

# LEGAL MOJO

## Recent Developments in Expert Witness Law

By Melissa Davis Andrews

Expert witnesses are a pervasive part of modern Texas litigation, and Texas law on expert witnesses is ever evolving. Below is a discussion of some key developments in Texas expert-witness law reflected in recent decisions from the Texas Supreme Court.<sup>1</sup>

### 1. Ebola as a Precursor to COVID-19

In *Coming Attractions Bridal and Formal, Inc. v. Texas Health Resources*, an Ohio bridal shop sued a Dallas hospital when one of the hospital's nurses visited the shop after contracting Ebola from a patient.<sup>2</sup> The exposure resulted in health concerns and negative publicity that ultimately put the bridal shop out of business. The shop sued the hospital, alleging that its negligent policies and practices were the cause of the shop's closure. The appeal was about whether the case constituted a health care liability claim under the Texas Medical Liability Act (TMLA), such that the bridal shop was required to comply with the TMLA's expert-affidavit requirement.<sup>3</sup> A unanimous Texas Supreme Court held that the suit was subject to the TMLA.<sup>4</sup> A key factor in making this determination was the Court's conclusion that medical or healthcare expert testimony would be necessary to establish the standard of care, breach of the standard of care, and causation at trial.<sup>5</sup>

After concluding that the TMLA applied, the court described what would be necessary in the expert report. The court stated that the expert would need to "detail the hospital's failure to implement appropriate Ebola treatment, training, and infection control policies, and the circumstances necessary for an infected person to contaminate a store."<sup>6</sup> The court further stated that the "causal link that an expert must supply is the link between the hospital's negligence and the contamination of the store — and the corresponding risk that the disease will spread — not to the loss of business that allegedly stemmed from this contamination."<sup>7</sup> The court noted that "[e]xpert testimony about lost business value is beyond the scope of the [TMLA]."<sup>8</sup>

The court's reasoning in *Coming Attractions Bridal* indicates that medical or healthcare experts are likely to be necessary for plaintiffs in COVID-19 cases to meet their burden of proof on issues like the standard of care, breach of the standard of care, and/or causation.

### 2. Expert Discovery versus Privilege

In recent years, the Texas Supreme Court has recognized an "expert" exception to the work-product privilege, but it has declined to create an "expert" exception to the attorney-client privilege.

In *In re National Lloyds Insurance Company*, the court held that the work-product privilege does not apply to the entire scope of "information discoverable under [Texas Rule of Civil Procedure] 192.3 concerning experts."<sup>9</sup> The court further held that this exception applies only to the forms of discovery provided for in [Texas Rule of Civil Procedure]

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195: expert disclosures, expert reports, and expert depositions.<sup>10</sup> As a result, interrogatories and requests for production remain subject to work-product privilege, even if related to experts.<sup>11</sup>

In *In re City of Dickinson*, the court held that the attorney-client privilege applies in the context of expert discovery.<sup>12</sup> As a result, communications with a client that would otherwise be protected by attorney-client privilege do not become discoverable merely because the client is also an expert witness.<sup>13</sup>

### 3. Attorney's Fees

Until recently, Texas courts and practitioners have sometimes struggled to determine whether to apply a "lodestar" hourly-rate approach to proving attorney's fees, or *Arthur Andersen's*<sup>14</sup> "reasonableness" factors, or both.

In *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, the Texas Supreme Court clarified the relationship between these two approaches, and laid out a two-step process for determining reasonable and necessary attorney's fees.<sup>15</sup> First, the factfinder must "determine a base lodestar figure based on reasonable hours worked multiplied by a reasonable hourly rate."<sup>16</sup> Second, the jury may adjust the lodestar figure upward or downward in light of the Arthur Andersen factors and other relevant considerations demonstrating that reasonable and necessary fees were higher or lower than the lodestar figure under the circumstances.<sup>17</sup> However, to the extent that some of the Arthur Andersen factors are already incorporated into the lodestar figure; these factors cannot cause the base lodestar figure to be altered.<sup>18</sup>

### 4. Conclusion

Properly presenting the expert testimony necessary to support your client's claims or defenses is often the difference between a win or loss in the case. Prudent practitioners must carefully examine the opinions, analysis, and predicative material of their experts to ensure the following:

- (a) the opinion and methodology comply with applicable legal standards and case law[;]
- (b) the opinion is relevant to an issue in the case and goes beyond the ken of the average juror[;]
- (c) the analysis demonstrates, in a way that will be understandable to judges and juries, why the expert reached the conclusions reached[;]
- (d) the "why" is [] logically sound[,] tied to, and consistent with[] the facts and evidence in the case[;]
- (e) the data and other predicative materials the expert relies on actually support the inferences and conclusions the expert draws from them (and, when appropriate, are made part of the record) [;]
- (f) the expert's factual assumptions are supported by evidence admitted at trial[;]
- (g) the expert's forward-looking estimates are consistent with existing facts and based on objective facts, figures, or data[;]
- (h) limitations on the expert's analysis — such as the unavailability of certain data or testing — [are] made part of the record when appropriate[;] and
- (i) in the context of causation opinions, the expert either rules out plausible, alternative causes or shows why the advocated cause is more likely than other plausible causes.<sup>19</sup>

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<sup>1</sup> This article was prompted by a previous publication. See Melissa Davis, "Recent Developments in Expert Witness Law," State Bar of Texas 12th Annual Business Disputes, Chapter 3 (Texas Bar CLE 2020) (available at <https://www.texasbarcle.com/CLE/Home.asp> (paywall)) (last visited May 20, 2021) (hereinafter, "Recent").

<sup>2</sup> See *Coming Attractions Bridal and Formal, Inc. v. Tex. Health Resources*, 595 S.W.3d 659, 660 (Tex. 2020).

<sup>3</sup> See *id.* at 662.

<sup>4</sup> See *id.* at 662.

<sup>5</sup> See *id.* at 667.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *In re National Lloyds Ins. Co.*, 532 S.W.3d 794, 803 (Tex. 2017) (orig. proceeding) (hereinafter, "Lloyds").

<sup>10</sup> See *Lloyds* at 814; Tex. R. Civ. P. 192.3 & 195.

<sup>11</sup> See *Lloyds* at 814.

<sup>12</sup> See *In re City of Dickinson*, 568 S.W.3d 642, 649 (Tex. 2019) (orig. proceeding).

<sup>13</sup> See *id.*

<sup>14</sup> See *Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812, 818 (Tex. 1997).

<sup>15</sup> See *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 501 (Tex. 2019).

<sup>16</sup> *Id.*

<sup>17</sup> See *id.* at 502.

<sup>18</sup> See *id.*

<sup>19</sup> Recent at 33.

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