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Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002121-MR
AND
NO. 2001-CA-002176-MR

NITA BANDY, ADMINISTRATRIX OF
THE ESTATE OF RUSSELL D. BANDY — APPELLANT/CROSS-APPELLEE

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 96-CI-03157

CINCINNATI, NEW ORLEANS AND
TEXAS PACIFIC RAILWAY COMPANY,
A/K/A NORFOLK SOUTHERN RAILWAY
COMPANY; RUSSELL GARNETT;
AND G. R. McDONALD — APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON, KNOPF AND McANULTY, JUDGES.

JOHNSON, JUDGE: Nita Bandy has appealed from the trial order and final judgment entered by the Fayette Circuit Court on August 9, 2001, which dismissed her claims against the appellees, Cincinnati, New Orleans and Texas Pacific Railway Company (hereinafter CNO&TP), G. R. McDonald, and Russell

Garnett, with prejudice, following a jury verdict in favor of the appellees.[1] The appellees have filed a protective cross-appeal. Bandy moved the trial court for a default judgment, a directed verdict, or a judgment notwithstanding the verdict based on the spoliation of evidence and discovery abuses committed by the appellees throughout the course of the litigation. Bandy contends the trial court abused its discretion by denying these motions. Having concluded that the trial court did not abuse its discretion, we affirm.

On September 23, 1995, Russell Bandy and Terry Cole were riding in a vehicle driven by Gerald Toney when it was struck by a train owned by CNO&TP and operated by McDonald,[2] and Garnett.[3] The vehicle was attempting to cross the railroad tracks on Kearney Hills Road in Fayette County, Kentucky, when it was hit by the train which was traveling at a speed of approximately 52 miles per hour.[4] On September 23, 1995, the railroad crossing on Kearney Hills Road did not have a gate to prevent vehicles from crossing when trains were passing through, however, the crossing was equipped with flashing lights and

[1] Cincinnati, New Orleans and Texas Pacific Railway Company is a Virginia corporation qualified to do business in the State of Kentucky. The railroad company is primarily engaged in the business of transporting freight and it operates trains and rail lines throughout the State of Kentucky.

[2] McDonald was the engineer.

[3] Garnett was the conductor.

[4] The train consisted of 25 cars which were powered by two locomotives.

bells, which were fully operational when the collision occurred.[5] It appears from the record that the driver of the automobile, Toney, was attempting to "beat" the train by crossing the railroad tracks in front of the train.[6]

Russell Bandy and his companions had just attended the PGA Senior U. S. Open golf tournament, which was being held at Kearney Hills Golf Course. The three men were leaving the event when the accident occurred.[7] Russell Bandy and Toney were killed instantly as a result of the collision, which occurred at approximately 1:00 p.m. Cole survived the accident with relatively minor injuries, but with limited memory of the accident.

On September 17, 1996, Nita Bandy, filed a wrongful death action against the appellees as the administratrix of Russell Bandy's estate and a loss of consortium claim in her individual capacity as Russell's wife.[8] In her complaint, Bandy

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[5] CNO&TP did not provide a flagman or issue a flag order for the Kearney Hills railroad crossing on the day of the accident. Thus, other than the flashing lights and bells, there was nothing to prevent motorists from attempting to cross the tracks while a train was passing through.

[6] Numerous witnesses testified to this fact at trial. Moreover, McDonald and Garnett both testified at trial that they were blowing the horn and ringing the bell extensively as they approached the Kearney Hills crossing.

[7] Kearney Hills Golf Course is immediately adjacent to the railroad crossing where the accident occurred. The men were traveling eastbound across the tracks and the train was traveling southbound. CNO&TP has conceded that it was aware of the potential for increased traffic at the Kearney Hills crossing during the PGA Senior U. S. Open.

[8] Norfolk Southern Railway Company was originally named as a defendant, however, CNO&TP was later substituted in place of Norfolk Southern by an

alleged that CNO&TP, by and through its employees, McDonald and Garnett, negligently and carelessly operated the train that struck the vehicle transporting Russell Bandy and his companions and that this action was the direct and proximate cause of Russell's death. Bandy also alleged that CNO&TP was negligent and careless in its maintenance of the Kearney Hills crossing due to the lack of adequate warning devices and safety precautions.

On October 2, 1996, the appellees filed an answer averring that Russell's death was substantially caused by his own contributory negligence and/or by the negligence of a third party over whom they exercised no control. The appellees claimed the allegations concerning warning devices and safety precautions were preempted by federal law pursuant to the Federal Railroad Safety Act of 1970 (FRSA)[9] and the Highway Safety Act of 1973 (HAS), which, among other things, created the

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agreed order of substitution entered on April 21, 1999. In addition, Tonya Bandy, Russell's daughter, was also listed as a plaintiff in the complaint, however, her claim was subsequently dismissed as Kentucky does not recognize a cause of action for loss of consortium by an adult child. See Giuliani v. Guiler, Ky., 951 S.W.2d 318, 323 (1997). Tonya was 20 years old at the time of the accident.

[9] 49 U.S.C. §§ 20101 to 21311. The FRSA was previously codified at 45 U.S.C. § 434, et seq. On July 5, 1994, Pub. L. No. 103-272 § 7(b), 108 Stat. 1379 (1994), the former version of the FRSA, was repealed, amended, and moved to 49 U.S.C. §§ 20101 to 21311.

Federal Railway-Highway Crossings Program (Crossings Program).[10] The case then proceeded to the discovery process.

On September 10, 1997, Bandy served CNO&TP with interrogatories and requests for production of documents. In particular, Bandy requested transcripts of the dispatcher tape generated on the date of the accident; any time tables, bulletins, notices, track warrants, slow orders, special orders, superintendent orders, and train orders in effect on the date of the accident; any documents evidencing CNO&TP's safety programs in effect at the time of the collision; all grade crossing safety manuals, safety procedures, inspection procedures, maintenance procedures, and recommendations published by CNO&TP for a period of ten years preceding the accident; and all documents detailing or describing any grade crossing safety and improvement programs initiated by CNO&TP for a period of ten years prior to the accident. Bandy also served Garnett and McDonald, individually, with interrogatories. On October 30, 1997, the appellees served Bandy with interrogatories and requests for production of documents.

On November 18, 1997, CNO&TP responded to Bandy's request for transcripts of the dispatcher tape by claiming that the tapes had been destroyed pursuant to company policy and thus

[10] See 23 U.S.C. § 130, et seq.

were no longer available.[11] As for the documents pertaining to CNO&TP's safety programs, safety manuals, safety procedures, inspection procedures, maintenance procedures, and safety improvement programs, the appellees advised that these documents would be provided "when and if" they were located. The appellees did provide a time table that was in effect at the time of the accident along with a dispatcher bulletin, however, they claimed that all other time tables, bulletins, notices, track warnings, slow orders, special orders, superintendent orders, and train orders in effect on the date of the accident were no longer available.

The interrogatories addressed to Garnett and McDonald were answered by counsel for the appellees on November 18, 1997. However, the interrogatory responses were not verified or signed by either Garnett or McDonald. In fact, they were answered and signed by counsel for CNO&TP, who also represented Garnett and McDonald.[12]

An apparent lull in the discovery process occurred between November of 1997 and July of 1998; and on July 8, 1998, the case was dismissed due to Bandy's failure to prosecute the

[11] CNO&TP claimed that "[i]n the regular course of business dispatching tapes are not retained after two months . . . ."

[12] The appellees were originally represented by Charles E. Palmer and Lynn C. Stidham of Stites & Harbison, however, Robert B. Cetrulo of Ware, Bryson, West & Kummer was substituted as counsel for the appellees on December 20, 1999. Mr. Cetrulo is currently representing the appellees on appeal.

action. Bandy responded with a motion to vacate the July 8, 1998, order dismissing her cause of action, and on August 11, 1998, the trial court entered an order reinstating the case on the docket.[13] On January 15, 1999, Bandy deposed both Garnett and McDonald, at which time they disavowed any knowledge of the aforementioned answers to interrogatories which had been tendered on their behalf.[14]

In September 1999 Bandy attempted to obtain further written discovery from the appellees by submitting a second request for production of documents. In particular, Bandy requested the track volume records for the Kearney Hills railroad crossing and the minutes for CNO&TP's grade crossing safety committee meetings for the three years prior to and six months following the collision.[15] The appellees responded by claiming that the track records were no longer available due to the fact FRA regulations only mandate that such records be maintained for 12 months. As for the safety committee minutes,

[13] Bandy was originally represented by James G. LeMaster of Greenbaum Doll & McDonald PLLC, however, when Mr. LeMaster left the firm in 1996, Harry D. Rankin took over. Mr. Rankin was assisted at trial by E. Andre Busald of Busald, Funk and Zevely.

[14] Garnett and McDonald also indicated that they had nothing to do with the preparation of the responses contained in the answers to the interrogatories.

[15] The track volume records were requested for the 14-day period from September 17, 1995, through October 1, 1995. Various other documents were also included in the second request for production, however, the above-mentioned documents are particularly relevant to the present appeal.

the appellees claimed the records were similarly unavailable as they were beyond the company's records retention policy.

On January 18, 2000, Bandy filed an amended complaint adding a claim for punitive damages. Bandy alleged that the appellees' maintenance of the Kearney Hills crossing "rose to the level of wanton and reckless disregard for the lives and safety of the traveling public, including the life and safety of Russell D. Bandy, and such conduct constituted gross negligence and gross indifference to the welfare of the Plaintiffs' decedent entitling the Plaintiffs to punitive damages." Bandy further alleged that "because of its design, geometric configuration and traffic volume, the Kearney Hills Road grade crossing was 'extra-hazardous.'" The appellees filed an answer to the amended complaint on February 22, 2000, in which they reasserted the defenses raised in their original answer.

On May 4, 2000, the appellees filed a motion asking the trial court to compel Bandy to provide more complete answers to the interrogatories she received on October 30, 1997. Specifically, the appellees asked the trial court to compel Bandy to provide summaries of the opinions of the expert witnesses she intended to call at trial. Bandy responded by arguing that it would be unfair to require her experts to commit to opinions without first requiring the appellees to provide the documents necessary to formulate those opinions.

On August 26, 2000, Bandy informed the appellees that her expert, J. C. Scott, needed printouts of the event recorders located on the two locomotives that powered the train on the day of the collision. Bandy also requested a copy of CNO&TP's records retention policy. On October 27, 2000, Bandy tendered a preliminary opinion from her expert witness, Scott, in which Scott opined that the train involved in the collision was operated at an unsafe speed under the circumstances and that he would have recommended a speed of 25 miles per hour in light of the traffic congestion caused by the golf tournament. The case was then set for a jury trial on July 26, 2001.

On May 10, 2001, the appellees provided Bandy with a copy of what appeared to be the train's consist.[16] Upon further review, however, Bandy's expert, Scott, discovered that the document provided by the appellees was not the train's consist, but rather a bar tonnage graph which did not provide the specific information he needed to formulate his opinion. Despite further requests, Bandy was never provided with a copy of the train's consist.[17] Bandy was provided with a printout of the event recorder for the lead locomotive on May 25, 2001.

[16] A consist contains specific information relating to the makeup of a train. Bandy's expert witness, Scott, claimed that he needed the consist to identify the specific cars which made up the train so he could finalize his opinion regarding emergency breaking, stopping points and distances.

[17] The appellees claim the document Scott referred to as a bar tonnage profile was in fact the train's consist.

On July 12, 2001, the appellees filed a motion for summary judgment arguing that Bandy's claims were preempted by federal law. More specifically, the appellees cited CSX Transportation Inc. v. Easterwood,[18] for the proposition that "state law, including common law negligence claims are pre-empted or superceded by Federal law, at any crossing in which Federal funds have participated in the installation of safety devices." The appellees contended that the Kearney Hills Railroad crossing was improved in 1979 and that federal funds were expended in the installation of the flashing lights and bells attached to the crossing. Bandy responded to the appellees' motion for summary judgment on July 21, 2001, by arguing that Easterwood does not bar a suit for breach of a duty, "such as the duty to slow or stop a train to avoid a specific, individual hazard."[19] Bandy claimed the circumstances which existed at the Kearney Hills crossing on September 23, 1995, created a "specific individual hazard."[20]

On July 16, 2001, Bandy filed a motion for sanctions claiming that she had been prejudiced by the appellees'

[18] 507 U.S. 658, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993).

[19] Id. at 675 n.15.

[20] Bandy did not take the position that the specific warning devices present at the crossing were themselves inadequate, she simply argued that CNO&TP had an affirmative duty to provide a flagman and issue a reduced speed order for the crossing during the golf tournament due to the fact it was on notice of the potential for increased traffic during this time period.

deliberate and intentional failure to cooperate in the discovery process. Bandy claimed the appellees had committed spoliation of evidence with respect to several relevant and material documents and that they had failed to produce several critical documents despite numerous requests. In particular, Bandy claimed the appellees failed to produce the train's consist, the minutes of the grade crossing safety committee meetings, and CNO&TP's records retention policy. Bandy argued that the train's consist was particularly relevant as it would enable her expert to determine if the emergency brakes on the train were applied before, after, or during impact. As for the safety committee minutes, Bandy claimed the minutes were vital to her case-in-chief as they contained the "near-miss" or "close-call" history for the Kearney Hills crossing. Consequently, Bandy cited Baltimore & Ohio Railroad Co. v. Carrier,[21] and argued that she was entitled to an order granting summary judgment or default judgment in her favor due to the appellees' deliberate and intentional failure to cooperate in the discovery process. Bandy argued in the alternative that she was entitled to an instruction advising the jury that any destroyed or missing evidence should be presumed to have been favorable to her position.[22]

[21] Ky., 426 S.W.2d 938 (1968).

[22] See Monsanto Co. v. Reed, Ky., 950 S.W.2d 811 (1997).

The appellees responded to Bandy's motion for sanctions on July 20, 2001. The appellees claimed the dispatcher tapes requested by Bandy were no longer available as the railroad only retains such documents for a period of two months. CNO&TP claimed the tapes had been destroyed by the time Bandy first requested the documents on September 10, 1997. As for the minutes of the grade crossing committee meetings, the appellees argued that the materials were privileged under 23 U.S.C. § 409, which provides as follows:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.[23]

On July 21, 2001, Bandy filed a motion to compel discovery of the minutes of the grade crossing committee

[23] As previously discussed, the appellees originally responded to Bandy's request for the minutes of the safety committee meetings by claiming that the documents were no longer available. Apparently, the appellees managed to locate the documents and now claimed that any records pertaining to the committee meetings were privileged under the statute.

meetings. Bandy claimed 23 U.S.C. § 409 was inapplicable as the statute applies only to documents or data compiled or collected by or at the direction of governmental or administrative agencies for the specific purposes outlined in the statute. Bandy argued that CNO&TP was not a governmental agency and that the grade crossing safety committee meetings did not fall within any of the specified purposes outlined in the statute.[24]

On July 25, 2001, the trial court heard arguments from both parties concerning the appellees' motion for summary judgment and Bandy's motion for sanctions. The trial court summarily denied the appellees' motion for summary judgment and ordered the appellees to produce the minutes of the safety committee meetings and their records retention policy pertaining to the destruction of documents. On July 26, 2001, the appellees filed a motion for directed verdict on Bandy's punitive damages claim. The appellees claimed that Bandy had failed to produce any evidence supporting a punitive damages instruction pursuant to KRS[25] 411.184, which was in effect when the action was filed. The motion was denied. The case then proceeded to trial.

Despite the trial court's order, the appellees never produced a copy of the train's consist as requested by Bandy.

[24] See Kitts v. Norfolk & Western Railway Co., 152 F.R.D. 78 (S.D.W.Va. 1993).

[25] Kentucky Revised Statutes.

Thus, Scott was unable to render an opinion as to when the emergency brake on the train was applied.[26] The appellees also failed to produce the minutes of the safety committee meetings requested by Bandy. Thus, on July 30, 2001, Bandy renewed her motion for sanctions.[27] In addition to their failure to produce the train's consist and the minutes of the safety committee meetings, Bandy also pointed out that the appellees had failed to comply with their own records retention policy in respect to the production of the dispatcher tapes generated on the date of the accident.[28] More specifically, Bandy claimed that pursuant to CNO&TP's records retention policy, the records were required to be kept for a period of two years. Consequently, Bandy asked the trial court to strike the appellees' pleadings and to enter a default judgment against the railroad. Bandy further requested that the case be submitted to the jury solely on the issue of punitive damages.

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[26] Once again, the appellees claim they did in fact provide Bandy with a copy of the train's consist. In support of this argument, the appellees cite the trial testimony of their expert witness, Brian Heikkila, who testified that he had no problem identifying the cars making up the train based upon the information provided by CNO&TP. As CNO&TP's expert, certainly Heikkila was in a much better position than Scott to obtain the information necessary to formulate an opinion on the issue.

[27] A hearing was conducted on the motion at which time Bandy's expert, Scott, explained to the trial court that the bar tonnage profile provided by the appellees did not contain the information necessary to allow him to determine the specific characteristics of the train so that he could render an opinion as to when the emergency brake was applied.

[28] CNO&TP provided Bandy with a copy of its records retention policy on July 27, 2001.

The appellees responded by arguing that Bandy's request for the minutes of the safety committee meetings pertained to a "very specific committee" and that the minutes for that particular committee did not contain any specific references to the Kearney Hills crossing. Apparently, there is a difference between the "Division Grade Crossing Safety Divisional Committee" and the "Division Grade Crossing Safety/Trespass Committee". According to the appellees, Bandy had originally requested the minutes of the "Division Grade Crossing Safety Divisional Committee," which did not contain any specific references for the Kearney Hills crossing. The appellees claimed that this was "simply a matter of the wrong request" and that they should not be held responsible for Bandy's failure to specify the particular documents she was requesting. As for CNO&TP's records retention policy, the appellees argued that the dispatcher tapes were not requested within two years of the accident as Bandy filed her first request for production of documents on September 10, 1997.[29]

The trial court granted Bandy's motion for sanctions and concluded that a spoliation of evidence instruction was an appropriate remedy for the discovery abuses committed by the

[29] This argument appears to be premised upon the rule providing a party 30 days to respond to a written request for production. We hasten to point out that CNO&TP had been aware that litigation was pending since the action was filed on September 17, 1996.

appellees. The trial court expressed a great deal of concern regarding CNO&TP's conduct throughout the discovery process and noted that the railroad should have been aware that litigation was pending when it destroyed the dispatcher tapes requested by Bandy. The trial court also concluded that the bar tonnage profile provided by the appellees was not the consist that Bandy had requested. The trial court also expressed its disapproval of the appellees' failure to produce the minutes of the safety committee meetings requested by Bandy. The trial continued.

On July 31, 2001, Bandy rested her case and the appellees moved for a directed verdict, which was summarily denied.[30] On August 1, 2001, the trial court gave the jury the following instruction:

> During the trial you have heard reference to documents that were not retained by the railroad despite its knowledge of the claim of the plaintiff, Nita Bandy, administratrix of the estate of Russell D. Bandy. You may but are not required to infer that had these documents been retained by the railroad and produced here at trial that these documents would have been adverse evidence to the railroad and favorable to the plaintiff.

The parties then presented their closing arguments and the matter was submitted to the jury for deliberation. The jury returned with a 9-3 verdict in favor of the appellees.

[30] Similarly, after the appellees rested Bandy requested a directed verdict. The trial court summarily denied Bandy's motion as well.

On August 9, 2001, the trial court entered its final judgment and trial order consistent with the jury's verdict and the case was dismissed, with prejudice. On August 20, 2001, Bandy filed a motion for a judgment notwithstanding the verdict and/or a new trial. Bandy claimed she was entitled to a judgment notwithstanding the verdict and/or a new trial as a result of the numerous discovery abuses committed by the appellees throughout the course of the litigation. The motion was denied on September 13, 2001. This appeal and cross-appeal followed.[31]

Bandy claims the trial court abused its discretion by refusing to strike the appellees' pleadings and to grant her a default judgment, or to grant her a directed verdict or a judgment notwithstanding the verdict due to the discovery abuses and spoliation of evidence committed by the appellees. The appellees, on the other hand, claim the trial court erred by denying their motion for summary judgment, because they insist Bandy's cause of action is preempted by federal law.[32]

Bandy argues that she was unfairly prejudiced by the appellees' willful and deliberate failure to comply with her

[31] The notice of appeal filed by Bandy was in her capacity as administratrix of the estate of Russell D. Bandy only, and not in her individual capacity.

[32] The appellees also take issue with several evidentiary rulings made by the trial court during the course of the trial, however, our affirmance on the direct appeal causes all of the issues in the protective cross-appeal to be moot.

discovery requests. More specifically, Bandy claims her expert, Scott, was unable to formulate an opinion at trial on a critical issue due to CNO&TP's failure to provide a copy of the train's consist. Bandy further claims that CNO&TP failed to produce the dispatcher tapes that were generated on the day of the accident. The dispatcher tapes are particularly relevant as they contain the only record of communication between the crew of the train and the dispatcher on the afternoon of the collision. Although CNO&TP claims the tapes were destroyed pursuant to "company policy," Bandy points out that CNO&TP failed to comply with its own records retention policy in regards to the destruction of these documents. Bandy also claims she was prejudiced by CNO&TP's failure to provide the minutes of the safety committee meetings.[33] Consequently, Bandy claims she was entitled to a default judgment or a directed verdict in her favor as a result of the discovery abuses and spoliation of evidence committed by the appellees.

The appellees, on the other hand, claim that they complied with Bandy's discovery requests to the best of their

[33] In addition, Bandy claims she was prejudiced by CNO&TP's deliberate failure to respond to her interrogatories and requests for production of documents addressed to Garnett and McDonald, individually. While the signing of the interrogatory responses addressed to individual defendants without first obtaining their approval or input was improper, we simply do not believe Bandy was unfairly prejudiced by CNO&TP's actions in this regard. Bandy had the opportunity to depose both McDonald and Garnett. Moreover, their depositions took place after Bandy was made aware of the fact that neither Garnett nor McDonald signed or prepared the responses to their individual interrogatories.

ability. CNO&TP maintains that it did in fact provide Bandy with a copy of the train's consist. CNO&TP also claims that its records retention policy does not specifically address dispatcher tapes. Furthermore, CNO&TP stands by its position that Bandy simply failed to request the appropriate committee minutes in her requests for production. We have reviewed all of the relevant testimony and arguments from the trial record; and we are unpersuaded by CNO&TP's attempt to minimize the gravity of its misconduct. It is clear from the record below that the bar tonnage profile provided by CNO&TP was not the train's consist, and the trial court so found. Moreover, CNO&TP's records retention policy specifically references "Train dispatcher records" and the policy provides that such records should be maintained for a period of two years. We are similarly disturbed by CNO&TP's failure to provide the minutes of the safety committee meetings. That is to say, we agree with Bandy that she was prejudiced by the discovery abuses and spoliation of evidence committed by the appellees. Thus, the question now becomes whether the trial court abused its discretion by applying the remedy it chose in light of the appellees' conduct throughout the course of the litigation.

The Supreme Court of Kentucky recently addressed the issue of spoliation of evidence in Monsanto, supra, in the

context of a products liability action. In summarizing Kentucky's position on spoliation of evidence, the Court stated:

> Where the issue of destroyed or missing evidence has arisen, we have chosen to remedy the matter through evidentiary rules and "missing evidence" instructions.[34]

The Court then went on to cite Tinsley v. Jackson,[35] and Sanborn v. Commonwealth,[36] as illustrative of the approach Kentucky Courts have taken when faced with spoliation of evidence issues.

In Tinsley, the Commonwealth failed to produce a blood soaked garment that arguably supported the defendant's theory of the case. The Commonwealth claimed the garment was lost during the course of the underlying investigation. The trial court conducted a hearing on the issue and concluded that the garment was "exculpatory evidence." The trial court granted a mistrial, but it did not make a finding as to the question of bad faith on the part of the Commonwealth. The defendant then sought a writ of prohibition barring a second trial on double jeopardy grounds.[37]

On appeal, this Court denied the defendant's petition for a writ of prohibition. The Supreme Court affirmed and stated:

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[34] Monsanto, 950 S.W.2d at 815.

[35] Ky., 771 S.W.2d 331 (1989).

[36] Ky., 754 S.W.2d 534 (1988).

[37] Tinsley, 771 S.W.2d at 332.

> Upon remand, the trial court should conduct a hearing to determine whether failure of the Commonwealth to produce the "sleeper" will substantially prejudice appellant's right to a fair trial. If such is determined to be the case, the court should consider whether a "missing evidence instruction" should be given or whether the Commonwealth's evidence should be limited, or even prohibited, to eliminate the prejudice resulting from the unavailability of the exculpatory evidence.[38]

The Court was simply unwilling to bar a second trial as a remedy for the Commonwealth's failure to produce the "exculpatory evidence."

In Sanborn, the Court was faced with a spoliation of evidence issue involving prosecutorial misconduct. The prosecutor in Sanborn had intentionally erased the tape-recorded statements of four witnesses, three of whom testified against the defendant at trial.[39] Defense counsel had attempted to obtain the statements of the witnesses via a pre-trial discovery motion, however, the prosecutor, who was aware of the trial court's policy to order such disclosures, subsequently erased the tapes. Consequently, defense counsel requested a missing evidence instruction pertaining to the destruction of the tapes. The trial court denied the motion and Sanborn was subsequently convicted of intentional murder, rape in the first degree,

[38] Id.

[39] Sanborn, 754 S.W.2d at 539.

sodomy in the first degree, and kidnapping in the first degree.[40]

In Sanborn's appeal, the Commonwealth argued that the prosecutor had the right to destroy the tapes. The Supreme Court disagreed and even went so far as to label the Commonwealth's argument as "specious" and the prosecutor's tactics as "unforgivable."[41] Nevertheless, despite the egregious tactics employed by the prosecutor, the Supreme Court was unwilling to dismiss the case as a result of the spoliation of evidence. Instead, the Court reversed the conviction and directed the trial court at re-trial to give the jury a missing evidence instruction. The Supreme Court reasoned that a missing evidence instruction would sufficiently offset the prosecutor's misconduct.[42] The Court went on to quote, with approval, the following missing evidence instruction:

> "If you find from the evidence that there existed a tape recording . . . and that the state intentionally destroyed the tape recording, you may, but are not required to, infer that the information contained on the tape recording would be, if available, adverse to the state and favorable to the defendant." [43]

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[40] Id. at 537.

[41] Id. at 539.

[42] Id. at 540.

[43] Id. at 540 n.3 (quoting State v. Maniccia, 355 N.W.2d 256, 259 (Iowa App. 1984)).

While Bandy claims "the issue of spoliation . . . has not been appropriately explored by Kentucky Appellate Courts other than in Monsanto[,]" we believe Monsanto, Tinsley and Sanborn demonstrate that Kentucky Courts have consistently ruled that "[w]here the issue of destroyed or missing evidence has arisen, [the appropriate remedy is] through evidentiary rules and 'missing evidence' instructions."[44] Bandy's brief does not even mention Tinsley or Sanborn, but instead she attempts to convince us to follow a plethora of federal cases which have addressed the issue and apparently concluded that summary judgment or default judgment is an appropriate civil penalty where one party has deliberately and intentionally destroyed relevant evidence. However, Bandy has failed to cite a single case from any jurisdiction in which dismissal or default judgment was held to be required as a result of spoliation of evidence. Regardless, we are convinced that there is ample Kentucky case law addressing this issue, and there is no need to look to federal case law as persuasive authority.

The trial court in the case sub judice concluded that a "missing evidence instruction" was an appropriate means of remedying the prejudice Bandy suffered as a result of the spoliation of evidence and discovery abuses committed by the appellees. We cannot conclude that it was an abuse of the trial

[44] Monsanto, 950 S.W.2d at 815.

court's discretion for the trial court to limit the sanction for the appellees' misconduct to the giving of this jury instruction.[45]

Bandy argues in the alternative that under CR[46] 37.04 the trial court has the power to sanction a party who fails or refuses to submit answers to interrogatories by entering an order striking that party's pleadings or dismissing the case with prejudice. Bandy cites Naive v. Jones,[47] and Baltimore Railroad Co. v. Carrier,[48] in support of this proposition. Bandy claims the trial court should have stricken the appellees' pleadings and entered a default judgment in her favor. We disagree and conclude that while dismissal or default judgment may have been warranted under CR 37.04 based upon the discovery abuses committed by the appellees, such a ruling was not required.

Bandy has failed to cite a single Kentucky case holding that dismissal or default judgment is mandatory when a party fails to comply with the discovery process. Naive and

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[45] "'Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.'" Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679, 684 (1994)(quoting Kentucky National Park Commission v. Russell, 301 Ky. 187, 191 S.W.2d 214 (1945)).

[46] Kentucky Rules of Civil Procedure.

[47] Ky., 353 S.W.2d 365 (1961).

[48] Ky., 426 S.W.2d 938 (1968).

Baltimore both stand for the proposition that dismissal is warranted under CR 37.04, however, neither case mandates such a result. The sanctions provided under CR 37.04 are left to the sound discretion of the trial court. As was stated by the former Court of Appeals in Naive:

> The proper application and utilization of [the Civil Rules of Procedure] should be left largely to the supervision of the trial judge, and we must respect his exercise of sound judicial discretion in their enforcement.[49]

We are unpersuaded by Bandy's argument that any sanction short of dismissal or default judgment would be inappropriate. Bandy claims that "[w]here a party has provided false or misleading information and has willfully failed to produce relevant documents, courts have consistently held that sanctions short of dismissal were not sufficient even where the information was ultimately discovered." However, Bandy has failed to cite a single case in which dismissal was held to be mandated due to an opposing party's abuse of the discovery process.

Having concluded that the trial court did not abuse its discretion by imposing the sanction of a missing evidence instruction for the appellees' misconduct related to spoliation of evidence and discovery abuses, we affirm the final judgment

[49] Naive, 353 S.W.2d at 367.

of the Fayette Circuit Court. Accordingly, all the issues raised in the protective cross-appeal are moot.

ALL CONCUR.

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