mart and other similarly-situated retailers are not summarily stripped of those protections, the Court should take this case to reinforce the evidentiary standards for sustaining a products liability claim.

CONCLUSION

Because the expert testimony of design defect and causation is legally insufficient to support judgment, this Court should grant review, reverse the judgment of the court of appeals, and render judgment for Wal-Mart.

Respectfully submitted,

ALEXANDER DUBOSE
& TOWNSEND LLP
Bank of America Center
515 Congress Avenue, Suite 2350
Austin, Texas 78701
Telephone: (512) 482-9300
Telecopier: (512) 482-9303

By: _____

Susan S. Vance
State Bar No. 24036562
Douglas W. Alexander
State Bar No. 00992350

Jeffrey A. Cox
Edward A. Davis
HARTLINE, DACUS, BARGER,
DREYER, & KERN, L.L.P.
6688 N. Central Expressway, Suite 1000
Dallas, Texas 75206
Telephone: (214) 369-2100
Telecopier: (214) 369-2118

COUNSEL FOR PETITIONER
WAL-MART STORES, INC.

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 January 26, 2010:

Gary D. Corley
Gary D. Corley, P.C.
7914 North Glen Drive, Suite 1021
Irving, Texas 75063

Via U.S. Mail

Robert L. Galloway
Robert L. Galloway, P.C.
1303 San Jacinto
Houston, Texas 77002

Via U.S. Mail

Counsel for Respondents

Susan S. Vance