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IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO. 16-2014-CA-001165

MICHAEL SPRADLIN, and
LORETTA SPRADLIN, his wife,

Plaintiffs,

v.

RING POWER CORPORATION,
a Florida corporation,

Defendant.
_____/

PLAINTIFFS' MOTION TO STRIKE DEFENDANTS' PLEADINGS FOR FRAUD ON THE COURT, SPOLIATION, AND DISCOVERY ABUSE AND ALTERNATIVE MOTION FOR OTHER SANCTIONS

COME NOW the Plaintiffs, MICHAEL SPRADLIN and LORETTA SPRADLIN, his wife, and move this Honorable Court for an order striking Defendant's pleadings, entering default, striking defenses, or such other relief as the Court deems appropriate for fraud upon the Court, discovery abuse, and spoliation of material evidence, and as grounds therefore state as follows:

INTRODUCTION

Plaintiffs seek sanctions against Defendant on the grounds that Defendant has engaged in deception and attempted fraud upon the Court, discovery abuse, violation of agreed protocols for preservation, inspection and testing of material evidence, and spoliation of evidence. Defendant's misconduct includes, but is not limited to, the following:

- Production of false document known as a "manlift inspection report";
- Destruction and discarding a "Ready to Rent" tag that was evidence of Defendant's failure to perform a required pre-rental inspection of the rented aerial lift;
- Destruction and discarding of an electrical cable and wire harness that had frayed and exposed electrical wiring;
- Performing repairs to, removing component parts of, and performing function tests with the aerial lift without notice to and outside the presence of Plaintiffs' counsel and Plaintiffs' experts in violation of agreed protocols pertaining to preservation of evidence.

BACKGROUND AND SUMMARY OF PLAINTIFF'S CLAIMS

On or about March 26, 2013, Tree of Life Services of Orlando, LLC (TOL), a limited liability company owned and operated by Plaintiff Michael Spradlin, rented a Genie S-65 aerial boom lift device from Defendant RING POWER CORPORATION for one month for the purpose of performing tree removal services at multiple jobsites including at two residences, one in Ocoee, Florida and one at the intersection of Lakeview Court and Lake Nettie Drive in Eustis, Florida. TOL rented a Genie S-65 boom lift, an aerial manlift device that is operated in part by hydraulic and electrical power. (Exhibit A – Photograph of Genie S-65.)

On March 27, 2013, the Genie boom lift was delivered to TOL at the Ocoee job site with labels and a tag indicating it was past due for a regular service and with visible hydraulic leaks. Mr. Spradlin accepted delivery, insisting that the delivery driver take photographs of the evidence of leaks and document the shortcomings on the delivery paperwork. (See Exhibit B – Delivery Documents and Exhibit C – Delivery Driver Photographs.) Thereafter, Mr. Spradlin

and his crew experienced malfunctions of the machine while working at the two residences. The malfunctions they experienced included intermittent interruptions in functioning of the boom and all other functions, including forward travel functions. On the day of delivery and on several occasions thereafter, Mr. Spradlin called Defendant's rental representative, Mark Mann, and reported the unsatisfactory condition of the machine and the malfunctions. (Exhibit D – Michael Spradlin Dep. 218—228, Oct. 27, 2014.)

Mr. Spradlin and his crew finished the work at the Eustis home on March 30, 2013, the date of the accident. This home was located on Lakeview Court, a sloped street that led from Haselton Avenue downhill to Lake Nettie Drive, a lakeside street. (Exhibit E – Aerial Screenshot of Accident Location.) Mr. Spradlin parked his truck and "gooseneck flatbed" trailer rig with the front of the truck facing uphill toward Haselton Avenue and at a crest close to the top of the sloped street. The incline in this area was between seven and eight degrees. (Exhibit F – Photographs of Lakeview Court.) He then maneuvered the Genie boom lift into position to load it upon his flatbed trailer. During the process and when he reached the rear of the trailer where the full weight of the Genie was on the rear of the trailer, the machine lost power to the electrical functions from the operator platform, i.e. "basket," and would not proceed further. Mr. Spradlin lost all functions including the forward travel function. This resulted in the unexpected and unintended locking or "grabbing" application of the spring lock brakes on the boom lift causing it to "grab" or "shock load" and abruptly stop at the rear of the trailer.

As a result of this "shock-loading" or "grabbing" effect at the rear of the trailer, the trailer's "gooseneck hitch" at the truck bed lifted upward causing loss of traction between the truck tires and the street. This caused the entire truck and trailer rig, with the boom lift on the

rear of the trailer, to begin sliding backward and eventually over the crest of the hill on Lakeview Court and down into a home below at the lakeside street on Lake Nettie Drive. (Exhibit G – Photographs of accident scene.) During the catastrophe, Mr. Spradlin was thrown about the inside of the operator's basket or "platform" at the end of the boom and eventually was ejected from the platform at the bottom of the hill. He sustained many injuries, but the most serious was paralysis as a result of a thoracic level spinal injury.

A pre-rental inspection of the Genie boom lift was required by ANSI standards, industry standards and practices, and Defendant's own company policy and routine practices. Plaintiffs contend that the Genie boom lift was not inspected at all or was not inspected adequately prior to rental and delivery. Plaintiffs also contend that Defendant's own service records establish that the Genie boom lift had a history of malfunctioning and was not maintained in accordance with Defendant's own service standards and with the Genie's service manual requirements. Plaintiffs' experts will testify that mechanical and electrical problems and malfunctions resulting from the poor inspection and maintenance were the sole proximate cause of or substantially contributed to the accident. Indeed, Plaintiffs have conducted a reenactment of the loading process at a virtually identically sloped street, with Mr. Spradlin's own truck and trailer, and with a Genie S-65 aerial lift. The loading of the boom lift was successful and no difficulties were encountered. The entire reenactment was videotaped and is proof that a properly maintained and functioning Genie S-65 boom lift could be loaded onto Mr. Spradlin's truck and trailer rig without risk of accident or injury. This is further supported by the Genie Operator's Manual, which indicates the aerial device may be operated on 24-degree grade (or 45%) when the platform is in the downhill position. (See Exhibit H – Genie Operator's Manual excerpt (RPC00271).)

During post-accident inspections of the Genie boom lift before, during and after post-accident repairs, Plaintiffs and their experts observed multiple mechanical deficiencies including, but not limited to: (1) worn, fatigued and broken electrical plugs connecting the foot pedal and other components to the operator basket or "platform" control box; (2) a disconnected tilt alarm speaker; (3) a damaged and broken tilt alarm speaker; (4) a frayed limit switch cable and harness with exposed electrical wiring; (5) unsecured electrical wiring inside the platform control box at the electrical control module; (6) broken or fractured limit switches; and (7) a misrouted foot pedal cable at the platform control box. Plaintiffs' experts will testify that these conditions, separately or in concert, explain the intermittent and ultimately total loss of functions, including forward travel function, described by Plaintiff and other witnesses as having occurred prior to the accident and at the time of the accident. (See Composite Exhibit I.)

In addition, Defendant failed to follow industry standards, including applicable ANSI standards and requirements of the Genie Service Manual, by failing to familiarize Plaintiff with the machine upon delivery and failing to offer training as required by ANSI for each rental. Had Defendant familiarized Plaintiff with this model Genie boom lift or offered training, the accident would have also been less likely. Had familiarization or training been provided, Plaintiff would have then been educated and/or reminded of precautions to take, e.g. the use of chocks, not loading on a hill, the use of a safety harness during loading, etc. Defendant now contends Plaintiff's failure to take these precautions was the sole cause of the accident, so Defendant's failure to follow ANSI requirements of familiarization and training are peculiarly important to a jury's assessment of the parties' comparative fault.

Finally, Defendant failed to "tag and remove" the machine from service immediately upon the reporting of malfunctions and/or at the time of delivery when Defendant's own delivery driver observed, noted, and photographed hydraulic leaks. Genie's service manual explicitly required the boom lift to be "tagged and removed from service" as a safety measure if there were any malfunctions. (See Exhibit J – Genie Service Manual excerpt (SPRADLIN-004203).) Had the machine been removed from service as required by Genie's service manual, the accident would not have occurred.

SUMMARY OF DEFENDANTS' MISCONDUCT AND DECEPTION

Both before and after this lawsuit was filed, Defendant engaged in a pervasive pattern of deception, discovery abuse, spoliation of evidence, and misconduct that is detailed and documented below. While it is difficult to encapsulate all of the pre-suit investigation and litigation discovery into a brief summary, the primary instances of misconduct can be summarized as follows:

1. Defendant's technician who allegedly inspected the Genie boom lift before the delivery to Plaintiff created and completed a "manlift inspection report" as a routine industry practice and as required by company policy. Defendant presented this document before the delivery of the boom lift to Plaintiff as evidence that Defendant had indeed performed the pre-rental inspection. When the Defendant's technician was deposed, he referenced this document and his personal diary as proof that this inspection had been performed on the dates and times that he claimed in his testimony that he had performed the pre-rental inspection. The technician alleged in his testimony that he performed the inspection on

March 26, 2013 at 4:00 through 5:00 P.M. and finished it on March 27, 2013 beginning at 7:00 A.M. and ending at 8:00 A.M. He produced his handwritten personal diary and the "manlift inspection report" as corroboration of his contention. According to the extracted metadata of the original digital version of the "manlift inspection report" the technician completed that document on March 26, 2013 at 11:22 A.M. Eastern Time, long before he had allegedly performed and completed the inspection. In other words, this critical pre-rental inspection document is falsified and suggests, as does the blank "Ready to Rent" tag referenced below, that no inspection occurred at all. (Exhibit K – Affidavit of Richard D. Connor, Jr.) Defendant produced a false document as material evidence and had Plaintiffs not had the metadata extracted and analyzed by an ESI expert, neither this Court nor Plaintiffs would have ever known of the false nature of the document.

2. Sometime after the initial inspection of the Genie boom lift that occurred on September 17, 2013, Defendant apparently discarded a blank "Ready to Rent" tag that had been affixed to the boom lift at the time of this initial inspection. The tag was to be completed with details of the date of the "rent ready" inspection. This "Ready to Rent" tag was photographed by Plaintiffs and was completely "blank" from which it can be inferred that no pre-delivery inspection occurred. Defendant has suggested that the "Ready to Rent" tag was simply faded from weather and not "blank." The evidence is no longer available for closer inspection, testing, or analysis in this regard. (Exhibit L – Photographs of discarded Ready to Rent tag.)
3. Defendant also cut away and discarded a section of frayed electrical cable and wire harness that had been discovered and photographed during initial visual inspections

despite an explicit agreement between counsel that all component parts removed or replaced would be preserved for further inspection, analysis, and/or testing. Plaintiff's experts have been deprived of the ability to test, inspect, or analyze this critical piece of evidence that they believe, alone or in concert with other electrical deficiencies in the machine, explain the intermittent interruptions and ultimate total loss in electrical and mechanical functioning of the machine before and at the time of the accident. (Exhibit M – Photographs of frayed cable and wire harness and remaining section.)

4. Defendant also conducted repairs outside the presence of Plaintiffs and their representatives in direct violation of the agreements and protocol reached by both parties with the advice of counsel. Those repairs included the repairs to the limit switch cable referenced above that led to the splicing, destruction, and discarding of the frayed section of the limit switch cable referenced above.

HISTORY AND DETAILS OF DEFENDANT'S MISCONDUCT

Original Trial Counsel's Conflict of Interest:

While not directly relevant to these issues, it should be noted at the outset that Plaintiffs forced one law firm to withdraw on the grounds of conflict of interest at the commencement of this litigation. During the inspections before this action was filed, Covington Insurance Company had initially retained different counsel (David Harrigan of Cole, Scott & Kissane, P.A.) to represent TOL, Plaintiff's business entity, in the case. That attorney attended the inspections on behalf of TOL before the lawsuit was filed and had expert(s) present at those

inspections. When this action was filed, Mr. Harrigan notified Plaintiffs that he would be appearing as trial counsel for Defendant, Ring Power.

Plaintiffs' counsel successfully persuaded the Cole Scott law firm that they could not ethically represent Defendant after having represented TOL before suit was filed. After initially refusing to withdraw, Cole Scott eventually voluntarily withdrew as counsel for Defendant. The current counsel for Defendant then appeared as counsel of record. The same insurance company that retained Cole, Scott & Kissane, P.A., Covington Insurance Company, is apparently paying Defendant's counsel now. (Exhibit N – Substitution of Counsel.)

Both Covington and Defendant contend that no confidential information acquired by Cole, Scott & Kissane, P.A. has been shared with the current counsel for Defendant. Of course, Plaintiff must rely upon Defendant's and Covington Insurance Company's word for it that no confidential information acquired by Defendant's prior counsel had been shared with Defendant. Plaintiffs have been uncomfortable with this from the start of this litigation and considered moving to disqualify all counsel on the defense side of the case. Until now, Plaintiffs' have accepted Defendant's assertion that no confidential information acquired by Cole, Scott & Kissane, P.A. was shared with Defendant. Defendant's misconduct leaves Plaintiff wondering if some discovery directed to the insurer(s) and Defendant on this issue is warranted, but that is not at issue at this time. Plaintiff merely provides this information to give the Court context for consideration of the issues raised by this motion.

Defendant's Production of Falsified Manlift Inspection Report:

During discovery, Plaintiffs first Request to Produce requested all pre-accident inspection reports pertaining to the boom lift. On or about June 10, 2014 in response to Plaintiffs' First Request to Produce, Defendant allegedly produced all pre-accident inspection reports pertaining to the subject Genie boom lift. (Exhibit O – Defendant's Response to Request to Produce – Manlift Inspection Reports and Repair Invoices). With this Response to Request to Produce, Defendant produced no inspection report for the pre-rental inspection required before the boom lift was delivered to Plaintiff.

Over four months later, on or about October 21, 2014, Defendant served its Supplemental Response to Plaintiffs' Request for Production and produced a pre-rental inspection report dated just prior to the rental to Plaintiff. (Exhibit P – Defendant's Supplemental Response to Request to Produce – Spradlin Pre-Rental Manlift Inspection Report). By the belated production of this document, Defendant represented that this inspection report was completed in association with the inspection of the boom lift just before it was rented and delivered to Plaintiff. This particular "manlift inspection report" was digitally completed while all the previously produced "manlift inspection reports" pertaining to the subject boom lift had been completed in handwriting. Clearly, it was the intention of Defendant that Plaintiff presume this inspection report was accurate, truthful, authentic, and completed during or after an inspection of the Genie that actually occurred prior to and in association with the rental of the boom lift to Plaintiff. Certainly, it had to be anticipated by Defendant that any recipient of that "manlift inspection report" would interpret the production of the report as evidence that a pre-rental inspection had occurred before the rental and delivery to Mr. Spradlin.

At the deposition of Bill Bowers, the author of this "manlift inspection report," Plaintiffs' counsel requested that Defendant e-mail the original document to Plaintiffs' counsel. After some initial reluctance, Defendant complied by having a representative e-mail the original document to Plaintiff's counsel during the deposition of Mr. Bowers. Following Mr. Bowers' deposition, Plaintiffs' counsel retained an expert in electronically stored information (ESI) and had the metadata of the document analyzed. It was determined that the document was actually completed at 11:22 A.M. Eastern Time on March 26, 2013. This was in conflict with Mr. Bowers' testimony under oath that he began performing the inspection several hours later, between the hours of 4:00-5:00 P.M. on March 26, 2013 and that he concluded the inspection the following day, at 7:00-8:00 A.M. on March 27, 2013. He even produced his handwritten personal diary as proof of his contention that he performed the inspection on those dates and at those specific times. Of course, this means he completed the inspection report hours before he even began the inspection, calling into question both the accuracy of the report and even whether an inspection was done at all. (Exhibit Q – Bill Bowers Dep. 15—30, 37--39, 54, and 75, Feb. 17, 2015.) Dan Leach, the statewide general operations and service manager of Defendant's rental stores at the time of this rental, acknowledged in his own testimony that he would question whether an inspection had occurred at all if the "manlift inspection report" was completed before the inspection was begun. (Exhibit R – Dan Leach Dep. Pages 56—57, Mar. 12, 2015.)

In short, the "manlift" inspection report was produced to Plaintiffs belatedly in Defendant's Supplemental Response to Request to Produce as evidence that an inspection had in fact occurred and then later in native digital format at Mr. Bowers' deposition in

support of his testimony that he performed the pre-rental inspection over a two day period from March 26, 2013, 4:00 to 5:00 P.M. and March 27, 2013, 7:00 to 8:00 A.M.

This document was plainly false. Had Plaintiffs not obtained the original digital version and had it analyzed by an ESI expert, neither Plaintiffs nor this Court would have ever known of the false nature of this key document that was presented as material evidence in support of Defendant's defenses in on-going litigation of a paraplegia case. Defendant should be sanctioned for this discovery abuse and this attempt to commit a fraud upon the Court and Plaintiff.

Destruction of Evidence and Violation of Agreed Protocol for Inspections and Repairs:

Exhibit S is a composite exhibit of the communications between counsel establishing the protocol and agreements between counsel pertaining to the inspections, repairs, and preservation of material evidence before and during this lawsuit. These communications support Plaintiffs' contention in this motion that there was a continuing obligation to require that Defendant permit observation, photographs, and videotaping of all material repairs and function testing of the Genie boom lift after the accident. These communications also establish as true Plaintiffs' contention in this motion that there was a continuing obligation to preserve all material evidence including all component parts of the Genie boom lift during and after disassembly and repairs.

Mr. Spradlin's accident occurred on March 30, 2013. On June 14, 2013, the undersigned counsel notified Defendant of representation and the need to preserve any and all material evidence pertaining to the condition of the Genie boom lift both before and after the accident, including documentation pertaining to repairs, maintenance, inspections, and any other work on

the boom lift before or after the accident. On July 16, 2013, Plaintiffs' counsel confirmed by electronic mail to Defendant's counsel that the Genie boom lift was in safe-keeping and had not been repaired.

After several communications, the parties agreed on or about August 23, 2013 to an initial inspection protocol permitting visual inspection of the machine. This protocol included a continuing duty to preserve the boom lift for potential future inspections. The initial inspection was scheduled for September 17, 2013 at Defendant's Orlando location. At that time, Plaintiffs' expert took a number of photographs of the boom lift, but no disassembly or breakdown of the machine or its component parts was permitted. Among the photographs taken at this initial inspection were photographs of the blank "Ready to Rent" tag affixed to the boom lift. **At all later inspections, it was noted that this "Ready to Rent" tag was missing and had apparently been discarded.** Defendants have had no specific explanation for the missing evidence but at least one witness has contended there was visible evidence of faded writing on the tag before it was lost. This is not evident in any of the photographs of this material evidence.

After this initial inspection, Defendant's counsel notified Plaintiffs that continued preservation of evidence was unnecessary. On September 18, 2013, Plaintiffs disagreed and requested continued preservation of the evidence and additional and more extensive visual inspection, operational inspection, diagnostics, and observation of repairs.

On September 20, 2013, Plaintiffs proposed a second stage inspection protocol that included preservation of documents, observation of diagnostics regarding evaluation and estimate of repairs required, preservation of all components, no repairs without notice, no destructive or material changes of any component parts during repairs, videotaping of the

process, etc. On November 7, 2013, Defendant's counsel advised for the first time that a repair estimate had already been prepared but assured Plaintiff that no evidence had been altered.[1] To the extent that there was any disturbance of the boom lift of its component parts in analyzing the machine for purposes of preparing this estimate, there was a violation of the agreement and Defendant's obligation to preserve the boom lift and all its component parts as material evidence. Subsequently, the parties agreed to videotaping and observation of the disassembly and repairs that were likely to occur at a later time over a two-day period.

The disassembly and breakdown stage occurred on January 16, 2014 at Defendant's Orlando location. Following that stage, the undersigned communicated by electronic mail with Defendant's counsel confirming that no technicians performed any function testing in the presence of Plaintiffs' representatives prior to commencement of the disassembly and further confirming that all component parts to be replaced should be maintained for later inspection, no matter how minor the component. Plaintiffs did not understand then and cannot understand now how Defendant knew what component parts required repair and replacement unless Defendant had conducted some function tests prior to disassembly and outside the presence of Plaintiffs. As a further follow-up, the undersigned requested copies of any additional repair estimates and notice of the next stage, i.e. commencement of repairs, advising that Plaintiffs desired to be present for any repairs, as contemplated by the previous communications.

On January 31, 2014, Defendant's counsel stated Defendant's intention to proceed with repairs and its belief that nothing learned in the disassembly suggested that there was any malfunction of the boom lift that contributed to the accident. Plaintiffs immediately objected and

[1] Plaintiffs wondered then and now how such a repair estimate could have been generated without some functions testing, operation, and inspection of the machine over and above any visual inspection. Apparently, no recordation by video or otherwise of any such activities outside the presence of Plaintiffs' representatives exists.

requested dates to observe the repairs. On February 5, 2014, Plaintiff again reiterated this objection, requested that any component parts removed or replaced be preserved and noted that the repair estimate was ambiguous in many particulars. On February 14, 2014, Defendants advised it was their intent to proceed with repairs in the ordinary course of business in the absence of Plaintiffs' representatives. This position was in direct contravention of previous communications and agreements on a protocol for observation of the disassembly and repairs. Plaintiffs immediately objected and filed suit in order to seek a court order to prevent spoliation of evidence. In addition, Plaintiffs suggested that Defendant should videotape any repairs if they proceeded in Plaintiffs' absence and in violation of the earlier agreement before court intervention. Over the next several months, discovery was exchanged. During this time, Defendant changed its mind and agreed to permit Plaintiffs' representatives to be present for and videotape repairs. Defendant apparently continued to maintain that all material evidence had been preserved and no repairs performed.

After several months, the repairs were scheduled to occur on September 10 and 11, 2014. This time, the protocol for the inspection and repairs was filed with the Court and included retention of all components until the parties agreed otherwise. At the beginning of the second day of the repairs, Plaintiffs' representatives noticed that the tension sensor cable at the rear of the boom lift had been connected in the absence of Plaintiffs' representatives sometime between the end of the first day of repairs and the beginning of the second day of repairs. No explanation was given. At the end of the second day of the repairs, it was agreed between counsel that the only remaining work to be performed was replacement of the "engine tray assembly" that "might" lead to related work on the hydraulic filter and hoses and lines in the engine area. Given

those agreements, the parties agreed that the remaining repairs need not be videotaped, could be performed on a third day outside presence of Plaintiffs' representatives, and that a final repair and work order would be produced.

During these repairs, all the parties noticed that the "crawl speed" of the boom lift was stuck in "low" speed after the repairs were complete. On September 26, 2014, Plaintiffs notified Defendant of Plaintiffs' concern about whether the "crawl speed" malfunctions were going to be repaired before the machine was put back into service or rental and requesting notice of any repairs pertaining to this issue. Having not received the repair and work orders promised at the conclusion of the repair stage, on October 9, 2014, Plaintiffs requested an update on those repair and work orders, as well as the "crawl speed" issue.

The repair and work documents were finally provided on October 24, 2014, which was about five (5) weeks after the three-day repair stage was completed. Defendant represented in that communication that all removed parts were being preserved. Upon review of the final repair records, Plaintiffs learned for the first time that Defendant had performed repairs beyond the agreed "engine tray assembly" replacement and after videotaping had ceased, including repair of the "crawl speed" issue without notice to Plaintiffs. This work performed without notice to Plaintiff entailed repair and/or replacement of a limit switch and harness which had been observed as damaged and frayed with exposed electrical wires during the disassembly and during the two days of videotaped repairs. Accordingly, on October 27, 2014, Plaintiffs requested another inspection of the boom lift to observe operation with "crawl speed" corrected by the unobserved and unrecorded repairs and requested permission to inspect all repaired and removed

parts. This inspection was conducted on October 29, 2014 and was photographed and videotaped.

At the October 29, 2014 inspection, Plaintiffs learned that not only had the frayed harness and limit switch been removed and replaced, but the frayed and damaged section of the harness, observed during the disassembly and repairs of the boom lift, had been cut away and discarded. Thus, this exposed wiring and harness were not available for inspection or testing by Plaintiffs' experts. This damaged wiring and harness had been removed and replaced outside the presence of Plaintiffs and in violation of the agreement between the parties that the only remaining repairs were the engine plate assembly replacement and related hose work. In addition, the damaged wiring and harness had been discarded. Defendant's technician, Javier Rivera, has testified that he was only following instructions when conducting these repairs outside presence of Plaintiffs or a videographer and that the frayed cable must have been discarded. (Exhibit T – Javier Rivera Dep. 27—48, Feb. 24, 2015.)

THE WELL-ESTABLISHED CASE LAW SUPPORTS STRIKING DEFENDANTS' PLEADINGS IN THIS CASE AS A SANCTION FOR MISCONDUCT

Where a party deliberately frustrates the discovery process through false testimony, conscious concealment of information, and intentional destruction of relevant evidence, the striking of pleadings and entry of a default is well within the trial court's discretion, even if the aggrieved party, through diligence or luck, eventually uncovers the truth. This is especially true where, as here, it is the party itself, and not the party's lawyer, who is to blame. In cases of a party's willfulness and bad faith, Florida courts have consistently affirmed the entry of the most

severe sanctions. While it is anticipated that Defendant will contend the above described conduct was unintentional, accidental or otherwise excusable, an objective assessment of Defendant's misconduct compels a finding that this misconduct was far from innocent and has been designed to obstruct Plaintiffs' discovery and ability to prove the elements of Plaintiffs' case. Worse, Defendant's misconduct appears intended to even lead Plaintiffs and the Court to believe in the veracity of at least one document that was, in fact, false evidence.

Where a party gives false information central to its own claim or defense or a portion of that claim or defense, fraud permeates the entire proceedings and the court should strike the party's pleadings. *Hagner v. Allstate Ins. Co*., 867 So. 2d 1202 (Fla. 5th DCA 2004); *Brown v. Allstate Ins. Co.*, 838 So. 2d 1264 (Fla. 5th DCA 2003); *Distefano v. State Farm*, 846 So. 2d 572 (Fla. 1st DCA); *Hogan v. Dollar Rent a Car*, 783 So. 2d 1211 (Fla. 4th DCA 2001); *Baker v. Myers Tractor Services, Inc.*, 765 So. 2d 149 (Fla. 1st DCA 2000); *Carbrezio v. Fortune International Realty*, 760 So. 2d 228 (Fla. 3d DCA 2000); *Simmons v. Henderson*, 745 So. 2d 1031 (Fla. 2d DCA 1999); *Stavely v. Branton*, 743 So. 2d 633 (5th DCA 1999); *Desimone v. Old Dominion Ins. Co.*, 740 So. 2d 1233 (Fla. 4th DCA 1999); *Tramel v. Bass*, 672 So. 2d 78 (Fla. 1st DCA 1996); *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115 (1st Cir. 1989). *See Also* Kolinski, *Fraud on the Court as a Basis for Dismissal with Prejudice or Default*, 78 Feb Fla.B.J. 16 (February 2004); and Blackwell, *The "Big Lie" Contrary to what you may have Heard on the Evening News, False and Misleading Testimony by a Civil Litigant Can and Does have Serious Consequences*, 73 –Aug Fla. B.J. 20.

The decision to impose sanctions, and the choice of sanctions imposed, may be reversed only for abuse of discretion. *U.S. Fire Ins. Co. v. C & C Beauty Sales, Inc.*, 674 So. 2d 169 (Fla. 3d

DCA 1996). That means that an appellate court must affirm unless reasonable persons could not differ with the conclusion that the decision is unreasonable. *Mercer v. Raine*, 443 So.2d 944, 946 (Fla. 1983); *Mack v. National Constructors, Inc.*, 666 So. 2d 244 (Fla. 3d DCA 1996).

Where a party lies under oath, consciously conceals discoverable information, and intentionally destroys relevant items, the sanction of default is necessary and proper even if diligence or luck permits the party seeking the discovery to proceed to trial without actual prejudice. *Mercer v. Raine*, 443 So. 2d 944 (Fla. 1984). *See Tramel v. Bass*, 672 So. 2d 78 (Fla. 1st DCA 1996), *rev. denied*, 680 So. 2d 426 (Fla. 1996). *See also Mendez v. Blanco*, 665 So. 2d 1149 (Fla. 3d DCA 1996).

In *Mercer*, the Supreme Court rejected the Defendant's contention that it was an abuse of discretion to enter a default "in the absence of a finding ... that plaintiffs suffered any undue prejudice due to the defendant's noncompliance." 443 So. 2d at 945. The Court held that the sanction was within the trial court's discretion based on evidence that the Defendant's violation was willful. Because of the willfulness, the Court did not require prejudice.

In *Tramel*, the plaintiff sought discovery of a videotape of the event that gave rise to the lawsuit. The defendant produced a tape that it had intentionally altered to delete a damaging segment. The plaintiff could not have been prejudiced because he already had obtained an unedited tape from another source.

The trial court in *Tramel* found the alteration of the videotape was an intentional attempt to mislead the plaintiff, the defendant's own attorney, and the court. *Id.* at 82. Although no specific discovery order was violated, and although the plaintiff could not have been misled, the trial court held that it had the inherent authority to impose the severest of sanctions to remedy that fraud upon

the court. *Id.* The First District agreed and affirmed the default judgment and order striking the answer and affirmative defenses. No prejudice was required.

Similarly, in *U.S. Fire Ins. Co. v. C & C Beauty Sales, Inc.*, 674 So. 2d 169 (Fla. 3d DCA 1996), the Court affirmed a default for persistent false denials that a document existed and refusals to produce it, even though the defendant finally produced the document. *See generally Mendez*, 665 So. 2d at 1150 (affirming dismissal where the plaintiff "committed serious misconduct by repeatedly lying under oath during a deposition").

Courts recognize the goals of penalizing the offending party and of deterring others from future misconduct. "The more culpable Defendant's conduct, the greater the sanction that is required. If Defendant's conduct is highly culpable, then *prejudice to Plaintiff is not the focal point*. The judicial system must be vindicated and like-minded parties deterred." *BankAtlantic v. Blyth Eastman Paine Webber, Inc.*, 127 F.R.D. 224, 235 (S.D. Fla. 1989)(emphasis added), *aff'd*, 12 F.3d 1045 (11th Cir. 1994).

In a case cited approvingly in *Mercer v. Raine*, 443 So. 2d at 945-46, the U.S. Supreme Court recognized the importance of the goals of punishment and deterrence. *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976). *NHL* arose out of a dismissal for failure to timely answer interrogatories as ordered. The Supreme Court quashed the decision reversing that dismissal order and held: "the most severe in the spectrum of sanctions ... must be available ... in appropriate cases, *not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.*" *Id.* at 643 (emphasis added). Florida law is in accord. *Tramel v. Bass*, 672 So. 2d at 84 (Fla. 1st DCA), *rev. denied*, 680 So. 2d 426 (Fla. 1996) citing *NHL*. *See also Heimer v. Travelers Ins. Co.*, 400 So. 2d

771, 773 (Fla. 3d DCA 1981) (party was to be "punished for willful misconduct" by striking of answer).

Florida law as illustrated by *Tramel* and *U.S. Fire* permits defaults and sanctions in the absence of actual prejudice where the violation is willful.

It is settled that if a party submits materially false evidence in a civil proceeding, whether in discovery or at trial, the court has the discretion to strike the offending party's claim or defense as a sanction. *See Long v. Swofford,* 805 So. 2d 882 (Fla. 3d DCA 2001); *Leo's Gulf Liquors v. Lakhani,* 802 So. 2d 337 (Fla. 3d DCA 2001); *Rosenthal v. Rodriguez,* 750 So. 2d 703 (Fla. 3d DCA 2000); *Metropolitan Dade County v. Martinsen,* 736 So. 2d 794 (Fla. 3d DCA 1999); *Hanono v. Murphy,* 723 So. 2d 892 (Fla. 3d DCA 1998); *O'Vahey v. Miller,* 644 So. 2d 550 (Fla. 3d DCA 1994); *Young v. Curgil,* 358 So. 2d 58 (Fla. 3d DCA 1978). The sham pleading rule may also be applicable. *See Fla. R. Civ. P. 1.150.*

In *Rosenthal v. Rodrigues*, 750 So. 2d 703 (Fla. 3d DCA 2000), a plaintiff's entire lawsuit was dismissed with prejudice for concealing prior injuries in her deposition. The Appellate Court concluded that the trial court did not abuse its discretion when it exercised its inherent authority to strike her pleadings and dismiss her cause with prejudice. Courts throughout this state have repeatedly held "'that a party who has been guilty of fraud or misconduct in the prosecution or defense of a civil proceeding should not be permitted to continue to employ the very institution it has subverted to achieve her ends.'" *Metropolitan Dade County v. Martinsen,* 736 So. 2d 794, 795 (Fla. 3d DCA 1999) (quoting *Hanono v. Murphy,* 723 So. 2d 892, 895 (Fla. 3d DCA 1998)); *see also Cox v. Burke,* 706 So. 2d 43, 47 (Fla. 5th DCA 1998); *O'Vahey v.*

Miller, 644 So. 2d 550, 551 (Fla. 3d DCA 1994); *Kornblum v. Schneider*, 609 So. 2d 138, 139 (Fla. 4th DCA 1992).

Given Defendant's destruction of material evidence on at least two occasions and Defendant's production of a false "manlift inspection report," Defendant's misconduct warrants sanctions by this Court. Fraud has permeated these proceedings. Neither Plaintiffs nor this Court can rely upon the candor and veracity of this Defendant that it has complied in good faith with the discovery requests to date or that it will do so in the future or at trial. While Plaintiffs' counsel was diligent and persistent enough to discover the fact that evidence had been destroyed, discarded, and even falsified by Defendant, that is precious little assurance that there is not some additional destroyed, discarded, or false evidence that Plaintiffs' counsel has not discovered despite due diligence and zealous representation of Plaintiffs.

While Plaintiffs' counsel was diligent and persistent enough to discover the fact that the inspection report was false and that material evidence had been destroyed and discarded twice, that is precious little assurance that there is not even more material evidence that has been falsified, discarded, destroyed or withheld by this Defendant. It would not be an abuse of discretion for this Court to use its inherent authority to impose sanctions upon Defendant under these circumstances. Enough is enough.

Plaintiff submits that any of the following sanctions are appropriate:

1. Entering default against Defendant on liability;
2. Striking one or more of Defendant's affirmative defenses;
3. Striking one or more of Defendant's experts;
4. Imposing and awarding Plaintiff the costs of inspections and discovery to date;

5. Finding that Plaintiff is entitled to presumptions of negligence on the part of Defendant.
6. Such other sanctions as the Court deems appropriate.

FLORIDA LAW ON SPOLIATION OF EVIDENCE

The Florida Supreme Court held that where a party fails to produce evidence within his control, an adverse inference may be drawn that the withheld evidence would be unfavorable to the party failing to produce it. *See Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596 (Fla. 1987). In *Valcin*, the plaintiff was hindered in her medical malpractice action against a hospital because the hospital could not produce the records of her surgical procedure. *Id.* Her expert could not give an opinion as to the negligence of the hospital without those records. *Id.* Court articulated that the problem could be solved by the use of rebuttable presumptions which could either shift the burden of producing evidence or the burden of proof. *Id.* The Court determined that a presumption that shifts the burden of proof, to the party against whom the presumption operates to prove the nonexistence of the fact presumed, ensures that the issue goes before the jury and best implements public policy. *Id.*

Spoliation is defined as, the intentional destruction, mutilation, alteration, or concealment of evidence. *Black's Law Dictionary (8th ed. 2004).* The destruction of evidence by a party, that is duty bound to preserve it, entitles the other party to an adverse inference instruction. *See Golden Yachts, Inc. v. Hall*, 920 So. 2d 777 (Fla. 4th DCA 2006). As the Fourth District Court of Appeals of Florida stated, in cases involving negligent spoliation, courts prefer to utilize adverse evidentiary inferences and adverse presumptions during trial to address the lack of

evidence. *Id.* at 780. The judge has broad discretion in determining the proper remedy, which may be cumulative to include the circumstances surrounding the spoliation as well as instructing the jury on the inferences that may be drawn from the spoliation. *Id.*

More recently the Florida Supreme Court has addressed first party spoliation of evidence and concluded that the available remedies are discovery sanctions and a rebuttable presumption of negligence for the underlying tort. *See Martino v. Wal-Mart Stores, Inc.,* 908 So. 2d 342 (Fla. 2005). In *Martino*, the plaintiff suffered injuries from a shopping cart that collapsed, and during discovery of her negligence claim she requested the specific shopping cart and a copy of the video surveillance tape from defendant. *Id.* at 344. Defendant could not produce either item; therefore, plaintiff amended her complaint to allege a separate claim for spoliation of evidence. *Id.* The trial court granted defendant's motion to dismiss the spoliation claim on the basis that it had no contractual or statutory duty to preserve the evidence. *Id.* at 344-45. The trial court also refused plaintiff's argument that she was entitled to an inference of negligence based on the spoliation of evidence. *Id.* at 345. On appeal the **Florida Supreme Court reiterated the *Valcin* holding by stating that where the first-party intentionally loses, misplaces, or destroys evidence, trial courts are to rely on sanctions found in Fla. R. Civ. P. 1.380(b)(2), and a jury inference of negligence from a finding of intentional destruction. *Id.* at 346. However, where the spoliation of evidence was merely negligent, a presumption of negligence applies. *Id.* at 347. In either scenario, the wronged party is entitled to a presumption of negligence.**

Plaintiffs submit that this Defendant has engaged in a pervasive pattern of discovery abuse in the form of both destroying and discarding evidence and proffering a false document as

material evidence on a key issue. Defendant destroyed at least two items of material evidence in this case: the blank "Ready to Rent" tag and the frayed limit switch cable and harness. This Court must now consider whether the spoliation of evidence by the Defendants was intentional or simply negligent. The fact that Defendant would proffer a falsified document in addition to destroying and discarding material evidence can be considered together in determining the intentional nature of the misconduct in this case. Considering all the circumstances outlined above, it is hard to imagine that Defendant was not aware of the importance of the evidence discarded or destroyed and of the explicit agreement of the parties that all components of the Genie boom lift must be preserved given the on-going litigation of the injury claim of a paraplegic who narrowly survived this accident. Throughout the inspections Plaintiffs' counsel repeatedly reminded Defendants, through their counsel, of the need to preserve all components and evidence, and to permit Plaintiffs to be present for any and all repairs. Defendant conducted function tests and repairs outside Plaintiffs' presence and then destroyed and discarded evidence including both the blank "Ready to Rent" tag and the frayed electrical cable and wire harness.

It is stunning that Defendant would so arrogantly and cavalierly perform repairs outside the presence of counsel and in violation of explicit inspection protocol agreements to perform all repairs in the presence of counsel on videotape. It is especially true given the multiple and repeated reminders by way of e-mails, correspondence and communications between Plaintiffs' counsel and Defendant's counsel that no additional repairs should be performed without notice to and the opportunity for Plaintiffs to be present. The decision to proceed with repairs to the damaged and frayed electrical cable and wire harness is inexplicable absent some motivation to put Plaintiffs at a disadvantage in the litigation, particularly when this material evidence was

thereafter removed from the machine and discarded, all without notice to Plaintiffs or the opportunity to inspect and test the removed components.

It is important to emphasize that such repairs were performed in violation of explicit agreements between the parties without notice to Plaintiffs and that Plaintiffs' counsel discovered the fact that such repairs had been performed only through due diligence**.** For that matter, and given the misconduct of Defendant that Plaintiff has discovered, Plaintiff is left to wonder what, if any, other tampering, repairs, or work was performed in Plaintiffs' absence, whether during the extraction of the boom lift from the accident site or during the many months before the disassembly or, as here, during or after the repairs were completed.

Finally, there can be no doubt that the "manlift inspection report," belatedly produced to Plaintiffs in a Supplemental Response to Request to Produce before deposition testimony was taken, was presented to Plaintiffs and this Court as evidence that the boom lift was, in fact, inspected before rental and delivery to Plaintiff. Had Plaintiffs' counsel relied upon the Defendant's honesty and good faith in discovery exchanges and not requested that the digital version of the document be e-mailed in native format during the deposition of Mr. Bowers, neither Plaintiffs, nor this Court, would be aware that the document was actually falsified, having been created about 20 hours before the inspection that allegedly occurred was completed. Indeed, Defendant's own managerial level witness, Dan Leach, has acknowledged under oath that a document generated so far in advance of an alleged inspection leaves doubt as to whether the inspection was performed at all. Again, given the misconduct of Defendant, Plaintiffs and this Court are left to wonder what, if any, additional material evidence has been falsified or

withheld. Neither Plaintiffs nor this Court can trust Defendant's candor, veracity, or good faith in the exchange of information and evidence during formal discovery in this litigation.

Should the Court conclude that the destruction and loss of this evidence by Defendants was intentional, Fla. R. Civ. P. 1.380 sanctions should be imposed a requested above, including striking Defendant's pleadings and defenses or such other sanctions the Court deems appropriate. The Court can impose harsher or lesser sanctions in its discretion, and Plaintiffs have suggested sanctions above.

In the event that the Court concludes that the destruction of evidence by Defendants was merely negligent, then Plaintiffs are entitled to a *Valcin* presumption that Defendant was negligent in failing to perform a pre-delivery inspection of the Genie boom lift, that the discarded electrical cable and wire harness contributed to causing the accident and/or the intermittent interruptions in functioning of the boom lift from the "platform" or operator basket, and that a proper inspection by Defendant would have discovered the various mechanical and electrical deficiencies discovered during post-accident inspections.

Accordingly, Plaintiffs submit that any of the following sanctions are appropriate:

1. Entering default against Defendant on liability;
2. Striking one or more of Defendant's affirmative defenses;
3. Striking one or more of Defendant's experts;
4. Imposing and awarding Plaintiff the costs of inspections and discovery to date;
5. Finding that Plaintiff is entitled to presumptions of negligence on the part of Defendant;
6. Such other sanctions as the Court deems appropriate; and/or

7. Order establishing a presumption of negligence on the part of Defendant in the inspection, maintenance, and rental of the Genie boom lift to Plaintiff.

WHEREFORE, Plaintiffs move this Honorable Court to strike Defendant's pleadings an enter default, or alternatively impose sanctions deemed appropriate by the Court, or alternatively find that presumptions of negligence against Defendant are appropriate at any trial of this matter. Further, Plaintiffs move this Court to conduct an evidentiary hearing to the extent the Court deems it necessary for a determination of these issues.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by e-mail, this 6th day of January, 2016, to: Kenneth W. Waterway, Esq., 1401 E. Broward Blvd, Victoria Park Centre, Ste. 204, Ft. Lauderdale, FL 33301, kww@waterwayblack.com, firm@waterwayblack.com, and kelsey.black@waterwayblack.com.

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