No. 01-07-00999-CV

In the First Court of Appeals
Houston, Texas

EL PASO FIELD SERVICES MANAGEMENT, INC.,

Appellant/Cross-Appellee

v.

ERNESTO LOPEZ AND GEORGIA LOPEZ,

Appellees/Cross-Appellants

APPEAL FROM CAUSE 2002-43093
334TH JUDICIAL DISTRICT COURT OF HARRIS COUNTY, TEXAS
HON. SHARON MCCALLY PRESIDING

BRIEF OF APPELLEES/CROSS-APPELLANTS

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ORAL ARGUMENT (CONDITIONALLY) REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

Appellees/cross-appellants believe that the briefs and record adequately present the facts and legal arguments involved in this appeal and that oral argument would not aid the decisional process significantly. *See* TEX. R. APP. P. 39.1 (as amended September 1, 2008). Should the Court conclude that oral argument would be helpful, however, appellees/cross-appellants stand ready and request the opportunity to participate.

IDENTITY OF PARTIES AND COUNSEL

Appellees/cross-appellants supplement appellant's list as follows:

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5. Expert testimony that is conclusory or speculative is, in effect, no evidence. El Paso's liability expert provided no reasoned basis for his suggestion that Lopez was at fault for standing where he was when his injury occurred. Does legally sufficient evidence support the jury's finding, in response to Question 2b, that Lopez's negligence proximately caused his own injury? (Presented as Cross-Appellants.)

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TO THE HONORABLE FIRST COURT OF APPEALS:

Appellees/cross-appellants Ernesto and Georgia Lopez ("the Lopezes") file this brief asking the Court to overrule all issues raised by appellant/cross-appellee El Paso Field Services Management, Inc. ("El Paso"); hold that the trial court erred by failing to disregard the jury's contributory-negligence finding; modify the trial court's judgment; and affirm the judgment as modified. The Lopezes respectfully show:

STATEMENT OF THE CASE

Nature of the Case:	This negligence suit arose from an injury suffered by Ernesto Lopez, an employee of Texas Pipe Fabricators, Inc., while working at a facility owned or operated by El Paso's predecessor-in-interest. CR 1392-94; *see* Appellant's Br. at 1-3.
Course of Proceedings:	The case was tried to a jury, which found that El Paso and Lopez each bore some fault. CR 1416 (App. Tab 1).[1] The jury allocated 80 percent of the responsibility to El Paso and 20 percent to Lopez. CR 1417.
Trial Court's Disposition:	The trial court signed a final judgment based on the jury's verdict. CR 1452 (App. Tab 2). The judgment awarded the Lopezes money damages, interest, and costs. *Id.*

ISSUES PRESENTED

1. In response to Question 1, the jury found that Lopez was not El Paso's borrowed servant. To vitiate that finding on appeal, El Paso had to (a) conclusively establish that Lopez was its employee and that its predecessor-in-interest had workers' compensation insurance, or (b) show that the jury's finding was against the great weight

[1] All appendix citations refer to the appendix submitted with El Paso's opening brief.

and preponderance of the evidence. El Paso did neither. Should the jury's finding on the borrowed-servant issue be disturbed? (Reply to El Paso's Issue No. 1.)

2. No expert testimony was necessary to establish causation in this case, and Lopez presented legally and factually sufficient evidence to support the jury's finding, in response to Question 2a, that El Paso's conduct proximately caused his injury. Should that portion of the trial court's judgment be affirmed? (Reply to El Paso's Issue No. 2.)

3. The workers' compensation benefits Lopez received came from a source collateral to El Paso, and the record contains no evidence—much less conclusive evidence—that the carrier contractually waived its subrogation rights. Does the collateral-source rule bar El Paso's request for a credit against the judgment based on the benefits Lopez received? (Reply to El Paso's Issue No. 3.)

4. A plaintiff who lacks knowledge of and cannot reasonably anticipate the danger cannot be charged with contributory negligence. El Paso failed to demonstrate that Lopez knew or should have known Hammers would suddenly open the plug valve, an act the jury could have found caused Lopez's injury. Did Lopez owe any duty of care under these circumstances? (Presented as Cross-Appellants.)

5. Expert testimony that is conclusory or speculative is, in effect, no evidence. El Paso's liability expert provided no reasoned basis for his suggestion that Lopez was at fault for standing where he was when his injury occurred. Does legally sufficient evidence support the jury's finding, in response to Question 2b, that Lopez's negligence proximately caused his own injury? (Presented as Cross-Appellants.)

STATEMENT OF FACTS

Although much of El Paso's Statement of Facts is unobjectionable, some disputed evidence is presented in a light the jury obviously rejected. *See* Appellant's Br. at 3-9. Out of an abundance of caution, the Lopezes therefore challenge all factual statements made in El Paso's brief to the extent they are inconsistent with the jury's verdict. *See* TEX. R. APP. P. 38.1(f).

TPF's Contractual Relationship With El Paso: On August 23, 2000, Ernesto Lopez was injured while cleaning an oilfield sump tank at a Hobson, Texas facility. 3 RR 58-59; 5 RR 155, 248. Lopez was employed by Texas Pipe Fabricators, Inc. ("TPF"), which performed services at the Hobson facility under a Continuing Work Agreement with PG&E Texas Pipeline, L.P. 3 RR 31-32; 5 RR 112, 116; PX 1; DX 1-A (App. Tab 5).[2] Relevant provisions of the Agreement are:

> 1. . . .This Agreement does not obligate [PG&E] to order work or services from [TPF], but it shall control and govern all work and services performed by [TPF], its subsidiaries and divisions, subcontractors, and their employees and agents, and shall define the rights and obligations of [TPF] during the term hereof.
>
> . . .
>
> 3. Contractor agrees to have available at all times and to furnish all labor, supervision, insurance, machinery, equipment, materials and supplies, tools and transportation necessary for performance of the following kinds of work in accordance with this Agreement:
>
> fabrication work

[2] The PG&E entities affiliated with the Hobson facility have undergone several corporate transformations since Lopez's injury occurred. 4 RR 57-65. On appeal, El Paso does not contest that it is responsible for the legal obligations of the facility's owner or operator as of the date Lopez was injured. *See* Appellant's Br. at 1, 3, 9, 15 & 20.

. . .

Independent Contractor: In the performance of work, [TPF] shall at all times be an independent contractor, and the relationship of the parties hereunder shall in no event be construed as constituting any other relationship. The detailed manner, means, and method of performing the work are under the sole control of [TPF], [PG&E] being interested only in the results of the work and [TPF] complying with the Agreement.

Work: The work of [TPF] includes all services to be performed and things to be furnished hereunder, including but not limited to competent supervision, all labor, material, insurance, supplies, water, tools, equipment, light, fuel, power, heat, transportation, or other facilities necessary or desirable for the completion of a project in accordance with this Agreement and to the complete satisfaction of [PG&E]. . . .

. . .

Changes in the Work: Without invalidating this Agreement, [PG&E] may at any time order extra work, alterations, additions to, or deductions from the work and the Agreement sum shall be adjusted accordingly, provided any change or extra work resulting in additional cost must be made in advance in writing by [PG&E's] Representative. All such extra work shall be executed in accordance with the terms and conditions of this Agreement.

. . .

Entirety: This Agreement comprises the entire Agreement between [PG&E] and [TPF] and there are no conversations understandings, agreements, conditions, or representations, expressed or implied[,] with reference to the subject matter hereof that are not merged herein or superseded hereby. This Agreement shall be binding on the parties hereto, their respective heirs, successors, and assigns. . . .

DX 1-A (App. Tab 5); *see* PX 1.[3]

[3] Except for the parties' signatures, PX 1 appears entirely within DX 1-A. PX 1 redacts information about workers' compensation insurance and does not include certificates of insurance apparently attached to the original Continuing Work Agreement. 1 RR 17-19. For completeness, the defense submitted and the trial court admitted DX 1-A for use outside the jury's presence. Because DX 1-A is more legible and a version of it is already included in the appendix, the Lopezes will cite that exhibit instead of PX 1 when referring to the Continuing Work Agreement.

The Injury: Lopez's injury occurred while he and his brother[4] were assisting in a "pigging" operation, which involves running a steel-bristled brush through an oilfield pipeline to remove unwanted materials such as sludge, mud, water, and oil. 3 RR 34-35. At the end of this process, the debris is collected in a sump tank. 3 RR 35-39, 148; 5 RR 12-13, 148, 217; PX 3 (App. Tab 3). From there, the materials are pumped through a three-inch steel line into a larger tank for disposal. 3 RR 41-42, 52-53; 5 RR 12-13, 206-07, 221-22; PX 4 (App. Tab 4).

At the end of the pigging process, Lopez was using a hose to pump the unwanted materials out of the sump tank. 3 RR 39-40; 5 RR 151-52. To do so, Lopez had to stand near the tank to ensure that the hose reached the sludge and sucked the materials out into the three-inch line. 3 RR 44-46, 54-55; 5 RR 152-54. Meanwhile, a PG&E employee, Norris Hammers, opened an upstream plug valve and released pressure in the line. 3 RR 52; 5 RR 217-18, 221-26, 245, 248; PX 3-4, 22-24. Hammers initially turned the valve the wrong direction, then reversed course and quickly threw the valve open all the way. 3 RR 56-57. The downstream pipe suddenly moved, crushing Lopez's foot against the steel sump tank lid. 3 RR 58-59; 5 RR 155, 248; PX 6-18, 6-19, 22 & 23.

Paramedics came to the scene, but did not transport Lopez for medical treatment. 3 RR 60-61; 5 CR 155. After waiting in the field for two hours, Lopez was flown by helicopter to a hospital in San Antonio, where he remained for several weeks. 3 R 229-

[4] Lopez's brother, Pedro Lopez, was also a TPF employee. 3 RR 36, 64.

30; 5 RR 155. He has since endured several surgeries and, at less than sixty years of age, is unable to walk without a cane. 5 RR 112, 125-26, 137, 139-40; 6 RR 14-15.

The Lawsuit and Trial: The Lopezes sued El Paso, asserting that the negligence of its predecessor-in-interest caused Ernesto Lopez's injury. CR 1392-94. El Paso answered and asserted several affirmative defenses, including contributory negligence, the borrowed-servant doctrine, and a right of offset for workers' compensation benefits. CR 1405-07. The liability questions, as answered by the jury, stated as follows:

> QUESTION 1
>
> On the occasion in question, was Ernesto Lopez acting as a borrowed employee of El Paso Field Services Management, Inc.?
>
> One who would otherwise be in the general employment of one employer is a "borrowed employee" of another employer if such other employer or his agents have the right to direct and control the details of the particular work inquired about.
>
> A person is not acting as an employee if he is acting as an "independent contractor." An independent contractor is a person who, in pursuit of an independent business, undertakes to do specific work for another person, using his own means and methods without submitting himself to the control of such other person with respect to the details of the work, and who represents the will of such other person only as to the result of his work and not as to the means by which it is accomplished.
>
> A written contract expressly excluding any right of control over the details of the work is not conclusive if it was a subterfuge from the beginning or was persistently ignored or was modified by subsequent express or implied agreement of the parties; otherwise such a written contract is conclusive.
>
> Answer "Yes" or "No"
>
> Answer: No

QUESTION 2

Did the negligence, if any, of those named below proximately cause the occurrence in question?

Answer "Yes" or "No" for each of the following:

a. El Paso Field Management Services, Inc. Yes

b. Ernesto Lopez Yes

. . .

QUESTION 3

What percentage of the negligence that caused the occurrence do you find to be attributable to each of those listed below and found by you, in your answer to Question 2, to have been negligent?

a. El Paso Field Management Services, Inc. 80%

b. Ernesto Lopez 20%

Total 100%

CR 1415-17 (App. Tab 1).

The jury awarded damages, and the trial court rendered judgment for the Lopezes on the jury's verdict. CR 1418-21. Both sides filed post-trial motions, which were overruled expressly or by implication when the trial court signed its final judgment. CR 1429, 1458, 1473, 1562-63. All parties perfected appeal. CR 1576; 2nd Supp. CR.[5]

[5] Although El Paso requested that the Lopezes' notice of appeal be included in the record, it was mistakenly omitted. *See* 1st Supp. CR 13. The Lopezes have requested a supplemental clerk's record to include the notice and will also be filing a file-stamped copy with the clerk. All cites to "2nd Supp. CR" refer to the Lopezes' notice of appeal.

SUMMARY OF THE ARGUMENT

Applying settled standards of review, the Court should overrule all of El Paso's issues and affirm the trial court's judgment awarding damages to the Lopezes.

In its answer to Question 1, the jury found that Ernesto Lopez was not El Paso's borrowed servant, an issue on which El Paso bore the burden of proof. To satisfy that burden, El Paso had to show that Lopez was its constructive employee and that it was covered by workers' compensation insurance. El Paso has failed to show that conclusive evidence contradicts the jury's refusal to answer Question 1 in the affirmative or that the jury's finding is against the overwhelming weight and preponderance of the evidence.

Likewise, the jury's proximate cause finding in Question 2a is supported by legally and factually sufficient evidence. Expert testimony was not required under the facts of this case, and the Lopezes successfully established the required causal link between the occurrence in question and the injury.

El Paso's argument that it should receive a credit for workers' compensation insurance benefits procured through Lopez's employer should also be overruled. The collateral-source rule bars any such credit, but in any event, El Paso failed to meet the evidentiary standards under the exception to that rule it urges the Court to adopt.

Upon reviewing the issues raised in the Lopezes' cross-appeal, the Court should modify the judgment to increase the damages award by the amount attributed to Lopez's comparative fault. Lopez had no duty to anticipate El Paso's negligence, and the record contains no evidence that Lopez knew or anticipated that the plug valve would be thrown completely open while he was cleaning out the sump tank. Moreover, there is no

evidence—expert or otherwise—that Lopez's conduct fell below the standard of care or proximately caused his injury. El Paso's issues should accordingly be sustained.

STANDARDS OF REVIEW

The test for legal sufficiency is "[w]hether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review." *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). An appellant challenging the legal sufficiency of an adverse finding on which it had the burden of proof must demonstrate that the evidence conclusively established all vital facts. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam). The reviewing court considers the evidence in the light most favorable to the judgment, crediting favorable evidence if a reasonable fact-finder could, and disregarding contrary evidence unless a reasonable fact-finder could not. *City of Keller*, 168 S.W.3d at 807. The point will be sustained only if the evidence establishes the contrary proposition conclusively. *Dow Chem. Co.*, 46 S.W.3d at 241.

When reviewing a finding for factual sufficiency, the appellate court considers all of the evidence. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam); *Minucci v. Sogevalor, S.A.*, 14 S.W.3d 790, 794 (Tex. App.—Houston [1st Dist.] 2000, no pet.). The reviewing court will set aside the jury's finding only if the evidence is so weak or the finding is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Cain*, 709 S.W.2d at 176; *Minucci*, 14 S.W.3d at 794. An appellant challenging a finding on which it had the burden of proof must show that the finding is "against the great weight and preponderance of the evidence." *Dow Chem. Co.*, 46 S.W.3d at 241. Because the fact-finder is the sole judge of the witnesses' credibility and

the weight to be given their testimony, an appellate court may not substitute its opinion merely because it might have resolved the facts differently. *Herbert v. Herbert*, 754 S.W.2d 141, 144 (Tex. 1988); *M.D. Anderson Hosp. & Turnover Inst. v. Felter*, 837 S.W.2d 245, 247 (Tex. App.—Houston [1st Dist.] 1992, no pet.).

ARGUMENT

I. El Paso Failed to Conclusively Establish Its "Borrowed Servant" Defense

El Paso first contends that, contrary to the jury's answer to Question 1, the evidence admitted at trial conclusively established that Lopez was acting as El Paso's borrowed servant when his injury occurred. *See* Appellant's Br. at 11-21. Alternatively, El Paso contends that the jury's finding is against the great weight and preponderance of the evidence. *See id*. at 11-12, 23. The Court should reject both arguments.

El Paso's legal sufficiency challenge to Question 1 asserts that Lopez's claims were barred under the Texas Workers' Compensation Act's exclusive-remedy provision. *See* Appellant's Br. at 12, 21-23 (citing TEX. LAB. CODE § 408.001). This provision establishes an affirmative defense on which El Paso bore the burden of proof at trial. *See Western Steel Co. v. Altenburg*, 206 S.W.3d 121, 123-24 (Tex. 2006) (per curiam). To receive the benefit of this statute, El Paso had to establish that: (1) its predecessor had workers' compensation insurance when Lopez's injury occurred; and (2) Lopez was its employee. *See Western Steel*, 206 S.W.3d at 123; *Garza v. Exel Logistics, Inc.*, 161 S.W.3d 473, 475-76, 481 (Tex. 2005). Because El Paso did neither, its first point fails.

A. El Paso Presented No Evidence That Any PG&E Entity Was Covered by Workers' Compensation Insurance When Lopez's Injury Occurred

El Paso limits its argument on whether its predecessor entity had workers' compensation coverage to two footnotes and one paragraph in its brief. *See* Appellant's Br. at 21-23 & nn.7-8. These efforts are insufficient to meet its burden on appeal.

One footnote refers to an alleged agreement between the parties in which Lopez supposedly promised not to contest workers' compensation insurance coverage at trial. *See* Appellant's Br. at 23 n.8. Although El Paso pledged to supplement the record to include this agreement, it has not done so. *See id.* Thus, any such agreement cannot be enforced on appeal. *See* TEX. R. APP. P. 6.6; TEX. R. CIV. P. 11.

In the other footnote, El Paso asks the Court to take judicial notice of previously unfiled documents attached to an affidavit included behind Tab 7 of its appendix. *See* Appellant's Br. at 22 n.7.[6] As a general rule, appellate courts take judicial notice "only to determine jurisdiction over an appeal or to resolve matters ancillary to decisions which are mandated by the law (*e.g.*, calculation of prejudgment interest when the court renders judgment)." *City of Glenn Heights v. Sheffield Dev. Co.*, 55 S.W.3d 158, 162-63 (Tex. App.—Dallas 2001, pet. denied) (internal quotation omitted). Going further runs the risk of turning an appellate court into a court of original jurisdiction. *Id*. at 163.

This Court has been especially reluctant to take judicial notice of documents offered as evidence to support disputed facts when the trial court was not afforded the

[6] El Paso also requested that these items be included in a supplemental clerk's record, which has never been filed.

opportunity to examine and consider that evidence. *See Tran v. Fiorenza*, 934 S.W.2d 740, 742-743 (Tex. App.—Houston [1st Dist.] 1996, no writ). Consistent with the concerns expressed in *Tran* and similar cases, taking judicial notice a this stage of the case would allow El Paso to raise allegations critical to its defense for the first time on appeal and would provide this Court with evidence that was unavailable to the trial court when it rendered final judgment. *See id.*; *see also Hood v. Wal-Mart Stores, Inc.*, No. 05-05-01049-CV, 2008 WL 256763, at *2 (Tex. App.—Dallas Jan. 31, 2008, pet. denied) (mem. op.). For the same reasons the Court declined to take judicial notice in *Tran*, it should do so again here.

El Paso cannot show that it presented the trial court with ***any*** evidence—much less conclusive evidence—capable of establishing workers' compensation coverage for any PG&E entity when Lopez's injury occurred. Unless the Court grants its request for judicial notice on appeal, El Paso cannot satisfy its burden of demonstrating that the exclusive-remedy provision barred Lopez's claim. *See Western Steel*, 206 S.W.3d at 123; *Garza*, 161 S.W.3d at 481. Taking judicial notice of evidence that should have been presented at trial would provide El Paso a second bite at the apple, with potentially harsh results. In fairness to the Lopezes and the trial court, the Court should deny this request.

Even if the Court were to take judicial notice, the documents El Paso has provided hardly satisfy its burden of presenting conclusive proof of workers' compensation insurance coverage. Although El Paso's opening brief loosely refers to its predecessor-in-interest as "PG&E" (apparently PG&E Texas Pipeline Company), the affidavit of El Paso's appellate counsel identifies PG&E Texas Pipeline, LP as the relevant entity. *See*

App. Tab 7. The documents attached to the affidavit go on to name PG&E Corporation, PG&E Energy Trading-Gas Corporation, PG&E Energy Trading Corporation, and PG&E Gas Transmission, Texas as insureds. *See id.* One of them suggests that leased employees are not covered. *See id.* (describing primary policy as a "non-employee leasing policy"). Without additional information, such as copies of the policies and precise information about their scope, the Court is left to guess whether they might have afforded coverage to borrowed employees.[7]

The only discussion of this issue in the body of El Paso's brief suffers similar problems. Almost in passing, El Paso suggests that it was covered under TPF's workers' compensation policy because its predecessor-in-interest apparently contracted with TPF to be named as an additional insured under that policy. *See* Appellant's Br. at 22. As the Texas Supreme Court noted in *Garza*, however, "[t]he methods of obtaining coverage are 'through a licensed insurance company or through self-insurance as provided by [the Workers' Compensation Act].'" 161 S.W.3d at 478 (quoting TEX. LAB CODE § 406.003); *see* TEX. LAB CODE § 406.002. An employer cannot obtain coverage for purposes of the Act except through a contract with "an insurance company . . . to secure an employer's liability and obligations and to pay compensation by issuing a workers' compensation insurance policy." *Id.* (quoting TEX. LAB. CODE § 406.0051(a)). Evidence that TPF

[7] Even assuming that appellate counsel could properly submit an affidavit without being subject to cross-examination, the affidavit cannot show that El Paso's predecessor-in-interest had workers' compensation coverage because it addresses the wrong entity. According to the testimony of El Paso's corporate secretary, the entity which merged into El Paso was PG&E Texas Pipeline ***Company***, not PG&E Texas Pipeline, ***L.P.*** 4 RR 46, 49, 58-59, 62-65. Other than the Lopez brothers, all of the oil field workers at the Hobson facility on the day in question, including Norris Hammers, were employees PG&E Texas Pipeline Company. 4 RR 44-45.

contracted to name El Paso's predecessor as an additional insured does not tend to show—much less conclusively prove—that an insurance company agreed to cover El Paso's workers' compensation obligations in accordance with the statutory requirements. *See id*. at 477-78.

In sum, El Paso failed to establish workers' compensation coverage in the trial court, and its eleventh-hour effort in this Court fares no better. Regardless of the request for judicial notice, the Court should overrule El Paso's first issue and thus uphold the jury's finding that Lopez was not its borrowed servant.

B. The Jury Properly Found That Lopez Was Not a Borrowed Employee

The failure to conclusively prove that any PG&E entity was covered by workers' compensation insurance when Lopez's injury occurred provides a ready pathway to resolving the exclusive-remedy question against El Paso. Should the Court reach the second part of the inquiry—whether Lopez was effectively employed by El Paso's predecessor-in-interest—the result should be no different.

TPF was Ernesto Lopez's employer when his injury occurred. 3 RR 31-32; 5 RR 112, 116. However, an employer's general employee may become the borrowed servant of another when the general employer loans or supplies the employee to a special or borrowing employer. *Flores v. North Am. Tech. Group, Inc*., 176 S.W.3d 442, 448 (Tex. App.—Houston [1st Dist.] 2004, pet. denied). This determination hinges on whether the special employer has the right to direct and control the details of the employee's work. *Id*. at 448-49. A contract between a general employer and special employer expressly assigning the right of control is a factor to be considered, though not necessarily

determinative. *Exxon Corp. v. Perez*, 842 S.W.2d 629, 630 (Tex. 1992) (per curiam); *Flores*, 176 S.W.3d at 449. When the right of control is disputed, the fact-finder must determine the contract's effect. *Perez*, 842 S.W.2d at 630.

El Paso concedes that the relationship between its predecessor-in-interest and Lopez's employer (TPF) was governed by the Continuing Work Agreement. *See* Appellant's Br. at 15 (citing DX 1-A (App. Tab 5)). As El Paso further acknowledges, the Agreement specified that: (1) TPF was an independent contractor; (2) the parties had no other relationship; and (3) "[t]he detailed manner, means, and method of performing the work are under the sole control of [TPF]." *See id*. (quoting DX 1-A (App. Tab 5)). Then, citing a number of cases, El Paso urges the Court to disregard the plain terms of this contract because of evidence it says is conclusive. *See id*. at 13-18. This approach is flawed because it ignores the plain language of the jury charge, other critical provisions in the Continuing Work Agreement, and the Lopezes' evidence at trial.

1. The charge states the applicable law

When a party complains about a jury's finding, but did not object to the charge, the sufficiency of the evidence is measured against the charge as submitted and not some other unidentified law. *See Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000); *Country Village Homes, Inc. v. Patterson*, 236 S.W.3d 413, 433 (Tex. App.—Houston [1st Dist.] 2007, pet. granted, judgm't vacated w.r.m.). Here, El Paso did not object to any of the liability questions or instructions and, having failed to do so, does not challenge them on appeal. 6 RR 142-45. *See generally* Appellant's Br. Accordingly, the Court must

evaluate El Paso's arguments regarding the legal and factual sufficiency of the evidence in light of the law as stated in the charge.

2. The Continuing Work Agreement was conclusive under the law as stated in the charge

Under the instructions to Question 1, the Continuing Work Agreement and its provisions vesting the exclusive right of control in TPF were conclusive of the borrowed-servant issue unless the jury found that the Agreement "was a subterfuge from the beginning or was persistently ignored or was modified by subsequent express or implied agreement of the parties . . . ." CR 1415 (App. Tab 1); *see* COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEX. PATTERN JURY CHARGES—GENERAL NEGLIGENCE & INTENTIONAL PERSONAL TORTS PJC 7.9 (2006) (containing this instruction). Of these, El Paso relies only on modification as a potential basis for avoiding the Agreement's effect. *See* Appellant's Br. at 13-18. More specifically, El Paso contends that "the parties' conduct essentially modified the terms of the contract" because El Paso's predecessor "exercise[d] actual control" and, therefore, that "the document is not dispositive of Lopez's employment status." *Id.* at 18.

El Paso misapplies the standard of review and the law in relation to the jury charge. More than an "essential" modification was required to render the Continuing Work Agreement anything but conclusive proof that Lopez ***was not*** El Paso's borrowed servant, and El Paso has offered no evidence or argument to show that the Agreement was modified in accordance with its provisions or general contract law. *See*, *e.g.*, *Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 228 (Tex. 1986) (contract

modification must satisfy elements of contract formation, including meeting of minds and new consideration); *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984) (contract modification is an affirmative defense; burden of proof falls on party seeking to enforce modification).[8] And even then, any proof that El Paso's predecessor exercised actual control over Lopez's work—and, as discussed in Part I.B.4 below, there was none—could not conclusively show that it had "the right to direct and control" the work, as Question 1 inquired. CR 1415 (App. Tab 1).

"Evidence is conclusive only if reasonable people could not differ in their conclusions, a matter that depends on the facts of each case." *City of Keller*, 168 S.W.3d at 816 (footnote omitted). At best, El Paso's evidence allowed the jury to treat it and the Agreement as conflicting and weigh them and other relevant evidence in its fact-finding role. *See Hoffman v. Trinity Indus., Inc.*, 979 S.W.2d 88, 90 (Tex. App.—Beaumont 1998, pet. dism'd by agr.) (reversing summary judgment on basis that similarly worded contract raised a fact issue). After performing that calculus, the jury resolved the borrowed-servant question against El Paso.

The Texas Supreme Court has recognized that a contract between two employers vesting one with the right to control employees is "a factor to be considered" in resolving borrowed-servant issues, a function falling to the fact-finder. *See Perez*, 842 S.W.2d at 630; *see also St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 544 n.92 (Tex. 2002) (noting that, when evidence contradicts contractual assignment of right of control, "the issue is

[8] TPF, not Lopez, was a party to the Continuing Work Agreement. *See* DX 1-A (App. Tab 5). There is no evidence that Lopez had authority to modify the contract on TPF's behalf.

left to the jury"). El Paso fails to cite a single case holding otherwise or applying the legal sufficiency standard to reach its desired result. Because the Continuing Work Agreement supplied far more than a scintilla of evidence upon which the jury could have based its determination under this charge, the Court should overrule El Paso's first issue and leave the jury's answer to Question 1 undisturbed.

3. The Continuing Work Agreement covered Lopez's work

As a last desperate move to try and avoid the contractual provisions specifying that TPF was an independent contractor and assigning sole control over Lopez's work to TPF, El Paso contends that the Continuing Work Agreement does not apply because Lopez was not performing "fabrication work" when injured. *See* Appellant's Br. at 18-21. This argument fails for at least two reasons.

First, absent a contractual definition of the term "fabrication work," whether Lopez was acting within the scope of the Continuing Work Agreement was a disputed fact issue. Question 1 plainly allowed the jury to find that Lopez was not El Paso's borrowed employee if a contract excluded any right of control, yet the record does not reflect that El Paso requested or objected to the absence of a jury question or instruction addressing whether the Agreement applied here. *See* 6 RR 142-45. Accordingly, the Court must deem a finding that the Agreement controls if such a finding has more than a scintilla of evidentiary support in the record. *See* TEX. R. CIV. P. 279; *Ramos v. Frito-Lay, Inc.*, 784 S.W.2d 667, 668 (Tex. 1990).

As the jury heard at trial, El Paso admitted in discovery that the Continuing Work Agreement covered the work Lopez performed at the Hobson facility on the day he was

injured. 4 RR 6-7.[9] If not a conclusive judicial admission, El Paso's acknowledgement that Lopez's work was governed by the Agreement is at least a "quasi-admission" constituting some evidence of that fact. *See Hickman v. Dudensing*, No. 01-06-00458-CV, 2007 WL 1500334, at *3 (Tex. App.—Houston [1st Dist.] May 23, 2007, pet. denied) (mem. op.). Under the circumstances, the jury was entitled to weigh El Paso's admission and conclude that the Continuing Work Agreement applied. *See id*.

Just as importantly, El Paso's position ignores critical language in the contract. The Continuing Work Agreement expressly states that it "shall control and govern all work and services performed by [TPF and its employees]" DX 1-A ¶ 1 (App. Tab 5). The contract defines "work" as "all services to be performed" and, "[w]ithout invalidating [the] Agreement," authorized "extra work, alterations, additions to, or deductions from the work . . . ." *Id.* (General Conditions). Moreover, the Agreement contains a merger clause declaring that it "comprises the entire Agreement between Company and Contractor and there are no conversations, understandings, agreements, conditions, or representations, expressed or implied[,] with reference to the subject matter hereof that are not merged herein or superseded hereby" *Id*. Taken together, these provisions plainly bring the pigging operation within the Agreement's scope and foreclose any possibility that Lopez's work was performed under any other agreement.[10]

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[9] The Lopezes' trial counsel read the relevant discovery responses into the record without objection from the defense. 4 RR 6-7.

[10] Among other distinctions, the absence of another agreement renders El Paso's authorities inapplicable to this case. *See, e.g., Clark v. Texaco, Inc.*, 382 S.W.2d 953, 958 (Tex. Civ. App.—Dallas 1964, writ ref'd n.r.e.) (relying on evidence of separate oral agreement to conclude that fact issue existed on right of control).

Reviewing this issue under the appropriate standard, El Paso did not conclusively establish that Lopez's work was governed by anything other than the Continuing Work Agreement. Based on the Agreement, a reasonable jury was entitled to find that Lopez was not El Paso's borrowed servant. El Paso's first issue should thus be overruled.

4. Other evidence supports the jury's finding

Even assuming that the Continuing Work Agreement did not exist, the Lopezes presented legally sufficient evidence that El Paso's predecessor did not control TPF employees' work at the job site. Pedro Lopez testified that he worked for TPF and did not consider any of the PG&E employees at the job site his boss. 3 RR 91-93. He and Ernesto received no instructions on how to clean the pig or the pump or perform whatever other work they were doing. 3 RR 38-40, 97-101; 5 RR 147-51. The PG&E employees on the scene that day consistently testified that they did not give Lopez any actual instructions on how to carry out the details of his work. 5 RR 232-33; 6 RR 41-43. Had there been a conflict between TPF's instructions and something PG&E wanted, TPF's instructions would have controlled. 3 RR 101-02.

With or without the Continuing Work Agreement, El Paso failed to prove that it exercised actual control, and the jury had sufficient evidence before it to determine that Lopez was not El Paso's borrowed employee. *See Flores*, 176 S.W.3d at 448. On this independent basis, El Paso's first issue should be overruled.

C. Factually Sufficient Evidence Supports the Jury's Finding in Response to Question 1

El Paso's factual sufficiency challenge to Question 1 does nothing more than incorporate its discussion of supposedly conclusive evidence under its legal sufficiency argument. *See* Appellant's Br. at 23. El Paso fails to explain how the Court should weigh the evidence—other than to find it conclusive—and makes no substantive argument why that evidence, if weighed in accordance with the factual sufficiency standard of review, supports a new trial. *See id.* Without such explanation or argument, any points concerning factual sufficiency with respect to Question 1 were inadequately briefed and therefore waived. *See* TEX. R. APP. P. 38.1; *City of Houston v. Levingston*, 221 S.W.3d 204, 217 n.9 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (refusing to consider claim that damages award was "against the overwhelming weight of the evidence" for failure to make substantive argument in brief); *Harris v. Archer*, 134 S.W.3d 411, 447 (Tex. App.—Amarillo 2004, pet. denied) (concluding that assertion jury findings were against overwhelming weight of evidence "for the foregoing reasons and considering the evidence already described" failed to present error for review).

In any event, as El Paso acknowledges throughout its brief, the record contains evidence of an agreement allocating sole control over Lopez's work to TPF. *See* Appellant's Br. at 4, 15, 20 (citing and quoting DX 1-A (App. Tab 5)). Under these circumstances, the evidence is not so weak and the finding is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Cain*, 709

S.W.2d at 176; *Minucci*, 14 S.W.3d at 794. Accordingly, El Paso's factual sufficiency argument should be rejected, and its first issue should be overruled.

II. Legally and Factually Sufficient Evidence Supports the Jury's Finding, in Response to Question 2a, That El Paso's Negligence Proximately Caused Lopez's Injury

In its second issue, El Paso attempts to vitiate the trial court's judgment by arguing that Lopez should have presented expert testimony on causation and that his evidence on that element of negligence was legally and factually insufficient. *See* Appellant's Br. at 24-31. El Paso is wrong on all counts. Because a reasonable jury could have answered the causation inquiry in Question 2a as this one did, the judgment should be affirmed.

A. The Jury Could Determine Causation Without Help From an Expert

Negligence consists of four elements: (1) a legal duty; (2) breach of that duty; and (3) damages; (4) proximately caused by the breach. *D. Houston, Inc. v. Love*, 92 S.W.3d 450, 454 (Tex. 2002). El Paso criticizes the Lopezes' arguments at trial that it committed negligence by failing to secure the pipeline appropriately and by opening the plug valve too rapidly, yet it assigns no error to the jury's findings that such conduct breached a duty and that the Lopezes suffered damages. *See id*. at 24. Rather, El Paso limits its sufficiency challenge to the issue of proximate cause. *See id*. at 24-25, 31-33.

Whether expert testimony is required to establish causation depends on whether lay witnesses are capable of presenting "[c]ompetent proof of the relationship between the event sued upon and the injuries or conditions complained of . . . ." *Guevara v. Ferrer*, 247 S.W.3d 662, 666 (Tex. 2007). The law is well settled that lay testimony "establishing a sequence of events which provides a strong, logically traceable

connection between the event and the condition is sufficient proof of causation." *Morgan v. Compugraphic Corp*., 675 S.W.2d 729, 733 (Tex. 1984); *see Guevara*, 247 S.W.3d at 667 (noting that "the existence and nature of certain basic conditions, proof of a logical sequence of events, and temporal proximity between an occurrence and the conditions can be sufficient to support a jury finding of causation without expert evidence").

The net effect of El Paso's decision not to challenge the jury's findings of negligence (duty and breach) or damages is to establish those facts conclusively on appeal. *See Adamcek v. Reynolds Metals Co*., No. 13-06-240-CV, 2008 WL 1822772, at *3 (Tex. App.—Corpus Christi April 23, 2008, pet. denied) (mem. op.); *Hutchison v. Pharris*, 158 S.W.3d 554, 563 (Tex. App.—Ft. Worth 2005, no pet.). Thus, for purposes of causation, expert testimony is necessary to sustain the trial court's judgment only if other evidence fails to connect the event—the movement of the oilfield pipe—and the injury to Lopez's foot. *See Guevara*, 247 S.W.3d at 667; *Morgan*, 675 S.W.2d at 733. As demonstrated below, the evidence is more than sufficient to accomplish that task.

B. Abundant Evidence Supports the Causation Finding

The jury received the following instruction on proximate cause:

> "Proximate Cause" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

CR 1414. Despite El Paso's desire to turn the causation question into a scientific exercise, it is not nearly so complicated when viewed in light of the charge and the applicable standards of review.

The evidence at trial, which the jury was entitled to believe, showed the following:

- When Lopez's injury occurred, the pipeline was highly pressurized upstream from the plug valve. 5 RR 58-59, 95, 104, 245. The three-inch pipe was downstream from the valve and was designed for minimal pressure. 5 RR 36-37, 104; 6 RR 118.

- According to PG&E's own safety manuals, the three-inch line was not properly anchored. 4 RR 50-54; PX 16.

- El Paso's witnesses testified that the three-inch line was clogged, something that had happened at least two or three times earlier that week. 5 RR 218, 221, 224-25, 235-36, 245.

- It is common knowledge in the oilfield industry that pressurized valves should be opened slowly. 3 RR 85-86; 5 RR 90-92. El Paso's own engineering expert acknowledged that suddenly opening a pressurized valve all the way "is a danger" and should not be done because someone could get hurt. 5 RR 102-03.

- During a heated exchange with another PG&E employee, and using the wrong tool, Hammers turned the valve the wrong direction, then reversed course and threw the valve open fully, at which time the pipe suddenly jumped. 3 RR 52, 56-57; 5 RR 217-18, 221-26, 245, 248.

- The pipe struck Lopez, crushing his foot against the sump tank lid. 3 RR 44, 58-59 5 RR 155, 248; PX 22 & 23. The pipe also struck a PG&E employee standing nearby and knocked him to the ground. 3 RR 59. The force was significant enough to shake a large work truck in which another PG&E employee sat. 6 RR 27, 47-48.

- Before Lopez's injury, the three-inch steel pipe was straight; afterward, because of the force of the blowout, it was bent. 3 RR 43-44; 5 RR 234-35; 6 RR 29, 46; PX 22.

- According to El Paso's, own expert, the manner in which the pipe moved was foreseeable. 5 RR 82-83. The expert agreed that opening

the plug valve to 100 percent too quickly could cause the pipe to move and injure someone. 5 RR 104-05.

- The engineers who designed the system knew that someone would need to stand near the sump tank when removing sludge. 5 RR 89. That risk could have been designed out of the system by including more space between the sump tank and the three-inch line. 5 RR 84-85, 89.

- Had Hammers opened the valve properly, Lopez would not have been injured. 3 RR 89.

Viewing this evidence in light of the charge instruction on proximate cause, it provides a strong, logically traceable connection between opening the valve too quickly and failure to secure the pipe—conduct the jury could have found negligent—and Lopez's injuries. But for the negligent acts, Lopez would not have been injured, and, as El Paso's own expert agreed, harm resulting from suddenly opening a pressurized valve in this situation was foreseeable. *See Brown v. Edwards Transfer Co.*, 764 S.W.2d 220, 223 (Tex. 1988) (concluding that actor need not foresee details of particular accident or injury, just that injury be of same general character as might reasonably have been anticipated). Under established precedent, this sort of connection is legally sufficient proof of causation. *See Guevara*, 247 S.W.3d at 667; *Morgan*, 675 S.W.2d at 733.

No expert testimony was necessary to prove causation in this case. Lopez presented far more than a scintilla of evidence to support the jury's finding that El Paso's negligence—unchallenged in this Court—proximately caused his injury. And for the basic reasons stated in Part I.C above, El Paso's factual sufficiency challenge likewise fails. *See* Appellant's Br. at 31, 33. Accordingly, El Paso's second issue should be overruled, and the trial court's judgment awarding damages should be affirmed.

III. El Paso Was Not Entitled to a Credit for Workers' Compensation Benefits Lopez Received Under TPF's Insurance Policy

In its last issue, El Paso asks the Court to shave $245,170.53 from the verdict as a credit for payments he received from TPF's workers' compensation carrier, Texas Mutual Insurance Company, even though El Paso had nothing to do with obtaining those benefits. *See* Appellant's Br. at 33-39. El Paso's argument is misguided, as the collateral-source rule plainly prohibits such a credit. But even if that were not so, El Paso has not proved its right to a credit under the standards it asks the Court to adopt.

A. The Collateral-Source Rule Bars the Requested Credit

"The collateral source rule is both a rule of evidence and damages." *LMC Complete Auto., Inc. v. Burke*, 229 S.W.3d 469, 480 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (quoting *Johnson v. Dallas County*, 195 S.W.3d 853, 855 (Tex. App.—Dallas 2006, no pet. (internal quotations omitted)). The rule precludes a tortfeasor from presenting evidence of or obtaining an offset for payments to the injured party from other sources, even if those payments would otherwise result in a double recovery. *See id.*; *see also Brown v. Am. Transfer & Storage Co.*, 601 S.W.2d 931, 934 (Tex. 1980) (noting that prohibition against double recovery does not apply when payment is within collateral-source rule, and applying rule to bar wrongdoer from obtaining credit for insurance independently procured by injured party); *Triumph Trucking, Inc.* v. *Southern Corp. Ins. Managers, Inc.*, 226 S.W.3d 466, 471 (Tex. App.—Houston [1st Dist.] 2006,

pet. denied) (stating that "a defendant may not offer evidence of payment from a collateral source and may not take an offset for such payments").[11]

"Medical insurance, disability insurance, and other forms of protection purchased by a plaintiff, as well as gifts a plaintiff receives are easily identifiable as 'independent' sources of income that are subject to the collateral source rule." *Lee-Wright, Inc. v. Hall*, 840 S.W.2d 572, 582 (Tex. App.—Houston [1st Dist.] 1992, no writ). As this Court has recognized, workers' compensation benefits are usually a collateral source when raised in litigation because a plaintiff ordinarily cannot sue his employer in tort. *Id.* at 582 & n.4; *see* TEX. LAB. CODE § 408.001.[12] That straightforward principle holds true here.

Double recovery is not at issue in this case, and Lopez is not the one seeking a windfall. El Paso—the wrongdoer according to the jury's findings—can claim no connection to or involvement in Lopez's procurement of workers' compensation benefits. There can be no dispute that Lopez obtained those benefits solely by virtue of his employment with TPF, his employer's decision to subscribe to the workers' compensation scheme, and its payment of the necessary insurance premiums. Under these circumstances, the collateral-source rule bars El Paso from receiving any credit for those benefits. *See Brown*, 601 S.W.2d at 934; *Hall*, 840 S.W.2d at 582. El Paso's third issue should accordingly be overruled.

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[11] Based on these authorities, El Paso's suggestion that the rule only applies to evidentiary matters before a jury is plainly incorrect. *See* Appellant's Br. at 34-35.

[12] El Paso implies that an 80-year-old Texas Supreme Court decision supports its position, but never attempts to reconcile its reading of that decision with the collateral-source rule. *See* Appellant's Br. at 36 (citing *Mitchell v. Dillingham*, 22 S.W.2d 971, 971-72 (Tex. 1929)).

B. In Any Event, El Paso Failed to Prove That TPF's Workers' Compensation Carrier Contractually Waived Its Subrogation Rights

El Paso further claims that it is entitled to an offset because TPF's carrier contractually waived its subrogation rights to the proceeds of Lopez's recovery in this suit. *See* Appellant's Br. at 36-39. Neither the evidentiary record nor the case upon which El Paso relies supports that result.

El Paso cites *Chevron, U.S.A., Inc. v. Simon* for the proposition that, "where a defendant is the beneficiary of an insurance carrier's waiver of subrogation rights, the defendant is entitled to offset the damages found by the jury by any amounts already paid or that will be paid to the plaintiff by the insurance carrier." Appellant's Br. at 37 (citing 813 S.W.2d 491, 491-92 (Tex. 1991) (per curiam). In *Chevron*, the Texas Supreme Court concluded that the court of appeals erred by rendering judgment for the plaintiff, even though only the defendant tortfeasor had sought summary judgment. 813 S.W.2d at 491. Instead of remanding to the court of appeals, however, the supreme court sent the case back to the trial court after concluding that certain contracts were some evidence that Chevron was an intended beneficiary of provisions in the carrier's policy waiving its subrogation rights. *Id.* at 491-92.

No appellate court has applied *Chevron* to hold that a carrier's waiver of subrogation rights entitles a tortfeasor to offset a jury's damage award by the amount of workers' compensation benefits paid to the plaintiff, particularly when the credit would otherwise be barred by the collateral-source rule. Fortunately, the Court need not tread that ground here because of defects in El Paso's proof.

To demonstrate that TPF's workers' compensation carrier waived its right of subrogation, El Paso relies solely on a letter from the carrier's attorney informing Lopez's trial counsel of "Texas Mutual Insurance Company's position that their workers' compensation policy contains a valid waiver of subrogation as to Ernesto Lopez's above lawsuit as to defendant El Paso Field Services Management, Inc. . . ." Appellant's Br. at 37-38 (citing CR 1488). The letter itself does not purport to be a waiver, but instead merely states Texas Mutual's position on what its policy says. *See id.* Neither the policy nor the letter were offered or admitted into evidence at trial.[13]

As a rule, documents not admitted into evidence are not considered on appeal. *See Barnard v. Barnard*, 133 S.W.3d 782, 789 (Tex. App.—Ft. Worth 2004, pet. denied); *In re B.R.G.*, 48 S.W.3d 812, 818 (Tex. App.—El Paso 2001, no pet.). But even if it had been admitted, the only document El Paso cites to support its argument fails to conclusively show that the carrier waived its subrogation rights. The letter from Texas Mutual's counsel might arguably have raised a fact issue under *Chevron*, but that would not satisfy the standard of review under which El Paso labors at this stage of the litigation. Because the district court committed no error by refusing to credit El Paso for insurance benefits derived from a collateral source, its third issue should be overruled.

[13] The letter was attached to El Paso's motion to modify the judgment, along with an affidavit from El Paso's trial counsel, and was included in the appendix. CR 1473, 1485-88 (App. Tab 9). El Paso cites these pages in the clerk's record when discussing the letter. *See* Appellant's Br. at 7, 33, 37-39.

IV. The Trial Court Should Have Disregarded the Jury's Answers to Questions 2b and 3b Because No Evidence Supports the Findings that Lopez Was Negligent and Proximately Caused His Own Injury

The Lopezes filed a motion asking the trial court to disregard the jury's answers to Questions 2b and 3b. CR 1429; *see* TEX. R. CIV. P. 301. These questions submitted El Paso's contributory-negligence defense and asked the jury to assign him at least some portion of the fault. CR 1416-17 (App. Tab 1). The jury allocated 20 percent of the responsibility to Lopez. *Id.* By rendering judgment on the verdict, the trial court implicitly overruled the Lopezes' motion. *See* TEX. R. APP. P. 33.1(a).

The legal sufficiency standard of review applies to the denial of a motion to disregard jury findings. *See Bank of Tex. v. VR Elec., Inc.*, ____ S.W.3d ____, 2008 WL 4075594, at *6 (Tex. App.—Houston [1st Dist.] Sept. 4, 2008, no pet. h.); *Shell Oil Prods. Co. v. Main St. Ventures, L.L.C.*, 90 S.W.3d 375, 387 (Tex. App.—Dallas 2002, pet. dism'd by agr.). Here, the trial court should have disregarded the jury's findings that Lopez was 20 percent at fault for his own injuries because no evidence supports them. CR 1416-17 (App. Tab 1).

A. The Court Should Consider the Lopezes' Point as Cross-Appellants

The Lopezes timely filed a notice of appeal from the trial court's judgment. 1st Supp. CR 13; 2nd Supp. CR.[14] After the undersigned took over as lead appellate counsel last month, he became aware that trial counsel had not filed an appellant's brief or obtained the Court's consent for the Lopezes to present their points as cross-appellants in

[14] *See supra* note 5.

their appellees' brief. Wishing to present their argument that no evidence supports the jury's contributory-negligence finding, the Lopezes filed a motion and asked the Court to issue an order clarifying in advance that they would be allowed to do so. The Court denied the motion without prejudice.

The Lopezes renew their request that the Court consider their points as cross-appellants and, upon finding error, modify the trial court's judgment accordingly. Addressing a similar situation, the Waco Court of Appeals considered and sustained the cross-appellant's points after overruling the appellant's issues. *See Byrd v. Estate of Nelms*, 154 S.W.3d 149, 165-66 (Tex. App.—Waco 2004, pet. denied). The *Byrd* court's analysis is informative:

> The Nelms Partnership filed a notice of appeal and asserted in a single cross-point that the trial court erred by failing to award it prejudgment interest. We first consider Byrd's contention that we should not consider the cross-point because the Nelms Partnership did not present it in a timely filed appellant's brief, but included the cross-point in his appellee's brief. Byrd contends that the Nelms Partnership was required to do so because it seeks, by means of the cross-point, to alter the trial court's judgment.
>
> A party seeking to alter the trial court's judgment must file a notice of appeal. An appellant is a party taking an appeal to an appellate court. As we interpret these rules, the Nelms Partnership is an "appellant" (or "cross-appellant") with regard to its cross-point.
>
> The Texas Rules of Appellate Procedure do not clearly delineate when a cross-appellant must file its brief raising issues on a cross-appeal. In appeals from a judgment notwithstanding the verdict, Rule 38.2(b) suggests cross-issues can be raised as part of the appellee's brief. In any event, Rule 38.8(a)(2) says our choices in this situation are to dismiss the cross-appeal for want of prosecution or decline to dismiss it and give further direction to the case as we consider proper.

> Byrd in its appeal seeks to reverse the judgment in its entirety, whereas the Nelms Partnership seeks to affirm it except for the additional recovery of prejudgment interest. Had Byrd and the Nelms Partnership both presented themselves as appellants, as apparently contemplated by the rules, it would have created the possibility of confusion with respect to the reference of the parties in this opinion. Under the circumstances, it makes sense, even if not technically correct, for the Nelms Partnership to present its cross-point in its appellee's brief, as it has done. Under these circumstances, we will exercise our discretion and consider the merits of the issue as briefed by the parties.

Id. The parties in the instant case are similarly situated, except that the Lopezes took the additional step of seeking this Court's permission before asserting their points as cross-appellants in this brief.

A party should not lose its right to appeal based on an unduly technical application of procedural rules. *Willis v. Donnelly*, 199 S.W.3d 262, 270 (Tex. 2006). This Court has jurisdiction over the Lopezes' cross-appeal, as none of the omissions about which El Paso complained in opposing the Lopezes' motion are jurisdictional.[15] *See* TEX. R. APP. P. 25.1(e), 32.4, 38.1. El Paso, which seeks rendition of a take-nothing judgment, can hardly claim prejudice in this situation. For these reasons, as well as those stated in *Byrd*, the Court should exercise its discretion and consider the Lopezes' arguments for modifying the trial court's judgment after overruling El Paso's issues on appeal.

B. No Competent Evidence Supports the Jury's Contributory-Negligence Findings

The standards and tests for determining contributory negligence are the same as for negligence. *McDonald v. Dankworth*, 212 S.W.3d 336, 340 (Tex. App.—Austin

[15] The Lopezes will be filing a copy of their notice of appeal and their own docketing statement with the clerk shortly. At the Court's request, they will tender the standard docketing fee.

2006, no pet.). A defendant seeking to establish contributory negligence bears the burden of proof on that issue. *Id.* Negligence is generally an issue for the fact-finder, but the existence of a duty is a question of law. *See General Elec. Co. v. Moritz*, 257 S.W.3d 211, 217 (Tex. 2008) (noting that existence of duty is "a question of law for the court; it is not for the jury to decide under comparative negligence or anything else").

1. Lopez had no duty to anticipate El Paso's negligence

The only conceivable basis on which the jury could have found Lopez negligent was in deciding where to stand at the time his injury occurred. That was El Paso's position at trial. 5 RR 94, 250; 6 RR 199-201.

Texas law does not require a plaintiff to anticipate the negligent conduct of another. *J.R. Beadel & Co. v. De La Garza*, 690 S.W.2d 71, 73 (Tex. App.—Dallas 1985, writ ref'd n.r.e.). A plaintiff cannot be charged with contributory negligence when he lacks knowledge of the danger and cannot reasonably anticipate it. *See Terminix, Inc. v. Right Away Foods Corp.*, 771 S.W.2d 675, 682 (Tex. App.—Corpus Christi 1989, writ denied); *Edwards Transfer Co., Inc. v. Brown*, 740 S.W.2d 47, 50 (Tex. App.—Dallas 1987), *aff'd*, 764 S.W.2d 220 (Tex. 1988); *J.R. Beadel & Co.*, 690 S.W.2d at 73.

Here, El Paso brought forth no evidence whatsoever that Lopez knew or should have known that Hammers would suddenly open the plug valve, the event that triggered this whole ordeal. Without an appreciation for that fact, Lopez had no duty to avoid standing where he was when the incident occurred. *See Terminix*, 771 S.W.2d at 682; *Brown*, 740 S.W.2d at 50; *J.R. Beadel & Co.*, 690 S.W.2d at 73. Absent such a duty, the

trial court erred by declining to disregard the jury's finding to Questions 2b and 3b, and the Lopezes' issue should be sustained.[16]

2. There is no evidence Lopez's negligence, if any, proximately caused his own injury

Even if Lopez somehow had reason to know that Hammers would open the valve suddenly, El Paso's evidence of contributory negligence was limited to (1) training on "pinch points"; (2) his failure to stand somewhere other than where he was when the pipe moved; and (3) testimony from an engineer implying that Lopez bore some fault. 5 RR 24, 26, 94, 179. This evidence is legally insufficient to sustain the jury's contributory-negligence findings.

A jury's causation finding may be based on either direct or circumstantial evidence, but cannot be supported by mere conjecture, guess, or speculation. *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 727 (Tex. 2003). Expert testimony that is conclusory or speculative is insufficient because it does not tend to make the existence of a material fact more or less probable. *See Coastal Transp. Co. v. Crown Central Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex. 2004). To avoid being held conclusory or speculative—and therefore no evidence—an expert's opinion must have a reasoned basis that the expert is qualified to state. *See id.*; *Burrow v. Arce*, 997 S.W.2d 229, 235-36 (Tex. 1999).

[16] Technically, sustaining the Lopezes' no-evidence point with respect to Question 2b on either of the Lopezes' points would render the jury's answer to Question 3b immaterial. *See Am. Jet, Inc. v. Leyendecker*, 683 S.W.2d 121, 127 (Tex. App.—San Antonio 1984, no writ).

El Paso presented its causation evidence through the testimony of Donald Remson, its liability expert. Remson, a retired petroleum engineer, opined that the pipe moved because a plug in the three-inch line downstream from the valve suddenly became dislodged. 5 RR 7-8, 16-19. Remson never visited the scene or examined any physical evidence in connection with this case, but instead based all his opinions on deposition transcripts and photographs. 5 RR 12, 14, 21, 72. His testimony reveals that he conducted no research, gathered no data, and performed no tests. He relied on no engineering or industry standards of any kind, published or unpublished.

Without some basic foundation for his conclusion, Remson could not legitimately testify that Lopez's negligence proximately caused his own injury. *See Burrow*, 997 S.W.2d at 235 (noting that "a claim will not stand or fall on the mere *ipse dixit* of a credentialed witness"). Indeed, he did not do so, as his only criticism of Lopez was—in answers that merely affirmed questions from El Paso's counsel—that where he was standing was not "a good and safe practice." 5 RR 94. On its face, Remson's testimony fails to establish the standard of care, how Lopez breached it, or how the standards for proximate cause on which the jury received instructions were met. *See Love*, 92 S.W.3d at 454; CR 1414 (App. Tab 1).

To the extent Remson's testimony could be read as expressing opinions about the necessary elements of proof, it is speculative and conclusory and thus fails to provide the required nexus between Lopez's conduct and his injury. *See Coastal Transp. Co.*, 136 S.W.3d at 232; *Burrow*, 997 S.W.2d at 236. No other evidence in this record makes that connection. For this independent reason, the jury's answers to Questions 2b and 3b lack

evidentiary support, and the Lopezes' issue as cross-appellants should be sustained. The trial court's judgment should be modified accordingly.

CONCLUSION AND PRAYER

For the foregoing reasons, and pursuant to Texas Rule of Appellate Procedure 43, the Lopezes ask the Court to:

- overrule all of El Paso's issues, sustain their issue as cross-appellants, modify the trial court's judgment to disregard the jury's contributory-negligence findings, and affirm the judgment as modified;
- alternatively, overrule all of El Paso's issues and affirm the trial court's judgment in its entirety;
- strictly in the alternative, remand the case for a new trial; and
- grant all other appropriate relief to which they are entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On September 29, 2008, in compliance with Texas Rule of Appellate Procedure 9.5, I served a copy of this brief upon all other parties to the trial court's judgment by first-class United States mail, properly posted and deliverable as follows:

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