

STATE OF LOUISIANA
COURT OF APPEAL, FIRST CIRCUIT

FRANK CUSHENBERRY AND ROBIN
CUSHENBERRY, INDIVIDUALLY AND ON
BEHALF OF THE MINOR CHILDREN, NOAH
CUSHENBERRY AND KHLOE CUSHENBERRY

NO. 2020 CW 1271

VERSUS

JOHNNY SCOTT AND BARBER BROTHERS
CONTRACTING COMPANY, LLC LOUISIANA

CONSOLIDATED WITH

BARBER BROTHERS CONTRACTING
COMPANY, LLC

VERSUS

CAPITOL CITY PRODUCE COMPANY, LLC,
FRANK CUSHENBERRY AND XYZ
INSURANCE COMPANY

DECEMBER 30, 2020

In Re: Barber Brothers Contracting Company, LLC, applying for
supervisory writs, 19th Judicial District Court, Parish
of East Baton Rouge, No. 674957 c/w 672217.

BEFORE: GUIDRY, McCLENDON, AND LANIER, JJ.

WRIT GRANTED IN PART; WRIT DENIED IN PART ON THE SHOWING MADE. The trial court's December 8, 2020 judgment, granting the Motion and Order for Adverse Inference on Spoliation of Evidence filed by Frank Cushenberry and Robin Cushenberry, Individually and on Behalf of the Minor Children, Noah Cushenberry and Khloe Cushenberry (collectively "the Cushenberrys"), is reversed. The Cushenberrys did not meet their burden of proving Barber Brothers Contracting Company, LLC or Johnny Scott intentionally destroyed evidence to deprive the Cushenberrys of its use or denied the Cushenberrys' access to the evidence. See e.g. **Stephenson v. Bryce W. Hotard Sunbelt Rentals, Inc.**, 2019-0478 (La. 5/20/19), 271 So.3d 190, 192; **Randolph v. General Motors Corp.**, 93-1983 (La. App. 1st Cir. 11/10/94), 646 So.2d 1019, 1027, writ denied, 95-0194 (La. 3/17/95), 651 So.2d 276. Accordingly, the trial court abused its discretion in granting the Motion and Order for Adverse Inference on Spoliation of Evidence, which is denied. In all other respects, the writ is denied on the showing made, and the trial court's judgment, denying the Motion for Partial Summary Judgment filed by Barber Brothers Contracting Company, LLC, is maintained, as this court was not provided with a copy of the exhibits attached to the Cushenberrys' Supplemental Opposition to Motion for Partial Summary Judgment.

JMG
WIL

McClendon, J., concurs. I agree with the majority and am constrained to grant the writ as to the Motion for Adverse Inference on Spoliation of Evidence based on the limited evidence introduced at the hearing on the motion.

COURT OF APPEAL, FIRST CIRCUIT



DEPUTY CLERK OF COURT, FOR THE COURT