



Alerts

Expert Testimony Sufficient to Defeat Summary Judgment Motion in Settle and Sue Case

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Webb v. Ellis, 2020 Tex. App. LEXIS 3527 (2020)

Brief Summary

A Texas appellate court reversed the trial court's grant of summary judgment in defendants' favor on plaintiffs' legal malpractice claim—which was based on plaintiffs' allegations that defendants were negligent in advising plaintiffs to settle their underlying claim—because plaintiffs presented sufficient evidence of causation and damages to defeat defendants' no-evidence challenge to plaintiffs' professional negligence claim. Plaintiffs' legal expert was allowed to opine that plaintiffs would have prevailed in the underlying litigation and obtained a significant jury award.

Complete Summary

Plaintiffs, a family whose wife/mother died in a house fire that also destroyed the residence, retained defendants to represent them on a contingency basis. The firm filed a product liability action against the manufacturer of a clothes dryer that the fire department identified was at or near the origin of the fire. The fire department was unable to determine the specific ignition source.

The firm retained a certified fire investigator and a professional engineer to determine the fire's origin and cause. The experts determined that the fire originated from the dryer, but were able to offer only hypotheticals as to the possible ignition source. Those hypotheticals were contingent upon whether lint had built up in the dryer itself. The manufacturer's motion to strike the experts and motion for summary judgment were denied.

During mediation, defense counsel argued that the family had a causation problem. Consequently, the family asked defendants whether they should retain additional experts. The firm replied that they had the experts they needed.

After mediation failed and less than two weeks before trial, however, defendants advised the family that: "We cannot win an appeal because no expert can testify as to the cause of the fire and without that we don't stand a chance."

Defendants further urged the family to settle, advising that even if the family succeeded at trial, they would lose on appeal. The family settled for \$800,000.

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Still curious about what caused the fire, after the settlement, the family retained a new expert, who concluded that a manufacturing defect within the dryer's gas valve caused the fire. The gas valve manufacturer had not been named as a defendant in the underlying suit.

Plaintiffs sued defendants for legal malpractice. They initially claimed that defendants were negligent in failing to retain experts who could identify the defect to prove the product liability case. The claim was based, in part, on defendants' email concerning the lack of expert testimony to prove causation. Defendants argued that the email was "inartfully drawn" and actually meant that the family could not win on appeal because "Texas appellate courts disfavor personal injury cases generally and would likely overturn an award." The family then added a claim that defendants were negligent in encouraging them to settle because they would not be able to prove causation. The trial court granted defendants' "no-evidence" motions for summary judgment.

The appellate court reversed as to the professional negligence claims. First, the court explained that for a "no-evidence" motion for summary judgment, the movant must only allege that there is no evidence of an essential element of a claim that the nonmovant would have to prove at trial. The nonmovant can defeat the motion by presenting "more than a scintilla of evidence to raise a genuine issue of material fact." In other words, "[a] no-evidence summary judgment is the equivalent to a pretrial directed verdict."

Second, the appellate court recognized that in order to prevail in a legal malpractice action, a plaintiff must establish that he or she would have obtained a more favorable result in the underlying litigation but for the attorney's negligence—a "suit-within-a-suit." If the underlying claim required expert testimony, "that same testimony is necessary to prove the suit-within-a-suit in the malpractice action."

Here, the negligence claim involved a manufacturing defect claim. The family offered testimony from multiple experts to oppose defendants' summary judgment motion, including their new expert who concluded that a manufacturing defect in the inlet booster valve was a proximate cause of the fire. That expert considered and eliminated alternative causes of the fire. The appellate court found that the expert's testimony provided "more than a scintilla of evidence from which an inference may be drawn to conclude that the valve was defective at the time it left the manufacturer."

The appellate court also examined the evidence that the family offered to support damages. This included testimony that they would have tried the case to a jury if defendants had retained experts to establish causation. The family presented evidence of their losses and other special damages. It also offered the opinion of a legal malpractice expert that a jury verdict in the relevant jurisdiction would, more likely than not, exceed \$1 million for the loss of life alone. That expert relied on 30 years of his own professional experience, consultations with other experienced attorneys, and review of jury verdicts for similar cases. In a footnote, the appellate court noted that defendants agreed that "with legally-sufficient expert testimony," the family could have recovered as much as \$3 million at trial. The expert also offered evidence of collectability and causation. The appellate court allowed the expert testimony on plaintiffs' ability to prevail in the underlying case and its probable outcome.

Significance of Opinion

This decision is significant because unlike many courts, this Texas appellate court allowed a legal expert to opine that plaintiffs would have indeed prevailed in the underlying case and what the likely verdict range would have been. This decision, however, addressed a "no-evidence" summary judgment motion. Most courts do not allow a legal expert to opine on what a reasonable jury would award on a particular claim—*i.e.*, that is for the jury to determine.