IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, Plaintiff, vs. P. STONE, INC., and WILD ROSE, INC. Defendants	: : DOCKET NO. 13-02,284 : : CIVIL ACTION – LAW : : : SUMMARY JUDGMENT

OPINION AND ORDER

Before the Court are cross-motions for summary judgment and Defendants' motion to dismiss the complaint or exclude evidence as a sanction for alleged spoliation of evidence. Upon review of the motions, briefs and arguments of Counsel, the Court denies Plaintiff's motion for summary judgment and Defendants' motion for summary judgment. Defendants' motion to dismiss the complaint as a sanction for spoliation is denied; however the Court will allow a permissible adverse inference to be drawn from the fact-finder. The Court provides the following in support of its decision.

Factual Background

The Commonwealth of Pennsylvania Department of Transportation (PennDOT) brought a negligence action against Defendants for a diesel fuel spill which damaged State Route 1006, known as Slack's Run Road (Road). PennDOT owns the Road and is responsible for repair and maintenance of the Road. On September 15, 2012, a truck spilled diesel fuel onto the Road. The truck was owned by Defendant Wild Rose, Inc., (Wild Rose) for about two years. Wild Rose, never replaced the fuel tank. The truck had been inspected in accordance with law and was subject to a safety inspection on the date of the event and no defects had been observed. The truck was driven by an employee of Defendant P.Stone, Inc. (P. Stone) The fuel tank strap, affixing the right tank to the truck, broke. After the tank strap broke, the truck dragged the 75

gallon fuel tank along the Road causing it to split open. About 25 gallons of diesel fuel leaked onto the Road. There was long continuous spill on the road and a puddle of fuel at the area where the truck stopped. The leak was 2 feet to 3 feet wide and covered a distance of 2,000 feet. Since diesel fuel can damage the Road, PennDOT tested samples from the roadway. As a result of the testing, PennDOT milled and repaved the Road prior to the harsh winter conditions. The total cost was $37,438.00.

The spill occurred on September 15, 2012. Defendants informed Plaintiff that they would argue spoliation if Plaintiff milled the Road prior to allowing Defendants to conduct their own expert testing. On November 2, 2012, Plaintiff advised Defendants that its testing would be completed by November 30, 2012 and milling would begin within three days of that date. Defendants advised Plaintiff that they wanted to wait until Plaintiff's testing results were completed prior to deciding whether to conduct their own testing and objected to milling prior to their own testing. On November 14, 2012, Plaintiff provided core test results to Defendants and advised them that the road would be milled after November 20, 2012. Plaintiff contended that the milling needed to occur expeditiously to avoid further damage due to winter conditions. Plaintiff milled the road on November 19, 2012. Defendants seek a sanction for Plaintiff's failure to preserve evidence in good faith by having the complaint dismissed or evidence regarding the core samples be precluded.

Conclusions of Law

Summary Judgment

1. Pursuant to Pa. R.C.P. 1035.2, the Court may grant summary judgment at the close of the relevant proceedings if there is no genuine issue of material fact or if an adverse party has

failed to produce evidence of facts essential to the cause of action or defense. *Keystone Freight Corp. v. Stricker*, 31 A.3d 967, 971 (Pa. Super. Ct. 2011).

2. A non-moving party to a summary judgment motion cannot rely on its pleadings and answers alone. Pa. R.C.P. 1035.2; 31 A.3d at 971.

3. When deciding a motion for summary judgment, the Court must view the record in the light most favorable to the non-moving party, with all doubts as to whether a genuine issue of material fact exists being decided in favor of the non-moving party. 31 A.3d at 971.

4. If a non-moving party fails to produce sufficient evidence on an issue on which the party bears the burden of proof, the moving party is entitled to summary judgment as a matter of law. *Keystone*, 31 A.3d at 971 (citing *Young v. Pa. Dep't of Transp.*, 744 A.2d 1276, 1277 (Pa. 2000).

Negligence – Res Ipsa Loquitur

5. In Gilbert v. Korvette, Inc., 457 Pa. 602, 327 A.2d 94 (1974), the Pennsylvania Supreme Court adopted the evidentiary rule of res ipsa loquitur as articulated in the Restatement (Second) of Torts. Gilbert v. Korvette, Inc., 457 Pa. 602, 327 A.2d 94 (1974); D'Ardenne v. Strawbridge & Clothier, Inc., 712 A.2d 318, 321 (Pa. Super. 1998).

6. Specifically, RESTAT 2D OF TORTS, § 328D, Res Ipsa Loquitur, provides as follows.

> (1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when
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> (a) the event is of a kind which ordinarily does not occur in the absence of negligence;
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> (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and
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> (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.

(2) It is the function of the court to determine whether the inference may reasonably be drawn by the jury, or whether it must necessarily be drawn. (3) It is the function of the jury to determine whether the inference is to be drawn in any case where different conclusions may reasonably be reached. RESTAT 2D OF TORTS, § 328D.

7. "Circumstantial evidence in all negligence cases therefore can create only a permissible inference of fault 'unless the facts are so compelling that no reasonable man could reject it.'" Gilbert v. Korvette, Inc., 327 A.2d at 103. "It becomes the jury's responsibility, under appropriate instructions, to draw or refuse to draw the inference." Pa. SSJI (Civ) 13.30, *citing* Gilbert v. Korvette, Inc., 457 Pa. 602, 327 A.2d 94 (1974); and comment m., Restatement (Second) of Torts, Section 328D.

8. With respect to RESTAT 2D OF TORTS, § 328D, "it is apparent that the Restatement contemplates that there will be circumstances such that the inference of negligence must be drawn, and in those circumstances, where there are no material facts in dispute and different conclusions may not reasonably be reached, the court may direct the jury to find for the plaintiff. " Quinby v. Plumsteadville Family Practice, Inc., 589 Pa. 183, 207, 907 A.2d 1061, 1074 (Pa. 2006). The inference is mandated only when there is no reasonable disagreement. Pa. SSJI (Civ) 13.30, *citing* Quinby, 907 A.2d at 1061.

Spoliation of Evidence

9. In considering whether and to what extent to sanction the spoliation of evidence, the Pennsylvania appellate courts consider three factors: "(1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party[;] and (3) the availability of a lesser sanction that will protect the opposing party's rights and deter future similar conduct." The three factors relate to the entire balance of what sanction to impose for the spoliation of evidence, with the jury

charge being considered as a lesser sanction. These three factors were enunciated by the Third Circuit in Schmid v. Milwaukee Electric Tool Corp., 13 F.3d 76, 79 (3d Cir. (Pa. 1994) and were adopted by the Pennsylvania Supreme Court in Schroeder v. Com., Dept. of Transportation, 710 A.2d 23, 27 (1998).

Discussion

There are three matters before the Court: (1) Plaintiff's motion for summary judgment, (2) Defendants' motion for summary judgment and (3) Defendants' motion to dismiss or impose sanctions. The Court will discuss these matters in turn.

1. Plaintiff's Motion for Summary Judgment

Plaintiff moves for summary judgment on the grounds that the circumstantial evidence of negligence in this case is so strong that it mandates a finding of negligence and that there are no issues of fact with respect to the demand for damages. This Court disagrees. The Pennsylvania Supreme Court recognized Quinby, supra, to be an exceptional case that mandated a finding of negligence as no reasonable minds could disagree. In Quinby, a quadriplegic patient left unattended on an examination table following surgery fell, sustaining injuries. No consequential facts were in dispute in which the event would not ordinarily occur in the absence of negligence and the evidence sufficiently eliminated other causes. By contrast, in the instant case, reasonable minds could disagree as to Defendants' negligence and to what extent such negligence caused Plaintiff damages. "In the ordinary case, where different conclusions may be reasonably reached, it is the function of the jury to determine whether the inference is to be drawn." Quinby, supra, 907 A.2d at 1076. Furthermore, the Defendants contest the demand of damages, asserting that mitigation was appropriate. As the fact-finder may or may not infer the

Defendants were negligent, and as material issues of fact exist as to the demand for damages, Plaintiff's motion for summary judgment is denied.

2. Defendants' Motion for Summary Judgment

Defendants' motion for summary judgment raises a more difficult question. Plaintiff has not offered any direct evidence of negligence in this case. As result, Defendants are entitled to summary judgment, unless the Plaintiff can meet its burden of proof by establishing negligence through a permissible inference under res ipsa loquitur. This requires a determination of whether the events ordinarily occur in the absence of negligence and whether non-negligent causes have been sufficiently ruled out. RESTAT. 2D OF TORTS, § 328D (1)(a) & (b). As applied to the instant case, the Court must determine whether the fact that fuel strap broke and/or that the fuel tank was dragged, to the point of splitting open and leaking 25 gallons of fuel, are events which do not ordinarily occur in the absence of negligence.

The Court concludes that an inference can arise from the breaking of the fuel tank strap. Defendants contend that a fuel tank strap breaking is the type of event that occurs in the absence of negligence and analogies it to a tire blowout. According to the Comment on Clause (a) of Subsection (1) of RESTAT 2D OF TORTS, § 328D, "there are many types of accidents which commonly occur without the fault of anyone[,]" and a tire blowout is identified as one of them. However, the Comment also provides that events such the escape of gas or water from main, are events that do not ordinarily occur in the absence of negligence. The Court notes that it is within the common knowledge of experience that a tire blowout may be caused by a nail in the road or other conditions on the road as opposed negligence. By contrast, a fuel tank strap breaking is more akin to the breaking of couplers, where the inference is permissible. In Hammerstone v. Rose, 317 Pa. Super. 567, 464 A.2d 468 (Pa. Super. 1983) the Superior Court affirmed liability

where a parked Volkswagen was damaged by a welding trailer which broke loose and fell from a passing truck. In discussing § 328D the Court described cases where a coupler breaks resulting in harm as follows.

> [N]egligence may be inferred when a **heavy coupler breaks loose** from a railroad train and rolls down an embankment causing damage to a passing vehicle. Mack v. Reading Co., 377 Pa. 135, 103 A.2d 749 (1954). *See also*: Kirkland v. Barfield, 45 Ala.App. 384, 231 So.2d 161 (1970) (inference of negligence permissible where **trailer** laden with peanuts **separates** from defendant's truck and strikes plaintiff's gasoline tanks); Tamiami Trail Tours, Inc. v. Locke, 75 So.2d 586 (Fla. 1954) (inference of negligence permissible where **defendant's truck is coupled to plaintiff's trailer** and the **coupling fails**, causing damage to the trailer); * * * McCleese v. Glockner Chevrolet Corp., 6 Ohio App.2d 69, 216 N.E.2d 389 (1966) (inference of negligence permissible where **flatbed truck** being prepared for towing by wrecker **breaks free**, crosses center line of highway and strikes car in which plaintiff is riding as a passenger).
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> Hammerstone v. Rose, 317 Pa. Super. 567, 464 A.2d 468, 469 (Pa. Super. 1983)

The Court also believes that an inference is permissible where a fuel tank has been dragged to the point of splitting open and then spills fuel for about 2,000 feet consisting of about 25 gallons. As a result, Defendants' motion for summary judgment is denied.

3. Spoliation

The Court must consider three factors when determining whether to sanction spoliation of evidence: "(1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party[;] and (3) the availability of a lesser sanction that will protect the opposing party's rights and deter future similar conduct." Schroeder v. Com., Dept. of Transportation, 710 A.2d 23, 27 (1998). In Mount Olivet Tabernacle v. Edwin L. Wiegand Div., Emerson Elec. Co., 781 A.2d 1263, 1269 (Pa. Super. Ct. 2001), the Superior Court analyzed the three factors when it reviewed and upheld the trial court's decision not to impose an adverse inference when a fire scene was destroyed. The destruction prevented the opposing party's expert from evaluating and determining alternative causes of the fire.

Under the first prong, the trial court found that there was no negligence or bad faith by plaintiff. In upholding this determination, the Superior Court noted that the Church was not blameless in failing to preserve the evidence, but that the responsibility to preserve the evidence was low given the limitations on the power of the party to control the scene, the fact that there was no other apparent cause for the fire, and the dangers of leaving a fire scene intact. Under the second prong, the trial court found little to no prejudice because there were "voluminous documents and photographs" of the fire scene and the fire department conducted its own independent investigation of the cause of the fire. Mount Olivet Tabernacle, supra, 781 A.2d at 1270. The Superior Court acknowledged that it was within the trial court's discretion provide a spoliation instruction but it was not an abuse to fail to do so. Mount Olivet Tabernacle, supra, 781 A.2d at 1273. The Court noted that "in cases similar to this one, a spoliation instruction is **often granted because it is considered the least onerous penalty** commensurate with the plaintiff's degree of fault and the defendant's prejudice." Id. (emphasis added).

In the present case, the Court believes the first factor weighs slightly in favor of Defendants. There was a minimal degree of fault by Plaintiff in going forward with the milling of the Road before Defendants had an opportunity to drill their own core samples. Plaintiff should have at least waited until the November 30, 2012 date it originally gave to Defendants. This would have allowed Defendants a month and a half to perform their own drilling and testing, if they indeed wanted to do that. Plaintiff mitigated its conduct by retaining core samples for Defendants to test. Furthermore, the Court does not believe that Plaintiff was under an obligation to delay milling the Road so that Defendants would await Plaintiff's testing results before deciding whether to conduct their own testing. As to the second factor, the Court does not believe the Defendants suffered significant prejudice. It is unclear that Defendants would have

chosen to drill their own core samples for testing at their own expense. Plaintiff's retained core samples for the Defendants to test. As to the third factor, the Court finds that there is a lessor sanction, that is permitting the fact-finder to draw an adverse inference, that protects the party's rights and deters recklessness with respect to evidence.

Accordingly, the Court enters the following order.

ORDER

AND NOW, this **20th** day of **March, 2015**, it is ORDERED and DIRECTED as follows.

1. Plaintiff's motion for summary judgment is DENIED.
2. Defendants' motion for summary judgment is DENIED.
3. Defendants' motion to exclude evidence and dismiss or preclude evidence of the core-samples is DENIED; however, the Defendants' motion for a sanction for spoliation of evidence is Granted in part, to allow a permissible adverse inference.
4. This matter shall proceed to arbitration which has or is in the process of being scheduled.

BY THE COURT,

March 20, 2015
Date

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Richard A. Gray, J.

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