Conditionally Grant and Opinion Filed January 15, 2016

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-14-01497-CV

IN RE J.H. WALKER, INC. D/B/A J.H. WALKER TRUCKING, RELATOR

On Appeal from the 44th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-12-00661

MEMORANDUM OPINION

Before Justices Bridges, Fillmore, and Evans
Opinion by Justice Bridges

In this petition for writ of mandamus, relator J.H. Walker, Inc. d/b/a J.H. Walker Trucking ("Walker Trucking") asserts the trial court abused its discretion by ordering death penalty sanctions for the alleged spoliation of evidence. We agree and conditionally grant mandamus relief.

Background

On December 15, 2010, Derwin Scott Graham ("decedent") was traveling north on Interstate 45 in Dallas County. While decedent was driving an eighteen-wheeler within the course and scope of his employment with Walker Trucking, the tractor trailer travelled off the road into a ditch and hit a concrete cistern. Nothing at the scene indicated decedent applied the brakes or tried to avoid driving off the road. The record contains conflicting evidence as to

whether the truck caught fire before or after it left the roadway and hit the concrete cistern. Decedent died from burns caused by the fire and explosion.

Benny Ellington, Walker Trucking's operations manager, went to the scene to ascertain what happened. Although officers from the Dallas County Sheriff's Department and representatives from the coroner's office were present, Ellington did not speak to them. When decedent's ex-wife arrived at the scene later in the morning, Ellington said she was "asking, you know, what had happened, and you know, all I could tell her was, you know, that I had been contacted and the accident occurred, and so that was it."

Scott White, Walker Trucking's director of safety, talked with an investigating officer who said the truck "just drove off the highway." White did not receive information from anyone at the scene that the truck caught fire before leaving the roadway. He only read that information two to three weeks later in the police report, which stated three witnesses said the truck appeared to be on fire while still traveling on the highway before it veered right, crashed into a concrete culvert inside a ditch, and then exploded. One witness also indicated the truck was leaking diesel fuel.

Walker Trucking's insurance carrier, Great West Casualty Company, sent a letter on December 15, 2010 noting its receipt of the loss and stating, "We are in the process of investigating the facts." Great West Casualty Company received a copy of the police report on January 4, 2011; however, nothing in the record indicates the insurer provided a copy of the report to Walker Trucking.

After the tractor trailer was towed from the scene to the salvage yard, John Walker ("Walker"), the president of Walker Trucking, instructed Oscar Starbuck, a maintenance manager, to see if any part of the tractor or trailer was salvageable. After inspecting the remains, Starbuck determined none of the burned tractor components were salvageable; however, he

removed the wheels and tires from the trailer. Walker instructed Starbuck to retrieve the electronic control mechanism ("ECM") if it was identifiable. The ECM was recovered, though it was badly damaged. Because of the extensive damage to the ECM, no data could be extracted. Walker Trucking stored the ECM until August 2012, when decedent's family specifically inquired about it in discovery.

On January 7, 2011, Walker decided to have the remains of the tractor and part of the trailer cut in half and crushed because he did not believe anything of value survived the explosion. The value of the salvaged tractor was $863, which offset part of the $8,600 wrecker bill.

Walker Trucking received a preservation of evidence letter from an attorney on January 18, 2011, but the tractor had already been destroyed.

Decedent's children and their mother (collectively "Graham") filed suit against Walker Trucking alleging negligent maintenance of the tractor and gross negligence. Graham also alleged Walker Trucking intentionally and purposefully destroyed the tractor and some maintenance records immediately after the incident in an attempt to hide and eliminate evidence. They sought wrongful death damages, survival damages, and punitive damages.

Walker Trucking filed a traditional and no evidence motion for partial summary judgment in which it argued Graham could not maintain claims for wrongful death and survival damages because Walker Trucking was a workers' compensation subscriber. Thus, it alleged Graham could recover punitive damages only upon a showing of Walker Trucking's intentional act or omission or gross negligence. On August 25, 2014, the trial court granted Walker Trucking's motion for partial summary judgment because "Walker Trucking had a valid worker's compensation policy covering decedent Derwin Scott Graham in full force and effect

on the date of the accident and is therefore entitled to the benefits and protections of Tex. Lab. Code § 408.001."

Later, Graham filed a motion for sanctions against Walker Trucking for spoliation of evidence and asked the court to award the fullest extent of sanctions allowed under statutory and common law, including striking Walker Trucking's pleadings and defenses. During a June 20, 2014 hearing, the court verbally announced it would include the standard spoliation instruction in the jury charge as to the tractor. The court specifically stated, in part, as follows:

> Okay. The Motion for Sanctions by the plaintiff- - the Court will allow the plaintiffs to have a spoliation presumption as to their causes of action.
>
> I am not going to grant death penalty sanctions against the defendant where we're just talking about money. You're still going to have to do the dog-and-pony show in front of the jury. I believe there's enough evidence here to support the Court finding a spoliation presumption and warranting a spoliation instruction, but you're still going to have to go through it.
>
> I do not believe that the sanction should include a striking of all the defendants' defenses, including the workers' comp bar. That stays in place. As a result, you're going to have to show gross negligence as to the plaintiffs.

The court never signed an order memorializing these rulings.

On July 3, 2014, the Texas Supreme Court issued *Brookshire Brothers, Ltd. v. Aldridge*, 438 S.W.3d 9 (Tex. 2014), which provided new parameters for determining whether spoliation occurred and, if so, the proper remedy. Walker Trucking filed a motion for reconsideration of the trial court's order granting the spoliation instruction, and the court held another hearing on October 30, 2014. At the conclusion of the hearing, the trial court stated, "[S]ome type of sanction is appropriate" and encouraged both parties to provide guidance on what the remedy should be based on its spoliation finding.

The trial court signed its spoliation order against Walker Trucking on November 6, 2014. The order struck Walker Trucking's pleadings, vacated the partial summary judgment rendered

in favor of Walker Trucking as to its workers' compensation defense, and rendered default judgment on liability as to Graham's negligence and gross negligence claims.

Walker Trucking then sought mandamus relief in this Court. We granted Walker Trucking's motion for temporary relief, stayed the trial of the case until further order, and abated the mandamus proceeding to allow the successor judge of the trial court to reconsider the ruling. After further proceedings, the trial court signed an order on April 30, 2015 declining to disturb the November 6, 2014 spoliation order.

Mandamus Standard of Review

Mandamus is an extraordinary remedy that is available in limited circumstances. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding); *In re Goodyear Tire & Rubber Co.*, 437 S.W.3d 923, 927 (Tex. App.—Dallas 2014, orig. proceeding). To obtain mandamus relief, a relator must show both that the trial court has clearly abused its discretion and that relator has no adequate remedy by appeal. *In re Prudential Ins. Co.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding). When, as here, a court imposes death penalty sanctions that have the effect of adjudicating the dispute, by striking pleadings and rendering a default judgment as to liability for negligence and gross negligence, but which do not result in the rendition of an appealable judgment, there is no adequate remedy by appeal. *TransAmerican Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 919 (Tex. 1991) (orig. proceeding). Thus, the only question before this Court is whether the trial court clearly abused its discretion by ordering death penalty sanctions. If the trial court abused its discretion, then Walker Trucking has no adequate remedy by appeal and mandamus is appropriate.

Spoliation Framework and Remedies

The spoliation of evidence is a serious issue. When a party fails to reasonably preserve discoverable evidence, the nonspoliating party's ability to present its claims or defenses may be significantly hampered. *Brookshire Bros.*, 438 S.W.3d at 17.

The trial court determines, as a question of law, whether a party spoliated evidence, and if spoliation occurred, the court must impose an appropriate remedy. *Id*. at 20. In order to find that spoliation has occurred, the trial court must determine (1) that the party failing to produce evidence had a duty to preserve the evidence, and (2) that it breached its duty to reasonably preserve material and relevant evidence. *Id*. The party alleging spoliation bears the burden of establishing that the nonproducing party had a duty to preserve evidence. *Id*. The standard governing the duty to preserve evidence resolves two related inquires: when the duty is triggered and the scope of that duty. *Id*. A duty is triggered only when "a party knows or reasonably should know that there is a substantial chance that a claim will be filed and that evidence in its possession or control will be material and relevant to that claim." *Id*. A "substantial chance of litigation" arises when "litigation is more than merely an abstract possibility or unwarranted fear." *Id*. Second, the party seeking a remedy for spoliation must demonstrate the other party breached its duty to preserve material and relevant evidence. *Id*. Such a breach may be either intentional or negligent. *Id*. "Intentional" spoliation, often referred to as "bad faith" or "willful" spoliation, means the party acted with the subjective purpose of concealing or destroying discoverable evidence. *Id*. at 24. On rare occasions, a situation may arise in which a party's negligent breach of its duty to reasonably preserve evidence irreparably prevents the spoliating party from having any meaningful opportunity to present a claim or a defense. *Id*. at 25.

After the trial court determines a party spoliated evidence by breaching its duty to preserve such evidence, it may impose an appropriate remedy under Texas Rule of Civil

Procedure 215.2, which includes striking the parties pleadings. *See* TEX. R. CIV. P. 215.2. The remedy, however, must have a direct relationship to the act of spoliation and may not be excessive. *Id*. at 21; *see TransAmerican*, 918 S.W.2d at 917. In other words, the remedy crafted by the trial court must be proportionate when weighing the culpability of the spoliating party and the prejudice to the nonspoliating party. *Brookshire Bros*., 438 S.W.3d at 21. For that reason, the trial court must consider lesser sanctions and "in all but the most exceptional circumstances, actually test lesser sanctions." *Cire v. Cummings*, 134 S.W.3d 835, 841 (Tex. 2004). The goal is to restore the parties to "a rough approximation of their positions if all evidence were available." *Id*.

We may disturb the trial court's sanctions order only if the trial court acted without reference to any guiding rules or principles, such that the resulting ruling is arbitrary and unreasonable. *Id*. at 838–39. Although the trial court made extensive findings of fact and conclusions of law, in reviewing the sanctions order itself, we are not bound by those findings of facts and conclusions of law; rather, we must independently review the entire record to determine whether the trial court abused its discretion in ordering the death penalty sanctions. *See Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 852 (Tex. 1992) (orig. proceeding); *Tex. Mut. Ins. Co. v. Narvaez*, 312 S.W.3d 94, 97 (Tex. App.—Dallas 2010, pet. denied); *see also Primo v. Rothenberg*, No. 14-13-00794-CV, 2015 WL 3799763, at *17 (Tex. App.—Houston [14th Dist.] June 18, 2015, pet. denied).

Duty to Preserve Wrecked Vehicle

We begin by determining whether Walker Trucking had a duty, as a matter of law, to preserve the wrecked tractor trailer. Walker Trucking argues Graham presented no evidence of a substantial chance that a claim would be filed, and there was no evidence Walker Trucking knew

or reasonably should have known that the tractor, which was severely damaged in the accident, would be material or relevant to a future claim.

Walker Trucking relies on the fact that it was a worker's compensation subscriber and therefore entitled to all of the benefits and protections due an insured employer, which specifically limited Graham's claims against Walker Trucking to workers' compensation benefits, except for the recovery of exemplary damages in the case of death caused by the intentional act or omission or gross negligence of Walker Trucking. TEX. LABOR CODE ANN. § 408.001 (West 2015). Thus, because Walker Trucking believed any potential claim would be covered by worker's compensation, it argues it did not have a duty to preserve the tractor. It further argues no litigation hold had been requested at the time Walker Trucking decided to destroy the tractor; therefore, it was not on notice of any potential claim.

Graham responds Walker Trucking knew it had a duty to preserve the wreckage based on Walker's thirty-two years of experience in the trucking industry, and his instruction to employees to remove the ECM in case of future litigation. Further, Graham argues decedent's family visited Walker Trucking's facility the morning after the incident "seeking answers," which should have put Walker Trucking on notice of a future claim.

We first address Walker Trucking's workers' compensation defense. Walker Trucking asserts it believed any negligence or related claims would be paid by its workers' compensation insurance policy, and at the time it destroyed the tractor, it had no reason to believe it might be accused of gross negligence. However, a subjective belief that it is not liable does not relieve a party of its duty to preserve evidence; rather, we apply an objective standard in making the determination whether a party should have reasonably anticipated litigation. *See Brookshire Bros.*, 438 S.W.3d at 20 (applying a "reasonable person" standard to duty determination); *see also IQ Holdings, Inc. v. Stewart Title Guar. Co.*, 451 S.W.3d 861, 868 (Tex. App.—Houston

[1st Dist.] 2014, no pet.) (concluding insurer's subjective belief that no substantial chance of a lawsuit existed because relatively few claim denials resulted in litigation each year did not relieve its duty to preserve evidence). Thus, Walker Trucking's subjective belief that any claims brought would be compensable under only the workers' compensation statute is irrelevant.

Relieving workers' compensation subscribers of their duty to preserve evidence based on the subjective belief that an accident is covered under the statute and any other litigation would be unsuccessful would encourage subscribers to destroy evidence. "A party should not be able to subvert the discovery process and the fair administration of justice simply by destroying evidence before a claim is actually filed." *Trevino v. Ortega*, 969 S.W.2d 950, 955 (Tex. 1998) (Baker, J., concurring). The workers' compensation statute permits recovery for gross negligence. TEX. LABOR CODE ANN. § 408.001(b). A reasonable person should know that after a deadly accident, in which an eighteen-wheeler inexplicably caught fire and exploded, a substantial chance exists that a claim will be filed and that "litigation is more than merely an abstract possibility or unwarranted fear." *Brookshire Bros.*, 438 S.W.3d at 20. Thus, Walker Trucking's subjective belief that any claims against it would be subject to the workers' compensation bar does not relieve it of its duty to preserve evidence.

We are also unpersuaded by Walker Trucking's reliance on the absence of a litigation hold letter at the time the tractor was destroyed to assert it had no duty to preserve evidence. The relevant inquiry is whether a party should have anticipated litigation at the time it destroyed the evidence. A party can anticipate litigation before it receives actual notice of potential litigation. *See Clark v. Randalls Food*, 317 S.W.3d 351, 357 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) ("Common sense dictates that a party may reasonably anticipate suit being filed . . . [even] before the Plaintiff manifests an intent to sue."). Again, to conclude otherwise would

suggest that so long as a party acts quickly enough to destroy evidence, it is excused from a charge of spoliation.

Moreover, in some circumstances, it is possible to conclude objectively "from the severity of the accident and other circumstances surrounding it" that there is a substantial chance that litigation will ensue. *See Tex. Elec. Coop. v. Dillard*, 171 S.W.3d 201, 209 (Tex. App.—Tyler 2005, no pet.). However, citing *Pilgrim's Pride Corp. v. Mansfield*, No. 09-13-00518-CV, 2015 WL 794908 (Tex. App.—Beaumont Mar. 5, 2015, no pet.), Walker Trucking argues the "mere existence of a fatality" did not put it on notice that a lawsuit would be filed. That case, however, did not involve a fatality. Rather, it involved a woman who slipped and fell after liquid from a chicken bag dripped onto the floor, and the store threw the bag away shortly after the incident. *Id.* at *2. The trial court denied a spoliation instruction after concluding the store had no duty to preserve the bag. *Id.* at *6. On appeal, Pilgrim's argued the severity of the incident was sufficient to place the grocer on notice that Mansfield would pursue a claim. *Id.* The court of appeals disagreed. The record reflected Mansfield declined a suggestion to seek medical attention because she did not think she needed any treatment at the time, and she left the store without stating she intended to sue. *Id.* at *7. Thus, the trial court reasonably concluded the store was not on notice Mansfield would subsequently sue for injuries from the fall, and as such, the store did not have a duty to preserve the evidence. *Id.*

Here, the severity of the injuries resulted in death and not simply a driver being injured in a motor vehicle accident. The record shows Walker had been in the trucking industry for over thirty years. He knew the importance of preserving evidence because he instructed an employee to remove the ECM from the tractor. Although Walker claimed the tractor was a pile of ash, the remnants were in good enough condition to identify and remove the ECM. When asked why he

tried to preserve the ECM, Walker said, "In case we were here today." As such, the record supports the conclusion Walker Trucking knew it had a duty to preserve evidence.

While the evidence does not show that Walker Trucking received the police report prior to destroying the tractor,[1] the record indicates Walker Trucking knew a report would be forthcoming. In fact, Walker testified this was not the first truck wreck for the company, and he knew police reports sometimes took thirty to sixty days to receive. In the past, he said, "We do our best to get a copy of the police report . . . we call multiple times in lots of cases to try to get those." However, rather than waiting for the report, Walker ordered destruction of the tractor.

While Graham asserts, and the trial court found, Walker Trucking was on notice of litigation because the decedent's family visited the facility hours after the accident "seeking answers," no evidence supports this finding. Rather, the record indicates they stopped by to collect decedent's personal effects and to introduce his children. The family never indicated they would be investigating the crash or filing a lawsuit. We acknowledge Ellington engaged in a conversation with decedent's ex-wife at the scene of the crash "and she was asking, you know, what had happened," but such a generic comment cannot be imputed to put Walker Trucking on notice of potential litigation.

Thus, while we agree some of the trial court's findings are not supported by evidence, we nevertheless conclude based on the record as a whole, Walker Trucking had a duty to preserve the tractor. Specifically, because of the severity of the crash, Walker's years of experience in the industry, his previous dealings with obtaining police reports, and his awareness to preserve the ECM, an objective party in Walker Trucking's position would know or "reasonably should know

[1] Walker Trucking challenges finding of fact 14, which provides in part that "On January 7, 2011, right after the Defendants received the Crash Report per Mr. White's testimony, the vehicle was cut in half and crushed." No evidence supports a finding Walker Trucking knew any information in the police report, which included witness statements, before it destroyed the truck. Mr. White testified Walker Trucking received the report two to three weeks after the incident. The record indicates Walker Trucking's insurer received the report on January 4, 2011, but neither the claim file, nor any other evidence in the record, reflects it provided the report to Walker Trucking.

that there is a substantial chance that a claim will be filed and that evidence in its possession or control will be material and relevant to that claim." *Brookshire Bros.*, 438 S.W.3d at 20. Under these facts, litigation was "more than merely an abstract possibility or unwarranted fear." *Id.* As such, Walker Trucking had a duty to preserve the tractor.

Walker Trucking has not challenged its duty to preserve maintenance records, but only argued the evidence is insufficient it intentionally or negligently breached its duty to preserve any such documents. Thus, we address those arguments below.

Breach of Duty to Preserve Tractor and Maintenance Records

Because Walker Trucking had a duty to preserve evidence, we must now determine whether there is evidence to support the trial court's finding that Walker Trucking "intentionally destroyed the wrecked vehicle and some of the maintenance records" and the spoliation of the "material and relevant evidence greatly prejudiced the ability of Graham to present [her] case." As previously noted, intentional spoliation means the party acted with the subjective purpose of concealing or destroying discoverable evidence. *Brookshire Bros.*, 438 S.W.3d at 24.

We begin by considering whether the evidence supports a conclusion that Walker Trucking intentionally breached its duty to preserve the tractor. As noted above, Walker knew a police report would be forthcoming and given his years of experience in the industry, he knew such reports often took months to receive. Yet, despite this knowledge, he allowed for the destruction of the tractor within weeks after the accident. Moreover, the record shows Walker Trucking had the ECM in its possession in January 2010, but did not reveal its existence until Graham specifically inquired about it in discovery in August 2013.

Further, the record indicates the tractor trailer had a history of maintenance issues, some of which required repeated service. These included repeated repairs for drained batteries and alignments because the tractor pulled to the right (which was the same direction the truck drove

off the road before hitting the concrete cistern). Peter Sullivan, Graham's expert, expressed specific concern over the tractor's repeated need for new batteries because it indicated a parasitic draw from an electrical source. Sullivan thought this fact was important because parasitic draws can be the source of an electrical fire. Rather than address the concern, maintenance records indicated Walker Trucking spent thousands of dollars replacing batteries.

Other repairs included maintenance for the recall of oil lines about a year before the accident. In March 2010, the "jake brake" was repaired. In May 2010, the tractor was serviced because the fan clutch was out, and the tractor needed a new alternator. Although Sullivan agreed that any problems with the electrical malfunction of the alternator, which could have caused the fire, were corrected with the replacement of the alternator, he emphasized the repeated work made him question the quality of the repair.

On May 11, 2010, the truck's transmission was checked because of "jumping out of gear." On October 13, 2010, the transmission was checked again because it would not leave second gear. Sullivan stated, "[A]ny time that there is a repetitive repair, you have to call into question the workmanship and the quality of the repair because it's having to be re-done."

Sullivan also noted the tractor's oil-sending unit was replaced on December 7, 2010, eight days before the crash. When asked if any documents reflected a "bad repair," Sullivan opined that because several repairs had to be addressed a second time, he again questioned whether issues were subsequently repaired properly.

Further, despite its knowledge of repeated maintenance issues, Walker Trucking did not conduct any investigation into the cause of the incident before allowing the tractor to be destroyed. Although Walker sent his mechanics to look at the tractor for usable parts, he did not think they inspected the remnants. He described the remains of the tractor trailer as nothing more than a pile of ash, which is inconsistent with photographs and Sullivan's testimony.

Sullivan agreed the tractor was a total loss in terms of asset value and insurance calculations, in the physical sense, but "there were significant components that were not burned up by the fire."

From the crash photos, Sullivan identified many oil/fuel line fittings, several main fuel supply and return lines, the fuel filter, the manual fuel primer pump, and components from the power steering system. These components were not "severely deformed or detached from their connection points. And- - and were generally intact." Although he admitted he was not aware of any maintenance records showing any problems with these parts, he included them because they are common problem areas for cracks and leaks.

Sullivan testified it was likely that enough of the sending unit survived the crash and could have been tested to determine the source of the engine oil that lead to the fire. He also identified the engine's turbocharger oil supply line and fittings, the turbocharger housing, and other related items he could have tested for possible leaks or cracks using metallurgical x-ray imaging. He identified steering and axle components. Given the tractor's maintenance history of repeated transmission problems, an inspection of the external lubrication fittings and seals, which he identified in the crash scene photo, could have revealed whether a transmission fluid leak provided the source for combustible material.

Sullivan also testified that based on his review of the crash scene photos, it was likely the ABS Control System Module was not damaged in the crash or by fire because it was located between and above the two trailer axles, which were not exposed to excessive heat. The system would have contained electronically sensitive information that could have been downloaded. Such critical information would have included when and what diagnostic tools were connected to the system and if the diagnostic tools recorded any trouble codes.

In the crash scene photos, Sullivan could see portions of the wiring harness that attached to the ECM. If the wiring had been saved, he could have performed arc mapping to determine if

there was an electrical short indicative of the source of the fire. He also identified a three or four foot segment of primary cabling, which is the primary positive and negative battery cables that go from the bank of batteries to the starter and alternator and to the power distribution box. If saved, he could have performed arc mapping on these components to determine the cause of the electrical fire.

Thus, although the tractor was severely damaged in the accident, the record indicates it was not complete rubble. Accordingly, the evidence supports a conclusion that Walker Trucking acted with the subjective purpose of concealing or destroying discoverable evidence.

We do not agree, however, that the record shows Walker Trucking intentionally destroyed some maintenance records. Finding number 20 provides, "Mr. Sullivan identified the absence of some of the maintenance records, as could be confirmed as missing by cross reference from other documents." Sullivan, however, could not identify any records with certainty that were missing. Rather, he said "it appears to me" some records are missing, and "it just felt like there were repairs to this vehicle that were not represented." He admitted he did not know whether the alleged maintenance records were missing or simply never existed. Thus, Sullivan provided no more than a hunch that perhaps maintenance records were missing. This is not enough to establish that any records existed or were ever within Walker Trucker's possession, and therefore capable of production. *See, e.g., Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 850 (Tex. 1992) (record contained no evidence that missing crash test reports existed or were within Chrysler's possession, custody, or control and therefore it could not be penalized for failing to produce documents under such circumstances); *see also Smith v. Williams*, No. 06-14-00040-CV, 2015 WL 3526089, at *8 (Tex. App.—Texarkana May 29, 2015, no pet.) (because there were no evidence logs in existence at the time of request for production, they were not destroyed "in a purposeful effort to conceal relevant evidence"). Accordingly, the record does

not support the conclusion that Walker Trucking intentionally destroyed some maintenance records.

Having concluded the evidence supports a conclusion that Walker Trucking intentionally destroyed the relevant remains of the tractor trailer that survived the crash, we now turn to whether the trial court abused its discretion by imposing death penalty sanctions.

Appropriateness of Sanction

Upon finding that spoliation occurred, the trial court must exercise its discretion in imposing a remedy. *Petroleum Sols., Inc. v. Head*, 454 S.W.3d 482, 488 (Tex. 2014). While the trial court's discretion to remedy an act of spoliation is broad, it is not limitless. *Id*. at 489. We review a trial court's imposition of sanctions under an abuse of discretion standard. *Id*. (citing *Cire*, 134 S.W.3d at 838).

Sanctions must not be more severe than necessary to satisfy its legitimate purpose and must be "just." *Petroleum Sols*., 454 S.W.3d at 489. A direct relationship must exist between the offensive conduct, the offender, and the sanction imposed. *Id*. To meet this requirement, a sanction must be directed against the wrongful conduct and toward remedying the prejudice suffered by the innocent party. *TransAmerican*, 811 S.W.2d at 917. Further, a sanction must not be excessive, which means it should be no more severe than necessary to satisfy its legitimate purpose. *Id*. This requires a trial court to consider the availability of lesser sanctions, and "in all but the most exceptional cases, actually test the lesser sanction." *Id*.; *see also Cire*, 134 S.W.3d at 841.

We begin by considering the trial court's striking of Walker Trucking's workers' compensation defense to Graham's negligence claim. As previously stated, the trial court granted Walker Trucking's motion for partial summary judgment on the basis that "Walker Trucking had a valid worker's compensation policy covering decedent Derwin Scott Graham in

full force and effect on the date of the accident and is therefore entitled to the benefits and protections of Tex. Lab. Code § 408.001." Although the trial court acknowledged its prior ruling on the workers' compensation defense in its spoliation order, it nonetheless vacated that order and included it among the defenses stricken.

We agree with Walker Trucking that the trial court abused its discretion by striking its defense under the workers' compensation statute and entering a default judgment as to its liability for negligence. Texas Labor Code section 408.001(a) provides that "Recovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage . . . for the death of or a work-related injury sustained by the employee." TEX. LABOR CODE ANN. § 408.001(a). However, the statute does not prohibit the recovery of exemplary damages by the surviving spouse or heirs of a deceased employee whose death was caused by "an intentional act or omission of the employer or by the employer's gross negligence." *Id*. § 408.001(b). Thus, the only cause of action Graham may seek against Walker Trucking is gross negligence, as the statute specifically bars negligence claims.

The remedial purpose underlying the imposition of a spoliation remedy is to "restore the parties to a rough approximation of their positions if all evidence were available." *Brookshire Bros.*, 438 S.W.3d at 21; *Wal-Mart Stores*, 106 S.W.3d at 721. Here, the trial court has put Graham in a better position by allowing her to pursue a cause of action to which she is not statutorily entitled. By denying Walker Trucking the protections of the workers' compensation defense and deeming it liable for negligence, the trial court provided Graham with a remedy the legislature has explicitly barred. As such, the trial court's sanction is excessive. *See TransAmerican*, 811 S.W.2d at 917 (holding spoliation remedy must have direct relationship to the act of spoliation and may not be excessive).

Graham cites *Tobias v. Davidson Plywood*, 241 F.R.D. 590 (E.D. Tex. 2007) to support her position that sanctions are appropriate despite the workers' compensation bar. In that case, the federal court struck a workers' compensation immunity defense when the defendant first stated that no workers' compensation policy covered the plaintiff and then, three months later when the plaintiff moved to strike the workers' compensation defense, the defendant claimed that a policy did in fact exist, but failed to produce the policy. The federal court struck the immunity defense because the defendant failed to establish the existence of the policy, the lengthy delay in asserting that the policy existed prejudiced the plaintiff, and the defendant admitted knowing of the policy all along and concealing its existence. *Id*. at 594. The trial court's sanction—prohibiting the defendant from asserting the workers' compensation bar—was directly related to the conduct at issue, which was failing to prove the existence of and produce the policy that allegedly gave rise to the bar. Here, in contrast, the conduct in question—destroying the tractor—is not directly related to the trial court's sanction prohibiting the assertion of the defense. In addition, the evidence is unchallenged that Graham's surviving spouse made demands for and has received workers' compensation benefits, so the facts of this case are materially different from the facts in *Tobias*. Thus, *Tobias* does not support Graham's position.

Further, we are unpersuaded by Graham's argument that imposing negligence liability on Walker Trucking is just despite the workers' compensation defense because Walker Trucking's destruction of the tractor hindered her ability to pursue negligence claims against other potential responsible parties. Graham has cited no authority supporting her position and we reject any invitation to disregard section 408.001(2). Striking the workers' compensation statute's bar to a common law negligence claim while the beneficiaries draw worker's compensation benefits effectively allows a double recovery not permitted by Texas law. *See Waite Hill Servs., Inc. v. World Class Metal Works, Inc*., 959 S.W.2d 182, 184 (Tex. 1998) (settled principle of Texas

jurisprudence that party not entitled to more than one recovery for injury). Accordingly, the trial court abused its discretion in prohibiting Walker Trucking from asserting the workers' compensation bar as an affirmative defense.[2]

We now consider the trial court's striking of Walker Trucking's pleadings and entering default judgment as to its liability for Graham's gross negligence claim. Walker Trucking argues there is no evidence that the burned remains of the tractor are essential to Graham's gross negligence claim and that claim exists independent of the cause of the accident. It acknowledges causation is an element of negligence, but asserts it is not a necessary element of gross negligence. Walker Trucking's argument, however, ignores the relationship between negligence and gross negligence.

Negligence and gross negligence are not separable causes of action, but are inextricably intertwined. *See Bastida v. Aznaran*, 444 S.W.3d 98, 109 (Tex. App.—Dallas 2014, no pet.). Negligence is a liability finding, involving duty, breach, and causation; gross negligence presumes a negligent act or omission and includes two further elements. *Id*. The additional two elements require the existence of an act or omission (a) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and (b) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others. TEX. CIV. PRAC. REM. CODE ANN. § 41.001(11) (West Supp. 2015).

Because this is a workers' compensation case involving a fatality, liability for gross negligence may be imposed given the proper evidence. *See* TEX. LABOR CODE ANN. §

[2] In reaching this conclusion, we do not reach the issue of whether the trial court abused its discretion in vacating the partial summary judgment. *See In re McAllen Med. C*tr., 275 S.W.3d 458, 466 (Tex. 2008) (orig. proceeding).

408.001(b). However, the existence of negligent conduct is a prerequisite to the establishment of gross negligence. Here, while the trial court reasonably concluded the destruction of the tractor prevented Graham from establishing the existence of a defect that may have caused the crash, destruction of the tractor did not hamper Graham's ability to establish the remaining two elements of gross negligence, if they exist. In other words, the gross negligence claim includes elements of proof that focus on Walker Trucking's conduct prior to the accident and not only elements that focus on the cause of the accident. Accordingly, there is no direct relationship between the offensive conduct (destroying the tractor) and the sanction imposed (striking Walker Trucking's pleadings and entering a default judgment as to gross negligence liability).

Moreover, a trial court must consider the availability of lesser sanctions, and "in all but the most exceptional cases, actually test the lesser sanction." *Cire*, 134 S.W.3d at 841. Although the trial court stated it "considered lesser sanctions . . . [but] such lesser sanctions were found to be insufficient for the intentional destruction of material and relevant evidence that severely and substantially prejudiced Plaintiffs," the record does not explain what lesser sanctions the trial court considered or why lesser sanctions were insufficient. In fact, to the contrary, in the June 20, 2014 hearing, the court verbally announced, "I am not going to grant death penalty sanctions against the defendant where we're just talking about money. You're still going to have to do the dog-and-pony show in front of the jury." Following another hearing in October 2014, the trial court again reiterated that "some type of sanction is appropriate," and encouraged the parties to provide guidance "as to what you think it should be." Then, without testing a lesser sanction or providing any further explanation, the trial court ordered death penalty sanctions. Under these facts, the trial court abused its discretion in striking Walker Trucking's pleadings and entering a default judgment as to gross negligence liability.

Conclusion

Because the trial court abused its discretion by striking Walker Trucking's workers' compensation defense and its pleadings, the trial court adjudicated the dispute, thereby leaving Walker Trucking without an adequate remedy by appeal. *See TransAmerican*, 811 S.W.2d at 919. Accordingly, we conditionally grant Walker Trucking's petition for writ of mandamus. A writ will issue only in the event the trial court fails to vacate both its April 30, 2015 order in which it declined to disturb the original November 6, 2014 spoliation order and the original November 6, 2014 spoliation order. Our opinion is not to be interpreted as prohibiting the trial court from entering correct sanctions.

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/David L. Bridges/
DAVID L. BRIDGES
JUSTICE