

**IN THE CIRCUIT COURT OF FAULKNER COUNTY, ARKANSAS
FIFTH DIVISION**

**ROSEY PERKINS and RHONDA COPPAK,
Individually and as Co-Administratrixes
And Personal Representatives of the
Estate of Martha Bull, Deceased**

PLAINTIFFS

vs.

Case No. 23CV-14-862

**MICHAEL MAGGIO, Individually and
In His Official Capacity; MICHAEL MORTON;
GILBERT BAKER; And JOHN DOES 1-5**

DEFENDANTS

**MICHAEL MORTON'S RESPONSE TO
PLAINTIFFS' MOTION TO EXCLUDE TESTIMONY AND OPINIONS
OF JAMES MOODY, SR.**

Comes now separate defendant, Michael Morton ("Morton"), and respectfully submits his Response to Plaintiffs' Motion to Exclude Testimony and Opinions of James Moody, Sr.

INTRODUCTION

At the center of Plaintiffs' case is Michael Maggio's decision to remit the jury verdict in the *Bull* case. Whether Maggio's action in granting the remittitur was warranted by the facts and evidence in *Bull* and whether the remittitur would have been granted by any impartial judge are important facts in this case that the jury will have to determine if this case goes to trial.

Specifically, to prove that the alleged conspiracy to bribe Maggio proximately caused Plaintiffs to suffer damages, Plaintiffs will have to prove that Defendants' actions caused damages that otherwise would not have occurred. Plaintiffs will not be able to prove causation or damages if the jury determines that the remittitur was proper and would have been granted in the absence of any alleged bribe.

Incredibly, Plaintiffs assert that "[i]t simply does not matter if an impartial judge would have reached the same conclusion." This cannot be true because if an impartial judge would have

reached the same conclusion and remitted the *Bull* verdict, then Plaintiffs suffered no damages as a result of the conduct they complain about in this case.

Judge Moody's expert testimony should be admitted because it will be helpful to the jurors who will likely have no knowledge or experience with excessive jury verdicts and the standards for considering a motion for remittitur. Judge Moody's testimony about the procedural aspects of a remittitur, the considerations a judge must take into account in determining whether to grant a remittitur and whether a remittitur of the *Bull* verdict was proper are all matters that will be helpful to the jury in determining the factual question of causation and damages in this case.

LEGAL ARGUMENT

A. To prove a claim for civil conspiracy Plaintiffs will have to prove proximate causation and damages, which are factual questions for the jury and are proper matters for expert testimony.

If the Court denies Morton's motion for summary judgment and this case proceeds to trial, Plaintiffs are going to have to prove that Morton's alleged actions in engaging in a civil conspiracy "proximately caused damages to [Plaintiffs]." *See* AMI 714. Causation is generally a question of fact for the jury. *See Southeastern Distributing Co. v. Miller Brewing Co.*, 366 Ark. 560, 237 S.W.3d 63 (2006). Because this case presents an issue outside the jury's common knowledge, it requires expert testimony. *See Skaggs v. Johnson*, 323 Ark. 320, 325-26, 915 S.W.2d 253 (1996) (holding that medical practice case presented an issue outside the jury's common knowledge and, thus, required expert testimony on the issue of causation). Judge Moody unquestionably has the knowledge and expertise to testify about the procedures of a remittitur and the evidence a judge would consider in determining whether a remittitur was required.

Further, Arkansas courts recognize "concurrent causation," which means that causation does not exist if "the concurrent cause was clearly sufficient to produce the result or the conduct of

the defendant clearly insufficient.” *Earnest v. State*, 2000 WL 377711 at *2 (Ark. Ct. App. Jan. 19, 2000); *see also* AMI 501 (defining proximate cause as a cause which produces damage “and without which the damage would not have occurred.”). In this case, the jury may find, based on the facts and evidence presented at trial, that the cause of the remittitur was not the alleged conspiracy to bribe Maggio, but was the result of a judicial decision that was based on the law of remittiturs in Arkansas as applied to the record and verdict in the *Bull* case. If the remittitur would have occurred regardless of the alleged conspiracy to bribe Maggio, then the jury cannot find that causation exists in this case.

Moreover, even if the jury finds that causation exists, the jury will have to find that Plaintiffs suffered damages. Plaintiffs presume that the amount of their damages in this case is \$4.2 million, which is the amount of the remittitur. A jury may find, however, that the *Bull* verdict was not worth \$5.2 million given the state of the law in Arkansas with respect to excessive verdicts and remittiturs. Stated differently, when the motion for remittitur was filed, the market value of the *Bull* verdict was impacted such that it was no longer worth \$5.2 million. The jury could find that, because any impartial judge would have remitted the verdict, Plaintiffs were not damaged by the full amount of the remittitur or at all. Judge Moody’s testimony regarding the process of considering a motion for remittitur and whether any impartial judge would have granted a remittitur in the *Bull* case is relevant expert testimony on the issue of damages that should be admitted at trial.

B. Judge Moody’s opinions are admissible under Rule 702 of the Arkansas Rules of Evidence.

1. Judge Moody’s opinions are relevant.

Plaintiffs assert that “the evidence clearly shows that the remittitur was the result of a bribe;

therefore, there is no need for expert testimony related to the reasonableness of the remittitur. It is simply a non-issue.” As Plaintiffs know, Morton denies that he bribed anyone, including Maggio, and, despite Plaintiffs’ assertion, Morton is entitled to present evidence that the remittitur was not “the result of a bribe” but, rather, was a decision that had to be made under the facts and circumstances of the *Bull* case and would have been made by any impartial judge under the same or similar circumstances.

Further, Plaintiffs concede that they have to prove damages in this case and, specifically, that they have to establish how they were damaged as a result of Morton’s conduct. Plaintiffs pose this very question in their brief: “how did Morton’s abuse of public trust damage Plaintiffs?” Plaintiffs answer that question by stating that the amount of damage is the amount of the remittitur and is “undisputable.” If the remittitur was proper and inevitable under the facts and evidence presented in *Bull*, then Morton’s alleged abuse of public trust did not cause Plaintiffs any damage. If the Court excludes Judge Moody’s testimony, the Court would be denying Morton the opportunity to present evidence that the *Bull* verdict was excessive, the remittitur was proper and, therefore, Plaintiffs were not damaged by the conduct they complain about in their complaint.

2. Judge Moody’s opinions are not inadmissible legal conclusions.

Judge Moody intends to offer the following opinions at trial. First, Judge Moody intends to testify about the procedural aspects of a motion for a remittitur and that a judge has a duty to review a jury verdict for excessiveness. Second, Judge Moody intends to testify that any impartial judge reviewing the record in the *Bull* case would have and should have granted the remittitur. Third, Judge Moody intends to testify about the procedural aspect of a party’s right to accept a remittitur or retry the case and refuse the remittitur.

While it is true that expert testimony on the ultimate legal issues in a case is generally inadmissible, all testimony regarding legal issues is not prohibited. Courts have permitted expert legal testimony to explain a discrete point of law “to aid the jury in understanding the facts in evidence even though reference to those facts is couched in legal terms.” *Specht v. Jensen*, 853 F.2d 805, 809 (10th Cir. 1988). Expert legal testimony “is proper under Rule 702 if the expert does not attempt to define the legal parameters within which the jury must exercise its fact-finding function.” *Id.*, at 809-10. In other words, an expert witness can testify about legal issues as long as he does not “define the law of the case.” *Id.*

There is no question that courts permit expert testimony in legal malpractice cases to address an attorney’s standard of care. Courts have allowed legal expert testimony in many other types of cases as well. For example, courts have allowed expert testimony on legal issues in the following cases: *George Weis Co., Inc. v. Dwyer*, 956 S.W.2d 335 (Mo. Ct. App. 1997) (admitting testimony that, as a procedural matter, under the state’s laws a bond may be enforced against an entity not registered in Missouri); *United States v. Cavin*, 39 F.3d 1299 (5th Cir. 1994) (admitting testimony regarding legal and ethical issues facing commercial lawyers in real estate transactions); *Wulfing v. Kansas City Southern Indus.*, 842 S.W.2d 133 (Mo. Ct. App. 1992) (admitting testimony on complex procedural, legal matters to allow the jury to evaluate the conduct of the parties); *United States v. Bilzerian*, 926 F.2d 1285 (2d Cir. 1991) (admitting testimony regarding federal disclosure requirements for SEC filing); *Phillips Oil Co. v. OKC Corp.*, 812 F.2d 265 (5th Cir. 1987) (admitting testimony regarding specialized meaning of a contract term); *Guy v. Knight*, 431 So.2d 653 (Fla. Dist. Ct. 1983) (admitting testimony as to the legal effect of the word “tender” as used in settlement negotiations); *United States v. Garber*, 607 F.2d 92 (5th Cir. 1979) (admitting testimony regarding state of the law regarding the taxability of certain proceeds); *Noa v. United*

Gas Pipeline, 305 So.2d 182 (Fla. 1974) (admitting testimony regarding the duty owed by a gas pipeline company to a power company because such testimony was helpful to the jury to understand the safety regulations and their practical application); and *People v. Wolden*, 255 Cal. App.2d 798, 63 Cal. Rptr. 467 (1st Dist. 1967) (admitting testimony of deputy tax assessor as to whether under the law he would have allowed certain deductions from personal property assessments in a case where tax assessor had ordered such deductions and was accused of accepting bribes to do so).

Here, Judge Moody's testimony will not be to "define the law of the case," but will be to provide the jury with general background information about the procedural aspects of considering and granting a remittitur and his opinion as to whether a remittitur was appropriate given the record in *Bull*. The Court should permit Judge Moody to testify about these discrete issues to aid the jury in understanding the facts even though reference to those facts may be couched in legal terms.

3. Judge Moody's opinions are reliable.

Plaintiffs assert that Judge Moody's opinion that any impartial judge would have granted the remittitur is unreliable and speculative because it is based on what an impartial judge would have done, and is not based upon what a bribed judge or biased judge would have done. Plaintiffs' argument misses the point. If an impartial judge, faced with a motion to remit the *Bull* verdict for excessiveness, would have remitted the verdict under the standards governing a motion for remittitur under Arkansas law, then Plaintiffs were not damaged and the alleged bribe could not have caused them any damage. In other words, if the remittitur was proper under Arkansas law, then Plaintiffs cannot have suffered any damage as the verdict would have been remitted regardless of what judge presided over their case. Judge Moody has experience evaluating

verdicts for excessiveness and ruling on motions for remittitur and he should be permitted to render opinions in this case that are relevant and reliable.

C. Judge Moody's testimony should not be excluded under Rule 403.

Finally, Plaintiffs assert that Judge Moody's testimony will confuse and mislead the jury because he will be instructing the jury on the law and, therefore, his testimony should be excluded as unduly prejudicial under Rule 403 of the Arkansas Rules of Evidence. Plaintiffs are mischaracterizing what Judge Moody's testimony will be at trial. Judge Moody will not be instructing the jury on the law of this case. He will not be testifying about the elements necessary to establish Plaintiffs' claims for abuse of public trust, civil conspiracy or a civil rights violation. Nor will he be testifying that Morton is or is not liable under any of Plaintiffs' claims. Rather, Judge Moody is going to explain the process for motions for remittitur, for reviewing verdicts for excessiveness and is going to opine on the excessiveness of the verdict in the *Bull* case and the reasonableness of the remittitur based on his review of the record in *Bull*. Judge Moody's testimony will not confuse or mislead the jury, but will aid the jury in understanding the remittitur process and what a trial judge has to do in reviewing a verdict for excessiveness. These are matters that will be foreign to jurors and Judge Moody's testimony will be helpful to the jury in understanding the issues.

CONCLUSION

For the reasons stated above, Morton respectfully requests that the Court deny Plaintiffs' Motion to Exclude Testimony and Opinions of James Moody, Sr.

RESPECTFULLY SUBMITTED BY:

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CERTIFICATE OF SERVICE

I, John C. Everett, do hereby certify that on this 7th day of October, 2016, the foregoing pleading was sent via electronic mail and U.S. Mail, postage prepaid and properly addressed to the following:

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