

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

KENNETH L. GILBERT, et al.,     )  
  )  
                  Plaintiffs         )  
  )  
v.                                     ) Civil No. 05-136-B-W  
  )  
BLOUNT, INC.,                     )  
  )  
                  Defendant        )

**RECOMMENDED DECISION**

Kenneth Gilbert alleges he suffered severe personal injury during the course of his employment when the boom arm of a crane fractured from its base, hit Gilbert, and pinned him to the bed of his truck. The boom arm was manufactured by defendant Blount, Inc., according to the plaintiffs. Blount has now moved for summary judgment, claiming that as a result of "spoliation of evidence" it is entitled to judgment in its favor as a matter of law. I recommend that the court deny the motion.

**Statement of Material Facts**

The following statement of facts is drawn from the parties' Local Rule 56 statements of material fact in accordance with this District's summary judgment practice. See Doe v. Solvay Pharms., Inc., 350 F. Supp. 2d 257, 259-60 (D. Me. 2004) (outlining the procedure); Toomey v. Unum Life Ins. Co., 324 F. Supp. 2d 220, 221 n.1 (D. Me. 2004) (explaining "the spirit and purpose" of Local Rule 56). Pursuant to Rule 56 of the Federal Rules of Civil Procedure, all evidentiary disputes appropriately generated by the parties' statements have been resolved, for purposes of summary judgment only, in favor of the non-movant. Merch. Ins. Co. v. U.S. Fid. & Guar. Co., 143 F.3d 5, 7 (1st Cir. 1998).

Kenneth Gilbert was injured at work on or about August 7, 1999, when a crane owned by his employer fractured. (Statement of Material Facts ¶ 1, Docket No. 19 & Opposing Statement of Material Facts ¶ 1, Docket No. 23 (jointly cited hereinafter as "SMF"); see also Statement of Additional Material Facts ¶ 3, Docket No. 23 & Reply Statement of Material Facts ¶ 3, Docket No. 26 (jointly cited hereinafter as "SAMF").)<sup>1</sup> On or about August 24, 1999, Plaintiffs' expert witness Stephen Broadhead examined the crane components involved in the accident, and wrote a report of his findings. In particular, he examined the weld at issue in this litigation, and arrived at various conclusions based on his examination, all of which were set forth in his report, which has been disclosed to the defendant in this case. Broadhead initially prepared a report for Acadia Insurance, the worker's compensation carrier for Gilbert's employer. Plaintiffs did not retain him as an expert witness until August 2005. (SMF ¶ 2.) On or about October 7, 1999, the plaintiffs' predecessor counsel wrote to Blount informing it of the August 7, 1999, accident and the fact that Kenneth Gilbert was injured. (SMF ¶ 3). On or about October 22, 1999, counsel for Blount wrote back to the plaintiffs' predecessor counsel asking for more information regarding Kenneth Gilbert's accident, photographs or diagrams relating to the accident, medical records, and the name and address of the owner of the crane involved in the accident. (SMF ¶ 4.) Plaintiffs' predecessor counsel responded in November 1999 indicating that the crane was located at American Concrete industries in Bangor, Maine. (Id. ¶ 4.) On January 7, 2000, the plaintiffs' predecessor counsel wrote to Blount's counsel indicating that American Concrete

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<sup>1</sup> The defendant's statement of material facts actually says Gilbert was injured by a falling crane and cites the Deegan affidavit in support of that statement. The plaintiffs "qualify" the statement by stating that Deegan has no personal knowledge about how the accident occurred and therefore his affidavit is inappropriate record evidence under F.R.C.P. 56(e). The plaintiffs go on to state by way of qualification that Gilbert was injured "when the boom arm on a loader truck he was operating at work separated from its base due to weld failure and struck and pinned Kenneth Gilbert to the truck bed." Plaintiffs cite their own unsworn complaint as record support for their "qualification." It is hard to understand why this basic preliminary fact is material to the issue raised by this particular motion for summary judgment. In any event, if the plaintiffs really believed the qualification was material, one wonders why they compounded defendant's Rule 56(e) error with their own even more egregious error.

Industries wished to put the truck that had carried the damaged crane back into service, and had asked him if they could remove the crane from the truck and put the crane into storage. The plaintiffs' predecessor counsel stated that he would be making arrangements to store the crane and would like to hear Blount's counsel's thoughts regarding an acceptable method of storage. (Id. ¶ 5.)

On January 24, 2000, David Miller, Blount's Director of Product Assurance for Blount's Industrial & Power Equipment Group, visited American Concrete and inspected the truck and crane components. (SAMF ¶ 17.) Mr. Miller has years of experience with welds, including but not limited to inspections of fillet welds, the kind of weld at issue in this case. (Id. ¶ 18.) In addition to inspecting the subject weld, Mr. Miller took notes and pictures. (Id. ¶ 18.) According to Miller, the subject weld was already "very badly rusted" at that time. (Id. ¶ 19.) According to Miller, the weld could have rusted within a week of the fracture, although he did not testify that excessive rusting would be likely to occur in that timeframe. (Id. ¶ 20.) Miller was able to make certain visual observations about the weld. In particular, he noted that the failed weld situated on the right side of the crane was smaller in size than the weld situated on the left side of the crane and that he would not have expected the smaller weld to pass inspection. (Id. ¶ 21.)<sup>2</sup> Miller did not conduct any detailed examination of the weld on January 24, 2000. (Id. ¶ 22.) He thought it was obvious that a weld failure had occurred. (Id. ¶ 23.) He made no request at that time that the components be stored inside. (Id. ¶ 34.) He conceded at his deposition that, even if placed in a climate-controlled storage space, the corrosion process would continue. (Id. ¶ 38.) In his view, the best way to store the components would have been to coat

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<sup>2</sup> Blount responds that the Court should not interpret this testimony as an admission "that the weld(s) at issue in this case were even performed by an agent of Blount, Inc." (Reply Statement ¶ 21.)

them with a sealant, such as oil, grease or wax, and place them in a climate controlled space.

(Id.) Miller allows that even steps such as those would not entirely stop further rusting. (Id.)

On February 1, 2000, a paralegal for the plaintiffs' predecessor counsel wrote to Blount's counsel referencing the fact that the parties had met at American Concrete for an inspection on January 24, 2000, had spoken by telephone on February 1, 2000, and that the plaintiffs' firm wished to reach an agreement to allow storage of the crane indoors out of the weather. (SMF ¶ 6.) On February 9, 2000, counsel for Blount wrote to the plaintiffs' predecessor counsel stating: "[T]he base unit attached to the truck, and loose upper portion, should be retained for purposes of litigation. Also, it should be retained in such a manner that it is not damaged or mishandled or deteriorates [sic] further due to the weather." (Id. ¶ 7.)

On March 2, 2000, a paralegal for the plaintiffs' predecessor counsel wrote to Blount's counsel stating that they would attempt to arrange storage "at its earliest availability" for certain specified truck components. (Id. ¶ 8.) On September 6, 2000, a paralegal for the plaintiffs' predecessor counsel wrote to Blount's counsel to "confirm" that the parts at issue "are being stored inside at the American Concrete plant." (Id. ¶ 9.) The plaintiffs' second liability expert, Douglas Harvey, examined the parts in September 2004, while the defendant's liability expert, Dennis Deegan, examined the parts on March 22, 2006. (Id. ¶ 10.) Dr. Deegan also reviewed an OSHA report prepared following Kenneth Gilbert's August 7, 1999, accident, in which the OSHA investigator indicates that he believed that pre-failure cracking existed in the welds, something that Deegan opines would be evidence of pre-existing fatigue or embrittlement in the relevant welds, suggestion something other than precipitous failure. (Id. ¶ 11.) Dr. Deegan reports that when he observed the crane it had too much rust and corrosion in the area of the welds to permit him to evaluate this alternative explanation for the failure of the crane. (Id. ¶¶

12-14.) Mr. Harvey similarly asserts that the present level of corrosion makes observation of the welds difficult and conceals the character of the fracture. (Id. ¶ 17.) Dr. Deegan opines that proper storage would have prevented such extensive corrosion. The record of correspondence between the parties' counsel related to storage of the crane components would support an inference that the crane components were not stored inside until about thirteen months after the date of the accident. (Id. ¶ 15.) The correspondence also reflects that the crane components remained in the possession of American Concrete. (SAMF ¶ 4.)

### **Discussion**

"The role of summary judgment is to look behind the facade of the pleadings and assay the parties' proof in order to determine whether a trial is required." Plumley v. S. Container, Inc., 303 F.3d 364, 368 (1st Cir. 2002). A party moving for summary judgment is entitled to judgment in its favor only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if its resolution would "affect the outcome of the suit under the governing law," and the dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In reviewing the record for a genuine issue of material fact, the Court must view the summary judgment facts in the light most favorable to the nonmoving party and credit all favorable inferences that might reasonably be drawn from the facts without resort to speculation. Merch. Ins. Co., 143 F.3d at 7. If such facts and inferences could support a favorable verdict for the nonmoving party, then there is a trial-worthy controversy and summary judgment must be denied. ATC Realty, LLC v. Town of Kingston, 303 F.3d 91, 94 (1st Cir. 2002).

The federal courts have inherent power to impose sanctions to reprimand misconduct by litigants. Young v. Gordon, 330 F.3d 76, 81 (1st Cir. 2003). This inherent authority is augmented in some respects by the Federal Rules of Civil Procedure, in particular with respect to the disregard of judicial orders, but the courts are not dependent on the Rules to issue appropriate sanctions. Id. Nevertheless, the dismissal of an action is a severe remedy befitting only extreme misconduct. Id.; Batiz Chamorro v. P.R. Cars, Inc., 304 F.3d 1, 4 (1st Cir. 2002). It "runs counter to [the] strong policy favoring the disposition of cases on the merits." Benjamin v. Aroostook Med. Ctr., Inc., 57 F.3d 101, 107 (1st Cir. 1995) (quotation marks omitted). In some situations, the failure of a party to preserve evidence material to a litigation can justify dismissal, though exclusionary remedies or other evidentiary remedies are typically more appropriate. "The intended goals behind excluding evidence, or at the extreme, dismissing a complaint, are to rectify any prejudice the non-offending party may have suffered as a result of the loss of evidence and to deter any future conduct, particularly deliberate conduct, leading to such loss of evidence." Collazo-Santiago v. Toyota Motor Corp., 149 F.3d 23, 29 (1st Cir. 1998).

Blount argues that it is entitled to judgment against Kenneth Gilbert's personal injury claims and Patricia Gilbert's loss of consortium claim because the crane component or components exhibiting the failed weld in this case were left outdoors, exposed to the elements, for roughly a year following the accident and the resulting corrosion on and around the weld prevents Blount from determining the "critical issue" of "whether the weld failure . . . was a result of pre-existing fatigue cracking," as opposed to a defect in the weld. (Def.'s Mot. Summ. J. at 1, Docket No. 18.) In Blount's view, the Gilberts' failure to ensure that the components were properly stored and preserved is a form of evidence spoliation so severe as to warrant outright dismissal of the case. (Id. at 2.) In support of this contention, Blount asserts that it did not

conduct an expert analysis of the weld until more than six years had transpired, "at which time the rust and corrosion on the welds rendered it impossible to detect fine details which would be indicative of fatigue cracking." (Id.) Nowhere in its motion for summary judgment or in its supporting statement of material facts does Blount make reference to the fact that Mr. Miller inspected the weld within five months of the accident or to the fact of its own failure to take reasonable care to see to the preservation of its "fatigue cracking" defense. Naturally, the Gilberts focus on the fact that Blount was notified about the allegation of a defective weld within three months of the accident so that "Blount had the information it needed, and equal right and ability as Plaintiffs, to contact American Concrete Industries . . . and to make arrangements to examine it (or test it)." (Pls.' Opp'n Mem. at 8, Docket No. 24.) They also call the Court's attention to the fact (omitted from Blount's initial motion papers) that Mr. Miller did inspect the weld within five months of the accident, but failed to identify the fatigue cracking at the time or else failed to take prompt action to preserve evidence of it. (Id. at 8.) In addition to these arguments, the Gilberts principally argue that a spoliation sanction is uncalled for because the relevant crane components all belonged to American Concrete and were no more in the care and custody of the Gilberts than they were in the care and custody of Blount. (Id. at 2-5.) Finally, the Gilberts argue that the requested sanction of dismissal would be inappropriate in any event because there is no suggestion in the record, or even in Blount's motion, that the Gilberts actually intended to destroy evidence to prejudice Blount. (Id. at 6.)

This Court has previously stated that "the most severe sanction of dismissal should be reserved for cases where a party has maliciously destroyed relevant evidence with the sole purpose of precluding an adversary from examining that relevant evidence." N. Assurance Co. v. Ware, 145 F.R.D. 281, 283 n.2 (D. Me. 1993) (Carter, J.). There is plenty of more recent

authority to support this position. See, e.g., Collazo-Santiago, 149 F.3d at 29 (affirming denial of dismissal sanction where the plaintiff "neither maliciously destroyed evidence nor deliberately attempted to prevent the defendant from inspecting [it]"); Leon v. IDX Sys. Corp., 464 F.3d 951, 958 (9th Cir. 2006) ("Dismissal is an available sanction when a party has engaged deliberately in deceptive practices that undermine the integrity of judicial proceedings because courts have inherent power to dismiss an action when a party has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice.") (quotation marks omitted); Menz v. New Holland N. Am., Inc., 440 F.3d 1002, 1006 (8th Cir. 2006) ("[T]o warrant dismissal as a sanction for spoliation of evidence there must be a finding of intentional destruction indicating a desire to suppress the truth.") (quotation marks omitted); Flury v. Daimler Chrysler Corp., 427 F.3d 939, 944 (11th Cir. 2005) ("Dismissal represents the most severe sanction available to a federal court, and therefore should only be exercised where there is a showing of bad faith and where lesser sanctions will not suffice."); cf. Altschuler v. Univ. of Penn. Sch. of Law, No. 99-7423, 1999 WL 1314734, \*2, 1999 U.S. App. LEXIS 34303, \*6-7 (2d Cir. Dec. 27, 1999) (unpublished) ("[T]he district court properly declined to sanction Brach Eichler with an adverse inference due to the spoliation of certain evidence because there was no showing that Brach Eichler destroyed or suppressed relevant evidence in bad faith."); but see West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999) (asserting that "fault" short of bad faith can suffice for a sanction of dismissal, but vacating trial court's order of dismissal because a less severe sanction was available under the circumstances). Of course, not every court requires evidence of bad faith to support a sanction of dismissal. For example, a sanction of dismissal has been affirmed on appeal where the plaintiff's insurance carrier authorized its consultants to dispose of electrical equipment alleged to have caused a building

fire, the plaintiffs failed to provide prior notice to the defendant of their claim or of the possibility that the evidence would be destroyed, and the destruction of the evidence denied the defendant any viable defense. King v. Am. Power Conversion Corp., 181 Fed. Appx. 373, 376-77 (4th Cir. 2006). However, unlike the circumstances of King, in this case the Gilberts did provide Blount with reasonably prompt notice of their claims, the location of the crane components, and the concern over the need to preserve the crane components for purposes of litigation because they were in the possession of a third party.<sup>3</sup> Additionally, none of the Gilberts' communications with Blount can fairly be regarded as having lulled Blount into a belief that the Gilberts were taking the kind of steps necessary to protect the crane components from corroding to a material degree over a course of six years, which is the amount of time that Blount waited before seeking to develop its "fatigue cracking" defense. It would appear from Mr. Miller's testimony that even relatively exacting steps to prevent further rusting would not have been sufficient to prevent a substantial amount of additional rust over the course of such an extended period of time. In summary, whatever modicum of "culpability" or "fault" there is in this case is essentially shared by the parties, but because the Gilberts did not act in bad faith and afforded Blount with reasonably prompt notice of the claims and the concern over preservation of the crane components and the location of the crane components, there simply is not sufficient fault or culpability here to support a sanction of dismissal. Accordingly, I recommend that the Court deny the motion requesting the sanction of dismissal.<sup>4</sup>

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<sup>3</sup> The record does not support a finding that the crane components were so corroded as to obliterate any evidence of fatigue cracking in the weld as of the time of Mr. Miller's initial inspection.

<sup>4</sup> Blount states in a footnote that it "defers to the Court regarding whether . . . other sanctions are appropriate in the event the Court does not order dismissal." (Def.'s Mot. Summ. J. at 7. n.2.) I do not entertain this invitation to consider a lesser sanction because the pending motion is a motion for summary judgment. Because dismissal is not called for, Blount is not entitled to judgment as a matter of law.

## Conclusion

For the reasons set forth above, I recommend that the Court **DENY** Blount, Inc.'s motion for summary judgment (Docket No. 18).

## NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, and request for oral argument before the district judge, if any is sought, within ten (10) days of being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/ Margaret J. Kravchuk  
U.S. Magistrate Judge

October 27, 2006

GILBERT et al v. BLOUNT INC

Assigned to: JUDGE JOHN A. WOODCOCK, JR

Cause: 28:1441 Petition for Removal- Product Liability

Date Filed: 09/02/2005

Jury Demand: Plaintiff

Nature of Suit: 365 Personal Inj. Prod.  
Liability

Jurisdiction: Federal Question

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