

Florilli Transp., LLC v. W. Express, Inc.

United States District Court for the Western District of Missouri, Western Division

December 29, 2015, Decided; December 29, 2015, Filed

Case No. 14-CV-00988-DW

Reporter

2015 U.S. Dist. LEXIS 183176 *

FLORILLI TRANSPORTATION, LLC, Plaintiff, v.
WESTERN EXPRESS, INC., and LINDA K. WATERS,
Defendants.

Core Terms

truck, speed, spoliation, retention, summary judgment,
recorded, destruction, causation, destroyed

Counsel: [*1] For Florilli Transportation, LLC, Plaintiff:
Edward C Gillette, LEAD ATTORNEY, Gillette Law
Firm, P.A., Mission, KS; Kyle A Branson, LEAD
ATTORNEY, Mogenson & Branson LLC, Mission, KS;
Michael S. Mogenson, LEAD ATTORNEY, Mogenson &
Branson LLC, Mission, KS; Paul Hasty, Jr., Hasty &
Associates, LLC, Overland Park, KS.

For Western Express, Inc., Linda K. Waters,
Defendants: Shawn M. Rogers, LEAD ATTORNEY,
Baker, Sterchi, Cowden & Rice, LLC - KCMO, Kansas
City, MO; Angela M. Higgins, Baker, Sterchi, Cowden &
Rice, LLC - KCMO, Kansas City, MO.

Judges: Dean Whipple, United States District Judge.

Opinion by: Dean Whipple

Opinion

ORDER

Before the Court is the Defendant Western Express, Inc. ("Western Express") and Linda Waters's ("Waters") (collectively, the "Defendants") Motion for Summary Judgment (the "Motion"). See Doc. 50. The Plaintiff Florilli Transportation, LLC ("Florilli") filed a response in opposition (Doc. 53), and Defendants filed a reply brief (Doc. 57). For the reasons set forth below, the Motion is DENIED.

I.¹

On May 5, 2014, Matthew Gentry ("Gentry") was driving a tractor/trailer truck for Florilli, and Waters was driving a tractor/trailer truck for Western Express. Florilli alleges that Waters negligently [*2] operated her truck and forced Gentry off the road. Specifically, Florilli alleges that the "accident occurred as a result of the negligence of defendant Waters, in failing to maintain a proper lookout, failing to maintain proper control, and failing to yield the right of way on an entrance ramp to I-35 and on I-35 she forced [Gentry's] vehicle off the roadway where it overturned." Complaint, at ¶ 6. As a result of the accident, Florilli asserts a negligence claim against Waters and Western Express.

At the time of the accident, Gentry's truck contained a PeopleNet electronic device. PeopleNet is a vendor that provides operational data for a trucking fleet. If there is a triggering event such as a hard brake, the device records the truck's speed on a second-by-second ("SBS") basis. Curtis Thayer ("Thayer") is Florilli's safety manager. Shortly after the accident, Thayer reviewed the SBS data recorded by PeopleNet. According to Thayer, PeopleNet recorded Gentry's speed at 25-30 miles per hour seconds before Gentry applied a hard brake. Thayer only reviewed the SBS data on a computer screen; he did not print the data or electronically forward it to anyone else.

Under PeopleNet's retention [*3] policy, SBS data is

¹The following facts are uncontroverted by the parties or deemed uncontroverted by the Court. Only those facts and issues necessary to resolve the Motion are discussed below, and those facts and issues are simplified to the extent possible. Many of the following facts are taken from the parties' briefs, without further quotation or attribution unless otherwise noted.

preserved for only 6 or 12 months.² Thayer, however, erroneously believed that SBS data could be retrieved indefinitely. Thayer testified that "[w]e thought they were automatically archived . . . I was under the assumption, mis-guided, that we could still archive those records . . . lesson learned . . . [i]f there is any accident, period, I am printing all the information out immediately." Doc. 53-3, p. 5, 11.

Because of Thayer's misunderstanding, Florilli did not instruct PeopleNet to preserve SBS data beyond the 6 or 12 month retention period. The SBS data was thus destroyed and is no longer available. Thayer admitted that Florilli should have preserved the SBS data. Thayer also agreed that a SBS breakdown of Gentry's speed would have been far more valuable to assess the accident than any other document Florilli produced to Defendants.

Florilli filed this case on November 4, 2014, one day before the expiration of a 6 month retention period. On April 17, 2015, before the expiration of a 12 month retention period, Defendants served their first request for production to Florilli. In relevant part, Defendants requested that Florilli produce the electronic device from Gentry's[*4] truck that recorded speed, "[a]ny data acquired through the download of the [device] on the Subject tractor for May 5, 2014," and "[h]ard brake incident(s), last stop record or similar data collected by any on-board [device] . . . for May 5, 2014[.]" Doc. 51-4.

Florilli produced some but not all of this information. Florilli obtained and produced the truck's speed by the minute as recorded by PeopleNet. Florilli also made Gentry's truck and the PeopleNet device available to Defendants for examination. The SBS data, however, had been destroyed by the time Florilli's discovery responses were due. As a result, Florilli was unable to produce the SBS data.

Discovery has closed, and Defendants now move for summary judgment. Defendants' first argument is that this case should be dismissed because Florilli failed to preserve the SBS data.³ Defendants argue that the

²At his deposition, Thayer referred to a document from PeopleNet which states that "retained data onboard event recording, 6 or 12 months." Doc. 51-2, p. 8-10. Neither Florilli or Defendants have shown whether the SBS data was governed by a 6 or 12 month retention policy. As a result, the parties have failed to show when the SBS data was actually destroyed.

³Although the parties inconsistently and confusingly refer to

spoliation of this evidence "deprives them of a full defense[.]" Defendants' second argument is that Florilli cannot prove causation because Florilli's "own evidence does not establish any consistent theory of speed and position from which the jury could reasonably make a non-speculative determination of the circumstances of the incident." Both [*5] arguments are addressed below.

II.

Summary judgment is appropriate "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." *Wilkie v. Department of Health & Human Servs.*, 638 F.3d 944, 949 (8th Cir. 2011) (citations and quotations omitted). If the moving party meets its initial burden, the nonmoving party cannot rest on the mere allegations of its pleadings. *Conseco Life Ins. Co. v. Williams*, 620 F.3d 902, 910 (8th Cir. 2010). Instead, the nonmoving party must "come forward with specific facts showing that there is a genuine issue for trial." *Id.* "A genuine issue of material fact exists if a reasonable jury could return a verdict for the party opposing the motion." *Humphries v. Pulaski Cnty. Special Sch. Dist.*, 580 F.3d 688, 692 (8th Cir. 2009).

III.

First, Defendants move for summary judgment based on Florilli's failure to preserve the SBS data. A district court's "inherent power includes the discretionary ability to fashion an appropriate sanction for conduct which abuses the judicial process." *Stevenson v. Union Pacific R.R., Co.*, 354 F.3d 739, 745 (8th Cir. 2004). Abusive litigation conduct includes spoliation, which is defined as "the intentional destruction, mutilation, alteration, or concealment of evidence." *Insignia Sys., Inc. v. News Am. Mktg. In-Store, Inc.*, 2009 U.S. Dist. LEXIS 14685, 2009 WL 483850, at * 4 (D. Minn. Feb. 25, 2009) (quoting Black's Law Dictionary 1409 (7th ed. 1999)).

A party guilty of [*6] spoliation is subject to an adverse inference instruction and the dismissal of a claim. *Oros & Busch App. Tech, Inc. v. Terra Renewal Servs., Inc.*, 2014 U.S. Dist. LEXIS 28728, 2014 WL 897405, at * 3 (E.D. Mo. Mar. 6, 2014). A spoliation sanction generally "requires a finding of intentional destruction indicating a desire to suppress the truth." *Greyhound Lines, Inc. v.*

"the data" as well as the "second-by-second" data, it appears their dispute primarily revolves around the SBS data.

[Wade, 485 F.3d 1032, 1035 \(8th Cir. 2007\)](#). If, however, a party destroys evidence after litigation has commenced, it is not an abuse of discretion to enter a sanction "even absent an explicit bad faith finding." [Gallagher v. Magner, 619 F.3d 823, 845 \(8th Cir. 2010\)](#). That said, if "a court expressly finds . . . that there is no evidence of intentional destruction of evidence to suppress the truth, then the district court also acts within its discretionary limits by denying sanctions for spoliation of evidence." *Id.* The Court must also find that the destruction prejudiced the opposing party. [Hallmark Cards, Inc. v. Murley, 703 F.3d 456, 460 \(8th Cir. 2013\)](#).

Here, Defendants point to various facts in support of their request for the sanction of dismissal. Defendants argue that Florilli "filed this action before the expiration of the minimum of six months for which the data was supposed to be preserved. Plaintiff's director of safety admits that the PeopleNet data was so important that he reviewed it in evaluating whether to sue defendants . . . If there was a six month retention policy in place for the PeopleNet data, it would have [*7] been in existence on the dates that [Florilli's attorney] sent his preservation letter to defendants and when this lawsuit was filed . . . [i]f the data was on a twelve-month retention schedule, it should have been in existence when Western Express served its first request for production and first interrogatory to plaintiff, seeking this information." *See* Doc. 51, p. 13-15.

Even if all of these facts are true, however, they are not inconsistent with Thayer's mistaken belief that the SBS data would be archived and accessible at any time. Thayer provided a reasonable explanation for failing to preserve the SBS data, and there is no evidence that his explanation was untruthful or contradicted by other facts. Although Thayer may be negligent for failing to preserve the data and for failing to confirm his understanding of the retention policy, the record does not show that the SBS data was intentionally destroyed with a desire to suppress the truth. [Gallagher, 619 F.3d at 845](#) (holding that "where a court expressly finds, as here, that there is no evidence of intentional destruction of evidence to suppress the truth, then the district court also acts within its discretionary limits by denying sanctions for spoliation [*8] of evidence").

The Defendants have also failed to establish prejudice. "In evaluating prejudice, we have looked to whether an allegedly harmed party took other available means to obtain the requested information." *Id.* Here, Defendants have not shown that they attempted to obtain the SBS data directly from PeopleNet, or that they requested

(formally or informally) any information directly from PeopleNet. Under all these circumstances, a spoliation sanction—especially the most drastic sanction of dismissal—is not warranted. Consequently, Defendants are not entitled to summary judgment.⁴

Defendants' second argument is based on causation. According to Defendants, Gentry's speed "prior to and at the time of the alleged near-collision is absolutely critical to establishing plaintiff's negligence theory, but the evidence that plaintiff has offered on the matter is conflicting." Doc. 51, p. 19; Doc. 57, p. 13-17. In particular, Thayer testified that PeopleNet showed Gentry's truck was travelling between 25-30 miles per hour near the time of the accident, but Gentry testified he was travelling up to 45 miles per hour. Based on this conflicting testimony and other alleged discrepancies, Defendants [*9] argue that Florilli cannot show that Waters caused the accident.

Defendants' argument is not supported by the applicable facts or law. First, Defendants have failed to show that Gentry's speed is dispositive on the issue of causation. They have not, for example, shown that the accident would or would not have occurred at a certain speed. Moreover, Waters testified that she didn't know how fast she was travelling around the time of the accident. Additionally, Florilli's theory of liability relies on facts other than the exact speed and position of the trucks, including that Waters "simply got impatient, didn't keep a proper lookout, and wound up forcing two motorists off the roadway in order to avoid colliding with the tractor/trailer truck she was driving." Doc. 53, p. 12.

Second, Missouri law provides that "[g]enerally causation is a jury question." [Baker v. Eckelkamp, 760 S.W.2d 178 \(Mo. Ct. App. 1988\)](#). Consequently, the jury must weigh the evidence and decide whether the accident was caused by the drivers' speed and/or other facts. Any conflicting testimony about the speed and/or positions of the trucks must also be resolved by the jury.

⁴ At trial, Defendants may renew their request for a spoliation sanction. As recently explained by one court, "[m]any of the considerations which determine whether a spoliation sanction is appropriate . . . are factual matters which are best decided by a trial judge in the context of a trial, where the court can consider the precise nature of the proof at trial, and the credibility of various witnesses." [Gilliland v. Harley-Davidson Motor Co. Grp., LLC, 2015 U.S. Dist. LEXIS 2778, 2015 WL 134333, at *4 \(D. Neb. Jan. 8, 2015\)](#) (citations and quotations omitted). Any such request shall be made outside the presence of the jury.

Ross v. Presley, 359 S.W.3d 156, 159 (Mo. Ct. App. 2012) ("Negligence is always a question for the jury when there is conflicting evidence on the issue or where, the [*10] facts being undisputed, reasonable minds could draw different conclusions therefrom.")⁵ For these reasons, Defendants are not entitled to summary judgment on the issue of causation.

IV.

For the foregoing reasons, it is hereby ORDERED that Defendants' Motion for Summary Judgment (Doc. 50) is DENIED.

IT IS SO ORDERED.

Date: December 29, 2015

/s/ Dean Whipple

Dean Whipple

United States District Judge

End of Document

⁵ Defendants also suggest that the accident was caused by Gentry's use of a cell phone while driving. It is for the jury, not the Court, to consider the evidence and make that determination.