

TADC EVIDENCE LAW UPDATE

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EDITORS' NOTE

The cases we selected for this edition of the Evidence Law Update are not an exhaustive review of every published opinion involving evidentiary issues since the last update. Rather, we selected cases that provide new law regarding evidence-related issues, apply existing evidence-related law to unique facts or circumstances, or otherwise discuss interesting evidentiary points. We hope that you find the update both interesting and useful in your practice.

ADMISSIBILITY OF EVIDENCE

TRIAL COURT DID NOT ERR IN ADMITTING BUSINESS RECORDS AFFIDAVIT OF PARTY THAT AUTHENTICATED A THIRD-PARTY'S RECORDS.

Simien v. Unifund CCR Partners, No. 01-08-00593-CV, 2010 WL 1492267 (Tex. App.—Houston [1st Dist.] April 15, 2010, no pet. h.).

The plaintiff, a consumer debt purchaser, sued debtor to collect on consumer credit card debt. During a bench trial, the trial court admitted, over the defendant's objection, a business record affidavit executed by one of the plaintiff's employees. The affidavit authenticated several business records, including those of another company who had assigned the debt to the plaintiff. To support her objection to the affidavit, the defendant not only argued it was hearsay but also offered excerpts of a deposition given by the affiant at trial in a previous action against an unrelated debtor for an unrelated debt. The trial court ruled the affiant's testimony from the previous trial was irrelevant and inadmissible, and thus excluded the proffered deposition excerpts. The trial court found in favor of the plaintiff.

On appeal, the defendant argued, *inter alia*, that the trial court erred by admitting the documents attached to the affidavit because the affidavit offered by the plaintiff was inadequate to permit the admission of third party business records under the hearsay exception. Citing to its own precedent, the First Court of Appeals applied a three pronged test for determining the admissibility of business records under Rule 803(6): (1) the testifying witness keep and incorporate the document in the regular course of business; (2) the party seeking admission generally relies upon the accuracy of the information in the business record; and (3) the circumstances generally support the trustworthiness of the business record.

Refuting the defendant's argument that additional evidence was necessary, the Court held the affiant's statement in the affidavit, which indicated the plaintiff kept the third party records as permanent company records in the regular course of business, was sufficient to meet the test's first prong. Addressing the second prong, the Court held that the plaintiff had proven reliance on the accuracy of the business records because the records in question formed the basis for its suit. The Court agreed with the defendant that personally verifying the accuracy of the records would be sufficient to meet the second

prong. However, the Court also noted there are several other permissible methods, including reliance on the records to avoid liability and to make informed decisions on whether to make reimbursements.

Addressing the third prong of trustworthiness, the Court reasoned the affiant's assertion that his company created the records did not conflict with the fact a third party had originally "authored" the records. In any event, the credibility of the affiant was irrelevant to determining the trustworthiness of the records. In addition, the Court declined to follow decisions of other appellate courts, and held that the Court's own precedent along with analogous federal precedent interpreting Rule 803(6) did not require proof of personal knowledge to satisfy the trustworthiness of the records. The Court concluded that the plaintiff established the trustworthiness of the records because the credit card company's business would suffer and it risked potential criminal and civil liability if it failed to keep careful records of the defendant's debt.

The Court also upheld the trial court's exclusion of deposition testimony given by the affiant in a previous proceeding to cast doubt on the trustworthiness of the affiant's testimony. The defendant attempted to introduce portions of the testimony as relevant under Rule 401 of the Texas Rules of Evidence. However, the offered testimony related to the credibility of the affiant regarding a different account in a different case. The Court affirmed the judgment of the trial court.

ADMISSIBILITY OF EVIDENCE

EVIDENCE OF PARTY'S KNOWLEDGE AND EXPERIENCE WITH PREVIOUS LITIGATION IS ADMISSIBLE IN LEGAL MALPRACTICE SUIT WHERE PARTY IS ALLEGING UNCONSCIONABLE FEES AND UNFAIR CONTINGENCY FEE AGREEMENT.

Cunningham v. Hughes & Luce L.L.P., No. 08-07-00292-CV, 2010 WL 108170 (Tex. App.—El Paso Jan. 13, 2010, no pet.).

A law firm and one of its attorneys (collectively, "law firm") filed suit against a client seeking a declaratory judgment that the fee contract between the parties concerning the attorneys' representation of the client in her underlying suit against a car repair facility was valid and enforceable. The client filed a counterclaim for malpractice, alleging multiple causes of action. The client's counterclaim was based on the fact that in the underlying litigation her

expert's testimony regarding the amount of reasonable and necessary attorney's fees was excluded because the discovery responses failed to disclose the expert's opinion. Unable to present expert testimony during the underlying trial, the client was not allowed to submit a jury question on attorney's fees and thus was not able to collect attorney's fees in her jury award. The trial court ultimately entered judgment on a jury verdict in favor of the law firm.

On appeal, *inter alia*, the client contended that the trial court erred by admitting limited evidence of prior litigation including two sexual harassment lawsuits and sanctions entered against plaintiff by a federal court. The client's legal malpractice claim included a claim that the law firm violated the DTPA by charging her an unconscionable fee, entering into an unfair contingency fee agreement and urging her to settle her claims. The law firm argued, and the trial court agreed, that the client's experience in the lawsuits was directly relevant to her "knowledge, ability, experience, [and] capacity" regarding contingency fee agreements and settlements. Additionally, the admission of the evidence was limited. The trial court did not permit questioning about the facts or details of the prior lawsuits. Affirming the trial court's decision on this issue, the El Paso Court of Appeals emphasized that the client's knowledge and previous litigation experience went directly to her claim and thus, the trial court's decision was neither arbitrary nor unreasonable.

EXCLUSION OF EVIDENCE

AFFIDAVIT OF PLAINTIFF'S EXPERT WITNESS COULD NOT BE EXCLUDED BASED ON TRIAL COURT'S CONCLUSION THAT THE AFFIDAVIT MISREPRESENTED DEFENDANT'S DEPOSITION TESTIMONY.

Moreno v. Quintana, No. 08-06-00134-CV, 2010 WL 797921 (Tex. App.—El Paso March 10, 2010, no pet.).

The plaintiffs sued a cardiologist and the treating hospital for medical malpractice for the death of their daughter. Following the trial court's grant of summary judgment in favor of the defendants, the plaintiffs appealed, complaining in part that the trial court abused its discretion by sustaining one of the defendant's objections to the plaintiffs' expert's affidavit.

Specifically, the defendant cardiologist objected to the plaintiff's expert's summary judgment

affidavit, claiming that the affidavit misrepresented the cardiologist's own deposition testimony. The trial court sustained the objection, explaining that the expert's affidavit misrepresented the deposition testimony because it did not consider the sworn deposition errata page and the sworn supplementation to the cardiologist's deposition testimony.

The El Paso Court of Appeals agreed with the plaintiffs and explained: "[W]e have been unable to locate Texas precedent holding that an otherwise unchallenged expert affidavit is subject to exclusion from evidence during summary judgment proceedings for 'misrepresenting' another witness [']s] testimony or for allegedly failing to consider another witness's clarifications of his testimony, or another other part of the record in general."

The Court concluded that whether or not this type of evidentiary "misrepresentation" has occurred can only be answered when the fact finder determines which witnesses are credible and what weight to give their testimony. The Court also noted that whether the plaintiff's expert considered all of the appropriate evidence is a ripe subject for cross-examination and, therefore, could be properly addressed at summary judgment. The Court reversed the judgment of the trial court for this reason and others, and remanded the case for further proceedings.

EXPERTS: ADEQUACY OF EXPERT REPORT

EXPERT REPORTS OF PSYCHOLOGIST AND INTERNAL MEDICINE SPECIALIST IN SUPPORT OF MALPRACTICE CLAIM WERE SUFFICIENT; EXPERTS WERE QUALIFIED TO TESTIFY AS TO THE STANDARD OF CARE AND THE REPORTS PROVIDED A FAIR SUMMARY OF THE MANNER IN WHICH STANDARD OF CARE WAS BREACHED.

Davisson v. Nicholson, No. 2-09-169-CV, 2010 WL 1137031 (Tex. App.—Fort Worth Mar. 25, 2010, no pet. h.).

The plaintiffs, a patient and his wife, filed a health care liability claim against a psychologist, physician and clinic alleging that the patient developed addiction and psychosis after the defendants prescribed the patient amphetamines for attention deficit disorder (ADD) without proper diagnoses and adequate evaluation. The plaintiffs filed two expert reports, one from a psychologist and the other from an internal medicine specialist. The defendants filed a motion to dismiss the reports for

failure to timely file an adequate expert report. The trial court denied the motion, and refused to dismiss the claims against the defendants.

On interlocutory appeal, the defendants challenged the adequacy of both reports, specifically that: (1) neither expert was qualified to testify as to the applicable standard of care for diagnoses and treatment of ADD and the manner in which the standard of care was breached; (2) both expert reports were inadequate as to causation; and (3) the expert report of the internal medicine specialist was insufficient to show that the specialist was qualified to give an opinion as to the standard of care and that his opinion on causation was conclusory.

Regarding the standard of care, the Fort Worth Court of Appeals first focused on the qualifications of the psychologist. The Court noted that the expert report of the psychologist adequately demonstrated his qualifications by showing that he had a private clinical practice in psychology and often evaluates patients who have had the medication at issue prescribed for them in the regular course of his practice. Having treated patients who have been prescribed that medication, the Court held the psychologist was qualified to opine to the ongoing standard of care for a psychologist who has made a diagnoses for which the patient was prescribed that medication by a medical doctor. The Court then turned to the question of whether the report provided a fair summary regarding the standard of care. The Court concluded that the psychologist's report clearly articulated a standard of care and breach of that standard by detailing how defendants failed to adequately or properly assess, monitor, and treat the plaintiff patient.

The Court then turned to the expert report of the internal medicine specialist, first noting that the specialist was an expert with respect to standard of care for physicians because the specialist is board certified in internal medicine, geriatrics, and rheumatology and is an attending physician at Presbyterian Hospital in Dallas. The expert report further provided that the specialist has evaluated patients who have been prescribed the medication at issue for ADD. The Court held that the report showed the expert is actively and currently practicing medicine at the time of the report, had treated and was treating patients being prescribed the medication at issue for ADD, and is board certified in internal medicine, therefore meeting the qualifications set forth in section 74.401(a) of the Civil Practice and Remedies Code. The Court also held that the report adequately articulated the standard of care and breach

of that standard by specifically pointing to violations of the standard of care with respect to the defendants' prescription of the medication without proper diagnosis. The Court concluded the report constituted a fair summary of the expert's opinions as to standard of care and the manner in which that standard was breached.

Finally, with respect to the issue of causation, the court held that the report of the internal medicine specialist provided a detailed factual summary which explains how the defendants' alleged omissions/failures to meet with the plaintiff patient on a timely and regular basis caused the injury. The report clearly opined that if the defendants had seen the plaintiff in the office, they would have observed the behavioral manifestations which led to injury. The Court noted that because the report of the internal medicine specialist was sufficient as to causation, it is irrelevant that the psychologist was not qualified to render an opinion on causation.

Based on this analysis, the Court held that the trial court did not abuse its discretion by determining that the reports, when read together, represented a good faith effort by the plaintiffs to comply with the statutory definition of an expert report. The Court noted that the reports properly demonstrated how the defendants failed to assess, monitor and treat the patient and by continuing treatment without seeing the patient for evaluation. The Court affirmed the trial court's ruling on the above issues, and reversed and remanded for potential cure deficiencies in the reports as to other claims.

EXPERTS: RELIABILITY

ENGINEERING EXPERT'S OPINION AS TO CAUSE OF FATAL FIRE WAS UNRELIABLE UNDER *ROBINSON*.

Whirlpool Corp. v. Camacho, 298 S.W.3d 631 (Tex. 2009).

The plaintiffs, parents of a child killed by a fire in their home, brought a products liability design defect action against the manufacturer of their clothes dryer. The plaintiffs alleged that the dryer caused the fire. The trial court entered a judgment on a jury verdict in favor of the plaintiffs, and the defendant appealed. The Corpus Christi Court of Appeals affirmed, and the defendant further appealed to the Texas Supreme Court. The Supreme Court reversed, holding that the opinion of the plaintiffs' design defect expert was legally insufficient to support the verdict.

At trial, the defendant objected to admission of the expert's opinions as to design defect and safer alternative design on the ground that they were not reliable. It also challenged the legal sufficiency of the evidence to support the jury submission of design defect on the basis that the expert's testimony was the only support for the submission.

In reviewing the reliability of the expert's testimony and affirming the trial court judgment, the court of appeals limited its review to determining whether "an analytical gap existed between the data he used and his conclusions". It did not incorporate the reliability factors from *E.I. du Pont de Nemours & Co. v. Robinson*.

At the Texas Supreme Court, the manufacturer contended, *inter alia*, that the court of appeals incorrectly analyzed the legal sufficiency of the expert's testimony by (1) applying an abuse of discretion standard rather than a "de novo-like" review and (2) considering only whether there was an analytical gap in Clayton's methodology instead of also applying other relevant factors.

In addressing the first of those contentions, the Court determined that the court of appeals incorrectly applied an abuse of discretion standard. The Court stated that, because the manufacturer asserted a no-evidence challenge to the expert's opinion the Court of Appeals should have: (1) independently considered whether the evidence at trial would enable a reasonable and fair-minded juror to reach the verdict, and (2) reviewed the entire record, including contrary evidence tending to show the expert opinion was incompetent and unreliable.

Regarding the second issue, the Court also faulted the court of appeals for only relying on the "analytical gap" test and not also focusing on *Robinson* factors. Applying the *Robinson* factors, the Court noted that: (1) the expert did not adequately explain how the data in the reports he relied upon supported his ultimate conclusion; (2) the expert's theories were not published and thus not subject to peer review; and (3) the expert's theories were not accepted as valid by any part of a relevant scientific or expert community at large. The Court concluded that the expert's testimony was unreliable. Because the expert's opinion was the only evidence that the design defect caused the fire, the Court determined that the evidence was legally insufficient to support the verdict. The Court reversed and rendered judgment that the plaintiffs take nothing.