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Tex.App.-Dallas, March 11, 2021

216 S.W.3d 436

Court of Appeals of Texas, Corpus Christi–Edinburg.

FORMOSA PLASTICS
CORP., USA, Appellant,

v.

KAJIMA INTERNATIONAL, INC., Appellee.

No. 13–02–00385–CV

|

Dec. 28, 2006.

Synopsis

Background: Contractor sued project owner for fraud, breach of contract, quantum meruit, and negligent misrepresentation arising from work performed for owner. The 135th District Court, Calhoun County, [K. Stephen Williams, J.](#), entered judgment for contractor, and contractor appealed. The Court of Appeals, [15 S.W.3d 289](#), reversed and remanded. On remand the District Court entered judgment on a jury verdict for contractor on the fraud claim, and owner appealed.

Holdings: On rehearing en banc, the Court of Appeals, [Rogelio Valdez, C.J.](#), held that:

[1] on issue of first impression, contractor's expert witness was not disqualified on basis that expert's colleague in consulting group had previously consulted with project owner;

[2] entire consulting group was not disqualified on basis of imputed knowledge;

[3] expert testimony on calculation of damages was reliable;

[4] evidence supported jury's award of fraud damages in an amount that was neither the figure requested by contractor nor the figure suggested by project owner;

[5] evidence did not support project owner's requested instruction on ratification;

[6] project owner was not entitled to requested instruction on mitigation of damages;

[7] single business enterprise rule of corporate liability applied; and

[8] Finance Code section addressing effect of a settlement offer on accrual of prejudgment interest did not apply.

Affirmed.

Errlinda Castillo, J., concurred in result and filed opinion.

[Yanez, J.](#), dissented and filed opinion in which [Hinojosa, J.](#), joined.

West Headnotes (66)

[1] **Appeal and Error** **Expert Evidence and Witnesses**

Court of Appeals reviews the trial court's decision to admit or exclude expert evidence for an abuse of discretion, whether matter turns on qualifications, reliability, or alleged conflict of interest.

[2] **Evidence** **Disqualification of Expert**

Disqualification of expert witness is a drastic measure that courts should impose only hesitantly, reluctantly, and rarely.

[3] **Evidence** **Former employment or associations**

Disqualification of adversary's expert witness based on expert's prior relationship with moving party is warranted if: (1) moving party possessed an objectively reasonable basis to believe that a confidential relationship existed between that party and the expert, and (2) confidential or privileged information was in fact provided to the expert by the moving party.

[4 Cases that cite this headnote](#)

[4] Evidence 🔑 [Qualifications and competency](#)

Party seeking disqualification of adversary's expert witness based on expert's prior relationship with party bears the burden of demonstrating that disqualification is necessary.

[2 Cases that cite this headnote](#)

[5] Evidence 🔑 [Qualifications and competency](#)

Party seeking disqualification of adversary's expert witness based on expert's prior relationship with party bears the burden of establishing both the existence of confidentiality and its nonwaiver.

[1 Case that cites this headnote](#)

[6] Evidence 🔑 [Former employment or associations](#)

Determination of whether moving party had an objectively reasonable belief of a confidential relationship with adversary's expert witness, as would support disqualification of expert based on expert's prior relationship with party, involves an emphasis not on whether the expert was retained per se, but whether there was a relationship that would permit party to reasonably expect that any communications would remain confidential.

[3 Cases that cite this headnote](#)

[7] Evidence 🔑 [Disqualification of Expert](#)

"Confidential information" disclosed to expert witness, for purposes of disqualification motion, is information of either particular significance or that which can be readily identified as either attorney work product or within the scope of attorney-client privilege.

[1 Case that cites this headnote](#)

[8] Privileged Communications and Confidentiality 🔑 [Professional Character of Employment or Transaction](#)

Communication based upon technical information, as opposed to legal advice, is not

considered privileged, nor is information that is routinely discoverable.

[9] Privileged Communications and Confidentiality 🔑 [Presumptions and burden of proof](#)

Unlike attorney-client communications, discussions between parties or counsel and experts do not carry the presumption that confidential information was exchanged.

[10] Evidence 🔑 [Presumptions, Burden, and Degree of Proof](#)

Because burden is on party seeking disqualification of adversary's expert witness based on expert's prior relationship with party, that party should point to specific and unambiguous disclosures that, if revealed, would prejudice the party.

[11] Evidence 🔑 [Former employment or associations](#)

Stringent attorney-client conflict standards do not apply in determining whether adversary's expert witness should be disqualified based on expert's prior relationship with moving party.

[2 Cases that cite this headnote](#)

[12] Evidence 🔑 [Former employment or associations](#)

Contractor's expert witness was not disqualified from testifying in contractor's fraud action against project owner, on basis that expert's colleague in consulting group had previously consulted with project owner, where project owner did not have a prior relationship with expert and had never met, corresponded, or spoke with him about litigation, and there was no showing that colleague or law firm retained by project owner disclosed any confidential or privileged information to expert.

[13] Evidence 🔑 Former employment or associations

Entire consulting group to which contractor's expert witness belonged was not disqualified from testifying in contractor's fraud action against project owner, on basis of imputed knowledge by virtue of prior consulting work that expert's colleague performed for project owner.

[14] Evidence 🔑 Disqualification of Expert

Disqualification rules applicable to attorneys, which would allow for disqualification of a law firm based on imputed knowledge, are inapplicable to expert witnesses.

[15] Evidence 🔑 Former employment or associations

Trial court's decision to not disqualify contractor's expert witness or his consulting group, on basis of prior consulting work performed by expert's colleague for project owner, was neither prejudicial nor fundamentally unfair to either party, in contractor's fraud action against project owner; policies of allowing experts to pursue their trade, allowing parties to select their own experts, and preventing gamesmanship, whereby parties create conflicts solely for the purposes of preventing their adversary from using services of expert, outweighed policy of preventing conflicts under facts of case.

[16] Evidence 🔑 Former employment or associations

Prejudice from disqualification of an adversary's expert witness based on expert's prior relationship with moving party is particularly likely at a late stage in the litigation, at which time disqualification is more likely to disrupt the judicial proceedings.

[17] Evidence 🔑 Breach of contract

Testimony of contractor's expert witness regarding calculation of reasonable value of work performed by contractor, in support of contractor's claim for damages for project owner's fraud, was reliable; testimony did not include the criticized "as-released method" for calculating damages, testimony was objectively reasonable, and testimony was based on unit pricing and quantities and utilized standard estimating techniques. *Rules of Evid., Rule 702.*

[18] Evidence 🔑 Methodology and reasoning; scientific validity

In determining whether expert testimony is reliable, a court should examine the principles, research, and methodology underlying an expert's conclusions. *Rules of Evid., Rule 702.*

[19] Evidence 🔑 Methodology and reasoning; scientific validity**Evidence** 🔑 Speculation, guess, or conjecture; probability or possibility

When expert testimony involves scientific knowledge, the expert's conclusions must be based on the methods and procedures of science, or the testimony is no more than subjective belief or unsupported speculation. *Rules of Evid., Rule 702.*

[20] Evidence 🔑 Daubert and Frye tests as to reliability in general

Court applies certain non-exclusive factors to examine the reliability of expert testimony based on scientific knowledge, but these factors may not apply when testimony involves technical or other specialized knowledge. *Rules of Evid., Rule 702.*

[21] Evidence 🔑 Methodology and reasoning; scientific validity

When expert testimony is based on technical or other specialized knowledge, there must be some basis for the opinion to show its reliability,

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