No. 02-1097

IN THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

FFE 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 PETITIONER FFE TRANSPORTATION SERVICES, INC.

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IDENTITY OF PARTIES AND COUNSEL

Petitioner FFE Transportation Services, Inc. certifies that the following is a complete list of all parties to the trial court's final judgment and the names and addresses of their counsel:

Parties

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Larry Fulgham and Debra Fulgham	Respondents/Appellants/Plaintiffs

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS (cont'd)

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES (cont'd)

Page

Cases (cont'd)

Statutes

Rules

STATEMENT OF THE CASE

Nature of the Case:	This is a negligence and products liability action for personal injuries against FFE Transportation Services, Inc., following the rollover of a tractor-trailer driven by Larry Fulgham.
Trial Court:	The County Court at Law Number 4, Dallas County, Texas, the Honorable W. Bruce Woody presiding.
Trial Court Disposition:	The trial court directed a verdict for FFE on the Fulghams' negligence and products liability claims.
Parties in the Court of Appeals:	Larry and Debra Fulgham — Appellants FFE Transportation Services, Inc. — Appellee
Court of Appeals:	Fifth Court of Appeals, Dallas, Texas; opinion authored by Justice Rosenberg and joined by Justice James and Justice Farris. The opinion is unpublished. A copy of the opinion and judgment is included in Tab 1 of the Appendix.
Court of Appeals Disposition:	Reversed and remanded.

STATEMENT OF JURISDICTION

This Court has jurisdiction of this appeal under Section 22.001(a)(2) of the Texas Government Code because the Court of Appeals held differently than other courts of appeals (including itself) and this Court on the issue of whether an entity can be held strictly liable as a seller of a product where that entity does not release the product to the general, consuming public, but merely uses the product for its own purposes. *Compare Fulgham v. FFE Transp. Servs., Inc.*, No. 05-01-01040-CV, 2002 WL 1801596 (Tex. App. – Dallas Aug. 7, 2002, pet. filed) (not designated for publication), *with Armstrong Rubber Co. v. Urquidez*, 570 S.W.2d 374 (Tex. 1978), *Hernandez v. Southern Pacific Transp. Co.*, 641 S.W.2d 947 (Tex. App. – Corpus Christi 1982, no writ), and *Thate v. Texas & Pacific Railway Co.*, 595 S.W.2d 591 (Tex. Civ. App. – Dallas 1980, writ dism'd).

This Court also has jurisdiction of this appeal under Section 22.001(a)(6) of the Texas Government Code because this case presents important issues regarding the

necessity of expert testimony to establish the applicable standard of care and breach of that standard in ordinary negligence cases, the basis for making that determination, and the standard of review to ultimately be applied to that determination, all of which are likely to recur in future cases.

STATEMENT OF ISSUES

1. Can an entity that uses a product strictly for its own purposes, but that leases, or otherwise relinquishes possession of, the particular product to a third-party to further those purposes, be considered to have released that product into the stream of commerce such that it can be subject to strict tort liability?

2. In ordinary negligence cases, when and under what circumstances is expert testimony necessary to establish the applicable standard of care and breach of that standard of care?

3. What standard of review is to be applied on appeal to a determination regarding the necessity of expert testimony in ordinary negligence cases?

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner FFE Transportation Services, Inc. submits this Brief on the Merits to address in greater detail the decision of the Fifth Court of Appeals at Dallas, which reversed the trial court's directed verdict and remanded this case for trial.

I. INTRODUCTION

Contrary to the well-settled "stream of commerce" requirement for strict liability, the court of appeals concludes that a trucking company that provided Larry Fulgham a trailer solely for purposes of having Fulgham deliver that trailer for FFE could be held strictly liable. In doing so, the court of appeals extends the chain of distribution, and thus the entities to which strict product liability can apply, to the actual end-users of products. Now,

according to the Dallas Court of Appeals, strict product liability can be extended to entities that use products in the conduct of their business but who, in the process, necessarily lend those products to employees, independent contractors, or other third parties to further that business. This Court and the Texas courts of appeals have never authorized such an extension of liability. The Dallas Court of Appeals' decision to the contrary demands correction.

Additionally, the court of appeals erroneously decided that expert testimony was unnecessary to establish FFE's alleged negligence in inspecting the trailer at issue without giving proper consideration to the specific conduct and evidence at issue and without giving proper deference to the trial court's decision. It is not at all clear from the case law how such a determination is to be made by the trial court or reviewed on appeal. At the very least, however, determining whether a negligence case requires expert testimony requires the trial court to consider whether the conduct at issue requires the use of specialized equipment and techniques unfamiliar to the ordinary person. Necessarily, then, this determination must be made on the facts of each case. For this reason, the decision whether to require expert testimony by the trial court should be given deference by the courts of appeals.

This Court should take this opportunity to address these issues in greater detail and clarify an area of law that no doubt will occur more and more frequently as ordinary negligence cases increasingly involve more complex conduct and equipment. In doing so, this Court should provide deference to the trial courts making these decisions and, at the

same time, recognize that the trial court here was well within the law and facts of this case in determining that expert testimony was necessary.

II. STATEMENT OF FACTS[1]

A. Factual Background.

On March 7, 1998, Larry Fulgham was involved in a single-vehicle accident when the tractor-trailer he was driving flipped onto its side on a sharply curving exit ramp. (2 RR 32). At the time of the accident, Fulgham was hauling FFE's trailer. (2 RR 32). An agreement existed between Fulgham and FFE whereby Fulgham would furnish his tractor and his services as a driver to pull trailers on behalf of FFE, in exchange for a percentage of the money FFE earned on each load transported. (2 RR 27; DX 1).

At some point during the course of the accident, the upper coupler and kingpin detached from the base rail of the trailer.[2] (3 RR 141, 148-49, PX 6 & 7). The Fulghams filed suit against FFE[3] for negligence and strict products liability claiming that the bolts connecting the kingpin to the upper coupler were "rusted and weakened," which caused the trailer to break loose from the upper coupler while the tractor-trailer was on the exit ramp, causing the rollover. (CR 23-29). The Fulghams claimed FFE was negligent in failing to

[1] Except as expressly pointed out herein, the court of appeals' opinion accurately reflects the factual background of the case.

[2] The *fifth wheel* is a coupling device attached to the tractor, which supports the front of the trailer and locks the trailer to the tractor. The *upper coupler* is the surface on the underside of the front of a trailer, which rests on the tractor's fifth wheel and has a downward protruding *kingpin*, an anchor pin at the center of the trailer's upper coupler, that is then captured by the locking jaws of the tractor's fifth wheel.

[3] The Fulghams also sued Wabash, the manufacturer of the trailer at issue. (CR 23). The Fulghams settled with Wabash prior to trial. (CR 122, App. Tab 2).

properly inspect the trailer, failing to properly maintain the trailer, and failing to warn of this unsafe condition and that FFE was strictly liable for the defective design and manufacture of its trailer. (CR 25-26).

B. Trial.

The case was tried to a jury. The Fulghams called the following witnesses to testify: (1) Larry Fulgham; (2) James Fogus, an eyewitness to the accident; (3) Patricia Meyer, the police officer who first arrived on the scene following the accident; (4) Lieutenant Colonel Harry Hupp, a Kentucky Vehicle Enforcement officer who arrived shortly after Office Meyer and investigated the cause of the accident; (5) Bill Robinson, the former Director of Equipment and Maintenance at FFE; and (6) Jim Mallory, the Fulghams' accident reconstruction expert.

Larry Fulgham testified that prior to departing Hillshire Farms on the day of the accident, he conducted an inspection of both the tractor and the trailer, inspecting the parking brake, the brakes, the coupling device, the landing gear, lights, reflectors, tires, wheels and rims. (2 RR 87-89). He also inspected the tractor's fifth wheel and the trailer's upper coupler by going under the trailer and closely examined the trailer's base rail, specifically looking for bolts connecting the upper coupler to the base rail. (2 RR 90). He did not find any broken, missing or loose bolts, nor did he see any signs of scratching or wear around the perimeter of the bolts. (2 RR 91-92). In fact, had he seen a broken, missing, or loose bolt or a bolt that appeared to be worn out or have wear around it, Fulgham stated he would have noted the problem on his report and immediately notified FFE of the problem. (2 RR 92).

Following the accident, Fulgham, Mr. Hogus, Officer Meyer and Officer Hupp witnessed rust and broken bolts at the scene of the accident. (2 RR 45; 3 RR 24, 66, 145-46). From this, as well as his observation that the fifth wheel plate remained attached to the trailer, Officer Hupp concluded that the accident occurred because these bolts holding the upper coupler assembly had rusted, causing the fifth wheel plate to come loose from the trailer and flip. (3 RR 158). Hupp offered no opinion regarding FFE's inspection of the trailer. (3 RR 181).

Only Bill Robinson and the Fulghams' expert, Jim Mallory, touched on FFE's inspections and the sufficiency of those inspections. Mr. Robinson explained that FFE inspects each of its trailers every 60 days, utilizes a computer program to maintain the schedules for each trailer's 60-day inspections and annual inspections, and also maintains a file on each trailer which documents the work performed on the trailer. (4 RR 16-19).

Mr. Robinson explained that, for trailers like the one involved here, each side of the upper coupler is attached to the base rail on the trailer by stainless steel bolts. (4 RR 23). Each 60-day inspection, therefore, entails a visual inspection of the trailer's base rail to confirm that none of these bolts are loose. (4 RR 25). Generally, however, Mr. Robinson noted that the bolts of each trailer are tightened at the manufacturer's factory and do not come loose. (4 RR 30). Finally, addressing the alleged rust viewed at the scene, Mr. Robinson explained that no rust would appear on the trailer's base rail because it is made of aluminum. (4 RR 25).

Jim Mallory, the Fulghams' designated expert, did not criticize FFE's method of

inspection.[4] Mallory's only testimony to the jury was that FFE's 60-day, visual inspection should have detected a problem with the bolts. (6 RR 60, 64-66).

Mallory, however, seemed to disagree with Colonel Hupp's opinion regarding the specific problem with the bolts. (6 RR 82-83). The rusted and broken bolts identified by Hupp and the other witnesses appeared to connect the bottom of the trailer to the upper coupler plate. (2 RR 46, 49; 3 RR 158). However, Mallory's review of the trailer manufacturer's engineering drawings on did not reveal any indication of bolts connecting the bottom of the trailer to the upper coupler plate. (6 RR 31).

Instead, based on his review of part of the trailer's base rail, Mallory noted that the bolts connecting the upper coupler to the base rail were absent at the time of the rollover. (6 RR 61). Mallory seemed to believe that distorted bolt holes along the base rail indicated that those bolts were loose and, based on this fact, he concluded that this looseness caused the accident. (6 RR 49-50).

However, Mallory was unable to pin down when these loose bolts may have existed. He claimed that the bolts could have been loose from the time of manufacture, or could have come loose during service. (6 RR 62-63). Ultimately, Mallory admitted that he just did not know. (6 RR 62). He simply speculated that loose bolts could have

[4] Although he was not allowed to testify before the jury regarding the standard of care applicable to the industry and FFE's alleged breach of that standard of care, Mallory did admit that FFE's 60-day inspection of its trailers was reasonable. (7 RR 18, 21). In fact, the 60-day inspections were much more frequent than the annual inspections recommended by the Federal Motor Carrier Safety Regulations (FMCSR), which also only required visual inspections of equipment. (7 RR 17, 26). Mallory's only additional suggestion was that at least some of the bolts should also be checked for torque. (7 RR 21-22). However, and one of the reasons this particular testimony was excluded, Mallory was unable to testify that checking bolts for torque was any sort of standard or practice within the industry. (7 RR 18, 26).

been caused by Wabash's failure to properly torque the bolts or someone else's loosening the bolts. (6 RR 62-63). In any case, Mallory testified that loose bolts and, more specifically, the shiny area around the bolt hole, could have been detected during a visual inspection of the trailer. (6 RR 60, 64-66).

C. Directed Verdict.

Following the close of the Fulghams' case, FFE moved for directed verdict, arguing: (1) that no testimony was presented to establish the standard of care applicable to inspection of the trailer, that FFE breached that standard, or that any such breach caused this accident; and (2) that there was no evidence that FFE placed its trailer into the stream of commerce such that it could be strictly liable. (7 RR 45-47). During the hearing on the motion for directed verdict, the trial court noted, with regard to the Fulghams' negligence claim, that there needed to be expert testimony to establish the industry's standard of care for the inspection of trailers (7 RR 42-43), and that the simple fact that an accident occurred did not mean that FFE's last 60-day visual inspection of the trailer was negligent, especially since the Fulghams had presented no evidence to indicate that the rust or loose bolts identified following the accident existed at the time of FFE's last 60-day inspection (7 RR 65). The trial court granted FFE's motion. (7 RR 68, CR 122, App. Tab 2).

On appeal, the Fulghams argued, among other things, that: (1) there was sufficient evidence of the standard of care, breach of the standard of care, and causation; (2) that expert testimony to establish these elements was not necessary; and (3) that FFE placed its trailer in the "stream of commerce" pursuant to its independent contractor agreement with Fulgham and, by doing so, could be held strictly liable for any defect in that trailer. The

Dallas Court of Appeals agreed, reversed the directed verdict, and found: (1) that expert testimony was not necessary to establish the applicable standard of care and its breach and that the jury could decide the issue based solely on the limited evidence presented; (2) that the Fulghams had presented at least some evidence that FFE breached its duty to inspect the trailer at issue, and that this breach was a cause of the accident; and (3) that the agreement between FFE and Fulgham constituted a lease whereby FFE introduced its trailer into the stream of commerce, such that FFE could be strictly liable for any defect contained therein. (App. Tab 1).

III. SUMMARY OF THE ARGUMENT

At the time of this accident, the trailer at issue was being used to further FFE's business. It was not released to the general, consuming public. It was provided to a licensed truck driver solely for purposes of hauling that trailer to Texas. Such a transaction has never placed a product into the "stream of commerce" for purposes of imposing strict product liability - until now. In subjecting FFE to strict liability, the court of appeals ignored the "stream of commerce." In doing so, the court issued an opinion that conflicts with over twenty years of precedent from this Court, the Fifth Circuit, and other courts of appeals, including itself. That conflict requires correction.

Additionally, the court of appeals decided that expert testimony was not necessary to support the Fulghams' negligence claim. It does so, however, without reference to the precise conduct at issue or the evidence presented, without serious consideration of the average layperson's experience regarding such conduct, and ultimately without any deference to the trial court's determination of the matter. Certainly, the trail court was in the

best position to determine whether the conduct at issue was within the experience of the ordinary layperson. The trial court determined it was not and, therefore, required expert testimony. Given the evidence before it, as well as the limited guidance provided by Texas case law, it was within the trial court's discretion to make that decision. It was not the court of appeals' place to simply disagree with that decision. Instead, the court of appeals' only consideration should have been whether the trial court abused its discretion in reaching that conclusion. Because the role of the court of appeals in this context has never been defined by Texas case law, this Court should take this opportunity to define that role and, at the same time, expand on the basic rules to be considered in deciding whether expert testimony is necessary in cases of ordinary negligence. Upon resolving these issues, this Court should affirm the trial court's directed verdict.

IV. ARGUMENT & AUTHORITIES

A. The Trial Court's Directed Verdict On The Fulghams' Product Liability Claim Was Proper Because, As A Matter Of Law, FFE Does Not Release Its Trailers Into The Stream Of Commerce.

In reversing the directed verdict on the product liability claim, the court of appeals focused solely on the transaction between Fulgham and FFE and whether the agreement between the two could be considered a lease. (App. Tab 1 at *3-4). This focus was too narrow, failing to consider the much larger issue: whether FFE is engaged in the business of introducing its trailers into the stream of commerce for use by the ordinary, consuming public.

1. "Stream of Commerce."

A core requirement for strict products liability is that the Defendant be engaged in the business of introducing its products into the stream of commerce for use by the consuming public. *See Armstrong Rubber Co. v. Urquidez*, 570 S.W.2d 374, 376 (Tex. 1978); *Thate v. Texas & Pacific Railway Co.*, 595 S.W.2d 591, 598-99 (Tex. Civ. App. – Dallas 1980, writ dism'd). By ignoring this basic tenet, the court of appeals issued an opinion that conflicts with, among other settled law, its own opinion in *Thate* and this Court's opinion in *Armstrong Rubber*. That conflict requires correction. *See* Tex. R. App. P. 56.1(a)(5); Tex. Gov't Code Ann. § 22.001(a)(2), (6) (Vernon 1988).

In *Armstrong*, this Court first addressed the question of whether strict product liability can apply to a product that has not entered the stream of commerce. *See id.*, 570 S.W.2d at 375. The underlying lawsuit arose out of the death of a test driver employed by Automotive Proving Grounds, the owner and operator of a tire-testing facility. Automotive had agreed to provide testing facilities and drivers to test Armstrong Rubber's tires. *See id.* Armstrong Rubber agreed to provide all trucks and vehicles required for testing.

At the time of the accident, the test driver was driving a tractor/trailer rig owned by Armstrong. *See id.* The rig's two front tires were "non-interest spares" – tires mounted on a test truck but that are not themselves being tested. The tire was manufactured and provided solely for use as a non-interest spare on Armstrong's trucks, but was of the same quality as tires manufactured by Armstrong and sold across the nation. *See id.* During the test drive, one of the non-interest spares blew out, causing the tractor to overturn and kill the driver.

The driver's widow and son file suit against Armstrong Rubber claiming that the tire was defectively designed and manufactured. *See id.* at 375, 376. The jury agreed and judgment against Armstrong was entered accordingly. *See id.* at 375.

Armstrong appealed to the El Paso Court of Appeals, which affirmed the judgment. Upon further appeal, however, this Court held that strict liability could not apply to the tire at issue because the tire never entered the stream of commerce. *See id.* at 377.

"To invoke the doctrine of strict liability in tort," this Court began, "the product producing injury or damage must enter the stream of commerce." *Id.* at 376. Although recognizing that the application of strict liability does not depend on there being a formal sale of the product, "the product must be released in some manner to the consuming public." *Id.* Because the defective tire always remained within the industrial, testing process and never entered the stream of commerce, strict product liability could not apply. *Id.* at 377.

The Dallas Court of Appeals then expanded on this holding. In *Thate*, the plaintiff was injured when, to avoid a falling stanchion used to stabilize trucks transported by the railroad, he jumped to the ground from a flatbed railroad car owned by the railroad. The plaintiff, who was employed by a trucking company to load and unload trailers from these flatbed railroad cars, sued the railroad on, among other theories, strict liability. *Thate*, 595 S.W.2d at 594.

In support of this claim, plaintiff argued that a bailment was created when the railroad supplied his employer with railroad cars intended for interstate commerce which gave rise to strict tort liability. *Id.* at 598. The Dallas Court of Appeals disagreed. First, it noted a distinction between a product employed in interstate commerce and one in the

channels of commerce. "Channels of commerce implies that a product is placed for use by or sale to the consuming public, while interstate commerce is a term used for purposes of determining the scope of federal regulation." *Id.* "Merely because a product is employed in interstate commerce does not necessarily mean that it is in the channels of commerce."[5] *Id.*

Then, relying on *Armstrong Rubber*, the Dallas Court distinguished commercial transactions from industrial transactions. To enter the stream of commerce, the product must be released in some manner to the consuming public. *See id.* at 599. Absent release of the product to the ordinary, consuming public, the transaction remains industrial, to which strict liability does not apply. *See id*. Because the bailment in *Thate* was not incident to the sale of some other product or service, the railroad never released the railroad car to an ordinary user or consumer within the meaning of the *Restatement (Second) of Torts*, section 402A, and, therefore, the theory of strict liability in tort could not have applied. *See id.*

The Corpus Christi Court of Appeals reached a similar result under nearly identical facts in *Hernandez v. Southern Pacific Transp. Co.*, 641 S.W.2d 947, 952-53 (Tex. App. – Corpus Christi 1982, no writ). The court of appeals affirmed a directed verdict on the employee's strict liability claims, finding that there was no evidence the railroad was engaged in the business of releasing stanchions into the stream of commerce. *Id.* at 952. "The railroad merely leased the stanchion from Trailer Train Corp. and, through persons such as the appellant, used it for its intended purpose." *Id.*

[5] Ironically, the Fulghams seek to hold FFE strictly liable solely because the trailer is employed in interstate commerce. (7 RR 56) ("The highway is the stream of commerce in this instance.").

The Fifth Circuit agrees. In *Foster v. Ford Motor Co.*, 616 F.2d 1304 (5th Cir. 1980) (applying Texas law), the plaintiff brought suit to recover for injuries suffered when a bale of hay slid off a hayfork attached to his tractor's front-end loader. *Id.*, 616 F.2d at 1306. Plaintiff sued Ford, the manufacturer of the tractor. *Id.* Ford, in turn, sued the plaintiff's employer for indemnity and/or contribution. *Id.* at 1307. Ford alleged, among other things, that the plaintiff's employer was strictly liable to the plaintiff. *Id.* at 1312. The Fifth Circuit disagreed, noting that plaintiff's employer did not, in a commercial transaction, put the hayfork into the stream of commerce. Instead, he used it for his own purposes. *See id.* at n. 19. Plaintiff's employer, the Court held, was not the seller of the hayfork, but its purchaser. *See id.* at 1312. As such, strict liability could not apply.

2. FFE Did Not Place Its Trailer In The "Stream of Commerce."

The Dallas Court of Appeals, under facts strikingly similar to those presented above, ignores these cases and, in doing so, now allows employers to be considered sellers of products used by its employees in carrying out the employer's business. This is simply not what the "stream of commerce" requirement envisions.

The trailer at issue is owned by FFE. (4 RR 65). These trailers are then picked up and dropped off at pre-determined locations according to FFE's instruction. (2 RR 28-29). This is FFE's business – hauling cargo from place to place for its clients. It is not in the business of selling or otherwise distributing its trailers to the ordinary consumer. The relationship between FFE and Fulgham was not one of seller and consumer. Fulgham was

working for FFE, performing FFE's business.[6] The trailer was never released into the stream of commerce. Thus, strict liability cannot apply.

B. The Directed Verdict On The Fulghams' Negligence Claims Was Proper Because Those Claims Required Expert Testimony To Establish The Applicable Standard Of Care And Its Alleged Breach.

The Dallas Court of Appeals summarily dismissed the necessity of expert testimony as follows:

> The Fulghams argue that this case is similar to the detection and repair of a deteriorating pipeline in *Scurlock Oil Co. v. Harrell*, 443 S.W.2d 334, 337 (Tex. Civ. App. – Austin 1969, writ ref'd n.r.e.). … We conclude that the inspection and detection of loose and rusty bolts connecting the parts of the trailer is not a "fact so peculiar to a specialized industry" and is within the experience of a layperson, like a leaking pipe. [citations omitted]. Thus, expert testimony was not required to establish negligence.

(App. Tab 1 at *2). With all due respect, this conclusion ignores the facts and circumstances of this case and the evidence relied on to support the negligence claim. More importantly, this conclusion is the result of an entirely subjective determination that provides no deference to the trial court's ruling and, ultimately, no guidance to other courts or counsel regarding how this issue might be resolved in the future. Granted, none of the other courts of appeals to have addressed this issue provide much guidance themselves. Nonetheless, the issue is an important one as ordinary negligence cases will no doubt continue to focus more and more on increasingly complex equipment and conduct. This Court should therefore take this opportunity to provide the courts of

[6] This relationship has been identified as a "statutory employee" relationship between the owner-operator and the carrier which imposes vicarious liability upon the carrier as if it actually employed the driver. *See, e.g., John B. Barbour Trucking Co. v. State*, 758 S.W.2d 684, 688 (Tex. App. – Austin 1988, writ denied).

appeals, as well as trial judges and attorneys, some guidance as to how this issue can be practically addressed in the future, both at the trial court and on appeal. Tex. R. App. P. 56.1(a)(5), (6).

1. The Current State Of Texas Law Regarding Expert Testimony In Ordinary Negligence Cases.

Almost every case to address this issue begins (and ends) with this Court's simple statement in *Roark*: "Expert testimony is necessary when the alleged negligence is of such a nature as not to be within the experience of the layman." *Roark v. Allen*, 633 S.W.2d 804, 809 (Tex. 1982). In those cases that satisfy this requirement, expert testimony is therefore required to establish both the standard of care and the breach of that standard. *Turbines, Inc. v. Dardis*, 1 S.W.3d 726, 738 (Tex. App. – Amarillo 1999, pet. denied). The difficult question becomes which cases are not "within the experience of the layman" and, more importantly, how that determination is made.

Texas courts of appeals provide few published examples of ordinary negligence cases that require expert testimony. Flying an airplane is an activity not within a layperson's experience. *See McKinney v. Air Venture Corp.*, 578 S.W.2d 849, 851 (Tex. Civ. App. – Fort Worth 1979, writ ref'd n.r.e.). The aerial application of herbicide and pesticide requires the use of specialized equipment and techniques and, thus, requires expert testimony. *See Hager v. Romines*, 913 S.W.2d 733, 734-35 (Tex. App. – Fort Worth 1995, no writ). Finally, the performance of inspections and mechanical work on aircraft engines is not within a layperson's experience. *See Turbines, Inc.*, 1 S.W.3d at 738.

Negligence cases that do not require expert testimony are even less. The deterioration of a pipe such that it would no longer hold oil is not a fact so peculiar to a specialized industry that the alleged defect could only be established with expert testimony. *See Scurlock Oil*, 443 S.W.2d at 337. Additionally, driving an automobile in areas of road construction and the appropriate placement and type of construction warning signs are not outside the understanding of the average layman. *See J.D. Abrams, Inc. v. McIver*, 966 S.W.2d 87, 93 (Tex. App. – Houston [1st Dist.] 1998, pet. denied).

2. The Proper Consideration By The Trial Court: Does The Conduct Alleged To Be Negligent Involve The Use Of Specialized Equipment And/Or Techniques Unfamiliar To The Ordinary Person?

As quickly becomes apparent upon reviewing the relevant case law, determining whether expert testimony is necessary to prove ordinary negligence is made largely on an ad hoc basis, and understandably so since the factual variations in ordinary negligence cases can be endless. However, a few general guidelines can be gleaned from these cases that are instructive in establishing at least some basic ground rules for making this determination:

(1) Whether the conduct at issue requires the use of specialized equipment and techniques unfamiliar to the ordinary person. *See Hager*, 913 S.W.2d at 735; *see also J.D. Abrams*, 966 S.W.2d at 93; and

(2) If so, whether the use of such specialized equipment and techniques is actually at issue in the accident itself. *See J.D. Abrams*, 966 S.W.2d at 93.

Granted, these two basic rules do not provide much guidance, but they at least provide more objective considerations for a trial court to employ than the wholly subjective one employed by the Dallas Court of Appeals.

Applying these rules to this case, the negligence alleged by the Fulghams required expert testimony. First, the Fulghams took the position at trial that, generally, FFE's 60-day visual inspection of its trailers was not reasonable. (7 RR 61). Yet, the Fulghams failed to present any testimony, much less expert testimony, regarding the standard of care applicable to the trucking industry and whether FFE's inspections fell below this standard. Certainly, the trucking industry standard of care for conducting trailer inspections is not something familiar to the ordinary person. Thus, the trial court was correct in requiring expert testimony on this subject.

The court of appeals ignored this focus of the Fulghams' negligence case and, instead, focused simply on the Fulghams' claim that FFE's inspection of this specific trailer prior to this accident was negligent and, more specifically, whether expert testimony was necessary to prove such negligence. The court of appeals determined that expert testimony was not necessary and that the jury could have decided the issue on the limited facts presented. That decision, with all due respect, was wrong.

First, the court of appeals failed to consider the actual equipment and techniques at issue. This case involved the inspection of a refrigerated trailer. Hauling, maintaining, and certainly inspecting trailers, much less refrigerated trailers, is not within the experience of the ordinary person. In fact, Larry Fulgham had to be specially trained to

do daily inspections of this trailer. (2 RR 60). Obviously, daily inspection of the tractor and trailer was not something within Fulgham's ordinary experience.

Further, the evidence presented by the Fulghams established that the inspection and, in particular, the detection of loose bolts and rust was not as simple a task as the court of appeals seems to imply. (App. Tab 1 at *2) ("inspection and detection of loose and rusty bolts connecting parts of a trailer … is within the experience of a layperson, like a leaking pipe."). One of the Fulghams' experts, Jim Mallory, testified that loose bolts could be discovered by a visual inspection. (6 RR 60, 64-66). The Fulghams' other expert, however, testified that the alleged rusty bolts he discovered came from underneath the trailer and that, because of their location, would not have been visible to anyone until the fifth wheel plate broke loose from the trailer during the accident. (3 RR 142, 171). Thus, due to the specialized equipment involved, there was no consensus even among the Fulghams' own witnesses as to whether the alleged loose and/or rusty bolts could have been discovered by a reasonable, visual inspection.

Finally, and most telling, is the fact that the Fulghams attempted to introduce expert testimony regarding the standard of care applicable to trailer inspections in the trucking industry and FFE's alleged breach of that standard. (7 RR 11-26). The trial court excluded this testimony because it failed to establish a reliable industry-wide standard of care. (7 RR 28-31). However, this fact reveals that even the Fulghams believed expert testimony to be necessary to establish the applicable standard of care and its breach by FFE. Clearly, then, there was significant evidence from which the trial

court could reasonably conclude that the alleged negligence was not within the experience of the ordinary layperson.

3. Another Proper Consideration By The Trial Court: Does Circumstantial Evidence Allow An Inference Of Breach To Be Made That Is Within The Experience Of The Ordinary Person?

The court of appeals also failed to consider the circumstantial evidence the Fulghams necessarily relied on to infer that FFE was negligent in conducting its last 60-day inspection on this trailer. Upon concluding that expert testimony was not necessary in this case, the court of appeals went on to find at least some evidence that FFE had breached its duty to inspect the trailer based on Hupp's testimony that he found broken and rusty bolts at the scene of the accident. (App. Tab 1 at *3). From this simple fact, the court of appeals then makes the enormous leap to conclude that "[a] jury could have inferred that rust was present or might have been present for more than sixty days, long enough to have been detected by a visual inspection of the trailer."[7] (App. Tab 1 at *3). However, there was no evidence from which an ordinary layperson could infer that this rust existed over sixty days prior to the accident and would have been detected.

[7] This enormous leap was made necessary by the lack of any direct testimony from the Fulghams' witnesses as to when the alleged condition may have existed. Jim Mallory testified that loose bolts, not broken or rusty bolts, could have existed from the time the trailer was manufactured or that the bolts could have loosened while the trailer was in service. (6 RR 62-63). However, he admits that he simply did not know and, more importantly, did not testify that such looseness was discoverable, or even existed, at the time of FFE's last inspection. (6 RR 62). Fulgham's testimony indicates that any alleged rust or loose bolts did not exist at the time of FFE's inspections. Prior to departing Hillshire Farms on the day of the accident, Fulgham testified that he closely examined the base rail of the trailer, specifically looking at the bolts connecting the upper coupler assembly to the base rail and did not find any broken, missing or loose bolts. (2 RR 90-91). Thus, Fulgham's own visual inspection of the trailer on the day of the accident revealed no problems.

For such an inference to have been reasonable, it was necessary for the Fulghams to present expert testimony to at least explain that the alleged rust, as it existed on the day of the accident, somehow also could have existed more than sixty days prior. As the court of appeals states, the evidence demonstrated only that rust existed on the date of the accident. Certainly, it is not within the ordinary, common knowledge of a jury to make a reasonable determination as to whether the corrosion rate of metal is such that rust might have existed, and might have existed in a form that was discoverable by a visual inspection, more than sixty days prior to the date of the accident. Thus, the bare circumstantial evidence relied on by the Fulghams to prove a breach of the standard of care required expert testimony to provide the jury a reasonable basis to infer that this condition may have existed, and could have been discovered, at the time of FFE's last inspection. *Cf. McKnight v. Hill & Hill Exterminators, Inc.*, 689 S.W.2d 206, 208-09 (Tex. 1985) (although exact date of insect infestation was not known, expert witness may form a conclusion as to the approximate date of infestation by examining the premises and analyzing the damaged wood such that a jury may reasonably infer that the damage sued for resulted from the defendant's conduct). Otherwise, any inference that this condition existed over sixty days prior to the accident and would have been discoverable by a visual inspection, is no more than suspicion or surmise which is, in legal effect, no evidence. *See Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 928 (Tex. 1993).

4. The Proper Standard Of Review On Appeal: Abuse Of Discretion.

No Texas cases discuss the appropriate standard of review to be applied to such a determination. In light of this fact, as well as the fact that this issue will almost certainly recur in future ordinary negligence cases, this matter demands attention.

In choosing an appropriate standard of review, the standard should be reasonably related to the nature of the decision being made by the trial court. *Cf. BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002) (examining nature of decisions trial court makes when ruling on special appearance to determine appropriate standard of review applicable to that ruling on appeal). In its initial briefing to this Court, the Fulghams suggest that determining whether expert testimony is necessary is an issue centered on the legal weight to be given non-expert evidence and, as such, should be a question of law governed on appeal by a de novo standard of review. *See* Response to Petition for Review at p. 12. De novo review, however, is typically reserved for pure questions of law. *See Pacesetter Pools, Inc. v. Pierce Homes, Inc.*, 86 S.W.3d 827, 830-31 (Tex. App – Austin 2002, no pet.).

The determination to be made here is not a purely legal question. To the contrary, the necessity of expert testimony to prove ordinary negligence is one that will necessarily depend on the facts of each case. At most, the decision consists of a mixed question of law and fact which, generally, warrants an abuse of discretion standard of review on appeal. *See Brainard v. State*, 12 S.W.3d 6, 30 (Tex. 1999).

Upon closer examination of the nature of the decision being made, an abuse of discretion standard makes the most sense. The determination is closely analogous to the

decision a trial court makes regarding the admissibility of expert testimony and, more specifically, whether 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. *See K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000). That decision is reviewed for an abuse of discretion. *See id.*

In fact, the two determinations are necessarily intertwined. Obviously, if a trial court determines that the conduct at issue is within the common experience of the jury, then expert testimony is unnecessary to prove negligence and, potentially, is inadmissible. If, however, the conduct at issue involves specialized equipment and techniques and thus requires expert testimony, then expert testimony is necessarily admissible, at least under *K-Mart*. Whether the issue is evidentiary in nature or concerns the plaintiff's burden of proof, the underlying determination to be made by the trial court is the same: is the jury competent to form an opinion about the ultimate fact issue or issues or is expert testimony necessary. Thus, it stands to reason that the same standard of review – abuse of discretion – would apply to both.

Further, because the decision to be made is largely factual, considerable deference should be given the trial court's decision on appeal. After all, the trial court, having heard the evidence and being familiar with the allegations of negligence is in the best position to decide this issue. Only an abuse of discretion standard of review provides such deference.

The court of appeals did not apply any standard of review to the Fulghams' argument that expert testimony was not necessary. The court of appeals simply

concluded that the inspection of the trailer in this case was more like the detection and repair of a deteriorating pipe (*Scurlock Oil*) than the inspection and repair of a turbine engine (*Turbines, Inc.*) and, thus, that expert testimony was not necessary. There was no sound basis for this decision. The court of appeals just picked one case over the other. However, this was not the court of appeals' role. This was the role of the trial court.

As this Court explained in *Downer*, "[t]he test for abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action." *See Downer v. Aquamarine Operations, Inc.*, 701 S.W.2d 238, 241 (Tex. 1985). A trial court abuses its discretion when it acts arbitrarily and unreasonably, without reference to guiding rules or principles, or when it misapplies the law to the established facts of the case. *See id.* at 241-42. "The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred." *See id.* at 242; *see also Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991).

Thus, whether the facts of this case were more like *Scurlock Oil* than *Turbines, Inc.* was not for the court of appeals to decide. The only issue before the court of appeals should have been whether the trial court acted "without reference to guiding rules and principles" or misapplied "the law to the established facts of this case." With all due respect, the court of appeals failed that task. Upon proper consideration of those rules and principles and the established facts of this case, it becomes clear that the trial court did not abuse its discretion in requiring such testimony.

In *Turbines, Inc.*, the alleged negligence centered on the inspection and repair of a turbine aircraft engine and was found to not be within the experience of a layperson. *See id.*, 1 S.W.3d at 729. *Scurlock Oil*, on the other hand, dealt simply with the leaking of oil from the defendant's pipeline and whether that leak should and could have been detected and repaired. *See id.*, 443 S.W.2d at 337. A leaking pipe, that court held, was within a layperson's experience. *See id.* Although the inspection and maintenance of a refrigerated trailer may not be quite as complex as the inspection and maintenance of an airplane engine, it is certainly more complex than a leaky pipe. The court of appeals' decision to the contrary was simply without support in the record. More importantly, however, it violated what should be the applicable standard of review by deciding an issue more appropriately left to the trial court's discretion. This Court should declare an abuse of discretion standard of review applicable to such determinations and, upon doing so, find that the trial court was well-within its discretion in deciding that expert testimony was necessary.

V. CONCLUSION

In the end, the court of appeals' opinion creates two new rules that are simply not workable. First, ignoring clear authority to the contrary, the court of appeals extends strict product liability to the end-users of products. Now, simply by allowing an employee, independent contractor, or some other third-party to use that product to carry out its business, the end-user can be sued for strict product liability. This Court, the Fifth Circuit, and other courts of appeals, however, have long recognized that a party cannot be strictly liable unless that party places the product in the stream of commerce. Here, FFE

did not place its trailer in the stream of commerce. If anything, FFE removed the trailer from the "stream" when it purchased it for use in its trucking business. Strict product liability cannot apply under these circumstances.

Next, the court of appeals approves blatant "second-guessing" of a trial court's largely fact-based decision regarding the need for expert testimony to prove ordinary negligence. The court of appeals, without noting any standard of review, simply decides that FFE's inspection of the trailer was not an issue that required expert testimony. That decision necessarily implies that the court of appeals felt it was in as good a position as the trial court to decide that matter. Given the fact-intensive nature of the decision, however, the trial court, who hears the evidence and is much more familiar with the negligence allegations being made and proof supporting those allegations, is undoubtedly in a much better position to decide whether expert testimony is necessary to prove ordinary negligence. The trial court should, therefore, be afforded discretion in making that decision. Admittedly, no court has ever declared the appropriate standard of review applicable to this sort of determination. This Court should, therefore, take this opportunity to address the standard of review applicable to such decisions and, upon doing so, apply an abuse of discretion standard to such decisions on appeal.

Ultimately, the court of appeals simply disagreed with what should have been a discretionary decision of the trial court. Reversal of a trial court's discretionary ruling decision on that basis is not allowed. The trial court's decision that expert testimony was necessary to prove negligence was within what should be its discretionary authority and, thus, the trial court's judgment should be affirmed.

WHEREFORE, PREMISES CONSIDERED, Petitioner FFE Transportation Services, Inc. respectfully requests that this Court grant its Petition for Review, and upon review, reverse the Court of Appeals' judgment and affirm the trial court's judgment in favor of FFE. FFE also requests such other relief to which it may be justly and equitably entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument has been forwarded via CERTIFIED MAIL, RETURN RECEIPT REQUESTED, on this **3rd** day of **April 2003**, to the following:

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