

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

**AMERICAN CENTRAL INSURANCE )  
COMPANY )**

**Plaintiff )**

**v. )**

**Civil No. 97-CV -214-B-B**

**RYDER TRUCK RENTAL, INC. )**

**and )**

**CYRUS THOMPSON, JR. )**

**and )**

**LANDSTAR RANGER, INC. )**

**Defendants )**

**RECOMMENDED DECISION**

In this diversity action, the plaintiff as subrogee of W.D. & Smith & Sons [“Smith”] alleges negligence against the defendants, Ryder Truck Rental [“Ryder”], Cy Thompson, Jr. [“Thompson”] and Landstar Ranger [“Landstar”], and seeks compensation for damage caused by a fire at the Smith warehouse. Plaintiff alleges that the ignition point of the fire was in the cab of a tractor trailer Thompson purchased from Ryder. Pending before this Court is Ryder's Motion in Limine and for Summary Judgment and Plaintiff 's Response and Defendant Thompson’s and Landstar's opposition to the motion in limine.

## Background

On January 11, 1995 Thompson purchased from Ryder a Freightliner tractor trailer. Subsequently Thompson leased the tractor trailer to Landstar, but Thompson's employee, Louis Thompson, continued to operate the truck.

Louis Thompson parked the truck inside the Smith warehouse on February 16, 1995. Thompson smokes cigarettes and approximately an hour to an hour and a half before leaving the truck that evening he was smoking in the tractor trailer's cab.<sup>1</sup> Thompson recalls putting the cigarette out on the warehouse floor before leaving the truck that evening. Later that evening a fire ignited inside the truck's cab and spread into the warehouse. The Bangor Fire Department arrived and extinguished the fire. The fire marshall determined that the fire began on the passenger's side of the truck's cab but he did not determine what caused the fire.<sup>2</sup>

A couple of days after the fire Philip Brown, representing the interests of Landstar and its insurance carrier, went to the warehouse to examine the damage caused by the fire. When Brown arrived he discovered that Commercial Union (plaintiff's affiliated company) employed John Mickel, a cause and origin expert, to examine the damage and to determine the cause of the fire. Mickel and Brown met one another and Mickel claims Brown told him not to enter cab's interior. Brown denies ever telling Mickel that he could not enter the truck's cab. Brown maintains that he told Mickel not

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<sup>1</sup> Although Thompson stated in his deposition that he was smoking in the truck's cab an hour to an hour and a half before he left that evening, he apparently told James Eddy, Defendant Thompson's cause-and-origin expert, that he had not been smoking in the truck that evening. Thompson claims that he only lit a cigarette in the cab which in Thompson's view is not smoking a cigarette.

<sup>2</sup> Whether the fire marshal's report contained any other evidence regarding the cause of the fire is unclear because none of the parties discuss the report any further.

to conduct destructive testing on the cab because Brown wanted to preserve the cab until Thompson's own cause and origin expert arrived on the scene. Although Brown denies ever telling Mickel that, no one disputes that Mickel did not enter the cab when he investigated the cause of the fire. Mickel did take about one hundred photographs of the scene and examined the cab's exterior. During the investigation, Mickel noticed that a wire inside the cab appeared to have arced but made no conclusions as to what caused the fire. After Mickel reported the findings of his investigation Commercial Union put the investigation on "hold".

Thompson retained James Eddy, a cause and origin expert, to examine the damage and determine the cause of the fire. Thompson also retained Robert Gavin, a truck mechanical expert, to determine if the truck was mechanically sound at the time of the fire.

On February 24<sup>th</sup> Eddy and Gavin examined the cab and concluded that the fire originated on the passenger's side of the cab. Specifically, Eddy determined that a wire that ran beneath the carpet and eventually to a dome light was the point of ignition. The wire had apparently sparked or arced which ignited the carpet and the clothing on the floor of the cab. Eddy and Gavin believed that the wire that caused the fire was not original to the truck and was improperly installed. Both maintain that the wire should have been installed beneath the sub-floor and not between the carpet and the sub-floor. After completing his investigation Eddy removed the dome bezel and portions of the wire that survived the fire.

Although Eddy determined that a wire ignited the fire, during his deposition he stated that the fire in the cab was consistent with a cigarette being dropped and then clothing being placed on top of the cigarette. Additionally, at the time Eddy made his findings he was told by Lou Thompson that he was not smoking inside the cab prior to the fire that evening.

Defendant Thompson had the cab removed between February 28<sup>th</sup> and March 10<sup>th</sup> to a salvage yard. Defendant Thompson notified the plaintiff that they would be removing the truck to a salvage yard in Augusta. Once the truck was placed in the salvage yard Defendant Thompson had no control over how quickly the truck was salvaged. On March 18<sup>th</sup> Eddy met with the plaintiff's expert, John Mickel, to explain that he believed an improperly installed wired caused the fire. The plaintiff first notified Ryder of the fire and the possibility of a claim by a letter dated on March 25<sup>th</sup>. Ryder never responded to the letter. The plaintiff filed his Complaint in July 1997.

### **Summary Judgment**

Summary judgment is appropriate 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 a judgment as a matter of law." Fed. R. Civ. P. 56(c). A "genuine" issue exists if "the evidence on the point is such that a reasonable jury, drawing favorable inferences, could resolve the fact in the manner urged by the nonmoving party." *Smith v. F.W. Morse & Co.*, 76 F.3d 413, 428 (1<sup>st</sup> Cir. 1996). "A material fact is one which has the 'potential to affect the outcome of the suit under applicable law.'" *FDIC v. Anchor Properties*, 13 F.3d 27, 30 (1st Cir. 1994) (quoting *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 703 (1st Cir. 1993)). The Court views the record on summary judgment in the light most favorable to the nonmovant. *Levy v. FDIC*, 7 F.3d 1054, 1056 (1st Cir. 1993).

However, summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the moving party has presented evidence of the absence of a genuine issue, the nonmoving

party must respond by "placing at least one material fact in dispute." *Anchor Properties*, 13 F.3d at 30 (citing *Darr v. Muratore*, 8 F.3d 854, 859 (1st Cir. 1993)).

### **Discussion**

Ryder has moved for summary judgment because Ryder claims that the plaintiff and Thompson spoiled relevant evidence prejudicing Ryder. Ryder argues that the Court should sanction the parties by excluding the expert testimony of James Eddy who was the only expert to examine the interior of the cab and has testified that the cause of the fire was an improperly installed wire. If the Court excludes this evidence, Ryder maintains that no genuine issue of material fact concerning Ryder's liability exists and the Court must therefore grant Ryder's motion for summary judgment.

Spoilation is the "intentional, negligent or malicious destruction of relevant evidence." *Corales v. Sea-Land Service, Inc.* 172 F.R.D. 10, 13-14 (D. P.R. 1997). If a party destroys relevant evidence the Court must determine what sanction to apply to that party. When a party spoils evidence the sanctions most frequently used by courts are "dismissal of the case, the exclusion of evidence, or a jury instruction on the 'spoilation inference'." *Corales*, 172 F.R.D. at 13, 14 citing *Howell v. Maytag*, 168 F.R.D. 502, 505 (M.D. Pa. 1996)).

Courts generally consider five factors to determine what type of sanction to impose if a party intentionally, recklessly, or negligently spoils relevant evidence. Those five factors include: (1) whether the absence of the destroyed evidence prejudices the defendant; (2) whether the prejudice, if any exists, can be cured; (3) the practical importance of the evidence; (4) whether the plaintiff (or in this case defendant Thompson) acted in good faith or bad faith; (5) the potential for abuse if the evidence is excluded. *Northern Assurance Co. v. William Ware, et al.* 145 F.R.D. 281, 283 (D. Me.

1993). Courts have particularly focused on the degree of prejudice suffered by the party who is unable to examine the evidence and the culpability of the party that destroyed the evidence. *See, Northern Assurance*, 145 F.R.D. at 283-84; *Schmid v. Milwaukee Elec.Tool Corp.*, 13 F. 3d 79. Having delineated the law regarding the spoiling of evidence by a litigant, the Court will now examine if any sanctions should be imposed on the parties.

### ***The Plaintiff***

Ryder argues that a sanction should be imposed on the plaintiff because the plaintiff failed to preserve the cab for Ryder to examine. Although a litigant has a duty to preserve evidence, “the duty does not extend to evidence which is not in the litigant’s possession or custody and over which the litigant has no control.” *Townsend v. American Insulated*, 174 F.R.D. 1, 5 (D. Mass. 1997). Ryder presents no facts to support its claim that the plaintiff destroyed the evidence or that the evidence was in the plaintiff’s care, custody or control.

The facts clearly demonstrate that Defendant Thompson, not the plaintiff, had care, custody and control over the truck at all times. Defendant Thompson restricted plaintiff’s access to the cab, examined the cab without the plaintiff’s consent and removed the cab from the Smith warehouse to a salvage yard in Augusta. Even when the lessee of the Smith warehouse wanted the truck removed he asked Thompson, not the owner of the warehouse, to remove the truck. Ryder has not demonstrated that the plaintiff had care, custody or control over the evidence. Accordingly, the Court recommends that Eddy’s testimony not be excluded. If Eddy’s testimony is offered at trial, there will be evidence that an improperly installed wire caused the fire in the truck’s cab. Since Ryder may have installed that wire, the Court finds that a genuine issue of material fact exists as to

whether Ryder negligently installed a wire in the cab which in turn caused the fire. Accordingly, the Court recommends that Ryder's Motion for Summary Judgment be DENIED.

### **Defendant Thompson**

Generally a litigant has the duty to preserve evidence when the evidence is potentially relevant to another's case. *See, Corales* 172 F.R.D. at 13. Ryder maintains that it was unable to fully explore their belief that a lit cigarette ignited the fire because the cab was removed to a salvage yard two to three weeks before the plaintiff notified Ryder about the possibility of a claim.

The Court is satisfied that Ryder has at least some evidence available to examine and defend itself against the theory that an improperly installed wire caused the fire. Ryder can examine the wire that allegedly caused the fire and the approximately one hundred photos taken of the scene. The preservation of that evidence allows Ryder to defend itself against Defendant's Thompson theory that an improperly installed wire caused the fire. Ryder's complaint that the destruction of the cab deprived it for positing other ignition sources does not warrant the sanction of excluding Eddy's testimony from trial. *See Mayes*, 931 F. Supp. at 84. Accordingly, since the wire and the photographs were preserved the Court recommends that Defendant Thompson be permitted to offer the expert testimony of James Eddy at trial.

Even though the Court recommends that Eddy's testimony be admitted at trial, the Court is nevertheless troubled by Defendant Thompson's conduct subsequent to the fire. A representative of Thompson asked the plaintiff's expert either not to enter the cab or not to conduct destructive testing on the interior of the cab until Thompson's expert arrived. A week later Thompson's expert arrived, without any notice to the plaintiff, and conducted destructive testing on the interior of the cab to determine the cause of the fire. Thompson's expert determined that an improperly installed

wire caused the fire. Thompson had only purchased the truck from Ryder a month before the fire and should have known that Ryder could be named a party in any future action. Nevertheless, Thompson had the truck removed to a salvage yard where it had no control over how quickly the truck's cab would be destroyed.

Although the Court is troubled by Thompson's conduct, the Court is not now prepared to recommend a sanction against Thompson. Instead the Court recommends that a "spoilation inference" instruction be entered against Defendant Thompson if Ryder offers further proof of Thompson's reckless conduct. The "spoilation inference" permits "the trier of fact. . . [to] infer that the party who [destroyed an item arguably relevant to this case] did so out of a realization that the [evidence was] unfavorable." *Mayes*, 931 F.Supp. at 84 (quoting *Blinzer v. Marriot Int'l Inc.*, 81 F.3d 1148,1158 (1<sup>st</sup> Cir. 1996)). Before the inference can apply, Ryder must establish a sufficient foundation that Thompson had notice of the potential claim and of the evidence's potential relevance. *Id.* The inference "cannot be drawn merely from his negligent loss or destruction of evidence; the inference requires a showing that the party knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction." *Id.* (quoting *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 159 (4<sup>th</sup> Cir. 1995)). If the factfinder determines that the evidence was destroyed inadvertently or accidentally then the factfinder can reject the inference. *See, Blinzer*, 81 F.3d at 1159 (other citations omitted). Whether the "spoilation inference" applies will therefore be determined by the development of the evidence to support the inference during trial.

### ***Conclusion***

Accordingly, the Court recommends that the testimony of Defendant Thompson's expert, James Eddy, be allowed and that Ryder's Motion for Summary Judgment be DENIED. The Court

additionally recommends that upon the proper showing by Ryder, the Court allow a “spoilation inference” instruction against Defendant Thompson as a sanction for Defendant’s Thompson’s failure to preserve relevant evidence.

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) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum 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.

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Eugene W. Beaulieu

United States Magistrate Judge

Dated on April 21, 1998.