

# Williams v. Werner Enters.

Supreme Court of Appeals of West Virginia

February 11, 2015, Submitted; March 2, 2015, Filed

No. 14-0212

## Reporter

770 S.E.2d 532; 2015 W. Va. LEXIS 145

JANNELL WILLIAMS, as the Personal Representative of the Estate of Kenneth Williams, and CHERYL RUTLEDGE, as the Personal Representative of the Estate of Quentin Rutledge, Plaintiffs Below, Petitioners v. WERNER ENTERPRISES, INC., a Nebraska Corporation, Defendant Below, Respondent

**Prior History:** **[\*\*1]** Appeal from the Circuit Court of Ohio County. The Honorable Martin J. Gaughan, Judge. Civil Action No. 09-C-419. Williams v. Werner Enters., 2013 W. Va. LEXIS 766 (W. Va., June 24, 2013)

**Disposition:** AFFIRMED.

## Syllabus

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### **[\*534]** BY THE COURT

1. "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

2. "Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syllabus Point 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995).

3. "Intentional spoliation of evidence is defined as the intentional destruction, mutilation, or significant alteration of potential evidence for the purpose of defeating another person's recovery in a civil action." Syllabus Point 10, *Hannah v. Heeter*, 213 W.Va. 704, 584 S.E.2d 560 (2003).

4. "The tort of intentional spoliation of evidence consists of the following elements: (1) a pending or potential civil action; (2) knowledge of the spoliator of the pending or potential civil action; (3) willful destruction of evidence; (4) the spoliated evidence **[\*\*2]** was vital to a party's ability to prevail in the pending or potential civil action; (5) the intent of the spoliator to defeat a party's ability to prevail in the pending or potential civil action; (6) the party's inability to prevail in the civil action; and (7) damages. Once the first six elements are established, there arises a rebuttable presumption that but for the fact of the spoliation of evidence, the party injured by the spoliation would have prevailed in the pending or potential litigation. The spoliator must overcome the rebuttable presumption or else be liable for damages." Syllabus Point 11, *Hannah v. Heeter*, 213 W.Va. 704, 584 S.E.2d 560 (2003).

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Mary H. Sanders, Esq., Cindy D. McCarty, Esq., Huddleston Bolen LLP, Charleston, West Virginia, Counsel for the Respondent.

**Judges:** JUSTICE KETCHUM delivered the Opinion of the Court. JUSTICE BENJAMIN

concur and reserves the right to file a separate opinion. CHIEF JUSTICE WORKMAN dissents and reserves the right to file a separate opinion. JUSTICE DAVIS dissents and reserves the right to file a separate opinion.

## Opinion

Justice Ketchum:

The [\*\*3] tort of intentional spoliation of evidence requires a plaintiff to prove that a defendant had "knowledge" of a pending or potential civil action, at the time that the defendant disposed of evidence vital to the plaintiff's action.

In this appeal from the Circuit Court of Ohio County, the circuit court granted summary judgment and dismissed two plaintiffs' claims that the defendant intentionally spoliated evidence vital to a product liability action by the plaintiffs. The circuit court determined that there was no indication whatsoever in the record to establish the defendant knew of any pending or potential civil action when it disposed of the evidence.

After a review of the record, we affirm the circuit court's summary judgment order.

### I.

#### FACTUAL AND PROCEDURAL BACKGROUND

Defendant Werner Enterprises ("Werner") is a nationwide freight transportation company. [\*\*535] Quentin Rutledge and Kenneth Williams were long distance drivers for Werner who drove a tractor-trailer as a team.

In the early morning hours of January 12, 2009, sometime around 2:30 a.m., Mr. Rutledge was

driving northbound on I-79 near Jane Lew, West Virginia. Mr. Williams was located in the tractor-trailer's sleeper berth. A winter [\*\*4] storm began, and a police report indicates that the roadway was covered in snow. As Mr. Rutledge crossed a bridge he lost control of the tractor-trailer. The vehicle hit a guardrail, jackknifed, overturned, then went off the road and slid 30 feet down a steep embankment.

Witnesses who arrived on the scene discovered a small fire had started that could not be extinguished. The fire eventually consumed the tractor-trailer. Mr. Rutledge and Mr. Williams died before they could be extracted.

By 5:30 a.m., Werner had hired an adjuster from Crawford & Company, a national adjusting firm. The adjuster arrived at the scene of the accident shortly thereafter and gathered information. The adjuster electronically provided Werner a written report and photographs on the day of the accident. The adjuster also called Werner and discussed the scene.

The adjuster informed Werner that this was a single-vehicle accident, caused by weather conditions, which involved only the two Werner employees. Hence, Werner (a Nebraska company) knew that it would be responsible (under Nebraska law) to pay workers' compensation death benefits to the drivers' families. Under Nebraska workers' compensation law, Werner was [\*\*5] required to pay the benefits regardless of who was at fault for the accident; in return, Werner was immune from tort liability to the drivers' families for any tort damages.<sup>1</sup>

The adjuster also told Werner that there were two other potential "claimants" from the accident. The first was the State of West Virginia. The adjuster

<sup>1</sup> Nebraska law (specifically Neb. Rev. Stat. §§ 48-111 and 48-148) provides that workers' compensation benefits are the exclusive remedy for any employee who suffers a personal injury that arises out of and in the course of his or her employment. *See, e.g., Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 394, 631 N.W.2d 510, 520 (2001) ("Indeed, the Nebraska Workers' Compensation Act is an employee's exclusive remedy against an employer for an injury arising out of and in the course of employment."); *Marlow v. Maple Manor Apartments*, 193 Neb. 654, 659, 228 N.W.2d 303, 306 (1975) ("If coverage exists, even though for some reason compensation

stated that Werner would likely receive from the State a claim for damage done to the guardrail, for the cost of cleaning up diesel fuel spilled from the tractor-trailer, and for the removal of any hazardous substances left behind from the burning of the cargo and equipment.<sup>2</sup> The second potential claimant was the owner of the cargo. The adjuster thought there might be some scrap value that could be salvaged from the cargo, but also thought that the cost to handle and transport the scrap materials would exceed its scrap value. The adjuster therefore deemed the cargo a total loss.<sup>3</sup>

[\*536] The only question remaining for Werner was whether the vehicle was repairable, or had any scrap value. The record indicates that by 3:15 a.m., while the tractor-trailer was still on fire, several heavy-duty tow trucks had arrived at the accident scene. Cables were attached to stabilize the tractor-trailer wreckage and prevent it from sliding further down the steep hill. The tow trucks later lifted [\*\*8] the wreckage to allow removal of the bodies of Mr. Rutledge and Mr. Williams. For

the remainder of the day — until approximately 9:00 p.m. — 15 employees of the towing company loaded five dump and/or flatbed trailers with the remains of the tractor-trailer. Because the local dump was closed at night, the remains of the tractor-trailer were hauled to the towing company's garage.

At some point within 48 hours of the accident, the assistant director of Werner's fleet maintenance program reviewed photos of the fire-burned tractor-trailer and immediately decided it was damaged beyond repair. Werner directed the towing company to dispose of the wreckage of the tractor-trailer. The towing company then hauled the wreckage to a local landfill.

Approximately one month after Werner disposed of the remains of the tractor-trailer, on February 11, 2009, a lawyer retained by Mr. Williams's family wrote a letter to Werner. The lawyer said he had been hired to investigate the January 12th accident, and said the purpose of the letter was "to

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may not be payable, the Workmen's Compensation Act is exclusive. If the accident does not arise out of and in the course of the employment, there is no coverage, and the parties then are not subject to the act.").

Furthermore, Nebraska's workers' compensation law only allows an action by an employee against an employer or co-worker if the employee's "injury or death is proximately caused by the willful and unprovoked physical aggression of such employee, officer, or director." Neb. Rev. Stat. § 48-111. Compare W.Va. Code § 23-4-2 [2005] (permitting lawsuit in addition to workers' compensation benefits where [\*\*6] "injury or death result to any employee from the deliberate intention of his or her employer to produce the injury or death," and giving an expansive definition to "deliberate intention"); Syllabus Point 2, *Mayles v. Shoney's, Inc.*, 185 W.Va. 88, 405 S.E.2d 15 (1990) ("A plaintiff may establish 'deliberate intention' in a civil action against an employer for a work-related injury by offering evidence to prove the five specific requirements provided in W.Va.Code § 23-4-2(c)(2)(ii) (1983).").

<sup>2</sup> The report of the adjuster states:

There will be a claim made [\*\*7] by the State of West Virginia for damage done to the guard rail and for the cost of cleaning up the hazardous substances left behind by the diesel spill and fire of the cargo and equipment. The WV Dept. of Environmental Protection was scheduled to arrive at the scene within the hour after we were released from the scene.

<sup>3</sup> The report of the adjuster states:

As is shown by the photographs the cargo on this truck consisted of a mixed load. From what we saw there were BB guns, custom aluminum wheels, flat screen TVs, hair products, two mopeds, and various adult novelties. The cargo was totally consumed by the fire. There was some salvage value in the wheels but the current [scrap] value of aluminum is \$.30 and the cost to handle and transport would exceed return. We would deem the cargo a total loss.

request preservation of the vehicle and all evidence associated with the accident.” Werner received the letter by certified mail on February 18th .

Within a week of [\*\*9] receiving the letter, general counsel for Werner advised the lawyer by telephone that the vehicle had been disposed of, and in a letter dated March 4th general counsel clarified that the remains of the vehicle had been hauled to a landfill.

On December 9, 2009, the plaintiffs (the family of Mr. Williams, later joined by the family of Mr. Rutledge)<sup>4</sup> filed the instant lawsuit. The plaintiffs alleged a hodgepodge of legal theories, including that Werner acted with deliberate intent in violation of West Virginia’s workers’ compensation law; that Werner had negligently trained and supervised the plaintiffs; and that Werner had caused the wrongful death of the plaintiffs.<sup>5</sup>

Among the various causes of action asserted by the plaintiffs, only two are relevant to this appeal. First, the plaintiffs asserted product liability claims against the manufacturer of the tractor-trailer, Freightliner Corporation, Inc. (and its parent corporation, Daimler Trucks North America, LLC). Second, the plaintiffs alleged that Werner had either negligently or intentionally spoliated and “disposed of evidence related to the subject accident, including the aforementioned Freightliner vehicle, with the knowledge of plaintiff[s’] request that such evidence be preserved[.]”

At a hearing on October 7, 2011, counsel for Freightliner asked the circuit court for summary judgment on the plaintiffs’ product liability claims. Counsel for the manufacturer argued that the plaintiffs were unable to establish [\*\*11] any

product defect that caused the fire in the Werner tractor-trailer. Freightliner’s counsel argued, based upon discussions with expert witnesses,

[\*537] that there are multiple potential causes for this fire, and due to the inability to inspect the vehicle itself, they are unable to arrive at any opinions that would be admissible in a court of law.

The plaintiffs’ attorneys conceded that summary judgment was proper because “the vehicle was destroyed within 48 hours” by Werner, and because the “few photographs that were taken were both of poor quality and failed to depict the areas . . . that our design engineer would need to be able to look at . . . to establish a specific defect.” Accordingly, the circuit court granted summary judgment to Freightliner (and its parent corporation, Daimler Trucks). The plaintiffs did not appeal that summary judgment order.

At the same hearing, the circuit court heard a motion for summary judgment by Werner. Werner asked that all of the plaintiffs’ claims be dismissed. However, in an order dated October 17, 2011, the circuit court granted only partial summary judgment to Werner, dismissing all but one of the plaintiffs’ causes of action against Werner.

In its [\*\*12] order, the circuit court dismissed the plaintiffs’ claims that Werner was negligent in its training and supervision of Mr. Rutledge and Mr. Williams; that Werner had caused the wrongful death of Mr. Rutledge and Mr. Williams; and that Werner had, in violation of West Virginia workers’ compensation law, caused injuries to and the death of Mr. Rutledge and Mr. Williams with deliberate intent. Additionally, the circuit court

<sup>4</sup> The initial complaint was filed by Jannell Williams, as the personal representative of the Estate of Kenneth Williams, against various defendants including Cheryl Rutledge, as the personal representative of the Estate of Quentin Rutledge. Ms. Williams alleged, in part, that Mr. Rutledge (as driver of the tractor-trailer) negligently caused or contributed to Mr. William’s death. After various answers, cross-claims, counter-claims, and dismissals, Cheryl Rutledge was re-aligned as a plaintiff against Werner Enterprises, Inc. [\*\*10]

<sup>5</sup> The plaintiffs also brought suit against Crawford & Company (and its adjuster-employee, Mark Griffith). The plaintiffs alleged that Crawford & Company had engaged in either negligent and/or intentional spoliation when it worked with Werner to dispose of the tractor-trailer. The record on appeal suggests that Crawford & Company settled with the plaintiffs and was dismissed from the action.



dismissed the plaintiffs' claim that Werner had *negligently* spoliated evidence.<sup>6</sup> The plaintiffs appealed the partial summary judgment order to this Court. In a memorandum decision, we affirmed the circuit court's October 17, 2011, order. *See Williams ex rel. Williams v. Werner Enterprises, Inc.*, 2013 W. Va. LEXIS 766, 2013 WL 3184845 (No. 12-0847, June 24, 2013).

The circuit court's partial summary judgment order dismissed all of the plaintiffs' claims except for one: whether Werner *intentionally* spoliated evidence when it disposed of the tractor-trailer. This ruling, favorable to the plaintiffs, was not appealed. The circuit court initially **[\*\*13]** permitted the intentional spoliation claim to proceed to trial. However, out of caution the circuit court certified questions to this Court on June 15, 2012, concerning whether the plaintiffs had proffered sufficient evidence to establish a genuine issue of fact in their intentional spoliation claim against Werner. We refused to review the certified questions.

On December 30, 2013, Werner renewed its motion for summary judgment on the plaintiffs' intentional spoliation claim.<sup>7</sup> To establish Werner intentionally spoliated evidence to defeat the plaintiffs' product liability suit, the plaintiffs had to prove Werner had "knowledge . . . of the pending or potential civil action" against Freightliner at the time Werner decided to send the remains of the tractor-trailer to the landfill. Syllabus Point 11, in part, *Hannah v. Heeter*, 213 W. Va. 704, 584 S.E.2d 560 (2003). Werner

asserted that because there was no evidence suggesting Werner knew that the plaintiffs intended to sue Freightliner, summary judgment was proper.

In an order dated January 24, 2014, the circuit court granted Werner's motion for summary judgment. The circuit court could find nothing in the record suggesting "that Werner, prior to disposing of the subject **[\*538]** vehicle in this case, had examined its records and reached a direct and clear recognition (actual knowledge) that Freightliner tractor-trailers were defective." Because there was no material question of fact favorable to the plaintiffs on this critical point, the circuit court concluded that the plaintiffs could not establish their intentional spoliation claim.

The plaintiffs **[\*\*15]** now appeal the circuit court's summary judgment order.

## II.

### STANDARD OF REVIEW

We give a *de novo* review to a circuit court's order granting summary judgment under Rule 56 of the WEST VIRGINIA RULES OF CIVIL PROCEDURE. Syllabus Point 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Accordingly, we apply the same standards that the circuit court relied upon in our review.

Under Rule 56 of the RULES OF CIVIL PROCEDURE, summary judgment is proper where the record demonstrates "that there is no genuine issue as to any material fact and that the moving party is

<sup>6</sup> "West Virginia recognizes spoliation of evidence as a stand-alone tort when the spoliation is the result of the negligence of a third party, and the third party had a special duty to preserve the evidence." Syllabus Point 5, *Hannah v. Heeter*, 213 W.Va. 704, 584 S.E.2d 560 (2003).

<sup>7</sup> The plaintiffs argue that the circuit court was precluded from addressing the motion for summary judgment on the intentional spoliation claim because (a) the circuit court's October 2011 order had denied summary judgment on the claim, **[\*\*14]** and (b) this Court had "affirmed" the circuit court's order in a June 2013 memorandum opinion. We reject this argument because none of the parties appealed the circuit court's intentional spoliation ruling, and none of our reasoning in the June 2013 memorandum decision discussed or approved of the ruling. Hence, the circuit court was free to readdress its ruling on intentional spoliation if it felt "a need to correct a clear error or prevent manifest injustice." *Tolley v. Carboline Co.*, 217 W.Va. 158, 161 n.3, 617 S.E.2d 508, 511 n.3 (2005) (quoting Franklin D. Cleckley, Robin Jean Davis & Louis J. Palmer, *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 56(c) (Supp.2004)).

entitled to a judgment as a matter of law." "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syllabus Point 3, *Aetna Casualty and Surety Company v. Federal Insurance Company of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963). "Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syllabus Point 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995).

Moreover, this Court has observed that, in reviewing an order granting a motion for summary judgment, any permissible inferences from the underlying facts must be drawn in the [\*\*16] light most favorable to the party opposing the motion. See *Mueller v. American Electric Power Energy Services*, 214 W.Va. 390, 393, 589 S.E.2d 532, 535 (2003). Nevertheless, Syllabus Point 3 of *Williams v. Precision Coil, Inc.*, 194 W.Va. at 56, 459 S.E.2d at 333, holds:

If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.

With these standards in mind, we turn to the plaintiffs' challenge to the circuit court's summary judgment order dismissing their claim against Werner for intentional spoliation of evidence.

### III.

#### ANALYSIS

"Intentional spoliation of evidence is defined as the intentional destruction, mutilation, or significant alteration of potential evidence for the purpose of defeating another person's recovery in a civil action." Syllabus Point 10, *Hannah v. Heeter*, 213 W.Va. 704, 584 S.E.2d 560 (2003). "The gravamen of the tort of intentional spoliation is the *intent to defeat a person's ability to prevail in a civil action*. Therefore, it must be shown that the evidence was destroyed with the [\*\*17] specific intent to defeat a pending or potential lawsuit." 213 W.Va. at 717, 584 S.E.2d at 573. "West Virginia recognizes intentional spoliation of evidence as a stand-alone tort when done by either a party to a civil action or a third party." Syllabus Point 9, *Hannah*, 213 W.Va. at 708, 584 S.E.2d at 564.

This Court adopted a seven-factor test in *Hannah* governing claims of intentional spoliation of evidence. Those seven factors are (with emphasis on the factor at issue in this appeal):

The tort of intentional spoliation of evidence consists of the following elements: [\*\*539] (1) a pending or potential civil action; (2) *knowledge of the spoliator of the pending or potential civil action*; (3) willful destruction of evidence; (4) the spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action; (5) the intent of the spoliator to defeat a party's ability to prevail in the pending or potential civil action; (6) the party's inability to prevail in the civil action; and (7) damages. Once the first six elements are established, there arises a rebuttable presumption that but for the fact of the spoliation of evidence, the party injured by the spoliation would have prevailed in the pending or potential litigation. The spoliator must overcome [\*\*18] the rebuttable presumption or else be liable for damages.

Syllabus Point 11, *Hannah*, 213 W.Va. at 708, 584 S.E.2d at 564.

This Court considered the meaning of the first factor — whether there was a pending or potential civil action — in *Mace v. Ford Motor Co.*, 221 W.Va. 198, 653 S.E.2d 660 (2007) (*per curiam*). We noted that the dictionary definition of “pending” is:

Begun, but not yet completed; during; before the conclusion of; prior to the completion of; unsettled; undetermined; in process of settlement or adjustment. Thus, an action or suit is “pending” from its inception until rendition of final judgment.

221 W.Va. at 202, 653 S.E.2d at 664 (quoting *Black’s Law Dictionary* (5th Ed. 1979)). We found the dictionary definition of “potential” was “quite distinguishable,” and is this:

Existing in possibility but not in act. Naturally and probably expected to come into existence at some future time, though not now existing[.]

*Id.* We concluded that a “pending or potential civil action” exists where the plaintiff has actually filed a claim, or where there is evidence objectively demonstrating the possibility that the plaintiff was likely to pursue a claim in the future. 221 W.Va. at 203, 653 S.E.2d at 665.

This appeal centers exclusively on the second factor of *Hannah*: the knowledge of the spoliator of a pending or potential civil action. The dispute in this case [\*\*19] is over the degree of proof necessary to fairly say a spoliator “knew” of a pending or potential claim, and thereafter destroyed evidence to foil the plaintiff’s pursuit of the claim.

The plaintiffs in this case contend there is substantial, uncontroverted evidence from which the only reasonable conclusion is that Werner had actual knowledge of the plaintiffs’ claims requiring preservation of the tractor-trailer. Based on Werner’s communication records, the plaintiffs assert Werner was aware that the tractor-trailer had broken down twice on the trip immediately preceding the trip encompassing the accident at issue.<sup>8</sup> Furthermore, the adjuster who visited the accident scene advised Werner of a significant diesel fuel leak and subsequent fire that consumed the tractor and trailer. On the day of the accident, Werner was aware that two of its employees had died in a severe accident. Werner was also aware it faced claims for damage to the guardrail and for environmental remediation. Additionally, the cargo in the trailer was a total loss.

The plaintiffs further assert that Werner is a sophisticated trucking entity that has an in-house legal department and a claims department that is well versed in litigation arising from trucking accidents.

Putting these facts together, the plaintiffs contend that on the same day as the accident, Werner “knew” that numerous potential claims existed. These claims included (1) claims by the plaintiffs for negligent maintenance of the tractor-trailer; (2) product liability claims by the plaintiffs against the manufacturer of the Freightliner tractor-trailer; (3) subrogation claims by Werner (or its insurers) for workers’ compensation payments made to the plaintiffs’ survivors; and [\*540] (4) subrogation claims by Werner for amounts spent on the lost cargo and property damage. Still, within 48 hours of the accident Werner [\*\*21] approved the disposal of the tractor-trailer in a landfill.

Werner argues that the facts laid out by the plaintiffs are nothing more than a case for

<sup>8</sup> Aside from Werner’s communication logs, the record contains no other information about these alleged breakdowns. The log entry, on January 9, 2009, says only [\*\*20] this: “1306 each added to current trip for both breakdowns.” The plaintiff has provided nothing to suggest what part of the tractor-trailer was involved, the cause of the breakdowns, who did the repairs (if any), the extent to which Werner was aware of the breakdowns or repairs, or — most importantly — how these breakdowns may have caused or contributed to the January 12th accident.

"constructive" knowledge, not "actual" knowledge. Werner contends that on the day of the accident, January 12th, no pending or potential claims required the preservation of the tractor-trailer. The investigations by a sheriff's deputy and by Werner's adjuster showed the accident resulted exclusively from snow and ice on the roadway.<sup>9</sup> The carcass of the vehicle was irrelevant to the outcome of the only potential claim from the plaintiffs that Werner knew of: the claim for Nebraska workers' compensation death benefits. Werner also knew that Nebraska's workers' compensation laws barred any negligence suits by the plaintiffs against Werner, including against Werner's maintenance department. The tractor-trailer was also irrelevant to any claims that might be asserted by the State for the damage to the guardrail or the environmental damage, or asserted by the owner of the destroyed cargo.

Put simply, within 48 hours of the accident, Werner argues that the extent of its "actual" knowledge was that the tractor-trailer was a total loss, burned, in pieces, and sitting in five dump or flatbed trailers. Based on that knowledge, Werner authorized disposal of the vehicle.

It was not until over a month later, on February 18th, that Werner received a certified letter from the plaintiffs asking Werner to preserve the remains of the tractor-trailer. Hence, Werner claims it had no "actual knowledge" of any claims by the plaintiffs involving the tractor-trailer until this date. Since it had relinquished all possession, custody, and control of the vehicle to the towing company that then dumped the vehicle in a landfill, Werner asserts it had neither a right nor a duty to extract the remains of [\*\*23] the vehicle

for the plaintiffs. Additionally, Werner asserts the plaintiffs had just as much right to visit the landfill and attempt to inspect the remains of the tractor-trailer, but did not do so.

The circuit court and the parties proceeded below on the notion that, in an intentional spoliation suit, the plaintiff must prove the spoliator "had actual knowledge of the pending or potential litigation." On appeal, the parties again dispute whether the evidence is sufficient to suggest a question of material fact as to whether Werner had "actual" knowledge of the potential claims requiring preservation of the tractor-trailer.

Our scrutiny of the seven-factor test in Syllabus Point 11 of *Hannah v. Heeter*, as well as the text of *Hannah*, reveals no requirement of "actual" knowledge. The tort of intentional spoliation requires only proof of "knowledge of the spoliator of the pending or potential civil action." Syllabus Point 11, *Hannah*.

In the common vernacular, knowledge is an awareness, familiarity or understanding of a fact or of a range of information. "As a general matter, *knowledge* requires awareness of a fact or condition[.]" Bryan A. Garner, *A Dictionary of Modern Legal Usage* 495 (1995). [\*\*24] Digging deeper into epistemology, the Oxford English Dictionary defines knowledge as an "[a]cquaintance with a fact; perception, or certain information of, a fact or matter; state of being aware or informed; consciousness (of anything)." It is also defined as "knowledge of a person, thing, or perception gained through information or facts about it rather than by direct experience" and as an "[i]ntellectual acquaintance with, or perception

<sup>9</sup> The report of the sheriff's deputy suggests that a rough road may also have contributed to the truck sliding on ice. The deputy's narrative says, in part (with [\*\*22] capitalization removed):

At approximately 0230 AM . . . the driver . . . lost control of this tractor trailer owned by Werner Enterprises while crossing an icy snow covered bridge . . . (the bridge was also bumpy from several attempts to patch holes on it) . . . This officer can only speculate that the cause of the accident was the snowy road conditions, and possibly the condition of the bridge.



of, fact or truth; clear and certain mental apprehension; the fact, state or condition of understanding." VIII *The Oxford English Dictionary* 517-18 (2nd Ed. 1991).

[\*541] The Oxford English Dictionary indicates that many of the iterations of the word "knowledge" are "derived from the verb KNOW[.]" To "know" something means to "recognize or distinguish," "to acknowledge," and "to be acquainted with (a thing, a place, or a person)." More specifically, "to know" a fact is "[t]o have cognizance of (something) through observation, inquiry, or information; to be aware or apprised of . . . to become cognizant of, learn through information or inquiry, ascertain, find out." It is also "[t]o apprehend or comprehend as fact or truth; to have a clear or distinct perception or apprehension of; to understand [\*\*25] or comprehend with clearness and feeling of certainty." VIII *The Oxford English Dictionary* at 512-515.

When opposing a motion for summary judgment, a party must show something more than a metaphysical doubt that there is a genuine issue of fact to be tried. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed. 2d 538 (1986) ("When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts."). In the instant case, the plaintiffs assert that Werner is a sophisticated trucking company, and therefore that it should have known of the potential for a product liability lawsuit by the plaintiffs against Freightliner. However, we find no evidence to suggest that when Werner disposed of the tractor-trailer that it had any inkling of (let alone cognizance, awareness, a clear perception, or information that

would impel it to inquire, ascertain, or find out about) a pending or potential product liability lawsuit, by the plaintiffs or anyone else. It is only with hindsight that the plaintiffs can justly say Werner "should have known."<sup>10</sup>

The first evidence that Werner had knowledge of the plaintiffs' potential product liability suit was on February 18, 2009, when they received a letter from a plaintiff's lawyer asking that the tractor-trailer be preserved. This is the primary evidence indicating that a Werner employee had an articulable awareness and understanding of a potential future suit. But this letter was received over a month after the remains of the tractor-trailer had been hauled to a landfill (in pieces loaded on dump and flatbed trailers) and after Werner was alleged to have "spoliated" evidence critical to the plaintiffs' case.

The plaintiffs' case is therefore staked on whether Werner, in the 48 hours after the accident, had knowledge of information that would lead it to inquire further, and to investigate and inquire whether the plaintiffs had some potential claim based upon the tractor-trailer. However, we can find no such evidence that should have impelled Werner to act differently. Within 48 hours of the accident, Werner understood that two of its employees had [\*\*27] died in a horrific accident likely triggered by nothing more than snow and ice.<sup>11</sup> The tractor-trailer had plowed into and through a guardrail, jackknifed, rolled over, and then slid down a steep hillside before being consumed by fire. The vehicle was not towed from the site; it was hauled away in pieces, collected over 15 hours, on five dump and flatbed trailers.

The plaintiffs contend that Werner knew the tractor-trailer had mechanical difficulties which

<sup>10</sup> The circuit court noted in its summary judgment order that it was "disturbed with the conduct of Werner by quickly disposing of the subject [\*\*26] vehicle under the circumstances." However, as with the plaintiffs, this opinion derives from the circuit court's view of the case in hindsight.

<sup>11</sup> The record also contains allusions that the drivers were inexperienced, with only four months of truck-driving experience.

should have caused Werner to suspect a potential product liability action. However, the plaintiffs' only evidence of the mechanical difficulties is an abbreviated note in a communication log with Werner, which says simply, "1306 each added to current trip for both breakdowns." No other documentation or deposition testimony is in the record to describe the nature of these breakdowns, the cause of the breakdowns, who conducted the repairs, or how these mechanical problems in any way caused or contributed to the accident. Moreover, there is nothing to suggest [\*542] these breakdowns were extraordinary, out of the routine, or [\*\*28] indicative of a pattern such that Werner would have been aware of a potential product liability action.<sup>12</sup>

The plaintiffs also contend that Werner itself had various potential claims that should have triggered a more sedulous investigation. For instance, the on-scene adjuster hired by Werner noted potential claims might be filed by the State of West Virginia (for the guardrail and environmental damage) and by the owner of the destroyed cargo. The plaintiffs, however, do not explain why — when liability for these expenses was so clear — that Werner needed to preserve the tractor-trailer to defend either of these potential claims.

Furthermore, the plaintiffs assert that [\*\*29] Werner should have perceived a potential claim by the plaintiffs against Freightliner so that Werner could recover subrogation of the workers' compensation death benefits paid to the plaintiffs'

families, and recover subrogation for the lost cargo and environmental damage. However, to have perceived a claim for subrogation would have required Werner to first perceive that the plaintiffs were naturally and probably expected to bring a suit against Freightliner. We see no evidence of this latter fact.

We agree with the plaintiffs that Werner is a sophisticated entity, with on-staff lawyers familiar with trucking accidents. But, until Werner received the letter on February 18, 2009, we can see no evidence indicating Werner perceived or even suspected impending future litigation over tractor-trailer defects by the plaintiffs. All of the evidence of record suggests that when the tractor-trailer was hauled to the landfill, Werner knew only that the plaintiffs had claims for workers' compensation benefits. The remains of the tractor-trailer were irrelevant to that claim.

The tort of intentional spoliation is designed to preclude a party from destroying evidence with the intent to harm another [\*\*30] party's ability to bring or defend a legal claim. But the tort is not intended to unduly interfere with the rights of individuals to dispose of their property lawfully. Because there is no evidence of record to say Werner was aware, informed, perceived, or had any knowledge that would lead it to the conclusion the plaintiffs had a pending or potential suit when it destroyed the tractor-trailer, the circuit court was correct in granting summary judgment.<sup>13</sup>

<sup>12</sup> As an example of a pattern of breakdowns, see *Appalachian Leasing, Inc. v. Mack Trucks, Inc.*, 765 S.E.2d 223, 226 (W.Va. 2014). The plaintiff in *Appalachian Leasing* bought four Mack trucks that were repeatedly driven or towed back to the dealership because they "(1) would not run, (2) hard to start, (3) transmission problems, (4) overheating, (5) leaking water pump, (6) hoods falling off and (7) cabs falling apart." *Id.* The plaintiff sought damages and sought to rescind the purchase contract because the four trucks failed in their essential purpose of being suitable for off-road coal hauling purposes.

<sup>13</sup> Werner raises one cross-assignment of error, and asserts that under the choice-of-law doctrine *lex loci delicti*, Nebraska law and not West Virginia law should control this case. Nebraska has never recognized the tort of intentional spoliation of evidence. See *McNeel v. Union Pac. R. Co.*, 276 Neb. 143, 156, 753 N.W.2d 321, 332 (2008) ("In Nebraska, the proper remedy for [intentional] spoliation of evidence is an adverse inference instruction."); *State v. Davlin*, 263 Neb. 283, 302, 639 N.W.2d 631, 649 (2002) ("an instruction on the inference that may be drawn from spoliation of evidence is appropriate only where substantial evidence exists to support findings that the evidence had been in existence, in the possession or under the control of the party against whom the inference may be drawn; that the evidence would have been admissible at trial; and that the party responsible [\*\*31] for the destruction of the evidence did so intentionally and in bad faith.").

[\*543] IV.

## CONCLUSION

The circuit court correctly determined that there was no question of material fact as whether Werner had knowledge of the plaintiffs' potential claim when it disposed of the tractor-trailer. The circuit court's January 24, 2014, summary judgment order is therefore affirmed.

Affirmed.

**Dissent by:** Davis; Workman

## Dissent

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Davis, Justice, dissenting:

In this case, two truck drivers were killed while traveling in West Virginia. They were employed by Werner Enterprises ("Werner"). The truck drivers were killed as a result of a single vehicle accident on January 12, 2009. On January 14, 2009, within two days of the accident, Werner had the tractor-trailer destroyed. On or about February 11, 2009, counsel for the estate of one of the truck drivers, Kenneth Williams, wrote a letter to Werner and asked that the tractor-trailer not be destroyed. Counsel was informed by a letter from Werner, dated March 2, 2009, that the tractor-trailer had already been destroyed. The estates of both accident victims sued Werner in a joint action. One of the causes of action was a claim for

intentional spoliation [\*\*33] of evidence. In other words, the intentional destruction of the tractor-trailer.

Here, the plaintiffs argued that the trial court committed error in granting Werner summary judgment on their claim for spoliation of evidence. The majority opinion determined that because the plaintiffs did not meet their burden of showing a genuine material issue of fact was in dispute, summary judgment was appropriate. For the reasons set out below, I dissent.

## Under the Majority Opinion, Defendants Can Now Destroy All Evidence of Their Wrongdoing within 48 Hours of Their Wrongful Conduct

Let me be clear at the outset. The majority opinion has abolished the tort of spoliation of evidence. I do not say this lightly. Under the majority's decision, no plaintiff will ever be able to withstand a summary judgment motion for spoliation of evidence, as long as a defendant destroys evidence within 48 hours of the accident and without immediate notice from the victim to preserve the evidence. The ramification of the majority's ruling is mind-boggling, because it effectively removes even the possibility of a sanction for such outrageous and devious conduct.

The majority opinion spends an inordinate amount of time consulting [\*\*34] dictionary definitions for "knowledge" in order to show that the plaintiffs failed to present any evidence that Werner had

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Werner urges that we adopt the method of analysis outlined in the *Restatement (Second) of Conflict of Laws* § 145 (1971) to guide our choice of applicable law. However, we have specifically rejected the Section 145 analysis, largely because it is inherently subject to manipulation. Further, although Section 145 may have been designed as "a method of analysis that permitted dissection of the jural bundle constituting a tort and its environment," history has taught the Court that such schemes instead "produce protracted litigation and voluminous, inscrutable appellate opinions, while rules get cases settled quickly and cheaply." *Paul v. National Life*, 177 W.Va. 427, 432, 352 S.E.2d 550, 554 (1986).

This Court has, therefore, consistently applied the common-law "*lex loci delicti*" choice-of-law rule; that is, the substantive rights between the parties are determined by the law of the place of injury." *McKinney v. Fairchild Int'l, Inc.*, 199 W.Va. 718, 727, 487 S.E.2d 913, 922 (1997). The tort of intentional spoliation of evidence is, in part, a procedural rule designed to protect local courts from the deliberate destruction of evidence necessary to prosecute claims. Because Werner's disposition of the truck occurred in West Virginia, and allegedly impinged upon the plaintiffs' prosecution [\*\*32] of a West Virginia product liability injury suit, West Virginia's intentional spoliation rules govern this case.

"knowledge" that a lawsuit might be pending. The majority opinion could have used its time more productively and uncovered the fact that Werner appears in the citation to over 220 cases, including numerous wrongful death and personal injury actions naming Werner as a defendant. *See, e.g., Keifer v. Reinhart Foodservices, LLC*, 563 F. App'x 112 (3d Cir. 2014) (personal injury action against Werner); *LaBarre v. Werner Enters., Inc.*, 420 F. App'x 169 (3d Cir. 2011) (personal injury action against Werner by two plaintiffs); *Whittenburg v. Werner Enters. Inc.*, 561 F.3d 1122 (10th Cir. 2009) (injured pickup truck driver brought negligence action against Werner, arising from his collision with stalled tractor-trailer); *Marcano v. Werner Enters., Inc.*, 113 F.3d 1229 (2d Cir. 1997) (person injury action against Werner); *Gruenbaum v. Werner Enters., Inc.*, 270 F.R.D. 298 (S.D. Ohio 2010) (survivor of driver brought wrongful death action against Werner); *Wallace v. Tindall*, No. 09-00775-CV-W-FJG, 2010 U.S. Dist. LEXIS 60456, 2010 WL 2545553 (W.D. Mo. June 18, 2010) (plaintiff brought personal injury action against Werner); [\*544] *Brown v. Werner Enters., Inc.*, No. 04-1664, 2009 U.S. Dist. LEXIS 36257, 2009 WL 1158938 (E.D. La. Apr. 28, 2009) (personal injury action against Werner); *Yeakel v. Werner Enters., Inc.*, No. 3:07cv2054, 2008 U.S. Dist. LEXIS 40471, 2008 WL 2120515 (M.D. Pa. May 19, 2008) (personal injury action against Werner); *Blackshear v. Werner Enters., Inc.*, No. 2004-4-WOB, 2005 U.S. Dist. LEXIS 46109, 2005 WL 6011291 (E.D. Ky. May 19, 2005) (personal injury action against Werner); *Werner Enters., Inc. v. Stanton*, 302 Ga. App. 25, 690 S.E.2d 623 (Ga. Ct. App. 2010) (two wrongful death actions against Werner); *Schmitt v. Werner Enters., Inc.*, 277 A.D.2d 1003, 716 N.Y.S.2d 505 (2000) (motorist brought action against Werner to recover for physical and psychological injuries [\*35] sustained as a result of accident); *Abraham v. Werner Enters.*, No. E-98-077, 1999 Ohio App. LEXIS 2128, 1999 WL 299540 (Ohio Ct. App. May 14, 1999) (personal injury action against Werner); *Forklift*

*Sys., Inc. v. Werner Enters.*, No. 01-A-01-9804-CH-00220, 1999 Tenn. App. LEXIS 324, 1999 WL 326159 (Tenn. Ct. App. May 25, 1999) (plaintiff sued Werner for property damage); *Werner Enters., Inc. v. Brophy*, 2009 WY 132, 218 P.3d 948 (Wyo. 2009) (injured motorist and wife brought action against Werner for personal injuries and loss of consortium arising out of accident).

More importantly, Werner is not new to claims for destruction of evidence. For example, in *Ogin v. Ahmed*, 563 F. Supp. 2d 539 (M.D. Pa. 2008), the plaintiff was injured in an accident on October 4, 2005, when Werner's truck driver ran into the vehicle the plaintiff was driving. Prior to commencing the litigation, the plaintiff's counsel sent Werner a letter specifically requesting that it not destroy any of the driver's logs. Once the litigation began, the plaintiff requested the driver's logs. Werner informed the plaintiff that it had destroyed the driver's logs for the critical period right before the accident: September 4, 2005, through September 26, 2005. The plaintiff filed a motion to have a spoliation of evidence adverse instruction be given to the jury at the trial. The court granted the motion and ruled that, "[a]t the time of trial, the Court will instruct the jury as to the [\*36] proper adverse inference they may draw from Defendants' destruction of the actual driver's logs for the period from September 4, 2005, through September 26, 2005." *Ogin*, 563 F. Supp. 2d at 546.

Similarly, in *Duque v. Werner Enterprises, Inc.*, No. L-05-183, 2007 U.S. Dist. LEXIS 23473, 2007 WL 998156 (S.D. Tex. Mar. 30, 2007), the plaintiff was injured by a truck being driven by a driver for Werner. Prior to the litigation, the plaintiff's counsel requested Werner not to destroy the tractor-trailer. When the plaintiff's expert went to inspect the tractor-trailer, the expert found that the tractor-trailer had been repaired. The plaintiff subsequently filed a motion for sanctions against Werner that included a spoliation of evidence jury instruction. The trial court granted the motion, in part, as follows:



The Court orders the issuance of a permissive inference jury instruction as to Defendant Werner regarding the repair of the tractor and trailer, the precise wording of which will be determined when jury instructions are considered by the Court before trial. The Court also grants Plaintiff monetary sanctions against Defendant Werner in the amount of \$6,921.35 for Plaintiff's expert's expenses and fees, \$3,750.00 for Plaintiff's counsel's expenses and fees, and \$10,000.00 as punitive [\*\*37] sanctions for the significant prejudice it caused Plaintiff by altering this critical evidence. This combination of jury instruction and monetary assessment against Defendant Werner is the least severe sanction which will adequately address Defendant Werner's misconduct. All other relief requested is hereby denied.

*Duque*, 2007 U.S. Dist. LEXIS 23473, 2007 WL 998156, at \*7.

These cases clearly demonstrate that Werner has a practiced pattern of destroying evidence to preclude its use in future litigation against it. While other courts have imposed sanctions on Werner for destroying evidence, the majority of our Court rewards Werner's reprehensible conduct.

This Court previously has noted that "[a] party's precise knowledge or state of mind concerning a situation often cannot be determined by direct evidence, but must instead be shown indirectly through circumstantial evidence." *Mace v. Ford Motor Co.*, 221 W. Va. 198, 204, 653 S.E.2d 660, 666 (2007) (citations omitted). The plaintiffs in this case presented sufficient circumstantial evidence [\*\*545] to raise a material issue of fact as to whether Werner had knowledge that litigation might occur as a result of the accident. The plaintiffs argued that Werner was an experienced trucking company. My cursory review of litigation that Werner has been involved with supports the [\*\*38] allegation that Werner has extensive

litigation experience as well. Such extensive litigation experience ultimately explains why Werner destroyed the tractor-trailer. The plaintiffs also presented evidence that Werner's investigator provided a written report and photographs from the accident scene to Werner electronically on the date of the accident, thus further evidencing Werner's appreciation of the need to quickly document the scene of the accident. In sum, the plaintiffs presented sufficient circumstantial evidence to permit a jury to consider whether they had satisfied the elements of a claim for intentional spoliation of evidence. I further agree with the analysis set forth in Chief Justice Workman's dissenting opinion detailing the myriad of ways in which the plaintiffs' evidence is sufficient to survive Werner's summary judgment motion.

Werner learned from its investigator that there had been damage to a guardrail, the tractor-trailer had overturned, there had been a significant diesel fuel leak, and a subsequent fire engulfed the tractor-trailer. Werner further learned that both of its employees were killed in the crash. Werner also was informed that the State would be making [\*\*39] a claim for damage done to the guardrail and that claims likely would be made for environmental remediation. Further, based on its own communication records, Werner knew that the tractor-trailer had broken down on two separate occasions on a trip immediately preceding the fatal accident. The majority opinion has described this evidence as being no more than a scintilla of evidence of Werner's knowledge. This is nonsensical. If a defendant is going to be permitted to destroy evidence within two days of an accident, then no plaintiff will ever be able to present evidence of the defendant's "knowledge" that a potential lawsuit would follow. In other words, the majority has accomplished its implicit intent of abolishing a cause of action for intentional spoliation of evidence.

Based upon the foregoing, I strongly dissent from the majority's opinion in this case.

**Workman, Chief Justice, dissenting:**

Today our Court violates a bedrock principle of our summary judgment jurisprudence: a court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial. Syl. Pt. 3, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). With regard to summary judgment, we have stated that "[t]he essence of the inquiry the court must make is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 61, 459 S.E.2d 329, 338 (1995) (citation omitted.). "In assessing the factual record, we must grant the nonmoving party the benefit of inferences, as '[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge[.]'" *Id.* at 59, 459 S.E.2d at 336 (citation omitted).

The majority, sitting as a three-member jury, examined the record and could not uncover the proverbial smoking gun in Werner's documents that prove it had actual knowledge of a *potential* lawsuit against the manufacturer of the tractor-trailer. I emphasize the word *potential* because there is virtually no way the plaintiffs could have a *pending* lawsuit within 48 hours of the fatal vehicle accident. Undoubtedly, the families were making funeral arrangements while the evidence was being destroyed.

This decision is clearly wrong because it creates a new and unattainable burden on a plaintiff in an intentional spoliation claim. Even more disturbing, the decision [\*\*41] sends an iniquitous message: a defendant who rushes to destroy evidence will be rewarded, not sanctioned.

Viewing the record in a light most favorable to the plaintiffs, material issues of fact [\*546] exist as to

whether Werner had actual knowledge of potential litigation involving the tractor-trailer's manufacturer at the time it sent this essential evidence to a landfill. Therefore, the plaintiffs presented sufficient evidence to survive Werner's motion for summary judgment. The majority makes no mention of the findings of Kathleen J. Robison, the plaintiffs' expert on spoliation claims. After reviewing the documents relating to this litigation, Ms. Robison recognized that Werner's accident investigator, Mark Griffith of Crawford and Company, reported to Werner that Mr. Rutledge was trapped inside the truck and conscious before the fire spread and killed him. Ms. Robison determined: "Werner knew truck fires after accidents were rare, and this would have put Werner on notice [that] something could be wrong with the truck." Ms. Robison ultimately concluded that

[b]ased upon industry investigative and claims handling standards and practices, it was reasonable to anticipate based upon the type of deaths [\*\*42] Mr. Williams and Mr. Rutledge endured that litigation would ensue. Due to the deaths of the drivers the tractor-trailer would be key evidence in ensuing litigation and should have been preserved. Werner Enterprises had at the time the professional experience in handling significant tractor-trailer accidents involving significant injuries. It was reasonable for them to anticipate that litigation would ensue and that the tractor-trailer would be prime evidence that must be preserved.

While weighing the evidence, the majority apparently rejected Ms. Robison's conclusions. However, this type of fact-finding is a function of the jury, not a reviewing court.

Based on the circumstantial evidence alone, a reasonable person could conclude that Werner had actual knowledge of potential lawsuits against the manufacturer of the tractor-trailer. In fact, Justice

Davis' dissent reveals that Werner is no stranger to claims for spoliation of evidence and other courts have imposed sanctions on Werner for destroying evidence.

I further dissent from the majority's gratuitous suggestion that because the "investigations by a sheriff's deputy and by Werner's adjuster showed the accident resulted exclusively [\*\*43] from snow and ice on the roadway[,] the plaintiffs could not have a potential claim against the manufacturer of the tractor-trailer. This inference misses the point entirely; Mr. Rutledge's *death* resulted from a fire due to a significant diesel fuel leak.

A crashworthiness case involving a motor vehicle is sometimes referred to as a 'secondary impact,' 'second collision,' or 'enhanced injury' case. 62A Am.Jur.2d *Products Liability* § 1020 (1997). This is because a defendant's liability is based on an alleged failure to protect the occupants of a vehicle from the *consequences* of the crash rather than liability for the crash itself.

*Estep v. Mike Ferrell Ford Lincoln-Mercury, Inc.*, 223 W.Va. 209, 216, 672 S.E.2d 345, 351 (2009). See Syl. Pt. 1, *Blankenship v. General Motors Corp.*, 185 W.Va. 350, 406 S.E.2d 781 (1991) ("A complaint against the seller of a motor vehicle states a cause of action under West Virginia law if the complaint does not allege that a vehicle defect *caused* a collision, but alleges only that the injuries sustained by the occupant as a result of the collision were *enhanced* by a design defect in the vehicle.").

In this case, the plaintiffs' lawsuit against the manufacturer of the tractor-trailer was dismissed on summary judgment because they lacked this critical piece of evidence to determine if a design defect caused this fatal fire. It is patently unfair [\*\*44] to now deny the plaintiffs their day in court on their claims against Werner for its intentional spoliation of this evidence. For the foregoing reasons, I respectfully dissent.