UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No.: 8:12-cv-275-T-23AEP

VICKI LYNNE MCBRIDE,

Plaintiff,

v.

COCA-COLA REFRESHMENTS, USA, INC.,

Defendant.
_____/

MOTION FOR ORDER COMPELLING DISCOVERY
OR IN THE ALTERNATIVE,
MOTION FOR SANCTIONS DUE TO SPOLIATION OF EVIDENCE

Plaintiff, VICKI LYNNE MCBRIDE, files this Motion for Order Compelling Discovery pursuant to Rule 37 of the Federal Rules of Civil Procedure, and Local Rules 3.04 and 3.01. In the alternative, the Plaintiff moves this Court for sanctions against the Defendant based upon its spoliation of evidence crucial to the Plaintiff's prima facie case.

FACTS

1. This case is a vehicle negligence case, removed from the Twelfth Judicial Circuit of Florida.

2. Plaintiff alleged in her complaint that on April 1, 2011, her automobile was rear-ended at a stoplight by a Coca-Cola Refreshments, USA semi-tractor delivery truck driven by Donald Thompson, a Coca-Cola Refreshments USA employee. Discovery is ongoing. Both sides

have exchanged and answered requests to produce.[1]

3. On April 4, 2011, three days after the accident, the Defendant, acting through its claims administrator, Sedgwick Claims, interviewed Michelle Bender, a witness to the accident, and Mr. Thompson's supervisor, Dirk Brown. According to the Defendant's Response to the Plaintiff's Request to Admit, these interviews were taken "*in anticipation of litigation*," and therefore privileged.[2]

4. On April 6, 2011, the Defendant then took the statement of its driver, Len Thompson. According to its privilege log, this statement also falls under the work-product privilege, as it was taken "*in anticipation of litigation."*[3]

5. On the same day, counsel for the Plaintiff notified Sedgwick Claims CMS of its representation of the Plaintiff. The letter included the date of the accident, the fact that she had been injured, and demanded disclosure of the Defendant's insurance information.[4] The same day, The Hartford Insurance Company, seeking subrogation as the Plaintiff's health insurer, notified the Defendant by registered letter that the Plaintiff was injured as a result of the accident with its driver and attributed liability for the accident to the Defendant.[5]

6. On April 14, 2011, the Defendant obtained the property damage appraiser's estimate for the Plaintiff's vehicle, and took 10 photographs of the Plaintiff's vehicle. According to its response, this statement also falls under the work-product privilege, as it was taken "*in*

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[1] In response to some of the requests, the Defendant responded "none"; In others, a privilege is claimed, with a reference to an accompanying privilege log. This log, along with the Defendant's responses and incorporated requests to produce, is attached to this motion as Exhibit "A".
[2] See Exhibit A, Defendant's Response and privilege log, document #4 and #5.
[3] *Id.*, privilege log, document #3.
[4] This letter is attached to this motion as Exhibit "B."
[5] This letter is attached to this motion as Exhibit "C."

anticipation of litigation."[6]

7. On April 22, 2012, counsel for the Plaintiff received a response letter from Sedgwick Claims acknowledging the Plaintiff's April 6, 2012 letter, and its role as the claim administrator for the Defendant. The letter sought a recorded interview of the Plaintiff regarding the accident, information about her injuries, her treatment status and a medical authorization.[7]

MOTION TO COMPEL

8. Pursuant to the Local Rule 3.01 and 3.04, the Plaintiff directs the Court to the following requests, the Defendant's answers and objections, and her reason this motion should be granted:

9. PLAINTIFF'S REQUEST 2: "**Copies of any communication, dispatch, scheduling, or appointment documents, emails or logs pertaining to the activities or assignments of the employee involved in the accident on the day alleged.**"

DEFENDANT'S ANSWER: "**None."**[8]

REASON FOR GRANTING THE MOTION: Contrary to this answer, in his deposition, Defendant's driver Len Thompson testified that he was supplied with a physical manifest[9] as well as a physical itinerary[10] by the Defendant on the morning of the accident, maintained a log of his

[6] See Exhibit A, Defendant's Response and privilege log, document #1.
[7] This letter is attached to this motion as Exhibit "D."
[8] In response to a subsequent letter from Plaintiff's counsel seeking production of these documents, the Defendant, through its counsel, indicated that these documents had been destroyed by the Defendant. The Plaintiff's letter and the Defendant's response are attached to this motion as Exhibit "E" and "F," respectively.

[9] See *Deposition of Donald Thompson*, Page 19, lines 17-25 and pg. 20, lines 1-4, and lines 14-22. attached to this motion as Exhibit "G."
[10] *Id*., Page 34, lines 1-15

hours,[11] and used, on the day of the accident, a Coca-Cola issued handheld computer to communicate with his supervisors and customers.[12]

Under the Federal Rules of Civil Procedure, parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense. Fed.R.Civ.P. 26(b)(1). This request seeks physical and electronic evidence of the route, schedule, appointments, speed and activities of the Defendant's driver during the day of the accident with the Plaintiff. The documents sought are clearly relevant, and indeed essential to the presentation if the Plaintiff's prima facie case and the possible impeachment of the Defendant driver.

10. PLAINTIFF'S REQUEST 4: "**A copy of the employee handbook, checklist(s) or any other document pertaining to the driving and/or delivery regulations or procedures promulgated by the Defendant in effect on the date of the accident alleged.**"

DEFENDANT'S ANSWER: "**None."**

REASON FOR GRANTING THE MOTION: If the answer is taken on its face, it is difficult to conceive that a large corporation the size of Coca-Cola Refreshments USA, operating throughout the state with hundreds of delivery vehicles, has no written regulations, procedures, or employee handbooks directed to the activities of its drivers. In contrast with its answer, however, the Defendant's driver, Donald Thompson, testified in his deposition that he had to complete a driving pretest the morning of the accident, and referred several times to the procedures that Defendant drivers had to follow at the time of the accident, including the use of checklists.

This request seeks all written materials that pertain to the driver policies, procedures and regulations promulgated by the Defendant on the day of the alleged accident with the Plaintiff.

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[11] *Id.*, Page 17, lines 16-25 and pg. 18, lines 1-2.
[12] *Id.*, Page 56, lines 18-25; Pages 57-61, lines 18-25, and Page 62, lines 1-9.

Again, the documents sought are not only relevant but essential to the presentation if the Plaintiff's prima facie case and the possible impeachment of the Defendant driver. Fed.R.Civ.P. 26(b)(1).

11. PLAINTIFF'S REQUEST 8: "**A complete copy of the employment file of the employee involved in the accident on the day alleged.**"

DEFENDANT'S ANSWER: "**Objection. This request calls for information that is protected as private information. Moreover, the request is not reasonably calculated to lead to the discovery of relevant evidence. See Privilege Log."**

REASON FOR GRANTING THE MOTION: Under Florida law, a Defendant does not have standing to object to a request to produce on the basis of its employees' privacy rights. *See Alterra Healthcare Corp. v. Estate of Shelley,* 827 So.2d 936, 940 (Fla.2002).[13] While Florida recognizes an individual's right of privacy in article I, section 23 of the Florida Constitution, the right is personal to the individual. *Id* . at 941. *See Moss v. GEICO Indem. Co*. **(**Slip Copy), 2012 WL 682450 M.D.Fla., 2012. The requested file undoubtedly contains information concerning Donald Thompson's training, competence, abilities, shortcomings, accolades and disciplinary history, if any, all of which is relevant. *Id. At 4; See also Simon Turner v. GEICO Indemnity Co.,* No. 1:11–20546–civ–Martinez/McAliley (S.D.Fla. Sept. 8, 2011) (order granting motion to compel documents relating to job performance).

12. The Plaintiff does not seek, nor does it ask this Court to compel, information regarding Mr. Thompson's compensation, health records, financial benefits or pension

[13] The Plaintiff asked the Defendant to remove this file from its privilege log, and cited this case in its letter as support. The Defendant, through its counsel, wrote that it "reject[s] your contention that Coca-Cola is unable to object to the production of its employee's personnel file, an employee who is a named defendant in this action." *See* Exhibit "F." Mr. Thompson is not a defendant in this action.

information. Any other information in the file is patently relevant to the Plaintiff's case, and should be produced.

Memorandum of Law

13. It is axiomatic that the scope of discovery is broad "in order to provide parties with information essential to the proper litigation of all relevant facts, to eliminate surprise and to promote settlement." *Coker v. Duke & Co., Inc.,* 177 F.R.D. 682, 685 (M.D.Ala.1998). The Federal Rules of Civil Procedure "strongly favor full discovery whenever possible." *Farnsworth v. Proctor & Gamble Co.,* 758 F.2d 1545, 1547 (11th Cir.1985). Federal Rule of Civil Procedure 26(b)(1) allows parties to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense.

14. Relevance is "construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 351, 98 S.Ct. 2380, 57 L.Ed.2d 253(1978).

15. Indeed a, discovery request "should be considered relevant if there is any possibility that the information sought may be relevant to the subject matter of the action." *Roesberg v. Johns–Manville Corp.,* 85 F.R.D. 292, 296 (E.D.Pa.1980); *see also Deitchman v. E.R. Squibb & Sons, Inc.,* 740 F.2d 556 (7th Cir.1984) (If Court is in doubt concerning the relevancy of requested discovery the discovery should be permitted.).

16. The failure of the Defendant to comply with properly served Requests to Produce has necessitated the filing of the instant motion. The Defendant should be ordered to produce documents that are fully responsive to the cited requests, *supra*.

MOTION FOR SANCTIONS
IN THE ALTERNATIVE
DUE TO SPOLIATION OF EVIDENCE

17. The Defendant has indicated, by way of letter, that it is unable to produce the documents sought in Plaintiff's Requests for Production Two and Four, as outlined, *supra*, because all of the requested documents have been destroyed.

18. If these crucial and relevant documents have actually been destroyed by the Defendant before they could be produced to the Plaintiff, they were done so with the full understanding that the matters to which they pertained would be relevant to the accident alleged, and should have been preserved.

19. It is inarguable that the Defendant began taking statements, interviews and photographs of the vehicles involved immediately after the accident occurred, on April 4, 2012. It refused to provide any of these documents to the Plaintiff, indicating that they were made, in the words of their response, "*in anticipation of litigation*." The Defendant then evidently destroyed all documents and information related to the activities, route, manifest, delivery log and schedule of the truck that injured the Plaintiff, (*see* Request Number 2, *supra*.). It also destroyed, according to its counsel, any handbooks, checklists and materials pertaining to the policies and procedures governing the conduct of the employee driver on the date of the incident. (*see* Request Number 4, *supra*.)

20. This conduct is inexcusable, particularly as it occurred while the Defendant was, in the words of their own response, anticipating litigation.

21. This Defendant cannot, in good faith, assert on one hand that they were anticipating litigation regarding this accident, yet on the other be excused from producing these documents

when requested because they have been destroyed. This Defendant must be held accountable for its actions through the application of appropriate sanctions by this Court.

Memorandum of Law

22. "Spoliation" is the intentional destruction, mutilation, alteration, or concealment of evidence. *St. Cyr v. Flying J Inc.,* 2007 WL 1716365, (M.D. Fla. June 12, 2007). Federal law governs the imposition of sanctions for spoliation of evidence in a diversity action. *Martinez v. Brink's, Inc.*, 171 Fed.Appx. 263, 269 (11th Cir. 2006).

To establish spoliation, the party seeking sanctions must prove:[14]

a. **That the missing evidence existed at one time.** The Defendants admit in their counsel's letter that the materials existed, but were destroyed after six months. Further, as briefed and cited herein, Donald Thompson testified as to the existence of the requested documents in his deposition.

b. **That the alleged spoliator had a duty to preserve the evidence.** There can be no dispute that no dispute in this case that the Defendant destroyed evidence when litigation was reasonably foreseeable, and Florida district Court have consistently upheld the duty of a potential litigant to preserve evidence once litigation is likely. *E.g., Schulte v. NCL (Bahamas) Ltd.,* Slip Copy, 2011 WL 256542 S.D.Fla., 2011, at 3. ("Once defendant was aware that a claim might be made based upon the plaintiff's slip and fall incident, the defendant had a duty to preserve evidence and counsel for the defendant had a duty to advise the defendant to do so."). Again, the Defendant has already asserted that it was collecting statements and photographing the Plaintiff's vehicle in "anticipation of litigation" within three days of the accident.

c. **That the evidence was crucial to the movant being able to prove its prima facie**

[14] *See Floeter v. City of Orlando,* 2007 WL 486633, (M.D.Fla. Feb. 9, 2007).

case or defense. The documents and materials that have been destroyed by the Defendant in this case are crucial to proving its case, and establishing the veracity of the Defendant's driver. The materials provide virtually all of the objective documentary evidence available to the Plaintiff to establish the facts of its case at trial, and the intentional destruction of these materials by the Defendant has prejudiced the Plaintiff's ability to prove its case and respond to the affirmative defenses asserted by the Defendant.

The Plaintiff has no other way to obtain these materials, and no other copies are known to exist.

A party's failure to preserve evidence rises to the level of sanctionable spoliation "only when the absence of that evidence is predicated on bad faith," such as when a party purposely loses or destroys relevant evidence. *Bashir v. Amtrak,* 119 F.3d 929, 931 (11th Cir.1997). "Mere negligence" in losing or destroying records is not enough for an adverse inference, as "it does not sustain an inference of consciousness of a weak case." *Vick v. Texas Employment Comm'n,* 514 F.2d 734, 737 (5th Cir.1975).

If, however, Court decides that there is insufficient direct evidence of bad faith on the part of this Defendant, bad faith may be founded on circumstantial evidence, if the following criteria are met: (1) evidence once existed that could fairly be supposed to have been material to the proof or defense of a claim at issue in the case; (2) the spoliating party engaged in an affirmative act causing the evidence to be lost; (3) the spoliating party did so while it knew or should have known of its duty to preserve the evidence; and (4) the affirmative act causing the loss cannot be credibly explained as not involving bad faith by the reason proffered by the spoliator. *Walter v. Carnival Corp.,* 2010 WL 2927962, (citing *Calixto v. Watson Bowman Acme Corp.,* 2009 WL 3823390, (S.D.Fla. Nov. 16, (2009)).

In the instant case, *all* of the elements of circumstantial bad faith are met: (1) The destroyed materials and documents sought by the Plaintiff were clearly material to the proof of the Plaintiff's claim and the veracity of the Defendant's driver and affirmative defenses; (2) The Defendant has admitted that the materials and documents have been destroyed; (3) The Defendant destroyed these crucial evidentiary materials relating to the driver, vehicle and crash, even though they were, by their own admission, anticipating litigation within days after the accident. (4) The Defendant cannot credibly explain the destruction of these documents as somehow accidental, or a matter of policy, or done without an understanding of what their evidentiary value was. After all, the plain fact is that the Defendant was preparing for litigation regarding this case within days of its occurrence, and knew within four days after it happened that the Plaintiff had retained counsel and had been injured.

The Eleventh Circuit has held that appropriate sanctions for spoliation may include, among other things, (1) dismissing the case; (2) excluding expert testimony; or (3) instructing the jury that spoliation of evidence raises a presumption against the spoliator. *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 945 (11th Cir.2005).

WHEREFORE, the Plaintiff in this case prays that this Court will grant its motion to compel the Defendant to produce the documents requested, and in the alternative, if Court finds that these documents were spoliated, enter an order sanctioning the Defendant, and instructing the jury at trial that the spoiliation of evidence raises a presumption against the spoliator.

Further, the Plaintiff asks that the Court award reasonable attorney's fees and expenses, pursuant to Federal Rule of Civil Procedure 37(d)(3), *et seq.*, and grant such other and further relief that may be awarded at law or in equity.

CERTIFICATE OF GOOD FAITH ATTEMPT TO RESOLVE

I, the undersigned attorney, counsel for Plaintiff, Y. Drake Buckman, II, Esquire, hereby certify that, prior to filing this motion, I have conferred with the opposing party and have made a good faith attempt to resolve this matter.

CERTIFICATE OF SERVICE

I certify that on May 21, 2012, a true and correct copy of the foregoing was served on Catherine Verona, Esquire via the ECF filing system.

/s/ *Y. Drake Buckman, II, Esq.*

Y. DRAKE BUCKMAN, II
Attorney for Plaintiff
Florida Bar Number: 0137634
BUCKMAN & BUCKMAN PA
3333 Clark Road
Suite 190
Sarasota, FL 34231
Telephone: (941) 923-7700
Fax: (941) 923-7736
E-Mail: attorney@buckmanandbuckman.com