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SOWENS

**MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY**

MITCHEL A. BURGESS and  
RENE BURGESS,

Plaintiffs,

v.

MONTANA HIGHWAY PATROL,

Defendant.

Cause No. CDV-2019-1017

**ORDER ON MOTION  
FOR SANCTIONS**

On June 24, 2020, Plaintiffs Mitchel A. Burgess and Rene Burgess (Plaintiffs) filed a motion for sanctions against Defendant Montana Highway Patrol (MHP) pursuant to Mont. R. Civ. P. Rule 37(e). Both parties briefed the motion. Counsel for Plaintiffs and MHP presented oral argument on November 5, 2020. From the pleadings, testimony, and exhibits filed, the Court makes the following:

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## FINDINGS OF FACT

1  
2           1.     On August 4, 2017, Mr. Burgess was driving northbound on  
3 Montana Highway 59 (MT 59). At the same time, MHP Trooper Michael Howell  
4 finished a traffic stop from the southbound lane. Without warning, Trooper  
5 Howell made an illegal U-turn onto MT 59's northbound lane. Mr. Burgess, who  
6 was driving 70 mph, drove off the paved highway to avoid colliding with the  
7 trooper's vehicle. Trooper Howell's patrol vehicle dashcam recorded the incident  
8 without audio.

9           2.     Eight days later, on August 12, 2017, Mr. Burgess contacted  
10 MHP and reported the near-miss accident. Mr. Burgess described some medical  
11 issues and mechanical damage to his truck that he believed originated from the  
12 incident.

13           3.     MHP's policy on storing video and audio recordings like  
14 dashcam footage states: "All digital audio recordings which are not evidence in  
15 criminal proceedings should be maintained for five (5) years." Pl.'s Br. in  
16 Support of Mot. for Sanctions/Spoliation, Ex. G, at 5.

17           4.     Plaintiffs served a combined set of discovery on MHP on  
18 November 6, 2019. As part of discovery, Plaintiffs sought all video or audio  
19 recordings from Trooper Howell's patrol car or from his person related to the  
20 August 4, 2017 incident. MHP responded that it had no such recordings.

21           5.     In an interrogatory, Plaintiffs asked MHP to provide a  
22 reason if a recording of the near-miss incident did not exist. In response, MPH  
23 stated that the recording was "accidentally corrupted through a remote retrieval  
24 process." Pl.'s Br. in Support of Mot. for Sanctions/Spoliation, Ex. A, at 8.

25     ////

1           6.     However, other information produced by MHP in discovery  
2 did not indicate that the recording was corrupted. Instead these documents  
3 expressed that MHP lost the recordings.

4           7.     In a deposition with MHP designee Lieutenant Colonel  
5 Jason Hildenstab, Plaintiffs' counsel asked about the video recording. Hildenstab  
6 responded that MHP lost the recording. First, an office computer "more than  
7 likely . . . had the video on it." Response Br. to Pl.'s Mot. for Sanctions, Ex. A, at  
8 44:13-44:14. However, that office computer "got removed from the office" and  
9 was not recovered. *Id.*, at 44:12-44:13.

10          8.     Lt. Colonel Hildenstab further stated that despite MHP  
11 removing the office computer, the video should have been on MHP's server. *Id.*,  
12 at 45:15-45:16. But MHP also could not locate the video on the server.  
13 According to Hildenstab, the only explanation was that MHP failed to properly  
14 tag the video for administrative review. "It was just tagged as a traffic incident  
15 and it self-purged . . . after 180 days if the recording is not tagged properly, it will  
16 just self-purge off the server." *Id.*, at 44:18-44:22.

17          9.     Additionally, Hildenstab stated that MHP created a DVD of  
18 Trooper Howell's video recording. The DVD "got shipped up to the major, it  
19 made it to him, he has thousands of these and somehow he misplaced it. He does  
20 not know where it is." *Id.*, at 44:24-45:1.

21          10.    During his deposition, Hildenstab also addressed MHP's  
22 interrogatory answer stating the video file was corrupted. He stated, "I don't  
23 know what they were thinking or their definition of it being corrupted, but it was  
24 lost." *Id.*, at 45:25-46:2.

25        ////

11. On April 21, 2020, the Court granted Plaintiffs' motion for partial summary judgment on duty and breach. The Court found MHP negligent *per se* in the near-miss accident with Mr. Burgess. However, the Court required that Plaintiffs prove the remainder of their case – causation and damages.

From these findings of fact, the Court makes the following:

### CONCLUSIONS OF LAW

1. Evidence spoliation is “the material alteration destruction, or failure to preserve evidence for use by an adversary in pending or future litigation.” *Mont. St. U.-Bozeman v. Mont. First Jud. Dist. Ct.*, 2018 MT 220, ¶ 22, 392 Mont. 458, 462 P.3d 541 (citing *Guzman v. Jones*, 804 F.3d 707, 713 (5th Cir. 2015)). Under the Rules of Civil Procedure, a court may impose sanctions, in exceptional circumstances, if a party fails to “provide electronically-stored information lost as a result of the routine, good-faith operation of an electronic information system.” Mont. R. Civ. P. 37(e).

2. For a court to impose sanctions for evidence spoliation, the party claiming spoliation must show the spoliating party had a duty to preserve evidence. *Mont. St. U.-Bozeman*, ¶¶ 23, 25 (citations omitted). The Rules of Civil procedure imply “a common-law duty to preserve evidence when a party in control knows or reasonably should know that existing items of information may be relevant to pending or reasonably foreseeable litigation.” *Id.*, 23 (citing *Wilson v. Addison*, 2011 MT 179, ¶ 27, 361 Mont. 269, 258 P.3d 410). The party claiming spoliation must also show that the adverse party “intentionally, knowingly, or negligently breached” its duty to preserve. *Id.*, ¶ 25 (citing *Stokes v. Ford Motor Co.*, 2013 MT 29, ¶¶ 18-19, 368 Mont. 365, 300 P.3d 648). Intentional spoliation creates a presumption of prejudice to the non-spoliating

1 party. *Id.*, ¶ 26 (citing *Guzman*, 804 F.3d at 713). But for negligent spoliation  
2 claims, the non-spoliating party must show “a reasonable probability that the lost  
3 evidence would have materially supported an essential element of a claim or  
4 defense at issue.” *Id.*, ¶ 26 (citing *Wilson*, ¶ 28).

5           3. Where a court finds that a party spoiled evidence under Rule  
6 37(e), the court may: “(1) exclude evidence, including spoiled evidence;  
7 (2) admit evidence of the circumstances of the destruction or spoliation; or  
8 (3) instruct the jury that it may infer that the spoiled or destroyed evidence would  
9 have been unfavorable to the responsible party.” *Peschel v. City of Missoula*,  
10 664 F. Supp. 2d 1137, 1142 (Mont. Dist. 2009) (citing *Glover v. BIC Corp.*,  
11 6 F.3d 1318, 1329 (9th Cir. 1993)).

12           4. In an analogous case, *Spotted Horse v. BNSF Ry. Co.*, the  
13 Montana Supreme Court reviewed a district court decision granting a plaintiff’s  
14 motion for sanctions. The plaintiff filed a motion for sanctions after his employer  
15 negligently or intentionally destroyed security footage of the plaintiff’s work-  
16 related injury. 2015 MT 148, ¶ 11, 379 Mont. 314, 350 P.3d 52. The district court  
17 agreed to impose two sanctions on the defendant. *Id.*, ¶¶ 11-13.

18           5. First, the district court precluded the defendant “from  
19 offering evidence that showed no accident unless Spotted Horse opened the door  
20 by informing the jury that videos had been destroyed.” *Id.*, ¶¶ 11, 33. Second, the  
21 district court provided a jury instruction that ordered the jury to view evidence  
22 with distrust if it appeared “that a party intentionally or recklessly destroyed or  
23 concealed evidence favorable to the other party.” *Id.*, ¶ 13.

24           6. However, the Supreme Court ultimately found that the  
25 district court should have imposed stricter sanctions on the defendant. *Id.*, ¶ 39.

1 The Court in *Spotted Horse* explained that a “sophisticated and recurrent party to  
2 litigation . . . is aware of its obligation to preserve evidence.” *Id.*, ¶ 22. Further,  
3 the spoiled evidence was materially relevant to establish the plaintiff’s injury  
4 claim. *Id.*, ¶ 32 (stating the video “could have revealed a wealth of information  
5 relating to the alleged injury.”).

6 7. The Court in *Spotted Horse* stated that default judgment may  
7 be appropriate where an adverse party intentionally destroyed evidence. *Id.*, ¶ 20  
8 (citing *Oliver v. Stimson Lumber Co.*, 1999 MT 328, ¶ 33, 297 Mont. 336,  
9 993 P.2d 11). However, the Court found default judgment inappropriate in  
10 *Spotted Horse* as the Court could not determine whether the defendant  
11 intentionally or negligently destroyed the evidence. *Id.*, ¶ 39. Nonetheless, the  
12 Court remanded the lower court’s order on sanctions. *Id.* The Court instructed the  
13 district court to impose “a meaningful sanction” that punished rather than invited  
14 the defendant to “capitalize on the destruction of the video footage.” *Id.*, ¶¶ 37,  
15 39.

16 8. In reaching its conclusion, the Court noted that the  
17 defendant took the “disconcerting position” that even if the defendant preserved  
18 the video recording of the incident, the video would not have benefited the  
19 plaintiff’s case. *Id.*, ¶ 28. The Court stated that “relevant evidence is critical to  
20 the search for the truth.” *Id.*, ¶ 29 (quoting *Oliver*, ¶ 31). Further, “[t]here can be  
21 no truth, fairness, or justice in a civil action where relevant evidence has been  
22 destroyed before trial.” *Id.* The Court therefore rejected the defendant’s attempt  
23 to “unilaterally determine which evidence is relevant or valuable.” *Id.*

24 9. MHP argues that *Oliver v. Stimson Lumber Co* provided an  
25 alternative analysis to *Spotted Horse*. MHP contends *Oliver* required plaintiffs to

1 establish seven elements before a court could grant sanctions for negligent  
2 spoliation. *Oliver*, ¶ 41. However, the Supreme Court in *Oliver* expressly stated  
3 that these elements apply only where a third party negligently destroyed  
4 evidence. *Id.* ¶¶ 32, 41. According to the Court:

5 Remedies already exist for parties to an action who have suffered a  
6 loss as a result of the spoliation of evidence by another party . . .  
7 Trial judges are well equipped under the Montana Rules of Civil  
8 Procedure to address the problem as it occurs and deal with it  
9 accordingly, even entering default when the circumstances justify  
10 such relief.

11 *Id.*, at ¶ 32.

12 The elements in *Oliver*, therefore, have no bearing on this case.

13 10. The Court finds that Plaintiffs are entitled to sanctions under  
14 Montana Rule of Civil Procedure 37(e). *See Spotted Horse*, ¶ 39; *Oliver*, ¶ 32.  
15 Plaintiffs in this case established that MHP breached its duty to preserve  
16 evidence materially relevant to Plaintiffs' claim.

17 11. First, MHP had a duty to preserve video evidence from the  
18 near-miss accident. *See Mont. St. U.-Bozeman*, ¶ 23. Mr. Burgess alerted MHP  
19 about a potential lawsuit one week after the near-miss accident. Pl.'s Br. in  
20 Support of Mot. for Sanctions/Spoliation. 7 (June 24, 2020). MHP is a  
21 sophisticated and recurrent party to litigation. *See Spotted Horse*, ¶ 22. After  
22 receiving notice from Mr. Burgess, MHP had a duty to preserve video evidence  
23 pursuant to its own policy to preserve such evidence for five years. Pl.'s Br. in  
24 Support of Mot. for Sanctions/Spoliation, Ex. G, at 5.

25 12. Second, MHP breached its duty to preserve evidence. *See*  
*Mont. St. U.-Bozeman*, ¶ 23. Lt. Colonel Hildenstab described MHP losing the  
video evidence from three different locations. First, MHP seemingly removed



1 and lost a computer that contained the footage. Response Br. to Pl.'s Mot. for  
2 Sanctions, Ex. A, at 44:12-44:14. Second, MHP failed to properly tag the video  
3 on the server and after 180 days the MHP's server purged the video. *Id.*, at  
4 44:18-44:22. Third, MHP sent a DVD copy to Major Lavin, who then misplaced  
5 the DVD in his office. *Id.*, at 44:24-45:1. Through these three instances, MHP  
6 breached its duty to preserve evidence for litigation.

7           13. Third, Plaintiffs demonstrated a reasonable probability that  
8 the spoiled evidence would have materially supported the elements of causation  
9 and damages. *See Mont. St. U.-Bozeman*, ¶ 26. Plaintiffs' reply brief pointed to  
10 a variety of facts that Trooper Howell's dashcam footage would have established.  
11 This included: the speed of Mr. Burgess's vehicle when he swerved off MT 59,  
12 how Mr. Burgess's vehicle reacted, the force and impact of Mr. Burgess's vehicle  
13 in the ditch, the size and shape of the ditch, the interactions between Mr. Burgess  
14 and Trooper Howell following the accident, and whether Mr. Burgess's vehicle  
15 sustained any damage. Pl.'s Reply Br. in Support of Mot. for Sanctions/  
16 Spoliation 10-11 (Aug. 26, 2020). This information would have better helped the  
17 jury assess the validity of Mr. Burgess's alleged damages and whether the near-  
18 miss accident caused such damages. The dashcam footage was therefore  
19 materially relevant. *See Mont. St. U.-Bozeman*, ¶ 38.

20           14. In its response brief, MHP takes a similar position to the  
21 defendant's in *Spotted Horse*. MHP argues that even if MHP preserved the video,  
22 the video was not favorable to Plaintiffs. According to MHP, the video "did not  
23 show Mr. Burgess's time off the road and instead only showed the U-turn and  
24 Mr. Burgess stopping safely." Response Br. to Pl.'s Mot. for Sanctions 4  
25 (Aug. 20, 2020). Such a position seeks to unilaterally decide what evidence is



1 relevant or valuable. *See Spotted Horse*, ¶ 29. The Court therefore declines to  
2 accept MHP's position on this point.

3 15. Like in *Spotted Horse*, the Court is unable to determine  
4 whether MHP negligently or intentionally failed to preserve the video evidence.  
5 *See Spotted Horse*, ¶ 39. Despite its own failure to preserve the video footage,  
6 MHP inaccurately described the reason MHP no longer possessed the footage. In  
7 its interrogatory answer, MHP claimed that the video was inadvertently  
8 corrupted. Pl.'s Br. in Support of Mot. for Sanctions/Spoliation, Ex. A, at 8.  
9 Because the Court cannot determine if MHP negligently or purposefully lost the  
10 video recording, the Court will not impose a default judgment in this case. *See*  
11 *Spotted Horse*, ¶ 39. However, the Court finds that punitive sanctions are  
12 appropriate. *See id.*, ¶¶ 37, 39.

13 **IT IS THEREFORE ORDERED** that:

- 14 1. Plaintiffs' Motion for Sanctions is **GRANTED**.  
15 2. The Court will instruct the jury that it may infer that the  
16 spoiled or destroyed evidence would have been unfavorable to MHP.  
17 3. The Court prohibits MHP from offering into evidence any  
18 matter which relied upon the lost dashcam footage as its foundation element. This  
19 includes testimony from any expert witnesses that either watched the video or  
20 read memorandums from Captain Edward Hilbert and Sergeant Daniel D. Martin  
21 describing what they saw in the video.

22 DATED this 14 day of December 2020.

23  
24   
25 KATHY SEELEY  
District Court Judge

1 pc: Michael D. McLean, PO Box 1713, Helena MT 59624  
2 Rutherford B. Hayes, PO Box 200124, Helena MT 59620  
3 Paul R. Haffeman, PO Box 2103, Great Falls MT 59403  
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