



Alerts

Expert's Opinion That Settlement Was Inadequate Was Insufficient To Establish Damages

October 23, 2013

Lawyers for the Profession® Alert

Elizondo v. Krist, ___ S.W.3d ___, 2013 WL 4608558 (Tex. 2013)

Brief Summary

The Texas Supreme Court held that although expert testimony was appropriate to establish an inadequate settlement in a mass tort case, the plaintiffs' expert's testimony was conclusory. Although the court acknowledged that plaintiffs' expert witness was an experienced attorney and qualified, the court stated the problem was the lack of a "demonstrable and reasoned basis on which to evaluate his opinion that the settlement was inadequate." The expert failed to provide specifics about why the value of the case was \$2–3 million and not the \$50,000 received in settlement.

Complete Summary

In March 2005, an explosion occurred at Chemical Company, killing fifteen workers and injuring many others. Approximately 4,000 claims were filed against Chemical Company, and Chemical Company settled them all. A handful of cases proceeded to trial but settled before a verdict. Plaintiff was working for a Chemical Company contractor on the day of the explosion. The blast threw him about twenty feet, and he received medical treatment for neck and back injuries. He returned to work a few days later, but claimed he continued to suffer from psychological problems. His wife claimed loss of consortium. Plaintiff retained Attorney and signed a power of attorney retaining Attorney to represent him on "all claims I may have against [Chemical Company] and others."

Attorney sent a demand letter to Chemical Company asking for a settlement of \$2 million. Shortly thereafter, Chemical Company offered to settle for \$50,000. In an effort to increase the settlement offer from Chemical Company, Attorney associated a second law firm as additional counsel (Additional Counsel). Additional Counsel met with Chemical Company, but could not obtain a larger settlement. Plaintiff decided to accept the \$50,000 settlement offer and signed the release in February 2006. Plaintiff's wife did not sign because she could not speak or read English.

In August 2007, plaintiffs filed suit against the attorneys, claiming they failed to obtain an adequate settlement on their behalf. The attorneys filed several motions for summary judgment on grounds of no evidence of damages,

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Terrence P. McAvoy

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impermissible "claim splitting," and no attorney-client relationship with the wife. In response, plaintiffs submitted the expert affidavit of an attorney (Expert). The trial court granted some of the summary judgment motions, including the motions regarding damages. The court of appeals affirmed, holding that because the plaintiffs had not presented more than a scintilla of competent evidence of damages, the trial court did not err in granting summary judgment.

The parties disagreed on whether the Expert affidavit was sufficient to defeat summary judgment on the issue of malpractice damages. The court noted that it was undisputed that Chemical Company, a large, solvent corporation, made the decision to settle every case arising from the plant explosion. The court found that where the same defendant settled thousands of cases, and indeed made the business decision to settle all cases and not try any to a verdict, there was no reason why an expert could not base his opinion of malpractice damages on a comparison of what similarly situated plaintiffs obtained from the same defendant. This data is perhaps the best evidence of the real-world settlement value of the case. The court noted that under Evidence Rule 703, experts may base their testimony on facts or data that are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." That test is met when, in a mass tort litigation involving thousands of similar claimants and arising out of the same event, the expert measures the "true" settlement value of a particular case by persuasively comparing all the circumstances of the case to the settlements obtained in other cases with similar circumstances arising from the event.

Here, however, the Texas Supreme Court held that the Expert affidavit was conclusory. Although the Expert affidavit was from an experienced attorney whose credentials were not the problem, the problem was the lack of a demonstrable and reasoned basis on which to evaluate his opinion that the settlement was inadequate. The Expert affidavit explained, in some detail, the factors or criteria that should inform a determination of the value of the case. The affidavit confirmed that the affiant considered the facts relevant to the case, but it failed to offer specifics on why the value of the case was \$2–3 million as opposed to the \$50,000 received in settlement. The court concluded that a fatal analytical gap divided the recitation of the facts of the plaintiffs' case and the declaration of its settlement value. Summary judgment in favor of the attorneys was thus affirmed.

Significance of Opinion

This case is significant because the court held that expert testimony is appropriate to establish an inadequate settlement in a mass tort case. The court held, however, that the expert must show a "demonstrable and reasoned basis on which to evaluate his opinion that the settlement was inadequate," as compared to other cases with similar circumstances arising from the event.

For more information, please contact [Terrence P. McAvoy](#).

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