Published on *The National Law Review* (http://www.natlawreview.com)

Wal Mart Stores, Inc. v. Merrell: The Elephant In The Room

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posted on: Wednesday, July 21, 2010

Every once in a while you can learn something really useful from good ol' Judge Per Curiam. The Supreme Court's recent decision in Wal Mart Stores v. Merrell is just such a case.

The decedents died from smoke inhalation when their recliner burned. So obviously, it was Wal Mart's fault because the damaged floor lamp Wal Mart sold them was the culprit. Right? After all, according to the expert "the lamp's halogen bulb exploded, sending burning glass shards onto the recliner, which smoldered for several hours."

Or maybe the decedents set the recliner alight themselves while smoking the drugs that were found in their system--either with candles or perhaps the "blunts" and "smoking paraphernalia throughout the house, including ash trays, a bong, and marijuana cigarette butts."

(Incidentally, did anyone other than me find it amusing that the Supreme Court of Texas found it necessary to drop a footnote to explain exactly what a "blunt" is? I never saw anything stronger than an aspirin at my High School, but even I found the definition unnecessary and humorous.)

After the jump, a little homily on what this case really teaches us.

In Merrell, Wal Mart moved for summary judgment that it's lamp did not cause the fire. It objected to the Plaintiffs' expert affidavit that attempted to raise a fact question on causation. The trial court let the affidavit in, but granted summary judgment nonetheless, finding (of necessity) that it did not raise a fact issue. The court of appeals found that it did, but Judge Per Curiam found that it did not.

According to Judge Per Curiam, defects such as the expert's failure to address the alternative explanation for the fire (i.e., they burned it themselves while they were high) rendered the testimony conclusory and legally speaking "no evidence."

> He explained why the melted candle wax and location of the candles precluded the candles as the source of the fire (pointing to the melted pool of wax on the table, which could not have survived the fire exposure if the candles themselves had ignited the fire). Yet he provided no explanation for why lit smoking materials could not have been the source. An expert's failure to explain or adequately disprove alternative theories of causation makes his or her own theory speculative and conclusory. *See Gen. Motors Corp. v. Iracheta*, 161 S.W.3d 462, 470 (Tex. 2005) ("[The expert] eliminated the obvious possibility that fuel or vapors from the tank filler neck ignited only by saying so, offering no other basis for his opinion. Such a bare opinion was not enough.").

Now, some might use this space to wax eloquent or become apoplectic about:

- Legal sufficiency review and the end of civilization as we know it post *City of Keller*
- What is and is not a fact issue
- What is the difference between an expert opinion that is "no evidence" and one that is inadmissible evidence

But I am a simple man. To me, there is a much simpler lesson here that has wider application:

DON'T ignore the elephant in the room.

Whether you are the trial lawyer dealing with the facts in front of the jury, the appellate lawyer dealing with a bad record or bad law, you have to deal with the warts in your case.

If you don't deal with the bad facts or the adverse precedent, the best you can hope for is that you merely hemorrhage credibility. Worse still you can become a joke, *i.e.*,

> It's just a flesh wound. I'm *INVINCIBLE!*
>
> Other than that, Mrs. Lincoln, how was the play?
>
> Pay no attention to that man behind the curtain.

Much better to admit that your case is a pig wearing lipstick and then explain why the law gives your pig the victory. You might still lose, but you improve your chances, both in the pig case and the next one.

From Andrews Kurth's Appellate Record Blog:

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