



## Alerts

### Causation Expert Required in Case-Within-a-Case

July 10, 2013

*Lawyers for the Profession® Alert*

*Kelley & Witherspoon, LLP v. Hooper*, \_\_\_ S.W.3d \_\_\_, 2013 WL 1912452 (Tex. App. 2013)

#### Brief Summary

After dismissal of their personal injury claims arising from a rear-end vehicular collision, plaintiff clients, a husband and wife, sued their lawyers. Defendant law firm challenged the clients' failure to call, as part of the legal malpractice case-within-a-case, a medical expert to establish a causal connection between the auto accident and the damages arising from physical injuries. The court concluded that the clients were required to provide expert testimony to establish causation and damages in the underlying suit, and therefore in the legal malpractice trial.

The appellate court was also critical of trial court's broad instruction to the jury on the issue of damages: "What sum of money, if paid now in cash, would [plaintiff husband] have recovered and collected in his Suit." The instruction was erroneous because it included both valid and invalid elements of damages, and therefore precluded proper appellate review.

#### Complete Summary

The clients' car was rear-ended, causing the couple to visit the hospital. After treatment that lasted for a few weeks, their physician gave them both a full release. While the wife's recovery was complete, the husband later had neck and back problems that robbed him of his ability to enjoy hobbies and, eventually, to work. The clients retained counsel to seek recovery from the other driver. The law firm named the wrong defendant in the complaint, and only named the right defendant after the statute of limitations had run.

On the clients' claims of malpractice, the jury found that the law firm was negligent, and that the clients would have prevailed on their personal injury claims but for the negligence. While no medical expert was called at trial, the husband's medical records were admitted into evidence. In answer to broad form damage questions, the jury found that the clients would have recovered about \$235,000 had the personal injury suit been properly handled. The law firm appealed, arguing that the clients had not demonstrated proximate cause in the underlying action. Moreover, because of the failure to prove causation, the law firm asserted that the broad form damage questions were

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erroneous because they contained both valid and invalid elements of damages.

On the cause in the underlying case, the court concluded that all elements of the underlying case must be proved as part of the legal malpractice action:

[A] legal-malpractice plaintiff who contends that his attorney's negligence caused him to lose a claim he otherwise would have won and collected on must adduce expert testimony to prove the case-within-a-case aspect of causation if that causal connection is beyond a lay juror's common understanding. . . . If the plaintiff would have needed medical-expert testimony to prevail in the underlying suit, then the same kind of testimony is required to prove the case within a case in the legal-malpractice suit.

Here, while the expert testimony was not necessary to connect the head and neck pain felt immediately after the accident, it was required to connect the accident to the husband's subsequent back pain, surgery and wage loss.

The jury was asked to provide the amount that the clients would have recovered and collected if the lawyers had properly prosecuted the underlying suit. Each damage question was followed by a single blank, followed by an instruction to consider various listed categories of damages, including past medical expenses, past and future pain and suffering, loss of earning capacity, loss of consortium, etc.

Because the clients failed to provide proof of at least one element of damages (lost earning capacity), but provided proof of other elements (for example, past medical expenses), the appellate court could not reasonably be certain that the jury was not influenced by the inclusion of past and future lost earning capacity in the damage question. Accordingly, the court reversed the verdict.

### **Significance of Opinion**

This decision is significant because it confirms the need for a full presentation of the case-within-the-case as part of proving a claim of legal malpractice.

For more information, please contact [Terrence P. McAvoy](#) or [Noah D. Fiedler](#).

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