KEY DEVELOPMENTS IN TEXAS LAW REGARDING EXPERT TESTIMONY

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I. Expert Testimony – The Rules

A. Tex. R. Evid. 702 [with additional text from Fed. R. Evid. 702]

“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, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”

B. Tex. R. Evid. 703 [with additional text from Fed. R. Evid. 703]

The facts relied on by the expert need not be admissible in evidence if they are “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject,” but such inadmissible facts or data shall not be disclosed to the jury by the party offering the expert testimony unless the court determines that their probative value substantially outweighs their prejudicial effect.

C. Tex. R. Evid. 704 [with additional text from Fed. R. Evid. 704]

Experts may testify as to the ultimate issues in the case except with respect to whether a defendant in a criminal case did or did not have the mental state or condition constituting an element of the crime charged or a defense thereto.

II. Recent Texas Supreme Court Cases on the Admissibility and Reliability of Expert Testimony

A. General Motors Corp. v. Iracheta, 161 S.W.3d 462 (Tex. 2005).

In this April 8, 2005 opinion, the Texas Supreme Court reversed and rendered a $10 million judgment against General Motors on the basis of incompetent expert testimony. The Court wrote:

[Plaintiff] attempts to borrow from each of her experts pieces of opinion that seem to match, tie them together in an ill-fitting theory, discard the unwanted opinions, disregard the fact that the experts fundamentally contradicted themselves and each other, and then argue that this is some evidence to support the verdict. Inconsistent theories cannot be manipulated in this way to form a hybrid for which no expert can offer support.
B. *Volkswagen v. Ramirez*, 159 S.W.3d 897 (Tex. 2004).

In this case, the Texas Supreme Court reversed a $17 million judgment on the basis that the expert testimony was not sufficient to support a finding of causation. The Court found that the appellate court had misinterpreted its holdings in *Helena Chemical* and *Gammill* in holding that the expert’s skill and experience alone provided a sufficient basis for his opinion. Because the expert’s opinion was based on his subjective interpretation of the facts, it was held to be unreliable and no evidence of causation.

III. **Recent Texas Supreme Court Case Regarding Need for Expert Testimony on Causation in Legal Malpractice Case**

*Alexander v. Turtur & Associates, Inc.*, 146 S.W.3d 113 (Tex. 2004), emphasizes the need for expert testimony on causation in a legal malpractice case and raises questions about what type of expert, if any, would be qualified to testify on such issues. The Court rendered a take-nothing verdict in this legal malpractice case, holding that Plaintiffs had failed to provide any evidence that the alleged negligence of the Defendant attorneys proximately caused an unfavorable verdict for Plaintiffs in the underlying lawsuit. The jury was asked whether, in a reasonable probability, a bankruptcy judge would have decided the underlying adversary proceeding differently if a more senior lawyer had tried the case or if more or different evidence would have been admitted. Because there was no competent expert testimony on this issue, and it was beyond the jury’s common understanding, the Court affirmed the trial court’s ruling that Plaintiffs had presented no evidence of causation. Plaintiffs’ expert’s testimony regarding the alleged breach was not sufficient to prove causation. The Court wrote:

> Breach of the standard of care and causation are separate inquiries, however, and an abundance of evidence as to one cannot substitute for a deficiency of evidence as to the other. Thus, even when negligence is admitted, causation is not presumed.
Justice Hecht wrote a concurring opinion in which he discussed whether any expert witness would be able to make this causal connection and expressed doubt as to “whether a jury could ever be fairly expected to determine, even with expert testimony, what a judge would have decided in such hypothetical circumstances.”

IV. **Expert Testimony on Fiduciary Duty and Other Legal Issues**

In *Greenberg Traurig v. Moody*, 161 S.W.3d 56 (Tex. App.—Houston [14th Dist.] 2004, no pet.), the Houston Court of Appeals discussed the circumstances under which an alleged “legal expert” can testify regarding the legal standards to be applied in a case. In that case, the Plaintiff offered the testimony of a former Texas Supreme Court justice and a law professor regarding, among other things, the duties allegedly owed by a fiduciary and the “basic rules of conspiracy law.” The court of appeals ruled that admission of the testimony was in error, as it is “not the role of the expert witness to define the particular legal principles applicable to a case; that is the role of the trial court.” The court went on to opine at some length about the potential for harm from the admission of such testimony. The court wrote:

> The potential prejudicial effect of an attorney testifying as an expert is of greater significance than that of other experts. . . . By permitting attorneys to state opinions as to what the applicable law is, the trial judge voluntarily allows his role as the legal expert in the courtroom to be usurped or diminished by the testifying attorney. . . . These concerns are magnified when the expert witnesses . . . are cloaked with the authority associated with being a learned legal scholar, a law school professor, or a former supreme court justice.

V. **A Split Between the Appellate Courts Concerning Whether What Your Expert Says Can Be Used Against You**

The Beaumont and Houston courts of appeal have disagreed on the issue of whether an expert’s opinion can be used against the retaining party as an admission of a party opponent. The Supreme Court denied review of the 2004 Houston decision and, thus, declined to resolve this issue.

The first case on this issue is *Yarbrough’s Dirt Pit, Inc. v. Turner*, a case in which Plaintiff filed a motion for summary judgment relying in part on the deposition testimony of Defendant’s expert witness. In reviewing the summary judgment evidence, the Beaumont court agreed with the Defendant that the expert testimony was conclusory, but held that – because it was Defendant’s expert – the testimony was an admission of a party opponent and admissible, even though it might not otherwise have been admissible expert testimony.


The Houston court considered a similar issue in *McCluskey v. Randall’s Food Markets* and rejected the above analysis. In that case, Plaintiffs attempted to introduce the deposition testimony of an expert retained – but ultimately not used – by Defendant, contending that it constituted an admission of a party opponent, and relying on *Yarbrough’s Dirt Pit*. The Houston Court of Appeals disagreed and stated that it was “not persuaded by *Yarbrough’s* rationale.” The Houston court explained that, to be an admission, a statement must be made by a party’s agent or servant and that, without control, there is no agency. Because expert witnesses are hired to testify about their own expert opinions and such opinions are theoretically supposed to be impartial, there is no control by the retaining party.

VI.  **Expert Testimony Regarding Lost Profits**

A.  **Lost Profits – The Standard**

“A party seeking to recover lost profits must prove the loss through competent evidence with reasonable certainty. While this test is a flexible one in order to accommodate the myriad circumstances in which claims for lost profits arise, at a minimum, opinions or estimates of lost
profits must be based on objective facts, figures or data from which the amount of lost profits can be ascertained. In other words, “reasonable certainty” is not demonstrated when the profits claimed to be lost are largely speculative or a mere hope for success, as from an activity dependent on uncertain or changing market conditions, on chancy business opportunities, or on promotion of untested products or entry into unknown or unproven enterprises. The mere assertion that contracts were lost does not demonstrate a reasonably certain objective determination of lost profits.” *Toshiba Mach. Co. v. SPM Flow Control, Inc.*, No. 2-03-156-CV, 2005 WL 1293598 (Tex. App.—Fort Worth June 2, 2005, no pet. h.) (internal cites omitted).

**B. Cases where evidence was sufficient:**

1. *Toshiba Mach. Co. v. SPM Flow Control, Inc.*, No. 2-03-156-CV, 2005 WL 1293598 (Tex. App.—Fort Worth June 2, 2005, no pet. h.) – In a breach of contract action against the maker of machine tools, the court held Plaintiff’s expert testimony regarding lost profits was admissible, even though Plaintiff’s expert relied on inadmissible facts to form his opinion. The Plaintiff, an oil field pump manufacturer, sought lost profits due to defective equipment. The Plaintiff’s expert relied on customer surveys to ascertain why certain sales were lost or cancelled. The court held the expert could rely on these facts because they were the type of facts reasonably relied on by experts in the field. In fact, the court opined: “[w]e cannot think of a more appropriate method to determine why sales were lost than to ask the customer.”

2. *KMG v. Davis*, No. 01-02-00344-CV, 2005 WL 568056 (Tex. App.—Houston [1st Dist.] March 10, 2005, no pet.) – Court found Plaintiff’s expert’s testimony concerning lost profits under an employment agreement (utilizing the “top-down approach” to corporate valuation) was reliable and relevant even though the expert conceded that he had had to make a number of assumptions about the future performance of the business.

3. *Anthony Equipment Corp. v. Irwin Steel Erectors, Inc.*, 115 S.W.3d 191 (Tex. App.—Dallas 2003, pet. dism’d) – In a case where contractor lost construction bid on the United Spirit Arena as a result of Defendant’s conduct, Plaintiff presented sufficient evidence of lost profits by demonstrating its typical profit margin multiplied times the value of the construction project at issue. Plaintiff did not need to prove the actual profit realized by the company with the winning bid.
4. *Helena Chemical Company v. Wilkins*, 47 S.W.3d 486 (Tex. 2001) – Evidence of lost profits resulting from unsuitable grain was sufficient where Plaintiff relied on government statistics regarding average farm-yield, market prices, Plaintiff’s actual yield, and anticipated harvesting and marketing expenses.

C. **Cases where evidence was not sufficient:**

1. *Atlas Copco Tools, Inc. v. Air Power Tool & Hoist, Inc.*, 131 S.W.3d 203 (Tex. App.—Fort Worth 2004, pet. denied) – Court reversed and rendered trial court’s $2.2 million judgment because expert testimony constituted “no evidence” of lost profits. The court held that because the contract at issue was a renewable year-to-year contract, the expert erred in calculating damages over a six-year period. The expert also failed to correctly deduct “all expenses incurred in carrying on the business” and only deducted the “incremental costs of selling the tools.”

2. *Capital Metropolitan Transportation Authority v. Central of Tennessee*, 114 S.W.3d 573 (Tex. App.—Austin 2003, pet. denied) – The court in this case reversed a $1.8 million judgment on the grounds that expert testimony on lost profits was insufficient to support the award. The expert witness acknowledged that Plaintiff had lost money every year it operated and had no reliable basis to support the increased revenue he relied upon to show future lost profits. Another interesting aspect of this case is that the court held that Defendant did not have to object to the testimony at trial because Defendant was not arguing that the expert testimony was unreliable, only that it was premised on unsupported assumptions, speculation, and surmise.

3. *Fraud-Tech, Inc. v. Choicepoint, Inc.*, 102 S.W.3d 366 (Tex. App.—Fort Worth 2003, pet. denied) – In this case, Defendant filed a motion for summary judgment as well as a motion to exclude Plaintiff’s damages experts. Plaintiff’s damage model was based, in large part, on an assumed growth in market share from 5% to 15% over three years. The court of appeals held that the trial court acted within its discretion in excluding Plaintiff’s expert testimony regarding lost profits because the record did not demonstrate the likelihood that any company would have utilized Plaintiff’s product, and the record was “devoid of any objective facts, figures, or data upon which experts based their opinions regarding market share and growth of plaintiff’s product.”