ORAL ARGUMENT – 10-20-04
03-0526
MACK TRUCK INC., V. TAMEZ

BREEN: This case presents two material issues to this court today. First, is a trial judge's hands tied, and is that judge forced to give somebody who has lost a Robinson challenge a rehearing, a second bit sometime before an appeal? Second, in a case where a Robinson challenge is granted and a trial judge finds when a party admits the expert was unreliable, when that expert does not show methodology, when in fact that expert does not rule out with reasonable certainty other alternative causes of an event in this case, is it an abuse of discretion for that trial judge to have excluded the causation opinion? Because the 13th CA incorrectly got the answers wrong to those questions, this court ought to reverse and reinstate the dismissal of this case, the summary judgment.

HECHT: Do you think the outcome is different if we consider the Billow(?) exceptions or not?

BREEN: I don't. I don't think it's different. I do think it has material effects although J. O'Neill, I don't think I will tell you the sky is falling. It will have an impact on trial judges and what goes on in courts around the state. But it will not impact, I don't believe, this court's ultimate analysis. And the reason is, because Mr. Elwell, even in the second bite hearing which is about 60 some odd pages long, although he did a little bit better job of showing his methodology, what he didn't do even in the second hearing was rule out the cargo, the 8,000 gallons of crude oil, highly volatile, as a potential source of the fire. The outcome will be the same. But the problem is, and it goes to the first prong really before the court today, which is when you have a scenario where as in this case multiple parties were sued, including several that were involved in the tank, which is now essentially disavowed as a cause of the fire. Those parties settled out and left only Mack, the manufacturer of this truck left to go to trial. The truck was 10 years old at the time of the accident. So Mack is the only one left. They are on the eve of trial. Mack has filed a motion to exclude the expert in this case, who is not only the product liability expert from a liability sense in terms of here's what the defect is, here's what I think the problem is...

OWEN: That's kind of what I want to know procedurally. I have not yet looked at the record. You say this was on the eve of the trial. Was there an order in place, a scheduling order?

BREEN: Not that I'm aware of. This motion was set and what you will see when you get into the record is at best it's convoluted in terms of what was heard, when and how it shook out. Although it is convoluted procedurally, the issues come out being very simple.

OWEN: In the order setting the hearing on your motion to exclude the expert's testimony, did the TC advise the plaintiff's counsel that this is your only shot, come loaded for bear because this is the only time you are going to get...

BREEN: I can't say that it did. I don't know. I don't believe anybody has ever claimed either way in this case. The plaintiffs have never argued in this case, Oh well we were unfairly ambushed, or the trial judge didn't give us the procedural due process, or the procedural rights we needed. Which would potentially be a different story. The US SC has addressed that in the Kumho case and said, there are two areas where the court needs to give trial judges a great deal of deference. In the expert sense. One is, in the procedural settings when are you going to have this hearing? how is going to be vetted? is it going to be written or oral? And your question goes to that, because the SC has said, even though you have discretion trial judge you have to be careful. You can't do it in such a manner that it's unfair and people can't fairly present the facts.

BRISTER: When would it be an abuse of discretion not to give them a second chance? The standard would be abuse of discretion. Would there ever be a circumstance where it would be an abuse of discretion?

BREEN: Yes, there would. It would be an abuse of discretion if, for instance, in J. Owen's hypothetical. What happened was, in essence the trial judge said by the way you have three days to get your expert down here. If he's not down here and I don't hear him live then, too, bad. You can't submit anything in writing. I'm not going to listen to anything.

That type of thing has come up before in the federal court context and the SC has said, not directly addressing it on review, procedurally you do have to _____. There can't be a manifest error procedurally that forbids somebody from bringing that evidence. That didn't occur here. What occurred here was there was a written motion filed by Mack. There was some type of response filed by the respondent in this case, and then the judge had a full-blown oral hearing. And it's important...

BRISTER: We don't have a standard by this case, or is there by any other about what fire experts, accident reconstructionist involving fires standards they have to meet? I'm unaware of any case on that. Are you in Texas?

BREEN: I'm not aware. There is not that I know of a case.

BRISTER: So you come down, you think your guys going to meet it. You come down and the judge says, No. It's a case of first impression. Shouldn't you get a second chance to try to meet since it was unclear whether analytical gap or some part of the Daubert factors would apply?

BREEN: I don't believe so, and I think particularly in this case is because there is no scenario here that the plaintiffs are arguing. Well we just didn't know what our burden was. The respondent in this case.

You're right. There isn't an exact litmus for a fire expert. In fact, in most scenarios there is not an exact litmus for what the expert has to testify to. We have on the one hand Robinson which has the fact that it can be applied, and then we have Gammil on the other which is

allegedly the beekeeper standard. And if you're testifying just on experience, in this case, the respondents have said, well our expert is so good he satisfies both. He's not only the beekeeper, he's also the aeronautical engineer. And if you will what this case is, I think, this is sort of like Robinson light. And I don't mean that in a flippant way. I mean that's what the SC, and I believe this court envisioned, when you have a case that may be a little bit different than some other case.

OWEN: Well that's substantively. But procedurally we have not nailed down - we've so far intentionally not passed any rules that say, okay, here's how you are going to handle experts. I guess my question would be, should we treat this motion for reconsideration like a motion for continuance of a summary judgment hearing? What procedurally - how procedurally should we judge what the TC did?

BREEN: I do. I think that would be a valid analogy. I think what you need to do procedurally is treat it in terms of 1) you start with the presumption of the trial judge has great deference in deciding when he is going to set the hearing and what type of hearing it will be. Using your analogy, it would be just like the trial setting, and for instance discovery under level 3. The trial judge has great discretion in managing his docket. This court has said that over and over before.

HECHT: Is it like amending the deposition, or supplementing the deposition, or reopening the evidence at trial? Is it like those things?

BREEN: In a sense I suppose it would be except that I think the standard needs to be higher than simply amending the deposition. Obviously if you are just going to amend the deposition, there are ways you can do it under the rules. But in this particular case, the reason the courts have articulated, this court, the SC, that you give so much deference to a trial judge in the procedural manner, is because you want finality, you want the balance between the judge being able to manage his or her docket and moving forward on a case if the facts merit it.

HECHT: But until recently, we didn't have these hearings. These decisions were made in the course of the trial. And if you thought you had a pretty good leg, you just went on. But if you thought over night, I might not have done so well with that witness yesterday, maybe I better put him on again and see if I can't get a little more out of him. That's a pretty loose standard when you can do that and when you can't.

BREEN: Right. Which is why I am telling you. I think it's different in this scenario. And I think General Electric v. Joiner and Kumho Tire out of the US SC have peripherally addressed that and said this is a much more serious scenario. Because in your example, the trial judge is not making a gatekeeping decision as to the witness necessarily, whether he will or she will or won't testify. That's what's happening in this case. So there isn't any reason and there's been no complaint made by the respondent in this case that somehow they were surprised, that somehow they didn't have the opportunity. In fact, I think what's very telling in this case is, not only did the respondents concede four different times...

O'NEILL: Okay. But you started out by saying the outcome is no different whether you consider the bill of exceptions or not. So do we really need to address the discretionary piece?

BREEN: Yes. You need to address it because the way the Corpus Christi CA set this up is as follows: they considered the evidence that was put in on the record at the actual live hearing. Which by the way did not include the deposition testimony of this witness other than the portions the Mack counsel read into the record. The court's record will reflect that. So the court had the live testimony. The Corpus Christi CA said they considered that. Then the Corpus Christi court also said, two times in the opinion they explicitly considered the evidence in the bill of exception. What does that mean and why should this court address that?

O'NEILL: Wasn't that same evidence proffered in response to the no evidence summary judgment motion?

BREEN: It was not. It was different evidence. And what I've done is charted out some of it to give you an example of what it would be. For instance, if you look at the record, and I believe it's vol. 3 of the reporter's record where Mr. Elwell originally testified, there is about 9 pages, a very conslusory type opinions that he gives on the case. If you look at the second hearing where Mr. Terry, one of the plaintiff's attorneys was putting him back up on the bill of review, there is 60 some odd pages. And they do a better job of showing methodology in terms of how he came up with some of his opinions. Although my contention and the answer to J. Hecht's question would be they never did the ultimate job of ruling out the cargo.

JEFFERSON: What was the cross-examination in the bill of exceptions like?

BREEN: The cross examination in the bill of exceptions was very similar to the cross that was put on earlier. It was that he asked questions about the O'Day(?) and the Maryland study and what he had done and...

JEFFERSON: In your experience is it typical that there would be a full adversarial hearing on a bill of exceptions or not?

BREEN: I've done several. And some there have and in some there haven't. To be candid in my experience nothing is really typical in any of these Robinson hearings.

JEFFERSON: If we say that there is a - that the TC abused its discretion in this case, wouldn't that make all bills of exceptions full adversarial trial type hearings, as if the evidence were coming int?

BREEN: It sure could have that effect.

JEFFERSON: Isn't the other way that a bill of exceptions works is the TC has ruled on the admissibility of this evidence. We are going to put on a bill. We don't need cross examination,

Judge. We are just trying to make a record to show the CA what the evidence would have been. It last a short amount of time. There is no cross examination. There is really no back and forth between counsel. Isn't that how it can work at least?

BREEN: Typically, a bill would work like that. Rarely do you have cross examinations on a bill. In fact sometimes people just make informal bills, which I believe the rules allow.

JEFFERSON: But if we were to hold the TC abused its discretion in this case under these circumstances, wouldn't that do away with that type of bill where there is not this adversarial ____?

BREEN: I believe it could. It could easily have that affect. Also appropriately in this case, too, the effect it could also have is the shilling effect, an over the shoulder effect on trial judges who are in the trenches. So the example would be this. You have a trial judge who conducts a full Robinson hearing, like this, two days: the first day he tells everybody, you can put whatever evidence you want in on this record, and they do; then the next day he discusses and ask questions and things like that. The idea that you then have a bill that can be reviewed for the first time by a CA to see if a trial judge abused his discretion, then makes the CA the gatekeeper. That is the effect.

OWEN: Procedurally, this hearing took place before you had a motion for summary judgment on file.

BREEN: There was a motion on file but it wasn't a no evidence motion. It's very confusing.

OWEN: Was there a motion aimed at causation on file?

BREEN: Not a no evidence motion.

OWEN: Any motion?

BREEN: There was motions to dismiss the case on file. Yes.

OWEN: But did it go to causation?

BREEN: I believe it did. I think they had several categories, including the ones that are sort of at the tail end of the ones that are on appeal.

OWEN: When this hearing took place, before the hearing took place, was it clear to the plaintiff's counsel that this testimony can't be used for any purpose - not for summary judgment, this is your one shot at it, this witness lives or dies in this case henceforward based on this hearing?

BREEN: It was as clear as to anybody who is going into a Robinson hearing. You don't ever know what opinions the judge may find that are unreliable especially when you have an expert

that's hitting to all fields.

OWEN: Do they know that that was at risk?

BREEN: I believe they did. Because when you look at the record, the counsel for respondent told J. Banales, Judge, if you strike this expert, that does me in on the summary judgment. In fact, now that I think of it, technically everybody thought there was a summary judgment pending because they argued it. But what it turned out to be is Mack's counsel at the time hadn't actually filed it, or there was some confusion about it. So it wasn't technically pending even though they argued it and the judge granted it.

O'NEILL: What specific evidence is in the bill that was not proffered at the original Robinson hearing, or in response to the no evidence summary judgment motion?

BREEN: What I took was the Corpus Christi CA when they said, Here's what we've looked at from Mr. Elwell in the bill. For instance, witness statements in depos. In the first hearing, the only mention of anything was Mr. Harrell, who was...

O'NEILL: Let me ask you about Mr. Harrell. Why is that not enough in and of itself for him to say that I know the difference between diesel and crude, by sight and smell, and I got there right after this happened and Mr. Tamez was covered with diesel fuel, and looking at the diesel burn marks on the road, why is that not enough to provide reliability for the opinion that this was a diesel fire?

BREEN: Number 1, it's speculative. Number 2, I don't believe he talks about the burn pattern in terms of where the fire started. Number 3, Mr. Harrell concedes that he's assuming a number of these things. And number 4, it doesn't rule out that the fire started in the cargo, the 8,000 gallons of crude. Mr. Harrell came upon the scene minutes after it happened. And important is, and not totally cited within the briefs, if we look at Mr. Harrell's deposition testimony is that he testified that the cargo trailer, the roof, the hatch was opened and flames were coming out if it when he got to the scene. Mr. Harrell does not offer a scintilla of evidence that there was a product defect that caused or was a producing cause of this particular event.

WAINWRIGHT: You make a lot of arguments in your brief, and you have made a lot of arguments today about why Mr. Elwell's testimony is not admissible. Is your principal point, however, that he failed to exclude the cargo as the cause of the injury? Is that your principal point?

BREEN: Yes. That is one of the two principal points that makes his opinion unreliable and, therefore, under an abuse of discretion standard, J. Banales should be upheld.

WAINWRIGHT: And the other principal point?

BREEN: He did not state and show his methodology for how he came to his opinions

that were rendered in the first hearing.

WAINWRIGHT: You don't' like the fire triangle then?

BREEN: It's not that I don't like it. And I certainly don't dispute it. But it's not methodology. Fire triangle would be akin to me telling your honor, Well I'm an expert in people who fall off of towers. And by the way, I base my experience on Newton's law and I know there is gravity on earth, so I can tell you why this person fell off a tower. It's a principle of physics. Sure. Everybody knows that you need oxygen, fuel and ignition. But it applies equally to the cargo in the trailer and a number of other places. So sure it's a sound principle, but it's not a methodology.

O'NEILL: I'm a little bit confused on the exclusion piece - failure to exclude other possible causes. Because it seems to me that if you...presuming you had reliable testimony that the fire started here, doesn't that in and of itself exclude other possible causes? If you say I've looked at it, I'm reliable, this is where it started, and here's why I think it does. Why doesn't that exclude the ultimate cause right there?

BREEN: Because I believe this court told us in Gammill it's not enough just to say...have the reasoning - I've concluded in my mind that one thing was the cause of this event, therefore, there can't possibly be other causes. You have to identify and analyze separately the other causes and show a methodology that rules them out with a reasonable certainty. Otherwise, all you would have to do as an expert would be to say, I've determined what the cause of this fire was, therefore, it can't be any other cause.

O'NEILL: But you could undermine those other studies. I think it was the O'Day study that they apparently concluded that all cargo, whether it's fuel or not, tends to be the source of fires. Can't you just cast doubt on it, and didn't we do that here?

BREEN: You can. I'm not here taking the position that either the Maryland study of the O'Day study shows as a matter of law that Mr. Elwell was wrong nor was it Mack's burden to do that. It was not Mack Trucks burden to prove that the Maryland study or the O'Day study conclusively proved it couldn't have been the fuel system in the Mack truck It was the respondent's burden to exclude with reasonable certainty other things. And the reason the Maryland study and the O'Day study got such heavy play is because if you look at the excerpts from the reporter's record on pages 68-70, you will see exactly what the trial judge saw in this case, which was an expert who took the stand, not only in his deposition, but in front of the trial judge and said, I don't have to show you my methodology. He said, gatekeeping is for the judges. If the judges want methodology they need to figure it out. That's what J. Banales was looking at. So the question is, doesn't the O'Day or the Maryland study give us some pause to think well maybe Mr. Elwell could have possibly been correct. The question has to be, did J. Banales abuse his discretion when he decided as a gatekeeper that this expert wasn't playing by the rules, did not state his methodology, and was giving an unreliable opinion.

What J. Canales excluded wasn't all of his opinions. He excluded his opinions on proximate and producing cause. So it wasn't as if he just shotgunned the whole thing. He clearly used a scalpel. He didn't throw the entire event out.

WAINWRIGHT: Did you object to the bill of review?

BREEN: I believe that initially - I wasn't trial counsel, and I'm trying to think, and I want to answer you accurately. So I'm going to tell you I don't know. I doubt it because trial counsel asked questions during the bill. So effectively I just don't know the answer to be able to tell you accurately.

WAINWRIGHT: It's an important enough point that you probably would have searched for it and brought it out if you had.

BREEN: I think so. Important is, that what Mack did say at the beginning of that hearing was, which by the way akin to the question before, was really more of a surprise because they show up, they are getting ready to argue a motion for summary judgment, and all of a sudden the plaintiff saying, Judge, we're back here, we've got our witness back from Phoenix or wherever he was from, we would like to make the bill, because he didn't give you the good methodology the first time. And I realize that now respondents don't want to embrace the four times at least on the record that they admitted Mr. Elwell didn't provide methodology. They say, oh well we were just saying that. We didn't really mean it. We were just trying to give J. Banales an easy way out.

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RESPONDENTS

BOUDREAUX: I represent two of the respondents in this case. Mr. Gsanger represents the balance. I have to respond very quickly to something that was said right before the end of petitioner's argument. Because I think the mischaracterization of Mr. Elwell's testimony at any point in this trial, live or by an affidavit, is just right from this record. To suggest that Mr. Elwell ever said that he didn't have to present any methodology to the court simply misstates the record. I am sure without looking at it just now, as I heard that repeated again, that was in response to a question where Mack Truck's trial counsel was trying to get Mr. Elwell to admit that he didn't follow the rationale set out in the Maryland state, which Mr. Elwell considered an irrational approach to this case.

Now those kind of suggestions have been made over and over throughout the briefing from the day that we started the first Robinson hearing at the TC all the way through this court. The fact of the matter is, I think it will be helpful to the court if the court understood just what happened at the initial Robinson hearing.

O'NEILL: What is it about Mr. Tamez being covered with diesel fuel that indicates the fire started in the fuel system?

BOUDREAUX: The contest in this expert witness case was whether or not the crude oil in the trailer was the source and origin of the fire, which took Mr. Tamez, or whether diesel fuel was which was located at the tractor. Simply stated, if there is diesel on Mr. Tamez that indicates that the diesel tanks lost integrity at some point in this process. Probably during the rollover.

OWEN: Is that enough to get you to a jury?

O'NEILL: But my question is, how do you tell where the source of ignition was?

BOUDREAUX: You look to see if there are ignition sources first of all, both at the tractor and then at the trailer. The trailer is simply being pulled by the tractor. The tractor was 1) operating hot surfaces; 2) is carrying a battery pack within 3 inches of the diesel pack that fuels that tractor. There is nothing back at the trailer that is going to ignite crude oil much less any other substance that's flammable, certainly not crude.

BRISTER: How fast was the truck going?

BOUDREAUX: The trooper estimated 28-32 mph.

BRISTER: And the rollover is on a highway?

BOUDREAUX: This was on a county road where the suggested curb speed as Mr. Tamez entered this curb was 30 mph.

BRISTER: And a tractor, trailer rolling over there is not going to be any sparks from anything other than the battery?

BOUDREAUX: I wouldn't ever say that. I think you're looking for the most likely sources.

BRISTER: The jury can't just guess.

BOUDREAUX: One of the things that came out subsequent to the first Robinson hearing...

BRISTER: That's what we decided in Ridgeway. You've got a fire in a truck, that doesn't mean you win. You've got to show a defect and that the defect was the cause, which would seem to me eliminating the fact that you've got a giant tractor, trailer skidding, rolling down the highway, metal on the roadway. There's not going to be any sparks. How are you going to eliminate those?

BOUDREAUX: There are a number of possible ignition sources. If you're just to list all of the ignition sources that may be the actual ignite in any given accident, rollover, t-bone, crash, whatever it may be, there is going to be a whole range of ignition sources, including sparks from the friction of this machinery rolling over. In this case into a dirt...

BRISTER: And how were those eliminated by your expert?

BOUDREAUX: You look for the most probable ignition source. The most likely...

BRISTER: Which just happens to be the one defendant that's left.

BOUDREAUX: I don't think that's taking a fair view of Mr. Elwell's task or the job that he performed.

BRISTER: We didn't in Daubert suggest well, we can't figure out you know Bendictin(?) more probable than anything else we can imagine. You've got to prove it was Bendictin. That's what Daubert was about. Don't you have to prove - I mean you can't...

BOUDREAUX: I don't understand that to be the test. I think the test is whether or not, not whether the trial judge is convinced by the expert's opinion and conclusions, but whether or not that opinion seems to have a reliable basis.

OWEN: We're down to the ignition source. Isn't that really where we are?

BOUDREAUX: Absolutely, which is why the trailer is almost always excluded if you're looking at probable and likely ignition sources.

OWEN: The eyewitness who said he got there within seconds after he heard the crash said he saw the tank on fire and the cab on fire. From those two facts how can anybody say well it's more likely than not that the fire started first in the cab and then in the tank? What's in the record that there's a methodology?

BOUDREAUX: At least two things. First of all, there's a clear diesel spill print that is left on the ground that Mr. Elwell talks about.

O'NEILL: But that doesn't indicate a fire ignition source. If there's diesel on the ground, and diesel that burned, and diesel on Mr. Tamez doesn't indicate that that was the source of the ignition. It's the source of the spill but not an ignition source.

BOUDREAUX: First of all, nothing spilled out there that didn't burn.

O'NEILL: But we're trying to get at the source of the ignition is a more probable one than the other.

BOUDREAUX: That's right. Probably, as I say, I think there are a number of ways to answer that question. Probably to me the most persuasive is, Mr. Tamez is in the cab with the tractor. This is not a violent rollover. This is a low speed, half roll on the cab's part, 3/4 roll on the trailer part. So you've got a crude oil spill that never encroaches on the tractor. Mr. Tamez is in the tractor. He

comes out of the tractor...

OWEN: So what was the ignition source for the crude oil?

BOUDREAUX: Probably the first fire which started at the tractor.

OWEN: What's the methodology? The only eyewitness testimony was within seconds they are both on fire. Now what is the methodology that allows an expert to say this source started this. What was the ignition source? What methodology allows someone to pick this ignition source and not this ignition source?

BOUDREAUX: First of all, don't assume that - if you want to assume that the less likely ignition source is at the trailer, that doesn't forgive the fact that the Mack truck allowed diesel when it should not have. When it didn't have to. When it was economically feasible to do otherwise.

OWEN: That's why I asked you. Are we down to an ignition source? Now what you seem to be saying is it doesn't matter where the ignition came from. As long as diesel spilled there there's a defect.

BOUDREAUX: That wasn't our argument. Our argument was that the battery was the ignition source. But that doesn't mean that there aren't other constructions or interpretations of this scene that wouldn't also implicate the Mack tractor.

OWEN: Is the truck defective simply because diesel fuel spilled during a crash?

BOUDREAUX: We think it was a compound defect, and that's our first position that the battery should never have been placed. It should have been separated from fuel, because it provides ignition.

OWEN: So you do need to prove that the battery was the source of the ignition for your theory to work?

BOUDREAUX: I don't think I have to prove that. I'm saying that's our primary position, and we think that's what happened. But, if diesel was allowed to escape because of this inferior balance line between the duel tanks on the tractor, and if somehow the crude oil ignited before the tractor became inflamed in diesel fire, and the trailer was the ignition source because of this fire that occurred back there further, then the tanks should not have lost integrity allowing them to be ignited by the trailer. As I say, that's not our first position. But I think it is an arguable position and the evidence fits.

O'NEILL: I did not get that out of the briefing and I'm going to suspect the other side is going to tell me that's never been in the case.

BOUDREAUX: I was only responding to the justice's question. I'm not saying that we took that position. It's not the position we took. But if one were to look at it that way, it still implicates the Mack tractor and a design defect.

HECHT: But you've got to land at some point. I share my colleague's concern here. It seems to be very clear from your brief you say by Mack truck's design the source of combustible diesel fuel is located inches away from the battery. And your theory is, as I take it, that J. Banales was ruling on was whether this battery started the fire basically.

BOUDREAUX: Let me hedge just a little. We were looking at the most likely cause of ignition. That's not to say that we excluded for instance the hot surface of the engine or the exhaust manifold, all of which can become implicated in these kinds of fires. But when the battery is located 3 inches from the fuel tank and later after the Robinson hearing, Mack produces a photograph that they had showing that the battery cable is welded to the metal of the truck, then that indicates that's a pretty good...

HECHT: Mr. Elwell testified that one source of ignition was the hot engine. And my sense of that was if that's true, if he can't rule that out then on the theory that you presented to J. Banales you lose. Is that not your position?

BOUDREAUX: No. It is not our position. Again, I say I think Mr. Elwell was trying to give the TC a fill for what he thought was the most likely occurrence without saying that the Mack tractor was otherwise fault free. But the point here is that 1) you separate fuel from ignition sources as best you can; 2) you put that fuel in a container that is least likely to lose integrity in the event of an accident such as this one.

HECHT: Are you alleging in this case that the truck was defective because the diesel tanks were not designed the way they should be?

BOUDREAUX: We certainly say that there shouldn't be this garden hose type arrangement to allow the two tanks to communicate with each other.

O'NEILL: If the battery had been located exactly where you think it should have been located and couldn't have been an ignition source, are you still claiming that just the fuel tank in and of itself was a product defect?

BOUDREAUX: Sure. Absolutely. You can't lose fuel in a hot environment unless you are sure that you are shielding that fuel from those hot ignition sources that exist all over the tractor.

OWEN: That's not the impression I got from your briefing as to what your theory was. And we're trying to figure out what the TC had in front of it, what you said at the TC was your theory.

BOUDREAUX: Mr. Elwell talked about other ignition points on the tractor. We do believe, because the evidence seems so compelling, that it was the battery that was the ignition source. But that doesn't excuse Mack from putting together fuel tanks that had no integrity whatsoever and that were going to spill...

OWEN: So under the theory it doesn't matter if - under your theory if there is diesel on the ground that the fire could have started first in the tank and then ignited the diesel. It's still a defect. So what difference does it make where the fire started first?

BOUDREAUX: I'm not sure I'm following the question.

OWEN: I thought - what I now hear you saying that as long as there is diesel fuel on the ground basically, it doesn't matter whether the fire started in the cab or in the trailer, because as long as there is diesel on the ground and the tanker started on fire first and then it ignited the diesel fuel, Mack is still liable. So it doesn't really matter where the fire started first.

BOUDREAUX: I've never taken that position, not today or in my briefing. Our primary ____ was that the battery was the ignition source and the fuel tank was poorly designed because they were unable to contain fuel in what was a relatively nonviolent accident.

O'NEILL: So it's a combination theory?

BOUDREAUX: Yes. Well we pointed to two defects. But that's not to say that it's okay if you allow your tanks to lose integrity when they shouldn't in a _____ environment. Because ignition sources can be found all over that tractor. To say that the fire triangle is not a methodology is bewildering to me. If you're looking for you know that fires don't occur without ignition, fuel and oxygen, oxygen is always there, fuel was in both segments of this trailer. For Mr. Elwell to say let's look for likely ignition sources and see if we can take that factor that wasn't necessarily present at both points on this rig and see if we find ignition sources capable of igniting either of these fuels, and if so in proximity to these fuels in such a way that it's likely that it happened, to say that that's not a methodology for _____. It's a methodology. It's a methodology that all arson investigators follow.

JEFFERSON: Let me ask you about the abuse of discretion, the procedural aspect. How can it be an abuse of discretion? What guiding principle tells us or can we look at from a prior opinion of ours or from some rule that says the TC must allow a second Daubert hearing after the conclusion of the first one?

BOUDREAUX: I will take an example from this case that I think would be supportable. It may not give you the best general rule to announce to the State of Texas. But in this case, the challenge by Mack wasn't as to the methodology per se, or the data in the physical evidence on the ground. In fact they avoided that fastidiously in their long cross examination of Mr. Elwell. They never wanted to talk about the foot prints left by the two different ___. They never wanted to talk about

crude oil never encroaching the tractor area where Mr. Tamez was consumed by fire.

JEFFERSON: So if we say that, then we say the TC abused its discretion because Mack didn't inquire into methodology?

BOUDREAUX: Mack essentially gave Elwell his due on his methodology and tried to pin with the Maryland and the O'Day study, which I think he did quite a good job of answering.

JEFFERSON: Why did the TC have no discretion but to permit and to consider the evidence after the conclusion of the first hearing?

BOUDREAUX: Understand that proposition has arisen in this case not our instance. It arises from the fact that Mack has raised the issue because of the fray in the CA's opinion. I don't think the CA, and Mack acknowledges that it makes no difference. It's the same evidence which was presented in Robinson is in the bill. But if the court is looking for guidance as to when the challenged party should be allowed to be recurred, I would say in this case that Mack used but never proved up, never...

OWEN: You keep going to substance. We're just looking at procedurally. Let's just supposed Mack didn't say a word at the Daubert hearing. The TC said, show up, give me your best shot. And at the end of the day the TC said I don't think you get there, I'm going to exclude your witness. Now what standard, if any, should we apply when you come back and show up at a later date and says, Judge, I've got my witness again. I want another shot at it. What standard should we apply?

BOUDREAUX: I think a good starting point would be to make the challenging party set out as though it was a pleading, set out in writing exactly how they are going to challenge this person. Because this challenge went off on an issue that no one was expecting, no one was forewarned about, about an article called Maryland Study primarily, that we think has no relevance to this case.

OWEN: Did you ask for a motion for continuance?

BOUDREAUX: No. But we objected to them using that study.

OWEN: Did you say Judge, we need more time. Can we come back? We're just trying to figure out procedurally how you get through this.

JEFFERSON: And perhaps your co-counsel can explore that.

* * *

GSANGER: Let me go ahead and start with that question. We are not complaining, never complained at the CA level, and are not complaining now, or contending now that the TC had a duty

to conduct a motion for reconsideration of our Daubert defense. We did not say in the CA that the TC abused its discretion by failing to reconsider that point. That was not our point on appeal.

BRISTER: So if the CA relied on evidence that appears only in the reconsideration, then they applied the wrong standard or review?

GSANGER: Wrong. I'm glad you asked because that's I think one of two confusions I would like to clarify. Here is why that comes up. First of all, I do not believe that the CA relied on any evidence that was not part of our original Daubert.

BRISTER: Just assume they did.

GSANGER: Assume that they did. Here's why they actually must. We are here on a motion for summary judgment. Because we're here on a motion for summary judgment, which was filed after their Daubert motion was granted, we had a duty to try to put forth the evidence that we would put forth upon our response to the motion for summary judgment. We understood that the judge was not overly impressed with that motion at the hearing.

OWEN: The TC could have entered a scheduling order at the outset and said, Okay, everything is to be done by a date certain and then we are going to have a Daubert hearing. And so you better have it in a row because if you don't that's the drop dead deadline. After this hearing no more from this expert. So why couldn't he do that by an order on motion of counsel to exclude this witness, and your own notice I better get it in because if I don't the judge is going to exclude my witness? Now didn't you understand that the witness, or not, that the witness was going to be excluded in that proceeding for all purposes when the judge made his ruling.

GSANGER: We have absolutely no dispute that the TC had the discretion to rule on the admissibility of this expert's testimony at that hearing. No question.

OWEN: For all purposes?

GSANGER: For all purposes, but recall there was not the motion for summary judgment.

OWEN: Even including a subsequent motion for summary judgment, doesn't the TC have the discretion to order the pre-trial proceedings and say, okay, I'm going to rule and then that's it. You don't get this witness.

GSANGER: No dispute. The judge has that discretion under Texas law as it stands right now. I don't dispute that one bit. We did not dispute that in the appellate court either. What we do say is this. Is that if we are going to appeal our motion for summary judgment granted against us, we will need to allow the CA to make two separate decisions. One, should the TC have considered Mr. Elwell's testimony? That's kind of what we're talking some about why we believe it was error to exclude him. And then two, as a separate question, had the TC considered Mr. Elwell's testimony

would it have made a difference in this case? The CA is not only being asked Was Mr. Elwell improperly excluded? And then if they say yes we go home and get a chance to try our case.

Mack Trucks may have an argument that wait second. Even if this guy wasn't properly excluded, you guys still didn't meet the burden to prevail on summary judgment. So to be confident that we could prevail, we said this guy is wrong when he excluded our testimony and had he not the summary judgment should not have been granted.

OWEN: How can you say the TC should not have excluded this testimony if you just agreed or said that the TC has the absolute right to preclude any evidence from that expert at the conclusion of the Robinson hearing?

GSANGER: What I'm trying to say is that the TC, I think, has any duty under Texas law. I don't think there are any guidelines that suggest under this circumstance the judge absolutely must conduct a motion for reconsideration, and under this circumstance he need not. I don't think there are any guidelines currently under Texas law...

OWEN: So why does he have to look at the bill of exception?

GSANGER: He doesn't. I'm trying to say in the CA, the CA may have a question. The CA may in response to an argument made by Mack Trucks, the CA might conclude, Hey you know what? We agree that Mr. Elwell should have been allowed to testify. But you know what? We just don't think he gets you there. And so as a consequence, we have to have as part of our appellate record, not only the part of the proceedings where Mr. Elwell was stricken improperly in our view, but we also have to have that part of the summary judgment response that says, And by the way, if you will let him testify here is what he will testify to, and that testimony will get us by the motion for summary judgment.

O'NEILL: What evidence do you point to that would show the cab is the more likely ignition source than the trailer? Presuming the ignition source is determinative, and I understand you are saying it's not, but let's presume that you need to show an ignition source to make the expert reliable. What evidence is there that it more likely originated in the cab than in the trailer?

GSANGER: The fire triangle analysis that Mr. Elwell applied simply goes like this.

O'NEILL: I understand the fire triangle.

GSANGER: And here's the physical evidence that he looked at.

O'NEILL: I want to know the physical evidence indicated that it originated there.

GSANGER: First, we have the undisputed defect testimony. Again, the reason why we don't talk very much about the problem with the gas tanks is that's defect and that's not disputed.

O'NEILL: I understand. We have testimony that there is a defect.

GSANGER: Right. Again, to prove this fire triangle, we have to have the fuel source, the oxygen which is in the air, and then the source of ignition. The fuel source is this...

O'NEILL: Let's say you got the fire triangle theory on the cab that indicates it could have started there. You've got the fire triangle theory on the trailer because you've got the same factors there. What do you have to show that this fire triangle happened more likely than that fire triangle?

GSANGER: What we have is this fire triangle being more likely than that fire triangle is that first of all, we have Mr. Tamez who is close to the source. He's that close to that ignition source. We have the fact that three inches away we have one source - again our defect is on the tanks, but our fire source...

O'NEILL: I understand there is two possible sources. And what evidence is there that it originated with one as opposed to the other? Because you've got those same things in the tank.

GSANGER: The source is this. We're not claiming that trucks shouldn't have batteries...

O'NEILL: Again you're talking defect. Let's presume the cab is defective. Let's presume the cargo is defective. How can you tell which one caused it?

GSANGER: Which one burned Mr. Tamez to death is the issue. What we are saying is the defect was there should not be a spill of diesel fuel. So if diesel fuel is what burned Mr. Tamez to death, whether he was smoking a cigarette, which there is no evidence of that, but whether he was smoking a cigarette and that's how that diesel fueled burned him to death, whether it was sparks from rubbing a metal truck on the ground...

O'NEILL: So you're saying the ignition source doesn't matter?

GSANGER: The ignition source is very much an aggravating factor to what is a defective tank design. But the ignition source does not matter. Here's what matters. And this is what the TC focused on, and this is what Mr. Elwell focused on. Did he burn with crude on him, or did he burn with diesel on him? Because if the fuel system, this is a fuel system integrity case, not a complaint about the tank system. If he burned from having diesel on him, then that is our complaint. If he burned from having crude on him, then we lose. That was the fight before the TC. Not, hey did it start because he was smoking a cigarette? or did it start because of the battery? or did it start because of the sparks?

O'NEILL: I didn't get that from the briefing. From the briefing my assumption has always been that the issue depends on where the fire started?

GSANGER: No. It's where the fuel started. Which fuel got on to Mr. Tamez? Because

it's our theory that the fuel system should not have leaked.

WAINWRIGHT: Which issue was presented to the trial judge as being the issue on which causation was being disputed at the Robinson hearing? That's the question. What was presented to the trial judge?

GSANGER: Did he die of crude burns or diesel burns? That was the issue.

WAINWRIGHT: That's what the record of the Robinson hearing is going to show?

GSANGER: Absolutely.

WAINWRIGHT: Was there a motion to exclude the expert filed?

GSANGER: Yes.

WAINWRIGHT: And a response?

GSANGER: Yes.

WAINWRIGHT: And then record of the hearing?

GSANGER: Absolutely.

O'NEILL: If that's the case why does the fire triangle theory even matter?

GSANGER: Because again the triangle is oxygen - a given.

O'NEILL: If we don't care about the source....

GSANGER: It's the fuel source. That's why the fire triangle matters.

OWEN: Nobody disputes that there was fuel on the ground. And I don't see it even hotly disputed that Mr. Tamez was covered with diesel fuel.

GSANGER: Exactly.

OWEN: Then why did J. Banales exclude all of this?

GSANGER: Because he did not believe that we showed that it was the fuel from the tanker, not fuel from the crude, which burned Mr. Tamez to death. He said we failed to prove that, not whether or not it was sparks, or whether or not it was the battery. He said we failed to prove it was diesel verses crude. That's what we're saying: well wait a second. We filled that analytical gap to

the extent there is any with Rev. Harrell's testimony. That filled that gap. You will see when you look at the record that the dispute at the TC was whether or not we proved it was the crude or the diesel that burned Mr. Tamez. I believe that we did fill that analytical gap and that's what the CA concluded.

SMITH: Can you concede or do you concede the TC did not abuse its discretion by refusing to hold this second hearing?

CSANGER: Absolutely. We concede the TC did not abuse its discretion under Texas current law. I believe that under Texas current law the TC absolutely has the discretion.

O'NEILL: But your position is is that the no evidence summary judgment motion it was bound to consider what was offered in the bill of exception on causation?

CSANGER: I don't know that the TC was bound to consider it. But we were certainly bound to prove up our record, and the CA appropriately looked at what we wished to prove.

* * * * * * * * * *

REBUTTAL

BREEN: First of all, I disagree with the respondents in their attempt to characterize the Robinson hearing as something about what was the source of the fuel that burned Mr. Tamez? The question there was the source of the fire. It's repeated throughout. Did it originate in the cargo, or did it originate somewhere in the cab? And respondents today have shown you that there is multiple areas the fire could have originated.

O'NEILL: If they did plead a fuel system integrity case, and if fire origination was just an alternative part of their theory, would the TC here have abused its discretion in striking this witness just as to the source of the fuel?

BREEN: No. He would not have, and they haven't shown an abuse of discretion. They haven't even argued that here on either of the points. In fact, I think they conceded the first one procedurally. There was no abuse of discretion in the trial judge not letting them have a second bite at the apple.

O'NEILL: But at the first hearing there was the witness statement wasn't there?

BREEN: Right. His opinion was unreliable regardless of why they were trying to offer it. If you're asking me did J. Banales abuse his discretion in striking Mr. Elwell's opinion? To me...

O'NEILL: If their only theory was fuel fed regardless of ignition source.

BREEN: No. And it touched on the reason that you and I talked on before is, is that it

was pure speculation. J. Owen you talked about somebody being on the scene seconds after this occurred. Actually they have corrected that in a corrected brief. It's minutes after the accident occurred. It's pure speculation. In fact the witness testified to it as speculation as to what was on Mr. Tamez. And mind you judge, you and I are talking a big if.

BRISTER: Their expert did not know whether diesel was on him or not.

BREEN: Correct.

BRISTER: So striking their expert had nothing to do with whether there was diesel on this fellow or not?

BREEN: Absolutely. You are correct. It had everything to do with what the thrust of the issue was right before trial. Is the battery too close to the fuel tanks? Was that the source of the ignition? In fact their second expert, Mr. Holmes, that was struck that they don't complain about, that's what he was testifying too also - the battery. That was the crux of the issue.

You asked me before in terms of why I think there is evidence in the bill of exception that's important to consider? There is three reasons I will tell you why we know there had to be different evidence in the bill of exception. One, anybody who reads the record can see the 9 pages verses 60 plus. Two, if the CA hadn't relied on that evidence, why were they mentioning it? why were they looking at it? Three, respondents themselves said, We have to put this on Judge, we concede that we didn't do enough, meaning my expert didn't do enough the first time. So they have conceded on the record that their first offer by their expert wasn't enough to get past a Daubert hearing. And four, more importantly, if you look at for instance just a few of the categories. Witness statements and depos. Only Harrell mentioned in the first. There is others in the bill of exception. DPS report. Nothing in the first hearing. It's in the second bill of exception. Physical inspection of scene. Only minute description in the first hearing. There is more extensive description in the second. Photos of the burned vehicle. Nothing marked or offered in the first hearing, but was in the second hearing.

OWEN: Again procedurally. They had the hearing. The witness was excluded. Then did they file any kind of formal motion for reconsideration?

BREEN: They made an oral motion for reconsideration.

OWEN: At the summary judgment hearing?

BREEN: Yes.

OWEN: So no three days notice.

BREEN: There wasn't a complaint about it, so I should tell you I'm not 100% that they

didn't file a written notice to say it. I will tell you, when you read the record you will know the trial judge was like what in the world. I've done this one time before. That's when he asked respondent's counsel, aren't you just asking for a second bite at the apple? And they said yes, we are. We shouldn't give litigants a second bite on a Robinson challenge. It's bad public policy. We ask this court to reverse the 13 CA.

SMITH: You do agree that the expert should have not been excluded at this first hearing, then once you get to summary judgment or maybe trial, you are entitled to improve your expert at that point in time.

BREEN: Subject to the rules.

SMITH: So if we say that the judge was wrong that this person was excluded, then whatever extra he says at trial or extra in a summary judgment affidavit that occurs after the hearing should be considered for the purposes of whether there is any evidence summary judgment should be granted?

BREEN: I would agree with you under this caveat, that there are stringent rules about "improving" your expert. A lot of people try to do it on the eve of trial and some guy comes in and surprises you with whole different things. That's not what happened here. The complaint by Mack to J. Banales wasn't, Hey, we agree, we think you ought to exclude this guy because he is surprising us. That's different. Mack's complaint was, this expert witness ought to be excluded because he doesn't have the methodology he should and he hasn't ruled out the causes with reasonable certainty. Those two reasons, there was no abuse of discretion in J. Banales striking.

WAINWRIGHT: Looking at your brief. It looks like you are saying, the CA erred from your perspective because its opinion essentially requires a trial judge to have a second hearing. Is that correct so far?

BREEN: Yes. I agree with you.

WAINWRIGHT: But you don't object to the trial judge having discretion to have a second hearing, and the trial judge exercised that discretion in this case. So in this case you don't object to what the trial judge did. You object to the effective rule of law you believe the CA created.

BREEN: Yes. With one clarification. He did not hold a second hearing. He refused to hold a second hearing which was his discretion. They then made a bill of exception.

WAINWRIGHT: Which sounds like was a second hearing.

BREEN: It wasn't a hearing. It was a bill of exception. It's different because he doesn't rule on it at the end as if he did the first time.

WAINWRIGHT: I've not been a trial judge and I've had many bills before them, and I know how they work. You're saying the trial judge did not consider the live testimony, cross examination and additional evidence that you've just gone through in that bill?

BREEN: That's what I am saying. And we know that because he said, you can make a bill if you want to, but I'm not giving you a second hearing.

WAINWRIGHT: So he didn't make a ruling after that bill?

BREEN: I can't tell you 100% if he made a ruling on it. I do know 100% that what he said was, I don't have to give you a second hearing. I'm not giving you a second hearing. You can make a bill if you want to. So in effect, he didn't give them a second hearing. But the CA did.

WAINWRIGHT: Although if there's a ruling after the second hearing, if you will, in the record that will suggest that he did.

BREEN: Perhaps, but I don't believe there is. I think it's very clear from the record he declined to do so, which was within his discretion.