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

PETITIONER FFE TRANSPORTATION SERVICES, INC.'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. ARGUMENT & AUTHORITIES 3

A. Strict Liability Simply Does Not Apply Here. 3

B. The Need For Expert Testimony In Ordinary Negligence Cases. 8

1. Proper Framing Of The Issue. 8

2. Standard Of Review. 11

C. The Fulghams' Other Points On Appeal. 13

1. The Alleged Spoliation Did Not Preclude The Directed Verdict. 13

a. No Presumption Was Warranted Here. 15

b. A Presumption, Even if Warranted, Did Not Preclude The Directed Verdict. 16

2. A Portion Of Jim Mallory's Testimony Was Properly Excluded. 18

CERTIFICATE OF SERVICE 20

TABLE OF AUTHORITIES

Page

Cases

Armstrong Rubber Co. v. Urquidez,
570 S.W.2d 374 (Tex. 1978) 4

Brewer v. Dowling,
862 S.W.2d 156 (Tex. App. - Fort Worth 1993, writ denied) 14, 15

E.I. du Pont de Nemours & Co. v. Robinson,
923 S.W.2d 549 (Tex. 1995) 18

Felix v. Gonzalez,
87 S.W.3d 574 (Tex. App. - San Antonio 2002, pet. denied) 14, 15

Foster v. Ford Motor Co.,
616 F.2d 1304 (5th Cir. 1980) 7

Hernandez v. Southern Pac. Transp. Co.,
641 S.W.2d 947 (Tex. App. - Corpus Christi 1982, no writ) 6

John B. Barbour Trucking Co. v. State,
758 S.W.2d 684 (Tex. App. - Austin 1988, writ denied) 7

K-Mart Corp. v. Honeycutt,
24 S.W.3d 357 (Tex. 2000) 2

Merrill Dow Pharmaceuticals, Inc. v. Havner,
953 S.W.2d 706 (Tex. 1997) 19

Morris v. JTM Materials, Inc.,
78 S.W.3d 28 (Tex. App. - Fort Worth 2002, no pet.) 8

Ordonez v. M.W. McCurdy & Co., Inc.,
984 S.W.2d 264 (Tex. App. - Houston [1st Dist.] 1998, no pet.) 14

Parkway Co. v. Woodruff,
901 S.W.2d 434 (Tex. 1995) 12

Roark v. Allen,
633 S.W.2d 804 (Tex. 1982) 12

TABLE OF AUTHORITIES (cont'd)

Page

Cases (cont'd)

Rourke v. Garza,
530 S.W.2d 794 (Tex. 1975) 5

Southwestern Bell Telephone Co. v. McKinney,
699 S.W.2d 629 (Tex. App.-San Antonio 1985, writ ref'd n.r.e.) 10

Thate v. Texas & Pac. Ry. Co.,
595 S.W.2d 591 (Tex. Civ. App. - Dallas 1980, writ dism'd) 6

Trevino v. Ortega,
969 S.W.2d 950 (Tex. 1998) 17, 18

Wal-Mart Stores, Inc. v. Middleton,
982 S.W.2d 468 (Tex. App. - San Antonio 1998, pet denied) 14

Williford Energy Co. v. Submergible Cable Services, Inc.,
895 S.W.2d 379 (Tex. App. - Amarillo 1994, no pet.) 14

Rules

Tex. R. Evid. 702 2

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner FFE Transportation Services, Inc. respectfully files this reply brief, responding to the arguments and issues raised in Larry and Debra Fulgham's Response Brief on the Merits.

I. INTRODUCTION

First, the Fulghams argue that the stream of commerce issue is decided simply by whether one party releases the product to another as part of a commercial transaction and, since FFE released the trailer to Fulgham, FFE can be strictly liable. Actually releasing the product to another, however, is simply part of the test. As the cases from this Court, the Fifth Circuit, and the courts of appeals all demonstrate, the party releasing the product

must also be in the business of releasing such products to the ordinary, consuming public. It is this aspect of the "stream of commerce" requirement that the Fulghams and the Dallas Court of Appeals completely overlook and that is notably absent from the facts of this case. FFE is not in the business of releasing its trailers to the ordinary, consuming public.

Second, with regard to the need for expert testimony in ordinary negligence cases, the Fulghams simply argue that the trial court was wrong and the court of appeals was right, again without acknowledging their own theories of negligence which necessarily centered on matters not within the ordinary knowledge of laypersons – the industry standard or custom applicable to the inspection of trailers and the likelihood that loose or rusty bolts existed in a manner discoverable by visual inspection at the time of FFE's last inspection. These matters required expert testimony.

Then, the Fulghams take the rather shortsighted position that this determination is a question of law that is reviewable de novo. However, this position completely ignores the nature of the decision to be made by the trial court, which is largely identical to the decision to admit expert testimony under Texas Rule of Evidence 702 and *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357 (Tex. 2000), and thus more appropriately subject to an abuse of discretion standard of review on appeal.

Finally, the Fulghams argue that two other issues not reached by the Dallas Court of Appeals – the spoliation of evidence and exclusion of expert testimony – both independently require that the directed verdict in FFE's favor be reversed. With regard to the spoliation issue, the Fulghams claim that a spoliation presumption was warranted based

on the failure to produce the upper coupler assembly following the accident and that this presumption somehow excused any deficiency in their burden of proof. However, there was ample evidence, from the Fughams' own witnesses, as well as from photographs following the accident, as to what the upper coupler assembly would have shown. No presumption was appropriate.

As for the Fulghams' expert, they claim his testimony that FFE's inspection should have included a check of the trailer's bolts for torque in addition to the 60-day visual inspections was improperly excluded. However, a review of the record reveals that the exclusion of this evidence was proper. The Fulghams' expert was unfamiliar with any standard or custom in the industry and, thus, had no factual basis upon which to base his opinion.

These last two issues do not require reversal of the directed verdict and, frankly, do not warrant this Court's attention. The court of appeals avoided these issues altogether, instead focusing on the application of strict liability to trucking companies like FFE and the need for expert testimony to prove ordinary negligence to reverse the trial court's judgment. It is those issues, and the unworkable rules created by the Dallas Court of Appeals' resolution of those issues, that demand this Court's attention.

II. ARGUMENT & AUTHORITIES

A. Strict Liability Simply Does Not Apply Here.

The Fulghams argue that the answer to this question is as simple as whether one party released a product to another as part of a commercial transaction. To make this argument, however, is to ignore each and every one of the cases FFE cites. In each and

every one of those cases, a product was released by one party to another as part of a commercial transaction. The key instead, and that aspect of strict liability that both the Fulghams and the Dallas Court of Appeals choose to ignore, is that the party must also be in the business of releasing such products to the ordinary, consuming public. That aspect of the "commercial transaction" is notably lacking here.

The Fulghams' attempt to distinguish each and every one of the cases cited by FFE makes that clear. First, the Fulghams argue that *Armstrong Rubber Co. v. Urquidez*, 570 S.W.2d 374 (Tex. 1978), is inapplicable here because the specific product there was not intended to enter the stream of commerce, and did not enter the stream of commerce. Yet FFE's trailer is no different. FFE was using the trailer solely for purposes of conducting its business. The trailer did not enter the stream of commerce.

The Fulghams then cite to the cases this Court considered being in the stream of commerce in *Armstrong*. However, the Fulghams' own recitation of these examples from *Armstrong* proves that the product here never entered that stream:

> Among the situations that the *Armstrong* court considered as being in the stream of commerce was the defendant loaning <u>its customer</u> a defective car for use while repairing the customer's car; the defendant providing a defective potato vine burner <u>to its customer</u> in connection with defendant's sale of gas; the defendant loaning a defective gas tank in which <u>its customer</u> stored gas purchased from defendant; and the defendant substituting a defective wheel assembly from its own stock in the course of repairing <u>its customer's</u> truck.

See Response at p. 5 (emphasis added). As emphasized, in each of the above-referenced examples, the party to whom the product was released was <u>a customer</u>. Moreover, as this Court noted, each example involved a "bailment for mutual benefit <u>accompanied [by] a sale of goods or services</u>." *Id.*, 570 S.W.2d at 377 (emphasis added). As has been repeatedly

mentioned, by no stretch of the imagination could Fulgham be considered FFE's customer nor was the lease of the trailer to Fulgham accompanied by any sale of goods or services. Fulgham was working for FFE. Strict liability simply does not attach in that context.

Rourke v. Garza, 530 S.W.2d 794 (Tex. 1975), reinforces this position. The Fulghams cite *Rourke* for the proposition that a rental company releases its products into the stream of commerce when it leases products to its customers. Again, however, *Rourke* involved rental to a customer. As this Court noted, "Rourke Rental had been in the business of renting scaffolding equipment for about fifteen years prior to the accident, and it had previously rented such equipment to Har-Con." *Id.* at 797 (emphasis added). Thus, Rourke was clearly "in the business of introducing its products into the channels of commerce." *Id.* at 800. FFE is not.

The Fulghams also take a rather remarkable position based on *Rourke* – they seem to claim, contrary to FFE's argument and the Dallas Court of Appeals' holding in *Thate,* that strict liability can apply to purely industrial transactions. *See* Response at p. 5. The Fulghams base this argument on their mistaken assumption that this Court found strict liability applicable to a purely industrial transaction in *Rourke*. The Fulghams simply misread *Rourke*. The equipment leased in *Rourke* was leased to an "industrial user." It was not the purely industrial transaction identified in *Armstrong* and *Thate*.

The Fulghams ultimately attempt to dismiss *Thate*'s holding entirely by arguing that its real, correct basis was that the railroad car at issue was never released to any other party. *See* Response at p. 5. Again, the Fulghams misread the case law. In *Thate*, the railroad car was released to the trucking company. In fact, the plaintiff argued and the Dallas Court of

Appeals found a bailment of the railroad car. *See Thate v. Texas & Pac. Ry. Co.*, 595 S.W.2d 591, 599 (Tex. Civ. App. – Dallas 1980, writ dism'd). However, citing *Armstrong*, the court held that "the bailment … was not incident to the sale of a product or service, that the railroad never released the railroad car to an ordinary user or consumer within the meaning of the Restatement, and therefore, that the theory of strict liability in tort should not have been applied to this industrial transaction." *Id.* Certainly, the transaction at issue here exhibits these same characteristics and, thus, demands similar treatment.

Nonetheless, the Fulghams continue their attack on the case law. They argue that *Hernandez v. Southern Pac. Transp. Co.*, 641 S.W.2d 947 (Tex. App. – Corpus Christi 1982, no writ), is not instructive because FFE is much more like the nonparty who leased the stanchion to the railroad (who was engaged in the business of releasing its products into the stream of commerce) rather than the railroad itself (who was not). *See* Response at p. 6. Once again, however, the Fulghams miss the focus of *Hernandez*.

In *Hernandez*, the railroad delivered the product to the trucking company (plaintiff's employer) to use for purposes of unloading trailers from a flatcar. The court refused to apply strict liability, however, because "[t]he railroad merely leased the stanchion from Trailer Train Corp. and, through persons such as the appellant, used it for its intended purpose." *Id.* at 952. FFE merely purchased the trailer from Wabash and, then, like the railroad in *Hernandez*, used the trailer through persons such as Mr. Fulgham for its intended purpose. In this sense, FFE is no different from the railroad, having delivered the trailer to Mr. Fulgham for purposes of delivering the trailer and its contents to Houston. (2 RR 32).

Finally, the Fulghams attempt to distinguish *Foster v. Ford Motor Co.*, 616 F.2d 1304 (5th Cir. 1980), by implying that FFE is more like Ford, who manufactured the tractor, or the company that modified the tractor, than the farmer who simply provided the tractor and hayfork to his employee to use in furtherance of his farm's business. Yet, in doing so, the Fulghams' again ignore the true nature of the relationship between Mr. Fulgham and FFE. Larry Fulgham was working for FFE at the time of the accident. Thus, the relationship here is no different from that between the farmer and employee in *Foster*.

The Fulghams take issue with this characterization of FFE's relationship with Fulgham and the statement that the court of appeals' opinion now extends strict liability to the employer-employee context, noting that Fulgham was not FFE's employee. *See* Response at p. 6. In doing so, the Fulghams attempt to walk a rather fine line, going so far as to actually argue that "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." *See* Response at pp. 3-4. However, the distinction between an independent contractor and an employee driver is without a practical difference.

For example, unlike in other contexts, the law treats this relationship here as one of "statutory employee," which imposes vicarious liability upon the carrier as if it actually employed the driver. *See John B. Barbour Trucking Co. v. State*, 758 S.W.2d 684, 688 (Tex. App. – Austin 1988, writ denied). Under the Federal Motor Carrier Safety Regulations, interstate motor carriers maintain both a legal right and duty to control leased vehicles operated for their benefit. *See Morris v. JTM Materials, Inc.*, 78 S.W.3d

28, 38 (Tex. App. – Fort Worth 2002, no pet.). Accordingly, federal regulations create a statutory employer-employee relationship between the owner and the carrier, making the carrier vicariously liable as a matter of law for the negligence of its drivers. *See id.* at 38-39. Granted, FFE's vicarious liability for Fulghams' negligence is not at issue here. However, what is at issue is the Fulghams' attempt to distinguish an independent contractor from an employee. Here, there is none.

Even if there was, it would not affect the analysis. For all practical purposes, the relationship between Fulgham and FFE was one of employer-employee, to which strict liability simply does not attach. Fulgham, without a doubt, was conducting FFE's business at the time of the accident and was provided a trailer in furtherance of that business. Fulgham was not a customer of FFE. Fulgham was working for FFE. In this sense, Fulgham, whether labeled an independent contractor or employee, is no different from the plaintiffs in *Hernandez* and *Foster* and, like those plaintiffs, cannot maintain a valid strict liability claim against FFE.

B. The Need For Expert Testimony In Ordinary Negligence Cases.

1. Proper Framing Of The Issue.

The Fulghams argue that framing their negligence issue as one involving the inspection of a refrigerated trailer, and thus one unfamiliar to the ordinary person, is to frame the issue too broadly. *See* Response at p. 7. Yet, the Fulghams' argument ignores their own theories of negligence.

The Fulghams focused their negligence case at trial on two theories: (1) that the 60-day visual inspection of the trailer, in and of itself, was inadequate; and (2) if the 60-

day visual inspection was adequate, it nonetheless should have detected the existence of loose and/or rusty bolts. Both theories required expert testimony.[1]

The first theory focused on the inspection standard applicable to the trucking industry. The Fulghams implicitly admitted that expert testimony was necessary on this topic by attempting to call Jim Mallory on this subject. Mallory opined that, in addition to a visual inspection, the trailer's bolts should also be checked for torque. (7 RR 21-22). Mallory, however, was unable to testify that such a requirement constituted any sort of industry standard or practice. (7 RR 18, 26). Accordingly, the trial court excluded that testimony. (7 RR 11-25). Certainly, the trucking industry's standard of care was not a matter within the jury's ordinary knowledge and thus required expert testimony. In its absence, the Fulghams' negligence theory necessarily failed.

The Fulghams' fall-back theory was no different. The Fulghams also took the position that even if FFE's 60-day visual inspection was adequate, it should have detected the existence of loose and/or rusty bolts. This position necessarily assumes that the loose or rusty bolts existed and were capable of being detected at the time of FFE's last inspection. At the very least, expert testimony was necessary on this subject.

To provide the jury a basis upon which to infer that the loose or rusty bolts found on the scene existed at the time of FFE's last inspection, there had to be some expert

[1] The Fulghams state that even if expert testimony was necessary, adequate testimony was provided. The Fulghams state that expert testimony was presented on the issues of duty to inspect for loose and/or rusty bolts, frequency of inspections, detecting loose bolts. *See* Response at p. 10. However, no one disputed FFE's duty to inspect the trailer for loose or rusty bolts, no one criticized the frequency of FFE's inspection, and no one really questioned the method of detecting loose bolts. Ultimately, however, none of this testimony is of any concern here since it fails to answer the specific negligence theories pursued by the Fulghams at trial.

testimony to provide that link. The Fulghams simply argue that such testimony was not necessary, making the rather bold statement the jury could make this call based on the limited facts presented. The Court of Appeals made this same bold leap. That leap was not justified by any evidence presented.

The Fulghams instead argue, based exclusively on *Southwestern Bell Telephone Co. v. McKinney*, 699 S.W.2d 629 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.), that FFE had a continuing duty to inspect its trailers and, thus, that knowledge of any defect in the trailer, regardless of when the defect was found, could be imputed to FFE for purposes of determining negligence. That case, however, is quite different from the facts presented here.

In *McKinney*, Bell argued it owed no duty to reasonably inspect because it was never notified of any defect in the telephone lines. The court disagreed, finding that Bell's visual inspection program was insufficient and that Bell had to do more to sufficiently monitor the condition of its lines. Here, everyone acknowledged FFE's duty to inspect and no one criticized the manner or frequency of FFE's inspections. Thus, the Fulghams' (and the Court of Appeals') reliance on *McKinney* is misplaced.

The issue here fell simply to whether FEE should or even could have detected loose or rusty bolts at the time of its last inspection. To support a "Yes" answer to that question, the Fulghams had to provide the jury a basis upon which to infer that the condition of the bolts following the accident was discoverable by visual inspection some

time before the accident.[2] Certainly, this was not within the experience of ordinary laymen. The Fulghams failed to present the necessary expert testimony to support such an inference. *See* Response at p. 10 ("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"). Thus, the directed verdict was proper.

2. Standard Of Review.

As they did in their previous briefing to this Court, the Fulghams continue to argue that determining whether expert testimony is necessary is one centered on the legal weight to be given evidence and, thus, is a question of law to be reviewed *de novo*. *See* Response at p. 13. Again, however, the determination, as the parties own discussion demonstrates, is not a purely legal question but necessarily is dependent largely on the facts of each case. As such, the more appropriate standard of review is for an abuse of discretion.

This time, however, the Fulghams additionally rely on the standard of review applicable to directed verdicts to argue that, even assuming a mixed question of law and fact is involved, the directed verdict requires that all facts and inferences be resolved in

[2] The last date of FFE's inspection was not seven or eight days prior to the accident as the Fulghams claim in their brief. There was an inspection performed by FFE on December 18, 1997, and then a safety inspection done by an outside vendor, T.A. Truck Stops, on January 22, 1998. (4 RR 21). The only other evidence of an inspection was the one conducted by Fulgham himself before he left Hillshire Farms the day of the accident. (2 RR 87-88). Given that approximately 45 days had elapsed since the January 22 inspection, there needed to be some evidence from which the jury could infer that the loose or rusty bolts the Fulghams claim caused the accident existed and could have been detected at that inspection. No such evidence was presented.

the Fulghams' favor, leaving no underlying factual dispute and only a purely legal issue reviewable *de novo*. *See* Response at p. 13. This argument, however, again fails to account for the true nature of the determination being made or the ramifications of applying such a standard to the trial court's decision.

Whether expert testimony is necessary in an ordinary negligence case is not a legal weight question but a burden of proof question. A trial court must determine, based on the facts of each case, whether the alleged negligence is within the experience of the layman. *See Roark v. Allen*, 633 S.W.2d 804, 809 (Tex. 1982). Thus, the determination necessary dictates what a plaintiff must show to prevail on its theory. If the facts relied on to establish negligence are unfamiliar to the ordinary person, expert testimony is necessary to prove plaintiff's case. If plaintiff fails to present such testimony, the plaintiff necessarily fails its burden and, thus, directed verdict is appropriate. *Cf. Parkway Co. v. Woodruff*, 901 S.W.2d 434, 445 (Tex. 1995) (in professional negligence case, failure to present expert testimony of the standard of care applicable to engineers or any basis for finding a breach of that standard justified directed verdict on claims against engineers).

To apply the directed verdict standard to this determination does not make sense. If, as the Fulghams propose, all facts and inferences regarding the need for expert testimony are to be construed in favor of the plaintiff, then the presumption in every directed verdict case would be that expert testimony <u>is not necessary</u> to prove negligence. Certainly, given this Court's statement in *Roark*, this is not the correct approach.

Abuse of discretion should govern that initial determination. If a trial court requires expert testimony, then expert testimony will be necessary to survive a directed verdict. All facts and inferences from the expert's testimony then can be construed in favor of the plaintiff. However, the underlying, largely factual determination should be, both at trial and on appeal, one within the trial court's discretion.

C. The Fulghams' Other Points On Appeal.

Interestingly, the Fulghams seem to concede that the Dallas Court of Appeals' opinion was wrong by focusing the bulk of their briefing on two issues never reached by the court of appeals. First, the Fulghams argue that a spoliation presumption was warranted here which, in and of itself, should have provided the evidence necessary to survive a directed verdict. Second, the Fulghams argue that if expert testimony was required, it was reversible error to exclude its expert's testimony as to the standard of care applicable to FFE. As will be shown in more detail below, neither point is supported by the evidence or case law and, thus, neither requires reversal of the directed verdict.

1. The Alleged Spoliation Did Not Preclude The Directed Verdict.

The Fulghams argue that FFE's failure to preserve and produce the upper coupler assembly constituted spoliation, which entitled them to an evidentiary presumption that the upper coupler assembly, had it been produced, would have been unfavorable to FFE and, more importantly, that would have provided evidence sufficient to survive a directed verdict. This position, however, fails to find support in the evidence or Texas law.

Generally, two rules apply to presumptions that derive from the spoliation of evidence. First, the intentional spoliation of evidence raises a presumption that the

evidence would have been unfavorable to the spoliator. *Felix v. Gonzalez*, 87 S.W.3d 574, 580 (Tex. App. - San Antonio 2002, pet. denied); *Wal-Mart Stores, Inc. v. Middleton*, 982 S.W.2d 468, 470 (Tex. App. - San Antonio 1998, pet denied). This rule applies, however, only where evidence has been intentionally destroyed, not merely lost. *Williford Energy Co. v. Submergible Cable Services, Inc.*, 895 S.W.2d 379, 390 (Tex. App. - Amarillo 1994, no pet.).

The second rule, and the one the Fulghams apparently rely on here, applies in cases of unintentional spoliation or the failure to produce evidence within a party's control and raises a rebuttable presumption that the missing evidence would be unfavorable to the nonproducing party. *Felix,* 87 S.W.3d at 580; *Ordonez v. M.W. McCurdy & Co., Inc.*, 984 S.W.2d 264, 273 & n. 11 (Tex. App. - Houston [1st Dist.] 1998, no pet.). This presumption, however, is not warranted if the nonproducing party testifies as to the substance or content of the missing evidence. *Brewer v. Dowling*, 862 S.W.2d 156, 159 (Tex. App. – Fort Worth 1993, writ denied).

a. No Presumption Was Warranted Here.

Here, the Fulghams claim that FFE spoliated the upper coupler assembly.[3] There was no evidence that FFE's failure to produce the assembly was intentional. Mr. Robinson, FFE's Director of Maintenance, testified that he instructed his staff to keep the upper couple assembly following the accident and that, as far as he knew, FFE still had it when he retired in 1999. (4 RR 32-37). At best, the evidence was simply lost, in which case a presumption was warranted only if there was no other evidence as to the substance or content of the missing evidence. *See Brewer*, 862 S.W.2d at 159.

Here, other evidence existed showing the upper coupler assembly following the accident. As such, no presumption was warranted.

First, the Fulghams called no less than four eyewitnesses that could and did testify as to what they saw following the accident and, in particular, the condition of the upper coupler assembly. Fulgham, Mr. Hogus, Officer Meyer and Officer Hupp all testified to having seen rust and broken bolts at the scene of the accident that they believed protruded

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[3] The Fulghams imply that other evidence may have also been spoliated. *See* Response at p. 18. Specifically, the Fulghams cite to Colonel Hupp's testimony that when he went to the wrecker yard "[t]here were some people out there, and I have no idea who they were, but I'm pretty sure they got some of those bolts." (3 RR 153). However, there is no indication anywhere in the record that these people were representatives of FFE or that they actually recovered any bolts. Ironically, the only thing the evidence does show is that Colonel Hupp retrieved a bolt from the accident scene, which later "disappeared." (3 RR 153-54).

The Fulghams also cite to a wrecker service bill to FFE that purported to include "three sets of pictures and video film." (4 RR 38-39, PX 20). However, Bill Robinson denied ever having seen any such pictures or video. (4 RR 39). In fact, there was no other evidence that any such pictures or video existed or were obtained by FFE. Clearly, such evidence could not support a claim of spoliation. *See Felix*, 87 S.W.3d at 580 (where there was no evidence, other than Defendant's recollection, that a recorded statement was taken by an insurance adjuster, there could be no spoliation instruction based on the failure to produce that statement).

vertically to hold the upper coupler assembly to the trailer. (2 RR 45, 49; 3 RR 24, 66, 145-46). In fact, Officer Hupp was allowed to testify that these bolts, which he thought held the upper coupler to the trailer, had rusted, causing the assembly to break free of the trailer and flip. (3 RR 158).

In addition to this eyewitness testimony, a number of photographs[4] of the scene were produced along with the trailer manufacturer's engineering drawings. This evidence was relied on by the Fulghams expert, Jim Mallory, who actually disagreed with the position that there were any vertical bolts holding the upper coupler assembly to the trailer. (6 RR 83). Instead, based on his review of the trailer's base rail (which was retained and produced) and engineering drawings, it was Mallory's opinion that the only bolts holding the upper coupler to the trailer were bolts running horizontally along the base rail of the trailer. (6 RR 83). In any event, the substance and content of the upper coupler was testified to by almost all of the Fulghams' witnesses and demonstrated otherwise by photographs and drawings. Clearly, no presumption was warranted.

b. A Presumption, Even if Warranted, Did Not Preclude The Directed Verdict.

Even assuming the failure to produce the upper coupler assembly warranted a spoliation presumption, the presumption warranted is not one that would enable the Fulghams to survive the directed verdict. According to Justice Baker's concurrence in *Trevino v. Ortega*, 969 S.W.2d 950 (Tex. 1998), differing levels of presumption exist

[4] The Fulghams state in their brief that none of the photographs were of sufficient clarity and proximity to tell how the upper coupler was attached to the trailer. *See* Response at p. 18. As with a number of their other statements, however, no cite to the record is provided for that statement.

depending on the level of prejudice to the nonspoliating party. *See id.* at 960. Where the nonspoliating party cannot prove its case without the spoliated evidence, a rebuttable presumption arises that actually shifts the burden of proof to the spoliating party to disprove the presumed fact or issue. *See id.* at 960. According to Justice Baker, such a presumption can enable the nonspoliating party to survive, among other things, a directed verdict. *See id.*

On the other had, where the nonspoliating party can prove a *prima facie* case without the spoliated evidence, a less severe, adverse presumption can be utilized. *See id.* This less severe presumption simply presumes that the evidence, had it been produced, would have been unfavorable to the spoliating party. *See id.* This presumption, however, does not enable a party to survive directed verdict. Justice Baker expressly noted that this presumption "does not relieve the nonspoliating party of the burden to prove each element of its case." *Id.* at 961. The Fulghams, at best, may have been entitled to this adverse presumption.

Here, the Fulghams' own expert testified that the upper coupler assembly was not necessary to prove the case. Based on Mallory's review of the photographs and design drawings, he concluded that, contrary to eyewitness testimony, there were no bolts protruding vertically through the upper coupler assembly that held it to the trailer. (6 RR 31). Instead, Mallory opined that the bolts holding the upper coupler assembly to the trailer ran horizontally along the base rail of the trailer. (6 RR 61). Given this opinion, the upper coupler assembly was unnecessary to prove plaintiff's case.

Since the prejudice to the Fulgham could not have been severe, the Fulghams, arguably, would have only been entitled to the "adverse" presumption, which does not shift the burden of proof and does not relieve the nonspoliating party of the burden to prove each element of its case. *See Trevino,* 969 S.W.3d at 961. Accordingly, any presumption that may have been warranted would not have enabled the Fulghams to survive directed verdict.

2. A Portion Of Jim Mallory's Testimony Was Properly Excluded.

Finally, the Fulghams complain regarding the fact that a portion of Jim Mallory's testimony – a portion in which he attempted to testify that FFE's 60-day visual inspection of its trailers was inadequate for failing to also check the trailer's bolts for torque – was excluded based largely on Mallory's failure to testify that this requirement was any sort of standard or custom in the industry. The Fulghams concede that Mallory could not testify as to any standard of care in the industry regarding the inspection of trailers. *See* Response at p. 21. Although difficult to tell from their brief, it appears the Fulghams argue that although Mallory could not identify a standard of care for the industry, his suggestion that trucking companies also check the bolts on their trailers for torque demonstrated an industry custom, which was nonetheless admissible.

Regardless of how the Fulghams couch their expert's testimony, it had to be based on a reliable foundation. *See, E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995). It was not. The Fulghams' counsel expressly asked Mallory regarding the standard of care in the industry. (7 RR 18). In response, Mallory admitted

that he was not familiar with what all companies do. (7 RR 18). Thus, he clearly did not know what the industry custom was.

Mallory did testify that he was aware of what Central Freightlines was doing with regard to maintenance on their vehicles. (7 RR 18). However, Mallory never testified to exactly what Central Freightlines was doing or even whether Central Freightlines was the basis for his conclusion that FFE should have also checked the bolts on its trailers for torque. Instead, Mallory only testified that this additional requirement was based "on what I perceive to be an adequate procedure for assuring that those bolts do not come loose." (7 RR 22). This bald assertion, unsupported by any facts, was not only unreliable, but constituted no evidence of any industry custom or standard. *See Merrill Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997) (naked expert opinion unsupported by fact carries no probative force at law). Thus, Mallory's testimony could not enable the Fulghams to survive the directed verdict.

WHEREFORE, PREMISES CONSIDERED, Petitioner FFE Transportation Services, Inc. respectfully re-urges its request that this Court grant its Petition for Review and, upon review, reverse the Court of Appeals' opinion 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 **7th** day of **May 2003**, to the following:

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