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## Court Rebuffs Request to Write Goodner Decision Using BIC Pen

### Judges Parse Expert Testimony Required for Causation in Products Liability Cases

by JOHN COUNCIL  
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Expert testimony can make or break the likelihood a jury verdict will survive an appeal, especially when causation

is disputed in a products liability case. But as recent opinions show, appellate courts can differ on when expert testimony is needed to prove causation — and when it isn't.

In June, the Texas Supreme Court vacated a jury award because of the lack of expert testimony on causation, but earlier this month the 5th U.S. Circuit Court of Appeals affirmed a verdict in a similar case.

So when is qualified expert testimony on causation not needed in products liability cases? According to the

5th Circuit's Aug. 19 opinion in *Stuart Goodner, et al. v. Hyundai Motor Co.*, it's not necessary when juries can reasonably infer what caused the injuries.

In *Goodner*, the 5th Circuit set out the following background: In 2007, 16-year-old R.G. was driving a 2005 Hyundai Tucson, in which her sister, 19-year-old Sarah Goodner, was a passenger. R.G. fell asleep at the wheel, drifted off the

▶ see *Court*, page 21



David Weiner

## Breaking Free of Hourly Fees

### Texas Firms Find Success As Lean, Mean Alternative-Billing Machines

by BRENDA SAPINO JEFFREYS  
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Dallas appellate lawyer David Weiner says he had an epiphany about billing in 2009, which led him to leave his firm and hourly billing behind to open a flat-fee solo practice.

"I had done flat-fee work when I was a younger lawyer doing criminal-defense work, and it dawned on me — I really did

have this moment or this epiphany — when I realized I could apply that same model to civil appellate work," Weiner says.

He notes that flat-fee billing is a natural for appellate work "because people want to know how much something is going to cost them."

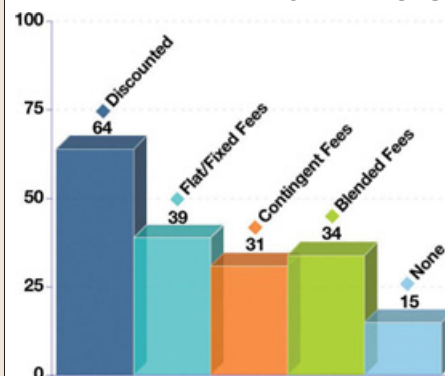
The Weiner Law Firm, which Weiner opened in May 2009 after departing Dallas' Glast, Phillips & Murray, isn't the only Texas firm embracing flat fees and other forms of alternative billing. Others include Skiermont Puckett, a newly formed firm in Dallas doing intellectual property, antitrust and commercial litigation, and the Law Office of Thomas Esparza Jr. of Austin, an immigration firm.

Alternative billing isn't new, and Texas firms have been experimenting with it for decades. But most firms, particularly large ones, cling to hourly billing and offer alternative billing only for certain types of work or clients.

Among the 101 firms that responded to *Texas Lawyer's* 2011 Salary and Billing



### PERCENTAGE OF FIRMS USING ALTERNATIVE-BILLING METHODS



Source: 101 firms.  
Note: Percentage sum exceeds 100 percent because most of the firms use more than one method of alternative billing.

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# Court Rebuffs Request to Write *Goodner* Decision Using *BIC Pen*

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highway and overcorrected after she woke up. The car then rolled over three times.

Both girls were wearing seat belts, and R.G. sustained minor injuries. However Sarah, who was reclined in the passenger seat, was ejected from the vehicle and died en route to a hospital. Parents Stuart and Lisa Goodner filed a products liability suit against Hyundai, arguing that the front passenger seat and the restraint system were defective, because the seat could recline to an unsafe position, which permitted Sarah to be ejected from the vehicle even though she was wearing a seat belt.

After the plaintiffs rested their case before a jury, Hyundai moved for judgment as a matter of law, arguing that the plaintiffs had failed to prove the seat design was unreasonably dangerous. The trial court denied the motion. The jury later awarded \$900,000 apiece to Stuart and Lisa Goodner, but the trial court reduced the final judgment to \$405,000 for each parent. Hyundai appealed to the 5th Circuit, alleging the trial court should have granted its motion for judgment as a matter of law because the Goodners failed to meet their causation burden of proof.

A 5th Circuit three-judge panel examined Texas law to determine whether the Goodners had met their evidentiary burden and concluded “there was no manifest miscarriage of justice.”

Among other things, the 5th Circuit examined whether expert testimony was needed to support the jury’s finding on causation. The 5th Circuit scrutinized a

plaintiffs’ expert who testified that Hyundai’s “seat recline” caused Sarah’s ejection and that ejection significantly increased the risk of serious injury or death. But the trial court prevented that expert from testifying about the ultimate issue — that the seat recline caused Sarah’s injuries — because he was unqualified to reach that conclusion, the 5th Circuit wrote.

To support its contention that the plaintiffs had not shown causation, the defendant argued in a June 23 letter brief that the 5th Circuit should look at a June 17 Texas Supreme Court decision, *BIC Pen Corp. v. Carter*. *BIC Pen* reversed a products liability judgment in favor of a plaintiff and rendered judgment for the defendant, in part because of a lack of expert testimony on causation.

In *BIC Pen*, the high court sought specific evidence of causation, including expert testimony, to prove that a child would not have been able to ignite a lighter but for its manufacturing defects. The high court decided *BIC Pen* after the 5th Circuit heard oral arguments in *Goodner*.

Hyundai alleged in its letter brief in *Goodner* that no expert testified in *BIC Pen* or in *Goodner* that a product defect caused the injuries. The letter brief also stated that *BIC Pen* “presents a more difficult causation hurdle for Plaintiffs to overcome” in *Goodner*.

Hyundai further argued that in *BIC Pen* there was no question that a child’s use of the lighter caused his sister’s injuries. In *Goodner*, the only evidence of causation was that Sarah’s sister’s “negligence”

caused the accident; there was no evidence that any alleged defect in the passenger seat caused Sarah’s injuries or death. Similarly, there was no evidence that, absent any alleged design defect, Sarah’s injuries or death would not have occurred.

## Reasonable Inferences

Fifth Circuit Senior Judge Patrick Higginbotham noted in *Goodner* that, under the *BIC Pen* holding, expert testimony generally is required to prove causation; however, it is not always required.

“It was not unreasonable for the jury, without an expert’s testimony, to infer causation [in *Goodner*]. *BIC Pen* does not require an alternative finding [on causation] by the court. The Goodners presented expert testimony on some causation elements, and other reasonable inferences are sufficient to find that the seat’s design caused Sarah’s injuries . . .,” Higginbotham wrote in an opinion joined by 5th Circuit Judges James Dennis and Ed Prado.

“This is a close, complex case, but our system relies on juries to evaluate the evidence and reach an outcome. It is not the role of this court to second-guess jurors, so long as there was a legally sufficient evidentiary basis for their verdict,” Higginbotham concluded in affirming the trial court judgment.

Kirk Pittard, a partner in Dallas’ Kelly, Durham & Pittard who represents the Goodners, is pleased with the decision.

“The court concluded that laypeople on a jury can certainly understand that, based on the circumstantial evidence when

comparing the injuries of the two girls, there is circumstantial evidence to support the inference that it was the design defect that caused the injuries,” Pittard says.

In *BIC Pen*, “there was no issue in the causation analysis that was within the knowledge of lay people. And, therefore, you had to have expert testimony on all of the causation evidence,” Pittard says.

David Keltner, a partner in Fort Worth’s Kelly Hart & Hallman who represents Hyundai, declines comment.

Houston appellate solo Martin Siegel believes the 5th Circuit’s opinion in *Goodner* is consistent with the Supreme Court’s ruling in *BIC Pen*.

“*BIC* reaffirms that expert testimony on causation is generally required, but it also quotes an earlier decision noting that lay experience and common understanding will suffice in some instances, and the [*Goodner*] court found that the plaintiffs’ expert adequately covered the aspects of causation that were technical or beyond lay jurors in that case,” writes Siegel in an email. ■

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The 5th Circuit’s opinion in *Stuart Goodner, et al. v. Hyundai Motor Co.* and the Texas Supreme Court’s opinion in *BIC Pen Corp. v. Carter* are online at [www.texaslawyer.com](http://www.texaslawyer.com). Look for the links within the online version of this article.

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