IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

WILLIAM SMITH,	)	
Plaintiff,	)	**CIVIL ACTION FILE**
	)	**NO. 2016EV002143-J**
v.	)	
	)	
FULTON COUNTY, GEORGIA,	)	
Defendant.	)	
_____	)	

ORDER GRANTING PLAINTIFF'S MOTION FOR SANCTIONS

This action arises out of a car accident which occurred while the Plaintiff was riding in the back of a police car. According to the allegations in the Complaint, the Plaintiff had been arrested for shoplifting and was sitting in the back of the police car driven by Officers Nicholas Williams and Dwight Green when a radio broadcast notified them that there was a stolen vehicle near the location. The officers saw the stolen vehicle pass them, and began a car chase while the Plaintiff was sitting, handcuffed, in the back seat.[1] The officers' vehicle collided with the stolen vehicle, and Plaintiff was injured and transported to Grady for medical treatment. He has required surgery to repair a back injury from the crash, and his medical expenses are currently in excess of $100,000.00.

Currently, the case appears before this Court on Plaintiff's motion for sanctions against the County, based upon both spoliation of evidence and its discovery abuses.[2] In the motion, the Plaintiff contends that the following are grounds for sanctions:

(1) sale and modification of the police car (including removal and destruction of the data recorders on the vehicle) and failure to produce records regarding the vehicle (as Ordered by the Court),

1 There is a dispute regarding whether or not the Plaintiff was buckled. There is also a dispute regarding the speed of the vehicle at the time of the collision. Both issues relate to the motion for spoliation, as discussed *infra*.
2 This case has appeared before this Court on several prior discovery disputes, and in the last discovery order the Court specifically gave the Plaintiff permission to file a motion for sanctions (Order, 11/10/2016).

(2) failure to produce and destruction of photographs of the scene and the other vehicle involved in the crash,

(3) failure to produce most of the records the Court odered to be produced in a timely fashion,[3] and

(4) failure to produce some of the documents at all, including: proof of payment for the police vehicle, Officer Williams' workers' compensation application, documents showing where police car was taken after collision, and a recorded statement of Officer Williams.

Additionally, the motion seeks sanctions for other discovery conduct, including the failure of a witness (Freeman) to appear at his deposition and the failure of the County to produce a representative for deposition on November 3, 2016 or to have any of the 30(b)(6) witnesses prepared and documents produced by those depositions.[4]

In response, the County argues that it has produced all of the information it has, that the late production does not matter, and that the still missing information is not prejudicial to Plaintiff because the information is "irrelevant" to the Plaintiff's claims. In short, the County concedes that it has not given the Plaintiff all of the information as Ordered by the Court, but contends that its failure to do so was not willful because it did not know what happened to the information and it has produced most of what Plaintiff sought. The County also contends that because the information would not be admissible at trial, it is irrelevant and it does not matter that it has not been produced. In regard to the allegedly still missing documents, the County states that there is no recorded statement by Officer Williams, and it has produced a "transfer of title" receipt from the auction which addresses the Plaintiff's discovery requests regarding the vehicle; however, the County does not address the other allegedly missing documents. Finally, as to the deposition issues, the County asserts that the one witness who did not appear (Freeman)

3 In its discovery Order, this Court ordered Defendant to produce the documents no later than October 13, 2016; however, Defendant did not produce a large portion of the documents until November 8-10, 2016.

4 Plaintiff contends that most of the documents the Court ordered to be produced were not produced until November 8, 2016, so the early November depositions were, essentially, worthless. This was also the subject of a November 10, 2016 Court Order regarding discovery. At the hearing, counsel for Plaintiff stated that many of those 30(b)(6) depositions had not been rescheduled because of the ongoing failure of Defendant to produce its discovery as Ordered by this Court.

was subsequently deposed, and that it offered other witnesses when Plaintiff found the original deponents to be lacking. In short, the County's position is that it may have been slow in responding to discovery, but it has made a sufficient effort such that this Court cannot strike its Answer.

Initially, this Court notes that it is faced with two issues: spoliation of the vehicle parts and information and discovery sanctions for the County's conduct during the discovery process. Because the legal standard for these issues is different, this Court will address each, in turn.

(1) **Spoliation**

First, as to the spoliation issue, this Court finds that, based upon the record in the case and the applicable case law, sanctions are warranted.

In Georgia, spoliation refers to the destruction or failure to preserve evidence that is necessary to "contemplated or pending litigation." Bouvé & Mohr, LLC v. Banks, 274 Ga. App. 758 (2005); see also, Silman v. Assocs. Bellemeade, 286 Ga. 27 (2009); Paggett v. Kroger Co., 311 Ga. App. 690 (2011); Wal-Mart Stores, Inc. v. Lee, 290 Ga. App. 541 (2008). Importantly, more recent cases have clarified that notice of potential liability is not the same as notice of potential litigation, and to prove spoliation the injured party must show that the alleged tortfeasor was put on notice that the party was contemplating litigation. Silman v. Assocs. Bellemeade, 286 Ga. 27 (2009); Clayton County v. Austin-Powell, 321 Ga. App. 12 (2013); Craig v. Bailey Bros. Realty, 304 Ga. App. 794 (2010). The simple fact that someone is injured in an accident, without more, is not notice that the injured party is contemplating litigation sufficient to automatically trigger the rules of spoliation. Kitchens v. Brusman, 303 Ga. App. 703 (2010); see also, Sentry Select Ins. Co. v. Treadwell, 318 Ga. App. 844 (2012). The duty to preserve relevant evidence must be viewed from the perspective of the party with control of the evidence

and is triggered not only when litigation is pending but also when litigation is "reasonably foreseeable" to that party. Phillips v. Harmon, 297 Ga. 386 (2015). If the moving party does demonstrate that evidence was destroyed in the face of pending litigation, then this may lead to a presumption that the evidence would have been against the destroying party or, at the discretion of the trial judge, exclusion of any testimony about the evidence at trial. See, Baxley v. Hakiel Indus., 282 Ga. 312 (2007); American Multi-Cinema, Inc. v. Walker, 270 Ga. App. 314 (2004); Bridgestone/Firestone North American Tire, LLC v. Campbell, 258 Ga. App. 767 (2002); R.A. Siegel Co. v. Bowen, 246 Ga. App. 177 (2000); Chapman v. Auto Owners Ins. Co., 220 Ga. App. 539 (1996); O.C.G.A. § 24-4-22.

In this case, this Court finds that the Defendant was on notice of contemplated litigation. First, the Defendant admitted in its discovery responses that it reasonably foresaw litigation on the date of the collision and the Plaintiff's injuries. (Defendant's Responses to First Interrogatories No. 18, attached as Ex. "1" to the motion).[5] Additionally, the Plaintiff actually gave written ante litem notice of contemplated litigation to the Defendant on October 2, 2014. Defendant also concedes in its Brief that it had a duty to preserve the vehicle, stating: "[Defendant] understands it had a duty to retain the vehicle after receiving the October 2, 2014 ante litem notice." Therefore, there is no question in this case that Defendant was on notice that it had a duty to preserve the vehicle. Despite this, the vehicle was sold or scrapped in May of 2016.[6] It is also undisputed that, by the time the County got the vehicle back from the junkyard, two data recorders had been removed and destroyed – the powertrain core module (PCM) and

5 Interrog. 18: "When did you first anticipate litigation with regard to the Crash?" Response: "On the date that Officer Williams' vehicle was struck."

6 During discovery, Defendant took the positions both that the vehicle had been sold *and* that it had not been sold. After a discovery conference with the original trial judge on this case, Defendant disclosed that the vehicle was located at Fulton County Central Maintenance, but failed to disclose that it had been sold and recovered. Ultimately, the documents relating to the sale were produced until after this Court Ordered production in October 2016.

the airbag control module (ACM). Both recorders would have information regarding velocity, steering and seatbelts.[7] Neither data recorder has been found or recovered, and this is the basis for Plaintiff's motion for sanctions based upon spoliation.

At this point, this Court finds that sanctions are warranted. Importantly, Defendant knew of its duty to preserve the police car pending litigation. The fact that a lawsuit was not filed until several years after the ante litem notice is completely irrelevant; Defendant had an on-going duty to preserve the evidence as requested by Plaintiff. This is particularly true since the statute of limitations had not expired on the Plaintiff's claim and he had already hired counsel.[8] Moreover, the Defendant's efforts to place the blame on the sale of the vehicle on the police department are unavailing. In this case, the police department had actual knowledge of its duty to preserve the evidence, and it was acting as the Defendant's agent in retaining the vehicle for the Plaintiff. Bouve & Mohr, LLC v. Banks, 274 Ga. App. at 762. In addition, this Court specifically finds that Defendant acted in bad faith in relation to the data recorders, in particular by selling the vehicle, attempting to hide the sale and secretly recovering the car, denying the mere existence of the data recorders, and generally obfuscating the Plaintiff's discovery of the information that now has been destroyed.

Finally, this Court finds that the destroyed data recorders are material to the Plaintiff's case. Importantly, the Defendant's defenses to the Plaintiff's claims include that Officer Williams was travelling at a reasonable speed and that the Plaintiff was securely buckled at the time of the collision.[9] Defendant's witnesses testified that the data recorders would have

7 Defendant also denied the existence of any data recorder in the vehicle until after this Court ordered production of all data recorders in October of 2016. At that point, it finally acknowledged that the data recorders had been in the vehicle but were now destroyed.

8 The Court notes that the law on spoliation does not require actual litigation but applies to ***contemplated*** litigation, as well.

9 *See, e.g.*, Defendant's Response Brief at 2, where it stated: "[Plaintiff] was placed in the backseat of [the] vehicle

recorded information regarding the speed pre- and post-impact, if any seatbelts were activated, whether or not brakes were applied, and similar information that is central to Plaintiff's claims and Defendant's defenses in this action. It is beyond comprehension to state, as Defendant does in its response, that the destroyed data recorders "do not substantially prejudice the Plaintiff's claims" and that the information contained on the data recorders is "irrelevant as a matter of law." To the contrary, the compelling evidence is that the lost information is highly prejudicial to Plaintiff's ability to prosecute its claims, and the prejudice cannot be cured because the information has been utterly destroyed.

Based upon the above, this Court hereby **GRANTS** the request for sanctions based upon spoliation. In regard to the particular sanctions, this Court declines to strike the Answer of Defendant, as Plaintiff requests. Instead, this Court finds that exclusion of any and all evidence which relates to information contained on the data recorders would be warranted, and Defendant shall not be permitted to introduce evidence in its defense as to the speed of the vehicle, pre- and post-impact, if any seatbelts were activated, whether or not brakes were applied, and similar information. This Court also finds that a jury charge regarding the destruction of the evidence, and a presumption that the evidence would be against the Defendant, is also warranted. The exact nature and scope of the limitation and the instruction, however, are **RESERVED** for future determination at the trial of this case.

(2) **Discovery Sanctions**

Additionally, the Plaintiff has moved for sanctions based upon the Defendant's conduct during the discovery period in this case. After consideration, this Court also finds that discovery sanctions are warranted.

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with a safety belt." and "[Officer Willams'] vehicle was traveling at a normal rate of speed."

Under O.C.G.A. § 9-11-37, a trial court may impose sanctions against a party for failing to comply with a court order compelling discovery, including establishing facts, striking evidence, striking claims, or striking pleadings or parts thereof. O.C.G.A. § 9-11-37(b). The imposition of sanctions by the trial court does not require that a party display, or that the trial court find, actual willfulness; instead, it requires at least a conscious or intentional failure to act, as distinguished from an accidental or involuntary noncompliance. N. Druid Dev., LLC v. Post, Buckley, Schuh & Jernigan, Inc., 330 Ga. App. 432 (2014); Howard v. Alegria, 321 Ga. App. 178 (2013); Resource Life Ins. Co. v. Buckner, 304 Ga. App. 719 (2010); Ga. Cash Am., Inc. v. Strong, 286 Ga. App. 405 (2007). The only defenses to a contempt action are that the order was not sufficiently definite and certain, was not violated, or that the violation was not willful (e.g., inability to pay or comply). Schiselman v. Trust Co. Bank, 246 Ga. 274 (1980); Hamilton Capital Group, Inc. v. Equifax Credit Info. Servs., 266 Ga. App. 1 (2004); see also, Vautrot v. West, 272 Ga. App. 715 (2005).

In determining whether a party has abused discovery, the trial court sits as trier of fact, and its findings regarding a willful discovery abuse are discretionary. Howard v. Alegria, supra. Importantly, the trial court may apply sanctions after giving the obstinate party an opportunity to be heard and determining that the obstinate party's failure to obey was willful. McConnell v. Wright, 281 Ga. 868 (2007); Porter v. WellStar Health Sys., 299 Ga. App. 481 (2009). Furthermore, in determining willfulness, the trial court should review the discovery proceedings *in toto*, beginning with service of the discovery requests and ending with service of the answers. Swindell v. Swindell, 233 Ga. 854 (1975); City of Griffin v. Jackson, 239 Ga. App. 374 (1999); Smith v. Nat. Bank of Georgia, 182 Ga. App. 55 (1987). Under Georgia law, "[p]unishment should not be imposed on a party to a civil case for conduct which is ancillary to the merits of the

case and which occurs during the life of the case without a consideration of the nonmovant's defense of its conduct." General Motors Corp. v. Conkle, 226 Ga. App. 34, 42 (1997) (physical precedent only); see also, Tenet Healthcare Corp. v. Louisiana Forum Corp., 273 Ga. 206 (2000) (adopting Conkle).

In this case, this Court, as well as the prior trial judge, handled multiple discovery disputes between the parties, necessitating the entry of two Orders compelling discovery. The first, entered on October 11, 2016 (*nunc pro tunc* to October 5th), required Defendant to produce a number of different documents no later than October 13, 2016. After this Order was entered, the Defendant finally started producing some information, but it failed to produce large portions of the compelled discovery until almost a month past the deadline, between November 8–10, 2016. Moreover, it appears that the only reason the Defendant produced the information in November was because a second telephone conference with the Court was scheduled, resulting in a second Order compelling discovery. At this point, Defendant still has not produced documents evidencing the payment received for the police car when it was scrapped, documents reflecting where the car was sent to at the time it was scrapped, the worker's compensation application for Officer Williams, and a recorded statement from Officer Williams. Defendant claims that all of these documents have been produced or, in the case of the recorded statement by Officer Williams, do not exist.[10]

In light of the conduct of the Defendant during discovery, as a whole, this Court finds that it has engaged in a pattern and practice of willful discovery abuse. In short, Defendant's conduct in this case has been to intentionally delay the production of discoverable information.

10 Defendant also argued, in its Brief, that it did not matter if the information was produced late or not at all because much of it was not admissible at trial to establish liability. Unfortunately for Defendant, this is not the legal standard. *See* O.C.G.A. § 9-11-26(b)(1), which states, *inter alia*: "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

The Defendant's pattern has been to deny the existence of any responsive information, then, when faced with Court intervention, to admit that it exists and promise to turn it over, but still delay in turning over information even in the face of a Court Order compelling the discovery. Notably, a discovery response that falsely denies the existence of discoverable information is not equivalent to no response; it is *worse* than no response. Ford Motor Co. v. Conley, 294 Ga. 530 (2014). Furthermore, simply because the County has produced most of what was ordered by this Court does not render the issue of sanctions moot. E.g., Phoebe Putney Memorial Hosp. v. Skipper, 235 Ga. App. 534 (1998); West v. Equifax Credit Information Svcs., 230 Ga. App. 41 (1997); Fisher v. Bd. of Com'rs of Douglas Cty., 200 Ga. App. 353 (1991); Danger v. Strother, 171 Ga. App. 607 (1984). Defendant's continued dilatory conduct and resistance to turning over even the most obviously relevant information is appalling. The Plaintiff has been required to resort to intervention by this Court in order to get the Defendant to admit that documents exist and to produce even the most minimal discovery, and even then the production is untimely and insufficient.

For example, in regard to the workers' compensation file for Officer Williams, the County was ordered by this Court to produce the "complete worker's compensation file relating to Officer Nicholas Williams … which involve claims for compensation arising out of the collision at issue." (Order, October 11, 2016). Furthermore, in that same Order, the Defendant was ordered to file an Affidavit stating that "all responsive documents and information" was produced, and, if not, what items were destroyed and by whom. In producing the workers' compensation file, counsel for Defendant made an initial production on October 11, 2016. The Affidavits filed by Defendant, however, were "upon information and belief," and Plaintiff objected to their sufficiency on October 14, 2016. In response, this Court required additional

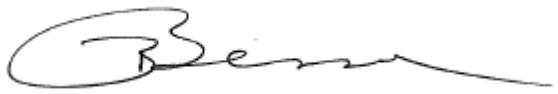
affidavits from Defendant, as well as an Affidavit from counsel, stating that all information produced by the County which is responsive has been turned over. Defendant was given until Friday, October 21, 2016 to file those Affidavits. Despite filing an Affidavit stating that "all information" had been produced, Defendant had not, in fact, produced the complete workers' compensation file, and it was not until November 8, 2016 that the workers' compensation information was supplemented.[11] Moreover, at the hearing on this motion, counsel for Defendant stated that he has *never personally confirmed* that all of the workers' compensation file has been produced; notwithstanding his statements in his Affidavit, counsel admitted to the Court that he relied upon his paralegal to collect and produce the information, and he did not personally check to verify that it was complete. Despite his lack of personal knowledge, counsel also represented to the Court that he "believes" that the information which Plaintiff claims is still missing is "the first few pages" of the file previously produced. This is but one example of the tortuous path of discovery in this case. The entire discovery process has been characterized by deliberate denial and delay by Defendant, compounded by counsel's complete lack of oversight or attention to the matter – even after Court intervention. In the face of Defendant's conduct, this Court is compelled to find that sanctions are warranted.

For the foregoing reasons, and after consideration of the law, the discovery process in this case, and the argument of counsel, this Court finds that Plaintiff's motion for sanctions for discovery abuse should be and hereby is **GRANTED**. Under O.C.G.A. § 9-11-37, this Court has a range of sanctions available to it, including ordering that certain facts be established, excluding

11 As with the discovery production, counsel's Affidavit was not filed until October 27, 2016, six days after the Court's deadline. It stated that "All information produced by the County which if responsive has been turned over." (Affid. ¶ 2). An amended Affidavit was filed by counsel on December 13, 2016, which now stated that "all information" responsive to this Court's October 11, 2016 Order was turned over as of November 8, 2016, and specifically addressed the incomplete workers' compensation filed. Unfortunately, additional documents responsive to this Court's October 11, 2016 Order were still being produced as of November 10, 2016, making that Affidavit incorrect, as well.

evidence relating to the discovery, striking pleadings, a finding of contempt, and, in lieu of any of the foregoing or in addition thereto, requiring the offending party "to pay the reasonable expenses, including attorney's fees, caused by the failure." Although this Court would be completely justified in striking the Defendant's Answer based upon its misrepresentations during discovery[12], it declines to do so at this time. Instead, this Court finds that financial sanctions would be warranted both for the Defendant's delay in and failure to produce documents previously Ordered by this Court. Therefore, Plaintiff's request for fees and expenses is **GRANTED**, and this Court hereby awards Plaintiff his costs and attorney's fees which were reasonably incurred during the initial discovery process while attempting to obtain accurate responses from Defendant, and those incurred while attempting to ensure compliance by Defendant with this Court's Orders, and in relation to the motion and hearing on this matter. As required by law, the amount of those expenses and fees, as well as the reasonableness of the costs and expenses, shall be determined at a hearing to be set by this Court.

SO ORDERED, this 22nd day of February, 2017.



Judge Diane E. Bessen
State Court of Fulton County

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12 *See*, Howard v. Alegria, 321 Ga. App. 178 (2013), affirming striking of answer for false discovery responses.