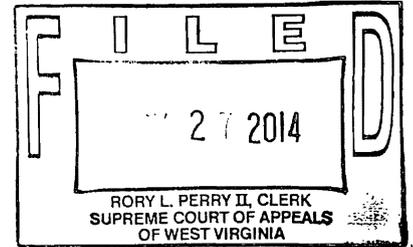


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**JANNELL WILLIAMS, as the Personal Representative of  
the Estate of Kenneth Williams, Plaintiff Below, and  
CHERYL RUTLEDGE, as the Personal Representative of  
the Estate of Quentin Rutledge, Defendant and  
Cross-Claimant Below,  
Petitioners,**



v.     **No. 14-0212 (Ohio County 09-C-419)**

**WERNER ENTERPRISES, INC., a Nebraska Corporation,  
Defendant Below,  
Respondent.**

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**PETITIONERS' BRIEF**

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## **RELEVANT PROCEDURAL HISTORY**

By orders entered October 17<sup>th</sup> and 24<sup>th</sup>, 2011 the Circuit Court, *inter alia*, denied Werner Enterprises, Inc.'s ("Werner") motion for summary judgment on Plaintiffs' claims for intentional spoliation. The West Virginia Supreme Court of Appeals subsequently affirmed the entire Order, including of course the ruling on the intentional spoliation claim, by Corrected Memorandum Decision filed on June 24, 2013. The Supreme Court of Appeals adopted the Circuit Court's opinion, and ordered that it be attached to the opinion. The Supreme Court specifically stated, 'Having reviewed the circuit courts "Order" entered on October 17, 2011, and "Order" entered on October 24, 2011, we hereby adopt and incorporate the circuit court's well-reasoned findings and conclusions as to the assignments of error raised in this appeal. The Clerk is directed to attach a copy of the circuit court's order to this memorandum decision.' Williams v. Werner Enters., Inc., No. 12-087 (W.Va., 2013). Upon remand, by Order entered January 24, 2014, the Circuit Court granted Defendant Werner's *Renewed Motion for Summary Judgment* on the Petitioners' claims for intentional spoliation of evidence. It is from this grant of summary judgment that the Petitioners now appeal.

## **ASSIGNMENTS OF ERROR**

### **ISSUE I**

The Circuit Court erred in granting Werner's *Renewed Motion for Summary Judgment* on the issue of intentional spoliation of evidence after the previous denial of that motion was upheld by the West Virginia Supreme Court of Appeals.

### **ISSUE II**

Even if Werner's *Renewed Motion for Summary Judgment* could have been considered procedurally, the Circuit Court erred in granting summary judgment in favor of Werner on

Petitioners' claims for intentional spoliation of evidence.

### **STATEMENT OF THE CASE**

On January 12, 2009, Quentin Rutledge ("Quentin") was driving a Werner tractor-trailer on I-79 northbound near Jane Lew, Lewis County, West Virginia when he came upon a winter storm. (App.213).<sup>1</sup> At that time, Kenneth Williams ("Kenneth"), a co-driver, was located in the sleeper berth. (App.213). The vehicle went out of control passing over a bridge, and impacted the guardrail on the east side of the roadway. (App.213). The tractor-trailer jackknifed, over-turned one-quarter turn to its driver's side, and went down the east embankment approximately 30 feet. (App.213). Quentin Rutledge was injured, but conscious and trapped inside the vehicle. Fire consumed the tractor-trailer, overtaking the cab with Kenneth and Quentin inside. (App 213). Kenneth and Quentin died as a result of the accident. (App.213).

At the time of their deaths, Kenneth and Quentin were driving a tractor-trailer owned by Werner, hauling a just-in-time (on-time delivery critical) load from Los Angeles, California to Columbia, Maryland. (App.212-218).

On the day of and in response to the subject accident, Werner hired Crawford and Company and its West Virginia claims adjustor to travel to and report from the scene. (App.212-215). This adjustor reported from the scene of the accident to Kenneth Dechant of Werner, and further provided a written report and photographs from the scene to Werner electronically on the date of the accident. (App.212-215, 217-218). Through this communication and report, Werner learned that there had been damage to the guardrail, the tractor-trailer had overturned, there had been a significant diesel fuel leak, and a subsequent fire which consumed the tractor and trailer. (App.212-214). Werner further learned that Quentin was trapped in the vehicle and was killed when the fire spread. (App.212-214). Werner also learned that Kenneth was a passenger in the

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<sup>1</sup> All citations and reference to the Appendix set forth in this Brief are made by "App.xxx".

vehicle at the time of the accident, and also died. (App.212-214). Werner further learned that the State of West Virginia would be making a claim for damage done to the guard rail, and that claims would be made for environmental remediation. (App.213). Werner also learned that that the cargo being hauled at the time of the accident was a total loss. (App.213, 222-223). Further, based on its own communication records, Werner knew that the subject tractor-trailer had broken down on two separate occasions on the trip immediately preceding the trip encompassing the subject accident. (App.268).

Despite this knowledge, Werner chose to destroy and dispose of the tractor-trailer within 48 hours of the accident, or by January 14, 2009. (App.227). Pursuant to Werner's direction, the tractor-trailer was taken to a local landfill after being impounded by M & J Towing, the company which provided tow services for this accident. (App.259-262, 264-265). According to the environmental remediation response company hired by Werner to respond to this accident, the State of West Virginia does not allow immediate disposal of items such as the tractor-trailer and other materials gathered at the accident site, given the issue of contamination from diesel fuel. Rather, these items are required to be stored on plastic at the landfill until such time as the State approves their disposal, a process which typically takes 3-4 weeks, and a process which Bruce Hefner testified was done here. (App.267).

At the time it authorized the destruction of the tractor-trailer, Werner was fully aware of the concept of litigation, and previously had claims for spoliation asserted against it in other litigation. (App. 220-224). Mr. Dechant (the individual tasked by Werner to head this investigation) testified that he knew, prior to the date of the accident, that a vehicle should be preserved when there is a fatality or life-threatening situation because it could be important physical evidence for claims arising from an accident, and its destruction could hamper the

ability to bring such claims. (App.221).

However, neither Kenneth Dechant nor any other Werner employee took any action to preserve the subject tractor-trailer. Rather, Werner took the affirmative step of ordering the destruction of the tractor-trailer within 48 hours of the accident, or by January 14, 2009. (App.227). Indeed, the individual who ordered this destruction (Thomas Sporven) made clear his intention to destroy the tractor-trailer regardless of the circumstances, be it injury, death or third-party vehicle involvement. (App.237-239). Mr. Sporven could think of no circumstance under which he would preserve a tractor-trailer that had been involved in an accident. (App.242). Further, Mr. Sporven testified that he made no attempt to communicate with anyone in Kenneth's or Quentin's families prior to directing the destruction of the tractor-trailer. (App.241).

Werner's designated expert on the issue of spoliation, James Mahoney, testified that the decision to destroy the subject tractor-trailer had to involve Werner's claims and/or legal department. (App.335-337). Mr. Mahoney reasoned that Werner's claims and legal departments would have been required to go through a mental process of evaluating the facts and circumstances of the accident (including a review of driver and equipment history) to evaluate its cause and determine potential exposures. (App.335-337). Mr. Mahoney further opined that Werner would not be in a position to dispose of the tractor-trailer until this review was completed and the determination was conveyed to the person responsible for authorizing the vehicle's destruction. (App.335-337). Petitioners' expert on their spoliation claim, Kathleen Robison, similarly believes that an identification of potential exposures was necessary. (App.244). Ms. Robison further concluded that, based upon the facts known to Werner, Werner had actual knowledge of potential claims requiring preservation of the vehicle, including

negligent maintenance claims, product liability claims and subrogation claims (including those that may be held by Werner or Drivers Management). (App.244-245).

Within one month of the accident, and specifically on February 11, 2009, counsel for Plaintiff Williams sent a letter to Werner requesting that it preserve the tractor-trailer and all evidence related to the accident. (App.248). A representative of Werner signed the return receipt for the certified mail copy on February 18, 2009. (App.249). Werner did not further respond until February 27, 2009, in which its general counsel, James Mullen, communicated with Plaintiff's counsel by telephone, advising that Werner was attempting to locate the vehicle. (App.250).

In a subsequent letter dated March 4, 2009, Mr. Mullen responded to Plaintiff's counsel's request for information and preservation of evidence, stating that both Kenneth and Quentin "were employees of Driver's Management Inc." (App.253). Mr. Mullen went on to state that Werner "made the decision to dispose of the units" and that "[t]he units have been disposed of at the landfill", although Werner did not identify the landfill where the vehicle had been disposed. (App.253). Mr. Mullen further stated that "[t]he nature of some of the inquiries which you have presented to Werner are arguably applicable in a 3<sup>rd</sup> party negligence claim." (App.253).

Plaintiff filed suit on December 9, 2009, alleging various claims against various defendants, including claims of negligence, deliberate intent, wrongful death, and negligent and intentional spoliation of evidence against Werner. (App.1-15). Plaintiff also asserted product liability claims against the manufacturer of the tractor-trailer, Freightliner/DTNA. (App.7-11). Defendant Rutledge answered and filed cross-claims against the other defendants similar to those raised in Plaintiff's Complaint. (App.23-34).

On or about September 28, 2011, Werner filed a motion for partial summary judgment regarding Petitioners' claims for spoliation of evidence. (App.409-473). Werner claimed, *inter*

*alia*, that it did not have knowledge of any potential claims at the time it destroyed the tractor-trailer.

The Circuit Court held a hearing on Werner's motions on October 7, 2011, at which time the Court took the motions under advisement. (App.310-322). The Circuit Court then issued its Order regarding the motions on October 17, 2011, in which it granted Werner's motion for partial summary judgment regarding Petitioners' claims for negligence, deliberate intent and wrongful death. (A.343-357). The Court found that Werner was an employer of Kenneth and Quentin, stating there was no genuine issue of material fact as to this finding. (App.354).

In first denying summary judgment on Petitioners' claims for intentional spoliation of evidence, the Court found Petitioners met their burden of showing the existence of genuine issues of material fact, including whether Werner disposed of the tractor-trailer with actual knowledge of potential claims, such as negligent maintenance and product defect. (App.356-357).

On or about October 20, 2011, Petitioners filed a motion to clarify and/or reconsider the Court's Order of October 17, 2011 as it pertained to the Court's ruling that workers' compensation immunity barred Petitioners' claims for negligent spoliation of evidence. The Circuit Court denied the motion in its Order dated October 21, 2011. (App.357). In its Order, the Court further restricted Petitioners' claims for intentional spoliation of evidence to a potential claim for product defect against the vehicle manufacture, precluding Petitioners from arguing a potential civil action existed for negligent maintenance against Gra-Gar. (App.355-356). The Court based its decision on a finding that Gra-Gar was a concurrent employer of Kenneth and Quentin because it was a subsidiary of Werner, stating that Petitioners only remedies against Gra-Gar are found in the Nebraska Workers' Compensation Act. (App.355, 525).

The Circuit Court then raised the potential for certifying questions to this Court based on its rulings, so that the issues would be decided before a trial on Petitioners' remaining claims. (App.525-526). The parties agreed to delay the trial and certify questions to this Court. (App.530-533). The Circuit Court later issued an Order, dated June 6, 2012, in which it made final its rulings of summary judgment in favor of Werner, pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure. (App.617). The Circuit Court also issued its Certification Order, dated June 6, 2012, raising four certified questions to this Court. (App.505-511). Those questions pertained to (1) whether there was a genuine issue of material fact concerning the "actual knowledge" element for Petitioners' spoliation claims; (2) whether Petitioners would be allowed to present certain expert opinions in support of their spoliation claims; (3) whether Petitioners would be allowed to present evidence of past settlements by and verdicts against the manufacturer of the tractor-trailer (DTNA) to rebut Werner's experts' opinions that the tractor-trailer was not defective; and (4) whether Petitioners may include negligent maintenance as a potential civil action in connection with their spoliation of evidence claims.

### **SUMMARY OF ARGUMENT**

The Circuit Court erred in granting Werner's motion for summary judgment on Petitioners' claim for intentional spoliation of evidence, since the Circuit Court's rulings and supporting findings were affirmed and adopted by the Supreme Court of Appeals. Because the Circuit Court's decision was affirmed, Werner should be estopped from rearguing the same motion. Werner does not raise any new issues, or offer new evidence or new law to support its motion for summary judgment on the spoliation claims. Even if review of the motion for summary judgment was procedurally proper, the Circuit erred in granting Werner's motion for summary judgment on the Petitioners' claims for intentional spoliation of evidence.

Werner had clear and actual knowledge of potential civil actions arising from the accident prior to its destruction of the tractor-trailer, based on an investigation it undertook on the day of the collision. Further, both parties' experts agree that Werner's claims and legal departments had to undertake an analysis of the facts of the accident and determine potential exposures prior to authorizing destruction. At the very least, genuine issues of material fact exist on Werner's actual knowledge of potential claims which preclude the proper entry of summary judgment.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Oral argument is necessary. The considerations of Rule 20 are met, in that this appeal involves issues of fundamental public importance.

### **ARGUMENT**

#### **A. Standard for Summary Judgment/Standard for Review**

"Upon appeal, a circuit court's entry of summary judgment is reviewed *de novo*." Perrine v. E. I. du Pont de Nemours & Co., 225 W.Va. 482, 506, 694 S.E.2d 815, 839 (2010). In reviewing summary judgment, this Court will apply the same test that the Circuit Court should have used initially, and must determine whether "it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syllabus Point 3, Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York, 148 W.Va. 160, 133 S.E.2d 770 (1963).] We defined a "genuine issue of fact" in Syllabus Point 5 of Jividen v. Law, 194 W.Va. 705, 461 S.E.2d 451 (1995):

Roughly stated, a "genuine issue" for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving

party for a reasonable jury to return a verdict for that party. The opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed “material” facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law.

As with the circuit court, we “must draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion,” that is, the appellants.

Painter v. Peavy, 192 W.Va. at 192, 451 S.E.2d at 758.

### ISSUE I

The Circuit Court erred in granting Werner’s *Renewed Motion for Summary Judgment* on the issue of intentional spoliation of evidence after the previous denial of that motion was upheld by the West Virginia Supreme Court of Appeals

The Circuit Court’s rulings and supporting findings were affirmed and adopted by the Supreme Court of Appeals. Because the Circuit Court’s decision was affirmed, Werner should be estopped from rearguing the same motion. Werner does not raise any new issues or offer new evidence or new law to support its motion for summary judgment on the spoliation claims.

A trial court may, in the exercise of its discretion, allow a party to renew a previously denied summary judgment motion. A renewed summary judgment motion is appropriate if one of the following grounds exists: (1) an intervening change in the controlling law; (2) the availability of new evidence or an expanded factual record; or (3) a need to correct a clear error or prevent manifest injustice. Tolley v. Carboline Co., 617 S.E.2d 508, 217 W.Va. 158 (2005), quoting Franklin D. Cleckley, Robin Jean Davis & Louis J. Palmer, *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 56(c) (Supp.2004).

None of the elements necessary to support a renewed motion for summary judgment are offered by Werner to support its motion. Given that the Circuit Court's ruling has been affirmed, Werner cannot argue that the motion needs to be granted to prevent "manifest injustice". There is neither an intervening change in the controlling law nor a new and expanded factual record offered by Werner in its renewed motion. For this reason alone, *Werner's Renewed Motion for Summary Judgment* should have been dismissed by the Circuit Court.

## ISSUE II

Even if *Werner's Renewed Motion for Summary Judgment* could have been considered procedurally, the Circuit Court further erred in granting summary judgment in favor of Werner on Petitioners' claims for intentional spoliation of evidence.

In its Order of October 17, 2011, the Circuit Court properly denied Werner's request for summary judgment on Petitioner's claims for intentional spoliation of evidence, finding the existence of genuine issues of material fact. (App.473-474). The Circuit Court then erred in its Order of January 24, 2014, granting *Werner's Renewed Motion for Summary Judgment* on the intentional spoliation claims.

The West Virginia Supreme Court has described a cause of action for intentional spoliation of evidence as follows:

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.

Hannah, *supra*, at 717, 573.<sup>2</sup>

In granting Werner's motion, the Court focused its analysis on the element of actual knowledge of a pending or potential civil action, quoting Mace v. Ford Motor Company, 653 S.E.2d 660, 221 W.Va. 198 (W.Va., 2007). (App 622-627).

The Court in Mace defined a potential civil action as one that "is existing in possibility but not in act. Naturally and probably expected to come into existence at some future time, though not now existing." Mace, *supra*, at 202, 664. Werner's expert on the spoliation claims, James Mahoney, testified that notice is an understanding of facts or events. (App.335-337). Regardless of the definition used, the only reasonable conclusion remains that Werner had actual knowledge of claims requiring preservation of the subject tractor-trailer. These potential claims included (1) negligent maintenance claims against Gra-Gar, (2) product liability claims against the manufacturer of the tractor-trailer, DTNA, (3) subrogation claims by Drivers Management and/or its insurers for workers' compensation payments made to the survivors of Kenneth and Quentin, and (4) subrogation claims by Werner for amounts spent in response to this accident, such as cargo loss payments and property damage claims.

The list of facts indisputably known by Werner at the time the tractor-trailer was destroyed is extensive, and was developed as a result of an investigation undertaken by Werner

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<sup>2</sup> The Court further recognized a cause of action for negligent spoliation of evidence, which consists of substantially similar elements. Hannah, *supra*, at 713-14, 569-70.

on the day of the accident. (App.333-336,339-340). Werner knew that the tractor-trailer had overturned, there had been a significant diesel fuel leak, and a subsequent fire which consumed the tractor and trailer. (App.333-335,346). Werner further knew that Quentin was trapped in the vehicle and was killed when the fire spread. (App.334,345-346). Werner also knew that Kenneth was a passenger in the vehicle at the time of the vehicle, and also died. (App.334,345-346). Werner further knew that the State of West Virginia would be making a claim for damage done to its guard rail and that claims would be made for environmental remediation. (App.335). Werner also that knew that the cargo being hauled at the time of the accident was a total loss. (App.335, 343-344). Further, based on its own communication records, Werner knew that the subject tractor-trailer had broken down on two separate occasions on the trip immediately preceding the trip encompassing the subject accident. (App.389).

Despite this knowledge, and being a sophisticated trucking entity with a legal department and a claims department well-versed in litigation arising from trucking accidents, Werner chose to destroy and dispose of the tractor-trailer within 48 hours of the accident, by January 14, 2009. (App.348). Werner did so fully aware of the concept of litigation, having had claims for spoliation asserted against it in other litigation. (App.350-354). Mr. Dechant (the individual tasked by Werner to head this investigation) testified that he knew, prior to the date of the accident, that a vehicle should be preserved when there is a fatality or life-threatening situation because it could be important physical evidence for claims arising from an accident, and its destruction could hamper the ability to bring such claims. (App.342).

Yet, despite full knowledge of the facts of this accident, neither Mr. Dechant nor any other Werner employee took any action to preserve the tractor-trailer. Rather, Werner took the affirmative step of ordering the destruction of the tractor-trailer within 48 hours of the accident,

or by January 14, 2009. (App.348). Indeed, the individual who ordered this destruction (Thomas Sporven) made clear that he would destroy the tractor-trailer regardless of the circumstance, be it injury, death or third-party vehicle involvement. (App.358-360). He ordered such destruction without even the courtesy of attempting to contact the families of Kenneth or Quentin. (App.362).

Werner's designated expert on the issue of spoliation, James Mahoney, testified that the decision to destroy the tractor-trailer required the involvement of Werner's claims and/or legal department. (App.335-337). Mr. Mahoney reasoned that Werner's claims and legal departments would have been required to go through a mental process of evaluating the facts and circumstances of the accident (including a review of driver and equipment history) to evaluate its cause and determine potential exposures. Mr. Mahoney further opined that Werner would not be in a position to dispose of the tractor-trailer until this was completed and conveyed to the person responsible for authorizing the vehicle's destruction. (App.335-337). This is an area where Petitioners can agree, as their expert on their spoliation claims, Kathleen Robison, similarly opined that an identification of potential exposures was necessary. (App. 245). Ms. Robison concluded that, based upon the facts known to Werner, Werner had actual knowledge of potential claims requiring preservation of the vehicle, including negligent maintenance claims, product liability claims and subrogation claims. (App.245-247).

It is from these facts that the Court may properly determine that potential claims existed, and that Werner had actual knowledge of such potential claims at the time that the tractor-trailer was destroyed. What Werner truly wants this Court to believe is that it is required that someone within Werner come forward to affirmatively state that they had actual knowledge of a potential claim, in order for Petitioners to succeed on their spoliation claims. However, West Virginia law

imposes no such requirement. Rather – and even in the cases cited by Werner in its Motion – West Virginia law is clear that “[a] party’s precise knowledge or state of mind concerning a situation often cannot be determined by direct evidence, but must instead be shown indirectly through circumstantial evidence.” Mace, *supra*, at 204, 667. Also see, *e.g.*, Hinerman v. Daily Gazette Co., Inc., 188 W.Va. 157, 170 n. 18, 423 S.E.2d 560, 573 n. 18 (1992) (“a plaintiff is entitled to prove the defendant’s state of mind through circumstantial evidence”); Sias v. W-P Coal Co., 185 W.Va. 569, 575, 408 S.E.2d 321, 327 (1991) (“Subjective realization, like any state of mind, must be shown usually by circumstantial evidence”); Syllabus Point 2, Nutter v. Owens-Illinois, Inc., 209 W.Va. 608, 550 S.E.2d 398 (2001) (an employer’s state of mind “must ordinarily be shown by circumstantial evidence, from which conflicting inferences may often reasonably be drawn.”); State ex rel. Erie Ins. Property & Cas. Co. v. Mazzone, 218 W.Va. 593, 598, 625 S.E.2d 355, 360 (2005) (“Bad faith is a state of mind which must be established by circumstantial evidence.”).

This Court has, on several prior occasions, recognized that the knowledge and mindset of an artificial legal entity like a corporation is often difficult to fathom. Cases involving insurance companies like the appellee usually arise as a result of “corporate bureaucracy that has pushed some victim into a red-tape limbo.” TXO Production Corp. v. Alliance Resources Corp., 187 W.Va. 457, 475, 419 S.E.2d 870, 888 (1992).

This [insurance company] bureaucracy is neither inherently good nor inherently evil, and it performs a necessary function in the insurance industry. Nonetheless, the claims settlement bureaucracy is subject to the same dynamics as every other bureaucracy known to man: its natural tendency is to maximize upward mobility for middle management members of the bureaucracy and to augment the work that the bureaucracy is responsible for doing. In

government, this phenomenon is often referred to as “turf protection.” The extent to which pernicious dynamics prevail in any particular company’s claims bureaucracy differs from company to company and from office to office within the same company. Hayseeds, Inc. v. State Farm Fire & Cas., 177 W.Va. 323, 328, 352 S.E.2d 73, 78 (1986). [653 S.E.2d 667]. Thus under West Virginia Law actual knowledge can be proven circumstantially, even against a corporation such as Werner.

Werner argued below that it had no actual knowledge of a potential or pending claim until counsel for the Williams Estate wrote a letter 35 days after the accident. As will be discussed further below, this fact is in dispute. In any case, this alone is insufficient to defeat the claim that Werner had actual knowledge, because actual knowledge can come from any source. In Mace, this Court expressly states that “[w]e made it clear in *Hannah v. Heeter* that, in order for a plaintiff to successfully pursue a claim against a third party for negligent spoliation of evidence, the plaintiff must show that the third party had actual knowledge, **from whatever source**, of the plaintiff’s pending or potential lawsuit.” Id. at 667. (Emphasis added).

Sufficient direct and circumstantial evidence exists in this case, when construed in the requisite light, from which a jury could conclude that Werner had actual knowledge of a potential civil action arising from the deaths of the co-drivers of the truck that was destroyed at Werner’s direction. Werner actually undertook an extensive investigation, hiring a claims adjustment company, to determine the facts and circumstances of this accident. This and more served to create actual knowledge of potential claims.

Werner’s claimed lack of actual knowledge of potential claims is also short-sighted, as it looks only to the hours between the accident and its action authorizing destruction of the tractor-trailer. It wholly fails to account for the fact that it knew, within one month of the accident, that

Plaintiff intended to pursue claims. On February 11, 2009, in a letter to Werner sent via regular and certified mail, counsel for Plaintiff requested that Werner and/or its agents preserve the tractor-trailer and all evidence related to the accident. (App.248). A representative of Werner signed the return receipt on February 18, 2009. (App.249). At that time, Werner had the knowledge necessary to track down the tractor-trailer, as it knew who it had hired to take the tractor-trailer to the landfill, having paid the invoice of M & J Towing on January 14, 2009. (App.259-262,264-265).

Based upon the testimony of the person hired by Werner to conduct environmental remediation at the site and deal with the West Virginia authorities with respect to this clean-up (Bruce Hefner), the tractor-trailer may well have still been in existence at the time Werner received the preservation letter from Plaintiff's counsel. Mr. Hefner testified that the State of West Virginia does not allow immediate disposal of items such as the tractor-trailer and other materials gathered at the accident scene, given the issue of contamination from diesel fuel. Rather, such items are required to be stored on plastic at the landfill until the State approves its disposal, a process which typically takes 3-4 weeks, and a process he testified was done in connection with this accident. (App.267). Yet, Werner did nothing to prevent the tractor-trailer from being placed in the landfill, or to locate it in the landfill after receiving Plaintiff's request for the vehicle. This is true despite Werner's general counsel's statement at that same time, that "[t]he nature of some of the inquiries which you have presented to Werner are arguably applicable in a 3<sup>rd</sup> party negligence claim." (App.253). Given these facts, it may properly be concluded that Werner had received Plaintiff's counsel's letter before the time the tractor-trailer was disposed of or rendered unrecoverable from the landfill.

Any argument that Werner was unaware of potential claims is contradicted by its own

assertion of claims against Petitioners in this litigation. Here, Werner and Drivers Management asserted counterclaims against Plaintiff and cross-claims against Defendant Rutledge in subrogation, seeking to recover workers' compensation payments made to the families from the monies that they may recover against DTNA (Freightliner). (App.58-61,85-87,108-111). Certainly, an awareness of these potential claims did not appear out of thin air. This is especially true as Werner has asserted subrogation claims previously in connection with the third-party claims of drivers operating its trucks. (App.234). As these claims would require Werner and Drivers Management to step into the shoes of Petitioners with respect to their product liability claims against DTNA, to now feign a lack of knowledge of potential claims is simply disingenuous.

The cases cited by Werner in support of their motion on the issue of actual knowledge of potential claims are readily distinguishable from the facts in this case. Mace involved a vehicle that was owned by the injured person who ultimately tried to bring claims against the vehicle manufacturer. The plaintiff in that case sold the vehicle to his insurer, Liberty Mutual, without advising his insurer of a need to retain it for purposes of litigation. In comparison here, the tractor-trailer was owned by Werner, and the families of Kenneth and Quentin were never given the opportunity or right to retain the vehicle prior to its destruction.

Also, the timing of the destruction of the vehicle in Mace did not occur for more than two months following the accident, compared to the swift 48 hours Werner used to destroy the subject tractor-trailer. Further, in Mace, the plaintiff did not file any claims until almost two years after the accident, compared to the one month period of time that it took the family of Kenneth to grieve his loss and provide an evidence preservation letter. Moreover, the defendant in Mace, Liberty Mutual, had no reason to evaluate the cause of any damages to the plaintiff in

that case. In comparison, here, by the testimony of Werner's own expert, Werner would have been required to go through a mental process of evaluating the accident and the resulting potential exposures before disposing of the vehicle. Therefore, Mace is inapposite to the facts and circumstances here.

The other case cited by Werner, Williams v. Great West Casualty Co., 2009 U.S. Dist. LEXIS 116331 (N.D.W.Va. 2009) is similarly distinguishable on these same grounds. In that case, the tractor-trailer was destroyed by an insurer after the owner of the vehicle informed it that it did not wish to keep the vehicle.

This case has far reaching implications. What Werner asks this Court to say is that it is acceptable for a vehicle owner to rush to destroy a vehicle before a request for preservation is received. It is patently unreasonable to expect Petitioners to have made a request to preserve the tractor-trailer in a shorter period of time than occurred in this case. In fact, given the egregious evidence preservation practices of Werner, as described above, it is clear that there are no circumstances in which such a formal request could reasonably be made prior to Werner's action to destroy a vehicle. In his opinion, Judge Gaughan notes that he is "disturbed with the conduct of Werner by quickly disposing the subject vehicle under the circumstances...." (App.626). Indeed, Werner's conduct is disturbing. This Court should neither condone nor encourage such actions, and a ruling in favor of Werner on Petitioners' spoliation claims in this circumstance would do both. Based upon the evidence set forth above, when reviewed in the requisite light, this is clearly a case where the Petitioners have established sufficient direct and circumstantial evidence from which a jury could conclude that Werner had actual knowledge of a potential civil action.

**CONCLUSION**

For the reasons set forth herein, Petitioners respectfully request that the Court reverse the Circuit Court's grant of summary judgment in favor of Werner on their intentional spoliation of evidence claims. Finally, Petitioners request that the Court remand this cause to the Circuit Court for further proceedings, including trial.

Respectfully submitted,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**JANNELL WILLIAMS, as the Personal Representative of  
the Estate of Kenneth Williams, Plaintiff Below, and  
CHERYL RUTLEDGE, as the Personal Representative of  
the Estate of Quentin Rutledge, Defendant and  
Cross-Claimant Below,  
Petitioners,**

v. No. 14-0212 (Ohio County 09-C-419)

**WERNER ENTERPRISES, INC., a Nebraska Corporation,  
Defendant Below,  
Respondent.**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing "*Petitioners' Brief*" has been served on counsel as shown below, as required by Rules 10(c)(9) and 37, Revised Rules of Appellate Procedure, by depositing a true copy thereof in the United States Mail, first class postage prepaid, facsimile, electronic mail or in-hand delivery, addressed as follows:

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