COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

NO. 320006

RAYMOND COOK and ARLENE COOK,
Petitioners/Plaintiffs,

v.

STEVENS COUNTY, a local governmental entity,

Respondents/Defendants

and

TARBERT LOGGING, INC., A Washington Corporation, and SHANE BEAN and JANE DOE BEAN, husband and wife and the marital community comprised thereof;
Respondents/Defendants

APPELLANT'S APPEAL BRIEF

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A. IDENTITY OF THE PARTIES

The appellants, Raymond E. Cook, Jr. and Arlene Cook, husband and wife, are the appellants in this matter. Tarbert Logging, Shane Bean and Stevens County are the named respondents.

B. INTRODUCTION

Under Washington's application, spoliation is used as a remedial tool to place the parties into a position where an alleged unfair investigative advantage by the spoliating party is removed by excluding the evidence that provided the advantage and placing the parties onto even footing. In this matter, the trial court made a number of spoliation rulings which resulted in placing the Cooks in a disadvantageous position, prejudicing the jury, and resulting in a defense verdict.

The fact of the matter is that none of the parties had obtained an investigatory advantage through the examination of the vehicle. The airbag control module, the evidence at issue in the spoliation motion, was never examined by any party. The accident reconstruction expert retained by Cooks did not assess or possess this information, nor did he testify at trial.

Upon Stevens County's motion, this trial court considered the

motion for spoliation and ruled in their favor. The court's ruling was made in error as there was no general duty to preserve evidence aside from those created by statute, regulation, or other pre-existing legal relationships between the parties. None of these conditions were present. In addition, the Cooks were not the lawful or legal owners of the subject vehicle. To further compound the problem, the respondents, Tarbert and Stevens County, failed to make any requests to examine the vehicle until almost three years post-accident.

Finally, the court's authorization to the respondents allowing them to evoke testimony concerning Cooks' expert. Whose relevant opinion testimony was excluded by the court, was based on logically flawed analysis, and created jury confusion rather than resolving it. The result was that Stevens County was allowed to argue about the absence of evidence that was the direct result of the court's prior spoliation ruling. Prohibiting Cooks from presenting rebuttal testimony concerning these assertions by Stevens County increased the prejudicial impact of the prior court ruling, prejudiced the Cooks, and resulted in a fundamentally unfair trial and a defense verdict.

For these reasons, this court must reverse the lower court and

remand for a new trial.

C. ASSIGNMENTS OF ERROR

1. The Court's pre-trial rulings on Spoliation were an abuse of discretion because the Cooks had no duty to preserve the evidence, as there was no applicable statutory or regulatory duty to hold, and respondents failed to make a litigation hold, or even request inspection of the evidence in a reasonable time frame.

2. The Court's trial rulings of Spoliation were an abuse of discretion and prejudicial error because the court allowed the respondents to submit evidence and testimony for a witness not present, and whose opinions were excluded by the court.

3. The Court's refusal to allow Cooks the opportunity to rebut the inference created by these rulings further compounded the court's errors.

D. STATEMENT OF THE CASE

Raymond Cook was injured in a motor vehicle collision in Stevens County, Washington on February 6, 2009. (CP 1-7, 72). At the time of the collision, Cook was driving a pick up truck owned by Golden Opportunities, a Washington corporation. (CP 72). On March 18, 2009, Tarbert Logging's agent acknowledged the claim. (CP 80). In March of 2009, Richard Gill, Ph.D., inspected the vehicle for damage and took photos. (RP 115).

On February 9, 2010, via certified mail, Cooks served an RCW

4.96 Tort claim on Stevens County. (CP 82-84) On December 27, 2010, the underlying action was filed in Spokane County Superior Court per RCW 36.01.500. (CP 4). On February 9, 2011, Stevens County appeared in the action. (RP 767 Aug. 22. 2013, A.M. Session).

Prior to January, 2012, neither of the respondents had requested the opportunity to inspect the vehicle operated by Cook at the time of the collision. (CP 33-34). January 17, 2012, Stevens County sought an order of spoliation. (CP 50). At no time was the ACM examined by any party, appellants expert was not qualified to do so at the time of his inspection. (CP 60; 284-85). At the time of the request, the vehicle had been completely parted out and disposed over the intervening three years. (RP 1068, Aug. 26, 2013 A.M. Session; CP 33-34).

In hearing, in February 8, 2013, the court ruled that the Cooks failed to preserve the evidence in the form of the wrecked vehicle and excluded all of Dr. Gill's testimony on opinions that were "speed-related". In addition, any opinions by Dr. Gill concerning Mr. Cook's speed prior to the impact, whether Cook's speed contributed to the collision, and other opinions supporting Cook's version of events leading up to the collision. (CP 41-42, 119-125).

The court found "clearly there's no bad faith. The evidence establishes that this truck was kept for a period of approaching two and a half years . . .". (RP, 19, February 8, 2103, Spoliation Hearing). The exclusion of the Cooks' experts opinions were "the least severe remedies to cure the prejudice to Defendants in this case from the spoliation". (CP 123). As a result, Dr. Gill was withdrawn as a witness by Cooks. (CP 149-150) The court reserved on the issue of submitting a spoliation instruction to the jury. (CP 124).

At the time of trial, Cooks sought a ruling *in limine* to exclude testimony concerning argument by the respondents of Richard Gill's precluded speed testimony. (CP 138 - RP 65-69, Aug. 19, 2013 A.M. Session). The court requested additional briefing on the spoliation issue and Cooks motion to exclude testimony concerning Dr. Gill's involvement in the matter. (RP 69, Aug. 19, 2013 A.M. Session).

During trial the parties submitted briefing on the issue of providing spoliation instructions to the jury. (CP 335-41).

In its ruling on spoliation and Cooks motion in limine regarding Dr. Gill, the court stated:

> I will refrain from giving that [spoliation] instruction. I think it's appropriate and fair, given the fact that there have now been two sanctions imposed on plaintiff, one is the Gill testimony, and

> secondly the permission and approval to the defense that they may establish the fact that this box existed, it was destroyed, it was destroyed at the instance of the plaintiff or related persons to the plaintiff, and defense never had a chance to analyze it, and it well might have determined the central issue here, the speed.

(RP 772-73. Aug. 22, 2013 A.M. Session).

During argument the discussion turned to the absence of appellant's expert and the impact on the jury.

> THE COURT: Hold on a second, Counsel. What do you say, Mr. Andersen, to the fact that there will be sort of a, for lack of a better term, a vacuum, in the evidence and that is the two defense experts will say, well, the speed was Mr. Cook was going too fast.
> MR. ANDERSEN: That's what they'll say.
> THE COURT: And so there's really -- and you'll be cross-examining these experts.
> MR. ANDERSEN: Yes. And I'd go –
> THE COURT: And the question will arise, I'm sure, in the jury's mind, well, how come the plaintiff doesn't have an expert. And I wouldn't be at all surprised if there were a jury question during deliberation to that effect. So, I'm concerned about that gap there, and apart from an instruction, what's your view on providing or allowing the jury to hear some
> information that yes, there was evidence at an early juncture, and it was lost, it was destroyed?

(RP 759-760, Aug. 22, 2013, A.M. Session).

As a matter of clarification Stevens County requested the ability to inquire about "an expert hired by the plaintiff examined the vehicle before the vehicle was parted out?" (RP 773). The court stated "I've already made the ruling on Mr. Gill, and there won't be any reference to Mr. Gill

apart from the fact that *there was an expert who evaluated the vehicle at the instance of the plaintiff*". (RP 773, *Id., emphasis added*).

MR. ANDERSEN: I have a question, Your Honor. If, in fact, they can establish it, then I
would think the plaintiff would have the right to indicate to the jury that the expert's
opinions were not negative towards Mr. Cook. Because the – excuse me?
MS. BLOOMFIELD: I didn't say anything.
MR. ANDERSEN: Sorry, I thought you said something. Because if the parties are allowed to say the plaintiff hired an expert to inspect this vehicle, the jury is going to say,
well, where is this expert. So, there's clearly going to be some negative inference derived
from the plaintiff to indicate that the expert is going to have a negative opinion against
the plaintiff.
THE COURT: I would disagree with that. I've already made the ruling on Mr. Gill, and
there won't be any reference to Mr. Gill apart from the fact that there was an expert who
evaluated the vehicle at the instance of the plaintiff.

(RP, 774-75, Aug. 22, 2013, A.M. Session).

Further argument elicited the following colloquy:

THE COURT: So your main difficulty with this is the giving of the instruction?
MR. ANDERSEN: Yes, and any mention of Dr. Gill.
THE COURT: My concern is if -- well, getting back to Mr. McFarland's comment of a moment ago, it sounds as though if the jury is precluded from having that information, i.e., that the truck was destroyed and the scientific evidence was forever lost, then without the instruction, it tends to operate as a motion in limine against the plaintiffs' expert's testimony. But what you're saying

now is you don't object to that?
MR. ANDERSEN: No. I don't object to the discussion of the loss of the truck. I mean, they're perfectly free to elicit that testimony and argue to the jury that they should
enter a negative inference, because Mr. Cook -- or, you know, take whatever inference they want from that, but consider the fact that Mr. Cook got rid of this truck before they even filed a lawsuit, before our defense experts ever had an opportunity to examine it. All of that can be brought out in testimony and in an argument. I'm just saying that ***the further addition of the instruction along with the removal of Dr. Gill or even the mention of Dr. Gill would be highly prejudicial at this point***, specifically given the fact that the court has made a finding of no bad faith.

(RP 763-64, Aug. 22, 2013, A.M. Session, *emphasis added*).

In closing, Stevens County was allowed to argue to the jury that Cooks' expert took measurements of "crush damage", the expert was trying to determine speed specifically. (RP 1021 Aug. 26, 2103, PM Session P. 1020, by Mr. McFarland) .

> And contrary to that, *plaintiff hasn't called an expert to tell you what caused this accident*. Plaintiffs called Mr. Keep to tell you how the road should be plowed, but there's *not one bit of expert testimony* from anyone in this trial *to suggest that the accident was caused by anything other than Mr. Cook's speed*".

(RP 1331-32,Aug. 28, 2013, *emphasis added*).

> That truck, after plaintiff's expert examined it, was disposed of. It was parted off and sold, so the defense experts didn't have the opportunity to look at that airbag control module. When you go to the jury room to deliberate, you can take whatever inference you want from Mr. Cook's actions in having an expert examine that vehicle and then sell that vehicle.

(*Id.*).

The jury returned a defense verdict. (CP 356-58).

E. ARGUMENT

1. The Court's pre-trial rulings on Spoliation were an abuse of discretion because the Cooks had no duty to preserve the evidence, as there was no applicable statutory or regulatory duty to hold, and respondents failed to make a litigation hold, or even request inspection of the evidence in a reasonable time frame.

The standard for review on matters of spoliation is "an abuse of discretion". *Henderson v. Tyrell*, 80 Wn. App. 592, 605, 910 P.2d 522 (1996). To show an abuse of discretion the moving party must demonstrate that the trial court rulings were "manifestly unreasonable or based on untenable grounds". *Homeworks Construction, Inc. v. Dan Wells et al.*, 133 Wn. App. 892, 896; 138 P.3d 654 (Div. II, 2006).

Homeworks involved a claim for spoliation arising out of repairs to home siding. In *Homeworks*, State Farm paid a claim for defective siding installation by one of their insureds. JRP Engineering, an expert was retained to inspect that damage and determine fault. After a year had passed, the expert submitted a report claiming defendant Wells, the siding installer, was negligent. Roughly two months later, after payment of the claim, and prior to the lawsuit, the homeowners repaired and replaced the

defective siding, thirty six months after making the initial claim. State Farm, brought an action against Wells to recoup their subrogated interest in the claim.

Wells moved for and received summary judgment against State Farm dismissing the claim for spoliation. On appeal, the Division Two court of appeals reviewed the development of spoliation law in Washington citing *Pier 67, Inc. v. King County* (89 Wn.2d 379, 573 P.2d 2 (1977)) and *Henderson v. Tyrell. Id.*

The *Homeworks* court reversed the trial court's summary judgment, holding that *Homeworks* had **not** committed spoliation. The basis for the court's ruling was that State Farm "did not violate a duty to preserve evidence". *Homeworks* at 899. Although the condition of the house and siding was important evidence, the court held that the defending parties could use the photographs, report, the repair bids, the repairing parties, and the individuals who did performed the original work to establish the "extent to the damages". *Id.* Given these facts and the lack of any evidence that either of the plaintiffs had viewed the demolition or repair, **"all parties would have been in the same position at trial with regard to that issue**". *Id. emphasis added.*

Similarly, in *Henderson*, the defendants sought a finding of spoliation, when plaintiff Henderson disposed of his vehicle scrap two years after his collision, and, after Tyrell's attorney made a request to Henderson's attorney to retain the salvage. After considering the circumstances of the case, the timing of the requests, and the ultimate disposal of the vehicle, the court determined that "the real culprit was the passage of time". *Henderson v. Tyrell*, 80 Wn. App. 592, 603; 910 P.2d 522 (Div. III, 1996). The court added that lastly, "[i]n any case, for a direct sanction to apply the spoliation must in some way be connected to the party against whom the sanction is directed". *Id.* at 606.

In this matter, there are a number of reasons why spoliation should not have been found by the court. Initially, and most problematically, the vehicle at issue was not owned by the Cooks. (RP 1067, August 26, 2013, A.M. Session; CP 35, 72 [Police Traffic Collision Report]). After the collision, the vehicle was stored at Josh Cook's business location for a period of years. (RP 1068, August 26, 2013, A.M. Session). Cook had no authority or control over the vehicle (RP 1069, August 26, 2013, A.M. Session).

Similar to the *Homeworks* matter, the "owner" of the evidence was

not the Cooks. And, although the vehicle was inspected and stored, there is no evidence to support the idea that this was directed or controlled by the Cooks. Further, following the inspection, the parties were notified of the claim, Tarbert and Bean in March of 2009, and Stevens County in February of 2010. Neither of the respondents filed a litigation hold letter to preserve the evidence nor submitted a request to inspect under CR 34. Not until February, 2012, did any party request to inspect the vehicle. (CP 30, 33-34).

Applying the analysis in *Henderson* and its' progeny, as an initial matter this court should note the lack of ownership and control. Second, there is no duty to preserve evidence recognized in the state of Washington absent a statutory requirement, or notice of a litigation hold. Third, the evidence at issue, the airbag control module was never accessed or examined by any party. *Id.* Fourth, the examination results and photographs were used by the respondents experts to craft their own reports and responses to the expert's opinions. Thus, any investigatory advantage postulated by Stevens County and Tarbert were absent. Respondents were able to refute Cooks testimony with their own experts, and exclude Gill's testimony.

It is possible for the court to find spoliation without a finding of bad faith, "but even under this theory, the party must do more than disregard the importance of evidence; the **party must also have a duty to preserve the evidence**." *Homeworks*, *Id.* at 900, *citing* Karl B. Tegland, 5 Washington Practice: Evidence, §402.6 at 37 (Supp. 2005), *emphasis added.*

A. There was no applicable duty to preserve

A duty to preserve evidence without notice or a request to preserve *may* arise under specific circumstances. For instance, a partner may have a duty to maintain partnership records, this is an independent duty that arises out of the partner relationship. *See, Homeworks* at 901. In the alternative, the party may have a duty that arises by statute or policy, such as the requirement to maintain medical records or records retention policies of business entities. *Id.* There is **no general duty** that arises when a party knows it is going to sue and is aware of the evidence's importance. *See, Homeworks* at 901, *citing Henderson, supra.*

> Significantly, in *Henderson*, the court did not suggest that potential plaintiffs have a general duty to preserve all evidence . . . Instead, the *Henderson* court looked to other sources for duty such as the duty of a partner to preserve records or the duty of a medical provider to save medical information.

Homeworks, *Id.*

There is no general duty to preserve evidence by a potential litigant. A duty must be established either by statute, regulation, under common law, or by way of notice between the parties. In this matter, given the absence of a litigation hold request, there were no applicable duties that required preservation of the salvage for more than three years post-accident. The court's finding of a duty in this matter was an error of law.

"Thus, *Henderson* **does not hold that a potential litigant owes a general duty to preserve evidence."** *Id. emphasis added.* The ownership of the vehicle is undisputed, the Cooks were not the lawful or legal owners of the vehicle at any time in this matter. They did not maintain or possess the scrap after the collision. Nor were they requested to maintain the vehicle through either discovery or a litigation hold letter. Therefore, under the analysis developed in *Henderson* there was no applicable duty to preserve the vehicle. The court's ruling that a duty existed was made in error.

B. No investigative advantage was obtained by the Cooks.

Additionally, should this court find that there was a duty applicable, the respondents were not placed at an investigatory disadvantage. As stated above, no party had access to the airbag control module. Each of the experts, from respondents, as well as Mr. Gill, calculated the speeds of the vehicles at the time of impact based on the photos, the reported speeds, and the crush depth of the Cook vehicle. This same information was used by both sides to create controverting expert reports. Therefore, any alleged investigatory advantage was illusory.

The Cooks never obtained the alleged "important evidence" of the airbag control module. None of the parties had access to this information, and all expert opinions, those of Stevens County and Tarbert, as well as, the Cooks based their opinions on the photos and crush damage. As all of the experts used the same information to develop their opinions regarding the cause of the collision, there was no investigatory advantage to the Cooks.

Given the foregoing, it is apparent that the application of spoliation doctrine was inappropriate and an abuse of discretion. The court's ruling was abuse of discretion because the Cooks were not the lawful owners or possessors of the vehicle at issue. There was no duty that was created

either by statute or common law, and no litigation hold request by any party. Lastly, the ACM was not accessed by any party therefore there was no investigatory advantage.

2. The Court's trial rulings of Spoliation were an abuse of discretion and prejudicial error because the court allowed the respondents to submit evidence and testimony for a witness not present, and whose opinions were excluded by the court.

After an evidentiary ruling excludes specific evidence or testimony, the evidence is inadmissible for all purposes. ER 103 Rulings on evidence provides

> In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statement or offers of proof or asking questions in the hearing of the jury.

ER 103(c).

Unlike a case where a party has failed to call relevant witness testimony, as addressed in WPI 5.01, in this matter the testimony was excluded. "The Rules of Evidence impose a duty on counsel to keep inadmissible evidence from the jury". *Teter v. Deck*, 174 Wn.2d 207, 223; 274 P. 3d 336 (2012).

Even WPI 5.01, in commentary from the Supreme Court Committee on Jury Instructions, "recommends a trial court not instruct a

jury on a party's 'failure to produce evidence or a witness'." WPI 5.01. The commentary section continues with the following assertion:

> a court or jury may draw such inference only when under all the circumstances of the case the failure to produce such witness or witnesses, unexplained, creates a suspicion that the failure to produce was a willful attempt to withhold competent testimony.

Id.

"The rule is there laid down that evidence explaining the absence of a material witness is admissible ***when the failure to produce him would warrant an unfavorable inference***; and there is no doubt of the soundness of that rule when it is applied to a proper case." *Merrill v. John B. Stevens & Co.*, 61 Wash. 28, 31; 112 P. 353 (1910), *emphasis added.* "[A] court of jury may draw such inference ***only when under all the circumstances*** of the case the failure to produce such witnesses or witnesses, unexplained, creates a suspicion that the failure to produce was ***a willful attempt to withhold competent testimony***." *Wright v. Safeway Stores*, 7 Wn.2d 341, 352; 109 P.2d 542 (1941). "Litigants must prevail upon the strength of their own case and not upon the weakness of their adversaries. To advise the jury, as was done by instruction No. 10, was, in effect, to tell it that appellant had a weak or no defense." *McFarland v. Commercial Boiler Works*, 10 Wn.2d 81, 91; 116 P.2d 288 (1941).

In this instance, the trial judge, authorized the respondents to "open the door" to evidence, that is, the involvement of Mr. Gill and his investigation for plaintiffs, while excluding any testimony concerning his findings or opinions that were previously excluded by the trial court per the spoliation ruling in February, 2013.

The attorneys for Stevens County and Tarbert were authorized to inform the jury: 1). Cooks had retained an expert; 2). the expert took crush damage photographs; 3). an accident reconstruction expert takes these types of photos; 4). the Cooks disposed of the vehicle; and, 5). there was "not one bit of expert testimony from anyone in this trial to suggest that the accident was caused by anything other than Mr. Cook's speed". (RP 1331-32,Aug. 28, 2013).

When a party is allowed to admit evidence through the "open door" fairness dictates that the responding party have the ability to address the contentions raised by the admission of the evidence, either through contrary documentation or testimony.

> Otherwise inadmissible evidence is admissible on cross examination if the witness 'opens the door' during direct examination and the evidence is relevant to some issue at trial. For example, when a witness testifies to his good character on direct examination, the *opposing party is entitled to make further inquiries on the subject* during cross-examination even though that

evidence would otherwise be inadmissible.

State v. Stockton, 91 Wn. App. 35, 40; 955 P.2d 805 (Div. I, 1998) *emphasis added.*

The court opined that there was a potential for jury confusion and asserted that confusion would arise from the fact that both Stevens County and Tarbert Logging would present accident reconstruction expert testimony, and plaintiff would have none. The court felt that the **absence** of an accident reconstruction expert by Cook would prompt a jury question as to why the Cooks did not have their own expert. (RP 759-760, Aug. 22, 2013, A.M. Session). Therefore, the court allowed Stevens County and Tarbert to inform the jury of the absent expert, with no explanation for the absence based on untenable logic of a possible jury question arising.

The standard for review of spoliation and evidentiary rulings of this nature is "abuse of discretion". *Henderson v. Tyrell*, 80 Wn. App. 592, 605, 910 P.2d 522 (1996). When a ruling is "manifestly unreasonable or based on untenable grounds". *Homeworks Construction, Inc. v. Dan Wells et al.*, 133 Wn. App. 892, 896; 138 P.3d 654 (Div. II, 2006). "Such abuse occurs only if no reasonable person would take the view adopted by the trial court." *State v. Woolworth*, 30 Wn. App. 901, 906; 639 P.2d 216

(Div. I, 1981).

The court's argument was since both respondents have experts to testify at trial, and as the plaintiff without an expert, would cause the jury to speculate about the absence of plaintiff's expert, therefore, to avoid confusion, we will tell the jury that you had an expert who examined the vehicle for accident reconstruction purposes, who was not brought to court to testify. Further, the court ruling was that the Cooks had no opportunity to address these matters through rebuttal. The result of this analysis and flawed application of the law, was to create suspicion and create even more jury questions had the information never been presented to the jury.

The court's logical basis for authorizing the admission of testimony concerning the Cooks' excluded expert was based on manifestly unreasonable and untenable grounds. The court's belief that the ***lack*** of an accident reconstructionist by Cooks would create jury confusion and questions to the court, was a logical fallacy. This error was further compounded by the court's authorization to Stevens County to argue about inadmissible and excluded evidence to the jury.

If the inquiry into Dr. Gill's participation was allowable under the rules of evidence. Under ER 403, the evidence should have been excluded

as unduly prejudicial. "Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the likelihood it will mislead the jury". *Degroot v. Berkley Constr. Inc.*, 83 Wn. App. 125, 128; 920 P. 2d 619 (Div. III, 1996).

"[O]therwise admissible evidence should be excluded only when it tends 'to generate heat instead of diffusing light, or, . . . where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it'." *State v. Stirgus*, 21 Wn. App. 627, 638; 586 P.2d 532 (Div. I, 1978). In this matter, the introduction of this information did nothing more than to create an impression of the Cooks trying to 'hide the ball' from the jury.

The trial court abused its discretion by allowing Stevens County to argue to the jury the absence of a witness that was a result of a spoliation motion, by flawed analysis concerning potential jury questions based on questionable logic, and by prohibiting Cooks from rebutting the inferences raised by counsel's argument concerning the excluded expert testimony. The court's determinations were an abuse of discretion, based on untenable grounds, and a mis-application of the law.

F. CONCLUSION

Under Washington's application, spoliation appears to be used as a

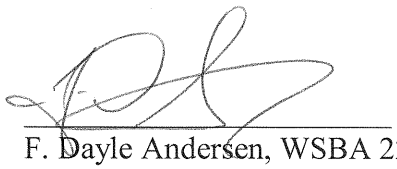
remedial tool to place the parties into a position where the alleged unfair advantage by the spoliating party is removed by excluding the evidence that provided the advantage and placing the parties onto even footing. The rulings were made in error and an abuse of discretion. The Cooks were not the lawful owners or possessors of the vehicle, had no legal duty to preserve and were not requested to preserve by way of a litigation hold letter. There was no bad faith by the Cooks.

All of the experts formulated their opinions from the same evidence of photographs and crush damage. None of the parties accessed or obtained the ACM from the vehicle, and there was no investigative advantage.

The court's exclusion of Mr. Gill was improper and reversible error. The further allowance of argument and testimony concerning Mr. Gill's absence based on the court's flawed logical analysis compounded the prior error by the court. The trial court's rulings resulted in placing the Cooks in a severely disadvantageous position, prejudicing their claim, negatively impacting the jury and was highly prejudicial and improper.

For these reasons, this court must reverse the lower court and remand for a new trial.

Respectfully submitted this 31ST day of March, 2014.



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CERTIFICATE OF SERVICE

I, F. Dayle Andersen, under penalty of perjury under the laws of the state of Washington state that on March 31, 2014, the Appellants Brief was submitted to the following individuals in the manner indicated below:

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