MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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IN THE COURT OF APPEALS OF INDIANA

Elizabeth Muncy,
Appellant-Plaintiff,

v.

BJT Express, Inc., Arka Express, Inc. d/b/a Spider Logistics, Inc., and Ninos Gorgees,
Appellees-Defendants.

October 3, 2022

Court of Appeals Case No. 22A-CT-310

Appeal from the Marion Superior Court

The Honorable Patrick Dietrick, Judge

Trial Court Cause No. 49D12-1906-CT-24540

Robb, Judge.

Case Summary and Issues

[1] Elizabeth Muncy filed a complaint against BJT Express, Inc.; Arka Express, Inc., d/b/a Spider Logistics, Inc.; and Ninos Gorgees (collectively "Arka Express") for injuries she sustained in a motor vehicle accident. Arka Express filed a motion for summary judgment that was granted by the trial court. Muncy now appeals, raising multiple issues for our review which we restate as: (1) whether the trial court abused its discretion in determining that Muncy is not entitled to an adverse inference based on the spoliation of evidence, and (2) whether a genuine issue of material fact existed as to Muncy's negligence claim. Concluding that Muncy is not entitled to an adverse inference and that Arka Express negated an element of Muncy's negligence claim, we affirm.

Facts and Procedural History

[2] On August 21, 2018, at approximately 3:23 a.m., Muncy was the passenger in a vehicle driven by Clayton Bedel. The pair were driving on Interstate 65 South when Bedel fell asleep at the wheel, drifted off the road, and struck a semi-tractor trailer parked on the shoulder of the interstate. Bedel's vehicle flipped over and slid past the semi-tractor trailer before coming to a stop. Muncy sustained severe and permanent injuries, including fractures to her femur, sternum, and spine.

[3] The semi-tractor trailer was driven by Ninos Gorgees. Prior to the crash, Gorgees had been driving on the interstate when he heard rumbling sounds

from his truck and believed he had a flat tire. He then activated his "four white flash hazards" and pulled onto the shoulder. Appellant's Appendix, Volume III at 62. Within "a minute" of coming to a complete stop and before Gorgees could exit the semi-tractor trailer, it was struck by Bedel. *Id.* After the accident, the axle on the left side of the trailer was broken and two of the tires were flat.[1] Arka Express documented the damage and submitted a claim to Bedel's insurance carrier for reimbursement for the damage. Gorgees' semi-tractor trailer was equipped with an "e-tablet" that was capable of tracking when and for how long drivers were stopped. Appellant's App., Vol. IV at 11. However, these "driver logs" are "overwritten after six months" when Arka Express does not anticipate litigation. *Id.* at 12. Gorgees' driver logs for the incident were not saved. An Arka Express employee testified in a discovery deposition that because Bedel's insurance carrier "accepted liability and issued Arka Express payment . . . there was no anticipation of saving the driver logs[.]" *Id.*

[4] On June 18, 2019, Muncy filed a complaint for damages against Arka Express claiming Gorgees "carelessly and negligently parked his vehicle at an unreasonable and unsafe location under the circumstances." Appellant's App., Vol. II at 26. Muncy employed Walter Guntharp as an expert witness. Guntharp was deposed and opined that Gorgees "should have never stopped on the shoulder of the road" and instead should have "continue[d] down to either the next exit or to the truck stop to get off of the road without pulling over onto

[1] Gorgees was unable to determine whether his tire was flat prior to the accident.

the shoulder of the highway and jeopardizing other traffic." Appellee's Appendix, Volume II at 64-65. Guntharp also prepared a written report for Muncy.

[5] On May 25, 2021, Arka Express filed a motion for summary judgment arguing it did not breach a duty to Muncy and that its actions were not the proximate cause of Muncy's injuries. Further, on October 19, 2021, Arka Express filed a motion to exclude the "report and testimony of [] Guntharp." Appellant's App., Vol. IV at 144.

[6] Following a hearing on both motions, the trial court entered its findings of fact and conclusions of law and judgment granting Arka Express's motion for summary judgment.[2] The trial court concluded, in relevant part:

> 37. There is no evidence that Gorgees failed to use ordinary care to avoid injuries to the other drivers on I-65.
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> 39. There is no statute in Indiana that states a vehicle may not pull over onto the shoulder to investigate a potential mechanical issue. Therefore, the presence of Gorgees' tractor-trailer on the shoulder of the road is not negligent.

[2] The trial court's summary judgment order did not rule on Arka Express's motion to strike, stating that "Guntharp's report and opinions are the subject of a Motion to Strike which is being decided separately." Appealed Order at 5, n.1.

* * *

47. The uncontroverted evidence establishes that Gorgees had been stopped for less than 1 minute when Bedel's vehicle left the roadway and struck his trailer.

48. The Court finds that Gorgees' actions did not breach the applicable standard of care owed by the driver of a disabled motor vehicle under either I.C. 9-21-15-2 or 49 C.F.R. §392.22.

* * *

53. Under the but for analysis, Bedel's inattentive conduct would be the cause in fact of the accident. But for Mr. Bedel falling asleep and leaving the traveled portion of the roadway, the accident would not have occurred.

* * *

62. The evidence supports that Gorgees was immobile on the shoulder of I-65 out of traffic with his emergency flashers activated. Additionally, the evidence supports that Bedel and Muncy were both asleep when the vehicle left the roadway and struck the stopped trailer[.]

63. Under these circumstances, Gorgees could not have foreseen that Bedel and Muncy would both be asleep in the car and leave the traveled portion of the roadway.

64. Gorgees had no role in Bedel falling asleep while traveling on I-65. Therefore, it was not foreseeable that Gorgees' presence on the shoulder could have resulted in an accident.

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> 74. There is no evidence in the record sufficient to invoke a finding that Arka [Express] knew, or should have known, that it needed to retain Ninos Gorgees' driver logs past the 6 months mandated by the Federal Motor Carrier Safety Regulations.
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> 75. There is no evidence in the record to even suggest that [Arka Express] allowed the logbook entries to be purged for an improper purpose.
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> 85. Where there is no evidence that Arka [Express] allowed the logs to be overwritten for an improper purpose an adverse jury instruction would be fundamentally unfair. Arka [Express] will not be punished for compliance with the Federal Motor Carrier Safety Regulations where there is no evidence that it acted willfully to destroy evidence that it knew would be important in later litigation, and where there is no evidence that such evidence was destroyed for an improper purpose.

Appealed Order at 6-14. The trial court granted Arka Express's motion to strike expert testimony in a separate order.[3] Muncy now appeals. Additional facts will be provided as necessary.

[3] Both parties claim that the trial court never issued an order on Arka Express's motion to strike. However, as indicated in the Chronological Case Summary, the "Order Granting Motion to Exclude Expert Witness Testimony" was signed January 14, 2022, the same day as the summary judgment order. Appellant's App., Vol. II at 8. Accordingly, we take judicial notice of this order and disregard citation to Guntharp's testimony and report in Muncy's appellate brief.

Discussion and Decision

I. Standard of Review

[7] We review a trial court's summary judgment order de novo. *Kovach v. Caligor Midwest,* 913 N.E.2d 193, 196 (Ind. 2009). We apply the same standard as the trial court: whether the designated evidence shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); *Freidline v. Shelby Ins. Co.,* 774 N.E.2d 37, 39 (Ind. 2002). In making this determination, we construe all facts and reasonable inferences therefrom in a light most favorable to the nonmovant. *Boggs v. Tri-State Radiology, Inc.,* 730 N.E.2d 692, 695 (Ind. 2000). Our review of a summary judgment motion is limited to those materials designated by the parties to the trial court. *Mangold ex rel. Mangold v. Ind. Dep't of Nat. Res.,* 756 N.E.2d 970, 973 (Ind. 2001). We will affirm the trial court's grant of summary judgment if it is sustainable upon any theory supported by the designated materials. *Reed v. Luzny,* 627 N.E.2d 1362, 1363 (Ind. Ct. App. 1994), *trans. denied.*

II. Spoliation

[8] Muncy argues that "material disputed facts exist due to [Arka Express's] spoliation of evidence[.]" Appellant's Brief at 23. Spoliation of evidence is "the intentional destruction, mutilation, alteration, or concealment of evidence." *Glotzbach v. Froman,* 854 N.E.2d 337, 338 (Ind. 2006) (citation omitted). In *Gribben v. Wal-Mart Stores, Inc.,* our supreme court noted that

"[c]ourts uniformly condemn spoliation." 824 N.E.2d 349, 354 (Ind. 2005). The "[i]ntentional destruction of potential evidence *in order to disrupt or defeat another person's right of recovery* is highly improper and cannot be justified." *Id.* (emphasis added). Further, "[i]t is well-established in Indiana law that intentional first-party spoliation of evidence may be used to establish an inference that the spoliated evidence was unfavorable to the party responsible." *Id.* at 351.

[9] Muncy contends that Gorgees' driver log entries would have shown exactly how long he was stopped on the shoulder of I-65 prior to the crash and that Arka Express intentionally destroyed that evidence by allowing the driver logs to be overwritten. Because of this, Muncy argues that she is entitled to an inference that "Gorgees was stopped along the shoulder of I-65 for long enough . . . to comply with Indiana Code section 9-21-15-2 and display warning devices, such as flares and triangles, prior to the collision, making his conduct negligent per se." Appellant's Br. at 22.

[10] A party raising a claim of spoliation must prove that: (1) there was a duty to preserve the evidence, and (2) the alleged spoliator either negligently or intentionally destroyed, mutilated, altered, or concealed the evidence. *N. Ind. Pub. Serv. Co. v. Aqua Env't Container Corp.*, 102 N.E.3d 290, 301 (Ind. Ct. App. 2018). A duty to preserve may be assumed voluntarily or imposed by statute, regulation, contract, or certain other circumstances. *See Glotzbach,* 854 N.E.2d at 338-39. Here, Gorgees' driver log entries were overwritten six months after

the collision in compliance with 49 C.F.R. § 395.8(k)(1).[4] However, the duty to preserve evidence may also occur "when a first-party claimant 'knew, or at the very least, should have known, that litigation was possible, if not probable.'" *Golden Corral Corp. v. Lenart*, 127 N.E.3d 1205, 1217 (Ind. Ct. App. 2019) (quoting *N.* Ind. Pub. Serv. Co., 102 N.E.3d at 301), *trans. denied*. And this duty may exist prior to the commencement of a lawsuit. *Id*. at 1218.

[11] Muncy argues that Arka Express should have anticipated the possibility of litigation following the accident due to the seriousness of her injuries.[5] Muncy points to Arka Express's submission of a claim to Bedel's insurance carrier as an indication that Arka Express believed the accident to be "an event of importance[.]" Appellant's Br. at 21. However, Bedel's insurance provider accepted liability and reimbursed Arka Express for damages. Although Muncy contends that the crash itself should have caused Arka Express to anticipate litigation, everything in the record suggests that Arka Express had no reason to believe that Gorgees was at fault, including that Bedel's insurance carrier accepted liability. Further, the police crash report listed three contributing

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[4] Muncy cites to 49 C.F.R. § 390.15 and seemingly argues that the regulation requires Arka Express to maintain its driver logs for three years after an accident. First, we note that Muncy argues this for the first time on appeal. Second, although 49 C.F.R. § 390.15 requires that a carrier maintain an accident register for three years, it does not require that driver logs be maintained. *See* 49 C.F.R. § 390.15(b); *see also* 49 C.F.R. § 395.8(k)(1) (referring to logbooks as "records of duty status").

[5] We note that although Muncy raises a spoliation claim in her complaint, she does not argue in either her complaint or response to summary judgment brief that a duty to preserve evidence existed because Arka Express should have anticipated litigation. Generally, an appellant who presents an issue for the first time on appeal waives the issue for purposes of appellate review. *Mid-States Gen. & Mech. Contracting Corp. v. Town of Goodland*, 811 N.E.2d 425, 438 n.2 (Ind. Ct. App. 2004). However, for the sake of completeness we will address this argument.

factors to the accident: (1) Bedel ran off the road; (2) Bedel fell asleep or was fatigued; and (3) Bedel engaged in unsafe lane movement. *See* Appellant's App., Vol. III at 128. Muncy points to no other evidence that would have put Arka Express on notice that litigation was impending prior to the overwriting of the driver log entries six months after the crash in compliance with 49 C.F.R. § 395.8(k)(1).

[12] Accordingly, we cannot say the trial court erred in concluding Muncy failed to prove spoliation. Therefore, Muncy is not entitled to an adverse inference.

III. Negligence

[13] Muncy argues that there were genuine issues of material fact regarding her negligence claim that preclude the entry of summary judgment in favor of Arka Express. Summary judgment is rarely appropriate in negligence cases "because negligence cases are particularly fact sensitive and are governed by a standard of the objective reasonable person—one best applied by a jury after hearing all of the evidence." *Rhodes v. Wright*, 805 N.E.2d 382*,* 387 (Ind. 2004). Nonetheless, a defendant is entitled to judgment as a matter of law when the undisputed material facts negate at least one element of the plaintiff's claim. *Id*. at 385.

[14] To prevail on her claim of negligence, Muncy must demonstrate that: (1) Arka Express owed her a duty; (2) Arka Express breached that duty by allowing its

conduct to fall below the applicable standard of care[6]; and (3) she suffered a compensable injury proximately caused by the breach of that duty. *Denson v. Est. of Dillard*, 116 N.E.3d 535, 539 (Ind. Ct. App. 2018). It is well established that "[a]ll operators of motor vehicles have a general duty to use ordinary care to avoid injuries to other motorists." *Wilkerson v. Harvey*, 814 N.E.2d 686, 693 (Ind. Ct. App. 2004), *trans. denied*. Therefore, Gorgees owed Muncy a duty of care while operating his semi-tractor trailer.

[15] As addressed above, Muncy is not entitled to an adverse inference that Gorgees was stopped on the shoulder for a period of time that would have required him to comply with Indiana Code section 9-21-15-2 or 49 C.F.R. § 392.22 and display warning devices. However, Muncy contends Gorgees' actions still amounted to a breach of duty because "Gorgees had safer alternatives than pulling his semi-tractor trailer just barely over the fog line with a metal guardrail to his right." Appellant's Br. at 23.

[16] Muncy's argument that Gorgees' conduct breached a duty owed to her relies solely on Guntharp's opinion which was struck by the trial court. There is no other evidence that Gorgees failed to use ordinary care to avoid harming other drivers on the interstate. The undisputed evidence in the record is clear that while driving down the interstate, Gorgees heard rumbling sounds from his truck and believed he had a flat tire. Gorgees testified that he could see the

[6] It is undisputed that the accident occurred within the scope of Gorgees' employment with Arka Express.

shoulder and its length was long enough to stop his trailer. *See* Appellant's App., Vol. III at 65. Gorgees activated his "four white flash hazards" and pulled onto the shoulder, coming to a complete stop. *Id.* at 62. His vehicle was not protruding into the interstate. And within "a minute" of coming to a stop and before Gorgees could exit the semi-tractor trailer it was struck by Bedel who had fallen asleep at the wheel. *Id.*

[17] We conclude that Gorgees' actions did not constitute a breach of duty.[7] Accordingly, the trial court did not err by granting summary judgment to Arka Express.

Conclusion

[18] We conclude that Arka Express did not commit spoliation; therefore, Muncy is not entitled to an adverse inference regarding the amount of time Gorgees was stopped on the interstate shoulder. Further, the undisputed designated evidence shows Gorgees did not commit a breach of duty so Muncy's negligence claim must fail. Accordingly, we affirm.

[19] Affirmed.

Pyle, J., and Weissmann, J., concur.

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[7] Because we have determined that the undisputed material facts negate the breach of duty prong of Muncy's negligence claim, we need not address proximate cause. *See Rhodes*, 805 N.E.2d at 387.