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## *Evidence—Expert Witnesses*

### **Shoddy Legal Work by Expert Witness Nets \$409K Award for Breach of Contract**

**A** hydrogeologist is liable for \$409,000 to a homeowner for breaching a litigation services contract by failing to provide the homeowner with a defensible expert opinion in a toxic tort case, the Oklahoma Supreme Court ruled March 11, upholding a lower court verdict (*Ellison v. Campbell*, Okla., No. 108468, 3/11/14).

Oklahoma Justice Joseph M. Watt held, in a question of first impression in the state, that homeowners Jackie and Marcia Ellison didn't need expert testimony demonstrating that expert Michael D. Campbell's performance in the 1999 tort litigation was inadequate, because Campbell's own admissions at a 2007 deposition were sufficient to infer negligence.

Jeffrey M. James, a shareholder at Banker Lopez Gassler P.A. in Tampa, Fla., who specializes in defending professional liability cases, told BNA in a March 14 e-mail that while suits against expert witnesses "are not common, they are a threat, especially after this holding."

The top court said that under the "unique facts" of this case, non-expert testimony presented at the 2010 breach-of-contract trial was enough that a lay person could determine that Campbell "did not produce the very thing for which the Ellisons contracted, a supportable expert opinion concerning the state of the groundwater underlying the Ellisons' property and the source of its pollution."

In the Ellisons' underlying suit against an oilfield waste disposal facility that allegedly polluted the family cattle farm, Campbell conceded during a deposition that some of his calculations contained errors, that he hadn't read pertinent Oklahoma or federal regulatory standards and that his opinions would probably not be deemed reliable by the Environmental Protection Agency.

While the expert acknowledged that some flaws in his testimony could be remedied, Campbell said he could not do so promptly because he was "a busy person" and was "too tired" to comply.

The top court said Campbell's "testimony, in and of itself, presents sufficient evidence from which the jury could have determined that the report he submitted was not what the Ellisons had bargained for when he was hired as an expert."

Under "these unique facts, it was unnecessary that the Ellisons present expert testimony by another hydro-

### **More on When Experts Can be Sued**

Attorneys Jeffrey M. James and Thomas E. Peisch have written several articles on when expert witnesses may be sued for lapses in their professional work.

- "Professionals Sued for Expert Witness Work: When Does Witness Immunity Apply?," James, DRI's *Riding the E&O Line* (Publication of the Professional Liability Committee), Vol. 4, Issue 2 (June 12, 2012)

- "Expert Testimony in Legal Malpractice Cases: When is It Needed?," James, DRI's *For The Defense* (July 2010)

- "Expert Owes No Duty to Party in Suit," Peisch, *Mass. Lawyers Weekly* (January 2011)

- "Witness Immunity in the Post-*Daubert* World," Peisch, DRI's *For the Defense* (2008)

geologist to counter Campbell's conclusions in the underlying litigation," the court said.

Thomas E. Peisch, of Conn Kavanaugh Rosenthal Peisch & Ford in Boston, told BNA in a March 17 e-mail that "claims against friendly experts by disgruntled litigants are on the rise."

Peisch, who devotes part of his practice to professional malpractice, said the Oklahoma high court's decision was a "narrow one." The court was "careful to confine its holding to egregious facts and NOT to invite every unhappy litigant to sue his/her expert," Peisch said.

James agreed, saying the court's effort to restrict its holding to the "unique set of circumstances" found in *Ellison* may have been "to discourage future unhappy clients from suing their expert when they don't get the outcome they expect at trial."

**Narrow Ruling.** The supreme court stressed that the opinion in *Ellison* should not be read for the proposition that "a losing party may recover monies paid to an expert witness for the formulation and presentation of an opinion in the context of litigation merely because the party requesting such opinion did not prevail or recover to the extent anticipated."

The case here presented "unique facts," the court said: An individual held himself out as an expert in hydrogeology capable of preparing a scientifically supportable report in that field. He contracted with the El-

lisons to prepare such a document and be available to support it with his testimony.

“Instead, he produced a report which was admittedly error-riddled and based upon methodologies not meeting either state or federal regulations. Simply, Campbell did not perform the services for which the Ellisons contracted and paid.”

The decision set aside a 2–1 ruling in September 2013 by the Oklahoma Court of Civil Appeals, which concluded the plaintiff’s verdict was not supported by expert proof showing Campbell’s action constituted a breach of his services contract. The supreme court’s 8-0 ruling, with Justice Noma D. Gurich recusing, reinstated the \$409,000 breach-of-contract verdict for the plaintiffs in the Oklahoma County District Court.

The \$409,000 award closely follows the \$313,000 that Campbell was paid for his services, plus the amount the Ellisons said they expended at Campbell’s request for investigatory work, about \$106,000.

The plaintiffs had settled the underlying toxic tort case soon after Campbell’s deposition “for much less than its actual value,” according to the 2007 complaint.

Had the contract suit made it to the state supreme court before 2013, the result may have been different. In April 2013, the Oklahoma top court relaxed a 23-year-old rule immunizing experts from liability for their work in judicial proceedings. The decision came in a divorce case, *Simonson v. Schaefer*, 2013 OK 25, No. 110997, in which an expert was paid \$16,000 for an expert report but allegedly refused to provide the document.

**Oklahoma in Line With Other States.** James said a majority of jurisdictions that have touched on the topic find that an expert can now be sued for litigation-related work/testimony.

“This is particularly true where the basis for the claim against the expert is related to pre-trial work,” he said. “If the expert had made a mistake during his testimony at trial, the analysis may be different.”

As for whether the Ellisons needed expert testimony to establish for the jury that Campbell had breached the standard of care of a hydrogeologist to arrive at the verdict, James said that while the general rule is that the plaintiff in a professional liability suit must provide expert testimony on the standard of care, there are exceptions to that rule, including the “common sense exception.”

When using this exception, courts have held that a plaintiff can proceed to verdict without presenting expert testimony where the defendant expert’s alleged transgressions are so “obvious and clear” that a layperson could determine that he or she failed to meet the standard of care, James said. This exception is applied on a case-by-case basis and is “extremely fact-oriented,” he said.

In this case, the court determined that the defendant, by his own admissions during deposition, provided the necessary basis for the jury to determine that he failed to meet his contractual obligations, James said. “He, in effect, served as the plaintiff’s expert at trial,” James said.

**Lessons for Litigators and Experts.** Peisch said practitioners should take from this ruling a limited advisory to be thoughtful about expert selection, and to “be sure that the expert has the time and the temperament to do the job thoroughly, especially in jurisdictions where experts are routinely deposed.”

James offered similar guidance: Keep watch over retained experts and the work they are doing leading up to a deposition or the issuance of an expert report.

“While the attorney cannot be expected to second-guess an expert’s work in every situation—you hire them because they are experts, after all—it is important to look for obvious errors or omissions and to prepare the expert as well as possible for deposition,” James said. “This will hopefully head off a corresponding legal malpractice claim at the pass.”

Experts can also learn from this decision, James contended.

Simply do the job you were hired to do. “Taking shortcuts or accepting an assignment that goes beyond the expert’s abilities or knowledge is a surefire way for an expert to find themselves at odds with a client,” James said.

Jayne Jarnigan Robertson in Oklahoma City, represented the plaintiffs. Andrew E. Karim in Oklahoma City represented Campbell and M.D. Campbell & Associates, L.P.

BY BRUCE KAUFMAN

Full text at [http://www.bloomberglaw.com/public/document/Ellison\\_v\\_Campbell\\_2014\\_OK\\_15\\_Court\\_Opinion](http://www.bloomberglaw.com/public/document/Ellison_v_Campbell_2014_OK_15_Court_Opinion)