

In The News

Proving Malpractice Damages for Inadequate Settlement in Texas Requires Expert Testimony and an Actual Comparison to Other Settlements

Elizondo v. Krist, No. 11-0438, 56 Tex. Sup. J. 1074, 2013 Tex. App. LEXIS 677 (Aug. 30, 2013)

By D. Lance Currie, Esq., Carrington, Coleman, Sloman & Blumenthal, L.L.P.

The Texas Supreme Court's 7-2 decision in *Elizondo v. Krist* affirmed a summary judgment against two legal malpractice plaintiffs because of the inadequacy of their expert witness's affidavit testimony about malpractice damages. In so doing, the Court clarified its prior jurisprudence that such damages are "the difference between the result obtained [in the case in issue] and the case's 'true value,' defined as the recovery that would have been obtained 'following a trial' in which the client had 'reasonably competent, malpractice-free' counsel."¹ A plaintiff need not necessarily prove what would have happened had his case gone to trial with competent counsel, the Court explained—the accepted "suit within a suit" approach. Instead, when a case involves an allegedly inadequate settlement, damages may be proven if an "expert measures the 'true' settlement value of a particular case by persuasively comparing all the circumstances of the case to the settlements obtained in other cases with similar circumstances."² Here, the Court found the plaintiffs did not satisfy this alternative approach because of the dreaded "analytical gap" in their expert's testimony, which rendered his affidavit conclusory and therefore no obstacle to summary judgment.

In March 2005, an explosion occurred at a BP refinery in Texas City, killing fifteen people and injuring many others. Over four thousand claims were filed against BP, and BP settled them all. Jose Elizondo suffered injuries, but returned to work in a few days. Nevertheless, he claimed he continued to suffer from psychological problems, and his wife, Guillermina, claimed she suffered from loss of consortium.

Jose retained counsel, who sent a demand letter seeking \$2 million from BP. BP responded by offering \$50,000. After counsel was unsuccessful in persuading BP to increase its offer, Jose accepted the \$50,000 and signed a release covering both himself and Guillermina.

Later, the Elizondos sued the attorneys, contending they had failed to obtain an adequate settlement. The attorneys filed several summary judgment motions, including one asserting the Elizondos had no evidence of malpractice damages. The Elizondos responded with the expert affidavit of Arturo Gonzalez, an attorney who had represented other claimants in connection with the BP explosion. He recited the facts of the Elizondos' case and identified ten criteria that BP had used to determine the value of a case for settlement. Based on his experience in the BP litigation, including knowledge of and the criteria for settlement values, he opined that the Elizondos should have been able to settle for \$2-3 million. Nevertheless, the trial court granted summary judgment, and the court of appeals affirmed.

The Texas Supreme Court rejected BP's initial argument that Gonzalez's affidavit was inadequate because it only analyzed what the Elizondos would have received by settlement, rather than analyzing the amount they would have received at trial. The Court acknowledged that the "suit within a suit" approach—determining the value of success after trial—was a valid method for proving malpractice damages, but held it was not the only method. Where BP had settled all claims and none proceeded to trial, a comparison of those other settlements with the plaintiffs' case could prove malpractice damages.

But the Gonzalez affidavit failed to make the requisite comparison. Gonzalez had recited the pertinent settlement factors and facts and had shown he had personal experience with other

settlements; he had then concluded based on his expertise that the Elizondos' settlement was inadequate. But he had not tied the facts of the Elizondos' case to those factors or to the other cases and the settlements in those cases. Relying on its prior decision in *Burrow v. Arce*,³ the Court held that, absent that comparison, there was an "analytical gap" between the data Gonzalez purported to rely on and his proffered opinion, which (consistent with the Court's prior rulings in the realms of expert testimony) rendered Gonzalez's affidavit conclusory and, effectively, "no evidence."

The Court rejected the Elizondos' argument that Gonzalez could not perform this comparison because the BP settlements were confidential. The record showed the Elizondos had disclaimed the need to discover the amounts of the other settlements. The Court also rejected the Elizondos' final contention that their lay testimony created a fact issue, because the requisite "analysis of settlements made under comparable circumstances . . . requires expert testimony."⁴

The dissent argued that the Elizondos were only required to prove they sustained some damages. Because Gonzalez's affidavit attested the Elizondos were paid only nuisance value when the case had actual value, and because it recited facts that plaintiffs' attorneys would have developed to establish the claims had merit (but were not developed here), the dissent believed the Gonzalez affidavit created a fact issue sufficient to survive summary judgment. But the majority found this conclusion to be equally subject to the fatal "analytical gap."

Practice Note: By not limiting recoverable damages to the "suit within a suit" approach, the Texas Supreme Court left open the door to legal malpractice claims based on allegedly inadequate statements. For an expert to opine on the inadequacy of a settlement, however, he likely must compare the settlement at issue to other actual settlements under similar circumstances to avoid an "analytical gap" in his analysis.

¹ 2013 Tex. App. LEXIS 677, at *9.

² *Id.* at *10.

³ 997 S.W.2d 229, 235 (Tex. 1999).

⁴ 2013 Tex. App. LEXIS 677, at *16.