

BAR NEWS ITEM

The Prothonotary of Franklin County, Pennsylvania, has issued the following press release (printed here, only in part), concerning filing fees for UCC filings in 1999:

November 10, 1998

Presented are regulations setting forth the amounts of fees and costs to be charged pursuant to Act 167 of 1992, along with the amounts payable to the Commonwealth, during the calendar year 1999. In addition to adjusting the fees (see future issues of the Pennsylvania Bulletin), the amounts have been rounded to the next fifty cents (\$0.50) for purposes of accounting and operational efficiency. (See Supreme Court Administrative Order No. 1, authorizing Court Administrator of Pennsylvania to promulgate regulations to implement costs and fees schedules of Act 167 of 1992.)

UNIFORM COMMERCIAL CODE (UCC) FEE SCHEDULE

County Fees:

UCC-1 (per debtor name): \$56.50; each ancillary transaction: \$56.50; for each transaction not filed on a standard form approved by the Department of State, revised 1989 or thereafter: \$131.00; each page of attachment furnished: \$2.00.

Please remember to make all checks payable to Linda L. Beard, Prothonotary.

TEXAS EASTERN TRANSMISSION CORP., Plaintiff vs. J.L. ALLEN CO., MODERN ELECTRIC COMPANY, and PSD, INC., d/b/a POWER SYSTEMS DEVELOPMENT, Defendants
FRANKLIN COUNTY BRANCH CIVIL ACTION - LAW
A.D. 1995-366

Texas Eastern Transmission Corp. v. J.L. Allen et al.

Spoliation of evidence

Facts: electrical fire took place in 1993 in switch gear building of natural gas compressor station operated by plaintiff; plaintiff sued defendants for having improperly installed electrical connections. Defendants filed motion to dismiss arguing plaintiff did not properly preserve evidence in order for defendants' expert to establish alternate causes of the fire.

1. Standard to be used in determining proper penalty for spoliation of evidence recently set by Supreme Court in *Schroeder v. Commonwealth of Pennsylvania Dept. of Transportation*, Pa., 710 A2d 23 (1998); courts must consider (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) the availability of a lesser sanction that will protect the opposing party's rights and deter future similar conduct.

2. Court did not get to *Schroeder* analysis: no spoliation of evidence exists where plaintiff has preserved all equipment in vicinity of the fire, where plaintiff has taken 449 photographs of the scene and the equipment, and where witnesses who observed the fire and who were familiar with the original location of the equipment were available to talk to defendants' experts.

3. Plaintiff has no duty to keep scene in exact after-fire condition; plaintiff is permitted to dismantle equipment for examination by its own expert and to start repairs as long as the equipment is preserved so that it is not permanently available.

4. Plaintiff has no duty to preserve fuses which were located in a substation owned by a different company (West Penn) even if West Penn would have preserved those fuses if plaintiff had asked; defendants themselves could have attempted to obtain fuses for preservation.

5. Defendants are estopped from claiming spoliation based on fact that some equipment has deteriorated over time; defendants were notified within two months that plaintiff blamed defendants for the cause of the fire; the equipment was available for inspection but defendants' insurers neglected to have experts examine the scene until four and five years after the fire, which was substantial factor in defense experts' inability to determine cause of the fire.

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OPINION AND ORDER

Factual and Procedural Background

Plaintiff Texas Eastern Transmission Corporation ("Texas Eastern") owns and operates a natural gas compressor station located in Chambersburg, Franklin County. The Chambersburg station is part of a lengthy pipeline used to pump gas to customers in the Chambersburg area as well as to customers in New Jersey and New York. In 1991, Texas Eastern contracted with Defendant PSD, Inc. ("PSD") to construct a new electrical substation at the Chambersburg facility and install therein a 4160/480 volt transformer. In 1992, Texas Eastern contracted with Defendant J.L. Allen, Co. ("Allen") to construct a new compressor and metering facilities at the Chambersburg compressor station. Allen also had to make the electrical connections between the existing electrical equipment in the switchgear building at the Chambersburg facility and the volt transformer being installed in the substation by PSD. Allen subcontracted the electrical work to Defendant Modern Electric Co. ("Modern").

On August 22, 1993, at 3.00 a.m., a fire occurred in the switchgear building of the Chambersburg station. The switchgear building held eight cubicles which contained electrical equipment. Tom Caldwell, a Texas Eastern employee, was the first one to arrive at the scene and he observed flames in the area between cubicles number 2 and 3. Steve Perrin, the second Texas Eastern employee to arrive at the scene, also observed flames near cubicle 3. The fire was confined to the switchgear building.

After the fire, Texas Eastern retained an electrical expert to determine the cause of the fire. The expert, Charles Emery, determined that the cause of the fire was the fact that the elbows on the ends of the "5kV cables," which connected the existing electrical equipment in the switchgear building to the 4160/480 volt transformer, had been improperly installed, causing an electrical fault in the elbows. Because of the improper installation, electrical current was permitted to flow from that fault back through the 5kV cable to the breaker in cubicle 3 in the switchgear building.

After Mr. Emery's inspection, Texas Eastern began removing electrical equipment from the facility for repairs and to put the station, which was an important part of the pipeline, back in operation. Texas Eastern stored many parts of the equipment from the switchgear building as well as the 4160/480 volt transformer in a warehouse.

It is not disputed that Texas Eastern informed Allen of the fire in writing on October 15, 1993. In that letter, Texas Eastern notified Allen that the fire was caused by the improper electrical work performed by Allen and Modern. In July 1996, Modern's experts inspected the scene for the first time. Allen's experts did the same in August 1997. In August 1998, defendants' experts inspected the cubicles from the switchgear building.

A writ of summons was filed on August 21, 1995. On September 11, 1995, a rule was issued on plaintiff to file a complaint. The complaint was filed on October 4, 1995. On January 14, 1998, Defendants Allen and Modern filed a motion to dismiss the case due to spoliation of evidence caused by representatives of the plaintiff. A rule to show cause was issued on plaintiff, who filed a timely answer. A hearing on this issue was held on October 15, 1998. Counsel for all parties subsequently submitted letters to this court.

Discussion

The Pennsylvania Supreme Court recently addressed the standard to be used in determining the proper penalty for the spoliation of evidence. *Schroeder v. Commonwealth of Pennsylvania. Dept. of Transportation*, Pa. , 710 A.2d 23 (1998). The Court found it relevant to consider (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) the availability of a lesser sanction that will protect the opposing party's rights and deter future similar conduct. *Schroeder*, 710 A.2d at 27, citing *Schmid v. Milwaukee Electric Tool Corp.*, 13 F.3d 76 (3rd Cir. 1994). A common penalty for spoliation (where summary judgment is not granted) is a jury instruction allowing an inference that the missing evidence would have been unfavorable to the party that destroyed it. *Schroeder*, at 27. However, before the above stated standard can be applied, it must first be determined whether there was in fact spoliation of evidence in the underlying case.

Spoliation exists where evidence relevant to the litigation has been lost or destroyed. *Schmid*, 13 F.3d at 78. Defendants argue that certain equipment was not or not properly preserved for examination by defendants' experts in order to rebut plaintiff's theory with evidence of alternate causes of the fire. Defendants, in their letters and at the hearing, have raised several issues regarding the improper preservation of evidence by Texas Eastern. This court will attempt to recount them briefly.

Defendants' Allegations of Destruction of Evidence by Texas Eastern

First, defendants take issue with the fact that within two weeks of the fire Texas Eastern had taken down the switchgear building, where the fire had taken place, and had begun construction on a new building. The equipment in the switchgear building had been detached by the use of a blow torch and removed to a warehouse. This occurred before defendants were notified by letter. Defendants argue that plaintiff thus did not provide them with the same opportunity for inspection of the after-fire scene as plaintiff allowed its own expert.

Defendants also argue that Texas Eastern did not properly photograph the equipment before it was taken down, especially cubicles three and four which were critical to the determination of the cause of the fire. They also point out that a picture provided by Texas Eastern designated as "unit 3" apparently was not unit 3 but some other piece of equipment. Defendants also contend that much of the equipment inside the cubicles was missing both at the time the photographs were taken as well as when Modern's expert, Mr. William Calhoun, inspected them. Mr. Calhoun testified that a review of these components was necessary to determine the cause of the fire. Defendants furthermore argue that while the number of photographs is overwhelming, they lack sufficient quality. Specifically, defendants argue that the photographs do not show a sufficient overview to allow their experts to see where certain components were located and to what equipment they were attached. Defendants also take issue with the fact that one side of the switchgear building was not photographed.

Next, defendants argue that Texas Eastern did not properly tag and identify the equipment it removed and that it has not properly stored the items. Specifically, defendants note that since September

1997, the equipment has been stored outside and exposed to the elements. Defendants have also pointed out that the 5kV cable, which was stored in a warehouse belonging to plaintiff, was stolen. The warehouse had previously been broken into and equipment had been stolen from it. Lastly, they argue that the fuses which were part of the electrical circuit but which were located in a substation owned by West Penn and which would have been removed by West Penn, were not available for defendants' inspection. Defendants argue that if Texas Eastern had asked West Penn, it would have preserved the fuses for defendants' inspection.

Texas Eastern's Actions Regarding the Preservation of Evidence

Defendants' first argument deals with the fact that they could not inspect the scene of the fire before the equipment was removed by Texas Eastern. It appears to be defendants' standpoint that the scene of the fire should have been preserved in the exact after-fire condition until defendants' experts had the opportunity to inspect it. Looking at how long it took defendants to finally send their experts to the scene (four and five years after the fire), this could have been very costly for plaintiff. However, even assuming that defendants would have sent their experts over sooner if the scene had been preserved, this court finds that a plaintiff has no duty to keep the scene in the exact condition for an indeterminate period of time. This is especially so where the fire destroyed an important part of that business and where repair and rebuilding is necessary to keep the business going. Plaintiff has cited a case from the District Court of the Eastern District of Pennsylvania whose reasoning this court finds to be persuasive. *Childs v. General Motors*, 1997 WL 611616 (E.D. Pa.) (not reported). In that case, defendant sought the "adverse spoliation inference" because plaintiff's expert had dismantled a car seat which plaintiff alleged to be defective. The court noted that "unlike in cases where the evidence is permanently unavailable, here the seat assembly was dismantled, but not destroyed, and thus defendant has not been deprived of examining it." *Childs*, at *2. Modern's expert, Louis Gahagan, a fire investigator, testified at the hearing that he has investigated fire scenes after they have been cleaned up, and that such investigations can be done by reviewing photographs and diagrams. Plaintiff argues that in the underlying case, it has dismantled the equipment because it had to make repairs and get the pipeline back in business, but that it has preserved all relevant equipment and taken

photographs. It is plaintiff's position that defendants were not deprived of an opportunity to examine the equipment and that therefore there is no spoliation of evidence. This court agrees with plaintiff.

Witness testimony showed that the fire took place only in the switchgear building, and specifically at or near cubicle three. Texas Eastern has preserved all eight cubicles present in the switchgear building, as well as the breakers and the 4160/480 volt transformer. Texas Eastern's expert had to disassemble the breakers in cubicles 3 and 4 in order to examine them. Mr. Calhoun, the electrical engineer retained by Modern, admitted at the hearing that this was a reasonable thing to do to properly investigate the cause of the fire. Texas Eastern furthermore preserved the elbows alleged to have been defectively installed, including one foot of wire attached at each end of the elbows. Mr. Calhoun admitted that he had the same opportunity as Texas Eastern's expert to examine the elbows and the wire ends.

Mr. Calhoun testified that he could not make a full determination as to the cause of the fire because certain parts were missing and the photographs taken by Texas Eastern were not complete or did not provide sufficient overview to determine where the parts originally were located. Mr. Gahagan testified that the pictures did not provide sufficient overview for him to determine where the fire started because he had to see what other equipment was near or connected to the damaged equipment. This court finds it very difficult to believe that the pictures taken by Texas Eastern were not sufficient to allow an expert to make a determination as to the cause of the fire. Texas Eastern submitted to this court a binder containing a total of 449 photographs taken of the equipment and a building the size of a garage. Most pictures were very detailed and some do depict overviews of the scene. The pictures appear to this court to be more than sufficient.

However, even if the pictures do not provide a complete overview of the scene as to allow defendants' experts to determine where the parts were located and what other equipment was there, that does not mean that Texas Eastern did not adequately preserve the evidence. Steve Perrin, an employee of Texas Eastern, testified at the hearing that he was the second person on the scene of the fire, and that he

observed where the flames were. He furthermore testified that he was familiar with the equipment inside the station and could have told defendants' experts where the equipment had originally been located. Both Mr. Calhoun and Mr. Gahagan admitted at the hearing that they did not speak to any of the people who witnessed the fire, nor to any Texas Eastern employees at the Chambersburg station or Texas Eastern's expert. Witness accounts of the fire could have directed defendants' experts to the origin of the fire. Mr. Gahagan testified that eyewitness accounts play an important part in determining the cause of a fire. Furthermore, Texas Eastern's employees could have provided defendants' experts with the proper "overview" of the scene allowing them to determine where the equipment was originally located. Plaintiff's expert, who inspected the equipment when the fire-scene was still intact, could have provided important information regarding the condition of the scene immediately after the fire. Similarly, the fact that a picture may have been mislabeled also could have been resolved by simply asking a Texas Eastern employee what was depicted in the picture and where it had been located.

The same argument can be made with respect to defendants' argument that the equipment was not properly labeled. This court found Mr. Perrin's testimony that the parts, except for the cubicles themselves, were properly tagged with tape and marker to be credible. He furthermore testified that it was clear from the cubicles where they belonged, and that he could have reconstructed the equipment. Therefore, even if the equipment must be found to be inadequately tagged, a conversation with Mr. Perrin would have solved the problem because he could have explained to defendants' expert where the tagged equipment had been located.

With respect to defendants' claim that there is spoliation of evidence because the 5kV cable was stolen from a warehouse under Texas Eastern's control, this court finds that it was sufficient for plaintiff to preserve one foot of the 5kV cable at each end of the elbows for defendants' inspection. However, even if the loss of the cable must be deemed to be spoliation, this court finds that defendants are not entitled to relief. Applying the Schroeder analysis, this court finds that plaintiff is not at fault for the loss of the cable. Texas Eastern preserved the cable and put it in a locked warehouse. After it was broken into, Texas Eastern immediately informed the police, but the perpetrator was never found. This court does not find that any

blame can be put on Texas Eastern merely because the warehouse in which the cable was stored had been broken into one year before. This court also finds the prejudice to defendants to be minimal. Texas Eastern did preserve the ends of the cable which were available for defendants' inspection, and they will be able to cross-examine plaintiff's expert regarding the condition of the rest of the cable. Thus, this court will not provide any relief to defendants on the basis of spoliation of the 5kV cable.

With respect to the fuses from the West Penn substation which were not preserved¹, this court does not find that plaintiff had a duty to preserve them. They were removed by West Penn and were never under the control of Texas Eastern. While West Penn probably would have preserved them if Texas Eastern had asked, that does not mean that a claim for spoliation exists against plaintiff. Defendants themselves have never attempted to contact West Penn to ensure the preservation of those fuses, despite the fact that they were notified of the fire within several weeks. Thus, defendants cannot now claim that Texas Eastern failed to preserve evidence which they could have attempted to preserve themselves.

Because Texas Eastern preserved the equipment involved in the fire, took a large number of pictures, and made eye witnesses available, this court finds that it sufficiently preserved relevant evidence to permit an examination by defendants' experts for the determination of the cause of the fire. The fact that the experts neglected to do part of their jobs cannot now be blamed on plaintiff.

Estoppel

It appears that the condition of some equipment which had been preserved by Texas Eastern has deteriorated over time. However, defendants are not permitted to argue spoliation with regard to such equipment because they failed to inspect the equipment within a reasonable time. It was established that on October 15, 1993, Defendant Allen was notified in writing by Texas Eastern that a fire had taken place and that Texas Eastern blamed the cause of the fire on Allen's electrical work. It also appeared from the testimony that

¹Plaintiff has recently located the fuses from the West Penn substation. Counsel for plaintiff informed this court shortly after the hearing that the fuses had been located and that defendants will be given an opportunity to inspect them.

Allen was informed within one week that a fire had occurred, even though no blame had been put on Allen at that time. Mr. Leafliker, Allen's vice-president, testified at the hearing that he forwarded the letter to its insurance company the same day he received it. Mr. Leafliker further testified that Allen never made a request to view the scene or the equipment, because it was up to the insurance company to handle it from that point on. Mr. Richard Liden, the claims representative of Allen's insurance company who was handling the case, admitted that he received the letter from Allen and that he informed Modern that it would hold Modern responsible.

Mr. Liden furthermore described his efforts to obtain Texas Eastern's expert report, but he did not succeed in getting it until after the suit was filed in August of 1995. Mr. Liden also testified that it was his impression that the scene had not been preserved because a Texas Eastern representative had told Allen that repairs were being made at the scene. Modern's insurance company finally sent an expert to the scene to inspect the equipment in July 1996, three years after the fire. Allen's insurance company sent an expert to the scene in August 1997. Mr. Liden testified that the insurance company had previously hired an expert, but he passed away and another expert had to be hired. Mr. Liden could not remember when the expert died, but it was clear that he was not hired until after suit was commenced in 1995 and that he did not go to the scene before his death. After they viewed the scene, defendants' experts complained to Texas Eastern by letter dated October 1, 1997 that they could not identify the cubicles. In response to that, Texas Eastern notified defendants that it would work with defendants to solve any difficulties and it subsequently had the cubicles arranged in the proper order. It was not until August 1998 that defendants actually inspected the cubicles.

Allen knew as early as one week after its occurrence that there was a fire at the Chambersburg station, where it had performed electrical work less than one year before. If that was not sufficient to put Allen on notice, it is undisputed that less than two months after the fire defendants had written notice that they were being held responsible for the fire, yet they failed to act on it for several years. The fact that defendants did not receive Texas Eastern's expert report regarding the cause of the fire (although they were informed by letter regarding the cause) certainly did not prevent defendants from going to the scene and investigate the cause of the fire themselves

immediately after it occurred. Modern's own expert, Mr. Calhoun, testified that the fact that it had been four years since the fire was a large factor in his inability to determine the cause of the fire.

Defendants have not provided any reasons for why they waited so long to inspect the scene. They were timely notified by Texas Eastern and had every opportunity to view the scene and the equipment, yet they failed to do so. A statement by a Texas Eastern representative to Allen that the scene was being repaired can hardly qualify as a reason for believing that the scene was destroyed and thus that inspection would be fruitless. Defendants should have sent their experts over immediately after having been notified that they were being held responsible for the fire.

The fact that the cubicles were placed outside the warehouse in September 1997 also cannot be a basis for defendants' claim of spoliation. Defendants have had every opportunity to inspect them long before that date, and did in fact view them in 1996 and 1997 when they were still kept inside. Defendants themselves caused the delay by not sending an expert back until August 1998.

This court finds the solution found by President Judge Eby of the Lebanon County Court of Common Pleas, cited by plaintiff, to be persuasive. *Reigert v. Giant Food Stores, Inc.*, 35 Lebanon County Legal Journal 162 (1997). In that case, plaintiff sued Giant Foods for having sold bologna which contained salmonella, causing her son to get food poisoning. Plaintiff had preserved the bologna in her freezer and she promptly notified defendant of the claim. Defendant did not request a sample of the bologna and after nine months, plaintiff disposed of it. The court found that it would be unjust to penalize plaintiff for disposing of the bologna after nine months when defendant had known of the existence of the sample for seven months but failed to request a sample. *Reigert*, at p. 164-165. While that case deals with perishable foods which require inspection within a short period of time, this court finds the reasoning to be applicable to the underlying case. Defendants had notice of the fire shortly after it occurred, yet their insurance companies neglected to do anything to inspect the scene for four to five years after the fire. This long period was a substantial factor in the experts' inability to make any determinations regarding the cause (or alternate causes) of the fire. Texas Eastern had the equipment available for defendants inspection

and was willing to have its employees provide assistance. Because defendants appear to have no good reason for waiting so long after having been notified, they are now estopped from asserting that spoliation occurred. Defendants cannot sit back and do nothing and then claim spoliation if after a long period of time the evidence has deteriorated. If defendants' insurance companies want to play games of this kind, they must not be surprised when they lose that game.

ORDER OF COURT

October 29, 1998, after consideration of defendants' motion to dismiss the case due to spoliation of evidence, this court finds that plaintiff has adequately preserved all relevant evidence and that defendants are estopped from asserting spoliation. Therefore, defendants' motion to dismiss is denied. This court also denies defendants' request to give the "adverse spoliation inference" instruction to the jury.