

IN THE SUPREME COURT OF TEXAS

=====
No. 94-1057
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MARITIME OVERSEAS CORPORATION, PETITIONER

v.

RICHARD ELLIS, RESPONDENT

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ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS
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Argued on November 5, 1997

JUSTICE GONZALEZ, joined by JUSTICE ABBOTT with respect to Part III, concurring.

I concur with the Court's judgment. The Court correctly resolves the main issues: (1) approving the court of appeals' standard for reviewing the factual insufficiency of the evidence of a Jones Act cause of action, and (2) rejecting Maritime Overseas Company's untimely attempt to challenge the reliability of scientific evidence. *See E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995) (making trial courts the "gatekeepers" of scientific evidence). I do not entirely agree with the Court's analysis of the *Robinson* issue. However, I ultimately reach the same conclusion that Maritime did not timely raise the issue. I think it is imperative to ventilate any *Robinson* issues as early as possible, preferably as a pretrial matter. To further that policy, we should give trial courts wide discretion to reject late *Robinson* objections, and hold that the trial court did not abuse its discretion in this case.

I

In *Robinson*, we made trial courts the gatekeepers of scientific evidence, charging them with the duty to screen out the speculative and unreliable. *See id.* at 556-57. It is impossible for a court to exercise its gatekeeper function after the evidence has been admitted and the jury discharged. Until now, however, we have not discussed in depth the procedure to preserve a *Robinson* objection.

Preservation was not an issue in *Robinson*, wherein we upheld the trial court's exclusion of expert testimony after a pretrial hearing on its reliability. During trial the proponent of the evidence asked the court to reconsider its pretrial ruling, and made a bill of exceptions when it did not. *See id.* at 552.

We sustained a no-evidence point without discussing error preservation in *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995). The facts recited in the opinion do not reveal what steps Burroughs took to preserve error, other than its objection to the evidence when it was offered. We also sustained a no-evidence *Robinson* complaint in *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997). Preservation of error was beyond question in that case because Merrell Dow repeatedly challenged certain scientific evidence, raising the issue in a motion for summary judgment, motions in limine, extensive pretrial hearings on the motions, objections during the expert's testimony, a motion for a directed verdict at the close of the Havners' evidence, and multiple post-trial motions. *Id.* at 708-09; *Merrell Dow Pharm., Inc. v. Havner*, 907 S.W.2d 535, 539 (Tex. App.—Corpus Christi 1994).

The Court resolves the question in this case by characterizing Maritime's *Robinson* argument as a no-evidence complaint, and then holding that Maritime failed to preserve a legal insufficiency point. The dissenting opinion also treats Maritime's arguments as legal insufficiency points. I think their respective analyses are wrong for two reasons. First, Maritime's arguments here are not true no-evidence points. As the Court observes, Maritime expressly disavows any legal insufficiency complaint, and instead claims only to challenge the court of appeals' standard of review when it evaluated factual insufficiency. Maritime's prayer for relief seeks only a new trial. I would take Maritime's arguments at face value and not try to read a no-evidence point into them.

Maritime argues instead that the evidence of causation is factually insufficient because the record is utterly devoid of reliable scientific evidence of causation. Such an argument would be a legitimate factual insufficiency argument if made to a court of appeals. A court of appeals reviewing factual insufficiency considers all of the evidence to see if "the evidence supporting the finding is

so weak or the evidence to the contrary is so overwhelming that the finding should be set aside and a new trial ordered.” *Garza v. Alviar*, 395 S.W.2d 821, 821 (Tex. 1965). If there is no evidence to support the verdict, then certainly the court of appeals could conclude that the evidence is too weak to support the verdict. If the appellant’s only viable point is factual insufficiency, the court of appeals should remand for a new trial. *See Wright Way Spraying Serv. v. Butler*, 690 S.W.2d 897, 898 (Tex. 1985).

However, an argument proper in the court of appeals may not be appropriate in our Court because of our limited jurisdiction over factual insufficiency. Our jurisdiction over factual insufficiency is limited to whether the court of appeals applied the proper standard of review. *See In re King’s Estate*, 244 S.W.2d 660, 661-62 (Tex. 1951). Maritime asserts that it only wants us to exercise our limited jurisdiction over standards of review, but its arguments come perilously close to asking us to substitute our opinion for that of the court of appeals. I question whether our jurisdiction would allow us to consider the merits of Maritime’s argument. *See Havner v. E-Z Mart Stores, Inc.*, 846 S.W.2d 286, 286 (Tex. 1993) (Gonzalez, J., concurring on denial of application for writ of error) (cautioning that this Court must not second-guess the court of appeals’ review of factual insufficiency); *Lofton v. Texas Brine Corp.*, 777 S.W.2d 384, 388 (Tex. 1989) (Hecht, J., dissenting) (criticizing the Court for circumventing constitutional limitations over factual insufficiency through pretextual legal issues). *Compare with Jaffe Aircraft Corp. v. Carr*, 867 S.W.2d 27, 29-30 (Tex. 1993) (Gonzalez, J., concurring) (noting rare circumstance that allowed this Court to exercise jurisdiction over a court of appeals’ factual insufficiency review). In any event, since Maritime only brings a factual insufficiency point, it is not necessary to decide if Maritime preserved a no-evidence complaint.

II

Moreover, whether we categorize Maritime’s arguments as factual insufficiency or legal insufficiency does not resolve the case for me. I do not think the usual rules for preserving either factual or legal insufficiency complaints adequately address the concerns unique to *Robinson* issues.

Ordinarily, both legal and factual insufficiency points may be preserved by post-judgment motions. *See Cecil v. Smith*, 804 S.W.2d 509 (Tex. 1991). A court simply looks at the record to determine the existence and weight of evidence to prove a given point. Appellate courts and trial courts make such a review without additional information from outside the record. However, the no-evidence analysis we describe in *Havner* is qualitatively different from the ordinary evidentiary review:

[W]e emphasize that courts must make a determination of reliability from all the evidence. Courts should allow a party, plaintiff or defendant, to present the best available evidence, assuming it passes muster under *Robinson*, and only then should a court determine from a totality of the evidence, considering all factors affecting the reliability of particular studies, whether there is legally sufficient evidence to support a judgment.

Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d at 720.

It should be apparent that appellate courts constitutionally cannot conduct such a hearing in the first instance. However, I do not think that allowing parties to raise *Robinson* objections for the first time post verdict, or even during trial, is fair to the litigants or judicially efficient.

A court should not be required to interrupt trial to conduct a *Robinson* hearing which could have been held pretrial. As *Merrell Dow v. Havner* illustrates, the trial court's role as gatekeeper requires it to decide complex issues in fields outside its primary expertise. Some courts have tried innovative approaches, such as selecting neutral experts in the field to serve as masters, a step I encourage when the issues are especially complex. *See Justice Breyer Calls for Experts to Aid Courts in Complex Cases*, N.Y. Times, Feb. 17, 1998, at A17. Such innovation is not possible if the trial court is not given advance warning.

I recognize that there may be instances of good cause for not making a *Robinson* objection pretrial, in which case the trial court should entertain the objection. Also, some opinion testimony may be so untenable on its face that no *Robinson* hearing is necessary. For example, our Court recognized long before *Robinson* that courts are not bound by testimony at odds with indisputable physical facts and common knowledge because it has no probative value. *Humble Oil & Refining Co. v. Martin*, 222 S.W.2d 995, 1001-02 (Tex. 1949) (holding that court could disregard petitioner's

“incredible” testimony that she had secured her automobile by engaging the reverse gear before it rolled downhill striking pedestrians). Such situations will be comparatively rare, however. Our discovery rules require the proponent of expert testimony to identify the witnesses and the substance of their opinions in response to appropriate discovery. Thus in the ordinary case, it should be very apparent at the discovery stage that a party will proffer scientific testimony. The opponent of such testimony should bring its objections to the trial court’s attention so that the trial court may resolve them without interfering with the eventual trial.

III

As a final note, I encourage trial courts to aggressively exercise their role as gatekeepers of scientific evidence. There are many steps a court could take to try cases efficiently and fairly, with fidelity to sound scientific methodology. For example, a court could:

- 1) require parties to notify opponents and the court sufficiently in advance of the trial of plans to either offer scientific evidence or challenge an opponent’s evidence;
- 2) conduct a preliminary hearing on admissibility in advance of plans to offer the evidence;
- 3) in complex litigation, appoint a panel of specially trained scientists or a special master to hear evidence and report on complicated scientific and statistical matters. The report would be filed with the clerk’s office. If the parties request it, the court should conduct a hearing on the report and allow the parties to cross examine the court experts (the expert’s fees would be taxed as court costs);
- 4) render expert testimony inadmissible or rule objections waived unless the parties fully comply with the notice requirements set out above.

In sum, because a *Robinson* objection profoundly impacts the trial of a case, an opponent to proffered scientific evidence should raise the issue of reliability early in the litigation or risk losing the objection. I agree with the Court that an opponent to scientific evidence must object to it when offered, at the very latest. However, I would go further and hold that if a party knows pretrial about the existence of *Robinson* issues but fails to ask for a pretrial hearing, any objection about the admission or exclusion of such evidence raised for the first time during trial is waived.

Raul A. Gonzalez
Justice

OPINION DELIVERED: April 16, 1998