UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 16-14248-CV-Middlebrooks/Lynch

BRUCE HENKLE and TRACY
ELIZABETH HENKLE,

Plaintiffs,

v.

CUMBERLAND FARMS, INC.,
DEYMEYER AVENTURA CONSTRUCTION
CORP. d/b/a Aventura Corp./Deymeyer Aventura
Corp., CORESTATES CONSTRUCTION
SERVICES, INC., and ALLEVATO
ARCHITECTS, INC.,

Defendants.

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ORDER DENYING AMENDED MOTION FOR SANCTIONS

THIS CAUSE comes before the Court on Plaintiffs Bruce Henkle ("Henkle") and Tracy Henkle's (collectively, "Plaintiffs") Amended Motion for Sanctions Against Defendant Cumberland Farms, Inc. for Spoliation of Evidence ("Motion"), filed on May 10, 2017. (DE 114). Defendant Cumberland Farms, Inc. ("Cumberland") filed a response on May 26, 2017 (DE 152), to which Plaintiffs replied on June 1, 2017 (DE 157).

Plaintiffs seek spoliation sanctions against Cumberland because Cumberland failed to preserve surveillance video footage of Henkle's trip and fall incident (the "Video") after Plaintiffs sent Cumberland a preservation letter.[1] Specifically, Plaintiffs request a permissible, rebuttable, adverse inference jury instruction that the Video would have demonstrated that the curb over which Henkle

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[1] Plaintiffs also request a hearing on this matter. However, because the key facts are not in dispute, I find that a hearing is not necessary for me to decide the issues. *See* S.D. Fla. L.R. 7.1(b)(2) ("The Court in its discretion may grant or deny a hearing as requested, upon consideration of both the request and any response thereto by an opposing party.").

tripped was a dangerous condition which Cumberland knew, or should have known, about, or created. (DE 114 at 14). Alternatively, Plaintiffs ask the Court to prohibit Cumberland from offering the testimony of any of its employees or experts that Henkle was not paying attention when he tripped. (*Id.*). For reasons stated below, Plaintiffs' Motion is denied.

Background

On November 13, 2014, Henkle tripped and fell over a curb in front of a Cumberland Farms store, located at 957 Sebastian Blvd., Sebastian, Florida ("Store"). A week after the incident, Pamela Moses, the Store's manager, reviewed the Video of Henkle's fall. (Moses Deposition ("Dep."), DE 59-3, 52:5-15). Moses testified that the Video did not capture Henkle's fall because two poles obscured the camera's view of Henkle at the moment he fell, although the Video did capture Henkle immediately before and after he fell. (Moses Dep., 58:3-15).

On March 17, 2015, Plaintiffs' counsel sent two letters to the Store – a request for Cumberland to notify its insurance carrier of the incident and a preservation letter, which demanded that Cumberland preserve any video footage of the incident. (Preservation Letter, DE 102-1). Moses signed for both letters, but only read the letter that requested that Cumberland notify its insurance carrier. (Moses Dep., 92:3-93:16). As to the preservation letter, Moses testified that upon seeing that the letter was addressed to Cumberland's attorney, she would have forwarded the letter to Robert Gwizdala, her area sales manager, rather than reading it. (Moses Dep., 93:17-94:3). Moses testified that no one ever contacted her to ask her for the Video. (Moses Dep., 83:23-25).

Trevor Dean, who manages Risk Management at Cumberland and is "ultimately responsible for all . . . general liability claims," testified that either Robert Gwizdala or Rob Sides would likely have forwarded the letter to him and others in Risk Management. (Dean Dep., DE 102-11, 138:6-12). Dean testified that although that he did not specifically recall receiving the preservation letter, he would have forwarded the letter to Gallagher Bassett Services ("GBS"), Cumberland's third party claims administrator, who began handling Cumberland's claims, including Henkle's claim, around February

2015.[2] (Dean Dep., 11:1-8, 19:7-20:1, 98:1-11, 129:5-9, 140:13-16). Dean testified that GBS was "absolutely" responsible for addressing Plaintiffs' preservation request, including issuing any preservation hold. (Dean Dep., 63:2-13). GBS's file on Henkle's claim documents that GBS never requested a copy of the Video. (Dean Dep., 117:2-4). Dean was not aware that GBS did not request the Video until 2016. (Dean Dep., 118:21-119:1).

Dean testified that prior to February 2015, he would have assigned Henkle's incident to an in house investigator, whose practice would have been to contact the store manager to conduct "any additional investigation that might be needed," including securing video, "if necessary." (Dean Dep., 38:19-39:11, 40:15-17). The investigator would ask a store manager whether the store had video, and whether the video captured the incident. (Dean Dep., 41:18-25). The investigator would not report back to Dean unless "there was something significant," such as an injury or accident that was "serious in nature." (Dean Dep., 42:1-18). Dean testified that he assigned Henkle's incident to Susan Anderson, who no longer works for Cumberland. (Dean Dep., 81:18-25). Dean testified that GBS's file on Henkle's claim states that Susan Anderson did not request the Video. (Dean Dep., 116:22-24).

Dean testified that Cumberland's surveillance software automatically records over previously recorded surveillance footage, and that there is no company policy relating to the retention of surveillance footage, including how long video footage is maintained before it is recorded over. (Dean Dep., 99:15-102:16). Dean testified he does not know whether the Video had already been recorded over by the time Cumberland received Plaintiffs' preservation letter. (Dean Dep., 170:3-11).

In Cumberland's Initial Disclosures, dated August 29, 2016, Cumberland's counsel represented that "Counsel has been advised that there is a surveillance video from the day of the accident and is awaiting receipt." (Cumberland Initial Disclosures, DE 102-2 at 5). In email correspondence on August

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[2] As of March 17, 2015, the date of the preservation letter, GBS had already been assigned to Henkle's claim. (Dean Dep., 23:19-24:14).

31, 2016, Cumberland's counsel against stated, "we've been told that there is a video from the date of the incident but I haven't seen it or received it yet." (Email Correspondence, DE 102-3 at 1). On September 1, 2016, Cumberland's counsel informed Plaintiffs' counsel that "we did not find out until yesterday afternoon that [Cumberland] no longer [has] the video." (Email Correspondence 2, DE 102-4 at 1).

Standard

"Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Graff v. Baja Marine Corp.*, 310 F. App'x 298, 301 (11th Cir. 2009) (quoting *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999)). A court may sanction a party for spoliation pursuant to its inherent power to manage its own affairs and to achieve the orderly and expeditious disposition of cases. *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 944 (11th Cir. 2005). "As sanctions for spoliation, courts may impose the following: (1) dismissal of the case; (2) exclusion of expert testimony; or (3) a jury instruction on spoliation of evidence which raises a presumption against the spoliator." *Flury*, 427 F.3d at 945.

Under federal law,[3] "[t]he elements of a spoliation claim are (1) the existence of a potential civil action; (2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action; (3) destruction of that evidence; (4) significant impairment in the ability to prove the lawsuit; (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit; and (6) damages." *Green Leaf Nursery v. E.I. DuPont De Nemours & Co.*, 341 F.3d 1292, 1308 (11th Cir. 2003) (citations omitted). In addition, in the Eleventh Circuit, sanctions for a party's failure to preserve evidence are appropriate "only when the absence of that evidence is predicated on bad faith." *Bashir v. Amtrak*, 119

[3] "[F]ederal law governs the imposition of sanctions for failure to preserve evidence in a diversity suit." *Flury*, 427 F.3d at 944. Nevertheless, because "[f]ederal law in [the Eleventh] circuit does not set forth specific guidelines," courts may "examine the factors enumerated in [state] law" where they are consistent with federal spoliation principles. *Id.*

F.3d 929, 931 (11th Cir. 1997) (citation omitted); *see also Mann v. Taser Int'l, Inc.*, 588 F.3d 1291, 1310 (11th Cir. 2009). The party seeking sanctions bears the burden of proving spoliation and bad faith.[4] *See Green Leaf Nursery*, 341 F.3d at 1308; *see also, e.g.*, *Wandner v. Am. Airlines*, 79 F. Supp. 3d 1285, 1289 (S.D. Fla. 2015).

Discussion

Cumberland does not dispute that it possessed the Video at one time, that the Video no longer exists, and that it received Plaintiffs' March 17, 2015 preservation letter. Rather, Cumberland argues that Plaintiffs have failed to prove that: (1) the loss of the Video caused a significant impairment in Plaintiffs' ability to prove their case, or (2) the absence of the Video is predicated on Cumberland's bad faith.

A. Significant Impairment

Plaintiffs argue that video footage of the manner in which Henkle fell is necessary to rebut Cumberland's theories that Henkle's failure to look where he was walking caused his trip, and that the manner in which Henkle fell could not have caused the injuries for which he seeks damages. Cumberland responds that both of these theories rely entirely on Henkle's version of how he tripped and fell. Specifically, Cumberland argues that Henkle was not paying attention to where he walked based on Henkle's testimony that he was looking straight ahead, and not at the ground, when he tripped. In addition, Cumberland argues that its expert's conclusion that Henkle's trip did not cause the significant spinal injuries for which he seeks damages is based on Henkle's description of the manner in which he fell.

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[4] The Parties do not address whether Plaintiffs' burden is a preponderance of the evidence or clear and convincing evidence. At least one district court has noted that "[t]he Eleventh Circuit has not decided the appropriate evidentiary standard to use when the requested sanctions are based upon the Court's inherent powers." *Wandner*, 79 F. Supp. 3d at 1300 (S.D. Fla. 2015); *cf. In re Heinz*, 501 B.R. 746, 758 (Bankr. N.D. Ala. 2013), *as amended* (Nov. 13, 2013) (applying preponderance of the evidence standard); *In re Brican Am. LLC Equip. Lease Litig.*, No. 10-MD-02183, 2013 WL 5519980, at *7 (S.D. Fla. Oct. 1, 2013) (applying preponderance of the evidence standard). However, I need not determine which standard to apply because Plaintiffs cannot meet the lower preponderance of the evidence standard.

To establish significant impairment, Plaintiffs must "demonstrate that [they] were unable to prove [their] underlying action owing to the unavailability of the evidence." *Green Leaf Nursery*, 341 F.3d 1292, 1308 (11th Cir. 2003) (citation omitted); *see also In Matter of Complaint of Boston Boat III, L.L.C.*, 310 F.R.D. 510, 514 (S.D. Fla. 2015) ("In meeting the requirement to demonstrate that the spoliated evidence was **crucial** to the movant's ability to prove its *prima facie* case or defense, it is not enough for the movant to show only that the spoliated evidence would have been *relevant* to a claim or defense.") (emphasis in original) (citations omitted). "Plaintiffs' inability to rebut a defense theory is not 'significant impairment' of the Plaintiffs' ability to prove its case." *Green Leaf Nursery*, 341 F.3d at 1309. In addition, courts routinely find that loss of evidence does not significantly impair a movant's ability to prove its claim or defense when there is other available evidence, unless the available evidence is "much less reliable" than the lost evidence. *Compare Flury*, 427 F.3d at 946 (holding that destruction of vehicle in negligence action, alleging that vehicle was not crashworthy, "forced experts to use much less reliable means of examining the product's condition," such as post-accident photographs and the accident report) *with Wandner*, 79 F. Supp. 3d at 1304 (holding that loss of video footage of plaintiff's encounter with airline personnel and police was not material to plaintiff's case where there were witnesses to the encounter, such that, although plaintiff "may not like their testimony, [] this does not equate to a situation where a party destroyed the **only** evidence concerning a critical issue.") (emphasis in original).

Here, Plaintiffs do not argue that they are unable to prove their negligence claim without the Video. The allegedly negligently-constructed curb was not destroyed, making this case unlike *Flury*, in which the negligently-constructed vehicle was destroyed. *See Flury*, 427 F.3d at 946. Plaintiffs' expert was able examine the curb at issue, as well as photographs of the curb taken immediately after the incident and extensive documentation related to the curb's construction.[5]

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[5] Based on this evidence, I have denied Cumberland's motion for summary judgment, finding that Plaintiffs have offered sufficient evidence on each element of their negligence claim.

Instead, Plaintiffs argue that the Video is necessary to rebut Cumberland's theories on comparative negligence and causation.[6] However, the Video is not the only evidence of where Henkle was looking before he fell or the manner in which he fell. Rather, Henkle has offered an account of his fall, and as it is the only evidence of the manner in which he fell, Cumberland's theories rely on Henkle's version of where he was looking and how he fell.[7] Given that these facts are not disputed, there is no need for more reliable evidence.[8] Accordingly, because Plaintiffs seek to use the Video to rebut defense theories and have not proved that loss of the Video significantly impairs their ability to prove their underlying negligence action, they are not entitled to spoliation sanctions.[9]

B. Bad Faith

Plaintiffs state that they have no direct evidence of bad faith, but argue that Cumberland's failure to preserve the Video after Moses reviewed the Video and after Cumberland's Risk Management employees received the preservation letter is circumstantial evidence of bad faith. Cumberland acknowledges that its receipt of the March 17, 2015 preservation letter triggered a duty to preserve the

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[6] Although Plaintiffs argue that the Video is necessary to rebut Cumberland's theory of causation, the remedies that Plaintiffs seek – an inference that the curb was a dangerous condition or preclusion of any testimony that Henkle was not paying attention before he tripped – do not relate to the issue of causation.

[7] Specifically, Cumberland represents that its comparative negligence argument is based on Henkle's testimony that he was looking straight ahead, and not at the ground, when he fell. Plaintiffs argue that Moses may testify that her review of the Video showed that Henkle was looking to the left before he fell. However, Cumberland represents that Moses could not see which direction Henkle was looking before he fell, and will not testify that he was looking to the left. Although another Cumberland employee stated that Henkle told her that he was not paying attention when he tripped, nothing precludes Plaintiffs from challenging her second-hand knowledge of the incident.

[8] In addition, it is unclear whether the video evidence would even have assisted Henkle in proving his case, given that its absence forces Cumberland to rely on Henkle's version of events. Furthermore, Moses testified that the Video did not show Henkle's fall. *See Wandner v. Am. Airlines*, 79 F. Supp. 3d at 1304 (noting that missing video may not have even assisted plaintiff in proving his case given employee's testimony that he reviewed the video and it did not capture the incident).

[9] Although I need not address bad faith, I do so in an abundance of caution.

Video, but argues that its failure to do so was at most grossly negligent, which does not amount to bad faith.

In order to prove bad faith through circumstantial evidence, a movant "must establish all of the following four factors: (1) evidence once existed that could fairly be supposed to have been material to the proof or defense of a claim at issue in the case; (2) the spoliating party engaged in an affirmative act causing the evidence to be lost; (3) the spoliating party did so while it knew or should have known of its duty to preserve the evidence; and (4) the affirmative act causing the loss cannot be credibly explained as not involving bad faith by the reason proffered by the spoliator." *In Matter of Complaint of Boston Boat III, L.L.C.*, 310 F.R.D. 510, 520 (S.D. Fla. 2015) (citing *Calixto v. Watson Bowman Acme Corp.*, Case No. 07-60077-CIV, 2009 WL 3823390, at *16 (S.D. Fla. Nov. 16, 2009)).[10] "While [the Eleventh] circuit does not require a showing of malice in order to find bad faith, mere negligence in losing or destroying records is not sufficient . . . ." *Mann*, 588 F.3d at 1310 (citation omitted); *Bashir*, 119 F.3d at 931 ("'Mere negligence' in losing or destroying the records is not enough for an adverse inference, as 'it does not sustain an inference of consciousness of a weak case.'").

Cumberland's failure to preserve the video can be credibly explained as not involving bad faith. Dean testified that Cumberland's surveillance software routinely records over prior surveillance footage.[11]

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[10] Although the Eleventh Circuit has not laid out specific factors for evaluating circumstantial evidence of bad faith, courts in the Southern District of Florida routinely apply the four-factor test set forth in *Calixto*. *See, e.g.*, *Wandner*, 79 F. Supp. 3d at 1300; *Doe v. Miami-Dade Cty.*, 797 F. Supp. 2d 1296, 1303 (S.D. Fla. 2011); *Managed Care Sols., Inc. v. Essent Healthcare, Inc.*, 736 F. Supp. 2d 1317, 1323 (S.D. Fla. 2010).

[11] Because Cumberland merely failed to prevent the surveillance software from recording over old footage, it is also unlikely that Plaintiffs have established that Cumberland engaged in an affirmative act. Furthermore, to the extent that Cumberland's failure to issue a preservation hold is an affirmative act, the Video may have already been destroyed by the surveillance software's standard recording procedures by the time Cumberland received the preservation letter, approximately four months after the incident. *See Vick*, 514 F.2d at 737 (affirming absence of bad faith where records were destroyed in advance of service of interrogatories).

See Vick v. Texas Employment Comm'n, 514 F.2d 734, 737 (5th Cir. 1975)[12] (affirming trial court's holding that records were not destroyed in bad faith where "[t]here was indication [] that the records were destroyed under routine procedures . . . "). In addition, Dean testified that Cumberland forwarded the preservation letter to GBS, who was "absolutely" responsible for issuing preservation holds. Plaintiffs have offered no evidence that third-party GBS had any motive not to preserve the Video.[13] *See Bashir*, 119 F.3d 929 at 932-33 (finding no bad faith, even though there was no innocent explanation for why evidence in possession of defendant was destroyed, where there was no evidence that employees of defendant had opportunity or motive to destroy the evidence).

Although Cumberland employees Moses and Anderson did not preserve the Video, they reviewed Henkle's incident before receipt of the preservation letter.[14] More importantly, the evidence supports a non-bad faith explanation for their decision not to preserve the Video. Specifically, Moses testified that the Video did not capture Henkle's fall, and Dean testified that Anderson was not required to preserve the Video if she determined that that it was not necessary. Finally, given that the loss of the Video forces Cumberland to rely on Henkle's testimony of the incident, it is unclear what bad faith motive Cumberland employees would have had to destroy the Video.[15] Accordingly, at most, the evidence shows that the failure to issue a preservation hold was at most gross negligence, rather than bad faith.

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[12] The Eleventh Circuit has recognized the case law of the former Fifth Circuit prior to 1981 as its governing body of precedent. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981).

[13] Plaintiffs do not argue that GBS's actions can be attributed to Cumberland.

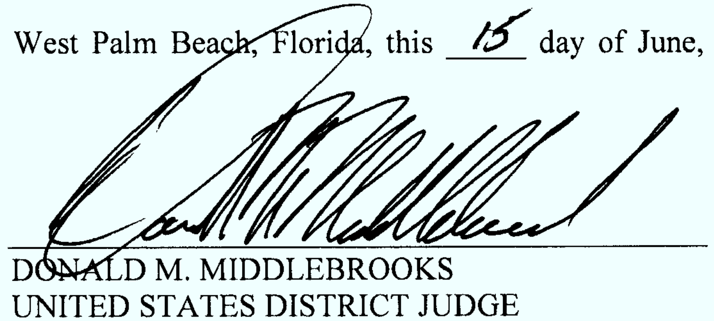
[14] In addition, Moses testified that upon receipt of the preservation letter, she did not read it because it was addressed to Cumberland's attorney. She also testified that she did not receive any instruction to preserve the Video.

[15] Given that Cumberland relies on Henkle's version of the incident, as discussed in more detail in Section A., the evidence also does not establish that the Video could fairly be supposed to have been material to proof of their negligence claim.

In sum, because Plaintiffs have not established spoliation or bad faith, they are not entitled to sanctions. It is hereby

ORDERED AND ADJUDGED that Plaintiffs' Amended Motion for Sanctions (DE 114) is **DENIED.**

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 15 day of June, 2017.



DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

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