IN THE SUPREME COURT OF TEXAS

NO. 02-1009

TOM ALEXANDER, INDIVIDUALLY, AND
ALEXANDER & MCEVILY, PETITIONERS AND CROSS-RESPONDENTS,

v.

TURTUR & ASSOCIATES, INC., MARIO TURTUR,
STEVE TURTUR, AND THE TURTUR FAMILY PARTNERSHIP,
RESPONDENTS AND CROSS-PETITIONERS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

JUSTICE HECHT, joined by JUSTICE WAINWRIGHT, concurring.

I agree with the Court that without expert testimony, which it did not have, the jury in this legal malpractice case could not possibly have made a reasoned determination that U.S. Bankruptcy Judge Houston Abel would have decided fact issues in a 1987 adversary proceeding differently if only Tom Alexander had represented the creditor instead of Judy Mingledorff, or if Mingledorff had presented different evidence. But I also doubt whether a jury could ever be fairly expected to determine, even *with* expert testimony, what a judge would have decided in such hypothetical circumstances, and if a jury is to be assigned that responsibility, I worry what the testimony would be. The only person who might actually know what a trial judge would have done if a case had been presented differently is the judge himself, if his memory would serve, but he probably cannot testify

voluntarily[1] and should not be compelled.[2] So testimony would need to come from lawyers or maybe former judges who would explain why one thing or another would have influenced the judge's decision — notably something the plaintiffs' expert in the present case was unwilling to do. Even assisted by such evidence, the jury in the malpractice case would still have to decide what the trial judge would have decided without ever hearing the case he heard or the case the plaintiff says he should have heard.

Petitioners's brief states that "[i]f this Court were inclined to hold that no expert testimony on causation is required in a trial malpractice case like this . . . then this Court should hold that the issue of causation in such cases more properly presents a law question for the court to decide." Petitioners cite one case in support of this conditional contention,[3] and one against.[4] They draw an analogy to criminal cases, arguing briefly that just as the issue of whether a criminal defendant was denied effective assistance of counsel is one for the court to decide,[5] so is the issue of whether the outcome of a civil case was probably affected by the trial lawyer's negligence in presenting it. While this argument has some appeal, we have not been told whether it has been made elsewhere or with what success. Absent a more thorough presentation of the legal malpractice caselaw in other

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[1] *See Joachim v. Chambers*, 815 S.W.2d 234 (Tex. 1991).

[2] *See United States v. Morgan*, 313 U.S. 409, 422 (1941) (suggesting that a judge cannot be compelled to testify about his mental impressions of a case).

[3] *Harline v. Barker*, 912 P.2d 433, 439-440 (Utah 1996).

[4] *Chocktoot v. Smith*, 571 P.2d 1255, 1258-1259 (Or. 1977).

[5] *See Strickland v. Wash.*, 466 U.S. 668, 694-698 (1984); *Childress v. Johnson*, 103 F.3d 1221, 1224 (5th Cir. 1997).

jurisdictions, the issue whether causation in a case like the present one should be determined by the judge rather than a jury should be left for another day.

The Court decides only that the jury in this case could not determine causation without expert testimony; the Court does not decide that if such evidence had been adduced, the issue was properly one for the jury. With this understanding, I join the Court's opinion.

Nathan L. Hecht
Justice

Opinion delivered: August 27, 2004