

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

JANNELL WILLIAMS, as the  
Personal Representative of the Estate  
Of Kenneth Williams, and CHERYL  
RUTLEDGE, as the Personal Representative  
Of the Estate of Quentin Rutledge,

Plaintiffs,

v.

Civil Action No: 09-C-419

WERNER ENTERPRISES, INC.,  
a Nebraska Corporation,

Defendant.

ORDER

On January 10, 2014, a hearing was held in this matter on *Werner Enterprise Inc.'s Renewed Motion for Summary Judgment*. After considering the pleadings, oral arguments, and pertinent legal authorities, the Court sets forth its decision below.

*Factual and Procedural History*

A succinct account of the facts reflects that the Plaintiff's decedent, Kenneth Williams ("Williams"), suffered injuries from a vehicular accident causing his death on or about January 12, 2009. Williams was a passenger in a tractor-trailer driven by co-worker and Defendant/Cross-Complainant Quentin Rutledge ("Rutledge"). On January 12, 2009, Williams and Rutledge, both long distance truck drivers, were driving through Lewis County, West Virginia during snowy weather to transport cargo from California to Maryland. Unfortunately, the tractor-trailer went out of control causing the vehicle to crash. Rutledge also suffered deadly injuries from this accident. After the crash, a fire commenced that eventually consumed the subject vehicle. Williams and Rutledge were residents of Michigan at the time of their death.

The tractor-trailer was owned by Werner Enterprises, Inc. ("Werner"), a company incorporated under the laws of Nebraska. Soon after the accident, Werner hired Crawford and Company to go to the accident scene to perform an investigation. Crawford and Company reported to Werner its assessment of the accident. Werner was advised in part that the accident was a single-vehicle accident, which involved only Werner employees, and no other parties were involved. In addition, Werner was advised that the tractor-trailer was not salvageable and thereafter approved of the disposal of the subject vehicle on January 14, 2009. Werner received a letter (dated February 11, 2009) on February 18, 2009 wherein counsel for Plaintiff first advised Werner of his representation of Williams' family regarding this accident and requested that the tractor-trailer be preserved. Werner responded to this letter on or about February 27, 2009 wherein Werner advised Plaintiff's counsel by telephone that Werner was attempting to locate the subject vehicle. Thereafter, by letter dated March 4, 2009, Werner informed Plaintiff's counsel that it had made the decision to dispose of the subject vehicle because there was no issue of negligence under the Workers' Compensation Act.

As a result of this accident, a civil action was instituted by the Plaintiff Williams on December 14, 2009 alleging several claims against Werner. These claims consisted of: negligence, deliberate intent, wrongful death, and negligent spoliation and intentional spoliation of evidence. When this action was filed, Rutledge was named as a Defendant. Rutledge alleged cross-claims against Werner analogous to the claims averred by Williams. Subsequently, Williams dismissed her claims against Rutledge. Consequently, Rutledge was repositioned as a Plaintiff in this action.

On September 27, 2011, Werner filed a motion for partial summary judgment. Werner argued that the claims for negligence, deliberate intent, and wrongful death were barred by the

Nebraska Workers' Compensation Act. By Order dated October 17, 2011, the Court granted partial summary judgment in favor of Werner. The Court concluded that Werner was the employer of the decedents and the only remedy for them is the Nebraska Workers' Compensation Act. As to the spoliation of evidence claims, the Court found that the intentional spoliation of evidence claim is the only remaining stand-alone cause of action, and thus summary judgment on this issue was denied. On October 24, 2011, the Court entered an Order clarifying its Order of October 17, 2011 regarding the spoliation of evidence claims.

The Court entered an Order on June 15, 2012 certifying the Orders of October 17, 2011 and October 24, 2011 as final Orders. Thereafter, Williams and Rutledge appealed these Orders of October 17, 2011 and October 24, 2011 to the Supreme Court of Appeals of West Virginia ("Supreme Court"). In addition, the Court entered a Certification Order on June 15, 2012 certifying four (4) questions to the Supreme Court.

On June 24, 2013, the Supreme Court issued a Memorandum Decision affirming the circuit court's Orders of October 17, 2011 and October 24, 2011 thereby adopting and incorporating the circuit court's well-reasoned findings and conclusions as to the assignments of error raised in the appeal. Subsequently, the Supreme Court released a Corrected Memorandum Decision stating that it declined to address the four (4) certified questions.

*Standard of Review and Pertinent Legal Authorities*

Summary judgment "...shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law...." *West Virginia Rules of Civil Procedure*, Rule 56(c).

“Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing of an essential element of the case that it has a burden to prove.” Syl. Pt. 4, *Painter v. Peavy*, 451 S.E.2d 755 (W.Va. 1994). Rule 56 is “...designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial, if in essence there is no real dispute as to salient facts or if only a question of law is involved....” *Id.* at 758.

“A party who moves for summary judgment has the burden of showing that any doubt as to the existence of such issue is resolved against the movant for such judgment.” Syl. Pt. 6, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of N.Y.*, 133 S.E.2d 770 (W.Va. 1963).

“West Virginia recognizes intentional spoliation of evidence as a stand-alone tort when done by either a party to a civil action or a third party.” Syl. Pt. 9, *Hannah v. Heeter*, 584 S.E.2d 560 (W.Va. 2003).

“Intentional spoliation of evidence is defined as the intentional destruction, mutilation, or significant alteration of potential evidence for the purpose of defeating another person's recovery in a civil action.” Syl. Pt. 10, *Hannah v. Heeter*, 584 S.E.2d 560 (W.Va. 2003).

“The tort of intentional spoliation of evidence consists of the following elements: (1) a pending or potential civil action; (2) knowledge of the spoliator of the pending or potential civil action; (3) willful destruction of evidence; (4) the spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action; (5) the intent of the spoliator to defeat a party's ability to prevail in the pending or potential civil action; (6) the party's inability to prevail in the civil action; and (7) damages. Once the first six elements are established, there arises a rebuttable presumption that but for the fact of the spoliation of evidence, the party injured by the spoliation

would have prevailed in the pending or potential litigation. The spoliator must overcome the rebuttable presumption or else be liable for damages.” Syl. Pt. 11, *Hannah v. Heeter*, 584 S.E.2d 560 (W.Va. 2003).

“In general, this state adheres to the conflicts of law doctrine of *lex loci delicti*.” Syl. Pt.1, *Paul v. National Life*, 352 S.E.2d 550 (W.Va. 1986).

#### *Discussion*

This Court finds that it has discretion to revisit a previous denial of summary judgment in an effort to ensure the proper administration of justice. *See, Dellinger v. Pediatric Medical Group, P.C.*, 750 S.E.2d 668 (W.Va. 2013). Hence, the Court will now address *Werner Enterprise Inc. 's Renewed Motion for Summary Judgment (“Renewed Motion”)*. In its *Renewed Motion*, Werner re-argues that it is entitled to summary judgment as a matter of law regarding the intentional spoliation of evidence claim. In addition, Werner raises for the first time the conflicts of law doctrine wherein Werner contends that the substantive law of Nebraska rather than West Virginia should be applied to determine the remaining cause of action for intentional spoliation of evidence. If this Court should determine that the substantive law of Nebraska applies, then the remaining cause of action for intentional spoliation of evidence must be dismissed as Nebraska does recognize the tort of spoliation of evidence. *See, McNeel v. Union Pacific Railroad Company*, 753 N.W.2d 321 (Neb. 2008) (In Nebraska, the proper remedy for spoliation of evidence is an adverse inference instruction).

The Court will first address the recently raised issue regarding the conflicts of law doctrine. In general, this state adheres to the conflicts of law doctrine of *lex loci delicti*.” Syl. Pt.1, *Paul v. National Life*, 352 S.E.2d 550 (W.Va. 1986). However, the *lex loci delicti* rule has generally been applied to clear-cut cases of physical injury. *See, Oakes v. Oxygen Therapy*

*Services*, 363 S.E.2d 130 (W.Va. 1987). Otherwise, the standards set forth in the *Restatement (Second) of Conflicts of Law* §145-146 should be used for guidance. *Id.* The *Restatement (Second) of Conflicts of Law*, § 145-146 (1971) provides:

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principle stated in § 6.

(2) Contacts being taken into account in applying the principle of § 6 to determine the law applicable to an issue include:

- (a) the place where the injury occurred,
- (b) the place where the conduct causing injury occurred,
- (c) the domicile, residence, nationality, place of incorporation, and place of business of the parties, and
- (d) the place where the relationship, if any, between the parties, is centered.

These contacts should be evaluated according to their relative importance with respect to the particular issues.

Section 6 of the *Restatement* lists the following factors as important choice of law considerations in all areas of law.

- (a) The needs of the interstate and international systems;
- (b) The relevant policies of the forum;
- (c) The relevant policies of other interested states and relative interest of those states in the determination of the particular issue;
- (d) The protection of justified expectations;
- (e) The basic policies underlying the particular field of law;
- (f) Certainty, predictability, and uniformity of results; and
- (g) Ease in the determination and application of the law to be applied.

As the claim of intentional spoliation of evidence, in and of itself, is obviously not a straightforward account of a physical injury, this Court should consider the criteria described in

the *Restatement (Second) of Conflicts of Law* §145-146 to determine the applicable substantive law in this case. After careful consideration of the applicable criteria, the Court concludes that the substantive law of West Virginia must apply to the intentional spoliation of evidence claim. In support of this conclusion, the Court has placed considerable weight on the following circumstances: (a) that the accident occurred in West Virginia; (b) the subject vehicle was inspected and destroyed in West Virginia (which is the origin for the intentional spoliation of evidence claim); and (c) the injuries and subsequent death of the Plaintiff Williams and Defendant/Cross-Complainant Rutledge occurred in West Virginia. Therefore, Werner's request to apply the substantive law of Nebraska is denied as the substantive law of West Virginia applies in this case.

In light of the above conclusion, the Court will now reconsider Werner's previously filed Motion for Summary Judgment, which was denied by an Order signed on October 17, 2011. In its *Renewed Motion*, Werner contends that it did not have "actual knowledge" of a pending or potential civil action before disposing the subject vehicle. Werner points out that as this Court expressed uncertainty on the day of trial as to whether "actual knowledge" is required under the law, reconsideration of the motion for summary judgment is warranted.<sup>1</sup> Conversely, Williams and Rutledge assert that the *Renewed Motion* be denied as the Supreme Court adopted the circuit court's entire opinion.

Eventually, this Court entered an Order on June 15, 2012 certifying the Orders of October 17, 2011 and October 24, 2011 as final Orders. In addition, this Court entered a Certification Order on June 15, 2012 certifying four (4) questions to the Supreme Court pertaining to spoliation of evidence. Of particular interest to the Court and the litigants was question

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<sup>1</sup> On October 24, 2011, the parties appeared for trial. Prior to jury selection, the Court gave the parties the option to proceed to trial or defer the trial to certify questions regarding the spoliation of evidence claims. The parties elected to postpone the trial.

Number 1 which asked: "Have Williams and Rutledge raised a genuine issue of material fact concerning the "actual knowledge" element for both negligent and intentional spoliation of evidence claims?" Unfortunately, the Supreme Court chose not to answer this question or the remaining questions. However, Williams and Rutledge argue that our Supreme Court upheld this Court's ruling on any issues regarding the claim for intentional spoliation of evidence.

Contrary to the position of Williams and Rutledge, this Court is of the opinion that the Corrected Memorandum Decision does not resolve the dispute as to the "actual knowledge" element for an intentional spoliation of evidence claim. A close reading of the Corrected Memorandum Decision indicates that the circuit court's "Order" entered on October 17, 2011 and October 24, 2011 were adopted and incorporated by the Supreme Court *as to the assignments of error raised in this appeal*. (Emphasis added). According to the Corrected Memorandum Decision, the only assignments of error asserted by Williams and Rutledge were that the circuit court erred in granting partial summary judgment on the deliberate intent, negligence, wrongful death and negligent spoliation of evidence claims.<sup>2</sup> Nowhere in the Corrected Memorandum Decision does the Supreme Court specifically address the intentional spoliation of evidence claim. As such, the issue of what constitutes "knowledge" of the spoliator of a pending or potential civil action remains unresolved.

As certified question Number 1 was not answered and there is no precedent from our Supreme Court on this particular issue, this Court must use analogies from prior rulings by our Supreme Court and look to holdings of other jurisdictions for persuasive authority. The Court will begin its analysis with the decision in *Mace v. Ford Motor Company*, 653 S.E.2d 660 (W. Va. 2007) (per curiam) for guidance. In *Mace*, the appellant (and plaintiff below) was injured

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<sup>2</sup> Moreover, the Supreme Court stated in its Corrected Memorandum Decision the following: "The rulings on the spoliation claim were correct, as the circuit court found that spoliation of evidence is not a stand-alone tort when the spoliation is a result of negligence."

in a single-vehicle accident when her 1994 Ford Explorer went out of control and rolled over. Within hours, Liberty Mutual (plaintiff's insurer) was notified about the accident. Thereafter, representatives of Liberty Mutual inspected the vehicle and determined it to be a total loss. The plaintiff executed documents giving Liberty Mutual ownership of the vehicle in exchange for paying the plaintiff the "book value" for the vehicle. Subsequently, Liberty Mutual sold the vehicle to a salvage company and the vehicle was broken apart and sold for parts and scrap. Almost two years after the accident, the plaintiff and her husband sued Ford Motor Company asserting various product liability and negligence claims. The plaintiff then sued Liberty Mutual for negligent spoliation of the suspension on the vehicle.

Liberty Mutual argued in its motion for summary judgment that there was no evidence that the plaintiffs had filed or were contemplating filing a civil action, or that Liberty Mutual knew of the existence of such a pending or potential civil action. In response, the plaintiffs contended that Liberty Mutual knew that the plaintiffs had a potential lawsuit against Ford Motor Company for the following reasons: (a) Liberty Mutual had processed approximately 500 claims nationwide involving the "upset" of Ford Explorers in the ten years preceding the plaintiff's accident; and (b) about nine months prior to plaintiff's rollover accident, Liberty Mutual had filed a subrogation action in a fatal Ford Explorer rollover case. Based on these facts, plaintiffs argued that Liberty Mutual had knowledge of the defective nature of the Ford Explorer and its propensity to roll over in collisions. The circuit court agreed with Liberty Mutual and granted the summary judgment dismissing the plaintiffs' negligent spoliation claim. The circuit court concluded that Liberty Mutual had no duty to preserve the vehicle.

On appeal, our Supreme Court affirmed the circuit court's ruling and cited the seminal case of *Hannah v. Heeter*, 584 S.E.2d 560 (W.Va. 2003), which set forth a six factor test to

establish the tort of negligent spoliation of evidence by a third party. In the *Mace* opinion, the Supreme Court focused in part on the second of the six factors, namely whether “the alleged spoliator had actual knowledge of the pending or potential civil action.” The Court emphasized in its discussion that a third party must have had *actual* knowledge of the pending or potential litigation and that a third party’s constructive notice of a pending or potential action is not sufficient to force upon the third party the duty to preserve evidence. *Mace*, 653 S.E.2d at 666.

Although not binding upon this Court, there is persuasive authority on this issue from other jurisdictions. For instance, in *Williams v. Great West Casualty Company*, 2009 WL 4927710 (N.D. W.Va.), the District Court found that West Virginia law is unambiguous in that “a third party must have had actual knowledge of the pending or potential litigation.” (citing *Mace*, 653 S.E.2d at 666). The District Court found that the defendant had no duty to preserve the semi-tractor in that case and granted the defendant’s motion for summary judgment as the plaintiffs failed to state a claim of intentional spoliation of evidence by a third party.<sup>3</sup> Also, in another District Court case, the Court held that the plaintiff failed to provide a scintilla of evidence on all claims against the defendant, which included a claim for negligent spoliation of evidence. *Varney v. Nationwide Mutual Insurance Company*, 2011 WL 6153085 (S.D. W. Va.)

The tort of intentional spoliation of evidence consists of the following elements: (1) a pending or potential civil action; (2) knowledge of the spoliator of the pending or potential civil action; (3) willful destruction of evidence; (4) the spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action; (5) the intent of the spoliator to defeat a party's ability to prevail in the pending or potential civil action; (6) the party's inability to prevail in the civil action; and (7) damages. Once the first six elements are established, there arises a rebuttable

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<sup>3</sup> In *Williams*, the plaintiffs made a similar argument as in the case *sib judice* that the defendant was a sophisticated entity that should have known of a potential products liability claim.

presumption that but for the fact of the spoliation of evidence, the party injured by the spoliation would have prevailed in the pending or potential litigation. The spoliator must overcome the rebuttable presumption or else be liable for damages. Syl. Pt. 11, *Hannah v. Heeter*, 584 S.E.2d 560 (W.Va. 2003). As in *Mace*, the case *sub judice* comes down to “knowledge” of the spoliator of the pending or potential civil action. Here, Williams and Rutledge argue that Werner is a sophisticated trucking entity with a legal and claims department well versed in litigation arising from trucking accidents who should have known to preserve the subject vehicle under the circumstances.

While this Court is disturbed with the conduct of Werner by quickly disposing the subject vehicle under the circumstances, this Court believes it is obligated to follow the rationale set forth in *Mace* as to the meaning of “knowledge” of the spoliator of a pending or potential civil action. Although *Mace* involved a negligent spoliation of evidence claim, the Supreme Court was clear that a third party must have had *actual* knowledge of the pending or potential litigation and that a third party’s constructive notice of a pending or potential action is not sufficient to force upon the third party the duty to preserve evidence. As in *Mace*, there is nothing in the record indicating that Werner, prior to disposing of the subject vehicle in this case, had examined its records and reached a direct and clear recognition (actual knowledge) that Freightliner tractor-trailers were defective. *Mace*, 653 S.E.2d at 667. In addition, as in *Mace*, while, through the exercise of reasonable care or diligence, Werner might have examined the facts and circumstances and concluded that the Plaintiffs had a potential claim against Freightliner, there is nothing to suggest that Werner had a legal duty to do so. *Id.* In light of the holding in *Mace*, based upon the record, this Court cannot find anything suggesting that Werner had clear and direct knowledge that the subject vehicle, a Freightliner tractor-trailer, was defective, and that

such defect was the cause of death of Williams and Rutledge. Therefore, Werner's *Renewed Motion* must be granted.

*Conclusion*

Accordingly, it is **ORDERED, ADJUDGED, and DECREED** as follows:

1. *Werner Enterprise Inc. 's Renewed Motion for Summary Judgment* is **GRANTED** for the reasons set forth above; and consequently, the cause of action for intentional spoliation of evidence asserted on behalf of Plaintiff Williams and Defendant/Cross-Complainant Rutledge is **DISMISSED WITH PREJUDICE** and this civil action shall be **STRICKEN** from the active docket of this Court;
2. The objection of Plaintiff Williams and Defendant/Cross-Complainant Rutledge to this ruling is noted and saved; and
3. The Clerk of the Circuit Court of Ohio County shall send an attested copy of this Order to counsel of record.

ENTERED this 2<sup>nd</sup> day of January, 2014.

  
JUDGE MARTIN J. GAUGHAN