Georgia State University
Digital Archive @ GSU

Georgia Business Court Opinions | College of Law

9-25-2009

Order on Defendants' Motions to Exclude Testimony of Plaintiffs' Expert Charles Phillips (AMANA I SA)

Alice D. Bonner
Superior Court of Fulton County

Follow this and additional works at: http://digitalarchive.gsu.edu/col_businesscourt

Recommended Citation
Bonner, Alice D., "Order on Defendants' Motions to Exclude Testimony of Plaintiffs' Expert Charles Phillips (AMANA I SA)" (2009). *Georgia Business Court Opinions*. Paper 31.
http://digitalarchive.gsu.edu/col_businesscourt/31

This Court Order is brought to you for free and open access by the College of Law at Digital Archive @ GSU. It has been accepted for inclusion in Georgia Business Court Opinions by an authorized administrator of Digital Archive @ GSU. For more information, please contact digitalarchive@gsu.edu.

COPY

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

AMANA I SA and SHEIK MOHAMMED AL-AMOUDI Plaintiff, v. CAIRNWOOD GROUP, LLC, CAIRNWOOD CAPITAL MANAGEMENT, LLC, LANE P. PENDLETON, LAIRD P. PENDLETON, KIRK P. PENDLETON, and THAYER B. PENDLETON. Defendants,	*	Civil Action File No. 2006-CV-114931

FILED IN OFFICE
SEP 25 2009
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

ORDER ON DEFENDANTS' MOTIONS TO EXCLUDE TESTIMONY OF PLAINTIFFS' EXPERT CHARLES PHILLIPS

On August 26, 2009, the parties appeared before this Court on Defendants' Motion to Exclude Plaintiffs' Expert Charles Phillips. After reviewing the briefs of the parties, Mr. Phillips' report and his deposition, the record of the case, and the arguments presented by counsel, the Court finds as follows:

I. Facts

This case arises out of Plaintiffs' investment in the Cairnwood Global Technology Fund ("CGTF"), a fund created by the individual defendants, sponsored by Cairnwood Group, LLC and managed by Cairnwood Capital Management, LLC. Plaintiffs allege that they were fraudulently induced to invest in CGTF. On April 13, 2009, Plaintiffs' filed a Third Amended Complaint asserting counts for fraud, civil conspiracy to defraud, negligent misrepresentation and violation of the Georgia RICO Act. On June 22, 2009, all Defendants except Lane Pendleton moved to exclude the testimony of Plaintiffs'

damages expert, Charles Phillips. On, August 14, 2009, Defendant Lane Pendleton also moved to exclude the testimony of Plaintiffs' expert Charles Phillips and adopted his co-Defendants' arguments as his own.

II. The Daubert Standard

In 2005, the Georgia General Assembly adopted O.C.G.A. § 24-9-67.1, which requires a trial court to apply the federal Daubert rule in assessing the admissibility of expert testimony. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Therefore, federal authority, as well as Georgia law, is relevant to the question of admissibility. See, Mason v. Home Depot U.S.A., 283 Ga. 271 (2008). Pursuant to both O.C.G.A. § 24-9-67.1 and Daubert, once a court determines that "scientific, technical, or other specialized knowledge will assist the trier of fact," an expert may give opinion testimony so long as such testimony is reliable and relevant. O.C.G.A. §24-9-67.1; Daubert, 509 U.S. at 589-595 (1993). O.C.G.A § 24-9-67.1 defines reliable and relevant testimony as testimony that is based upon sufficient facts or data, is the product of reliable methods, and is the product of a reliable application of the methods to the facts of the case.

The Daubert standard is liberal and favors admissibility. See, e.g., KSP Investments, Inc. v. U.S., 2008 WL 182260 (N.D. OH 2008) ("As commentators have noted, Rule 702 evinces a liberal approach regarding admissibility of expert testimony. Under this liberal approach, expert testimony is presumptively admissible."); In re Scrap Metal Antitrust Litigation, 527 F.3d 517, 530 (2008) ("[R]ejection of expert testimony is the exception, rather than the rule."); see also, Mason, 283 Ga. at 279 (holding that it is

"proper to consider and give weight to constructions placed on the federal rules by federal courts when applying or construing" O.C.G.A. § 24-7-67.1 because the Georgia statute was based upon Rule 702 and Daubert).

The burden to establish admissibility falls upon the proffering party. Netquote, Inc. v. Byrd, 2008WL 2442048, at *6 (D. Colo. 2008). In a Daubert inquiry, the trial court acts as a "gatekeeper" in determining whether the expert is qualified to testify. See, e.g., CSX Transp., Inc. v. McDowell, 294 Ga. App. 871, 872 (2008).

III. The Daubert Analysis

a. Qualifications of Mr. Phillips

Defendants do not contest Mr. Phillips's qualifications to serve as an expert witness. Rather, Defendants seek to exclude Mr. Phillips's testimony on grounds that it is unreliable and irrelevant. The Court finds that Mr. Phillips possesses proper qualifications to allow him to serve as an expert witness on damages in this case.

b. Reliability and Relevance of Mr. Phillips's Opinion

Defendants argue that Mr. Phillips's expert opinion should be excluded because it rests on three faulty legal premises and is, therefore, unreliable and legally irrelevant. First, Defendants argue that Mr. Phillips used the wrong measure of damages under Georgia law. Defendants maintain that the correct measure of damages is the difference between the actual value of the property at the time of purchase and what the value would have been if it had been as represented. In opposition, Plaintiffs maintain that they are entitled to "damages arising directly and consequential to" the fraud, or as

Mr. Phillips described in his rebuttal expert witness report, "the amount of money that would restore the Plaintiffs to the position they were in before the investment, less any distributions or benefits received due to having made the investment, plus interest."

Generally, "damages for fraudulent misrepresentation are the difference between the value of the thing sold at the time of delivery and what would have been its value if the representations made by the defendants had been true." BDO Seidman, LLP v. Mindis Acquisition Corp., 276 Ga. 311, 311 fn 1(2003) (providing the measure of damages for a fraudulent misrepresentation claim in an opinion establishing and explaining the propriety of a different measure of damages for a negligent misrepresentation claim.) However, Georgia courts also recognize that "damages arising directly and consequential to a tort are recoverable." Rodrigue v. Mendenhall, 145 Ga. Appl. 666, 667 (1978) (noting that "[g]enerally, the measure of damages in an action for fraud and deceit is the difference between the actual value of the property at the time of purchase and what the value would have been if it had been as represented" but allowing for additional recovery); see also Orkin Exterminating Company, Inc. v. Bryan, 163 Ga. App. 804, 805 (1982) (affirming denials of a motion for judgment notwithstanding the verdict and a motion for a new trial finding that "although the evidence in this case does not show the difference in the value of the house at the time of the purchase and what its value would have been if appellant's representations had been true," the evidence established the cost to repair the damage to plaintiffs' home which was the amount of compensatory damages awarded by the jury) . These Georgia cases are consistent with The Restatement Second of Torts Section 549 which provides

for alternative measures of damages in fraud cases. Therefore, the court finds it appropriate for a jury to consider Mr. Phillips's damages calculation.

Second, Defendants argue that Phillips's opinion is based on the incorrect standard of causation. Phillips states in his expert witness report that he has "assume[d] causation as claimed by the Plaintiffs." In its Order on Defendants' Motion for Summary Judgment, the Court addressed at length the Parties' dueling views of causation in this case. While, Plaintiffs must show proximate cause to maintain their action for fraud, the Court rejected Defendants' argument that Plaintiffs can only show proximate causation in one narrow way which is akin to the requirement of "loss causation" under federal securities law. Therefore, Phillips's assumption regarding proximate cause is consistent with the Court's finding in its summary judgment order.

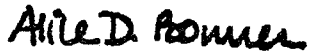
Third, Defendants argue that Phillips incorrectly assumes that prejudgment interest is warranted in this case. Phillips assumes that damages in this case are "certain and fixed" and, thus, are rightfully considered liquidated damages upon which pre-judgment interest accrues. Under Georgia law, liquidated damages "are an amount certain and fixed, either by the act and agreement of the parties, or by operation of law; a sum which cannot be changed by proof." McCorvey Grading & Pipeline, Inc. v. Blalock Oil Co., 268 Ga.App. 795, 796 (2004); see also O.C.G.A. 7-4-15. The Court finds that the damages at issue in this case may be "changed by proof" and, therefore, are not properly considered liquidated damages. The damages Mr. Phillips calculates assume that a jury would find Plaintiffs' damages entirely attributable to Defendants. Additionally, issues of valuation persist even as admitted in Mr. Phillips's expert report.

Accordingly, Mr. Phillip's testimony as to the propriety of an award of pre-judgment interest shall be excluded.

IV. Conclusion

Defendants' Motions to Exclude Expert Testimony of Charles Phillips are granted in part and denied in part. The Court finds that Mr. Phillips's testimony as to Plaintiffs' damages is relevant and reliable and shall be permitted. However, any testimony by Mr. Phillips opining that the damages in this case are rightfully characterized as liquidated shall be excluded.

SO ORDERED this 25th day of September, 2009.



ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

Copies to:

Attorneys for Plaintiffs:

David L. Balser, Esq.
Gregory S. Brow, Esq.
McKenna Long & Aldridge LLP
303 Peachtree ST. NE, Suite 5300
Atlanta, Georgia 30308
(404) 527-4170
(404)527-4198 (fax)
dbalser@mckennalong.com

Attorneys for Defendant Lane Pendleton

John Kenney, Esq.,
Hoguet, Newman, Regal & Kenney, LLP
10 E. 40th Street, 35th Floor
New York, NY 10016
Phone 212-689-8808
jkenney@hnrklaw.com

Attorneys for all remaining defendants:

Michael C. Russ, Esq.
Emily J. Culpepper, Esq.
David E. Meadows, Esq.
King & Spalding LLP
1180 Peachtree Street
Atlanta, Georgia 30309
(404) 572-4600
(404) 572-5100 (fax)
mruss@kslaw.com

William T. Hangley, Esq.
Wendy Beetlestone, Esq.
Paul W. Kaufman, Esq.
Hangley Aronchick Segal & Pudlin
One Logan Square, 27th Floor
Philadelphia, Pennsylvania 19103
(215) 96-7033
(215) 568-0300 (fax)
wth@hangley.com
wbeetlestone@hangley.com