**Affirmed and Memorandum Opinion filed September 13, 2011.**

**In The**

# Fourteenth Court of Appeals

**NO. 14-10-00703-CV**

**BARBARA JANE JONES, INDIVIDUALLY AND AS NEXT FRIEND OF BRITTANY JONES, A MINOR AND HEIR TO CANDELARIO SANTOS III, DECEASED, AND TERESA CRUZ, AS REPRESENTATIVE OF THE ESTATE OF AND AS HEIR TO CANDELARIO SANTOS III, DECEASED, Appellants**

**V.**

**PENNZOIL-QUAKER STATE COMPANY D/B/A SOPUS PRODUCTS, Appellee**

**On Appeal from the 151st District Court**
**Harris County, Texas**
**Trial Court Cause No. 2007-36639**

## M E M O R A N D U M  O P I N I O N

Barbara Jane Jones, individually and as next friend of Brittany Jones, a minor and heir to Candelario Santos III, deceased, and Teresa Cruz, as representative of the estate of and as heir to Candelario Santos III, deceased, sued Pennzoil-Quaker State Company d/b/a Sopus Products. The suit arises from a tire blowout and accident that Jones and Cruz attribute to the use of Pennzoil's product Fix-A-Flat. The trial court granted a no-evidence summary judgment on all claims against Pennzoil. We affirm.

## BACKGROUND

Barbara Jones was driving a car containing her fiancé, Candelario Santos, and her daughter, Brittany Jones, on January 29, 2007 when the right rear tire experienced a blowout. Barbara lost control of the vehicle, which veered into the median and rolled over. Santos was killed and Barbara suffered serious injuries.

Barbara had been visiting her parents approximately two to three weeks before the accident when she noticed that her right rear tire was not fully inflated. Jones's father testified that he checked the tire pressure, determined that it was low, and used Fix-A-Flat on the tire. Fix-A-Flat is a sealant that can be introduced through a tire's air valve to provide a liquid seal and increased air pressure in certain punctured tires.

Neither Jones nor her father took the tire to an independent tire professional for further evaluation. The parties do not dispute that Barbara continued to drive on the tire for approximately three weeks or 300 miles until the blowout and accident occurred. An officer at the scene of the accident reported that all four tires had "very low tread," and that the tread on each tire measured between 2/32 of an inch and 6/32 of an inch.

Jones and Cruz sued Pennzoil, the manufacturer of Fix-A-Flat, in connection with the accident. They allege that the blowout was caused by Fix-A-Flat, which has a "propensity to cause tread/belt separation under normal and foreseeable operation." They contend that Pennzoil defectively marketed Fix-A-Flat as a "lasting durable repair" when, in fact, it should be used only as a short-term, emergency repair. They additionally claim that Pennzoil is liable for negligence, breach of express and implied warranties, and Texas Deceptive Trade Practices Act violations. They also sued the tire manufacturer, which is not a party to this appeal.

Jones and Cruz designated Charles Gold as a "tire failure analyst" who "may be called to testify to offer opinions relating to the cause of the failure of the subject tire . . . [and] other similar tire failure incidents involving substantially similar tires." They submitted Gold's two-page expert report, in which he opines that continued operation

after the use of Fix-A-Flat, in part, caused the blowout. Gold states:

> The [Fix-A-Flat] sealant used in this tire is meant to be used as a temporary repair to allow the vehicle to be moved safely to a permanent repair facility. The instructions to the user should clearly inform the user that it is not a long term solution to the flat tire. Moreover, the sealant is an inadequate repair as advertised. A tire repair should have included a proper patch preceded by buffing of the innerliner, at a minimum.

Pennzoil filed a motion to exclude Gold's testimony. Pennzoil contended that Gold's causation opinion is not supported by "any empirical evidence, methodology, or studies to explain the validity of his extrapolation that Fix-A-Flat caused the tread separation at issue simply from the allegation that a tire sealant/inflator was used and the tire later failed." Jones and Cruz filed a response to the motion and attached an additional 16-page affidavit, in which Gold details his qualifications, opinions, and methodology.

Gold asserts in his affidavit that oxygen exposure causes rubber components in the internal structures of a tire to degrade, compromising the rubber's adhesive and fatigue-resistant qualities. Innerliners protect the internal structures found between the innerliner and the outside tread of a tire from exposure to the oxygen contained in the inflationary gases. Gold states that a nail punctured the accident tire, causing a breach in the outside tread as well as the innerliner. Gold testified at his deposition that (1) although Fix-A-Flat may seal the outside surface of a puncture and prevent air from leaking completely from the tire, an unrepaired breach in the innerliner allows oxygen to enter the internal structures from the inflationary gases; and (2) this circumstance causes a condition called "intra-carcass pressurization" (ICP). According to his affidavit, ICP causes an "accelerated degradation of the [tire's] internal components" and "substantially increases" a tire's susceptibility to failure by tread separation.

After a hearing on Pennzoil's motion, the trial court concluded that Gold could testify about the following points: (1) that the innerliner in the accident tire was not sealed; (2) this unrepaired breach in the innerliner caused ICP in the accident tire; and (3) ICP can cause tire failure in general. The court ruled that Gold could not testify that ICP

caused the blowout at issue in this case.

Pennzoil subsequently filed a no-evidence summary judgment motion on each claim raised by Jones and Cruz. Pennzoil asserted that Jones and Cruz could proffer no evidence to show that Fix-A-Flat caused the blowout in this case. The trial court granted the motion as to all claims asserted against Pennzoil on April 1, 2010.

Jones and Cruz filed an emergency motion to reconsider, which the trial court denied, stating:

> The Court finds that the evidence on which Plaintiffs rely in response to Pennzoil's no-evidence summary judgment motion does not create a fact issue . . . . No matter how many times Plaintiffs repeat that Fix-a-Flat was never intended to be a permanent repair as suggested . . . by its label, Plaintiffs still need to adduce sufficient summary judgment evidence that the tread separation/failure was actually *caused* by the alleged intra-carcass pressurization leading to premature degradation of the . . . rubber [in the internal structures of the tire] *in this case*. They have not. They have only adduced summary judgment evidence that the general condition of intra-carcass pressurization was likely present in this case.

(emphasis in original). The summary judgment became final when the trial court signed an agreed final judgment disposing of all of Jones's and Cruz's remaining claims against the tire manufacturer on July 14, 2010.

## ANALYSIS

Jones and Cruz argue on appeal that the trial court erred in (1) granting Pennzoil's motion to exclude Gold's expert opinion on causation; and (2) granting Pennzoil's no-evidence summary judgment.[1]

[1] These arguments are contained in Jones's and Cruz's second and third issues on appeal. Jones and Cruz argue in their first issue that, as a preliminary matter, the trial court's ruling that they could not present evidence of unpleaded claims "was of no consequence" to the no-evidence summary judgment because they have not tried to do so. The record reflects that the trial court understood Jones's and Cruz's theory of causation to be encompassed by the pleadings, and the trial court did not exclude any evidence because it related to "unpleaded claims." We do not address Jones's and Cruz's fourth issue — that the trial court improperly granted summary judgment on the bystander claims asserted on behalf of Brittany on the grounds that she lacks standing — because we uphold the trial court's summary judgment on other grounds. *See supra*, Part II.

## I. Motion to Exclude

Jones and Cruz first argue that the trial court erroneously granted Pennzoil's motion to exclude Gold's opinion that Fix-A-Flat caused the accident tire to fail.[2]

"'If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.'" *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 800 (Tex. 2006) (quoting Tex. R. Evid. 702); *see also Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 588–89 (1993). Expert testimony is admissible when (1) the expert is qualified; and (2) the testimony is relevant and based on a reliable foundation. *Mendez*, 204 S.W.3d at 800. If the expert's scientific evidence is not reliable, it is not evidence. *Id*. Courts must determine reliability from all of the evidence. *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 720 (Tex. 1997); *Taber v. Roush*, 316 S.W.3d 139, 147–48 (Tex. App.—Houston [14th Dist.] 2010 no pet.).

We review the trial court's determination under these standards for abuse of discretion. *Mendez*, 204 S.W.3d at 800. A trial court abuses its discretion when it acts without reference to any guiding rules or principles. *Id*. Admission of expert testimony that does not meet the reliability requirement constitutes an abuse of discretion. *Id*. Expert testimony must be based on a reliable foundation of scientific or professional technique or principle. *Wiggs v. All Saints Health Sys.*, 124 S.W.3d 407, 410 (Tex. App.—Fort Worth 2003, pet. denied) (citing *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995)). When the expert's underlying scientific technique or principle is unreliable, the expert's opinion is no more than subjective belief or unsupported speculation and is inadmissible. *Id*. Causation opinions predicated on possibility, speculation, and surmise are no evidence. *Havner*, 953 S.W.2d at 711–12.

[2] Jones and Cruz also argue as part of this issue that the trial court erred in sustaining Pennzoil's objection to the expert testimony of James Gardner on grounds that Jones and Cruz failed to designate him as an expert. We address this argument in conjunction with our analysis of their issue regarding the trial court's summary judgment ruling.

In *Robinson*, the Texas Supreme Court set forth six non-exclusive factors to assist courts in determining whether expert testimony is 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/or 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 that have been made of the theory or technique.

*Robinson*, 923 S.W.2d at 557. The Texas Supreme Court has explained that these factors cannot always be used in assessing an expert's reliability but concluded that "'there must be some basis for the opinion offered to show its reliability.'" *Mendez*, 204 S.W.3d at 801 (quoting *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726 (Tex. 1998)). Under such circumstances, expert testimony is unreliable if there is simply too great an analytical gap between the data and the opinion proffered. *Id*. at 800. A reviewing court is not required to ignore gaps in an expert's analysis or assertions that are simply incorrect, and a trial court is not required to admit evidence connected to existing data only by the expert's *ipse dixit*. *Id*. at 800–01. Bald assurances of validity do not suffice. *Havner*, 953 S.W.2d at 712. The underlying data should be independently evaluated in determining if the opinion itself is reliable. *Id*. at 713.

Jones's and Cruz's theory is that Fix-A-Flat sealed the outside surface of a puncture on the accident tire but failed to seal a breach in the innerliner. The accident tire then was placed into service on the accident vehicle for approximately 300 miles or three weeks. When asked in his deposition whether he could cite to any scientific evidence to support his opinion that "oxygen molecules would have migrated from the nail hole to the point of tread separation sufficient to cause a tire failure within 300 miles," Gold answered, "I don't know. I'm sure there's some work out there on — on migration. . . . I

can't think of any right now."

Gold cites one publication in his affidavit in support of his conclusion that ICP caused the accident tire to fail within three weeks or 300 miles of the application of Fix-A-Flat. This publication is an article by John Baldwin that, according to Gold, includes a study concerning "the use of nitrogen, as opposed to oxygen, as a tire inflationary gas."[3] According to Gold, Baldwin inflated certain tires with more that 95 percent nitrogen, and others with a combination of nitrogen and oxygen in a ratio of 80/20 and 50/50. Baldwin then baked the tires in an oven at 140 degrees Fahrenheit for three to twelve weeks. Baldwin noted that "the tires inflated with the oxygenated media change dramatically, even three weeks in the oven" as compared to the nitrogen-filled tires, which do not begin to show visible "oxidative degradation" until after twelve weeks. Baldwin concluded that "nitrogen molecules cause[] less rubber degradation due to the decreased contact the rubber had with oxygen," and that "the rate of degradation is significantly lower" when the tire is filled with more than 95 percent nitrogen compared to when the tire is filled with 20 or 50 percent oxygen.

Gold relies on Baldwin's study to opine that "oxygen inflated tires degrade at a much higher rate,"[4] and that the use of Fix-A-Flat "will cause ICP over time which will result in premature oxygenated rubber degradation and ultimate tire failure." Based on these statements and his visual and tactile examination of the accident tire, Gold concludes that Fix-A-Flat "as used in the accident tire was a cause of the subject tire failure."

Gold does not explain how the conditions of Baldwin's study — or the unspecified rates and degrees of degradation discussed therein — compare to the circumstances surrounding the accident tire's use and failure. Baldwin's study alone is insufficient to bridge the analytical gap between (1) data regarding ICP and degradation from oxygen

[3] The Baldwin study cited in Gold's affidavit does not appear in the record on appeal.

[4] In response to a question asking how much oxygen is typically found in the gases that inflate a tire, Gold responded, "I wish I could tell you. I forgot. But it's 30 percent or something, 28, something like that."

exposure in general; and (2) an opinion that ICP and degradation resulting from the unrepaired breach in the innerliner of the accident tire was rapid and extensive enough to cause tire failure within three weeks or 300 miles of applying Fix-A-Flat. *See Goodyear Tire & Rubber Co. v. Rios*, 143 S.W.3d 107, 114 (Tex. App.—San Antonio 2004, pet. denied) ("The issue is not the reasonableness *in general* of a tire expert's use of a visual and tactile inspection to determine what caused the tire's tread to separate from its steel-belted carcass. Instead, it is the reasonableness of using such an approach, along with the expert's particular method of analyzing the data thereby obtained, to draw a conclusion regarding *the particular matter to which the expert testimony was directly relevant*.") (internal quotations omitted) (emphasis in original) (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 153–54 (1999)).

Because of this analytical gap, Gold's causation opinion rests on his subjective interpretation and is inadmissible under *Robinson*. *See Robinson*, 923 S.W.2d at 557; *see also Mendez*, 204 S.W.3d at 802 ("[W]e note that Grogan conducted nothing in the nature of a *quantitative* analysis of wax contamination, such as calculating the amount of wax improperly deposited on the skim stock or the amount necessary to cause a tire malfunction. He offered no testimony that the scientific community has determined the amount of wax needed to cause a tire failure. He admitted in his deposition that he had not 'done any type of mathematical calculations with respect to anything in this case.'") (emphasis in original). Accordingly, we conclude that Gold's causation opinion is predicated on possibility, surmise, and speculation, and that the trial court acted within its discretion in striking the challenged portions of Gold's testimony. *See Mendez*, 204 S.W.3d at 800, 802–05 (expert testimony regarding cause of tire failure was unreliable, in part, because record was devoid of any scientific testing or peer-reviewed studies confirming expert's hypothesis that wax contamination causes radial tire belts to separate); *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 905–06 (Tex. 2004) (expert testimony regarding cause of automobile accident was unreliable, in part, because the expert did not conduct tests or cite studies to support theory that wheel separation was

the cause of the accident and not the result of the accident); *Rios*, 143 S.W.3d at 115 (expert testimony regarding cause of tire failure was unreliable because expert did not refer to any article or publication that specifically supported his use of a visual and tactile inspection to conclude that a manufacturing defect was present, rather than a defect "caused by use and abuse of tire over time"). We overrule Jones's and Cruz's issue regarding the trial court's ruling on Pennzoil's motion to exclude.

## II. No-Evidence Summary Judgment

Jones and Cruz next argue that the trial court erroneously granted Pennzoil's no-evidence summary judgment motion.

An appellate court applies *de novo* review to a grant of summary judgment, using the same standard that the trial court used in the first instance. *Duerr v. Brown*, 262 S.W.3d 63, 68 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (citing *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005)). A no-evidence motion for summary judgment under Rule 166a(i) must be granted if (1) the moving party asserts that there is no evidence of one or more specified elements of a claim or defense on which the adverse party would have the burden of proof at trial; and (2) the respondent produces no summary judgment evidence raising a genuine issue of material fact on those elements. *Duerr*, 262 S.W.3d at 69 (citing Tex. R. Civ. P. 166a(i)). In reviewing a no-evidence motion for summary judgment, we view all of the summary judgment evidence in the light most favorable to the non-movant, "crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not." *Id*. (quoting *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006)). The non-moving party is not obligated to marshal its proof, but it is required to present evidence that raises a genuine fact issue on the challenged element. *Id*. (citing *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002)).

Jones and Cruz concede on appeal that "[c]entral to every claim [plaintiffs] asserted is the allegation that using [Fix-A-Flat] in the manner marketed by Pennzoil caused the tire in this case to fail." To prevail on any of their claims, Jones and Cruz had

to proffer evidence sufficient to raise a fact issue as to whether Fix-A-Flat caused the tire failure and plaintiffs' injuries. *See Metro Allied Ins. Agency, Inc. v. Lin*, 304 S.W.3d 830, 835 (Tex. 2009) (analyzing claims for Deceptive Trade Practices Act violations); *Tamez*, 206 S.W.3d at 582 (analyzing claims for negligence, breach of warranty, and design, manufacturing, and marketing defects). Producing or proximate cause is an element of all of Jones's and Cruz's claims. *See Lin*, 304 S.W.3d at 835; *Tamez*, 206 S.W.3d at 582. Causation-in-fact is common to both proximate and producing cause, including the requirement that the defendant's conduct or product be a "substantial factor" in bringing about the injuries in question. *Lin*, 304 S.W.3d at 835; *Tamez*, 206 S.W.3d at 582.

Jones and Cruz argue on appeal that summary judgment was improper because (1) the trial court erroneously struck expert James Gardner's deposition testimony from the summary judgment record; and (2) Gardner's testimony "support[s]" their assertion that the use of Fix-A-Flat caused the accident tire to fail.[5]

The trial court initially sustained Pennzoil's objections to Gardner's testimony on grounds that Jones and Cruz failed to designate Gardner as an expert. However, the trial court states as follows in its order denying their emergency motion to reconsider its summary judgment:

> [T]he Court will assume, for the purposes of this Order, that Plaintiffs are able to rely on the testimony of James Gardner even though he was only designated as an expert [by the tire manufacturer] and not by Plaintiffs. [H]aving re-read all of the cited deposition testimony of Mr. Gardner, the most that may be said of that testimony is that it states that the use of Fix-a-Flat . . . may create the condition of intra-carcass pressurization, which is a hazardous condition which will eventually lead to failure. Mr. Gardner . . . does not ever state (and Plaintiffs do not cite to such a statement by Mr. Gardner) (1) how much time would ordinarily elapse between the use of Fix-a-Flat and tread separation or failure due to intra-carcass pressurization, or (2) that that is what, in fact, occurred <u>in this case</u>.

(emphasis in original). Even assuming that Jones and Cruz can rely on the testimony of

[5] We do not consider Gold's properly excluded causation opinion.

an expert designated only by the tire manufacturer, we have reviewed the deposition testimony proffered by Jones and Cruz in response to Pennzoil's no-evidence summary judgment motion and agree with the trial court that Gardner's testimony does not include an opinion that Fix-A-Flat caused the accident tire to fail in this case. Gardner's testimony "support[s]" Jones's and Cruz's causation theory only with respect to the effects of ICP generally, the function of innerliners, the existence of an unrepaired breach in the innerliner of the accident tire, and the likely presence of ICP in the accident tire. Jones and Cruz cite to no evidence in the summary judgment record that Fix-A-Flat caused the accident tire to fail in this case. Accordingly, the trial court properly granted Pennzoil's no-evidence summary judgment motion. *See Duerr*, 262 S.W.3d at 69. We overrule Jones's and Cruz's issue regarding the trial court's no-evidence summary judgment.

## CONCLUSION

Having overruled all of Jones's and Cruz's issues on appeal, we affirm the trial court's judgment.

/s/ William J. Boyce
Justice

Panel consists of Chief Justice Hedges and Justices Seymore and Boyce.