

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

TAYLOR TIGHE)
)
 Plaintiff,) **C.A. No. N17C-10-122 AML**
)
 v.) **JURY TRIAL DEMANDED**
)
 HECTOR CASTILLO, and)
 BALDOR EXPRESS)
 TRANSPORTATION CO., LLC,)
)
 Defendants.)

Submitted: October 20, 2020

Decided: January 14, 2021

Upon Plaintiff's Motion for Sanctions - GRANTED

ORDER

On December 16, 2016, Henry Castillo was driving a tractor-trailer on behalf of Baldor Express Transportation Co., LLC when he struck Plaintiff's vehicle, which had become disabled as a result of an earlier collision. Plaintiff filed this personal injury action against Castillo and Baldor on October 20, 2017. Plaintiff alleges Castillo was not paying attention, and the collision was avoidable. Castillo argues the collision was unavoidable. One of the key issues at trial will be the speed at which Castillo was travelling and whether and when he attempted to brake before colliding with Plaintiff's vehicle.

Shortly after the accident and several months before filing the complaint, Plaintiff sent Baldor a request to preserve evidence, including the tractor-trailer's engine control module (ECM), which is the vehicle's "black box." Plaintiff alleges that, had it been preserved, the ECM data could have indicated the exact moment Castillo touched the brakes and the speed he was going when the tractor-trailer collided with Plaintiff's vehicle. Baldor concedes it received the preservation letter, but it took no steps to preserve the ECM or its data, even though the truck and the ECM were in Baldor's possession at the time it received the letter and for several years thereafter. When Plaintiff later sought discovery relating to the ECM, Defendants took the position the ECM data "no longer existed." Plaintiff filed this Motion for Sanctions ("Motion"), arguing Baldor's reckless destruction of evidence warrants monetary sanctions and an instruction at trial that the jury should infer that the ECM data, had it been produced, would have been unfavorable to Defendants. As explained below, Baldor's failure to preserve the ECM data despite its obvious relevance, an express preservation request, and the reasonable anticipation of litigation, was at the very least reckless, and the sanctions Plaintiff seeks therefore are warranted.

FACTUAL & PROCEDURAL BACKGROUND

1. On December 1, 2016 at approximately 6:18 am, Plaintiff was traveling southbound in the left center lane on Interstate 95 ("I-95") near Newport, Delaware.

As a result of a collision with a tractor-trailer (Collision 1),¹ another vehicle swerved in front of Plaintiff's vehicle. Plaintiff attempted to merge into the far-left lane to avoid a collision, but failed, and her vehicle collided with the back-left side of the other vehicle (Collision 2). Collision 2 caused Plaintiff's car to spin out, and it came to rest in the center lane of I-95, facing toward oncoming traffic. Her vehicle was disabled, so Plaintiff turned on the car's hazard lights

2. Plaintiff's vehicle was disabled in the center lane for approximately two minutes when Castillo approached in a tractor-trailer he was operating on behalf of Baldor. Penske Truck Leasing Corporation owned the tractor-trailer and leased it to Baldor. Castillo contends he attempted to brake but was unable to avoid hitting Plaintiff's vehicle (Collision 3). The force of Collision 3 pushed Plaintiff's vehicle into an embankment.

3. On March 24, 2017, Plaintiff sent Baldor a preservation letter, requesting that Baldor preserve the "ECM [and] any and all data collected at the time of the accident."² The ECM is a tractor-trailer's "black box"; according to Plaintiff, the ECM could pinpoint the exact moment Castillo touched his brakes and what speed he was going at that moment.³ Jessica Merced, Baldor's Transportation Office Manager, received the preservation letter. Ms. Merced testified at her deposition

¹ This was not Castillo's tractor-trailer.

² Pl.'s Supp. Mot., Ex. G.

³ Pl.'s Mot. at 2.

that she received approximately fifty of these letters a year.⁴ According to Ms. Merced, her only responsibility upon receiving preservation letters was to forward the letter to Baldor's insurance company and upload it into Baldor's files.⁵ Ms. Merced did this and nothing more. Baldor took no steps to preserve the ECM, even though the tractor-trailer (and therefore the ECM) was in Baldor's possession.

4. On October 10, 2017, Plaintiff filed a complaint in this Court, alleging five counts of negligence against Defendants.⁶ The parties initially delayed discovery while they attempted mediation. Mediation proved unsuccessful, and on May 1, 2018, Plaintiff served discovery requests for any information and/or reports downloaded from the tractor-trailer's ECM. Defendants responded, stating there were no ECM downloads or reports known to them. On May 24, 2019, after deposing Baldor's Director of Transportation, Steven Tufo, Plaintiff requested "the Engine Control Module (ECM) information for [Baldor's] tractor trailer."⁷ Sometime later, Baldor contacted Penske, who informed Baldor that the ECM data from the day of the accident no longer existed. Defendants notified Plaintiff about this in a letter on September 6, 2019.⁸

⁴ Pl.'s Supp. Mot., Ex. H. at 20.

⁵ *Id.* at 18-19.

⁶ Plaintiff's complaint originally asserted claims against the drivers involved in Collisions 1 and 2, as well as the companies that owned and operated the tractor-trailers involved in Collision 1 and 3. All these parties ultimately were dismissed with prejudice. Castillo and Baldor are the only defendants remaining in this action.

⁷ Defs.' Resp., Ex. E.

⁸ Pl.'s Mot., Ex. C.

5. On October 22, 2019, Plaintiff filed this Motion for Sanctions against Defendants, seeking attorneys' fees and an adverse inference instruction advising the jury to assume that, had it been preserved, the ECM data would have been unfavorable to Defendants. Defendants responded on November 27, 2019. On December 15, 2019, the Court held oral argument and directed the parties to conduct additional discovery regarding the ECM data and the failure to preserve it. Despite this opportunity (and with the tractor-trailer still in its possession), Baldor apparently took no steps either to investigate what happened to the ECM or to supplement the record accordingly. Plaintiff submitted supplemental briefing on May 7, 2020. The Court held further argument on June 18, 2020 and asked the parties to attempt to determine: (1) when the truck was returned to Baldor; (2) when the ECM became unavailable; and (3) how it was destroyed. Again, although Plaintiff took a 30(b)(6) deposition of a Penske employee and attempted to obtain the information requested by the Court, Baldor still did not undertake its own efforts to investigate what happened to the ECM data or supplement the record.

6. Plaintiff's discovery revealed Baldor had possession of the tractor-trailer from January 19, 2017 until February 2020. Although Plaintiff deposed a Penske representative regarding how and when the ECM was destroyed or became unavailable, those questions remain unanswered. After Plaintiff exhausted her discovery efforts, the parties filed supplemental submissions with the Court.

PARTIES' CONTENTIONS

7. Plaintiff alleges Defendants had reason to anticipate litigation even before the complaint was filed and therefore had a duty to preserve the ECM data. Plaintiff contends Baldor's failure to do so was "extremely reckless."⁹ According to Plaintiff, this failure prejudices her because the ECM data was the most reliable way to determine the tractor-trailer's speed and if and when Castillo applied the brakes before colliding with Plaintiff's vehicle. Plaintiff implies Baldor might have intentionally failed to preserve the ECM data in an attempt to conceal Castillo's reckless driving.

8. Defendants' arguments in opposition to the motion have shifted over time. In their initial opposition to the motion, before the March 2017 preservation letter surfaced, Defendants asserted that they properly responded to the 2018 discovery requests because Plaintiff did not request the ECM data, only any ECM downloads, none of which existed.¹⁰ Defendants blamed the unavailability of the ECM data on Plaintiff's purported failure to correctly ask for it in a more timely manner.

9. In their later arguments after the March 2017 preservation letter came to light, Defendants sought to shift the blame for the ECM's destruction onto others

⁹ Pl.'s Mot. at 4.

¹⁰ Defs.' Resp. at 2.

while simultaneously pleading ignorance or a lack of sophistication. Defendants now maintain that Penske had control of the data and Baldor was unable to download the data on its own.¹¹ According to Defendants, Plaintiff had notice of this fact yet never deposed any Penske employees about the location or existence of the ECM data.¹² Defendants also attempt to downplay Baldor's culpability by emphasizing that no one at Baldor or Penske knew how to download the ECM data.¹³ Defendants allege that, as a person with no legal training, Ms. Merced's sole responsibility was to retrieve materials listed in the preservation letter only if the insurance company requested it.¹⁴ Accordingly, Defendants argue that any failure to preserve the ECM was an innocent mistake.¹⁵ Defendants also now take the incredible position that Plaintiff has not shown clearly that the ECM data does not exist. Defendants posit that Plaintiff could not rely on Baldor's express representation that the data no longer exists because that representation was "transparently based on an unsworn statement from Mr. Tufo who had in turn spoken informally with [Penske]."¹⁶

¹¹ *Id.* at 2-3.

¹² *Id.* at 4.

¹³ *Id.* at 3-4.

¹⁴ Defs.' 9/17/20 Letter, at 1-2.

¹⁵ *Id.* at 3.

¹⁶ *Id.* at 3-4; *see also id.*, Ex. F.

DISCUSSION

10. Delaware courts have the power to issue sanctions for discovery abuses under their inherent power to manage their own affairs.¹⁷ The Court has wide latitude to fashion an appropriate remedy, but the remedy must be tailored to the degree of culpability of the spoliator and the prejudice suffered by the complaining party.¹⁸ In determining what sanctions are appropriate, the Court considers the following factors: (i) the spoliator's culpability or mental state; (ii) the degree of prejudice suffered by the complaining party; and (iii) the availability of lesser sanctions that would avoid any unfairness to the innocent party while, at the same time, serving as a sufficient penalty to deter similar conduct in the future.¹⁹

A. Baldor had a duty to preserve the ECM data.

11. A party in litigation or who has reason to anticipate litigation has an affirmative duty to preserve evidence that might be relevant to the issues in the lawsuit.²⁰ A party has reason to anticipate litigation if “the facts and circumstances . . . lead to a conclusion that litigation is imminent or should otherwise be

¹⁷ *Beard Research, Inc. v. Kates*, 981 A.2d 1175, 1189 (Del. Ch. 2009) (citing *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 106–07 (2d Cir. 2002)); *Drejka v. Hitchins Tire Serv., Inc.*, 2009 WL 1813761, at *3 (Del. Super. June 24, 2009) (“This Court is vested with the inherent power to manage its own affairs and to achieve the orderly and expeditious disposition of its business.”).

¹⁸ *Riverside Fund V, L.P. v. Shyamsundar*, 2017 WL 624856, at *1 (Del. Super. Feb. 14, 2017).

¹⁹ *Id.* at *1 (citing *Beard Research*, 981 A.2d at 1189).

²⁰ *Beard Research*, 981 A.2d at 1185.

expected.”²¹ The Court may sanction a party who destroys relevant evidence or fails to prevent its destruction.²² In this case, the ECM data was central to the case, and its relevance should have been immediately apparent to Baldor. Steven Tufo, Baldor’s Director of Transportation, admitted at his deposition that an ECM download could record a hard braking situation and the truck’s speed at the time of the hard brake.²³ Moreover, Plaintiff sent Defendants a preservation letter four months after the accident expressly requesting preservation of the ECM data. Accordingly, Baldor had an indisputable duty to preserve the ECM data.

12. Baldor nonetheless failed to take any steps to preserve that evidence. Although Baldor has not shown how and when the ECM data was lost, overwritten, or otherwise destroyed, it is plain that Baldor had possession, custody, and control of the tractor-trailer at all relevant times, the ECM was relevant to the case, and Baldor failed to produce it in response to Plaintiff’s discover requests. Indeed, Baldor’s counsel expressly told Plaintiff the ECM data is not available and has never withdrawn that representation.²⁴ Baldor’s argument that Plaintiff must somehow affirmatively demonstrate the destruction of evidence that Baldor has not provided and has represented “no longer exist[s]” is, in a word, absurd. Baldor’s argument

²¹ *Id.* (quoting *The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age* (“*Sedona Guidelines*”) 40 n. 1 (2004)).

²² *Id.*

²³ Pl.’s Mot., Ex. D.

²⁴ Pl.’s Mot., Ex. C.

completely reverses the parties' obligations. Having expressly requested preservation of the evidence, sought its production in discovery, and received Baldor's counsel's representation that the evidence no longer existed, Plaintiff had no obligation to "fact check" the statements of a Delaware attorney.

B. Baldor's failure to preserve the ECM data was reckless.

13. "A court may sanction a party who destroys relevant evidence or fails to prevent the destruction such evidence."²⁵ An adverse inference instruction is appropriate where a litigant "intentionally or recklessly destroys evidence, when [the litigant] knows that the item in question is relevant to a legal dispute or it was otherwise under a legal duty to preserve the evidence."²⁶ Before giving such an instruction, a trial judge must make a preliminary finding that the record shows such intentional or reckless conduct.²⁷ Recklessness can be defined as a conscious disregard for the rights of others.²⁸

14. Defendants contend that, even if Baldor's actions constituted a failure to preserve evidence, the failure was a mistake and did not rise to the level of recklessness. But, several facts in the record show that Baldor was, at the very least, reckless in not preserving the ECM data. A preservation letter was sent to Baldor

²⁵ *Shawe v. Elting*, 157 A.3d 142, 150 (Del. 2017) (quoting *Beard Research*, 981 A.2d at 1185).

²⁶ *Sears, Roebuck and Co. v. Midcap*, 893 A.2d 542, 552 (Del. 2006).

²⁷ *Id.*

²⁸ *Beard Research*, 981 A.2d at 1191 (quoting *Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 530 (Del. 1987)).

approximately four months after the accident requesting Baldor preserve the “ECM [and] any and all data collected at the time of the accident.”²⁹ Jessica Merced, Baldor’s Transportation Department’s office manager, received the letter that day. Preservation letters were familiar to Merced; by her own estimation she received such letters about fifty times a year.³⁰ Despite her familiarity with preservation letters, neither Ms. Merced nor anyone else at Baldor took any steps to preserve any of the evidence requested.³¹ Thomas Glam, Baldor’s Senior Transportation Manager and Ms. Merced’s supervisor, testified that failure to upload requested documents into the system would go against the department’s standard operating procedures.³² Yet, by Defendants’ own admission, “no one took the lead” on the ECM preservation.³³

15. Defendants argue Plaintiff should have taken steps to contact Penske and have Penske obtain the ECM data. But it was not Plaintiff’s obligation to ensure Baldor satisfied its duty to preserve evidence over which Baldor had possession. If Baldor could not itself obtain the ECM data or did not know how to do so, it should have become familiar with the steps necessary to preserve or hired someone who was qualified to do so. Baldor knew or should have known there was no other way

²⁹ Pl.’s Supp. Mot., Ex. G.

³⁰ *Id.*, Ex. H.

³¹ *Id.*

³² *Id.*, Ex. I.

³³ Defs.’ Supp. Letter.

for Plaintiff to obtain the ECM data, yet Baldor did nothing to preserve it. A defendant cannot avoid its straightforward obligation to preserve information by claiming ignorance or a lack of training. This is particularly so in the case of a sophisticated transportation company who frequently receives preservation demands and has ready access to counsel.

16. An adverse inference instruction is a substantial sanction, and it is not one this Court enters lightly. But Baldor has left the Court with no other option. Despite multiple opportunities, Baldor has not provided the Court with any explanation of what happened to the ECM data or when it became unavailable. Instead, Baldor effectively asks this Court to assume, without evidence, that the failure to preserve was negligent. But, when a corporation that frequently receives preservation letters takes absolutely no steps to preserve critical evidence in response to a timely preservation letter and offers no explanation for its failure, this Court has no choice but to conclude that the corporation's actions were reckless. Had Baldor undertaken good faith efforts to preserve the ECM, and those efforts ultimately proved unsuccessful, it might plausibly contend its failure was inadvertent or negligent, rather than reckless. But given an unambiguous, timely preservation letter and the immediately apparent relevance of the ECM to the likely litigation, the utter failure to take any steps to preserve the evidence cannot be described as anything short of a conscious disregard for Plaintiff's rights. Accordingly, an adverse

inference instruction is appropriate and necessary to avoid unduly prejudicing Plaintiff, who has no other way to obtain this evidence. There is no lesser sanction that will eliminate the prejudice to Plaintiff caused by the unavailability of this information. The parties shall work together to craft an appropriate jury instruction reflecting this inference.

C. Plaintiff is entitled to attorneys' fees.

17. To impose monetary sanctions, the Court need only find that a party had a duty to preserve evidence and breached that duty; negligence alone is sufficient to support the imposition of monetary sanctions.³⁴ As established above, Baldor had a duty to preserve the ECM data but recklessly failed to do so. Baldor breached its duty to preserve, and monetary sanctions are warranted and necessary to reduce the prejudice to Plaintiff. Baldor shall pay all reasonable attorneys' fees and expenses Plaintiff incurred in connection with its Motion for Sanctions, including attorneys' fees associated with the additional discovery Plaintiff took relating to the issue after the Motion was filed. Plaintiff's counsel may file a fee affidavit within 30 days. If Baldor objects to any of the requested fees, the parties shall meet and confer within 15 days. Baldor may raise any unresolved objections within 30 days of the affidavit's filing.

³⁴ *Beard Research*, 981 A.2d at 1194.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Sanctions is **GRANTED**.

IT IS SO ORDERED.



Abigail M. LeGrow, Judge

Original to Prothonotary

cc: Joseph J. Farnan III, Esquire
Brian E. Farnan, Esquire
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