IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2015 Term

No. 14-0212

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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

v.

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

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Appeal from the Circuit Court of Ohio County
The Honorable Martin J. Gaughan, Judge
Civil Action No. 09-C-419

AFFIRMED

Submitted: February 11, 2015
Filed: March 2, 2015

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JUSTICE KETCHUM delivered the Opinion of the Court.

JUSTICE BENJAMIN concurs and reserves the right to file a separate opinion.

CHIEF JUSTICE WORKMAN dissents and reserves the right to file a separate opinion.

JUSTICE DAVIS dissents and reserves the right to file a separate opinion.

SYLLABUS BY THE COURT

1. "A motion for summary judgment should be granted only when 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).

2. "Summary judgment is appropriate if, from the totality of the evidence presented, the record 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 on an essential element of the case that it has the burden to prove." Syllabus Point 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995).

3. "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." Syllabus Point 10, *Hannah v. Heeter*, 213 W.Va. 704, 584 S.E.2d 560 (2003).

4. "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." Syllabus Point 11, *Hannah v. Heeter*, 213 W.Va. 704, 584 S.E.2d 560 (2003).

Justice Ketchum:

The tort of intentional spoliation of evidence requires a plaintiff to prove that a defendant had "knowledge" of a pending or potential civil action, at the time that the defendant disposed of evidence vital to the plaintiff's action.

In this appeal from the Circuit Court of Ohio County, the circuit court granted summary judgment and dismissed two plaintiffs' claims that the defendant intentionally spoliated evidence vital to a product liability action by the plaintiffs. The circuit court determined that there was no indication whatsoever in the record to establish the defendant knew of any pending or potential civil action when it disposed of the evidence.

After a review of the record, we affirm the circuit court's summary judgment order.

I.
FACTUAL AND PROCEDURAL BACKGROUND

Defendant Werner Enterprises ("Werner") is a nationwide freight transportation company. Quentin Rutledge and Kenneth Williams were long distance drivers for Werner who drove a tractor-trailer as a team.

In the early morning hours of January 12, 2009, sometime around 2:30 a.m., Mr. Rutledge was driving northbound on I-79 near Jane Lew, West Virginia. Mr. Williams was located in the tractor-trailer's sleeper berth. A winter storm began, and a police report indicates that the roadway was covered in snow. As Mr. Rutledge crossed a

bridge he lost control of the tractor-trailer. The vehicle hit a guardrail, jackknifed, overturned, then went off the road and slid 30 feet down a steep embankment.

Witnesses who arrived on the scene discovered a small fire had started that could not be extinguished. The fire eventually consumed the tractor-trailer. Mr. Rutledge and Mr. Williams died before they could be extracted.

By 5:30 a.m., Werner had hired an adjuster from Crawford & Company, a national adjusting firm. The adjuster arrived at the scene of the accident shortly thereafter and gathered information. The adjuster electronically provided Werner a written report and photographs on the day of the accident. The adjuster also called Werner and discussed the scene.

The adjuster informed Werner that this was a single-vehicle accident, caused by weather conditions, which involved only the two Werner employees. Hence, Werner (a Nebraska company) knew that it would be responsible (under Nebraska law) to pay workers' compensation death benefits to the drivers' families. Under Nebraska workers' compensation law, Werner was required to pay the benefits regardless of who was at fault for the accident; in return, Werner was immune from tort liability to the drivers' families for any tort damages.[1]

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[1] Nebraska law (specifically Neb. Rev. Stat. §§ 48-111 and 48-148) provides that workers' compensation benefits are the exclusive remedy for any employee who suffers a personal injury that arises out of and in the course of his or her employment. *See, e.g., Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 394, 631 N.W.2d 510, 520 (2001) ("Indeed, the Nebraska Workers' Compensation Act is an employee's exclusive remedy against an employer for an injury arising out of and in the course of employment."); *Marlow v. Maple Manor Apartments*, 193 Neb. 654, 659, 228 (continued . . .)

The adjuster also told Werner that there were two other potential "claimants" from the accident. The first was the State of West Virginia. The adjuster stated that Werner would likely receive from the State a claim for damage done to the guardrail, for the cost of cleaning up diesel fuel spilled from the tractor-trailer, and for the removal of any hazardous substances left behind from the burning of the cargo and equipment.[2] The second potential claimant was the owner of the cargo. The adjuster thought there might be some scrap value that could be salvaged from the cargo, but also

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N.W.2d 303, 306 (1975) ("If coverage exists, even though for some reason compensation may not be payable, the Workmen's Compensation Act is exclusive. If the accident does not arise out of and in the course of the employment, there is no coverage, and the parties then are not subject to the act.").

Furthermore, Nebraska's workers' compensation law only allows an action by an employee against an employer or co-worker if the employee's "injury or death is proximately caused by the willful and unprovoked physical aggression of such employee, officer, or director." Neb. Rev. Stat. § 48-111. *Compare* W.Va. Code § 23-4-2 [2005] (permitting lawsuit in addition to workers' compensation benefits where "injury or death result to any employee from the deliberate intention of his or her employer to produce the injury or death," and giving an expansive definition to "deliberate intention"); Syllabus Point 2, *Mayles v. Shoney's, Inc.*, 185 W.Va. 88, 405 S.E.2d 15 (1990) ("A plaintiff may establish 'deliberate intention' in a civil action against an employer for a work-related injury by offering evidence to prove the five specific requirements provided in W.Va.Code § 23-4-2(c)(2)(ii) (1983).").

[2] The report of the adjuster states:

> There will be a claim made by the State of West Virginia for damage done to the guard rail and for the cost of cleaning up the hazardous substances left behind by the diesel spill and fire of the cargo and equipment. The WV Dept. of Environmental Protection was scheduled to arrive at the scene within the hour after we were released from the scene.

thought that the cost to handle and transport the scrap materials would exceed its scrap value. The adjuster therefore deemed the cargo a total loss.[3]

The only question remaining for Werner was whether the vehicle was repairable, or had any scrap value. The record indicates that by 3:15 a.m., while the tractor-trailer was still on fire, several heavy-duty tow trucks had arrived at the accident scene. Cables were attached to stabilize the tractor-trailer wreckage and prevent it from sliding further down the steep hill. The tow trucks later lifted the wreckage to allow removal of the bodies of Mr. Rutledge and Mr. Williams. For the remainder of the day – until approximately 9:00 p.m. – 15 employees of the towing company loaded five dump and/or flatbed trailers with the remains of the tractor-trailer. Because the local dump was closed at night, the remains of the tractor-trailer were hauled to the towing company's garage.

At some point within 48 hours of the accident, the assistant director of Werner's fleet maintenance program reviewed photos of the fire-burned tractor-trailer and immediately decided it was damaged beyond repair. Werner directed the towing

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[3] The report of the adjuster states:

> As is shown by the photographs the cargo on this truck consisted of a mixed load. From what we saw there were BB guns, custom aluminum wheels, flat screen TVs, hair products, two mopeds, and various adult novelties. The cargo was totally consumed by the fire. There was some salvage value in the wheels but the current [scrap] value of aluminum is $.30 and the cost to handle and transport would exceed return. We would deem the cargo a total loss.

company to dispose of the wreckage of the tractor-trailer. The towing company then hauled the wreckage to a local landfill.

Approximately one month after Werner disposed of the remains of the tractor-trailer, on February 11, 2009, a lawyer retained by Mr. Williams's family wrote a letter to Werner. The lawyer said he had been hired to investigate the January 12th accident, and said the purpose of the letter was "to request preservation of the vehicle and all evidence associated with the accident." Werner received the letter by certified mail on February 18th.

Within a week of receiving the letter, general counsel for Werner advised the lawyer by telephone that the vehicle had been disposed of, and in a letter dated March 4th general counsel clarified that the remains of the vehicle had been hauled to a landfill.

On December 9, 2009, the plaintiffs (the family of Mr. Williams, later joined by the family of Mr. Rutledge)[4] filed the instant lawsuit. The plaintiffs alleged a hodgepodge of legal theories, including that Werner acted with deliberate intent in violation of West Virginia's workers' compensation law; that Werner had negligently

[4] The initial complaint was filed by Jannell Williams, as the personal representative of the Estate of Kenneth Williams, against various defendants including Cheryl Rutledge, as the personal representative of the Estate of Quentin Rutledge. Ms. Williams alleged, in part, that Mr. Rutledge (as driver of the tractor-trailer) negligently caused or contributed to Mr. William's death. After various answers, cross-claims, counter-claims, and dismissals, Cheryl Rutledge was re-aligned as a plaintiff against Werner Enterprises, Inc.

trained and supervised the plaintiffs; and that Werner had caused the wrongful death of the plaintiffs.[5]

Among the various causes of action asserted by the plaintiffs, only two are relevant to this appeal. First, the plaintiffs asserted product liability claims against the manufacturer of the tractor-trailer, Freightliner Corporation, Inc. (and its parent corporation, Daimler Trucks North America, LLC). Second, the plaintiffs alleged that Werner had either negligently or intentionally spoliated and "disposed of evidence related to the subject accident, including the aforementioned Freightliner vehicle, with the knowledge of plaintiff[s'] request that such evidence be preserved[.]"

At a hearing on October 7, 2011, counsel for Freightliner asked the circuit court for summary judgment on the plaintiffs' product liability claims. Counsel for the manufacturer argued that the plaintiffs were unable to establish any product defect that caused the fire in the Werner tractor-trailer. Freightliner's counsel argued, based upon discussions with expert witnesses,

> that there are multiple potential causes for this fire, and due to the inability to inspect the vehicle itself, they are unable to arrive at any opinions that would be admissible in a court of law.

[5] The plaintiffs also brought suit against Crawford & Company (and its adjuster-employee, Mark Griffith). The plaintiffs alleged that Crawford & Company had engaged in either negligent and/or intentional spoliation when it worked with Werner to dispose of the tractor-trailer. The record on appeal suggests that Crawford & Company settled with the plaintiffs and was dismissed from the action.

The plaintiffs' attorneys conceded that summary judgment was proper because "the vehicle was destroyed within 48 hours" by Werner, and because the "few photographs that were taken were both of poor quality and failed to depict the areas . . . that our design engineer would need to be able to look at . . . to establish a specific defect." Accordingly, the circuit court granted summary judgment to Freightliner (and its parent corporation, Daimler Trucks). The plaintiffs did not appeal that summary judgment order.

At the same hearing, the circuit court heard a motion for summary judgment by Werner. Werner asked that all of the plaintiffs' claims be dismissed. However, in an order dated October 17, 2011, the circuit court granted only partial summary judgment to Werner, dismissing all but one of the plaintiffs' causes of action against Werner.

In its order, the circuit court dismissed the plaintiffs' claims that Werner was negligent in its training and supervision of Mr. Rutledge and Mr. Williams; that Werner had caused the wrongful death of Mr. Rutledge and Mr. Williams; and that Werner had, in violation of West Virginia workers' compensation law, caused injuries to and the death of Mr. Rutledge and Mr. Williams with deliberate intent. Additionally, the circuit court dismissed the plaintiffs' claim that Werner had *negligently* spoliated evidence.[6] The plaintiffs appealed the partial summary judgment order to this Court. In

[6] "West Virginia recognizes spoliation of evidence as a stand-alone tort when the spoliation is the result of the negligence of a third party, and the third party had a special duty to preserve the evidence." Syllabus Point 5, *Hannah v. Heeter*, 213 W.Va. 704, 584 S.E.2d 560 (2003).

a memorandum decision, we affirmed the circuit court's October 17, 2011, order. *See Williams ex rel. Williams v. Werner Enterprises, Inc.*, 2013 WL 3184845 (No. 12-0847, June 24, 2013).

The circuit court's partial summary judgment order dismissed all of the plaintiffs' claims except for one: whether Werner *intentionally* spoliated evidence when it disposed of the tractor-trailer. This ruling, favorable to the plaintiffs, was not appealed. The circuit court initially permitted the intentional spoliation claim to proceed to trial. However, out of caution the circuit court certified questions to this Court on June 15, 2012, concerning whether the plaintiffs had proffered sufficient evidence to establish a genuine issue of fact in their intentional spoliation claim against Werner. We refused to review the certified questions.

On December 30, 2013, Werner renewed its motion for summary judgment on the plaintiffs' intentional spoliation claim.[7] To establish Werner intentionally spoliated evidence to defeat the plaintiffs' product liability suit, the plaintiffs had to prove Werner had "knowledge . . . of the pending or potential civil action" against Freightliner

[7] The plaintiffs argue that the circuit court was precluded from addressing the motion for summary judgment on the intentional spoliation claim because (a) the circuit court's October 2011 order had denied summary judgment on the claim, and (b) this Court had "affirmed" the circuit court's order in a June 2013 memorandum opinion. We reject this argument because none of the parties appealed the circuit court's intentional spoliation ruling, and none of our reasoning in the June 2013 memorandum decision discussed or approved of the ruling. Hence, the circuit court was free to re-address its ruling on intentional spoliation if it felt "a need to correct a clear error or prevent manifest injustice." *Tolley v. Carboline Co.*, 217 W.Va. 158, 161 n.3, 617 S.E.2d 508, 511 n.3 (2005) (quoting Franklin D. Cleckley, Robin Jean Davis & Louis J. Palmer, *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 56(c) (Supp.2004)).

at the time Werner decided to send the remains of the tractor-trailer to the landfill. Syllabus Point 11, in part, *Hannah v. Heater*, 213 W.Va. 704, 584 S.E.2d 560 (2003). Werner asserted that because there was no evidence suggesting Werner knew that the plaintiffs intended to sue Freightliner, summary judgment was proper.

In an order dated January 24, 2014, the circuit court granted Werner's motion for summary judgment. The circuit court could find nothing in the record suggesting "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." Because there was no material question of fact favorable to the plaintiffs on this critical point, the circuit court concluded that the plaintiffs could not establish their intentional spoliation claim.

The plaintiffs now appeal the circuit court's summary judgment order.

II.
STANDARD OF REVIEW

We give a *de novo* review to a circuit court's order granting summary judgment under Rule 56 of the WEST VIRGINIA RULES OF CIVIL PROCEDURE. Syllabus Point 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Accordingly, we apply the same standards that the circuit court relied upon in our review.

Under Rule 56 of the RULES OF CIVIL PROCEDURE, summary judgment is proper where the record demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "A motion for summary judgment should be granted only when 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 and Surety Company v. Federal Insurance Company of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963). "Summary judgment is appropriate if, from the totality of the evidence presented, the record 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 on an essential element of the case that it has the burden to prove." Syllabus Point 2, *Williams v. Precision Coil, Inc*., 194 W.Va. 52, 459 S.E.2d 329 (1995).

Moreover, this Court has observed that, in reviewing an order granting a motion for summary judgment, any permissible inferences from the underlying facts must be drawn in the light most favorable to the party opposing the motion. *See Mueller v. American Electric Power Energy Services*, 214 W.Va. 390, 393, 589 S.E.2d 532, 535 (2003). Nevertheless, Syllabus Point 3 of *Williams v. Precision Coil, Inc*., 194 W.Va. at 56, 459 S.E.2d at 333, holds:

> If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.

With these standards in mind, we turn to the plaintiffs' challenge to the circuit court's summary judgment order dismissing their claim against Werner for intentional spoliation of evidence.

III.
ANALYSIS

"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." Syllabus Point 10, *Hannah v. Heeter*, 213 W.Va. 704, 584 S.E.2d 560 (2003). "The gravamen of the tort of intentional spoliation is the *intent to defeat a person's ability to prevail in a civil action*. Therefore, it must be shown that the evidence was destroyed with the specific intent to defeat a pending or potential lawsuit." 213 W.Va. at 717, 584 S.E.2d at 573. "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." Syllabus Point 9, *Hannah*, 213 W.Va. at 708, 584 S.E.2d at 564.

This Court adopted a seven-factor test in *Hannah* governing claims of intentional spoliation of evidence. Those seven factors are (with emphasis on the factor at issue in this appeal):

> 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.

Syllabus Point 11, *Hannah*, 213 W.Va. at 708, 584 S.E.2d at 564.

This Court considered the meaning of the first factor – whether there was a pending or potential civil action – in *Mace v. Ford Motor Co.*, 221 W.Va. 198, 653 S.E.2d 660 (2007) (*per curiam*). We noted that the dictionary definition of "pending" is:

> Begun, but not yet completed; during; before the conclusion of; prior to the completion of; unsettled; undetermined; in process of settlement or adjustment. Thus, an action or suit is "pending" from its inception until rendition of final judgment.

221 W.Va. at 202, 653 S.E.2d at 664 (quoting *Black's Law Dictionary* (5th Ed. 1979)). We found the dictionary definition of "potential" was "quite distinguishable," and is this:

> Existing in possibility but not in act. Naturally and probably expected to come into existence at some future time, though not now existing[.]

Id. We concluded that a "pending or potential civil action" exists where the plaintiff has actually filed a claim, or where there is evidence objectively demonstrating the possibility that the plaintiff was likely to pursue a claim in the future. 221 W.Va. at 203, 653 S.E.2d at 665.

This appeal centers exclusively on the second factor of *Hannah*: the knowledge of the spoliator of a pending or potential civil action. The dispute in this case is over the degree of proof necessary to fairly say a spoliator "knew" of a pending or potential claim, and thereafter destroyed evidence to foil the plaintiff's pursuit of the claim.

The plaintiffs in this case contend there is substantial, uncontroverted evidence from which the only reasonable conclusion is that Werner had actual knowledge of the plaintiffs' claims requiring preservation of the tractor-trailer. Based on Werner's communication records, the plaintiffs assert Werner was aware that the tractor-trailer had broken down twice on the trip immediately preceding the trip encompassing the accident at issue.[8] Furthermore, the adjuster who visited the accident scene advised Werner of a significant diesel fuel leak and subsequent fire that consumed the tractor and trailer. On the day of the accident, Werner was aware that two of its employees had died in a severe accident. Werner was also aware it faced claims for damage to the guardrail and for environmental remediation. Additionally, the cargo in the trailer was a total loss.

The plaintiffs further assert that Werner is a sophisticated trucking entity that has an in-house legal department and a claims department that is well versed in litigation arising from trucking accidents.

Putting these facts together, the plaintiffs contend that on the same day as the accident, Werner "knew" that numerous potential claims existed. These claims included (1) claims by the plaintiffs for negligent maintenance of the tractor-trailer; (2) product liability claims by the plaintiffs against the manufacturer of the Freightliner

[8] Aside from Werner's communication logs, the record contains no other information about these alleged breakdowns. The log entry, on January 9, 2009, says only this: "1306 each added to current trip for both breakdowns." The plaintiff has provided nothing to suggest what part of the tractor-trailer was involved, the cause of the breakdowns, who did the repairs (if any), the extent to which Werner was aware of the breakdowns or repairs, or – most importantly – how these breakdowns may have caused or contributed to the January 12th accident.

tractor-trailer; (3) subrogation claims by Werner (or its insurers) for workers' compensation payments made to the plaintiffs' survivors; and (4) subrogation claims by Werner for amounts spent on the lost cargo and property damage. Still, within 48 hours of the accident Werner approved the disposal of the tractor-trailer in a landfill.

Werner argues that the facts laid out by the plaintiffs are nothing more than a case for "constructive" knowledge, not "actual" knowledge. Werner contends that on the day of the accident, January 12th, no pending or potential claims required the preservation of the tractor-trailer. The investigations by a sheriff's deputy and by Werner's adjuster showed the accident resulted exclusively from snow and ice on the roadway.[9] The carcass of the vehicle was irrelevant to the outcome of the only potential claim from the plaintiffs that Werner knew of: the claim for Nebraska workers' compensation death benefits. Werner also knew that Nebraska's workers' compensation laws barred any negligence suits by the plaintiffs against Werner, including against Werner's maintenance department. The tractor-trailer was also irrelevant to any claims

[9] The report of the sheriff's deputy suggests that a rough road may also have contributed to the truck sliding on ice. The deputy's narrative says, in part (with capitalization removed):

> At approximately 0230 AM . . . the driver . . . lost control of this tractor trailer owned by Werner Enterprises while crossing an icy snow covered bridge . . . (the bridge was also bumpy from several attempts to patch holes on it) . . . This officer can only speculate that the cause of the accident was the snowy road conditions, and possibly the condition of the bridge.

that might be asserted by the State for the damage to the guardrail or the environmental damage, or asserted by the owner of the destroyed cargo.

Put simply, within 48 hours of the accident, Werner argues that the extent of its "actual" knowledge was that the tractor-trailer was a total loss, burned, in pieces, and sitting in five dump or flatbed trailers. Based on that knowledge, Werner authorized disposal of the vehicle.

It was not until over a month later, on February 18th, that Werner received a certified letter from the plaintiffs asking Werner to preserve the remains of the tractor-trailer. Hence, Werner claims it had no "actual knowledge" of any claims by the plaintiffs involving the tractor-trailer until this date. Since it had relinquished all possession, custody, and control of the vehicle to the towing company that then dumped the vehicle in a landfill, Werner asserts it had neither a right nor a duty to extract the remains of the vehicle for the plaintiffs. Additionally, Werner asserts the plaintiffs had just as much right to visit the landfill and attempt to inspect the remains of the tractor-trailer, but did not do so.

The circuit court and the parties proceeded below on the notion that, in an intentional spoliation suit, the plaintiff must prove the spoliator "had actual knowledge of the pending or potential litigation." On appeal, the parties again dispute whether the evidence is sufficient to suggest a question of material fact as to whether Werner had "actual" knowledge of the potential claims requiring preservation of the tractor-trailer.

Our scrutiny of the seven-factor test in Syllabus Point 11 of *Hannah v. Heeter*, as well as the text of *Hannah*, reveals no requirement of "actual" knowledge.

The tort of intentional spoliation requires only proof of "knowledge of the spoliator of the pending or potential civil action." Syllabus Point 11, *Hannah*.

In the common vernacular, knowledge is an awareness, familiarity or understanding of a fact or of a range of information. "As a general matter, *knowledge* requires awareness of a fact or condition[.]" Bryan A. Garner, *A Dictionary of Modern Legal Usage* 495 (1995). Digging deeper into epistemology, the Oxford English Dictionary defines knowledge as an "[a]cquaintance with a fact; perception, or certain information of, a fact or matter; state of being aware or informed; consciousness (of anything)." It is also defined as "knowledge of a person, thing, or perception gained through information or facts about it rather than by direct experience" and as an "[i]ntellectual acquaintance with, or perception of, fact or truth; clear and certain mental apprehension; the fact, state or condition of understanding." VIII *The Oxford English Dictionary* 517-18 (2nd Ed. 1991).

The Oxford English Dictionary indicates that many of the iterations of the word "knowledge" are "derived from the verb KNOW[.]" To "know" something means to "recognize or distinguish," "to acknowledge," and "to be acquainted with (a thing, a place, or a person)." More specifically, "to know" a fact is "[t]o have cognizance of (something) through observation, inquiry, or information; to be aware or apprised of . . . to become cognizant of, learn through information or inquiry, ascertain, find out." It is also "[t]o apprehend or comprehend as fact or truth; to have a clear or distinct perception or apprehension of; to understand or comprehend with clearness and feeling of certainty." VIII *The Oxford English Dictionary* at 512-515.

When opposing a motion for summary judgment, a party must show something more than a metaphysical doubt that there is a genuine issue of fact to be tried. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed. 2d 538 (1986) ("When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts."). In the instant case, the plaintiffs assert that Werner is a sophisticated trucking company, and therefore that it should have known of the potential for a product liability lawsuit by the plaintiffs against Freightliner. However, we find no evidence to suggest that when Werner disposed of the tractor-trailer that it had any inkling of (let alone cognizance, awareness, a clear perception, or information that would impel it to inquire, ascertain, or find out about) a pending or potential product liability lawsuit, by the plaintiffs or anyone else. It is only with hindsight that the plaintiffs can justly say Werner "should have known."[10]

The first evidence that Werner had knowledge of the plaintiffs' potential product liability suit was on February 18, 2009, when they received a letter from a plaintiff's lawyer asking that the tractor-trailer be preserved. This is the primary evidence indicating that a Werner employee had an articulable awareness and understanding of a potential future suit. But this letter was received over a month after

[10] The circuit court noted in its summary judgment order that it was "disturbed with the conduct of Werner by quickly disposing of the subject vehicle under the circumstances." However, as with the plaintiffs, this opinion derives from the circuit court's view of the case in hindsight.

the remains of the tractor-trailer had been hauled to a landfill (in pieces loaded on dump and flatbed trailers) and after Werner was alleged to have "spoliated" evidence critical to the plaintiffs' case.

The plaintiffs' case is therefore staked on whether Werner, in the 48 hours after the accident, had knowledge of information that would lead it to inquire further, and to investigate and inquire whether the plaintiffs had some potential claim based upon the tractor-trailer. However, we can find no such evidence that should have impelled Werner to act differently. Within 48 hours of the accident, Werner understood that two of its employees had died in a horrific accident likely triggered by nothing more than snow and ice.[11] The tractor-trailer had plowed into and through a guardrail, jackknifed, rolled over, and then slid down a steep hillside before being consumed by fire. The vehicle was not towed from the site; it was hauled away in pieces, collected over 15 hours, on five dump and flatbed trailers.

The plaintiffs contend that Werner knew the tractor-trailer had mechanical difficulties which should have caused Werner to suspect a potential product liability action. However, the plaintiffs' only evidence of the mechanical difficulties is an abbreviated note in a communication log with Werner, which says simply, "1306 each added to current trip for both breakdowns." No other documentation or deposition testimony is in the record to describe the nature of these breakdowns, the cause of the

[11] The record also contains allusions that the drivers were inexperienced, with only four months of truck-driving experience.

breakdowns, who conducted the repairs, or how these mechanical problems in any way caused or contributed to the accident. Moreover, there is nothing to suggest these breakdowns were extraordinary, out of the routine, or indicative of a pattern such that Werner would have been aware of a potential product liability action.[12]

The plaintiffs also contend that Werner itself had various potential claims that should have triggered a more sedulous investigation. For instance, the on-scene adjuster hired by Werner noted potential claims might be filed by the State of West Virginia (for the guardrail and environmental damage) and by the owner of the destroyed cargo. The plaintiffs, however, do not explain why – when liability for these expenses was so clear – that Werner needed to preserve the tractor-trailer to defend either of these potential claims.

Furthermore, the plaintiffs assert that Werner should have perceived a potential claim by the plaintiffs against Freightliner so that Werner could recover subrogation of the workers' compensation death benefits paid to the plaintiffs' families, and recover subrogation for the lost cargo and environmental damage. However, to have perceived a claim for subrogation would have required Werner to first perceive that the

[12] As an example of a pattern of breakdowns, see *Appalachian Leasing, Inc. v. Mack Trucks, Inc.*, 765 S.E.2d 223, 226 (W.Va. 2014). The plaintiff in *Appalachian Leasing* bought four Mack trucks that were repeatedly driven or towed back to the dealership because they "(1) would not run, (2) hard to start, (3) transmission problems, (4) overheating, (5) leaking water pump, (6) hoods falling off and (7) cabs falling apart." *Id.* The plaintiff sought damages and sought to rescind the purchase contract because the four trucks failed in their essential purpose of being suitable for off-road coal hauling purposes.

plaintiffs were naturally and probably expected to bring a suit against Freightliner. We see no evidence of this latter fact.

We agree with the plaintiffs that Werner is a sophisticated entity, with on-staff lawyers familiar with trucking accidents. But, until Werner received the letter on February 18, 2009, we can see no evidence indicating Werner perceived or even suspected impending future litigation over tractor-trailer defects by the plaintiffs. All of the evidence of record suggests that when the tractor-trailer was hauled to the landfill, Werner knew only that the plaintiffs had claims for workers' compensation benefits. The remains of the tractor-trailer were irrelevant to that claim.

The tort of intentional spoliation is designed to preclude a party from destroying evidence with the intent to harm another party's ability to bring or defend a legal claim. But the tort is not intended to unduly interfere with the rights of individuals to dispose of their property lawfully. Because there is no evidence of record to say Werner was aware, informed, perceived, or had any knowledge that would lead it to the conclusion the plaintiffs had a pending or potential suit when it destroyed the tractor-trailer, the circuit court was correct in granting summary judgment.[13]

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[13] Werner raises one cross-assignment of error, and asserts that under the choice-of-law doctrine *lex loci delicti*, Nebraska law and not West Virginia law should control this case. Nebraska has never recognized the tort of intentional spoliation of evidence. *See McNeel v. Union Pac. R. Co.*, 276 Neb. 143, 156, 753 N.W.2d 321, 332 (2008) ("In Nebraska, the proper remedy for [intentional] spoliation of evidence is an adverse inference instruction."); *State v. Davlin*, 263 Neb. 283, 302, 639 N.W.2d 631, 649 (2002) ("an instruction on the inference that may be drawn from spoliation of evidence is appropriate only where substantial evidence exists to support findings that the evidence had been in existence, in the possession or under the control of the party against

(continued . . .)

IV.
CONCLUSION

The circuit court correctly determined that there was no question of material fact as whether Werner had knowledge of the plaintiffs' potential claim when it disposed of the tractor-trailer. The circuit court's January 24, 2014, summary judgment order is therefore affirmed.

Affirmed.

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whom the inference may be drawn; that the evidence would have been admissible at trial; and that the party responsible for the destruction of the evidence did so intentionally and in bad faith.").

Werner urges that we adopt the method of analysis outlined in the *Restatement (Second) of Conflict of Laws* § 145 (1971) to guide our choice of applicable law. However, we have specifically rejected the Section 145 analysis, largely because it is inherently subject to manipulation. Further, although Section 145 may have been designed as "a method of analysis that permitted dissection of the jural bundle constituting a tort and its environment," history has taught the Court that such schemes instead "produce protracted litigation and voluminous, inscrutable appellate opinions, while rules get cases settled quickly and cheaply." *Paul v. National Life*, 177 W.Va. 427, 432, 352 S.E.2d 550, 554 (1986).

This Court has, therefore, consistently applied the common-law "*lex loci delicti* choice-of-law rule; that is, the substantive rights between the parties are determined by the law of the place of injury." *McKinney v. Fairchild Int'l, Inc.*, 199 W.Va. 718, 727, 487 S.E.2d 913, 922 (1997). The tort of intentional spoliation of evidence is, in part, a procedural rule designed to protect local courts from the deliberate destruction of evidence necessary to prosecute claims. Because Werner's disposition of the truck occurred in West Virginia, and allegedly impinged upon the plaintiffs' prosecution of a West Virginia product liability injury suit, West Virginia's intentional spoliation rules govern this case.

No. 14-0212 - ***Jannell Williams, et al. v. Werner Enterprises, Inc.***

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March 2, 2015
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Workman, Chief Justice, dissenting:

Today our Court violates a bedrock principle of our summary judgment jurisprudence: a court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial. Syl. Pt. 3, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). With regard to summary judgment, we have stated that "[t]he essence of the inquiry the court must make is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 61, 459 S.E.2d 329, 338 (1995) (citation omitted.). "In assessing the factual record, we must grant the nonmoving party the benefit of inferences, as '[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge[.]'" *Id.* at 59, 459 S.E.2d at 336 (citation omitted).

The majority, sitting as a three-member jury, examined the record and could not uncover the proverbial smoking gun in Werner's documents that prove it had actual knowledge of a *potential* lawsuit against the manufacturer of the tractor-trailer. I emphasize the word potential because there is virtually no way the plaintiffs could have a

pending lawsuit within 48 hours of the fatal vehicle accident. Undoubtedly, the families were making funeral arrangements while the evidence was being destroyed.

This decision is clearly wrong because it creates a new and unattainable burden on a plaintiff in an intentional spoliation claim. Even more disturbing, the decision sends an iniquitous message: a defendant who rushes to destroy evidence will be rewarded, not sanctioned.

Viewing the record in a light most favorable to the plaintiffs, material issues of fact exist as to whether Werner had actual knowledge of potential litigation involving the tractor-trailer's manufacturer at the time it sent this essential evidence to a landfill. Therefore, the plaintiffs presented sufficient evidence to survive Werner's motion for summary judgment. The majority makes no mention of the findings of Kathleen J. Robison, the plaintiffs' expert on spoliation claims. After reviewing the documents relating to this litigation, Ms. Robison recognized that Werner's accident investigator, Mark Griffith of Crawford and Company, reported to Werner that Mr. Rutledge was trapped inside the truck and conscious before the fire spread and killed him. Ms. Robison determined: "Werner knew truck fires after accidents were rare, and this would have put Werner on notice [that] something could be wrong with the truck." Ms. Robison ultimately concluded that

> [b]ased upon industry investigative and claims handling standards and practices, it was reasonable to anticipate based upon the type of deaths Mr. Williams and Mr. Rutledge endured that litigation would ensue. Due to the deaths of the drivers the tractor-trailer would be key evidence in

> ensuing litigation and should have been preserved. Werner Enterprises had at the time the professional experience in handling significant tractor-trailer accidents involving significant injuries. It was reasonable for them to anticipate that litigation would ensue and that the tractor-trailer would be prime evidence that must be preserved.

While weighing the evidence, the majority apparently rejected Ms. Robison's conclusions. However, this type of fact-finding is a function of the jury, not a reviewing court.

Based on the circumstantial evidence alone, a reasonable person could conclude that Werner had actual knowledge of potential lawsuits against the manufacturer of the tractor-trailer. In fact, Justice Davis' dissent reveals that Werner is no stranger to claims for spoliation of evidence and other courts have imposed sanctions on Werner for destroying evidence.

I further dissent from the majority's gratuitous suggestion that because the "investigations by a sheriff's deputy and by Werner's adjuster showed the accident resulted exclusively from snow and ice on the roadway[,]" the plaintiffs could not have a potential claim against the manufacturer of the tractor-trailer. This inference misses the point entirely; Mr. Rutledge's *death* resulted from a fire due to a significant diesel fuel leak.

> A crashworthiness case involving a motor vehicle is sometimes referred to as a 'secondary impact,' 'second collision,' or 'enhanced injury' case. 62A Am.Jur.2d *Products Liability* § 1020 (1997). This is because a defendant's liability is based on an alleged failure to protect the occupants of a vehicle from the *consequences* of the crash rather than liability for the crash itself.

Estep v. Mike Ferrell Ford Lincoln-Mercury, Inc., 223 W.Va. 209, 216, 672 S.E.2d 345, 351 (2009). *See* Syl. Pt. 1, *Blankenship v. General Motors Corp.,* 185 W.Va. 350, 406 S.E.2d 781 (1991) (”A complaint against the seller of a motor vehicle states a cause of action under West Virginia law if the complaint does not allege that a vehicle defect *caused* a collision, but alleges only that the injuries sustained by the occupant as a result of the collision were *enhanced* by a design defect in the vehicle.”).

In this case, the plaintiffs’ lawsuit against the manufacturer of the tractor-trailer was dismissed on summary judgment because they lacked this critical piece of evidence to determine if a design defect caused this fatal fire. It is patently unfair to now deny the plaintiffs their day in court on their claims against Werner for its intentional spoliation of this evidence. For the foregoing reasons, I respectfully dissent.

No. 14-0212 - *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 v. Werner Enterprises, Inc., a Nebraska Corporation*

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, Justice, dissenting:

In this case, two truck drivers were killed while traveling in West Virginia. They were employed by Werner Enterprises ("Werner"). The truck drivers were killed as a result of a single vehicle accident on January 12, 2009. On January 14, 2009, within two days of the accident, Werner had the tractor-trailer destroyed. On or about February 11, 2009, counsel for the estate of one of the truck drivers, Kenneth Williams, wrote a letter to Werner and asked that the tractor-trailer not be destroyed. Counsel was informed by a letter from Werner, dated March 2, 2009, that the tractor-trailer had already been destroyed. The estates of both accident victims sued Werner in a joint action. One of the causes of action was a claim for intentional spoliation of evidence. In other words, the intentional destruction of the tractor-trailer.

Here, the plaintiffs argued that the trial court committed error in granting Werner summary judgment on their claim for spoliation of evidence. The majority opinion determined that because the plaintiffs did not meet their burden of showing a genuine material issue of fact was in dispute, summary judgment was appropriate. For the reasons set out below, I dissent.

Under the Majority Opinion, Defendants Can Now Destroy All Evidence of Their Wrongdoing within 48 Hours of Their Wrongful Conduct

Let me be clear at the outset. The majority opinion has abolished the tort of spoliation of evidence. I do not say this lightly. Under the majority's decision, no plaintiff will ever be able to withstand a summary judgment motion for spoliation of evidence, as long as a defendant destroys evidence within 48 hours of the accident and without immediate notice from the victim to preserve the evidence. The ramification of the majority's ruling is mind-boggling, because it effectively removes even the possibility of a sanction for such outrageous and devious conduct.

The majority opinion spends an inordinate amount of time consulting dictionary definitions for "knowledge" in order to show that the plaintiffs failed to present any evidence that Werner had "knowledge" that a lawsuit might be pending. The majority opinion could have used its time more productively and uncovered the fact that Werner appears in the citation to over 220 cases, including numerous wrongful death and personal injury actions naming Werner as a defendant. *See, e.g.*, *Keifer v. Reinhart Foodservices, LLC*, 563 F. App'x 112 (3d Cir. 2014) (personal injury action against Werner); *LaBarre v. Werner Enters., Inc.*, 420 F. App'x 169 (3d Cir. 2011) (personal injury action against Werner by two plaintiffs); *Whittenburg v. Werner Enters. Inc.*, 561 F.3d 1122 (10th Cir. 2009) (injured pickup truck driver brought negligence action against Werner, arising from his collision with stalled tractor-trailer); *Marcano v. Werner Enters., Inc.*, 113 F.3d 1229 (2d Cir. 1997)

(person injury action against Werner); *Gruenbaum v. Werner Enters., Inc*., 270 F.R.D. 298 (S.D. Ohio 2010) (survivor of driver brought wrongful death action against Werner); *Wallace v. Tindall*, No. 09-00775-CV-W-FJG, 2010 WL 2545553 (W.D. Mo. June 18, 2010) (plaintiff brought personal injury action against Werner); *Brown v. Werner Enters., Inc*., No. 04-1664, 2009 WL 1158938 (E.D. La. Apr. 28, 2009) (personal injury action against Werner); *Yeakel v. Werner Enters., Inc*., No. 3:07cv2054, 2008 WL 2120515 (M.D. Pa. May 19, 2008) (personal injury action against Werner); *Blackshear v. Werner Enters., Inc*., No. 2004-4-WOB, 2005 WL 6011291 (E.D. Ky. May 19, 2005) (personal injury action against Werner); *Werner Enters., Inc. v. Stanton*, 690 S.E.2d 623 (Ga. Ct. App. 2010) (two wrongful death actions against Werner); *Schmitt v. Werner Enters., Inc*., 716 N.Y.S.2d 505 (2000) (motorist brought action against Werner to recover for physical and psychological injuries sustained as a result of accident); *Abraham v. Werner Enters.*, No. E-98-077, 1999 WL 299540 (Ohio Ct. App. May 14, 1999) (personal injury action against Werner); *Forklift Sys., Inc. v. Werner Enters.*, No. 01A01-9804-CH-00220, 1999 WL 326159 (Tenn. Ct. App. May 25, 1999) (plaintiff sued Werner for property damage); *Werner Enters., Inc. v. Brophy*, 218 P.3d 948 (Wyo. 2009) (injured motorist and wife brought action against Werner for personal injuries and loss of consortium arising out of accident).

More importantly, Werner is not new to claims for destruction of evidence. For example, in *Ogin v. Ahmed*, 563 F. Supp. 2d 539 (M.D. Pa. 2008), the plaintiff was injured

in an accident on October 4, 2005, when Werner's truck driver ran into the vehicle the plaintiff was driving. Prior to commencing the litigation, the plaintiff's counsel sent Werner a letter specifically requesting that it not destroy any of the driver's logs. Once the litigation began, the plaintiff requested the driver's logs. Werner informed the plaintiff that it had destroyed the driver's logs for the critical period right before the accident: September 4, 2005, through September 26, 2005. The plaintiff filed a motion to have a spoliation of evidence adverse instruction be given to the jury at the trial. The court granted the motion and ruled that, "[a]t the time of trial, the Court will instruct the jury as to the proper adverse inference they may draw from Defendants' destruction of the actual driver's logs for the period from September 4, 2005, through September 26, 2005." *Ogin*, 563 F. Supp. 2d at 546.

Similarly, in *Duque v. Werner Enterprises, Inc*., No. L-05-183, 2007 WL 998156 (S.D. Tex. Mar. 30, 2007), the plaintiff was injured by a truck being driven by a driver for Werner. Prior to the litigation, the plaintiff's counsel requested Werner not to destroy the tractor-trailer. When the plaintiff's expert went to inspect the tractor-trailer, the expert found that the tractor-trailer had been repaired. The plaintiff subsequently filed a motion for sanctions against Werner that included a spoliation of evidence jury instruction. The trial court granted the motion, in part, as follows:

> The Court orders the issuance of a permissive inference jury instruction as to Defendant Werner regarding the repair of the tractor and trailer, the precise wording of which will be determined when jury instructions are considered by the Court before trial. The Court also grants Plaintiff monetary

> sanctions against Defendant Werner in the amount of $6,921.35 for Plaintiff's expert's expenses and fees, $3,750.00 for Plaintiff's counsel's expenses and fees, and $10,000.00 as punitive sanctions for the significant prejudice it caused Plaintiff by altering this critical evidence. This combination of jury instruction and monetary assessment against Defendant Werner is the least severe sanction which will adequately address Defendant Werner's misconduct. All other relief requested is hereby denied.

Duque, 2007 WL 998156, at *7.

These cases clearly demonstrate that Werner has a practiced pattern of destroying evidence to preclude its use in future litigation against it. While other courts have imposed sanctions on Werner for destroying evidence, the majority of our Court rewards Werner's reprehensible conduct.

This Court previously has noted 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 v. Ford Motor Co.*, 221 W. Va. 198, 204, 653 S.E.2d 660, 666 (2007) (citations omitted). The plaintiffs in this case presented sufficient circumstantial evidence to raise a material issue of fact as to whether Werner had knowledge that litigation might occur as a result of the accident. The plaintiffs argued that Werner was an experienced trucking company. My cursory review of litigation that Werner has been involved with supports the allegation that Werner has extensive litigation experience as well. Such extensive litigation experience ultimately explains why

Werner destroyed the tractor-trailer. The plaintiffs also presented evidence that Werner's investigator provided a written report and photographs from the accident scene to Werner electronically on the date of the accident, thus further evidencing Werner's appreciation of the need to quickly document the scene of the accident. In sum, the plaintiffs presented sufficient circumstantial evidence to permit a jury to consider whether they had satisfied the elements of a claim for intentional spoliation of evidence. I further agree with the analysis set forth in Chief Justice Workman's dissenting opinion detailing the myriad of ways in which the plaintiffs' evidence is sufficient to survive Werner's summary judgment motion.

Werner learned from its investigator that there had been damage to a guardrail, the tractor-trailer had overturned, there had been a significant diesel fuel leak, and a subsequent fire engulfed the tractor-trailer. Werner further learned that both of its employees were killed in the crash. Werner also was informed that the State would be making a claim for damage done to the guardrail and that claims likely would be made for environmental remediation. Further, based on its own communication records, Werner knew that the tractor-trailer had broken down on two separate occasions on a trip immediately preceding the fatal accident. The majority opinion has described this evidence as being no more than a scintilla of evidence of Werner's knowledge. This is nonsensical. If a defendant is going to be permitted to destroy evidence within two days of an accident, then no plaintiff will ever be able to present evidence of the defendant's "knowledge" that a potential lawsuit would

follow. In other words, the majority has accomplished its implicit intent of abolishing a cause of action for intentional spoliation of evidence.

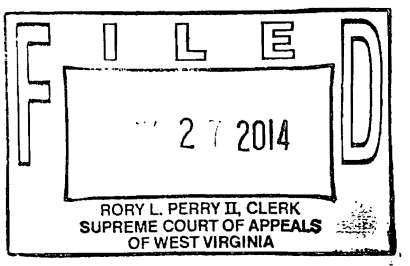
Based upon the foregoing, I strongly dissent from the majority's opinion in this case.

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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RELEVANT PROCEDURAL HISTORY

By orders entered October 17th and 24th, 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).[1] 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

[1] 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 3rd 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.[2]

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

[2] 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 3rd 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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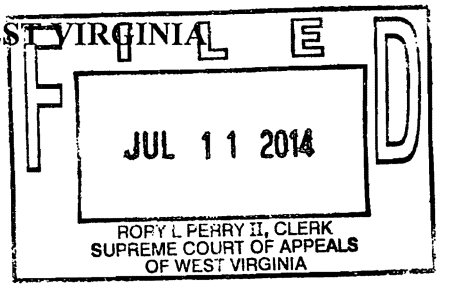
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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, Plainitiffs Below, Petitioners

vs.) **Case No. 14-0212**

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

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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, Petitoner 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, authority[7] 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 delecti* 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.

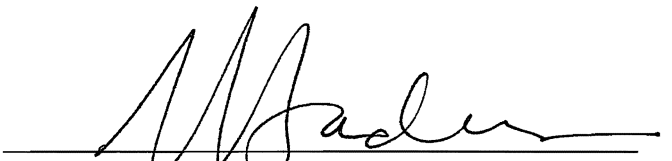
The place where the relationship, if any, between the parties, is centered. It is undisputed that the Services Agreement between Drivers Management and Werner, pursuant to which the Decedents were hired to operate Werner's trucks, was entered into in Nebraska. The Decedents were hired in Nebraska, and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

WERNER ENTERPRISES, INC.,
By counsel



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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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