NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

ATLANTIC STATES INSURANCE COMPANY A/S/O CUSTOM DESIGNS AND MANUFACTURING COMPANY, INC. AND CUSTOM DESIGNS & MANUFACTURING COMPANY, INC. AND WACHOVIA BANK, AS SUCCESSOR TRUSTEE TO ALEX J. TARAPCHAK, IRREVOCABLE INSURANCE TRUST AND CAROL LEE TARAPCHAK AND SHERRY STILAVA AND TARA TARAPCHAK AND ALEX TARAPCHAK	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellants	:	
v.	:	
SHERWIN WILLIAMS COMPANY	:	
	:	No. 999 MDA 2012

Appeal from the Judgment Entered May 4, 2012
In the Court of Common Pleas of Lackawanna County
Criminal Division No(s).: 04 CV 2060

BEFORE: BENDER, SHOGAN, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.:

Appellants—Atlantic States Insurance Company ("Atlantic") a/s/o Custom Designs and Manufacturing Company, Inc. and Custom Designs & Manufacturing, Inc. (collectively "Custom Design") and Wachovia Bank, as successor trustee to Alex J. Tarapchak, Irrevocable Insurance Trust and Carol Lee Tarapchak and Sherry Stilava and Tara Tarapchak and Alex

* Former Justice specially assigned to the Superior Court.

Tarapchak[1]—appeal from the judgment in favor of Appellee, Sherwin Williams Company, entered in the Lackawanna County Court of Common Pleas. Appellants claim that the trial court erred in: (1) refusing to instruct the jury on the "malfunction" theory; (2) overruling their objection to the qualifications of Appellee's fire investigation expert; (3) overruling their ***Frye***[2] objection to Appellee's defect expert; (4) overruling their objection to Appellee's evidence of lack of prior complaints; and (5) providing a jury instruction on facts in dispute.[3] We affirm.

Appellants' action arises from a fire that occurred on November 4, 2002, in the finishing department of a custom kitchen cabinet manufacturer, Appellant Custom Designs. The fire originated in a spraying booth, severely damaged the surrounding building, and caused over $6 million in damages. Appellants, on May 21, 2004, filed a complaint alleging, in relevant part, that Appellee's paint and lacquer products were defective because they created "overspray dust" susceptible to spontaneous combustion.

At the liability phase of a bifurcated jury trial, Appellants sought a determination that two products, Appellee's T77F37 and T77F38

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[1] The trust-related Appellants were the owners of the commercial property, the damage to which was the subject of the underlying action. Alex Tarapchak was the sole shareholder of Custom Designs. Atlantic insured Custom Designs and the trust-related Appellants and was the subrogee of Custom Designs against Appellee.

[2] ***Frye v. United States***, 293 F. 1013 (D.C. Cir. 1923).

[3] Appellants have filed a joint brief in this appeal.

precatalyzed lacquers, "were defective in that they [were] capable of spontaneous combustion under the circumstances of this case[.]" N.T., 1/24/12 at 258. The jury, on January 24, 2012, returned a verdict in favor of Appellee, finding that the two products were not defective.[4]

Appellants filed post-trial motions on February 3, 2012, requesting a new trial. The trial court denied Appellants' motions on April 18th. On May 4th, the verdict was reduced to a judgment, and Appellants took the timely instant appeal from the entry of judgment.[5]

Appellants present the following questions for our review:

> Did the trial court abuse its discretion when it refused to instruct the jury as to Strict Liability Upon Proof of Malfunction where [Appellants] not only established that [Appellee's] paint products had malfunctioned but also ruled out all other reasonable, secondary causes of malfunction?
>
> Did the trial court err when it permitted [Appellee's] expert, Robert Russell, to opine that the fire was not caused by spontaneous combustion even though Mr. Russell: a) was admittedly incapable and unqualified to determine whether something can chemically react and spontaneously ignite; b) did not know anything about the reactivity of [Appellee's] paint products; and c) could not identify an alternative cause of the fire?
>
> Did the trial court err [when] it permitted [Appellee's] expert, Tara Henrikson, to render opinions derived from an admittedly unreliable, ad hoc test that has never been

[4] Ten of the twelve jurors agreed with the verdict, and two disagreed. N.T., 1/24/12, at 268-69.

[5] The trial court did not order Appellants to file a Pa.R.A.P. 1925(b) statement.

> acknowledged, accepted or utilized by any member of the scientific community?
>
> Did the trial court abuse its discretion when it permitted [Appellee] to present evidence regarding the lack of any similar complaints without first requiring [Appellee] to produce records or otherwise establish that it had a means to identify prior, substantially similar accidents involving the product at issue?
>
> Did the trial court err when it instructed the jury that all experts had tested the same products which were utilized at the time of the fire even though: a) the products used at the time of the fire could not be tested as they were destroyed by the fire; and b) [Appellee] intentionally provided testifying experts with different products for testing?

Appellants' Brief at 2-3.

When reviewing an appeal following the denial of a post-trial motion seeking a new trial,

> [o]ur standard of review . . . is whether the trial court clearly and palpably committed an error of law that controlled the outcome of the case or constituted an abuse of discretion. In examining the evidence in the light most favorable to the verdict winner, to reverse the trial court, we must conclude that the verdict would change if another trial were granted. . . .

Schmidt v. Boardman Co., 958 A.2d 498, 516 (Pa. Super. 2008) (citation omitted). An abuse of discretion will be only found "when the trial court has rendered a judgment that is manifestly unreasonable, arbitrary, or capricious, has failed to apply the law, or was motivated by partiality, prejudice, bias, or ill will." ***Donoughe v. Lincoln Elec. Co.***, 936 A.2d 52, 68 (Pa. Super. 2007) (citation omitted).

Appellants first claim that the trial court erred in refusing their request for a jury instruction on the strict liability theory of malfunction.[6] They assert that their trial evidence established a proper foundation for the jury to infer that: (1) Appellee's T77F37 and T77F38 precatalyzed lacquers malfunctioned when they created overspray dust that self-heated and spontaneously ignited; and (2) the occurrence of the malfunction and resultant fire established the existence of the defect. Moreover, they argue that the trial court erred by concluding that they failed to provide adequate notice of their intent to pursue a claim based on malfunction. For the reasons that follow, we conclude that no relief is due.

When reviewing the underlying claim that a trial court's jury instruction were inadequate, we must

> determine whether the trial court committed a clear abuse of discretion or error of law controlling the outcome of the case. It is only when the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue that error in a charge will be found to be a sufficient basis for the award of a new trial.

Smith v. Morrison, 47 A.3d 131, 134-35 (Pa. Super.) (citation omitted), *appeal denied*, 57 A.3d 71 (Pa. 2012).

[6] Appellants properly preserved this issue in the final charging conference by raising a proposed instruction, taking an exception to the denials of their requested proposed instructions, and challenging the denial of their proposed malfunction instruction in their post-trial motions. ***See Meyer v. Union R. Co.***, 865 A.2d 857, 861 (Pa. Super. 2004)

The Pennsylvania Supreme Court, in ***Rogers v. Johnson & Johnson Prods., Inc.***, 565 A.2d 751 (Pa. 1989), adopted malfunction as an "evidentiary approach" to proving a products liability claim under Section 402A of the Restatement (Second) of Torts. ***Id.*** at 754.[7] In ***Rogers***, the plaintiff suffered second and third degree burns to his leg following the application of a splint. ***Id.*** at 752. The splint utilized layers of a plaster-wrapping product manufactured by defendant, Johnson & Johnson, which was designed to release heat when dipped in water prior to application. ***Id.*** The plaintiff, along with his wife, commenced an action against Johnson & Johnson and two hospitals. ***Id.*** The plaintiffs claimed, *inter alia*, that the wrapping product was defective. ***Id.*** at 752-53. At trial, however, the plaintiffs presented evidence tending to eliminate medical malpractice as a cause of the burns. ***Id.*** at 753. Johnson & Johnson, in its defense, presented evidence that the resident who applied the splint was negligent. ***Id.*** The jury found that Johnson & Johnson's plaster wrap was defective as a result of malfunction and returned a verdict in favor of the plaintiffs. ***Id.***

Johnson & Johnson took an appeal to this Court, and, in a published opinion, we reversed and granted a new trial. ***Rogers v. Johnson &***

[7] Section 402A of the Restatement (Second) of Torts provides for strict liability against a manufacturer of a product when the plaintiff demonstrates that: (1) the product was defective; (2) the defect caused the plaintiff's injury; and (3) the defect existed at the time the product left the manufacturer's control. ***Dansak v. Cameron Coca-Cola Bottling Co.***, 703 A.2d 489, 495 (Pa. Super. 1997). The Pennsylvania Supreme Court adopted section 402A in ***Webb v. Zern***, 220 A.2d 853 (Pa. 1966).

Johnson Prods., Inc., 533 A.2d 739 (Pa. Super. 1987). We concluded that the trial court erred in submitting the question of malfunction to the jury because the plaintiffs failed to eliminate secondary causes for the occurrence, namely, Johnson & Johnson's evidence that the physician was negligent in the application of the splint. ***Id.*** at 747.

The Pennsylvania Supreme Court reversed our order granting a new trial. ***Rogers*** 565 A.2d at 755. The ***Rogers*** Court found that the plaintiffs' evidence of malfunction and Johnson & Johnson's evidence of the physician's negligence were not incompatible, and held that "so long as the plaintiff's presented a case-in-chief free of secondary causes which justified the inference of a defect in the product, the jury was free to accept their scenario." ***Id.*** (footnote omitted). The Court reasoned:

> A plaintiff presents a *prima facie* case of strict liability by establishing that the product was defective and that the product caused the plaintiff's injury. In most instances the plaintiff will produce direct evidence of the product's defective condition. In some instances, however, the plaintiff may not be able to prove the precise nature of the defect in which case reliance may be had on the "malfunction" theory of product liability. This theory encompasses nothing more than circumstantial evidence of product malfunction. It permits a plaintiff to prove a defect in a product with evidence of the occurrence of a malfunction and with evidence eliminating abnormal use or reasonable, secondary causes for the malfunction. It thereby relieves the plaintiff from demonstrating precisely the defect yet it permits the trier-of-fact to infer one existed from evidence of the malfunction, of the absence of abnormal use and of the absence of reasonable, secondary causes. . . .

Id. at 754 (citations omitted).

In ***Barnish v. KWI Bldg. Co.***, 980 A.2d 535 (Pa. 2009), the Pennsylvania Supreme Court reiterated, "'Under Pennsylvania law, the application of the malfunction theory provides a means of proving a defect, but does not alter the basic requirements of section 402A of the Restatement (Second) of Torts.'"[8] ***Id.*** at 543 (citation omitted). The Court continued:

> While reminiscent of the logic of a *res ipsa loquitur* case, the malfunction theory requirements correlate with the three elements of a standard 402A claim. First, the "occurrence of a malfunction" is merely circumstantial evidence that the product had a defect, even though the defect cannot be identified. The second element in the proof of a malfunction theory case, which is evidence eliminating abnormal use or reasonable, secondary causes, also helps to establish the first element of a standard strict liability case, the existence of a defect. By demonstrating the absence of other potential causes for the malfunction, the plaintiff allows the jury to infer the existence of defect from the fact of a malfunction. For example, by presenting a case free of abnormal uses, such as using the product for an unintended purpose, the plaintiff can demonstrate that the product failed to perform as a reasonable customer would expect; thus, that it malfunctioned. Similarly, by eliminating other reasonable secondary causes, a plaintiff

[8] In ***Barnish***, the plaintiffs claimed that a sprinkler system at a manufacturing plant was defective because it failed to activate during a fire, despite properly operating for ten years before the incident. ***Barnish***, 980 A.2d at 539-40. The trial court granted summary judgment in favor of the manufacturer of the sprinkler system, and we affirmed. ***Id.*** at 544.

The Pennsylvania Supreme Court affirmed, concluding that the plaintiffs failed to adduce sufficient evidence to establish a defect in the sprinkler system based on a malfunction theory. ***Id.*** Specifically, the Court held that the plaintiffs failed to adduce any "evidence explaining how the product could be defective when it left the manufacturer's control and yet still function properly for a period of time." ***Id.*** at 547.

> allows the jury to infer that a defect in the product caused the malfunction, as opposed, for example, to operator error or failure to service the equipment. Similarly, by presenting a case free of "abnormal uses" by the plaintiff and free of "other reasonable secondary causes," a plaintiff can establish through inference from circumstantial evidence the second and third elements of a 402A case, that the alleged defect caused the injury (as opposed to another cause) and that the defect existed when it left the manufacturer's control (as opposed to developing after the product left the manufacturer's control).

Id. at 541-42 (citation and footnote omitted).

The ***Barnish*** Court noted that circumstantial evidence of a product's defect includes:

> (1) the malfunction of the product; (2) expert testimony as to a variety of **possible** causes; (3) the timing of the malfunction in relation to when the plaintiff first obtained the product; (4) similar accidents involving the same product; (5) elimination of other possible causes of the accident; and (6) proof tending to establish that the accident does not occur absent a manufacturing defect.

Id. at 542-43 (citation omitted).

Instantly, Appellants assert that they established a proper foundation for the jury to infer that the T77F37 and T77F38 precatalyzed lacquers were defective because they self-heated to the point of self-ignition, and thus caused the fire by spontaneous combustion. At trial, Appellants called the head of Custom Designs' finishing department at the time of the fire, David Reese, who was working in the spray booth on the day of the fire. Reese initially testified as to the spraying operations generally and stated that the creation and accumulation of "overspray dust" was a common occurrence.

N.T., 1/18/12, at 169. On a normal workday, he estimated a one-half to three-quarter inch layer of overspray accumulated in the booth, although the it formed deeper piles near the filters. ***Id.*** at 177. After Appellants' counsel refreshed his recollection, Reese stated that his "guess" was that one inch of overspray dust would accumulate. ***Id.*** at 178.

As to the incident at issue at trial, Reese testified that on the morning of November 4, 2002, he arrived at Custom Designs at 5:30 a.m., swept the spray booth of overspray dust left from the prior day, and checked whether the filters needed to be changed. ***Id.*** at 197-99. During the course of the day, he used five to seven gallons of the T77F37 and T77F38 precatalyzed lacquer products, which he mixed with a solvent, methyl amyl ketone ("MAK"), before spraying. ***Id.*** at 186, 201. He also used approximately one quart of pigmented conversion varnishes. ***Id.*** at 200.

At approximately 4:00 p.m., five to seven minutes before the fire, Reese left the spray booth to sand pieces for finishing. ***Id.*** at 203. When he returned, he saw a mark on the floor—a "black spot . . . about 12 inches around" and approximately six inches from the filters at the rear of the booth. ***Id.*** at 204. He testified that the depth of the overspray dust at that time was the same as that on a "normal day." ***Id.*** He "walked over, looked at it, scuffed it with [his] foot and it exploded" into flames. ***Id.*** at 205. The resulting fire destroyed the finishing department and severely damaged the building.

At trial, Appellants' expert, Dr. Richard Roby, Ph.D., P.E., described spontaneous combustion as "a special form of smoldering ignition that does not involve an external heating process." N.T., 1/20/12, at 107. According to Dr. Roby, spontaneous combustion by self-heating involves

> [a]n exothermic reaction within the material [that] is a source of energy that leads to ignition and burning. The key concept in ignition by self-heating is the ability of the material to dissipate the heat generated by the internal exothermic reaction. If the heat generated by the reaction cannot be dissipated to the surrounding the material will rise in temperature to the extent that reaction rate accelerates, i.e., run away, and a smolder front is formed. Key variables in self-heating include the ambient temperature, the pile size and the reaction kinetics of the exothermic process.

Id. Reaction kinetics, in turn, controls how quickly a material heats. ***Id.*** at 108.

Dr. Roby conducted predictive modeling tests to determine the self-heating characteristics of overspray dust from the T77F37 and T77F38 precatalyzed lacquers. ***Id.*** at 119. His testing consisted of creating and collecting overspray dust from the products, drying the dust for twenty-four hours, and then placing the dust in wire mesh cubes of varying sizes. ***Id.*** at 125. The cubes were suspended in an oven and heated to specific temperatures to determine their reaction kinetics. ***Id.*** at 120, 123.

Dr. Roby's samples ignited at the following oven temperature: 135° Celsius (275° Fahrenheit) for a two-inch cube, 118° Celsius (244.4° Fahrenheit) for a four-inch cube, and 110° Celsius (230° Fahrenheit) for a

six-inch cube.[9] ***Id.*** at 125. At lower temperatures, the cubes would "self heat" but not ignite. ***Id.*** at 126.

Dr. Roby extrapolated that "dry" overspray would not spontaneously combust at a pile height under fifteen to twenty **feet**. ***Id.*** at 147. However, he suggested that the presence of hydrocarbons, whether oils or solvents, reduced the critical pile size for spontaneous combustion. ***Id.*** at 141; N.T., 1/23/12, at 27-28. Therefore, he applied a "wet" factor of 100 to account for the presence of hydrocarbons and opined that (1) the critical pile size of "wet" overspray dust was "a couple of inches"; and (2) on the day of the fire, the dust from T77F37 and T77F38 precatalyzed lacquers self-ignited and was a "competent ignition source." N.T., 1/20/12, at 145, 147-48.

In addition to this expert evidence, Appellants presented evidence that Custom Designs had a long standing business relationship with Appellee and no incidents occurred when Custom Designs used Appellee's non-precatalyzed products. ***See*** N.T., 1/19/12, at 7. However, Custom Designs began using the T77F37 and T77F38 precatalyzed lacquers on a regular basis in the fall of 2002, less than one month before the fire. ***Id.*** at 15, 18-19. Appellants, through its expert witnesses, also eliminated secondary causes of the fire including mechanical, electric, and static electrical

[9] Dr. Roby testified to temperatures in terms of degrees Celsius. Because Appellee's expert testified using the Fahrenheit scale, we have added the corresponding degrees Fahrenheit to Dr. Roby's testimony to facilitate comparison.

sparking, and negligent factors such as careless smoking. ***Id.*** at 161-68; N.T., 1/20/13 at 78-105.

Appellants, throughout trial, argued that their evidence established a basis to infer the existence of a defect under malfunction. ***See*** N.T., 1/23/12, at 101. In their proposed jury instructions, Appellants requested that the trial court issue the malfunction instruction in Pennsylvania Suggested Standard Civil Jury Instruction 16.90.[10] Appellants conceded, however, that: (1) they initially pursued design defect and failure-to-warn claims; (2) they did not identify a malfunction theory of liability until "the first draft of our pretrial order middle of December," one month before trial; and (3) their request for a malfunction instruction sounded in a manufacturing defect claim rather than a design defect claim. N.T., 1/24/12, at 160-61, 163. The court denied the request for a malfunction instruction, reasoning, in relevant part that the late identification of the theory placed "an unreasonable onus on the part of [Appellee] . . . to go

[10] The suggested standard jury instruction states:

> A plaintiff in a strict liability case may prove his or her case merely by showing the occurrence of a malfunction of a product during normal use. The plaintiff need not prove the existence of a specific defect in the product. The plaintiff must prove three facts: that the product malfunctioned, that it was given only normal or anticipated use prior to the accident, and that no reasonable secondary causes were responsible for the accident.

Pa. SSJI (Civ) § 16.90.

ahead and test all other products that [were] involved in this thing." ***Id.*** at 164.

Subsequently, when denying Appellants' post-trial motion seeking relief on the failure to issue a malfunction instruction, the trial court reiterated:

> [Appellants] cannot decide to assert a new theory of liability on the eve of trial. Such a position would severely prejudice [Appellee], who would have had insufficient notice and a severely diminished ability to prepare its response, especially since by that time discovery already had long been completed. This new theory attacks the manufacturing process of [Appellee's] products, which had never been identified and which had never been the subject of any pre-trial discovery . . . .

Trial Ct. Op., 4/18/12, at 9.

Following our review, we detect no abuse of discretion in the trial court's determination of the trial court that a malfunction instruction was not appropriate under the circumstance of the case. Appellants, when requesting the instruction, conceded that they pursued claims against Appellee based on design defect and failure to warn theories of liability. They further admitted that their request for a malfunction instruction was based on a manufacturing theory of liability. Critically, Appellants admitted that they asserted a malfunction theory, and thus a manufacturing theory of liability, only one month before trial.[11] Therefore, we agree that Appellants'

[11] By way of illustration, the American Law Institute cogently summarized the categories of product defect theories:

request for a malfunction instruction introduced new theories of liability not properly developed before trial.

Moreover, although Appellants argue they established a proper foundation for the jury to infer the existence of a defect, they sought liability based on two specific products, the T77F37 and T77F38 precatalyzed lacquers. However, Reese testified to using four to six different products on the day of the fire. In light of this record, we also agree with the trial court that the issuance of a malfunction instruction would place into issue all other

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> . . . A product:
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> > (a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;
> >
> > (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;
> >
> > (c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

Restatement (Third) of Torts: Prod. Liab. § 2 (1998).

products in use on the day of the fire, and impose an unreasonable burden on Appellee to rebut the inference that the two to four other products in use were not defective.

In sum, we find no basis to disturb the conclusion of the trial court that Appellants' late identification of a malfunction theory to prove the alleged defect in the T77F37 and T77F38 products implicitly introduced new theories of liability and placed other products at issue without proper development during the pretrial proceedings. Thus, we agree with the trial court that Appellants were not entitled to a new trial based on the court's decision not to issue a malfunction instruction.

Appellants, in their second claim, contend that the trial court erred in permitting Appellee's fire investigation expert, Robert Russell, to testify that the spontaneous combustion did not cause the fire.[12] Appellants argue that Russell lacked proper qualifications to discuss spontaneous combustion and note that he conceded he was unqualified to discuss the chemical aspects of spontaneous combustion. Appellants also observe that the court precluded a similarly qualified expert, Pennsylvania State Trooper David Klitsch, from offering his opinion that spontaneous combustion caused the fire. We find no reversible error.

> [W]e review challenges to a trial court's qualification of an expert witness under an "abuse of discretion" standard.

[12] This issue was litigated in motions *in limine*.

> The testimony of expert witnesses is governed by Pa.R.E. 702, which states:
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> > If scientific, technical or other specialized knowledge beyond that possessed by a layperson 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 opinion or otherwise.

Reading Radio, Inc. v. Fink, 833 A.2d 199, 207 (Pa. Super. 2003) (citations omitted).

> [T]he standard for qualification of an expert witness is a liberal one. The test to be applied when qualifying an expert witness is whether the witness has any reasonable pretension to specialized knowledge on the subject under investigation. If he does, he may testify and the weight to be given to such testimony is for the trier of fact to determine.

Bindschusz v. Phillips, 771 A.2d 803, 808 (Pa. Super. 2001).

Instantly, Russell was certified as a fire investigator by the International Association of Arson Investigators and the National Board of Fire Service Professionals. N.T., 1/23/12, at 133-34. He was a fire investigator for more than thirty years and investigated over 2,000 fires. ***Id.*** at 131, 135. He investigated five fires "that were conclusively spontaneous combustion." ***Id.*** at 137. Those fires included causes such as teak oil, sawdust, and oil residue. ***Id.*** at 138. During cross examination by Appellants on his qualifications, Russell conceded that it was beyond his expertise to analyze the chemistry of a product for its propensity to spontaneously combust. ***Id.*** at 141. However, he maintained that his

"experience and education in fire investigations allow[ed him] to make a determination as to whether or not spontaneous ignition could be a cause of the fire." ***Id.***

Based on this record, we agree with the trial court that Russell was qualified as an expert in the causes and origins of fires, and possessed sufficient knowledge and experience to discuss spontaneous combustion from a fire investigator's perspective. ***See Reading Radio Inc.***, 833 A.2d at 207. Accordingly, we discern no abuse of discretion in permitting Russell to opine, based on his review of the evidence, that spontaneous combustion was not a cause of the fire.

Although Appellants argue that Russell's lack of expertise to analyze the chemical properties of products at issue precluded him from discussing spontaneous combustion, our review reveals that his testimony on spontaneous combustion fell within the scope of his experience and knowledge. Specifically, Russell opined that he excluded spontaneous combustion as a cause because any self-heating in the overspray dust would dissipate into the environment, and that he would expect to see "fingers" of combustion in the dust if self-heating occurred, and not the circle described by Reese. N.T., 1/23/12, at 169-71, 173-74. This testimony was within his ken as a fire investigator and his experience with spontaneous combustion. Accordingly, his lack of qualifications to discuss the specific chemical

reactions involved in the overspray dust went to the weight rather than admissibility of his opinions. ***See Bindschusz***, 771 A.2d at 808.

Additionally, the record belies Appellants' suggested equivalency between Russell and their expert, Trooper Klitsch, who the trial court ruled was unqualified to opine that chemical reactions and spontaneous combustion caused the fire. Instantly, Trooper Klitsch authored two reports following his investigation of the November 4, 2002 fire. First, in his investigation report, the trooper concluded that "the fire was accidental in nature and was caused by a reaction of the products being used at the time." Ex. B. to Appellee's Mot. *in Limine* to Preclude Any Evidence of Conclusions of Trooper David B. Klitsch as to Cause of Fire. Second, in his public information release report, the trooper opined, "The fire originated in a paint booth and occurred as a result of a reaction between products being used/applied. This situation resulted in a spontaneous combustion condition." ***Id.***

Appellee filed a motion *in limine* seeking to preclude Trooper Klitsch from offering an opinion on causation. In support, Appellee attached portions of Trooper Klitsch's deposition in which the following exchange occurred:

> [Appellants' Counsel]: As you sit here today, could you offer an opinion as to whether or not the products that were in that paint booth actually could chemically react and spontaneously ignite?
>
> [Trooper Klitsch]: Not at all.

> [Appellants' Counsel]: The opinions you rendered in that regard, was that simply based upon your systemic approach under the scientific method?
>
> [Trooper Klitsch]: That is correct.

Dep. of David B. Klitsch, 5/9/07, at 94. Subsequently, during cross-examination by Appellee, Trooper Klitsch admitted that his conclusion regarding spontaneous combustion was an "error":

> [Appellee's Counsel]: [C]an we agree that you did not make a definitive determination that this was a spontaneous combustion fire?
>
> [Trooper Klitsch]: We can agree on that.
>
> * * *
>
> And in preparing for today's deposition, I, in fact saw that, and **that's an error on my part**, that last sentence.

Id. at 124 (emphasis added).

The trial court granted Appellee's motion *in limine* to preclude the trooper from testifying as to his conclusions regarding the cause of the fire. Therefore, because the trooper conceded that he was not qualified to opine on spontaneous combustion and that his conclusion regarding spontaneous combustion was "an error," we find sufficient support in the record supporting the trial court's determination that Trooper Klitsch and Russell

were not similarly situated to discuss spontaneous combustion in this case.[13] Accordingly, this argument warrants no relief.

Appellants' third claim is directed to the trial court's decision to overrule their ***Frye*** objection to Appellee's expert, Dr. Tara Henriksen, Ph.D.[14] Appellants focus on a hotplate test Dr. Henriksen conducted instead of an EPA 1040-C oven test. Appellants assert that the hotplate test was an *ad hoc* test not generally accepted in the scientific community, and that the trial court should not have permitted her testimony that the T77F37 and T77F38 precatalyzed lacquers were not susceptible to spontaneous combustion. No relief is due.

We review the trial court's ruling upon a ***Frye*** issue for an abuse of discretion. ***Grady v. Frito-Lay, Inc.***, 839 A.2d 1038, 1046 (Pa. 2003). As this Court noted:

> The law set forth in ***Frye*** and its progeny governs the admission of novel scientific evidence in Pennsylvania. The ***Frye*** Court wrote as follows:
>
> > Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is

[13] Appellants do not present an independent claim that the trial court erred in precluding Trooper Klitsch from discussing spontaneous combustion.

[14] Appellants presented this objection in a motion *in limine*.

> made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.
>
> ***Frye*** does not apply every time science enters the courtroom. ***Frye*** does apply, however, where an expert witness employs a novel scientific methodology in reaching his or her conclusion.

Folger ex rel. Folger v. Dugan, 876 A.2d 1049, 1058 (Pa. Super. 2005) (citations omitted).

In ***Commonwealth v. Rodgers***, 605 A.2d 1228 (Pa. Super. 1992), we observed:

> In dealing with such challenges to the admissibility of scientifically adduced test results, courts have followed two different approaches: (1) applying the ***Frye*** standard as a three-prong test, or (2) treating the issue as a challenge to the weight of the particular evidence to be admitted. Under the prior method, the first prong considers whether there is an underlying theory which is generally accepted in the scientific community and which supports a reliable conclusion; the second prong determines whether techniques or experiments currently exist capable of producing generally acceptable and reliable results; and the third prong addresses whether the testing laboratory in question correctly performed the scientific techniques and procedures when analyzing specific forensic samples. The alternative approach applies the first two prongs of the ***Frye*** test . . . but treats the third prong as a credibility determination for the factfinder.

Id. at 1235 (citations omitted). The ***Rodgers*** Court endorsed the latter approach and concluded that the question of whether scientific procedures were performed correctly went to the credibility rather than the admissibility of the scientific evidence. ***Id.*** at 1236.

In the instant matter, Dr. Henriksen testified she conducted two government tests, referred to as the EPA 1050-A and 1050-B tests, to determine whether the T77F37 and T77F38 precatalyzed lacquers and their overspray dust were "pyrophoric," that is, capable of ignition within five minutes after contact with air and without an external heat source. N.T., 1/24/12, at 65-67. The products and their overspray dust were not pyrophoric. ***Id.***

Dr. Henriksen acknowledged that the third in the federal government's tests for spontaneous combustion—the EPA 1050-C test—was an oven test similar to the one conducted by Appellants' expert, Dr. Roby. ***Id.*** at 67. However, she concluded that an oven test was inappropriate to the circumstances of the case because the T77F37 and T77F38 possessed autocatalytic properties that would transform the product into a different type of material when exposed to high temperatures. ***Id.*** at 42-42, 48-49, 67-68. She instead conducted a hot plate test and heated samples of overspray dust to 165° Fahrenheit for one hour, which, she concluded, revealed no signs of self-heating. ***Id.*** at 69-70, 72-75, 81. Dr. Henriksen opined that it was "not possible for this dust to spontaneously combust" under the circumstances preceding the fire at Custom Designs. ***Id.*** at 82.

Appellants, in their motion *in limine*, asserted that Dr. Henriksen's "hotplate" test was an *ad hoc* test not generally accepted in the scientific community and attached an affidavit by Dr. Roby to support their position.

See Appellants' Mot. to Exclude Test. Of Expert Henriksen Including Motion to Exclude Novel Scientific Evidence under Rule 207.1, 10/28/11. Appellant's cited Dr. Roby's affidavit, which asserted that: (1) Dr. Henriksen should have conducted the EPA 1040-C oven test "that would have allowed her to identify if the paint overspray dust was capable of self-heating" in large quantities and/or over a long period of time; (2) that the hot plate test was "not generally accepted for th[e] purpose" of evaluating the self-heating properties of paint overspray dust; and (3) the hot plate test was not conducted in a generally accepted manner because Dr. Henricksen did not properly configure the sample before heating. Aff. of Richard J. Roby, 10/26/11, at ¶¶ 24, 25, 27.

However, Dr. Roby opined that Dr. Henriksen's test showed that her samples did self-heat despite the problems in her methodology. ***Id.*** at ¶ 28. He also acknowledged that a "hotplate" test was a generally recognized method to determine self-heating properties under certain circumstances. ***Id.*** at ¶ 26.

The trial court denied Appellants' motion *in limine*. The court reasoned that Appellants' objection "[was] more directed towards the expert's application of [her] opinions, as opposed to methodology, and [did] not fall under the purview of ***Frye***." Order, 1/3/12, at 4. The court concluded that the "validity and application of the expert's opinions [were] fodder for the jury's evaluation." ***Id.***

We detect no abuse of discretion in the trial court's decision to overrule Appellants' ***Frye*** objection to Dr. Henriksen's hot plate test. As Dr. Roby noted, a hotplate test is generally accepted to produce reliable results in certain circumstances. Indeed, Dr. Roby opined that her test produced results that supported his own theory of self-heating, but that Dr. Henriksen misinterpreted the data. Therefore, Appellants' arguments—that (1) Dr. Henriksen's test was not an appropriate test of the conditions at the time of the November 4, 2002 fire, (2) Dr. Henriksen deviated from the standard methodology, and (3) Dr. Henriksen did not properly conduct the test—went to the weight of her conclusions, not their admissibility under ***Frye***. ***See Rodgers***, 605 A.2d at 1235. Thus, no relief is due.

Appellants next claim that the trial court erred in admitting lack of prior claims evidence through Appellee's corporate regulatory director, Elizabeth Gilbert. Appellants assert that the trial court erred in rejecting their request for an *in camera* review of all complaints received by Appellee before admitting the lack of prior complaints evidence and that this error was highlighted by the subsequent testimony by Appellee's director of regulatory services, Ken Gable.

We review evidentiary rulings for an abuse of discretion or error of law. ***Gaudio v. Ford Motor Co.***, 976 A.2d 524, 535 (Pa. Super. 2009). In ***Spino v. John S. Tilley Ladder Co.***, 696 A.2d 1169 (Pa. 1997), the Pennsylvania Supreme Court held

> that evidence of the non-existence of prior claims is admissible subject to the trial court's determination that the offering party has provided a sufficient foundation—that they would have known about the prior, substantially similar accidents involving the product at issue. Clearly, the determination of admissibility turns upon the facts and circumstances of the particular action. As such, the trial court must assess whether the offering party lays a proper foundation by establishing the accident occurred while others were using a product similar to that which caused plaintiff's injury.

Id. at 1173. The Court, however, cautioned:

> [W]e are careful to note that while evidence of the absence of prior claims is admissible as relevant to the issue of causation, the evidence does not dictate an absolute finding that the product is not defective or unreasonably dangerous. . . . .
>
> * * *
>
> Opposing counsel can, and indeed should, soundly attack any prior claims testimony. We believe it is incumbent upon the party opposing the absence of prior claims testimony to attack such evidence through cross-examination, as well as request a cautionary or limiting instruction be provided.

Id. at 1174-75.

In ***Moroney v. GMC***, 850 A.2d 629 (Pa. Super. 2004), the plaintiff turned off her vehicle, the doors automatically unlocked, and an assailant entered her vehicle and attacked her. ***Id.*** at 631. She commenced a negligence and products liability action against the manufacturer of the automobile, asserting, in relevant part, that her car was defective for automatically unlocking the doors when the ignition was disengaged. ***Id.*** At trial, a defense witness noted that the automatic unlocking feature was

installed in most car lines since 1994, approximately one year before the attack, and 37 to 38 million vehicles had the feature. ***Id.*** at 631, 633. The witness continued that he "directed research be done . . . to determine whether there were other claims or lawsuits involving injuries as a result of the automatic door unlock feature," but found no similar instances. ***Id.*** at 633. Although the plaintiff in ***Moroney*** objected to the reliability of the proffer, the trial court overruled the objection. ***Id.***

This Court affirmed, emphasizing that the proper foundation for evidence of the absence of prior claims or lawsuits required only that the offering party show that it "should and would have the means to know about any prior, substantially similar accidents involving the product at issue." ***Id.***

Instantly, Elizabeth Gilbert testified that the T77F37 and T77F38 lacquers were first sold in 1995 or 1996, depending on the size of the container sold.[15] N.T., 1/19/12, at 220. Since then, Appellee sold 3.2 million gallons of the T77F37 product and 1.27 million gallons of the T77F38 product. ***Id.***

Appellants raised an objection to Gilbert's impending testimony regarding the lack of prior complaints, arguing, "[W]e never got to look at the claims records." ***Id.*** at 222. Citing ***Spino***, Appellants asserted an *in*

[15] Gilbert was called as an adverse witness by Appellants and examined as-of-cross regarding the labeling of the T77F37 and T77F38 products. She was then "cross-examined" by Appellee, at which time it elicited the challenged testimony.

camera review was necessary before admitting evidence of the lack of prior complaints. ***Id.*** Appellants further claimed that it would be unfair for Appellee to proceed with the introduction of lack of prior claims evidence without permitting a review of the claims documents. ***Id.*** at 223-25. The trial court overruled the objection, noting that the issue of disclosing the claims documents was addressed during discovery, and a request or challenge to the discovery ruling "could have been raised in a motion *in limine*." ***Id.*** at 224-25.

Gilbert continued to testify that a claim of spontaneous combustion would have come to her attention because she "work[ed] with various groups throughout [the company] with all allegations for [Appellee] to determine the claims and whether they have merit or not or if there's other requirements such as reporting obligations that we might have to do." ***Id.*** at 225-26. She stated that her department was also responsible for answering a 24-hour emergency telephone line through which claims were received. ***Id.*** at 227. Gilbert testified that she searched her records and checked with other departments to determine whether they received claims of spontaneous combustion regarding T77F37 and T77F38, or the individual components of both products. ***Id.*** at 228-29. She concluded that she "didn't find anything" with regard to a claim of spontaneous combustion. ***Id.*** at 230.

Subsequently, Appellee's director of regulatory services, Ken Gable testified that "[i]n the case of the conversion varnishes, we [Appellee] have never had a confirmed instance of spontaneous combustion with these products that we did not find had a cause of ignition, was caused by an ignition source, was something other than spontaneous combustion." N.T., 1/23/13, at 244. When asked whether Gilbert would be aware of the unconfirmed allegations of spontaneous combustion he referred to, Gable testified:

> The problem is she might not know of things that we know of. If there is an issue that is of concern we will raise it with her, but if it's proven that the allegation is false, and in most cases not just for spontaneous combustion, for most of all the complaints it turns out that the allegations are false, we are not going to waste her time on something that we have already proven is not the case.

Id. at 246.

Following our review, we find no legal support for Appellants' present argument that they were entitled to an *in camera* review of all prior complaints regarding fires. ***See Moroney***, 850 A.2d at 633. Moreover, in light of Gilbert's testimony that she reviewed her records, her department's records including a 24-hour emergency line, and inquired with other departments regarding claims of spontaneous combustion, the trial court had a reasonable basis in the record to conclude that Appellee proffered evidence that she would have known about the prior similar accidents. ***See Spino***, 548 A.2d at 1174; ***Moroney***, 850 A.2d at 633. Although Gable later

testified that certain claims were not forwarded to Gilbert, Gable's testimony went to the weight of Appellee's absence of prior claims evidence, not the admissibility of Gilbert's testimony in the first instance. ***See Moroney***, 850 A.2d at 633. Accordingly, we detect no abuse of discretion in the trial court's conclusion that a proper foundation for the absence of prior claims evidence was established.

To the extent Appellants assert that fairness dictated disclosure of all complaints, our review record establishes no basis to disturb the determination of the trial court that Appellants did not timely challenge the discovery master's order that denied in part their request to inspect Appellee's documents. Furthermore, we detect no abuse of discretion in the decision of the trial court that it was inappropriate, in the midst of trial, to resurrect a discovery dispute, request disclosure, and conduct an *in camera* review. Accordingly, no relief is due.

Appellants' final claim is directed to the following jury instructions of the trial court indicating that Dr. Roby and Dr. Henriksen tested the same products. Appellants contend that there existed an issue of fact as to whether the product tested by Dr. Henriksen were precatalyzed and, thus, whether the results of her tests were relevant at trial. We find that Appellants failed to preserve this issue at trial.

It is well settled that it is within the discretion of the trial court to comment upon evidence. ***Williams v. Philadelphia Transp. Co.***, 203 A.2d

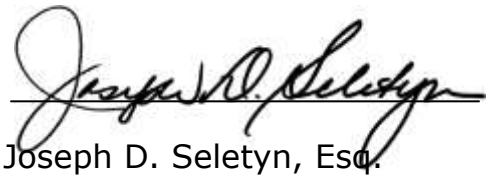
665, 668 (Pa. 1964). However, "[i]f the Court chooses to express an opinion it must be careful and take pains to instruct the jury in a way that will be understood by the members of the jury that the opinion of the Court is in no way binding upon them and that the jury is free to make its own determination." ***Id.*** (citations omitted).

Our rules of appellate procedure require that "[s]pecific exception shall be taken to the language or omission complained of." Pa.R.A.P. 302(b). Our decisional law also makes "clear that an appellant must make a timely and specific objection to a jury instruction to preserve for review a claim that the jury charge was legally or factually flawed." ***Stumpf v. Nye***, 950 A.2d 1032, 1041 (Pa. Super. 2008) (citations and quotation marks omitted).

Following our review, we are compelled to conclude that Appellants have waived this issue for appeal by failing to preserve an objection on the record to the instructions issued by the trial court. Appellants failed to place an objection in the record after the trial court initially issued its instruction to the jury following the testimony of Dr. Roby. ***See*** N.T., 1/23/12, at 84. Moreover, Appellants did not object when the court reissued the instruction in its charge. ***See N.T.***, 1/24/12, at 243. Therefore, this claim is waived.

Judgment affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/25/2013