

STEPHEN RAY COOPER, DUSTIN ELVIS
RHOADS, AND MICHAEL J. CORCORAN

Plaintiffs

v.

JOHN HENRY OTTO AND IESI TX
CORPORATION

Defendants

IN THE DISTRICT COURT

48th JUDICIAL DISTRICT

TARRANT COUNTY, TEXAS

PLAINTIFF'S SUPPLEMENTAL MOTION FOR SANCTIONS

To the Honorable Judge of Said Court:

Plaintiff Michael J. Corcoran has several pending motions for sanctions set for hearing before this court on January 6, 2011. He provides this supplement as a reference to consolidate the various issues, outline this Court's authority to sanction, and align the misconduct of the Defendant with the specific relief requested.

A. STATUTORY AND INHERENT AUTHORITY TO SANCTION

1. Rule 215 provides the general authority of this court to sanction for discovery abuse. *See* TEX. R. CIV. P. 215. In particular, Rule 215.3 provides:

Abuse of Discovery Process in Seeking, Making, or Resisting Discovery.—If the court finds a party is abusing the discovery process in seeking, making or resisting discovery . . . then the court in which the action is pending may, after notice and hearing, impose any appropriate sanction authorized by paragraphs (1), (2), (3), (4), (5), and (8) of Rule 215.2(b). Such order of sanction shall be subject to review on appeal from the final judgment.

Id. at 215.3. *See also* Rule 215.2(b) (Enumerating various evidentiary and monetary sanctions for abuse.)

2. In addition to statutory authority from the Rules of Civil Procedure, a trial court

has inherent power to remedy spoliation. *See Eichelberger v. Eichelberger*, 582 S.W.2d 395 (Tex. 1979)(Holding that trial courts have inherent judicial power to take action that will "aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity."); *Trevino v. Ortega*, 969 S.W.2d 950, 959 (Tex. 1998)(Baker, *concurring*)("The destruction of potentially relevant evidence clearly inhibits a courts' ability to hear evidence and accurately determine the facts. Thus, without the inherent power to protect against evidence destruction, courts would be prevented from hearing relevant evidence and would be unable to ensure the proper administration of justice.")

B. SANCTIONS MUST BE JUST

3. Sanctions under Rule 215 must be "just." *See TransAmerican Natural Gas Corporation v. Powell*, 811 S.W.2d 913 (Tex. 1991). *TransAmerican* set out a two-part test for determining whether a particular sanction is just. First, there must be a direct nexus among the offensive conduct, the offender, and the sanction imposed. *See id.* at 917. A just sanction must be directed against the abuse and toward remedying the prejudice caused to the innocent party, and the sanction should be visited upon the offender. *See id.* The trial court must attempt to determine whether the offensive conduct is attributable to counsel only, to the party only, or to both. *See id.*

4. Second, a sanction imposed for discovery abuse should be no more severe than necessary to satisfy its legitimate purposes, which include securing compliance with discovery rules, deterring other litigants from similar misconduct, and punishing violators. *See id.*; *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 849 (Tex. 1992). This Court should consider less-stringent sanctions. *See TransAmerican* 811 S.W.2d at 917. In cases of exceptional misconduct, this Court is not required to test lesser sanctions before striking pleadings, so long as the record

reflects that lesser sanctions were considered before striking pleadings and the defendant's conduct justifies the presumption that its defenses lack merit. *See Cire v. Cummings*, 134 S.W.3d 835, 842 (Tex. 2004).

C. SCOPE OF SANCTIONS

5. In making its determination of whether to impose discovery sanctions, the trial court is not limited to considering only the specific violation for which the sanctions are finally imposed, *Gentry v. Weaver Development Co.*, 909 S.W.2d 606, 610 (Tex. App.—Fort Worth 1995, no writ), and may consider everything that has occurred during the litigation. *Id.*; citing *White v. Bath*, 825 S.W.2d 227, 230 (Tex. App.—Houston [14th Dist.] 1992, writ denied), cert. denied, 507 U.S. 1039 (1993).

6. A trial court may impose sanctions on any party that abuses the discovery process. *See Bodnow Corp. v. City of Hondo*, 721 S.W.2d 839, 840 (Tex. 1986). That authority, however, is guided by the principle of *TransAmerican* that this Court must attempt to determine whether the offensive conduct is attributable to counsel, the party, or both. 811 S.W.2d at 917. In *TransAmerican*, the Supreme Court recognized that this determination would not be an easy task, noting specifically that a party should not be punished for counsel's conduct in which the party is not implicated, apart from having entrusted to counsel his legal representation. *See id.* Significantly, however, the *TransAmerican* Court explained that a party must bear some responsibility for counsel's discovery abuses when the party is or should be aware of counsel's conduct. *See id.*

7. A party may not escape sanctions by hiring a new lawyer. *See Mentis v. Barnard*, 870 S.W.2d 14, 17 (Tex. 1994). Otherwise, IESI might readily avoid sanctions for discovery abuse by substituting counsel and claiming that the abuse was not attributable to the new lawyer.

See id. (“Compliance with the rules of civil procedure is a matter ordinarily entrusted by the client to the attorney, but this court has never before suggested that a party may avoid discovery sanctions by hiring a new lawyer.”) Here, IESI retained new counsel subsequent to the events of which the Plaintiff complains in this motion. It has been represented that prior counsel has withdrawn or is withdrawing, but Plaintiff has not seen a motion or order on this topic.

D. SANCTIONS FOR ABUSE IN SEEKING DISCOVERY

8. As this Court noted in its letter of October 29, 2010, one of the Plaintiff’s chief discovery complaints concerns the conduct of Ms. Peavler and Ms Reynolds. The history of that event is well-known to this Court through prior briefing and live testimony, so this supplement is confined to a very short summary of the facts.

9. During the eight-month period between October 2009 and May 2009, IESI hired (through its counsel) a private investigator and an unlicensed person to conduct a scheme involving a series of *ex parte* interviews with Plaintiff Michael Corcoran. The scheme was only uncovered through IESI’s mistake in producing a few of the emails discussing the plan. Additional emails between and among the offenders were finally produced to the Plaintiff in June 2009.

10. The *ex parte* interviews were recorded and transcribed, and some of these transcriptions have been produced to the Plaintiff; however, the transcriptions contain internal references to other interviews for which no transcription has been produced. While the various meetings and interviewd were occurring and after their transcription, IESI nonetheless falsely represented to the Plaintiff, in writing, that it had produced all relevant materials.

11. The produced emails reveal that IESI’s counsel was sending the unlicensed investigator to the Plaintiff under the pretext of purchasing a \$3,400 saddle. The unlicensed

investigator was directed to elicit from the Plaintiff information directly relevant to his damages, including written instructions to inquire about his business profits after the accident, and reasons for any changes in the profits of the business. Russell Yates, IESI's Director of Risk Management, was aware of this scheme, and IESI specifically approved and authorized the \$3,400 saddle purchase. At the time he acknowledged his complicity in the scheme, Mr. Yates had given more than 100 depositions. Mr. Yates noted in his deposition that emails related to the Plaintiff's accident were not available because a computer mistake at IESI caused the destruction of one and one-half years of email surrounding the relevant time period. This spoliation blocks the Plaintiff's ability to provide further evidence regarding the full depth and scope of IESI's involvement in the scheme.

12. While Rule 4.02 violations are a common topic among reported opinions, the Plaintiff has been unable to locate precedent for violations as egregious as this, considering the eight-month duration, the multiple, extended contacts, and the direct, on-going choreography by counsel. Certainly, there is no precedent for the aggravating factors present here, including a) false testimony from counsel as to the scope of her involvement, b) criminal use of an unlicensed investigator, c) continued concealment of interview transcripts, and e) destruction of relevant and discoverable emails by the party. A spoliation event within a 4.02 violation is indeed a rare animal. But again, such collateral issues may be considered by this Court in crafting its sanctions order. *See Gentry v. Weaver Development Co.*, 909 S.W.2d 606, 610 (Tex. App.—Fort Worth 1995, no writ)

13. Given the seriousness of the wrongful conduct and IESI's knowledge and involvement which far exceeded a blind entrustment of its legal representation to prior counsel, the Plaintiff requests an order from this Court striking the answer of IESI and proceeding to trial

on May 16, 2011, at which time the Plaintiff will introduce evidence of his damages to the jury. In its order, the Plaintiff further requests that this Court consider the following lesser sanction that provides a direct nexus among the conduct, the offender, and the sanction imposed but is deficient because it is not sufficiently severe punish the Defendant and deter other litigants from seeking to profit by similar misconduct.

14. The Plaintiff requests as an instruction to the jury that establishes that portion of his prima facia case that was the subject of the improper scheme and an order from the Court disallowing IESI from offering controverting evidence. Specifically, the scheme was designed to develop evidence relevant to the proximate cause and damages element of the Plaintiffs cause of action. The Plaintiff therefore requests that this Court provide an instruction in the jury charge, as follows:

If you find that either IESI or JOHN HENRY OTTO were negligent, you are instructed that the negligence of IESI or JOHN HENRY OTTO was a proximate cause of the Plaintiff's damages.

As to the order, an appropriate order would exclude all evidence that is offered to—or does—negate, contradict, or rebut the evidence offered by the Plaintiff on the elements of proximate cause and damages.

E. SANCTIONS FOR ABUSE IN RESISTING DISCOVERY—SPOLIATION

15. The general topic under this section is IESI's failure to provide Vehicle Condition Reports, original Work Orders, and the actual accident report prepared by IESI concerning the incident in question. This topic has been referred to by the parties and the Court as the "Claudia Luna" situation, but that moniker tends to place the cart before the horse. Questions concerning who last controlled the documents, who lost or destroyed them, and any motive attached thereto,

are not relevant to a spoliation remedy. The initial inquiry is merely whether spoliation in fact occurred. Here, the answer is yes.

16. “The inquiry as to whether a spoliation presumption is justified requires a court to consider (1) whether there was a duty to preserve evidence; (2) whether the alleged spoliator breached that duty; and (3) whether the spoliation prejudiced the non-spoliator's ability to present its case or defense.” *Adobe Land Corp. v. Griffin, L.L.C.*, 236 S.W.3d 351, 357 (Tex. App.—Fort Worth 2007, no pet.)

17. Concerning the first element, a duty arises when a party knows or reasonably should know that there is a substantial chance that a claim will be filed and that evidence in its possession or control will be potentially relevant to that claim. *See id.* The duty requires “the party to preserve what it knows, or reasonably should know is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, or is the subject of a pending discovery sanction.” *Id.* Here, in seeking the protection of attorney-client privilege, IESI previously stated that it anticipated litigation immediately. The evidence is undisputed that IESI’s counsel was representing it in this matter within 18 hours after the accident. The unproduced documents include IESI’s actual accident report and a sequence of reports made by its driver concerning the truck’s brakes. IESI’s duty to preserve is established because it anticipated litigation and it knew or should have known these documents would be relevant.

18. The Fort Worth Court of Appeals has spoken on the second element: “While parties need not take extraordinary measures to preserve evidence, they have a duty to exercise reasonable care in preserving potentially relevant evidence. Therefore, in accordance with this duty, it is only logical that parties should be held accountable for either negligent or intentional

spoliation.” *Id.* at 359. While the parties disagree and the evidence is inconclusive on whether the documents were last in the control IESI or its counsel, and on whether they were lost or intentionally destroyed, the distinction is not relevant given that intentional and negligent spoliation receive identical treatment. *See also Trevino v. Ortega*, 969 S.W.2d 950, 957 (Tex. 1998)(Rejecting the idea that sanctions or spoliation instructions are available only for intentional or bad faith spoliation.)

19. Turning to the third element, prejudice, Defendant Otto has testified that he previously reported the truck’s brakes as malfunctioning and testified that the brakes in fact malfunctioned at the time of the incident in question. IESI has produced computerized print-outs reflecting that a minor, routine cleaning operation was performed on the truck’s brake pedal, presumably in response to Otto’s repeated complaints. Collectively, this evidence carries the ball for the Plaintiff on the question of negligence; however, the Plaintiff also seeks exemplary damages arising from gross negligence. It is spoliation of evidence relevant to this claim that has prejudiced the Plaintiff, as follows:

a) The computerized print-outs reflect only cleaning of the brake pedal with a wire brush and do not reflect a comprehensive diagnosis, a substantive repair, or overhaul to the brake system. The relevance of this cursory repair effort is illuminated by, and only by, evidence of the actual symptoms of which Otto complained. He does not recall his exact words, leaving his written vehicle condition reports and possibly the mechanic’s hand-written work orders as the only evidence on this topic.

b) The format of the computerized print-outs suggest they are a recent fabrication. When comparing the mechanic’s descriptions for the routine repairs to the truck in question to the mechanic’s descriptions for repairs performed across all IESI trucks in Texas, material differences become clear. The state-wide survey shows that it is the practice of IESI’s mechanics in Texas to provide brief, one- or two-line descriptions of their work. For the truck in question, and only the truck in question, the descriptions are highly detailed, providing not only the name of the operation performed but offering step-by-step descriptions spanning several lines. The actual written vehicle condition reports are the only source of

evidence that will resolve this question.

c) IESI's Director of Risk Management has testified that Mr. Otto's testimony conflicts with Mr. Otto's description of events given immediately after the accident. The Plaintiff has a burden to produce a preponderance of the evidence, and only the contemporaneously-prepared accident report can resolve this he said/he said dispute.

20. The Plaintiff's gross negligence claim requires him to prove IESI's actual, subjective awareness of the brake's condition. *See Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 290 S.W.3d 873, 875 (Tex. 2009). All documents reflecting this transmission of information to IESI, whether in the form of vehicle condition reports, repair work orders, or accident reports, were last in the control of IESI or its counsel and are now missing.

21. Justice Baker's concurrence in *Trevino v. Ortega* sets the standard for crafting a spoliation instruction. *See Trevino v. Ortega*, 969 S.W.2d 950, 960 (Tex. 1998)(cited with approval in *Adobe Land Corp. v. Griffin, L.L.C.*, 236 S.W.3d 351 (Tex. App.—Fort Worth 2007, no pet.) He wrote:

Depending on the severity of prejudice resulting from the particular evidence destroyed, the trial court can submit one of two types of presumptions. The first and more severe presumption is a rebuttable presumption. This is primarily used when the nonspoliating party cannot prove its prima facie case without the destroyed evidence. The trial court should begin by instructing the jury that the spoliating party has either negligently or intentionally destroyed evidence and, therefore, the jury should presume that the destroyed evidence was unfavorable to the spoliating party on the particular fact or issue the destroyed evidence might have supported. Next, the court should instruct the jury that the spoliating party bears the burden to disprove the presumed fact or issue. This means that when the spoliating party offers evidence rebutting the presumed fact or issue, the presumption does not automatically disappear. It is not overcome until the fact finder believes that the presumed fact has been overcome by whatever degree of persuasion the substantive law of the case requires.

In shifting the burden of proof to the spoliating party, trial courts are choosing a middle ground that neither condones the spoliation of evidence at the nonspoliating party's expense nor imposes an unduly harsh and absolute liability upon the spoliating party. Moreover, by shifting the burden of proof, the

presumption will support the nonspoliating party's assertions and is some evidence of the particular issue or issues that the destroyed evidence might have supported. The rebuttable presumption will enable the nonspoliating party to survive summary judgment, directed verdict, judgment not withstanding the verdict, and factual and legal sufficiency review on appeal.

The second type of presumption is less severe. It is merely an adverse presumption that the evidence would have been unfavorable to the spoliating party. The presumption itself has probative value and may be sufficient to support the nonspoliating party's assertions. However, it does not relieve the nonspoliating party of the burden to prove each element of its case. Therefore, it is simply another factor used by the factfinder in weighing the evidence.

Trevino, 969 S.W.2d at 960. Here, the Plaintiff cannot prove his prima facie case without the spoliated evidence. “What lifts ordinary negligence into gross negligence is the mental state of the defendant; that is what justifies the penal nature of the imposition of exemplary damages. . . . In other words, the plaintiff must show that the defendant knew about the peril, but his acts or omissions demonstrated that he didn't care.” *International Armament Corp. v. King*, 686 S.W.2d 595, 597 (Tex. 1985).

22. Accordingly, the Plaintiff requests a jury instruction as follows:

You are instructed that IESI has either negligently or intentionally destroyed evidence and, therefore, you should presume that the destroyed evidence was unfavorable to IESI on the question of whether it had an actual, subjective awareness of the risk presented by the mechanical condition of its truck.

F. SANCTIONS FOR ABUSE IN RESISTING DISCOVERY—OBSTRUCTION

23. Monetary sanctions are available when a party obstructs the discovery process. *See In re Zenergy, Inc.*, 968 S.W.2d 1 (Tex. App. Corpus Christi 1997). This includes the reasonable expenses, including attorney fees, caused by the conduct. *See* TEX. R. CIV. P. 215.2(b). The Court is familiar with the history of IESI's conduct in this case, but as a summary, the Plaintiff attaches a brief timeline as an appendix to this supplemental motion.

24. As shown on the timeline, IESI, through its counsel, engaged in a lengthy series of efforts to obstruct discovery. While it was assumed at one time that documents would never be produced, some, but not all, were delivered after a more than a year of requests, and only after IESI obtained new counsel. Significantly, IESI's corporate representative testified that he was aware of the missing documents in February 2008, and emails produced by IESI actually prove an earlier date in January 2007. Despite this knowledge, Claudia Luna's identity was concealed until July 2009, prolonging litigation of this issue for an additional two and one-half years.

25. Beyond the obstruction of document production, the Court will recall the affidavit of Claudia Luna wherein she described the efforts of IESI's prior counsel to intimidate her and threaten adverse consequences should Ms. Luna testify for the Plaintiff.

26. In segregating the additional time and expenses devoted to briefing, hearings, investigation (including needless trips to Houston occasioned by IESI's failure to provide Ms. Luna's address), the Plaintiff has incurred slightly over \$110,000 in additional costs caused by IESI's abuse of the discovery process. Plaintiff requests an award of monetary sanctions in this amount.

27. Staying mindful that this Court may consider everything that has occurred during the litigation when crafting its sanctions order, *Gentry v. Weaver Development Co.*, 909 S.W.2d 606, 610 (Tex. App.—Fort Worth 1995, no writ), the Plaintiff respectfully suggests that, to the extent IESI contends it has been harmed by its prior counsel's conduct, it may make claims against that counsel for professional negligence or seek fee forfeiture for the breach of fiduciary duty.

28. WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that his request for sanctions be granted as outlined in this supplemental motion and that he receive whatever

additional relief to which he is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing document was served on all counsel of record on November 19, 2010 via facsimile.

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Brian W. Butcher

Timeline of Plaintiffs' Requests for Discovery

Dec. 17, 2007	Plaintiffs serve written discovery
June 3, 2008	Letter requesting responses
July 9, 2008	Letter requesting responses
August 20, 2008	Letter requesting responses
Feb. 16, 2009	Plaintiffs' Second Request for Production
April 30, 2009	E-mail request for records
May 1, 2009	Peavler's response: "Chuck. Chuck. Chuck. No need for motions. Let me see if I can get you everything you need. Can you give me a week?"
May 13, 2009	Plaintiffs' file Motion to Compel
May 20, 2009	Peavler states: "We've produced everything accident-specific we have."
May 22, 2009	One week before discovery cut-off, defense counsel supplements RFP.
June 4, 2009	Plaintiffs' counsel inspects documents at defense counsel's office.
June 9, 2009	Plaintiffs file an opposed motion to continue the June 22 trial setting.
June 10, 2009	Defense counsel again states that everything relevant has been produced.
June 11, 2009	Plaintiffs' counsel requests the deposition of former IESI safety Manger, Claudia Luna. Peavler states that Ms. Luna was a former manager and therefore, Plaintiffs are not allowed to contact her.
July 9, 2009	Peavler writes: "I can affirmatively state that, after a diligent search, we have produced all records known to exist that relate to any truck repairs in 2006 to this particular truck. Further, I hereby affirmatively state that, after a diligent search, we have been unable to locate any VCR's for this truck that predate the accident." "The person who lost the repair orders/VCR's was Claudia Luna."

July 14, 2009 Peavler designates Claudia Luna as a person with knowledge of relevant facts:

Claudia Luna
Address/Phone unknown
Region safety manager ... has knowledge of lost/missing files

July 15, 2009 Defense counsel refuses to produce Luna's personnel file or contact information.

July 21, 2009 IESI supervisor Bill Osweiler testifies in deposition that Claudia Luna gathered all of the involved truck's maintenance records, VCR's, Repair Work Orders and Accident/Investigation forms, stating again that there are no documents that have not been produced.

July 30, 2009 Hearing on Plaintiff's Motion to Compel Written Discovery Responses. Defense counsel waives objections to requests for the truck's maintenance file, VCR's, Repair Work Orders and Accident/Investigation forms, stating again that there are no documents that have not been produced.

August 12, 2009 Court orders Luna employee file to be produced, subject to a protective order.

August 20, 2009 Peavler communicates via e-mail with Claudia Luna.

September 14, 2009 IESI produces Hours of Service Logs and route sheets for December 2006; Personnel records of the IESI driver, John Otto.

Sept. 16, 2009 Plaintiffs receive Luna's employee file, which contains her present address, telephone number and e-mail address. Compare this to the July 14, 2009 entry.

Sept. 29, 2009 IESI produces a Unit Repair History for December 2006, a Unit Repair Order History for March-August 2006 and February 2007.

Defense counsel does not explain why more than 600 pages of missing information was located after a year and one-half of requests or why critical Repair Work Orders, VCR's, and other documentation from the truck's maintenance file still have not been produced.