

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 33080

TERRY R. MACE and DONALD MACE,
Plaintiffs Below, Appellants

vs.

FORD MOTOR COMPANY, a Delaware corporation;
LIBERTY MUTUAL INSURANCE COMPANY, INC., a Massachusetts
corporation; and BERT WOLFE FORD, INC., a West Virginia corporation,
Defendants-Below,

LIBERTY MUTUAL INSURANCE COMPANY, INC.,
Defendant-Below, Appellee

Hon. Louis H. "Duke" Bloom, Judge
Circuit Court of Kanawha County
Civil Action No. 04-C-223

BRIEF OF THE APPELLEE

Counsel for Appellants

Edgar F. Heiskell, III, Esq.
WV State Bar ID No. 1668
Michie Hamlett Lowry Rasmussen & Tweel
P.O. Box 298
Charlottesville, VA 22902-0298
Telephone (434) 951-7234

J. Miles Morgan, Esq.
WV State Bar ID No. 5988
214 Capitol Street
Charleston, WV 25301
Telephone (304) 720-4999

Counsel for Appellee

Ancil G. Ramey, Esq.
WV State Bar ID No. 3013
Steptoe & Johnson
P.O. Box 1588
Charleston, WV 25326-1588
Telephone (304) 353-8112

Barbara J. Keefer, Esq.
WV State Bar ID No. 1979
MacCorkle, Lavender, Casey & Sweeney
P.O. Box 3283
Charleston, WV 25332-3283
Telephone (304) 344-5600

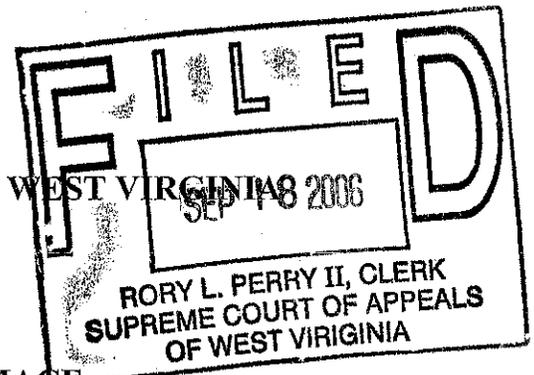


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I. INTRODUCTION

This is the Brief of the Appellee, Liberty Mutual Insurance Company, Inc., [Liberty], in an appeal from an order of the Honorable Louis H. "Duke" Bloom, Judge of the Circuit Court of Kanawha County in a suit instituted by the Appellants, Terry R. Mace and Donald Mace [Maces].

This Court should affirm the judgment for the following reasons:

1. The evidence was undisputed that Liberty had no "actual notice" of any "pending or potential suit" at the time it acquired the subject vehicle from the Maces and this Court has held that "constructive notice" is insufficient establish a claim for negligent spoliation of evidence.
2. The evidence was undisputed that Liberty never altered, damaged, or destroyed the subject vehicle after it acquired the vehicle from the Maces; rather, the vehicle left Liberty's possession in the same condition upon its sale to a salvage company as when Liberty acquired it from the Maces.
3. The evidence was undisputed that the Maces' claim against the Defendant, Ford Motor Company, Inc. [Ford], would have survived a motion for summary judgment, which defeats a claim for negligent spoliation of evidence under West Virginia law.
4. The evidence was undisputed that Liberty owed no duty to the Maces to preserve the vehicle when the Maces never informed Liberty prior to its sale of the vehicle to a third party that they intended to institute any cause of action.
5. The evidence was undisputed that the Maces settled with Ford for an amount in excess of their special damages, and because the Maces prevailed in their claim against Ford, their suit for negligent spoliation is barred.
6. The evidence was undisputed that the Maces voluntarily transferred title to the subject vehicle to Liberty and to impose liability upon Liberty for selling its own property to a third party would violate Liberty's rights under the United States Constitution and the West Virginia Constitution.
7. The evidence was undisputed that the Maces' lacked sufficient evidence of causation as their expert admitted, under oath, that (a) he could not testify that the rollover was caused by any defect in the Explorer because he does not know anything about the circumstances of the rollover and there is evidence that an unrepaired ball

joint may have caused the rollover;¹ (b) he could not say whether Ms. Mace's injuries were suffered in the initial collision with the guard rail or in the rollover;² (c) he could not say how Ford's defenses would have been received because he has no knowledge of the accident or of West Virginia law;³ and (d) he could not say whether the Maces' settlement or judgment would have been greater had the parts never been removed from the Explorer.⁴

8. The evidence was undisputed that the Maces could not rebut the sworn testimony of former Insurance Commissioner, Hanley C. Clark, that no insurance company doing business in the State of West Virginia, would have had any statutory, regulatory, or other legal duty to (a) advise policyholders of any potential civil action against the manufacturer of a "total loss" vehicle even if such insurance company had knowledge that the manufacturer had been successfully sued in other cases or had been sued by the insurance company for subrogation in other cases, or (b) maintain "total loss" vehicles for possible inspection after their acquisition under West Virginia law.

II. STATEMENT OF FACTS

On February 4, 2002, Terry R. Mace was involved in a single-vehicle accident while operating her eight-year-old 1994 Ford Explorer.⁵ Donald Mace, notified Liberty, which insured the Explorer, on the same day of the accident, of their property damage claim.⁶ Liberty inspected the Explorer, determined it to be a total loss, and paid the Maces the book value of \$7,775.25.⁷

¹Liberty Mutual's Response to Plaintiffs' Brief in Opposition to Liberty Mutual's Motion for Summary Judgment, Ex. B at 137-38, 161-66, 218.

²*Id.* at 198.

³*Id.* at 137-38, 161-66, 199.

⁴*Id.* at 202 ("Q. If Ford Motor Company paid \$50,000 to settle this case, you have no idea as to whether or not that's a high settlement or low settlement, do you? A. I don't know. Q. Because you have no idea what her medical bills were, do you? No, I don't. Q. You have no idea whether she lost any work, do you? A. No, I don't").

⁵Accident Report, attached as Exhibit A to Liberty's Motion for Summary Judgment.

⁶Recorded Interview of Donald Mace, attached as Exhibit B to Liberty's Motion for Summary Judgment.

⁷Correspondence, attached as Exhibit C to Liberty's Motion for Summary Judgment.

On February 26, 2002, Ms. Mace executed documents transferring ownership of the Explorer to Liberty, twenty-two (22) days after the accident.⁸ Mr. Mace also executed a “Bill of Sale” to Liberty, which expressly stated: “[T]he undersigned hereby sells and assigns to said LIBERTY MUTUAL GROUP . . . all title and interest in a . . . Ford . . . Explorer EXT 1994 Model . . .” *Id.* In addition to executing a “Bill of Sale” to Liberty, Mr. Mace executed a power of attorney which indicates that Plaintiffs had full notice that they were selling their vehicle to Liberty for “salvage” as follows: “I HEREBY AUTHORIZE LIBERTY MUTUAL INSURANCE COMPANY to be my lawful Attorney-In-Fact to act on my behalf to apply for a Certificate or duplicate Certificate of Title.”⁹ Following transfer of ownership of the vehicle to Liberty, it sold the vehicle to a salvage company on April 11, 2002, forty-four (44) days after the Plaintiffs sold the vehicle to Liberty.¹⁰

Importantly, the Maces were given an opportunity to and did inspect the vehicle prior to any change in its condition, including taking photographs.¹¹ The Maces never requested Liberty to preserve the vehicle.¹² To the contrary, the Maces agreed, in writing, that Liberty would “handle the

⁸Bill of Sale, attached as Exhibit D to Liberty’s Motion for Summary Judgment.

⁹Power of Attorney, attached as Exhibit E to Liberty’s Motion for Summary Judgment.

¹⁰Bill of Sale, attached as Exhibit F to Liberty’s Motion for Summary Judgment.

¹¹Copies of Photographs, attached as Exhibit H of Liberty’s Motion for Summary Judgment.

¹²Depo. Tr. of Donald Mace, attached as Exhibit S to Liberty’s Motion for Summary Judgment. In the Maces’ responses to Liberty’s requests for admissions, they stated as follows:

REQUEST FOR ADMISSION NUMBER TWO: Please admit that neither Plaintiff, prior to the institution of this lawsuit, ever requested Liberty to preserve the 1994 Ford Explorer.

RESPONSE: Objection. This Request is irrelevant, immaterial, and would not lead to admissible evidence. Without waiving the foregoing objections, this request is admitted .

...

Plaintiffs’ Responses to Liberty’s Discovery Requests, attached as Exhibit Q to Liberty’s Motion for

salvage of your vehicle.”¹³ The Maces further testified in their depositions that they understood what “salvage” meant and knew that Liberty would sell the vehicle which could be used for its parts.¹⁴

The Maces never informed Liberty that they intended to file any suit against any party as a result of the accident.¹⁵ Both testified that they had no thought for many months of even filing suit.

Summary Judgment.

¹³Correspondence, attached as Exhibit C to Liberty’s Motion for Summary Judgment.

¹⁴Depo. Tr. of Donald Mace, attached as Exhibit S to Liberty’s Motion for Summary Judgment; Depo. Tr. of Terry Mace, attached as Exhibit R to Liberty’s Motion for Summary Judgment.

¹⁵Ms. Mace testified in her own deposition:

Q. Okay. During the time period from the date of your accident up until the time that Liberty Mutual actually paid you for the vehicle, okay?

A. Okay.

Q. Did you ever tell Liberty that you were going to sue Ford?

A. No, at that point, I didn’t even realize that there were – you know, I hadn’t researched anything, didn’t know anything about the product to even go that route.

Liberty Mutual’s Motion for Summary Judgment, Ex. J. Mr. Mace testified:

Q. Okay. Did you, when you reported the incident to Liberty Mutual, ask them to retain the vehicle for you in any way?

A. No, ma’am.

Q. At any time while Liberty was processing your collision claim and paying for the vehicle, did you ask them to preserve the vehicle for you?

A. No, ma’am.

Q. Did you ever ask to buy the vehicle from Liberty Mutual?

A. No, ma’am.

Q. At any time in your dealings with Liberty Mutual about the collision claim on your Explorer, did you tell any representative of Liberty Mutual that you were going to sue Ford?

Indeed, the Maces did not file suit against Ford until January 30, 2004, almost two years after selling the Explorer to Liberty, alleging product liability and negligence claims.¹⁷ Only after allegedly discovering that some of the suspension parts of the vehicle had been removed on an undetermined date after Liberty sold it for salvage, did the Maces file their amended complaint against Liberty on February 13, 2004, alleging negligent spoliation of the suspension on the vehicle.¹⁸

Importantly, the Maces' product liability suit against Ford was successful as they settled their suit against Ford for \$50,000.00.¹⁹ Ms. Mace's itemization of special damages was less than the

A. No, ma'am.

Q. Did you ever tell a representative of Liberty Mutual that you were thinking about suing Ford?

A. No, ma'am.

Liberty Mutual's Motion for Summary Judgment, Ex. R. Finally, in the Maces' responses to Liberty's requests for admissions, they stated as follows:

REQUEST FOR ADMISSION NUMBER ONE: Admit that neither Plaintiff advised Liberty Mutual Insurance Company, prior to the institution of this suit, that they intended to sue Ford Motor Company for any reason arising out of the accident involving the 1994 Ford Explorer that took place on February 4, 2002.

RESPONSE: Admitted.

Plaintiffs' Responses to Liberty's Discovery Requests, attached as Exhibit Q to Liberty's Motion for Summary Judgment.

¹⁶Depo. Tr. of Donald Mace, attached as Exhibit S to Liberty's Motion for Summary Judgment; Depo. Tr. of Terry Mace, attached as Exhibit R to Liberty's Motion for Summary Judgment.

¹⁷Plaintiffs' Complaint, attached as Exhibit K to Liberty's Motion for Summary Judgment.

¹⁸Plaintiffs' Amended Complaint, attached as Exhibit L to Liberty's Motion for Summary Judgment.

¹⁹Dismissal Order, attached as Exhibit M to Liberty's Motion for Summary Judgment.

amount of the settlement with Ford.²⁰ Thus, granted the uncertainties in any product liability case against an automobile manufacturer, particularly where this was not a classic “rollover” case in the sense that the Mace vehicle did not suddenly rollover, but rolled over after striking a guardrail when Ms. Mace swerved sharply to avoid colliding with another vehicle, the settlement of \$50,000.00 could not be said to have been nominal. Nevertheless, seeking to recovery additional monies, however, the Maces persisted in their “negligent spoliation” claims against Liberty.

The evidence developed during discovery indicates that Liberty, as a company, has processed about 500 claims, nationwide, over the past 10 years, involving what is coded as the “upset” of Ford Explorers, which may or may not all be rollovers.²¹ It is undisputed that the Maces’ claim, because Ms. Mace’s vehicle first hit the guardrail, was not coded as an “upset.” *Id.* Liberty has paid out millions of dollars in claims arising from the “upset” of Ford Explorers, although the precise amount is uncertain.²² Of all of those hundreds of claims and millions of dollars in payments, Liberty filed a single subrogation claim in Florida against Ford and Bridgestone/Firestone, alleging defects in the Ford Explorer and Bridgestone/Firestone tires, which was later dismissed as to Ford without any payment by Ford to Liberty.²³ It is based upon this single case out of about 500, and which involved Bridgestone/Firestone tires which were not on the Maces’ vehicle, that the Maces claim that Liberty somehow should be charged with notice that it should preserve ever single Ford Explorer or be subject to liability for negligent spoliation. Wisely, Judge Bloom rejected this unrealistic argument.

²⁰Plaintiffs’ Itemization of Special Damages, attached as Exhibit N to Liberty’s Motion for Summary Judgment.

²¹Liberty Data Spreadsheet, attached as Exhibit 3 to Plaintiffs’ Motion for Summary Judgment.

²²Liberty Data Spreadsheet, attached as Exhibit 3 to Plaintiffs’ Motion for Summary Judgment.

²³Liberty Mutual’s Complaint, attached as Exhibit 2 to Plaintiffs’ Motion for Summary Judgment.

It was undisputed that, unlike the single Florida case, the Mace Explorer did not have Bridgestone/Firestone tires, but that Ms. Mace lost control, on an icy highway, while allegedly avoiding a collision with another vehicle, and struck a guardrail, after which her Explorer rolled over several times.²⁴ It was also undisputed in the record that there was another possible defect, an unrepaired ball joint, which might have contributed to instability in the Explorer, and might have been relied upon by Ford to exonerate itself from a claim that a product defect contributed to the rollover.²⁵ Finally, there is no medical evidence in the record to establish that Ms. Mace's injuries were the proximate result of the rollover, as opposed to the initial collision between her vehicle and the guardrail. Accordingly, unless this Court is going to overrule *Hannah v. Heeter* and depart from the manner in which other appellate courts have decided these issues under similar circumstances, it should affirm the judgment of the Circuit Court of Kanawha County.

III. DISCUSSION OF LAW

A. STANDARD OF REVIEW.

It is well-settled that the standard of review of an order granting a motion for summary judgment is *de novo*. In *Conrad v. ARA Szabo*,²⁶ this Court stated:

We exercise plenary review over a circuit court's decision to grant either a motion to dismiss or a summary judgment. Syl. pt. 2, *State ex rel. McGraw v. Scott Runyon Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995) (This Court reviews *de novo* a circuit court's order granting a motion to dismiss a complaint); Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994) ("A circuit court's entry

²⁴Accident Report, attached as Exhibit A to Liberty's Motion for Summary Judgment; D. Mace's Statement, attached as Exhibit B to Liberty's Motion for Summary Judgment.

²⁵Depo. Tr. of Thomas J. Feaheny, attached as Exhibit B to Liberty's Summary Judgment Reply, at 137-38, 161-66, 218.

²⁶198 W. Va. 362, 369, 480 S.E.2d 801, 808 (1996).

of summary judgment is reviewed de novo”). In determining whether a motion to dismiss or a summary judgment is appropriate, we apply the same test that the circuit court should have applied initially. *See Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 66, 99 S. Ct. 383, 387, 58 L. Ed. 2d 292, 299 (1978); *Gentry v. Magnum*, 195 W. Va. 512, 466 S.E.2d 171 (1995). We are not wed, therefore, to the lower court’s rationale, but may rule on any alternate ground manifest in the record.

In this case, the facts were not in dispute; rather, the only issue was whether the evidence satisfied this Court’s requirements for the cause of action of negligent spoliation. For the reasons relied upon by Judge Bloom, as well as additional reasons not relied upon, this Court should affirm judgment as a matter of law for Liberty.

B. THERE WERE NO GENUINE ISSUES OF MATERIAL FACT REGARDING THE MACES FAILURE TO SATISFY THE SIX ELEMENTS OF A CAUSE OF ACTION FOR NEGLIGENT SPOLIATION OF EVIDENCE.

The Maces seek to impose upon an insurance company the unilateral obligation to indefinitely retain ownership of its own property acquired in accordance with state law addressing property damage insurance claims, even though no request for retention of ownership has been made. Such a precipitous course is squarely foreclosed by the law of negligent spoliation adopted in Syllabus Point 8 of *Hannah v. Heeter*:²⁷

The tort of negligent spoliation of evidence by a third party consists of the following elements: (1) the existence of a pending or potential civil action; (2) the alleged spoliator had actual knowledge of the pending or potential civil action; (3) a duty to preserve evidence arising from a contract, agreement, statute, administrative rule, voluntary assumption of duty, or other special circumstances; (4) spoliation of the evidence; (5) the spoliated evidence was vital to a party’s ability to prevail in the pending or potential civil action; and (6) damages. Once the first five elements are established, there arises a rebuttable presumption that but for the fact of the spoliation of evidence, the party injured by the spoliation would have prevailed in the pending or potential litigation. The third-party spoliator must overcome the rebuttable presumption or else be liable for damages.

²⁷213 W. Va. 704, 584 S.E.2d 560 (2003).

The Maces woefully failed to meet the elements of a negligent spoliation claim.

First, the evidence is undisputed that Liberty had no “actual knowledge” of any “pending or potential civil action”. Ms. Mace admitted in her deposition that she did not even contemplate a civil action until well after Liberty’s sale of the vehicle for salvage as it was required to do under West Virginia law.²⁸ Indeed, the Maces acknowledged in writing when they sold their vehicle to Liberty that Liberty would “handle the salvage of your vehicle.”²⁹ Thus, the Maces received ample notice that, after selling their vehicle to Liberty only days after the accident, Liberty intended to “salvage” the vehicle.³⁰ The Maces proceed, not under a claim of actual knowledge, but constructive knowledge— a standard this Court has rejected in negligent spoliation cases.

Second, the evidence is undisputed that Liberty had no contractual, statutory, regulatory, or other “special” duty such as would be predicated on a unilateral promise to preserve. It is axiomatic

²⁸See Liberty Mutual’s Motion for Summary Judgment, Exhibit R (“Q. At what point in time, ma’am, did you decide to sue Ford? A. I’m not exactly sure. I think that it was about probably three months, three to four months after the initial accident, after I had just – you know, I got all of this literature and started reading, and I just really felt that there was more to that, because I didn’t recall doing anything incorrectly.”).

²⁹Liberty’s Mutual Motion for Summary Judgment, Ex. C.

³⁰Importantly, both the Maces testified that they understood what the word “salvage” meant:

Q. If I use the term, “salvage,” what does that term mean to you?

A. “Salvage,” is to dispose of.

[Liberty Mutual Motion for Summary Judgment, Ex. S].

Q. If I use the term, “salvage,” do you know what I mean by that term?

A. I would think that it is like a salvage yard that you would take the vehicle and take it there and take off of it whatever you could use and then destroy it.

Liberty Mutual Motion for Summary Judgment, Ex. J. Thus, both of the Maces well knew what it meant when they voluntarily sold their vehicle to Liberty for “salvage.”

that a defendant cannot breach a duty that does not exist. The Maces identified no source of any duty on the part of an insurance company to which its insured sells a totaled vehicle for value pursuant to law to indefinitely preserve the vehicle because of the mere *possibility* that the insured may bring an action against the manufacturer for product defect.

Third, the undisputed evidence is that Liberty did not “spoil” the Explorer. Pursuant to West Virginia law, Liberty acquired title to the Explorer from the Maces and, as is its constitutional right, sold its property to a third party. The vehicle was unaltered from the time Liberty acquired it until Liberty sold it. The Maces were afforded an opportunity to, and did, inspect it, including taking numerous pictures. Imposing liability on Liberty for selling its own property would violate Liberty’s state and federal constitutional rights.³¹

Fourth, the allegedly spoliated evidence was not “vital to a party’s ability to prevail in the pending or potential civil action,” as no summary judgment would have been granted to Ford, as there was circumstantial evidence of product defect and the Maces did “prevail” to the extent of a substantial settlement. This Court has held that existence of a defective product is not essential to a products liability case if there is other evidence of product defect. In this case, the Maces’ theory was that all Explorers were defective when they rolled off the assembly line. Thus, the Maces’ could have survived any summary judgment motion by Ford.

³¹The Maces propose some free-standing duty on the part of insurance companies to preserve total loss vehicles based upon their general knowledge that those vehicles may have been the subject of product liability suits, but who would have paid Liberty for the storage costs of the vehicle for two years while the Maces were contemplating a lawsuit; who would have paid Liberty for the storage costs of the vehicle for the years during which the case against Ford may have been in litigation; who would have paid Liberty for the loss of salvage value in the vehicle it had purchased for full value as these years passed?

Finally, the Maces suffered no “damages.” There is no evidence that a jury would not have awarded the full amount of damages to the Maces that were reasonably recoverable—even assuming the vehicle had not be altered by the third party to whom the vehicle was sold. Moreover, the Maces had no witness who would testify to the jury that the relatively minor injuries she allegedly suffered were not the result of the initial collision between her vehicle and the guardrail, but were the proximate result of the rollover.³²

Of the six requirements of *Hannah*, Judge Bloom determined that there were no genuine issues of material fact as to the first three and properly awarded summary judgment to Liberty. He did not find genuine issues of material fact as to the final three criteria, but simply did not address those factors upon which Liberty also relied. In any event, it is clear that the Maces failed to present genuine issues of material fact as to the elements of a cause of action for negligent spoliation.

C. BECAUSE THE EVIDENCE WAS UNDISPUTED THAT IT HAD NO ACTUAL NOTICE THAT THE MACES INTENDED TO FILE SUIT AGAINST FORD, JUDGE BLOOM PROPERLY CONCLUDED LIBERTY WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

The first criteria for a negligent spoliation claim is “the existence of a pending or potential civil action” and the second criteria is that “the alleged spoliator had actual knowledge of the pending or potential civil action.”³³ Actual and constructive are mutually exclusive. Therefore, the Maces’ theory that Liberty had constructive knowledge of a potential cause of action based upon its processing of other claims involving the Explorer contradicts *Hannah* and the decisions of every

³²As the Maces could satisfy five of the six requirements for the tort of negligent spoliation of evidence, Liberty was entitled to judgment as a matter of law. Accordingly, this Court should affirm the award of summary judgment.

³³Syl. pt. 8, *Hannah*, *supra*.

court which has considered the issue. Therefore, Judge Bloom properly granted summary judgment to Liberty under the first and second criteria of *Hannah*.

Hannah employed the terms “pending or potential civil action.” This Court could not have been clearer that only “actual knowledge,” and not “constructive knowledge,” suffices for a claim of negligent spoliation—“We emphasize that a third party must have had *actual* knowledge of the pending or potential litigation. ‘[A] third party’s constructive notice of a pending or potential action is not sufficient to force upon the third party the duty to preserve evidence.’”³⁴

The word “actual” means, as the Court has noted, “real or in fact, as opposed to seemingly or pretended.”³⁵ As *Black’s* notes, “actual” and “constructive” have opposite meanings. Thus, the term “actual knowledge” means “Direct and clear knowledge, as *distinguished from constructive knowledge*.”³⁶ “Constructive” means “Legally imputed; having an effect in law though not necessarily in fact. . . . See LEGAL FICTION. Cf. ACTUAL.”³⁷ Thus, the term “constructive knowledge” means “Knowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person.”³⁸

Obviously, there was no pending civil action when Liberty sold the Explorer. Moreover, Liberty had no actual knowledge of a potential civil action. There are two ways a third party can be

³⁴*Hannah, supra* at 714, 584 S.E.2d at 570 (citations omitted).

³⁵*Mooney v. Barton*, 155 W. Va. 329, 335, 184 S.E.2d 322, 326 (1971) (quoting *Black’s Law Dictionary and Webster’s New International Dictionary*); see also *Black’s Law Dictionary* (8th ed. 2004) (“Existing in fact; real Cf. CONSTRUCTIVE.”).

³⁶*Black’s Law Dictionary* (8th ed. 2004) (emphasis added).

³⁷*Black’s Law Dictionary* (8th ed. 2004).

³⁸*Black’s Law Dictionary* (8th ed 2004).

held liable for negligent spoliation: the third party must have actual knowledge that a lawsuit has been filed, or the third party must have actual knowledge of a potential law suit, i.e., that someone intends to file a lawsuit, but that such lawsuit has not yet been filed. It is undisputed in this case that neither of these circumstances existed when Liberty sold the vehicle. If the Maces had told Liberty, "We have a filed a lawsuit against Ford," it would have known that the vehicle had evidentiary value and arrangements could have been made for its preservation. If the Maces had told Liberty, "We intend to file suit against Ford," likewise, it would have known the vehicle had evidentiary value. But, where Liberty had no knowledge of an "actual" pending lawsuit or a "potential" or "impending" lawsuit, the law imposes no duty on Liberty, as a third-party, to preserve the vehicle.

In *Smith v. Atkinson*,³⁹ a case upon which this Court relied in *Hannah*, the Alabama Supreme Court made clear that the type of constructive knowledge upon which the Maces rely is insufficient:

We also agree with *Johnson* that a third party's constructive notice of a pending or potential action is not sufficient to force upon the third party the duty to preserve evidence. "*Limiting the usual duty in third-party negligent spoliation to an agreement to preserve, or a voluntary undertaking with reasonable and detrimental reliance, or a specific request, ensures that such a spoliator has acted wrongfully in a specifically identified way.*"

(emphasis added and citations omitted). In other words, unless "(1) the third party has knowledge of a potential lawsuit and accepts responsibility for preserving the evidence; (2) the third party voluntarily undertakes to preserve the evidence and a plaintiff reasonably and detrimentally relies thereon; (3) the third party agrees with plaintiff to preserve the evidence; or (4) plaintiff makes a specific request to the third party to preserve a particular item,"⁴⁰ *there is simply no cause of action*

³⁹771 So. 2d 429, 433 (Ala. 2000).

⁴⁰*Swick v. The New York Times Company*, 815 A.2d 508, 512 (N.J. Super Ct. App. Div. 2003) (citing *Gilleski v. Comm. Med. Ctr.*, 765 A.2d 1103 (N.J. Super Ct. App. Div. 2001)).

for negligent spoliation because there is no "actual knowledge" of a pending or potential cause of action.⁴¹

The West Virginia and the Alabama Supreme Courts are not alone in making clear that unless there is an explicit agreement to preserve evidence; or the plaintiff relied upon the third party's voluntary assumption of the preservation of evidence; or, the plaintiff specifically requested that the evidence be preserved, there is no cause of action for negligent spoliation.

⁴¹Importantly, the *Restatement (Second) of Torts* substantiates these limitations negligent spoliation. Section 42 of the *Restatement (Second) of Torts* provides:

An actor who undertakes to render services to another that the actor knows or should know reduce the risk of physical harm to the other has a duty of reasonable care to the other in conducting the undertaking if:

- (a) the failure to exercise such care increases the risk of harm beyond that which existed without the undertaking, or
- (b) the person to whom the services are rendered or another relies on the actor's exercising reasonable care in the undertaking.

This is the basis for the detrimental reliance form of negligent spoliation of evidence. Importantly, *Restatement (Second) of Torts* § 314 makes clear that, "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action," which is the Maces' theory in the instant case. Rather, only if Liberty had affirmatively agreed, or voluntarily assumed a duty, to preserve the evidence knowing that the Maces were so relying could a cause of action for negligent spoliation arise. *Restatement (Second) of Torts* § 323 also provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

- (a) his failure to exercise such care increases the risk of such harm, or
- (b) the harm is suffered because of the other's reliance upon the undertaking.

This is the basis for the voluntary assumption of duty form of negligent spoliation of evidence. Of course, in the instant case, there is absolutely no evidence that Liberty ever represented to the Maces that they would preserve the vehicle.

In *Johnson v. United Services Auto. Ass'n*,⁴² the California court made plain, “[C]onstructive notice of a need to preserve is not enough to create a duty to preserve in this context.” In *Johnson*, the plaintiff was ejected from a vehicle. USAA insured the car. The car was a total loss and a property damage settlement was reached. The plaintiff’s father specifically declined to retain the salvage. The car’s title was then transferred to USAA from plaintiff. In an internal record, USAA adjusters noted that shoulder belt of the seat where the plaintiff was sitting was torn from its housing, explaining why plaintiff was ejected from the car. USAA received a police report on October 7, 1991, and a statement from the plaintiff’s father around that time apparently identifying a seat belt malfunction.

A USAA adjuster on November 1, 1991, noted the plaintiff had a lawyer and wanted to sue the seatbelt manufacturer. The adjuster also observed that the plaintiff’s attorney or representative wanted to examine the vehicle. The plaintiff’s accident reconstruction expert inspected the car in mid-November 1991, who removed a portion of the seat belt to preserve it as evidence. In late November 1991, USAA transferred the car title to salvage. The car was purchased at a salvage auction in February 1992, reworked and resold in August 1992. In early 1992, USAA paid the plaintiff. In May 1992, the plaintiff sued Honda for product liability, claiming the seat belt was defective. Around June of 1992, the plaintiff’s counsel inquired of USAA where the car was, indicating it was needed for evidence in the product liability suit. Honda and the plaintiff eventually settled the product liability action for \$500,000.

⁴²79 Cal. Rptr. 2d 234, 240 (Ct. App. 1998), *abrogated by Lueter v. State of California*, 115 Cal. Rptr. 2d 68 (Ct. App. 2002).

In April 1993, the plaintiff sued USAA for, *inter alia*, negligent or intentional spoliation of evidence, claiming that had USAA preserved the car, plaintiff's product liability claim against Honda would have been worth more. The California court rejected this position:

[T]he fact that USAA knew (or should have known) there was a seat belt malfunction, coupled with the notice to USAA that the named insured had an attorney, that he (the insured) wanted to sue the seat belt manufacturer, and that he wanted his attorney or representative to look at the car, show only constructive notice rather than a specific request to preserve the car; therefore, these facts do not create a duty to preserve the car.⁴³

Johnson noted that creating a duty to preserve evidence absent well-defined circumstances was contrary to existing law:

Absent an agreement to preserve, a voluntary undertaking with reasonable and detrimental reliance, a specific request, or some other contractual, legal or analogous special relationship, there is little or no "transaction intended to affect the plaintiff," or "foreseeability of harm to the plaintiff," or "closeness of connection between the defendant's conduct and the injury suffered," or "moral blame attached to the defendant's conduct," or "future harm to prevent."

Id. (emphasis added; citations deleted) As there was no agreement to preserve, no voluntary undertaking with reasonable and detrimental reliance, no specific request, nor any contractual, legal or analogous special relationship, (which obviously would not include an insured/insurer relationship as those were the facts in *Johnson*,) there can be no negligent spoliation and Liberty was entitled to summary judgment.⁴⁴

⁴³*Id.*

⁴⁴Liberty's subrogation right against Ford imposed no duty upon Liberty to preserve the Explorer:

Plaintiffs argue that, based on those contractual terms, Allstate had a right to control the fire scene as well as a right to take and keep possession of any covered, destroyed property (Doc. 10, P 2(a), p. 9). Plaintiffs maintain that, arising from those rights, Allstate had an implied duty not to impair Plaintiffs' products liability cause of action when Allstate exercised its contractual rights. The Court disagrees. The relevant provisions, quoted above, do not indicate that Allstate's contractual rights are subject to any potential cause of action of the

Likewise, in *Yan v. Illinois Farmers Ins. Co.*,⁴⁵ the insureds were involved in the rollover of a Chevy Blazer.⁴⁶ The insurer, Farmers, like Liberty in this case, processed the insureds' total loss claim and purchased the vehicle for salvage under Indiana law.⁴⁷ Thereafter, as in this case, Farmers sold the vehicle for salvage as "At no time prior to the sale of the vehicle in May of 2001 did Mr. Yan, or anyone else on his behalf, indicate to Farmers that litigation of any sort was being contemplated."⁴⁸ Six months later, the insureds decided to pursue a suit against General Motors and inquired about the vehicle, which was eventually located in the United Arab Emirates.⁴⁹ After Farmers refused the insureds' request to repurchase the salvaged vehicle, they dismissed their product liability suit and brought a spoliation action against Farmers.⁵⁰ Awarding summary judgment to Farmers, the court reasoned:

The relationship between Farmers and the Plaintiffs is limited to that of an insurer to its insured, that is to say, it gives rise to a duty of good faith – nothing more, nothing less. There is no evidence of a breach of that duty here. Further, in terms of foreseeability of litigation between the insureds and the manufacturers of the tires and vehicle, Farmers is held to no higher standard than that which a reasonable insurer would ordinarily suspect, absent some mention by the insured of the possibility of a lawsuit, during the year and a half following the accident while the vehicle was still

insured (Plaintiffs). Those contract provisions give Allstate a right of subrogation and a right to take possession of covered, destroyed property. This Court will not create a contractual duty when the contract provisions do not indicate such a duty exists.

Silhan v. Allstate Ins. Co., 236 F. Supp. 2d 1303, 1309 (N.D. Fla. 2002).

⁴⁵2005 WL 2175525 (S.D. Ind. 2005).

⁴⁶*Id.* at *1.

⁴⁷*Id.*

⁴⁸*Id.*

⁴⁹*Id.*

⁵⁰*Id.*

in storage at Impact Auto Auctions. Nothing of that sort was indicated by the insured during that time, and the insurance company was not obligated to intuit such intentions. Finally, the negative public policy implications that would flow from requiring an insurer, who has received free and clear title to a vehicle from its insured, following settlement of a property damage claim, to refrain from disposing of the vehicle until it has made sure that the former owner does not need it for litigation or other purposes are unduly onerous.⁵¹

Likewise, in the instant case, there was no law imposing upon Liberty a duty to preserve a vehicle it had purchased for salvage under West Virginia law compelling such purchase in a total loss claim; it did not voluntarily assume such duty by its conduct; and the Maces never requested Liberty to assume such duty. Imposing of such duty on an insurer, merely because of general knowledge that the product *might* be the subject of suit, as the court held in *Yan*, would be unduly onerous.

Similarly, in *Reid v. State Farm Mut. Auto. Ins. Co.*,⁵² a permissive user lost control of a vehicle and struck a guardrail.⁵³ After the vehicle was deemed a total loss, it was purchased by State Farm and sold for salvage.⁵⁴ About eighteen months later, State Farm was contacted about the vehicle after the user filed suit against Honda alleging product defect.⁵⁵ Once the user discovered that the vehicle had been “cut up . . . for parts” which, of course, is how salvage works, he filed suit against State Farm for negligent spoliation. Rejecting such claim, under circumstances similar to this case, the court stated as follows:

In the case at bench, plaintiff Reid has not pointed to any provision in the contract of insurance or cited any legal authority whatsoever which imposes a duty on State

⁵¹*Id.* at *6.

⁵²173 Cal. App. 3d 557, 218 Cal. Rptr. 913 (1985).

⁵³*Id.* at 567, 218 Cal. Rptr. at 917.

⁵⁴*Id.*

⁵⁵*Id.* at 568, 218 Cal. Rptr. at 918.

Farm to take affirmative action to investigate possible causes of action of the insured [here permissive user Reid] against other third parties or to preserve as evidence wrecked motor vehicles absent a specific request from the insured to do so.

Here, the record shows that State Farm promptly investigated the accident; paid named insured Galloway's property damage claim as a total loss; settled passenger Tiller's claim against Reid and Galloway; and paid Reid the policy limit on medical coverage. It is uncontradicted that at no time during the handling of the claims, which involved personal conferences with permissive user Reid, named insured Galloway, or passenger Tiller, was any mention ever made to the possibility that a mechanical defect in the Honda vehicle may have contributed to the accident. Superimposed upon this absence of any request by Reid, Galloway or Tiller to preserve the totaled vehicle is the CHP report which concluded that plaintiff Reid, through inattention, overshot the Laurel Canyon off ramp and, in trying to still make the off ramp, collided with the guardrail.⁵⁶

Accordingly, we hold as a matter of law that, in the absence of a specific request by either Galloway or Reid, State Farm had no duty to preserve the 1978 Honda vehicle for plaintiff Reid. The undisputed facts of this case leave no room for a reasonable difference of opinion as to whether or not State Farm breached its duty of good faith and fair dealing. It did not. In the absence of an issue of fact which was triable, the summary judgment was properly granted.⁵⁷

Obviously, third-party negligent spoliation cases arise not only with respect to insurance companies and automobiles, but can arise in other contexts as well. In *Gilleski v. Community Medical Center*,⁵⁸ for example, the court found that the defendant hospital had no actual notice of a potential or pending lawsuit. In *Gilleski*, a plaintiff was injured when a chair collapsed. The hospital disposed of the chair and plaintiff sued alleging negligent spoliation. The appeals court

⁵⁶Likewise, in the instant case, the information made known to Liberty was that Ms. Mace lost control of her vehicle on a icy roadway after swerving to avoid another motorist and then, after striking a guardrail, her vehicle overturned. Obviously, this is not the classic rollover case where a vehicle unexpectedly during relatively normal conditions and maneuvers suddenly rolls over.

⁵⁷*Id.* at 580-81, 218 Cal. Rptr. at 927.

⁵⁸765 A.2d 1103 (N.J. Super. Ct. App. Div. 2001).

reversed a plaintiffs' verdict as, among other things, the hospital had no actual knowledge of a pending or potential suit:

Hospital personnel received calls from plaintiffs within days after the accident complaining that the hospital had not provided adequate medical care to plaintiff as a result of her fall. Neither plaintiff nor her husband requested that the chair be preserved or stated that they intended to pursue a law suit against the hospital or third party. Defendant was not given notice of a potential law suit until October 21, 1996, fourteen months after the accident when it received a letter from plaintiff's attorney. Notably, no mention was made in that letter of a potential claim against the manufacturer of the chair, nor did the attorney request that defendant preserve the chair for the purpose of a third-party action.⁵⁹

Constructive knowledge of a *possible* product liability suit is simply insufficient to impose a duty to preserve. In *Johnson*, for example, under facts substantially similar to those here (and, indeed, more favorable to plaintiffs), the California court held that constructive knowledge of a potential suit was insufficient. "It is common knowledge that thousands of accidents occur on California roadways each year, leaving behind totally and partially damaged cars and trucks. Every accident involving personal injury or property damage has the potential to be a lawsuit."⁶⁰ *Johnson* continued, "These lawsuits could encompass myriad parties, claims, and cross-claims—known and unknown, foreseeable and unforeseeable. Against this vast expanse, what is the duty of the alleged third-party spoliator who possesses or controls one of these totally or partially damaged vehicles?" *Id.* The court's response was that "The only answer is a duty whose cornerstone is actual, specific knowledge[,] and "[t]hat duty is appropriately defined in terms of an agreement to preserve, a

⁵⁹*Id.* at 1108. See also *Strickland v. CMCR Investments*, 610 S.E.2d 71, 73 n.7 (Ga. 2005) ("What is more, Strickland has failed to present any evidence that CMCR destroyed or failed to preserve evidence that was necessary to *contemplated* or *pending* litigation."); *Quinn v. Riso Invest., Inc.*, 869 So. 2d 922, 927 (La. Ct. App. 2004) ("Where suit has not been filed and there is no evidence that a party knew suit would be filed when the evidence was discarded, the theory of spoliation of evidence does not apply.").

⁶⁰79 Cal. Rptr. 2d at 241.

voluntary undertaking to preserve with reasonable and detrimental reliance, or a specific request to preserve accompanied by an offer to pay the cost or otherwise bear the burden of preserving, or some other contractual, legal or analogous special relationship.” *Id.*⁶¹

Constructive knowledge arising from the fact that Explorers, Blazers, Bridgestone/Firestone tires, ATVs, lawnmowers, space heaters, or any other defective product or condition⁶² allegedly injuring an insured or a third-party claimant⁶³ may have been the subject of successful product liability suits does not satisfy the requirement of negligent spoliation claim. *Hannah* carefully circumscribed negligent spoliation to actual knowledge of a pending or potential civil action.

⁶¹*Johnson* also made clear that:

The specific request to preserve must be accompanied by an offer to pay the cost or otherwise bear the burden of preserving. We do not think a tort duty to preserve should be created simply by someone specifically requesting a third party to preserve something. Preservation may entail significant burdens. Formally adding this condition to the “specific request” duty basis gives the alleged third-party spoliator “some say” and control in the matter, similar to what the spoliator has in the “agreement” and the “undertaking” duty contexts. This condition also places the burden of preservation rightfully where it belongs--on the person or entity requesting preservation.

Id. at 240-41.

⁶²In *Dardeen v. Kueling*, 821 N.E.2d 227 (Ill 2004), for example, an insurance company was sued for negligent spoliation of a sidewalk where it gave permission to clean up bricks on the sidewalk. The court held that the insurance company had no duty to preserve the sidewalk stating that, “Because Dardeen failed to show State Farm owed him a duty to preserve Kuehling’s sidewalk, summary judgment was appropriate.” *Id.* at 233. See also *Timber Tech Engineered Bldg. Products v. The Home Ins. Co.*, 55 P.3d 952 (Nev. 2002) (liability insurers for property owner and general contractor owed no duty in tort to a subcontractor to preserve debris from a collapsed roof, and, thus, the insurers were not liable on a theory of negligent spoliation of evidence; the insurers’ agreement with the owner and general contractor to preserve evidence did not create a tort duty to the subcontractor).

⁶³In this case, the Maces are Liberty’s insureds, but it is easy to foresee circumstances where non-insured claimants could be injured by allegedly defective products owned or controlled by insureds whom could also assert claims against insurance companies for negligent spoliation.

Insurance companies should not held to a standard of preternatural clairvoyance and Liberty was entitled to summary judgment.

D. AS THE MACES IDENTIFIED NO CONTRACTUAL, STATUTORY, REGULATORY, VOLUNTARY ASSUMPTION, OR SPECIAL CIRCUMSTANCES SUPPORTING ANY “DUTY” FOR LIBERTY TO RETAIN OWNERSHIP AND POSSESSION OF ITS OWN PROPERTY, JUDGE BLOOM PROPERLY CONCLUDED THAT LIBERTY WAS ENTITLED TO SUMMARY JUDGMENT.

To prove “negligent spoliation, a plaintiff must identify “a duty to preserve evidence arising from a contract, agreement, statute, administrative rule, voluntary assumption of duty, or other special circumstances.”⁶⁴ In West Virginia “[t]he determination of whether a defendant in a particular case owes a duty to the plaintiff is not a factual question for the jury; rather the determination of whether a plaintiff is owed a duty of care by a defendant must be rendered by the court as a matter of law.”⁶⁵ Because the Maces never identified any duty on the part of Liberty to maintain ownership and possession of its own vehicle, Judge Bloom properly awarded summary judgment to Liberty.⁶⁶ Under *Hannah*, any duty must arise from “from a contract, agreement, statute, administrative rule, voluntary assumption of duty, or other special circumstances.”⁶⁷ None of those are present in this case.

First, the Maces identified no contract that forms the basis of an affirmative duty on the part of Liberty not to sell the Explorer. Every court addressing the issue has held that an insurance

⁶⁴Syl. pt. 8, *Hannah, supra*.

⁶⁵Syl. Pt. 5, *Aikens v. Debow*, 208 W. Va. 486, 541 S.E.2d 576 (2000).

⁶⁶*See, e.g., Moore v. CNA Ins. Co.*, 215 W. Va. 286, 294, 599 S.E.2d 709, 717 (2004) (“CNA had no duty to defend Governor Moore. The circuit court properly granted summary judgment to CNA.”).

⁶⁷Syl. Pt., 8, *Hannah*.

contract does not impose a duty on an insurer to preserve evidence.⁶⁸ Moreover, in Syllabus Points 9 and 10 of *Lockhart v. Airco Heating & Cooling, Inc.*,⁶⁹ the Supreme Court of Appeals held:

9. Tort liability of the parties to a contract arises from the breach of some positive legal duty imposed by law because of the relationship of the parties, rather than from a mere omission to perform a contract obligation. An action in tort will not arise for breach of contract unless the action in tort would arise independent of the existence of the contract.

10. A tort, although growing out of a contract, must nevertheless possess all of the essential elements of tort.

If *Lockhart* did not give rise to a duty to prevent an infant with health problems from being exposed to cold air during a heating system installation, it is absurd to suggest an insurance policy,⁷⁰ completely silent on any obligation on Liberty's part to preserve evidence, supports a cause of action.

Second, the Maces identified no agreement by Liberty to preserve the evidence. Indeed, Ms. Mace admitted in her deposition that not only did she never request Liberty to preserve the Explorer, she never contemplated the filing of any suit while it was under Liberty's ownership and possession.

Third, the Maces have identified no statute imposing upon Liberty the obligation to preserve the Explorer. Indeed, the only relevant West Virginia statutes, as in other jurisdictions where courts have held that insurance companies have no obligation to preserve vehicles determined to be total losses and sold for salvage, support everything done by Liberty in this case.⁷¹ Moreover, after

⁶⁸See *Silhan v. Allstate Ins. Co.*, *supra* at 1309.

⁶⁹211 W. Va. 609, 567 S.E.2d 619 (2002).

⁷⁰See Liberty Mutual's Motion for Summary Judgment, Ex. O.

⁷¹W. Va. Code § 17A-4-10 provides as follows:

(a) In the event a motor vehicle is determined to be a total loss or otherwise designated as "totaled" by any insurance company or insurer, and upon payment of an agreed price as a claim settlement to any insured or claimant owner for the purchase of the vehicle, the

Liberty sold the Explorer for salvage, West Virginia law imposed upon the purchaser certain duties, under penalty of fine or imprisonment, including “surrender the certificate of title, nonrepairable motor vehicle certificate or salvage certificate to the division for cancellation,” indicating that any legal obligation on the part of Liberty ceased upon sale of the Explorer to the third party.⁷² If this Court imposes an obligation on insurers to preserve vehicles in total loss cases, when not requested

insurance company or the insurer shall receive the certificate of title and the vehicle

...

(3) If the insurance company or insurer determines that the damage to a totaled vehicle renders it nonrepairable, incapable of safe operation for use on roads and highways and which has no resale value except as a source of parts or scrap, the insurance company or vehicle owner shall request that the division issue a nonrepairable motor vehicle certificate in lieu of a salvage certificate. The division shall issue a nonrepairable motor vehicle certificate without charge.

(b) Any owner, who scraps, compresses, dismantles or destroys a vehicle for which a certificate of title, nonrepairable motor vehicle certificate or salvage certificate has been issued, shall, within twenty days, surrender the certificate of title, nonrepairable motor vehicle certificate or salvage certificate to the division for cancellation. Any person who purchases or acquires a vehicle as salvage or scrap, to be dismantled, compressed or destroyed, shall within twenty days surrender the certificate to the division.

...

Any person who violates the provisions of this section shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than five hundred dollars nor more than one thousand dollars, or imprisoned in the county jail for not more than one year, or both fined and imprisoned.

(emphasis added). This statute does not obligate Liberty to preserve vehicles deemed to be a total loss. In fact, it mandates, under penalty of fine and imprisonment, that Liberty do exactly what it did—determine the Explorer to be a “total loss;” pay the Maces “an agreed price as a claim settlement to any insured or claimant owner for the purchase of the vehicle;” accept “the certificate of title and the vehicle;” with the obligation to “endorse the assignment of ownership on the salvage certificate and deliver it to the purchaser.” Once the Explorer was purchased such purchaser was subject to the provision that it “shall not be titled or registered f(or operation on the streets or highways of this state unless there is compliance with subsection (c) of this section.” Rather, the third party who purchased the Explorer is permitted to use it “as a source of parts or scrap,” exactly as was done in this case.

⁷²Under West Virginia law, Liberty applied for and received a salvage certificate of title from the Division of Motor Vehicles. Liberty Mutual’s Motion for Summary Judgment, Ex. Q.

to do so by their insureds or third party claimants, it will be requiring insurers, in given circumstances, to violate West Virginia law.

Similarly, the Maces have identified no regulation requiring Liberty to preserve vehicles under these circumstances. Indeed, like the West Virginia statutes, the applicable West Virginia regulations obligate Liberty to do what it did here—assess the value of the vehicle and make a fair payment—but imposes no obligation whatsoever to preserve a vehicle that has been determined to be a total loss.⁷³ Liberty followed West Virginia statutory and administrative law. Thus, “[T]o accept the [Plaintiffs’] premise in this case would be to penalize [Liberty] for doing that which the law requires[,]”⁷⁴ and it is “unfair to penalize an insurer for doing exactly what the law requires of it[.]”⁷⁵

Indeed, the Maces do not dispute that Liberty paid out on the Explorer as a total loss and followed the procedures set forth by statute in W. Va. Code § 17A-4-10 and by legislative rule set forth in W. Va. CSR § 114-14-7.4. Former West Virginia Insurance Commissioner, Hanley C. Clark, offered expert testimony that (1) Liberty fully complied with West Virginia insurance law and industry practice in the handling of the Maces’ claim and (2) that no insurance company doing business in the State of West Virginia, would have had any statutory, regulatory, or other legal duty to (a) advise policyholders of any potential civil action against the manufacturer of a “total loss” vehicle even if such insurance company had knowledge that the manufacturer had been successfully sued in other cases or had been sued by the insurance company for subrogation in other cases, or (b) maintain “total loss” vehicles for possible inspection after their acquisition under West Virginia law

⁷³W. Va. CSR § 114-14-7.4 (2003).

⁷⁴*Clark v. Sears Roebuck & Co.*, 816 F. Supp. 1064, 1068 (E.D. Pa. 1993).

⁷⁵*Veillion v. Fontenot*, 692 So.2d 639, 641 (La. Ct. App. 1997).

even if such insurance company had knowledge that the manufacturer had been successfully sued in other cases or had been sued by the insurance company for subrogation in other cases.⁷⁶ Because the Maces withdrew their insurance expert, whom they had initially disclosed to refute Commissioner Clark, they had no competent standard of care expert to rebut Mr. Clark's expert testimony regarding West Virginia insurance regulations and industry practice.⁷⁷ For that reason alone, summary judgment was proper.

As previously discussed, the Maces identified no voluntary assumption of duty on Liberty's part to preserve the Explorer. Liberty made no representations regarding preserving the Explorer. Indeed, it is undisputed that the Maces requested and were permitted to inspect and photograph the vehicle. The Maces, though, *never* requested that Liberty preserve the Explorer. Under West Virginia law, Liberty was required to take possession and ownership of the vehicle and was allowed to sell the vehicle for salvage to a third party. Once Liberty sold the vehicle for salvage to a third party, the vehicle became the responsibility, under penalty of fine or imprisonment, of the third party, and there was no "voluntary assumption of duty" on the part of Liberty.

⁷⁶Depo. Tr. of Hanley Clark, attached as Exhibit A to Liberty Mutual's Summary Judgment Reply.

⁷⁷*See, e.g., Kiser v. Caudill*, 215 W. Va. 403, 599 S.E.2d 826 (2004)(affirming summary judgment when plaintiffs had no competent standard of care expert); *Withrow v. WVU Hospitals, Inc.*, 213 W. Va. 48, 576 S.E.2d 527 (2002)(affirming summary judgment when plaintiffs had no competent standard of care expert); *Banfi v. American Hosp. for Rehab.*, 207 W. Va. 135, 529 S.E.2d 600 (2000)(affirming summary judgment for defendants, in part, when plaintiff failed to present expert testimony in support of its claims that defendants were negligent by failing to restrain patient and by allegedly misdiagnosing her injuries after her fall); *Moats v. Preston County Comm'n*, 206 W. Va. 8, 521 S.E.2d 180 (1999) (requiring plaintiff to utilize a medical expert witness to establish that defendant deviated from the standard of care with regard to its actions during an involuntary commitment proceeding); *Hapchuck v. Pierson*, 201 W. Va. 216, 495 S.E.2d 854 (1997) (affirming summary judgment when plaintiff failed to produce medical expert testimony on the issue of a physician's duty to warn); *Neary v. Charleston Area Med. Ctr., Inc.*, 194 W. Va. 329, 460 S.E.2d 464 (1995)(affirming summary judgment for defendant when plaintiff failed to submit medical expert testimony in support of his failure to warn claim).

Finally, other than their constructive knowledge theory, which this Court has rejected, the Maces identified no special circumstances warranting the imposition of a duty to preserve the vehicle. "Special circumstances" in the negligent spoliation context, has a defined meaning; it refers to the situation where the plaintiff reasonably relied upon a "voluntary undertaking with reasonable reliance," but without an actual promise to preserve.⁷⁸ In this case, there was no pending litigation at the time Liberty assumed ownership and possession of the Explorer and the insurance policy did not require Liberty to preserve the vehicle. Liberty did not promise to preserve and the Maces never assumed that Liberty would preserve. The Maces placed no restrictions on Liberty's ownership or disposition of the vehicle; and, indeed, acknowledged in their depositions what Liberty's right of

⁷⁸For example, *Anderson v. Mack Trucks, Inc.*, 793 N.E.2d 962 (Ill. Ct. App. 2003), held that even where the third party owner of potential evidence received a request to preserve, such did not constitute "special circumstances" creating a duty. In *Anderson*, decedent was killed when a hydraulic hose in the hoist mechanism of the truck he was operating for his employer (BFI) ruptured. This caused a failure in the hoist mechanism that lowered the load onto him. Mack manufactured the truck involved, and Galbreath manufactured the hoist mechanism. Galbreath filed a third-party complaint against BFI for contribution alleging BFI's negligence in its repair and maintenance of the equipment and in training its employees. The court dismissed Galbreath's contribution complaint when BFI agreed to release its workers' compensation lien. Galbreath then filed its first-amended complaint, alleging BFI's negligence in losing the truck and related equipment impaired its ability to defend itself in the underlying suit. The complaint specified that three days after the accident BFI's district manager wrote to Galbreath informing it of the fatality and requesting that a service representative inspect the equipment. The letter also informed Galbreath that BFI intended to place the equipment back in service on March 1, 2000. A short time after the inspection, Galbreath sent the district manager a letter asking that he turn over evidence relating to the death, including the ruptured hose. Galbreath asked that the hose be preserved if it could not be turned over. On April 1, 2000, BFI sold the equipment to Onyx Waste Services, Inc. BFI did not inform Galbreath of the sale at the time the third-party complaint was filed and nor it comply with discovery demands for the equipment. BFI first informed Galbreath of the sale of the equipment in a letter dated May 2, 2001. Galbreath ultimately succeeded in locating the truck at the Onyx facilities, but the hoist and the hose were not recovered. In finding against Galbreath, the court noted that Galbreath alleged no contract or agreement between Galbreath and BFI, nor did Galbreath allege a statutory or regulatory duty to preserve the evidence. The court also found that there was no voluntary act on BFI's part to preserve the evidence since BFI informed Galbreath that the truck was to be put back into service approximately two weeks after the accident. At best, Galbreath suggested that its letter sent "shortly after" its truck inspection requesting that BFI deliver or the equipment constituted a special circumstance imposing a duty to preserve evidence. In rejecting this contention, the Court said, "We decline to hold that a mere request that a party preserve evidence is sufficient to impose a duty absent some further special relationship." 793 N.E.2d at 969.

salvage meant.⁷⁹ Finally, no adversity of interests existed between the Maces and Liberty when they transferred ownership and possession to Liberty.

The only cases relied upon by the Maces are cases in which an insurance company assumed not ownership, but possession of a product under circumstances where the insurance company had actual knowledge that the suit was either pending or impending. Plaintiffs rely on an annotation entitled *Negligent Spoliation of Evidence, Interfering with Prospective Civil Action*,⁸⁰ that cites three cases allegedly finding a duty on insurance companies to preserve evidence. The annotation cites *Dardeen v. Kuehling*,⁸¹ but this opinion was reversed by the Illinois Supreme Court.⁸² The annotation cites *Fada Industries, Inc. v. Falachi Building Co.*,⁸³ but it has been held to apply only where an insurer's loss of evidence impacts an insured's ability to defend a lawsuit.⁸⁴ The annotation finally cites, and Maces heavily rely upon, *Thompson v. Owensby*,⁸⁵ which is readily distinguishable.

In *Thompson*, the parents of a child mauled by a dog who broke from a leash sued the landlord of the property where the dog was located. The landlord's insurance company took possession of the leash before anyone could examine it and then lost it. The parents sued the company for negligent spoliation. *Thompson* found a special relationship between an insurer and

⁷⁹See Liberty's Motion for Summary Judgment, Ex. S and Ex. J.

⁸⁰101 A.L.R. 5th 61, §18[a] (2002).

⁸¹801 N.E.2d 960 (Ill. Ct. App. 2003).

⁸²821 N.E.2d 227 (Ill. 2004).

⁸³730 N.Y.S.2d 827 (App. Div. 2001).

⁸⁴See *Sterbenz v. Attina*, 205 F. Supp. 65, 72 n.9 (E.D.N.Y. 2002).

⁸⁵704 N.E.2d 134, 141 (Ind. Ct. App. 1998).

a third-party “if the carrier knew or should have known of the likelihood of litigation and of the claimant’s need for the evidence in the litigation.”⁸⁶ *Thompson* further held, “[i]f a carrier intentionally or negligently engages in claims-resolution practice that breaches the standard of care established by law, a third-party claimant is justified in seeking to hold the carrier liable for damages arising from that breach.”⁸⁷

Thompson is inapplicable in this case for several reasons. The insurance company in *Thompson* assumed possession of the leash as a result of the “duty in the ordinary course of business to investigate and evaluate claims made by its insureds.”⁸⁸ In this case, Liberty assumed ownership and possession of the Explorer not in conjunction with an accident investigation, but only after Liberty had paid out on Plaintiffs’ insurance claim. Moreover, the constructive knowledge standard applied in *Thompson* contradicts *Hannah* which emphasizes that “a third party must have had *actual* knowledge of the pending or potential litigation.”⁸⁹ This Court has further stated, “a third party’s constructive notice of a pending or potential action is not sufficient to force upon the third party the duty to preserve evidence.”⁹⁰

One of the significant dangers of the spoliation cause of action is the potential for an unlimited number of potential defendants, thus, “[t]he scope of the duty to preserve evidence is not

⁸⁶*Id.* at 137 (emphasis added).

⁸⁷*Id.* at 140.

⁸⁸*Id.* at 137.

⁸⁹213 W. Va. at 714, 584 S.E.2d at 570 (emphasis in original).

⁹⁰*Id.*

boundless.”⁹¹ “[S]poliation claims between parties have an inherently limited number of potential *defendants*, if spoliation by nonparties were actionable in tort, the cast of potential defendants would be much larger.”⁹² The “broad threat of potential liability, including that for punitive damages, might well cause numerous persons and enterprises to undertake wasteful and unnecessary record and evidence retention practices.”⁹³

Thus, this Court’s careful use of the term “civil action” in *Hannah* circumscribes the obligation of preservation only to those third-parties having actual knowledge of a potential civil action. Imposing a duty only the circumstances identified in the first two elements in *Hannah* (leaving aside the remaining four elements in *Hannah*) requires third-parties to undertake preservation only when the chance of a civil action is real, direct, and immediate, not when there is an uncertain cause of action that might – theoretically, contingently, or remotely at some point in the future – turn into litigation. This Court’s rationale has been echoed by other jurists, “[w]e should not impose a duty on third parties to store evidence indefinitely, just in case an underlying suit might be filed.”⁹⁴ “To impose a requirement forbidding the alienation of property for an uncertain and virtually open-ended period of time would place an intolerable burden upon [third-parties].”⁹⁵

Here is but one example. A Mennonite family is coming home from the hospital with a newborn when their Explorer overturns. The family presents a claim for the total loss of the vehicle and

⁹¹*Hirsch v. General Motors Corp.*, 628 A.2d 1108, 1122 (N.J. Super. Ct. Law Div. 1993).

⁹²*Temple Comm. Hosp. v. Superior Ct.*, 976 P.2d 223, 232 (Cal. 1999).

⁹³*Id.*

⁹⁴*Thompson v. Owensby*, 704 N.E.2d 134, 141 (Ind. Ct. App. 1998) (Staton, J., concurring).

⁹⁵*County of Solano v. Delancy*, 264 Cal.Rptr. 721, 735 (Ct. App. 1989), *review denied and depublication ordered* (Feb. 1, 1990) (Anderson, P.J., dissenting) (footnote omitted).

the insurer tenders a check in the amount of its NADA value in accordance with West Virginia law, and receives, again in accordance with West Virginia law, title to the vehicle which it in turn, again in accordance with West Virginia law, applies for and receives a salvage title, and sells the vehicle to a third-party salvage company. The Mennonite family decides not to pursue a products liability case against Ford, but twenty years later, within the West Virginia statute of limitations, the infant passenger demands the vehicle from the insurer and, when the insurer cannot produce the vehicle, sues for spoliation of evidence, claiming that the insurer knew or should have known: (1) his or her parents were Mennonite and might not file suit; (2) West Virginia law gave him or her twenty years to file suit; (3) plaintiffs had successfully maintained suits against Ford in Explorer rollover cases; (4) the insurer had filed a subrogation claim against Ford arising from payments made to another insured in a Explorer rollover case; and (5) even though no one asked the insurer to maintain custody of the vehicle, at its own expense, it should have done so. Unless the law of negligent spoliation is devoid of fairness or common sense, an insurer has no obligation to preserve a total loss vehicle unless it is asked to do so.

The Maces' negligent spoliation theory stumbles into the "pitfall concern[ing] the societal costs of mandating the preservation of anything that might conceivably be or become evidence."⁹⁶ For example, insurers and salvage yards would face a particularly onerous burden since "many vehicles relegated to a salvage yard would ordinarily constitute relevant evidence of at least a potential property damage claim[.]"⁹⁷ Indeed, as the California Court of Appeals observed in

⁹⁶*Metlife Auto & Home v. Joe Basil Chevrolet, Inc.*, 753 N.Y.S.2d 272, 279 (App. Div. 2002), *aff'd* 807 N.E.2d 865 (N.Y. 2004).

⁹⁷*Id.* (citing *Edwards v. Louisville Ladder Co.*, 796 F. Supp. 966, 970 n.9 (E.D. La. 1992)).

Johnson,⁹⁸ “[e]very accident involving personal injury or property damage has the potential to be a lawsuit.” Thus, in order to protect against lawsuits that could involve “myriad parties, claims, and cross-claims – known and unknown, foreseeable and unforeseeable,”⁹⁹ the *Johnson* court, like *Hannah*, found “[t]he only answer is a duty whose cornerstone is actual, specific knowledge.”¹⁰⁰ Thus, the crucial question is whether Liberty here had “actual knowledge” of a potential civil action by the Maces. The undisputed evidence is that it did not and, therefore, Judge Bloom correctly concluded that summary judgment was proper.

IV. CROSS-ASSIGNMENTS OF ERROR

In addition to the three criteria upon which Judge Bloom found no genuine issue of material fact, Liberty’s summary judgment motion also asserted the other three criteria, as well as other grounds which Judge Bloom did not address. Accordingly, Liberty cross-assigns as error the failure to award summary judgment on these grounds as well.

A. BECAUSE THERE IS NO EVIDENCE THAT THE VEHICLE WAS ALTERED WHEN IT WAS OWNED BY LIBERTY, JUDGE BLOOM SHOULD HAVE CONCLUDED THAT LIBERTY WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON THIS ISSUE.

To liable for “negligent spoliation,” a defendant has to be guilty of “spoliation of the evidence.”¹⁰¹ “Spoliation of evidence” consists of the “destruction, mutilation, or significant

⁹⁸79 Cal. Rptr. 234, 241 (Ct. App. 1998), *abrogated by Leuter v. California*, 115 Cal. Rptr. 68 (Ct. App. 2002).

⁹⁹*Id.*

¹⁰⁰*Id.*

¹⁰¹Syl. pt. 8, *Heeter, supra*.

alteration of potential evidence.”¹⁰² Unless Liberty, destroyed, mutilated, or significantly altered the evidence, there is simply no negligent spoliation.

Here, the evidence is undisputed that Liberty did not destroy, mutilate, or significantly alter the Explorer— it left Liberty’s ownership and control in the same condition as when Liberty assumed control. After Liberty sold the vehicle, the third-party altered it by removing certain parts. If a cause of action for negligent spoliation exists in this case it is against the third-party not Liberty. Selling a vehicle acquired during settlement of a total loss claim is not “spoliation.”

In *Metlife Auto & Home v. Joe Basil Chevrolet, Inc.*, *supra*, the fact that the insurer which assumed ownership and control of a vehicle sold the vehicle to a salvage company, as in the instant case, was held to defeat a claim for negligent spoliation. Specifically, the court noted the “problematic . . . notion of holding a third party liable for destroying or discarding its own property under such circumstances[,]” because “such liability would in our view constituted an unwarranted infringement on property rights. . . . In that connection, we note that, prior to the disposal of the fire-damaged vehicle, Royal had assumed ownership of the vehicle upon indemnifying its insured, Basil Chevrolet.”¹⁰³

Likewise, in *Sterbenz v. Attina*, *supra*, an insured, as in this case, instituted suit against her insurer, claiming that its sale of a vehicle in which her husband died constituted negligent spoliation of evidence, contending that she could have maintained a successful products liability action except for the unavailability of the vehicle. The court granted the insurance company’s motion for summary judgment, under circumstances nearly identical to those presented here, noting that, “pursuant to the

¹⁰²Syl. pt. 10, *Heeter*, *supra*.

¹⁰³753 N.Y.S.2d at 279 (citations omitted).

contract of insurance, defendant paid for the vehicle, plaintiff accepted payment, and defendant took ownership of the vehicle and exercised “[its] right to dispose of [its] property as [it chose]”¹⁰⁴

Similarly, in *White v. Ford Motor Company*,¹⁰⁵ an employee sued his employer’s insurance company for negligent spoliation arising from its sale of the vehicle after it acquired the vehicle in a total loss claim and sold it for salvage. The court, as did the courts in *Metlife* and *Sterbenz* rejected the claim, noting that, “Here, plaintiffs could not transfer a possessory interest in the automobile to Grange, because Grange had already purchased the vehicle from plaintiffs’ employer, and thus was owner of the vehicle.”¹⁰⁶

Finally, in *Fontanella v. Liberty Mut. Ins. Co.*,¹⁰⁷ the Defendant was sued after purchasing a vehicle during the adjustment of a total loss. Again, under circumstances nearly identical to those in the instant case, involving the same defendant as in the instant case, the Court held that there was absolutely no cause of action:

In this case, the plaintiff, Rose Fontanella, *sold* the vehicle to Liberty after the accident in question. The bill of sale contains no restrictions on Liberty’s ability to dispose of the vehicle. Such a provision could presumably have been written in the contract, but it was not. The plaintiffs make no breach of contract claims. Under these circumstances, Liberty owned the vehicle outright and owed no duty to anyone, including the plaintiffs, not to dispose of it as Liberty saw fit.¹⁰⁸

“It is axiomatic that a [person] may dispose of his or her property in any manner chosen so long as the disposition is not prohibited by law or public policy.’ There is no public policy that prohibits

¹⁰⁴*Id.* at 72 (citation omitted).

¹⁰⁵142 Ohio App. 3d 384, 755 N.E.2d 954 (2001).

¹⁰⁶*Id.* at 958.

¹⁰⁷1998 WL 568728 (Conn. Super. 1998).

¹⁰⁸*Id.* at *2.

someone who has purchased an automobile from subsequently disposing of that vehicle.”¹⁰⁹ “Moreover, even if there were to be a rule of law prohibiting a third party who owns property involved in an accident from subsequently disposing of that property, such a rule would make no sense when applied to a third party who purchases the property *after* the accident from the very person who claims to have been injured by the accident and who now claims that she needs the property as evidence.”¹¹⁰ In such circumstances, the burden to preserve property rests with the injured original owner who “should plainly not sell the property in the first place[,]” or “[a]t a minimum, . . . place the desired restrictions on subsequent disposition in the contract of sale.”¹¹¹ Absent undertaking these simple steps, “plaintiffs are simply in no position to complain about the asserted loss that has resulted.”¹¹² This analysis applies with equal force to Liberty in the instant case. The “sale” of a vehicle is not “spoliation” of the vehicle and to so find violates the policy of the law that “favors the free alienation of property.”¹¹³

In *State ex rel. Vedder v. Zakaib*,¹¹⁴ this Court addressed the question of whether a court properly refused a plaintiff permission to amend a complaint to assert a spoliation claim against an insurance company that had totaled the plaintiff’s SUV. In April, 2001, the plaintiff’s counsel requested by letter that respondent store the SUV until plaintiff’s expert could examine it. While

¹⁰⁹*Id.*

¹¹⁰*Id.*

¹¹¹*Id.*

¹¹²*Id.*

¹¹³63C Am. Jur. 2d *Property* § 35 at 103 (1997).

¹¹⁴217 W. Va. 528, 618 S.E.2d 537 (2005).

the defendant erroneously replied no claim was open, in actuality the defendant had totaled the SUV and sold it for salvage in May 2001. In January, 2002, the defendant informed the plaintiff that the SUV was totaled and provided the plaintiff with salvage documents identifying the purchaser. The plaintiff sued the SUV manufacturer and distributor for negligence and the respondent for statutory bad faith. In January 2004, the SUV was found to have been substantially altered since the sale. In April 2004, the plaintiff sought to amend the complaint to add a spoliation claim. The plaintiff claimed that he should be allowed to amend his complaint, but this Court rejected this request finding it was dilatory. "It should have been apparent to Petitioner at the time she learned the vehicle had been sold to a salvage yard that it was likely the vehicle would be dismantled and its salvageable parts sold."¹¹⁵ "Due diligence demanded, therefore, that Petitioner inquire into the vehicle's condition and to determine whether the vehicle had been altered or still could be preserved."¹¹⁶

The evidence is undisputed that Liberty never altered, damaged, or destroyed the subject vehicle between the time it acquired the vehicle from the Maces and sold it for salvage. Rather, Maces rely on *Pirocchi v. Liberty Mutual Insurance Company*,¹¹⁷ to contend that Liberty "spoliated" the vehicle by selling it for salvage. The Maces' reliance on *Pirocchi* is unavailing, however, as a matter of fact and of law. *Pirocchi* involved an employee's claim against Liberty, as a workmen's compensation carrier, that it negligently failed to preserve physical evidence which destroyed his cause of action against a third party. *Pirocchi* was hurt while working for Marriott when a metal chair on which he was sitting collapsed. A Liberty adjuster took possession of the chair to

¹¹⁵*Id.* at 533, 618 S.E.2d at 542.

¹¹⁶*Id.*

¹¹⁷365 F. Supp. 277 (E.D. Pa. 1973).

investigate a potential third party action against the chair manufacturer or other possible third parties. The adjuster returned the chair to the Marriott and it disappeared. The court denied summary judgment because the manner and circumstances in which the chair was taken into custody by Liberty and returned to Marriott were in dispute, leaving a question as to whether Liberty had assumed a duty to preserve a chair it did not own. Moreover, the federal court was bound to apply the substantive law of Pennsylvania because Pirrocchi was a diversity case, and Pennsylvania courts have subsequently rejected its analysis.¹¹⁸

In this case, the Maces *never* requested that Liberty preserve the Explorer, Liberty never assumed possession of the Explorer for purposes of any investigation, but like the insurer in *Vedder*, Liberty purchased and sold the vehicle for salvage in accord with West Virginia law. Similar to the plaintiff in *Vedder*, the Maces knew two years before amending their complaint to assert a spoliation claim that Liberty had taken title to the Explorer and was going to salvage it. Had the Maces wanted to preserve the Explorer they had every opportunity to communicate this desire and take steps to effectuate it. Thus, the Maces' spoliation claim is no more valid than the claim in *Vedder* and Liberty asserts that Judge Bloom should have granted summary judgment to Liberty on this issue.

B. BECAUSE THE EVIDENCE IS UNDISPUTED THAT MACES' CLAIM AGAINST FORD WOULD HAVE SURVIVED SUMMARY JUDGMENT, JUDGE BLOOM SHOULD HAVE CONCLUDED THAT LIBERTY WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON THIS ISSUE.

To prevail on a negligent spoliation claim, a plaintiff must prove "the spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action."¹¹⁹ Where a party can still

¹¹⁸See, e.g., *Carlotti v. Employees of General Electric Federal Credit Union*, 717 A.2d 564 (Pa. Super. Ct. 1998); *Doe v. Curran*, 45 Pa. D. & C.4th 544, 555 (Pa. Com. Pl. 2000).

¹¹⁹Syl. pt. 8, *Hannah*, *supra*.

proceed with the claims against the tortfeasor, there is no cause of action for negligent spoliation. Because the evidence is undisputed that the Maces in the case could—and did—successfully prosecute their products liability claim against Ford, and that their claim would have survived summary judgment, Liberty was entitled to judgment as a matter of law.

A perfect example of how a plaintiff has no cause of action for negligent spoliation unless the evidence involved is “vital to a party’s ability to prevail in the pending or potential civil action” is *Harrison v. Davis*.¹²⁰ In *Harrison*, a patient brought an action for malpractice and negligent spoliation. The spoliation claim was premised on the hospital’s discarding fetal monitor strips which plaintiff alleged would have indicated the defendants’ negligence. The plaintiff, however, failed to file her malpractice action within the applicable statute of limitations. This Court held that she stated no claim for negligent spoliation as she could not have prevailed on an untimely claim based upon such allegedly inculpatory evidence:

The plaintiff alleges she requested the fetal monitor strips from her labor and Meagan’s delivery on January 5, 1994. Thus, it appears she did not request these records until after the two-year filing period for her personal injury and wrongful death claims had expired. Since the plaintiff did not request the fetal monitor strips until after the two-year filing period had expired, it appears the defendants’ inability to locate such records did not impair the plaintiff’s ability to bring the underlying personal injury and wrongful death claims. Thus, we find the spoliation of evidence claim is barred by the two-year limitations period.¹²¹

Likewise, in the instant case, because sale of the vehicle to a third party “did not impair the plaintiff’s ability to bring the underlying personal injury” claim, Liberty was entitled to summary judgment.

¹²⁰197 W. Va. 651, 478 S.E.2d 104 (1996).

¹²¹*Id.* at 664, 478 S.E.2d at 117.

The Maces successfully filed and prosecuted to settlement a claim against Ford. The allegations of the Maces' own amended complaint amply demonstrate the viability of their claims against Ford even if the salvage company which purchased the vehicle from Liberty removed parts:

14. As of 1997, prior to plaintiff's accident, Ford's own statistical experts know that there had been at least 5,672 Bronco II rollovers in six (6) states alone. Both the Explorer and Bronco II were originally equipped with virtually identical suspensions

15. The Explorer was defective and unreasonably dangerous at the time it was designed, manufactured, advertised, marketed and distributed. The defective nature of the design of the Explorer included defects in design, stability, handling, marketing, instructions, warnings, crashworthiness, rollover resistance and controllability. The defective nature of the vehicle included the following

Am. Compl. ¶¶ 14 and 15 (emphasis added). In other words, the Maces contend that *their* Explorer in particular was defectively designed, manufactured, advertised, marketed, and distributed, but that *all* Explorers were defectively designed, manufactured, advertised, marketed, and distributed. Thus, according to their own pleadings, the Maces plainly did not need their Explorer in an unaltered form in order to successfully prosecute a cause of action against Ford.

Not only do the Maces' own pleadings indicate that they could successfully prosecute a products liability claim against Ford, their expert disclosures revealed that they intended to offer to the jury regarding their vehicle's defective condition:

Mr. Feaheny served as Ford Motor Company's Vice President of Car Engineering for North America and is a mechanical engineer and automotive engineering consultant. Mr. Feaheny is expected to describe the design defects inherent in the Ford Explorer which cause the vehicle to roll over in foreseeable highway maneuvers; Ford Motor Company's internal design and testing documents which demonstrate the stability defects; the failure of the Explorer to meet Ford's own design goals; the real-world performance of the Explorer, resulting in 7,711 Explorer occupants involved in rollover accidents in five (5) states alone; the litigation history involving the Explorer; settlements paid by Ford to injured victims in amounts of as much as \$12

million, compensatory verdicts of as much as \$150 million and punitive verdicts of as much as \$150 million in Explorer rollover cases¹²²

In other words, the Maces intended to present the same evidence of product defect that they would have presented in their case against Ford none of which would have required that the vehicle been in the same condition as it was immediately after the accident. What the Maces proposed was to try a products liability case against Liberty, which did not design or make the Explorer and which is not in the business of defending products liability cases.

The Maces should not be permitted to settle with the manufacturer against which it could have taken their case to trial and then claim a third party should be liable because of their choice to settle, rather than to go to trial against the manufacturer. Otherwise, every time an item is altered or destroyed where there is a possibility of a products liability action, the plaintiff will make the best settlement possible with the manufacturer, then claim some third party, not in the business of defending products liability claims, should be responsible for additional damages.

On this issue, the instant case is easily resolved as this Court held in *Hannah* that there can be no cause of action for negligent spoliation if the cause of action allegedly compromised by the spoliation of the evidence would have survived a motion for summary judgment:

In proving the element of proximate cause, we adopt the reasoning of the court in *Smith* that,

in order for a plaintiff to show proximate cause, the trier of fact must determine that the lost or destroyed evidence was so important to the plaintiff's claim in the underlying action that without that evidence the claim did not survive or would not have survived a motion for summary judgment Metropolitan argues that a plaintiff, in order to be able to file an action alleging spoliation of evidence against a third party, must first file an action pursuing the underlying cause of

¹²²Liberty Mutual's Motion for Summary Judgment, Ex. P.

action and be denied a recovery in that underlying action. We disagree. If we use the summary-judgment standard as a guide, there will be no need for a plaintiff to waste valuable judicial resources by filing a futile complaint and risking sanctions for filing frivolous litigation. The plaintiff can rely upon either a copy of a judgment against him in an underlying action or upon a showing that, without the lost or destroyed evidence, a summary judgment would have been entered for the defendant in the underlying action.¹²³

Obviously, the Maces could not satisfy *Hannah*'s initial requirement, the production of a summary judgment order in favor of Ford, nor can they meet the second— that “summary judgment would have been entered for the defendant in the underlying action.”

West Virginia has already definitively addressed the issue of whether a missing product will defeat a strict liability claim. In *Adkins v. K-Mart Corp.*,¹²⁴ the plaintiffs sued the manufacturer and distributor of a gas grill that exploded injuring one of the plaintiffs. Unfortunately for the plaintiffs, the grill was lost by their homeowners' insurer and was not available for inspection by the defendants. Reversing the award of summary judgment for the defendants, however, the Court held that direct evidence of the precise cause of the grill explosion was not necessarily required and circumstantial evidence could be sufficient:

[T]he Appellants maintain that they can present evidence that they purchased an assembled Char-Broil gas grill from K-Mart, that the gas grill exploded, causing both physical injuries and property damage, that they did not alter or modify the grill in any manner, and that an expert opined that the fire was possibly caused by a defect in the materials or the assembly of the grill. Accordingly, a genuine issue of material fact clearly exists regarding whether or not a defect in the gas grill or in the assembly of the gas grill caused the grill to explode.¹²⁵

¹²³*Id.* at 714, 584 S.E.2d at 570 (emphasis added).

¹²⁴204 W. Va. 215, 511 S.E.2d 840 (1998).

¹²⁵*Id.* at 221-22, 511 S.E.2d at 846-47 (emphasis added and footnotes omitted).

Likewise, in the instant case, the Maces would have survived any summary judgment motion by Ford because they have evidence that Ford knew Explorers to be unreasonably predisposed to rollover; their expert witness would testify that Explorers are defectively designed, manufactured, advertised, marketed, and distributed; and there would be a genuine issue of material fact regarding whether a non-defective vehicle would rollover under the conditions present in the accident.¹²⁶ We know that the vehicle was not essential to the Maces' claims against Ford because many plaintiffs have successfully prosecuted products liability cases arising from Explorer accidents where the

¹²⁶Ford would not even have been entitled to an evidentiary spoliation instruction. In *Tracy v. Cottrell*, 206 W. Va. 363, 524 S.E.2d 879 (1999), plaintiff sued General Motors, alleging that the subject vehicle's restraint system was defective and had been negligently designed and tested. As in *Adkins v. K-Mart*, the vehicle was destroyed after ownership and possession was transferred pursuant to the insurance claim adjustment. *Id.* at 369, 524 S.E.2d at 885. The Court found General Motors was not entitled to an evidentiary spoliation instruction:

Based upon our review of decisions from other jurisdictions and decisions by this Court, we adopt the following spoliation of evidence test. We hold that before a trial court may give an adverse inference jury instruction or impose other sanctions against a party for spoliation of evidence, the following factors must be considered: (1) the party's degree of control, ownership, possession or authority over the destroyed evidence; (2) the amount of prejudice suffered by the opposing party as a result of the missing or destroyed evidence and whether such prejudice was substantial; (3) the reasonableness of anticipating that the evidence would be needed for litigation; and (4) if the party controlled, owned, possessed or had authority over the evidence, the party's degree of fault in causing the destruction of the evidence. The party requesting the adverse inference jury instruction based upon spoliation of evidence has the burden of proof on each element of the four-factor spoliation test. If, however, the trial court finds that the party charged with spoliation of evidence did not control, own, possess, or have authority over the destroyed evidence, the requisite analysis ends, and no adverse inference instruction may be given or other sanction imposed.

In the instant proceeding, the evidence supports Tracy's contention that she did not control, own, possess or have authority over the destroyed evidence. Therefore, we conclude that it was an abuse of discretion for the trial court to give an adverse inference instruction.

Id. at 374, 524 S.E.2d at 890 (emphasis added and footnote omitted). Likewise, as here, where the Maces "did not control, own, possess or have authority over the destroyed evidence," Ford would not have been entitled to a evidentiary spoliation instruction.

vehicle or component parts were subsequently unavailable.¹²⁷ Thus, the Maces cannot argue that their “inherent design defect” would not have survived summary judgment.

The New York courts have squarely addressed this issue. In *Klein v. Ford Motor Co.*,¹²⁸ the Appellate Division reversed the granting of a motion to dismiss filed by Ford after an Explorer was inadvertently scrapped.¹²⁹ The Appellate Division found that while the general proposition was the best proof of a defective product was the product, “both the existence of a product defect as well as the identity of the manufacturer of the product are issues of fact capable of proof by circumstantial evidence[.]”¹³⁰ The court also recognized that “there is growing recognition that the loss of the specific instrumentality that allegedly caused the plaintiff’s injuries is not automatically prejudicial to the manufacturer thereof because the defect will be exhibited by other products of the same design[.]”¹³¹ It is quite indefensible to claim a product liability case cannot be prosecuted against a motor vehicle manufacturer if, for no fault of the insurer, the vehicle is altered or destroyed. A product liability case can proceed against the manufacturer of an allegedly defective motor vehicle,

¹²⁷ See *In re Bridgestone/Firestone, Inc.*, 2005 WL 1030422 at *4 (S.D. Ind.) (“We have previously rejected Ford’s argument that the unavailability of the subject Explorer for expert examination in itself defeats a plaintiff’s claim as a matter of law. . . . As we explained . . . , the claim of design defect in the Explorer can be supported by testing on like vehicles and other circumstantial evidence.”); *In re Bridgestone/Firestone, Inc.*, 287 F. Supp. 2d 938, 939 (S.D. Ind. 2003) (“Here, we have no such evidence of bad faith, but only the fact of the disposal of the subject tire soon after the accident in which Ms. Fayard was injured. We do not find such conduct to rise to a level that justifies imposition of the sanctions Firestone recommends. Therefore, dismissal or preclusion of evidence as a sanction for spoliation is not appropriate here.”).

¹²⁸ 756 N.Y.S.2d 271 (App. Div. 2003).

¹²⁹ *Id.* at 272.

¹³⁰ *Id.* (citations omitted).

¹³¹ *Id.* (citations omitted).

even if the vehicle has been altered or destroyed, if there is other evidence, such as a history of manufacturing defect, that might allow a rational trier of fact to conclude the subject vehicle was defective and proximately caused injury.

Other courts have recognized that as long as a spoliation plaintiff could have prevailed in the claim alleged to have been spoliated, there is no cause of action for negligent spoliation. In *Matsuura v. E.I. duPont de Nemours & Co.*,¹³² plaintiffs complained that certain evidence was destroyed in the testing of such evidence by the defendant. Rejecting the claim because there were alternative means of proof, the court stated as follows:

In their underlying lawsuits, the Matsuuras alleged damages from the use of Benlate. Thus, in order to constitute a valid claim of spoliation of evidence, the Matsuuras must prove that the destruction of the plants from the Costa Rica field test resulted in their inability to prove that Benlate damaged their plants and fields. However, the Matsuuras indicate that documents and other information pertaining to the Costa Rica field test--including photos and videotape of the plants--demonstrated the harmful effects of Benlate. Additionally, the Matsuuras indicate that the Alta test results and the Keeler documents both indicated that Benlate was contaminated with herbicides. Moreover, the plaintiffs in Kawamata Farms were successful in proving substantially identical claims without the benefit of any evidence from the Costa Rica field test.¹³³

¹³²330 F. Supp. 2d 1101 (D. Haw. 2004).

¹³³*Id.* at 1127. See also *Green Leaf Nursery v. E.I. duPont de Nemours & Co.*, 341 F.3d 1292, 1309 (11th Cir. 2003) ("Plaintiffs' inability to rebut a defense theory is not 'significant impairment' of the Plaintiffs' ability to prove its case."). It is also critical in this case that the Maces were permitted to inspect their vehicle prior to its alteration. For example, in *Anderson v. Mack Trucks, Inc.*, 793 N.E.2d 962, 968-69 (Ill. Ct. App. 2003), the Court noted:

In the usual case, where the plaintiff has had no opportunity to inspect the evidence in contemplation of litigation, establishing the inadequate protection of the evidence would be sufficient to plead the breach of the duty. *Here, Galbreath had the opportunity to, and did in fact, inspect the equipment before it was lost.* Arguably, the duty could have terminated with the inspection. . . . *Galbreath has not pleaded any facts that would indicate that BFI should have known, prior to selling the equipment, that further inspection or testing of the equipment would provide additional information material to a potential civil action. Absent this, we cannot say that any duty BFI may have owed Galbreath was not satisfied by allowing the inspection of the equipment; thus, Galbreath has not successfully pleaded that*

Likewise, because the Maces' claim against Ford would have survived summary judgment, Judge Bloom should have concluded that Liberty was entitled to summary judgment on this issue.

C. BECAUSE THE EVIDENCE IS UNDISPUTED THAT MACES SETTLED THEIR CLAIM AGAINST FORD FOR A SUBSTANTIAL SUM IN EXCESS OF THEIR CLAIMED SPECIAL DAMAGES, JUDGE BLOOM SHOULD HAVE CONCLUDED THAT LIBERTY WAS ENTITLED TO SUMMARY JUDGMENT ON THIS ISSUE.

A plaintiff must prove damages to prevail on a spoliation claim.¹³⁴ Where a spoliation plaintiff recovers more than nominal damages against the alleged tortfeasor, there is no cause of action for negligent spoliation as any damages are speculative. For example, in *Florida Evergreen Foliage v. E.I. duPont de Nemours & Co.*,¹³⁵ the plaintiffs attempted to prosecute a spoliation claim after settling with a product manufacturer. The court rejected this effort, because the plaintiffs not only “failed, as a matter of law, to allege facts that would show the required degree of impairment, they have also failed to allege the required causal link between the destruction of the Costa Rica field test plants and their alleged damages”¹³⁶ rather, “Plaintiffs’ allegations place the cause of their damage (the agreement to settle their cases for amounts far below the settlement value that would have been reasonable otherwise) on DuPont’s fraudulent concealment of the Costa Rica test and the

BFI breached its duty.

(emphasis added) (citation omitted). Likewise, there is nothing to indicate in the evidence in this case that the Maces’ opportunity to inspect the vehicle was inadequate to satisfy any concerns they had. It was perfectly natural to assume that if they desired preservation of the vehicle, they would have requested the same after their inspection. When they failed to do so, they lost any claim of subsequent spoliation.

¹³⁴Syl. pt. 8, *Hannah, supra*.

¹³⁵165 F. Supp. 2d 1345 (S.D. Fla. 2001).

¹³⁶*Id* at 1361.

documents and evidence associated with it.”¹³⁷ Thus, said the court, “it cannot be found, as a matter of law, that the fifth element of a spoliation of evidence claim (‘a causal relationship between the evidence destruction and the inability to prove the lawsuit’) can be established.”¹³⁸

Likewise, in *Hernandez v. Garcetti*,¹³⁹ a passenger sued a district attorney who had seized a vehicle, later sold by the salvage company that was storing it, and suggested her cause of action did not accrue until she settled her suit against Ford. The court, “[t]he resolution of that lawsuit might have enabled her to better calculate the *amount* of her damages caused by the spoliation, if any, but it was not the event which *caused* her damages.”¹⁴⁰ The court focused on the speculative nature of any damages, “The amount of damages for spoliation will often be difficult to prove, even when the underlying lawsuit has been resolved by settlement or verdict. Our Supreme Court has recognized that in a significant number of spoliation cases, even the fact of damages will be ‘irreducibly uncertain.’”¹⁴¹ Likewise, the Maces’ substantial settlement with Ford bars any spoliation claim.

D. BECAUSE THE MACES’ EXPERT COULD NOT OPINE THAT A PRODUCT DEFECT, RATHER THAN AN UNREPAIRED BALL JOINT, CAUSED THE ACCIDENT, JUDGE BLOOM SHOULD HAVE CONCLUDED THAT LIBERTY WAS ENTITLED TO SUMMARY JUDGMENT ON THIS ISSUE.

The Plaintiffs’ own expert, Thomas J. Feaheny, admitted under oath that (1) he cannot testify that the rollover was caused by any defect in the Explorer because he does not know anything about the circumstances of the accident and there is evidence that an unrepaired ball joint may have caused

¹³⁷*Id.*

¹³⁸*Id.* (citation omitted).

¹³⁹80 Cal. Rptr. 2d 443 (1998).

¹⁴⁰*Id.* at 447-78.

¹⁴¹*Id.* at 48 (citations omitted).

the rollover,¹⁴² (2) he cannot say whether Ms. Mace's injuries were suffered in the initial collision with the guard rail or in the rollover,¹⁴³ (3) he cannot say how Ford's defenses would have been received because he has no knowledge of the accident or of West Virginia law,¹⁴⁴ and (4) he cannot say whether the plaintiffs' settlement or judgment would have been greater had the parts never been removed from the Explorer as he has no personal knowledge of Explorer settlements and judgments, and no personal knowledge of any of the circumstances of the accident.¹⁴⁵ The Maces offered no one to testify that there was any causal link between the removal of the parts from the Explorer and the Maces' settlement with Ford. Moreover, the Maces offered no one to testify that Ms. Mace's injuries were proximately caused by the rollover, as opposed to the initial collision with the guardrail.

E. JUDGE BLOOM SHOULD HAVE GRANTED SUMMARY JUDGMENT BECAUSE IMPOSITION OF LIABILITY WOULD HAVE VIOLATED LIBERTY'S RIGHTS UNDER THE UNITED STATES AND WEST VIRGINIA CONSTITUTIONS.

Liberty is entitled to the protections of due process of law,¹⁴⁶ the impairment of contracts,¹⁴⁷ and protection the loss of property without just compensation.¹⁴⁸ A person--including a corporation--

¹⁴²Depo. Tr. of Thomas J. Feaheny, attached as Exhibit B to Liberty's Summary Judgment Reply, at 137-38, 161-66, 218.

¹⁴³*Id.* at 198.

¹⁴⁴*Id.* at 137-38, 161-66, 199.

¹⁴⁵*Id.* at 202 ("Q. If Ford Motor Company paid \$50,000 to settle this case, you have no idea as to whether or not that's a high settlement or low settlement, do you? A. I don't know. Q. Because you have no idea what her medical bills were, do you? No, I don't. Q. You have no idea whether she lost any work, do you? A. No, I don't").

¹⁴⁶U.S. Const., amend. XIV; W. Va. Const. art. III, § 10.

¹⁴⁷U.S. Const., art. I, § 10, cl. 1; W. Va. Const., art. III, § 4.

¹⁴⁸W. Va. Const. Art. III, § 10.

cannot be required to preserve its own property for the benefit of a third party where the person was never requested nor under any legal compulsion to preserve such property— particularly where it would be deprived of the value of its own property without just compensation. Under the Maces' theory, Liberty would have been required to pay the Maces the full value of the vehicle and then store the vehicle, presumably for the two-year statute of limitations or even longer, at its own expense, in case the Maces decided to pursue a suit against Ford. Judicial imposition of this duty would constitute the deprivation of Liberty's property rights without due process or just compensation. Had the Maces indicated that they intended to file suit, arrangements could have been made to have the Maces bear the expense of vehicle storage, or Liberty could have sought judicial relief. Liberty's knowledge that others had sued Ford following Explorer rollovers did not justify requiring Liberty to maintain the Maces' Explorer at Liberty's expense. As previously discussed, the courts in *Metlife*, *Sterbenz*, *White*, and *Fontanella*¹⁴⁹ all relied upon the concept that it is contrary to the private ownership of property to impose upon a third-party the obligation to preserve that property, particularly where no one outside that ownership interest has either requested preservation nor indicated a firm intention to pursue a suit in which such property might be needed as evidence. Thus, Liberty submits that Judge Bloom should have awarded it summary judgment on this issue.

V. CONCLUSION

Because it is undisputed that (1) there was no pending or impending suit at the time the Maces sold their vehicle to Liberty; (2) the Maces never requested Liberty to preserve the vehicle; (3) Liberty had no knowledge that the Maces intended to sue Ford; (4) the Maces had no present

¹⁴⁹See also *Edwards v. Louisville Ladder Co.*, 796 F. Supp. 966, 970 (W.D. La.1992) (“The courts must also be concerned with interference with a person's right to dispose of his own property as he chooses. This is particularly true where the evidence is in the hands of the third party.”).

intention to sue Ford at the time they sold their vehicle to Liberty;¹⁵⁰ (5) Liberty violated no contract, agreement, statute, or regulation; (6) Liberty made no representations to the Maces that it would preserve the vehicle; (7) the Maces do not indicate that they relied upon Liberty to preserve the vehicle; (8) the Maces were afforded an opportunity and did inspect the vehicle prior to its sale by Liberty for salvage; (9) the vehicle's condition was unaltered from the time it was received by Liberty until it was sold for salvage; (10) the vehicle was available for inspection by the Maces in conjunction with their suit against Ford; (11) the Maces alleged in their suit against Ford that the vehicle was inherently defective; (12) Liberty did not "spoliate" the vehicle other than allegedly by its sale for salvage to a third-party; (13) the Maces' suit against Ford, under existing West Virginia law, would have survived a motion for summary judgment; (14) the effect, if any, of the alternations to the vehicle after it was sold by Liberty to a third-party for salvage, on the Maces' suit against Ford is entirely speculative; (15) the Maces' settled their suit against Ford in excess of their special damages; (16) the Maces cannot demonstrate, to a reasonable degree of certainty, that the result of their suit would have been any different had the vehicle not been altered; (17) the Maces had no expert to refute the expert testimony of former West Virginia Insurance Commissioner Hanley C. Clark that insurance companies, including Liberty, had no statutory, regulatory, or industry-standard duty to preserve vehicles purchased from policyholders for salvage in total loss claims; and (18) the Maces' expert, Thomas Faheaney, admitted that (I) he could not testify that the rollover was caused

¹⁵⁰This is one of the critical undisputed facts in this case. Had the Maces known of their intention to file suit against Ford at the time they sold their vehicle to Liberty, they would have had an obligation to preserve the vehicle or they would have been subject to a negative evidentiary inference under *Tracy v. Cottrell*, 206 W. Va. 363, 524 S.E.2d 879 (1999). For the Maces to assert that they had no duty at the time they sold their Explorer to Liberty to preserve the vehicle because they did not intend, at that time, to sue Ford, but to impose upon Liberty, at that same moment, an obligation to preserve the vehicle, is beyond absurd. Judge Bloom wisely granted summary judgment under the circumstances of this case.

by any defect in the Explorer because he did not know anything about the circumstances of the accident and there is evidence that an unrepaired ball joint may have caused the rollover,¹⁵⁰ (ii) he could not say whether Ms. Mace's injuries were suffered in the initial collision with the guard rail or in the rollover,¹⁵¹ (3) he could not say how Ford's defenses would have been received because he had no knowledge of the accident or of West Virginia law,¹⁵² and (4) he could not say whether the Maces' settlement or judgment would have been greater had the parts never been removed from the Explorer as he had no personal knowledge of Explorer settlements and judgments, and no personal knowledge of any of the circumstances of the accident,¹⁵³ Liberty was entitled to summary judgment and this Court should affirm the judgment of the Circuit Court of Kanawha County.

**LIBERTY MUTUAL INSURANCE
COMPANY, INC.**

By Counsel



Ancil G. Rainey, Esq.
WV State Bar No. 3013
Steptoe & Johnson PLLC
P.O. Box 1588
Charleston, WV 25326-1588
Telephone (304) 353-8112

¹⁵⁰Depo. Tr. of Thomas J. Feaheny, attached as Exhibit B to Liberty's Summary Judgment Reply, at 137-38, 161-66, 218.

¹⁵¹*Id.* at 198.

¹⁵²*Id.* at 137-38, 161-66, 199.

¹⁵³*Id.* at 202 ("Q. If Ford Motor Company paid \$50,000 to settle this case, you have no idea as to whether or not that's a high settlement or low settlement, do you? A. I don't know. Q. Because you have no idea what her medical bills were, do you? No, I don't. Q. You have no idea whether she lost any work, do you? A. No, I don't").

Barbara J. Keefer, Esq.
WV State Bar No. 1979
MacCorkle, Lavender, Casey & Sweeney
P.O. Box 3283
Charleston, WV 25332-3283
Telephone (304) 344-5600

CERTIFICATE OF SERVICE

I, Ancil G. Ramey, do hereby certify that on September 18, 2006, I served the foregoing Brief of the Appellee by depositing true copies thereof in the United States Mail, first class postage prepaid, addressed as follows

Edgar F. Heiskell, III, Esq.
Michie Hamlett Lowry Rasmussen & Tweel, PLLC
P.O. Box 298
Charlottesville, VA 22902-0298

J. Miles Morgan, Esq.
214 Capitol Street
Charleston, WV 25301
Counsel for Plaintiffs

A handwritten signature in black ink, appearing to read 'ARAMEY', is written over a horizontal line.