

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JOSEPH E PLEAUGH : MDL-875
 :
v. :
 :
 : E.D. Pa. Case No. 11-63519
AW CHESTERTON COMPANY., et al. :

ORDER

AND NOW, this 6th day of April, 2012, upon consideration of Defendant Georgia-Pacific's Motion for Sanctions for Spoilation of Evidence (Doc. No. 268), plaintiff's response (Doc. No. 274), and Georgia-Pacific's reply (Doc. No. 275), it is hereby **ORDERED** that

1. The motion is **DENIED** as to the requested dismissal of plaintiff's case;
2. The motion is **DENIED** as to the requested bar from introducing any evidence, argument, testimony or inference that Plaintiff used a Georgia-Pacific Product; and
3. The motion is **GRANTED** only to the extent that Georgia-Pacific is entitled to an inference that the fact finder may, but would not be required to conclude that the invoices destroyed by Mr. Pleaugh from Wallboard and Fleming did not show any purchases of Georgia-Pacific products.¹

¹ Mr. Pleaugh brought a complaint against Georgia-Pacific on January 25, 2011, alleging that his lung cancer was caused by, *inter alia*, the asbestos fibers contained in Georgia-Pacific's joint compound. On June 14, 2011, Georgia-Pacific served Plaintiff with a Request for Production that sought "all purchase orders, invoices, bills of sale, bills of lading, sales receipts, contracts or other documents reflecting the sale or delivery of any products Plaintiff claims were manufactured, sold or designed by Georgia-Pacific to any job side where" Mr. Pleaugh was claiming that he had been exposed to Georgia-Pacific products. (Doc. No. 268 at 2 (citing Exh. B).) Mr. Pleaugh responded that he had no such documents. (*Id.*)

Mr. Pleaugh was deposed on August 26, 2011 and October 6, 2011. (*See* Doc. No. 268, Exhs. D and G.) During his depositions, he testified that he had found a number of old invoices from two supply companies, Wallboard and Fleming, which documented his purchase of joint compound from the 1960s through the 1980s. He stated that he had reviewed these documents when preparing his affidavits for certain of his bankruptcy trust claims. (*See* Doc. No. 268, Exh. G at 128-29.) When asked which particular stores the receipts were from, Mr. Pleaugh answered, "Wallboard, Fleming," and elaborated that he "remember[ed] picking all this stuff up
(continued...)

¹(...continued)

at Fleming and Wallboard.” (*Id.* at 129.) He further explained that he kept the receipts along with “property bills [and] tax bills” and that, ultimately, as he and his wife “started looking through all [their] files,” his wife “started cleaning everything out and threw all the files away for back taxes.” (*Id.* at 129-130.) Upon questioning as to why he kept the bills for so long and then threw them away, Mr. Pleaugh answered that he “didn’t know [he] had to keep them.” (*Id.* at 131.)

The significance of the Wallboard and Fleming documents arises from Mr. Pleaugh’s deposition testimony that “Wallboard and Fleming is a supplier that you got the material from, Georgia Pacific and the others.” (Doc. No. 275, Exh. A at 31. *See also id.* at 64.) Georgia-Pacific has provided deposition testimony from Wallboard and Fleming, which challenges Mr. Pleaugh’s assertion. (As to Wallboard, *see id.* Exhs. E and F, where the former and current presidents testified that Wallboard did not sell joint compound produced by Georgia-Pacific during the relevant time periods and, as to Fleming, *see* Exh. G, where the company president testified that Fleming only “took in one shipment [of joint compound] from [Georgia-Pacific] and distributed it to a couple of our bigger c[u]stomers, and that was it.”) Given that Pleaugh’s references to these suppliers implicate Georgia-Pacific, and may impact upon the disposition of the presently pending motion for summary judgment (to the extent that the court on summary judgment is to consider “reasonable inferences”), we set out our analysis with respect to the relief sought in this spoliation motion. *See, e.g., Pignataro v. Port Auth. of N.Y.*, 593 F.3d 265, 268 (3d Cir. 2010).

Mr. Pleaugh testified to having “put [the receipts] through the chopper,” and has admitted that he should have kept them. (*See, e.g.* Doc. No. 268, Exh. G at 128-129. *See also id.* at 134.) Accordingly, he deliberately destroyed the receipts. This indicates, however, only that Mr. Pleaugh meant to destroy the receipts—not that he destroyed the documents in bad faith, as there is nothing to suggest that he was motivated by a concern that the receipts would have been damaging to his case.

The Third Circuit has articulated that the following factors should be considered in cases of spoliation:

- (1) the degree of fault of the party who altered or destroyed the evidence;
- (2) the degree of prejudice suffered by the opposing party; and
- (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, whether the offending party is seriously at fault, will serve to deter such conduct by others in the future.

See Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76, at 79 (3d Cir. 1994) (citing *Dillon v. Nissan Motor Co., Ltd.*, 986 F.2d 263 (8th Cir. 1993); *S.D.I. Operating Partnership, L.B. v. Neuwirth*, 973 F.2d 652 (8th Cir. 1992)). Using these factors as a guide, we have determined that neither the degree of fault by Plaintiff nor the degree of prejudice suffered by Defendant is sufficient to warrant the sanctions of dismissal or preclusion of evidence sought in Georgia-

(continued...)

BY THE COURT:

/s/ David R. Strawbridge USMJ

DAVID R. STRAWBRIDGE

UNITED STATES MAGISTRATE JUDGE

¹(...continued)

Pacific's motion. We conclude that Georgia-Pacific is entitled to nothing more than an inference that the fact finder may, but would not be required to conclude that the destroyed invoices from Wallboard and Fleming did not show any purchases of Georgia-Pacific products. (*See* Doc. No. 268 at 8-9.)