IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR HENDRY COUNTY, STATE OF FLORIDA

FRANCISCO PARDO GARCIA, as
Personal Representative of the Estate of MARTA
PARDO, deceased, Individually and as Surviving
Spouse of MARTA PARDO, as parent and legal
guardian for FRANCISCO PARDO, JR.,
RODRIGO PARDO, DANIEL PARDO, and
JOSUE PARDO, minor children,
Plaintiff(s),

vs.

CASE NO.: 15-73-CA

BENJAMIN CARPENTER and PROGRESSIVE
AMERICAN INSURANCE COMPANY
Defendant(s).
_____/

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS COUNTS III AND IV OF PLAINTIFF'S COMPLAINT

This cause having come on to be heard before this Court on April 15, 2015, upon the Defendant, Progressive American Insurance Company's Motion to Dismiss Counts III and IV of the Plaintiff's Complaint, and the Court having heard argument of counsel and being otherwise duly advised in the premises, finds as follows:

1. This action arose as a result of a motor vehicle accident which occurred on April 3, 2013, in Hendry County, Florida.
2. The Plaintiff, Francisco Pardo Garcia, brings this action on behalf of himself and his minor children against the driver of the other vehicle who allegedly caused the accident and against Progressive American Insurance Company alleging that the insurance company disposed of the Plaintiff's vehicle thereby damaging the Plaintiff's ability to bring a lawsuit against the vehicle's manufacturer, Ford Motor Company.
3. The Defendant, Progressive, filed the action to dismiss Counts III and IV of the Plaintiff's action, which allege a spoliation of potential evidence by the Defendant's action of disposing of the motor vehicle.
4. The Defendant essentially alleges that was no contractual duty to preserve the evidence and that the action for spoliation of the evidence is premature.

5. The elements of a cause of action for negligent destruction of evidence are well established. They require: 1) existence of a potential civil action; 2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action; 3) destruction of that evidence; 4) significant impairment in the ability to prove the lawsuit; 5) a causal relationship between the evidence destruction and the inability to prove the lawsuit; 6) damages. *Continental Insurance Company v. Herman* 576 So.2d 313(3rd DCA 1990); *Hagopian v. Publix Supermarkets, Inc.* 788 So.2d 1088 (4th DCA 2001).
6. Initially, the Defendant argues that there was no duty to preserve the evidence, i.e., the Ford vehicle, in that the Plaintiffs merely requested that the Defendant preserve the automobile until inspections and tests could be performed.
7. It appears however, from the exhibits attached to the Plaintiff's complaint, that the Defendant requested that the Plaintiffs sign a release so that the Defendants could move the vehicle from Sugarland Towing (where they were paying a storage fee) to the Defendants free storage facility in Palmetto, Florida. The Plaintiff's apparently signed the appropriate releases and the car was moved to Palmetto.
8. At some later point, according to the correspondence, the Plaintiffs attempted to begin the inspection and testing procedures, but were prevented from doing so by the Defendant's storage facility. The storage facility would not permit for work to be done on site, in this case, a removal of a door for inspection and photographing.
9. The court concludes that this is not a situation where one party merely agreed to preserve the evidence, and later disposed of that evidence without knowledge of the other party. In this particular case, the Defendant requested that the Plaintiff allow them to relocate the vehicle in order to save the Defendant money, and then moved it to a facility which would not allow the Plaintiff to do a proper inspection. This appears to rise above the level of a "mere agreement" to preserve property.
10. The second ground the Defendant advances, is that the Plaintiffs have failed to allege a significant impairment in the ability to prove their potential lawsuit against Ford Motor Company.
11. The controlling case in the 2nd District Court of Appeal is *Jost v. Lakeland Regional Medical Center, et.al,* 844 So.2d 656 (2nd DCA 2003) In *Jost,* a personal representative brought a medical malpractice action against Lakeland Regional Medical Center. They also joined American Continental Insurance Company into that suit, alleging that the

insurance company destroyed evidence that was necessary to prove the medical malpractice action against Lakeland Regional Medical Center. The court held that claims for destruction of evidence against the hospital's insurer were premature and were not ripe until the underlying medical malpractice action was resolved.

12. On the other hand, if the destruction of the evidence results in the total inability of a plaintiff to advance their cause, the court is not required to force the plaintiff to sue the manufacturer of the alleged defective property if such lawsuit would amount in the plaintiff being forced to pursue a frivolous lawsuit. It therefore appears to be a balancing test between a frivolous lawsuit verses shifting the responsibility from a manufacturer of a defective product to the party who allegedly disposed of the evidence.
13. In the case at bar, we are referring to a 2004 automobile. The Plaintiffs are alleging that the vehicle was negligently constructed which resulted in a rollover and that the seatbelt failed to perform as it was designed. There should be available to the Plaintiff a history regarding this particular vehicle. For example, if the vehicle is prone to rollover, this court finds it difficult to believe that there are not other legal actions, opinions by experts or previous tests conducted on the vehicle in question to determine its propensity to overturn when struck by another vehicle. Likewise, the Plaintiff may be able to obtain a similar vehicle for testing of the seatbelt or once again discover previous lawsuits and/or engineering tests done which shows the propensity of the seatbelt in this type of a vehicle to fail. It therefore appears that requiring the Plaintiffs to proceed against Ford would not rise to the level of requiring them to file a frivolous lawsuit.
14. However, if the Plaintiffs are unable to prevail in that lawsuit, then their action against the Defendant, Progressive American Insurance Company, would be ripe.

NOW THEREFORE, it is,

ORDERED AND ADJUDGED as follows:

1. Counts III and IV of the Plaintiffs Complaint against Progressive American Insurance Company is hereby DISMISSED without prejudice.

DONE AND ORDERED in LaBelle, Hendry County, Florida this 22nd day of April 2015.

JAMES D. SLOAN
CIRCUIT COURT JUDGE

I hereby certify copy of the above order was furnished by èlectronic mail to:

Brent Probinsky, Esquire: service@probinskylaw.com

Philip D. Parrish, Esquire: phil@parrishappeals.com; dtownsend@parrishappeals.com

Stuart J. Freeman, Esquire: sjfreeman@brasfieldlaw.net; csiegel@brasfieldlaw.net

This 27th day of April, 2015.

Tilena Gutshall

TILENA GUTSHALL
JUDICIAL ASSISTANT