RENDERED: DECEMBER 28, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002081-MR

DUTCH HOUSING, INC. APPELLANT

v.

APPEAL FROM BALLARD CIRCUIT COURT
HONORABLE WILLIAM L. SHADOAN, JUDGE
ACTION NO. 99-CI-00001

NORTHLAND INSURANCE COMPANY APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE; COMBS AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Dutch Housing, Inc. has appealed from a jury verdict and subsequent judgment in favor of Northland Insurance Company entered by the Ballard Circuit Court on June 29, 2000. Primarily, Dutch has raised four issues: (1) whether the trial court abused its discretion by allowing Northland to introduce evidence through expert witnesses Paul Barnes and Harold Smith, concerning the fire given Northland's alleged spoliation of the evidence; (2) whether the trial court abused its discretion by refusing to give a missing evidence jury instruction concerning

Northland's alleged spoliation of evidence; (3) whether the trial court abused its discretion by allowing Smith to testify as an expert witness and by not holding a pretrial Daubert hearing; (4) whether the trial court erred by refusing to direct a verdict in favor of Dutch on the grounds that Northland failed to meet its burden of showing that Dutch's product was the legal cause of the fire. Having found no reversible error, we affirm.

This appeal follows a jury trial concerning a product liability subrogation claim arising from an alleged manufacturing defect in a mobile home which allegedly caused a fire which destroyed the mobile home. The mobile home at issue was owned by Jim and Terri Hutto, residents of Kevil, Kentucky. On November 28, 1996, the Huttos purchased the mobile home from a local dealer. The mobile home was moved to the Huttos' property and set up in January 1997. One room of the mobile home was used by the Huttos as an office and was equipped with a computer, a printer, a fax machine, two telephones, two answering machines and a desk lamp.

All utility hookups were the responsibility of the Huttos. Jim Hutto and his father performed the electrical, sewer, and water hookups themselves. Within several months of delivery, the circuit breakers in the mobile home began to trip occasionally. In an attempt to remedy the problem, Jim Hutto and his father ran a new supply line from the outside meter box to the circuit breaker box. Neither Jim Hutto nor his father was a

licensed electrician as called for by the instructions of the Dutch homeowners' manual.

On January 28, 1998, a fire destroyed the Huttos' home. The Kevil Fire Department was called, and the fire was eventually extinguished. The fire department did not make a determination of the cause of the fire. The Huttos had homeowners' insurance with Northland, which on January 30, 1998, assigned this claim to an outside adjusting firm, GAB Robins, North America, Inc. GAB Robins received the claim on February 2, 1998, and went to the Huttos' fire-loss scene on that day. Based on GAB Robin's estimates, Northland, on February 18, 1998, issued payment to the Huttos for $29,974.00 for loss of the mobile home and $11,000.00 for their personal property loss.

On February 17, 1998, GAB Robins spoke with Jim Tschida, a Northland adjuster, and Tschida authorized a "cause and origin" investigation. Northland retained the services of cause and origin investigator Paul Barnes, who was instructed by Northland to conduct a cause and origin investigation at the fire scene. On February 18, 1998, Barnes visited the loss site and determined that the fire was caused by a staple which had been driven through the insulation of a electric wire near a duplex outlet in the room of the mobile home which had been used as an office.

On February 25, 1998, Northland sent a letter to Dutch and Kentucky Oaks Homes (the dealer who sold and installed the mobile home) via certified mail, notifying them that it believed

the fire loss was caused by "faulty manufacturing" and that, if its expert attributes the loss to a manufacturing defect, "our company will seek recovery from your firm." The letter stated that Dutch and Kentucky Oaks Homes would have ten days to inspect the loss site, or Northland would assume that they did not wish to inspect and Northland's expert would be unchallenged.

Dutch received this letter from Northland on March 2, 1998. Dutch, a subsidiary of Champion Enterprises, Inc., contacted Louis M. Balius, general counsel for Champion. On March 3, 1998, Balius contacted Northland with the following electronic mail message:

> Please be advised that I received your February 25, 1998 notification letter regarding the above-referenced claim. Dutch will visit the site and investigate the remains of the home and attempt to determine the cause and origin of the fire. However, it will not be possible to have our investigators there within the 10 day deadline set forth in your letter. Today, we will contact our investigators, who will advise you of their schedule for visiting the site. Please forward to me any reports prepared by your fire experts, the local fire department or any other source so that we may assess the situation. Please do not hesitate to call me at 248-340-7745. My facsimile number is 248-340-7773. My address is: Louis M. Balius, Assoc. General Counsel, Champion Enterprises, Inc., 2701 University Drive, Suite 300, Auburn Hills, Michigan 48353.

Dutch also contacted GAB Robins, via facsimile, and requested any expert reports or pictures. GAB Robins responded by telling Balius that any photographs and reports would be "kept strictly between Paul Barnes and Northland Insurance Company."

After receiving the notice of loss from Northland, Dutch notified its insurance carrier, Travelers Insurance Company, of Northland's potential subrogation claim. On March 5, 1998, Peter Kovalski, a claims representative for Travelers, contacted Northland about the Huttos' loss and left a message that Dutch "was interested in investigating." Later that day, Kovalski spoke with JaAnne Coenen, a recovery specialist with Northland, and in a letter dated March 6, 1998, stated:

> As you know from our telephone conversation, we insure Champion and are responsible for evaluating this claim for property damage. Initially, I would like to obtain your expert's report, which identifies the product defect and color photos of the accident scene so we can determine if we need to arrange for an expert inspection within the next couple of weeks. Please send the report and photos by overnight mail as soon as possible.

On March 10, 1998, Coenen responded by letter stating in part:

> Per your requests to our office concerning the above-captioned file, I enclose for your review the limited documentation we have at this time. As of this date, I do not have the hard copy of the cause and origin report written by Paul Barnes.
>
> Mr. Barnes has inspected the premises, however, the formal report has not been received in Northland's office. Mr. Barnes can be reached at 502-885-0733.
>
> As this claim progresses, and I have additional supporting documentation for the claim, I will forward it to your offices.

It appears that after this point formal written communication between the parties ceased and the parties began to

communicate by telephone conversations and voice messages. Needless to say, the parties have different accounts of the subsequent communication which occurred between them. However, it is undisputed that without giving any further written notice Northland set a deadline that the debris could be removed by the Huttos after April, 1, 1998.[1] On April 2, 1998, the Huttos had all remains of the mobile home removed.

On April 30, 1998, Coenen received a phone call from Balius, asking for a status on Northland's subrogation claim against Dutch. Coenen called Kovalski and, on May 6, 1998, she sent documentation to Travelers on the subrogation claim. Included therein was a copy of Barnes' cause and origin report. On May 20, 1998, Kovalski notified Coenen that Travelers would like to arrange for an expert to visit the fire-loss site. Dutch claims that it learned on May 22, 1998, for the first time that the mobile home debris had been cleared on or about April 2, 1998.

On January 7, 1999, Northland and the Huttos filed this action against Dutch and Kentucky Oaks Homes alleging a manufacturing defect. Northland sought to recover $44,594.39 in payments it had made to the Huttos for loss of the mobile home

[1]At trial, Jim Hutto testified that he had received numerous complaints from both city officials and neighbors that the debris was an "eyesore" that needed to be removed as soon as possible. In its brief, Northland argues that the Huttos were "homeless" during this time. After reviewing the record, it appears that during this time Northland was paying the Huttos' necessary expenses including food and shelter as an accommodation so the fire scene could be preserved for further investigation.

and personal property, and the Huttos sought $29,933.14 in uninsured losses they incurred as a result of the fire.[2]

On June 5 and 6, 2000, a jury trial was held in Ballard Circuit Court, and the jury returned a verdict in favor of Northland for $44,594.39. On June 26, 2000, the trial court entered a judgment consistent with the jury verdict. On June 15, 2000, prior to entry of final judgment, Dutch filed a motion for judgment notwithstanding the verdict. On August 4, 2000, the motion was denied. This appeal followed.

Dutch first claims the trial court abused its discretion by allowing Northland to present evidence through Paul Barnes and Harold Smith concerning the cause of the fire given Northland's spoliation of the evidence. A trial court's evidentiary ruling is subject to appellate review to determine if it has abused its discretion.[3] The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.[4] Dutch's central argument is that the trial court abused its discretion by allowing Barnes and Smith to testify concerning the cause of the fire since the mobile home debris was removed before

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[2]By agreed order, the plaintiffs subsequently dismissed all claims against Kentucky Oaks Homes and the Huttos settled with Dutch and dismissed all claims against it.

[3]Goodyear Tire and Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 577 (2000)(citing Tumey v. Richardson, Ky., 437 S.W.2d 201, 205 (1969); and Transit Authority of River City v. Vinson, Ky.App., 703 S.W.2d 482, 484 (1985)).

[4]Id. at 581.

Dutch was able to inspect it making it difficult for Dutch to refute Northland's experts' conclusions.

On January 7, 2000, the trial court held a pretrial hearing to address Dutch's motions concerning Northland's actions and concluded that the notice of 29 days that Dutch had been given before the mobile home debris would be removed was insufficient under the circumstances.[5] The trial court recognized that under certain circumstances the time that Northland gave Dutch to inspect the mobile home debris could be deemed as reasonable, but that absent a compelling reason Dutch should have been provided more time and/or better notice of Northland's intention to remove the mobile home debris. The trial court indicated that to properly ensure that Dutch had notice and that Northland had documentation it had given notice, Northland should have given notice of its intentions through written letters rather than phone calls and voice messages.

During the hearing, the only relief that Dutch sought from the trial court was to completely exclude the expert testimony of Barnes and Smith. Northland argued that it had given adequate notice to Dutch, but that in the event the trial court concluded that it had improperly destroyed the evidence a missing evidence instruction would be the proper relief, and not disqualification of its only expert witnesses. The trial court

[5]This was the second time the parties had discussed possible sanctions before the trial court. During a hearing held on October 15, 1999, the trial court gave some indication as to how it might rule on the motions, but no order was entered.

concluded that Northland had improperly destroyed the evidence, but that Dutch was negligent in its own right. The trial court ultimately sanctioned Northland by refusing to permit Barnes to give an opinion that the staple was the cause of the fire. However, the trial court also ruled that provided it later concluded Smith was qualified as an expert metallurgist under KRE[6] 702, Smith would then be allowed to testify to his expert opinions relative to the cause of the fire.

In Monsanto Co. v. Reed[7], our Supreme Court declined to create a new tort or claim for spoliation of evidence. Instead, the Court ruled that "[w]here the issue of destroyed or missing evidence has arisen, we have chosen to remedy the matter through evidentiary rules and 'missing evidence' instructions."[8] In a criminal case interpreting the application of Sanborn, supra, the Court stated:

> [T]he court should consider whether a "missing evidence instruction" should be given or whether the Commonwealth's evidence should be limited, or even prohibited, to eliminate the prejudice resulting from the unavailability of the exculpatory evidence."[9]

We believe that under the circumstances of the case sub judice, the trial court did not abuse its discretion by imposing

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[6]Kentucky Rules of Evidence.

[7]Ky., 950 S.W.2d 811, 815 (1997).

[8]Id. (citing Tinsley v. Jackson, Ky., 771 S.W.2d 331 (1989); and Sanborn v. Commonwealth, Ky., 754 S.W.2d 534 (1988)).

[9]Tinsley v. Jackson, Ky., 771 S.W.2d 331, 332 (1989).

this limited sanction on Northland.[10] We believe that under Monsanto and Tinsley the trial court has discretion to weigh the culpability of the parties and to fashion an appropriate remedy. In the present case, the trial court noted that Northland acted unreasonably, but also that Dutch was dilatory in getting an investigator to go to the Huttos' home. Thus, the trial court chose a sanction whereby it attempted to ameliorate the harm caused to Dutch by the removal of the debris by preventing Barnes from testifying concerning his opinion as to the cause of the fire.[11] We hold that the trial court did not abuse its discretion in ordering this limited sanction.

Dutch also claims the trial court abused its discretion by failing to give a missing evidence instruction. We believe for the most part that this issue has already been sufficiently

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[10]Dutch has cited this Court to foreign courts that have treated spoliators more harshly than the trial court did in the present case. We note that our review of these cases reveal that the actions was more egregious. For example, in Stubli v. Big D International Trucks, Inc. 810 P.2d 785 (Nev. 1991) the spoliator destroyed evidence before the other parties were given notice and an opportunity to inspect. In Lee v. Boyle-Midway Household Products, Inc. 792 F.Supp. 1001 (W.D.Pa. 1992) a consumer was injured when drain cleaner he had used to unclog his kitchen sink erupted while he was bent over the sink. The plaintiff's counsel lost the only evidence that the manufacturer could use in its defense, the drain cleaner. In the present case, Dutch did have access to the staple that Northland argued was defective and Dutch had an opportunity to disprove Northland's conclusions. Moreover, in the present action Dutch was given an opportunity to inspect the premises before the Huttos removed the debris.

[11]We note that this sanction as a practical matter had very little impact on the trial. Barnes in fact did testify during cross-examination that he "sent to the lab what I thought caused it, the lab confirmed it." And, Smith's testimony obviously was based on the premise that Barnes had identified the staple and wire as the cause of the fire.

addressed. Under Monsanto and Tinsley, it is within the discretion of the trial court to remedy spoliation of evidence. Obviously, the remedy must be appropriate for the particular abuse in each individual case. During the pre-trial hearing, Northland asked the court to give a missing evidence instruction if it decided sanctions were appropriate. The trial court was within its discretion to refuse to give a missing evidence instruction.

Dutch next claims the trial court abused its discretion by allowing Harold Smith to testify and by failing to hold a Daubert[12] evidentiary hearing. We disagree.

Kentucky has adopted the standards set forth in Daubert and Kumho[13], for determining whether a witness is qualified to testify as an expert.[14]

KRE 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

For a review of Daubert and its application in Kentucky, we cite the applicable portion of Goodyear:

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[12]Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

[13]Kumho Tire Co. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

[14]Goodyear Tire, 11 S.W.3d at 577.

When faced with a proffer of expert testimony, the trial judge must determine at the outset of trial pursuant to KRE 104, "whether the expert is proposing to testify to (1) scientific [, technical, or other specialized] knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." Daubert, 509 U.S. at 592, 113 S.Ct. at 2796, 125 L.Ed.2d at 482. In order to meet the above standard, proffered expert testimony, which is based on "scientific, technical, or other specialized knowledge," must be both relevant and reliable. Id. at 589, 113 S.Ct. at 2795, 125 L.Ed.2d at 480.

The consideration of relevance has been described as one of "fit."

> "Fit" is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes. . . . The study of the phases of the moon, for example, may provide valid scientific [, technical, or other specialized] "knowledge" about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However, (absent creditable grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night.

Daubert, 509 U.S. at 591, 113 S.Ct. at 2796, 125 L.Ed.2d at 481-82 (internal citation omitted).

The consideration of reliability entails an assessment into the validity of the reasoning and the methodology upon which the expert testimony is based. It is the inquiry into the reasoning and methodology where application of the Daubert and Mitchell factors comes most into play. We emphasize that the inquiry into reliability and

> relevance is a flexible one. The factors enumerated in Daubert and Mitchell are neither exhaustive nor exclusive. A trial court may apply any or all of these factors when determining the admissibility of any expert testimony.
>
> The facts set forth in Daubert and adopted in Mitchell that a trial court may apply in determining the admissibility of an expert's proffered testimony include, but are not limited to: (1) whether a theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether, with respect to a particular technique, there is a high known or potential rate of error and whether there are standards controlling the technique's operation; and (4) whether the theory or technique enjoys general acceptance within the relevant scientific, technical, or other specialized community. Daubert, 509 U.S. at 592-94, 113 S.Ct. at 2796-97, 125 L.Ed.2d at 482-83.

One of Dutch's main arguments is that the trial court abused its discretion by failing to hold a pretrial Daubert hearing. Dutch has offered no authority for the proposition that the trial court must hold a formal Daubert hearing. Dutch cites this Court to Goodyear for support of its position that the trial court abused its discretion in making its Daubert determinations. However, Goodyear merely states that the trial court must make the necessary determinations "at the outset of trial"[15] and "at a preliminary hearing."[16]

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[15]Goodyear, supra at 578.

[16]Id. at 583.

We believe Morales v. American Honda Motor Co., Inc.,[17] correctly states the law:

> Furthermore, contrary to Defendants' assertions, a district court is not required to hold a formal hearing to determine whether a person is qualified to be a witness; rather, the court must merely make a determination as to the proposed expert's qualifications.

We have reviewed that record and believe the trial court complied with the requirements set forth in Goodyear as to the manner of the hearing. Dutch's argument that the trial court failed to comply with Goodyear is disingenuous. Two preliminary hearings were held and Dutch was given the opportunity to add oral arguments to its motions to exclude Smith as an expert witness. At a hearing held on May 5, 2000, the trial court indicated that it had read all of the extensive written motions submitted by the parties. We believe the pre-trial hearings held by the trial court complied with the requirements of Goodyear.

Dutch also argues that the trial court abused its discretion by allowing Smith to testify because he was unqualified to render an expert opinion. In its brief, Dutch argues:

> The fact that Smith was attempting to give an opinion on what caused the fire at the Hutto Home without having personally gone to the scene and having eliminated other potential causes concerned the trial court, and was the basis for its ruling that Smith could not testify that a high resistance fault was the cause of the fire. However, the Court

[17]151 F.3d 500, 515 (6th Cir. 1998)(citing Hopkins v. Dow Corning Corp., 33 F.3d 1116, 1124 (9th Cir. 1994)).

> apparently disagreed or disregarded Dutch's challenges to Smith's qualifications or his unreasonable reliance on the findings of Barnes [citation to record omitted][.]

After reviewing the record and the authority cited to us by the parties, we cannot say that the trial court abused its discretion by allowing Smith to testify. In Daubert, the Court recognized that an expert's testimony will often be based on specific evidence given to him for examination, and unlike a lay witness, he may offer opinions, "including those that are not based on first hand knowledge or observations."[18]

Furthermore, KRE 703(a) states:

> The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Thus, the argument that Smith's testimony is tainted or that he was unqualified to render an opinion because he never visited the fire scene is unfounded.

At trial, Smith was called for the specific purpose of testifying as to whether the melting around the staple indicated that it was an ignition point. Whether the melting was consistent with the external heat of a fire or whether it was consistent with a higher degree of heat at the origin of the fire was hotly disputed at trial. Obviously, Smith testified that he

[18]Daubert, supra at 592.

believed after testing the staple that its condition was consistent with melting that would have occurred at the origin of the fire.

Dutch's central argument before this Court is that Smith is a metallurgist and not an electrical engineer, and thus unqualified to testify as to an electrical cause of the fire. Dutch presented this same argument to the trial court and the jury during the trial. For its contention, Dutch has cited Weisgram v. Marley Co.[19] In Weisgram, a wrongful death action was brought against a manufacturer of an allegedly defective baseboard heater. The plaintiffs' sought to introduce testimony of a metallurgist who had been instructed as to the plaintiffs' theory of the cause of the fire and had been asked to look at certain heater components. The metallurgist examined the thermostat contacts and the high limit control contacts. He admitted that he was not an expert in fire cause and origin, in baseboard heater operation, or in the design or testing of contacts in such a unit.

Weisgram is easily distinguished from the present case. Here, Smith was asked to testify with regard to an area within his specific expertise. More precisely, at trial his testimony was introduced for the purpose of examining a staple which had been in the fire. Also, unlike the expert in Weisgram, Smith did have ten years of experience as a cause and origin investigator, but conceded that his expertise was limited to testing materials

[19]169 F.3d 514 (8th Cir. 1999).

that related to causes of fire. Moreover, in Weisgram the metallurgist formed his theory with practically no knowledge of the heater at issue and performed no tests to determine whether his theory was possible.

In the present case, Smith performed tests on the staple using both a microprobe and an electron microscope. Smith did microprobe analysis of the staple legs to determine the cause of globules that formed on the staple. Smith also was able to determine the elements that were present on the leg of the staple and to determine the origin of the elements. Smith determined that the staple leg revealed iron and copper prominently fused together on the globule. Smith concluded that there had been a fusion between the copper wire and metal staple and this came about through a long, slow defusion process until an ignition occurred. Smith concluded that this was the result of a misdriven staple in the wire which created a high resistance fault.

Smith testified that this would have generated heat in the surrounding area which would have affected the surrounding materials and would have made the materials more easily ignitable. Smith testified that his theory was based on more than "mere speculation." Dutch effectively cross-examined Smith as to the range of his knowledge and attempted to dispute his findings with its own expert witness, James MacDonald. After a thorough review of the record, we cannot say that the trial court abused its discretion by allowing Smith to testify. His

testimony was based on scientifically acceptable examinations with the caveat that he was relying on the assumption that Barnes had given him untainted evidence. The trial court did not err in allowing his testimony.

Dutch's final claim of error is that Northland failed to meet its burden of proof at trial to prove that a misdriven staple was the case of the fire and that the trial court should have granted Dutch a directed verdict. We initially consider Northland's burden of proof in a product liability case. In Perkins v. Trailco Manufacturing & Sales Co.,[20] our Supreme Court stated:

> The sufficiency of circumstantial evidence to overcome a motion for a directed verdict was discussed in Holbrook, supra. Therein we said, ". . . the essence of the test concerning the sufficiency of the plaintiff's circumstantial evidence concerning causation is that the proof must be sufficient to tilt the balance from 'possibility' to 'probability'."

The standard of review of a trial court's denial of a motion for a directed verdict is set forth in Lewis v. Bledsoe Surface Mining Co.,[21] which states:

> Upon review of the evidence supporting a judgment entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. All evidence which favors the prevailing party must be taken as true and

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[20]Ky., 613 S.W.2d 855, 857 (1981).

[21]Ky., 798 S.W.2d 459, 461-62 (1990). See also Smith v. Wal-Mart Stores, Inc., Ky., 6 S.W.3d 829, 830 (1999).

> the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is "'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice'" [citations omitted].

After reviewing the record, we cannot say that the verdict was "palpably or flagrantly against the evidence so as to indicate that it was reached as a result of passion or prejudice." For its contention that Northland's evidence never achieved the required threshold of "probability", Dutch relies on the following excerpt from Smith's testimony:

> Q: Did you make a conclusion as to whether or not the staple contributed to ignition?
>
> A: Yes.
>
> Q: Tell the jury your conclusion.
>
> A: Melting occurred and this long term high resistance fault resulted in continuous heating over a period for a year until ignition of adjacent wood resulted and the fire started.
>
> Q: In your opinion, is that something that could have caused the fire?
>
> A: Yes.

Admittedly, Northland would have been better served by never asking Smith whether the melting was something that "could" have caused the fire. Moreover, upon cross-examination by Dutch about other possibilities as to why the staple was in such

condition, Smith noted that "anything is possible." However, Smith had already testified in length that from his testing and examination of the staple that he believed the staple was the origin of the fire. It is clear from reviewing Smith's testimony that he believed the staple and the wire caused a high resistance fault[22] which ignited the adjacent wood. Smith's testimony coupled with Barnes' testimony that the staple was the cause and origin of the fire met the necessary requirements set forth in Perkins and Holbrook, supra.

For these reasons, the judgment of the Ballard Circuit Court is affirmed.

GUDGEL, CHIEF JUDGE, CONCURS AND FILES SEPARATE OPINION.

COMBS, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

GUDGEL, CHIEF JUDGE, CONCURRING: Although I am very sympathetic to the views expressed in the dissenting opinion herein by Judge Combs, I nevertheless feel constrained to concur in the result reached by Judge Johnson. As an appellate judge, I ordinarily am unwilling to second-guess the trial court's exercise of its discretion in supervising and conducting trial proceedings, except in instances where the alleged abuse is egregious. Indeed, reasonable judicial minds may disagree regarding particular issues in most cases involving abuse of discretion issues. Because I am reluctant to find an abuse of

[22]Smith defined a "high resistance fault" as "an incomplete circuit."

discretion except in the most egregious of instances, and I am satisfied that the trial court's rulings and exercise of its discretion herein were not sufficiently egregious to justify our intervention on appeal, I concur in Judge Johnson's opinion.

COMBS, JUDGE, DISSENTING: I am concerned about the inadequacy of the sanctions imposed by the trial court on the spoliation of evidence issue. Since the excluded testimony of Barnes ultimately made its way to the jury through Smith, more of an equalizer was needed in order to compensate for the disadvantage resulting to Dutch by the lack of opportunity to investigate the crime scene. Indeed, the trial court had observed that such an injustice had been perpetrated on Dutch. I believe that more of a reprisal or sanction against Northland was required as a compensation.

At the very least, a missing evidence instruction was warranted. Under the circumstances of this case, the combination of spoliation with the inadequacy of the sanction made such an instruction necessary. Failure to grant that instruction did amount to an abuse of discretion. I would vacate and remand for a new trial.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:	BRIEF AND ORAL ARGUMENT FOR APPELLEE:
Mindy Barfield Lexington, KY	R. Aaron Hostettler London, KY