No. 02-1097

IN THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

FEE TRANSPORTATION SERVICES, INC.
Petitioner

v.

LARRY FULGHAM and DEBRA FULGHAM
Respondents

On Petition for Review from the
Fifth Court of Appeals at Dallas, Texas

BRIEF ON THE MERITS OF RESPONDENTS, LARRY FULGHAM and DEBRA FULGHAM

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STATEMENT OF ISSUES

Respondents have no disagreement with Petitioner's statement of its issues. However, two issues raised by Respondents in the Court of Appeals, but undecided by that court, require affirmance of the Court of Appeals' judgment on independent grounds:

1. What weight should be given to spoilated evidence in considering a directed verdict?

2. Was expert testimony erroneously excluded?

STATEMENT OF FACTS

Respondents have no disagreement with Petitioner's Statement of Facts, except as follows: The Fulghams contend that the upper coupler assembly detached from the trailer for two reasons, not one: bolts extending through the top of the assembly were rusted and weakened to the point of fracture at the moment of rollover; and other bolts extending through the side of the assembly were missing and loose to the point of fracture at the moment of rollover. The police officers who investigated this accident opined that the cause of the detachment were the rusted bolts in the top of the assembly. (Vol. 3 pp. 73-75, 136, 145, 148-149, 158-161, 164; Vol. 8 pp. 14, 15.) Jim Mallory, the safety expert retained by Respondents, opined that the cause of the detachment was the missing and loose bolts in the side of the assembly and did not discuss the bolts in the top of the assembly, because the manufacturer's specifications did not include any such bolts. (Vol. 6 pp. 35-41.) This dual attack on causation was made necessary by FFE's spoilation of the upper coupler assembly.

FFE owns approximately 3,000 trailers, 600 of which FFE routinely "leases" to owner/operators/independent contractors. (Vol. 4, pp. 62, 64.)

On or about March 30, 1998, FFE Transportation Services took possession of the upper coupler assembly and transferred it to its main terminal in Lancaster, Texas. (Vol. 4 pp. 33-35.) FFE's Director of Maintenance, Bill Robinson, instructed FFE personal to preserve the upper coupler assembly for anticipated litigation. (Vol. 4 p. 33.) Sometime after April 9, 1998, the upper coupler assembly "disappeared" and has never been found. (Vol. 4 pp. 36-37.)

The trial court excluded Jim Mallory's attempt to testify on the standard of care for inspecting trailers. (Vol. 7, pp. 11-25.)

SUMMARY OF THE ARGUMENT

FFE takes the position that its 600 owner/operators/independent contractors are not part of the "consuming public." These operators cannot be meaningfully distinguished from businessmen renting cars from Hertz - - a situation which the Supreme Court has already approved as a "product entering the stream of commerce."

The trial court is not in any better position than an appellate court to determine whether particular conduct is within the experience of lay persons. If the necessity of expert testimony is a mixed question of law and fact, there are no underlying factual disputes, and therefore the determination of necessity is purely a legal issue, which is to be determined de novo by an appellate court. Inspection for loose bolts and rusted bolts are within the common knowledge of the ordinary person, and the reasonableness of an inspection is generally a question of fact for the jury.

FFE's spoilation of the upper coupler assembly should entitle the Fulghams to survive a motion for directed verdict.

ARGUMENT AND AUTHORITIES

STREAM OF COMMERCE

Petitioner's argument begs the answer to two questions: What is the stream of commerce? Who is the consuming public? Unfortunately neither phrase is concisely defined in Texas law, but case law does establish that there must be a release of possession of a product from one party to another party, other than that party's employee. That release must take place in a commercial setting; the housewife's garage sale does not suffice. Restatement (2d) of Torts §402A, *cmt. f.* The release may be of a new or a used product, so long as the releaser is in the business of releasing similar products. *Hovenden v. Tenbush*, 529 S.W. 2d 302 (Tex. Civ. App. - - San Antonio, 1975 no writ). A sale is not required - a lease will suffice. *Rourke v. Garza*, 537 S.W. 2d 794 (Tex. 1975). Even a gift will suffice. *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967). The critical element is the transfer of possession of a product as part of a commercial transaction.

Civil Practice and Remedies Code, §82.001(3) defines a "seller" as:

> a person who is engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any component part thereof.

Texas Pattern Jury Charges, 2000 Ed., Malpractice, Premises and Products 70.4 suggests the following instruction to jurors:

> The "business of selling" means involvement, as part of its business, in selling, leasing, or otherwise placing in the course of commerce products similar to the product in question by transactions that are essentially commercial in character.

The transaction between FFE and Mr. Fulgham fulfills every part of this instruction. The trailer which injured Mr. Fulgham was one of hundreds that were manufactured by Walbash National Corporation and purchased by FFE. Some of these trailers were pulled by FFE employees, and as to those trailers, the commercial transaction was at an end. However, as to the other trailers, pulled by owner/operators, the commercial transaction continued as a lease or bailment.

Though Petitioner has not directly attacked the lease concept in this court, Petitioner has done so indirectly by reference to Mr. Fulgham as a statutory employee and by emphasizing that Mr. Fulgham was not an ordinary consumer. Black's Law Dictionary, 7th Ed., 1999, defines a lease, among other definitions, as "a contract by which the rightful possessor of personal property conveys the right to use that property in exchange for consideration." The independent contractor agreement between Larry Fulgham and FFE governed Mr. Fulgham's use of FFE's equipment, obligated Mr. Fulgham to return the equipment in good condition, normal wear and tear excepted, and obligated Mr. Fulgham to reimburse FFE for any damages to the equipment if that damage was caused by Mr. Fulgham's negligence. (Vol. 8, exh. 60). In return for Mr. Fulgham's having use and possession of FFE's equipment, and carrying the cargo assigned by FFE to that equipment, FFE would receive thirty percent of the payload. (Vol. 8, exh. 60). Though not labeled a lease, the independent contractor agreement does serve as the commercial transaction by which possession of the trailer was transferred from FFE to Larry Fulgham. When so framed, the Court of Appeals opinion does not conflict with past product liability case law.

In *Armstrong Rubber Company v. Urquidez,* 570 S.W.2d 374 (Tex. 1978) the specific product which caused the injury was never intended to enter the stream of commerce, and did not enter the stream of commerce. Mr. Urquidez was injured and killed while testing a tire for Armstrong on a closed test track. Though Armstrong sold and introduced into the stream of commerce other tires identical to the test tire, there was never any intent by Armstrong to introduce into the stream of commerce the specific tire that injured the Plaintiff. The *Armstrong* court distinguished several out of state cases that extended the doctrine of strict liability to bailment transactions and noted that in each of those cases "the manufacturer, supplier or retailer released the product to its customer. Accordingly the product provided was in the stream of commerce." *Armstrong, supra,* p. 377. Among the situations that the *Armstrong* court considered as being in the stream of commerce was the defendant loaning its customer a defective car for use while repairing the customer's car; the defendant providing a defective potato vine burner to its customer in connection with defendant's sale of gas; the defendant loaning a defective gas tank in which its customer stored gas purchased from defendant; and the defendant substituting a defective wheel assembly from its own stock in the course of repairing its customer's truck.

In *Rourke v. Garza*, 530 S.W.2d 794 (Tex. 1975) the court relied upon two out of state cases: *Cintrone v. Hertz Truck Leasing and Rental Service,* 45 N.J. 434, 212 A.2d 769 (1965) and *Stang v. Hertz Corp*., 83 N.M. 730, 497 P.2d 732 (1972). In both these cases a rental company (*Hertz)* leased a defective vehicle to a customer, and the court held that the product entered the stream of commerce, and thus strict liability applied. FFE places

approximately 600 trailers on this country's highways by leasing them to owner/operators. When a company places by lease this many products on this country's highways, it is difficult for Respondents to conceive that these products are anything but entering the stream of commerce.

Thate v. Texas and P. Ry Co. 595 S.W.2d 591 (Tex. Civ. App. - - Dallas, 1980, writ dismissed) does attempt to distinguish between industrial transactions, interstate commerce, and stream of commerce. In *Thate*, the court does state that strict liability in tort does not extend to industrial transactions. With due deference to the Dallas Court, that statement is either incorrect or a misnomer. *Rourke v. Garza, supra*, was an industrial transaction. Garza's employer was a plumbing, heating, and air conditioning company that rented a defective scaffold from Rourke to be used in the construction of a new school. The correct basis of the *Thate* decision is that the railroad car in question was never released to any other party - - not the consuming public, an industrial customer, or anyone else. The railroad maintained possession of the car, and the plaintiff was injured while unloading materials off that railroad car.

Hernandez v. Southern Pacific Transp. Co. 641 S.W.2d 947 (Tex. Civ. App. - - Corpus Christi, 1982, no writ) is likewise distinguishable. This case did not focus on what is the stream of commerce, but instead focused upon whether Southern Pacific was in the business of releasing stanchions into the stream of commerce. The court held that the railroad was not in such a business, but interestingly, the court held that a non-party, who leased the stanchion to the railroad, was in the business of releasing stanchions into the

stream of commerce. The court states at p. 952: "Although AFC Industries, as the manufacturer of the stanchion, and Trailer Train Corp. as lessor, were engaged in the business of releasing stanchions into the stream of commerce, they were not joined as defendants." In the Fulgham case, FFE occupies the position of Trailer Train Corp.

Similarly, in *Foster v. Ford Motor Co.,* 616 F.2d 1304 (5th Cir. 1980) Ford Motor Company, as the manufacturer of a tractor, and the company that modified the tractor were strictly liable for the allegedly defective forks attached to the tractor, but not the farmer who never engaged in the business of leasing his equipment to anyone. The plaintiff was the farmer's employee.

Petitioner's statement (Pet. Brief p. 13) that the Dallas Court of Appeals "now allows employers to be considered sellers of products used by its employees in carrying out the employer's business" is simply not true. Larry Fulgham was not FFE's employee. FFE's attempt to categorize Mr. Fulgham as a "statutory employee" is misplaced. [1]The record is clear that FFE did employ drivers, but a substantial part of their fleet was pulled by owner/operators, who are not employees. The fact that the Mr. Fulgham was performing work for the FFE is a distinction without meaning. Many of the products liability cases in Texas law involve commercial clients, as opposed to housewives and other persons traditionally considered consumers. The fact that 600 owner/operators have a business relationship with FFE does not take them out of the category of the "consuming public." The

1 The one case on which Petitioner relies to establish the "statutory employee" relationship, *John B. Barbour Trucking Co. Vs. State,* 758 S.W. 2d 684 (Tex. App. - - Austin, 1988, writ denied), did not find the statutory employee relationship to exist and refused to find vicarious liability. The whole concept of a "statutory employee" is founded in an Interstate Commerce Commission regulation applicable to non owners of equipment that has nothing to do with the facts of this particular case.

most analogous situation is the rental car business where a businessman uses Hertz exclusively on his business trips. As stated above, the Texas Supreme Court, in *Rourke v. Garza*, *supra,* has already approved this situation as one of a product entering the stream of commerce.

The purpose of product liability law is to shift the cost of injury caused by a defective product to the party who is in the best position to prevent the defect in the product, i.e. manufacturers, sellers, and lessors. FFE, as the owner of the trailer, with the continual duty to inspect and maintain the trailer, is in the best position to prevent a defective trailer from entering this country's highways. Therefore, the purpose of product liability law is served by imposing upon FFE the cost of Respondent's injuries.

WAS EXPERT TESTIMONY NECESSARY?

Petitioner is correct that the answer to this question is based upon the simple statement in *Roark v. Allen,* 633 S.W.2d 804, 809 (Tex. 1982) "expert testimony is necessary when the alleged negligence is of such a nature as not to be within the experience of the layman." Petitioner is further correct in saying that application of this test has been primarily on an *ad hoc* basis because of the endless factual variations in ordinary negligence cases. [2] However, Petitioner is incorrect in framing the question as whether inspecting refrigerated trailers is within the experience of the layman. This frames the negligence issue

2 Inspecting and detecting rusted bolts or loose bolts in the upper coupler assembly of a trailer is more analogous to the leaks in a deteriorating pipe line considered in *Scurlock Oil Co. v. Harrell,* 443 S.W. 2d 334, 337 (Tex. Civ. App. - Austin 1969, writ ref'd n.r.e.) than the compressor bleed valve in an aircraft engine considered in *Turbines, Inc. v. Dardis,* 1 S.W.3d 726, 738 (Tex. App. - Amarillo 1999, pet. denied).

too broadly. The proper framing of the issue is whether a layman can detect when a bolt is rusted or when a bolt is loose. The proper framing of the issue is whether a layman can determine that a reasonable inspection of any piece of equipment would include checking for rusted bolts and loose bolts. The proper framing of the issue is whether a layman can determine that a reasonable inspection should discover the presence of rusted bolts and/or loose bolts. As stated in *J. D. Abrams, Inc. v. McIver*, 966 S.W.2d 87, 93 (Tex. App. - - Houston [1st Dist.] 1998, pet. denied), on which Petitioner heavily relies, the proper inquiry is not whether specialized equipment or techniques were involved in the accident, but whether the allegation of negligence involves some part of that equipment or some technique that is beyond the scope of the experience of the layman:

> [T]he appropriate placement of construction warning signs and the differences between traffic barrels and CTBs are not so complex as to require the explanation of an expert to fully develop the appropriate standard of care. We do not doubt specialized equipment or construction techniques were used at the time of this accident. However, these elements were not at issue in the accident itself. Thus, Appellees were not required to present expert testimony to establish the appropriate standard of care for Abrams. Expert testimony was also not required to establish Abrams breached this standard of care.

SUFFICIENT EXPERT TESTIMONY WAS PROVIDED

If expert testimony was necessary, Bill Robinson and Jim Mallory supplied sufficient expert testimony to survive a directed verdict. Bill Robinson was FFE's Director of Maintenance at the time of the events made the basis of this suit, and he testified as follows:

(Vol. 4, p. 25, line 8)

Q. Okay. Do you agree that as part of every 60 day inspection that the inspector is supposed to check the base rails to make sure there are no loose rivets and no loose bolts?

A. Yes, they should check that.

Q. Should visually check to make sure there is no missing bolts?

A. Yes.

Q. Do you agree that he should check to make sure there is no excessive rust?

A. Wouldn't be any rust on the lower rail. It's made out of aluminum.

Q. I'm not talking about just on the base rail. I mean going over the entire trailer to make sure there is no excessive rust.

A. Well, he could look, but on a refrigerated trailer there is very little steel to rust. Manufacturers make them out of mostly aluminum so they do not rust and they are light weight so we can haul more cargo.

Q. I'm just saying as far as his responsibility, he is supposed to check to see if there is any excessive rust?

A. Yeah. You should visually look and see if there is any problem with it.

(ending page 26, line 7)

Jim Mallory, Respondents' safety expert, testified as follows:

(Vol. 6, page 64, line 10)

Q. If these roadside base rail connections were loose to the point that it was - - these bolts were subjected to impact forces, how would that looseness have been discovered?

A. By an inspection.

(Vol. 6, page 65, line 19)

Q. Let's go at it that way. If a bolt of the same size that was originally in this trailer was put through one of those distorted holes, what would you see from the outside?

A. Well, you would see the shiny area of metal that had been rubbed either somewhere around the perimeter of the bolt or all the way around the perimeter of the bolt. You would see a shiny area. I mean, that's what you would see because the hole is distorted and the bolt head apparently didn't change size. It's going to move around in there and leave a shiny area around the edge of the bolt head.

Q. How large of a shiny area?

A. It would be small, but it would be noticeable upon close inspection.

Q. Did you see evidence of such shiny areas larger than the head of the bolt in the base rail that you examined?

A. Yes.

Q. And were those shiny areas in these 24 bolt holes, or at least some of these 24 bolt holes that attached the upper coupler assembly?

A. Yes.

The trailer in question underwent its last sixty day periodic inspection on either December 19, 1997 or January 28, 1998. (Vol. 8, Exh. 17, Vol. 4, pp. 20-21). Additionally, each time the trailer comes through the Lancaster, Texas terminal, it goes through a safety lane and is safety inspected. (Vol. 4, p. 59). The duty to inspect was established by expert testimony and exhibits. The frequency of the inspection was established by expert testimony and exhibits. Including the upper coupler assembly in the periodic inspections was established by expert testimony and exhibits. Looking for rusted bolts and loose bolts as part of the periodic inspections was established by expert testimony. How to detect the loose bolts in question was established by expert testimony. The only question not directly answered by expert testimony was the ultimate issue of whether it was negligence for FFE to miss these rusted bolts and/or loose bolts during its last periodic inspection or during one of its safety lane inspections. Rule 704, Texas Rules of Evidence, gives the trial court and the parties the option whether to offer expert opinion on the ultimate issue, but nowhere in our jurisprudence appears the requirement that a party must offer expert opinion on the ultimate issue.

REASONABLE INFERENCES FROM THE EVIDENCE SUBMITTED

Petitioner next complains that the ordinary lay person cannot infer that bolts were in a rusted condition and that other bolts were in a loosened condition for a sufficient length of time that their condition should have been discovered upon inspection. Petitioner further

complains of the absence of proof that these bolts deteriorated more than 60 days prior to the accident. As stated above, the last periodic inspection may have been January 28, 1998, 38 days before the accident. The last safety lane inspection may have been only 7 or 8 days before the accident. Regardless of the date of the last inspection, bolts do not rust or fatigue to the point of fracture within a few days, and especially not a sufficient number to allow the upper coupler assembly to detach from the trailer. Surely this fact is within the knowledge of laymen. Respondents are aware that America has transitioned from a rural society to a urban society and that consumers do not as readily perform their own repairs on their automobiles, household appliances, and other machines; but surely the layman could look at photographs of this upper coupler assembly, hear how the assembly is attached to the trailer, and reasonably conclude that regardless which set of bolts held this assembly to the trailer, they would not deteriorate to the point that they fracture and allow this upper coupler assembly to detach from the trailer in less than 60 days and possibly much less than 60 days. Surely the layman is sufficiently knowledgeable to conclude that FFE was not making a reasonable inspection of its trailers, when the trailer in question had traveled approximately 100,000 miles, had nine inspections, and according to FFE's records required absolutely no maintenance other than one tire.

Respondents also emphasize that FFE has a continuing duty to inspect its trailers and make sure that no defective trailer is placed on the roadway. This continuing duty makes this case analogous to *Southwestern Bell Telephone Co. v. McKinney*, 699 S.W.2d, 629 (Tex. App. - - San Antonio, 1985, n.r.e), where the appeal centered around a no evidence point on

the creation and breach of a duty to inspect telephone lines. The plaintiff was injured when the truck he was operating with an oversized load came in contact with some sagging telephone lines. Quoting at length from page 634 of the opinion:

> "Bell contends that there is a lack of evidence which fails to trigger its duty to reasonably inspect. Bell asserts that its visual inspection program, original installation of telephone wires to the proper height, and safe history of the wires in question, illustrates the reasonable care with which the wires were maintained. According to Bell, McKinney's injury was the first indication of the defective condition of the wire. Therefore, Bell argues, there is no competent evidence raising a duty or supporting the finding of negligence or proximate cause. We disagree with Bell."
>
> * * *
>
> "Bell argues that although it owed a duty to reasonably inspect and maintain its wires, that duty was not triggered because McKinney failed to give actual or constructive notice to Bell.
>
> As a general rule, a plaintiff has failed to meet his fundamental burden of proof where the record is devoid of any testimony that would impute actual or constructive knowledge to a defendant. *R.R. Hutson v. City of Houston*, 418 S.W. 2nd 911, 914 (Tex. Civ. App. - - Houston, [14th Dist.] 1967, writ ref'd n.r.e.). The rule also applies where the record is silent as to the length of time the defective condition existed or might have existed. *Id.*
>
> However, the testimony in the case before us indicates that constructive notice may be inferred. The witness Robles testified that Bell was aware of a continuing duty to maintain its overhead lines. The witness Luna's testimony showed that use of a fiberglass, telescoping, "measuring pole," for inspections was quick, convenient, and inexpensive. Bell's own employees established that it was actually cheaper for Bell to bury the lines underground than to string them overhead. Despite this testimony, Bell maintains that it has no duty to inspect, to repair, or to warn without notice or knowledge of the defective condition. We cannot agree. The duty of care owed by Bell does not arise from its being made aware of a defective condition by a prospective plaintiff. McKinney and all users of the underline roadway are entitled to expect that the Bell will exercise reasonable care to make the overhead wire safe. A visual inspection program of the type conducted by Bell is insufficient. Bell had the duty to ascertain the condition of its telephone wires

and to give intelligent warning to those who might use the underline public roadway."

FFE relied solely on a visual inspection program. It was up to the jury to decide whether a visual inspection program was sufficient. It was up to the jury to determine whether a visual inspection program should have detected the shiny areas around the heads of the bolts connecting the upper coupler assembly to the base rail. It was up to the jury to determine whether a visual inspection program should have detected the rust described by Colonel Hupp.

STANDARD OF REVIEW

Interestingly, Petitioner decries the *ad hoc* determination of whether expert testimony is necessary and then advocates leaving this determination to the vagaries of trial judges. The determination whether expert testimony is necessary is not an admissibility of evidence question, which admittedly would be reviewed under an abuse of discretion standard, but a question of what legal weight should be given to the non-expert evidence in the record. This is a question of law, and questions of law are generally reviewed on a de novo standard.

Petitioner relies upon *Brainard v. State*, 12 S.W.3d 6 (Tex. 1999) to state that mixed questions of law and fact are generally reviewed on an abuse of discretion standard. However, the *Brainard* court went on to state that in applying the abuse of discretion standard of review, the court would defer to the trial court's factual determinations if they are supported by evidence, but review its legal determinations de novo. The *Brainard* court went on to find that there was no underlying factual dispute, but only a legal issue, and determined that issue de novo. On a directed verdict, all facts, and inferences from those

facts, are to be resolved in favor of the party against whom the verdict was directed. *Collora v. Navarro*, 574 S.W.2d 65 (Tex. 1978). There could be no underlying factual issues resolved by the trial court that formed the basis of its decision that expert testimony was necessary. The determination whether expert testimony was necessary has to be purely a legal issue.

Even if the abuse of discretion standard applies, the Court of Appeals obviously found that the trial court had misapplied the law to the established facts of this case. If the established facts present issues of negligence that are within the common experience of laymen, then requiring expert testimony to address those same issues, to survive a directed verdict, is a misapplication of the law. Rule 702 of the Texas Rules of Evidence permits an expert to testify if his expertise will assist the trier of fact to understand or determine a fact in issue, but if the ultimate fact issue or the expert's testimony is within the common knowledge of the jury, then the expert testimony is inadmissable. As stated in *K-Mart Corp. v. Hunnicutt*, 24 S.W.3d 357, 359 (Tex. 2000), cited by Petitioner:

> When the jury is equally competent to form an opinion about the ultimate fact issues or the expert's testimony is within the common knowledge of the jury, the trial court should exclude the expert's testimony (citation omitted). Thus, "Rule 702 makes inadmissable expert testimony as to a matter which obviously is within the common knowledge of jurors because such testimony, almost by definition, can be of no assistance." (citation omitted).

SPOILATION

The Texas Supreme Court recently reviewed the concept of evidence spoilation, and though the Court refused to recognize evidence spoilation as a separate tort, the Court

reaffirmed that evidence spoilation is properly framed as an evidentiary concept. The Court further reaffirmed that trial courts have broad discretion to punish spoilation ranging from jury instructions to death penalty sanctions. *Trevino v. Ortega*, 969 S.W. 2nd 950 (Tex. 1998). Justice Baker, in his concurring opinion, explored these options more fully and also the criteria for their applications. Justice Baker explains that if a spoilation instruction was indicated, the presumption itself would have probative value sufficient to withstand a directed verdict if a presumption of negligence instruction was given. If the instruction merely presumes that the spoilated evidence would have been unfavorable to the spoilating party, then the presumption should be one of the factors considered by the fact finder in weighing the evidence. *Trevino, supra* pp. 960 - 961. Since the trial court did not allow the trial to progress to the point of ruling on the spoilation issue, a full discussion of its application to this case is necessary.

The elements of a spoilation complaint are very similar to the elements of any negligence case: they include duty, breach of that duty, and causation. As Justice Baker states in his concurrence in *Trevino, supra* at page 954: "This legal inquiry involves considering (1) whether there was a duty to preserve evidence; (2) whether the alleged spoilator negligently or intentionally spoilated evidence; and (3) whether the spoilation prejudiced the non-spoilater's ability to present its case or defense." Justice Baker further explains that the duty to preserve evidence may be statutory, regulatory, or ethical. Rule 215 of the Texas Rules of Civil Procedure definitely creates a duty to preserve evidence after suit is filed, but the pre-suit duty to preserve evidence is less clear in Texas law. Justice Baker

suggests that the duty should arise when there is "anticipation of litigation" as addressed in *National Tank Co. v. Brotherton,* 851 S.W. 2nd 193 (Tex. 1993) where the court was considering when a party should be allowed to assert an investigative privilege. *Watson v. Brazos Electric Power Cooperative, Inc.,* 918 S.W. 2nd 640 (Tex. App. - - Waco, 1996, writ denied) was less analytical about the creation of duty and stated that the evidentiary presumption arises whenever the party not in possession of evidence has introduced evidence harmful to the party who had control of the evidence. Whichever test is used, the duty was definitely created in this case by the testimony of Bill Robinson, FFE's maintenance director, who testified as follows:

(beginning Vol. 4, page 32, line 12)

Q. When and how did you learn the trailer number 16634 had been involved in a wreck?

A. I'm sure it was the same day of the accident.

Q. What did you do in relationship - - well, it's a little too broad. Were you made aware at the same time there might be a problem with the upper coupler assembly that's depicted in Exhibit Number 8?

A. I don't think I was notified at that time, but sometime later I understood that there was some question about the upper coupler.

Q. And so what did you do as far as requesting that the upper coupler - - upper coupler assembly be preserved?

A. Well, what we did, we - - along with the other salvage on the wrecked trailer, we brought the upper coupler back to the Lancaster terminal along with the refrigeration unit, the wheels and tires and, as I recall, a fuel tank on the reefer unit.

Q. But didn't you give a specific instruction to preserve the upper coupler assembly?

A. Yes. When we brought it back, I said, "Don't lose this. There may be some litigation."

Q. In fact, you were aware not too long after that that there probably was going to be litigation?

A. Yeah. Yes.

Q. Would you look at Exhibit Number 19 and tell me generally what that is.

A. It's a message on our computer system.

Q. What is the date of the message?

A. 4/9/98.

Q. It's an e-mail, is it not?

A. Yes.

Q. And who is it from?

A. Jeff Gamling.

Q. And who is he?

A. He is a member of our risk management team.

Q. And who is it to?

A. Bill Nichols.

Q. And who is he?

A. He's in our safety department, safety director.

Q. And would you agree that that particular letter is an acknowledgement that FFE was aware that litigation might arise over this upper coupler assembly?

A. Yes sir. I was aware of that.

(ending Vol. 4, page 34, line 12)

(beginning Vol. 4, page 36, line 25)

Q. Do you know what happened to that upper coupler assembly?

A. No, sir.

Q. Was it still being stored at FFE as of the date you retired?

A. Best of my knowledge, it was.

(ending Vol. 4, page 37, line 5).

Mr. Robinson retired in May of 1999, and suit was filed in this cause in October of 1998. Respondents do not know when the upper coupler assembly was destroyed, lost, or misplaced, and consequently, Respondents do not know whether its "disappearance" was before or after suit was filed.

Similarly, since no one seems to know what happened to the upper coupler assembly, it is impossible for Respondents to prove whether its disappearance was intentional, negligent, or something in between. In any event, it is undisputed that the upper coupler assembly was examined by FFE's representatives, but never examined by Respondents' representatives. FFE did preserve and produce for inspection very late in the discovery process the roadside base rail to which the upper coupler assembly was attached. FFE also produced various pictures of the upper coupler assembly after it had become detached from the trailer. However, none of these photographs were of sufficient clarity and proximity to resolve a crucial conflict in the evidence of how this upper coupler assembly was attached to the trailer. Colonel Hupp, who was the Kentucky Department of Transportation officer on the scene of the accident and whose job included inspections of trailers for DOT violations, observed a number of rusted bolts that had sheared, and it was his opinion that these bolts had sheared due to their rusted condition. (Vol. 3 pages 158 - 161). Larry Fulgham testified that these rusted bolts were in an "H" pattern traversing the top plate of the upper coupler assembly. (Vol. 2, pages 46-54). However, the manufacturer's specifications for this upper coupler assembly does not include any bolts traversing the top of the upper coupler plate. The manufacturer's specifications attach the upper coupler assembly to the trailer only by means of stainless steel bolts that attach to the base rail around the perimeter of the upper coupler assembly. (Vol. 6, pages 30-34, 83). This conflict between the manufacturer's specifications and the eyewitness testimony could indicate that FFE had modified and/or repaired the trailer by changing out the stainless steel bolts with steel bolts and/or by

reinforcing the means of attaching the upper coupler assembly to the trailer by adding additional bolts across the top plate of the upper coupler assembly. Either action would indicate a problem with the means of attaching the upper coupler assembly to the trailer that no FFE or Wabash employee would admit. Either action would further create an additional duty to inspect these bolts more carefully.

There is some indication in the record that FFE may have spoliated more evidence than just the upper coupler assembly. FFE had an adjuster at the scene who was probably made aware that the upper coupler assembly might be an issue in a subsequent lawsuit (Vol. 4, page 35). When Colonel Hupp visited the wrecking yard a day or two after the accident to reinspect the tractor trailer, "There were some people out there, and I have no idea who they were, but I'm pretty sure that they got some of those bolts." (Vol. 3, page 153). The wrecker service that towed the damaged tractor and trailer to its wrecking yard charged FFE for "three sets of pictures and video film" that have never surfaced in this lawsuit. (Vol. 4, pages 38 - 40; Vol. 8, exh. 20).

The Trial Court recognized the spoilation issue and even made comments that Plaintiffs would probably be entitled to a spoilation instruction, (Vol. 7, page 52) but yet refused to attach evidentiary weight to the spoilation presumption when considering the Motion for Directed Verdict, or at least the Trial Court did not give this presumption the legal weight that the law requires. Justice Baker, in his concurring opinion in *Trevino v. Ortega*, *supra,* summarizes the jury instructions that can be given in a proper spoilation case.

The first type is a rebuttable presumption that shifts the burden of proof to the spoilating party to disprove the fact or issue presumed by the destruction of evidence.

> [B]y shifting the burden of proof, the presumption will support the non-spoilating party's assertions and is some evidence of the particular issue or issues that the destroyed evidence might have supported The rebuttable presumption will enable the non-spoilating party to survive summary judgment, directed verdict, judgment not withstanding the verdict, and factual and legal sufficiency review on appeal. *Trevino v. Ortega, supra*, at p. 960.

The second type of presumption is less severe and does not shift the burden of proof. It is merely an instruction that the evidence would have been unfavorable to the spoilating party. Significantly, even this type of adverse presumption has "probative value" when unrebutted by the spoilating party. *Trevino v. Ortega, supra*, J. Baker conc. at p.960-961; *H.E. Butt Grocery Co. v. Bruner*, 530 S.W. 2nd 340 (Tex. Civ. App. - - Waco, 1975, writ dism'd); and *Watson v. Brazos Electric Power Cooperative, Inc.*, 918 S.W. 2nd 640 (Tex. App. - - 1996, writ denied).

Watson v. Brazos Electric Power Cooperative, Inc. is also instructive because it is an "inspection case" and has other facts very similar to the case at hand. Mr. Watson sued the power company for fire damage to his farm caused by a cross-arm on a utility pole giving way and allowing a power line to come in contact with the ground. Power company officials inspected the cross-arm and discarded it. Mr. Watson's theory of recovery was that woodpeckers had weakened the cross-arm to the point that it broke, and that a reasonable inspection of the utility pole by the power company would have revealed the cross-arm's weakened condition. Power company officials denied that any woodpecker holes existed and testified that the break was "unusually clean." After a defense verdict on the issue of

negligence, the appellate court held that it was reversible error to fail to instruct the jury on the spoilation presumption.

Though Respondents introduced other evidence of negligence, it is their position that their spoilation complaint , viewed under the circumstances and facts of this particular case, presumes sufficient evidence to withstand a directed verdict.

EXCLUDED EXPERT TESTIMONY

Respondents complain of the exclusion of Jim Mallory's testimony reported on pages 11-25 of Vol. 7 of the Record. Though counsel and the Trial Court discussed the admissibility of this testimony at length, the Trial Court excluded the testimony on the basis that such testimony did not evidence "an industry-wide accepted standard of care" (Vol. 7, page 28) and that Mr. Mallory was not qualified to render an opinion on an industry-wide standard of care (Vol. 7, page 41). Petitioner did not urge, and the Trial Court did not rule, on any *Daubert/Robinson* motion that Mr. Mallory's testimony on the standard of care was unreliable.

Rule 702, Texas Rules of Civil Procedure, allows expert testimony by a witness "qualified as an expert by knowledge, skill, experience, training, or education." Determining the qualifications of an expert witness is left to the discretion of the Trial Court, and the Trial Court's determination in that regard will not be disturbed absent a showing of abuse of discretion. *Southland Lloyd's Insurance Co. vs. Tomberlain*, 919 S.W. 2nd 822 (Tex. App. - - Texarkana 1996, writ denied); *Gammill vs. Jack Williams Chevrolet, Inc.*, 972 S.W. 2nd 713 (Tex. 1998).

Jim Mallory testified that he designed and implemented the safety programs for two different companies' fleet of trucks. He had studied Central Freight Lines safety program extensively. He had worked extensively with the Federal Motor Carrier Safety Regulations in both his litigation and non-litigation work. He is a safety engineer. What probably convinced the Trial Court to exclude Mr. Mallory's testimony was his quasi-admission that there was no standard of care in the trucking industry regarding the inspection of fasteners on trailers. Some companies perform a very detailed inspection, and other companies do a *pro forma* check-off of a list. Consequently, Mr. Mallory had to resort to his safety engineering experience to state what the standard of care should be.

Custom in an industry and standard of care are not necessarily the same thing. What is customary in an industry may be evidence of a standard of care, but compliance with that custom may still fail the test of ordinary care. As stated long ago in *Great Atlantic and Pacific Tea Company vs. Garner*, 170 S.W. 2nd 502, 505 (Tex. Civ. App. - - Dallas, 1943, writ ref. want merit).

> Evidence of custom is, of course, admissible as tending to prove what an ordinarily prudent man would do; but such evidence is not essential to a finding on the issue, nor conclusive thereof when so introduced (citations omitted), for a custom itself may fail to conform to the minimum requirements of ordinary care.

More recently, in *Lewis and Lambert Metal Contractors, Inc. vs. Jackson*, 914 S.W. 2nd 584 (Tex. App. - - Dallas, 1994, writ granted and vacated 918 S.W. 2nd 716 (Tex. 1997), the Dallas Court reaffirmed that evidence of custom is admissible as evidence of what an ordinary prudent person would do, but it is not conclusive proof, because the custom itself

may not meet the requirements of ordinary care. See also *Air Control Engineering Co. vs. Hogan*, 477 S.W. 2nd 941 (Tex. Civ. App. - - Dallas 1972, no writ)

To be reversible error, exclusion of expert testimony must not only be error, but that error must be reasonably calculated to cause and probably did cause rendition of an improper judgment. It is not a *but for* test but a *probability* test that an improper judgment was rendered because of the exclusion of evidence. *McCraw v. Maris* 828 S.W. 2nd 756 (Tex. 1992). The Trial Court granted an instructed verdict based in large part on the lack of evidence of a standard of care, ruled that this standard of care required expert testimony, and then excluded Respondents' attempts to offer expert testimony on the standard of care. Undoubtedly there was the necessary nexus between this exclusion of evidence and the directed verdict. The mental processes of the Trial Court stated in the Record confirm such fact. (Vol. 7, pages 28-43). Respondents reiterate that expert testimony was not necessary on the standard of care, but if the Trial Court was going to require such testimony, then its exclusion was reversible error. *See Glasscock v. Income Property Services*, 888 S.W. 2nd 176 (Tex. App. - - Houston [1st Dist.] 1994, writ dism'd by agreement); and *Nissan Motor Company, Ltd. v. Armstrong*, 32 S.W. 3rd 701 (Tex. App. -- Houston [14th Dist], 2000, writ hist. unavailable).

PRAYER

WHEREFORE, PREMISES CONSIDERED, Respondents, Larry Fulgham and Debra Fulgham, respectfully request this court to deny FFE's Petition for Review; that if the Petition for Review is granted, the Court of Appeals opinion be affirmed, or alternatively, this cause be remanded to the Court of Appeals for consideration of the Points of Error raised and briefed in that court but not decided by that court. Respondents also request such other and further relief to which they may show themselves justly entitled.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing document has been served on attorneys for Petitioner via certified U.S. Mail on this ____ day of April, 2003.

_____
Kenneth W. Fuqua