AFFIRM; Opinion issued July 29, 2011

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-09-01549-CV

DOUGLAS AND ORALIA SCHULTZ, Appellants

V.

MELVIN L. LESTER, M&K LOGISTICS, INC., AND TRANSPORT LEASING/CONTRACT, INC., Appellees

On Appeal from the 298th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-07-13400-M

MEMORANDUM OPINION

Before Justices Bridges, Lang-Miers, and Murphy
Opinion By Justice Bridges

Appellants Douglas and Oralia Schultz appeal from the jury's take nothing verdict in favor of appellees Melvin L. Lester, M&K Logistics, Inc., and Transport Leasing/Contract, Inc. In six issues, appellants allege the trial court erred by: (1) admitting expert opinion testimony of an unqualified witness; (2) admitting a police accident report that included opinions based on inadmissible hearsay; (3) refusing to admit as evidence section 392.14 of the Federal Motor Carrier Safety Regulations, *see* 49 C.F.R. § 392.14 ("Regulations"); (4) refusing to admit into evidence excerpts from the Texas Commercial Motor Vehicle Drivers Handbook ("Handbook"); (5) refusing initially to take judicial notice of the Regulations and Handbook or, if the court did take notice, refusing to clearly

communicate that fact to the jury; and (6) refusing to submit their proposed jury charge question on negligence. We affirm.

Background

Lester, an employee of M&K, was driving a tractor-trailer west on Interstate 30 in Garland, Texas. Steve Woods, a fellow M&K employee, was following Lester. To the right and slightly ahead of Lester was a tractor-trailer driven by Michael Huber, an employee of a different company. Lester, Woods, and Huber were traveling at roughly fifty to fifty-five miles per hour immediately before the accident. The roadways were wet, and Woods saw ice on his windows prior to the accident. The posted speed limit was sixty miles per hour

Sonia Schultz, appellants' daughter, was also driving west on Interstate 30 at approximately sixty-five to seventy-five miles per hour. Schultz passed Lester on his left, crossed in front of Lester's vehicle, and hit the truck driven by Huber. When Lester saw Schultz pass in front of him, he touched the brake, took his truck out of gear, and steered to the left to avoid the collision between Schultz and the truck driven by Huber. After Schultz struck Huber's truck, her car spun out of control and shot back across the road directly in front of Lester. Lester collided with Schultz's vehicle as it was spinning in front of him. Schultz died at the scene from injuries sustained in the accident.

Appellants sued Lester and M&K for negligence, later adding TLC as a defendant and included claims against M&K and TLC for negligent hiring, training, and supervision. After considering the evidence, the jury found Schultz 100% negligent for the accident. Thereafter, the trial court rendered a take-nothing judgment against appellants pursuant to the jury verdict. This appeal followed.

Discussion

In their first issue, appellants contend the trial court erred in admitting into evidence, over objection, expert opinion testimony of an unqualified witness. Specifically, they assert the trial court erred in allowing Officer R. T. Clark to testify "as an accident reconstruction expert and to give expert opinion testimony concerning the cause of the accident and who was at fault for the accident, despite having neither the qualifications nor underlying reliable data to give such opinions." Appellees maintain Clark was qualified, he investigated the accident himself, and any error was harmless.

We review evidentiary rulings, including rulings on expert testimony, for an abuse of discretion. *See E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995). The trial court abuses its discretion only if it acts without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985). "A two-part test governs whether expert testimony is admissible: (1) the expert must be qualified; and (2) the testimony must be relevant and be based on a reliable foundation." *Helena Chemical Co. v. Wilkins,* 47 S.W.3d 486, 499 (Tex. 2001) (citing *Robinson,* 923 S.W.2d at 556). Appellants argue appellees failed to satisfy either part of this test.

First, appellants complain that Clark was allowed to offer unsupported opinions that: (1) Schultz failed to control her speed; (2) her failure to control her speed caused or contributed to the accident that caused her death; (3) the accident sequence was "rapid"; and (4) Lester did not do or fail to do anything that caused or contributed to the accident "(i.e. Lester was not negligent)." Appellants combine their arguments as to Clark's qualifications and the reliability of the foundation for his opinions.

"[A] witness qualified as an expert by knowledge, skill, experience, training, or education

may testify thereto in the form of an opinion or otherwise." TEX. R. CIV. EVID. 702. Clark testified that, at the time of the accident, he was assigned to the traffic unit and his primary responsibilities included investigating collisions and writing tickets. He had obtained his basic, intermediate, advanced, and reconstruction certifications. In discussing those certifications, Clark explained (1) the intermediate class was a one-week class covering traffic investigation, (2) the advanced class was a two-week, eighty-hour class covering traffic investigation and logistics, and (3) the reconstruction class was also a two-week school where he was taught how to reconstruct an accident, including taking measurements and calculating speeds and distances of the vehicles involved. Clark testified that accident reconstruction is one of the higher levels of certification for a police officer. Clark testified that although he was off duty at the time of the accident, it was typical for him to be called to investigate an accident scene. We conclude Clark's qualifications were sufficient to give an expert opinion concerning the cause of the accident. *See Ter-Vartanyan v. R&R Freight, Inc.*, 111 S.W.3d 779, 781-82 (Tex. App.–Dallas 2003, pet. denied) (eight-year officer trained and certified in accident investigations with experience investigating hundreds of accidents sufficient qualification to opine as to causation). In reaching this conclusion, we note that appellants have pointed to nothing unique about this accident that would require a trucking expert to testify about causation.

With regard to appellants' contention that Clark's opinions were not based on a reliable foundation, they claim his opinions (1) had never been tested, (2) were solely based upon his subjective interpretations and observations made at the accident scene after Officer Byrd conducted a brief investigation, (3) have never been published, peer reviewed or generally accepted by the scientific community or otherwise, (4) were not consistent with any published peer-reviewed or generally accepted scientific literature, and (5) contained major analytical gaps.

When, as here, the reliability of an expert's opinion is challenged, the trial court must ensure

that the expert opinion comports with applicable professional standards. *TXI Transportation Co. v. Hughes*, 306 S.W.3d 230, 235 (Tex. 2010) (citing *Helena*, 47 S.W.3d at 499). The factors to consider include those relied on by appellants. *Id.* (citing *Robinson*, 923 S.W.2d at 557). Those factors are non-exclusive, however, and "are particularly difficult to apply in vehicular accident cases involving accident reconstruction testimony." *Id.* (citing *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 39 (Tex. 2007)). In such cases, the supreme court has recognized it is appropriate to determine whether "the expert's opinion actually fits the facts of the case." *Id.* (citing *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 904-05 (Tex. 2004)).

Our review of Clark's testimony shows he visually observed the scene when he arrived. He then contacted Officer Chris Byrd, the lead investigator on the accident, and walked the scene with him while discussing the accident. Clark observed the debris on the roadway, took a laser measurement, and determined the debris measured 293 feet. Clark also determined there were no skid marks due to the condition of the road. On the night of the accident, Clark also spoke with Lester, the driver of the 18-wheeler that struck Schultz's car, to obtain the "commercial supplement."[1] The next day he met with and took the written statements of Lester, Woods (a witness to the accident), and Huber (the driver of the tractor-trailer initially struck by Schultz's car). He testified that both Woods and Huber described a white car, driven by Schultz, that passed them. According to Clark, he completed the witness sheet and drew the diagram depicting the collision sequence based on his investigation. He testified his investigation was complete, and he concluded there was nothing Lester could have done to avoid colliding with Schultz's car after it struck Huber's truck.

[1] The record before us does not provide a definition of "commercial supplement."

Appellants stress a number of things Clark did not do or was unable to do, such as talking to Woods the night of the accident, inspecting and measuring the vehicles, examining log books, examining skid marks, determining when or if Lester braked before impact, and attempting to determine Schultz's and Lester's rates of speed. Those factors, however, go to the weight the jury was to give Clark's opinions, not the admissibility of the opinions themselves. *See Ter-Vartanyan*, 111 S.W.3d at 782 (things officer did not do, such as interview witnesses, go to weight jury to give opinion). The jury here heard testimony from both Woods and Lester and was capable of giving appropriate weight to Clark's testimony. *Id.* at 783.

From our review of Clark's testimony, we conclude there is no analytical gap between the data Clark collected and relied on in his investigation and his opinion as to causation. We, therefore, conclude the trial court did not abuse its discretion in admitting Clark's expert testimony. *See Robinson*, 923 S.W.2d at 558. We overrule appellants' first issue.

In their second issue, appellants contend the trial court erred by admitting, over objection, a police accident report that included opinions based on inadmissible hearsay. Specifically, appellants complain the trial court denied their motion in limine request to redact the sections entitled, "Investigator's Narrative Opinion of What Happened" and "Factors and Conditions Listed are the Investigator's Opinion." According to appellants, Byrd, who did not testify, was responsible for these two sections and his opinions were merely adopted by Clark.

To complain about the wrongful admission of evidence, appellants must show they made a timely objection or motion to strike that appears in the record. TEX. R. EVID. 103. The objection must be specific and, where an exhibit contains admissible and inadmissible material, the objection must state specifically what information is objectionable. *Id.* A general objection to evidence as a whole, which does not point out specifically the portion objected to, is properly overruled if any part

of that evidence is admissible. *Speier v. Webster College*, 616 S.W.2d 617, 619 (Tex. 1981). The law also is well settled that a trial court's ruling on a motion in limine preserves nothing for review. A party must object at trial to preserve error on appeal. *See Hartford Accident & Indem. Co. McCardell*, 369 S.W.2d 331, 335 (Tex. 1963).

Appellants' reliance on their motion in limine as the basis for asserting an objection to the police report is without merit because the trial court's ruling on the motion in limine does not preserve error. *Id.* In addition to their motion in limine, appellants also refer in their reply brief to the trial court's ruling in a pre-trial hearing to pre-admit exhibits. Specifically, the trial court overruled appellants' following objection to the police report:

> [W]e want to lodge an objection that the Garland Police Department exhibit we object to on the grounds of hearsay within hearsay by an expert. Mr. Clark -- Officer Clark, should not be qualified as an expert. Those are our objections to the Garland Police Department Texas Police Officer's Crash Report. In addition to the fact that there are multiple copies without any authorship or signature on some, and it's confusing and cumulative.

Because objections to evidence offered out of the jury's presence shall be deemed to apply to such evidence when admitted without the necessity of repeating the objection, we conclude appellants have preserved error on this objection. *See* TEX. R. EVID. 103(a)(1).

With regard to appellants' objection to the police report based on Clark's qualifications as an expert, we overrule that portion of the second issue based on our resolution of issue one. We note also that appellants acknowledge that police reports can be admissible as an exception to the hearsay rule. *See* TEX. R. EVID. 803(8). They argue, however, the report contains inadmissible hearsay within the report. Specifically, appellants contend Byrd, who did not testify, was responsible for the two objected-to sections of the police report and his opinions were merely adopted by Clark. Appellants did not object, however, on the basis that Byrd's testimony was inadmissible. Because

their complaint on appeal does not comport with their objection at trial, they have not preserved that issue for appeal. *See* TEX. R. APP. P. 33.1(a).

Further, appellants have failed to show error. They rely solely on *Griffin v. Carson*, No. 01-08-00340-CV, 2009 WL 1493467 (Tex. App.–Houston [1st Dist.] 2009, pet. denied), as authority for requiring redaction of two portions of the report. The question in that case was whether the trial court erred in excluding an unredacted police report. Concluding the trial court did not abuse its discretion by excluding the unredacted report, the court noted that, when, as here, the investigating officer is not deposed, does not testify at trial, and nothing is offered in the way of qualifications, opinion testimony regarding causation may properly be deemed inadmissible. *Id.*

Unlike *Griffin*, in this case the record shows Clark (1) was one of the investigators of the accident who performed his own investigation at the scene, (2) was deposed, (3) testified at trial through deposition, and (4) as previously concluded, is qualified to testify as an expert. The trial court had broad discretion and authority for admitting the unredacted police report. *See Ter-Vartanyan*, 111 S.W.3d at 784. Under these circumstances, we cannot conclude the trial court abused its discretion by admitting the complained-of evidence. We overrule appellants' second issue.

In their third, fourth, and fifth issues appellants argue (1) the trial court erred by refusing to admit into evidence the Regulations, *see* 49 C.F.R. § 392.14, and sections 2.6 and 2.10 from the Handbook, and (2) the trial court erred by not "initially" taking judicial notice and in "refusing to clearly communicate that fact to the trier of fact." We first address the exclusion of the Regulations and Handbook provisions as exhibits.

To show reversible error, appellants must show the trial court's evidentiary ruling was in error and the error probably caused the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1;

Owens-Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35, 43 (Tex. 1998). We review the entire record to determine if the excluded evidence probably resulted in the rendition of an improper judgment. *See Interstate Northborough P'ship v. State*, 66 S.W.3d 213, 220 (Tex. 2001). To challenge the trial court's evidentiary rulings successfully, appellants must demonstrate that the judgment turns on the particular evidence excluded. *Id.* at 220. Ordinarily, we will not reverse a judgment for erroneous exclusion of evidence when the evidence in question is cumulative and not controlling on a material issue dispositive to the case. *See id.*

Like appellants, we consider their third and fourth issues together. Our review of the record references relied upon by appellants with regard to these issues shows the parties and the trial court generally discussed admission of "the Regulations" and Handbook. The only specific request for admission of the complained-of evidence is with regard to 49 C.F.R. §392.14, which provides:

> Extreme caution in the operation of a commercial motor vehicle shall be exercised when hazardous conditions, such as those caused by snow, ice, sleet, fog, mist, rain, dust, or smoke, adversely affect visibility or traction. Speed shall be reduced when such conditions exist. If conditions become sufficiently dangerous, the operation of the commercial motor vehicle shall be discontinued and shall not be resumed until the commercial motor vehicle can be safely operated. Whenever compliance with the foregoing provisions of this rule increases hazard to passengers, the commercial motor vehicle may be operated to the nearest point at which the safety of passengers is assured.

49 C.F.R. §392.14. When appellants sought admission of this provision as an exhibit, appellees objected to the exhibit as hearsay. Appellees also objected to the Handbook on hearsay grounds. The trial court sustained both objections.

In support of their claim that the trial court should have admitted the Regulations and Handbook, appellants rely on this Court's decision in *Hickson v. Martinez*, 707 S.W.2d 919, 927 (Tex. App.–Dallas 1985, writ ref'd n.r.e.). In *Hickson*, we concluded the "Code of Federal Regulations is not hearsay because it does not contain an assertion of fact that was offered to prove the truth of the matter asserted." However, before reaching that conclusion we determined the regulation at issue, 42 C.F.R. §405.1033(d)(1), established the standard of care which should have been known to the jury at the time of their deliberations. *See id.*

In this case, however, the Regulations and Handbook at issue do not establish a special standard of care. *See Freudinger v. Keller*, 104 S.W.3d 294, 297 (Tex. App.—Texarkana 2003, pet. denied) (discussing section 392.14). Rather, they incorporate the ordinarily prudent person standard. Because the standard of care within the Regulations and Handbook at issue was subsumed under the ordinarily prudent person standard, it was properly addressed by the court's charge. *See id.*

Further, although not formally admitted as evidence, appellants used sections as demonstrative exhibits and questioned their own expert witness, David Stopper, on the substance of 49 C.F.R. §392.14 [2] in the following exchange:

Q. What does 394.12 describe?

A. It's a–well, 392.14?

Q. Sorry.

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[2] Section 392.14 provides as follows:

> Extreme caution in the operation of a commercial motor vehicle shall be exercised when hazardous conditions, such as those caused by snow, ice, sleet, fog, mist, rain, dust, or smoke, adversely affect visibility or traction. Speed shall be reduced when such conditions exist. If conditions become sufficiently dangerous, the operation of the commercial motor vehicle shall be discontinued and shall not be resumed until the commercial motor vehicle can be safely operated. Whenever compliance with the foregoing provisions of this rule increases hazard to passengers, the commercial motor vehicle may be operated to the nearest point at which the safety of passengers is assured.

49 C.F.R. § 392.14.

> A. Section 392 refers to responsibility of the drivers and dispatchers and Section 14 relates to adverse weather conditions. It says, "The driver shall exercise extreme caution whenever conditions exist that will reduce visibility or traction; such as, rain, snow, sleet, ice, wind." I believe I covered them all. And that the driver shall reduce speed and that they–they shall discontinue operations if conditions become sufficiently dangerous. The only exception to that is that they can drive to the safest place where they can either discharge passengers or get off the highway.

Similarly, Handbook sections 2.6, entitled "Controlling Speed," and 2.10, entitled "Driving in Winter," relate to adjustment of speed depending on driving conditions and its applicability were discussed by appellants during Lester's testimony and again during closing argument. The jury was instructed at the beginning of trial that "[t]he evidence you may consider will consist of the testimony of the witnesses, the exhibits offered and admitted, [and] the term 'witness' means anyone who testifies in person or by deposition." We presume the jury followed the trial court's instructions. *See Owens-Corning Fiberglass Corp. v. Martin*, 942 S.W.2d 712, 720 (Tex. App.—Dallas 1997, no pet.) (in absence of evidence to the contrary, we must presume jury followed trial court's instructions). The use of the Regulations and Handbook as demonstrative exhibits over the course of the trial and the discussion of the Regulations and Handbook during trial and at closing argument gave appellants the opportunity to present the complained-of evidence to the jury on multiple occasions. Consequently, we conclude the trial court did not err by refusing to admit the complained-of evidence. We overrule appellants' third and fourth issues.

In their fifth issue, appellants contend the trial court erred by refusing initially to take judicial notice of the Regulations and Handbook or, if the court did take notice, the court failed to communicate that fact to the jury. In support of this argument, appellants rely on their rule 202 motion, in which they asked the trial court to take judicial notice only as to the Regulations. Appellants admit they failed to provide the trial court with a proper copy of the Regulations. And, appellants fail to provide a record reference in which they complained that the trial court did not

instruct the jury properly as to what notice was taken. Under these circumstances, we conclude appellants have not preserved their complaint regarding the Handbook for our review. *See* TEX. R. EVID. 202; TEX. R. APP. P. 33.1.

With regard to the Regulations, appellants concede "the court ostensibly said it would take judicial notice." In discussion with counsel, the trial court indicated that "any judicial notice that [it took was] for the purpose of submission of any definitions or instructions to the jury." Appellants did not provide a copy of the Regulations or complain that the trial court had failed to take some specified action. Therefore, we do not address whether the trial court took judicial notice, but instead address appellants' contention that the trial court failed to clearly communicate that fact to the jury.

As support for this complaint, appellants rely solely on rule of evidence 201(g). *See* TEX. R. CIV. EVID. 201(g) ("court shall instruct the jury to accept as conclusive any fact judicially noticed"). However, Rule 201(g) governs only judicial notice of adjudicative facts. *See id.* at 201(a). Adjudicative facts are those that help explain "who did what, when, where, how, and with what motive or intent." *See Tarrant County v. Ashmore*, 635 S.W.2d 417, 423 (Tex. 1982). The Regulations are not adjudicative facts, but matters of law. Similarly, the referenced Handbook sections were not adjudicative facts. When a fact is classified as legislative rather than adjudicative, judicial notice is discretionary. *See Aguirre v. State*, 948 S.W.2d 377, 380 (Tex. App.–Houston [14th Dist.] 1997, pet. ref'd). As discussed above, the jury heard testimony regarding the standard of care, including evidence of the Regulations and Handbook sections in the form of demonstrative evidence and testimony from the witnesses. Thus, we conclude appellants' complaint lacks merit. We overrule appellants' fifth issue.

In their sixth and final issue, appellants contend the trial court erred by refusing to submit

their proposed jury charge question on negligence. In particular, they argue the trial court should have instructed the jury concerning section 392.14 of the Regulations and sections 2.6 (Controlling Speed) and 2.10 (Driving in Winter) of the Handbook.

It is the duty of the trial court to instruct the jury on the law as provided in the jury charge. *See* TEX. R. CIV. P. 236; *Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 862 (Tex. 2009). The trial court's submission of instructions and jury questions is reviewed under an abuse of discretion standard. *Maxus Energy Corp. v. Occidental Chem. Corp.*, 244 S.W.3d 875, 883 (Tex. App.–Dallas 2008, pet. denied). The trial court has broad latitude in determining necessary and proper jury instructions. *Louisiana-Pacific Corp. v. Knighten*, 976 S.W.2d 674, 676 (Tex. 1998). We reverse only if, in light of the pleadings, evidence, and the entire jury charge, the error amounted to such a denial of the complaining party's rights as was reasonably calculated to cause, and probably did cause, rendition of an improper judgment. *Freudinger v. Keller*, 104 S.W.3d 294, 296 (Tex. App.–Texarkana 2003, pet. denied) (citing *Island Recreational Dev. Corp. v. Republic of Tex. Sav. Ass'n*, 710 S.W.2d 551, 555 (Tex. 1986)).

When, as here, a statute incorporates the ordinarily prudent person standard, "it is redundant to submit a question on the statutory standard or to instruct the jury regarding it, and the negligence per se standard is subsumed under the broad-form negligence question." *See Freudinger*, 104 S.W.3d at 297 (quoting *Smith v. Cent. Freight Lines, Inc.*, 774 S.W.2d 411, 413-15 (Tex. App.–Houston [14th Dist.] 1989, writ denied)). The trial court provided a broad-form negligence question to the jury. Appellants point to no legislative enactment or a finding by a court in a civil case that the Regulations create a special standard of care. *See Freudinger*, 104 S.W.3d at 298. Likewise, the Handbook, promulgated by the Texas Department of Public Safety (and not the legislature), incorporates the reasonable person standard of common law negligence. Therefore, the trial court

did not err in denying the requested instructions. *See id.* We overrule appellants' sixth issue.

Having overruled all of appellants' issues, we affirm the judgment of the trial court.

DAVID L. BRIDGES
JUSTICE

Murphy, J. concurring without opinion.

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