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| DISTRICT COURT, ADAMS COUNTY, COLORADO  1100 Judicial Center Drive, Brighton, CO 80601 | DATE FILED: February 6, 2017 4 FILING ID: A2840CCB49164 CASE NUMBER: 2015CV31808 |
| **PLAINTIFF: AMERICAN FAMILY MUTUAL INSURANCE COMPANY, AS SUBROGEE OF KATHRYN WINDT** |
| **V.** |  |
| **DEFENDANTS: JVONNE BECERRIL & AURELIO MEZA-CUEVAS** | * COURT USE ONLY  |
| **&** |  |
| **DEFENDANTS:/THIRD PARTY PLAINTIFFS: IVONNE BECERRIL & AURELIO MEZA-CUEVAS** |  |
| **V.** |  |
| **THIRD PARTY DEFENDANT/COUNTERCLAIMANT: KATHRYN WINDT** |  |
| Name: **THE LAW FIRM OF STEPHEN H. COOK, P.C.**  Address: 2590 Trailridge Drive East, Suite 202 Lafayette, Colorado 80026  Telephone: 303-543-1000  Facsimile: 303-543-8582  Atty. Reg#: Stephen H. Cook: 6692 | Case No. 2015CV31808  Ctrm: |
| **KATHRYN WINDT’S RESPONSE TO DEFENDANTS’ MOTION FOR SANCTIONS FOR WINDT’S SPOLIATION OF EVIDENCE** | |

Kathryn Windt responds to Defendants’ motion for sanctions as follows:

RELEVANT FACTS

1. The collision giving rise to this action occurred on October 3, 2014. The collision involved vehicles driven, respectively, by Mrs. Windt and Mrs. Becerril. The collision occurred at the intersection of 104th Avenue and Fox Run in Thornton Colorado. *Motion,*

*Relevant Facts, #1.* Mrs. Windt was traveling north on Fox Run. Ms. Becerril was traveling east on 104th. They entered the intersection at right angles[1](#_bookmark0).

1. Both Mrs. Windt and Mrs. Becerril have testified that they each faced a green light.

*Id.* #3-4.

1. Mrs. Windt is a school bus driver for the past 12 years. *Exhibit 1,* Windt Dep. 9:6-10.

She was driving through an intersection near her house. *Id.* at 23:11-17. On the other hand, Ms. Becerril has admitted she was on her cell phone, getting driving directions as she entered the intersection. *Exhibit 2,* Becerril Dep. 35:10-18 (talking on phone receiving directions); *Exhibit 3,* Traffic Accident Report (driving east).

1. The disputed issue as to liability for the collision is who had the green light.
2. After the collision, Mrs. Windt never again had possession of her car. *Exhibit 4,* Windt Affidavit, ¶5. She gathered her personal belongings from the car in the weeks after the collision. *Id.* She never saw her car again. *Id.* Her car was controlled by American Family Insurance, who provided Mrs. Windt’s collision coverage. It evaluated the car as a total loss not worth repairing. *Id*, ¶3. It salvaged the vehicle.
3. A complaint in subrogation was filed by American Family, Mrs. Windt’s insurance carrier, against Defendants on November 6, 2015. This was for property damage to the Windt vehicle which had been paid for by American Family. *Complaint,* filing ID 77CA3ADD2D625. Mrs. Windt was not a party to that action. *Id.*
4. On December 23, 2015 Defendants filed a third-party claim against Mrs. Windt for personal injuries and property damage. *Answer, Jury Demand, and Third-Party Complaint,* filing ID 1C35E9B161609.

1 Defendants’ Motion at p 2 inaccurately states that the parties entered the intersection “from the opposite direction.”

1. On January 18, 2016 Mrs. Windt filed a counterclaim for personal injuries against Defendants. *Counterclaims Against Third Party Plaintiffs,* filing ID C2548E97B1C04.
2. Defendants never communicated any desire to review information from any “event data recorder” until November 28, 2016, more than two-years after the collision and over a year after litigation commenced. *Exhibit 5,* email string discussing “black box”.
3. Defendants never asked to inspect Mrs. Windt’s vehicle at any time after the collision occurred. Defendants did not send or serve a letter or other communication at any time to American Family, or Mrs. Windt, asking for preservation of as event data recorder. Defendants themselves made no effort to inspect or obtain such an instrument.
4. Mrs. Windt has no understanding of what an “event data recorder” is. Affidavit at

¶6. She does not know how to “download” information from it. *Id.* She was unaware that her car even had one, if it did. *Id.*

1. Mrs. Windt has never heard from anyone about preserving information that might come from an “event data recorder”. *Id.* at ¶7.

ARGUMENT

Mrs. Windt first notes that defendant’s motion is characterized as a request for sanctions “for Windt’s spoliation of evidence.” Of course, Mrs. Windt did not destroy the car after it was salvaged. If anyone did, that was American Family. Generally, sanctions for pre-complaint destruction of evidence are only available in limited circumstance, one of which is where spoliator is the party against whom the sanction is sought. *Castillo v. Chief Alternative, LLC,* 140 P.3d 234, 237 (Colo. App 2006). Since Mrs. Windt was not the person in possession of the vehicle at the time it was allegedly destroyed, sanctions are not available against her.

*Defendants have failed to make a showing that any information that was allegedly available from the “event data recorder” was relevant to a disputed issue:* Without stating its proposed contents, Defendants seek an adverse inference instruction because of a claim that Mrs. Windt was “grossly negligent” in failing to “download” information from an “event data recorder” that Defendants’ counsel believes was installed in her car. *Motion*, p. 6.

Defendants fail to meet their burden to receive such an instruction.

Defendants note that an adverse instruction is only warranted when the lost evidence is relevant to a contested issue at trial. *Motion,* p. 5, citing *Aloi v. Union Pacific,* 129 P.3d 999, 1002 (Colo. 2006). Here, assuming *arguendo,* that data existed[2](#_bookmark1), it is not relevant to a contested issue at trial. Defendants argue that the event data recorder would have shown Mrs. Windt’s speed, acceleration, and braking. *Motion, Relevant Facts, 7.*

However, Defendants recite no basis in support of their contention. First, no affidavit from a qualified expert, or anyone else, is offered to establish what information the data recorder might show. Second, no evidence or affidavit is presented to establish how the data allegedly available from an event data recorder would assist the jury in determining the color of the traffic lights. Defendants’ argue that such data might have revealed “information which would have been useful to any accident reconstruction expert analyzing the case.” *Motion*, p. 5. However, that is merely argument of counsel. Defendants have submitted no affidavit from a qualified expert that substantiates its argument. There is no showing by Defendants that the alleged data makes it more or less probable that Mrs. Windt, or Mrs. Becerril, had a green light. Even if there was information from the event data recorder, Defendants have not established that such information is relevant to a

2 Mrs. Windt does not know if her car had an event data recorder, or if it did, what information it contained.

contested issue at trial. Defendants can establish no prejudice caused by the absence of speculative data. Without establishing prejudice, there is no remedial purpose underlying an adverse inference instruction. Defendants’ motion fails for this reason.

*Gross Negligence:* Defendants are correct that an adverse inference instruction is only warranted when the loss of evidence was the result of recklessness or gross negligence or a “surprising lack of care”. *Motion,* p. 6, citing *Pfantz v. Kmart,* 85 P.3d 564, 568-69 (Colo. App. 2003). Citing *Castillo,* Defendants’ argue that Courts “typically impose sanctions for the pre-complaint destruction of evidence where the spoliator is the Plaintiff.” *Motion, p. 3.* It is first noted that *Castillo* affirmed a Court’s *refusal* to give an adverse instruction for alleged spoliation. And while defendants overstate the holding in *Castillo,* their argument fails for this simple reason: Mrs. Windt did not own or have control over the vehicle after American Family took possession, which occurred *before* the vehicle was salvaged. Assuming data was spoliated, that occurred as a result of the conduct of American Family. And Defendants and American Family have settled their dispute over the property damage to the vehicles, and American Family has been dismissed from the case with the Defendants’ agreement.

Although relying on *Castillo,* Defendants fail to note that the ruling states Courts “typically impose sanctions for pre-complaint destruction *only in three circumstances.” Castillo,* 140 P.3d at 236 *(emphasis added).* Those circumstances are: (1) the Defendant knew litigation would be filed and willfully destroyed evidence it knew would be relevant to the case; (2) the party against whom an adverse interest is sought “engage in a series of lawsuits and destroys evidence after litigating a first lawsuit but before another lawsuit has

been filed”; and (3) the spoliator is the plaintiff. *Castillo,* 140 P.3d at 236-37. Obviously, none of those circumstances apply to Mrs. Windt.

Here, Mrs. Windt does not know if her car had an event data recorder, or even what an event data recorder is. Defendants never requested that any evidence, much less an event data recorder, be preserved. The first time Defendants ever mentioned the event data recorder was over a year after litigation commenced and two-years after the collision. Mrs. Windt never had possession of her car after the collision. And, it was not Mrs. Windt who salvaged her vehicle, it was her insurance company. *Motion, Relevant Facts #8.* Mrs. Windt’s alleged inaction with respect to an unknown component somewhere in the engine of her car is not negligent, much less grossly negligent or reckless. She had no role in the destruction of any event data recorder, assuming one existed, and is not the spoliator.

Sanctions are not warranted. *Castillo,* 140 P.3d at 236. Defendants’ motion fails for this reason also.

*Defendants’ Conduct:* The conduct of Defendants is an “important factor for assessing whether sanctions are appropriate.” *Id.* at 237. Did the party seeking sanctions ever seek to inspect the evidence or request that it be retained? *Id.* Here, no such requests were made. It was not until years after the collision that the event data recorder was referenced. Further, for Defendants to argue that Mrs. Windt was somehow grossly negligent, then they must explain why they have not disclosed any such information from Defendants’ vehicle. Because Defendants took no steps to request inspection of Mrs.

Windt’s vehicle, nor did they request that any specific evidence be preserved or retained, their motion fails.

CONCLUSION

Defendants fail to carry their burden to receive an adverse inference instruction. Defendants do not state what the adverse instruction they seek. Defendants fail to show that the information from the event data recorder (if it was installed, and working, in Mrs. Windt’s car) is relevant to a contested issue. Defendants fail to show that the loss of the event data recorder was the result of Mrs. Windt’s gross negligence, willful conduct, or surprising lack of care. Since she was not the one who allegedly spoliated the data recorder, she could not be guilty of gross negligence or willful conduct. The motion should be denied.

Dated: February 6, 2017.

# The Law Firm of Stephen H. Cook, P.C.

*Original Signature on file at The Law Firm of Stephen H. Cook, P.C.*

By: */s/ Stephen H. Cook*

Stephen H. Cook

Attorney for Kathryn Windt

# CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on February 6, 2017 via *ICCES* to the following:

Jeffrey Ruebel Katherine Brim Casey Quillen

RUEBEL & QUILLEN, LLC

8501 Turnpike Drive, Suite 106

Westminster, CO 80031

*Signature on file at COOK & PAGANO, P.C.*

*/s/ Ashley Neumann*

Ashley Neumann