Reverse and Render in part, Affirm in part, and Remand; Opinion filed March 20, 2018

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-14-01218-CV

STARWOOD MANAGEMENT, LLC, BY AND THROUGH NORMA GONZALEZ, Appellant
V.
DON SWAIM AND ROSE WALKER, L.L.P., Appellees

On Appeal from the 193rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-13-12760-L

MEMORANDUM OPINION ON REMAND

Before Justices Lang, Brown, and Boatright[1]
Opinion by Justice Lang

This legal malpractice case is before us on remand from the Supreme Court of Texas. Appellant Starwood Management, LLC, by and through Norma Gonzalez ("Starwood") filed claims for negligence and breach of fiduciary duty against appellees Don Swaim and the law firm of Rose Walker, L.L.P. Appellees filed a combined traditional and no-evidence motion for summary judgment on both claims, which was granted by the trial court. This appeal timely followed.[2]

[1] The Honorable Michael J. O'Neill, Justice, Fifth District Court of Appeals at Dallas, Retired, sitting by assignment, participated in the original submission of this cause. The Honorable Jason Boatright has reviewed the record and the briefs in this cause.

[2] On appeal, Starwood asserts fifteen issues, grouped into three categories. Those issues are stated by Starwood as follows:

A. Defendants' Motion to Strike Plaintiff's Summary Judgment Affidavits

On original submission, this Court affirmed the trial court's order granting appellees' motion for summary judgment. This Court concluded in part (1) the trial court did not abuse its discretion by striking the two experts' affidavits submitted by Starwood respecting the causation element of Starwood's negligence claim because those affidavits are conclusory; (2) in light of

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1. Did the trial court abuse its discretion in striking the expert opinion affidavit of Plaintiff's expert, George E. Crow, where Defendants' only articulated argument was that causation cannot be proved by reference to other proceedings and that the facts on which Crow relied (i.e., his success in recovering five other planes seized from Plaintiff) were not sufficiently similar to support Crow's opinion that Aircraft would have been recovered if Defendants had timely filed a claim, where:

    a. the methodology of opining on causation by comparing results in similar cases was approved in *Elizondo v. Krist*, 415 S.W.3d 259 (Tex. 2013);

    b. Defendants' argument that the other cases were not substantially similar is a challenge to the factual basis for Crow's opinion and goes only to the weight of the evidence, not its admissibility;

    c. even if the trial court could properly consider whether the other proceedings were sufficiently similar, Defendants' dissimilarity arguments relied on "facts" contradicted by the record; and

    d. Defendants' other objections were boilerplate and were offered without any explanation or citation to facts or law?

2. Did the trial court abuse its discretion in striking not only Crow's opinion testimony, but also striking Crow's testimony as a fact witness and documents attached as exhibits to his affidavit, when Defendants' objections provided no basis for striking any of this fact evidence?

3. Did the trial court abuse its discretion in striking the affidavit of Plaintiff's other expert, Steve Jumes, on the same grounds as the Crow affidavit?

B. Defendants' No-Evidence Motion for Summary Judgment

1. Did the trial court err in granting Defendants' no-evidence motion as to Plaintiff's negligence claim on the ground that there was no evidence of causation, when:

    a. Plaintiff offered the Crow and Jumes affidavits which contained competent and admissible expert testimony on causation, and the trial court improperly struck those affidavits?

    b. Even without the opinion testimony of Crow and Jumes, the fact testimony and documentation attached to Crow's affidavit was sufficient to raise a fact issue on causation, and the trial court improperly struck those affidavits?

2. Did the trial court err in granting Defendants' no-evidence motion as to Plaintiff's breach of fiduciary duty claim on the ground that there was no evidence of breach or injury to Plaintiff or benefit to Defendant, when (a) Plaintiff's expert Crow attested to the breach, and the trial court improperly struck his affidavit, and (b) Defendants' receipt of attorneys' fees is a benefit?

C. Defendants' Traditional Motion for Summary Judgment

1. Did the trial court err in granting summary judgment in Defendants' favor on a theory that Defendants conclusively disproved causation, when:

    a. The opinion testimony of Crow and Jumes, and fact testimony and documents attached to Crow's affidavit, were sufficient to raise a fact issue on causation and the trial court improperly struck those affidavits?

    b. Defendants' "no causation" theory lacked any basis in fact or law because it was premised (a) on alleged events that occurred after Defendants lost the right to contest the DEA's seizure, and which were therefore irrelevant to causation, and (b) on misrepresentations of the record evidence?

2. Did the trial court err in granting Defendants' traditional motion as to Plaintiff's breach of fiduciary duty claim on the ground that the claim sounded in negligence, when Plaintiff's breach of fiduciary duty claim does not allege any failure to meet a duty of care?

that conclusion, Starwood produced no evidence respecting the causation element of its negligence claim and therefore the trial court properly granted summary judgment in favor of appellees on that claim; and (3) the trial court did not err by dismissing Starwood's breach of fiduciary duty claim because that claim is barred by the anti-fracturing rule. *See Starwood Mgmt., LLC v. Swaim*, 530 S.W.3d 688, 702–03 (Tex. App.—Dallas 2016) (hereinafter *Starwood I*), *rev'd*, 530 S.W.3d 673 (Tex. 2017) (per curiam).

On appeal to the supreme court, Starwood challenged only this Court's determination as to the striking of one of the affidavits as conclusory. *See Starwood Mgmt., LLC*, 530 S.W.3d at 678 (hereinafter *Starwood II*). The supreme court concluded that affidavit is not conclusory, reversed this Court's judgment, and remanded the case to us to consider the issues not reached on original submission. *Id*. at 682. Those issues include challenges by Starwood respecting (1) several additional grounds asserted by appellees in the trial court for the striking of the affidavit described above and (2) appellees' motion for traditional summary judgment as to Starwood's negligence claim.[3] On remand, this Court granted the parties' joint motion for supplemental briefing and both sides filed supplemental briefs.[4]

Based on the reasoning and conclusions set forth in the supreme court's opinion remanding this case, we conclude the trial court abused its discretion by striking the affidavit in question on the remaining grounds asserted by appellees in the trial court. Additionally, we conclude appellees are not entitled to traditional or no-evidence summary judgment on Starwood's negligence claim. We reverse the portion of the trial court's order granting summary judgment on Starwood's

[3] Also, in addition to Starwood's fifteen issues described above, the argument portion of Starwood's appellate brief contains a section titled "Defendant Cannot Justify the Trial Court's Summary Judgment on Damages Grounds." In that section, Starwood asserts the trial court erred to the extent it granted summary judgment against it on its negligence claim based on no evidence of damages. We construe this as an additional issue asserted by Starwood, *see* TEX. R. APP. P. 38.9 ("Briefing Rules to Be Construed Liberally"), and address it in our analysis.

[4] Additionally, in their supplemental brief in this Court, appellees requested oral argument on remand, stating in part, "[A]lthough this case has already been argued once, [appellees] believe that another oral argument to further discuss the ramifications of the Texas Supreme Court's opinion would greatly assist this Court in deciding the remaining issues." Because we determine additional oral argument would not significantly aid the decisional process on remand, we decide this appeal based on the parties' previous oral arguments and original and supplemental briefing in this Court. *See* TEX. R. APP. P. 39.1.

negligence claim, render judgment denying summary judgment on that claim, affirm the granting of summary judgment as to Starwood's breach of fiduciary duty claim, and remand this case to the trial court for further proceedings.

I. FACTUAL AND PROCEDURAL CONTEXT

Because the background of the case has been set forth in the prior opinions, we discuss the facts only as they are relevant to the analysis of the issues presented. Gonzalez, an American citizen, is the owner and sole managing member of Starwood Management, LLC, a charter aircraft company. Ed Nunez, a Starwood employee who was not a U.S. citizen, registered a 1982 Gulfstream aircraft in Starwood's name and signed the application as Starwood's "Manager." The aircraft was seized by the Drug Enforcement Administration ("DEA") pursuant to a federal statute that prohibits registration of an airplane by a business entity unless "at least 75% of the [entity's] voting interest is owned or controlled by persons that are citizens of the United States." *See* 49 U.S.C. §§ 40102(a)(15)(C), 46306(b). Because Nunez signed as manager, the DEA concluded the aircraft's registration violated the relevant statutory provisions. Starwood's insurer, Chartis Aerospace Insurance, retained Swaim, an attorney with Rose Walker, L.L.P., to attempt to recover the aircraft.

After the seizure, the DEA sent Starwood a notice containing procedures for challenging the seizure and seeking return of the airplane. There were three options: (1) file suit in federal court, (2) file a Petition for Remission or Mitigation with the DEA Forfeiture Counsel, or (3) do both. Swaim chose to do both.

If the option to challenge the seizure in federal court is pursued, the DEA bears the initial burden to prove by a preponderance of the evidence that the seizure was proper. *See* 18 U.S.C. § 983(c)(1). Further, in order to pursue relief in court, notice of claim must be filed with the DEA Forfeiture Counsel within thirty days of receipt of the seizure notice. *See* 28 C.F.R. § 9.4(a). Swaim

did not file such a notice on behalf of Starwood, but rather simply filed suit to contest the seizure. Because the notice requirement was not met, the case was dismissed.

However, Swaim did comply with requirements for the alternative procedure of petitioning for remission or mitigation. That procedure involves an in-house review process by the DEA in which the petitioner has the initial burden of establishing a vested legal right to the property and the innocent owner defense. *See* 28 C.F.R. § 9.5. However, even if a petitioner such as Starwood establishes both, the DEA has complete discretion to return or retain the aircraft. *See In re $67,470.00*, 901 F.2d 1540, 1543 (11th Cir. 1990). After Swaim filed the petition, the DEA subpoenaed Gonzalez for an interview. She invoked her Fifth Amendment rights and refused to testify. In light of her refusal, the DEA denied Starwood's Petition for Remission.

At that point, the only avenue to recover the airplane was a motion for the DEA to reconsider its denial of the Petition for Remission, which Swaim filed. After he did so, the DEA again sought to interview Gonzalez. This time she agreed to be interviewed if the interview would be limited to the events and issues surrounding seizure of the aircraft. However, the DEA insisted that she waive her Fifth Amendment rights and, consequently, she refused to be interviewed. Following her refusal, the DEA denied Starwood's motion. Having lost its challenges both in court and in the administrative process, Starwood lost the aircraft.

As it happens, the DEA had seized from Starwood not only the 1982 Gulfstream aircraft referenced above, but six additional aircraft. Chartis retained attorney George Crow to represent Starwood as to the other seizures. Crow complied with the notice requirements for filing suit in federal court. In the five cases Crow was handling that had been disposed of at the time summary judgment was sought in this case, three airplanes had been recovered for nominal settlement payments and two were recovered without conditions. Gonzalez was not subpoenaed or asked to submit to an interview with the DEA in any of the proceedings where Crow represented Starwood.

Subsequently, Starwood filed this lawsuit against appellees, asserting claims for professional negligence and breach of fiduciary duty as described above. In their combined traditional and no-evidence motion for summary judgment, appellees asserted (1) "as a matter of law, the alleged negligence of [appellees] was not a proximate cause of Starwood's inability to recover the aircraft,"[5] (2) Starwood has produced no evidence as to the causation and damage elements of both claims, and (3) the breach of fiduciary duty claim is merely an alternative label for the professional negligence claim and thus is precluded by the anti-fracturing rule.

In response to appellees' motion for summary judgment, Starwood presented affidavits from attorneys Crow and Steve Jumes. In his affidavit, Crow (1) based his opinion on his experience as legal counsel for Starwood in successfully recovering the five aircraft described above, (2) asserted he succeeded in recovering those aircraft simply by initiating the proper judicial contest to the forfeiture claims by the DEA, and (3) stated those aircraft "were all seized under the same aircraft registration law cited in the seizure notice for [the 1982 Gulfstream aircraft described above]." Further, Crow stated in his affidavit that it is his "belief" that "the five (5) aircraft were recovered quickly (between 6 to 10 months) because the [DEA's] case for seizure was weak and not supported by reliable evidence." He concluded (1) "Rose Walker, faced with the same set of facts, failed to comply with the instructions and deadlines, which caused the forfeiture of [the 1982 Gulfstream aircraft described above] to the government," and (2) had Swaim "properly file [sic] the verified claim with the DEA Forfeiture Counsel . . . , then the aircraft would have been returned in the same manner as the five" that had been recovered so far. Thus, Crow opined that Swaim's negligent failure to comply with the notice requirements "caused the forfeiture" of the aircraft. Jumes's affidavit stated essentially the same conclusions as did Crow's affidavit, based on Crow's

[5] Specifically, as to their traditional motion for summary judgment, appellees asserted in part (1) "Starwood simply could not have proven that it was the owner of the Aircraft . . . , or that the seizure was invalid, while simultaneously refusing to cooperate in discovery and invoking the Fifth Amendment with regard to the Aircraft and company registration, ownership, and financial records," and (2) "[f]or those reasons, Starwood cannot prove its case-within-a-case as a matter of law and summary judgment should be granted on Starwood's negligence claim."

experience respecting the planes he recovered. Additionally, as to the element of damages pertaining to Starwood's negligence claim, (1) Jumes testified in his affidavit that Starwood "lost the entire value of the airplane, as it was forfeited to the government," and (2) the attachments to Starwood's response included an affidavit of Swaim in which he testified the insured value of the seized aircraft is $1.5 million and a letter from Swaim to the DEA in which he stated the seized aircraft "is valued at $854,750."

Appellees objected to the affidavits of Crow and Jumes on the grounds that certain portions of the testimony in those affidavits and certain exhibits attached thereto are "speculative, hearsay, conclusory, not relevant, Rule 403 more prejudicial than probative, and not competent expert witness summary judgment evidence." Specifically, appellees contended in part "[t]he other seizure actions are not analogous, and are not indicative of the outcome of the underlying seizure."

The trial court sustained appellees' objections and ruled that the portions of the Crow and Jumes affidavits to which objections were made would not be considered for summary judgment purposes. Additionally, the trial court signed an order in which it granted appellees' traditional and no-evidence motion for summary judgment without stating a basis for that ruling and rendered judgment that Starwood take nothing.

On original submission, this Court concluded the Crow affidavit is conclusory, and therefore was properly excluded, because Crow made "no case-by-case comparison of the facts in other aircraft seizures cases" with "the facts that are the subject of this case." *Starwood I*, 530 S.W.3d at 699 (citing *Elizondo v. Krist*, 415 S.W.3d 259, 265 (Tex. 2013)). Additionally, this Court concluded (1) the Jumes affidavit is conclusory for the same reason as the Crow affidavit and (2) the dismissal of Starwood's breach of fiduciary duty claim was proper because that claim violated the anti-fracturing rule. *Id*. at 700–02.

On appeal to the supreme court, that court's analysis was limited to the sole issue raised in that court by Starwood, i.e., whether the Crow affidavit is conclusory. In reaching its conclusion that such affidavit is not conclusory, the supreme court reasoned in part,

> Crow's affidavit could have set out a more detailed basis for his opinion. But the extent of the detail into which the affidavit delved goes to quality, not adequacy. Crow's ultimate conclusion was that had Swaim complied with the notice provisions required for the federal court proceedings, Starwood's aircraft would have been recovered. . . . The basis for the conclusion was that Crow followed the prescribed methodology six times and had a perfect track record on the five cases disposed of as of the time the trial court granted summary judgment. The facts he relied on are both demonstrable and reasonable. They are demonstrable—as set out in his affidavit, he followed the method he says Swaim should have followed, and in five of the cases the result was recovery of the aircraft. The other case remained pending at the time he executed his affidavit. And his reliance on the high rate of success resulting from his complying with the DEA's procedures to come to that conclusion is reasonable.
> . . . .
> . . . While the seized airplanes were different models, with disparate values, seized in different states, and with different registered owners, differences between the airplane at issue here and the six others are not material because the basis for Crow's conclusion is rooted in procedure, not qualitative facts as to the aircraft. Further, the circumstances surrounding the other six seizures are demonstrated by the documents attached to Crow's affidavit.

Starwood II, 530 S.W.3d at 679–80 (citation to authority omitted). Additionally, as to appellees' argument that Crow's affidavit is conclusory because it does not address certain reasons why Starwood could not have prevailed if the DEA had chosen to aggressively pursue the case in federal court, the supreme court stated,

> [T]he case-within-a-case analysis requires a comparison of scenarios: the actual result and the hypothetical result advanced by the plaintiff. Here, the hypothetical result is the airplane's successful recovery because the DEA would not have pursued the matter in federal court. The basis for that hypothetical result is the DEA's decision not to do so in the five other seizures Crow handled. Under this hypothetical result, Gonzalez's citizenship and the likelihood of overcoming trial burdens and other allegations are irrelevant because the claim is that the case would not have gone to trial. The DEA did not meet the burden to prove that the seizures were proper in any of the comparators. Thus, analysis regarding ultimate victory on the merits is unnecessary because, as the affidavit sets out, "more likely than not," those issues would have never come up.

Id. at 681.

II. ISSUES NOT REACHED ON ORIGINAL SUBMISSION

A. Standard of Review

We review a trial court's granting of summary judgment de novo. *See, e.g., Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). Where, as here, a trial court's order granting summary judgment does not specify the ground or grounds relied on for its ruling, we must affirm summary judgment if any of the grounds advanced is meritorious. *See, e.g., Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989).

No-evidence and traditional grounds for summary judgment may be combined in a single motion. *Binur v. Jacobo*, 135 S.W.3d 646, 650–51 (Tex. 2004); *Coleman v. Prospere*, 510 S.W.3d 516, 518 (Tex. App.—Dallas 2014, no pet.). When a party files both a no-evidence and a traditional motion for summary judgment, we first consider the no-evidence motion. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004).

We review the exclusion of summary judgment evidence for an abuse of discretion. *Barraza v. Eureka Co.*, 25 S.W.3d 225, 228 (Tex. App.—El Paso 2000, pet. denied). A trial court abuses its discretion when it acts without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985).

B. Applicable Law

To prevail on a traditional motion for summary judgment, the moving party must prove there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Nixon v. Mr. Prop. Mgmt. Co., Inc.*, 690 S.W.2d 546, 548 (Tex. 1985). The movant must conclusively disprove an element of the nonmovant's claim or conclusively prove every element of an affirmative defense. *See Smith v. Deneve*, 285 S.W.3d 904, 909 (Tex. App.—Dallas 2009, no pet.). A matter is conclusively proved if "ordinary minds could

not differ as to the conclusion to be drawn from the evidence." *In re Hendler*, 316 S.W.3d 703, 707 (Tex. App.—Dallas 2010, no pet.).

A no-evidence motion for summary judgment must be granted by the trial court unless the nonmovant brings forth more than a scintilla of probative evidence to raise a genuine issue of material fact on the challenged elements. TEX. R. CIV. P. 166a(i); *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003). "More than a scintilla of evidence exists when the evidence rises to a level that would enable reasonable, fair-minded persons to differ in their conclusions." *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997).

In deciding whether a disputed material fact issue exists respecting either type of summary judgment, evidence favorable to the nonmovant will be taken as true. *See Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009); *Nixon*, 690 S.W.2d at 548–49; *McAfee, Inc. v. Agilysys, Inc.*, 316 S.W.3d 820, 825 (Tex. App.—Dallas 2010, no pet.). Further, every reasonable inference must be indulged in favor of the nonmovant and any doubts resolved in his favor. *Cmty. Health Sys. Prof'l Servs. Corp. v. Hansen*, 525 S.W.3d 671, 680 (Tex. 2017); *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005).

The elements of a legal malpractice cause of action are duty, breach, proximate cause, and damages. *Kuzmin v. Schiller*, No. 05-13-01394-CV, 2015 WL 150206, at *3 (Tex. App.—Dallas Jan. 8, 2015, no pet.) (mem. op.). Proximate cause requires proof that (1) the negligent act or omission was a substantial factor in bringing about the harm at issue, and (2) absent the negligent act or omission, the harm would not have occurred. *Id*. An expert's opinion that is speculative or conclusory is legally insufficient to support causation. *See Thompson & Knight LLP v. Patriot Expl., LLC*, 444 S.W.3d 157, 162 (Tex. App.—Dallas 2014, no pet.). "[T]estimony is speculative if it is based on guesswork or conjecture." *Nat. Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 156 (Tex. 2012).

C. Application of Law to Facts

1. Exclusion of Evidence

In subpart 1 of issue "A" in its appellate brief, Starwood contends the trial court abused its discretion by striking the Crow affidavit pursuant to any of the objections asserted by appellees. As described above, those objections were that the affidavit is "speculative, hearsay, conclusory, not relevant, Rule 403 more prejudicial than probative, and not competent expert witness summary judgment evidence." In light of the supreme court's conclusion that the Crow affidavit is not conclusory, we now address the remaining objections to that affidavit.

As to appellees' objection that the Crow affidavit is speculative, appellees contended in the trial court that Crow "fails to provide any factual support or examples" respecting his testimony. In their brief filed on original submission in this Court, appellees' argument as to that objection is combined with their argument respecting their objection that the affidavit is conclusory. In the portion of that argument addressing speculation, appellees state,

> Crow did not provide any factual support as to why the DEA returned the other aircraft. Instead, Crow simply speculates: "It is my belief that the five (5) aircraft were recovered quickly (between 6 to 10 months) because the government's case for seizure was weak and not supported by reliable evidence." Crow provided no factual support or explanation to support his belief that the government's case for seizure was weak and not supported by reliable evidence. By all appearances, the DEA did not disclose the reasons it elected to release the seized aircraft in those cases, leaving Crow to merely speculate as to the reason for their release. These opinions are thus speculative and conclusory and, therefore, not competent summary judgment proof.

(citation to record omitted). Further, in their supplemental brief filed upon remand to this Court, appellees assert (1) "Texas case law identifies 'conclusory' and 'speculative' as two, distinct objections that address separate—albeit somewhat related—problems with an expert's affidavit," and (2) "an expert's testimony can still be speculative even if it is not conclusory." According to appellees,

> While, according to the Texas Supreme Court, Crow's affidavit was not "conclusory," it remained—fundamentally—speculative. Crow's causation opinions were based on nothing more than conjecture and guesswork as to why the DEA returned the aircraft in the other seizure cases he handled and why the DEA would have similarly returned this aircraft to Starwood. Crow claimed that all of the government's cases against Starwood were "weak," implying that the government's case against Starwood here was weak too. But, Crow never made any effort to explain why the government's case was weak here, or in any of the other cases he handled. Absent any such explanation, Crow's opinion was speculative and therefore, unreliable, irrelevant, and no evidence of causation.

Starwood responds in its supplemental reply brief in this Court (1) Crow supported his opinion "with demonstrable and reasonable facts—his own experience in five other seizure cases," and (2) "[b]ecause Crow's opinion was 'supported by facts,' his affidavit is not speculative." Specifically, according to Starwood,

> Crow's main conclusion . . . was that if Defendants had "complied with the notice provisions required for the federal court proceedings, Starwood's aircraft would have been recovered." The basis for Crow's conclusion was that he had himself complied with the notice provisions and "had a perfect track record on the five cases disposed of as of the time the trial court granted summary judgment." Whether the DEA's position in those cases was strong or weak does not change Crow's main conclusion.

(quoting *Starwood II*, 530 S.W.3d at 679).

As described above, in *Starwood II*, the supreme court stated in part,

> Crow's ultimate conclusion was that had Swaim complied with the notice provisions required for the federal court proceedings, Starwood's aircraft would have been recovered. . . . The basis for the conclusion was that Crow followed the prescribed methodology six times and had a perfect track record on the five cases disposed of as of the time the trial court granted summary judgment. The facts he relied on are both demonstrable and reasonable. . . .

Id. Because Crow's opinion testimony respecting causation was based on facts described by the supreme court as "demonstrable and reasonable," *see id.*, we conclude that testimony was not speculative. *See Nat. Gas Pipeline*, 397 S.W.3d at 156; *see also Mosely v. Mundine*, 249 S.W.3d 775, 781 (Tex. App.—Dallas 2008, no pet.) (concluding expert's testimony as to causation "is not mere conjecture and speculation because he supported his statement with facts"). Accordingly, on

this record, we conclude the trial court abused its discretion by excluding the Crow affidavit based on appellees' objection that such affidavit is "speculative." *See Starwood II*, 530 S.W.3d at 679.

Next, we address appellees' objection respecting lack of relevance. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." TEX. R. EVID. 401. In the trial court, appellees asserted in part that Crow's testimony lacked relevance because "whether a party prevails in one action is not evidence it will prevail in a separate action." Further, on appeal, appellees argue that "because Crow failed to provide any context or factual explanation as to how the other six cases pertained to this case," his affidavit testimony in question "did not have any tendency to make a fact of consequence more or less probable than it would be without that evidence" and therefore "was not relevant."[6] Starwood asserts the trial court abused its discretion by striking Crow's affidavit on relevance grounds because "[e]vidence that Starwood's other attorney successfully used the DEA's procedures to recover multiple other aircraft seized from Starwood—on the same grounds and in the same time frame as the DEA's seizure of the Aircraft—is unquestionably some evidence from which a jury could reasonably infer that (1) more likely than not, Defendants' failure to pursue those same procedures with respect to the Aircraft 'caused the damages alleged'—the inability to recover the Aircraft, and (2) that it is 'reasonably probable' that Defendants would have recovered the Aircraft if they had followed the DEA's procedures and filed a timely notice requiring the DEA to prove its case in federal court." Because the record shows appellees' objection respecting lack of relevance relies on the same rejected basis as their objection that Crow's affidavit is conclusory, we conclude the trial court abused its discretion by

[6] Additionally, appellees assert in a footnote in their appellate brief on original submission in this Court that they objected on relevance grounds to Crow's statement, "At no time did Norma Gonzalez or anyone with Starwood Management refuse to provide statements or evidence to Rose Walker in support of their recovery efforts." According to appellees, "This statement is irrelevant absent some explanation of the 'statements or evidence' Gonzalez would have provided and how those 'statements or evidence' would have made a difference in the forfeiture proceeding." In light of the reasoning in the supreme court's opinion quoted and described above, *see Starwood II*, 530 S.W.3d at 681, and the conclusions in this opinion below, we conclude the purported lack of relevance of that statement is not material to this appeal and need not be addressed. *See* TEX. R. APP. P. 47.1.

excluding the Crow affidavit based on appellees' objection that the testimony therein is "not relevant." *See Starwood II*, 530 S.W.3d at 679–80; *see also* TEX. R. EVID. 401.

Appellees also objected based on hearsay. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. TEX. R. EVID. 801(d). Appellees did not describe in the trial court what portion of the objected-to evidence constitutes hearsay, nor do they address or mention their hearsay objection on appeal. Further, the record does not show the evidence in question contains any statements attributed to third parties offered for the truth of the matter asserted. *See id*. On this record, we conclude the trial court abused its discretion by excluding Crow's affidavit based on appellees' hearsay objection.

Next, appellees' objection that Crow's affidavit is "more prejudicial than probative" was made pursuant to Texas Rule of Evidence 403. *See* TEX. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice . . . ."). "Under Rule 403, it is presumed that the probative value of relevant evidence exceeds any danger of unfair prejudice." *In re J.D.*, No. 03-14-00075-CV, 2016 WL 462734, at *2 (Tex. App.—Austin Feb. 3, 2016, no pet.) (mem. op.). Further, "the plain language of Rule 403 does not allow a trial court to exclude otherwise relevant evidence when that evidence is merely prejudicial." *Id*.; *see also Bay Area Healthcare Grp. v. McShane*, 239 S.W.3d 231, 234 (Tex. 2007) ("testimony is not inadmissible on the sole ground that it is 'prejudicial' because in our adversarial system, much of a proponent's evidence is legitimately intended to wound the opponent"). Such evidence should be excluded only if it is unfairly prejudicial to the defendant. *In re J.D.*, 2016 WL 462734, at *2; *see also Turner v. PV Int'l Corp*., 765 S.W.2d 455, 471 (Tex. App.—Dallas 1988, writ denied) ("'Unfair prejudice' refers to 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.'"). It is the objecting party's burden

to show that the probative value is substantially outweighed by the danger of unfair prejudice. *McCarthy v. Padre Beach Homes, Inc.*, No. 13-01-00846-CV, 2003 WL 22025858, at *3 (Tex. App.—Corpus Christi Aug. 29, 2003, no pet.) (mem. op.).

The record shows appellees did not address or describe in the trial court how they would be unfairly prejudiced by the evidence in question, nor do they address or mention that objection on appeal. Further, to the extent their objection relies on the same basis as their objection that Crow's affidavit is conclusory, that reasoning was rejected by the supreme court. *See Starwood II*, 530 S.W.3d at 679–80. On this record, we conclude the trial court abused its discretion by excluding the Crow affidavit based on appellees' objection that it is "Rule 403 more prejudicial than probative." *See* TEX. R. EVID. 403; *In re J.D.*, 2016 WL 462734, at *2.

Finally, we address appellees' objection that Crow's affidavit is "not competent expert witness summary judgment evidence." Appellees did not describe any specific basis for that objection in the trial court and do not mention or address that objection on appeal. To the extent appellees assert that objection as separate from their other objections, they cite no authority, and we have found none, describing incompetency of evidence as an independent evidentiary objection that does not require a basis. *See, e.g.*, *Coastal Transp. Co., Inc. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 232 & n.1 (Tex. 2004) (types of "incompetent" evidence include expert opinion testimony that is conclusory, speculative, or not relevant). On this record, we conclude the trial court abused its discretion by excluding Crow's affidavit as "not competent expert witness summary judgment evidence."

We conclude the trial court abused its discretion by striking the Crow affidavit pursuant to any of the objections asserted by appellees in the trial court. Accordingly, we decide in favor of Starwood on subpart 1 of issue "A." We need not reach the remaining two subparts of that issue. *See* TEX. R. APP. P. 47.1.

2. Summary Judgment as to Negligence Claim

In subpart 1.a. of its issue "B," Starwood asserts in part that the trial court erred by granting appellees' no-evidence motion for summary judgment as to Starwood's negligence claim because Crow's affidavit constituted "competent and admissible expert testimony on causation" and the record contains "some evidence of injury or damages." Additionally, in subpart 1.a. of its issue "C," Starwood contends the trial court "erroneously granted Defendants' traditional motion for summary judgment on the theory that Defendants disproved causation."

Appellees respond in part that "to satisfy its burden of proving causation here, it was incumbent on Starwood to have its expert explain how and why Starwood would have prevailed in the judicial forfeiture proceeding." According to appellees, (1) "[t]he judicial remedy required the government to prove that the property was subject to forfeiture and Starwood to prove that it was an 'innocent owner'"; (2) "Starwood's outright failure to address that burden in the trial court or here is fatal to its challenge to the summary judgment"; and (3) "Crow never explains how or why the aircraft would or could have been returned" and therefore "Starwood's affidavit proof of causation is no evidence."

As described above, the supreme court concluded in this case that "analysis regarding ultimate victory on the merits is unnecessary because, as [Crow's] affidavit sets out, 'more likely than not,' those issues would have never come up." *Starwood II*, 530 S.W.3d at 681. Further, the supreme court stated in part (1) "[t]he basis for [Crow's] conclusion was that Crow followed the prescribed methodology six times and had a perfect track record on the five cases disposed of as of the time the trial court granted summary judgment"; (2) "[t]he facts he relied on are both demonstrable and reasonable"; and (3) "differences between the airplane at issue here and the six others are not material because the basis for Crow's conclusion is rooted in procedure, not qualitative facts as to the aircraft." *Id*. at 679–80. Based on the supreme court's opinion, we

conclude Crow's affidavit constituted some evidence of causation respecting Starwood's negligence claim. Additionally, as described above, the record shows (1) Jumes testified in his affidavit that Starwood "lost the entire value of the airplane, as it was forfeited to the government,"[7] and (2) the attachments to Starwood's response included an affidavit of Swaim in which he testified the insured value of the seized aircraft is $1.5 million and a letter from Swaim to the DEA in which he stated the seized aircraft "is valued at $854,750."

On this record, we conclude the trial court erred by granting appellees' no-evidence motion for summary judgment as to Starwood's negligence claim. Accordingly, we decide in favor of Starwood on subpart 1.a. of issue "B." We need not reach subpart 1.b. of issue "B." *See* TEX. R. APP. P. 47.1.

As to appellees' traditional motion for summary judgment, Starwood asserts in part (1) "[s]ince Defendants based their traditional motion for summary judgment on the absence of causation, and since the DEA (not Plaintiff) had the burden of proof in the underlying claim, Defendants could only negate causation by *conclusively proving* that, had they timely filed a claim with the DEA, the DEA would have been able to prove its theory by a preponderance of the evidence" (emphasis original), and (2) "Defendants offered no summary judgment evidence at all, much less conclusive evidence, to prove that the DEA would have won its case."

Appellees do not specifically address their summary judgment burden to negate causation in their brief in this Court. To the extent appellees rely on the same arguments respecting causation asserted by them in the trial court and described above, those arguments are not consistent with the supreme court's reasoning. *See Starwood II,* 530 S.W.3d at 679–80. Based on the supreme court's opinion in this case, we conclude the record does not show appellees negated the element

[7] The record does not show that portion of Jumes's testimony was objected to by appellees in the trial court. Appellees do not address the damages element of Starwood's negligence claim on appeal.

of causation as to Starwood's negligence claim. *See id*. Accordingly, we conclude the trial court erred by granting appellees' traditional motion for summary judgment on that claim. We decide in favor of Starwood on subpart 1.a. of issue "C." We need not reach subpart 1.b. of issue "C." *See* TEX. R. APP. P. 47.1.

3. Summary Judgment as to Breach of Fiduciary Duty Claim

In subpart 2 of its issue "B" and subpart 2 of its issue "C," Starwood challenges the trial court's granting of appellees' no-evidence and traditional motions for summary judgment as to its breach of fiduciary duty claim. On original submission, this Court concluded the trial court did not err by dismissing Starwood's breach of fiduciary duty claim because that claim is barred by the anti-fracturing rule. *See Starwood I*, 530 S.W.3d at 702. That conclusion was not challenged by Starwood in its appeal to the supreme court. *See Starwood II*, 530 S.W.3d at 678. Based on the analysis in this Court's opinion on original submission, we conclude the trial court did not err by dismissing Starwood's breach of fiduciary duty claim. *See Starwood I*, 530 S.W.3d at 701–02.

We decide against Starwood on subpart 2 of issue "B" and subpart 2 of issue "C."

III. CONCLUSION

We decide in Starwood's favor on subpart 1 of issue "A," subpart 1.a. of issue "B," and subpart 1.a. of issue "C." We decide against Starwood on subpart 2 of issue "B" and subpart 2 of issue "C." We need not address the remaining subparts of Starwood's issues. *See* TEX. R. APP. P. 47.1.

We (1) reverse the portion of the trial court's order granting summary judgment as to Starwood's negligence claim, (2) render judgment denying summary judgment as to that claim, (3) affirm the granting of summary judgment as to Starwood's breach of fiduciary duty claim, and

(4) remand this case to the trial court for further proceedings.

/Douglas S. Lang/
DOUGLAS S. LANG
JUSTICE

141218RF.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

STARWOOD MANAGEMENT, LLC, BY AND THROUGH NORMA GONZALEZ, Appellant

No. 05-14-01218-CV V.

DON SWAIM AND ROSE WALKER, L.L.P., Appellees

On Appeal from the 193rd Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-13-12760-L.
Opinion delivered by Justice Lang, Justices Brown and Boatright participating.

In accordance with this Court's opinion of this date, we (1) **REVERSE** the portion of the trial court's order granting summary judgment as to the negligence claim of appellant Starwood Management, LLC, by and through Norma Gonzalez; (2) **RENDER** judgment denying summary judgment as to that claim; (3) **AFFIRM** the granting of summary judgment against appellant Starwood Management, LLC, by and through Norma Gonzalez, on its breach of fiduciary duty claim; and (4) **REMAND** this case to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 20th day of March, 2018.