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eDiscovery Includes Electronic Vehicle Data and Possible Sanctions for Spoliation

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Discovery of relevant material extends far beyond documents created on personal computers. Discoverable data exists in many forms, including electronic data found in vehicles such as tractors used for tractor-trailers. This type of data is also subject to spoliation sanctions if not properly preserved. A recent case in the Northern District of Alabama, *Barry v. Big M Transportation, Inc.*, addressed whether sanctions were warranted when electronic vehicle data was not preserved for a tractor-trailer that was involved in an accident.

Plaintiffs David and Vanessa Berry were injured when a tractor-trailer driven by defendant Joshua Shaffer, who was an employee of defendant Big M Transportation, Inc. ("Big M"), collided with their vehicle. After the collision, Shaffer called Big M's CFO who told him to take pictures of everything including the truck, trailer, and car, but Shaffer did not recall being instructed to preserve the data on the tractor's electronic data recorder. A State Trooper investigated the accident and prepared an accident report that included a diagram of the accident. The Big M truck was towed away and then driven back to Big M's headquarters. A day or two after the accident Shaffer was interviewed by the CFO and a liability insurance representative, during which he drew a sketch of the accident.

Less than a month after the accident, Big M received a "letter of preservation" from the Barrys' counsel requesting that Big M preserve evidence including the tractor-trailer and the "Electronic Data/Electronic Control Module (ECM) Vehicle Data Recorder/Black Box and its data" ("ECM data"). At this time the tractor had already undergone repairs and had also been selected to be sold as part of a vehicle swap program. Big M did not download or preserve the tractor's ECM data prior to the sale of the tractor.

Plaintiffs filed a motion for partial summary judgment, which included a spoliation sanction against Defendants for failing to preserve the tractor's ECM data after the accident. They moved for a default judgment on the Defendants' liability or an order establishing the speed at which Shaffer was driving and the maneuvers he made in the light most favorable to Plaintiffs. Defendants responded that not preserving the ECM data was "well-reasoned and justifiable" and even if it was not seen as reasonable, it did not warrant sanctions. Additionally, Shaffer argued that he did not have a duty to preserve the ECM data at the time of the accident and that he didn't have custody or control over the tractor after the accident.

The court found that Big M, but not Shaffer, was guilty of spoliation. Big M's corporate representative confirmed that it was normal practice for Big M to recover ECM data from a tractor if a collision was severe and that there was nothing preventing Big M from preserving the ECM data in this case. Big M also received a preservation letter from Plaintiffs' counsel three days before selling the truck. The court stated, "Under these circumstances, Big M's failure to preserve the truck's ECM data amounts to spoliation, as it was reasonably foreseeable, if not a near certainty, that the accident would lead to litigation." The court also found that Big M's failure to preserve the ECM data prejudiced Plaintiffs because it deprived them of "the best and most accurate evidence of the truck's speed in the moments prior to the collision."

The court noted that Rule 37(e)(2) of the Federal Rules of Civil Procedure provides that severe sanctions are limited to situations where the party "acted with the intent to deprive another party of the information's use in the litigation." The court was unwilling to impose severe sanctions for several reasons. First, the court wasn't convinced that Big M acted with the intent of depriving Plaintiffs the ECM data for use in the litigation. Second, despite the seriousness of the accident and that litigation was reasonably foreseeable, "it was Big M's impression that [Plaintiffs] were at fault for the accident." Third, the Plaintiffs had not been prejudiced to a degree that would warrant severe sanctions. Finally, Plaintiffs did not show that Shaffer bore any responsibility for the loss of the ECM data.

Rather than order spoliation sanctions, as an alternative, the court decided that it would "tell the jury that the ECM data was not preserved and will allow the parties to present evidence and argument at trial regarding Big M's failure to preserve the data."

It is important to remember that severe sanctions are warranted only in certain situations and courts should exercise caution in using these measures. While spoliation may not always lead to severe sanctions, it can lead to alternative measures as the court ruled in this case.

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