

Court's Order. Plaintiff contends that this concealment and destruction of evidence and willful disobedience to the Order of this Court have prejudiced Plaintiff in the proof of her case.

After lengthy hearings on these discovery motions, and after considering the briefs, arguments, and evidence submitted by the parties, the Court agrees with Plaintiff and finds that Plaintiff's motions should be granted.

As discussed more fully below, the repeated, deliberate, willful disobedience to this Court's Order, the magnitude of and nature of the evidence concealed, and the obvious prejudice to Plaintiff on the eve of trial dictate that the Court enter evidentiary findings to address the missing evidence Plaintiff needs, and is entitled to have, for trial. The Court also finds that Plaintiff is entitled to attorneys' fees and costs.

Plaintiff filed her First Motion for Sanctions on August 3, 2004. That motion addressed the fact that FM (1) tampered with a witness and (2) refused to produce numerous documents. By abusing the attorney client privilege, counsel for FM prevented Plaintiff from contacting, serving or deposing Alejandro Quinonez, Jr., the former FM employee who caused the underlying wreck. In addition, FM refused to produce, or confer in good faith about, numerous documents that Plaintiff had asked FM to produce. These documents, which to date FM has not produced or accounted for, include 14 log audits of Mr. Quinonez's driver's logs, receipts and other items reflecting the whereabouts of Mr. Quinonez during the trip leading up to the subject wreck, and internal records of overtime violations by FM drivers. FM did not respond to Plaintiff's First Motion for Sanctions.

The Court held a hearing on Plaintiff's First Motion for Sanctions on January 26, 2005. After that hearing, the Court entered a detailed Order compelling FM to (1) respond to Plaintiff's Third Interrogatories and Third Request for Production of Documents, which Plaintiff served on

FM on August 9, 2004 and July 9, 2004, respectively, (2) produce all documents addressed in Plaintiff's Motion to Compel by no later than February 28, 2005, and (3) produce for deposition five defense witnesses that Plaintiff had unsuccessfully attempted to depose numerous times through the discovery period.

The Court declined, at that time, to sanction FM. In so doing, the Court provided FM yet another opportunity to avoid sanctions and comply with its discovery obligations. FM, however, failed to comply with the Court's January 26, 2005 Order.

Plaintiff filed her Second Motion for Sanctions on March 2, 2005 to address this non-compliance. FM has not responded to that motion. Plaintiff filed this motion after FM violated the first deadline in the Court's January 26, 2005 Order, which required FM to respond to Plaintiff's Third Interrogatories and Third Request for Production of Documents by February 4, 2005. In fact, as of the fifth hearing in this case, held on March 30, 2005, FM still has failed to comply with the Order's requirement that FM provide verified responses to Plaintiff's Third Interrogatories and a response to Plaintiff's Third Request for Production of Documents. The Court finds this failure to be a willful violation of the Court's January 26, 2005 Order.

Plaintiff filed her Third Motion for Sanctions on March 29, 2005, to address FM's continued non-compliance with the Court's January 26, 2005 Order. In addition to violating the Order's February 4, 2005 deadline, FM also violated every other deadline in that Order.

By February 28, FM was required to produce all documents addressed in Plaintiff's Motion to Compel. FM, however, failed to produce a single document by February 28. And FM did not seek an extension or offer an explanation for completely ignoring this deadline. Moreover, now over one month after the expiration of the February 28 deadline, FM still has not

produced a single document in response to this Court's January 26 Order. The Court finds, therefore, that this failure is a willful violation of the Court's Order.

The third deadline in the Court's January 26, 2005 Order was extended to March 18, 2005.² By March 18, FM was required to bring its witnesses to Georgia so that Plaintiff could finally conduct their depositions. The Court compelled depositions of the following witnesses: Alejandro Quinonez, Jr. (driver that caused this wreck), Lilli Saucedo (records custodian), Hector Saucedo (president), Rudy Corral (former safety director), and Myrna de la Rosa (current safety director).

Prior to the January 26 Order, Plaintiff had previously noticed the depositions of all of these individuals on multiple occasions. Plaintiff had even traveled to Texas -- in response to FM's demand -- to personally serve these witnesses with subpoenas, since FM's lawyers refused to accept any subpoenas for depositions of any defense witnesses (including the President of FM). Despite these repeated efforts, Plaintiff was unable to secure a single deposition because FM refused to comply with any of its discovery obligations, including honoring Plaintiff's subpoenas and notices of deposition.

As a result, this Court had to Order FM to produce these deponents. However, despite this Court's Order, and despite the notices of deposition Plaintiff provided FM in compliance with that Order, FM refused to produce the witnesses as ordered. The Court finds this refusal particularly problematic in light of the fact that, at the January 26, 2005 hearing on Plaintiff's First Motion for Sanctions, FM asked the Court to delay making a sanctions ruling because these depositions had not yet occurred.

² The original February 28, 2005 deadline in the Court's January 26, 2005 Order was modified by the Court's Order of February 20, 2005 to give FM additional time (to March 18, 2005) to produce witnesses for deposition.

FM's conduct deserves the severest of sanctions. The Court has given FM every opportunity to comply with its discovery obligations. At this point in the case -- over two years after FM went into default, and on the eve of trial -- it is necessary for the Court to make certain evidentiary findings because such findings are the only way to begin to address the fact that Plaintiff has been denied a large portion of the evidence she needs, and is entitled to have, for trial. See, e.g., O.C.G.A. § 9-11-37(b)(2); Agnor's Discovery Under The Georgia Civil Practice Act at § 12-6 ("These sanctions have one central theme. They are intended to place the party seeking discovery as nearly as possible in the position he would have reached had discovery been made and had the information secured been most favorable to him.").

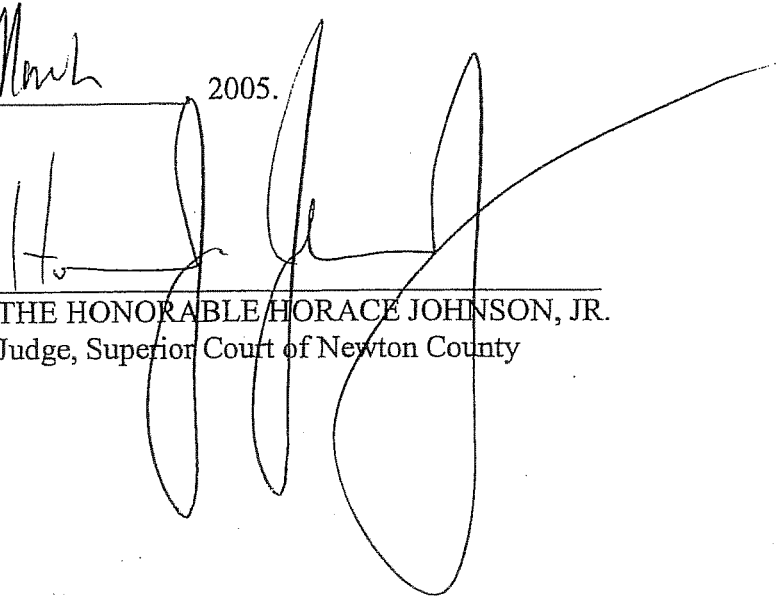
As a result, the Court finds as fact that but for FM's obstruction, each compelled witness would have provided testimony that strongly underscores every allegation in Plaintiff's complaint and that such testimony would have included, among other things, the following: (1) testimony that FM intentionally underpaid and overworked its drivers, knowing they constantly violated the hours of service rules, in order to maximize profits; (2) testimony that FM did not take corrective action in response to the subject wreck and, instead, continued to encourage drivers to drive overtime no matter what the safety risk to the motoring public; and (3) testimony that Alejandro Quinonez, Jr., the FM driver who fell asleep while driving overtime when he caused this wreck, habitually drove overtime for FM both before and after the subject wreck and that FM was fully aware of his unacceptable pattern of violating the hours of service rules. The Court further finds that no testimony of any of the compelled witnesses would have supported any of FM's positions or arguments.

In addition, in response to FM's complete failure to produce any documents by February 28, 2005, as ordered, or to even acknowledge that complete failure, the Court finds as fact that

FM destroyed or concealed all of the documents on which Plaintiff moved in her Motion to Compel.

Finally, the Court awards Plaintiff attorneys' fees and expenses. Plaintiff shall submit a verified motion for attorneys' fees and costs to the Court within twenty days.

SO ORDERED this 30th day of March 2005.



THE HONORABLE HORACE JOHNSON, JR.
Judge, Superior Court of Newton County

PRESENTED BY:

James E. Butler, Jr., P.C.
Georgia Bar No. 099625
Matthew E. Cook
Georgia Bar No. 184399
Gregory R. Feagle
Georgia Bar No. 256913
Butler, Wooten, Fryhofer,
Daughtery & Crawford, LLP
2719 Buford Highway
Atlanta, Georgia 30324
(404) 321-1700

Bryan M. Pulliam
Bryan M. Pulliam, LLC
Georgia Bar No. 589640
4163 Hospital Drive
Covington, GA 30014
770/787-1920

Attorneys for Plaintiff Trudy Hudson Parker