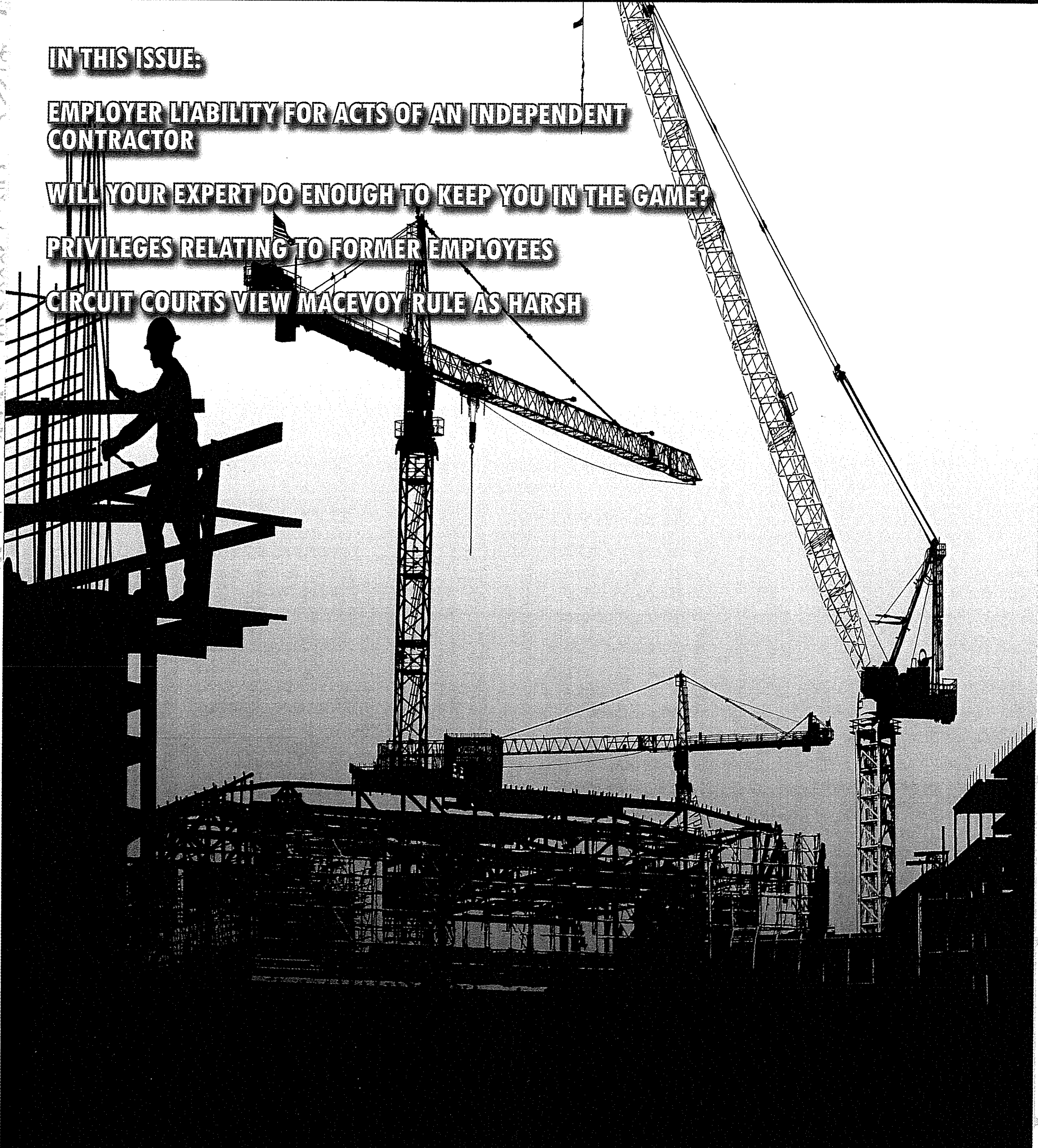
Construction Law Journal

Winter 2017 Volume 14, Number 1



Official Publication of the Construction Law Section of the State Bar of Texas • www.constructionlawsection.org

BY: DAVID PEDEN AND JOHN GARZA[1]

WILL YOUR EXPERT DO ENOUGH TO KEEP YOU IN THE GAME?

UPDATE ON EXPERTS AND EVIDENCE IN TEXAS CONSTRUCTION CASES

First, the courts gave us *Robinson*[2] and *Daubert*.[3] The trial judge became the gatekeeper for admissibility of expert opinion. In the *Havner*[4] and *Khumo*[5] cases, the courts tightened the requirements for admissibility of expert opinion. Then, *McGinty v. Hennen* ushered in a new, combined standard.[6] How do you satisfy the new, combined standard in Texas construction defect cases? This article will explore some key cases.

Repairing construction defects presents many problems for property owners who decide to sue the builder. One of the most pressing of these is planning for the successful recovery in court of the costs to repair the defects. In addition to identifying the defects and finding an appropriate contractor to make the repairs, owners must also document the cost of the repairs and demonstrate that the costs are both "reasonable and necessary."[7] Counsel for the owner is tasked with presenting expert testimony regarding the reasonableness and the necessity of the repair costs. Attorneys must be very diligent in preparing and presenting their chosen experts. *McGinty* expanded the *Mustang Pipeline* rule, emphasizing a new standard where merely citing a contractor's repair estimate is not enough. Now you must do more than showing what it costs to repair. You have to prove that the costs of repair are not only necessary, but are reasonable. Subsequent cases, in particular *City of Alton*, *CCC Group*, and *Balfour Beatty Rail*, have cemented the standard.

Before reviewing those cases, it is important to talk about the standard for admission of expert testimony in general. Both Texas and Federal Rule of Evidence 702 require an expert offering testimony to be qualified, and the testimony offered to be both relevant and reliable. Under Texas law, the court must consider the factors set out in *E.I. DuPont de Nemours and Co., Inc. v. Robinson*,[8] as well as the expert's experience, knowledge and training.[9] *Robinson* cites the United States Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* and includes the *Daubert* factors in its holding.[10] To better understand these factors, one must consider these two seminal cases.

Daubert

The United States Supreme Court decided *Daubert* in 1993. The *Daubert* standard replaced the "general acceptance" test of *Frye v. United States*[11] for expert testimony and required judges to assess expert testimony pursuant to Federal Rule of Evidence 702.[12] *Daubert* dealt with scientific expert testimony regarding potential birth defects caused by certain pharmaceuticals.[13] The Court stressed that Rule 702 required scientific expert testimony to be both relevant and reliable.[14] The Court set out four factors to consider when determining the reliability of

1. David Peden is a Partner at PORTER HEDGES LLP, Houston, Texas, and chairs the firm's Construction Law Group. Born in Houston, Texas, June 12, 1949. Admitted to Texas Bar, 1974. Licensed in all Texas courts; U.S. Supreme Court; U.S. Court of Appeals, Fifth Circuit; U.S. District Court, Southern, Northern and Western Districts of Texas. Education: University of Texas (B.B.A. in Finance, 1971; J.D., 1974). Phi Eta Sigma; Texas Law Review.
Chair of the State Bar of Texas Construction Law Section, 2006-2007. Listed as a Tier 1 practitioner in Chambers on Texas Construction Law. Associate Member, Houston Chapter, Association of General Contractors. Texas Monthly Super Lawyer in Construction since inception. Member, Joint AIA/AGC Committee (Houston). Chairman, 1996, Houston Construction Law Section. Former Director, College of the State Bar of Texas. Member, Federal, American, Texas and Houston Bar Litigation Sections.
David Peden has been on the American Arbitration Association panel of arbitrators in construction disputes for more than 20 years, and has chaired many panels involving complex multi-party disputes. He has accomplished all required continuing education courses to meet the requirements of this organization. He has also served as a party appointed arbitrator in a number of arbitrations. As a lawyer, he has represented party claimants and respondents in arbitrations for more than 35 years. Frequent speaker to lawyer and industry groups on matters of construction law. Practice areas: Litigation and arbitration of construction and surety disputes; construction transaction documentation, contracts.
This article was written with the assistance of John Garza, a 2017 summer associate at Porter Hedges LLP and a second-year student at South Texas College of Law Houston. He is a member of the South Texas Law Review.
2. E.I. DuPont de Nemours and Co., Inc. v. Robinson, 923 S.W.2d 549 (Tex. 1995).
3. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).
4. Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706 (Tex. 1997).
5. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 149–50 (1999).
6. 372 S.W3d 625 (Tex. 2012).
7. Mustang Pipeline Co. v. Driver Pipeline Co., 134 S.W.3d 195, 200 (Tex. 2004).
8. E.I. DuPont de Nemours and Co., Inc. v. Robinson, 923 S.W.2d 549, 557 (Tex. 1995).
9. *See* Transcontinental Ins. Co. v. Crump, 330 S.W.3d 211, 215–16 (Tex. 2010).
10. *Robinson*, 923 S.W.3d at 556–57 (finding *Daubert* persuasive and setting out six factors for evaluating reliability).
11. 293 F. 1013, 1014 (D.C. Cir. 1923).
12. *Daubert*, 509 U.S. at 587–88.
13. *See generally, id.*

expert testimony. Those four factors are (1) whether the theory or technique in question can be or has been tested; (2) whether the theory has been subjected to peer review and publication; (3) its known or potential error rate; and (4) whether it has attracted widespread acceptance within the relevant scientific community.[15] Only two years after *Daubert*, the Texas Supreme Court embraced these four factors and in true Texas fashion went bigger—requiring even more factors.

Robinson

The Texas Supreme Court's 1995 opinion in *E.I. DuPont de Nemours and Co., Inc. v. Robinson* concerned a claim for damages to an orchard.[16] The plaintiffs presented expert testimony that contaminated fungicide caused the damages to the plaintiffs' pecan orchard.[17] The trial court excluded the expert testimony after finding that:

(1) It was not grounded upon careful scientific methods and procedures;

(2) It was not shown to be derived by scientific methods or supported by appropriate validation;

(3) It was not shown to be based on scientifically valid reasoning and methodology;

(4) It was not shown to have a reliable basis in the knowledge and experience of the expert's discipline;

(5) It was not based on theories and techniques that had been subjected to peer review and publication;

(6) It was essentially subjective belief and unsupported speculation;

(7) It was not based on theories and techniques that the relevant scientific community had generally accepted; and

(8) It was not based on a procedure reasonably relied upon by experts in the field.[18]

The Court of Appeals reversed, holding that the expert's qualifications had not been challenged, only his methodology and research, and that the jury should determine his credibility as an expert witness.[19] The case was appealed to the Texas Supreme Court, which held that, consistent with *Daubert*, the judge must act as a gatekeeper and determine if expert testimony is reliable.[20] The Court went on to establish its own list of six *non-exclusive* factors that should be considered in assessing reliability:

(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 which have been made of the theory or technique.[21]

The Texas Supreme Court's ruling in *Robinson* meant that both Texas and Federal law required the court to act as gatekeeper, and first determine that expert testimony was relevant and reliable before allowing it to be heard. However, questions remained. Both *Daubert* and *Robinson* dealt with scientific evidence, not evidence based on technical or specialized knowledge. *Daubert's* concentration on scientific expert testimony led federal circuit courts to differ on what standard should be applied to non-scientific expert testimony based on skill and experience.[22] Should the *Daubert* and/or *Robinson* factors be applied to expert testimony similar to the experience based testimony common in construction matters? Fortunately, both the Texas and United States Supreme Courts soon provided answers.

Gammill and *Kumho*

In December 1997, the Texas Supreme Court heard argument in *Gammill v. Jack Williams Chevrolet, Inc.*[23]

14. *See id.* at 590–91.
15. *Id.* at 593–94.
16. *See generally* E.I. DuPont de Nemours and Co., Inc. v. Robinson, 923 S.W.2d 549 (Tex. 1995).
17. *See id.* at 551.
18. *Id.* at 552.
19. *Id.*
20. *Id.* at 556–57.
21. *Id.* at 557.
22. *Compare, e.g.,* Watkins v. Telsmith, Inc., 121 F.3d 984, 990–91 (5th Cir. 1997) (applying *Daubert* to engineering principles and practical experience), *with, e.g.,* Compton v. Subaru of Am., Inc., 82 F.3d 1513, 1518–19 (10th Cir.) (finding application of *Daubert* unwarranted in cases where expert testimony is based solely upon training and experience).

Gammill was a products liability car crash case dealing with an allegedly defective accelerator and seat belts.[24] Plaintiffs presented expert testimony regarding the design of the accelerator and seat belts.[25] The trial court excluded plaintiffs' final two experts and granted summary judgment for defendants.[26] The court of appeals affirmed.[27] The Texas Supreme Court took the case. Plaintiffs argued that the *Robinson* analysis did not apply to their proffered experts.[28] Plaintiffs argued that *Robinson* was reserved for novel scientific evidence and also did not apply to expert testimony based on an expert's individual skill, experience, or training.[29] The Court held that there was no reason for rules governing admission of scientific evidence to differ depending on whether the proffered evidence is novel or unconventional.[30] The Court further held that nothing in the language of Rule 702 "suggests that opinions based on scientific knowledge should be treated any differently than opinions based on technical or other specialized knowledge. . . . All expert testimony should be shown to be reliable before it is admitted." [31]

Roughly one year later, the United States Supreme Court decided *Kumho Tire Co. v. Carmichael,* and similarly held that *Daubert's* gatekeeping obligation applies not only to scientific testimony, but to all expert testimony.[32] *Kumho* makes clear that the *Daubert* factors *may* be considered and that the trial judge, acting as gatekeeper, should conduct a flexible inquiry as to the expert testimony's reliability. Although the *Kumho* opinion stresses that courts *may* consider the *Daubert* factors, the Fifth Circuit has stated that the *Daubert* factors should be the starting point for evaluating the reliability of expert testimony.[33]

Based on *Gammill* and *Kumho*, it is clear that all expert testimony must be shown to be relevant and reliable, but do the *Daubert* and *Robinson* factors seem to fit the discussion of construction defects and evaluation of repair costs? Consider a retired contractor offering opinion testimony on expected repair costs. This is not scientific. Is this kind of testimony good enough? For the claimant, and for the respondent challenging the opinion testimony, the *Daubert* and *Robinson* factors remain the starting point of any evaluation.

Recognizing that the *Robinson* factors are not easily applied to expert testimony outside the hard sciences, the Austin Court of Appeals, in a case that did not involve construction, has noted that "some cases involve situations that are not susceptible to scientific analysis, and the *Robinson* factors are not appropriate and do not strictly govern in those instances."[34] The Austin court went on to identify three additional factors that should be considered when dealing with the so-called soft sciences.[35] Those three factors are: whether (1) the field of expertise is a legitimate one; (2) the subject matter of the expert's testimony is within the scope of that field; and (3) the expert's testimony properly relies upon the principles involved in that field of study.[36] The approach of the Austin court is illustrative of the flexibility that must be demonstrated by courts when considering expert testimony in varying contexts.

Expert testimony regarding the costs to repair construction defects and damages caused by those defects may well not fit the standard *Daubert* or *Robinson* analysis, but courts have the flexibility to look outside those factors to other indicia of reliability. However, even if an owner can demonstrate that his expert is qualified and that the testimony is both relevant and reliable, another hurdle awaits.

The *Daubert* and *Robinson* factors lay the groundwork for whether an expert's testimony is reliable, but in the context of repair costs, the real question is, are the costs reasonable and necessary? Texas law allows for the recovery of repair costs only if the repairs are "necessary" and the costs "reasonable."[37] Expert testimony is generally required to establish the reasonableness of the costs and it is not uncommon for an owner to present the testimony of his chosen repair contractor as his sole evidence of the costs to repair. This testimony, in many cases, involves

23. 972 S.W.2d 713 (Tex. 1998).
24. *See generally id.*
25. *See id.* at 716–17.
26. *Id.* at 718.
27. *Id.*
28. *Id.* at 721.
29. *Id.*
30. *Id.*
31. *Id.* at 726.
32. 526 U.S. 137, 151–52 (1999).
33. *See* Paz v. Brush Engineered Materials, Inc., 555 F.3d 383, 388 (5th Cir. 2009); Black v. Food Lion, Inc., 171 F.3d 308, 311–12 (5th Cir. 1999).
34. Taylor v. Tex. Dept. of Protective & Regulatory Servs., 160 S.W.3d 641, 650 (Tex. App.—Austin 2005, pet. denied).
35. *Id.*
36. *Id.*

nothing more than an estimate of repair costs prepared by the contractor. While some lower courts have previously excluded such evidence, it is the Texas Supreme Court's ruling in *McGinty* that really forces attorneys to pay close attention to how they present their expert testimony regarding repair costs.[38]

McGinty

McGinty centered on the plaintiff's Seabrook, Texas house that suffered water damage and mold from construction defects.[39] Hennen, the plaintiff, designated a Corpus Christi contractor as an expert and the contractor testified that the cost to repair the home was $651,230.72.[40] He arrived at this amount by using estimation software[41] and prices from other contractors or historical job data, but did not include competitive pricing bids from other contractors in Seabrook.[42] Unfortunately, he also admitted that prices he used in the calculations were not localized to the Seabrook area. Neither the contractor, nor any other witness, ever testified that the repair costs were both "reasonable and necessary."[43]

On appeal to the state Supreme Court, McGinty argued that the repair costs had not been shown to be reasonable and necessary.[44] The Supreme Court agreed. The Court, in a rather succinct opinion, citing *Mustang Pipeline Co. v. Driver Pipeline Co.*, stated that a contractor's estimate of out-of-pocket (repair) costs is not evidence of reasonableness.[45] The Court reiterated that no witness had testified that the repair costs were reasonable.[46]

Hennen argued that the extensive testimony given by the contractor as to how he arrived at his estimate was sufficient to establish reasonableness.[47] The Court disagreed and stated the testimony did not reveal the factors considered to ensure reasonableness and was thus insufficient.[48] The Court then rendered a take nothing judgment for Hennen.[49] The case was not sent back for a new trial. This is a harsh result.

Just what did the Hennen team do wrong? How did more than $650,000 in repair costs awarded by the jury disappear? The answer actually lies in what Hennen did not do. First and foremost, Hennen did not produce testimony from any qualified person that actually said the repairs were both necessary and reasonable. But Hennen's mistakes are numerous and were ultimately fatal to his claims.

Upon move in, Hennen immediately identified and reported water leaks to the builder and demanded they be corrected.[50] Hennen hired a contractor and an engineer to inspect the home.[51] The engineer determined that the water intrusion was the result of wind driven rain and tested for mold.[52] Despite these inspections and numerous, visible defects, Hennen did nothing to stop the leaks.[53] Instead, he hired a lawyer and initiated his ill-fated litigation.[54]

Hennen's expert testimony just did not tell the court what it needed to hear. Hennen's evidence provided one estimate of cost to repair the house. How much of the repairs were necessary? How would the damage model be different if Hennen had stopped the leaks when they were first noticed? Hennen's expert apparently did not answer these questions.

In light of Hennen's misfortune, how should an owner go about proving up its costs to repair? The Court in *McGinty* did provide some hints. First and foremost, make sure the expert actually uses the magic words "reasonable and necessary." Spend some time on each

37. Mustang Pipeline Co. v. Driver Pipeline Co., 134 S.W.3d 195, 200–01 (Tex. 2004); McGinty v. Hennin, 372 S.W3d 625 (Tex. 2012).
38. *See, e.g., Mustang Pipeline Co.*, 134 S.W.3d at 200–01; Ebby Halliday Real Estate, Inc. v. Murnan, 916 S.W.2d 585, 589 (Tex. App.—Fort Worth 1996, writ denied); GATX Tank Erection Corp. v. Tesoro Petroleum Corp., 693 S.W.2d 617, 619–20 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).
39. *See* McGinty v. Hennen, 372 S.W.3d 625, 626 (Tex. 2012).
40. *See* Hennen v. McGinty, 335 S.W.3d 642, 654 (Tex. App.—Houston [14th Dist.] 2011), *rev'd*, 372 S.W.3d 625 (Tex. 2012).
41. *McGinty*, 372 S.W.3d at 627.
42. *Hennen*, 335 S.W.3d at 658 (Frost, J., dissenting). The authors recommend that this dissent be considered required reading before trying your next construction defect case.
43. *Id.*
44. *McGinty*, 372 S.W.3d at 626.
45. *Id.* at 627–28.
46. *Id.* at 628.
47. *Id.*
48. *Id.*
49. *Id.* at 629. The Court also threw out the plaintiff's evidence of difference in value of the home, which was based upon the homeowner's testimony of value at the time of trial, rather than when the defective work was completed and plaintiff moved in.
50. *Id.* at 645–46.
51. *Id.* at 646, 654.
52. Brief of Petitioner-Appellant at 7, McGinty v. Hennen, 372 S.W.3d 625 (Tex. 2012).
53. Hennen v. McGinty, 335 S.W.3d 642, 657 (Tex. App.—Houston [14th Dist.] 2011) (Frost, J., dissenting), *rev'd*, 372 S.W.3d 625 (Tex. 2012).

issue and elicit testimony that the repairs at issue, as well as the cost of those repairs, are "reasonable and necessary." Make sure they actually say these words!

Secondly, make sure the proposed repairs track the alleged defects.[55] At the very least, ensure the estimate breaks out the various components of the damages in sufficient detail to allow the fact finder or the court to excise certain costs without disallowing the entire amount. What is not clear is to what extent you should get competitive bids, versus relying on an experienced contractor to tell you his opinion of costs.

The Post McGinty Cases

In the author's 2013 paper on the McGinty case,[56] we made the fundamental suggestion to treat the contractor or engineer like any other expert. This requires using the *Daubert/Robinson* factors as a starting point, as suggested by the Fifth Circuit. While those factors are generally used to evaluate the reliability of expert testimony, evidence of these factors can only strengthen the argument that repair costs are reasonable. It adds little to preparation of the case, because these factors must be addressed in order to get the expert testimony admitted in the first place.

To find evidence of these factors, we suggested discussing the following:

1. Testing
2. Error rates
3. Peer review and publication
4. The general acceptance of an expert's pricing methods within the construction industry
5. That an expert's estimating software has been reviewed by industry professionals and is widely used
6. The error rate or potential for error in the expert's pricing methodology.
7. Do differences in location create the potential for error (it did in *McGinty*)? If so, at what rate?
8. Testing of the structure to identify defects

We also suggested experts testify as to whether the repair estimate was produced solely for the sake of litigation or whether the repairs were made prior to litigation. However, if you make repairs before giving the contractor notice and an opportunity to observe, you may get a claim of spoliation thrown at you. Make sure you comply with whatever notice provisions are in the contract, or the current spoliation standards.

Finally, we suggested the expert discuss his or her pricing methodology—does it rely on the subjective interpretation of the expert, or is it a published price list? This factor seems to relate to the competitive bidding process. Competitive bids certainly have the potential to demonstrate that the expert's pricing is not solely subjective and based on objective industry standards.

The above cited factors might be discussed in some manner by an expert witness, but it seems prudent for the attorney to make sure that these facts are presented in the context of the expert witness standards set out in *Daubert* and *Robinson*. Tailor the witness' foundation testimony to the *Daubert* and *Robinson* factors, and then demonstrate that the expert testimony is reliable and that the repair costs presented are necessary and reasonable.

In short, do not just let the contractor say "I looked at it and it will cost X to fix." Ensure the contractor expert can explain in detail why the repairs are necessary, what methodology was used to determine the costs to repair, and why those costs are reasonable. As the United States Supreme Court noted in *General Electric Co. v. Joiner*, courts cannot rely on opinion evidence that is related to the existing data only by the *ipse dixit* of the expert.[57] It takes more than an expert merely saying "I can fix it for this much" to ensure that the repair costs can be recovered.

Since the author's 2013 paper, there have been three cases that reinforce these ideas. They are: (1) *City of Alton v. Sharyland Water Supply Corp.*, (2) *CCC Group, Inc. v. South Central Cement, Ltd.*, and (3) *Balfour Beatty Rail, Inc. v. Kansas City Southern Railway Company.* Each court began its expert witness analysis with the *Daubert/ Robinson* factors and, if those were satisfied, then went on to perform a *McGinty* analysis. This is what we refer to when we say the new, combined standard.

City of Alton v. Sharyland Water Supply Corp.

The City of Alton (Alton) planned to build a sewer system for the town, but encountered challenges in the building process.[58] Some of the lines would intersect lines of the main water distribution system, which Sharyland

54. *Id.* at 656.
55. *See, e.g.*, Ebby Halliday Real Estate, Inc. v. Murnan, 916 S.W.2d 585, 589 (Tex. App.—Fort Worth 1996, writ denied) (noting that plaintiff's alleged damages included "adding to it or adding supplemental systems").
56. *Robinson, Daubert, and McGinty vs. Hennin: Update on Experts and Evidence in Construction Cases*, 26th Annual Construction Law Conference (2013).
57. 522 U.S. 136, 146 (1997).

owned.[59] Sharyland wanted to change this plan but could not agree with Alton on an alternate course of action.[60] So, Sharyland filed suit against Alton and its contractors, alleging negligence.[61] The case was tried and appealed multiple times and ultimately reached the Texas Supreme Court.[62] The Court held that Sharyland was entitled to damages under its claim.[63]

The *Alton* opinion directly cited *McGinty* and emphasized the requirement that costs of repair or completion be both reasonable and necessary.[64] Sharyland presented the testimony of its expert who had developed a repair estimate for future costs.[65] The expert first provided a detailed description of his method for calculating damages, in which he: (1) utilized his past experience, (2) took 2001 projected costs on how to repair the lines, and (3) applied a price increase factor to determine what "a current figure would be to hire a contractor and have it done."[66]

In actually determining damages, the expert used a sample of twenty-two line crossings to calculate the percentage of compromised lines at "77 percent with a 95 percent competence level and determined a range of crossings in need of repair from 252 to 425."[67] Based on these figures, the expert projected that the total cost to dig up 440 crossings, at $625 each, would be $275,000.[68] He further testified that the total encasement cost, at $2,500 each, would be $875,000.[69] He admitted this did not include the cost to dig up the crossings.[70] That combined cost would be $1,125,000.[71]

The court considered this range of numbers and awarded Sharyland the full $1,125,000 in future damages.[72] It stated that the expert provided the jury with enough evidence to assess the facts and award damages accordingly.[73] In particular, the court said that the comprehensive overview of cost factors ensured the reasonableness of the damages awarded by the jury.[74]

The *Alton* court's approach to that expert's testimony reflects a few of our suggestions to counselors. The expert provided a wide range of figures, including the estimated number of damaged lines, the associated cost to fix them, and the associated cost to access them first and then fix them. More than that, he showed all of the calculations at the heart of reaching those figures. To get your damages sustained on appeal, you should list your damages separately, associate a price with each, and offer up your methodology for calculating the damages.

CCC Group, Inc. v. South Central Cement, Ltd.

CCC Group, Inc. v. South Central Cement, Ltd. also contains an analysis of construction damages testimony, per *McGinty.* It also includes the first application of the combined *Robinson/McGinty* standard, after the Texas Supreme Court handed down *McGinty*. *CCC Group* dealt with a cement storage warehouse that collapsed and damaged the building in which it was housed.[75] South Central Cement (South Central) retained River Consulting, LLC (River) to build two cement warehouses.[76] The warehouses would feature three concentric, circular chambers, which would house the cement.[77] CCC Group (CCC) was chosen to build the walls of these chambers.[78] After this point, River abandoned the project.[79] CCC proceeded with work, and completed the first storage warehouse.[80] When loading the first shipment of cement, one of the structure's walls "exploded" and damaged the building.[81] Two years later, South Central sued CCC and

58. City of Alton v. Sharyland Water Supply Corp., 402 S.W.3d 867, 872 (Tex. App.—Corpus Christi 2013, pet. denied).
59. *Id.* at 871–72.
60. *Id.* at 872.
61. *See id.*
62. *See id.*
63. *See id.* at 873.
64. *Id.* at 876 (quoting McGinty v. Hennen, 372 S.W.3d 625, 627 (Tex.2012) (per curiam)).
65. *Id.* at 885.
66. *See id.*
67. *See id.* at 886.
68. *See id.*
69. *See id.*
70. *See id.*
71. *See id.*
72. *See id.* at 887.
73. *See id.*
74. *See id.*
75. CCC Group, Inc. v. S. Cent. Cement, Ltd., 450 S.W.3d 191, 193–94 (Tex. App.—Houston [1st Dist.] 2014, no pet.).
76. *See id.* at 194.
77. *See id.*
78. *See id.* at 195.
79. *See id.*
80. *See id.*

River for breach of contract and negligence.[82]

At trial, South Central called an expert to testify about its future damages.[83] Citing *Robinson* and *Daubert*, CCC objected to Aries' role as an expert.[84] The court overruled the objections and admitted his testimony.[85] This victory was short-lived. The court heard the expert's testimony on two different repair options and said both fell short of the *McGinty* reasonable and necessary standard.[86] The court expressed its belief that the expert possessed no familiarity with how the costs were calculated.[87] He lacked knowledge of the costs involved and did not participate directly in estimating costs.[88] Furthermore, his engineering firm did not assess whether the potential repairs were feasible or cost-effective.[89]

CCC Group presents a full application of the combined *Robinson/McGinty* standard after the Texas Supreme Court decided *McGinty*. The court first evaluated Aries as an expert witness, starting with the *Daubert* and *Robinson* factors, and proceeded to analyze his evidence about the construction damages according to *McGinty*.

Balfour Beatty Rail, Inc. v. Kansas City Southern Railway Company

The *Balfour* case arose from a railway track construction project.[90] While there were multiple claims and counterclaims, the most important claim for our purposes is Balfour Beatty Rail, Inc.'s (Balfour) delay claim against Kansas City Southern Railway Company (KCSR). Balfour alleges that KCSR did not uphold its end of the contract by failing to timely deliver ballast material needed to construct a railroad section.[91] Consequently, Balfour fell behind schedule.[92] Balfour based its claim on expert opinion.[93] KCSR argued that the expert's testimony was unreliable, and the court agreed.[94]

The court first evaluated the expert under Rule 702 of the Federal Rules of Evidence as well as the factors laid out in *Daubert* and *Robinson*.[95] The expert held an undergraduate degree in construction engineering technology and a master's degree in business administration.[96] He employed a "critical path schedule analysis" to discern which work activities were critical, and testified that such an analysis is the industry standard for evaluating construction delays.[97] However, the court found that he never articulated the methodology underlying the analysis.[98] The court also felt that he relied on incomplete data to claim Balfour had made up for a delay at the beginning of the project.[99] The court stated that the expert neglected to review relevant evidence regarding the delays.[100] The court found that the expert was evasive during his cross-examination, which the court took as further evidence that he should not be allowed to serve as an expert witness.[101] These were the court's chief complaints about the expert, which led it to disregard his expert opinion.[102]

Balfour is valuable to us for multiple reasons. First, it reinforces our suggestion that attorneys start every call of an expert witness with a walk through of the *Daubert* and *Robinson* factors. As seen here, they represent a hurdle that must be cleared before the court even entertains an analysis of the expert's damages recommendation. Secondly, this case confirms that satisfying the *Daubert/Robinson* factors aids in satisfying the *McGinty* standard. Had the expert in *Balfour* possessed more knowledge of the methodology behind labeling something a critical path activity or delay, the court could have better understood the value of that analysis. At the time of writing this paper, the *Balfour* case has been appealed to the 5th Circuit, but no opinion has

81. *See id.*
82. *See id.*
83. *See id.* at 200.
84. *See id.* at 201.
85. *See id.*
86. *See id.* at 202.
87. *See id.*
88. *See id.*
89. *See id.*
90. Balfour Beatty Rail, Inc. v. Kansas City S. Ry. Co., 173 F. Supp. 3d 363, 385 (N.D. Tex. 2016).
91. *See id.* at 409.
92. *See id.*
93. *See id.* at 413.
94. *See id.*
95. *See id.* at 414.
96. *See id.*
97. *See id.*
98. *See id.*
99. *See id* (The expert had only used Balfour's self-reported status documents to make this determination).
100. *See id.* at 415 (The expert neglected to review the Orfalinda report, which both parties agreed held valuable information).
101. *See id.* at 417.

been issued.

To reiterate the central thesis, post *McGinty*, Texas courts are applying a combined *Daubert/McGinty* standard to expert witness testimony in construction cases. The *Daubert* factors are employed right off the bat to determine whether a witness should even serve as an expert in the trial. Subsequently, the *McGinty* analysis is performed to ensure that the recommended damages are reasonable and necessary. *Alton* represents the best example of this new, combined standard. Courts of course analyze the *Daubert* factors in non-construction cases. However, it appears that they're also beginning to apply the *McGinty* standard in[103] and outside of construction contexts as well.[104] The overall trend, from *Daubert* to *Kuhmo* to *McGinty* has been that the historically different approaches to expert witnesses in different industries are melding into one. Be sure that your expert witnesses are prepared to clear these hurdles. You do not want to end up with a reverse and render opinion that plaintiff take nothing, like in the *McGinty* case.

102. *See id.*

103. *See* Paschal v. Engle, 03-16-00043-CV, 2016 WL 4506298, at *4 (Tex. App.—Austin Aug. 23, 2016, no pet.) (Couple could not rely on fact witnesses estimate for repairing a wall because it was too late in the trial and admitting it into evidence would constitute unfair surprise, in conflict with the "reasonable charge" requirement of *McGinty*); *see also* CS Custom Homes, LLC v. Stafford, 03-13-00315-CV, 2015 WL 5684080, at *1 (Tex. App.—Austin Sept. 23, 2015, no pet.) (Plaintiff homeowner was not entitled to recover reasonable and necessary costs of repair that included out-of-pocket costs paid to a structural engineer to identify construction defects and craft solutions because they simply appeared as numbers without descriptions of their computation).

104. *See* Gov't Emps. Ins. Co. v. Spring Indep. Sch. Dist., 01-13-00696-CV, 2014 WL 3971432, at *4 (Tex. App.—Houston [1st Dist.] Aug. 14, 2014, no pet.) (GEICO Insurance Co. had to do more than show an amount paid to repair a car to recover that money from a negligent defendant); *see also* Wood v. Carpet Tech, Ltd., 07-16-00029-CV, 2016 WL 6560047, at *3 (Tex. App.—Amarillo Nov. 2, 2016, pet. denied) (Married couple failed to successfully state their damages from breach of contract by service provider because they simply stated the amounts); United Nat. Ins. Co. v. AMJ Investments, LLC, 447 S.W.3d 1, 9 (Tex. App.—Houston [14th Dist.] 2014, pet. dism'd) (Insurance company claimed exemption from paying insurance money to client for hurricane damage to its building because the client merely relied on a piece of software to state the damage amounts, which did not satisfy *McGinty*, but failed); *Park Plaza Solo, LLC v. Benchmark–Hereford, Inc.*, 07-16-00004-CV, 2016 WL 6242824, at *8 (Tex. App.—Amarillo Oct. 24, 2016, no pet.) (Plaintiff could not recover out of pocket costs incurred in opening a Sears from co-owner because the evidence merely proved the existence of the charges); Ergon Energy Partners, L.P. v. Sheffield, 09-11-00190-CV, 2012 WL 4466363, at *7 (Tex. App.—Beaumont Sept. 27, 2012, no pet.) (Landowner could not recover damages from oil company that made an oil pit on his land, while drilling, because his damages calculations included too many variables and made the amounts unreasonable under *McGinty*); Ins. All. v. Lake Texoma Highport, LLC, 452 S.W.3d 57, 70 (Tex. App.—Dallas 2014, pet. denied) (Owner of flooded marina restaurant could recover millions of dollars from insurance company because an affidavit that contained prices of services paid for by the restaurant, which were deemed reasonable, made the insurance payout reasonable under *McGinty*).