



Alerts

Attorney's Expert's Affidavit on Causation Sufficiently Detailed to Withstand Summary Judgment

October 30, 2017

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Starwood Management, LLC by and through Norma Gonzalez v. Don Swaim and Rose Walker, LLP, Texas Supreme Court Number 16-0431 (September 29, 2017)

Brief Summary

The Texas Supreme Court overturned the trial court and appellate court findings that a plaintiff's expert's affidavit was conclusory regarding causation in a legal malpractice case. The court found the affidavit was sufficiently detailed to withstand defendant's summary judgment motion, and the court thus reversed and remanded for further proceedings.

Complete Summary

Plaintiff sued the defendants, an attorney and his law firm, for legal malpractice for allegedly failing to file within the 30 days required by law a notice of claim to recover aircraft seized by the DEA. The aircraft had been seized because it was not properly registered pursuant to the requirements of a federal statute.

The attorney missed the 30 day notice requirement, but complied with the requirements for an alternative procedure for petitioning for remission or mitigation. After the owner of the LLC that owned the aircraft refused to testify in the proceeding to recover the aircraft, the DEA denied the petition. The attorney filed a motion to reconsider, but the owner of the LLC again refused to testify and the DEA denied the motion.

After plaintiff sued defendants for malpractice, the defendants filed a motion for summary judgment asserting that their alleged conduct was not the proximate cause of the loss of the aircraft. Plaintiff filed a response supported by the affidavit of another attorney who had been retained by plaintiff to recover six other aircraft that had been seized, and who had succeeded in recovering five of them, with the sixth case not yet resolved. This attorney's affidavit contained the opinion that the defendant attorney's negligent failure to comply with the notice requirement caused the forfeiture of the aircraft.

Defendants objected to the affidavit on various grounds, including that it was speculative and hearsay, and that the affiant was not a competent expert witness for purposes of summary judgment. The trial court ruled that the affidavits would not be considered for summary judgment purposes, and granted the defendants' motion. The court of appeals affirmed, finding that the

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affidavit was "conclusory" because the affiant did not make a case-by-case comparison of the facts of the other aircraft seizure cases and the facts of the instant case, and the affidavit was not supported by sufficient factual allegations.

The Texas Supreme Court noted that in legal malpractice actions, expert witness testimony is generally required to rebut a defendant's motion for summary judgment challenging causation, that expert affidavits must be probative and raise a fact issue, and that conclusory affidavits are not probative. The court disagreed with the trial and appellate courts that the expert affidavit was conclusory. Quoting its own recent opinion, *Rogers v. Zanetti*, the Court stated: "the relevant question when addressing the adequacy of expert opinion affidavits in legal malpractice cases is 'Why': Why did the expert reach that particular opinion?"

Although the court noted that the affidavit could have set out more detailed bases for the opinion it reached, the court concluded the affidavit adequately set out the bases for the conclusions, which were that the attorney who handled the other six cases had filed the notices within the 30 days and had succeeded in recovering the aircraft in all of the matters that had been decided. The court rejected the defendants' other arguments that the affidavit did not contain sufficient facts and ignored other facts and held that it was not necessary for an expert to provide a legal analysis of every possible exigency, no matter how remote. The court held that the expert affidavit asserting that had the attorney "challenged the seizure by complying with the notice requirements, the DEA likely would have yielded as it did in the other cases" was not conclusory. The court thus reversed the judgment of the court of appeals and remanded the case.

Significance of Opinion

This decision is useful for its general discussion of the threshold level of detailed analysis required in expert witness affidavits to defeat a defendant's motion for summary judgment in a legal malpractice case. The opinion of another attorney who had successfully recovered aircraft for the same client from the DEA under similar circumstances by following the required procedure was allowed and found to be sufficiently founded to defeat defendants' summary judgment motion.

For more information, please contact Terry McAvoy.

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