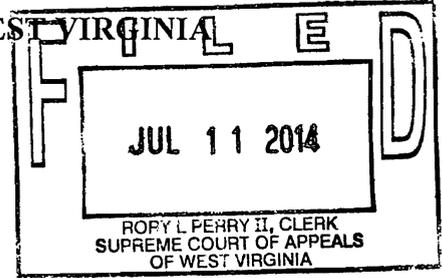


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**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 Below,
Petitioners**



vs.)

Case No. 14-0212

**Werner Enterprises, Inc., a Nebraska corporation,
Defendant Below, Respondent**

**RESPONDENT'S BRIEF
AND CROSS-ASSIGNMENT OF ERROR**

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CROSS-ASSIGNMENT OF ERROR

Werner Enterprises, Inc. (“Werner”) respectfully requests that the Circuit Court’s *Order* of January 24, 2014 (the 1/24/14 *Order*) (App. 616-627) granting summary judgment to Werner be affirmed because, applying West Virginia law, specifically the precedent established in *Mace v. Ford Motor Co.*, 221 W. Va. 198, 653 S.E.2d 660 (2007), Petitioners’ intentional spoliation claim fails as a matter of law. In the alternative, as a separate and distinct basis for summary judgment in Werner’s favor, Werner submits that the Circuit Court erred in applying West Virginia law, rather than Nebraska law, to Petitioners’ claim. Although applying clear and controlling West Virginia precedent to the relevant, material, and undisputed facts of this case compels summary judgment in favor of Werner, as the Circuit Court correctly held, Nebraska law should have been applied to the intentional spoliation claim, just as Nebraska law was applied to all of the other claims by both the Circuit Court and the West Virginia Supreme Court of Appeals.¹ Because Nebraska has never recognized the tort of intentional spoliation, Petitioners’ intentional spoliation claim must be dismissed.

STATEMENT OF CASE

Relevant Facts

Kenneth Williams and Quentin Rutledge (collectively, the “Decedents”) were long distance drivers for Werner who travelled together as a team. In January 2009, Decedents were passing through West Virginia as they transported cargo from California to Maryland in a tractor-trailer owned by Werner. In the early morning hours of January 12, 2009, Mr. Rutledge was driving in a winter storm in Lewis County, West Virginia, and Mr. Williams was in the sleeper berth. As Mr. Rutledge was going across a bridge, he lost control of the unit, hit a

¹ See *Corrected Memorandum Decision* of June 24, 2013 (App. 480-483) in which this Court found that the Circuit Court correctly applies Nebraska law to the deliberate intent, negligence, and wrongful death claims.

guardrail, and the tractor-trailer proceeded to roll down a steep embankment. Mr. Williams was impaled with the guardrail at impact. (App. 476). There is no evidence to suggest that Mr. Williams was alive when the first witnesses arrived at the scene. (App. 171, 179). Mr. Rutledge was initially conscious, though he suffered deadly injuries from the accident, and could not be removed from the vehicle prior to his death. (App. 172-174). A small fire started that eventually consumed the entire rig. The West Virginia Medical Examiner opined to a reasonable degree of medical certainty that Mr. Williams died as a result of extensive internal injuries *prior* to the fire. (App. 165-167), and Petitioners have failed to proffer any evidence to the contrary.

Werner, located in Nebraska, hired Crawford and Company (“Crawford”)² to report to the accident scene and gather information. Werner learned that this was a single-vehicle accident, and no third-parties were involved. (App. 212-215). Werner knew that it would be responsible to pay workers’ compensation death benefits to the drivers as a result of the accident without any tort liability being established against Werner, and, accordingly, Werner would be immune from suit in tort for any excess damages. Thus, under Werner’s policy, there was no reason to place a litigation hold on the subject vehicle. Of the dozens of professionals that reported to the scene, including Crawford’s insurance adjustor, police officers, firemen, and others experienced in accident investigation and evidence preservation, not a single person suggested to Werner that the vehicle should be preserved.

Because Werner did not foresee any litigation arising from a single-vehicle accident caused by inclement weather conditions, the only remaining decision was whether the vehicle was commercially salvageable. Tom Sporven, Assistant Director of Fleet Maintenance,

² Werner objects to Petitioners’ characterization of the Crawford report (App. 212-215), as described at pp. 2-3 of Petitioners’ Brief, as it contains factual assertions that are simply not supported by the document. However, these disputed issues are not relevant to the fully dispositive legal issues under consideration.

determined that the subject vehicle was damaged beyond repair and disposed of it by directing the towing company in possession thereof to deposit it in a landfill in accordance with applicable environmental laws. (App. 239, 339 - 342).³

Approximately one month after the subject accident, by letter dated February 11, 2009 (App. 248), and received on February 18, 2009 (App. 249), Petitioner Williams' attorney, Chris Heavens, advised Werner for the first time that he had been retained by Mr. Williams' family regarding the subject accident and requested that Werner preserve the subject vehicle. Thus, Werner did not receive notice of a potential civil action and a request for preservation until approximately thirty-five (35) days after Werner disposed of the vehicle. Werner did not have ownership, possession, custody, or control of the vehicle at the time the notice was sent by Petitioner Williams' counsel.

It is important to note that, as the Circuit Court held and as this Court affirmed in the *Corrected Memorandum Decision* (App. 480-483), Werner was obligated to pay benefits to the Decedents' beneficiaries without regard to fault and, thus, was immune from suit in tort relating to the subject accident. This case does not involve evidence that would have been used by Petitioners for a claim against Werner, but instead, evidence that purportedly would have been used against third-parties – Freightliner Corporation, Inc. ("Freightliner" and Daimler Trucks

³ Werner disputes the characterizations set forth on pp. 3-4 of the Petitioners' Brief regarding the roles of Mr. Dechant and Mr. Sporven in the decision to dispose of the vehicle. Mr. Dechant testified that his role is limited to gathering information, which is passed on to Werner's legal department. Mr. Dechant testified that he does not make any determination regarding whether a legal hold is required for any items and has no expertise in making such determinations. (App. 218, 224). Likewise, Mr. Sporven testified that the decision of whether evidence should be preserved for litigation purposes is not within his job responsibilities. (App. 339 - 342). Mr. Sporven's role is limited to determining whether a vehicle is commercially salvageable. (App. 239). As set forth herein, Werner perceived no reason for preservation in single-vehicle accidents involving only Werner drivers. Werner understood that it would be responsible to pay workers' compensation benefits to its employees regardless of whether or not it was at fault, accepted that responsibility, and, accordingly, did not foresee any litigation due to the exclusivity provisions of the applicable workers' compensation law.

North America, LLC (“Daimler”) - for an alleged product defect claim about which Werner had no notice or knowledge at the time Werner authorized disposal of the subject vehicle. Thus, the essential question is whether Werner - in the absence of a request for preservation and in the absence of any notice that the Petitioner’s intended to bring a product defect action against third parties - had any legal duty to investigate the possibility of such product defect claim on Petitioners’ behalf and preserve the subject vehicle for such third party claim by the Petitioners.

Relevant Procedural History

This action was instituted on December 14, 2009.⁴ Petitioners brought several claims against Werner including: deliberate intent, negligence, wrongful death, negligent spoliation, and intentional spoliation.

On September 27, 2011, Werner filed a motion for partial summary judgment concerning the deliberate intent, wrongful death, and negligence claims on the basis that Werner was the special employer of the Decedents, is paying workers’ compensation death benefits to the Decedents’ beneficiaries, and, accordingly, is immune from suit under Nebraska law.

On September 28, 2011, Werner filed its original motion for summary judgment regarding the Petitioners’ spoliation claims (App. 135 - 158), arguing, among other things, that Petitioners are unable as a matter of law to prove the elements of a spoliation claim under West Virginia law because the undisputed evidence demonstrates that Werner did not have actual knowledge of a pending or potential lawsuit at the time Werner disposed of the subject vehicle, which had already been destroyed by fire.

⁴ At the time the action was filed, Cheryl Rutledge was named as a Defendant and asserted cross-claims against Werner that were in substance similar to the claims asserted by Plaintiff Jannell Williams. Prior to trial, Plaintiff Jannell Williams voluntarily dismissed her claims against Cheryl Rutledge, and Ms. Rutledge was realigned as a Plaintiff in this action.

By *Order* entered on October 17, 2011 (the “10/17/11 *Order*”) (App. 343 - 357), the Circuit Court granted summary judgment in favor of Werner concerning the claims of deliberate intent, negligence, wrongful death, and negligent spoliation. Based on the Circuit Court’s 10/17/11 *Order*, the only remaining claim upon which Petitioners were permitted to proceed to trial was the intentional spoliation claim.⁵

On the morning of October 24, 2011, counsel and the parties appeared for trial. Just prior to jury selection, Judge Gaughan held a conference in chambers. Judge Gaughan stated that intentional spoliation “is a relatively new cause of action in this state.” (App. 533). Judge Gaughan also expressed considerable uncertainty as to whether “*actual* knowledge” is a required element of an intentional spoliation claim under West Virginia law. (App. 525 – 527). Judge Gaughan then gave the parties the option of proceeding with the trial or, instead, deferring the trial in order to certify questions to the West Virginia Supreme Court of Appeals concerning whether or not Petitioners had raised a genuine issue of material fact to satisfy the knowledge element of the intentional spoliation claim. The parties agreed to continuance of the trial and submitting certified questions to this Court.

On June 15, 2012, the Circuit Court entered the *Certification Order*. (App. 504 – 512). On the same date, the Circuit Court entered another *Order* (App. 513 - 516), wherein the Court deemed its 10/17/11 *Order* granting summary judgment to Werner on the deliberate intent, negligence, wrongful death, and negligent spoliation claims to be a final, appealable order pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure, so that such order could be

⁵ See also the *Order* entered on October 21, 2011 (App. 499 - 503) in which the Circuit Court denied Petitioners’ motion to reconsider the dismissal of the negligent spoliation claim, ruling that the negligent spoliation claim was barred by the Nebraska Workers’ Compensation Act.

reviewed contemporaneously with the certified questions concerning the intentional spoliation claim. On July 13, 2012, Plaintiffs filed a notice of appeal concerning the 10/17/11 *Order*.

This Court entered a *Scheduling Order* on July 18, 2012, and ordered that the certified questions be docketed with the appeal as a single proceeding (Case No. 12-0847). One of the four certified questions asked whether Petitioners had “raised a genuine issue of material fact concerning the ‘actual knowledge’ element” for the intentional spoliation claims. (App. 506).

In the *Corrected Memorandum Decision*, this Court affirmed summary judgment in favor of Werner concerning the claims for deliberate intent, negligence, wrongful death, and negligent spoliation, finding that the Circuit Court properly applied Nebraska law to determine that Werner was immune from suit for the deliberate intent, negligence, and wrongful death claims because: “Werner is a Nebraska corporation, the employment relationship was entered into in Nebraska, and the beneficiaries received workers’ compensation benefits from Werner pursuant to Nebraska law.” (App. 482).

Importantly, however, the *Corrected Memorandum Decision* contains no discussion of the intentional spoliation claim. Instead, Footnote 3 of the *Corrected Memorandum Decision* merely states that:

The June 15, 2012, order also certified four questions in the event this case would be remanded on appeal for further proceedings. **The Court declines to address these questions.**

(App. 482) (emphasis added).

The *Corrected Memorandum Decision* states that: “Having reviewed the circuit court’s ‘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.***” (App. 482-483)(emphasis added). The assignments of error

raised by Petitioners in that appeal related solely and only to the dismissal of the deliberate intent, negligence, wrongful death, and negligent spoliation claims. (App. 482).

Because this Court declined to address the certified questions pertaining to the intentional spoliation claim, there has been no appellate review of the 10/17/11 *Order* denying Werner's original motion for summary judgment concerning the intentional spoliation claims.

After this Court (1) affirmed the summary judgment relating to the deliberate intent, negligence, wrongful death, and negligent spoliation claims, and (2) declined to address the certified questions relating to the intentional spoliation claim, this action was remanded to the Circuit Court. On December 30, 2013, Werner filed a renewed motion for summary judgment (App. 386-389) requesting that the Circuit Court revisit the interlocutory order denying Werner's prior motion for summary judgment on the intentional spoliation claim, which the Circuit Court is authorized to do pursuant to the holding of *Dellinger v. Pediatrix Med. Group, P.C.*, 2013 W. Va. LEXIS 1153, 2013 WL 5814173, 750 S.E.2d 668, 672 n.8 (W. Va. 2013) ("We find nothing in our jurisprudence which would prevent a lower court from exercising its discretion to revisit a previous denial of summary judgment in an effort to ensure the proper administration of justice.").

By *Order* entered on January 24, 2014, the Circuit Court granted the renewed motion for summary judgment. The Circuit Court applied the holding of *Mace v. Ford Motor Co.*, 221 W. Va. 198, 653 S.E.2d 660 (2007) and concluded that:

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 lawsuit 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 to suggest 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. (App. 626-627).

It is from this *Order* that Petitioner's appeal. As is clearly established from the foregoing procedural history, there is no question that the Circuit Court possessed the authority to revisit its prior interlocutory ruling and grant summary judgment in favor of Werner. As set forth below, there is also no question that the Circuit Court's ruling is substantively correct and follows the binding legal precedent of *Mace v. Ford Motor Co.*, 221 W. Va. 198, 653 S.E.2d 660 (2007).

SUMMARY OF ARGUMENT

Issue I: The Circuit Court had the authority to reconsider its interlocutory order.

There was no procedural error in the Circuit Court's decision to grant Werner's renewed motion for summary judgment. Contrary to Petitioners' assertions, there has been no appellate review of the Circuit Court's 10/17/11 *Order* relative to the intentional spoliation claim. Accordingly, the Circuit Court's original order denying Werner's motion for summary judgment was an interlocutory order, and the Circuit Court was vested with the authority to reconsider the motion and change its ruling.

Issue II: The Circuit Court did not err in granting Werner's renewed motion for summary judgment concerning the intentional spoliation claim; controlling precedent - *Mace v. Ford Motor Co.*, 221 W. Va. 198, 653 S.E.2d 660 (2007) - mandates that summary judgment be granted in favor of Werner.

In order to escape dismissal of the intentional spoliation claim, it would be necessary for Petitioners to proffer evidence sufficient to raise a genuine issue of material fact to show that

Werner had *actual knowledge* of a product defect claim by Petitioners against Freightliner and Daimler prior to disposing of the subject vehicle. Petitioners are unable to make this showing because: (1) it is undisputed that disposal of the subject vehicle, which had been destroyed by fire, occurred on or about January 14, 2009; and, (2) it is undisputed that Werner did not receive notice of Petitioners' intent to potentially bring a lawsuit against third-parties until February 18, 2009, more than a month after disposing of the vehicle. Petitioners urge that because Werner is a sophisticated corporate entity, Werner should have known (i.e. had constructive knowledge) of a potential lawsuit. However, Petitioners' argument in this regard is contrary to the holding of *Mace v. Ford Motor Co.*, 221 W. Va. 198, 653 S.E.2d 660 (2007).

In addition, Petitioner Williams' has no viable product defect case relating to the post-collision fire because Mr. Williams was fatally impaled with a guardrail at impact and died prior to the fire. Accordingly, Petitioner Williams' intentional spoliation claim must be dismissed because there is no viable product defect case relating to Mr. Williams death.

Cross-Assignment of Error: Nebraska law, not West Virginia law, applies, and Nebraska has never recognized the tort of intentional spoliation of evidence.

The Circuit Court erred in ruling that West Virginia law applies. Nebraska law should be applied to the intentional spoliation claim, just as Nebraska law was applied to all of the other claims by both the Circuit Court and this Court in the prior appeal.

Only approximately eleven (11) states recognize a cause of action for intentional spoliation of evidence. Nebraska is among the majority of states that has never recognized the tort of third-party spoliation of evidence. Instead, Nebraska's law is limited to permitting sanctions for first-party spoliation. *McNeel v. Union Pac. R.R.*, 276 Neb. 143, 156 (Neb. 2008) ("In Nebraska, the proper remedy for spoliation of evidence is an adverse inference instruction.").

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a), Werner states that oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. Further, oral argument is unnecessary because the dispositive issues have been authoritatively decided by the decisions cited herein.

ARGUMENT

A. The standard of review is *de novo*.

“A circuit court’s entry of summary judgment is reviewed *de novo*.” Syll. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

B. The Circuit Court had the authority to reconsider its interlocutory order.

As this Court recently explained: “we find nothing in our jurisprudence which would prevent a lower court from exercising its discretion to revisit a previous denial of summary judgment in an effort to ensure the proper administration of justice.” *Dellinger v. Pediatrix Med. Group, P.C.*, 2013 W. Va. LEXIS 1153, 2013 WL 5814173, 750 S.E.2d 668, 672 n.8 (W. Va. 2013).⁶

Although Judge Gaughan denied Werner’s original motion for summary judgment in regards to intentional spoliation in the 10/17/11 *Order*, Judge Gaughan subsequently acknowledged considerable doubt in this ruling (App. 525 - 527), and continued the trial of this matter to certify questions to this Court for guidance on the applicable legal standard for the

⁶ In *Dellinger*, this Court cited with approval *Keystone Ranch Co. v. Cent. Neb. Pub. Power and Irrigation Dist.*, 237 Neb. 188, 465 N.W.2d 472, 475 (Neb. 1991) for the proposition that “denial of summary judgment motion was interlocutory order which could be reconsidered by the court” and quoted *Maxev v. Leniger*, 14 Ohio App. 3d 458, 14 Ohio B. 578, 471 N.E.2d 1388, 1389 (Ohio Ct. App. 1984) (“If the trial court errs in overruling a motion for summary judgment, it is not necessary that that court wait until the judgment is reversed on appeal . . . ***the court may correct its error . . . upon a new motion for summary judgment predicated upon the same law and facts.***”)(emphasis added). See *Dellinger*, 750 S.E.2d at 672 n.8.

“knowledge” element of the intentional spoliation claim. However, this Court declined to address the certified questions.

Petitioners argue that Werner was estopped from presenting a renewed summary judgment motion because the Circuit Court’s rulings and supporting findings were affirmed and adopted by this Court’s *Corrected Memorandum Decision*. (Pet’rs’ Br. 9). However, Petitioners’ argument is based upon a flawed reading of the *Corrected Memorandum Decision*, which states: “Having reviewed the circuit court’s ‘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.*” (App. 482-483)(emphasis added). In that appeal, the assignments of error did not relate to the intentional spoliation claim; rather, the assignments of error related only to the grant of summary judgment to Werner on the deliberate intent, negligence, wrongful death, and negligent spoliation claims. (App. 482). It was the certified questions that related to the intentional spoliation claims, and this Court *explicitly stated* that it did not address the certified questions. (App. 482). As the Circuit Court correctly recognized in its 1/24/14 *Order*: “Nowhere in the Corrected Memorandum Decision does the Supreme Court specifically address the intentional spoliation of evidence claim.” (App. 623).

Petitioners further argue that a renewed summary judgment motion may only be properly considered when there is (1) a change in the controlling law; (2) the availability of new evidence; or (3) a need to correct a clear error. (Pet’rs’ Br. 9). Petitioners incorrectly argue that there was no “clear error” because the previous denial of summary judgment concerning intentional spoliation was affirmed by this Court. (Pet’rs’ Br. 10). However, as discussed above, this Court *expressly* declined to address the certified questions and, thus, did not review the intentional

spoliation claims at all. Therefore, the Circuit Court had every right to correct its previous ruling pursuant to *Dellinger*.

Further, Werner's renewed motion set forth a legal basis for summary judgment that was not previously presented to, considered by, or ruled upon by the Circuit Court. More specifically, the Circuit Court's previous decision was based solely on West Virginia law, and in the renewed motion, Werner moved the Circuit Court to apply Nebraska law. In addition, there was new, albeit persuasive, authority⁷ rendered in regards to West Virginia law on intentional spoliation after Judge Gaughan's 10/17/11 *Order*.

For the foregoing reasons, it was procedurally proper for the Circuit Court to reconsider its previous denial of Werner's motion for summary judgment in regards to Petitioners' intentional spoliation claim. The Circuit Court's previous denial was not reviewed by this Court on appeal and, accordingly, it remained an interlocutory order. The Circuit Court was vested with the authority to reconsider the motion and change its ruling.

C. The Circuit Court did not err in granting Werner's renewed motion for summary judgment concerning the intentional spoliation claim; controlling precedent - *Mace v. Ford Motor Co.*, 221 W. Va. 198, 653 S.E.2d 660 (2007) - mandates that summary judgment be granted in favor of Werner.

The elements of a claim for intentional spoliation are as follows:

- (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.

⁷ *Varney v. Nationwide Mut. Ins. Co.*, 2011 U.S. Dist. LEXIS 142812, 2011 WL 6153085 (S.D. W. Va. Dec. 12, 2011).

Syll. Pt. 11, *Hannah v. Heeter*, 213 W. Va. 704, 584 S.E.2d 560 (2003).⁸ In order to satisfy the “knowledge requirement” (element 2), Petitioners are required to prove actual knowledge rather than mere constructive knowledge. Under West Virginia law, “actual knowledge is clear and direct, while constructive knowledge is knowledge which someone should have known after using reasonable care and diligence.” *Williams v. Great West Casualty Co.*, 2009 U.S. Dist. LEXIS 116331, 2011 WL 6153085 (N.D. W.Va. 2009), citing *Mace v. Ford Motor Co.*, 221 W. Va. 198, 653 S.E.2d 660 (W. Va. 2007).

In the context of spoliation claims, this Court has noted the definitions of actual knowledge, actual notice, constructive knowledge, and constructive notice as follows:

The textbook definitions of ‘actual’ and ‘constructive’ knowledge and notice are helpful guides in assessing the state of a third party’s knowledge and notice of pending or potential litigation.

On the one hand, Black’s Law Dictionary defines “actual knowledge” as “**direct and clear knowledge**, as distinguished from constructive knowledge,” Black’s Law Dictionary at 888 (8th Ed. 2004), and defines “actual notice” as “[n]otice given directly to, or received personally by, a party.” Id. at 1090.

On the other hand, “constructive knowledge” is defined by Black’s Law Dictionary as “[**k**]nowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person.” Id. at 888 (8th Ed. 2004). Similarly, “constructive notice” is defined as “[n]otice arising by presumption of law from the existence of facts and circumstances that a party had a duty to take notice of . . . ; notice

⁸ As set forth in the original motion for summary judgment on the spoliation claims (App. 135 - 158), Petitioners lack sufficient evidence not only as to the “actual knowledge” element of the intentional spoliation claims, but also on other elements. For example, there is no basis upon which a jury could reasonably infer that Werner subjectively intended to prevent Petitioners from prevailing in a product liability claim. In fact, since Werner is paying workers’ compensation death benefits to the Decedents’ respective beneficiaries, and will continue to do so for many years, and Werner would be entitled to subrogation from any third party who caused or contributed to Mr. Williams’ and Mr. Rutledge’s deaths, the only reasonable inference is that Werner would have preserved the truck if it knew of any basis for a product liability claim. Such inferences need not be reached, however, because *Mace* is directly on point and compels that summary judgment in favor of Werner on the actual knowledge element.

presumed by law to have been acquired by a person and thus imputed to that person.” *Id.* at 1090.

Mace, 221 W. Va. at 204, 653 S.E.2d at 666 (emphasis added). As is clear from Petitioners’ brief, Petitioners rest their case solely on alleged constructive notice. Petitioners contend that Werner was on notice of facts and circumstances (post-collision fire of the subject vehicle) from which Werner should have foreseen that Petitioners might decide to bring a product defect action against Freightliner and Daimler.

However, since “actual knowledge” is the required standard, the only salient fact is when was “notice given directly to, or received personally by” Werner. *Id.* It is undisputed that Werner did not receive notice of Petitioners’ intent to potentially assert a product liability action until it received a letter from Petitioners’ counsel on or about February 18, 2009—approximately one month *after* Werner authorized the towing company to dispose of the destroyed vehicle on January 14, 2009.

The facts of the present case are indistinguishable from *Mace*, where the plaintiff was injured in a single-vehicle accident when her Ford Explorer struck a guardrail and rolled over. Within hours, the plaintiff’s insurer, Liberty Mutual, was notified of the accident. Thereafter, Liberty Mutual inspected the vehicle, determined it to be a total loss, and sold the vehicle to a salvage company. The vehicle was broken apart and sold for parts and scrap. *Mace*, 221 W. Va. at 200, 653 S.E.2d at 662.

Subsequently, the plaintiff sued Ford Motor Company alleging various product defect and negligence claims. The plaintiff then sued Liberty Mutual alleging spoliation as a result of Liberty Mutual’s decision to sell the vehicle to the salvage company and permit the vehicle to be torn apart. In its motion for summary judgment, Liberty Mutual argued that it was entitled to

judgment in its favor because it had received no notice that the plaintiff intended to pursue an action against Ford Motor Company prior to the destruction of the vehicle.

The plaintiff conceded that no notice had been given to Liberty Mutual prior to the destruction of the vehicle. However, the plaintiff argued that Liberty Mutual reasonably should have known of the potential that litigation would ensue for two reasons. First, the plaintiff argued that Liberty Mutual had processed approximately 500 claims involving “upsets” of Ford Explorers in the ten years preceding the plaintiff’s accident. *Mace*, 221 W. Va. at 201, 653 S.E.2d at 663. Second, Liberty Mutual had formerly filed a subrogation action in a fatal Ford Explorer rollover case, alleging product liability theories against Ford Motor Company. *Id.* The plaintiff argued that, based on these circumstances, Liberty Mutual should have known that the potential for litigation existed as a result of the plaintiff’s accident. *Id.* The circuit court granted summary judgment in favor of Liberty Mutual, finding that there was no genuine issue of material fact, and plaintiff could not prove the *prima facie* elements of a spoliation claim as a matter of law.

Mace makes it clear that *actual* knowledge of pending or potential litigation must be proven, and allegations of constructive knowledge are insufficient as a matter of law. Here, Petitioners essentially argue that Werner should be deemed to have had constructive knowledge of potential product liability litigation because it is a sophisticated trucking company that would have or should have foreseen the potential for a product liability lawsuit. (Pet’rs’ Br. 12 - 15). This reasoning was summarily rejected in *Mace*, in which this Court noted that the plaintiffs “concede that it was not until long after their Ford Explorer was altered that they gave notice of their civil action, or their intent to file a civil action, against Ford Motor Company directly to

appellee Liberty Mutual.” *Mace*, 221 W. Va. at 205, 653 S.E.2d at 667. This fact was dispositive and summary judgment was affirmed in favor of Liberty Mutual.

Federal district courts in West Virginia have applied the clear holding of *Mace* to reach the same conclusion that the Circuit Court reached in this case. For example, in *Williams v. Great West Casualty Co.*, 2009 U.S. Dist. LEXIS 116331, 2009 WL 4927710 (N.D. W. Va. Dec. 14, 2009), decedent Candace Williams died in a single-vehicle accident on September 3, 2006 while driving a 2000 Freightliner semi-tractor. The vehicle rolled over and exploded, killing Williams and a passenger. The owner of the Freightliner tractor-trailer informed the insurance company that it did not wish to keep the semi-tractor. Thereafter, the insurance company, Great West, which had taken control of the semi-tractor, authorized the disposal of the vehicle on September 12, 2006, nine days after the accident.

In *Williams*, the plaintiffs made the same argument that Petitioners are making in this case—that the defendant was a “knowledgeable and sophisticated” entity that should have reasonably foreseen the potential for a product liability lawsuit against Freightliner. However, the court concluded that: “In order to establish a *prima facie* case for the tort of negligent spoliation, the plaintiff may not impute knowledge to the defendant of what it should have known.” *Williams* at *20 (citing, *Mace*, 653 S.E.2d at 666) (“We emphasize that a third party must have had **actual** knowledge of the pending or potential litigation. 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.”) (emphasis in original).

Another District Court case that recently followed the clear legal standard of *Mace* is *Varney v. Nationwide Mut. Ins. Co.*, 2011 U.S. Dist. LEXIS 142812, 2011 WL 6153085 (S.D.

W. Va. Dec. 12, 2011).⁹ In *Varney*, the plaintiff was driving a Toyota Tacoma when the brakes failed and the vehicle flipped over. The plaintiff's insurer, defendant Nationwide, settled the insured's claim and sold the vehicle for salvage in May 2009. *Id.* at *2. Plaintiffs brought a spoliation claim against Nationwide, alleging that Nationwide should have known of the potential for litigation. However, the plaintiffs admitted that they did not notify Nationwide of their intent to bring a product liability lawsuit until November 2009. *Id.* at *2. For this reason, Judge Goodwin held that the defendant could not be held liable for spoliation as a matter of law, citing *Mace* and *Williams*. *Id.* at *6 - *8.

As is clearly established in the cases discussed above, a duty to preserve evidence for someone else's potential lawsuit against a third party does not arise under the law until receipt of a litigation notice and request for preservation. Petitioners have not cited a single case from this Court in which it was held that an alleged spoliator had a duty to preserve evidence for a claim against a third-party prior to receiving a preservation request. Quite simply, there is no such case. The obvious reason there is no such case is because it would put an undue burden on society if one had a legal duty to guess whether another person or entity might eventually file a lawsuit against a third party.

Finally, Petitioners argue that Werner could have tried to extract the vehicle from the landfill over a month after Werner had authorized disposal of the vehicle. However, Werner had already relinquished all possession, custody, and control of the vehicle to a third party for disposal. If Petitioners believed that the vehicle could have been recovered from the landfill after the preservation request was sent, then why did Petitioners not attempt to do so? Werner no

⁹ This decision was rendered after Judge Gaughan's 10/17/11 *Order* denying the motion for summary judgment on the intentional spoliation claim. Accordingly, this is additional persuasive authority that was not available at the time the motion was previously considered.

longer owned the tractor-trailer at the time Petitioners sent the preservation request—as such, Petitioners had the same ability as Werner to attempt to extract the tractor-trailer from the landfill, assuming that the vehicle was even recoverable, which has not been and cannot be proven.

It must also be noted that, while Werner is clearly entitled to summary judgment based on the “actual knowledge” element, Petitioners’ also have a complete lack of proof as to other requisite elements. Most notably, a requisite element to an intentional spoliation claim is that the spoliated evidence was “vital to a party’s ability to prevail in the pending or potential civil action.” Syl. 11, *Hannah v. Heeter*, 213 W. Va. 704, 584 S.E.2d 560 (2003). Here, with respect to Petitioner Williams’ claim, the vehicle in question was not vital to a viable product liability claim against Freightliner and Daimler because Mr. Williams’ death resulted from the injuries he sustained in the accident impact and rollover—not the subsequent fire, which forms the basis of the alleged product liability claim.

The autopsy of Mr. Williams was performed by the West Virginia Medical Examiner’s Office. Dr. Sabet, Deputy Chief Medical Examiner, opined to a reasonable degree of medical certainty that Mr. Williams died from extensive internal injuries **prior** to the fire that eventually consumed the vehicle. Dr. Sabet testified that toxicology revealed a negative blood carboxyhemoglobin saturation, which is a measurement of carbon monoxide in the blood at the time of death. This establishes that Mr. Williams was deceased prior to the fire, because he did not breathe in smoke. (App. 162). This is consistent with examination of the trachea, which revealed that there was no appreciable soot deposition. Based on the autopsy examination, Dr. Sabet concluded to a reasonable degree of medical certainty that Mr. Williams died as a result of extensive internal injuries prior to the fire. (App. 167).

Petitioner Williams' proffered no evidence, medical or anecdotal, to dispute Dr. Sabet's conclusion that Mr. Williams was deceased before the subject vehicle caught on fire. Petitioners' expert pathologist, Dr. Burton, testified that there is no evidence whatsoever that Mr. Williams was alive after the accident and before the fire, except for reports from a witness that he heard "screaming," which Dr. Burton asserts could be interpreted to mean that more than one person was screaming:

Q: So do you have an opinion as to the length of time between the truck at rest and the fire?

A: No, I do not, other than the fact that I think ten minutes or less, plus or minus, is reasonable, but I don't know. ...15 to 30 minutes.

Q: And during that 15 or 30 minutes, you'll agree no one even knew that Williams was in the cab?

A: That's what I have -- that's what I've surmised from the people's statements that everybody knew the driver was there, but no one knew there was a second person there.

Q: *So there is no evidence that Williams was alive?*

A: *There is a witness who says he heard them screaming, which suggests two people, but other than that, no.* (App. 152 - 153) (emphasis added).

Dr. Burton later testified that there is no evidence that Mr. Williams was alive at the time of the fire:

Q: Well, first of all, you agree that we don't have evidence whether Mr. Williams was really alive?

A: I said if he were. And I agree we don't.

Q: You don't know that he was alive?

A: That's right.

MR. LANGDON: Let me object to misstating testimony the doctor had talked about with the eyewitness that said he heard them screaming, voices from them. So you mischaracterized. (App. 153).

Based on Dr. Burton's testimony it is clear that there is no factual evidence to dispute Dr. Sabet's conclusion that Mr. Williams died prior to the fire, except the purported statement from a witness who heard "screaming." This witness, Donald Renn, an EMT, was transporting a patient in an ambulance, saw the truck over the embankment, and stopped to see if he could render any assistance. Mr. Renn testified as follows:

Q: Okay. When you came down over the hill and as you came down towards the truck, how close to the truck did you eventually get?

A: All the way up to the passenger door, which was what I was looking at, and I heard screams coming from inside the truck, and when I knelt down on the ground to try to look in, from the damage that was done to the truck, I didn't have but like a six or eight inch window between the ground and the door, the bottom would be the top of the door, an area about like that (indicating) that I could look into and I still couldn't see anything.

...Q: Okay. And when you say you couldn't see anything, are you saying you couldn't see a person in there?

A: I could not see a person in there.

Q: Okay, but you heard someone screaming?

A: I heard someone screaming to get them out, --

Q: Okay.

A: -- that there was a fire and that they wanted out.

Q: Okay, At this point in time, is this when you're saying the fire was still what you described as small?

A: Yes. (App. 154).

Dr. Burton concedes that this is the only "evidence" on which he relies in speculating that Mr. Williams may have been alive, and that there is no pathological evidence to indicate that Mr. Williams survived the initial crash. Dr. Burton and Petitioners' counsel assert that this testimony

could be construed to mean that Mr. Renn heard more than one person screaming. However, Mr. Renn unequivocally testified that he heard only *one* voice:

Q: So when you – do you recall whether you heard just one voice coming from the truck or more than one voice?

A: Just one. (App. 178)

Mr. Renn also testified that he did not learn there was a second person (Mr. Williams) in the vehicle until approximately October 2010, when he was informed of this fact by Petitioners' investigator, Fred Sylvester:

A: And to tell the truth, I didn't even know there was two drivers in this vehicle until Fred come and talked to me, and I told him, you know, one is what I – one is who I talked to, one I was trying to carry on a conversation with to see in the truck, I did not know there was two... (App. 179)

Thus, Petitioners' pathologist, Dr. Burton, concedes that there is *no evidence* that Mr. Williams survived the accident and was alive at the time of the fire unless one infers that Mr. Renn's testimony that he heard "screaming" might mean that screaming came from multiple people. However, this is not a permissible inference since Mr. Renn also testified unequivocally that he heard only one voice and did not know there was a second person in the vehicle until a year and a half after the accident.

Since Mr. Williams died as a result of extensive injuries sustained in the accident *prior* to the post-accident fire, Petitioner Williams would be unable to show the required element of causation in a product liability claim against Freightliner and Daimler regarding the post-accident fire. Thus, the product liability claim would not be viable even if the subject vehicle had been preserved.

D. Cross-Assignment of Error: Nebraska law, not West Virginia law, applies, and Nebraska has never recognized the tort of intentional spoliation of evidence.

This Court has held that the doctrine of *lex loci delicti* applies to the choice of law analysis in cases of physical injury, but in tort actions involving damages to economic interests, a different standard applies. In *Oakes v. Oxygen Therapy Servs.*, 178 W. Va. 543, 363 S.E.2d 130 (1987), a case involving the tort of retaliatory discharge, the Court explained that:

In general, this state adheres to the conflicts of law doctrine of *lex loci delicti*.” Syllabus point 1 *Paul v. National Life*, 352 S.E.2d 550 (1986). However, the *lex loci delicti* rule has generally been applied to clear-cut cases of physical injury. In the case before us we are dealing with an alleged tort whose very existence depends on the breadth and legality of a Maryland employment contract.

Oakes, 178 W. Va. at 544, 363 S.E.2d at 131. Because the retaliatory discharge claim was not a “clear-cut case of physical injury,” this Court concluded that the principals set forth in the Restatement (Second) of Conflicts of Law § 145 were instructive and adopted the use of this standard. Similarly, in this case, the intentional spoliation claim is not a personal injury claim. The damage stemming from the alleged intentional spoliation is *solely economic damage*, i.e. an alleged inability to prevail in a suit to recover monetary damages from a third party. Accordingly, just as in *Oakes*, Restatement (Second) of Conflicts of Law § 145 should be applied to determine which state’s substantive law governs the spoliation claim. The factors that must be considered are:

- (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.

Oakes, 178 W. Va. at 545, 363 S.E.2d at 132 (quoting Restatement (Second) Conflicts of Law § 145).

Here, the substantive law of Nebraska should be applied regarding the tort of spoliation, based on the factors outlined in the Restatement (Second) Conflicts of Law § 145:

The place where the injury occurred. Although the underlying accident that caused the Decedents' death occurred in West Virginia, Petitioners have correctly claimed that the injury in a spoliation claim is the deprivation of the ability to prevail in a lawsuit against a third-party. This is an economic injury separate, distinct, and independent from the physical injury suffered in the underlying accident. By applying Petitioners' own reasoning, the place of the injury in a spoliation claim is the place where a Petitioners' litigation interests are jeopardized as a result of loss of evidence. Thus, the place of injury could be any state in which Petitioners could properly bring a lawsuit but for the lost evidence, and in this case, includes but is not limited to West Virginia. Since the place of the injury could be multiple places, this factor would be given the least weight under the Restatement test.¹⁰

The place where the conduct causing injury occurred. The second factor to be considered is the place where the conduct causing injury occurred. The conduct that allegedly caused the injury is Werner's decision to dispose of the vehicle. Indeed, Petitioners have argued that "[t]here is simply no question that it was the actions of Werner which resulted in the spoliation of the tractor-trailer." (App. 550). It is undisputed that Werner's decision to dispose of

¹⁰ "Choice of the applicable law becomes more difficult in situations where the defendant's conduct and the resulting injury occurred in different states. When the injury occurred in two or more states, or when the place of injury cannot be ascertained or is fortuitous and, with respect to the particular issue, bears little relation to the occurrence and the parties, the place where the defendant's conduct occurred will usually be given particular weight in determining the state of the applicable law. For example, the place where the conduct occurred is given particular weight in the case of torts involving interference with a marriage relationship (see § 154) or unfair competition (see Comment f), since in the case of such torts there is often no one clearly demonstrable place of injury. Likewise, when the primary purpose of the tort rule involved is to deter or punish misconduct, the place where the conduct occurred has peculiar significance (see Comment c)." Restatement (Second) of Conflict of Laws, § 145, cmt. (e).

the tractor-trailer was made solely by employees of Werner or its subsidiaries in Nebraska. Werner's conduct in issuing directions to carry out that decision likewise occurred in Nebraska.

The domicile, residence, nationality, place of incorporation, and place of business of the parties. Werner is a Nebraska corporation with its principal office in Omaha, Nebraska. Neither of the Decedents were residents of West Virginia, and this fact is undisputed.

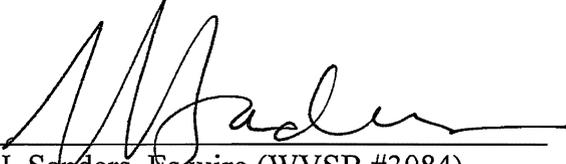
The place where the relationship, if any, between the parties, is centered. It is undisputed that the Services Agreement between Drivers Management and Werner, pursuant to which the Decedents were hired to operate Werner's trucks, was entered into in Nebraska. The Decedents were hired in Nebraska, and the employment relationship was entered into and in all respects centered in Nebraska.

In sum, choice of law considerations dictate that the substantive law of Nebraska be applied. Nebraska, like the majority of jurisdictions, has never recognized the tort of intentional spoliation. *McNeel v. Union Pac. R.R.*, 276 Neb. 143, 156 (Neb. 2008) ("In Nebraska, the proper remedy for spoliation of evidence is an adverse inference instruction.").

CONCLUSION

WHEREFORE, Werner respectfully requests that this Court find that the Circuit Court was vested with the authority to reconsider its interlocutory ruling concerning Werner's motion for summary judgment on the intentional spoliation claim. Additionally, Werner respectfully requests that the Circuit Court's grant of summary judgment in regards to the intentional spoliation claim be affirmed for the reason that this case is not materially distinguishable from *Mace*. In the alternative, Werner respectfully requests that the Court find that the substantive law of Nebraska (which does not recognize the tort of intentional spoliation) must be applied.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the foregoing *Respondent's Brief and Cross-Assignment of Error* has been served upon counsel of record listed below by mailing a true copy thereof, this 11th day of July 2014:

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