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ALEXANDER V. TURTUR & ASSOCIATES

LAWYER: ...or even a West Point military court martial. The Oregon SC said we don't care who the underlying fact finder is. We're just going to put the red malpractice jury in the box and let them see if they would have decided it differently.

Now the US SC in the Briggs case, the 4th circuit cites Chocktoo(?) and it says we don't agree with that. What you're doing in Chocktoo(?) is you're allowing the red malpractice jury to just speculate on causation. The language of the US 4th circuit is, that's a cognitive leap over the necessity to have evidence of causation in the malpractice case.

So the 4th circuit says you've got to have causation evidence. So that's why you have to reject the rule of Chocktoo, because Chocktoo is too saying you don't need causation evidence. We're just going to let the malpractice jury see if they would have decided it differently. And the reason on a public policy basis if the Chocktoo rule is a bad rule, is that all litigants always think that they shouldn't have lost. And if all you're going to do is put the second jury in the box, the red jury and ask them if they would have decided it differently, it's a complete enticement to the client to say let's just try it again and see if I can win this time. Because I don't have to have evidence of causation. All I have to do is convince that second jury that they should decide differently. And that's why we believe the rule of Chocktoo, which is also the rule in the Virginia SC in...

O'NEILL: If you can prove the jury would have decided it differently why isn't that causation?

LAWYER: It's not proof. It's not requirement of evidence of proof that the underlying fact finder, that's the blue guy, that you put on under Chocktoo, that you have causation evidence of what a reasonable blue guy, what a reasonable underlying fact finder would have done. Because what you're going to do is just re-try the case. On a case within a case, you are just going to re-try the case and this time you're going to not have any of those trial errors that are being complained of in the malpractice case, and you're going to let the malpractice jury decide if they would have decided it differently. In effect, you allow the malpractice jury to supply the evidence of causation because they say, well we would have decided differently. And that's what we're saying is the wrong rule. And that the right rule would have required in a legal malpractice case just like every other case you put on here's what happened, here's what should have happened, and here's why it would have made a difference. And what's missing under the Chocktoo rule is here's why it would have made a difference.

WAINWRIGHT: Is your argument that it doesn't matter what the orange guy, or the blue guy, or even the red guy would have done with the first trial. All those colors don't matter. What matters is whether there was expert causation evidence tying any errors of the lawyer into the incorrect result in the first trial?

LAWYER: The second part I agree with. But actually my colors do make a difference, because what that causation evidence should be is evidence to indicate that a reasonable fact finder, a reasonable decision maker in the underlying trial, whether it be a bankruptcy judge or a jury, whoever it is would have a reasonable, not the subjective, not whether that particular judge would have, or that particular jury, but a reasonable jury, a reasonable judge would have decided differently.

PHILLIPS: What's the expert witness going to look like in this case, or worse in a case where we're looking at a reasonable jury?

LAWYER: I'm getting ready to argue to you that the trial judge has a role. Because under Robinson, the trial judge is going to be the initial gatekeeper on whether the expert's testimony is reliable.

PHILLIPS: That's my question.

LAWYER: Trial judges everyday on motions for new trial for newly discovered evidence for example, have to decide whether the evidence that didn't get put in was so material that you would get a different result if you had granted a new trial.

And I think that's my best example to show that it is reasonable to expect that a judge, and I would say a judge is an expert, and that you could have an expert lawyer, you could have a former judge, or you could have an expert lawyer as the witness, would be competent to look at the way the case got tried, to look at the way the case should have gotten tried. And I would say a qualified under Broaders(?), depending on who your underlying fact finder is, if it was a bankruptcy judge you probably need an expert that's tried a lot of bankruptcy cases. Maybe a former bankruptcy judge.

HECHT: It's a little disturbing that you would just march in a whole group of bankruptcy judges and they say, Oh. No. Any bankruptcy judge worth his salt would have decided this this way. And then you have another crew of bankruptcy judges come in and say, well that's crazy. Nobody would ever do that.

LAWYER: It wouldn't necessarily have to be a bankruptcy judge. Any qualified expert.

HECHT: Doesn't that seem a little tacky?

LAWYER: I will say this. We would be perfectly happy with a rule that says that a malpractice judge decides it as a matter of law. That's our fall back position. I felt like the court would be nervous about taking this away from a jury. But my point is if you're going to allow the malpractice jury to decide the question they have to have assistance in doing so.

BRISTER: Unless it is obvious. In other words. If a client comes up in the malpractice trial. It turns out that there was a perfect alibi witness to show I was not anywhere near the scene of the crime, has objected evidence with pictures and a videotape showing I was somewhere else, attorney did not call him. The jury doesn't need an expert to say something that's obvious. We

didn't call the person with the iron clad alibi that would have proved you weren't guilty. Why do we need an expert witness?

LAWYER: If you take just that hypothetical you might be able to get there. But if you added to it other things like would the bankruptcy judge have let that evidence in...

BRISTER: Would it have been admissible? Right.

LAWYER: Right. Those kind of questions you might need an expert. But certainly in my case for a complex trial where the argument is, you should have put this witness on when my guy was saying, well but that witness would have hurt my case. Those kind of questions are not obvious scenarios that you would not need some help on the causation front on that.

Now what I was getting at with this last point on causation is just that the judge does have a role. And the reason I think this would be a reasonable way for the court to go at this, is that you have the expert Profer(?), and then there's a Robinson determination on whether the expert's opinion is reliable. And so there the judge is really doing what Judge Wittig did at the end of the trial in the malpractice case. In this one J. Wittig jnov it and said, there's just not evidence of causation here.

But a judge would be permitted, would have to on a Robinson challenge, look at the testimony.

HECHT: But what are the factors evaluating reliability? If it's a car crash you're talking about science, rules and syphoning like the last case. If it's this there's no peer review.

LAWYER: I would go look at your opinion in RC v. Burrows where you talked about the adequacy of the affidavit that was given on whether the lawyer had handled the settlement right. And you were unhappy with the language in the affidavit. And you said, Look. This is how you should have done it. The lawyer should have looked at this, and this, and should have talked about how you would have structured settlements. To me it's the same thing. The expert looks at the way the case got tried. He looks at whether there was a missing alibi witness. And he says, Look in my experience this would have made a difference. What's the difference between that and a district judge deciding on motion for new trial on newly discovered evidence.

HECHT: Because he was there. He saw the trial.

LAWYER: In the malpractice case, the expert has got to be knowledgeable about the underlying trial. He's also got to be knowledgeable about what should have been put on. So he's probably going to be there. He's probably going to hear all the evidence in the malpractice case, or at least he's got to be familiar with it. And see that's what's wrong with the expert testimony in this case. And that's at Tab 4, where Steve Peterson from the State Bar testified. And he said, well I don't know what the available evidence was that could or should have been put on. And I can't tell you what other evidence might have been out there. And this is the testimony that our opponents say is evidence of causation.

See this expert didn't do what we're saying an expert should do and can do to help the jury establish causation. Or alternatively CJ Phillips, if you're not comfortable with that, let the malpractice judge decide. In effect that's what happened here. When J. Wittig said, I heard all the evidence and you don't have any evidence of causation. J Wittig was saying, I say there is no evidence of causation. So you see that's the check that you would have if an expert had testified. He could have still made that determination if he thought the expert's testimony was unreliable.

But the point is, you can't do it without any evidence of causation. Because then you're just letting the red malpractice jury decide how it would have decided the case. And that we think is terrible public policy among other things.

PHILLIPS: As a trial judge I never had a lawyer/expert witness. Getting my mind around a jury saying what a reasonable bankruptcy judge sitting as a finder of fact would have done is interesting.

LAWYER: It is. It's tough. You can see it more easily if the underlying fact finder were a jury. And see that's what the court had in Chocktoo. If you put jury against jury, blue jury to red jury, that's when I think it looks deceptively simple to say well just let the red jury decide what the blue jury would have done if they had heard the evidence. But when you start thinking about no you're deciding a rule of law that's going to apply whether the underlying fact finder is a judge, a jury, an arbitration panel, then you have to really stop and think about whether the Chocktoo rule really makes any sense.

So this is an area of the law that needs some clarification. Really the point I want to make is we're not asking for a special rule for legal malpractice. We're not asking for a special rule for lawyers. What we're asking for is that the same rule that applies to everybody else has to apply to legal malpractice. You have to have evidence of causation in the malpractice case and if causation is not within the lay person's knowledge and expertise you've got to put on an expert. And the expert ought to be subject to the rules of Robinson and Havner and everything else that we do in other case.

If I'm wrong on causation, I would still get a new trial under the Formosa case, because J. Wittig is right that there is not legally sufficient evidence of $3 million in actual damages. And under Formosa that would mean a new trial, not a rendition for some smaller amount of dollars.

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RESPONDENT

HOVNATANIAN: A good place to start is with this court's own jurisprudence from 1989 in the Millhouse case, where this court said causation in legal malpractice cases is a question of fact with one exception. And that exception as CJ Phillips noted is appellate malpractice, which of course we don't have here. So we start with the understanding that comes from this court's own case, that causation in trial malpractice or any other kind of malpractice accept appellate malpractice is a question of fact.

Now courts across the country have held that causation in trial malpractice cases still is a question of fact, no matter who the fact finder is; whether it's a judge, a jury sitting as the trier of fact. The SC of Washington said so...

O'NEILL: Causation in a medical malpractice case is a matter of fact, but it's not information that's within the knowledge of the average lay person. So you have to be guided by medical testimony. Why don't we carve out a legal exception only if it's something like res lipso loquitur, which is very difficult to show? Why wouldn't we use that same construct here?

HOVNATANIAN: We think you should. And it already exist in Texas law. In the Delp v. Douglas case, and in the 5th circuit case of Streber.

O'NEILL: It sounds to me like you're applying it on the liability piece, but not the causation piece. In other words, you're standing up and saying they didn't do this, they didn't do that, and therefore malpractice, therefore damages. It appears to me that there's nothing in the transcript here that shows if you had put on a case you would have won.

HOVNATANIAN: I think the construct that we suggest is the one that comes from those Texas cases like the CA's version of RC v. Burrow, before the case got to this court. And Delp and Streber where the court said - and none of those courts said res ipsa, but it is obviously close to res ipsa, that if the causation is obvious, if the causal link is obvious to a layman, then as J. Brister pointed out, in a case like that you don't require expert testimony.

Now to the second part of your question. We think that exception applies in this case because there is evidence in the record that Turtur & Associates would have prevailed in the underlying adversary proceeding if the...

BRISTER: What specifically?

HOVNATANIAN: There's actually three strata of evidence characterized in our brief. The most direct is perhaps the lay evidence from Mario Turtur. For instance, Mr. Turtur testified that he was forced to settle claims because of the loss that they took in the adversary proceeding. That he was forced to surrender other claims. That he was forced to pay money. That he got sued again.

O'NEILL: The question is evidence that he would have won had it been tried properly.

HOVNATANIAN: Again, I go back to Mr. Turtur's testimony. He testified that the evidence was there. In fact that's almost a direct quote, although he goes into much greater specifics than that, that the evidence was there. Had it been put in front of J. Able, the bankruptcy judge, we would have prevailed.

HECHT: How can he know that? If he's not a judge how can he begin to say that?

HOVNATANIAN: And that goes back to the application of the exception. Every court to rule on the exception, including the Texas courts that I mentioned, have said that when that causal link

is obvious, then lay testimony from the client will be sufficient to show causation.

PHILLIPS: The cases like Delp are cases - they don't have the intervention of a judge or jury. It's where the client was taking advice and shows what happened as a result of that advice. And this is very different when you're going through the court proceeding. What in this record shows that the judge would have ruled a different way had this other evidence come in in a two day limitation? And this wasn't like you have all the time in the word.

HOVNATANIAN: Very true. There are three key points to make here. First of all, this is not just a trial malpractice case. If you look at the three liability questions submitted to the jury, no's 1, 4 and 5, they cover not only the malpractice at the trial, but also the pretrial of malpractice. For instance question 1 says, the preparation or trial of the adversary proceeding. So it's not quite accurate for the other side to say this is a case about trial malpractice.

PHILLIPS: And a jury can decide what's adequate for pre-trial work without expert testimony.

HOVNATANIAN: Yes they can. And that's exactly what they did.

BRISTER: But what was obvious about this. I mean the underlying case to the extent I could gather it from the briefs was something about we would have kept doing these programs after 1983. We would have entered a contract. What evidence would have conclusively, obviously proved we would have entered a contract when one party of the contract can just say no?

HOVNATANIAN: There was a lot more to it than that.

BRISTER: But that was most of it wasn't it? I mean most of your damages was we would have kept getting these things for later years.

HOVNATANIAN: Respectfully, I don't know that I would go that far. A huge portion of the damages in the adversary proceeding were for commissions on sales that had already been made, and that money was already owed. Not just commissioners, but the bonding, a premium that was advanced by the Tuturs. There are several categories.

BRISTER: It was a brief that we would have had those if you had contracted with us instead of not getting the bonding, and therefore it fell through and you did it on your own. What obvious proof is there that you would have had to have entered a contract with us?

HOVNATANIAN: There already were two contracts in existence. And the question was not so much future contracts...

BRISTER: But there was nothing in them that required the Ranch to keep contracting with you and only you forever.

HOVNATANIAN: There as not forever, but there was an exclusivity provision that said you are

my agents for these sales and nobody else will be. And that was part of the Turtur's breach of contract.

BRISTER: But that ended in 1983. Right?

HOVNATANIAN: It did end in 1983 or 1984. It may have gone on in to 1984. But certainly I wouldn't quibble with 1983.

PHILLIPS: Part of what bothers me about your case is that we got along in the Anglo American legal system for several hundred years without the concept of pre-trial. You just came down and told your story and the fact finder resolved it. It seems to be an underlying presumption of your position that a lack of exhaustive pre-trial is per se negligence that causes damages.

HOVNATANIAN: No. That's not our position. And that gives me a chance to respond to a previous question about what was obvious. We're not saying the pre-trial has to be exhaustive. We're not saying at trial the lawyer better preform like Clarence Darrow. What we are saying and what makes this case, what we think and what the jury thought an obvious case, and the CA thought an obvious case, is essentially six things that were lacking in this case. First of all, the fact that the trial lawyer had no experience in adversary proceedings.

BRISTER: If the case is a malpractice case, the doctor was drunk and cut off the wrong leg. Now the doctor's attorney also is drunk at trial, calls no witnesses, and sleeps through the trial. We all agree that that trial attorney is negligent. But the problem is, he couldn't have won that case. So it doesn't matter how bad he was. If he was drunk and cut off his own leg at trial, the question is what would he have done to win the malpractice case with a drunk doctor that cut off the wrong leg? And the answer is nothing.

HOVNATANIAN: There is an answer in this case. And the answer is do some discovery. Send out interrogatories.

BRISTER: All could have been complained about my drunk lawyer. But what would they have found that would have shown - unless there's some evidence the doctor wasn't drunk or didn't cut off the wrong leg. It's not going to get any better whatever the lawyer does. So what would have gotten better if Ms. Mingledorf had done all these things?

HOVNATANIAN: The evidence that was admitted in to the malpractice trial of all of the evidence that should have been admitted in to the underlying adversary proceeding.

BRISTER: Again that was mostly stuff she didn't do. I need the substance. I don't need - I would have called three more witnesses. I mean every guy that gets convicted said I would have called 5 more witnesses and they would have said I didn't do it. What was presented at the malpractice trial where somebody said specifically this is why the Ranch breached the contract?

HOVNATANIAN: It's summarized in our brief and I will give you the best possible example. The best possible example is the evidence from the third party witnesses not affiliated with either

side who could have come in and said this is what Mr. McKeller did that was wrong that cost the Turturs this money. For instance, the investors with whom Mr. McKeller closed the deal. Unbeknownst to Mr. Turtur and his family when there was an exclusivity provision in the contract that said only Mr. Turtur and his associates gets to close those deals and paid on those commissions. That's just one example. There's a host of others.

HECHT: Was the expert Mr. Peterson ever asked about causation?

HOVNATANIAN: That's actually not that easy of a question to answer. He was asked about it by Ms. Davenport. Without getting in to the extent of it, the key phrase that the parties are arguing about in this case was the evidence that was offered and admitted at trial caused J. Able to make the decision that he made.

HECHT: Anything else? Was he just asked point blank would this have come out differently?

HOVNATANIAN: No. Did he give testimony in and around the excerpt that I just read to the court from which that conclusion can reasonably be reached? Yes. Absolutely.

WAINWRIGHT: You mentioned six points that you believe were lacking and I think you got to two of them.

HOVNATANIAN: The lack of experience. The fact that virtually no discovery was done, including no written discovery. The third one was that there was no preparation for trial. The fourth one was that at trial a case for the Turturs was barely put on. The fifth one was that correspondingly the case that the McKeller's put on was barely defended against. And the sixth one of course which is all throughout the record is that all of this happened with no supervision whatsoever.

O'NEILL: Which gets you to negligence. But you're saying you don't need evidence that they would have won the case if it had been done right?

HOVNATANIAN: Oh no. I'm not saying that.

O'NEILL: So you agree you do need evidence the case would have been one?

HOVNATANIAN: Absolutely. We have never taken the position we don't need evidence of causation.

O'NEILL: That's where I'm having trouble. I don't see where that evidence is. Regardless of who it came from.

HOVNATANIAN: The other area I can point the court to is just that the facts that we argue in our brief regarding obviousness. And that is that the six facts that I just mentioned to J. Wainwright could have led a jury to conclude, well of course they lost. Look what happened and look what didn't happen. Of course there's a causal relationship between no discovery, not preparing for trial,

not putting on a case and losing.

O'NEILL: Again that's negligence. I still haven't heard anything that tells me they would have won. And I think what you're telling me is we can glean that from this record as a matter of law.

HOVNATANIAN: That's correct. That's where the exception comes in to play if the causal link is obvious between the negligence and the damages. If you can glean from the record...

O'NEILL: As a matter of law they would have won.

HOVNATANIAN: I would say as a matter of fact.

O'NEILL: As a matter of fact we can't do that can we? Can we determine as a matter of fact they would have won?

HOVNATANIAN: A jury can. Are you asking me that or whether this court can?

O'NEILL: It's just hard for me to see that a lay person could determine based on what might have come in, the underlying case was winnable. And you're saying it's so obvious from this record.

HOVNATANIAN: Correct. And that's why if you look at the cases that apply the exception unanimously those cases will say lay testimony from the client in an obvious case is enough to get the job done. That's because you've got the negligence and you've got the damages. The causal link is obvious and all the client does is validate it. All the client does is come and say I was there. I know what happened. And here's what happened. In an obvious case, which we contend this case is, then as a matter of fact the causation element is met.

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DAVENPORT: I know this court does not have fact finding jurisdiction. But a bankruptcy court can wear two hats. It is not just a court of law. It can take off its robe and sit as a finder of fact. Like a person in a jury box it is not a bankruptcy judge as it does that. It is like a one many jury. J. Able was like a one person jury sitting there with no greater expertise. He was supposed to sit there and disregard his greater expertise as a fact finder and be a finder of fact: listen to those facts, disregard, not bring in outside expertise about what he knew, while he was supposed to still obey all of those rules about fact finders, and listen to that evidence and make findings of fact based on the evidence he heard. And he heard certain evidence that was introduced in the trial in J. Wittig's court. And all of that evidence bound was admitted at that trial for that jury to look at. That fact finder, another fact finder made up of 12 people this time who did not also have another job as a person trained in the law to make conclusions of law, but another group now of 12 who were supposed to make findings of fact. And what they said is, okay. We're sitting here as finders of fact and yes with these volumes of evidence that have now been introduced we would have made the same decisions of this fact finder had we seen these items.

J. Brister you asked, what else did they see? They saw that the Turtur prospectus was being used to sell cattle. The exact Turtur prospectus was being used by Miller to market the cattle for the Green Creek Cattle Co.

BRISTER: Is that a copyright claim?

DAVENPORT: No. They had drafted it. And they had $50,000 to be charged for each unauthorized use of the Turtur prospectus. And also the Turturs had told Mr. McKeller that to dilute the market using - that that's why they had an exclusivity provision. They said, Look we can't sell too many of these. What makes them able to be sold is to keep the number down. That holds their value. And that's why when Mark Sorrell was selling these that he said - they wrote him and said you can't be doing this because it's hurting the value of these offers.

PHILLIPS: It cannot be malpractice that I go try a case and lose it, and when we re-try it in the malpractice case against me it gets won because of another strategy. There's got to be something more doesn't there, or else lawyer malpractice premiums are going to go pretty high.

DAVENPORT: But don't you think it's malpractice if I buy Clarence Darrow and I send in _____ Snodgrass - a first year law student. Or even somebody else who's never tried a civil case and never seen a bankruptcy court and knows nothing about cattle embryos. Because that's what happened here.

BRISTER: So you're argument is it's okay if it's really bad malpractice. If it's just regular malpractice that the second lawyer says well I wouldn't have called that witness or I would have called another one, that's a different case?

DAVENPORT: What we had here is we had an expert testify about all of this was negligence. Liability. The question is causation.

BRISTER: But the chief's question is, another lawyer can always second guess the way you try a case. Another lawyer can always come in and say I would have tried it differently. That's supposedly why you hire lawyers. Right?

DAVENPORT: That is true. But when you're talking malpractice you won't always have a lawyer say this is negligence. We do have - it's almost like in medical negligence cases. We a lot of times have issues of - and it rings in my head all the time. Medicine is not an exact science. You know there's a judgment call involved. But this wasn't a judgment call. Tom Alexander knew he was supposed to be there and he didn't show up. He promised the Turturs that he would represent them personally. That's what was found even by the CA.

O'NEILL: It seems like though all of our argument is about liability.

DAVENPORT: What we have is a man who said I will supervise the operation of this case and spent 2 hours.

O'NEILL: _____ liability.

DAVENPORT: No. But in development of the case. Now the question is did that cause it that somebody who had boxes of evidence produced never look them over prior to trial, and none of that evidence made the exhibit list. But in the case when it was tried later...

O'NEILL: But wouldn't you have to show that the exhibits would have gotten you liability?

DAVENPORT: Right. And that's what I did. Because what happened was we introduced the scarcity of evidence in the first trial. We introduced the entire record. And said this is what they got. And then we said this is what's available. Look at the Spring Creek Cattle Co. Look at the fact that there were these prospectuses being used and sales were being used to dilute the market. Look at the fact that the Turturs got loan money to finance their sales that McKeller used for his other debt rather than funding the buyers that the Turturs were sending to finance their sales. McKeller used that money to pay off his own other debt.

When they set up the bonding thing, he wouldn't even pay the bond premiums. This was an exclusive deal. They sold out quickly in 1982. They sold out totally in 1983. And they had the 1984 deal but he cut it to Dec. 1, so they couldn't get the end of the year market, and then he didn't put the funding in place, and used the funding they got for his own deals. None of that came in.

PHILLIPS: Was the second trial, the malpractice trial, concluded in two days?

DAVENPORT: But it wasn't limited to two days. She didn't have any witnesses there. That was the problem. We did have 30 hours a side for the malpractice trial. But if you look at that that's two trials. We did a trial within a trial.

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REBUTTAL

LAWYER: It was a question of judgment as to what got put on at the bankruptcy trial. Because J. Able despite the fact that he had been asked to give 3 or 4 days, the bankruptcy lawyer that was co-counsel said no. You're only getting two days. And it was a question of judgment for Ms. Mingledorf, who I think has been maligned in this case. She's a very fine trial lawyer in white collar criminal cases. And she testified in the malpractice case that she made judgment calls about whether to put on the only three witnesses that they called in the malpractice case that were not called in the bankruptcy case, two of them were the bankers, and Ms. Mingledorf explained they gave testimony that hurt our side. That's why I didn't put them on. And the third one was Chris Turtur, and remember there were 3 Turturs, Mario, Chris and Steven, and she didn't put Chris Turtur on but she put the other two, and Chris's testimony would have been cumulative.

And here's why it's not obvious. The big thing they are complaining about is the bankruptcy judge's fraud finding. He says on the record in the bankruptcy hearing at the end

of the trial. He compliments both sides and he says you know. This is just a swearing match. I just have to decide whether I believe Mario and Steve Turtur about what happened in the meeting when the fraud allegedly occurred, or do I believe Dr. McKeller and his accountant. Because they were all four at the meeting, and they all four testified. And this is a swearing match, and I've just got to decide who I believe.

BRISTER: What fraud did the Turtur's commit?

LAWYER: To get Dr. McKeller not to cancel the contract for 1984, they had a meeting in Sept, and at that point the bankruptcy judge found that misrepresentations were made by the Turturs to Dr. McKeller and his accountant. And that was the fraud. And that's the fraud that they complain about in the malpractice case. But the point I'm trying to make is that was the bankruptcy judge's call on the credibility of the witnesses.

HECHT: And when that's the issue what the fact finder would have done, and it clearly turns on credibility of the witnesses, and demeanor, how can that be second-guessed in a second trial by anybody who wasn't there the first time, because who will say well their eyes shifted around, or they squirmed in their seat, or they kept looking at the ceiling?

LAWYER: I think the argument that the other side would make if they were here would say if you would have also put on Chris Turtur that might have made a different. Now my expert in the malpractice case would say Chris's testimony would have been cumulative. Wouldn't have made any difference to that bankruptcy judge. But a lay jury in the malpractice case may not realize the effect and the importance of cumulative evidence. That makes my point on why expert testimony...

PHILLIPS: This question is much more generic. In the malpractice trial when we're trying to decide causation what kind of evidence can you put on that the decision in the underlying case would have been different when it turns on credibility issues and nobody was there?

LAWYER: Unless there's somebody else to put on who was there, that aspect of the case, and the fraud was only one aspect, there were other claims too, that aspect of the case may be something where the malpractice plaintiff can't make a case. Maybe he can't prove that it would have made any difference that there was any causation.

HECHT: But certainly if you call some sort of expert, like a bankruptcy judge - I mean assuming this can be done, which I'm not sure how it can be done. But assuming that it can be done, and he comes in and says well yes, I think this would have come out the other way. And you say well wouldn't it depend on credibility? And on cross-examination he says it probably would have. But I can tell from this record it would have come out the other way. Is that reliable testimony?

LAWYER: Under my scenario, the malpractice judge would probably say that's not a reliable opinion. You can't testify to that. But you've got to keep in mind. In this case the fraud finding is only one aspect. Ms. Davenport would tell you, you may be right J. Hecht with respect to the fraud, but I have other complaints about the way Mr. Alexander and Ms. Mingledorf handled

the bankruptcy proceeding besides just the testimony on the fraud. But I'm with you on the fraud. I bet you couldn't reliably put anybody up there that would say it would have made a difference.

HECHT: And I suppose if you contracted for someone in particular to be there, and that was very important to you, irrespective of whether you were going to win or lose and that didn't happen, there would be a breach and maybe some other problems, but you would still have causation problems I suppose.

LAWYER: You sure do. Particularly when you predicate your damages in the malpractice case on determination that the adversary proceeding would have come out better or more favorably. And that's what all the damages and all the fact findings went to in this case.