Formosa Plastics Corp.

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OPINION

Following a jury trial in this suit for fraud, the trial court rendered judgment in favor of appellee, Kajima International, Inc. ("Kajima"). Appellant, Formosa Plastics Corporation, USA ("Formosa"), challenges the trial court's judgment by nine issues. We sustain appellant's third issue and hold that the trial court erred in refusing to disqualify Kajima's expert witness, A. W. "Chip" Hutchison ("Hutchison") and his firm, A. W. Hutchison & Associates, Inc., ("AWH") on the basis of "side-switching." Accordingly, we reverse the trial court's judgment and remand for a new trial.

I. Background

In 1993, Kajima sued Formosa for breach of contract, fraud, quantum meruit, and negligent representation arising from construction contracts for work Kajima performed at Formosa's expansion plant project in Point Comfort, Texas.[1] In 1997, following a jury trial, the trial court rendered judgment for Kajima for $5,591,066.65. Kajima appealed, contending, among other things, that the trial court erred in refusing to submit a broad form fraud question. This Court reversed and remanded to the trial court for a new trial. See Kajima Int'l, Inc. v. Formosa Plastics Corp., 15 S.W.3d 289, 294 (Tex. App.--Corpus Christi 2000, pet. denied).

On remand, Kajima non-suited all of its claims except fraud. Following a jury trial, the trial court rendered judgment in favor of Kajima and awarded it $15,432,123.45 in actual damages, plus pre-judgment interest of $14,210,269.65 and $403,156.86 in costs. This appeal followed.

II. Disqualification of Kajima's Expert Witness

A. Background Facts of "Side-Switching" Issue

In its third issue, Formosa contends the trial court erred in refusing to disqualify Hutchison as Kajima's expert witness because of "side-switching." In 1993, Formosa's former outside counsel, Jones, Day, Reavis & Pogue ("Jones Day"), retained Steve Huyghe, an associate of Hutchison's at AWH,[2] and AWH as Formosa's consulting experts in connection with the Kajima lawsuit. On October 4, 1993, Huyghe and an associate met with lawyers at Jones Day to discuss the suit. Over the next few months, Huyghe and AWH performed work for Formosa. By the end of December 1993, Formosa had paid AWH $20,875.89 for work done on the Kajima case.

In December 1993, Formosa transferred its defense from Jones Day to Porter & Hedges. On December 3, 1993, Huyghe met with lawyers from Jones Day and Porter & Hedges to discuss the case. In April 1994, Porter & Hedges told Huyghe that his work for Formosa was "on hold."

A few months later, in August 1994, Kajima's lead counsel contacted Huyghe about AWH working on the case for Kajima. Huyghe notified Margaret Kelihar, an attorney at Jones Day, Formosa's former counsel, that he had been contacted by Kajima. Kelihar testified she told Huyghe his knowledge and involvement in the case "would make it difficult for him to represent the other side" and advised him to notify Porter & Hedges. Huyghe did not notify Porter & Hedges or Formosa. Formosa did not learn that Hutchison and Brian Rogers (also of AWH) had been designated as Kajima's testifying experts until September 19, 1995. Several weeks later, on October 4, 1995, Formosa filed a motion to strike Hutchison and AWH as Kajima's expert witnesses for "side-switching." Following a hearing, the trial court denied Formosa's motion.

B. Kajima's Arguments

In response to Formosa's "side-switching" argument, Kajima argues the trial court was not required to disqualify Hutchison because: (1) even though Formosa initially shared some non-confidential information with Huyghe, who worked for A. W. Hutchison of California, no conflict exists between the work initially performed by Huyghe for Formosa and the work later performed by Hutchison for Kajima because Hutchison worked for AWH, a separate corporate entity based in Atlanta; (2) any information given to Huyghe by Formosa was discoverable and thus was not confidential; (3) Formosa did not directly share confidential information with Hutchison or Huyghe; and (4) the attorney vicarious-qualification rules do not apply to expert firms.

C. Standard of Review and Applicable Law

We review a trial court's decision on whether to disqualify an expert witness for an abuse of discretion. See Koch Ref. Co. v. Jennifer L. Boudreaux MV, 85 F.3d 1178, 1181 (5th Cir. 1997). Disqualification of an expert that switches sides in a lawsuit is an issue of first impression in Texas. However, the Fifth Circuit has addressed the test courts should apply when determining whether to disqualify an expert witness who has previously been retained to consult with another party. See id.

In Koch, the Fifth Circuit adopted the two-part test adopted by the majority of courts that have considered the issue: (1) was it objectively reasonable for the first party who claims to have retained the expert to conclude that a confidential relationship existed between that party and the expert; and (2) did the first party disclose any confidential or privileged information to the expert? Id.; see also, e.g., Turner v. Thiel, 553 S.E.2d 765, 768 (Va. 2001) (adopting and applying two-part test to disqualify expert in medical malpractice case); Mitchell v. Wilmore, 981 P.2d 172, 175-77 (Colo. 1999) (applying two-part analysis to disqualify car accident reconstruction expert); Nelson v. McCreary, 694 A.2d 897, 903-04 (D.C. 1997) (applying two-part test to deny disqualification of medical expert who had been

paid by both sides, due to lack of confidential or privileged information).

Courts have the inherent power to disqualify experts. Koch, 85 F.3d at 1181. That power derives from the necessity to protect privileges which may be breached when an expert switches sides, and from the necessity to preserve public confidence in the fairness and integrity of judicial proceedings. Paul v. Rawlings Sporting Goods Co., 123 F.R.D. 271, 277-78 (S.D. Ohio 1988).

Accordingly, we adopt the two-part expert-qualification test outlined in Koch. See Koch, 85 F.3d at 1181. The party seeking disqualification bears the burden of proving both elements of the test. Id.

In Koch, the Fifth Circuit noted that in cases where an expert has switched sides, no one would seriously contend that a court should permit a consultant to serve as one party's expert where it is undisputed that the consultant was previously retained as an expert by the adverse party in the same litigation and had received confidential information from the adverse party pursuant to the earlier retention. This is a clear case for disqualification.

Id. (quoting Wang Lab., Inc. v. Toshiba Corp., 762 F. Supp. 1246, 1248 (E.D.Va.1991) (citations omitted) (emphasis added)). The Koch court notes that the two-part test thus applies to "disqualification cases other than those in which the expert clearly switched sides."[3] Id. (emphasis added).In the present case, Kajima disputes whether Formosa's earlier retention and passage of confidential information occurred. Thus, we apply the two-part test outlined in Koch. See id.

D. Analysis

We begin by addressing the first part of the two-part test outlined in Koch: whether it was objectively reasonable for Formosa to conclude that it had established a confidential relationship with Huyghe and AWH. We conclude that it was.

Kelihar testified at the hearing on Formosa's motion to strike[4] that in 1993, Formosa retained Huyghe and AWH, but that a confidentiality agreement was not considered necessary because Jones Day had "used [Huyghe] as an expert before." The record contains copies of invoices to Jones Day from AWH[5] for services rendered for Formosa, including preparation of a "work plan," compilation of "key project documents," review of "project documentation," and "discussion with staff." The record also contains a copy of a check from Formosa, dated December 21, 1993, in the amount of $20,875.89 to AWH at its Atlanta office for work on the "Kajima case." A January 7, 1994 letter to Huyghe from Formosa refers to invoices from AWH "for services provided to Formosa as requested by Jones, Day, Reavis & Pogue" and asks about the location of "the work product your company produced." In response, a letter from Huyghe identifies the "work product" produced by the firm as including an "original claims work plan prepared to outline our proposed method for evaluating the performance of Kajima," and an "index and review of documents received to date" from Kajima. An April 15, 1994 letter from Huyghe to an attorney at Porter & Hedges notes that the "initial

assignment" to "review and critique Kajima's claim and to research the Formosa records, identifying pertinent documents" has been completed. Based on this evidence, we hold that it was objectively reasonable for Formosa to conclude that a confidential relationship existed with Huyghe and AWH.

Next, we consider whether Formosa disclosed confidential information to Huyghe. Kelihar testified that in several meetings, she discussed with Huyghe: (1) Formosa's "strategies for this case and what kind of defense we ought to establish;" (2) information gathered from interviews of potential witnesses for Formosa and what testimony such witnesses could provide; (3) which witnesses might be "good" and "bad" for Formosa; and (4) the amount of money Formosa was willing to expend to settle Kajima's claims. A letter dated October 19, 1993 from Huyghe to Jones Day describes AWH's initial budget estimate for additional services based on its "knowledge gained to date" from reviewing Formosa documents and its development of a "claims work plan." The October 19, 1993 letter is labeled "Privileged & Confidential."

Ken Alexander, a partner with Porter & Hedges, testified that on December 3, 1993, following Formosa's transfer of its defense from Jones Day to Porter & Hedges, he met with Huyghe and several of the Jones Day attorneys. At the meeting, Huyghe said he had been retained by Formosa. Alexander understood that Formosa had retained AWH and that Huyghe worked for the firm. Alexander testified that at the meeting, Huyghe made a case for "what A.W. Hutchison had to offer," and said that Chip Hutchison had "expertise to offer to the lawyers in whatever way it was needed to assist with the defense of the case." Alexander said that they discussed Kajima's claims and "the ways in which we would go about responding to those claims." Alexander said he considered the information exchanged at the meeting confidential. Similarly, at the trial in the present case, Alexander testified that at the meeting, he discussed confidential information with Huyghe, including Formosa's probable defenses to Kajima's claims, evidence that might be developed and had been developed up to that time, matters pertaining to potential witnesses, "strategies," and various other confidential matters.

Kajima argues that no confidential information was shared with Huyghe, and even if it was, that such information cannot be imputed to Hutchison. Kajima points to the fact that Kelihar failed to identify specific confidential documents that Formosa provided to Huyghe and to Huyghe's testimony that in all of his meetings with Formosa's attorneys, he was not exposed to and did not discuss any information he considered confidential. Kajima argues that Huyghe's work for Formosa was limited to the preparation of a document index.

Kajima's arguments are not persuasive. Huyghe's statement that he did not discuss anything with Formosa that he considered confidential is conclusory. See In re Amer. Home Prods. Corp., 985 S.W.2d 68, 74 (Tex. 1998)(conclusory opinions of witnesses regarding what is "confidential information" does not raise fact issue). Kelihar's uncontroverted testimony that Huyghe discussed Formosa's defense strategies, potential witnesses, and willingness to settle establishes that Formosa provided confidential information to Huyghe. See Koch, 85 F.3d at 1182 ("confidential information"

includes discussion of a party's strategies in litigation, the kind of experts that the retaining party expected to employ, a party's view of the strengths and weaknesses of each side's case, the role of each party's witnesses to be hired, and anticipated defenses).

Kajima also argues that even if confidential information was disclosed to Huyghe, the trial court did not err in allowing Hutchison to testify for Kajima because Huyghe was employed by A.W. Hutchison of California, Inc., which was a separate entity from Hutchison's firm, AWH, in Atlanta.[6]

Huyghe's own testimony contradicts Kajima's argument. Huyghe testified that A.W. Hutchison & Associates, Inc. of California and AWH were both owned by Chip Hutchison. At the hearing on the motion to strike, Huyghe also testified as follows:

Q: [Formosa's counsel]: And, again, when you talk about "our professional team," you're including Mr. Chip Hutchison in that, correct?

A: [Huyghe]: Yes. We have--- our company is broken into divisions. We have an Industrial Division, a team of experts, who have got twenty to thirty years. And---

Q: And, Mr. Chip Hutchison is part of that team of experts, correct?

A: Yes.

Q: Okay. If you look down on your little logo and so forth on the bottom there, it says, in big letters, "A.W. Hutchison and Associates, Incorporated," and, then, you've got, "Atlanta, Los Angeles, Washington, D.C." under that, correct?

A: Correct.

Q: And, these are all part of A.W. Hutchison and Associates, Inc., correct?

A: Yes.

In addition, Huyghe's June 14, 1993 and October 19, 1993 (marked "Privileged and Confidential") letters to Jones Day and his April 15, 1994 letter to Porter & Hedges were copied to Hutchison. Kelihar testified that Huyghe said that by hiring the firm, Formosa was retaining the option of having Hutchison available to testify, if Formosa so chose. Similarly, Alexander testified that Huyghe represented that Hutchison's expertise was available to Formosa "in whatever way it was needed to assist with the defense of the case." Based on this evidence, it is reasonable to conclude that the information provided to Huyghe was provided to AWH and to Hutchison.

At the hearing on Formosa's motion to strike, former Supreme Court Justice Eugene Cook testified

for Formosa as an expert on rules concerning conflicts of interest and disqualification of experts and the public policy reasons for such rules. Justice Cook provided the following testimony:

Q: [Formosa's counsel]: Justice Cook, what is the general rule regarding disqualifications?

A: [Justice Cook]: It's really pretty simple. An expert, like an attorney, is not permitted to change sides in the middle of a lawsuit.

Q: Why is that?

A: There's several reasons. Probably, one of the most fundamental reasons is that it--- it adversely effects public confidence in your entire legal system. If the people out there perceive that you can hire an expert and, later, he can change sides, it's going to lower the overall esteem that people have for the lawyers in this Country and, in fact, the entire system of justice. It's fundamentally unfair for one side to hire an expert and for another side to later come in and hire the same expert to testify against them. And, probably, a third reason, this is a very simple reason, if it doesn't pass the smell test. Lawyers and judges are supposed to avoid the appearance of impropriety. This clearly does not pass that smell test.

Q: What conclusion have you reached, in your own mind, about whether A.W. Hutchison and Associates has such a conflict of interest that requires disqualification?

A: My opinion is that it has such a disqualification. My opinion is based upon the following factors: First, there was testimony, today, that the settlement authority was disclosed, that the defenses were disclosed. This, clearly, is confidential information. One of the letters from A. W. Hutchison is stamped, "privileged and confidential," which is an admission. In listening to Mr. Huyghe testify, he talked about a short involvement. He talked about a copy of everything that comes out of our file goes to the corporate . . .Mr. Chip Hutchison. He talks about the fact that he was paid over Twenty Thousand Dollars. He understood his services would be on hold. And, the original assignment, from what I took down, was to review and critique the Plaintiff's claims. If you allow this sort of conduct to stand and for him to testify, you're going to create serious doubt on the entire integrity of our legal system.

Hutchison's testimony involved all aspects of Kajima's case, including liability, causation, and damages. He testified that Formosa defrauded Kajima, that Formosa knew of significant problems with the drawings before it signed contracts with Kajima, that the problems caused delays, and that the delays resulted in losses to Kajima. Hutchison also testified regarding the method for calculating Kajima's damages. We conclude that Hutchison's testimony was critical to Kajima's case. We hold that without his testimony, the judgment must be reversed and the case remanded for a new trial.

III. The Dissent's Waiver Argument

The dissent contends that Formosa waived its right to seek disqualification of Hutchison and AWH by failing to assert a claim of confidentiality over information Formosa provided to and the work product created by Huyghe. The dissent argues that "Formosa had at least five opportunities" to establish the confidentiality of information it provided to Huyghe, and that by failing to do so, Formosa waived its right to assert a claim of confidentiality.

The dissent argues Formosa initially failed to address the confidentiality issue at several points during the fall of 1993 when Huyghe was performing work for Formosa at the request of Jones Day. According to the dissent, Formosa missed a fourth "opportunity" when it transferred its defense from Jones Day to Porter & Hedges in December 1993, and Porter & Hedges failed to clearly establish confidentiality over information provided to and work product created by Huyghe. Finally, the dissent argues, Formosa missed its fifth "opportunity" when it failed to object after "Huyghe reported the initial contact by Kajima."

With respect to Formosa's failure to address the confidentiality issue with Huyghe at the outset, we note that Kelihar testified at the hearing on Formosa's motion to strike that in 1993, Formosa retained Huyghe and AWH in connection with the Kajima lawsuit. She also testified that it "wasn't necessary for us to enter into a confidentiality agreement with [Huyghe] before we disclosed confidential information" because Jones Day had "used [Huyghe] as an expert before."

With regard to the fourth "opportunity," when Porter & Hedges assumed Formosa's defense, Alexander testified he understood that AWH had been retained by Formosa and that Huyghe worked for the firm. He also testified that until he learned in late September 1995 that Kajima had named Hutchison as its expert, he believed Formosa still retained the option of using Hutchison in whatever capacity it chose.[7]

The dissent contends Formosa missed a fifth "opportunity" when it failed to object after Huyghe "reported the initial contact by Kajima." The record reflects, however, that in 1994, Huyghe "reported" that he had been contacted by Kajima only to Kelihar at Jones Day, Formosa's former counsel. Kelihar testified that Huyghe said he had been approached by Kajima to be an expert and asked her opinion regarding whether the work he and the firm had earlier performed for Formosa could result in a conflict. Kelihar told Huyghe she thought he "knew some things that . . . would make it difficult for him to represent the other side" and that he should contact Porter & Hedges. Huyghe admitted that he never called Porter & Hedges to let Formosa know that AWH had signed up with Kajima. Formosa learned that Hutchison and Brian Rogers (also of AWH) had been designated as Kajima's testifying experts on September 19, 1995, when Formosa received Kajima's supplemental interrogatory responses. Approximately two weeks later, on October 4, 1995, Formosa filed its motion to strike. The trial court held a hearing on Formosa's motion on October 12, 1995.

By filing its motion to strike only a few weeks after learning of Kajima's designation of experts, Formosa preserved its right to seek disqualification of Hutchison and AWH. See In re Amer. Home

Prods. Corp., 985 S.W.2d at 73 (delay of less than two months in filing motion to disqualify counsel did not constitute waiver of right to disqualify) (citing Rio Hondo Implement Co. v. Euresti, 903 S.W.2d 128, 131 (Tex. App.--Corpus Christi 1995, orig. proceeding) (holding that two and one-half month delay does not constitute waiver of right to disqualify)).

IV. Conclusion

We hold Formosa met its burden of establishing that: (1) it reasonably concluded that it had a confidential relationship with Huyghe and AWH; and (2) it disclosed confidential information to Huyghe and AWH. See Koch, 85 F.3d at 1181. Accordingly, we hold that the trial court abused its discretion in refusing to disqualify Hutchison as an expert witness for Kajima. We reverse the judgment of the trial court and remand this case for a new trial in which neither Hutchison nor any other AWH employee will be permitted to testify as an expert witness.

Opinion delivered and filed this the 10th day of November, 2004.

DISSENTING OPINION

Dissenting Opinion by Justice Castillo

The majority concludes that the trial court abused its discretion in refusing to disqualify Hutchison as an expert witness. I respectfully dissent.

I. HISTORY OF THE CASE

This is a suit for fraud tried to a jury after appeal and remand. In January 1993, Kajima International, Inc. ("Kajima"), an international industrial construction firm, sued Formosa Plastics Corporation, USA and Formosa Plastics Corporation, Texas ("Formosa"), a petrochemical company with operations in Point Comfort, Calhoun County, Texas. Kajima sought damages for fraud, breach of contract, quantum meruit, and negligent misrepresentation arising out of five contracts for work performed by Kajima in expanding Formosa's Point Comfort facility.[8]

After two mistrials, the case went to jury verdict in 1997. The trial court entered judgment notwithstanding the jury's findings in Kajima's favor on some but not all of Kajima's theories of recovery. Kajima appealed the resulting judgment for $5,591,066.65, complaining that the trial court erroneously refused to submit a broad-form fraud question. This Court held that the trial court abused its discretion in submitting a fraud question that precluded the jury's consideration of "string-along" fraud that occurred after execution of the written contracts. Kajima Int'l, Inc. v. Formosa Plastics Corp., 15 S.W.3d 289, 294 (Tex. App.--Corpus Christi 2000, pet. denied) ("Kajima I "). We reversed and remanded for a new trial. Id. at 294.

After remand, Kajima moved for a partial summary judgment that Formosa USA and Formosa Texas comprised a single business enterprise. The trial court agreed. Kajima nonsuited Formosa Texas. It also nonsuited all of its claims against Formosa USA except fraud.

Before and during both the retrial in 2002 and the 1997 trial, Formosa unsuccessfully sought to strike Kajima's expert witness, claiming that the witness's opinions were unreliable and that he had "switched sides" during the litigation. At the 2002 trial, the expert testified, over Formosa's objection, that Kajima expended $38,717,854.00 in total costs in completing the project. He also testified Kajima expended $3,330,547.00 in costs that added no value to the project. The parties did not dispute that Formosa paid Kajima approximately $10,000,000.00 on the project. Kajima's expert concluded that Kajima's out-of-pocket damages equaled $25,387,380.00.

At the conclusion of the evidence, the trial court submitted a single broad-form fraud question to the jury. It refused Formosa's request for a fraud question that asked for separate findings as to each contract. It also refused Formosa's requested mitigation instruction and ratification question.

Before the 1997 trial, the parties had entered into a rule 11 agreement regarding the admissibility of thousands of pages of documents. See Tex. R. Civ. P. 11. After remand, the parties agreed that their rule 11 agreement regarding the admissibility of each party's trial exhibits applied to the second trial. During deliberations at the second trial, the jury requested all trial exhibits. Kajima objected to providing post-contract technical drawings to the jury on the grounds that they were irrelevant, misleading, and not in evidence. Formosa responded that the documents were admitted in accordance with the parties' rule 11 agreement. The trial court sustained Kajima's objections as to all post-contract drawings.

After deliberating, the jury answered the broad-form fraud question in Kajima's favor. It assessed Kajima's damages at $15,432,123.45. The resulting judgment against Formosa, filed April 12, 2002, awarded Kajima $15,432,123.45 in actual fraud damages, $403,156.86 in costs, and $14,210,269.65 in prejudgment interest at the rate of ten percent per annum, for a total judgment of $29,642,393.10. The judgment also awarded postjudgment interest at the rate of ten percent. In post-judgment motions, Formosa sought an adjustment of the prejudgment interest awarded in the judgment to reflect settlement credits. The trial court refused.

This appeal ensued. Formosa presents nine issues. The majority sustains the third issue, reverses and remands. For the reasons stated below, I would affirm the judgment.

II. DISPOSITION

A. The Evidentiary Issues

In the second part of issue three, Formosa asserts that the trial court abused its discretion in denying

its challenge to Kajima's expert, arguing that the expert's methodology was unreliable. In the first part of issue three, Formosa also claims that the trial court should have struck the expert because of a disqualifying "side-switching" conflict of interest. In issue five, Formosa challenges the trial court's exclusion of evidence that Kajima caused a portion of its own damages by underbidding the contracts and other "self-inflicted" losses.

1. The Expert Witness Challenges

a. Reliability

Formosa asserts that the opinions of Kajima's expert witness, A. W. "Chip" Hutchison, are unreliable. Relying on Robinson and its progeny, Formosa contends that Hutchison's method of formulating his opinions, to which the expert referred as the "Hutchison Method," is idiosyncratic and not accepted within the construction industry. See E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 554 (Tex. 1995). Kajima acknowledges that the expert used the term "Hutchison Method" in promotional materials to describe his methodology. However, Kajima argues, Hutchison did not testify in the 2002 trial about delay causation, which is the area of expertise to which Formosa directs its argument, but only about the value of the work Kajima performed for Formosa. Kajima notes that Formosa fully cross-examined Hutchison and challenged his damages calculations. In any event, Kajima contends, Formosa did not challenge Hutchison's qualifications, based on his education and extensive experience in the construction industry, to render an opinion about the value of the work performed by Kajima. By not raising the issue in the trial court, Kajima concludes, Formosa waived its challenge on appeal to the reliability of Hutchison's opinions regarding Kajima's damages. I note that on appeal, Formosa does not challenge Hutchison's credentials or expertise or otherwise assert that Hutchison was unqualified or that his opinions were not relevant. Rather, Formosa asserts that Hutchison's opinions were not based on a reliable foundation.

(1) Standard of Review and Burden of Proof

Rule 702 of the Texas Rules of Evidence governs the admissibility of expert testimony. See Tex. R. Evid. 702; Robinson, 923 S.W.2d at 554. Rule 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." Tex. R. Evid. 702; Tamez v. Mack Trucks, Inc., 100 S.W.3d 549, 554 (Tex. App.--Corpus Christi 2003, pet. granted). The expert must be qualified to render the proffered opinions. Id. at 556. The testimony also must be relevant and based on a reliable foundation. Id. Once the opposing party objects to proffered expert testimony, the proponent of the witness's testimony bears the burden of demonstrating its admissibility. Id. at 557.

To meet this burden, the proponent must demonstrate that: (1) the expert is qualified; and (2) the expert's testimony is relevant and reliable. See Robinson, 923 S.W.2d at 556. These are threshold

issues the trial court determines under rule 104(a) before admitting the testimony. See Tex. R. Evid. 104(a); Robinson, 923 S.W.2d at 556. In this regard, the trial court acts as a "gatekeeper." Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 726 (Tex. 1998). We review a trial court's preliminary determination of the admissibility of expert witness testimony under an abuse-of-discretion standard. Guadalupe-Blanco River Auth. v. Kraft, 77 S.W.3d 805, 807 (Tex. 2002); Tamez, 100 S.W.3d at 554.

(2) Reliability Scope of Review

I note that Formosa objected to the reliability of Hutchison's opinions before, during, and after both the 1997 and the 2002 trials. The record before us consists of Hutchison's 1997 affidavit as well as testimony in multiple proceedings, including both trials.[9] The trial court took judicial notice of the prior proceedings, including a Robinson hearing, during the 2002 trial. This Court has not had occasion to determine the scope of our review in examining a trial court's exercise of discretion in performing its gatekeeping function with regard to expert testimony. Two of our sister courts of appeals have concluded that an appellate court examines the record as a whole when reviewing the trial court's preliminary admissibility determinations under rule 104(a). In re J.B., 93 S.W.3d 609, 619-20 (Tex. App.--Waco 2002, pet. denied); accord State Farm Fire & Cas. Co. v. Rodriguez, 88 S.W.3d 313, 320 (Tex. App.--San Antonio 2002, pet. denied) ("The record as a whole shows that [the expert's] opinions are grounded in scientific method and procedure and amount to more than subjective belief or unsupported speculation."). On this record, in light of the multiple proceedings in which Hutchison's testimony was both offered and cross-examined, I would hold that the scope of our review of the reliability of his opinions encompasses the complete record. See In re J.B., 93 S.W.3d at 619-20; see also State Farm Fire & Cas. Co., 88 S.W.3d at 320.

(3) Reliability Analysis

In his affidavit, Hutchison stated: "In the Kajima/Formosa litigation, my firm has spent the past three years analyzing approximately one million pages of project-related records." He explained his methodology:

The methodology that is generally accepted as the most appropriate approach to use to evaluate an industrial project is called the "as-released" method. This methodology has been subject to peer review and scrutiny for many years. For the past 17 years, my area of specialization has been the analysis of industrial construction jobs and the quantification of damages that involve delays, acceleration, disruption and productivity losses. The "as-released" approach is widely used for both litigation and non-litigation construction management purposes. Courts have reviewed the methodology applied in this case, and have found that it was both logical and reasonably calculated to reflect the extent of delays and causation for such delays. . . . The general approach that I used in analyzing the delay, related acceleration and extra work on all five jobs at issue in this is the "as-released" method. . . . The approach which we have used to evaluate this case has been used

countless times in analyzing industrial projects. It has been used outside the litigation context on a number of occasions, including (1) University of North Carolina Cogeneration Facility in Chapel Hill, (2) Vetrotex Certainteed plant in Wichita Falls, Texas, (3) Westinghouse Saraville facility in Saraville, New Jersey, (4) Dallas Civil Center, and (5) Fort Worth Sewage Treatment facility. The approach I described above is utilized in management of projects as well as analysis of claims after the projects have been completed. This approach is the only effective method used in analyzing complex industrial projects by engineers and consultants who specialize in that endeavor. At one Robinson hearing, Hutchison testified the "as-released" method "is something that's about, I would say, 20 years old, 17 years old. It has been around a long time and is new in relation to construction but not new in terms of its use in forecasting and in evaluating project delay and work restriction." After developing Hutchison's qualifications through education and extensive experience in the construction industry (which Formosa has not challenged), Kajima established Hutchison's expertise with regard to evaluating construction delays:

Q: Okay. Now, your company does construction management and analysis of delays and what causes delays on large industrial projects?

A: Yes, sir.

Q: Okay. As part of what you do, do you determine why delays occur?

A: Yes, sir.

Q: That's what people hire you to do?

A: It is.

Q: And are you hired usually to determine who or what causes the delays?

A: I am.

Q: Do you determine how much those delays cost?

A: I do, yes, sir.

Q: And what is the process of determining how much the delays cost? What's the method that you go through to determine that?

A: Quantification of damages, which is what I call what it costs, which is to go into the project records and to look at how the money was expended and to study the crude composition of the job and to see how crews were used and to see what conditions this labor was subjected is part and

parcel of evaluating why projects cost more than they are planned to cost.

The first step in any analysis is to find out what is the estimate, what should it cost, what is the -- what is the normal cost to accomplish this work.

The next is to identify what are the additional tasks. In some cases, it is a very easy, discrete exercise of simply looking at extra work, such as the double jointing of pipe on this project. In other cases, it has to do with phenomenon associated with overcrowding or overtime or congestion or dilution of supervision, all concepts which have been around in construction for years and years and years and have been evaluated by our firm for the past 17 years but have been evaluated by many different experts and authorities over that time.

Q: How many years have you personally spent analyzing causes of delays and quantification of the cost of those delays on large industrial projects like the Formosa job?

A: For the past 17 years.

Q: That's what you do for a living?

A: That's what I do for a living.

However, at the 2002 trial, as Kajima points out, the basis for Hutchison's opinions consisted of Formosa's documents, including internal memoranda, not the expert's "as-released" methodology. Hutchison testified:

Q: Mr. Hutchison, to keep in perspective what's at issue in this case, one of the questions that the jury's going to be asked . . . is did Formosa commit fraud against Kajima?

A: Yes, sir.

Q: Now, one of the things that we're going to want to be looking at and I think it's agreed that it's important is what did Formosa know before Kajima signed its contracts. And have you seen any evidence in this record that Formosa knew that these drawing problems existed and that Kajima would have the very types of problems that it had on this job and that they knew that before Kajima signed its contract?

A: Yes, sir, I have. And that's really the unbelievable part of this, is that Formosa knew it and they still let this job go forward.

Q: Now, do you base that on the Formosa internal memos that you've seen that were written before Kajima signed its contract?

A: Yes, sir.

Hutchison's 2002 trial testimony shows that Hutchison did not testify to any opinion regarding application of the "as-released" methodology in determining causation for the construction delays alleged by Kajima to have been caused by Formosa. In arguments to the trial court, Formosa acknowledged that Hutchison did not discuss "the 'as built' or the Hutchison Method that he made so much of at the last trial having anything to do with fraud damages." Rather, Hutchison arrived at his opinions by applying his knowledge, skill, experience, training, and education to his review of relevant construction documents. He then testified to a summary of his review of the documents as the basis for his opinions. See Tex. R. Evid. 1006. I conclude that Hutchison's opinions regarding Formosa's culpability for fraud and the value of Kajima's work on the project were based on his education and extensive experience in the construction industry, not on the "as-released" methodology challenged by Formosa in this appeal. Accordingly, I do not find any "analytical gap" between Hutchison's testimony and the basis for his opinions, nor do I find his opinions to be "subjective belief or unsupported speculation." See Gammill, 972 S.W.2d at 726. I would hold that the trial court did not abuse its discretion in determining that Hutchison's testimony met the threshold reliability requirements of rule 702. See Tex. R. Evid. 702. I would overrule the second part of Formosa's third issue.

b. Conflict of Interest

(1) The "Side-Switching" Issue

Formosa's attempt to disqualify Kajima's expert witness because of "side-switching" presents an issue of first impression in Texas. The parties agree that Kajima retained Hutchison as an expert witness. Hutchison was associated with Steve Huyghe, an expert witness initially consulted by Formosa. Formosa asserts that: (1) it disclosed confidential information to Huyghe; (2) Huyghe actually disclosed those confidences to Hutchison; or (3) Huyghe is presumed conclusively to have disclosed Formosa's confidences to Hutchison because of their association.

Kajima responds that: (1) Kajima did not retain Huyghe, who was an employee of a corporation that is a separate entity from the corporation that employed Hutchison, and Formosa did not retain Hutchison; (2) Formosa did not disclose any confidential information to Huyghe; (3) even if Formosa did disclose confidential information to Huyghe, knowledge of that information cannot be imputed to Kajima's testifying expert merely because Huyghe was employed by a corporation controlled by Hutchison; (4) even if Formosa disclosed confidential information to Huyghe, the information was subject to discovery because Formosa's own testifying expert witness reviewed Huyghe's work product; and (5) Formosa did not formally retain Huyghe and did not sign a retention agreement provided by Huyghe that included a confidentiality and non-disclosure clause, thus waiving any claim now that the information it provided to Huyghe was confidential.

Formosa counters that: (1) Hutchison controlled both A. W. Hutchison & Associates of California, Inc. ("AWH-C"), which was the California corporation that employed Huyghe, and A. W. Hutchison & Associates, Inc. ("AWH"), which was the Georgia corporation that employed Hutchison; and (2) the two corporations merged prior to trial. I turn first to determining the standard and scope of review applicable to this analysis.

(2) Expert Disqualification Standard and Scope of Review

No Texas court has set out the legal standards by which we must analyze Formosa's motion to strike Kajima's expert for a disqualifying conflict of interest. As noted above, the abuse-of-discretion standard applies to appellate review of the trial court's preliminary determinations of expert qualifications and the relevance and reliability of the expert's testimony. Kraft, 77 S.W.3d at 807; Tamez, 100 S.W.3d at 554. I also note that we apply an abuse-of-discretion standard in reviewing attorney disqualification motions. Metro. Life Ins. Co. v. Syntek Fin. Corp., 881 S.W.2d 319, 321 (Tex. 1994). Specifically, this Court has reviewed under an abuse-of-discretion standard an attorney disqualification motion that alleged the sharing of confidential information between counsel for co-defendants. See Rio Hondo Implement Co. v. Euresti, 903 S.W.2d 128, 132 (Tex. App.--Corpus Christi 1995, orig. proceeding) ("We review the trial court's finding that confidential information was or was not shared under an abuse of discretion standard."). Thus, only for purposes of determining the standard of review to apply to Formosa's conflict-of-interest challenge to Kajima's expert, I analogize to the standards associated with appellate review of a trial court's ruling on an attorney disqualification motion. Accordingly, I would hold that an abuse-of-discretion standard applies to our review of the trial court's denial of Formosa's motion to strike Kajima's expert because of a disqualifying conflict of interest. See Kraft, 77 S.W.3d at 807; see also Rio Hondo Implement Co., 903 S.W.2d at 132.

Further, I already have determined, given the procedural posture of this case, that the scope of appellate review of Formosa's challenge to the reliability of Kajima's expert's opinions encompasses the record as a whole. I have found no authority restricting the scope of review of Formosa's conflicted-expert issue. Accordingly, I would also hold that Formosa's motion to strike Kajima's expert because of a disqualifying conflict of interest encompasses the record as a whole, including documents submitted to the trial court in camera.

(3) The "Side-Switching" Facts

In June of 1993, Huyghe called on Formosa and offered the services of AWH-C to assist in Formosa's litigation with Kajima. Huyghe met with Formosa's in-house counsel. Huyghe also met with Formosa's outside counsel. He confirmed the meeting in a letter dated June 14, 1993 in which he referenced prior work AWH-C had performed for Kajima:

As we briefly discussed, we have a working knowledge of Kajima and the Japanese way of doing

business as a result of our involvement in their Fuji Photo Film Processing Plant project, among others for Japanese clients over the past five years, and this could be advantageous should negotiations occur.

From June through December of 1993, Huyghe and other AWH-C employees met with Formosa's outside counsel and reviewed, organized, and indexed more than sixty boxes of documents produced by Kajima to Formosa in discovery. Formosa did not seek any confidentiality or non-disclosure agreement with AWH-C before outside counsel met with AWH-C staff or before they transmitted documents to Huyghe. The lawyer who was the primary contact for Huyghe testified:

[I]t wasn't so urgent for us to enter into a confidentiality agreement with him. We've used him as an expert before. We certainly don't feel like that he is green as far as knowing what goes on in these kinds of situations. And, therefore, it just isn't -- it wasn't necessary for us to enter into a confidentiality agreement with him before we disclosed confidential information.

The law firm did not ask Huyghe to agree to maintain Formosa's confidentiality. Huyghe submitted bills totaling $22,350.11, including $8,493.50 for a proposed task list, $7,549.50 for clerical indexing, and $6,307.11 in reimbursable expenses.[10] Invoices detailing the work show a total of 13.5 hours for "discussion with client/counsel" out of a total of 167.5 billed hours. On October 19, 1993, Huyghe submitted a retention agreement for completion of the proposed task list to Formosa's outside counsel. The retention agreement included a confidentiality and non-disclosure clause:

All such services and the resultant work product shall remain privileged and confidential and shall not be disclosed to any person or party except as may be required to carry out and complete this project or as may be compelled by any law, regulation, rule, order, ordinance, court or administrative or legislative body of competent jurisdiction. Upon completion of this project and payment in full to AWH of all of its fees charged and expenses incurred in connection with this engagement, the foregoing non-disclosure obligation shall terminate.

In a letter marked "Privileged and Confidential" and also dated October 19, 1993, Huyghe submitted a proposed budget estimate of $340,000.00 to $400,000.00. The estimate expressly excluded "preparation for or the provision of expert testimony."

Meanwhile, Formosa changed outside counsel in December of 1993. New counsel met with Huyghe on December 3, 1993. Huyghe provided the new lawyers a copy of the indices AWH-C had prepared of the Kajima documents. The expert solicited retention on the remainder of the work, representing that Hutchison would be available to testify as an expert. However, instead of retaining Huyghe, Formosa's new counsel instructed Huyghe not to do any further work. By letter in April of 1994, Formosa's new law firm confirmed with Huyghe that AWH-C's services were no longer needed:

After we spoke last week I visited with Ken Alexander about Hutchison's role in the above

referenced case. The net result is that you should consider yourself indefinitely on "hold".

Although I would be happy to listen to your presentation if you are ever in Houston, we do not need to use your services at this time. If and when the circumstances change, I will contact you. The letter did not mention confidentiality or non-disclosure. On April 15, 1994, Huyghe confirmed with Formosa's new counsel that the Formosa work was "on hold."

In August of 1994, Kajima's counsel approached Huyghe about consulting with Kajima in this lawsuit. Huyghe informed Formosa's former counsel of the contact and potential retention. Formosa's former counsel testified:

He had called me and told me that he was -- had been approached by Kajima to represent or to be an expert for Kajima and did I think that that was going to be a problem based on the amount of work that they had done for us. And, I told him that I thought that it could be, that we were no longer the attorney for Formosa, and that I would talk to the partners in my firm, which I did. Mr. Huyghe and I had one other conversation about it. He told me that the conversations that he had had with Kajima had been very cursory, that they had just been approached by it, that he thought they were talking to some other people, wasn't sure they'd even be retained and there wasn't any sense in going in and kind of stirring up the hornets' nest until he found out if they were going to be retained. I told him that I thought he ought to contact [Formosa's new counsel], because [they] were now their attorney, and he ought to find out whether or not that was going to be a conflict. . . . I told him that I thought he'd been too involved in this case and I probably said knew some things that I thought it would make it difficult for him to represent the other side.

There is no evidence in the record of any actions taken at that time by Formosa's former counsel or by Formosa in response to Huyghe's disclosure of the contact by Kajima. Huyghe did not contact Formosa's new counsel regarding Kajima's approach. Nor did Formosa's new counsel contact Huyghe.

On August 9, 1994, Kajima's counsel sent a letter to Huyghe confirming their initial discussions:

As we discussed, we want to be absolutely certain and comfortable with the fact that there is no conflict of interest on your part. Based on the facts that you described to me, I do not believe that there would be.

As we also discussed, I would like you to be sure to review your files and speak to all those involved in your preliminary discussions with Formosa's prior counsel to make sure that there is nothing that would remotely suggest the existence of conflict.

I am in the process of preparing a conflict certification for you to sign which will basically certify that there is no conflict of interest, that you have not received any confidential information from

Formosa and that you agree to keep all information provided to you by Kajima in connection with this matter confidential. The record also contains a "Conflict Certification," in affidavit form, dated August 11, 1994 and signed by Huyghe as president of A. W. Hutchison & Associates, Inc. In the "Conflict Certification," Huyghe attested:

I hereby certify that A. W. Hutchison & Associates, Inc. has not received any confidential information from any Formosa entity or from its counsel related in any manner to this litigation. The "Conflict Certification" further represented:

I hereby further certify that A. W. Hutchison & Associates, Inc. has not prepared any analysis of damages in this case for Formosa and had not been hired by Formosa in this case to act as an expert witness.

In late September 1995, Kajima disclosed in discovery responses to Formosa that it had hired Hutchison as an expert witness. On October 4, 1995, Formosa filed its motion to strike the expert for "side-switching." At that time, Huyghe provided to Kajima's counsel copies of letters and billings between AWH-C and Formosa's counsel. After a hearing, the trial court denied the motion to strike.

(4) The Burden of Proof of Confidentiality and Non-Waiver

Generally speaking, the party asserting that information disclosed to a third party is protected by the attorney-client privilege has the burden of proving no waiver occurred in communicating the information to the third party. See Jordan v. Fourth Court of Appeals, 701 S.W.2d 644, 649 (Tex. 1985) (orig. proceeding). In the context of expert disqualification based on "side-switching," courts in other jurisdictions have held that the party seeking disqualification bears the burden of establishing both the existence of confidentiality and its non-waiver. See, e.g., United States ex rel. Cherry Hill Convalescent Ctr., Inc. v. Healthcare Rehab Sys., Inc., 994 F. Supp. 244, 249 (D. N.J. 1997); Cordy v. Sherwin-Williams Co., 156 F.R.D. 575, 580 (D. N.J. 1994); English Feedlot, Inc. v. Norden Labs., Inc., 833 F. Supp. 1498, 1501-02 (D. Colo. 1993). Accordingly, Formosa bears the burden of establishing both the existence of confidentiality in its consultation with Huyghe and its non-waiver of any confidentiality that attached to the information it conveyed to the expert or to the expert's work product. See Jordan, 701 S.W.2d at 649.

Waiver occurs when a party either intentionally relinquishes a known right or engages in intentional conduct inconsistent with claiming that right. See Tenneco, Inc. v. Enter. Prod. Co., 925 S.W.2d 640, 643 (Tex. 1996); Sun Exploration & Prod. Co. v. Benton, 728 S.W.2d 35, 37 (Tex. 1987). A party may expressly renounce a known right and waive it. See Tenneco, Inc., 925 S.W.2d at 643. A party's silence or inaction, for so long a period that it shows an intention to yield the known right, is also enough to prove waiver. See id. I first determine if Formosa met its burden of proving non-waiver.

(5) Waiver Analysis

Formosa had at least five opportunities to establish with Huyghe that AWH-C and Huyghe were to maintain the confidentiality of any information acquired and work product generated on Formosa's behalf. First, Formosa's in-house counsel could have addressed the confidentiality issue when Huyghe initially solicited the consultation from Formosa. In-house counsel did not. Second, Formosa's outside counsel could have insisted on confidentiality when Huyghe met with Formosa's first set of lawyers. Outside counsel did not. This omission is particularly significant in light of Huyghe's letter to outside counsel confirming that AWH-C had been involved in another Kajima project to the extent that its "working knowledge of Kajima . . . could be advantageous should negotiations occur." The solicitation letter evidences Formosa's knowledge, throughout the course of this litigation, of a previous working relationship between the expert and Kajima. Third, Formosa's counsel could have insisted on confidentiality when they transmitted documents to Huyghe for analysis and when they received the indices and other documents that comprised AWH-C's work product. Again, Formosa's initial outside counsel did not. Fourth, at the time Formosa's new counsel declined any further services and instructed Huyghe to put the work "on hold," counsel could have instructed Huyghe that Formosa considered confidential all information AWH-C and Huyghe had received and all work product generated on Formosa's behalf. Formosa's new outside counsel did not. This omission is particularly significant in light of Formosa's rejection of Huyghe's retention agreement, which contained an express confidentiality and non-disclosure clause and, in fact, provided that any duty of non-disclosure terminated when the consultation concluded. Finally, when Huyghe reported the initial contact by Kajima, Formosa or its counsel could have objected specifically to any retention of Hutchison by Kajima and unequivocally asserted the confidentiality of any information AWH-C received or work product it generated. No one did. AWH went on to accept Kajima's retention and ultimately performed thousands of hours of work and billed almost a million dollars in consulting fees in this litigation.

I note that some cases that address the "side-switching" of experts suggest an obligation on the part of the expert to "take care to avoid conduct that contributes to a lack of clarity about the relationship." See, e.g., Wang Labs., Inc., v. Toshiba Corp., 762 F. Supp. 1246, 1250 (E.D. Va. 1991). Nonetheless, as noted by one of the cases relied on by Formosa, the primary burden remains with the attorney to establish a reasonable basis for concluding that the expert understood the confidential nature of the relationship. Paul v. Rawlings Sporting Goods Co., 123 F.R.D. 271, 279 (S.D. Ohio 1988). The Paul court reasoned:

Of the two participants in an attorney-expert relationship. . . , the attorney, being an expert in legal matters, should be more aware both of the potential for privileged information to pass to the expert, and for the need to insure [sic] against such information finding its way into the hands of an adversary. Consequently, [it is not] unfair to place the burden of making sure that the expert understands the type of relationship which exists, and the need to keep information disclosed during the course of that relationship confidential, on the attorney in the first instance. Id.

Further, Formosa does not dispute that it provided the document indices created by AWH-C to its

testifying expert. The facts known to an expert and underlying the expert's mental impressions and opinions related to a case are discoverable "regardless of when and how the factual information was acquired." Tex. R. Civ. P. 192.3(e)(3); see Aetna Cas. & Sur. Co. v. Blackmon, 810 S.W.2d 438, 440 (Tex. App.--Corpus Christi 1991, orig. proceeding) (holding that designation of party employee as testifying expert waived attorney-client, work product, and party communication privileges as to the privileged information the expert relied on in forming mental impressions and opinions related to case).

Accordingly, I would hold that Formosa has not met its burden of proving non-waiver of its claim of confidentiality over the information it provided to and the work product created by Huyghe and AWH-C. See Jordan, 701 S.W.2d at 649; see also Mitchell v. Wilmore, 981 P.2d 172, 176 (Colo. 1999) (citations omitted) ("The discussion of mere technical information about a case does not meet a party's burden under this framework. Nor is disqualification [of an expert] appropriate where the confidentiality of the information has been legally waived or if the information claimed to be confidential is actually routinely discoverable.").

I would overrule the first part of Formosa's third issue. Having found that Formosa did not meet its burden of proving non-waiver, I would not address whether the information provided by Formosa to Huyghe was confidential or whether Huyghe actually or conclusively is presumed to have shared confidential information with Hutchison.[11] See Tex. R. App. P. 47.4.

2. Evidence of Mitigation

a. The Issue on Appeal

In its fifth issue, Formosa asserts that the trial court erred in excluding evidence that Kajima, not Formosa, caused much of its own losses. Formosa relies on Arthur Anderson & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 817 (Tex. 1997):

We emphasize that a plaintiff's recovery of damages is limited not only by his own evidence, but also by the defendant's evidence of the plaintiff's failure to reasonably mitigate losses or evidence of intervening causes. If a plaintiff's losses are attributable to his own mistakes or factors outside either of the parties' control, the defendant may be entitled to an appropriate limiting instruction to the jury. Id. (citations omitted). Formosa contends that it properly pleaded the defense of mitigation, but the trial court refused, over Formosa's objection, to permit development of evidence of Kajima's "self-inflicted" losses to the jury. Formosa argues that the trial court repeatedly prohibited it from examining witnesses about Kajima's bid omissions and other mitigating causes that inflated Kajima's damages. Specifically, Formosa attempted at trial to cross-examine Hutchison about how he accounted for Kajima's bid omissions when he prepared his damages calculations. However, the trial court sustained Kajima's objections to the questions because the court agreed that the bid omissions were irrelevant to the reasonable value of Kajima's work. See Formosa Plastics Corp. USA v. Presidio

Eng'rs & Contrs., 960 S.W.2d 41, 49-50 (Tex. 1998).

Kajima argues that the trial court concluded that mitigation evidence was not relevant after Kajima nonsuited its contract claims. The proper fraud measure of damages, Kajima maintains, is out-of-pocket loss, or the difference between the reasonable value of the work Kajima performed and what it received. Bid omissions do not factor into the fraud measure of damages, Kajima concludes.

Formosa also contends that the trial court abused its discretion in excluding testimony of other causes of Kajima's losses, such as mismanagement, overcharges, and theft by Kajima personnel. Kajima responds that the party who caused a loss bears the burden of proving lack of diligence on the part of the plaintiff as well as the amount by which the damages were increased by the failure to mitigate. See Lester v. Logan, 893 S.W.2d 570, 577 (Tex. App.--Corpus Christi 1994, writ denied). Kajima argues that Formosa does not in its brief cite to any evidence showing an increase in the amount of damages created by Kajima's failure to mitigate.

b. The Evidentiary Standard of Review

The trial court determines preliminary questions about admitting or excluding evidence. Tex. R. Evid. 104(a). Whether to admit or exclude evidence is a matter committed to the trial court's sound discretion. State v. Bristol Hotel Asset Co., 65 S.W.3d 638, 647 (Tex. 2001). A trial court abuses its discretion when it acts without regard to any guiding rules or principles. Id. (citing Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241-42 (Tex. 1985)).

c. Mitigation Analysis

(1) Evidence of Bid Omissions

In support for its position that bid omissions were not relevant to the fraud measure of damages, Kajima cites Presidio, which held:

[T]he out-of-pocket measure only compensates for actual injuries a party sustains through parting with something, not loss of profits on a bid not made, and a profit never realized, in a hypothetical bargain never struck. Thus, the $1.3 million hypothetical bid less the $600,000 actually received is not probative of Presidio's out-of-pocket loss. The proper out-of-pocket calculation of damages, based on Burnette's testimony, was $831,000 less the amount he actually received, $600,000, for damages of $231,000. Presidio, 960 S.W.2d at 49-50 (footnote omitted). Applying Presidio's logic to the facts of this case, I would hold that the trial court did not abuse its discretion in excluding evidence of Kajima's bid omissions. See id.

(2) Other Evidence of Mitigation

To preserve an error related to exclusion of the testimony of a witness, a party must offer proof or a formal bill of exceptions. Tex. R. App. P. 33.2; Tex. R. Evid. 103(a)(2). In that offer or bill, the party must specify what the proffered witness would testify to if allowed to testify. Tex. R. Evid. 103(a)(2). Only by such measures may the failure to allow testimony be preserved. Fletcher v. Minn. Mining & Mfg. Co., 57 S.W.3d 602, 606-07 (Tex. App.--Houston [1st Dist.] 2001, pet. denied). In this case, Formosa submitted offers of proof of the testimony of a number of witnesses. However, Formosa does not cite in its briefs to any record in its offers of proof where it developed evidence of damages. See Tex. R. App. P. 38.1(h). Having examined each of the offers of proof and finding no evidence of the amount by which Formosa claims Kajima increased its own damages, I would hold that Formosa did not preserve error over its challenge to the trial court's exclusion of testimony of other causes of Kajima's damages. See Fletcher, 57 S.W.3d at 606-07. Accordingly, I would overrule Formosa's fifth issue. See Rivas v. Cantu, 37 S.W.3d 101, 118 (Tex. App.--Corpus Christi 2000, pet. denied) (noting that "out-of-pocket measure computes the difference between the value paid and the value received"); see also Duperier v. Tex. State Bank, 28 S.W.3d 740, 754 (Tex. App.--Corpus Christi 2000, pet. dism'd by agmt.) (noting that "injured party in a fraud case has no duty to minimize damages resulting from the fraud" in holding that mitigation is no defense to violation of Texas Securities Act).

I turn to Formosa's challenge to the trial court's partial summary judgment on single-business-enterprise grounds.

B. Single-Business-Enterprise Partial Summary Judgment

1. The Issue on Appeal

In the first part of issue seven, Formosa asserts that the trial court's granting of Kajima's traditional motion for summary judgment that Formosa USA and Formosa Texas operated as a single business enterprise was error. Formosa contends that actual fraud is required for a finding of a single business enterprise. See Tex. Bus. Corp. Act Ann. art. 2.21(A)(2) (Vernon 2003) (prohibiting imposition of liability on corporate affiliate in absence of showing that affiliate caused corporation to be used for purpose of perpetuating and did perpetuate actual fraud primarily for direct personal benefit of affiliate). Formosa argues that Kajima did not submit summary-judgment evidence that Formosa USA and Formosa Texas engaged in a single business enterprise to perpetrate fraud. Kajima responds that proof of fraud is not required to recover on a single-business-enterprise finding. See N. Am. Van Lines, Inc. v. Emmons, 50 S.W.3d 103, 119 (Tex. App.--Beaumont 2001, pet. denied).

Formosa also asserts that whether a single business enterprise exists presents a fact issue for the jury. See Castleberry v. Branscum, 721 S.W.2d 270, 277 (Tex. 1986). Kajima responds that the trial court properly determined the single-business-enterprise issue as a matter of law. See Allright Tex., Inc. v. Simons, 501 S.W.2d 145, 150 (Tex. Civ. App.--Houston [1st Dist.] 1973, writ ref'd n.r.e.); see also Murphy Bros. Chevrolet Co. v. E. Oakland Auto Auction, 437 S.W.2d 272, 276 (Tex. Civ. App.--El Paso 1969, writ ref'd n.r.e.).

Formosa further contends that its summary-judgment evidence raised a material fact issue as to whether Formosa USA and Formosa Texas operated as a single business enterprise. Kajima counters that Formosa's summary-judgment evidence did not raise any issue of material fact, arguing that the only summary-judgment evidence Formosa submitted did not identify any relevant time period.

2. The Summary-Judgment Standard of Review

The standard of review for the grant of a motion for summary judgment is determined by whether the motion was brought on no-evidence or traditional grounds. See Tex. R. Civ. P. 166a(i), (c); see also Ortega v. City Nat'l Bank, 97 S.W.3d 765, 771 (Tex. App.--Corpus Christi 2003, no pet.) (op. on reh'g). We review de novo a trial court's grant or denial of a traditional motion for summary judgment. Ortega, 97 S.W.3d at 772. The movant bears the burden of showing both no genuine issue of material fact and entitlement to judgment as a matter of law. See Tex. R. Civ. P. 166a(c); see also Ortega, 97 S.W.3d at 771. In deciding whether there is a genuine issue of material fact, we take evidence favorable to the non-movant as true. Ortega, 97 S.W.3d at 771. We make all reasonable inferences and resolve all doubts in favor of the non-movant. Id.

3. The Summary-Judgment Evidence

Kajima presented summary-judgment evidence that agents of Formosa USA represented to Kajima that Formosa USA owned the Point Comfort facility. Kajima also presented summary-judgment evidence that Formosa Texas is the owner of record of the facility, even though it had no authority over the construction of its plant. Other summary-judgment evidence showed that Formosa Texas had no power to approve construction change orders in excess of $5,000.00. A change order in excess of $50,000.00 had to be approved by Formosa USA's executive vice-president, Susan Wang, who also was Formosa Texas's executive vice-president. All change orders more than $5,000.00 but less than $50,000.00 had to be approved by Formosa USA's assistant vice president, L.F. Pan. Kajima also presented summary-judgment evidence that Glenn Dobbs, an employee of Formosa Texas, performed bid analyses for Formosa USA on the Point Comfort construction project. Other evidence established that the principal place of business for Formosa USA during the contract negotiation and construction phases of the Point Comfort project was 9 Peach Tree Hill Road, Livingston, New Jersey 07039, which also was Formosa Texas's designated principal office address during that time. Also during the contract negotiation and construction phases of the Point Comfort project, Robert Hsueh and Simon Chang, both employees of Formosa Texas, reported to L.F. Pan, employed by Formosa USA. The director of legal services for Formosa Texas, Camp Mehrens, reported to Jack Wu, an officer of both Formosa Texas and Formosa USA. Another employee, Jack Huang, testified he was not sure if he worked for Formosa USA or Formosa Texas on the Point Comfort project. Yet another employee, Jeff Tseng, testified he did not understand the differences between Formosa USA and Formosa Texas.

As its summary-judgment proof, Formosa presented a two-page affidavit that identified the affiant,

Alice Nightingale, as the corporate secretary for Formosa USA and Formosa Texas since January 10, 1992. Nightingale's affidavit is dated December 11, 2001. Nightingale stated that Formosa Texas and Formosa USA: (1) have separate principal business addresses; (2) have separate telephone numbers; (3) file separate state franchise tax returns; (4) contract for purchases and sales separately; and (5) maintain separate real property ownership. The affidavit does not recite that the facts were true and correct during the contract negotiation and construction phases of the Point Comfort project.

4. The Law of Single Business Enterprise

Separate corporations operate as a single business enterprise when they do not operate as separate entities but rather integrate their resources to achieve a common business purpose. Paramount Petroleum Corp. v. Taylor Rental Ctr., 712 S.W.2d 534, 536 (Tex. App.--Houston [14th Dist.] 1986, writ ref'd n.r.e.); see also Gardemal v. Westin Hotel Co., 186 F.3d 588, 594 (5th Cir. 1999). Each constituent corporation may be held responsible for the liabilities of the other if they operate as a single business enterprise. Paramount Petroleum Corp., 712 S.W.2d at 536; Gardemal, 186 F.3d at 594. Elements relevant to a finding of a single business enterprise include: (1) common employees; (2) common offices; (3) centralized accounting; (4) payment of wages by one corporation to another corporation's employees; (5) common business name; (6) services rendered by employees of one corporation on behalf of another corporation; (7) undocumented transfers of funds between corporations; and (8) unclear allocation of profits and losses between corporations. Bridgestone Corp. v. Lopez, 131 S.W.3d 670, 682 (Tex. App.--Corpus Christi 2004, pet. filed) (citing El Puerto de Liverpool v. Servi Mundo Llantero S.A. de C.V., 82 S.W.3d 622, 637 (Tex. App.--Corpus Christi 2002, pet. dism'd w.o.j.) (op. on reh'g); Paramount Petroleum Corp., 712 S.W.2d at 536.).

5. Analysis of Single-Business-Enterprise Partial Summary Judgment

Proof of fraud as a separate element is not required to recover on a single-business-enterprise finding. "To recover under a finding of a single business enterprise, no proof of fraud is required; instead, the single business enterprise theory relies on equity analogies to partnership principles of liability." Bridgestone Corp., 131 S.W.3d at 682 (quoting Emmons, 50 S.W.3d at 119). The record supports Kajima's argument that the summary-judgment evidence it presented conclusively established as a matter of law that Formosa USA and Formosa Texas integrated their resources to achieve the common business purpose of completing the Point Comfort construction project. Kajima's summary-judgment evidence showed that during the contract negotiation and construction phases of the Point Comfort project: (1) Formosa USA and Formosa Texas had common employees; (2) Formosa USA and Formosa Texas had common offices; (3) the two corporations shared "Formosa" in their respective corporate names; (4) employees of one corporation rendered services for the other corporation; and (5) the two corporations had merged accounting functions to the extent they related to approval of construction change orders with regard to the project. See Bridgestone Corp., 131 S.W.3d at 682.

On the other hand, Formosa's summary-judgment evidence only provided evidence of the relationship between the two corporations on the date of the affidavit in 2001, not during the contract negotiation and construction phases of the project from 1991 through 1993. I note that the affidavit identifies Nightingale as an employee of both corporations, lending support to Kajima's position. Further, the affidavit establishes that Nightingale's tenure as a corporate secretary for the corporations did not begin until January 10, 1992, after the contract negotiation phase of the Point Comfort project began. Thus, Nightingale's affidavit did not raise any fact issue to controvert the commonalities between the two corporations during the contract negotiation and construction phases of the Point Comfort project shown by Kajima's summary-judgment evidence.

Accordingly, taking the summary-judgment evidence favorable to Formosa as true and making all reasonable inferences and resolving all doubts in Formosa's favor, I would hold that Kajima met its burden of showing both no genuine issue of material fact and entitlement to partial judgment as a matter of law on the issue of single business enterprise. See Tex. R. Civ. P. 166a(c); see also Ortega, 97 S.W.3d at 772. Thus, I would overrule the first part of issue seven.

C. The Jury Charge

1. The Alleged Charge Error

In a subissue within issue six, Formosa claims that the trial court abused its discretion in not instructing the jury on mitigation. Within issue seven, Formosa asserts that the trial court abused its discretion in instructing the jury that Formosa USA and Formosa Texas operated as a single business enterprise. Formosa also contends, in issue four, that the trial court abused its discretion in not charging the jury on ratification. In issue two, Formosa challenges the trial court's submission of a single broad-form fraud liability question rather than submission of a fraud liability question that required a jury finding as to each of the five contracts.

2. Charge Error Standard of Review

The standard of review for error in a jury charge is abuse of discretion. In re V.L.K., 24 S.W.3d 338, 341 (Tex. 2000); R & R Contrs. v. Torres, 88 S.W.3d 685, 696 (Tex. App.--Corpus Christi 2002, pet. dism'd). We accord the trial court broad discretion so long as the charge is legally correct. Hyundai Motor Co. v. Rodriguez, 995 S.W.2d 661, 664 (Tex. 1999). If a party timely raises a proper request that a matter be included in the jury charge, we cannot permit a judgment to stand when the trial court refuses to submit a valid theory of recovery or a vital defensive issue that the pleadings and evidence fairly present. Exxon Corp. v. Perry, 842 S.W.2d 629, 631 (Tex. 1992) (per curiam).

3. Instructions

When the trial court refuses to submit a requested instruction, the question on appeal is whether the

requested instruction was reasonably necessary to enable the jury to reach a proper verdict. R & R Contrs., 88 S.W.3d at 696 (citing Tex. Workers' Comp. Ins. Fund v. Mandlbauer, 34 S.W.3d 909, 912 (Tex. 2000) (per curiam)); see Tex. R. Civ. P. 277. A trial court has considerably more discretion in submitting instructions and definitions than it has in submitting questions. Ed Rachal Found. v. D'Unger, 117 S.W.3d 348, 364 (Tex. App.--Corpus Christi 2003, pet. filed) (en banc) (citing Harris v. Harris, 765 S.W.2d 798, 801(Tex. App.--Houston [14th Dist.] 1989, writ denied)).

a. Mitigation

I already have concluded that the trial court did not abuse its discretion in excluding evidence of Kajima's bid omissions as not relevant to Kajima's fraud claim. I also have concluded that Formosa did not preserve error by bill of exception or offer of proof of any increase in the amount of damages it contended Kajima caused by mismanagement, overcharges, theft, or other mitigating factors. I find that the evidence did not support submission of a mitigation instruction. See Elbaor v. Smith, 845 S.W.2d 240, 243 (Tex. 1992) (holding that trial court may refuse to submit jury question if no evidence warrants its submission). Formosa suggests that Hutchison's expert testimony that Kajima expended $3,330,547.00 in costs that did not add value to the project supported submission of a mitigation instruction. However, the amount of costs Kajima expended that did not add value to the project was a factor Hutchison took into account in calculating the reasonable value of the work Kajima performed. I conclude that a mitigation instruction was not reasonably necessary to enable the jury to reach a proper verdict. See R & R Contrs., 88 S.W.3d at 696. Accordingly, I would hold that the trial court did not abuse its discretion in refusing to instruct the jury on mitigation. See id. Thus, I would overrule Formosa's fourth issue.

b. Single Business Enterprise

An explanatory instruction is improper only if it is a misstatement of the law as applicable to the facts. D'Unger, 117 S.W.3d at 364. I already have concluded that Kajima met its burden of showing both no genuine issue of material fact and entitlement to partial judgment as a matter of law on the issue of single business enterprise. Thus, a single-business-enterprise instruction was reasonably necessary to enable the jury to reach a proper verdict. See R & R Contrs., 88 S.W.3d at 696. Accordingly, I would hold that the trial court did not abuse its discretion in instructing the jury to consider Formosa Texas and Formosa USA as a single business enterprise. See id. Thus, I would overrule the second part of issue seven.

4. Jury Questions

a. Ratification

Formosa contends it timely submitted a proper ratification jury question that instructed that ratification occurs when a defrauded party: (1) continues to accept benefits under the contract after it

became aware of the fraud or recognizes the contract is binding; (2) with full knowledge of the fraudulent act at the time of the ratification; and (3) intends to ratify the contract in spite of the fraud. See Fortune Prod. Co. v. Conoco, Inc., 52 S.W.3d 671, 676 n.1 (Tex. 2000). Formosa argues that the evidence showed that Kajima recognized in March 1992 that it would lose $25 million unless it cancelled the contracts and walked off the job. Kajima's decision to go forward even though it knew that it would cost $25 million to complete the contracts, Formosa argues, evidences Kajima's acknowledgment of the alleged fraud and constitutes ratification. Kajima responds that Formosa had the burden to produce evidence that Kajima acted with full knowledge of the fraud and of all material facts to entitle it to any ratification instruction. Formosa produced no such evidence, Kajima argues, because of the ongoing nature of the "string-along" fraud perpetrated by Formosa, that is, its post-contract assurances of payment for overages as inducement for continued performance. Accordingly, Kajima concludes, Formosa was not entitled to a ratification question. Kajima also asserts that Formosa's ratification question was not in the substantially correct form because it did not allow the jury to consider Formosa's post-contract fraud. Rather, Kajima argues, as submitted Formosa's ratification question invited the trial court to commit the same charge error we reversed and remanded for a new trial in Kajima I. See Kajima I, 15 S.W.3d at 291.

No general rule guides the analysis of what acts of ratification will or will not waive fraud in the inducement. Fortune Prod. Co., 52 S.W.3d at 678-79 (and cited authorities). I first note that the supreme court held in Fortune Prod. Co. that only the plaintiffs who continued to perform after the fraudulently induced contracts expired were precluded from recovering damages for the fraud. Id. at 680. On the other hand, the supreme court permitted recovery of fraud damages by those plaintiffs who continued to perform binding contracts for a stated term after they learned of the fraud that induced those contracts. Id. at 679. I conclude that ratification of fraud occurs if "the fraud no longer induce[s] the performance." Id. at 680. The burden was on Formosa to prove that Kajima had full knowledge of the ongoing fraud and made a voluntary, intentional choice to ratify the transactions in light of that knowledge. See Arroyo Shrimp Farm v. Hung Shrimp Farm, 927 S.W.2d 146, 153 (Tex. App.--Corpus Christi 1996, no writ). I find that Formosa introduced no evidence of a point at which its fraud no longer induced Kajima's performance so as to support submission of a ratification question. See Elbaor, 845 S.W.2d at 243. I would hold that the trial court did not abuse its discretion in refusing to charge the jury on ratification. See R & R Contrs., 88 S.W.3d at 696. I would overrule Formosa's fourth issue.

b. Broad-Form Fraud Question

In issue two, Formosa challenges the trial court's submission of a single broad-form fraud liability question rather than submission of a fraud liability question that required a jury finding as to each of the five contracts.[12] Formosa argues that the broad-form submission made it impossible for Formosa to challenge the legal or factual sufficiency of the evidence to support the jury's damages finding since the damages finding cannot be traced to any one contract. See Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378, 389 (Tex. 2000) ("When a single broad-form liability question erroneously commingles

valid and invalid liability theories and the appellant's objection is timely and specific, the error is harmful when it cannot be determined whether the improperly submitted theories formed the sole basis for the jury's finding."). Kajima responds that Casteel only prohibits the broad-form submission of separate theories of liability, not broad-form submission of only one theory of liability, in this case fraud. See id. Kajima also points out that the "law of the case" established by Kajima I mandated the broad-form submission. See Kajima I, 15 S.W.3d at 291. Formosa counters that our prior holding only required submission on remand of a jury question that permitted the jury to consider post-contract fraud as well as fraud in the inducement, not submission of a broad-form fraud liability question that did not differentiate between the contracts. However, our prior holding required the trial court to submit a broad-form fraud question that permitted the jury to take Formosa's post-contract fraud into account. See id. I would hold that the trial court did not abuse its discretion in refusing Formosa's submitted fraud question that required a liability finding as to each separate contract. See R & R Contrs., 88 S.W.3d at 696. I would overrule Formosa's second issue.

D. Sufficiency of the Evidence of Damages

In the second part of issue three, Formosa claims that Hutchison's opinions constitute no evidence of damages. Similarly, Formosa asserts as a subissue of issue six that Kajima's out-of-pocket losses could not have exceeded half of the amount the jury found. Focusing on the admittedly striking numerical sequence in the jury's damages finding of $15,432,123.45, Formosa asserts in issue one that the evidence is legally and factually insufficient to support the jury's award of fraud damages.

1. Sufficiency Standards and Scope of Review

Under a proper measure-of-damages instruction, a fact finder has the discretion to find damages within the range of evidence presented at trial. See Gulf States Utils. Co. v. Low, 79 S.W.3d 561, 566 (Tex. 2002). When an appellant challenges the legal sufficiency of a damages award, we consider only the evidence and inferences that support the fact finder's damages finding. See D'Unger, 117 S.W.3d at 354. We disregard all evidence and inferences to the contrary. Id. The appellant must show that the record presents no probative evidence to support the adverse finding. Croucher v. Croucher, 660 S.W.2d 55, 58 (Tex. 1983). The evidence is no more than a scintilla and, in legal effect, is no evidence "when the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence." Kindred v. Con/Chem., Inc., 650 S.W.2d 61, 63 (Tex. 1983). Conversely, more than a scintilla exists when the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 25 (Tex. 1994).

Unlike legal-sufficiency challenges, factual-sufficiency issues concede that the record presents conflicting evidence on an issue. Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co., 766 S.W.2d 264, 275 (Tex. App.--Amarillo 1988, writ denied). Like legal-sufficiency challenges, the standard of review on factual-sufficiency issues depends on the burden of proof at trial. Id. at 275. The party attacking a

finding on which an adverse party bore the burden of proof must show that the record presents "insufficient evidence" to support the finding. Gooch v. Am. Sling Co., 902 S.W.2d 181, 184 (Tex. App.--Fort Worth 1995, no writ). In reviewing an insufficient-evidence issue, we examine and consider all of the evidence, not just the evidence that supports the verdict, to see whether it supports or undermines the finding. Maritime Overseas Corp. v. Ellis, 971 S.W.2d 402, 406-07 (Tex. 1998). We set aside the finding for factual insufficiency if the "evidence adduced to support the vital fact, even if it is the only evidence adduced on an issue, is factually too weak alone to support it." See Ritchey v. Crawford, 734 S.W.2d 85, 86-87 n.1 (Tex. App.-- Houston [1st Dist.] 1987, no writ) (quoting Robert W. Calvert, "No Evidence" and "Insufficient Evidence" Points of Error, 38 Tex. L. Rev. 361, 366 (1960)).

2. Damages Sufficiency Analysis

I have already determined that the trial court properly admitted Hutchison's expert testimony as to Kajima's fraud damages. Hutchison testified that Kajima expended $38,717,854.00 in total costs in completing the project. He also testified Kajima expended $3,330,547.00 in costs that did not add value to the project. Formosa paid Kajima approximately $10,000,000.00 on the project. Hutchison concluded that Kajima's out-of-pocket damages equaled $25,387,380.00. This out-of-pocket damages calculation complies with the supreme court's measure-of-damages analysis in Presidio. See Presidio, 960 S.W.2d at 49. After observing all the evidence presented at trial and being charged on the proper measure of damages, the jury determined Kajima suffered $15,432,123.45 in damages.

I find more than a scintilla of evidence to support the jury's damages finding. See Moriel, 879 S.W.2d at 25; see also Kindred, 650 S.W.2d at 63. I do not find the evidence to be factually too weak to support the jury's damages finding. See Ritchey, 734 S.W.2d at 86-87 n.1. The jury's damages finding was within the range of evidence presented at trial and within the jury's discretion. See Gulf States Utils. Co., 79 S.W.3d at 566. I would hold the evidence legally and factually sufficient to support a jury award of $15,432,123.45. See id. Thus, I would overrule Formosa's first issue, the second part of its third issue, and the second part of its sixth issue.

E. Jury Examination of Documentary Evidence

In issue eight, Formosa challenges the trial court's refusal to permit examination by the jury of plans and specifications entered into evidence. Rule 281 of the Texas Rules of Civil Procedure sets out that the jury "may, and on request shall, take with them in their retirement. . . any written evidence. . . . Where part only of a paper has been read in evidence, the jury shall not take the same with them, unless the part so read to them is detached from that which is excluded." Tex. R. Civ. P. 281. Rule 281 is mandatory. First Employees Ins. Co. v. Skinner, 646 S.W.2d 170, 172 (Tex. 1983). The trial court is required to send all exhibits admitted into evidence to the jury room during the deliberations. Id. The rule is self-operative and requires no request from the jurors or counsel. Id.

If the drawings described by Formosa were admitted into evidence, the trial court, by refusing to submit the drawings to the jury during deliberations, would have acted without reference to guiding rules and principles by ignoring rule 281. This would be an abuse of discretion. See Downer, 701 S.W.2d at 241-42. However, Formosa does not establish on appeal that the exhibit containing the drawings was admitted into evidence. Formosa cites only to the volumes of the appellate record that include the drawings, not to any portion of the record showing the admission of those drawings into evidence. Further, even if the trial court initially admitted the drawings into evidence pursuant to the parties' rule 11 agreement, it later ruled that the post-contract drawings comprising part of the evidence were irrelevant and inadmissible. Thus, the trial court expressly withdrew post-contract drawings from evidence, but exactly which drawings is not clear from the record. Formosa does not complain of the trial court's evidentiary ruling, only that the trial court did not send the documents into the jury room during deliberations. Formosa cannot contend now that any pre-contract drawings were erroneously withheld from the deliberating jury as a result of the trial court's ruling on the post-contract drawings. Formosa, the party offering the evidence, had the burden of excising the inadmissible portions from the evidence so that the admissible portion could be submitted to the jury. See Am. Gen. Fire & Casualty Co. v. McInnis Book Store, 860 S.W.2d 484, 488 (Tex. App.--Corpus Christi 1993, no pet.). "The objecting party . . . must provide a reviewing court with a record that shows that the objectionable portion of the evidence was clearly identified either in the objection or in the ruling of the trial court." Id. Formosa does not do so, nor has it provided specific citation in the record to the post-contract documents to which its issue on appeal applies. I would hold that Formosa waived on appeal its complaint that the trial court did not comply with rule 281. See Tex. R. App. P. 38.1(h). Thus, I would decline to address Formosa's eighth issue.

F. Prejudgment Interest

Finally, Formosa claims in issue nine that the judgment awarded Kajima excessive prejudgment interest. In its appellant's brief, Formosa asserts that section 304.105 of the Texas Finance Code applies to Kajima's fraud claim through the supreme court's holding that specific provisions of chapter 304 apply to certain common-law cases. See Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc., 962 S.W.2d 507, 531-32 (Tex. 1998); see also Tex. Fin. Code Ann. § 304.105(a) (Vernon Supp. 2004) ("If judgment for a claimant is more than the amount of a settlement offer of the defendant, prejudgment interest does not accrue on the amount of the settlement offer during the period the offer may be accepted."). Formosa has not cited any authority that applies chapter 304 to fraud claims, and I have found none. I would decline Formosa's invitation to extend Johnson & Higgins to fraud claims. Thus, I would overrule Formosa's ninth issue.[13]

III. CONCLUSION

I would affirm the judgment of the trial court.

1. For a more detailed explanation of the background facts, see this Court's opinion in Kajima Int'l, Inc. v. Formosa

Plastics Corp., 15 S.W.3d 289, 294 (Tex. App.--Corpus Christi 2000, pet. denied).

2. At the trial in the present case, Hutchison testified that in 1993, he was the sole owner of A. W. Hutchison of California, then a wholly-owned subsidiary of A. W. Hutchison & Associates, Inc. Hutchison testified that he later merged A. W. Hutchison of California into A. W. Hutchison & Associates, Inc.

3. In Koch, an insurer retained an expert in an insurance dispute with two other parties. Koch Refining Co. v. Jennifer L. Boudreaux MV, 85 F.3d 1178, 1181 (5th Cir. 1997). After the insurer settled with the two parties, the expert was retained by parties adverse to the insurer. Id. Thus, the Koch court characterized the case not as one in which the expert switched sides, but as one in which the party changed its position. Id.

4. Attached to Formosa's "Motion to Reconsider Striking Plaintiff's Expert Witness -- A. W. Hutchison," filed February 5, 2002 in the 135th District Court of Calhoun County is the statement of facts from the hearing on Formosa's "Motion to Strike Experts," held on October 12, 1995, before the Honorable Michael M. Fricke, presiding judge of County Court-at-Law No. 1 in Calhoun County in trial court cause number 93-CV-29, styled Kajima Int'l, Inc. v. Formosa Plastics Corp., which ended in a mistrial in April 1996. Unless otherwise noted, all references to "testimony" and "the hearing" in this opinion refer to testimony at the October 12, 1995 hearing.

5. The invoices are identified as from "A.W. Hutchison & Associates, Inc." at its office in Atlanta, Georgia.

6. See footnote 2.

7. Alexander also testified at the present trial (in February 2002) that after Porter & Hedges assumed Formosa's defense, he had several telephone conversations with Huyghe involving confidential information.

8. For a more detailed discussion of the relevant facts, see this Court's opinion in Kajima Int'l v. Formosa Plastics Corp., 15 S.W.3d 289, 291 (Tex. App.--Corpus Christi 2000, pet. denied).

9. We ordered the record of the 1997 trial included within the record of this appeal along with the record of the 2002 trial.

10. The letterhead on the invoices shows "A.W. Hutchison & Associates, Inc." at an Atlanta, Georgia address. Payment documentation in the record includes a check from Formosa made payable to "A.W. Hutchison, Inc." for $20,875.89.

11. My conclusion that the abuse-of-discretion standard of review applicable to attorney disqualification proceedings also applies to expert disqualification should not be read as adopting attorney conflict-of-interest standards to experts.

12. Kajima argues that Formosa's oral on-the-record objections after the charge conference did not specify this particular objection. The record indicates that Formosa, after dictating oral objections, also confirmed on the record that the trial court had refused all of its requested issues and instructions. The clerk's record reflects that the trial court refused a written fraud liability issue submitted by Formosa that requested a separate finding as to each contract.

Formosa Plastics Corp.

2004 | Cited 0 times | Court of Appeals of Texas | November 10, 2004

13. In its reply brief, Formosa raises for the first time as a subissue within issue nine that amendments adopted in 2003 to pre-judgment interest rates in Texas apply to this appeal. The briefing rules do not allow an appellant to include in a reply brief an issue not raised in appellant's original brief. Tex. R. App. P. 38.3; see In re A.M., 101 S.W.3d 480, 486 (Tex. App.--Corpus Christi 2002, orig. proceeding) (citing Anderson Producing, Inc. v. Koch Oil Co., 929 S.W.2d 416, 424 (Tex. 1996); Barrios v. State, 27 S.W.3d 313, 322 (Tex. App.-Houston [1st Dist.] 2000, pet. ref'd)). Formosa did not seek leave to raise the new issue. I do not address Formosa's improperly raised issue. See In re A.M., 101 S.W.3d at 486.