ORAL ARGUMENT — 12-2-97
97-0237
GAMMILL V. JACK WILLIAMS CHEVROLET

McELROY: We are here today to consider whether or not there had been error committed by a trial court in Weatherford, which would call upon this court to change the past and to correct that error.

This case involves *Daubert*, a SC case and the *Robinson* case decided by this court - two very highly debated and much discussed cases that appear in so many CLE's at this particular time. In this case, we are concerned with whether or not there was an abuse of discretion by the TC, whether he followed guiding principles of law. We are concerned with rule 702 of the Rules of Evidence in Texas. We get down to our particular case where our theory is that there was a premature release of the buckle in the seat belt system of this car, which enabled the rear seat passenger to be freed during the accident and her body then to go forward with her head striking the back of her mother's drivers seat.

In support of that theory, which has had much written about it and it has appeared in other cases, we have presented two experts: Dr. Ronald Huston, and David Lowry. Both men well qualified by education and by practice. Indeed, Dr. Huston is as well qualified in the field of biomechanics, the movements of an occupant within a vehicle system for protection of occupants within a vehicle, as probably any person in the US.

GONZALEZ: Would you classify his testimony by affidavit as scientific?

McELROY: I think his testimony as shown in his affidavit is scientific, and also I believe it shows what he has known all these years of knowledge. But surely scientific.

GONZALEZ: Based on science?

McELROY: Yes.

HANKINSON: What was the issue that Mr. Huston was being asked to address in the case, to offer opinions on?

McELROY: He was asked to discuss the integrity of the restraint system, the seat belt system.

HANKINSON: Do you disagree with the CA's decision when it characterizes the opinions he was going to offer as being to the cause of death and the condition of the child's body?

McELROY: The autopsy report establishes the cause of death. Dr. Huston, of course,

being a biomechanic engineer, cannot give the opinion as to the cause of death himself. But he is giving his opinion as to what produced the injuries that would have led to the cause of death.

HANKINSON: I'm just trying to clarify. It seems to me that in looking at rule 702 and applying the test under 702 as to whether or not an expert would be allowed to testify, one of the first issues needs to be: What opinions is the expert going to be asked to render? And it looks like to me from the CA's decision that the opinions related specifically to cause of death and the condition of the body as opposed to anything to do with the operation of the seat belt. So do you disagree with the CA?

McELROY: I certainly do if that's what they are limiting his testimony to.

HANKINSON: And does the record in the TC reflect from the hearing that was held on the *Robinson* matters, that the issues did involve the operation of the seat belt as opposed to cause of death and condition of the body?

McELROY: Absolutely. In both his affidavit and in his courtroom testimony where he talked about how it would be desirable for a testing of the vehicle and on the seat belt assembly.

HANKINSON: Would you agree that it was outside of Dr. Huston's area of expertise to offer an opinion about the condition of the body or the cause of death?

McELROY: I do not believe it was outside his area of expertise to talk about the condition of the body, which is so sad and could be seen by anybody looking at the color photos of the autopsy report. But I do agree that a medical doctor would normally be the one to speak of the cause of death.

HANKINSON: So it was not within his area of expertise to offer opinions on the cause of death?

McELROY: I don't think so.

HANKINSON: And what was Mr. Lowry's issue?

McELROY: He gave some help on the seat belt issue.

HANKINSON: Was that what he was being asked to opine about in this case, the way the seat belt mechanism worked in the car?

McELROY: Yes, but also he was engaged to consider the matter of the stuck accelerator, and he gave an affidavit with a color photo, part of the record in this case, which shows how he thinks that mylar shrouding could have impeded the operation of the foot pedal arm and caused it

to be stuck once applied, and how in later models they have moved that mylar shrouding over ½". And I will say that this side buckling system of the seat belt had gone out of use in most vehicles by the time of this model, a 1988 model, with buttons on top now. And in fact, the button was on top is called an ____ push button in the front seat of this very vehicle, and it should have been that way in the back seat.

HANKINSON: The TC conducted a *Robinson v. DuPont* pretrial hearing to determine the reliability of the opinions being offered by both of the gentlemen, correct?

McELROY: Yes.

HANKINSON: Was it proper for the TC to apply the *Robinson* test and hold such a hearing with respect to these two experts?

McELROY: I think so. In other words, I think that this case can fit neatly and comfortably within the *Robinson* principles, that *Robinson* doesn't have to be changed. I have made some suggestions in my brief that point to some other considerations, but I don't see why *Robinson* can't hold. Just look at the 4 colored photographs that we have of the seat belt assembly in our brief. And I think what's immediately apparent if one looks at them is that these photographs indicate that the seat belt assembly does not involve great novel ideas. But at the same time, I think these photographs indicate that a jury called upon to decide fact issues in this case would appreciate some additional information and expertise about how the system works. A jury wouldn't know what a retractor is, or how it locks. A jury has never heard of a pendulum in a retractor. A jury doesn't know anything about anchorage points. A jury doesn't even know that a seat belt that is around an occupant is normally described as a webbing. A jury knows none of these things. And it would be helpful for a jury to know how the system works if the jury is going to be called upon to determine whether or not there is a design defect in that system, as we believe there is.

Dr. Huston gave 5 reasons based on the body. The photos show that Jaime's body has bruises across the chest. The photos show that her shirt had markings that could have been made by the seat belt. The seat belt itself has marks in it, and it had fibers in it. And the whole location of the seat belt for her in this vehicle showed the buckle too close to her hip. The design defects would be: the flow-through loop which allowed not enough tension to build up or loading to build up between the occupant and the belt; would have been the pushbutton side release of the buckle and would have been where that buckle was placed in this vehicle to allow the occupant to be released during the accident and just at the time when the buckle would be most relied upon.

HECHT: It is crucial to the plaintiffs' case that Jaime had her seat belt on at the time?

McELROY: Yes, it is.

HECHT: And Mr. Lowry did not testify on that subject as I recall?

McELROY: I don't know that he did.

HECHT: But Mr. Huston did?

McELROY: Dr. Huston did, I'm sure.

HECHT: Did anyone else testify in connection with the summary judgment about whether the child in the back seat, Jaime, had her seat belt on, do you know?

McELROY: No, but I do want to state this. The mother who is driving had her head smashed into the windshield and she developed amnesia - never able to testify as to just what the sequence of events was, and therefore, was unable to testify as to whether her daughter, Jaime, was wearing that seat belt or not.

HECHT: It puzzled me that there was no statement from the mother in the summary judgment record, but that's the explanation.

McELROY: Yes. I think it's not amiss for me to say that she took a truth serum afterwards to try to find out what had happened. It's not admissible because it wasn't taken under oath and no other attorneys present for cross examination. And I think it was generally favorable to the plaintiff, but it didn't cover enough points. So we don't really have from anybody in the vehicle whether or not Jaime was belted.

That's why we think the statements by Dr. Huston are so important in that regard. He believes that Jaime could not have had the marks on her body in the autopsy report unless it had been made by the seat belt. He believes that the seat belt itself wouldn't have had marks on it unless the occupant there had been wearing it. He believes that for the reasons I've stated in the brief that the autopsy pictures themselves show that the seat belt must have been in use prior to releasing Jaime. And then he points out, and I think it's very significant in the light of his training in biomechanics, that if Jaime had not been wearing the seat belt at all, she would almost surely have been thrown forward with great force and speed between the two seats in front, probably hitting the windshield or the dashboard at the very least, but certainly not having her head strike low down in the low back portion of her mother's front driver's seat. I will say that is the sort of thing that Dr. Huston is iminently qualified to talk about, the kinematics, the occupant movements, the system that might have protected an occupant from either being ejected or not ejected in some types of cases. It would be a matter that he has written about in many, many articles. So, we believe that those are the important parts of the brief with respect to our prime theory of the inertia release that's often caused of a premature release of the seat belt.

We have some other points in the brief, and they relate to our desire for testing that we think was not given us. We were allowed to look at the vehicle and to photograph it, but not to take the seat belt out and make tests upon it, not to take the mylar shrouding out and make tests

with respect to the accelerator. And we believe that there are other points as well that would have been helpful to us if we had been able to go into them more fully at the TC.

GONZALEZ: I want you to comment about the CA's analysis of this case, the CA concluded that all of the testimony by Dr. Huston there was no bases for it in fact. According to the opinion it says, "Dr. Huston conducted a test. We find nothing in the record to indicate that Dr. Huston conducted a test to exclude other possible causes, his theories or his theories had been tested, and all of the things that we've said in *Havener* in *Daubert* and *Robinson* that a court can take into consideration. " The CA says, "That is not in this record." So there are no bases for the opinions by these experts?

McELROY: I think some of them are in the opinion in the record and then some may not be because of the very obvious nature of them. In other words, some of these matters I don't think require a restatement of elementary physics and engineering. And so, those matters weren't largely developed. But he certainly did comment I think with regard to how the seat belt would have been prematurely released in this case.

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RESPONDENT

MAXWELL: This is a case that has been going on since July 5, 1988, that's the date of the accident. This is a one-vehicle accident that involves an Isuzu Trooper. The driver of the vehicle is the mother, Deborah Gammill. In the vehicle she had her two children: Curtis who was about 2 ½ years old, he was in the front seat, he was restrained with a 3-point restraint system and contrary to what plaintiffs have stated in their brief to this court was not severely injured. In the back seat was the 10 year old daughter, Jaime, and she died.

What is not spoken about and referred to in any detail by the Ft. Worth CA because it was Dr. Harry Smith's affidavit supporting the defendant's motion for summary judgment in this case, Dr. Smith in his affidavit recites at great length his experience and credentials. He is a board certified radiologist. He is a board certified emergency room physician. He has been a long-time practicing medical doctor and also has a Ph.D. in engineering. And did opine in his affidavit without argument or rebuttal by plaintiff that first of all, Jaime was not belted; second of all, that Jaime was thrown between the two seats and that the injury to her leg was caused as she struck her brother's seat sitting in the right passenger seat, and that she died because she struck the front windshield. That simply put, broke her neck. When she was taken to the hospital, she did not revive with emergency trauma procedures.

GONZALEZ: But if the plaintiff's experts are allowed to testify all that means is the issue has been joined, there's a fact issue and the matter cannot be resolved by summary judgment?

MAXWELL: No, I would disagree with you.

GONZALEZ: You say that as a matter of law?

MAXWELL: No, I was trying to make it clear here from a question that Justice Hecht asked when he asked if there was any testimony about whether she was restrained or not. We do know that the mother has no memory of the accident. But I wanted to make clear that there was a qualified medical doctor who would be permitted to give opinions in this case that has an opinion that first of all, she was not restrained because he examined the vehicle a number of times, all of the autopsy photographs, the autopsy report itself, and because of his experience as a board certified radiologist looking at all of the x-rays and the medical records, determined how she died. That is, she struck the windshield. There is no fact issue joined because Judge Mullin, the same trial judge that was the trial judge in *Robinson,* determined that neither Dr. Huston nor Mr. Lowry were qualified as experts in this case, he then ruled that they were disqualified and struck their affidavits. There is no fact issue in this case because there is no controverting affidavits on the part of the plaintiff that presently exist.

OWEN: I understand how a medical doctor can say: She broke her neck, she broke her leg, these are her injuries. Why is a medical doctor anymore qualified to testify about what she hit in a car or how her body would have responded in an accident than someone who is an expert in biomechanics, and who is an expert in what happens to people in accidents?

MAXWELL: I think you have the same problem that you had with Dr. Witkin in the *Robinson* case, and that is, simply because Dr. Huston says he is qualified, doesn't mean he's qualified. Simply because Mr. McElroy comes today and tells you that he is an eminent expert in biomechanics, doesn't mean he is an eminent expert in biomechanics. Because if you look carefully at what he said in the Oct. 6 hearing, which is part of the trial transcript that the CA in Houston looked at, you will find that he doesn't have any real opinions, and he doesn't tell Judge Mullin exactly how he arrives at any of his opinions.

OWEN: I thought he said that he saw a dent in the back seat and there was blood on it. And that based on his opinion about where she hit the seat - low down as opposed to higher up - based on that evidence it was his opinion that she had a seat belt on at the time of the crash?

MAXWELL: But he doesn't find any loading on the seat belt. The fibers that he talks about are not identified as to the source of the fibers. He looks at only two of about 18 autopsy photographs. The medical examiner's opinion was, "she was not restrained and the cause of death was she broke her neck." And as far as his opinion that he saw blood, he doesn't say that in his affidavit and he doesn't say it in the Oct. 6 hearing.

ENOCH: The question is, how is a medical doctor a qualified person about the neck breaking as a result of a windshield as opposed to a biomechanic, the neck breaking as a result of hitting the back of the seat?

CAMPBELL: But what is a biomechanic anymore than a self-anointed person who has a Ph.D. in mechanical engineering, who hasn't taken any anatomy courses according to his testimony in his deposition. So he's not a biomechanic. Dr. Smith is a biomechanic expert, I would say. If, Judge Mullin had found that Dr. Huston had the credentials, had taken the courses, had properly looked at all of the evidence in the case, and was satisfied 1) he was qualified, and 2) he had looked at it with the proper methodology and the proper science to come to his conclusions, and his conclusions were relevant and reliable and then to pass muster under 403, then he would have permitted him to testify. But he didn't.

HANKINSON: What was at issue with your motion to disqualify, the qualifications of these two gentlemen to offer opinions on the issues that had been identified by the plaintiffs or the reliability of the opinions that they wanted to offer? What was the subject of your motion to disqualify?

CAMPBELL: It was both.

HANKINSON: So both of those are grounds. And specifically in the order what was the basis for the TC's decision, or did the TC say?

CAMPBELL: The TC did not have findings of fact and conclusions of law.

HANKINSON: I understand. But did the court order just do a broad form order saying "Motion Granted," or did it say as I believe the briefs reflect that the opinions were not reliable?

CAMPBELL: The TC determined that the opinions were not reliable, they were not relevant, and determined specifically that Mr. Lowry was not qualified, and I believe also determined that Dr. Huston was not qualified.

HANKINSON: Now the CA did a *Robinson* analysis as opposed to a qualification analysis with respect to the experience and expertise of the witness to testify on a particular issue? I understand the qualifications are discussed in the opinion, but the bases is *Robinson*.

CAMPBELL: Yes. And more particularly what the CA did as to Mr. Lowry, is looked at Mr. Lowry's qualifications and found as did Judge Mullin that Mr. Lowry wasn't qualified, and then went on to find that his opinions were not relevant or reliable. I don't agree with the one part of the opinion of the CA when it said, "we did not contest Dr. Huston's qualifications. " We did. It was in our motion. The judge heard testimony on that issue as well, and that's part of Judge Mullin's order.

HANKINSON: Then are you really here today primarily looking at the fact that the qualifications of these two men were not established? Is that your first argument that their opinions should have been stricken because they were not qualified to render them?

CAMPBELL: Yes. And I know that when you read *Robinson*, when you read *Havener*, when you read *Watkins v. Tell Smith*, the most recent 5th circuit decision, when you read the *Hartman* case, which is the most recent CCA's decision on this issue of gatekeeping, that it becomes somewhat difficult to make a distinction: Is the trial judge looking at qualifications meaning and including relevancy and reliability, or are they looking at do they have an M.D., a Ph.D? did they take anatomy courses? what did they do to even qualify them to give an opinion? and are they basically then only for litigation or do they conduct research and have other fields of interest?

HANKINSON: And it's your view that *Robinson* applies in a case like this?

CAMPBELL: It is my view that *Robinson* applies. I absolutely do not agree with the *Compton* decision. Interestingly enough, and it's in our brief to the CA and we didn't put it in your brief simply because I don't think it applies, *Duffy v. Murray* which came out about 4 months later where the 10th circuit says: "Federal judge can apply *Daubert*," and that's a bicycle case looking at an accident reconstruction expert.

HANKINSON: So it's your view that novel scientific evidence is not the only circumstance in which *Robinson* would apply?

CAMPBELL: It's absolutely my view and I believe that the court across the hall, the CCA, has said so in *Hartman*.

HANKINSON: Then you had recited what Dr. Smith did and the bases for his opinions as to the cause of death. And as I recall, that was a review of medical records, vehicle inspection, his knowledge and expertise, basically his observations?

CAMPBELL: Correct. Complete examination of all of the restraint systems in the vehicle, the vehicle itself, the damage to the vehicle itself.

HANKINSON: And those are appropriate bases for expert opinions under *Robinson*?

CAMPBELL: Yes, is the answer. You're asking me a question, because certainly I was a proponent of Dr. Smith's affidavit, which was never put into contest in this case, which I think is also important to step back and reflect that *Robinson* is correct in that the proponent of the expert has the duty to establish that the proponent is qualified, which Mr. McElroy on behalf of the Gammills did not do as to Dr. Huston or to Mr. Lowry. Judge Mullin started on Oct. 13, 1995 in a hearing, that is in the trial transcript that is before this court, being concerned and telling Mr. McElroy: I am very concerned about the qualifications that your experts have, that is Dr. Huston and Mr. Lowry because the plaintiffs had then said we are not going to call the other 8 experts that we've listed in this case. He starts warning them then, and we had filed our motion to disqualify them between Sept. 8 and the 13th of that hearing. He then conducts the hearing on Oct. 6, gives them another vehicle inspection on Oct. 7, and in the hearing on Oct. 6 warns the plaintiffs that he is very concerned about

Dr. Huston and Mr. Lowry. And that's the reason I assume that it's in the order of the court where he makes a footnote and says that he was specifically concerned about it. At no time after these at least two warnings from Judge Mullin does the plaintiff come back and ask for a further hearing to establish the qualifications and the admissibility by relevancy and reliability under 702 of Dr. Huston and Mr. Lowry. He doesn't do it. When the hearing then goes forward to not only disqualify them, but strike their two affidavits at the summary judgment hearing, which followed in the course of this case and it's not in the record, two mediation efforts plus the court's effort to settle this case, falling all that, the plaintiff didn't file a motion: We want to have a second hearing or a further hearing that your honor offers us to put forward more testimony from Dr. Huston and Dr. Lowry. That doesn't happen. And so it concludes with Judge Mullin ordering as he did and finding as he did that neither one were qualified, so he disqualified them and struck their affidavits.

HANKINSON: Let me follow-up on this a little bit. I know that no objection was made to Dr. Smith, so you were not put to a burden under *Robinson*. However, you did rely on Dr. Smith's affidavit in support of your motion for summary judgment. What you have described is the bases for Dr. Smith's opinions and his qualifications. Had a *Robinson* challenge been made what is in his affidavit sufficient under *Robinson* to show the reliability and admissibility of those opinions? Because as I understand there's not anything in there about whether the literature accepts what he is doing or anything else. It's based on frankly his observations and experience as a physician. And is that enough under *Robinson* to prove the reliability of those opinions?

CAMPBELL: It seems to me the question you're asking is to create a higher standard for affidavits in product liability cases for summary judgment because if...

HANKINSON: No, I'm just trying to understand the reach of *Robinson*.

CAMPBELL: I think the reach of *Robinson* is this. I think that if the plaintiff had challenged Dr. Smith's affidavit, then I would have done what I had already done in this case when we were having the issue of inspection, I would have had Dr. Smith in the courtroom, which I did have, I would have put him on the stand and I would have demonstrated to Judge Mullin that he met all of the *Robinson* criterias.

HANKINSON: So you would have done more than what is in his affidavit had he been challenged and ordered to comply with *Robinson*?

CAMPBELL: Yes is the answer to the question, and I would have done exactly what I just described, yes.

HANKINSON: So as I understand the bases for Dr. Huston's opinions, he said he did an investigation, he did document inspection, a vehicle inspection, and he based it on his knowledge and experience?

CAMPBELL: He looked at two of the 18 autopsy photographs. He could find no loading on the rear seat belt that Jaime was in. But he still speculated that she was in it.

HANKINSON: Under your interpretation of *Robinson* then, inspection of documents, vehicle accident scene, whatever it may be can never meet the *Robinson* standard, additional work is required, or could that under some circumstances if it is done adequately, look at all the pictures, inspect the vehicle and etc., could that be sufficient to meet the *Robinson* requirements?

CAMPBELL: Yes if you are a medical doctor and qualify contrary to what the court held in *Border's* decision that is, that an emergency room doctors simply being an ER doctor doesn't qualify. I have a real problem with Dr. Huston having any qualifications to speak about what happened. So I don't think that Dr. Huston would ever be permitted to testify in a case such as this, because he doesn't show that he's had anatomy courses or that he has had enough medical training to really make him the proper scientist to then give an opinion. And in this case, he didn't even come close to supporting the basis for his opinion. So you don't just have somebody who is called an expert and they go out and they look at the accident scene and they look at the vehicle and they look at photographs and they look at documents and say, "Now I'm ready to give an opinion." And if challenged, the TC then has a duty under *Robinson* acting as the gatekeeper to go through and find out what documents did they look at and what opinions did they have as those documents, and what is the science that they are basing their opinions on?

OWEN: What is it about taking anatomy that makes only a medical doctor qualified to say: The neck was broken by hitting the windshield instead of the back of the seat?

CAMPBELL: First of all in all respect, I don't think a lay person necessarily knows whether it is a compressional fracture or an extensional fracture, and what part of the neck has to be broken to stop all of the respiratory functions and therefore death ensues. I don't think a lay person knows that. And I don't think the person knows it without at least at a minimum taking a basic anatomy course.

OWEN: But the doctor says, there's no dispute, her neck was broken, she died from a broken neck. But taking it beyond that, what is it about an anatomy course that makes the doctor more qualified than an engineer or someone else to say, she broke her neck when she hit the windshield and not when she hit the back of the seat. She didn't hit the back of the seat I can tell because of what? What is it about an anatomy course that makes only a doctor qualified to say that?

CAMPBELL: I don't think it's just exclusively an anatomy course. I think it's the study of medicine and I think the court has already said in the *Borders* case that simply because you have a board certified emergency room doctor, that doctor is not necessarily qualified to give causation testimony in respect to the particular young woman who later died. So it isn't just an anatomy course. So I will be very frank with you. I don't see how Dr. Huston who has a Ph.D. in mechanical engineering could ever give any opinions about what happened in respect to the body. Dr. Whitcum

in the *Robinson* case, had written plenty of articles, but that didn't mean that this court agreed that he was an expert. What this court determined is that Judge Mullin, the same judge we have in this case, abused his discretion. So it isn't just an anatomy course. I don't think Dr. Huston would ever qualify to give testimony about what was happening to a person inside a vehicle. He may say that he's a biomechanic, but I don't believe him.

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REBUTTAL

McELROY: I am very surprised that counsel would make such a remark as he just made. Dr. Huston has written hundreds of papers such as these reported in the SAE, *Effective Restraining Belts and Preventing Vehicle Occupants During System Impact; Analysis of Locking Dynamics in Retractors Automobile Seat Belts*.

OWEN: Does the record reflect where those were published?

McELROY: The record in his affidavit lists the various articles in his curriculum vitae, that he has written and where they were published. And in each of these, he not only has formulas, but he has drawings such as I have in my brief.

ENOCH: What is being argued about by the experts is whether or not you can demonstrate that the seat belt was being used and during the accident somehow released. And the crux of what Huston is testifying to and what's being objected to is, I have seen evidence from the accident site that demonstrates that Jaime was restrained by a seat belt at least during some portion of the collision. He's not really being used to testify that I've looked at the buckle and there's indications on the buckle that it broke during this deal, or the way it was designed it all is that this design somehow came loose. Your case really is, I've looked at the autopsy, I've looked at the vehicle, and I can tell from all observing that Jaime was restrained at some point during the collision and the seat belt came loose. And beyond that, he might speculate on how it might have come loose, but that's not the crux of his testimony that you're relying on is it?

McELROY: That may be right. He does rely strongly on the severe indentation in the back of the driver's seat, which he believes could have occurred no other way. And for Jaime's head which produced her death to have struck it there. This idea that Jaime was thrown forward to hit the windshield appeared in Dr. Manning's affidavit and it's been suggested here that would create a fact issue, and we believe it's no answer to say, Well you can't consider Dr. Huston because the judge struck his affidavit. What we're talking about here also is whether or not that would be error to strike his affidavit.

But Dr. Huston does more than just talk about the matters that your honors refer to. He does take up the seat belt assembly and the restraint system and point out the defects in it as he believes they exist.

We would point out further, Jaime's neck as we remember was not broken and she actually died from the head injuries.

I would like further to say with respect to *Robinson*, as we know, *Robinson* arose out of an effort by this court to put an end to so much reliance on junk science. That was the terminology used. And of course went on to show how experts can be called upon into the most far out type of situations to testify and to influence juries and the court considered it had gone too far. And it's really for this court to determine the reach of *Robinson*. I think it's an important question, not necessarily fundamental with this case, because I think we are comfortable even within *Robinson*, but I think surely *Robinson* should not strike the very fundamental kind of science involved in this case: engineering; nuts and bolts types. As shown by the drawings, not very heavy science there.

PHILLIPS: So you would in this case, the trial judge would still have to determine that the expert was qualified in the field?

McELROY: I think so. Even under rule 702.

PHILLIPS: But would not then look at whether or not that once he cited that since this is not novel science, you would not have the trial judge try to make some preliminary determination of whether that expert's inclusion were within the mainstream of the _____?

McELROY: I think that's right. He could think that what Dr. Huston is saying is outlandish, but it still ought to be admitted into evidence.

PHILLIPS: So there's not really a *Robinson* here? You don't think there should have been?

McELROY: Personally, I don't think that there is a *Robinson* here.

PHILLIPS: The reason for us to write in this case is not to try to review every determination that's made of every expert in the state one-by-one, but it's to try to give some parameters to the bench and bar about the scope of these hearings. So your earlier answer to Judge Hankinson about *Robinson* is not what you're saying in the brief and it's really not what you're saying today?

McELROY: I think the court's correct. I don't think that most of the suggestions that I made there at the end of 5 suggestions have a great deal of merit now. It would be easier and simpler just to say that probably *Robinson* isn't reached in a case involving such basic not novel, not junk science as involved in this case.