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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

Natron Corporation, a
Michigan corporation

Case No. 94-421-075 CK
Hon. Pamela R. Harwood

v

General Motors Corporation, a
Delaware corporation.

Opinion Granting Defendant's Motion in Limine No. 12 and Defendant's Motion to
Dismiss First Amended Complaint and Denying Plaintiff's Motion In Limine

Before the court are defendant's motions which challenge the viability of plaintiff's remaining claims.¹ The motions are titled:

1. motion in limine no. 12 to exclude time sheets and all testimony, evidence, and relief based on the time sheets; and
2. motion to dismiss first amended complaint based on plaintiff's willful disobedience of the court's orders and/or plaintiff's fraud on the court.

This opinion also addresses plaintiff's motion in limine regarding the admissibility of ink dating opinion testimony.

The court conducted an evidentiary hearing in order to make findings of fact necessary to the resolution of the issues raised in the motions.

The court finds that plaintiff intentionally altered relevant and significant evidence pertaining to its claim for research and development costs and other related damages after it was ordered to be produced. This act, along with plaintiff's continuing failure to produce the unaltered version of this evidence requires dismissal of the case. Secondly, the court finds that the time sheets offered by plaintiff in support of its

¹ The court has heard extensive motions for summary disposition and previously dismissed plaintiff's claims for breach of contract, promissory estoppel, and unjust enrichment. In addition, parts of plaintiff's claim for misrepresentation were dismissed. The court allowed plaintiff to file a motion for leave to file a second amended complaint adding a claim for breach of an express oral agreement. Defendant has moved to dismiss that claim as well as the remaining fraud and misrepresentation claim. Plaintiff also has a claim for obsolescence.

damage claim are not authentic as required by MRE 901 and excludes them as evidence. Lastly, the court denies plaintiff's motion to exclude the ink dating opinion testimony.

Plaintiff designed, manufactured and supplied a part to defendant for model years 1992 ½, 1993 and 1994; specifically a sensor for defendant's suspension system. In January 1993, defendant notified plaintiff that it would not order any additional sensors after model year 1994.² Defendant paid plaintiff over \$15 million dollars for the development of the prototype, tooling and a price per piece for those parts manufactured and delivered to defendant. Approximately 606,146 sensors were delivered to defendant and 21,898 remain in inventory. Plaintiff claims that defendant verbally agreed to pay it a reasonable price per unit and that the formula for calculating that amount includes the wages, fringe benefits and other expenses paid to develop the product. These expenses are referred to as research and development ("R&D") costs.³ Plaintiff seeks to prove its R&D costs through the admission of time sheets, or summaries of the time sheets, allegedly filled out by employees to reflect time spent on the project. Additionally, plaintiff also offers the expert opinion of accountants Cummins and Faber, P.C. and Correll Porvin Associates, P.C. as to the amount of R&D costs. Their opinion is based in part on these time sheets.

The sequence of production in this case began with plaintiff making original time sheets available for inspection by defendant's experts in June 1995. In September 1995, plaintiff's expert produced a report in which they rendered a cursory opinion on

² The court set forth an extensive statement of facts in its written opinion of April 23, 1998 and will not repeat them here.

³ Plaintiff's Supplemental Answers to Interrogatories, dated June 14, 1995: "Gross research and development costs consist of salaries, fringe benefits and reimbursements paid to engineering personnel, and reimbursements and expenses...paid to selling and administrative personnel who performed a product development support function during the relevant period. Amounts included for salaries are based, wherever possible, upon actual time records maintained contemporaneously by employees."

the reasonable price for the sensor based in part on the time sheets.⁴ Since the time sheets relied on were not specifically identified (for example, by date or employee or department), defendant requested the production of copies in October 1995. Defendant points out that some of the original time sheets already reviewed conflicted with copies subsequently produced. Because of this, the court ordered plaintiff to produce the original time sheets, some of which defendant had date tested by two (2) ink dating experts, Erich Speckin and Richard Brunelle. Both expressed the opinion that some of the time sheets were not created contemporaneously but were created after the lawsuit was filed and were back dated to appear as though they had been prepared contemporaneously by an employee of plaintiff.

Plaintiff has challenged the admissibility of this testimony under MRE 702.⁵ Plaintiff argues that ink dating is novel scientific evidence which is not admissible under the Davis-Frye rule.⁶ The court disagrees. Defendant laid a proper foundation for the testimony regarding dating Bic black ink by a method referred to as "reverse extraction." For this reason, plaintiff's motion in limine is denied.

During discovery, plaintiff failed to disclose in answers to interrogatories the existence of a database software program into which secretaries entered information from the time sheets for the prior week. These entries were done for 5 years and the system was in use at the time the lawsuit was filed. Defendant learned from employees of plaintiff during their depositions of the existence of this software program that was created in order to track time spent on this and other projects by its employees.

The software database program was called FoxPro. The program was designed to be part of plaintiff's cost accounting system. Basically, a data entry clerk would enter

⁴ "As part of this evaluation, we have preliminarily identified the resources expended by Nartron Corporation necessary to produce the product. This included both a review of unit expenditures in hours in the labor force of Nartron as well as an expenditure of actual dollars for various activities." p 2.

⁵ MRE 702 states: If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

⁶ People v Davis, 343 Mich 348 (1955).

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information from the weekly time sheets created by plaintiff's employees, such as engineers and toolmakers, in order to track the amount of time being spent on a project and the amount of time worked by employee. Specific fields were created to enable the entry clerk to enter the data sequentially. In other words, data had to be entered in each column or field to trigger access to the next field. Beginning with entry of the employee's identification number, the next field with the employee's name would appear making it possible for the clerk to enter the project number and task number which then automatically triggered a narrative description of the project to appear in the next field. Next, the clerk entered the number of hours spent by that employee on that project and task. After entry, the cursor moved down to the next line for entry of the next project and task number.

Plaintiff has two (2) departments in this database: "APD" which stands for Advanced Product Development which is where new products were designed and developed and "MFE" which stands for Manufacturing Engineering. Each department had its own computer with the FoxPro program installed in order to enter data from the time sheets. The system was used between 1990 and 1995.

Plaintiff was ordered to produce data from the FoxPro program on February 2, 1996. First it produced a printout and then a WordPro printout (2/15/96) which were sorted or formatted in such a way so that the information could not be compared to the time sheets. On March 12, 1996, plaintiff was ordered to produce the diskettes. When the existence of a backup tape, similar to a VCR tape, was made known in the deposition of John Washeleski on May 28, 1995, efforts to secure it culminated in an order to produce entered August 14, 1996. Plaintiff produced a copy of the backup tape on August 29, 1996. This purported to be a copy of the original backup tape containing the operating system and 5 years worth of data from the time sheets. However, the data in the middle fields of the APD file identifying the customer by a narrative description had been deleted which made it impossible to compare the data to the time sheets. The list of project numbers, customers and project descriptions had been deleted from the MFE section which rendered the MFE section non-functional. The index files show that the last modification was made to the data on August 22,

1996, 8 days after the order to produce was entered and 7 days before production this copy.

On March 8, 1999, the court again ordered plaintiff to produce the previously subpoenaed original backup tape. On March 15, 1999, plaintiff's counsel produced the tape in court. The court ordered that it be examined by a court-appointed expert who on June 7, 1999 opined that the tape produced in court was just another copy of the corrupted tape which had been produced in August, 1996 and in fact, this purported original had been created 7 minutes after the copy previously produced had been made. *Plaintiff has never produced the original tape.*

Plaintiff called no witness to refute the testimony of defendant's computer expert Peter Prychodko. Plaintiff's bare assertion that the data was lost as a result of a "crash" is not supported by evidence. The court finds that the deletion of data from these middle fields is evidence of the intentional nature of plaintiff's destructive acts.

The only persons having physical control of the documents and computer software were Norm Ratiola, President and John Washeleski who headed the APD section for most of the time the sensor was under development. Mr. Washeleski designed the database and was the person who maintained the original backup tape in his desk drawer. He supplied plaintiff's counsel with the tapes to be produced and he did not appear at the hearing. The self-serving affidavits presented contradicting his deposition testimony are not relied upon by the court.⁷

⁷ On March 8, 1999, then counsel for plaintiff, Stephen Afendoulis represented to the court that Mr. Washeleski was telling him that the original was given to him with the copy that he forwarded to defendant and that his firm was unable to find the original. The court suggested that contempt proceedings may be necessary if plaintiff continued to fail to comply with the court's order to produce the tape. When the issue was next addressed on March 15, 1999, Mr. Thomas Heiden, also then co-counsel stated: "On August 23, 1996, which is a couple of days before the tape that the defendant put in evidence in the hearing last week or the week before was sent to the defendant, Mr. Afendoulis got a letter from John Washeleski which says pursuant to your request of August 15 regarding discovery order for a copy of the FoxPro tape, enclosed is a copy of subject matter. We have retained the original tape in our files." Both Mr. Afendoulis and Mr. Heiden withdrew as counsel. Mr. Schwartz filed an appearance and the court requested that he file a brief on the issue of an appropriate sanction after he had an opportunity to review the transferred files. Mr. Schwartz did file a brief on this issue. He has subsequently moved to withdraw and the court is holding that motion in abeyance pending the issuance of this opinion.

Plaintiff offers the opinion of Maureen Fisher who as a CPA has an opinion on plaintiff's research and development costs based on her own database which was created from some time sheets and Mr. Washeleski's opinion as to the time spent by employees on this project. Of course no new database was necessary. The original FoxPro database could easily and quickly sort the hours of both APD and MFE employees on this project and it could have done it on August 22, 1996 when corrupted copies were being made of the data.

The court also notes that other possible corroborative documentary evidence related to this claim including budgets, engineering logs and tracking reports testified to by Mr. Washeleski and Marlin Fry, plaintiff's vice-president of sales, were not produced during discovery nor were they offered in response to these motions. The court also finds that plaintiff has not offered a reasonable explanation for the discrepancies between the original time sheets, the copies and the data in the program that were produced which would meet the requirements of authenticity as required by MRE 901(a).⁸ Plaintiff admits that the time sheets are disorganized and incomplete and seeks as a solution, the introduction of summaries. Creating other forms of the same inaccurate data does not correct the problem of the time sheets not being what plaintiff claims them to be—accurate and contemporaneous recordation of time spent on the project. For this reason, the court excludes the time sheets from evidence based on MRE 901.⁹

In its response, plaintiff does list all of the productions it made as evidence of its efforts to do everything to comply with discovery when what the list shows is how plaintiff tried to balance producing enough information to create a triable issue of fact by creating its own evidence while destroying that made during the business arrangement of the parties. Plaintiff's intentional obfuscation and finally, fabrication of the time

⁸ MRE 901(a) states: The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

⁹ The ink dating evidence admitted by the court supports the ruling to exclude the time sheets. However, even if the ink dating evidence is excluded, the lack of an adequate explanation regarding the discrepancies would still cause the court to exclude the time sheets based on MRE 901.

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sheets and alteration and deletion of data from the database makes the evidentiary record of this case devoid of credibility.

Defendant has filed a motion to dismiss plaintiff's first amended complaint based on plaintiff's willful disobedience of the court's orders and/or plaintiff's fraud on the court based on the actions of plaintiff. There is no question that the court has the authority to sanction a party, including dismissal of the action, for failing to comply with discovery requests and orders. MCR 2.504(B)(1) states:

Under MCR 2.313(B)(2), the court may sanction a party who "fails to obey an order to provide or permit discovery...." Those sanctions include:

"(a) an order that the matters regarding which the order was entered or other designated facts may be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(b) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters into evidence;

(c) an order striking pleadings or part of pleadings, staying further proceedings until the order is obeyed, dismissing the action or proceeding or a party of it, or rendering a judgment by default against the disobedient party."

In addition, a court has inherent authority to sanction for misconduct during discovery. Brenner v Kolk, 226 Mich. App. 149-161 (1998); Dean v Tucker, 182 Mich. App. 27, 32 (1990). The following factors have been identified for the court's deliberation in determining the appropriate sanction:

- 1) whether the violation was willful or accidental,
- 2) the party's history of refusing to comply with discovery requests,
- 3) the prejudice to the defendant,
- 4) actual notice to the defendant or the witness and the length of time prior to trial that the defendant received such actual notice,
- 5) whether there exists a history of plaintiff engaging in deliberate delay,

- 6) the degree of compliance by the plaintiff with other provisions of the court's order,
- 7) an attempt by the plaintiff to timely cure the defect, and
- 8) whether a lesser sanction would better serve the interests of justice.

Dean, supra 32-33; Bass v Combs, 238 Mich App 16, 26 (1999); Vicencio v Ramirez, 211 Mich App 501, 507 (1995);

The court reiterates its finding that plaintiff's actions in deleting the database were intentional. These acts distinguish this case from the line of cases where plaintiff negligently or inadvertently destroyed evidence and the court was able to identify other sanctions appropriate to the circumstances. For example, in Brenner, supra, plaintiff allowed the car in which she was a passenger at the time of a collision to be destroyed prior to suit. She saved a portion of the seatbelt that allegedly malfunctioned but did not save all of the seatbelt and did not preserve tires she claimed were bald. The Court of Appeals remanded for consideration of an appropriate sanction less than dismissal. In MASB-SEG v Metalux, 231 Mich 393 (1998), plaintiff alleged that a fire was caused by a defective light made by defendant. Plaintiff's experts examined the scene of fire and preserved the fixture but not any other physical evidence. Defendant's experts did not get to examine the scene so the court limited the scope of plaintiff's experts testimony. Similarly, in Hamann v Ridge Tool, 213 Mich App 252 (1995), plaintiff's expert lost pieces of a broken cable hoist handle upon which he relied in his opinion. The Court of Appeals held that the trial court should have limited the scope of the testimony. Again, these cases are distinguishable because the conduct was negligent or inadvertent and the trial court could order a sanction that eliminated the prejudice to defendant.

Secondly, plaintiff's failure to comply with discovery requests, subpoenas and court orders was chronic and continuous throughout the case. In this regard, plaintiff's actions are analogous to those sanctioned by dismissal in a number of cases. For example, in Bass, supra and Zantop v Eastern, 200 Mich App 344 (1993) plaintiffs' cases were dismissed for failure to comply with court ordered discovery. In Bass, plaintiff failed to satisfactorily answer interrogatories for 15 months although ordered to

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do so by the court. In Zantop, the court dismissed the case even though it held that most of the misconduct could be remedied because it found that plaintiff obviously could not be deterred from continuing its misconduct.

In Welch v Thompson, 187 Mich App 49 (1991) plaintiff sued his former employer. The defendant requested production of tax returns and the plaintiff refused even though the court ordered production twice, the second time assessing \$1000 in fines and giving the plaintiff 7 days to comply. The Court of Appeals upheld dismissal, holding, "the trial court did not abuse its discretion in dismissing plaintiff's case where defendant's attempts to discover information vital to a proper defense of the case were frustrated, where the noncompliance was not inadvertent, and where the imposition of alternate sanctions would not have deterred plaintiff from continuing his dilatory course of conduct."

In Bellok v Kohts, 163 Mich App 780 (1987) the Court of Appeals upheld dismissal because, "obstruction of discovery was not limited to a single instance, but rather plaintiff's lengthy, protracted delays and denials of discovery consumed the duration of this litigation." p 783 In the case, the plaintiffs frustrated discovery and failed to timely comply with at least 2 discovery orders. The trial court did not impose sanctions prior to dismissing the case, but more than once warned plaintiffs that it would dismiss the case if plaintiffs continued to violate orders.

Plaintiff cites several cases in support of his argument that dismissal is an inappropriate sanction. However, all of them are inapposite because the misconduct is not analogous to this case. Plaintiff relies primarily on MacArthur Patton v Farm Bureau, 403 Mich App 474 (1978) in which the plaintiff failed to attend two depositions and the subsequent motion. The judge granted the motion to dismiss. On appeal the Court of Appeals reversed and held,

"The authority of the circuit judge to take the most drastic step of dismissal of plaintiff's complaint with prejudice is clear. However, we believe that such measures should be exercised cautiously. This is not a case where the failure to respond to discovery requests extends over substantial periods. Nor is it a case in which the failure to provide discovery is in violation of a direct order of the trial court. In this case, in view of the relatively short time that elapsed between the failure to appear

and the motion to dismiss, and the ambiguous showing of wilfulness on the part of the plaintiff's agent, we conclude that the trial judge should have chosen less drastic measures to compel discovery." p 477

Such was not the case here. Plaintiff was ordered numerous times to produce Fox Pro information by order and by direction from the bench over a "substantial period." Plaintiff has made no attempt to comply with the orders to produce the original tape even after it has been given additional time necessitated by the substitution of counsel who was invited to, and did, file a supplemental brief on the issue. As previously mentioned, the original backup tape has never been produced.

Next, the absence of this database prevents defendant from meaningful cross-examination of plaintiff's estimates of time spent on the project. And lastly, as to the factor identified as the "interests of justice," courts have been reluctant to penalize parties for inadvertent or negligent acts which result in the destruction of evidence especially when the acts occurred prior to suit or without an order of the court. In this case, noting that the modification to the database occurred on August 22, 1996, it appears that the destruction was done in response to an order to produce entered August 14, 1996. In short, there is no reason to believe that plaintiff will ever produce an intact version of the database. Under these circumstances, allowing the case to proceed rewards the wrongdoer, punishes defendant and makes a mockery of the discovery process and orders of the court.

It is for these reasons that the court holds that dismissal of plaintiff's remaining claims is the appropriate sanction. Simply assessing fines and costs would not significantly punish plaintiff, nor would it cure the prejudice to defendant or the damage done to the integrity of the case; nor would simply excluding the database evidence and allowing plaintiff to proceed with his time sheet summaries. Such a ruling would allow plaintiff to go before the trier of fact and avoid any evidentiary sanction for its actions. Further, the court holds that an adverse instruction directing the jury to construe the missing database evidence adverse to plaintiff would be an inadequate remedy. The database evidence was not cumulative; it was the best evidence of the time sheets given the undisputed current disarray of the time sheets. Its loss defeats defendant's

ability for effective cross examination of any other evidence of time spent on the project. Such prejudice can not be cured by an adverse instruction.

Limiting the sanction to the exclusion of the time sheets would allow plaintiff to proceed without any documentary restraint and presumably, the testimony of Mr. Washeleski regarding what he believes were the time requirements of the project would stand unrefuted. This result, if such testimony survived other evidentiary challenges would leave defendant without any effective means of challenging the testimony.


In conclusion, plaintiff's intentionally destroyed significant evidence after it was ordered to be produced. Plaintiff's efforts to conceal this evidence frustrated defendant's efforts to "discover information vital to a proper defense of the case"¹⁰ and there are no alternative sanctions which will cause plaintiff to comply with the court's prior orders. For these reasons, the court grants defendant's motion to dismiss.

Defendant shall present an order for entry at the hearing on Mr. Schwartz's motion to withdraw scheduled for Friday, January 5, 2001. A copy of this opinion must be attached to the order.

PAMELA R. HARWOOD

Judge Pamela R. Harwood

January 2, 2001

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WAYNE COUNTY CLERK
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¹⁰ Welch, supra.