IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

William Bowden, as Administrator of the Estate of Douglas James Bowden as Next Friend of Brandon Bowden and Justin Bowden, Minor Children	)	
v.	)	**C.A. No. 08C-05-196-JRJ**
Curtis Smith	)	

ORDER

AND NOW TO WIT, this 31st day of March, 2009, the Court having heard and duly considered Plaintiff's Motion for Sanctions and Defendant's and State Farm's response thereto, **AND IT APPEARING THAT**:

1. On July 14, 2006 a vehicle operated by defendant Curtis Smith, struck a vehicle operated by the plaintiff's decedent, Douglas Bowden.
2. Plaintiff filed a personal injury suit against Smith on May 27, 2008, alleging that Bowden died as a result of the injuries proximately caused by Smith's negligence and recklessness.
3. Defendant answered the complaint on July 15, 2008. In response to Form 30 Interrogatory Number 3 which states: "Give the names of all persons who have been interviewed in connection with the above litigation, including addresses and telephone numbers of the persons who

made said interviews and the names and present or last known residential and employment addresses and telephone numbers of persons who have the original and copies of the interview," Smith stated: "None, other than those listed in police report."[1]

4. On October 10, 2008, Smith filed verified answers to plaintiff's interrogatories. In response to interrogatory number 6, Smith denied that any individuals had been interviewed on his behalf.

5. On January 16, 2009, plaintiff took the depositions of Smith and another witness to the collision, Joseph Edwards. Smith and Edwards testified that they had previously provided a recorded interview to a representative of the defendant's insurance company, State Farm. Defense counsel was unaware until the time of Smith's and Edward's depositions that State Farm had taken recorded statements from them.

6. As a result of this revelation, and with the agreement of defense counsel, plaintiff deposed the State Farm claims adjuster, Donna Dial, that same day. Ms. Dial confirmed that she interviewed Smith and Edwards and that the interviews were tape recorded. She further testified that the tape

[1] D.I. 5.

recorded interview of Smith was "lost," and that she did not know if the recorded interview of Joseph Edwards had yet been transcribed.[2]

7. Following Dial's deposition, she advised in an affidavit that the Edwards recorded statement is also lost.[3]

8. Relying on *Charles v. Lyzer*, C.A. No. 02C-06-039-WLW (Del. Super. July 10, 2003) and *Rittenhouse v. Frederik A. Potts*, 382 A.2d 235 (Del. 1977), plaintiff asks for a default judgment against the defendant for its willful or conscious disregard of the discovery rules. Plaintiff alleges that defendant filed two separate verified answers to interrogatories that he "knew to be false."[4] Plaintiff further alleges that State Farm "who is the party with the actual financial interest in this litigation, knowingly failed to disclose the statements of the only two eyewitnesses to a fatal collision in which liability is contested."[5] Plaintiff argues that the willful disregard of the discovery rules exhibited by State Farm is compounded by State Farm losing the statements that it failed to disclose.[6] According to plaintiff, because the non-disclosed statements have now been lost, the prejudice suffered by the plaintiff cannot be cured by a sanction short of default. Plaintiff maintains that default is the appropriate sanction to

[2] Pls.' Mot. for Sanctions, Ex. 3 at 4, 6.
[3] Affidavit of Donna Dial, Ex. A to Def's. and State Farm's Response (D.I. 17) at 2.
[4] D.I. 11 at 3.
[5] *Id*.
[6] *Id*.

deter future defendants and their insurance companies from engaging in similar conduct: "if a lesser sanction than default is ordered in this case, future litigants will continue to weigh the benefit of hiding potentially damaging evidence against the risk of a sanction that is less expensive than the cost of losing a lawsuit. Failing to deter such conduct will undermine this litigation as well as future litigation."[7]

9. Counsel for State Farm has entered an entry of appearance limited to Plaintiff's Motion for Sanctions. In opposition to the motion, State Farm alleges that Dial disclosed the existence of the two recorded statements when she sent a copy of the Auto Claims Service Record to defense counsel which contained written summaries of the recorded statements. After sending the tape recorded interviews of the two witnesses to a State Farm Office in Frederick, Maryland to be transcribed, Dial was unable to locate them despite a diligent search.[8] State Farm has turned over Dial's written summaries of the Smith and Edwards interviews to plaintiff.

10. State Farm and defendant argue that this case does not fall within the scope of cases warranting the extreme sanction of default judgment because the defendant's insurance company did not hide or intentionally lose the recorded statements. Defense counsel admits he simply failed to

[7] *Id.*
[8] *See* Affidavit of Donna Dial attached as Exh. A to Def. Curtis Smith's and State Farm Mutual Automobile Insurance Company's Response to Plaintiff's Motion for Sanctions ("Def./State Farm Resp.") (D.I. 17).

ask the adjuster at the time he filed defendant's Form 30 answers and interrogatory answers whether any recorded statements had been taken, and failed to notice that there were indications in the file forwarded to him from State Farm that such recorded statements had been taken.

11. Superior Court Civil Rule 37(b)(2)(c) permits judgment by default against a party who fails to comply with court ordered discovery. Judgment by default is an "extreme remedy."[9] Such a sanction will not be imposed unless there is "some element of willfulness or conscious disregard" of an order.[10]

12. Under the facts of this case, the extreme remedy of a default judgment is too punitive. It appears that counsel, not the defendant, bears the responsibility for the inaccurate and incomplete Form 30's and interrogatory answers.[11] Defense counsel's conduct, however, does not amount to "willfulness or conscious disregard" of an order. And the record does not support a finding that the loss of the recorded statements by State Farm was willful or intentional. Absent such facts, the Court will not impose the extreme sanction of default.[12] **IT IS THEREFORE ORDERED THAT** plaintiff's motion is **DENIED**.

[9] *Sundor Electric, Inc. v. E.J.T. Construction Co., Inc.*, 332 A.2d 651, 652 (Del. 1975).
[10] *Id*., quoting 4A Moore's Federal Practice 2d ed § 37.03 (2-5).
[11] *See Rittenhouse*, 382 A.2d at 236; *Sundor*, 337 A.2d at 652.
[12] *See id*.

13. The Court will, however, impose a sanction for defense counsel's failure to accurately and completely answer discovery.[13] The Court will award reasonable attorneys fees and cost incurred by plaintiff as a result of defense counsel's failure to disclose the existence of the recorded interviews of Smith and Edwards in response to Form 30's and interrogatories.[14] Plaintiff's counsel shall submit an affidavit setting forth such fees and costs within 30 days.

IT IS SO ORDERED.

Jurden, J.

cc: Prothonotary – Original

[13] *See Rittenhouse*, 382 A.2d at 237.
[14] *Id*.