IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD N. DEFER,
Appellant,
vs.
DAIMLERCHRYSLER MOTORS CORPORATION, A DELAWARE CORPORATION,
Respondent.

No. 39397

FILED

NOV 21 2003

JANETTE M BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing[1] Richard Defer's products liability action against DaimlerChrysler Motors Corporation (DCC), for his failure to preserve evidence.[2] On appeal, Defer argues that DCC was under a co-equal duty to preserve the evidence, that DCC had sufficient opportunity to inspect, and that the district court abused its discretion in its failure to craft a lesser sanction. We affirm.

FACTUAL HISTORY

On October 28, 1997, Defer was severely injured in a single vehicle accident while driving a 1996 Jeep Grand Cherokee ("the Jeep"). Investigation confirmed that the Jeep left the roadway and traveled a considerable distance before coming to rest on its side. Investigators found no physical evidence, i.e., skid marks, that Defer applied his brakes prior to leaving the paved portion of the roadway. Although Defer could not immediately remember the events preceding the accident, he advised Nevada State Trooper Robert E. Archey that he had not fallen asleep. The officer noted that the Jeep's airbags were deployed and that the damage to

[1]See NRAP 3A(b)(1).

[2]See NRCP 37.

03-19443

the vehicle was sufficient to cause deployment. Trooper Archey concluded that driver inattention caused the accident and cited Defer accordingly. We note Defer's concession that he made no mention of spontaneous airbag deployment at the scene of the accident

Defer's recollection of the events preceding the accident improved during the weeks that followed. He remembered a "white cloud" and a feeling that his vehicle was bouncing while traveling off of the pavement. He also recalled that the cloud disappeared, that the deployed passenger side airbag deflated, and that a "white gaseous substance" was seeping from the airbag. From this, he concluded that the airbag malfunctioned.

Defer initiated Internet research concerning airbag deployment within three weeks of the accident. He then forwarded information about automobile recalls resulting from faulty airbags to Safeco Insurance Company,[3] the justice court in which the citation was pending and Trooper Archey. None of this information related to malfunctions of airbags in 1996 Jeep Cherokees, and none of this information was ever directly supplied to DCC until after the Jeep had been sold for scrap.

Evidence in the record suggests that, by December 18, 1997, Safeco declared the vehicle a total loss and that, as part of the adjustment process, Defer transferred title to the Jeep to Safeco. Also, during the month of December 1997, Defer contacted his Jeep dealer and requested information on malfunctioning airbags. The dealer referred him to DCC. DCC failed to respond to Defer's first telephonic inquiry. Unbeknownst to Defer, on December 29, 1997, Safeco sold the salvage to Central Auto

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[3]Defer's automobile liability and property damage insurer.

Parts in San Diego, California. State of California Department of Motor Vehicles' records show that on January 23, 1998, the Jeep's status was listed as "junk" and "dismantled." Ultimately, Defer was able to make contact with DCC on January 26, 1998, at which time, according to DCC's records, Defer described the accident and his concern over the airbag deployment, and advised that the vehicle was declared a total loss and was being held at Safeco's Sacramento facility.[4] This stimulated a call from DCC to Safeco during which a Safeco representative apparently indicated that the Jeep had not been preserved for further inspection. In a letter dated January 27, 1998, DCC disavowed responsibility for Defer's injuries based upon the Jeep's age and mileage and the information he provided. Although DCC's call record notes that it denied Defer's claim because it was unable to inspect the remnants of the Jeep, the letter denying the claim did not mention DCC's inability to inspect.

Defer indicates that he first learned of the feasibility of inspecting the airbag system for defects in May of 1998. However, because of the disposition of the vehicle, an inspection of the vehicle or its components could not be undertaken as of that time. In short, Defer took no measures to preserve the vehicle until May of 1998, by which time a productive inspection had been rendered impossible.

PROCEDURAL HISTORY

On October 28, 1999, Defer filed a products liability suit against DCC contending that a defect in the airbag system caused a spontaneous deployment which, in turn, caused him to lose control of the

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[4]DCC's records also indicate that Defer's research concerning spontaneous deployment was separately provided to the Jeep dealer via facsimile transmission.

vehicle. DCC affirmatively alleged that Defer's claim was barred for failure to preserve the Jeep.

Defer formally admitted in court documents that he did not possess or control the Jeep or any of its components, that he had not commissioned an expert inspection of the Jeep, and that he was unaware of its whereabouts. Defer also conceded in the joint case conference report filed by the parties that he was not in possession of any repair or service records, or of any reports of persons who may have inspected the Jeep after the accident.

Defer testified at a pretrial deposition that he failed to request that Safeco preserve the Jeep for a possible lawsuit because he did not believe it was possible to determine whether the airbag spontaneously deployed. DCC then filed a motion requesting dismissal of Defer's complaint with prejudice based upon his failure to preserve the Jeep and its components. In its moving papers, DCC conceded that it had contacted Safeco in January after Defer's call and learned that the vehicle had not been preserved. DCC argued that the destruction of the Jeep put it at a severe disadvantage because no physical evidence existed to refute Defer's airbag malfunction claims. More particularly, DCC relied upon a number of exhibits and an affidavit from its engineer in support of its contention that an inspection could confirm whether the airbag sensors remained within the original operating calibration specifications and if there were any stored "fault codes." Although the engineer's affidavit claimed that he could testify that no malfunction occurred, it was clear that this opinion would be much more circumstantial and speculative without an inspection.

The district court dismissed Defer's complaint with prejudice based upon this court's eight-factor analysis in GNLV Corporation v.

Service Control Corporation,[5] concluding: (1) that the evidence was irreparably lost; (2) that, notwithstanding public policy considerations favoring resolution of cases on the merits, loss of the product severely prejudiced DCC; (3) that Defer was "reckless or at least highly negligent" by not instructing Safeco to preserve the vehicle; and (4) that a lesser sanction was not warranted because examination of the lost evidence was necessary to resolve DCC's contention that the crash was due to driver error. Defer appeals.

DISCUSSION

"'[E]ven where an action has not been commenced and there is only a potential for litigation, the litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action.'"[6] Under NRCP 37(b)(2), a district court has "'inherent equitable powers to dismiss actions or enter default judgments for . . . abusive litigation practices.'"[7] A district court may impose sanctions for the failure to preserve relevant evidence, the destruction of which occurs prior to filing an action and the commencement of discovery.[8] We generally review

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[5]111 Nev. 866, 870, 900 P.2d 323, 325-36 (1995).

[6]GNLV Corp., 111 Nev. at 869, 900 P.2d at 325 (quoting Fire Ins. Exchange v. Zenith Radio Corp., 103 Nev. 648, 651, 747 P.2d 911, 914 (1987)).

[7]Young v. Johnny Ribero Building, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990) (quoting Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 916 (9th Cir. 1987)).

[8]Stubli v. Big D International Trucks, 107 Nev. 309, 313, 810 P.2d 785, 788 (1991).

imposition of discovery sanctions under an abuse of discretion standard and will not substitute our judgment for that of the district court.[9]

"[A] somewhat heightened standard of review" applies to dismissals under NRCP 37.[10] A district court should only dismiss a case "in extreme situations; if less drastic sanctions are available, they should be utilized."[11] While a district court need not apply less severe sanctions before dismissing a case, the district court must thoughtfully consider all factors in a particular case before ordering dismissal.[12] Every order of dismissal with prejudice must "be supported by an express, careful and preferably written explanation of the court's analysis of the pertinent factors."[13]

Defer claims that both parties should bear responsibility for the failure to preserve, and argues for a rule that sanctions are not available when the destroyed evidence was equally available to all parties. Defer also argues he was unaware that examination of his vehicle could disclose whether the airbag malfunctioned. Additionally, he contends that while a litigant has a duty to preserve evidence, that duty does not extend to evidence not in the possession or control of the litigant. Thus, because

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[9]Young, 106 Nev. at 92, 787 P.2d at 779 (citing Kelly Broadcasting v. Sovereign Broadcast, 96 Nev. 188, 192, 606 P.2d 1089, 1092 (1980)).

[10]Id.

[11]Nevada Power v. Flour Illinois, 108 Nev. 638, 645, 837 P.2d 1354, 1359 (1992).

[12]Young, 106 Nev. at 92, 787 P.2d at 780 (citing Aoude v. Mobile Oil Corp., 892 F.2d 1115 (1st Cir. 1989)); see also GNLV Corp., 111 Nev. at 870, 900 P.2d at 325-26.

[13]Young, 106 Nev. at 93, 787 P.2d at 780.

he did not have control over the Jeep, he could not have preserved it for litigation.[14] While his lack of sophistication and possession of the wreckage by third parties militates in his favor, we conclude that the district court's order of dismissal under NRCP 37 was within the sound exercise of its discretion under the rule. We will treat these contentions separately.

1. Defer's reliance upon Safeco

Defer places considerable reliance upon his lack of sophistication in mechanics, engineering and the legal process, all of which contributed to his failure to appreciate the need for preservation. As a preface to his argument on appeal, he indicates in his opening brief that his problems in documenting his case began as follows:

> Notwithstanding the fact that Plaintiff had informed Safeco of the spontaneous airbag deployment and that it owed a fiduciary duty to plaintiff, it did not inform him that he could pursue a products liability claim or that he needed to preserve his vehicle for inspection. Moreover, Safeco did not preserve the Plaintiff's vehicle (which it had possession of until December 31, 1997).

As indicated below, Safeco was Plaintiff's agent for these purposes and he failed to take measures that would have insured equal access for inspection and testing. We note parenthetically that Safeco had no fiduciary duty as a property damage insurer to provide Defer with legal advice concerning claims against third parties stemming from the

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[14]For this proposition, Defer cites Townsend v. American Insulated Panel Co. Inc., 174 F.R.D. 1, 4 (D. Mass 1997), and Dinello v. General Motors, 1993 WL 407864 (Conn. Super. 1993).

accident. Its only duty was to seek subrogation if it chose to do so and refund any deductible to him.

2. Equal opportunity to preserve for inspection

Defer asserts that DCC, because of its "superior knowledge and financial resources," and its failure to preserve the Jeep when it knew Defer was unaware Safeco sold the Jeep for salvage, "renders [DCC] every bit as, if not more, culpable than [himself]" for loss of the evidence.

According to Defer, DCC failed to advise him of the preservation problem after its January contact with Safeco. He also argues in his opening brief that DCC's contact with Safeco placed DCC on notice that Defer was unaware that the Jeep was not still "safely stored in Safeco's storage yard." In his reply brief, Defer expands upon that contention by stating that DCC also learned during its January 1998 contact with Safeco that the Jeep had been sold to Central Auto Parts. First, the statement that DCC was aware that Defer did not know the status of the vehicle is only an argument, not a statement of fact. Second, the district court made no findings to that effect. Third, there is no direct evidence in the record confirming DCC's knowledge about what Defer knew or did not know. Fourth, the record of the telephonic contact between DCC and Safeco does not indicate what Safeco had done with the salvage or that Central Auto Parts was in any way involved.[15] Fifth, as

[15]Defer argues that, according to affidavits obtained from Central Auto Parts' employees, the parties could have inspected and examined the remnants of the Jeep up and through April of 1998. He also argues that the process of "totalling" the vehicle was not concluded until March of 1998. Based upon the California DMV records that the vehicle was junked and dismantled as of January 23, 1998, three days before the first documented contact between DCC and Defer, the district court was within its discretion to conclude DCC assumed no duties concerning preservation.

indicated below, DCC assumed no duties to preserve evidence based upon its interactions with Safeco.

3. Duty to preserve and severity of sanctions

Defer's claim of product defect was discrete to his particular vehicle, i.e., he had not lodged a claim of general design defect. It was therefore Defer's burden to preserve the Jeep for litigation. This is in line with the general notion that any plaintiff is under a burden to preserve his evidence[16] and to present proofs in support of his case. Accordingly, at least as a general proposition, a potential defendant is under no duty to preserve evidence not within its control. Shortly after his accident, Defer clearly believed that his airbag malfunctioned. Before his call to DCC in late January 1998, only Defer or his agents could have preserved the Jeep. In this intervening period, Defer's agent, his insurer, declared the Jeep a total loss. Absent instructions from Defer to the contrary, Safeco sold the Jeep for scrap before DCC was on notice of Defer's claim. DCC was under no duty to inquire further, to inform Defer that the Jeep was unavailable for inspection, or in some way to anticipate a suit and assist Defer with documentation in support of it. Thus, we reject Defer's contention that, as a general matter, a defendant with knowledge of potential litigation has a co-equal duty to preserve evidence not in its possession.

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[16]See Wilson v. Beloit Corp., 921 F.2d 765, 767 (8th Cir. 1990) (quoting Koplin v. Rosel Well Perforators, Inc., 734 P.2d 1177, 1179 (Kan. 1987)) ("'Absent some special relationship or duty arising by reason of an agreement, contract, statute, or other special circumstance, the general rule is that there is no duty to preserve possible evidence for another party to aid that party in some future action against a third party.'"); see also Timber Tech v. Home Ins. Co., 118 Nev. ___, ___, 55 P.23d 952, 953-54 (2002) (no independent tort for spoliation of evidence in Nevada, regardless if loss caused by first or third-party litigant).

It is true that this court has overturned discovery violation sanctions against plaintiffs based upon loss or destruction of evidence over which the plaintiff enjoyed no control.[17] However, in the current case, Defer and/or his agent, not DCC, held control over the Jeep before sale to, and apparent destruction by, a third party. Again, as found by the district court, Defer transferred title to Safeco without informing Safeco of the need to preserve the Jeep.[18] Thus, although he did not willfully destroy the evidence, Defer was indirectly responsible for its loss.[19]

Defer was unable to produce maintenance or service records for the Jeep.[20] This further compromised DCC's ability to determine whether a malfunction occurred as a result of manufacture or maintenance. A lesser sanction than dismissal would not have compensated DCC for Defer's loss of the Jeep or records concerning its maintenance or repair between the purchase of the vehicle and the accident.

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[17]GNLV Corp., 111 Nev. at 871-72, 900 P.2d at 326.

[18]See Fire Ins. Exchange v. Zenith Radio Corp., 103 Nev. 648, 747 P.2d 911 (1987) (failure of plaintiff to preserve television or to instruct agents to preserve television when plaintiff was on notice of potential litigation warranted a discovery sanction of exclusion of expert evidence and resulting summary judgment). Compare GNLV Corp., 111 Nev. 866, 900 P.2d 323 (sanctions not warranted against plaintiff for defendant's loss of evidence when plaintiff did not have control over the evidence and other information existed to prove the condition of the lost evidence).

[19]See GNLV Corp., 111 Nev. at 870, 900 P.2d at 326.

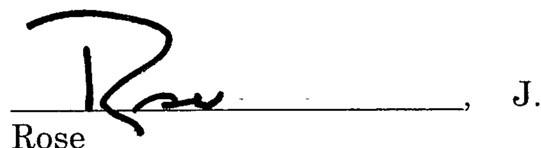
[20]At oral argument, Defer's counsel asserted that DCC was provided with these records. The parties' joint appendix does not contain these records.

CONCLUSION

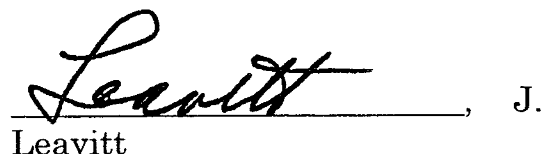
The record does not support Defer's contention that DCC knew in January of 1998 that Defer was unaware Safeco no longer possessed the Jeep. DCC acted properly when, after receiving Defer's information, it called Safeco to determine whether it could conduct an inspection. DCC was not required to take extraordinary measures to document Defer's case for him.[21] Finally, although DCC's expert was able to draw conclusions concerning the cause of the accident that favored DCC, those conclusions were considerably marginalized by the inability to specifically inspect and test the remnants of the airbag system.

We therefore conclude that the district court did not abuse its discretion when it dismissed Defer's complaint with prejudice. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_______________, J.
Rose



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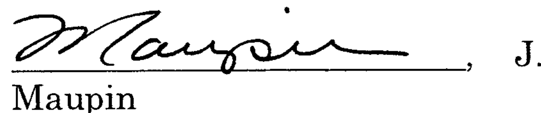
Leavitt



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Maupin

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[21]We have considered Defer's argument that DCC was equitably estopped from arguing it was prejudiced by its inability to inspect the Jeep. We conclude that even if Defer properly raised this argument before the district court, his argument lacks merit on appeal.

cc: Hon. Robert E. Estes, District Judge
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