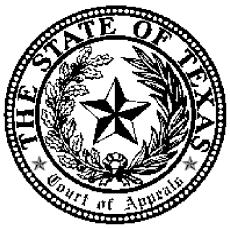
Affirmed and Opinion filed October 4, 2001.



In The

Fourteenth Court of Appeals

NO. 14-99-01163-CV

CARL A. ELLIS, Appellant

V.

MISSOURI PACIFIC RAILROAD D/B/A UNION PACIFIC RAILROAD COMPANY, Appellee

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On Appeal from the 164th District Court
Harris County, Texas
Trial Court Cause No. 98-21524

M E M O R A N D U M O P I N I O N

The parties are already familiar with the background of the case and the evidence adduced at trial, therefore, we limit recitation of the facts. We issue this memorandum opinion pursuant to Texas Rule of Appellate Procedure 47.1 because the law to be applied in the case is well settled. This is an appeal from the trial court's exclusion of a videotape from evidence at trial. We affirm.

Background

Appellant, Carl Ellis, injured his back while manually loading batteries weighing

approximately 70 pounds each at Union Station in Houston. Ellis sued appellee, Missouri Pacific Railroad ("the Railroad"), for negligence under the Federal Employer's Liability Act (FELA). 45 U.S.C.A. § 51, *et seq*. Specifically, Ellis claimed that the Railroad was negligent in failing to provide him reasonably safe and adequate equipment and methods for work, and that such negligence caused his injury.

At the jury trial, Ellis sought to introduce an approximately six-minute videotape. According to Ellis's offer of proof,[1] the tape is a training video created by the Railroad in which workers demonstrated the correct method to move batteries with a lift device called the "Genie." Ellis stated he was offering the tape "to show that the Railroad had mechanical lifting devices that were specially designed for lifting and moving [the type of batteries appellant was lifting when he sustained his injury]." The court refused to allow the tape to be shown to the jury. However, the court did admit an actual Genie lift into evidence for demonstrative purposes. Also admitted at trial was the testimony of a former Railroad employee, Rodney Tyson, in which he asserted that, prior to the time of Ellis' injury, the Railroad provided him with a Genie lift to move batteries. Tyson demonstrated to the jury the proper use of a Genie lift. Additionally, Ellis's expert, Dr. David Anderson, testified that the Railroad was negligent in failing to provide a lifting device to assist Ellis. Anderson also stated that the Genie lift would have assisted Ellis in moving the batteries without causing injury. Anderson was allowed to give his opinion as to the Genie lift's proper operation.

The jury found in Ellis' favor and awarded him $500,000, finding the Railroad 20% negligent and him 80% negligent. Under FELA, the award was reduced to $100,000 before offsets. In his sole issue, Ellis contends the trial court erred in excluding the videotape from evidence.

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[1] Ellis did not request the videotape as part of the appellate record. Further, the tape was not delivered to the court, despite an order from the court to do so. We thus limit our consideration of this appeal to the parties' undisputed descriptions of the tape. *See* TEX. R. APP. P. 38.1(f) (court of appeals will accept as true the facts stated unless another party contradicts them as untrue).

Standard of Review

The admission and exclusion of evidence is committed to the trial court's sound discretion; thus, we review under an abuse-of-discretion standard. *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex. 1995). A court abuses its discretion only when it acts in an unreasonable and arbitrary manner, or when it acts without reference to any guiding principles. *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991). We must uphold the trial court's evidentiary ruling if there is any legitimate basis for it. *Owens-Corning Fiberglas Corporation v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998). We will not reverse a trial court for an erroneous evidentiary ruling unless the error probably caused the rendition of an improper judgment. *Id.*

Did the Trial Court Err in Excluding the Videotape?

Appellant claims the trial court erred in excluding the tape because the tape showed the correct and safe method of moving the same-type batteries appellant moved when he was injured, thus was relevant to his negligence claim. We agree that the tape was relevant to the extent that it indicated that the Railroad could have, but did not, provide Ellis with the Genie lift, which was an alternative and possibly safer means of lifting the batteries. *See* TEX. R. EVID. 401 ("Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence). However, relevance alone does not conclusively establish that a piece of evidence is ultimately admissible. Although relevant, a trial court may nevertheless exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence. TEX. R. EVID. 403; *see also* TEX. R. EVID. 611(a) (placing duty on trial court to exercise reasonable control over the mode of presenting evidence so as to avoid needless consumption of time); *Sims v. Brackett*, 885 S.W.2d 450, 453 (Tex. App.–Corpus Christi 1994, writ denied) (citing rules 403 and 611(a), observing that trial court has authority to

exclude testimony to avoid the needless presentation of cumulative evidence).

As discussed above, the court admitted an actual Genie lift into evidence. In addition, the court allowed two witnesses to demonstrate and testify at length about that device's proper use and utility for safe loading of the same batteries Ellis worked with. The court also admitted evidence that the Railroad was aware of and utilized the Genie lift prior to Ellis's injury. With this evidence, Ellis was able to forcefully drive home to the jury that the Genie lift was a means employed by the Railroad that could have minimized any risk of injury to him when he moved batteries that day at Union Station. In this light, Ellis has failed to show that the tape would have provided any additional relevant evidence or that it would have lent any significant weight to the evidence that had already been presented multiple times. *See Sims*, 885 S.W.2d at 453 (test of whether evidence is cumulative is not merely whether the evidence to be adduced from the two witnesses is similar, but also whether the excluded testimony would have added substantial weight to the offering party's case).

Additionally, had the tape been shown, there would have been a danger of misleading and confusing the jury as to the issue of the utility and proper operation of the Genie lift. In the tape, the demonstration took place in a different setting than where Ellis did his work. Further, the batteries were moved using different methods than Ellis could have used. According to Ellis, the tape demonstrated a Railroad truck with a small boom crane mounted in the back. The Genie lift was used to move batteries in conjunction with the boom crane and a battery transportation unit, which is a small rolling platform. In contrast, Ellis moved the batteries onto a dolly in a third-floor interior room when he was injured. Ellis admitted that it would have been impossible to have utilized a boom truck at his location. As such, though Ellis wished to show the proper method of using the Genie lift, the method of moving the batteries in the tape was significantly different than the method Ellis could have used. Thus, we agree with the Railroad that showing the tape would have misled and confused the

jury as to the proper use of the Genie lift.[2]

Therefore, because the tape's probative value was substantially outweighed by the danger of confusion of the issues, misleading the jury, by considerations of undue delay, and needless presentation of cumulative evidence, we find the trial court did not abuse its discretion in excluding it. *See* TEX. R. EVID. 403.[3]

Finally, we note that even if the trial court erred in excluding the tape, there is no showing that the exclusion probably caused the rendition of an improper judgment. *Owens-Corning*, 972 S.W.2d at 43. The jury found in Ellis' favor and awarded him damages. We see nothing indicating that Ellis would have been awarded a higher amount or apportioned a lower percentage of fault had the jury seen the tape.

We therefore overrule Ellis' sole issue and affirm the judgment of the trial court.

/s/ Don Wittig
Senior Justice

Judgment rendered and Opinion filed October 4, 2001.
Panel consists of Justices Fowler, Seymore and Senior Justice Wittig.[4]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[2] This is especially so in view of the fact that Ellis was allowed to show the operation of the lift as it applied to the specific work he did, which differed from that in the tape.

[3] The trial court was also within its discretion in excluding cumulative evidence under TEX. R. EVID. 611(a).

[4] Senior Justice Don Wittig sitting by assignment.