

Tim Martin

**STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT**

SIMON LEES, Individually, *et al.*,

Plaintiffs,

vs.

No. CV 2011-09334

**STOREFRONT SPECIALTIES AND
GLAZING, LLC, *et al.*,**

Defendants.

PLAINTIFFS' MOTION SEEKING SANCTIONS FOR SPOILIATION OF EVIDENCE

INTRODUCTION

Plaintiffs Simon Lees, Individually and as Guardian and Next friend of Claire Lees and Emma Lees, and Adelle Lees, by and through their attorney of record, FallickLaw, LTD., hereby respectfully move for sanctions to remedy Defendants' spoliation of evidence; that is, the failure to preserve interviews of third-party witnesses, which were recorded by Defendants' investigator at the specific direction of Defendant Peerless Indemnity Insurance Company (hereinafter "Defendant Peerless").

For the reasons discussed below, Plaintiffs respectfully request that this Court remedy Defendants' spoliation of evidence by entering an Order providing – as a separate, alternative, and independently-sufficient basis for relief – that partial judgment be rendered in Plaintiffs' favor and against Defendants as sought (1) in Plaintiffs' Motion For An Order That Matters Be

Admitted Pursuant To Rule 1-036 NMRA 2012, And In The Alternative For Partial Summary Judgment, With Supporting Points And Authority (filed June 1, 2012), and (2) in Plaintiffs' Motion for Partial Summary Judgment on Defendants' Claim that Plaintiff Bicyclist was Negligent for Failing to Escape the Consequences of Defendant Truck Driver's Negligence (filed contemporaneously herewith).

Defendants oppose this Motion.

ARGUMENT

I. DEFENDANTS FAILED TO PRESERVE THE RECORDED INTERVIEWS OF CRITICAL THIRD-PARTY WITNESSES.

Defendants indisputably failed to preserve the recorded interviews of third-party witnesses Lieutenant Shawn O'Connell and Suzanne March-Thomas. In addition, Plaintiffs believe and therefore aver that Defendants likewise failed to preserve the recorded interview of Roseanna Gallegos. The Defendants intend to rely on all three witnesses to support Defendants' contention that the crash somehow was Plaintiff Simon Lees' fault, because he allegedly was cycling too fast in the bicycle lane.

Plaintiffs served requests for production on Defendant Peerless Indemnity Insurance Company (hereinafter "Peerless") on October 3, 2011, seeking (among other things) "All [audio recordings] referring and or pertaining to the November 10, 2009 collision that is the subject of the State of New Mexico Uniform Crash Report 0710039204;" *i.e.*, the crash at issue in this case (RFP No. 1). Defendant Peerless responded: "Defendant produces the claim file for this matter, Bates No. PHIC 00001 - 000187. Certain work product is being withheld pursuant to Rule 1-026 NMRA. A privilege log is produced." Defendant Peerless's response and privilege log are attached hereto as Exhibit A.

Defendant Peerless's response and privilege log did not disclose the failure to preserve the recordings. To the contrary, this fact was not disclosed until three months later – that is, more than four months after the discovery request was served by hand-delivery – following Plaintiffs' fourth follow-up request, which notified Defendants' counsel that it would be Plaintiffs' final attempt to obtain voluntary compliance. *See* the e-mail string attached hereto as Exhibit B.

Notwithstanding Defendants' nondisclosure, Plaintiffs' analysis of Defendant Peerless's production of documents disclosed that Defendants' investigator (a) had recorded his in person interview with Lt. O'Connell (Exhibit C, PIIC 00010, and (b) likewise had recorded his telephone interview of Ms. March-Thomas (*id.*, PIIC 00012). In addition, the billing records of Defendants' investigator disclose that he had recorded the interviews based on the explicit direction of Defendant Peerless (*id.*, PIIC 00015).

On January 23, 2012, Plaintiffs' Counsel followed-up for the third time on this discovery, stating (among other things):

I am writing to follow-up again on paragraphs 1, 3 and 4 of my January 3rd e-mail, below. . . . My clients have a right to this discovery, and I do not think it is fair to expect them to wait very much longer for your clients to produce it voluntarily. Again, plaintiffs did serve the formal discovery requests for these items on October 3rd of last year; that is, nearly four months ago. I also began following-up on the defendants' failure to produce these recordings on November 9th of last year. . . . If your investigator did record the interviews of Lt. O'Connell and Ms. March-Thomas as his report states, and if he did preserve the recordings as required, I do not understand why those recordings were not produced along with your investigator's recording of Mr. Lynch. . . . [A]ssuming the recordings do exist, I would appreciate receiving copies by the end of next week, at the latest.

Exhibit B. Nevertheless, Defendants' Counsel responded on January 25th as follows:

Gregg: We have a big motions deadline Monday in another case and so I will not work on this issue until next week. But I will say that at least some of the material was not in the possession of defendants' insurer and so are [sic] arguably outside the scope of your discovery request. Yet, Erica has been diligently trying to track down these recordings that we have no reason to believe are even relevant given the summaries and transcripts that have been produced. Plus, we don't even have a scheduling order yet, so how has your client been prejudiced? We are trying to be sensitive to your sense of urgency, but honestly, I don't share it.

Id. Thereafter, in an e-mail dated February 8, 2012, Defendants' counsel finally disclosed the failure to preserve the recorded interviews – which had been requested in discovery more than four months earlier – admitting (*id.*):

Team One's investigator was unable to locate the audio recordings for Lt. O'Connell and Ms. March-Thomas. Rebecca MacIntyre reviewed Colorado Casualty's file and says it does not appear that any tapes were sent to them by Team One, so she does not have any. Therefore, we will be producing nothing further with respect to audio recordings.

Moreover, the billing records of Defendants' investigator disclose that "Ms. MacIntyre [of Defendant Peerless] also indicated that one witness, a Rosanna Gallegos, already had been interviewed." Exhibit C, PIIC 00015. Given Defendant Peerless's practice of requiring that all interviews be recorded, Plaintiffs believe and therefore aver that Ms. Gallegos's interview likewise was recorded, and that evidence of that recording either (a) was not preserved, or (b) was preserved but was withheld in discovery.

II. THE CIRCUMSTANCES WARRANT SEVERE SANCTIONS.

The circumstances here warrant severe sanctions. *Restaurant Management Company v. Kidde-Fenwal, Inc.*, 127 N.M. 708; 1999-NMCA-101; *Segura v. K-Mart Corporation*, 133 N.M. 192, 2003-NMCA-13.

In *Restaurant Management Company*, our Court of Appeals provided guidance on the standards informing the exercise of discretion by trial courts in determining appropriate sanctions for spoliation. Initially, the Court explained that the power to impose such sanctions is included in the trial court's "inherent power" to regulate the proceedings. 127 N.M. at 712; 1999-NMCA-101, § 11. That is, the power to impose such sanctions is included within the "'certain implied powers' of the courts 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.'" *Id.* (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)). Then, the Court held that trial courts "should consider" the following factors in determining the severity of the sanction to be imposed:

- (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, where the offending party is seriously at fault, will serve to deter such conduct by others in the future.

Id.; 1999-NMCA-101, § 13 (citation and internal quotation marks omitted). Finally, the Court held that findings and conclusions are required, in order to permit effective review of the severity of the sanction. *Id.* at 714; 1999-NMCA-101, § 23. Nevertheless, the Court emphasized in no uncertain terms that trial courts retain broad authority to exercise their sound discretion to make sanctions determinations. *Id.* at 711; 1999-NMCA-101, § 8 ("We cannot understate the difficulty of the task litigants face when challenging a district court's choice of sanctions" (citation and internal quotation marks omitted)).

The Court of Appeals applied this standard in *Segura v. K-Mart Corporation*, and upheld the trial court's imposition of a spoliation sanction directing that "K-Mart would be deemed

negligent and its negligence would be considered a proximate cause of Segura's injuries." 113 N.M. at 194; 2003-NMCA-13, ¶ 3. The Court of Appeals upheld these sanction, notwithstanding the fact that K-Mart "was merely negligent" in failing to preserve the evidence. *Id.* at 195; 2003-NMCA-13, ¶ 10. The *Segura* Court explained:

With respect to degree of fault, K-Mart argues the trial court found that it was merely negligent, and thus, such a severe sanction was improper. . . . [However,] K-Mart's degree of culpability is only one of the factors the court weighed in evaluating spoliation sanctions. In addition, the negligent care of evidence may have consequences as deleterious as the intentional destruction of evidence. As noted in *Thomas v. Isle of Capri Casino*, 1999- SA-01476-SCT, P40, 781 So. 2d 125 (Miss. 2001), "requiring an innocent litigant to prove fraudulent intent on the part of the spoliator would result in placing too onerous a burden on the aggrieved party." The Mississippi court explained that "to hold otherwise would encourage parties with weak cases to 'inadvertently' lose particularly damning evidence and then manufacture 'innocent' explanations for the loss." *Id.*

Initially, while the sanctions requested by Plaintiffs are severe on their face – partial judgment in Plaintiffs' favor regarding Defendant Lynch's violations of law and Plaintiff Simon Lees' lack of a duty to avoid the crash – Plaintiffs are entitled to the very same relief under Rule 1-056 NMRA 2012, as demonstrated by Plaintiffs' pending dispositive motions. Accordingly, granting the identical relief as a sanction is duplicative, and has no incremental negative impact on Defendants. That is, the requested relief simply provides a separate, alternative, independently-sufficient ground in support of the partial judgment to which Plaintiffs are entitled under Rule 1-056.

Moreover, assuming *arguendo* and contrary to law that there otherwise would be disputed issues of fact regarding the requested relief under Rule 1-056, the requested sanctions nevertheless would be entirely justified for the following reasons:

(a) Defendants should be faulted for their conduct, because they were not forthcoming about their spoliation and, therefore, repeated efforts by Plaintiffs' counsel were required to expose the spoliation;

(b) As discussed in *Segura*, it is apparent from Plaintiffs' pending dispositive motions that Defendants have a "weak cas[e]," and the requested sanction is necessary to avoid encouraging such parties "to 'inadvertently' lose particularly damning evidence;"

(c) Even assuming *arguendo* that some scintilla of evidence were to exist that would prevent summary judgment pursuant Rule 1-056, under the circumstances the sanction nevertheless would be immaterial to a proper determination of liability;

(d) The record as a whole demonstrates that Defendants' candor is suspect, and it would be particularly unfair under the circumstances to permit Defendants to benefit in any way from the spoliation; and

(e) Plaintiffs have been deprived of any opportunity to review the recordings, to determine whether Defendants' investigator used improper techniques to "poison the well" of the witnesses' testimony, and to question the witnesses regarding their prior recorded statements.

Finally, Plaintiffs believe and therefore aver that, if the investigator's interview technique had been fair and free of any evidence helpful to Plaintiffs, the recordings would have been preserved and produced in discovery. That is, Plaintiffs believe and therefore aver that the recordings were not preserved *because* they contain evidence of improper interrogation techniques that had the purpose and effect of suggesting testimony favorable to the Defendants and committing the witnesses to distortions in the testimonial record. In Plaintiffs' view, Defendants' conduct as a whole provides circumstantial evidence supporting Plaintiffs' belief. In any event, Defendants' spoliation precludes any definitive determination on the issue, and therefore the *Segura* case assures Plaintiffs the benefit of the resulting doubt: "requiring an innocent litigant to prove fraudulent intent on the part of the spoliator would result in placing too onerous a burden on the aggrieved party." 133 N.M. at 195; 2003-NMCA-13, ¶ 10.

CONCLUSION

WHEREFORE, Plaintiffs Simon Lees, Individually and as Guardian and Next friend of Claire Lees and Emma Lees, and Adelle Lees, respectfully request that this Motion be granted, and that this Court enter an Order providing – as a separate, alternative, and independently-sufficient basis for relief – that partial judgment be rendered in Plaintiffs’ favor and against Defendants as sought (1) in Plaintiffs’ Motion For An Order That Matters Be Admitted Pursuant To Rule 1-036 NMRA 2012, And In The Alternative For Partial Summary Judgment, With Supporting Points And Authority (filed June 1, 2012), and (2) in Plaintiffs’ Motion for Partial Summary Judgment on Defendants’ Claim that Plaintiff Bicyclist was Negligent for Failing to Escape the Consequences of Defendant Truck Driver’s Negligence (filed contemporaneously herewith). Plaintiffs also respectfully request that this Court impose such other and further sanctions as the Court deems just and proper.

Respectfully submitted,

FALLICKLAW, LTD.


By: Gregg Vance Fallick
Suite 205
Gold Avenue Lofts
100 Gold Avenue, S.W.
Albuquerque, New Mexico 87102
(505) 842-6000
GVF@FallickLaw.com

Attorney for Plaintiffs

DATED: September 4, 2012.

I hereby certify that on September 4, 2012, I caused true and correct copies of the foregoing Motion to be served by hand-delivery upon:

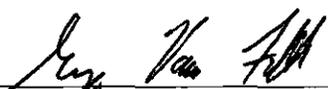
Seth Sparks, Esquire
ssparks@rodey.com;

and by electronic mail upon:

Lisa Chavez Ortega, Esquire
lortega@rodey.com

Gina Constant, Esquire
gconstant@rodey.com; and

Brandee R. Lynch, Esquire
brandee@bentleybriggs.com.



Gregg Vance Fallick

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

SIMON LEES, Individually and as Guardian
And Next Friend of CLAIRE LEES and
EMMA LEES; and ADELLE LEES,

Plaintiffs,

No. D-202-CV-2011-09334

vs.

STOREFRONT SPECIALTIES AND
GLAZING, LLC; JEFFREY T. LYNCH;
and PEERLESS INDEMNITY INSURANCE
COMPANY d/b/a Colorado Casualty, a
Liberty Mutual Agency Corporation and
a member of the Liberty Mutual Group, Inc.,

Defendants.

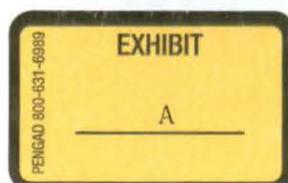
**DEFENDANT PEERLESS INDEMNITY INSURANCE COMPANY'S RESPONSES
TO PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS**

Defendant Peerless Indemnity Insurance Company hereby responds to Plaintiffs' First Request for Production of Documents as follows:

REQUEST FOR PRODUCTION NO. 1: All documents referring and/or pertaining to the November 10, 2009 collision that is the subject of State of New Mexico Uniform Crash Report 0710039204 (attached hereto). This request includes, but is not limited to, reports, memoranda, investigations, notes, statements, interviews, transcripts, summaries, papers, electronic files, photographs, video recordings, audio recordings, diagrams, and graphics.

RESPONSE:

Defendant produces the claim file for this matter, Bates No. PICC 00001 - 000187. Certain work product is being withheld pursuant to Rule 1-026 NMRA. A privilege log is produced.



REQUEST FOR PRODUCTION NO. 2: All insurance applications and/or disclosures submitted by and/or on behalf of Defendant Storefront Specialties and Glazing, LLC (“Storefront”) (including supporting documents and other enclosures).

RESPONSE:

Any responsive documents would be included in the claim file, see response to Request For Production No. 1.

REQUEST FOR PRODUCTION NO. 3: All documents constituting reports, disclosures, and/or notifications by Storefront to Peerless and/or its brokers and agents (including supporting documents and other enclosures) regarding the collision that is the subject of the attached report.

RESPONSE:

Any responsive documents would be included in the claim file, see response to Request For Production No. 1.

REQUEST FOR PRODUCTION NO. 4: All documents constituting reports, disclosures, and/or notifications by Storefront to Peerless and/or its brokers and agents (including supporting documents and other enclosures) regarding collisions, citations, and/or traffic warnings involving Storefront drivers and/or vehicles.

RESPONSE:

Defendant objects to this Request because it is not limited in time and scope and it is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR PRODUCTION NO. 5: All documents referring to, pertaining to, and/or constituting Defendant Lynch’s driving record, including but not limited to, citations, warnings, computer printouts, and reports.

RESPONSE:

Defendant has no documents responsive to this request.

REQUEST FOR PRODUCTION NO. 6: All documents referring to, pertaining to, and/or constituting Defendant Lynch's criminal record, if any.

RESPONSE:

Defendant has no documents responsive to this request.

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By: 
Gina T. Constant
Seth L. Sparks
P.O. Box 1888
Albuquerque, NM 87103
(505) 765-5900

Defendant's Privilege Log
117711

BATES NOS.	DATE	DESCRIPTION	BASIS OF OBJECTION
PLIC 00027	11/10/2009	Work product screen Print of claim containing adjuster Amanda Myers' handwritten notes and impressions prepared in anticipation of litigation.	Work Product Doctrine
PLIC 00186-00187	3/2/2010	Work product email correspondence between adjusters Amanda Myers and Rebecca MacIntyre regarding this claim and prepared in anticipation of litigation.	Work Product Doctrine
PLIC 00182-00183	3/3/2010	Internal work product document containing adjusters' notes and impressions prepared in anticipation of litigation.	Work Product Doctrine

Gregg Vance Fallick <GVF@FallickLaw.com>
To: Gina Constant <GConstant@rodey.com>
Cc: Seth Sparks <SSparks@rodey.com>, Erica Segovia <ESegovia@rodey.com>

February 8, 2012 2:39 PM

Re: Simon A. Lees, et al. v. Storefront Specialties and Glazing, LLC, et al.

Message:

Thank you for the response. -- Gregg

Gregg Vance Fallick
FallickLaw, LTD.
Suite 205
Gold Avenue Lofts
100 Gold Avenue, SW
Albuquerque, New Mexico 87102
(505) 842-6000 (Telephone)
(505) 842-6001 (Facsimile)
GVF@FallickLaw.com

On Feb 8, 2012, at 2:31 PM, Gina Constant wrote:

I believe we have produced the recorded interviews of Jeff Lynch, one by Amanda Myers and one by Team One's investigator. Team One's investigator was unable to locate the audio recordings for Lt. O'Connell and Ms. March-Thomas. Rebecca Macintyre reviewed Colorado Casualty's file and says that it does not appear that any tapes were sent to them by Team One, so she does not have any. Therefore, we will be producing nothing further with respect to audio recordings.

Thank you,
Gina

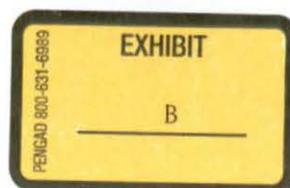
From: Gregg Vance Fallick [mailto:GVF@FallickLaw.com]
Sent: Wednesday, January 25, 2012 12:52 PM
To: Gina Constant
Cc: Seth Sparks
Subject: Re: Simon A. Lees, et al. v. Storefront Specialties and Glazing, LLC, et al.

Message:

Gina --

I find your response surprising, for at least three reasons. First, I don't understand your basis for contending that your investigator is not within your clients' custody and control, simply because his recordings "are not in the possession of defendants' insurer." Second, I don't understand why you do not think there is any urgency to producing discovery that is nearly three months overdue under the applicable Rules. (I suspect you have filed motions to compel discovery that was less overdue than that.) And third, I do not understand how you can think verbatim recordings of witness statements are not relevant, simply because you produced your investigator's summaries. (BTW, I learned a lot more from the audio recording of Mr. Lynch than I did from your investigator's summary. The verbatim recording was particularly important in this case, since your client denied the accuracy of statements contained in your investigator's report but I doubt he will deny the authenticity of the recording.)

Seth, do you agree with Gina's thinking? I would be far more surprised if that were true.



I likewise am working under various big deadlines in other cases. Nevertheless, if I have not received the recorded statements by February 10, 2012, plaintiffs promptly will file a motion to compel. If the statements are not produced by that date, please let me know if you will consent to an order compelling the overdue discovery.

Thank you. -- Gregg

Gregg Vance Fallick
FallickLaw, LTD.
Suite 205
Gold Avenue Lofts
100 Gold Avenue, SW
Albuquerque, New Mexico 87102
(505) 842-6000 (Telephone)
(505) 842-6001 (Facsimile)
GVF@FallickLaw.com

On Jan 25, 2012, at 11:38 AM, Gina Constant wrote:

Gregg: We have a big motions deadline Monday in another case and so I will not work on this issue until next week. But I will say that at least some of this material was not in the possession of defendants' insurer and so are arguably outside the scope of your discovery request. Yet, Erica has been diligently trying to track down these recordings that we have no reason to believe are even relevant given the summaries and transcripts that have been produced. Plus, we don't even have a scheduling order yet, so how has your client been prejudiced? We are trying to be sensitive to your sense of urgency, but honestly, I don't share it.

Gina

ps - I'm not sure what the 3 attachments to your email were about?

From: Gregg Vance Fallick [mailto:GVF@FallickLaw.com]
Sent: Monday, January 23, 2012 6:38 PM
To: Gina Constant; Seth Sparks
Cc: Erica Segovia; Sally Montoya
Subject: Re: Simon A. Lees, et al. v. Storefront Specialties and Glazing, LLC, et al.

Message:

Gina and Seth --

I am writing to follow-up again on paragraphs 1, 3 and 4 of my January 3rd e-mail, below. (I did receive a January 12, 2012 letter from Erica with your investigator's March 10, 2010 recorded interview of Mr. Lynch, which resolves paragraph 2. Thank you.)

My clients have a right to this discovery, and I do not think it is fair to expect them to wait very much longer for your clients to produce it voluntarily. Again, plaintiffs did serve the formal discovery requests for these items on October 3rd of last year; that is, nearly four months ago. I also began following-up on the defendants' failure to produce these recordings on November 9th of last year. (See below.) If your investigator did record the interviews of Lt. O'Connell and Ms. March-Thomas as his report states, and if he did preserve the recordings as required, I do not understand why those recordings were not produced along with your investigator's recording of Mr. Lynch.

I would appreciate it if you would provide me with the information I requested in paragraphs 1, 3 and 4 by the end of the week. And assuming the recordings do exist, I would appreciate receiving copies by the end of next week, at the latest.

Thank you. -- Gregg

Gregg Vance Fallick

FallickLaw, LTD.
Suite 205
Gold Avenue Lofts
100 Gold Avenue, SW
Albuquerque, New Mexico 87102
(505) 842-6000 (Telephone)
(505) 842-6001 (Facsimile)
GVF@FallickLaw.com

On Jan 3, 2012, at 12:01 PM, Gregg Vance Fallick wrote:

Message:

Gina and Seth --

Happy New Year. I hope you all had a nice holiday.

I am writing to follow-up on this e-mail string. Would you please let me know the following?

1. Whether your investigator's report is accurate insofar as it states that his interviews of Lt. Shawn O'Connell and Suzanne March-Thomas were recorded.
2. Whether your investigator's report is accurate insofar as it states that (in addition to Ms. Myers' recorded interview of Mr. Lynch) he conducted a recorded interview of Mr. Lynch.
3. Assuming the report is accurate as referenced in paragraphs 1 and 2 above, whether your investigator preserved the recordings.
4. Assuming the statements were recorded and the recordings were preserved, when I should expect to receive the recordings. (Please note that we asked for these recordings in the discovery requests served on October 3, 2011.)

Thank you. -- Gregg

Gregg Vance Fallick
FallickLaw, LTD.
Suite 205
Gold Avenue Lofts
100 Gold Avenue, SW
Albuquerque, New Mexico 87102
(505) 842-6000 (Telephone)
(505) 842-6001 (Facsimile)
GVF@FallickLaw.com

On Nov 18, 2011, at 4:26 PM, Erica Segovia wrote:

Dear Mr. Fallick,

We have been in contact with TeamOne about whether any audiotapes exist. We will contact you as soon as we hear back from them.

Thank you.



Erica M. Segovia, Paralegal

esegovia@rodey.com
(505) 768-7326

201 Third Street NW, Suite 2200
Albuquerque, New Mexico 87102
fax: 505.768.7395

Rodey, Dickason, Sloan, Akin & Robb, P.A.
www.rodey.com

This message is confidential and may be protected by the attorney-client privilege. If you believe that it has been sent to you in error, please reply to the sender that you received the message in error and then delete it. Thank you.

From: Gina Constant
Sent: Wednesday, November 09, 2011 6:59 PM
To: Gregg Vance Fallick
Cc: Seth Sparks; Sally Montoya; Gina Constant; Erica Segovia
Subject: RE: Simon A. Lees, et al. v. Storefront Specialties and Glazing, LLC, et al.

We do not have any recordings and I doubt Colorado Casualty has them. We will check with Team One who did the investigation and see if they have the recordings. Erica, can you call them tomorrow and let us know what you find?

Thanks,
Gina

From: Gregg Vance Fallick [mailto:GVF@FallickLaw.com]
Sent: Wednesday, November 09, 2011 5:49 PM
To: Gina Constant
Cc: Seth Sparks; Sally Montoya
Subject: Re: Simon A. Lees, et al. v. Storefront Specialties and Glazing, LLC, et al.
Importance: High

Message:

Gina -- I have done an initial review of the discovery you provided, and I noticed that there are references to a number of recorded statements, including summaries of those statements and a transcript of Mr. Lynch's statement. But none of the audio recordings were produced. I would appreciate it if you would provide me with the audio recording of Mr. Lynch's statement right away. I would like the chance to check the accuracy of the transcript in advance of Mr. Lynch's deposition, and I also to attempt to make out the audio on portions of the interview that are referenced in the transcript as inaudible. I likewise would appreciate receiving copies of the audio recordings of the other statements referenced in the discovery (including the statements of Lt. O'Connell and Ms. March-Thomas). Thank you. -- Gregg

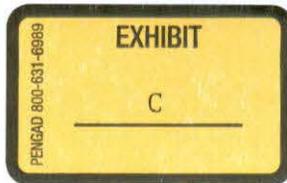
Gregg Vance Fallick
FallickLaw, LTD.
Suite 205
Gold Avenue Lofts
100 Gold Avenue, SW
Albuquerque, New Mexico 87102
(505) 842-6000 (Telephone)
(505) 842-6001 (Facsimile)
GVF@FallickLaw.com



Corporate Office
 8701 John Carpenter Freeway, Suite 140, Dallas Texas 7
 Toll Free No. 800.918.3498
 Toll Free Fax No. 800.794.3534

Recorded Statement Summary	Co. Claim No. 603841840
	Policy No. CBP1079728

Recorded: <input checked="" type="checkbox"/> In Person <input type="checkbox"/> By Telephone	Date Taken: 03/10/2010	Team One File No. 36524L
Adjuster: Thomas M. Brown	Insured: Storefront Specialties and Glazing, Inc.	
Person Interviewed: Lt. Shawn O'Connell	Driver's License Number:	
Social Security Number:		
<input type="checkbox"/> Insured <input checked="" type="checkbox"/> Witness <input type="checkbox"/> Claimant <input type="checkbox"/> Other	Home Phone Number: 505 761-8800	
Date of Birth:	Age: 36 yrs old	
<input checked="" type="checkbox"/> Married <input type="checkbox"/> Single <input type="checkbox"/> Widowed <input type="checkbox"/> Divorced		
Street Address: Albuquerque Police Department Sub-Station		
City: Albuquerque	State: NM	Zip: 87113
Spouse's Name: N/A		
Street Address: N/A		
City: N/A State: N/A Zip: N/A		
Dependents: Names & Ages: N/A		
Occupation: Police Officer	Employer: Albuquerque Police Department	
Person Interviewed Wages:	<input type="checkbox"/> Yearly <input checked="" type="checkbox"/> Monthly <input type="checkbox"/> Weekly	
Injured: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Treated: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
Dr/Hospital: Not Applicable		
Describe Injuries: Not Applicable		
Where was the person interviewed located at the time of the accident? Driving the police cruiser on Montano Rd. NW		
Attitude of person interviewed: Cooperative? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No Disinterested: <input type="checkbox"/> Yes <input type="checkbox"/> No		
Favorable: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		
Name, address & phone of someone who will know whereabouts of person interviewed: Albuquerque Police Department		
Were seat belts used: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Not Available		
Insured's Liability: <input type="checkbox"/> Clear <input type="checkbox"/> Probable <input checked="" type="checkbox"/> Doubtful <input type="checkbox"/> None		
Witnesses: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Undetermined		
(1) Names: Suzanne March-Thomas		
Address: 5500 Baer Place NW Phone: 505 853-0110		
(2) Names: Veronica Montoya		
Address: 10324 Country Manor Pl. Phone: 505 890-4773		
Accident: Date: 11/10/2009 Time: 07:19 A.M.		



PIIC 00010

Location: Montano Rd. NW nd Oxnard Drive
Police Investigation?: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
Charges?: <input type="checkbox"/> Insured <input type="checkbox"/> Claimant <input checked="" type="checkbox"/> Other
<i>If "Other" – Explain:</i> Not Applicable
Written Summary: I set a meeting time with Officer Lt. Shawn O'Connell of the Albuquerque, NM. police department. Lt. O'Connell had me meet him at the Valley Substation in order to conduct the interview. At the interview, I asked Officer O'Connell if I had his permission to record his statement? Officer O'Connell gave me his premission. I asked Officer O'Connell what the circumstances were regarding him witnessing the accident. Officer O'Connell indicated that he was sitting in traffic that was stopped at the intersection of Montano Rd. NW and Oxnard Drive. He indicated that the intersection was clear to allow cross traffic on Montano RD. NW to enter onto Oxnard Drive. As he was sitting in the car he noticed a bicyclist coming down the hill on Montano Rd. NW. He indicated that the bicyclist was travelling at a high rate of speed with his head down. The Officer stated that he made a mental note that this situation was an accident waiting to happen. Less than a minute or two later he heard the crash. The officer got out of his police cruiser and went over to the accident scene. He said the bicyclist was on the ground and was onconscious. He took contraol of the scene until the officers who were dispatched from the Valley Substation arrived on the scene. While he was tending to the accident scene he had the driver of the truck, Jeff Lynch stay by his truck. There were three other witnessess that were also at the scene. Officer O'Connell took there names and addresses and gave that information to the investigating officers. Officer O'Connell also indicated that this particular intersection has seen this type of accident on numerous occassions. Officer O'Connell turned the accident scene over to the investigating officers and departed the scene.
See Diagram Attached: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
Violations: None Issued

Respectfully Submitted

Thomas M. Brown

Team One Adjusting Services, LLC



Corporate Office
 8701 John Carpenter Freeway, Suite 140, Dallas Texas 7
 Toll Free No. 800.918.3498
 Toll Free Fax No. 800.794.3534

Recorded Statement Summary	Co. Claim No. 603841840
	Policy No. CBP1079728

Recorded: <input type="checkbox"/> In Person <input checked="" type="checkbox"/> By Telephone	Date Taken: 03/10/2010	Team One File No. 36524L
Adjuster: Thomas M. Brown	Insured: Storefront Specialties and Glazing, Inc.	
Person Interviewed: Suzanne March-Thomas	Driver's License Number: N/A	
Social Security Number: N/A		
<input type="checkbox"/> Insured <input checked="" type="checkbox"/> Witness <input type="checkbox"/> Claimant <input type="checkbox"/> Other	Home Phone Number: 505 853-0110	
Date of Birth: N/A Age: N/A		
<input checked="" type="checkbox"/> Married <input type="checkbox"/> Single <input type="checkbox"/> Widowed <input type="checkbox"/> Divorced		
Street Address: N/A		
City: Albuquerque	State: NM	Zip: 87113
Spouse's Name: N/A		
Street Address: N/A		
City: N/A	State: N/A	Zip: N/A
Dependents: Names & Ages:		
Occupation: N/A Employer: N/A		
Person Interviewed Wages: N/A <input type="checkbox"/> Yearly <input type="checkbox"/> Monthly <input type="checkbox"/> Weekly		
Injured: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No Treated: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		
Dr/Hospital: Not Applicable		
Describe Injuries: Not Applicable		
Where was the person interviewed located at the time of the accident? Sitting in traffic at the intersection of Montano Rd. NW and Oxnard Drive.		
Attitude of person interviewed: Cooperative? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No Disinterested: <input type="checkbox"/> Yes <input type="checkbox"/> No		
Favorable: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		
Name, address & phone of someone who will know whereabouts of person interviewed: Storefront Specialties and Glass, Inc.		
Were seat belts used: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Not Available		
Insured's Liability: <input type="checkbox"/> Clear <input type="checkbox"/> Probable <input checked="" type="checkbox"/> Doubtful <input type="checkbox"/> None		
Witnesses: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Undetermined		
(1). Names: Suzanne March-Thomas		
Address: 5500Baer Place NW Phone: 505 853-0110		
(2). Names: Veronica Montoya		
Address: 10324 Country Manor Pl. Phone: 505 890-4773		

Accident Date: 11/10/2009	Time: 07:19 A.M.
Location: Montano Rd. NW nd Oxnard Drive	
Police Investigation?: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	
Charges?: <input type="checkbox"/> Insured <input type="checkbox"/> Claimant <input checked="" type="checkbox"/> Other	
<i>If "Other" - Explain:</i> Not Applicable	
<p>Written Summary: I called the witness and left several messages asking Ms. Thomas to return my call. Ms. Thomas returned my call and agreed to discuss the accident with me on the telephone. I asked Ms. Thomas to explain the circumstances surrounding her involvement at the accident. Ms. Thomas indicated that she was stopped at the intersection of Montano Rd. NW and Oxnard Drive. Ms. Thomas said she was at the front of the waiting line of cars when the insured went through the intersection with his truck. She watched the truck go through the intersection and saw the bicyclist coming down the hill on Montano Rd. NW. Ms. Thomas indicated that the bicyclist was going very fast with his head down and did not even look at the intersection. She also indicated that the bicyclist had some kind of earphones in place and may have been listening to music. Ms. Thomas said that the bicyclist made no attempt to slow down or stop. Ms. Thomas said she exited her car and went over to the accident. She noted that the bicyclist was unconscious. The bicyclist started to come around and she told him to lay still and not move. She said there was another witness at the scene who ws also trying to help. Ms. Thomas said that she called 911 and told the dispatcher what had happened. She thought that she was the first to call in the accident. Ms. Thomas indicated that the truck driver acted in a very cautious and prudent manner when entering the intersection. She also indicated that the bicyclist was not paying any attention to the traffic or the road conditions. She said that he did not even look up when he went into the intersection. At his rate of speed, there was no way to stop or avoid the truck. Ms. Thomas indicated that if I needed any further information, to call her.</p>	
See Diagram Attached: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	
Violations: None Issued	

Respectfully Submitted

Thomas M. Brown

Team One Adjusting Services, LLC

Lynch's residence and proceed to interview and take the Insured's recorded statement. (1.2hrs.) Photographed the insured's truck in its current condition. Verified current license plate and vehicle registration. Photographed the insured next to the glass racks on the truck to determine the height of the racks and the potential visibility of the truck in the intersection. Reviewed the damage to the truck, impact location and driver seating in the truck cab. (.5hrs.)

DRIVE TIME- 1
MILES - 33

3/13/2010 10:10:47 AM	Thomas Brown	3/9/10 Called Veronica Montoya, one of the listed witnesses. L/M requesting a time to meet and take a recorded stmt. regarding the accident. (.1) 3/9/10 Called Sunanne March-Thomas, witness, and requested a time to meet and take her stmt. regarding the accident. (.1). 3/9/10 Called Lt. Shawn O'Connell, Albuquerque, NM Police Dept. L/M (.1). At approximately 9:15am., Officer O'Connell returned my call and we discussed the accident and scheduled an interview for 3/10/10 at 1:30pm. (.2)	0.5 HR
3/8/2010 5:07:49 PM	Thomas Brown	I received an email from the claimant's attorney, Gregg Fallick. Mr. Fallick provided the location for our meeting on Wednesday March 10, 2010. He also provided directions to the meeting location. I responded to Mr. Fallick confirming receipt of the location and directions. I reviewed the specific directions.	0.3 HR
3/4/2010 7:30:27 PM	Thomas Brown	I received an email from Mr. Fallick confirming a meeting time with the claimant, Simon Lees. The appointment is scheduled for 6:30pm March 10, 2010. There were several conditions attached to the meeting - the meeting will not last more than one hour; the bicycle, helmet and other related items may be photographed only. No destructive testing may be performed on the equipment. I emailed Mr. Fallick confirming the date and time of the appointment and accepting the conditions as outlined in his email.	0.4 HR
3/4/2010 4:41:25 PM	Thomas Brown	3:35pm Per Mr. Fallick's request, I have forwarded all my contact information to his office. Mr. Fallick is arranging a time and date to meet next week, with the claimant, to look at the bicycle, helmet and other related items from the accident.	0.2 HR
3/4/2010 3:45:47 PM	Thomas Brown	2:10pm I called Gregg Fallick, the claimant's attorney. We discussed setting a meeting time for next week to discuss the incident. Mr. Fallick indicated that he would make the claimant's bicycle, helmet, etc. available for inspection and for photographs. Mr. Fallick also indicated that he would have copies of the claimant's medical records (to date) for me.	0.6 HR
Mr. Fallick also indicated that he would not allow me to take a recorded statement from the claimant, Simon Lees. He indicated that he would allow a pre-trial deposition with the insured's legal council at a pre-set and agreed upon time.			
Mr. Fallick is contacting the claimant to set a time and meeting place to examine the accident related material. We have agreed to remain in contact via email, as this would be the most efficient method to coordinate our efforts. Mr. Fallick has agreed to send me dates and times that the claimant would be available.			
3/4/2010 3:32:53 PM	Thomas Brown	The claimant's attorney returned my telephone and left a message asking me to call him.	0.1 HR
3/4/2010 1:13:28 PM	Thomas Brown	12:05pm I called the claimant's attorney, Glenn Fallick, and left a message introducing myself and requesting a time to meet to discuss the incident and to obtain a recorded statement from the claimant Simon A. Lees. I left a message on Mr. Fallick's answering machine with my telephone number and requested a return telephone call.	0.2 HR
3/4/2010 1:10:27 PM	Thomas Brown	I received all the documentation from Rebecca Macintyre regarding the incident. I reviewed all the documentation including the Police Report, accident scene diagram, witness list, etc.	0.5 HR
3/4/2010 1:02:55 PM	Thomas Brown	I received a call from Rebecca Macintyre at Colorado Casualty. We discussed the claim and Ms. Macintyre expanded the scope and instructions pertaining to the claim. Ms. Macintyre indicated that she was going to forward documentation to me for my review. This included the Police Report from the date of the incident and a list of witnesses to be interviewed, including an off-duty policeman who witnesses the incident. Ms. Macintyre indicated that she was going to send me correspondence from the Claimant's attorney, Glenn Vance Fallick. She requested that I contact the claimant's attorney and request a time to take a statement from the claimant. She further detailed the types of information that was to be obtained, such as; current family members, status of a wrist injury, not yet related to this claim, work status, medical treatments etc. Ms. Macintyre also requested site photos, photos of the claimant's bicycle and helmet and the insured's truck.	0.4 HR

Ms. Macintyre confirmed that she wanted digitally recorded statements from all the parties including the claimant and witnesses. Ms. Macintyre also indicated that one witness, a Rosanna Gallegos, had already been interviewed.

I indicated to Ms. Macintyre that I would contact all the parties, including Mr. Fallick, today and schedule the necessary appointments for next week (3/8- 3/12).