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SUPREME COURT OF TEXAS
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NO. 20-1001

IN THE SUPREME COURT OF TEXAS

ALAN LYNN TAYLOR AND DONNA KAY TAYLOR,
INDIVIDUALLY AND AS NEXT FRIENDS OF S.K.T.
Petitioners

v.

BUILDER SERVICES GROUP, INC. D/B/A JOHNSON INSULATION,
Respondent.

RESPONSE TO PETITION FOR REVIEW

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Pursuant to Rule 53.3(a) of the Texas Rules of Appellate Procedure, Respondent supplements Petitioners' list of counsel to identify additional counsel for Respondent, Mr. Robert T. Adams:

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Mr. Loiacono is correctly identified as counsel for Respondent but his firm affiliation and contact information have changed as indicated in his Notice of Change of Counsel's Firm Affiliation and Address filed on May 3, 2021.

Mr. Pritchett is correctly named as counsel in the Petition.

RESPONDENT'S ISSUES

Issue: This Court has held that it is a question of law as to whether expert testimony is necessary to prove a matter or theory. *FFE Transp. Servs., Inc. v. Fulgham*, 154 S.W.3d 84, 89 (Tex.2004); *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 583 (Tex. 2006). Did the court of appeals properly hold that whether spray foam insulation was properly installed and whether it was off ratio to the extent that it emitted toxic fumes into the Taylors' home are issues that are outside the general experience and common understanding of a lay person, thus necessitating expert testimony to prove liability?

Unbriefed Issue: Did the court of appeals properly hold that no scientifically reliable evidence supports the jury's verdict in favor of the Taylors on the personal injury claims?

STATEMENT OF FACTS

In February 2013, the Taylors began construction of a home on their property in San Saba County, Texas. Johnson installed spray foam insulation during construction. Icynene manufactured the spray foam Johnson installed. CR:110. The Icynene spray foam is made of two liquid components referred to as the "A" side and "B" side. 6RR:72. To install spray foam, the two components are heated to specific temperatures in specialized barrels in Johnson's work truck. 10RR:18. They are then pushed through hoses to the point of application where they are combined in a spray gun which sprays the combined mixture onto a surface where it solidifies as foam. 6RR:86. The installation requires specialized components and equipment, including a device that prevents off-ratio spray foam. If either the A-side or B-side component starts to dominate the mixture during installation, this device turns the machine off to prevent further spraying. 10RR:33, 66; 16RR:949. There are no allegations this device was malfunctioning during the Taylors' installation.

When the Taylors moved into the home *two months later,* they complained that the air quality of the home was substandard, the home was humid, and the home had a smell. 9RR:20; 27. At the time, the Taylors blamed both Johnson and the heating and air conditioning installer, Farris Heating & Air ("Farris"). Farris admitted that the original heating and air conditioning unit in the Taylors' home was not appropriate for the home and that the home was not adequately ventilated.

9RR:13-19. Other installation problems included failing to install a dehumidifier, improperly installed ductwork, and inappropriate amounts of outside air circulating in the home. 12RR:22-24. The home also lacked the requisite ERV (energy recovery ventilator) for appropriate ventilation. 12RR:40-41. Farris ultimately replaced the original heating and air conditioning unit in August 2013 with a different unit. 9RR:13-14, 31. The Taylors allege that the new unit did not fix the air issues in the home and they moved out in February 2014. After the Taylors left, further investigation revealed improper repairs: Farris had installed the ERV incorrectly causing poor indoor air quality. 12RR:50-54.

Additionally, in February 2014, seven samples of spray foam were collected from the Taylors' home for testing by the manufacturer, Icynene. 10RR:21, 24-25. Icynene's test results confirmed that the spray foam was properly installed and on ratio. 9RR:242; 16RR:946-949.

SUMMARY OF THE ARGUMENT

The court of appeals' memorandum opinion did not create new law in Texas. It did not change any evidentiary burdens. It applied settled Texas law regarding a layperson's ability to testify to causation to the unique facts of this case and held that expert testimony was required. The Taylors' attempt to convert that holding, limited to the standard of care for the installation of spray foam and its possible effects, into a new and broad pronunciation of residential property damage law by comparing it to a "taking" goes against the plain language of the opinion of the court of appeals.

The court of appeals correctly held that whether spray foam insulation has been properly installed and whether its alleged improper application is causing it to emit toxic fumes are issues not within a layperson's general experience and common understanding. The installation of spray foam is highly technical in nature and requires specialized equipment. The Taylors concede this. During trial, in their court of appeals briefing, and in their Petition, they recite the scientific and technical nature of installing spray foam and possible effects thereof. But, at trial they did not introduce an expert to tie the two together, and neither there or after did they explain how a layperson could understand these technical topics through their general experience and common understanding.

The Taylors have now pivoted, telling this Court that the technical toxic tort case they set out to prove and ultimately failed to prove, is not really technical at all.

They now claim they no longer need expert testimony, lay testimony is sufficient, or a combination of the two will suffice. But the cases the Taylors cite do not support their conclusion. Under this Court's previous holdings, expert testimony was required to prove the standard of care, Johnson breached the standard of care and its breach caused an odor.

The Taylors' premise that installing spray foam insulation using a malfunctioning hose heater *may* have lowered the temperature of the chemicals during application which *could* have made the spray foam off ratio is nothing more than inferences and speculation. Despite introducing evidence that spray foam must be installed at certain temperatures and on ratio, the Taylors did not identify what temperature the spray foam was heated to or what temperature it was at the point of application. They did not test any samples of the spray foam to see if it was in fact, off ratio. Instead, the Taylors allege the spray foam did not look right, but do not tie the alleged appearance of the spray foam to the generation of an odor. They ignore the manufacturer's test results showing the spray foam was in fact, on ratio. As for the source of the odor, their own experts identified other causes and admitted they could not rule those causes out. Not to mention, the company that installed the heating and air conditioning in the Taylors' home admitted they installed the heating and air conditioning incorrectly, and replaced it, because of its impact on the air quality in the Taylors' home.

In light of these facts, the court of appeals properly determined the Taylors' evidence to be legally insufficient. This court should deny the Petition.

ARGUMENT

I. Lay evidence of liability is legally insufficient when expert testimony is required.

Evidence is legally insufficient if: (1) there is a complete absence of evidence of a vital fact; (2) the law precludes consideration of the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a scintilla; or (4) the evidence conclusively establishes the opposite of a vital fact. *City of Keller v. Wilson*, 168 S.W.3d 802, 810-811 (Tex. 2005).

"Lay testimony may be used as evidence of causation in certain circumstances, but '[w]hen expert testimony is required, lay evidence supporting liability is legally insufficient.'" *Jelinek v. Casas*, 328 S.W.3d 526, 533 (Tex. 2010) (citing *City of Keller*, 168 S.W.3d at 812). Expert testimony is required when an issue involves matters beyond jurors' common understanding. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 583 (Tex. 2006). "Proof other than expert testimony will constitute some evidence of causation *only* when a layperson's general experience and common understanding would enable the layperson to determine from the evidence, with reasonably probability, the causal relationship between the event and the condition." *Id*. (emphasis added).

The court of appeals concluded that "whether the spray foam insulation was properly installed and whether it was off ratio such that it emitted toxic fumes into the Taylors' home are issues that are outside the general experience and common understanding of a layperson." *Builder Servs. Group, Inc. v. Taylor*, No. 03-18-00710-CV, 2020 WL 5608484, *10 (Tex. App.—Austin Sep. 17, 2020) (mem.op.).

The court of appeals found the Taylors' evidence was "legally insufficient to support the jury's proximate-cause findings, especially in light of contrary evidence in the record that was not addressed by any expert witness" because: (1) the testimony that "there was a 'temperature issue' with the spray foam insulation during the installation process is merely speculation from which [the Taylors] inferred that there was an incomplete chemical reaction between the A side and the B side during installation," and (2) the testimony "about the presence of volatile organic compounds present in the Taylors' home did not rule out sources other than the spray foam insulation." *Id.*, at *10.

The Taylors do not dispute that none of their witnesses were qualified to testify to the standard of care for installing spray foam, that none of their witnesses addressed the manufacturer's test results and testimony or that their experts admitted that other possible sources for the volatile organic compounds were present in the Taylors' home and failed to rule them out. Instead, the Taylors misconstrue Texas law to argue that the combination of lay and expert testimony they did present is

sufficient but it is not, because these issues are not within the general experience and common understanding of a layperson, as the cases the Taylors rely on make abundantly clear.

II. The court of appeals properly applied Texas law in determining the Taylors' evidence was insufficient as to causation.

A layperson's ability to testify to causation is limited to those circumstances when a layperson's general experience and common understanding enable them to determine from the evidence the causal relationship with reasonable probability. *Mack Trucks*, 206 S.W.3d at 583. The cases the Taylors cite are instructive with regard to the limited applications of layperson testimony.

In *Lyons v. Miller Cas., Inc.*, 866 S.W.2d 597 (Tex. 1993) the plaintiff testified that she heard something banging on the outside of her house during a storm and she later discovered cracked bricks on the homes external veneer and the back staircase was 'out of kilter." *Id*. at 598. She and her neighbors further testified the damage did not exist before the storm to create the inference that the storm damage caused the damage at issue. *Id*. While such testimony was considered sufficient in *Lyons* it illustrates the stark contrast of the Taylors' legally insufficient testimony on specialized topics which require expert testimony regarding: the installation of spray foam insulation, the functioning of specialized spray foam equipment and its effect on installation, the chemical reactions for spray foam, and the ability of substances to off-gas toxic fumes at noxious levels.

Similarly, in *Zbranek Custom Homes, Ltd. v. Allbaugh*, No. 03-14-00131-CV, 2015 WL 9436630, at *6 (Tex. App.—Austin Dec. 23, 2015, pet. denied) (mem. op.) the Court addressed the sufficiency of testimony concerning a fire in an outdoor fireplace where "there was no dispute" about the origin of the fire "and there was competent testimony from the ['Plaintiffs'] experts ruling out all other possible causes (human, natural, electrical, natural gas) of ignition." *Id.* In reviewing the evidence, the Court determined the "causation theory was not complex and expert testimony on the exact sequence of events leading to ignition of the combustible materials framing the firebox was not necessary under those circumstances." *Id.* Those circumstances included: (1) "[Plaintiff's adult son's] observation of an improper gap where there were visible flames and burning debris"; (2) "Zbranek's failure to use fireproof mortar in the "gap" and positioning of flammable materials too close to the fire box, in contravention of the manufacturer's installation instructions"; (3) "the fire inspector's conclusion that the fire began in the void space between the fire box and the framing materials"; and (4) "testimony ruling out all other potential sources of ignition of the flammable materials." *Id.*

Zbranek further supports the conclusion of the court of appeals in this case. Here, the issues regarding whether Johnson's installation of spray foam met the standard of care and caused the Taylors' damages was disputed. Further, the Taylors

own experts identified other possible causes of the odor and admitted they could not rule them out.

The other cases the Taylors cite reinforce these concepts.

- In *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 733 (Tex. 1984) the plaintiff obtained a *default judgment* against a defendant who, because of the default, admitted that a typewriter was leaking the toxic fumes the plaintiff alleged injured her: "Upon returning to her job, she worked with her face two inches from a typesetting machine which, it is admitted by default, was leaking chemical fumes." *Id.*
- In *Raul Flores, Inc. v. Rodriguez*, No. 13-13-00331-CV, 2014 WL 1370344, at *2 (Tex.App.—Corpus Christi Apr. 3, 2014, no pet.) (mem. op.) the Court determined that lay testimony could theoretically support causation for whether delivery trucks driving over a parking lot caused damage to the underlying pavement, but not in that specific case because the plaintiff failed to exclude other potential causes.
- In *U.S. Fire Ins. Co. v. Lynd Co.*, 399 S.W.3d 206, 218 (Tex. App.—San Antonio 2012, pet. denied) the court permitted lay testimony of hail damage to defeat summary judgment.

These cases all concern topics within the general experience and common understanding of a layperson: *admitted* leaking of fumes, damage caused by heavy

trucks, and damage caused by hail. They do not concern the chemical reaction of the foam components and the foam's ability to emit alleged toxic fumes or odor months after the chemical reaction occurred, particularly without ruling out any other causes of the fumes or odor.

In situations like this case that involve complex matters and specialized knowledge, Texas courts have repeatedly required expert testimony to establish liability for property damage. *See*, *Mack Trucks*, 206 S.W.3d 573 at 583 (expert testimony necessary to show design defects caused release of diesel fuel in rollover accident); *FFE Transp. Servs., Inc. v. Fulgham*, 154 S.W.3d 84, 89 (Tex. 2004) (expert testimony required to establish defendant breached duty to inspect refrigerated trailers before transporting); *River City Drywall, LLC v. Hanlon*, No. 03-17-00482-cv, 2018 WL 4087715 (Tex. App.—Austin Aug. 28, 2018, pet. denied) (lay testimony insufficient to establish causation for defective drywall installation); *Cerny v. Marathon Oil Corp.*, 480 S.W.3d 612, 622 (Tex. App.—San Antonio 2015, pet. denied) (lay testimony insufficient to establish source of noxious odors on homeowners' property).

It makes no difference that this case involves a residence. In *Cerny v. Marathon Oil*, the plaintiff homeowners tried to establish their home was damaged by foul odors emanating from a nearby drip station. 480 S.W.3d at 615. Despite showing six of the same "hazardous substances" in the air at the drip station were in

the air at the home, the court of appeals concluded the lay evidence the homeowners introduced was too tenuous to establish causation. *Id.* at 625.

Similarly, in *River City Drywall*, a homeowner tried to establish a complex theory of causation for why their paint was peeling from the walls. That theory was found to be beyond the general experience and common understanding of a juror because it involved the proper application of drywall and paint texture and the possible interactions between the various substrates underneath the paint. The experts the plaintiffs relied on were not qualified to make their opinions and they failed to rule out other possible causes. 2018 WL 4087715, at *3-5. Here, none of the Taylors' witnesses have any specialized knowledge to opine on the technical process of installing spray foam, the chemical reaction that produced the foam, or whether the foam is off ratio, particularly where there exists test results on the spray foam establishing it to be at the proper ratio. 16RR:945–49; Ex. 34. Further, none of the Taylors' witnesses ruled out other possible causes of the odor.

Finally, the only other court of appeals to address the sufficiency of evidence for the standard of care for installing spray foam insulation reached the same conclusion as the court below and required expert testimony. *Buckstop Acquisition Company, LLC v. Castaneda*, No. 04-17-00484-cv, 2018 WL 2943949, at *6 (Tex. App—San Antonio June 13, 2018, no pet.). In that case, a fire destroyed a convenience store and restaurant. *Id.* at 1. The plaintiff alleged the spray foam

installer failed to install the spray foam with a fire retardant and failed to apply a thermal barrier to it. *Id.* Relying on *FFE Transp. Servs.*, 54 S.W.3d at 89, the court of appeals concluded that whether those failures breached the standard of care was a matter for expert testimony. *Id.*

III. There is no competent evidence of the standard of care or that Johnson breached it, and the Taylors failed to rule out other sources of the odor.

The evidence in this case places it squarely within those cases requiring expert testimony to prove causation. The standard of care for installing spray foam and whether or not spray foam is off ratio to the extent it emits toxic fumes and odor is not within a layperson's general experience or common understanding. One need only look at the evidence presented in this case to see why.

A. No competent evidence exists of the standard of care or a breach.

The court of appeals correctly noted in its opinion that "[t]he Taylors did not introduce any expert testimony on the proper method and standard of care for installing spray foam insulation." The Taylors tried to use Dr. Nicewicz as an expert on the standard of care for installing spray foam, but he had never even installed spray foam. CR:1276. For that, and other reasons, the Trial Court properly excluded his testimony on the topic. CR:1276, 2703. In the testimony he was allowed to provide, he admitted that the A-side and B-side proportions had to be correct to get a good end product, yet he never addressed or refuted the manufacturer's test results

of the Taylors' spray foam which established the spray foam was proper. 9RR:61-62.

The Taylors' industrial hygienist expert Andy Rowland admitted he had no specialized experience with spray foam insulation. 7RR:67–74. He stated he could not tell the jury "with any degree of certainty that the spray foam in the Taylor residence is off-ratio." 7RR:131. He also did not perform an evaluation of the foam to determine whether the foam was functioning properly or whether it had the appropriate insulating values. 7RR:134. Finally, the sample taken and tested by Mr. Rowland showed that the foam sample was *not* off-gassing formaldehyde, as the Taylors alleged. 7RR:128-129.

The Taylors' Petition references selective portions of testimony from Johnson's corporate representative Michael Purks, and Icynene's Robert Gilmour. However, their complete testimony, along with that of Johnson's installer, establishes that the foam was on ratio and properly installed:

- Purks testified unequivocally, and without objection, that he inspected the spray foam at the Taylors' home and believed it was on ratio and properly mixed. 9RR:242, 251-252. Regarding the Taylor's unsubstantiated claim that the hose heater could have caused off-ratio foam, he testified that the machine, not the hose heater, is responsible for heating the components for the spray foam. 10RR:67-69. He also

testified that even though Johnson knew the hose heater may not have been functioning properly, it was proper to move forward with the installation because the hose heat would not affect the installation. 10RR:33, 66. He testified that the machine would shut down if the foam was off ratio. 10RR:33. He also testified that the Taylors' installation was appropriate 10RR:39.

- Gilmour, Icynene's Technical Services Manager since 2003, testified that Icynene performed three tests on samples of foam from the Taylors' home to determine if the installation was correct. 16RR:920. He also testified the Taylors' spray foam passed these three tests confirming the installation was proper. 16RR:948-949. He specifically confirmed that the tests would show if there was more A-side or B-side. 16RR:947. He reiterated Purks's testimony that the machine would shut down if the spray foam was off ratio. 16RR:949. Regarding claims that the foam was being installed when it was cold, Gilmour testified that cold foam is still good foam. 16RR:949.
- Juan Archuleta installed the foam in the Taylors' home. The Taylors presented portions of Mr. Archuleta's deposition testimony in which he stated that he did not remember any problems or difficulty with the job,

or that the spray gun was not working or clogging, or that there was any problem with the equipment. 10RR:197.

The Taylors' evidence that Johnson breached the standard of care and improperly installed the spray foam in a manner that caused it to be off ratio and emitting toxic fumes or an odor is speculation. It is based on the appearance of the spray foam, not its chemical composition, and there exists no evidence indicating what spray foam that is emitting fumes looks like. Testimony which amounts to inferences stacked on inferences is not legally sufficient. *Marathon Corp.*, 106 S.W.3d 724 at 728 (Tex. 2003) ("An inference stacked only on other inferences is not legally sufficient evidence."). Such testimony is legally insufficient to establish a causal relationship between the event, the hose heater and the alleged condition of the off ratio foam. *Mack Trucks*, 206 S.W.3d at 583.

B. The Taylors failed to rule out other possible causes.

The Taylors do not know what the odor in their home was or where it came from. Their sole expert on this issue was industrial hygienist Andy Rowland who testified that smells are volatile organic compounds ("VOCs") and that he analyzed an air sample from the Taylors' home which showed elevated levels of VOCs. 7RR:125. Yet, he admitted that there were other sources of VOCs in the Taylors' home, including the OSB, the wood floor, the glue under the tile and the paint on the walls. 7RR123-124. He also admitted that his *methodology* could not identify the

specific sources of VOCs in the Taylors' home and that he did not know what sources caused the elevated levels. 7RR:122-24. While he testified that he believed those sources would have finished off-gassing by the time he conducted his test, he did not measure releases of VOCs from them to confirm. 7RR:124, 133.

Rowland's admission that there were numerous other sources of VOCs in the home coupled with his inability to rule them out renders his opinion legally insufficient to support the jury's verdict. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 558-59 (Tex. 1995) (concluding that failure of expert to rule out other causes of damage rendered his opinion little more than speculation).

The lay witnesses the Taylors offer (Donna Taylor, Truman Farris, Robert Brockman and Nicewicz) fare no better.

- Donna Taylor testified that she does not know "anything about the spraying process," 9RR:18–19, and admitted that the Taylors performed no testing on the personal property they discarded to see if it was contaminated, instead exclusively relying on Mrs. Taylor's "nose" to keep or discard items, 9RR:215. She also admitted that one of her own consultants told her that the absence of ventilation in the attic may contribute to chemical odors in the attic. 9RR:218-219.

- Truman Farris of Farris Heating & Air inspected the Taylors' home and concluded that the HVAC unit his father installed was not the correct HVAC unit for the home and would contribute to the humidity and odor the Taylors complained of. 9RR:14, 20, 27, 29-30. He did not comment on whether or not he believed the spray foam was off-ratio and he did not relate his visual observations of the foam to the ratio between the A-side and B-side.
- Robert Brockman, the owner of Brockman Painting, had hired others to install spray foam insulation but had never installed it himself. 6RR:202. He also could not smell the alleged contamination in the living areas of the home stating "I smelled the paint, you know, a little bit of the paint, but not – but other than that, I couldn't - - there wasn't any obnoxious odors downstairs that I could tell." 6RR:200.
- David Nicewicz testified that he did not know what the typical level of VOCs in a newly constructed home would be. 9RR:82. He also admitted there are other potential contaminates in the home from non-spray foam sources but could not tell which sources were contributing to the VOCs in the Taylors' home.

9RR:82-84. To the extent there were allegations that the spray foam was off-gassing formaldehyde, he did not evaluate any of the other possible sources of formaldehyde even though he admits there were other sources. *Id*.

The competing testimony of the Taylors' own witnesses on this topic was further clouded by two witnesses intimately familiar with the spray foam industry who testified that the home did not smell like improperly installed spray foam. Johnson's division manager, Purks, testified that he had personally observed over 250 spray foam job sites, and the smell in the Taylors' home did not result from a problem with the foam. 10RR:29. Rather, the odor in the Taylors' home was a humid musty smell. 10RR:29. Similarly, Heath Eckerman, who had experience installing both spray foam and heating and air conditioning, testified that he thought the home smelled musty and lacked appropriate ventilation. 12RR:20, 28, 40-41. He testified that he did not smell a chemical odor in the Taylor's home and that the spray foam looked typical. 12RR:28

The Taylors' evidence that the spray foam is the cause of the fumes or odor in their home is legally insufficient because their own witnesses admitted there are other possible sources of the odor the Taylors complained of and admitted that they could not rule them out. *E.I. du Pont de Nemours*, 923 S.W.2d at 558-59.

PRAYER

Johnson asks that this Court deny the Petition and for such other and further relief to which Johnson may show itself justly entitled.

Dated: May 24, 2021

Respectfully submitted,

By: */s/ Robert T. Adams*

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document contains 4,142 words in the portions of the document subject to the word-count limit in Texas Rule of Appellate Procedure 9.4, as measured by the undersigned's word-processing software.

/s/ Robert T. Adams

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing instrument was electronically served on the attorneys of record in this matter in accordance with the provisions of Texas Rule of Appellate Procedure 9.5. on May 24, 2020.

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