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 REPLY BRIEF

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I. Restatement of the Case

This matter involves a collision between a logging truck, owned and operated by respondents Tarbert Logging and Shane Bean, and a pick up truck owned by Golden Opportunity, a Washington Limited Liability Company, and driven by appellant Raymond Cook. (CP 36, 72, 77).

The collision occurred at a blind corner located on Dead Medicine Road in Stevens County, Washington. The claims made by appellants were made against both respondent Tarbert and Bean, as well as, Stevens County for the alleged negligent preparation of the road surface. (CP 1-9). The appellants alleged Stevens County plowed the roadway was plowed to less than two vehicle widths, forcing the vehicles into a collision. (CP 74).

The collision occurred in February, 2009. Respondent Tarbert was notified of the claim in March, 2009. (CP 80). A tort claim was served on Stevens County on February 9, 2010. (CP 82). The summons and complaint were filed and served following the statutory waiting period, in Spokane County, on December 27, 2010. (CP 1-7).

In March of 2009, an expert, Richard Gill, examined the Cook vehicle from the collision, took photos and recommended that the vehicle salvage be retained. (CP 67). At no time did Mr. Gill access or obtain

any electronic data from the vehicle, including the airbag control module. (RP 7).

For an inexact time period, Golden Resources, stored the vehicle in Chewelah, Washington at the shop of Joshua Cook, the sone of appellant, Raymond Cook. (CP 107). During the time of storage, Joshua Cook discussed the matter with Gina Cook, the manager of Golden Opportunities, and they determined that they needed to sell the vehicle salvage. (CP 111).

During deposition, counsel for respondent Stevens County asked Joshua Cook when the "parting out" of the vehicle began. When Joshua cook offered that he could not really remember the date, counsel prompted him as follows:

> Q. (McFarland) All right. And then so who parted it out and sold it?
> A. (Joshua Cook) I did.
> Q. All right. And, when did that occur.
> A. That was a long process.
> Q. Okay, when did that begin?
> A. Well I suppose I don't really know the date, but **it was after we met at the shop**. **Do you know when that date was**?
> Q. I think it was March of 2009, but that's just - - -
> A. **No. No. No. It was summertime. It would have been - - it would have been like August, maybe even September of 2010** when I did that.

(CP 109), *emphasis added.*

Mr. Joshua Cook goes on to explain that it was approximately one more year after the date identified in his testimony, before he got around to actually parting out the vehicle. (CP 110).

At hearing the trial court adopted the date set forth by respondents, finding that the vehicle was parted out in September of 2010. (CP 121). Interestingly, respondents reply briefs have moved this questionable date of loss back even further at this time, and now assert that the salvage was disposed of in September of 2009, or through the winter of 2009-2010. (Tarbert Reply p. 2, Stevens County reply p. 22).

Following the hearing on spoliation, in February, 2013, the trial court found that having Gill inspect the vehicle before its destruction, "have [sic] given Plaintiffs a litigation advantage". (CP 123). And, as a result, the trial court struck all "speed related opinions" in his report and provided through deposition. (CP 124). The court reserved only on the matter of whether the jury should receive a jury instruction on spoliation. (CP 124; RP 35).

In response, appellants elected not to call Dr. Gill for testimony and he was struck as a witness prior to trial. (CP 149-150). In order to

prevent any back-door testimony concerning Dr. Gill's participation, appellants motioned the court for an order *in limine* seeking to exclude testimony about Dr. Gill's involvement. (CP 137).

At the time of trial, during the time set aside for argument on the spoliation instruction, the court expressed concern that the jury would speculate as to "how come the plaintiff doesn't have an expert". (RP 759-760). Counsel for plaintiff suggested that the court limit testimony to the loss of the truck, but, stated that the "mention of Dr. Gill would be highly prejudicial". (RP 764).

> All right. Counsel, I will refrain from giving that 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).

> Upon ruling, respondent Stevens County asked for clarification,
> McFarland: May we establish that an expert hired by the plaintiff examined the vehicle before the vehicle was - -".
>
> Court: Yes.
> McFarland: - - parted off?

(RP 773).

When asked by plaintiffs whether they could indicate to the jury that Dr. Gill's opinions were not negative. The following colloquy took place:

> Q. (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 --
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> * * *
>
> 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 773-74).

Ultimately, the respondents argued to the jury that appellants disposed of the truck salvage before suit was filed, and after it was examined by *plaintiffs'* expert. The jury returned a defense verdict.

II. ARGUMENT

1. The Court's Pre-Trial Spoliation Ruling was an Abuse of Discretion.

a. There was no applicable general duty to preserve.

For over thirty (30) years, following *Henderson v. Tyrell,* 80 Wn.

App. 592, 910 P.2d 522 (1996), the Washington courts have consistently held that there is no general duty to preserve evidence on litigants. The courts have unanimously stated that a duty arises based on statute, regulation, or through operation of law, such as a fiduciary responsibility of a partnership. *See, Homeworks Construction, Inc. v. Dan Wells, et al., 133 Wn. App. 892, 901; 138 P.3d 654 (Div. II, 2006), citing, Henderson v. Tyrell, Id.* An additional basis, a request to preserve, such as a litigation hold letter, has been considered to also create a duty to preserve. *See, Ripley v. Lanzer*, 152 Wn. App. 296, 326, 215 P. 3d 1020 (Div. I, 2009).

Every Washington case cited by respondents re-iterates this rule of law on spoliation. It is abundantly clear, that there is no general duty to preserve. In the absence of statutory, regulatory, or fiduciary obligations, the courts have ruled against spoliation claims asserting this general duty, as claimed by respondents.

The court's determination that a duty had arisen, is not based on prior case law and, in fact, contradicts the holdings in the *Henderson* and its progeny.

In this instance, there was no regulatory or statutory duty which applied to the appellants. There was no fiduciary (partnership) obligation,

and there was never a litigation hold request made by any party. In fact, respondents goes so far as to indicate that failure to send a request to dispose of evidence to opposing parties is an obligation by all parties. (RP 14, 28).

b. There was No Litigation Advantage to the Appellants.

Although respondent Stevens County asserts appellants failed to raise the issue of "litigation advantage" at the trial court. Respondent Stevens County's argument is without merit. Appellants, at the spoliation hearing asserted that there are:

> additional considerations that should be analyzed by the court prior to any order on spoliation. The additional considerations are: 1). are there **other sources of information** such as photographs, reports, witnesses, statements, etc. ; 2). Is there evidence of willful or intentional destruction; and, 3). **What is the impact** to the moving party's case?
>
> * * *
>
> In addition to the foregoing, defendant Stevens County has retained John Hunter, an accident reconstructionist. Mr. Hunter has already testified in deposition that he has calculated the speed of both vehicles on a more probable than not basis. Given Mr. Hunter's opinion, **it is difficult to fathom the purported harm which forms the basis for the defendant's motion**. If Mr. Hunter can calculate each vehicle's speed at the time of collision on a more probable than not basis, the loss of the ACM creates no significant issue. Unlike the *Unigard* [(*v. Lake-wood Engineering*, 982 F. 2d 363, 369 (9th Ct., 1992)] case, **there are alternate sources of information** available to the parties, further, neither party has obtained or reviewed the ACM module data at issue.

CP 60, *emphasis added.*

Respondent Stevens County's appears to argue that appellants failed to raise the "talismanic phrase" or "magic words" of investigatory advantage. *See, State v. Piatnitsky*, 170 Wn. App. 195, 215, 282 P.3d 1184 (Div. I, 2012). Viewed in the context of the trial court record, as well as, appellants' brief opposing the spoliation ruling it is clear that the lack of "investigatory advantage", alternatively stated as the "importance of the evidence" (*Henderson* at 607), of the appellant was asserted in the trial court. Respondent Stevens County seeks to elevate form over substance with this argument, and it is incorrect.

"Whether the missing evidence is important or relevant obviously depends on the particular circumstances of the case . . . Another important consideration is whether the loss or destruction of the evidence has resulted in an investigative advantage for one party over another, or whether the adverse party was afforded an adequate opportunity to examine the evidence". *Henderson* at 607, *citations omitted.*

Viewed in the light of these factors where all parties possessed identical information, *i.e.* measurements and photographs, to determine the vehicle impact speeds, it is clear that there was not resulting advantage to

the appellants arising from the loss of the vehicle.

c. There is No Evidence Appellants Owned, Possessed or Controlled the Evidence.

Respondent Stevens County takes issue with appellants' argument concerning the possession and ownership of the vehicle. The record clearly establishes that the vehicle was owned by Golden Opportunities, a Washington Limited Liability Company. (CP 72, 76, 78) (RP 108, 1067-68). Appellants were not the owners, Appellant Raymond Cook was an employee. (CP 76).

Homeworks establishes that the evidence must be connected to the spoliating party. The state of Washington views LLC's as entities created by statute which have an existence, responsibilities, and obligations similar to corporations. *See*, *Landstar Inway, Inc. v. Frank Samrow*, 325 P.3d 327; 2014 Wash. App. LEXIS 1101 (Div. II, 2014). Respondents argue that this court should not recognize this status, contravening Washington Corporation and Business entity laws.

There was no evidence put on by either respondent that refuted the lack of ownership of the vehicle. Further, respondents put on no evidence to establish either possession, subsequent to the collision, or even control over the vehicle. Under the *Homeworks* analysis, the appellants are not

the party responsible for the loss of the vehicle as they lacked ownership, possession or control of the vehicle at the time of its disposal.

2. The Trial Court Erred by Authorizing Inquiry by Respondents into the Absent Expert Witness

Although the trial court, in the prior spoliation ruling reserved only on the issue of whether to provide a spoliation instruction to the jury, at trial, the court reversed itself, and determined that the purported spoliation by appellants justified informing the jury that appellants had 1). Hired an expert, 2). Who examined the vehicle, and, 3). took photographs. Further, over strenuous objection, the court authorized respondents to delve into the "type of expert" that was involved and inform the jury that appellants expert took crush depth to "determine speed on impact". (RP 1332).

At the time of the court's initial spoliation hearing, when the court struck Richard Gill's opinions, in response to the court ruling, Respondent Stevens County stated that the removal of the opinions of Dr. Gill "leveled the playing field" (CP 25). However, by the time of trial, respondents sought additional sanctions including a spoliation instruction, as well as, the right to inquire as to the involvement of appellants' expert. Appellants' request to rebut the likely negative inference raised by the absence of Mr. Gill, was rejected by the court. (RP 773-74).

There was no valid purpose of an additional sanction from the court, which authorized inquiry into appellants withdrawn expert. The court's ruling provided the respondents the opportunity to inject irrelevant and prejudicial evidence into this case, and as a direct result, appellants were impugned in the eyes of the jurors.

After extensive research, appellants were unable to locate any cases where the court has struck witness testimony, the witness has been withdrawn, and the jury has subsequently been informed of such withdrawn expert. Similarly, in an analogous matter, where one party has used an expert previously consulted by the other, the Federal courts have held:

> the coupling of his opinion testimony with the testimony that he had been hired by the Appellant, but was not utilized by the Appellant, gave the jury the ... inference ... that something was being hidden from them by Appellant's counsel.

Peterson v. Willie, 81 F.3d 1033 (11th Cir. Fla. 1996).

> Jurors unfamiliar with the role of counsel in adversary proceedings might well assume that plaintiff's counsel had suppressed evidence which he had an obligation to offer. **Such a reaction could destroy counsel's credibility in the eyes of the jury.**

Peterson at 1037, *emphasis added.*

III. CONCLUSION

The trial court's pre-trial spoliation rulings were in error based on a number of reasons, the court's reasoning that jurors would be confused by the absence of appellants' expert is non-sensical and not based on law or fact. The alleged date of loss is questionable and not supported by the weight of the evidence. There is no general duty to hold evidence recognized in Washington. There was no evidence to establish possession, ownership or control of the vehicle by appellants in the relevant time frame. All parties utilized the same evidence for expert review of the collision, and no party had the ACM data at any time in this claim, therefore, there was no litigation advantage for the appellants.

The trial court's trial ruling on spoliation was an abuse of discretion. Considering the foregoing, and the fact that the court solely reserved on whether to allow a spoliation instruction, it was error for the court to add additional sanctions at the time of trial. The court's prior order did not provide for any additional sanctions aside from the potential instruction. The decision to allow inquiry into appellants withdrawn expert was error. The court authorized the admission of inadmissible evidence and refused the appellants the opportunity to rebut this inference.

The result of these rulings was to deny the appellants the right to a

discretion. Considering the foregoing, and the fact that the court solely reserved on whether to allow a spoliation instruction, it was error for the court to add additional sanctions at the time of trial. The court's prior order did not provide for any additional sanctions aside from the potential instruction. The decision to allow inquiry into appellants withdrawn expert was error. The court authorized the admission of inadmissible evidence and refused the appellants the opportunity to rebut this inference.

The result of these rulings was to deny the appellants the right to a fair trial. For these reasons, this court must reverse the lower court and remand for a new trial.

Respectfully submitted this 11th day of August, 2014.

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For Appellants