



Texas Supreme Court Update *Opinions Issued April 28, 2017 – Part III*

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Legal Malpractice: Causation Requires Proof That the Result Would Have Been More Favorable But For the Failure to Meet the Standard of Care.

Probative Value of Expert Testimony: Never Assume Anything And Always Show the Factual Basis for the Expert's Opinion.

In [Rogers v. Zanetti](#), a law firm's transactional lawyer drafted an agreement so his client could invest in a healthcare business. After the client failed to comply with the agreement, the healthcare business's principals sued the client for fraud. The transactional lawyer recommended one of his litigation colleagues at the firm to defend the suit. The defense counsel ultimately withdrew from the representation, but the client was held liable for defrauding the healthcare company by conduct that preceded the execution of the investment agreement.

The client sued the transactional attorney, defense attorney, and the firm for legal malpractice. The client alleged the defense was compromised before defense counsel withdrew by defense counsel's conflicting interests between defending the client and protecting his firm and the transactional attorney's work drafting the investment agreement and that defense counsel failed to designate the transactional attorney and the firm as potentially responsible third parties. The client also complained that defense counsel engaged in discovery misconduct, failed to communicate a settlement offer and failure to designate a rebuttal expert concerning damages.

Drafting Errors in the Investment Agreement Were Immaterial When the Fraud Occurred Before the Agreement Was Entered.

The issue before the Texas Supreme Court was whether the client adduced any summary judgment evidence that the lawyer's alleged negligence caused harm to the client. Concerning claims that the agreement was drafted negligently and failure to raise the proportionate liability defense proximately caused a worse outcome than should have otherwise occurred, the court held that the finding that the client had committed fraud before the investment agreement was entered meant that neither the agreement nor the failure to name the transactional attorney as a responsible third party could have had any but-for causal effect on the outcome of the underlying suit. In reaching this conclusion, the court rejected the client's request to apply a relaxed version of the "substantial factor" reasonable person test in deciding whether an act or omission was a but-for cause of an outcome.

Legal Malpractice Plaintiffs Must At Least Show That the Error Caused a More Detrimental Outcome.

The court also reiterated that its case-within-a-case approach to deciding most legal malpractice claims did not mean that the lawyer escapes liability if the client would not have prevailed completely. Negligent lawyers are liable if their negligence makes worse what would have otherwise been a bad result. Regarding the client's malpractice claim for failing to designate a rebuttal damages expert, the evidence showed that the jury completely accepted the plaintiff's expert's damages valuation in the underlying suit. The court noted that this situation usually requires the

¹ The opinions expressed are solely those of the author. They do not necessarily represent the views of Munsch, Hardt Kopf & Harr, P.C. or its clients.

malpractice plaintiff to elicit expert testimony on the likely effect of omitted evidence because a juror's ordinary knowledge does not make them capable of making an informed evaluation.

Testimony That The Client Would Have Tried to Settle Had He Been Aware of the Settlement Offer Was No Evidence That the Case Would Have Settled.

Claiming that he was not informed of an early offer to settle for approximately 20% of the ultimate judgment, the client testified that he would have instructed his attorneys to "negotiate the best possible resolution." He did not testify that he would or could have paid the settlement demand. Without evidence that the case would have been resolved if the settlement offer had been communicated, there was no evidence of causation.

Deficient Expert Causation Testimony

The Opinion then turned to an analysis of the testimony of each expert that the malpractice plaintiff claimed to have been some evidence of causation. It found all such testimony wanting.

No Probative Expert Testimony the Jury Would Have Accepted Lower Damages Evaluation.

Testimony that estimated much lower damages from the client's fraud was rejected as causation evidence because the expert did not opine whether and why the jury would have been more likely to believe the lower damages evaluation.

Expert Testimony That Proceeding Without A Damages Expert Was Highly Risky Was Not Probative of Causation; Repeated Opinions Attributed to Other Expert Opinions Had No Probative Value Where Basis Not Disclosed.

Testimony that proceeding without a rebuttal expert was highly risky was deemed no evidence of causation because it only spoke to duty and did not address causation by illuminating what the jury in the underlying suit would have been likely to decide. Testimony that simply repeated the opinions of other lawyers was not probative when it provided no basis for such conclusions. Repeated say-so is still merely say-so.

Testimony That the Jury Accepted the Damages Evaluation Despite Concerns Due to Absence of Any Other Damage Testimony Did Not Provide an Adequate Basis for the Opinion That the Jury Would Have Found Lesser Damages.

The client also offered the expert testimony of opposing counsel in the underlying suit who testified that he knew from conversation with one of the jurors that the jury felt compelled to accept the valuation of the plaintiff's damages expert despite some concerns because they had no competing evidence to go on. From that, opposing counsel concluded that the failure to designate a rebuttal expert on damages caused the jury to find the amount of damages suggested by the plaintiff in the underlying suit. Not good enough, the court held. "As a matter of necessity, every trial-malpractice action ... involves a comparison of two cases—the case containing imprudent attorney conduct and the case the plaintiff claims should have unfolded with competent representation." Even if the testimony about what the juror said was competent at all, the opinion of opposing counsel was not probative because it offered no basis for the conclusion that the result would have been different had defense counsel designated a damages expert.

[Opposing counsel's] unnamed juror did not specify what the jury would have done had [the defense lawyer] designated someone And though the juror expressed a desire to have the opportunity to consider competing testimony, he made no credibility comparison between [the healthcare company's damages expert] and any given rebuttal expert. Nor could he; the ... jury never heard nor considered testimony from any such expert. Absent a comparison between the real and the hypothetical, [opposing counsel] is left to speculate on causation.

Slip. Op. at 20 (emphasis added). Thus, the court deemed opposing counsel's testimony to have no probative value – i.e., was no evidence – of causation.

Opinion Testimony That The Failure to Designate a Damages Expert Resulted In a Jury Award “Not Supported by the Evidence” Was Contrary to An Established Fact and Not Probative.

The client also offered the testimony of defense counsel for a co-defendant in the underlying suit. The co-defendant’s lawyer testified that the failure to designate a damages expert for the client resulted in a jury award not supported by the evidence, but which could not be controverted. The co-defendant’s lawyer opined that this failure was a breach of the standard of care that proximately caused the “huge damages” awarded by the jury. Accepting that this opinion superficially stated an opinion on causation, the court again did not find an adequate basis for that conclusion in the testimony and, therefore, rejected the testimony as having any probative value on causation. To be sure, co-defendant’s counsel’s familiarity with the case and experience as a trial attorney made him a credible witness, but it did nothing to articulate the necessary “demonstrable and reasoned basis” for his conclusions. The assertion that the “damages were not supported by the evidence” proved fatal because the it was “inherently false” because the court of appeals held that the damage award was supported by legally sufficient evidence. The court also pointed out that testimony that the jury “could” have considered opposing damages testimony had it been proffered was no evidence that the jury “would” have considered it and come to a result more favorable to the client.

The Rogers opinion is intimidating confirmation that the court takes a very strict view of the requirements that must be satisfied before the testimony of an expert witness will be accorded any probative value. It is also a compendium of pitfalls in drafting summary judgment affidavits. Critical analysis of the facts necessary to support each and every opinion and a detailed explanation of those facts is essential.

Tort Claims Act Individual Employee Immunity: Resident Physician Not an Employee of a Governmental Entity With No Right to Control the Resident’s Medical Tasks.

In [Marino v. Lenoir](#), the issue was whether a medical resident in a program offered by the UT Health Science Center and administered by the UT System Medical Foundation was a state employee entitled to dismissal of a medical malpractice claim under the Tort Claims Act, [Texas Civil Practice & Remedies Code §101.106\(f\)](#). The act [defines an employee](#) to include persons “in the paid service of a governmental unit .. but ... not ... a person who performs tasks the details of which the governmental unit does not have the legal right to control.”

Although the Foundation paid the resident and provided malpractice insurance, the residency program handbook provided that patient care was supervised by the program director and teaching staff at the resident’s clinic and that they are responsible for the quality of medical care. The clinic was considered part of the UT Health Science Center. The Foundation’s bylaws further provided that residents were subject to the direction and control of the hospital facility staff which assumes “full responsibility” for the resident’s acts as part of the staff. Based on the bylaws, the court was convinced that “hospital” included the clinic where the resident practiced. After reviewing its decisions in *Murk v. Scheele*, 120 S.W.3d 865, 867 (Tex. 2003) (per curiam), and *St. Joseph Hospital v. Wolff*, 94 S.W.3d 513, 521 (Tex. 2002), the court held that the resident was not an “employee” of the Foundation for purposes of the Tort Claims Act because the clinic, not the Foundation, had the right to control the details of the resident’s medical tasks at the clinic. The resident, therefore, was not entitled to have the suit against her dismissed under §101.106(f).

Hospital Anti-Retaliation Statute: Protects Reports of Reasonable Beliefs of Legal Violations, But Beliefs Based Only On Assumed Facts Are Unreasonable.

Statutory Interpretation: Language Must Be Construed in Context of the Statutory Objective.

Jury Charge: The Charge Defines What the Evidence Must Prove.

[El Paso Healthcare System, Ltd. v. Murphy](#) was a statutory retaliation and tortious interference suit brought by an independent contractor obstetric nurse anesthetist against a hospital. After telling a patient that she had the right to ask the doctor about a proposed procedure, the doctor confronted the nurse about interfering with patient management. The nurse then met with the hospital’s ethics coordinator to complain about the doctor’s behavior with patients generally, tendency to order procedures prematurely, and failing to obtain this particular patient’s informed consent. The hospital notified the service through which the nurse contracted that she should not be assigned to the facility until further notice.

After a month elapsed with no further assignments, the nurse sued the hospital for statutory retaliation and tortious interference. The retaliation claim was under [Texas Health and Safety Code §161.135](#) which prohibits hospitals from retaliating against non-employees for reporting a “violation of law.” The question submitted to the jury, however, predicated liability not on whether the nurse reported what in fact was a violation of the law by failing to obtain informed consent, but rather whether the nurse reported what she reasonably believed was a legal violation. The nurse argued that reasonable belief was enough because cases interpreting the Whistleblower statute protects good faith reports. The court agreed. Looking at the entire statute, the court decided that it was intended to encourage reporting and, therefore, protected reports of activities that the reporter reasonably believes to be legal violations. However, the nurse’s joy was short-lived. While a good faith report is protected, the court ruled that the nurse did not have an objectively reasonable basis for her report because she did not witness the doctor’s interaction with the patient and the nurse who was present stated that the doctor provided the information necessary to obtain informed consent, the nurse’s report had no reasonable basis because it was based on nothing more than the nurse’s admitted assumption the doctor had scared the patient into consenting.

The nurse was no more successful with her tortious interference claim. Because the nurse’s contract did not require her to receive assignments, and did not obligate her to accept them, she could not claim tortious interference with a contract notwithstanding the previous pattern of the nurse’s acceptance of numerous service requests from the hospital. Unfortunately, this was theory of liability submitted in the jury charge. The court ruled that there was no evidence that the hospital interfered with the nurse’s contract with the service through which she received work assignments. That contract did not oblige the hospital to request the nurse’s services, and the nurse had no obligation to accept any such assignments. The hospital’s refusal to request the nurse’s services simply did not interfere with any contract right.