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California Superior Court, Placer County.

Sarah DAVIS, Plaintiff,
v.
THE CITY OF AUBURN; William Batterman; Gary Batterman; Leslie Batterman; American Honda Motor Company, Inc.; Honda Automobile Division; Auburn Honda; Dryden J. Wilson; and Does 1–XXX, inclusive,

No. SCV9736.
|
Oct. 3, 2002.

ORDER AFTER HEARING IMPOSING SANCTIONS AGAINST HONDA DEFENDANTS, AND RESUMING TRIAL ON THE ISSUE OF DAMAGES ONLY

GARBOLINO, Presiding J.

***1** The court orders, as a sanction for deliberate spoliation of evidence, and acts in furtherance thereof, the following remedies *inter alia:* (1) the Honda's liability for the injuries suffered by plaintiff shall be deemed established; (2) that Honda's defenses of contributory negligence against Plaintiff Sarah Davis are hereby stricken, and (3) that the sole remaining issue of damages shall be tried to the jury.

I. INTRODUCTION

Jury trial in this case began on July 9, 2002. Before beginning proceedings on the morning of the twenty-sixth day of testimony, September 5, 2002, the court was advised that on the previous evening, a defense expert, Mr. Robert Gratzinger, attempted to, or did, obliterate certain "witness marks" on the buckle of the seatbelt allegedly worn by Plaintiff Sarah Davis at the time of the accident. Counsel for Plaintiffs orally moved for sanctions to and including striking the pleadings of the Honda defendants. A written motion followed. The matter has been thoroughly briefed. The parties have submitted numerous declarations. [1]

1 The court has received objections to many of the declarations, some of which are appropriate, some of which are not. The court has only considered the hearsay statements in the declarations for non-hearsay purposes. The court has ignored those portions of the declarations which lack foundation, or personal knowledge of the declarant.

The court set Monday, September 9, as the date for the hearing on the claim of spoliation of evidence. The court gave all counsel notice that September 6 could be used by them to prepare for the September 9 hearing. On Friday, September 7, and Saturday, September 8, 2002, parties and their representatives examined the belts in question. The court appointed a special master to supervise the inspection of the evidence on Saturday September 8, 2002 from noon to 4:00 p.m.

Hearing on the spoliation issue commenced September 9, 2002 outside the presence of the jury. The hearing was interrupted by intervening proceedings[2] and the court resumed hearing the motion on September 20, and September 23, 2002.

2 At the commencement of that hearing, a motion to disqualify the court pursuant to Calif. Code Civ. Proc. 170.3 was filed by counsel for the Honda Defendants. The court waived service of the motion. The motion was eventually denied by a judge assigned to hear the disqualification matter by the chairperson of the Judicial Council.

The court received physical evidence, declarations and live testimony.

II. FACTS

The following are the facts as found by the court. Plaintiffs rested their case on September 3, 2002. Defendants City of Auburn and William Batterman similarly rested. Pursuant to a demand for inspection, the Honda defendants arranged to view the vehicle in question in this case. The inspection was arranged for 4:00 p.m. on September 4th, 2002. The vehicle was in the custody of the City of Auburn, a party herein.

On September 4, 2002, a defense expert, Mr. Robert Gratzinger, accompanied by a photographer, began an inspection of the vehicle which was involved in this single-car accident. This was to be the third such inspection preformed by Mr. Gratzinger on the subject vehicle. Mr. Kirk Wolden, co-counsel for Plaintiff, observed the inspection. After inspecting portions of the seatbelt for the right rear passenger, Mr. Gratzinger kneeled down outside Mr. Wolden's direct view. In response to that movement, Mr. Wolden changed position in order to observe what Mr. Gratzinger was doing. Mr. Gratzinger examined the belt mechanism for 1 to 2 minutes. While handling the seatbelt and latchplate which was in the right rear passenger position (indisputably plaintiff's position in the auto at the time of the accident) Mr. Gratzinger first appeared to blow on the latchplate, as if removing dust. He then began to vigorously rub the latchplate with a reddish colored grease rag, in a rapid back and forth motion, bearing down and applying pressure to the latchplate while doing so, as in a buffing motion.[3] Mr. Gratzinger accomplished this by holding the latchplate with one hand, and with the other hand, holding the rag, he rubbed it parallel to the pass-through of the latchplate. Mr. Gratzinger rubbed back and forth between 5 and 10 times. Mr. Wolden observed this rubbing to go on for up to approximately 10 seconds.

3 The motion physically demonstrated by Mr. Wolden to the court resembled a motion one would use to "buff" a surface to make it shiny.

***2** Frozen in astonishment, Mr. Wolden briefly did nothing in reaction to Mr. Gratzinger's actions. But when his mind registered that Gratzinger was possibly damaging the "witness" marks on the latchplate, Mr. Wolden ordered Mr. Gratzinger to "Stop", and shortly thereafter "Stop it." Mr. Gratzinger did not react directly to Wolden, but simply stopped rubbing. Mr. Gratzinger then pulled the rag

away from the latchplate, and put the rag into his front pants pocket.

The photographer accompanying Gratzinger then began taking photos of the latchplate. Before that, they had been taking photos of the seatbelt webbing.

Meanwhile, at the conclusion of the trial day, which was 4:00 p.m ., Mr. Steven Gurnee and Mr. Daniel Wilcoxen, counsel for plaintiff, had driven in the opposite direction from Auburn to Mr. Gurnee's office. In Mr. Gurnee's office, the receptionist received a phone call from Dr. Tony Sances, an expert who previously had testified for plaintiffs in this case. Part of Dr. Sances' testimony dealt with the fact that he had observed "witness" marks on Plaintiff's seatbelt latchplate, and had shown these "witness" marks to the jury through photographs taken by an expert for the City of Auburn, Dr. David Yoshida.

Mr. Gurnee put Dr. Sances on the speaker-phone so that Mr. Wilcoxen could participate in the call. Mr. Gurnee then related to Dr. Sances over the phone that Honda defendants were in the process conducting an inspection of the vehicle. When Mr. Gurnee related to Dr. Sances that Mr. Gratzinger was conducting the inspection, Dr. Sances warned Mr. Gurnee not to allow Mr. Gratzinger to get near the seatbelts or the latchplate with any sort of cloth. When Mr. Gurnee inquired why, Dr. Sances opined that the "witness" marks which existed on the latchplate were delicate, and would be destroyed. Mr. Gurnee responded "They wouldn't do that." Nevertheless, Mr. Gurnee immediately placed a call to Mr. Wolden via cell phone at 5:03 p.m. Mr. Wolden received this call approximately 1 to 2 minutes after Mr. Wolden had ordered Mr. Gratzinger to stop rubbing the latchplate with the shop rag. When Mr. Wolden was warned by Mr. Gurnee not to allow Mr. Gratzinger to get close to the seatbelts or latchplate with a rag or cloth, Mr. Wolden replied "Too late." Mr. Wolden was instructed by Mr. Gurnee to secure the rag as evidence so that it could be examined.

Mr. Paul Cereghini, co-counsel for Honda defendants, approached Mr. Wolden and Mr. Gratzinger shortly after Mr. Wolden received the phone call from Mr. Gurnee. Mr. Wolden, having received instructions from Mr. Gurnee to obtain and secure the rag as evidence, was in the process of obtaining the means to properly secure the rag as evidence—a plastic ziplock bag, a staple gun, tape, and a marking pen. Mr. Wolden had enlisted the assistance of Mr. Tim Blaine, co-counsel for the City of Auburn, to obtain these items. When he had the items he needed to secure the rag, Mr. Wolden asked Mr. Gratzinger for the rag. Mr. Cereghini intervened, and refused to allow Mr. Gratzinger to turn the rag over to Plaintiffs. Mr. Cereghini did so, making a comment to the effect that: "What, do you want to make a federal case out of this too?" Mr. Cereghini then told Mr. Wolden and Mr. Blaine "We'll keep the shop rag."

***3** At 5:30 p.m. Mr. Blaine, counsel for the City of Auburn, terminated that vehicle inspection, the time for the same having

expired. Mr. Gratzinger kept control of the reddish grease rag upon leaving the scene.

On September 5, 2002, the court was informed in chambers of the basic facts as related above. The court thereupon entered open court, dismissed the jury for the day, and convened outside the presence of the jury. Upon receiving further comments from counsel on this subject, the court ordered that the seatbelts in the automobile be secured by the Placer County Sheriff's Department evidence technicians, and ordered that Mr. Gratzinger be produced in court later that day. The court also ordered that the rag used by Mr. Gratzinger be produced.

At the afternoon session, which was conducted outside the presence of the jury, Mr. Gratzinger gave what appeared to be a shop rag, to counsel for Honda, and counsel for Honda lodged the rag, now enclosed in a plastic ziplock bag, with the court.

Both parties have filed declarations in addition to presenting testimony and physical evidence. As a result of the evidence produced, the court further concludes as follows:

1. Mr. Gratzinger deliberately and intentionally used a rag upon the latchplate of Sarah Davis to obliterate or alter the pre-existing “witness” marks which were observed by plaintiff's experts and plaintiffs attorneys. It is unknown whether the rag used was impregnated with some sort of chemical or was used in connection with some foreign substance which assisted in the process of removal.

2. The rag subsequently produced by Mr. Gratzinger in court was not the same rag as was used by Mr. Gratzinger during the course of his vehicle inspection. This is based upon the observations of Mr. Tim Blaine, who the court finds to be credible.

3. Mr. Gratzinger is a seasoned forensic expert. His actions in rubbing the latchplate were contrary to accepted methods of handling physical evidence, and were not done by mistake, negligence, or inadvertence. No one had given permission to Honda to conduct destructive testing, nor was any request to conduct destructive testing ever made.

4. Mr. Cereghini knowingly prevented the rag, which was evidence of spoliation, from being preserved at the scene. This further prevented Plaintiffs from preserving the best evidence which would have demonstrated the mechanism by which the seatbelt latchplate had been physically altered.

5. Mr. Cereghini did not physically control of the possession of the rag used on the latchplate as he represented to counsel that he would. He allowed the rag to continue in Mr. Gratzinger's custody, allowing the chain of evidence concerning the rag to be irretrievably broken.

6. Mr. Cereghini's actions (1) ratified, on behalf of the Honda defendants, Mr. Gratzinger's actions in altering the evidence in question; (2) compounded

Mr. Gratzinger's alteration of evidence by refusing to allow the physical mechanism which was used to accomplish the alteration to be preserved; (3) prevented any subsequent examination of the rag by allowing the chain of evidence to be broken; (4) resulted in the further destruction of physical evidence consisting of the actual rag which was used to accomplish the physical alteration of the seatbelt latchplate.

***4** 7. Faint "witness" marks which existed on Sarah Davis' latchplate were removed by Mr. Gratzinger. The physical appearance of the Plaintiff's seatbelt latchplate was altered from its previous appearance, by elimination of the "witness" marks. The latchplate without the "witness" marks was then photographed by the photographer for Honda defendants, with the intention of producing the evidence of the altered latchplate to the jury.

III. DISCUSSION

Intentional or negligent spoliation of evidence, while not creating a new cause of action, may give rise to the imposition of recognized sanctions in order to punish and deter such conduct. Those sanctions can cover a broad range of remedies from monetary sanctions, instructions to the jury, discovery sanctions, which include monetary sanctions, issue preclusion sanctions, striking pleadings, and termination of the action. Sanctions in the form of other proceedings, such as those before the State Bar, or criminal sanctions are also available.

No California case has ruled upon the effect of a deliberate spoliation of evidence which actually occurred during the course of trial during an inspection of evidence. There are many cases that deal with the imposition of terminating sanctions prior to trial, including striking an answer or other pleading, entering a default, dismissing the action, or striking an affirmative defense. However, these cases focus on discovery abuses that are committed prior to trial, and primarily result from violations of previous discovery orders. It is recognized that in such situations, the imposition of "progressive" sanctions is especially appropriate to compel adherence to prior orders as well as deter future wrongful conduct. This is not that case.

Plaintiffs do not have the option of basing a new lawsuit or a new cause of action on the intentional spoliation of evidence by the Honda defendants. The tort of intentional spoliation of evidence was first recognized as an independent tort by California in *Smith v. Superior Court* (1984) 151 Cal.App.3d 491. Negligent spoliation of evidence was recognized in 1985 in the case of *Velasco v. Commercial Building Maintenance Co.* (1985) 169 Cal.App.3d 874. During the years of 1984 through 1998, if a party determined that an opposing party destroyed or failed to maintain evidence, their option was to amend their complaint or file a new pleading asserting a cause of action for negligent or intentional spoliation of the evidence. However, in 1998, the California Supreme Court refused to allow a separate cause of action for intentional spoliation of evidence

in Cedars–Sinai Medical Center v. Superior Court (Bowyer) 18 Cal.4th 1, 954 P.2d 511, 74 Cal.Rptr.2d 248 (1998). Subsequently, in 2000, the tort of negligent spoliation of evidence was likewise rejected. *Farmers Insurance Exchange v. Superior Court* (2000) 79 Cal.App.4th 1400.

In refusing to allow the tort of intentional spoliation, the *Cedars–Sinai* court focused on the availability of other deterrents to address spoliation, and specifically addressed the broad range of discovery sanctions (which include terminating sanctions) outlined in Calif. Code Civ. Proc. § 2023. However, § 2023 did not take effect until July 1, 1987. Therefore, no case prior to 1987 discussed the specific discovery sanctions which were later provided for in that section. Predecessor case law dealt primarily with compelling witnesses to appear and testify and related to the depositions of parties in default or not appearing.

***5** Cedars–Sinai Medical Center v. Superior Court (Bowyer) 18 Cal.4th 1, supra, notes that spoliation of evidence is a misuse of the discovery process, and would fall within the purview of Calif. Code Civ. Proc. § 2023:

> "The sanctions under Code of Civil Procedure section 2023 are potent. They include monetary sanctions, contempt sanctions, issue sanctions ordering that designated facts be taken as established or precluding the offending party from supporting or opposing designated claims or defenses, evidence sanctions prohibiting the offending party from introducing designated matters into evidence, and terminating sanctions that include striking part or all of the pleadings, dismissing part or all of the action, or granting a default judgment against the offending party." Cedars–Sinai Medical Center v. Superior Court (Bowyer) 18 Cal.4th 1, supra.

Ultimately, the question of the appropriate use of a sanction for intentional spoliation of evidence is one which falls within the sound discretion of the trial court. In reviewing its discretion, the court has considered the full range of available sanctions. In this case, the single most critical issue is whether Sarah Davis was wearing her seatbelt at the time of the accident. The defense has focused their efforts on this question, and have committed their defense to establishing that Sarah Davis was not belted. Their very first defense witness testified in depth in support of Honda's contention that Sarah Davis was not wearing her seatbelt. Honda represented to the court that their next two witnesses would similarly support that theory.

Honda's position is that if Sarah Davis would have been belted, that she would have survived the accident with no more than minor injuries, as were the other three occupants of the automobile. The defense's opening statement explains that:

> "The evidence will show that wearing a seat belt makes a tremendous difference. The occupants who are ejected during a roll-over have much greater chance of being seriously injured or killed in a roll-over. The principal benefit of a

> seat belt is to prevent ejection. The three wearing, the evidence will show, were not ejected. The one who was not wearing, Sarah Davis, was ejected and sustained her injury outside the car when it slammed into the ditch wall. Had she been belted, she would not have been ejected. She would have been uninjured just like her three friends." Opening Statement by Mr. Richard Bowman, counsel for Honda Defendants.

The issue whether there were "witness" marks on Sarah Davis' seatbelt and latchplate has been hotly contested. Plaintiffs experts point to faint, but unequivocal evidence that such "witness" marks are present. They posit that the "witness" marks have been demonstrated by the earliest photos taken of the belt and latchplate. The defense has contended, and intend to present testimony that there are no "witness" marks on Sarah Davis' seatbelt.

The significance of this issue is heightened by the testimony which describes the mechanism of the injury suffered by Sarah Davis. A non-retained expert, Dr. Lemmons, who was Sarah's treating physician at Sutter Roseville Hospital, indicated that she was injured by a downward blow to the rear right side of her head. This was testified to be consistent with the motion of a roof crushing inward during the course of a rollover accident. The defense theory is that Sarah was ejected out the back window ("back light" is the technical term used by the experts) of the automobile as it skidded to a halt against an embankment, and that she sustained her injuries when her head struck the embankment. The seatbelt issue is more than just a basis upon which to assert contributory negligence, it is critical to determining causation.

***6** Honda's deliberate spoliation of evidence amounts to an admission that Sarah Davis was wearing her seatbelt at the time of the accident. By destroying evidence favorable to plaintiff, and attempting to manufacture evidence favorable to themselves, the Honda defendants have essentially admitted the truth of Sarah Davis testimony that she was wearing her seatbelt. If this were not the case, then one must ask why Honda would bother to alter the evidence in question. Case law has recognized this connection, and it is particularly apt in this case. See Cedars–Sinai, supra, 18 Cal.4th 1, at page 11. Attempting to eliminate the evidence that she was wearing her belt essentially admits to the correctness of her position and her entitlement to prevail on the issue of causation of her injuries and the absence of any negligence on her part.

The court gives great weight to the testimony of Mr. Wolden and Mr. Blaine and finds their testimony credible. Mr. Wolden was visibly upset at even reporting the events of September 4, 2002, and was clearly uncomfortable with having to place his own credibility in issue. Mr. Blaine's critical testimony that the rag produced in court by Honda was different than the one used on the seatbelt latchplate is credible. Realizing that professional career and reputation of Mr. Gratzinger was on the line, Mr. Blaine swallowed back his breaking voice when he

testified to the difference which he noticed between the rag actually used by Gratzinger as opposed to that which was produced to the court the next day.

The court does not give credence to the Defense expert, Mr. McCarthy. The defense position in the sanctions hearing was that there never had been "witness" marks on Plaintiff's latchplate, and nothing done by Mr. Gratzinger altered the appearance of the latchplate. Calling attention to the existence of what appears to be a grease spot on the latchplate, Dr. McCarthy indicates that if the latchplate had been rubbed by Mr. Gratzinger, it would have rubbed off the grease spot. He was unconvincing in describing the opposite condition of the latchplate, and his explanation of what appeared to be lateral rubbing marks was evasive and unconvincing. The court does not believe his testimony that there were never witness marks on the latchplate. The declarations of Dr. Sances and Mr. Friedman are more persuasive. They both indicate that such marks were previously on the latchplate, and are now gone. The court finds that there were "witness" marks on the latchplate previously, and were obliterated by Mr. Gratzinger.

It is the court's opinion that the conduct by Honda defendants is of a most serious and egregious nature. This conduct should trigger a sanction which not only punishes Honda for its deliberate destruction of evidence which supports Plaintiffs case, but should deter future similar conduct. In that regard the sanction must be certain, should not be susceptible of allowing Honda to escape its ability to punish and deter, or render it meaningless. And it must be proportional to the actual harm which was done, and the malignant intent with which the acts were committed.

***7** The court does not need to recount the foundational premises which prohibit deliberately presenting, or attempting to present false evidence to a court in order to defeat a legitimate claim. Suffice it to say that the very nature of the justice process demands vigilance to the principle that it is the right of the parties to present the facts to the court in a light most favorable to their position—but that the false production or destruction or manufacture of evidence is an assault upon the integrity of the fact-finding process.

The court has contemplated a wide range of sanctions available to it. This range consists of singular remedies, and combinations of different remedies. For the purpose of exploring the way in which the court has evaluated the exercise of its discretion, the following represents the range of the court's thinking.

A. Criminal Sanctions. The issue whether a violation of the applicable criminal law has been reported by the court to the appropriate law enforcement agency. What, if any, further action is warranted in that connection will proceed on its own track without further involvement of this court. Whether Honda defendants themselves would ever be subject to criminal sanctions seems to be remote. Whatever criminal sanctions might be ultimately

sought, if any, will be likely be levelled against individuals, not the domestic or foreign corporate entitles involved in this case.

B. Monetary Sanctions. The issue of monetary sanctions has been considered. Assessing a proper amount is very difficult, both in the context of an appropriate amount to serve as a sanction, but also as a deterrent. It appears to the court that no reasonable amount of monetary sanctions would serve as a deterrent to the Honda defendants in this case. The stakes in this litigation are high, and even the imposition of a seven figure sanction would still leave the Honda defendants in the position that "It was worth it in the long run."

This seems to be a good point to stop and consider the nature of the current litigation. It is undisputed that the Plaintiff is a quadriplegic, rendered so at age 17. Not only has she suffered the horror of being rendered a prisoner in her own body, but she has lost the social and psychological support of her friends and family. Tragedy followed tragedy. Sarah Davis' mother, afflicted with brain cancer, chose to forego treatment for her cancer, and thus forfeited any chance of sustaining her own life, in exchange for spending what little time she had left with her daughter. Ms. Davis' teenage friends abandoned her. Her father was overwhelmed by this tragedy, and was physically and psychologically unable to care for Sarah himself. Plaintiff now lives in an assisted living facility away from her home town, surrounded geriatric patients. She has no one her own age to relate to. These devastating events have produced the potential for significant monetary damages. At this point in time, the economic damages which plaintiff has laid before the jury ranges between $15—$17 million dollars. The range of non-economic damages would depend upon the opinion of the trier of fact. Suffice to say that the plaintiff has lived more of her life in hospitals than she has out of hospitals since the accident. By any standards, this case presents a claim for damages of an unusual and high degree.

***8** This having been said, the consequences of the Honda defendants actions need to be evaluated in terms of their impact on the case, and the prejudice to the plaintiff and other parties—not in terms of how significant their conduct has been in terms of dollars. Clearly, a sanction, in order to punish and deter, would have to be in the millions of dollars. But were this to be the only sanction, the Honda defendants would still be in the position to profit from their wrong, should the court do nothing more. They would still be able to present their case on liability, argue the issues relating to damages, and in essence, still prevail, rendering a sanction award to plaintiff as a hollow remedy under the circumstances. Therefore, the court has rejected the imposition of monetary sanctions.

The court will, however, place part of the burden of the proceedings necessitated by Honda's conduct on them by awarding attorney fees and costs to the Plaintiffs, City of Auburn, and Defendant Batterman, according to cost bills to be submitted to the

court, supported by declaration. The costs shall include not only reasonable attorney fees necessitated in pursuing a sanction herein, but shall include the expenses incurred in utilzing experts, and other costs which are allowable by statute. Additionally, the court will require Honda to pay for the services of the special master appointed by the court to allow inspection of the seatbelts and latchplates in question on Saturday, September 6, 2002. That cost is in the sum of $1600, which the court orders paid forthwith.

C. Evidentiary inferences. Next, the court could inform the jury of the findings which the court has made regarding the events which amounted to spoliation. This would allow the jury to infer from Honda's conduct that they had something to hide, and that this would bulk in Plaintiff's favor in any eventual verdict. Once again, however, this still leaves the issue of liability and damages to the jury, which could conceivably result in no sanction against the defendant Honda whatsoever. Again, Honda is undeterred and the sanctions might, in hindsight, be rendered virtually meaningless.

The court could also allow the parties to present their own versions of what occurred on the afternoon of September 4, 2002. This would then call for instructing the jury that they could draw and adverse inference against the Honda defendants if they found that the alteration of the evidence occurred. This latter sanction is wholly unsatisfactory in these circumstances, as the court itself has determined that the spoliation in fact occurred by more than a preponderance of the evidence. Moreover, allowing or requiring the parties to litigate this issue would create a trial within a trial, would doubtelessly consume up to weeks of additional testimony. This would focus the attention of the jury away from the real issues in this case. Given the current posture of the case, the longer it takes to get the case to the jury, the greater probabilty of a mistrial.

***9** Parenthetically, this conduct on Honda's part does not occur in a vacuum. Evidence has been introduced in this trial which, if believed, shows a pattern of dishonesty on Honda's party by the production of false evidence in American litigation. The testimony of Akio Takaoka describes incidents where he was requested to personally alter safety test reports for use in American litigation. Numerous examples were recounted of alteration of test reports, instructions to prepare reports in pencil so that the results could be changed, and other similar improprieties. Evidence has shown that the safety test reports on the predecessors to the subject vehicle have been inexplicably inaccurate in their conclusions (testimony of Donald Friedman). Evidence produced from previous litigation in Hawaii points toward additional test report alteration.

While the posture of this case has, as a result of the factual findings made by the court herein, been set on a course which substantially alters the nature of the litigation, the fact remains that if the Defendants could precipitate a mistrial, it would clearly be in their best interests to

do so.[4] This is true for several reasons. In the first place, Plaintiff has completed her case, and the defense has vigorously cross-examined most all witnesses. A mistrial would essentially give Honda the benefit exploring and developing the inconsistencies in plaintiffs witnesses' testimony which invariably occur. Coupled with depositions already taken of these witnesses, Honda would be at a distinct advantage over the plaintiff in being able to exploit even minor deviations in testimony. A retrial of the case would give Honda the opportunity for pointing out discrepancies in a witnesses testimony from previous depositions and previous trial testimony. This court is well aware that retrials become logarithmically more difficult to obtain a verdict precisely for this reason. Moreover, none of the Honda witnesses have been yet been cross-examined by plaintiffs, leaving them without a similar opportunity in a subsequent retrial. This should not happen, and Honda should not profit from their own wrong in this regard.

4 The Honda defendants have continue to posture and "make a record" of what they perceive as reasons for a mistrial. For example, at the hearing on the sanctions, Honda defendants were clearly informed, and agreed that they would have limited time during which to present their case to the court. Having utilized all of their time with extensive cross examination, and the presentation of their live testimony, Honda requested additional time in which to present the testimony of five additional witnesses (this with no time left on the clock). When this was denied by the court, Honda then produced extensive declarations from the very witnesses they claimed they were prepared to call. Immediately before the court recessed and took the matter under submission, Honda fired a parting shot that they desired to call the court as a witness. Their tactics are transparent. Had they intended to call the court, they had ample opportunity to raise that issue so that the legal implications could have been fleshed out. Instead they chose to leave it for the last thing to occur in the record. Their request was untimely and not made in good faith.

Secondly, Honda would be benefit from the continuance by having additional time for trial.

Third, they would be able to alter their approach to the case to match the posture in which it now sits. All of the above inure to the benefit of Honda, and to the detriment of the remaining parties.

C. Issue Preclusion. The court has considered issue preclusion. In particular, the court has considered resolving the seatbelt issue against the defendants, and essentially instructing the jury that the issue has been determined against Honda. This remedy is more appropriate than mere monetary sanctions, because it removes from the Honda defendants the opportunity to profit by misleading the jury from the true facts. The very issue which they attempted to manipulate is thus resolved against them. While this is a sanction which has some symmetry, by itself, it falls short of the mark for three reasons.

***10** First, limiting the sanction to the elimination of the seatbelt defense leaves the Honda defendants in the position to argue for a defense verdict on the question of negligence or other products liability bases. In the event of a defense verdict, the deterrent effect, and the punishment for wrongdoing is hollow at best. Such a situation would leave the door open to accomplish nothing more than making the Honda defendants nervous.

Second, this limited sanction overlooks the events subsequent to the actual removal of the "witness" marks. By itself the act of removal of the "witness" marks should, in this court's opinion, justify the removal of the seatbelt defense from Honda. The conduct which occurred after there removal of the "witness" marks justifies the application of further sanctions to punish and deter that further conduct, that is, Mr. Cereghini's prevention of securing the rag by Plaintiff, his failure to preserve the evidentiary integrity of the rag, and providing a different rag to the court in place of the original.

Plaintiffs had not forcefully argued the significance of the role in this sordid matter which was played by Mr. Cereghini. The court can only deduce that this is due to considerations of professional courtesy. The fact is, that this situation has been seriously compounded by Mr. Cereghini's conduct. Acting on behalf of Honda, he erased any possibility of precisely determining how the alteration occurred. Faced with the existence of real and relevant physical evidence, he failed to preserve it, failed to make good on his representation that "We will retain the rag", and effectively destroyed any possibility of preserving the evidentiary value of the rag. His activities crossed every bright line which separates advocacy from manipulation of the facts.

The first spoliation by Mr. Gratzinger, destruction of the "witness" marks on the latchplate, was just the first in a series of events. Honda had other opportunities to limit the damage which was done, but at every opportunity, they selected the course of action which aimed at obfuscating the facts, and covering up the truth. Mr. Cereghini could have agreed to secure the rag in the first instance. But he did not. He could have personally retained the rag and taken measures to retain its evidentiary value. But he did not. Mr. Gratzinger could have secured the rag for evidentiary purposes. But he did not. Mr. Gratzinger could have turned the same rag into the court. But he did not. In sum, this is not a single wrongful act. It is a course of conduct.

Third, the issue whether Plaintiff was wearing her seatbelts is intricately wound up in the actual liability issues. If Sarah Davis was belted as she contends, then a compelling argument can be made that the automobile in question is clearly defective. This is consistent with plaintiffs theory that in a dynamic rollover accident, with a driver's side leading edge roll, the greatest danger to the occupants occurs when the passenger side contacts the pavement. The glass structures which held the roof in place during the leading edge strike are no longer present to give strength to the roof, and it collapses in on the occupants. Plaintiffs similarly point to a "witness" mark in the roof structure which is a concave dent in the approximate position where plaintiff's head would have been had she been belted into place. If the seatbelt defense is determined not to have merit, then the defense is left with a poor chance of avoiding liability.

***11** For the foregoing reasons, the court will not simply strike Honda's seatbelt defense.

.D. Striking all of Honda's Pleadings. Serious consideration was given to striking Honda's answer and entering their default. In light of the court's findings on the facts, it is clear that Honda was in the process of attempting to rob Plaintiff of her rights to litigate on a level playing field, and to utilize the court as a forum for a search for the truth and to seek adequate compensation. More than that, Honda was trying to win by cheating. They were attempting to deny Plaintiff even the chance of compensation.

Honda not only wrongfully and intentionally altered the most significant physical evidence in the case, but having accomplished that goal, their attorney then ratified those acts. By acting in this manner, Honda and their agents placed the evidence of spoliation beyond the control of the court and the remaining parties by deliberately allowing the rag to itself be the subject of spoliation.

But the court feels that striking Honda's pleadings and entering a default judgment against them goes too far. In addition to establishing their responsibility for damages, this course would have the effect of removing the case from the jury. Establishing liability effects a real and concrete sanction which cannot be undone by subsequent events. The plaintiffs case for damages, should stand on its own, and the defendants should have the opportunity to submit the issue of damages to an impartial jury. To do otherwise would be to compromise the right to a jury determination where there is little or nothing to be gained by depriving the defendants of that right.

E. Directing a verdict of liability against Honda. Finally, the court has accorded the greatest weight to directing a verdict on all liability issues, and to submit the issue of damages to the jury. This has the advantage of guaranteeing that the court's sanction is relevant to the conduct, gives weight to the effect of the fact that Honda's conduct is a conclusive admission that Plaintiff's case has merit. It also retains the judgment of a diverse jury to determine the issue of appropriate damages. For a multitude of reasons, which include the following, this is the course which the court selects.

The issue of the timely conclusion of the case is paramount. The jury was informed at the commencement of the trial that it would receive the case by the last week in August, 2002. As the case progressed, it appeared that the high degree of conflict between the parties slowed proceedings, and the estimates of time necessary to try the case were soon exceeded. Upon the occurrence of the events of September 4, 2002, all conceptions of an expeditious resolution evaporated. While the court scheduled an expeditious hearing to resolve the spoliation issues, external factors prevented this from occurring. [5] Before the court could get to the issues of spoliation, 20 days elapsed. Meanwhile, the jury sat idle.

5 The court will not comment on the disqualification motion filed by Honda defendants. They are privileged by statute to so move, and may not

be denigrated for utilizing a procedure which is permitted by law. Neither will the court comment on the pendency of a petition for writ in the Court of Appeals seeking the same result.

***12** Additionally, the court informed both parties and counsel early on that two weeks in October would be unavailable for trial proceedings due to pre-existing commitments of the court.[6] Thus, the possibility of recalling the jury for further proceedings was simply not possible until October 8, 2002.

6 The following information is provided solely for the purpose of disabusing any thoughts that the courts reasons for being absent were frivolous. The court committed to officials in the U.S. State Department to be a member of the United States Delegation to a Special Commission on the subject matter of treaty obligations at The Hague, Netherlands. At the request of President George W. Bush, the court then traveled to Washington D.C. to speak at the October 2 White House Conference on Missing Exploited, and Abducted Children.

The delay in proceedings is solely attributable to Honda. Even with the protracted schedule, the court revised the time to be allocated to trial, and the case was to have been submitted to the jury no later than September 20, 2002. This delay is likely to have a deleterious effect upon the Plaintiff's case due to the passage of time, and the fact that the jury will not have been attending the trial for over a month. The plaintiff's evidence is no longer fresh in the jury's mind, and the intricacies and nuances of the liability case are likely to be lost. The prejudice to the Plaintiff in this instance is palpable.

The issue of delay is particularly poignant to this Plaintiff. She is in fragile health. While she appears to be doing well at this time, all things considered, she has had to endure complications from her injuries which have required a serious course of different, and increasingly stronger antibiotics. Currently she is on the strongest medically available. There are legitimate medical concerns that should she contract an infection which is known to occur in cases such as Plaintiffs', that there is no cure, and she will die. Further delays may therefore risk this result.

Whether the case will be able to be finished with this jury is problematic. Four alternates were selected in anticipation of a longer than usual trial. Earlier in the trial, one of the alternates was excused by stipulation for alleged misconduct. The court has been notified that one additional juror is having physical difficulties occasioned by the fact that the trial has gone on longer than originally indicated, and that juror has asked the court to discuss the matter of his future service. Because of the delays in the trial, this discussion has not yet occurred. After this spoliation motion was taken under submission, the court's clerk notified the court that yet another juror requested a hardship excuse from further service, due to the death of an immediate member of his family, and the necessity to attend to details surrounding that loss. The court directed the clerk to excuse that juror. At this time, the total number of jurors and alternates sits at a maximum of 14, and perhaps only 13. The probability of losing other jurors grows with each passing day.

The court has considered the issue of continuing on all issues, including liability. To proceed in this fashion assumes the

very high probability of not being able to complete the trial due to the loss of jurors. This would result in nothing having been accomplished in nearly three months of trial. This would be burdensome on the court and upon other litigants who are clamoring for the opportunity to have their cases assigned out for trial.

***13** This court acts as the Presiding Department. There are 13.5 judicial officers (9 judges, the remaining positions are commissioners and referees) in the Placer County Superior Court. Of those, only six departments hear trials. Three departments hear trials three days a week, and three departments hear trials four days a week. This amounts to a weekly availability of 21 trial days. This department hears trials 4 days per week, thus amounting to a little less than 20% of the total trial resources. A recent study by the Administrative Office of the Courts has determined that the current need for this court is 20.5 judicial positions —7 more than the court has. Trial time is clearly at a premium.

This trial has already consumed far more time than the court allocated for it. To risk wasting the time already invested would be unduly burdensome on the court, to say nothing of the parties affected by Honda's wrongful conduct.

If the court directs a verdict on the liability issues, then even if a mistrial occurs, much of the court's time will not have been wasted, because that portion of the case will not require trial, nor will the Plaintiff be disadvantaged by Honda having the benefit of questioning all of Plaintiffs witnesses twice. The court is well aware that making a critical decision such as the one herein should not depend on whether the court "has the time" to try the case or not. Of course the court must make the time to do so. But when a party commits a serious wrong which threatens to render a substantial commitment of time, resources and energy to the legitimate resolution of a dispute, then the court should at least peripherally consider the implications of wasting precious court resources.

This is a high stakes case. In this court's opinion, however, this is secondary to the principles involved. Were this a case with a range of damages between $1500—$2500, the remedies, and the method of analysis by the court, should be the same. Honda will doubtlessly argue that this decision is one in which the court has usurped the role of the jury resulting in a denial of due process, with corresponding prejudice to them in terms of millions of dollars. The mirror image of that argument is that Sarah Davis may legitimately argue that Honda was caught red-handed attempting to deny her right to legitimate compensation of millions of dollars. If a litigant chooses a high stakes case in which to attempt to fabricate or destroy evidence, then they have risked the adverse high stakes result. It is the court's opinion that the wrongful conduct should not justify a different sanction just because the amounts in question are larger than usual.

The court's selection of remedies leaves intact the parties election to submit to the

determination of a jury on the issue of damages. The court is very reluctant to substitute its judgment for that of the jury on the issue of damages. Furthermore, the court's decision in this regard actually works in favor of Honda in at least one particular. Were the court to have instructed the jury as to the court's findings regarding Mr. Gratzinger's and Mr. Cereghini's conduct, the plaintiffs would have been able to make a devastating argument that Honda has continued with it's history of fabrication and manipulation of evidence in American litigation. Although this court has ruled against Plaintiff's motions to amend their complaint to allege punitive damages, this type of evidence would likely spark in the jury a reaction of outrage. Regardless whether the jury was instructed not to award damages for the purpose of making and example of, or punishing Honda, the temptation to do precisely that would likely be overwhelming.

***14** By directing a verdict on the liability issue against Honda, the parties are free to litigate this issue without the jury drawing any unduly prejudicial inferences as to the reason for the directed verdict.

Finally, the court notes that the damage done to the Plaintiff in this action has similarly been prejudicial to the defendant Batterman. While Honda would be jointly and severally liable to Plaintiff for her economic damages, her non-economic damages would be apportioned by reference to the relative degrees of respective fault between Defendant Batterman and Defendant Honda. Defendant Batterman has already made a judicial admission of liability for this accident. He will be found liable. But Honda's wrongful conduct as set forth herein threatened to prejudice Defendant Batterman a different way—establishing the seatbelt defense would entitle Honda to offload a disproportionate amount of responsibility onto Mr. Batterman. That this court's ruling herein results in establishing Honda as jointly and severally liable with Defendant Batterman, does justice by him as well.

THEREFORE, THE COURT ORDERS AS FOLLOWS:

1. The issue of Honda's liability for the injuries suffered by Plaintiff be determined adversely to Honda and in favor of Plaintiff. The jury will be instructed that liability for plaintiffs injuries has been established and that their remaining duty is to solely determine the issue of damages.

2. The trial will continue before the jury on the issue of damages only.

3. Honda shall be precluded from introducing any testimony on any issue except that of plaintiff's damages, and is specifically precluded from introducing evidence as to their alleged lack of negligence, or products liability, or causation.

4. Honda's liability for any damages awarded by the jury shall be that of joint and several liability with defendant Batterman, and Honda shall be precluded from introducing evidence or seeking in any manner to establish

any proportionate fault between itself and defendant Batterman.

5. The defense shall begin their case on damages at 9:00 a.m. on October 8, 2002.

6. That a hearing be held on October 7, 2002 at the hour of 1:30 p.m. for the purpose of arriving at a schedule in which to complete this case, and for submitting any revised sets of jury instructions which the parties wish to have the court consider.

7. The court hereby directs the clerk of the court to notify the members of the jury herein to attend the court at 9:00 a.m. on October 8, 2002.

8. That Plaintiffs, defendants City of Auburn, and William Batterman may submit a cost bill for their attorney fees and costs which were necessitated by the Honda's spoliation of evidence.

9. That Honda defendants forthwith pay Mr. Del Bino for his services as a special master.

All Citations

Not Reported in Cal.Rptr.2d, 2002 WL 32912203