PROVING UP DAMAGES IN A BUSINESS CASE

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33rd Annual Advanced Evidence & Discovery Course

San Antonio, May 21-22, 2020

1. CONFIRM THE PROCEDURAL FOUNDATION

Guillory v. Dietrich, No. 05-00504-CV, 2020 WL 57335 (Tex. App.—Dallas Jan. 6, 2020, no pet. h.)

Pleadings. *"Dietrich specifically pled that appellants had been unjustly enriched in the amount of 'approximately $24,280.00' … We conclude that the trial court erred by awarding Dietrich more than $24,280 as unjust enrichment damages."*

*(applying Tex. R. Civ. P. 301, which says: "**The judgment of the court shall conform to the pleadings**, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity."*

Ebert v. DeJoria, 922 F.3d 690 (5th Cir. 2020)

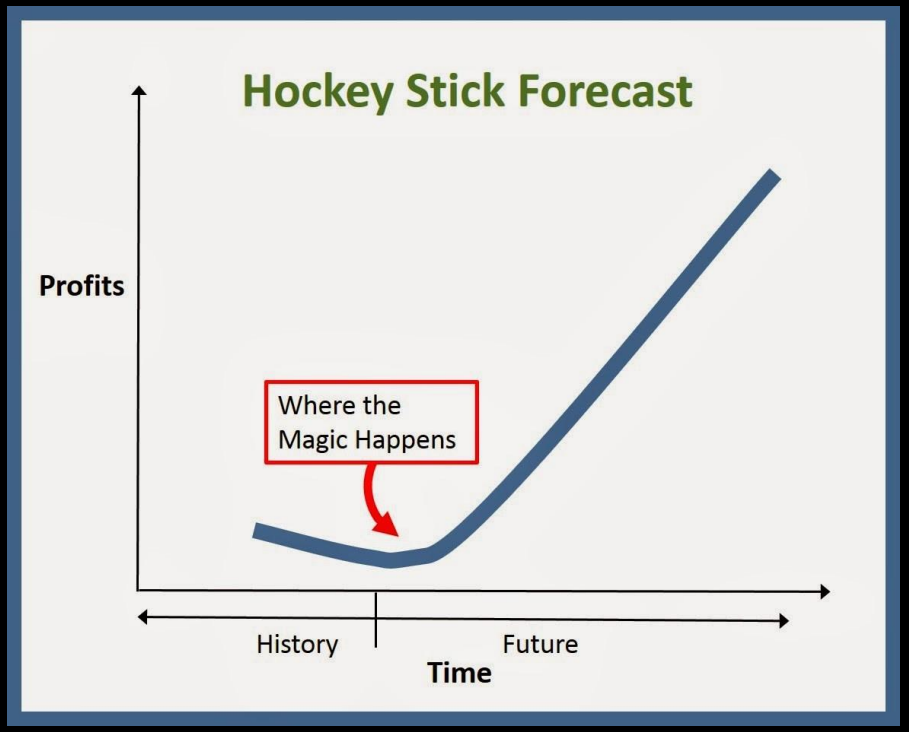
Parties. *"[Manz's calculations were based primarily on two documents: Schedule 7.B, which showed market sales of LSI stock, and a list of nominee companies with how many shares of LSI each owned as of September 9, 2011. Yet* ***these documents only list companies and provide no proof of or insight into Appel and Bartlett as individuals****."*

2. “BUT FOR” MEANS . . . “BUT FOR”

Eni U.S. Operating Co. v. Transocean,
919 F.3d 931, 941-42 (5th Cir. 2019)

"… [the model] looks to what Eni actually did after termination, when the operative question is what Eni would have done in a non-breach world. … The district court should have attempted to determine, ***in the hypothetical non-breach world****, how many days the Pathfinder would have spent at each applicable rate."*

3. BEWARE INTERNAL FORECASTS



Al-Saud v. Youtoo Media,
754 Fed. Appx. 246, 255 (5th Cir. 2018)

"[Counter-defendant] was a new venture with no history of profitability. The joint venture had few signed agreements with regional broadcasters or governments. Defendants' damages estimates had to rely in large part on hoped for partnerships, and speculation about the profits those agreements would generate. The profit calculations defendants would have presented at trial were ***'projections that were presented to investors,'*** *calculations which Texas courts have held insufficient when not supported with more reliable indicators of profitability."*

Jacked Up LLC v. Sara Lee Corp., No. 19-10391, 2020 WL 1672818 (5th Cir. April 3, 2020) (unpubl.)

"[Plaintiff's expert] seems to have ***assumed that the projections in the Sara Lee Pro Forma were correct*** *and then extrapolated lost-profits figures."*

"A declaration signed by … Sara Lee's Director of Marketing for Beverage Products … explained why ***the Sara Lee Pro Forma was 'an unlikely prediction*** *of the Jacked Up product's success.'"*

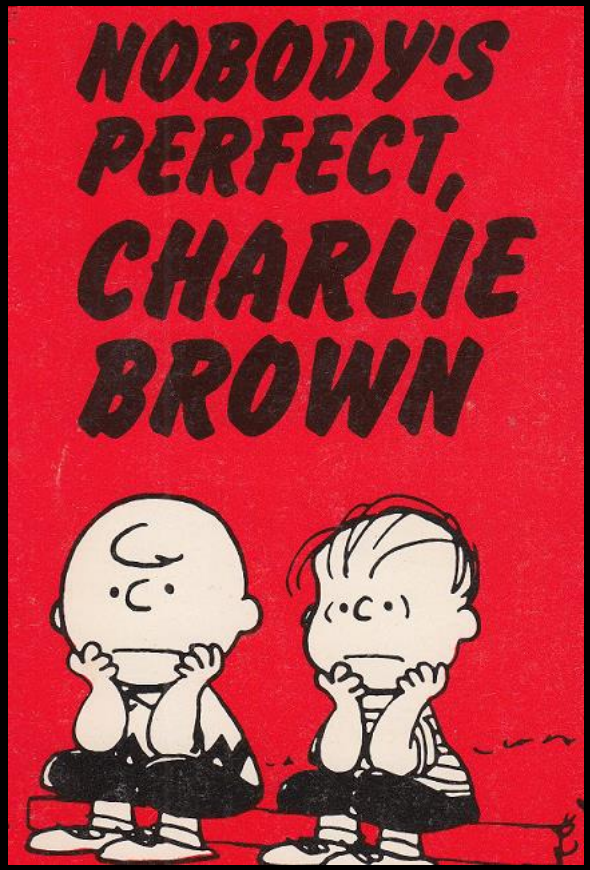
"Expert evidence that is not 'reliable at each and every step' is not admissible."

4. AVOID EXTREMES

Tow v. Organo Gold Int'l,
781 Fed. Appx. 298, 308 (5th Cir. 2019)

"[T]he cost approach showed AmeriSciences had incurred about $6.2 million over five years to develop the distributor network, attract new distributors, and retain existing ones. The income approach considers how long income is expected from the asset and the amount of income each year. Weingust concluded the income approach dictated the network would generate $700,327 over ten years. Weingust testified that ***neither valuation method was better than the other, so he averaged the two*** *to conclude the value of the distributor network was $3.451 million."*

5. PERFECTION IS OVERRATED



Balfour Beatty Rail v. Kansas City Southern Ry.,
725 Fed. Appx. 256 (5th Cir. 2018)

"That the party went out and purchased goods or services from a third party does not automatically establish that the price paid, even in an arms-length transaction, was reasonable. But ***Southern was not required to produce a witness to say 'magic words' such as 'reasonable' or 'necessary****.' … Southern is not just relying on the price it paid for the extra ballast for which Balfour is responsible. It is also relying on the price it paid for ballast for which it was responsible."*

6. GO TO MARKET

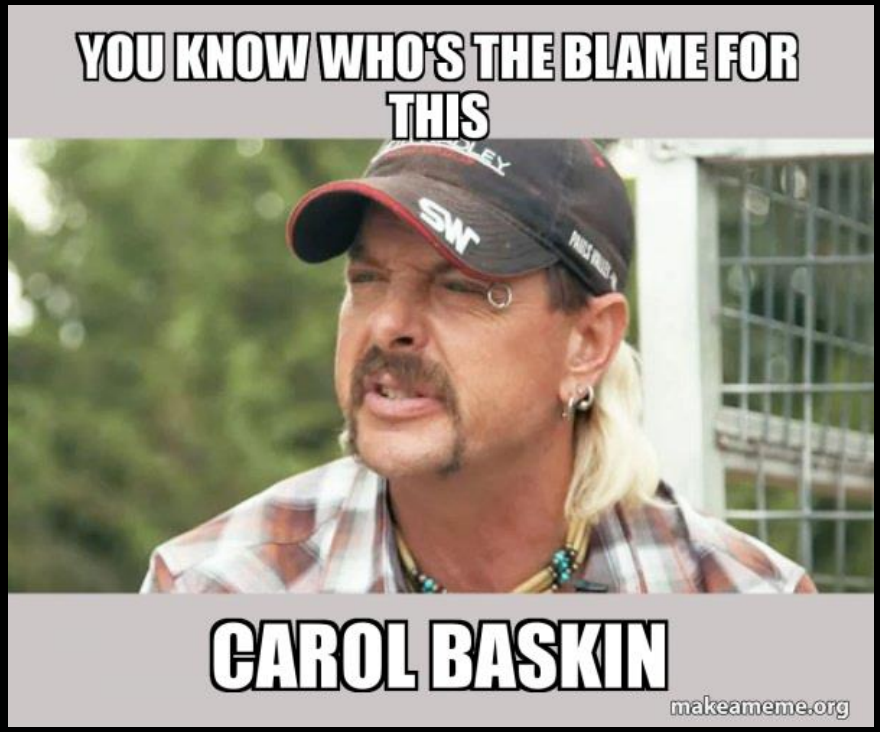
Parking Co. of Am. Valet, Inc. v. Fellman,
No. 05-17-01277-CV, 2019 WL 3451189
(Tex. App.—Dallas July 31, 2019, no pet.) (mem. op.)

"[This case does not involve natural gas, real estate, or [an]other market where the sales price of comparable property is readily determinable."

Bombardier Aerospace v. SPEP Aircraft Holdings, 572 S.W.3d 213, 227 (Tex. 2019).

"[F]inding comparable values in the marketplace tends to be difficult for aircraft, and Fogg explained that the depreciation in value of an aircraft is a 'variable number.' And ***finding comparable values for aircraft with certain damage or issues may be impossible****. Fogg made it clear that this particular Challenger 300 had unique issues and that the lack of documentation of all of these issues made the value uncertain … We note that Fogg's experience with aircraft alone may be a sufficient basis for his valuation, and coupled with the engines' issues, we conclude that he provided sufficient bases for his valuation opinion."*

7. BLAME THE OTHER SIDE



Soaring Wind Energy LLC v. Catic USA, Inc.
946 F.3d 742, 757 (5th Cir. 2020)

"It is true that, although the amount of lost profits may be estimated, claimants generally 'must show that there would [have been] some future profits' but for the breach. But in this case, ***Catic USA has refused to provide the relevant information****, and it was thus within the arbitration panel's authority to infer that AVIC's investment was indeed profitable."*

8. DON’T
BE GROSS.

Motion Med. Techs. v. ThermoTek, 875 F.3d 765, 779 (5th Cir. 2017).

Expert worked "by (1) multiplying the average sales ThermoTek made to Wilford each month by the unit sales price and relevant time period and (2) deducting the cost of the goods sold"	*"[T]hat is the very definition of gross profits … '[t]otal sales revenue less the cost of the goods sold, no adjustment being made for additional expenses and taxes."* *"A legally adequate calculation of 'lost profits' therefore accounts for* ***all expenses in carrying out the business****, not just the incremental costs of selling a particular product."*

9. OWN IT.

Wash Techs. v. Pappas,
No. 05-16-00633-CV, 2018 WL 718550
(Tex. App.—Dallas Feb. 6, 2018, pet. denied) (mem. op.)

"[T]he presumption that an owner is familiar with his property and its value … [requires that] the owner must provide ***the factual basis on which his opinion rests****, although this burden is not particularly onerous in light of the resources available today."*

(applying *Natural Gas Pipeline Co. v. Jutsiss*, 397 S.W.3d 150, 157 (Tex. 2012)).

10. VERIFY LIQUIDATED DAMAGES

Atrium Med. Center v. Houston Red C LLC, No. 18-0228, 2020 WL 596873 (Tex. Feb. 7, 2020)

1. ***Hard to estimate.*** *"[T]he harm caused by the breach is incapable or difficult of estimation."*

2. ***Reasonable forecast.*** *"[T]he amount of liquidated damages called for is a reasonable forecast of just compensation."*

3. ***IF THE FIRST TWO ARE SATISIFIED, then "reality check."*** *"[C]ourts must also examine whether 'the actual damages incurred were much less' than the liquidated damages imposed, measured at the time of the breach."*

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