ORAL ARGUMENT – 10/29/03
02-1097
FFE TRANSPORTATION V. FULGHAM

LAWYER: I'm here to ask this court to do two things. One, hold that a person or an entity that uses a product for purposes of conducting its business is not strictly liable for defects in that product. Two, we ask this court to hold that a TC has discretion to determine whether expert testimony is necessary in a case involving ordinary negligence, and that given the allegations and the evidence presented in this case, that expert testimony was in fact necessary here to establish a standard of care and a breach of that standard of care.

With regard to the product liability issue. This court in Armstrong Tire over 25 years ago established a core requirement of finding somebody strictly liable for a product defect. And that is, that the defendant be engaged in the business of introducing products into the stream of commerce for use or consumption by the consuming public.

In this case the CA in its opinion apparently assumes that requirement to exist. All the CA does in this case is address whether or not there was a transaction between FFE and its contract driver, which there was. There was an independent contractor arrangement between FFE and its driver, very common in the trucking industry for this type of arrangement to exist. The driver provides his tractor. FFE owns trailers, uses those trailers for purposes of delivering products for its customers. Obviously without the trailers it would be a little difficult to do that. FFE owns the trailers. It enters into these agreements with contract haulers like Mr. Fulgham in this case. As part of the arrangement he provides the tractor, FFE provides the trailer. He cannot haul for anyone else. He has to haul for FFE. As part of the arrangement he receives a percentage of each load that he delivers on behalf of FFE.

OWEN: So he's using different trailers over and over again, or the same trailer over and over again?

LAWYER: He's using different trailers. These trailers are at a particular location. In this case it was Hillshire Farms in Kentucky. Had been loaded with sausage. And what FFE says is okay you go to Kentucky, pick up this trailer, deliver it to Houston. So when he gets to Houston, he drops off that trailer and that trip is done.

OWEN: Picks up another load?

LAWYER: There may be another trailer there to pick up. He's directed by FFE. He delivers these products as ordered by.

PHILLIPS: Does he have a choice as to how much or how little he works, or if he only wants to works 10 weeks a year, as long as he doesn't do the work for anybody else that's okay, or

do you all set his schedule?

LAWYER: I believe that - it's an independent contractor arrangement. I don't recall if the contract has any specific requirements of how much that he has to conduct. He obviously gets paid per load, so it's his incentive to haul as much as possible. And FFE will call him and tell him we need you to pick up this trailer and take it here. I don't think there's any specific requirements as to how much he's supposed to work.

SMITH: FFE is a pretty big operation. They have their own employees who drive in similar situations?

LAWYER: They do have their own employees as well.

SMITH: Roughly what percentage is that? Do you know?

LAWYER: I do not recall the percentages. There is a significant percentage that are independent contractors.

SMITH: They have employee drivers and they have independent contract drivers. Do they rent empty trailers in a lease situation where a driver says I'd like to lease an empty trailer and find some other entity to pay me to fill it up and move goods?

LAWYER: No. The drivers are not soliciting business for FFE. FFE's customers are different entities that need goods delivered from place to place.

SMITH: If I came to FFE and said I sure would like to lease one of your trailers and make me some money, would they lease me an empty trailer?

LAWYER: No. I don't believe FFE leases its trailers. These trailers are used by FFE. FFE uses these exclusively for delivering goods for its customers. The only distinction really between the independent contractor arrangement and its employee drivers are the independent contractors provide their own tractor. It's obviously to FFE's advantage to not have to own all the tractors, but it does in fact own all the trailers and provides those.

The case law, Armstrong Tire, the Dallas CA case, The Corpus Christi CA case Hernandez, the 5th Circuit all require that there be some release of the product to the ordinary consuming public. And that where the product remains within the industrial context and that where the product remains used for purposes of conducting that entity's business, that does not release the product into the stream of commerce and strict liability doesn't apply.

PHILLIPS: What if GM says we aren't going to sell any more cars. We're going to lease them to you for the life of the car and every 6 months y'all are test drivers. Every 6 months every owner sends in an evaluation form and we'll send them $20 for doing that. That wouldn't really be

in the stream of commerce yet because GM's ____ like a 30 year test on its vehicles before it starts selling them.

LAWYER: Right. And I think that if that's not GM's business - if there's some - well I think in that case that would be a necessary part of GM's business. GM's business is selling vehicles and releasing vehicles into the stream of commerce. And I think whether it's a testing process - I mean this is a testing process unlike Armstrong Tire, that would be - I think strict liability would apply there.

HECHT: I suppose if Mr. Fulgham had been an employee there wouldn't be any question that this had not been release in the commerce?

LAWYER: I don't think so based on the case law. There's no case law addressing this kind of independent contractor situation. We do have case law involving railroads where railroads provided some products to a trucking company who's on the railroad premises and are loading trailers onto a railroad car. And the employee of the trucking company is injured. But in each of those cases what the case law says is that you're still using that product for purposes of conducting your business. That's not your business to sell those products that are then used to load trailers onto a railroad car.

OWEN: The employee could sue the manufacturer, but they could not sue their employer.

LAWYER: Right. And that's exactly what happened in this case. Mr. Fulgham sued the manufacture who was Walbash, ultimately settled out prior to trial. And Walbash is who FFE bought its trailers from.

OWEN: What about U-Haul. Are they in this debate about the trailers or trucks are in the stream of commerce?

LAWYER: U-Haul does. U-Haul obviously puts the rental vehicles into the stream of commerce. That is their business. Their business is not hauling things on behalf of customers. Their business is placing these products into the stream of commerce. Their business is giving these trucks, trailers, other cargo vehicles to its customers for their use. In that sense they are putting it into the stream of commerce. The least distinction is - it's unquestionable that a lease in and of itself is sufficient to release a product into the stream of commerce.

WAINWRIGHT: What if FFE didn't own any of its trailers then, and in a document called a lease had all these independent contractors with over 3,000 trailers, and they were all leased and the products were delivered that way. Would the trailers then be in the stream of commerce?

LAWYER: No. Because FFE is still using those products. Whether they obtain them by lease, or however they are using them and are providing them to their independent contractors or

employees for purposes of conducting their business. They are not releasing it into the stream of commerce.

WAINWRIGHT: So you don't think whether it's called a lease or not is determinable?

LAWYER: Not at all.

SCHNEIDER: So following up on J. Hecht's question about the employer/employee. Do you focus on that relationship between say Mr. Fulgham and the company such as Belmont.

LAWYER: No. I don't think so. There's no question that there was a bailment in this case. And I don't think whether it's a bailment, whether it's a lease, whether it's a sale, the case law is pretty clear that any of those situations are sufficient to release a product into the stream of commerce.

SCHNEIDER: What about a joint venture?

LAWYER: What the analysis has to boil down to, is what it gets back to is whether a joint venture or whoever the entity is with the product, whoever the bailor is, the seller, or the lessor, they have to be in the business of selling those products, or leasing those products into the stream of commerce. And where the use of the product is simply incidental to what their business is, then the policy is not there. The policy stated by the restatement and the cases that have followed the restatement, that where you are a commercial seller of a product that you assume a responsibility, where you do not put reasonably dangerous products in the stream of commerce. And where that is the core of your business is selling these products, or selling these vehicles, or leasing these vehicles, that's where your bread and butter comes from, and that you are going to stand behind those products. And if you're marketing those products to the public, then you're going to bear the burden of injuries caused to the public by those products. But that policy does not exist where that is not your business.

I think if that requirement is ignored, then you get into a situation where every trucking company is now going to be strictly liable for whatever vehicle it puts on the road. And taking that a step further, any employer that gives a product to its employees for purposes of conducting their business, is now going to be on the hook for a product defect. They are going to be strictly liable.

WAINWRIGHT: What if FFE made all of its income as a company from simply leasing trailers to independent contractors. No products were delivered in the trailers. If they were it wasn't part of FEE's business. FFE's entire business is leasing 3,000 trailers and getting income from that. I take it based on your analysis that would be releasing the trailers to the stream of commerce?

LAWYER: That would be. In that case they would be strictly liable.

WAINWRIGHT: And what if 600 of those trailers were leased for income purposes for FFE and the others were used to deliver products for FFE. How would your analysis conclude in that situation?

LAWYER: Then I think you have to look at the totality of the circumstances. The restatement is pretty clear that an occasional seller of a product - I mean even where a business is selling some of its products just at a depreciated value, they are just trying to get rid of it, where you're just an occasional seller of a product strict liability is not going to attach. And the analysis in that situation is you look at the totality of the circumstances to determine to what extent this is in fact the business; whether selling these products are the business or whether this is just an incidental part of their business.

OWEN: Who makes the decision what load to get, where, and all of that?

LAWYER: FFE makes that decision. The loads are loaded by the customer. FFE calls its drivers and tells them where to go.

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RESPONDENT

FUQUA: Conceptionally I cannot distinguish this case from the rental car cases, or as a U-Haul case. I realize at first blush there's some things involved here that one might think well this really isn't a strict product liability case. But when you start looking at each of the elements, each of the elements _____here, and I see nothing in our case law that distinguishes this case and takes it out of the strict product liability.

PHILLIPS: As to J. Hecht's question. If Mr. Fulgham had been an employee?

FUQUA: It's done for. Because there has not been that transfer of possession to an outsider, whether it's an independent contractor or whoever. If the employee is simply using his employer's equipment there is no continuance of a commercial transaction.

PHILLIPS: It's not like Mr. Fulgham has 30 different companies he can choose to work for that morning, and he's choosing whose load he is going to haul. He either hauls FFE or he's staying at home.

FUQUA: In this particular case that's true. That's not true with all trucking companies.

PHILLIPS: But we're talking about him. So it's FFE or nothing. With that in mind why conceptionally should this be different just because he's bringing his own tractor and he's an independent contractor?

FUQUA: Mr. Fulgham doesn't have the protection that most employees have. He

doesn't have worker's comp provided by the employer.

PHILLIPS: What does any of that have to do with the stream of commerce? I realize an independent contractor is a money saving plan for the employer or they wouldn't be handling their business that way. But why does that make it - what does that have to do with whether the product is in the stream of commerce or not?

FUQUA: Because it continues that one step beyond the purchaser. Just the same as in the rental car companies. Just because he picked up 50 different trailers, at different times and pulls them for FFE, to me is no different than if John Q businessman goes to Hertz 50 times a year and leases 50 different vehicles from them. I can't see the conceptional difference.

On a U-Haul case. Let's say that the renter of the U-haul trailer says, you're going to Kansas City Mr. Customer. I want you to take this load, whatever it is, this box to my niece. Would you mind doing that, and I will discount your fare or your rental? Does that take the case out of the strict product liability simply because the renter of the equipment was doing something for the party that rented to him the equipment? To me it does not. I don't think it's a workable distinction to say if the lessee is doing something for the lessor, that automatically takes it out of product liability law.

OWEN: Let's say I own two chemical plants, and I have a flammable explosive chemical, and then I have a trucking company that I have contracted with as an independent contractor to haul this chemical from one plant to the next plant on a frequent basis. And let's suppose while that's being transported by this independent contractor, one of the containers blows up and injures the driver. Now am I liable as the owner of the plant, as the owner of that product that I'm just shipping from one of my plants to another, for strict liability to that driver?

FUQUA: If a company is in the business of putting a product out on the road frequently, like several trailers or in your case this chemical container goes on the road from time to time regardless of who it is hauled by, as long as it's not hauled by an employee, there should be that strict liability test to the company that put that product on the road, because they are in the best position to make sure there is no defect in that trailer?

OWEN: So we've taken that step. Let's bring it back to a premise. Let's suppose that I have containers like that, or asbestos containing materials on my premises, and independent contractors are working in and around that. Am I liable to them for injuries for strict liability? Is that in the stream of commerce?

FUQUA: No.

OWEN: What's the difference?

FUQUA: Hillshire Farms where this was loaded, when their workers come on to that

trailer and load it up, there was no transfer of possession from FFE to any independent _____. To me that should be the basis of the distinction in.

OWEN: I hire people to carry my asbestos sacks from one place on my premise to the other. An independent contractor does that and some of these workers of the independent contractor have an asbestos related disease. They've just transported it from one place on my property to another. Should I be liable?

FUQUA: Still on your premises?

OWEN: Yes.

FUQUA: No. There is not the transfer of possession by some commercial transaction. Just because you have an independent contractor working on your premises does not mean that there is that commercial transfer by which legal possession to that article was transferred. In other words if you just pick up and use something that's on the premises...

OWEN: These people are hired to do the day labor, to move this pile to that pile.

FUQUA: I understand. That would be the same as building a house or anything else. The fact that it is a product that's on those premises that injured somebody does not transfer the legal possession of that product via some commercial transaction. Which in this case was an independent contractor agreement specifically related to the trailers.

OWEN: You say transfer possession but only during the time that it was actually being used in transportation. In other words he doesn't take this trailer every night. He doesn't drive the same trailer everyday.

SMITH: He doesn't have the right to use the trailer for other commercial purposes. He only uses it for FFE purposes.

FUQUA: As far as what's set forth in the independent contractor relationship or what's set forth in the working relationship?

SMITH: In regard to the facts of this case. Your client and FFE.

FUQUA: I'm not for sure whether he could have gone to them and said I want to rent this trailer to haul something. I don't know whether they would have done that or not. I do not know. It hasn't come up in any of the testimony.

But let's look at that situation. Let's assume that Larry Fulgham was not pulling this trailer with FFE's merchandise or something FFE had contract for, but Larry Fulgham was going to do his own property, whether he was going to move his furniture out of his house or

whatever, does a different rule apply there where he picks up a product from somebody else, rents it, and he is injured by use of that product while he's pulling it on the road? Just because FFE has contracted to haul that stuff in the back of the trailer, should that be the distinction? I don't see a meaningful distinction there.

It's the commercial transaction by which he obtained use of that trailer regardless of what purpose he's put it for. Larry Fulgham, we have to distinguish this employee/ independent contractor thing. Employees are to be treated differently because there is not that legal release of possession of a product that came in to the stream of commerce via the traditional manufacturer.

OWEN: That's the piece I don't understand. You say the relinquishment of the legal something or another. That's the piece I don't understand. It is bailment, however you want to describe it. Whether your employee is in the tractor pulling the trailer or an independent contractor, don't they both have the same right to have possession of the trailer at the same time?

FUQUA: If that tractor and trailer is being pulled by an employee. No. I don't think there is any bailment. I don't think you can bail something to your own employee can you?

OWEN: I don't understand the practical difference or the legal difference in terms of the right to possess that trailer.

FUQUA: To me Larry Fulgham is an independent contractor. He is a third party. He's a member of the public. So what if he has a contractual relationship with FFE. He is still an independent contractor. He's a member of the public that came...

SMITH: What if he got two hours away from this pick up and FFE called him and told him to turn around and come back. Would he turn around and go back, or is he free to do as he chooses?

FUQUA: Legally I think he's free to do what he wants to, but as a practical matter he better turn around and take it back and do what FFE says to do.

SCHNEIDER: Is causation an issue in this case?

FUQUA: To me it is not. Colonel Huff satisfies that requirement and Officer Meyers simply by saying the tractor rolled over due to the upper coupler assembly decasting from the tractor.

SCHNEIDER: How does a jury determine whether the kingpin connecting the coupler became unconnected because it was either defective or was it caused by the crash itself? Do they just depend on their common knowledge or do they need a little help?

FUQUA: Let me first clarify the mechanism of the accident. This was not a matter of

the kingpin coming loose from the 5th wheel. This was a matter of the entire plate, what is called the upper coupler and assembly, coming loose from the trailer. After the rollover the kingpin in this upper plate all of that was still stuck in the 5th wheel. It stayed attached to the tractor. All of the bolts around the face rail and/or some vertical bolts going up through this plate, which there is a dispute about whether those exist, all of those came out, or broke, or missing, whatever to allow this thing to detach.

I don't pretend that the average layman knows everything about inspecting refrigerator trucks. I will be the first to grant they do not. My position is, that when a jury is informed whether by layman or by experts enough about the mechanics of how something works, explains how it rolled over, explained how it came off, explain it came off due to either missing bolts, or rusted bolts, when the jury is shown all of that, shown when it was inspected, shown that an inspector should catch these things, when a jury is shown all of that, the jury can make the determination himself that well a reasonable inspection would have caught this. This didn't just happen last night. This isn't like the WalMart store where someone spilt something on the floor. It takes a long time for bolts to rust to this degree that they would break. It takes a long time for them to get loose to the point that they will come out. And that's what I'm saying that even though there was some aspects of the overall scheme that needed expert testimony, the final decision of whether a jury can determine whether a reasonable inspection would catch these loose bolts or these rusted bolts, to me the average layman can make that decision. When you get down to the bottom question, should a reasonable inspection have caught this? That I say the average layman has enough knowledge to _____.

HECHT: The part I don't understand about this is if you have all of that expert testimony you say you need about how its put together, and when you should inspect it, why couldn't or didn't the expert say the failure to catch that was negligence?

FUQUA: That's an ultimate issue that I don't think is necessary in our law. The ultimate issue was this negligence. I don't think it's necessary for any expert to say that in any case. I understand the standard of care, and breach of the standard of care, but I don't think that the expert has said this was negligence.

HECHT: The safety inspector who testified, who was hired by FFE who testified that this needed to be inspected every 60 days.

FUQUA: That was Bill Robinson, their safety director. That was not a retained expert.

HECHT: But he could have testified that in addition, or could he, that the failure to find loose, rusty, missing bolts was negligence, or you should have found those if you were looking?

FUQUA: If I could have gotten a defense witness to say that for me, yes. That would have been beautiful. He did say that a reasonable inspection should catch rusty bolts, loose and missing bolts. I did not ask him whether it was negligence. I didn't think he would ever do that for

me.

SMITH: What about the lost evidence. There was some important piece of this trailer that was in the possession of defendants that disappeared at some point. Normally you would be looking for some type of jury instruction, and obviously this was a directed verdict before it got to the jury, so what evidence before you rested, if any, was directed towards that this was lost and that you were building a basis for - future request for an instruction. Were you going to wait until, and do it in a separate hearing, or should you do that before the trial, or would you just handle it during your case?

FUQUA: It was definitely handled during the discussion on the directed verdict. The judge said, I realize that you're probably entitled to a spoilation instruction.

SMITH: But facts underlying that judicial decision where are those in the record?

FUQUA: I think I even quoted them in the brief. They came from Bill Robinson, FFE's maintenance director. He says, I realize there was going to be litigation regarding this. I realized that there was a problem with the upper coupler.

SMITH: So you think there's a factual record that would support a jury instruction on spoilation against the defendants?

FUQUA: Definitely.

SMITH: And that should have been considered as a directed verdict - application to directed verdict standard by the judge?

FUQUA: Yes. This was a pretty egregious case of spoilation. When you've got the defendants upper level management realizing that there's probably going to be litigation regarding this upper coupler assembly, they bring it back to their plant because they figure there is going to be litigation. They give the instruction, You save this upper coupler assembly, because there's going to be litigation. They instruct the risk department there's going to be litigation. Save this piece. And then some time it disappears. We don't know when. As far as Bill Robertson knew it was still there 7 months after suit was filed.

SMITH: It would be your position that if we overturn the CA's opinion, we ought to send it back to the CA for a review on that question?

FUQUA: Consider the spoilation evidence, because I think it does fill in any gaps that are missing in the evidentiary record. Again, this upper coupler assembly is this whole bottom plate. And why this spoilation issue is so important, all the witnesses at the scene said that this upper coupler assembly detached from the trailer because of bolts going up through the floor of the trailer, up through this plate going vertically. That all of those were rusted and broken into.

The manufacturer says those bolts don't exist. That's not our design. I have photographs, but there was no way that I could tell from those photographs whether these rusted bolts relied upon by Colonel Huff and the other witnesses whether those were actually bolts that attached this plate to the trailer or not. Of course I couldn't evaluate the rust issue from any retained expert. I asked Col. Huff what I could about those bolts. I couldn't explore - argue the rust issue at all because I never had the upper coupler assembly to where I could look at the rust issue.

WAINWRIGHT: You've asserted in your brief that the trial judge should have considered the spoilation determination as you called it, where the judge said I believe there was spoilation. But he didn't consider it in his directed verdict. How do you think say finding of spoilation should play into a directed verdict?

FUQUA: Well according to J. Baker in his concurrence in the Trevino case, he says that if the spoilation is of the type that it raises the rebuttable presumption of negligence, then it is enough by itself to survive a directed verdict. If it's the other kind of spoilation issue to where a jury is simply instructed that the spoilated evidence would be unfavorable, then the TC should at least consider it. It may not be by itself enough to survive a directed verdict, but the TC should at least consider that in weighing the evidence whether there's enough to survive a directed verdict.

OWEN: Let's suppose I'm a passenger on a plane, or a bus, or a train and something happens to that plane, train or bus and it turns over, crashes and I'm injured. Can I sue the transportation company under strict liability?

FUQUA: Good question. That is interesting. Common carrier has purchased a plane from Boeing we'll say, and there's a defect in that plane. I know it hasn't been done to my knowledge in the law. And I guess the difference is, the passenger never took control of the product. American Airlines retained control over that product, not only by the virtue of the fact that its pilots were flying it, but the passenger had no right to do anything other than ask the stewardess to help. So the passenger never got control of the product by a ticket or otherwise. I think that's the distinction that would be applied there.

OWEN: So what about the driver or the pilot of the train, bus, or plane? Does it matter whether they are an employee, or employer, whether they get to sue for strict liability?

FUQUA: It definitely it would not be a strict liability if it's an employee. But let's say an independent contractor flew Americans plane full of passengers. I think you would have to look at the agreement itself to see what the rights and responsibilities of each party were to see whether there might have been that transfer of possession sufficient to invoke product liability law. For example, if he rented the whole plane, and there was something wrong with the plane, then yes product liability...

OWEN: Let's say I'm a charter outfit. That's exactly what I was thinking. I run private planes or jets, or whatever, but I hire my pilots as independent contractors. And I tell them

you pick up this group here, be on runway X time and fly them to Las Vegas and back. And if that plane were to crash in transit would the pilot have a cause of action against me based on strict liability?

FUQUA: I think again you would have to look at the contract. What was his rights and responsibilities under that agreement? If he had the right to use the product, if he was renting the product as opposed to just drive the vehicle so to speak, I'm not for sure that product liability would apply unless he had legal possession of the entire aircraft.

SMITH: What about in FFE and your client if at the loading dock there there was a ladder that was owned by FFE that had a defect and they loaned it to your client and it blew apart and he got injured. Would FFE be strictly liable?

FUQUA: No. They are not in the business of leasing ladders or lumber ladders. You've got to have the criteria that the lessor was in the business of leasing products of similar kind.

SMITH: So if we characterize FFE's business as transportation of commodities, there's no strict liability?

FUQUA: But how did they accomplish that? They accomplish that by leasing their trailers. If the defect in the trailer was a defective tire, if we have this same situation and it wasn't the upper coupler assembly, but a defective tire, then yes. The argument would be that strict liability would apply.

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REBUTTAL

LAWYER: First of all, FFE does not lease its trailers. The CA characterized it as a lease, but it is not a lease arrangement. FFE is paid by its customers for the goods that it hauls from place to place. Mr. Fulgham then gets a percentage of that payment. But there is not a direct - Okay. Mr. Fulgham we will lease this trailer to you, you pay us X amount for that lease. So there's not a lease. There is a transfer of possession. I don't think there's any question about that.

Getting to J. Owen's concerns. The focus is whether you're in the business of doing that, whether that is your business. And where you own a plane and you charter that plane and you hire a pilot, your business is not selling or leasing planes or providing planes to people for their own personal use. Your business is a service. And your business is transporting people from place to place. And for the airline industry or bus industry, you're providing a service. The bus company, the airline company they are the consumers of those products. They are the end user of those products, and their using those products to further their business. And in that role they are not strictly liable for product defects.

WAINWRIGHT: Does the record reflect what happened to the upper coupler assembly?

LAWYER: The upper coupler assembly was retained by FFE, and we don't know what happened to it. It was lost.

WAINWRIGHT: Was there an order signed by the TC about this spoilation or do you agree with Mr. Fuqua that the trial judge simply said that the plaintiff was probably entitled to a spoilation construction?

LAWYER: He did say that. He did say that during the hearing on the expert testimony and the directed verdict. But what he also said was that he did not think it was a severe presumption. And looking to Trevino v. Ortega, in order for spoilation to have any affect on the directed verdict in this case, it had to arise in a situation and it had to preclude the plaintiff from proving their case. And plaintiff's own expert witness at the trial in this case, he didn't need the upper coupler assembly. Because what he had and what he decided was that the bolts that these witnesses saw at the scene of the accident, the bolts that some implied may have been protruding vertically into the underside of the trailer, that those did not exist. That what did exist are base rails that run along the side of the trailer, and it's these base rails that are then bolted in to the upper coupler assembly. And according to plaintiff's own expert, that is what holds the upper coupler assembly to the trailer. And what the expert did get to look at was the expert got to look at those base rails which are, the base rails on the outside of the upper coupler assembly. And the expert's testimony was that based on his examination of the base rail, and he also testified that even if he had the upper coupler assembly to look at, his analysis of it would have been the same as the analysis he conducted on the base rail, which was based on the bolt holes and shining areas around those bolt holes that there was evidence that there were loose bolts that were very loose or gone at the time of the accident and, that that's what caused the upper coupler assembly to break free of the trailer and roll.

So there is no requirement in this case, this spoilation that occurred did not prevent the directed verdict in this case. It was not necessary for the plaintiffs to prove his case. And according to J. Baker he still had the burden to prove his case.

SIDE A RUNS OUT

SIDE B

WAINWRIGHT: Because the trial judge did not think a severe presumption applied here, that the spoilation that he thought probably occurred should not be considered in the directed verdict ruling, or did something else happen?

LAWYER: No. If it's the less severe presumption, then I don't think spoilation has any impact on whether the directed verdict could be granted. And I think the other thing that you have to look at is the evidence that was in front of the TC and the focus of plaintiff's negligence allegations. And the focus was is that FFE should have detected lose or rusty bolts. And the bolts that broke free or that fell out nobody recovered those. The bolts were not spoilated. It's the rusty bolts and whether they had reached such a corrosive extent that they would have failed, that they

would no longer have the strength to hold that trailer and they would have failed. And there's no evidence of any spoilation of those.