Order

Michigan Supreme Court
Lansing, Michigan

June 11, 2025

166865-6

Megan K. Cavanagh,
Chief Justice

Brian K. Zahra
Richard H. Bernstein
Elizabeth M. Welch
Kyra H. Bolden
Kimberly A. Thomas
Noah P. Hood,
Justices

CHANDRA McDUFFIE, Personal Representative of the ESTATE OF WILLIAM HOWARD McDUFFIE-CONNOR,
Plaintiff-Appellant,

v

SC: 166865
COA: 358987
Wayne CC: 20-007497-NF
20-012305-NF

SCOTT M. NEAL and MEMBERSELECT INSURANCE COMPANY,
Defendants,
and

NSS CONSTRUCTION, INC.,
Defendant-Appellee.

_____/

CHANDRA McDUFFIE, Personal Representative of the ESTATE OF WILLIAM HOWARD McDUFFIE-CONNOR,
Plaintiff-Appellant,

v

SC: 166866
COA: 360585
Wayne CC: 20-007497-NF

SCOTT M. NEAL and MEMBERSELECT, INSURANCE COMPANY,
Defendants,
and

NSS CONSTRUCTION, INC.,
Defendant-Appellee.

_____/

On March 12, 2025, the Court heard oral argument on the application for leave to appeal the February 8, 2024 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(I)(1). In lieu of granting leave to appeal, we VACATE in part and REVERSE in part the judgment of the Court of Appeals, VACATE

the August 4, 2021 order of the Wayne Circuit Court, and REMAND this case to the trial court for further proceedings not inconsistent with this order.

Plaintiff's lawsuit arises from a fatal collision between the car driven by the decedent, William Howard McDuffie-Connor, and the truck operated by Scott Neal in the course of his employment with defendant, NSS Construction.[1] Video footage of the crash shows that the truck began to turn right when it collided with the decedent's vehicle, which was in a parking lane and attempting to pass the truck on the right. At issue on appeal are two decisions by the trial court: an order denying defendant's motion for summary disposition under MCR 2.116(C)(10) and an order granting plaintiff's motion for sanctions against defendant for the spoliation of evidence. In a split decision, the Court of Appeals vacated these rulings and remanded to the trial court for entry of summary disposition in defendant's favor. *Estate of McDuffie-Connor v Neal*, unpublished per curiam opinion of the Court of Appeals, issued February 8, 2024 (Docket Nos. 358870, 358987, and 360585). Plaintiff now appeals from that judgment.

We begin with the trial court's decision to deny summary disposition, which we review de novo. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159 (2019). When reviewing a motion brought under MCR 2.116(C)(10), a trial court considers affidavits, depositions, and other substantively admissible evidence in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120-121 (1999). Summary disposition must be denied when there is a genuine issue of material fact, meaning that reasonable minds might differ on the issue. *El-Khalil*, 504 Mich at 160.

The Court of Appeals erroneously vacated the trial court's order denying defendant's motion for summary disposition under MCR 2.116(C)(10). Genuine issues of material fact exist that must be resolved by a fact-finder. At the outset, reasonable minds could differ on whether the truck's turn signals were functioning properly at the time of the incident. By holding that there was "no evidence that the truck's turn signal was not operating properly before the collision," *Estate of McDuffie-Connor*, unpub op at 15, the Court of Appeals majority improperly disregarded the findings of a post-collision investigation and, as a result, failed to view the evidence in the light most favorable to plaintiff as the nonmoving party.

The evidence shows that, after the crash, police secured the truck for investigation, and Michigan State Police Officer Ryan Wilson inspected the vehicle six days later. Relevant here, Officer Wilson's inspection report stated that five of the truck's brakes were out of adjustment and all four turn signals were lighting up but not blinking. On the basis

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[1] Neal and MemberSelect Insurance Company have been dismissed from this litigation and are not parties to this appeal, so we use "defendant" throughout this order to refer solely to NSS Construction.

of his training and experience as a post-crash investigator and his observations of the condition of the truck, Officer Wilson believed that these maintenance defects existed before the crash. Plaintiff also obtained opinions from Timothy Abbo, a collision reconstructionist, and Larry Baareman, a licensed mechanic and certified Commercial Driver's License Examiner, who both agreed that the turn signals were not functioning properly before the crash.

Although Neal testified that he confirmed the truck's turn signals were properly functioning during a pre-trip inspection on the day of the crash, and witness Matthew Pace testified that the truck's right rear turn signal was blinking before the crash, their testimony merely highlights that a factual dispute exists. Whether to believe Neal and Pace rests on a credibility determination—and that is for a fact-finder to make, not a trial court in deciding a motion for summary disposition or an appellate court in reviewing that ruling. See *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 122-123 (1991) (opinion by LEVIN, J.).

Further, the factual dispute over the operability of the truck's turn signals is material to plaintiff's claims of negligence, statutory owner liability, and wrongful death. To establish a prima facie case of negligence, a plaintiff must show that "(1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages." *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162 (2011). Absent a statutory requirement, a driver has a duty to operate a vehicle with "ordinary and reasonable care and caution." *Zarzecki v Hatch*, 347 Mich 138, 141 (1956). But the violation of a penal statute may create a rebuttable presumption of negligence. *Zeni v Anderson*, 397 Mich 117, 128-133 (1976); *Klanseck v Anderson Sales & Serv, Inc*, 426 Mich 78, 86-87 (1986). Under the Michigan Vehicle Code's owner-liability provision, "[t]he owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle," provided the vehicle was being driven with the owner's knowledge or consent. MCL 257.401(1). A wrongful-death action similarly requires a showing that a person's death was caused by a "wrongful act, neglect, or fault of another." MCL 600.2922(1).

Drawing reasonable inferences from the record evidence, a reasonable juror could determine that Neal failed to conduct a pre-trip inspection that would have revealed the inoperable turn signals or, instead, knowingly operated a vehicle with these defects. In turn, a reasonable juror could conclude that Neal and defendant committed a wrongful act and breached their legal duty to ensure that the truck was properly maintained and safe to operate. This evidence also supports plaintiff's theory of causation because, if the truck's turn signals lit up but did not blink, the decedent may have reasonably believed that the truck was about to stop rather than turn, and thus, it was safe to pass on the right. Contrary to defendant's assertion, this conclusion is not speculative but follows a "logical sequence of cause and effect" when viewed in the light most favorable to plaintiff. *Skinner v Square*

D Co, 445 Mich 153, 174 (1994). Similarly, evidence of an inoperable turn signal supports plaintiff's position that Neal violated applicable statutes, which contributed to the crash. See MCL 257.648(1) ("The operator of a vehicle . . . , before stopping or turning from a direct line, shall first determine that the stopping or turning can be made in safety and shall give a signal . . . ."); MCL 257.642(1)(a) ("A vehicle . . . must not be moved from the lane until the operator has first ascertained that the movement can be safely made."). A reasonable juror could conclude that Neal failed to ensure that he could safely execute a right turn and that the harm to the decedent was a foreseeable consequence of that conduct. See *Ray v Swager*, 501 Mich 52, 65 (2017) (explaining that proximate cause "requires a determination of whether it was foreseeable that the defendant's conduct could result in harm to the victim"). Thus, genuine issues of material fact exist as to breach and causation.

The trial court likewise correctly denied summary disposition on the issue of comparative fault. Under Michigan's no-fault act, MCL 500.3101 *et seq*., "[a] person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). In these cases, "[d]amages must be assessed on the basis of comparative fault, except that *damages must not be assessed in favor of a party who is more than 50% at fault*." MCL 500.3135(2)(b) (emphasis added). In a comparative fault system, "the liability of each person shall be allocated . . . by the trier of fact and . . . in direct proportion to the person's percentage of fault." MCL 600.2957(1). As correctly noted by dissenting Judge HOOD, "the body of evidence supports a variety of reasonable conclusions for jurors." *Estate of McDuffie-Connor* (HOOD, J., dissenting), unpub op at 7. Although defendant contends that the decedent caused the crash by unlawfully passing the truck on the right, reasonable minds could conclude from the video footage of the crash and other evidence that both drivers bear some fault. One could believe that the decedent's maneuver—passing the truck on the right from the parking lane of the roadway—was not made "under conditions permitting the overtaking and passing in safety." MCL 257.637(2). But the evidence also supports the conclusion that Neal acted without ensuring that the turn could be safely made and without using functional turn signals to notify surrounding drivers. See MCL 257.642(1)(a); MCL 257.648(1). Because reasonable minds could differ on which driver was more at fault for the crash, MCL 500.3135(2)(b) does not bar recovery for plaintiff. See *Huggins v Scripter*, 469 Mich 898, 898 (2003).

We disagree, too, with defendant's alternative argument for affirming the Court of Appeals—that Neal had no legal duty to anticipate that the decedent would attempt to pass on the right. "[U]ntil a hazard is perceived, or until a hazard would have been apparent to a reasonable man, considering pertinent surrounding circumstances of traffic and terrain, a driver has no duty to guard against or anticipate an unknown hazard." *Briggs v Knapp*, 513 Mich 857, 857 (2023) (quotation marks and citations omitted). In *Briggs*, we agreed that the driver had no duty to anticipate a pedestrian who walked into the lane of highway traffic during dark, nighttime conditions. *Id*.; see *Briggs v Knapp*, unpublished per curiam

opinion of the Court of Appeals, issued March 9, 2023 (Docket No. 358641) (K. F. KELLY, J., dissenting), p 5. Unlike that case, reasonable minds could differ here on whether Neal should have perceived the decedent's vehicle. As discussed, whether the decedent's vehicle should have been apparent to Neal as it approached on the right, and after Neal had passed the vehicle on the left seconds earlier, is a determination properly left to a fact-finder. For these reasons, the trial court did not err by denying defendant's motion for summary disposition under MCR 2.116(C)(10). We therefore reverse the Court of Appeals judgment to the contrary.[2]

Finally, plaintiff argues that the Court of Appeals erred by vacating the trial court's award of sanctions against defendant for the spoliation of employment and maintenance records.[3] "When a party destroys or loses *material* evidence, whether intentionally or unintentionally, and the other party is unfairly prejudiced because it is unable to challenge or respond to the evidence, a trial court has the inherent authority to sanction the culpable party to preserve the fairness and integrity of the judicial system." *Teel v Meredith*, 284 Mich App 660, 666-667 (2009) (emphasis added). As the Court of Appeals majority acknowledged, the trial court abused its discretion by failing to make any findings as to whether the records discarded by defendant were material to plaintiff's claims. Nor did the trial court address the related issue of whether defendant had a duty to preserve this evidence before plaintiff filed suit. See *Brenner v Kolk*, 226 Mich App 149, 162 (1997) ("Even when an action has not been commenced and there is only a potential for litigation, the litigant is under a duty to preserve evidence that it knows or reasonably should know is relevant to the action."). Because the trial court did not make the necessary findings to impose sanctions for the spoliation of employment and maintenance records, it was unnecessary for the Court of Appeals to resolve the merits of this issue. We therefore vacate Parts II(A)(1), (2), and (3) of the Court of Appeals judgment, and we remand to the trial court to reconsider its ruling.

Accordingly, we vacate in part and reverse in part the judgment of the Court of Appeals, vacate the order of the Wayne Circuit Court granting plaintiff's motion for sanctions against defendant for the spoliation of evidence, and remand this case to the trial court for further proceedings not inconsistent with this order.

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[2] We express no opinion on arguments made by defendant in its motion for summary disposition that were not addressed by the trial court or the Court of Appeals, such as whether the wrongful conduct rule applies or whether summary disposition is warranted on any claims under MCR 2.116(C)(8).

[3] Plaintiff does not challenge the Court of Appeals' conclusion that defendant did not spoliate evidence by failing to preserve the dump truck itself, so we do not disturb that ruling.

We do not retain jurisdiction.

ZAHRA, J., would deny the application for leave to appeal.

BERNSTEIN, J., did not participate.

HOOD, J., did not participate because he was on the Court of Appeals panel.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 11, 2025

Clerk

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STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF WILLIAM HOWARD MCDUFFIE-CONNOR, by its Personal Representative, CHANDRA MCDUFFIE,

Plaintiff-Appellee,

v

SCOTT M. NEAL and MEMBERSELECT INSURANCE COMPANY,

Defendants,

and

NSS CONSTRUCTION, INC.,

Defendant-Appellant.

UNPUBLISHED
February 8, 2024

Nos. 358870, 358987, 360585
Wayne Circuit Court
LC Nos. 20-007497-NF, 20-012305-NF, 20-007497-NF

Before: GADOLA, P.J., and BORRELLO and HOOD, JJ.

PER CURIAM.

In Docket No. 358870, defendant NSS Construction, Inc. (NSS) appeals on leave granted the trial court's October 1, 2021 order denying the motion of defendants, NSS and Scott M. Neal, seeking relief regarding plaintiff's alleged spoliation of evidence. In Docket No. 358987, NSS appeals on leave granted the trial court's August 4, 2021 order granting plaintiff's motion for relief regarding NSS's alleged spoliation of evidence and imposing sanctions against NSS. In Docket No. 360585, NSS appeals on leave granted the trial court's February 23, 2022 order denying NSS's motion for summary disposition under MCR 2.116(C)(8) and (10). We vacate the trial court's August 4, 2021 order granting plaintiff's motion for relief regarding NSS's alleged spoliation of evidence and imposing sanctions against NSS, affirm the trial court's October 1, 2021 order denying NSS's motion regarding plaintiff's alleged spoliation of evidence, vacate the trial court's February 23, 2022 order denying NSS's motion for summary disposition, and remand this matter to the trial court for entry of summary disposition in favor of NSS.

I. FACTS

These consolidated cases arise from an automobile accident that occurred on July 17, 2019 on Meyers Road in Detroit. On that day, plaintiff's decedent, William Howard McDuffie-Connor, was driving a white 2000 Chrysler Sebring convertible. Defendant Neal was driving a 1997 Ford 8000 dump truck in the course of his employment with defendant NSS, the owner of the dump truck.

The accident was recorded by a surveillance camera near the site of the accident. The video recording shows the dump truck traveling northbound on Meyers Road and an automobile traveling behind the dump truck. McDuffie-Connor's Sebring was parked on the far right side of the northbound lane of the street, which the parties do not dispute is a parking lane not intended for vehicle travel. As the dump truck moved past the parked Sebring, McDuffie-Connor began to travel northbound in the Sebring in the parking lane, keeping pace with the dump truck and apparently attempting to pass the dump truck on the right. A few moments later, Neal turned the dump truck to the right, attempting to enter a driveway. The Sebring struck the dump truck and then overturned; McDuffie-Connor was killed.

Neal later testified during his deposition that on the day of the accident he was traveling on Meyers Road to pick up a load of gravel in the course of his employment with NSS. Neal testified that before driving the dump truck that day, he inspected the truck and "everything" on the dump truck was working properly. Neal told the investigating officers that he activated his right turn signal before beginning the right turn into the driveway. He testified that he looked in his mirror before turning right, but did not see the Sebring. Police inspection of the dump truck post-accident revealed that the dump truck's turn signals, including the right rear turn signal, lighted but did not blink, and that the brakes were not properly aligned. Neal tested negative for alcohol or substances after the accident.

The accident was witnessed by Matthew Pace, who was driving the car traveling immediately behind the dump truck on Meyers Road at the time of the collision. Pace testified that the white Sebring was parked in the parking lane on the right side of the northbound lane of Meyers Road. As Pace passed the Sebring, the Sebring began to drive alongside Pace while in the parking lane. Pace slowed to enable the Sebring to pull into the northbound lane in front of Pace. Instead of pulling in front of Pace, however, the Sebring continued to drive northbound in the parking lane. Pace testified that the driver of the Sebring was bobbing his head as though listening to music. The Sebring then accelerated forward as though "trying to speed off." At the same time that the Sebring accelerated forward, Pace saw the dump truck slow, saw the dump truck's brake lights, and saw the dump truck's right turn signal blinking. The dump truck then turned right; the Sebring hit the front passenger-side tire area of the dump truck and the Sebring flipped. Pace testified, in relevant part:

Q: All right. You're following behind the dump truck, correct?

A: Yes.

Q: At any point did the dump truck put on its turn indicator?

A: He turned them on as he got closer towards the railroad track.

Q: And was that his right turn indicator that he had on?

A: Yes.

Q: And did that right turn indicator blink?

A: Yes.

Q: And you saw it blink, correct?

A: Yeah, it was blinking for a while before he came to a stop.

Q: When you say before he came to a stop, was that before he came to a stop after the accident or prior to the accident?

A: Before and after.

Q: So explain that to me.

A: As we were coming towards the railroad track and we were following behind him, the dump truck, he never stopped. When he turned his blinker on, he slowed down and he turned his blinker on. As he turned his blinker on, that's when he began his turn. But at the same time as him turning, the white car – the guy in the white car hit his gas and sped up.

Q: And is that when the white car and the dump truck collided?

A: Yes.

Q: Did you see the dump truck's brake lights at all?

A: I saw his brake lights when he slowed down to turn.

Q: With respect to the driver of the white vehicle, did he ever look over toward your vehicle at you and your brother that you can recall?

A: Yes, he did.

Q: And did he indicate like that he wanted to get into your travel lane? Did he make any type of hand motions toward you?

A: No. As he was on the side of us, I – when I slowed down, I waited for him to go in front, but he just was like – just like bobbing his head to us, like listening to music. And then as we got closer to where the accident happened, he just hit his gas and I guess he tried to beat the turn of the truck and he hit the truck and flipped.

Q: If you recall, was the driver of the white vehicle far enough behind the dump truck to see the dump truck's turn signal?

* * *

A: Yes, being on the side of my vehicle the driver of the white vehicle would have been able to see the turn signal of the truck.

Q: And would he have been able to see the brakes, the brake lights of the dump truck?

A: Yes.

Chandra McDuffie, the decedent's mother, testified during her deposition that as a child the decedent had been diagnosed with attention-deficit/hyperactivity disorder (ADHD) and had taken medication for the condition, but as an adult had chosen to stop taking the medication. Chandra McDuffie testified that when the decedent was not taking the medication, she noticed a difference in his behavior, specifically a decrease in his attention span. She also testified that the decedent had worked the night shift before the accident and had finished work at 8:00 a.m. She later learned that the accident occurred at 11:30 a.m. The Wayne County Prosecutor's Office determined that there was insufficient evidence to establish that any crime had been committed and Neal was not cited for the accident.

After the accident, the Sebring was towed to a Detroit police impound lot. On August 18, 2019, Chandra McDuffie was appointed personal representative of McDuffie-Connor's estate. Chandra thereafter photographed the Sebring at the impound lot, but did not have the vehicle inspected. Chandra received a letter from the police department notifying her that the Sebring would be sold if she did not retrieve it. She did not retrieve the Sebring; the car was sold at auction on October 2, 2019, and was crushed by the purchaser and sent to Ferrous Processing & Trading Co. on October 16, 2019.

The dump truck also was towed and impounded by the police. In December 2019, NSS closed its business, its shop was lost to foreclosure, and the truck was sold at auction. The owner of NSS, Nick Schubeck, explained that when the business closed he disposed of most of the business's records, including records relating to the dump truck that were not in the truck, by putting them in a dumpster.

On June 15, 2020, plaintiff, Chandra McDuffie, as the personal representative of McDuffie-Connor's estate, filed a complaint in the trial court. The complaint alleged, in relevant part, negligence, gross negligence, willful and wanton misconduct, and wrongful death by Neal[1] and NSS, and also owner liability under MCL 257.401 and vicarious liability by NSS. In May

[1] The trial court dismissed without prejudice the estate's claim against Neal, who is no longer a defendant.

2021, plaintiff sought sanctions against NSS for spoliation of evidence, specifically, documents regarding Neal's driving and employment records and the dump truck's maintenance and inspection records. Plaintiff contended that these records were relevant to the lawsuit and that NSS destroyed the evidence knowing that a lawsuit was possible. After a hearing on the motion, the trial court took the motion under advisement, ordering NSS to produce the requested documentation and the dump truck. NSS provided plaintiff with the results of Neal's negative drug and alcohol tests from the day of the accident and also Neal's CDL license and medical certificates. NSS also located the dump truck in Vermont and indicated that it was available for inspection. NSS was unable to locate or obtain the additional documentation requested, much of which Schubeck, the owner of NSS, testified he disposed of when he closed the business.

After a further hearing on the motion, the trial court imposed sanctions on NSS, finding that NSS destroyed the documentation and failed to preserve the dump truck in bad faith. The trial court struck NSS's affirmative defenses, prohibited NSS from presenting mitigating evidence, stated that it would give an adverse inference instruction at trial, and ordered NSS to pay sanctions of $3,500. The trial court thereafter denied NSS's motion for reconsideration of the order without explanation.

NSS and Neal filed a motion for relief regarding plaintiff's alleged spoliation of evidence, asserting that plaintiff had failed to preserve the Sebring and that dismissal of the complaint therefore was warranted. The trial court denied defendants' motion, reasoning that plaintiff could not produce the Sebring because it had been in police custody.

NSS moved for summary disposition under MCR 2.116(C)(8) and (10). The trial court denied the motion "for the reasons stated on the record of the proceedings in this case on February 8, 2022." The trial court did not specifically address on the record each argument presented by NSS, but determined that questions of fact existed.

NSS and Neal applied for leave to appeal to this Court, challenging the trial court's orders granting plaintiff relief regarding alleged spoliation of evidence by NSS, but denying NSS relief regarding plaintiff's alleged spoliation of evidence. NSS also sought leave to appeal the trial court's order denying NSS's motion for summary disposition. This Court granted leave to appeal in all three cases and consolidated the appeals.

II. DISCUSSION

A. SPOLIATION OF EVIDENCE

Defendant NSS contends that the trial court abused its discretion by granting plaintiff's motion asserting that NSS engaged in spoliation of evidence and sanctioning NSS, and by conversely denying NSS's motion asserting that plaintiff engaged in spoliation of evidence. We agree that the trial court abused its discretion by sanctioning NSS for spoliation.

We review for an abuse of discretion the trial court's decision to sanction a party for spoliation of evidence. *Pugno v Blue Harvest Farms, LLC*, 326 Mich App 1, 24; 930 NW2d 393 (2018). An abuse of discretion occurs when the trial court's decision results in an outcome outside the range of principled outcomes. *Id.*

A party has a duty to preserve evidence material to litigation that is pending or that is reasonably foreseeable. *Brenner v Kolk*, 226 Mich App 149, 162; 573 NW2d 65 (1997). "Even when an action has not been commenced and there is only a potential for litigation, the litigant is under a duty to preserve evidence that it knows or reasonably should know is relevant to the action." *Id*. When a party fails to preserve evidence material to pending or reasonably foreseeable litigation, the party is said to have "spoliated" the evidence, and the trial court is permitted to draw an adverse inference against that party if (1) the evidence was under the control of the party and could have been produced, (2) the party lacks an excuse for failing to produce the evidence, and (3) the evidence is material, non-cumulative, and not equally available to the other party. *Ward v Consol Rail Corp*, 472 Mich 77, 85-86; 693 NW2d 366 (2005); see also *Teel v Meredith*, 284 Mich App 660, 666-667; 774 NW2d 527 (2009). Even when a party has destroyed or failed to preserve evidence, however, the party nonetheless may rebut an adverse inference by presenting a "nonfraudulent explanation" for its decision to discard evidence. *Ward*, 472 Mich at 85. "[N]o adverse inference arises if [the party] has a reasonable explanation for its failure to produce the missing evidence." *Id*. at 86.

When evidence has been lost or destroyed by a party, "a court must be able to make such rulings as necessary to promote fairness and justice." *Brenner*, 226 Mich at 160. When a party fails to preserve evidence, either negligently or deliberately, that the party knows or should know is relevant to potential litigation, and the other party is thereby unfairly prejudiced by the inability to examine the evidence, the trial court has authority to sanction the party who failed to preserve the evidence. *Bloemendaal v Town & Country Sports Ctr, Inc*, 255 Mich App 207, 211-212; 659 NW2d 684 (2002). A jury instruction regarding spoliation is warranted "if the evidence that is the subject of the instruction is (1) material, (2) not merely cumulative, and (3) not equally available to the opposite party." *Komendat v Gifford*, 334 Mich App 138, 150; 964 NW2d 75 (2020) (quotation marks and citation omitted). In addition, an adverse inference sanction allows the factfinder to infer that the evidence would have been adverse to the party who failed to preserve the evidence; the inference is permissive, not mandatory. See *Brenner*, 226 Mich App 155-156.

1. MATERIALITY

NSS first contends that its failure to preserve the dump truck, the dump truck's service records, and Neal's employment records did not result in spoliation because the evidence was not material to plaintiff's lawsuit. We agree.

A party's duty to preserve evidence for pending or reasonably foreseeable litigation is limited to evidence that is material to that litigation. See *Komendat*, 334 Mich App at 150. Although the terms relevance and materiality sometimes are used interchangeably, relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Relevance has two components, which are materiality and probative value. *Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651, 667; 819 NW2d 28 (2011). To be relevant, the evidence must be material and also probative, tending to make the existence of a material fact more probable or less probable than it would be without the evidence. MRE 401; *Hardrick*, 294 Mich App at 668.

Materiality is the requirement that the evidence be related to "any fact that is of consequence to the determination of the action," or in other words, "is the fact to be proven truly in issue?" *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). "[A] material fact need not be an element of a crime or cause of action or defense but it must, at least, be 'in issue' in the sense that it is within the range of litigated matters in controversy." *Hardrick*, 294 Mich at 667 (quotation marks and citations omitted). "Materiality 'looks to the relation between the propositions that the evidence is offered to prove and the issues in the case. If the evidence is offered to help prove a proposition that is not a matter in issue, the evidence is immaterial.' " *Id*., quoting 1 McCormick, Evidence (6th ed), § 185, p 729. Cases discussing spoliation sometimes use the terms relevance and materiality interchangeably, see *Bloemendaal*, 255 Mich App at 211, but a requirement of spoliation is materiality, not relevance. See M Civ JI 60.1; see also *Komendat*, 334 Mich App at 150-151 (Citing M Civ JI 60.1, and determining that a spoliation instruction may be warranted if the evidence in question is material).

In this case, the evidence that plaintiff contends was spoliated by NSS is not material to the litigation because it does not help to prove a proposition that is a matter in issue. In its motion, plaintiff alleged that NSS destroyed certain records it had the duty to preserve, namely:

a. The vehicle maintenance file for the dump truck;

b. The accident register for the dump truck;

c. Pre-trip inspections for the dump truck;

d. Documents showing inspections of the dump truck prior to the collision;

e. Any inspection reports for the dump truck;

f. Any bills or records in any way related to the dump truck;

g. Documentation of safety meetings held by N.S.S.;

h. Safety director records;

i. Driver vehicle inspection reports;

j. Driver qualification file;

k. The Driver's file for NSS employee, Defendant Scott Neal;

l. Defendant Scott Neal's certified driving record from 2019;

m. Driver logs for Defendant Scott Neal;

n. Preemployment drug and alcohol testing documents for Defendant Scott Neal;

o. Post-accident drug and alcohol screen for Defendant Scott Neal;

p. Acknowledgments of receipts for misuse of alcohol/use of controlled substance policy signed by Defendant Scott Neal;

q. Annual inquiry and review of Defendant Scott Neal's driving record;

r. Driver investigation history file for Defendant Scott Neal;

s. Defendant Scott Neal's abstract driving record from the time of his hiring; and

t. "all of the paperwork that was pertinent to this."

Plaintiff's motion asserted that these documents were important because they were evidence of NSS's compliance, or lack thereof, with the Federal Motor Carrier Safety Regulations, and NSS's efforts, or lack thereof, to put a safe vehicle with a safe driver on the roadway. Plaintiff argued that the evidence would likely help plaintiff prove that NSS knew the dump truck was defective and also prove that NSS was negligent in hiring Neal to drive the dump truck. Plaintiff also asserted that NSS was a defendant in an unrelated labor dispute and therefore was obligated to keep its records for that dispute.

NSS responded in part that defendant failed to state the relevance of these documents. NSS asserted that neither Neal nor NSS was cited for the accident; there was no finding by the authorities investigating the accident that any issue related to the dump truck caused the accident, nor any finding that Neal in any way caused the accident. Further, some documentation related to the dump truck was in the truck when it was seized by police; those documents were not destroyed by NSS, and plaintiff obtained Neal's medical cards, employment history, and driving record from other sources.

At the hearing on the motion, the trial court took the plaintiff's spoliation motion under advisement, and ordered that NSS had 30 days to provide plaintiff with the documents related to the dump truck and Neal's employment as outlined in plaintiff's motion, and also the dump truck. Although NSS located the dump truck and three people who had serviced the dump truck, the trial court held that NSS had not complied with its order; the trial court stated at a later hearing that NSS was obligated to keep its records because of the unrelated pending union dispute. The trial court did not address the issue of materiality of the evidence sought, but imposed sanctions reasoning in pertinent part:

> [Schubeck] indicated that he destroyed these records and there [sic] doesn't say anything about, you know, intention or whatever, but the fact of the matter remains is that he destroyed the records and, in order to promote fairness and justice, the Court does have to fashion a remedy here. This evidence has been destroyed, as has been indicated. The truck is now somewhere on the East Coast and it's been two years. So, that doesn't provide the expert with an opportunity to adequately inspect it because, you know, as is indicated, the state police said that their – the brakes didn't work and the – the turn signals didn't work and, of course if it's in operation on the East Coast somewhere, I'm sure those matters have been rectified at this point in time. So, you know – and, like I said, unfortunately, this named defendant just really is not acting in good faith in any stretch of imagination.

> And that being said, the Court could, could, as Mr. Marko indicated, default the – the defendant but the Court's isn't going to give that harsh remedy. What the Court will do is the Court will strike the affirmative defenses, prevent the defendant from presenting any evidence saying that they properly maintained the vehicle or that they did whatever else they were to do to properly maintain the vehicle. And the Court will utilize, if we get to trial, the jury instruction 6.01 and the Court will issue costs in the amount of $3,500, against the defendant. N – where is it? N – NSS and – what is it? I keep forgetting his name, Mr. Marko.

The trial court thereafter entered its order stating:

> IT IS HEREBY ORDERED that, Defendant having previously been ordered to produce certain documents and things no later than January 22, 2021, and Defendant having failed to comply with this Court's Order, this Court finds that Plaintiff is entitled to the following remedies to promote fairness and justice in this case in accordance with the applicable case law and Brenner v Kolk, 226 Mich App 149, 162 (1997).
>
> A. The Court shall give Model Civil Jury Instruction 6.01(a) to the jury in this matter;
>
> B. Defendant's Affirmative Defenses are hereby stricken and may not be refiled or relied upon at trial;
>
> C. Defendant is barred from introducing any mitigating evidence regarding their business practices, employment practices, vehicle maintenance practices, safety practices, or otherwise; and
>
> D. Defendant is to pay monetary costs in the amount of $3,500.00 to [plaintiff].

By failing to consider on the record whether the evidence requested was material before finding that NSS spoliated evidence and imposing sanctions, the trial court abused its discretion. As discussed, a party's duty to preserve evidence for pending or reasonably foreseeable litigation is limited to evidence that is material to that litigation. See *Komendat*, 334 Mich App at 150; see also *Brenner*, 226 Mich App at 162. The trial court therefore was obligated to determine whether the items requested were material before sanctioning NSS for failing to preserve the items.

A review of the items requested in the context of the facts of this case establishes that the items requested were not evidence material to the litigation. Plaintiff's complaint alleged against NSS negligence, gross negligence, willful and wanton misconduct, wrongful death, owner liability under MCL 257.401, and vicarious liability. The evidence that plaintiff claimed NSS spoliated can be grouped into two categories: records related to the maintenance of the dump truck and records related to Neal's driving record, including Neal's history of drug and alcohol use. The trial court also included the dump truck itself.

Neal's driving record and history of substance use would be material only if there were a question whether the collision had been caused by the driver's operation of the dump truck. Here, there is no indication that the collision was caused by Neal's driving; Neal's description of the collision is that McDuffie-Connor was driving in a parking lane and attempted to pass the dump truck on the right at the same moment that Neal turned the dump truck to the right after activating the truck's turn signal. Pace confirmed Neal's description of the collision, including Neal's assertion that he activated the dump truck's right turn signal before turning and that the turn signal was blinking. Neal's description of the collision is also consistent with the video, which does not demonstrate any traffic violation by Neal. The police report confirmed that Neal's description of the collision was consistent with the video and with the officers' inspection of the crash site. There also is no indication that substance use by Neal played a role in the collision; Neal's alcohol and substance tests administered after the accident were negative. In sum, plaintiff seeks evidence to prove that Neal has a history of substance abuse and/or a history of driving infractions, explaining that it wishes to demonstrate that NSS put an unsafe driver on the road. Those matters are not at issue in this case, however, because Neal did not commit any infraction or otherwise cause the collision. Because evidence offered to prove a proposition that is not a matter in issue is not material, *Hardrick*, 294 Mich at 667, NSS had no obligation to preserve evidence relating to Neal's driving record or substance abuse history.

Plaintiff also sought evidence related to the service records and safety inspection records for the dump truck. That evidence would be material only if there were a question whether the collision had been caused by the dump truck malfunctioning. Here, there is no evidence that the dump truck malfunctioned. Neither Neal nor NSS was cited for the collision and the video does not indicate that the dump truck malfunctioned. Rather, the video confirms that McDuffie-Connor moved alongside the dump truck in the parking lane and as a result, was in the path of the dump truck as the truck began to turn right.

Plaintiff suggests that there is a question whether the dump truck's brakes and right turn signal were operating properly at the time of the collision because the post-accident inspection of the dump truck by police stated that the dump truck's brakes were not properly adjusted and the turn signals were lighting but not blinking. There is no indication that the collision was caused by a failure of the dump truck to brake, however, so whether the dump truck's brakes were operating properly is immaterial.

Similarly, plaintiff seeks evidence that the turn signals of the dump truck were not working at the time of the collision. Whether a vehicle's turn signal was operating could be both material and relevant in a given case, especially where, as here, the collision occurred while one vehicle was in the process of turning. A driver has a statutory duty while operating a vehicle to determine before making a turn whether the turn can be made safely, and to use a turn signal. MCL 257.648. Violation of a statutorily-imposed duty constitutes negligence per se, and establishes the duty and breach elements of negligence. *Meyers v Rieck*, 509 Mich 460, 472; 983 NW2d 747 (2022). In this case, however, there is no evidence that the collision was caused by a failure of the dump truck's turn signal. Neal testified that he inspected the dump truck in the morning before the accident occurred and the turn signal was working properly. He further testified that he used the turn signal before turning, and Pace confirmed that while traveling behind the dump truck he could see the dump truck's right turn signal blinking. Pace further opined that the blinking turn signal would have been visible to the driver of the Sebring when the Sebring was traveling alongside

Pace's car. There is therefore evidence that the turn signal was working properly and no evidence that the collision was caused by a failure of the dump truck's turn signal. Plaintiff's theory appears to be "what if the turn signal was not working at the time of the collision?" With no support for that theory, however, it is speculation only.

The trial court also concluded that NSS's failure to preserve the dump truck itself was spoliation. Again, there is no evidence supporting the speculation that the condition of the dump truck caused or contributed to the collision. In addition, plaintiff had access to the police report that included an inspection of the dump truck, but failed to inspect the dump truck even though the dump truck remained in the Detroit area until February 13, 2020, and was available for inspection by plaintiff.

We conclude that the trial court abused its discretion by determining that NSS spoliated both the documents requested and the dump truck. The trial court did not evaluate on the record the materiality of the evidence requested and the record does not support a finding of materiality. When lost or destroyed evidence is immaterial, sanctioning the party at fault is inappropriate. See *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999).

2. FORESEEABILITY

As discussed, a party has a duty to preserve evidence material to litigation that is pending or that is reasonably foreseeable. *Brenner*, 226 Mich App at 162. In this case, the collision occurred on July 17, 2019, and the dump truck was impounded by police on that date. NSS did not retrieve the dump truck, and the dump truck was later sold. According to the owner of NSS, he closed the business in December 2019 and disposed of most of NSS's business records at that time by putting them in a dumpster. Plaintiff filed its complaint on June 15, 2020. The litigation thus was not pending at the time NSS disposed of the records and did not preserve the dump truck.

Plaintiff argues that the litigation was foreseeable because the collision resulted in the death of McDuffie-Connor. However, apart from the seriousness of the consequences of the collision in this case, there is nothing about the collision that would suggest that any tort occurred for which NSS would be facing liability. Neal was not cited by police for any violation, and there is no indication that Neal violated any traffic law or otherwise caused the collision. Rather, the collision occurred as the result of an apparent split-second decision by McDuffie-Connor to accelerate and pass the dump truck on the right while traveling in a parking lane contrary to law. In addition, contrary to the trial court's finding that NSS's involvement in an unrelated labor dispute was a basis for NSS to retain its business records, that consideration is not relevant to the question of foreseeability in this case. Even if the litigation were foreseeable, NSS's obligation was limited to preserving material evidence. As discussed, the evidence sought by plaintiff was not material to the litigation because the evidence sought did not relate to any fact in issue.

3. DISPROPORTIONATE SANCTIONS

We also find that the sanctions imposed were disproportionate. When a party fails to preserve evidence, either negligently or deliberately, that the party knows or should know is relevant to potential litigation, and the other party is thereby unfairly prejudiced by the inability to examine the evidence, the trial court has authority to sanction the party who failed to preserve the

evidence. *Bloemendaal*, 255 Mich App at 211-212. The trial court properly exercises its discretion when it "carefully fashions a sanction that denies the party the fruits of the party's misconduct, but that does not interfere with the party's right to produce other relevant evidence." *Id*. at 212. An appropriate sanction may be "the exclusion of evidence that unfairly prejudices the other party." *Brenner*, 226 Mich App at 161. A jury instruction regarding spoliation is warranted "if the evidence that is the subject of the instruction is (1) material, (2) not merely cumulative, and (3) not equally available to the opposite party." *Komendat*, 334 Mich App at 150 (quotation marks and citation omitted).

In this case the evidence requested was not material, and the trial court did not find materiality. In addition, the trial court did not explain why plaintiff was unfairly prejudiced by NSS's failure to preserve the requested evidence. Because the trial court did not consider materiality, the trial court concluded without basis that it was necessary for plaintiff to inspect the truck's post-collision condition, despite the fact that (1) there is no suggestion that the accident was the result of a mechanical failure of the truck, (2) the police inspected the truck post-collision and plaintiff has access to the police inspection report, (3) the truck was available for inspection for several months after the collision and plaintiff did not inspect the truck, and (4) the truck still existed and could be inspected, and the names of the truck's service providers had been identified. Because materiality was not considered and prejudice was not established, sanctions were not appropriate.

In addition, the sanctions were excessive. The sanctions imposed were (1) the jury would be given Model Civil Jury Instruction 6.01(a) regarding spoliation, (2) NSS's affirmative defenses were stricken and could not be relied upon at trial, (3) NSS was barred from introducing any mitigating evidence regarding their business practices, employment practices, vehicle maintenance practices, and safety practices, and (4) NSS was ordered to pay costs of $3,500.00 to plaintiff. A trial court properly exercises its discretion when it "carefully fashions a sanction that denies the party the fruits of the party's misconduct, but that does not interfere with the party's right to produce other relevant evidence." *Bloemendaal*, 255 Mich App at 212. In this case, the trial court's sanctions interfered with NSS's ability to assert affirmative defenses or present mitigating evidence, which was out of proportion to NSS's alleged misconduct. The trial court's sanctions would have effectively put an end to the lawsuit in plaintiff's favor. The trial court therefore abused its discretion by failing to carefully fashion an appropriate sanction.

4. PLAINTIFF'S SPOLIATION

NSS also contends that the trial court abused its discretion by ruling that plaintiff did not spoliate evidence by failing to preserve the Sebring for litigation. We conclude that for the same reasons that the condition of the dump truck is not material, the condition of the Sebring also is not material. There are no facts that suggest that the collision occurred because of mechanical failure of either vehicle, and thus the mechanical condition of the vehicles is not material and failure to preserve either vehicle should not be deemed spoliation. If, however, the speculation of possible mechanical failure of the dump truck is deemed sufficient to establish materiality and the failure of NSS to preserve the dump truck is spoliation, then the possible mechanical failure of the Sebring also is material and plaintiff's failure to preserve the Sebring similarly is spoliation. If mere speculation is sufficient to establish materiality, one could speculate that the Sebring may have experienced brake failure or that the condition of the Sebring was such that it caused the car

to flip on impact, resulting in the decedent's death. Further, whereas the question whether the litigation was foreseeable to NSS is debatable, plaintiff knew whether litigation would be initiated and Chandra McDuffie prepared for litigation by photographing the Sebring at the impound lot. In addition, plaintiff asserted that the production of the dump truck for inspection was vital and therefore should have anticipated that production of the Sebring for inspection also would be material.

B. SUMMARY DISPOSITION

1. BREACH OF DUTY

NSS contends that the trial court erred by denying its motion for summary disposition because there is no genuine issue of material fact whether the collision resulted from a breach of any duty owed by NSS to the decedent. We agree.

We review de novo the trial court's decision to grant or deny summary disposition. *Meemic Ins Co v Fortson*, 506 Mich 287, 296; 954 NW2d 115 (2020). We also review de novo the interpretation of statutes and legal doctrines. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the claim. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). When reviewing a grant or denial of summary disposition under MCR 2.116(C)(8), this Court considers the motion based upon the pleadings alone and accepts all factual allegations as true. *Id*. Summary disposition under MCR 2.116(C)(8) is warranted when the claim is so unenforceable that no factual development could justify recovery. *Id*. at 160.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Id*. Summary disposition under MCR 2.116(C)(10) is warranted when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Id*. When reviewing a motion for summary disposition granted under MCR 2.116(C)(10), this Court considers the documentary evidence submitted by the parties in the light most favorable to the nonmoving party, *id*., and will find that a genuine issue of material fact exists if "the record leaves open an issue upon which reasonable minds might differ." *Johnson v Vanderkooi*, 502 Mich 751, 761; 918 NW2d 785 (2018) (quotation marks and citations omitted). The moving party has the initial burden to support its motion with documentary evidence, but once met, the burden shifts to the nonmoving party to establish that a genuine issue of material fact exists. *AFSCME v Detroit*, 267 Mich App 255, 261; 704 NW2d 712 (2005).

Plaintiff's complaint alleges against NSS negligence, gross negligence, willful and wanton misconduct, wrongful death, owner liability under MCL 257.401, and vicarious liability for Neal's actions. To establish negligence, the plaintiff must demonstrate duty, breach, causation, and damages. *Hannay v Dep't of Transp*, 497 Mich 45, 63; 860 NW2d 67 (2014). The plaintiff must establish both factual causation, i.e., that the defendant's conduct caused harm to the plaintiff, and legal causation, i.e., that the harm caused to the plaintiff was the kind of harm that the defendant risked. *Ray v Swager*, 501 Mich 52, 64; 903 NW2d 366 (2017).

With respect to the claim of wrongful death, under MCL 600.2921 an action for injury that results in death may be brought by the personal representative of the decedent's estate under the wrongful death statute, MCL 600.2922, which provides:

> Whenever the death of a person, injuries resulting in death, or death as described in [MCL 600.2922a] shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured or death as described in [MCL 600.2922a], and although the death was caused under circumstances that constitute a felony. [MCL 600.2922(1).]

The elements of wrongful death thus are (1) a death, (2) caused by the wrongful act, neglect, or fault of another, (3) that had the death not occurred a cause of action could have been filed against the responsible party and damages recovered. The cause of action is not created upon the death of the decedent, but rather survives the death of the decedent, and the touchstone of that cause of action is whether the decedent could have maintained the action if death had not occurred. *Zehel v Nugent*, ___ Mich App ___, ___; ___ NW2d ___ (2022) (Docket No. 357511); slip op at 3, citing *Wesche v Mecosta Co Road Comm*, 480 Mich 75, 88-89; 746 NW2d 847 (2008).

The question is whether NSS or Neal, its employee, breached a duty owed to the decedent or caused the death of the decedent by wrongful act, neglect, or fault. A driver has a statutory duty while operating a vehicle to determine before making a turn whether the turn can be made safely, including the use of a signal. MCL 257.648. Violation of a statutorily imposed duty constitutes negligence per se and establishes the elements of duty and breach in a claim for negligence. *Meyers*, 509 Mich at 472. Apart from any statutory duty, a driver owes a duty to other motorists and pedestrians to act with ordinary and reasonable care and caution when operating a vehicle, being that which an ordinarily careful and prudent person would use under the circumstances, *Zarzecki v Hatch*, 347 Mich 138, 141; 79 NW2d 605 (1956), making reasonable allowances for traffic, weather, and road conditions. *DePriest v Kooiman*, 379 Mich 44, 46; 149 NW2d 449 (1967). A driver is not obligated, however, "to guard against every conceivable result, to take extravagant precautions, [or] to exercise undue care." *Hale v Cooper*, 271 Mich 348, 354; 261 NW 54 (1935). Rather, a driver is "entitled to assume that others using the highway in question would under the circumstances at the time use reasonable care themselves and take proper steps to avoid the risk of injury. *Id*. In addition, the fact that an accident occurred does not give rise to a presumption of negligence on the part of the driver. *Edgerton v Lynch*, 255 Mich 456, 460; 238 NW 322 (1931). Whether a driver met the standard of reasonable prudence generally is a question for the jury. *Marietta v Cliff's Ridge, Inc*, 385 Mich 364, 370; 189 NW2d 208 (1971).

In this case, plaintiff failed to present facts to establish that NSS or Neal breached a duty owed to the decedent. Plaintiff's complaint alleges that Neal, and thereby NSS, breached a duty by failing to keep the dump truck under control; failing to observe the Sebring and avoid the collision; operating the dump truck carelessly and without due care, thereby causing the collision; operating the dump truck at an excessive speed and failing to bring the truck to a stop within the assured clear distance ahead; and operating the vehicle recklessly, disregarding other users and failing to yield. The complaint also alleges that NSS breached its duty to the decedent by failing

to properly hire, train, instruct, supervise, and control Neal, and failing to properly maintain the dump truck.

Plaintiff's complaint, however, alleges no facts to establish that either Neal or NSS breached a duty to the decedent as described in the complaint. For example, plaintiff does not allege facts to establish that Neal failed to control the dump truck, operated the dump truck carelessly or at excessive speed, failed to stop the truck within the assured clear distance ahead, or failed to yield, nor does plaintiff allege facts that any such failure caused the collision. The facts indicate that while turning right from the appropriate lane, the dump truck was struck by the Sebring traveling in the parking lane contrary to law. Neal testified that he did not see the Sebring before the collision, but given that the Sebring was traveling in the parking lane and, according to Pace, accelerated just before the dump truck began to turn, the facts do not establish a failure by Neal to use due care.[2]

The only fact alleged suggesting a breach of duty is plaintiff's allegation that the dump truck's right turn signal did not function properly, thereby causing the accident. The only support for this assertion is a *post*-collision inspection by police that found that the dump truck's turn signals lighted but did not blink; there was no evidence, however, that the turn signals were not properly functioning before the collision, which caused significant damage to the truck. Neal testified that before driving the dump truck that day he conducted a pre-trip inspection of the truck and the turn signals were operating properly. He further testified that before turning, he activated the right turn signal. Pace, traveling immediately behind the dump truck, testified that he saw the dump truck's right turn signal blinking before the dump truck began its turn. Pace opined that based upon the location of the Sebring, the turn signal would have been visible to the driver of the Sebring. Any allegation that the turn signal was not functioning before the collision is entirely speculative. In sum, there is no evidence that Neal did not signal his turn or otherwise fail to operate the dump truck with ordinary and reasonable care and caution, and no evidence that the truck's turn signal was not operating properly before the collision, or that a malfunction of the truck's brakes contributed in some way to the collision. Because plaintiff alleged no facts that would establish a breach of duty by either Neal or NSS, or any wrongful act by Neal that caused the collision, plaintiff's complaint fails to state a claim of negligence or wrongful death.

Plaintiff also asserts that NSS is liable under MCL 257.401, which provides that the owner of a motor vehicle is liable for injury caused by the negligent operation of the vehicle if the vehicle was being driven with the owner's consent. See *Cooke v Ford Motor Co*, 333 Mich App 545, 555; 963 NW2d 405 (2020). Plaintiff also alleges that NSS is vicariously liable for the negligence of its employee, Neal. Generally, an employer is vicariously liable for the wrongful acts of his or her employee committed while performing a duty within the scope of the employment. *Rogers v J.B. Hunt Transport, Inc*, 466 Mich 645, 651; 649 NW2d 23 (2002).

[2] There is at least a reasonable possibility that the Sebring, a convertible sedan being operated with its top down at the time of the collision, was in Neal's "blind spot" just before and at the time of the impact with the dump truck.

In this case, there is no evidence that the decedent's death was caused by the wrongful act, neglect, or fault of another, specifically Neal. Similarly, there is no evidence that Neal breached any duty owed as a driver to McDuffie-Connor by failing to operate the dump truck with ordinary caution or care. Although circumstantial evidence may be sufficient to create a genuine issue of material fact, mere conjecture or speculation is not sufficient. *McNeill-Marks v MidMichigan Med Ctr-Gratiot*, 316 Mich App 1, 16; 891 NW2d 528 (2016). The trial court therefore erred by denying NSS's motion for summary disposition of plaintiff's complaint.

The trial court's August 4, 2021 order granting plaintiff's motion for relief regarding NSS's alleged spoliation of evidence and imposing sanctions against NSS is vacated, the trial court's October 1, 2021 order denying NSS's motion regarding plaintiff's alleged spoliation of the Sebring is affirmed, the trial court's February 23, 2022 order denying NSS's motion for summary disposition is vacated, and the we remand this matter to the trial court for entry of summary disposition in favor of NSS.

/s/ Michael F. Gadola
/s/ Stephen L. Borrello

STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF WILLIAM HOWARD MCDUFFIE-CONNOR, by its Personal Representative, CHANDRA MCDUFFIE,

Plaintiff-Appellee,

v

SCOTT M. NEAL and MEMBERSELECT INSURANCE COMPANY,

Defendants,

and

NSS CONSTRUCTION, INC.,

Defendant-Appellant.

UNPUBLISHED
February 8, 2024

Nos. 358870, 358987, 360585
Wayne Circuit Court
LC No. 20-007497-NF,
20-012305-NF, 20-007497-NF

Before: GADOLA, P.J., and BORRELLO and HOOD, JJ.

HOOD, J. (*dissenting*.)

I respectfully dissent. The trial court correctly concluded that genuine questions of material fact remained surrounding the fatal crash that started this case. The difficulty in reconciling eyewitness testimony with the technical evidence contained in the Michigan State Police (MSP) investigative report highlights the correctness of the trial court's conclusion. Further, defendant NSS Construction, Inc. (NSS) destroyed business records that would have shed light on critical issues in this case, including its maintenance of the truck involved in the wreck, its hiring, retention and training of defendant Scott M. Neal, and whether Neal actually performed (or regularly performed) a pre-trip inspection of the truck as required. This is a case with messy facts for both sides that requires a jury to sort out.

For these reasons and those stated below, I disagree with the conclusions related to spoliation of the business records in Docket Nos. 358870 and 358987, and I disagree with the

conclusions that stem from the genuine issue of material fact related to the operation and maintenance of the truck in Docket No. 360585. These conclusions stem from a different view and understanding of the body of evidence before the trial court. In my view these facts support the trial court's conclusion that genuine questions of material fact remain.[1]

I. BACKGROUND

I agree with the factual background contained in the majority opinion with one crucial difference: based on the record before us, there is conflicting evidence of whether the driver, Neal, actually signaled (or was even able to signal) his intention to turn. This single fact issue bleeds into a variety of issues affecting this case's outcome, including the manner in which Neal was driving, whether he performed the required "pre-check" before getting behind the wheel, the maintenance of the truck, and NSS's hiring, training, and retention of Neal.

The sole eyewitness, Matthew Pace, testified that he saw the truck's right turn signal on and blinking for a while before Neal attempted to turn. This, however, conflicts with the MSP investigation report and related testimony that indicated that there was a wiring issue that caused the truck's turn signal to malfunction. According to the MSP investigation, this issue could not have been caused by the accident.

The majority briefly references the MSP report in relation to the trial court's findings, but it did not discuss the testimony of its author, Officer Ryan Wilson, formerly of MSP. Both Wilson's testimony and his report are critical to resolving the legal issues in this case. In the MSP report, Officer Wilson identified several mechanical issues with the truck that were not caused by the crash. First, and most critically, none of the turn signals were operable. The left front, right front, left rear, and right rear turn signals lit up but did not blink. In his testimony, Wilson explained that the light malfunction could not have been caused by the accident. This appears to directly conflict with Pace's testimony that he saw the light on and blinking. Pace and Wilson cannot both be correct. In addition to identifying inoperable turn signals, Wilson testified that five of the six clamp- or roto-type brakes were out of adjustment. The report also indicated that, due to the truck's manufacturing date, it had an automatic airbrake adjustment system which fails to compensate for wear. The report distinguished between violations that were caused by the accident and those that were not. It also noted which section of the federal regulations applicable to commercial motor vehicles the truck violated. For example, it identified each of the "inoperative turn signal[s]" as a violation of 49 CFR 393.9 ("393.9TS-Inoperative turn signal . . . ."). Likewise, it identified each of the five brake adjustment issues as a violation of 49 CFR 393.47(e) ("393.47E-

[1] I, however, agree with the majority's analysis related to NSS's spoliation argument as contained in Section II.A.4 (Docket No. 358870) and the estate's spoliation argument related to the dump truck as contained in Section II.A.1, 2, and 3. And I agree with the conclusion that the trial court did not abuse its discretion by ruling that plaintiff did not spoliate evidence by failing to preserve the Sebring or that NSS did not spoliate evidence by failing to preserve the truck, and I concur with the majority on these two points.

Clamp or Roto type brake out-of-adjustment . . . .”). Each of these issues provided a basis for the truck not to be on the road.

As discussed below, these issues are significant as it relates to NSS’s maintenance of the vehicle, Neal’s compliance with required pre-trip inspections that are required for commercial drivers before taking the vehicle on the road, see 49 CF 396.13, and NSS’s training of Neal to conduct such checks. Standing alone, Wilson’s report generates genuine questions about whether Neal activated the signal, whether Pace is lying or simply mistaken, whether the truck had other mechanical issues that contributed to the crash, and the calculation of comparative negligence.

Officer’s Wilson’s testimony amplifies these issues. Wilson worked for MSP for 10 years as a commercial vehicle enforcement officer. He received training for this type of investigation and had completed approximately 50 post-crash investigations.

During his testimony, Officer Wilson confirmed that all four turn signals turned on but did not blink. He explained that someone not familiar with this malfunction on this particular truck could mistake it for a brake light. (As discussed below, this bears on many issues in this case, particularly the issue of contributory negligence.) Based on his training and examination of the vehicle, the turn signal issue likely was an issue that predated the crash. During his testimony, he explained that before beginning a shift a driver is required to perform a pre-trip inspection (or “pre-trip”) which, among other things, requires them to check the lights and the brakes. According to Wilson, had Neal performed a pre-trip inspection he would have found this issue.

Regarding the brakes, Wilson testified that the truck had brake issues that could not have occurred overnight and were more indicative of lack of maintenance and upkeep. He explained that based on the push rod movement, he determined that five of the six brakes on the vehicle were out of alignment. The brakes were in this condition prior to the crash. Wilson described this as a “serious safety violation.” He explained, “[I]f I were to stop this vehicle just on a regular traffic stop and complete an inspection, the vehicle would be placed out of service until those violations were corrected.” Wilson also explained that the driver of the vehicle should have discovered these violations before getting on the road if he “performed a correct pre-trip.” And he opined that the violations were serious enough that the truck “should not have been on the motoring road.” Because NSS’s business records, including records of the truck’s maintenance and Neal’s training, were destroyed or disposed of after the accident but before suit, the body of evidence that would shed additional light on Neal’s failure to perform a pre-trip is limited.

Put simply, Pace’s testimony is not the only evidence about Neal’s blinker or his signaling intention to turn. To the extent that a factfinder is going to rely on Pace’s testimony, they have to reconcile his testimony with that of Wilson and the findings in Wilson’s report which at least partially refute Pace’s testimony. This might cause a factfinder to consider what other parts of Pace’s testimony conflict with the universe of evidence in this case.[2]

[2] It is worth noting that Pace apparently was driving during his deposition, which was held via Zoom. During his testimony, he was rear-ended. The question of the admissibility of that conduct

For example, parts of Pace's testimony may conflict with the video, or are at least open to different interpretations. Pace indicated that he slowed down to let the decedent, William McDuffie-Connor enter the arterial lane. My review of the video indicates that Pace is more or less right behind Neal's truck before the accident or even speeds up to bogart or block McDuffie-Connor from entering the arterial lane. At best, the video of the crash is inconclusive. Because of its angle, the video only provides the viewer with a front-driver side view of the crash which occurred on the rear-passenger side of the truck. The viewer cannot see if the truck's turn signals are operating or if McDuffie-Connor signaled his intention to merge left. It does little to resolve the apparent discrepancy between Pace's testimony that he saw the turn signal blinking and Wilson's testimony and report that indicated that the truck's blinker was inoperable before the crash.

Wilson's testimony and the MSP report implicate many aspects of this case from the spoliation of business records analysis, to the duty owed by Neal and NSS, to application of the wrongful conduct rule if we were to get that far. I briefly discuss the most pronounced of these issues in turn.

II. STANDARDS OF REVIEW

The majority correctly states the standards of review. We review de novo the trial court's decision to grant or deny summary disposition. *Meemic Ins Co v Fortson*, 506 Mich 287, 296; 954 NW2d 115 (2020). A motion under MCR 2.116(C)(10) "tests the factual sufficiency of a claim." *El-Khalil v Oakwood Healthcare Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019) (emphasis omitted). In considering a motion under MCR 2.116(C)(10), the trial court "must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id*. Such a motion "may only be granted when there is no genuine issue of material fact." *Id*. "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *Id*. (quotation marks and citation omitted)..

Regarding spoliation, we review for an abuse of discretion the trial court's decision to sanction a party for spoliation of evidence. *Pugno v Blue Harvest Farms, LLC*, 326 Mich App 1, 24; 930 NW2d 393 (2018). An abuse of discretion occurs when the trial court's decision results in an outcome outside the range of principled outcomes. *Id.*

III. DUTY AND BREACH

The trial court correctly concluded that there is a genuine issue of material fact as to whether the accident resulted from a breach of duty owed by Neal and NSS to McDuffie-Connor. The majority cites the correct legal standards for negligence and an action under the wrongful death statute. Negligence requires the plaintiff to prove (1) a duty owed, (2) breach of duty, (3) causation, and (4) damages. *Hannay v Dep't of Transp*, 497 Mich 45, 63; 860 NW2d 67 (2014). The wrongful death statute, MCL 600.2921, keeps claims alive following the death of a decedent

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as evidence of Pace's inattentive driving, inattentive testimony, or both, is not presently before this Court.

and requires (1) death, (2) caused by a defendant's wrongful act or neglect, and (3) an independent cause of action. See *id*.; MCL 600.2922.

Regarding the facts, the majority posits that there were no facts suggesting that Neal was violating the law or any standard of care owed by a truck driver to other drivers, and the consequences (namely the fatal wreck) were not foreseeable. I disagree. Here, there is conflicting evidence about whether the turn signal was working on the truck Neal was driving. It is unclear from the video if he used his blinker. One witness, Pace, says he saw it activated and blinking. But the MSP investigation report indicated that it was not operational and that its malfunction was a wiring issue that could not have been caused by the accident.

Whether a turn signal was blinking (or even able to blink) may seem like a small enough issue until we drill down on the other facts that its nonfunctioning may impact. For example, Neal had a duty to make sure the truck was safe to operate before driving it by preforming a pre-trip check. See 49 CFR 396.13. Before driving a commercial motor vehicle, federal regulations require a driver to "[b]e satisfied that the motor vehicle is in safe operating condition," and under some circumstances review the last driver inspection report. See 49 CFR 396.13(a) and (b) (cross referencing 49 CFR 396.11(a)(2)(*i*)). Neal testified that he conducted such a pre-trip inspection, and Pace testified that the blinker was operating. As stated, their testimony conflicts with the MSP report that concluded that the turn signal was inoperable, and that its malfunction predated the crash. A reasonable juror could choose to believe the MSP report and Wilson's testimony over Neal and Pace's testimony. Having reached this conclusion, a reasonable juror could also conclude that Neal failed to identify this pre-crash malfunction because he failed to do the required pre-trip inspection. See 49 CFR 396.13. In other words, unless the turn signal inexplicitly began malfunctioning midtrip, its malfunction is potentially evidence that Neal did not conduct a pre-trip inspection at all, in violation of federal regulation. In reaching this conclusion, a juror would necessarily conclude that Neal testified falsely about the pre-trip. If a juror were to reach this conclusion, it would be reasonable to conclude that Neal breached his duty to McDuffie-Connor to make sure that his truck was in safe operating condition, and that NSS breached its duty to ensure that it properly trained and vetted Neal before it hired him or allowed him to operate its truck.

To be clear, the inoperable turn signal bears directly on causation and breach of duty, while other issues in Wilson's report bear indirectly on breach. If the turn signal was inoperable (lighting but not blinking) McDuffie-Connor may have interpreted the light as brake light instead of an intention to turn, thus, contributing to his accident. For example, there is no evidence that the truck's faulty breaks caused (or even affected) the crash leading to McDuffie-Connor's death. But the fact that Neal was on the road with five brakes out of adjustment, in violation of 49 CFR 393.47(e), is further evidence that he did not conduct a pre-trip inspection, in violation of 49 CFR 396.13(a), which is further evidence of breach. Put simply, this is evidence that he did not conduct an inspection that would have identified the inoperable turn signal in addition to the faulty breaks. Depending on the pervasiveness of the problem, it is also evidence that Neal did not review prior inspection reports, see 49 CFR 396.13(b) and 396.11(a)(2)(i), or that NSS did not maintain its trucks or adequately train its drivers. This bears on the duty that Neal and NSS owed to McDuffie-Connor not to put an unsafe vehicle on the road. Specific to Neal, it indicates that he failed to perform the pre-trip check for his turn signals and brakes. For NSS, this might imply that they did not vet Neal, did not train him, or did not discipline him. It also tends to suggest that NSS put

malfunctioning vehicles on the road as a matter of course. Admittedly, this is indirect evidence. NSS's business records would offer direct evidence of its hiring, training, and disciplining Neal, but, as stated, NSS destroyed those records.

I would note that this is one issue that separates this case from *Talley v Macomb Intermediate Sch Dist*, unpublished per curiam opinion of the Court of Appeals, issued November 29, 2018 (Docket No. 341980), the unpublished case on which NSS almost exclusively relies. First, in *Talley*, the driver signaled. *Id*. at 5. Beyond signaling, in *Talley* there was no indication that the driver failed to perform a pre-trip check that might have avoided the accident altogether. See *id*. at 1-2, 5-7. There was no indication that the bus in *Talley* was not safe for operation on the road. *Id*. This case is distinguishable from *Talley* if we consider the total body of evidence. Considering that Neal was driving a vehicle that was unfit for safe operation on the road and that NSS sent him out in such a vehicle, there seems to be at least a question of fact related to whether they breached a duty owed to McDuffie-Connor (and every other driver on Neal's path) and whether the breach of that duty contributed to the accident.

Separate from the truck's maintenance and operability, and Neal's duty to make sure the truck was in safe operating condition, Neal also had a duty to make sure his turn was clear. See MCL 257.648(1) ("The operator of a vehicle or bicycle upon a highway, before stopping or turning from a direct line, shall first determine that the stopping or turning can be made in safety and shall give a signal as required in this section."). The wrongful conduct rule does not extinguish the estate's claims because it applies when plaintiffs commit a criminal violation, not a civil infraction. See *Masrur v Regents of Univ of Mich*, 344 Mich App 102, 108, 111; 999 NW2d 55 (2022); *Varela v Spanski*, 329 Mich App 58, 81; 941 NW2d 60 (2019). But there are traffic laws that apply to Neal's turn, such as signaling and only turning when clear. See MCL 257.648(1) and (5) (providing requirements for specific signaling equipment for commercial motor vehicles). As stated above, Wilson's report and testimony, juxtaposed with Pace's testimony, creates a question as to whether Neal signaled. The video alone creates a question of whether he checked to make sure the turn was clear. See MCL 257.648. Further, NSS also had a duty to make sure that its drivers, like Neal, were operating safely.

Wilson's testimony and the MSP report highlight some of the questions that exist. But even if we were not to consider the report or Wilson's testimony, some of these questions still exist. Based on just the video there seems to be a question of whether Neal checked to see if his turn was clear. Considering that a reasonable juror could conclude that he did not do a pre-trip inspection and was driving an unsafe vehicle, a reasonable juror also could find that he and NSS violated duties owed to McDuffie-Connor.

IV. COMPARATIVE NEGLIGENCE

Likewise, there was a genuine issue of material fact related to comparative negligence. Again, the majority states the correct standard for comparative negligence: Although Michigan's no-fault act has eliminated individual tort liability for most auto accidents, "[a] person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle" where the injured person suffered death. See MCL 500.3135(1); MCL 600.2959 (reducing damages where wrongful death occurs "by the percentage of comparative fault of the person upon whose . . . death the damages are based . . . ."). In such a case, "[d]amages

must be assessed on the basis of comparative fault, except that damages must not be assessed in favor of a party who is more than 50% at fault." MCL 500.3135(2)(b). The majority correctly observes that the issue of respective percentages of fault are typically left to the fact finder. *Holton v A+ Ins Assoc, Inc*, 255 Mich App 318, 323-324; 661 NW2d 248 (2003). The question is whether reasonable minds could differ about the percentages of fault. See *id*.; *Rodriguez v Solar of Mich, Inc*, 191 Mich App 483, 488; 478 NW2d 914 (1991). In other words, if *no* reasonable juror could find that the defendant was more at fault than the plaintiff, then the trial court can consider comparative negligence and dismiss under MCR 2.116(C)(10). See *Huggins v Scripter*, 469 Mich 898 (2003).[3]

Here, the body of evidence supports a variety of reasonable conclusions for jurors. The majority correctly observes that a reasonable juror could find that McDuffie-Connor was attempting to pass on the right possibly in violation of MCL 257.637. See MCL 257.537 (providing the conditions under which a vehicle may lawfully overtake or pass another vehicle on the right). See also MCL 257.636 (passing generally). But a reasonable juror could also conclude that Neal was operating with malfunctioning turn signals (as evidenced by the MSP report), failed to perform a pre-trip inspection and then testified falsely about conducting an inspection (as suggested by the MSP reports inspection of the turn signals and breaks), and that he failed to confirm that his turn was clear in violation of MCL 257.648. If Neal was operating a truck with malfunctioning turn signals then comparative fault is up in the air and is best left to the jury. It turns on the juror's determination of whether the truck was operational before the juror can weigh that fact against the issues with McDuffie-Connor's driving. It also turns on the jury's decision about whether Neal breached his duty to make sure that his turn was clear. That McDuffie-Connor was driving in the curb lane does not dispose of this issue. On these issues, reasonable minds could differ. So I would not find error with the trial court's decision that a genuine issue of material fact exists.

V. SPOLIATION OF BUSINESS RECORDS

All of these issues amplify the spoliation issue. Regarding spoliation, I agree with the majority that the truck and the Sebring would do little to clarify any of the issues in this case. Particularly regarding the truck, because we have the MSP report, it is hard to see how it would be material. NSS's records, on the other hand, appear to bear directly on the issue of the truck's maintenance and repairs, along with Neal's hiring, training, and disciplinary record. In other words, there is a direct line between NSS's now-destroyed records and evidence of whether it breached a duty owed to McDuffie-Connor.

[3] A Supreme Court order is binding "if it constitutes a final disposition of an application and contains a concise statement of the applicable facts and reasons for the decision." *Gabrielson v Woods Condo Ass'n, Inc*, ___ Mich App ___, ___ n 7; ___ NW2d ___ (2024) (Docket Nos. 364809 & 364813); slip op at 16 n 7 (quotation marks and citation omitted). The Supreme Court's order in *Huggins* is the final disposition on an application, and it contains a concise statement of the applicable facts and the reasons for the decision. It is therefore binding. *Id*. at ___; slip op at 16 n 7.

The majority correctly states the legal standard for spoliation. Even before a lawsuit starts, a party is obligated to preserve evidence that is material to litigation that is pending or reasonably foreseeable. *Brenner v Kolk*, 226 Mich App 149, 162; 573 NW2d 65 (1997). "Spoliation" occurs when a party fails to preserve this evidence. *Id*. See also *Ward v Consol Rail Corp*, 472 Mich 77, 85-86; 693 NW2d 366 (2005). The court may draw an adverse inference when the party (1) had the evidence under its control and could have produced it; (2) has no excuse for failing to produce the evidence; and (3) the evidence is material, non-cumulative, and not equally available to the other party. *Ward*, 472 Mich at 85-86. At the threshold, I acknowledge that the trial court's discussion and analysis of materiality was sparse. I nonetheless would conclude that it reached the correct conclusion albeit for the wrong (or poorly stated) reasons related to NSS's spoliation of business records.

First, on the issue of foreseeability, NSS should have (and apparently did) foresee litigation. See *Brenner*, 226 Mich App at 162 (holding that a party has a duty to preserve evidence material to litigation that is pending or reasonably foreseeable). We have held that, "[e]ven when an action has not been commenced and there is only a potential for litigation, the litigant is under a duty to preserve evidence that it knows or reasonably should know is relevant to the action." *Id*. One of its drivers was involved in an accident resulting in death. This probably is enough. At oral argument, the parties indicated that NSS's owner went to the scene of the accident on the day it happened.[4] MSP investigated the wreck. The investigation resulted in findings that NSS's truck should not have been on the road the day of the accident. At a minimum, this likely would result in an insurance claim investigation. It seems obvious that there would be litigation following a fatal crash involving an NSS driver and NSS truck. NSS should have foreseen that litigation was on the horizon and that records related to the truck's maintenance and hiring and training of the truck's driver would be important.

Regarding materiality, I agree with the majority's conclusion that the trial court's findings were insufficient, but I believe the trial court reached the correct outcome related to the business records even if for the wrong (or unstated) reasons. See *Gleason v Mich Dep't of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003). The trial court did not adequately state its reasoning regarding materiality, but it largely reached the right result. The truck itself is not material; the MSP report accomplishes everything plaintiff could have conceivably required related to the truck's condition. The business records related to the truck's maintenance and Neal's employment *are* material, however. They potentially support the direct negligence against NSS for failing to maintain or repair the truck. And they potentially support claims of negligent hiring, retention, and training, related to NSS's relationship with Neal.

Additionally, separate from Wilson's testimony regarding the condition of the vehicle prior to the accident and its various violations, his testimony also implicated spoliation of business records. He testified that owners of vehicles like the truck at issue in this case are required to maintain records related to the truck's inspection and driver logs for potential audits by the U.S. Department of Transportation or the MSP investigating unit.

[4] Neal confirmed at his deposition that NSS's owner, Nick Schubeck, went to the scene of the accident on the day it happened.

I would further conclude that the sanctions were proportionate to the spoliation. When a party fails to preserve evidence, either negligently or deliberately, that the party knows or should know is relevant to potential litigation, and the other party is thereby unfairly prejudiced by the resultant inability to examine the evidence, the trial court has authority to sanction the party who failed to preserve the evidence. *Bloemendaal v Town & Country Sports Ctr, Inc*, 255 Mich App 207, 211-212; 659 NW2d 684 (2002). The trial court properly exercises its discretion when it "carefully fashions a sanction that denies the party the fruits of the party's misconduct, but that does not interfere with the party's right to produce other relevant evidence." *Id*. at 212. An appropriate sanction may be "the exclusion of evidence that unfairly prejudices the other party . . . ." *Brenner*, 226 Mich App at 161. A jury instruction regarding spoliation is warranted "if the evidence that is the subject of the instruction is (1) material, (2) not merely cumulative, and (3) not equally available to the opposite party." *Komendat v Gifford*, 334 Mich App 138, 150; 964 NW2d 75 (2020) (quotation marks and citation omitted).

Here, the sanctions included (1) the jury would be given Model Civil Jury Instruction 6.01(a) regarding spoliation, (2) NSS's affirmative defenses were stricken and could not be relied upon at trial, (3) NSS was barred from introducing any mitigating evidence regarding their business practices, employment practices, vehicle maintenance practices, and safety practices, and (4) NSS was ordered to pay costs of $3,500 to plaintiff. Though severe, this sanction was comparable with the probative value of the materials that NSS destroyed. This was an attempt to balance the prejudice the estate faced resulting from the lack of records related to Neal's employment and the vehicle's maintenance. These records, had NSS not disposed of them, would shed light on whether the turn signal was operational and potentially whether Neal actually performed a pre-check. For example, as Officer Wilson testified, owners of vehicles like the truck at issue in this case are required to maintain records related to the truck's inspection and driver logs for audit purposes. The content of these records (or the fact of their nonexistence prior to any spoliation) would shed light the truck's history of maintenance, history of inspections, and NSS's hiring, training, and discipline of its drivers including Neal. Aside from its reliance on the disposed truck, I would conclude that the trial court's sanctions were appropriate.

VI. CONCLUSION

For these reasons I respectfully dissent. I would affirm the trial court's conclusions that genuine issues of material fact continue to exist so that the issues could be resolved at trial.

/s/ Noah P. Hood