

Lance's¹ indignation about Steve Wilson's opinions must be considered in the objective light of the law and the facts. The law is that a qualified expert may offer the Court his opinion when that opinion is relevant to issues in the case. The opposing party may challenge the weight of that testimony, but may not have the testimony stricken on the basis that they disagree with it. The facts are that Mr. Wilson is qualified to give his opinion, that Lance is well aware of Mr. Wilson's opinion and methodology, and that Lance will not be prejudiced if he corrects secondary errors in his calculations.

Standard

The admissibility of expert testimony is a matter that the law grants the trial judge broad latitude to determine. *Jensen v. Milatzo-Jensen*, 2013 WY 27, 297 P.3d 768, 774, citing *Dean v. State*, 2008 WY 124, ¶ 14, 194 P.3d 299, 303. Review of the trial court's ruling is conducted under an abuse of discretion standard. *Id.*

Wyoming Rule of Evidence 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Wyo. R. Evid. 702.

The Wyoming Supreme Court has cautioned trial judges not to "determine the scientific validity of the conclusions offered by an expert witness." *Bunting v. Jamieson*, 984 P.2d 467, 473 (Wyo. 1999). The Court has consistently overruled trial court rulings excluding expert testimony, holding:

¹ Plaintiff will refer to Defendant as "Lance" throughout this brief. The Defendant at the time of filing the original Complaint was Lance Oil & Gas Company, Inc. On or about April 1, 2013, Lance merged into Anadarko E & P Onshore LLC, and the parties subsequently stipulated to a Substitution of Party.

It cannot be overemphasized that methodology should be distinguished from the conclusion of the expert. A trial judge need not and should not determine the scientific validity of the conclusions offered by an expert witness. Rather, to decide admissibility, the trial judge should only consider the soundness of the general scientific principles or reasoning on which the expert relies and the propriety of the methodology applying those principles to the specific facts of the case.

Hoy at ¶ 18, citing *Bunting*, 984 P.2d at 472-73; see also *Reichert* (reversing trial court's ruling that testimony regarding traumatic cause of Fibromyalgia was inadmissible); *Hannon v. State*, 2004 WY 8, 84 P.3d 320 (Wyo. 2004) (in criminal case, reversing trial court's ruling excluding expert testimony of psychologist regarding the voluntariness of defendant's confession); *Bunting v. Jamieson*, 1999 WY 105, 984 P.2d 467 (reversing trial court's ruling excluding plaintiff's expert medical opinions).

"[E]xpert testimony should be admitted so long as it can be adequately tested by an adversary." *Hoy* at ¶ 11; see also *Williams v. State*, 2002 WY 184, ¶15, 60 P.3d 151, ¶15 (Wyo. 2002).

Discussion

1. Mr. Wilson is qualified as an Expert on Wyoming Mineral Tax and Royalty Payments

Steve Wilson's CV is attached to Lance's Motion to Strike as Exhibit 5. It indicates that, from 1986 to the present, he has worked as a consultant providing mineral revenue consulting services, including accounting, damage claims and expert testimony. Before that, from 1981 to 1986, he was Lead Auditor for the Wyoming State Auditor's Office, where he "was responsible with oversight of an audit team charged with evaluating lessee compliance with federal and state of Wyoming oil and gas lease terms, including product valuation."

In response to questioning from Lance's attorney, Mr. Wilson testified:

- Q. Based on your years of doing royalty work, you're familiar with contracts and leases that provide for a royalty, aren't you?
- A. Yes.
- Q. You've seen those before?
- A. Yes.
- Q. Hundreds?
- A. Probably.
- Q. Thousands?
- A. I don't know.
- Q. A lot?
- A. Yes.

Exhibit 1, Steve Wilson Deposition, 43:11-22.

- Q. And you're familiar with the Wyoming Royalty Payment Act, aren't you?
- A. Yes.
- Q. Very familiar, aren't you?
- A. Yes.
- Q. That's your stock-in-trade, isn't it?
- A. Yes.

Id., 53:7-13.

Although Lance may not approve of his pedigree,² Mr. Wilson is very qualified to opine on the mineral taxation and royalty payment calculations at issue in this case.

² The law is clear that pedigrees are not necessarily required for qualification as an expert witness.

We find an analogous situation in *Runnion v. Kitts*, 531 P.2d at 1310. There, a highway patrolman offered expert testimony on the speed of the plaintiff's vehicle at the time of its collision with the defendant's. On appeal, the plaintiff complained the patrolman's testimony was improper because he admitted he was not an expert. This court wrote:

With some modesty, the highway patrolman, on cross-examination, in answer to the question, 'You don't qualify yourself as an expert?', replied, 'No.' Regardless of how the witness classified himself, he did [d]o a pretty good job and was expert, in the light of his experience and knowledge and ability to use the skid calculator tools given to him by the highway department, which had an accepted basis in accident investigation. Apparently, the jury was not impressed that he was as uninformed as the cross-examiner attempted to make him out.

Seivewright v. State, 7 P.3d 24, 31-32 (Wyo. 2000) quoting *Runnion v. Kitts*, 531 P.2d 1307, 1310 (Wyo. 1975). See also, *Malloy v. Monahan*, 73 F.3d 1012, 1015-16 (10th Cir.

2. *It is for the Court to Decide Issues of Statutory Construction*

Lance berates Mr. Wilson for his failure to identify and explain the relevant statutes, and then accuses him of “attempt[ing] statutory interpretation [that] usurps this Court’s authority to interpret the law.” (Lance Brief, p. 7). Plaintiff agrees that “statutory construction is a matter of law.” *Adelizzi v. Stratton*, 2010 WY 148, ¶ 11, 243 P.3d 563, 566. (Lance Brief, p. 7, n. 11). That is why both parties have submitted extensive summary judgment pleadings in which they have asked the Court to decide the correct construction of the statutes governing royalty payments and tax deductions. Mr. Wilson has explained that the statute requires Lance to deduct “Taxes paid times ownership interest.” Exhibit 1, Wilson Deposition, 105:24-106:1; 110:14-15. He then proceeded to gather the data and do the calculations necessary to determine the correct amount of deductions that Lance should have taken for taxes paid, the amount of deductions that Lance has taken in excess of taxes it paid, and the amount due to the class as a result of the overdeductions.

Plaintiff agrees it is for the Court to decide the issues of statutory construction. Mr. Wilson’s role is to assist the Court by applying his specialized knowledge to calculate the amount of Lance’s overdeductions.

3. *Mr. Wilson’s Methodology is Reliable*

Lance raises various criticisms of Mr. Wilson’s opinion, but does not challenge his methodology. (In fact, Lance’s own expert uses the methodology in his report, to make a

1996)(finding plaintiff’s calculation of profits admissible, he had 15 years experience in purchase, rehabilitation and sale of residential properties, had attended seminars and read literature on the subject.)

different point, thus demonstrating that he fully understands and can apply his methodology. *See* Lance's Expert Witness Designation, Expert Report of Michael A. Zeeb, pp. 3-4.) Mr. Wilson's original report was supplemented pursuant to the Court' Order of May 3, 2013, which, among other things, set June 7 "for Plaintiff Geer to initially supplement his designation of Expert James Steven Wilson." (emphasis added). The June 7 *Plaintiff's Supplemental Disclosure of Expert Testimony* is attached hereto as Exhibit 2 (excluding the thumb drive) so that the Court can see how comprehensive that report is. It contains an 11-page narrative by Mr. Wilson which thoroughly describes the data he had reviewed to date, and his methodology. Summary schedules are attached, along with a thumb drive containing the extensive backup data.

Mr. Wilson has conceded that he needs to make corrections to some errors which do not go to his basic methodology, and his Second Supplemental Report which includes those corrections will be filed on September 3 (subject to the Court's granting Plaintiff's Motion to Supplement Expert Witness Report). Lance has fully understood the concepts underlying Issue #1 (tax rate) and Issue #2 (tax value) since the Complaint was filed. It has understood the accounting methodology employed by Mr. Wilson since the time his initial report was filed. Lance's own expert has run the model, or he could not have identified the errors he did. Lance stridently contends that "Mr. Wilson himself admits just how defective and unreliable his report is" (Lance Brief, p. 16), citing a portion of his deposition. The full testimony on that subject is:

- Q. would you rely on that report if you were the court?
- A. There needs to be some adjustments to some values, yes.
- Q. Would you rely on that report if you were the court?
- A. There – there's some adjustments that need to be made.
- Q. Are you having a problem answering my question yes or no?
- A. There – I guess no.

Exhibit 1, Wilson Deposition, 122:3-13.

Mr. Wilson was not having a problem answering Lance counsel's question; he had answered it twice.

Lance's only criticism of Mr. Wilson's methodology arises from the fact Mr. Wilson did not review the individual leases to assess Lance's ability to take deductions. Lance alleges that, as a result, his testimony does not "fit." (Lance Brief, pp. 9-12.) It is correct that Mr. Wilson did not evaluate Lance's deduction-not-taken setoff/recoupment claims; that is because those claims are not part of the case. *See Plaintiff's Brief in Support of Motion for Partial Summary Judgment*, pp. 6-12. Mr. Wilson's failure to give credence to Lance's efforts to bring the individual lease language and its deductions-not-taken claims into the case does not render Mr. Wilson's opinion inadmissible.

4. Lance Is not Prejudiced By the Supplementation of Mr. Wilson's Report

The Wyoming Supreme Court has held the following factors are relevant to the trial court's determination regarding admissibility of expert testimony after the designation deadline:

- (1) whether allowing the evidence would incurably surprise or prejudice the opposing party;
- (2) whether excluding the evidence would incurably prejudice the party seeking to introduce it;
- (3) whether the party seeking to introduce the testimony failed to comply with the evidentiary rules inadvertently or willfully;
- (4) the impact of allowing the proposed testimony on the orderliness and efficiency of the trial; and
- (5) the impact of excluding the proposed testimony on the completeness of the information before the court or jury.

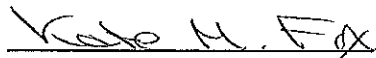
Fetzer v. J.D. Dayley & Sons, Inc., 2004 WY 64, ¶14, 91 P.3d 152, 158, quoting *Winterholler v. Zolessi*, 989 P.2d 621, 628 (Wyo. 1999). "The totality of the circumstances is considered when weighing these factors." *Fetzer*, 2004 WY ¶14.

In this case, Lance has known the accounting methodology employed by Mr. Wilson for many months, and trial is still three months away. If there is any surprise to Lance, it can be cured by a supplemental deposition of Mr. Wilson. Plaintiff agrees to pay the costs and reasonable fees of such a deposition. If Mr. Wilson's evidence were excluded, Plaintiff would be unable to present the classes' damages. Plaintiff's errors were inadvertent and not willful. Any trial in this matter would relate solely to Plaintiff's damage case, and could not proceed in an orderly or efficient manner without Mr. Wilson's complete testimony. The totality of the circumstances weighs heavily in favor of allowing Mr. Wilson's complete testimony.

Steve Wilson will provide his specialized knowledge to assist the Court to understand the evidence regarding Lance's accounting and royalty payment practices, and to quantify the extent of the overdeductions Lance has taken from the class of royalty payees. Wilson is qualified to do so, his methodology is a reliable means for doing so, and Lance is not prejudiced by allowing Mr. Wilson to adjust some values well in advance of trial.

WHEREFORE, Plaintiff respectfully requests the Court Deny Lance's Motion to Strike and Grant Plaintiff's Motion to Supplement its Expert Report.

DATED this 26th day of August, 2013.


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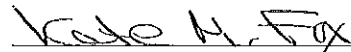
CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of August, 2013, the foregoing was served via U.S. Postal Mail to the following:

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