

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

FARM BUREAU GENERAL INSURANCE
COMPANY a/s/o William Bryan Dandurand
and Christine Marie Dandurand,

Plaintiff,

Case No. 15-02521-CKB

vs.

HON. CHRISTOPHER P. YATES

BMW OF NORTH AMERICA, LLC,

Defendant.

OPINION AND ORDER DENYING DEFENDANT BMW'S
REQUEST FOR DISMISSAL BASED UPON SPOLIATION

Long ago, Defendant BMW of North America, LLC (“BMW”) sought summary disposition on a host of grounds, including the theory that Plaintiff Farm Bureau General Insurance Company (“Farm Bureau”) failed to preserve intact the incinerated vehicle at the heart of the parties’ dispute. On October 5, 2016, the Court not only resolved the motion for summary disposition, but also noted that the issue of spoliation cannot be presented in a motion for summary disposition. Bloemendaal v Town & Country Sports, Inc, 255 Mich App 207, 211 (2003). Therefore, the Court scheduled an evidentiary hearing on the spoliation issue, and then conducted that hearing on November 9, 2016. Although a trial court manifestly “has the authority, derived from its inherent powers, to sanction a party for failing to preserve evidence that it knows or should know is relevant before litigation is commenced[.]” see id., the Court concludes that dismissal of the plaintiff’s claims is much too stiff a sanction to impose in this case. Accordingly, the Court shall deny BMW’s request for dismissal, but the Court shall afford BMW the opportunity to request a less-severe remedy.

I. Factual Background

The underlying facts are not seriously contested. William and Christine Dandurand bought a new BMW 328 in August 2014. On October 26, 2014, Christine Dandurand drove the BMW to the Triemstras' house in Jenison and parked the vehicle in the driveway. While the car was parked, it caught on fire, severely burning the vehicle and causing damage to the Triemstras' property. After the fire, the Dandurands submitted a claim to Plaintiff Farm Bureau for insurance coverage for all of the losses. Farm Bureau ultimately paid \$40,174.90 to the Dandurands for the loss to the BMW vehicle and an additional \$9,000 to cover the Triemstras' losses. Farm Bureau then stepped into the shoes of its insureds and filed this action against BMW on March 20, 2015.

From the date of the fire on October 26, 2014, until the filing of this case on March 20, 2015, Plaintiff Farm Bureau had control of the vehicle. On October 27, 2014, one day after the fire, Farm Bureau had the vehicle towed to a local BMW dealership. One day later, on October 28, 2014, Farm Bureau sent a letter to Defendant BMW explaining that it was “conducting an investigation into the loss” and stating: “We believe that the fire originated in the engine compartment of this vehicle and we intend to pursue all subrogation possibilities.” See Defendant BMW of North America LLC's Brief in Support of Sanctions Against Plaintiff for Spoliation, Exhibit C. One day after that, Farm Bureau sent Tim Herndon – an expert in cause and origin of fires – to inspect the damaged vehicle. Herndon, in turn, called Michael Donahoe – a product analysis specialist employed by BMW whom Herndon knew from prior investigations – and invited Donahoe to inspect the damaged vehicle. On November 13, 2014, Herndon met Donahoe at the BMW dealership, where Donahoe took at least 200 photographs of the fire-damaged car for BMW.¹

¹ Donahoe's photographs were admitted as Exhibit A at the evidentiary hearing.

On January 26, 2015, at Plaintiff Farm Bureau's behest, the damaged car was towed from the BMW dealership to Weller Salvage. On that same date, Farm Bureau sent Defendant BMW a letter stating that "[o]ur investigation of this loss reveals that your insured is responsible for the damages incurred by our insured" and demanding payment of \$49,274.90 for the loss. See Defendant BMW of North America LLC's Brief in Support of Sanctions Against Plaintiff for Spoliation, Exhibit J. Then, on March 10, 2015, Weller Salvage paid \$2,265 to Farm Bureau for the damaged vehicle. See id., Exhibit L (check). After Weller Salvage bought the car, it removed the parts it could sell, see Hearing Exhibit 1 (before-and-after photographs), and kept what was left of the vehicle in storage. On March 20, 2015, Farm Bureau sued BMW, but BMW did not send a cause-and-origin expert to examine the car until December 2, 2015, when Jon Olson conducted an inspection at Weller Salvage. Olson sent a report to BMW on December 11, 2015, in which he provided opinions and conclusions about the cause and origin of the fire. Olson opined that "[t]here is no evidence that indicates there is a manufacturing or design defect that led to the fire" and "Mr. Herndon's opinion of the cause of the fire is incorrect due to the misidentification of the area of origin." See Defendant BMW of North America LLC's Brief in Support of Sanctions Against Plaintiff for Spoliation, Exhibit Q (Olson report at 6-7). Despite Olson's ability to formulate those opinions, BMW now insists that the Court must dismiss all of Farm Bureau's claims for failure to preserve important evidence.

II. Legal Analysis

Under Michigan law, a request for dismissal on the theory of spoliation cannot be presented in a summary-disposition motion. See Bloemendaal, 255 Mich App at 211. Nor can spoliation be asserted as a cause of action, see Teel v Meredith, 284 Mich App 660, 661 (2009), or an affirmative

defense. Citizens Ins Co of America v Juno Lighting, Inc, 247 Mich App 236, 242 (2001). Rather, a proper “response to the problem of evidence spoliation frames the alleged wrong as an evidentiary concept,” Teel, 284 Mich App at 664, and the harshest response to spoliation is dismissal under the Court’s “inherent powers to sanction a party for failing to preserve evidence that it knows or should know is relevant before litigation is commenced.” Bloemendaal, 255 Mich App at 211. Dismissal, however, ““is a drastic step that should be taken cautiously.”” Id. at 214. Thus, “[b]efore imposing the sanction of dismissal, the trial court must carefully evaluate all available options” and “conclude that dismissal is just and proper.” Id. In addition, the Court must consider less-severe options, such as “the exclusion of evidence that unfairly prejudices the other party or an instruction that the jury may draw an inference adverse to the culpable party from the absence of evidence.” See id. at 212. After giving careful consideration to the issue, the Court concludes that dismissal is an inappropriate remedy in this case.

As an initial matter, the Court rejects Plaintiff Farm Bureau’s position that no spoliation took place. Before filing this lawsuit, Farm Bureau sold the damaged vehicle to Weller Salvage,² which stripped the valuable parts from the vehicle before BMW’s cause-and-origin expert had a chance to examine the vehicle. Faced with similar circumstances involving the negligent failure to prevent the loss of a damaged vehicle before litigation, our Court of Appeals noted that “whether evidence is lost as a result of a deliberate act or simple negligence, the other party is unfairly prejudiced because it is unable to challenge or respond to the evidence even when no discovery order has been violated.” Brenner v Kolk, 226 Mich App 149, 160 (1997). Consequently, under Michigan law, “[e]ven when

² Plaintiff Farm Bureau sold the vehicle on March 10, 2015, see Defendant BMW of North America, LLC’s Brief in Support of Sanctions Against Plaintiff for Spoliation, Exhibit L, and then filed the instant action on March 20, 2015.

an action has not been commenced and there is only a potential for litigation, the litigant is under a duty to preserve evidence that it knows or reasonably should know is relevant to the action.” Id. at 162. Farm Bureau breached that duty when it sold the damaged vehicle before filing suit. Indeed, Farm Bureau’s claim of innocence on this point is belied by an e-mail from Farm Bureau’s employee Jason Keller, who learned on November 3, 2015, that “[t]he motor has been removed and scrapped” and responded: “Oh, crap. We’re screwed.” See Defendant BMW of North America, LLC’s Brief in Support of Sanctions Against Plaintiff for Spoliation, Exhibit O. Thus, the Court readily finds that Farm Bureau engaged in spoliation before filing suit by selling the damaged vehicle in a manner that virtually assured the loss of important evidence.

But the Court concludes that dismissal is an inappropriate sanction for spoliation in this case for several reasons. First, although Defendant BMW’s cause-and-origin expert, Jon Olson, did not have an opportunity to inspect the entire damaged vehicle and test some of its parts, Plaintiff Farm Bureau enabled BMW’s employee, Michael Donahoe, to extensively inspect and take photographs of the damaged vehicle on November 13, 2014, before Farm Bureau sold the vehicle. Second, the photographs taken by Donahoe and Olson’s inspection of what remained of the damaged vehicle on December 2, 2015, enabled Olson to formulate opinions and conclusions as to the cause and origin of the fire that damaged the BMW. See Defendant BMW of North America, LLC’s Brief in Support of Sanctions Against Plaintiff for Spoliation, Exhibit Q (Olson report at 6-7). Third, BMW failed to act with alacrity in sending a cause-and-origin expert to inspect the vehicle despite knowing from the beginning that Farm Bureau intended to blame BMW for the fire. See Defendant BMW of North America, LLC’s Brief in Support of Sanctions Against Plaintiff for Spoliation, Exhibit C (letter from Farm Bureau to BMW dated October 28, 2014). Fourth, before the fire in this case occurred, BMW had run into this very same problem in another case by sending Donahoe to inspect a damaged car

but not promptly sending a cause-and-origin expert to follow up on Donahoe’s work, and then BMW had unsuccessfully sought dismissal of all claims on facts virtually identical to the instant case. See State Farm Mutual Auto Ins Co v BMW of North America, LLC, No 08-12402, slip op at 8-10 (ED Mich August 7, 2009) (unpublished decision available at 2009 WL 2447612). As a result, the Court concludes – as did the United States District Court for the Eastern District of Michigan in BMW’s prior case, see id. – that dismissal is too severe a sanction to impose upon Farm Bureau for spoliation in this case. See Brenner, 226 Mich App at 163 (dismissal “was an abuse of discretion because the record does not demonstrate the egregious conduct that would warrant such an extreme measure”). Because neither side has discussed any remedy other than dismissal, the Court shall invite BMW to propose a more modest remedy in a subsequent motion *in limine*.

III. Conclusion

For all of the reasons set forth in this opinion, the Court finds that dismissal of all claims is not an appropriate remedy for the spoliation that took place before Plaintiff Farm Bureau filed this action. At oral argument, the Court invited Defendant BMW to propose a remedy tailored to the loss of evidence resulting from the spoliation, but BMW simply chose to press for dismissal. Now that that sanction is off the table, the Court once again invites BMW to propose some form of remedy. If BMW presents such a proposal in a motion *in limine*, the Court shall rule upon that request prior to trial.

IT IS SO ORDERED.

Dated: November 14, 2016



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge