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| DISTRICT COURT, ADAMS COUNTY, COLORADO1100 Judicial Center Drive Brighton, CO 80601**Plaintiff :**American Family Mutual Insurance Company, As Subrogee of Kathryn Windt, | DATE FILED: January 25, 2017 6 FILING ID: 711411BE56655 CASE NUMBER: 2015CV31808* COURT USE ONLY 
 |
| v. |  |
| **Defendants/Third Party Plaintiffs:**Jvonne Becerril and Aurelio Meza-Cuevas, | Case Number: 2015CV31808 |
| v. | Div.: W Ctrm.: |
| **Third Party Defendant/Counterclaimant:** |  |
| Kathryn Windt |  |
| **Attorneys for Defendants Becerril and Meza-Cuevas:**Jeffrey Clay Ruebel Katherine L. Brim Ruebel & Quillen, LLC8501 Turnpike Drive, Ste 106Westminster, Colorado 80031Phone Number: (888) 989-1777FAX Number: (303) 362-5724E-mail: Jeffrey@rq-law.com |  |
| **MOTION FOR SANCTIONS FOR WINDT’S SPOLIATION OF EVIDENCE** |

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DEFENDANTS JVONNE BECERRIL and AURELIO MEZA-CUEVAS (“Mrs.

Becceril” and “Mr. Meza-Cuevas”), by and through counsel, RUEBEL & QUILLEN, LLC, hereby submit their Motion for Sanctions for Windt’s Spoliation of Evidence. They ask that the jury be instructed with an adverse inference against Windt based on the loss or destruction of evidence. As grounds therefore, they state and allege as follows:

# CERTIFICATE OF RULE 121 CONFERRAL:

Counsel for Defendants has conferred with Counsel for Mrs. Windt as to this Motion.

Mrs. Windt opposes the Motion.

# BACKGROUND

This matter arises out of an October 3, 2014 motor vehicle accident (“the accident”). Liability for the accident is disputed and will be a central issue at trial; both Mrs. Becerril and Mrs. Windt have testified that they entered the intersection immediately prior to the accident on a green light, and both allege that the other ran a red light, thereby causing the accident. The investigating police officer was unable to determine fault.

# RELEVANT FACTS

1. The accident at issue occurred at the intersection of 104th Avenue and Fox Run in Thornton, Colorado. See **Exhibit A**, Traffic Accident Report. The intersection is a four way stop controlled by traffic lights. **Exhibit B**, Deposition of Kathryn Windt, November 23, 2016 at 23.20-22.
2. The parties entered the intersection from opposite directions and collided. See **Exhibit A**, Traffic Accident Report.
3. Mrs. Becerril has consistently maintained that as she was proceeding through the intersection on a green light Plaintiff suddenly and unexpectedly pulled out directly into her path. See **Exhibit C**, Deposition of Ivonne Becerril, November 23, 2016 at p. 36.6-8; **Exhibit A**, Traffic Accident Report.
4. Mrs. Windt has claims that *she* entered the intersection on a green light and that Mrs.

Becerril ran a red light. See **Exhibit A**, Accident Report; Complaint of American Family Mutual Insurance as Subrogee of Windt, ¶ 9-10.

1. Windt was driving a 2014 Hyundai Santa Fe at the time of the accident. **Exhibit A**, Accident Report.
2. On information and belief, an event data recorder was present in Mrs. Windt’s vehicle at the time of the accident. See Rimkus Consulting Group, *Event Data Recorder Supported Vehicles*, p. 3, attached hereto as **Exhibit D**, available at [https://www.rimkus.com/uploads/pdfs/Event\_Data\_Recorder.pdf.](https://www.rimkus.com/uploads/pdfs/Event_Data_Recorder.pdf)
3. The event data recorder would have shown data such as Mrs. Windt’s speed, acceleration, and brake activity immediately prior to the accident at issue. See 49 C.F.R. Ch. V §

563.7 (October 1, 2011), attached hereto as **Exhibit E**.

1. Mrs. Windt’s vehicle was sent out for parts salvage, and the salvage was complete no later than January 7, 2015. See Claim Activity Log, attached hereto as **Exhibit F**.
2. There is no indication that the data from the event data recorder was downloaded and saved before the vehicle was sent to salvage.
3. Before the vehicle was sent to salvage, liability for the accident was obviously contested, and the likelihood of litigation was apparent. See **Exhibit F**, Activity Log.
4. Mrs. Windt has produced no data from the event data recorder, either in her disclosures or in response to counsel’s request for information as to the availability of the event data recorder data.

# ARGUMENT

This Court should give an adverse inference instruction where Windt failed to preserve data from the event data recorder which would have revealed valuable information regarding the hotly contested circumstances of the accident, despite the clear dispute as to fault and likelihood

of litigation. Sanctions are necessary to remedy the harm to Mrs. Becerril from the lack of evidence she could have gained from the event data recorder.

This Court enjoys broad discretion to impose sanctions for the spoliation of evidence, even if the evidence was not subject to a discovery order permitting sanctions pursuant to

C.R.C.P. 37. *Pfantz v. Kmart Corp*., 85 P.3d 564 (Colo. App. 2003). An adverse inference instruction is one such sanction and is well within the Court’s inherent power. *Aloi v. Union Pacific R.R. Corp*., 129 P.3d 999, 1002 (Colo. 2006). The Court’s decision to impose sanctions will not be disturbed unless it is deemed manifestly arbitrary, unreasonable, or unfair. *Castillo v. Chief Alt., LLC*, 140 P.3d 234, 236 (Colo. App. 2006). In the exercise of their inherent power, trial courts may impose sanctions both to punish the party who has spoiled evidence and to remedy the harm the injured party suffers due to the lack of the evidence. *Pfantz*, 85 P.3d at 567 (citations omitted).

Sanctions may be imposed where evidence was destroyed before a complaint was filed. *Castillo*, 140 P.3d at 236-237. Courts typically impose sanctions for the pre-complaint destruction of evidence where the spoliator is the Plaintiff. *Id*. at 237. A party may be sanctioned for destroying evidence after it knew or should have known that the evidence was relevant to reasonably foreseeable litigation. *Id*. at 236. In this case, Mrs. Windt, the personal injury claimant, is the spoliator, making sanctions for the pre-complaint destruction of the event data recorder especially appropriate. Moreover, litigation was reasonably foreseeable at the time the recorder was destroyed; liability for the subject accident was clearly in dispute, both parties to the accident had incurred significant damages, and Mrs. Windt’s insurance carrier was pursuing a subrogation claim for damage her vehicle incurred in the accident. See **Exhibit A**, Accident Report; **Exhibit F**, Activity Log.

To support a request for sanctions, a party need only show that the lost evidence would have been relevant to a contested issue at trial. *Aloi,* 129 P.3d at 1004. The lost evidence need not be the *only* evidence as to a particular issue; it must only have held the *possibility* of aiding the jury’s determination as to an issue. *See id*; *Pfantz*, 85 P.3d at 569-571. In *Aloi v. Union Pacific R.R. Corporation*, the jury was properly instructed that it could draw an adverse inference that destroyed evidence was unfavorable to the spoliator where destroyed records *may have provided more information* regarding the nature of the locomotive defect which allegedly caused the plaintiff’s injuries. 129 P.3d at 1004. Likewise, in *Pfantz v. Kmart Corporation*, where a party’s argument could not be supported with expert testimony due to the lack of a destroyed bench, sanctions were appropriate. 85 P.3d at 569. Sanctions were also appropriate as the jury was effectively prevented from examining the defective bench, because the jury’s observations *might* have assisted it in determining that the bench was a hazard. *Id*.

Here, the event data recorder obviously would have yielded relevant information as to the circumstances of the accident. Mrs. Windt has testified that she was traveling at only five to ten miles per hour prior to impact and that she was accelerating after slowing down to go over a dip in the concrete before she entered the intersection on a green light. **Exhibit B**, Deposition of Kathryn Windt at 80.13-83.20. The data recorder could have helped determine the veracity of her claims. It could have shown how fast Mrs. Windt’s vehicle was in fact traveling prior to impact, whether and when she accelerated, and whether and when she braked prior to impact. See **Exhibit E.** It would have provided the jury additional information as to Mrs. Windt’s actions and the forces at play in the collision, information which would have been useful to any accident reconstruction expert analyzing the case.

In order to impose sanctions, the court need not find that evidence was destroyed in bad faith or even intentionally; rather, it may impose sanctions if it finds that evidence was destroyed due to recklessness or gross negligence. *Pfantz*, 85 P.3d at 568. A party’s failure to act, as well as its affirmative actions, can justify the imposition of sanctions. *Id*. at 568-569. Where a party shows a surprising lack of care in preserving potentially adverse evidence that was in its sole possession and control, sanctions may be imposed. *Id*. at 569. In *Pfantz*, the bench which allegedly caused the plaintiff’s injury was destroyed by a store director who was unaware of the need to preserve it. *Id*. Where there was no indication that K-Mart made any efforts to mark the bench as needing preservation or stored the bench in a protected area, and where the store manager was not informed of the need to preserve the bench, the court properly found that K- Mart had acted recklessly. *Id*.

There was a surprising lack of care constituting gross negligence in the failure to preserve the event data recorder for Mrs. Windt’s vehicle. There is no indication that *any effort* was made to preserve the recorder or to download the data from it before it was destroyed. Rather, it appears that despite the parties’ dispute as to liability based on their sharply contrasting statements as to how the accident happened and the fact that damage claims were being actively pursued, *no steps* were taken to preserve the event data recorder which contained valuable information about the moments before the accident occurred. In these circumstances, Defendants should be afforded an adverse inference instruction against Mrs. Windt.

WHEREFORE, Defendants seek an Order permitting an adverse inference instruction against Mrs. Windt.

**DATED** this 25rd day of January, 2017.

Respectfully submitted, RUEBEL & QUILLEN, LLC



Katherine L. Brim, No. 46532

# CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the foregoing Motion for Sanctions was E-Served by the Court-authorized E-System provider, to the following on this 25th day of January, 2017:

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 */s/ Katherine L. Brim*

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