THE HONORABLE RICHARD MCDERMOTT
Notice for Hearing: August 21, 2015
Moving Party

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

RAMON ANEL,

Plaintiff,

v.

FRANCISCAN MEDICAL GROUP, a Washington Corporation; FRANCISCAN HEALTH SYSTEM, a Washington Corporation; and CATHOLIC HEALTH INITIATIVES, a Colorado Corporation,

Defendants.

No. 14-2-10378-6 KNT

PLAINTIFF'S MOTION FOR SPOLIATION SANCTIONS AGAINST DEFENDANTS

ORAL ARGUMENT REQUESTED AT AUGUST 21, 2015 9:30 a.m. HEARING

THE BLANKENSHIP LAW FIRM, P.S.
1000 Second Avenue, Suite 3250
Seattle, Washington 98104
(206) 343-2700

I. RELIEF REQUESTED

Defendants committed clear spoliation by destroying critical electronic evidence, which would have established two elements of Dr. Anel's Malicious Prosecution claim by proving Defendants falsely accused him of sending harassing messages colleague Aman Gill. Defendants illegally fired Anel for protesting non-payment of wages, then targeted him when he opened a competing medical practice by falsely telling police he sent harassing messages to Dr. Gill. Defendants claimed someone sent the messages to Gill's pager on five occasions, using computers located in "physicians' lounges" at Defendants' hospitals. There are no cameras recording activities inside the lounges, but cameras record the entrance/exit to the lounges. Defendants falsely told police that videos from these cameras proved Anel was inside the lounges when every message was sent to Gill. Defendants also told police that on one occasion, Anel was the only person in a lounge when a message was sent from that lounge. The police forwarded Defendants' false claims about the videos to the Gig Harbor Prosecutor ("Prosecutor"), who filed a criminal charge of Cyberstalking against Dr. Anel.

It was not until June 2015 that Defendants finally and conclusively admitted they do **not** have videos showing Anel was in the lounges when all the messages were sent. Instead, Defendants produced seven videos (each a few seconds long) which show when Anel *entered* the lounges (typically long before messages were sent). The videos only show when he *left* a lounge on one occasion, and thus only show he was in the lounge when **one** message was sent. Defendants' lead investigator even testified that Defendants have no evidence Anel was in the room when the other messages were sent, and they never bothered to check video surveillance to see who else entered/exited the lounges around the times the messages were sent.

Now, Defendants admit they destroyed all the surveillance videos that could have shown when Anel left the lounges and that could have shown who else was in the lounges when messages were sent. When the Prosecutor learned that the existing videos do *not* prove Anel was in the lounges when all the messages were sent, he dismissed the criminal charge.

THE BLANKENSHIP LAW FIRM, P.S.
1000 Second Avenue, Suite 3250
Seattle, Washington 98104
(206) 343-2700

Defendants also destroyed electronic "badge swipe" data. The lounges could only be entered when someone swiped a "badge," which unlocked the door and made a time-stamped record of whose badge was swiped. Defendants destroyed the "badge" data that could have revealed who actually went into the lounges around the times messages were sent, while deliberately saving printouts that showed when Anel entered lounges in order to falsely implicate him while destroying evidence about alternate suspects.

The video and badge evidence is especially important, because it could have proven Defendants lied to police about Anel being in the lounges when the messages were sent and withheld the identity of other suspects. This would have proven two elements of a Malicious Prosecution claim: (1) there was no probable cause to believe Anel committed Cyberstalking, and (2) Defendants maliciously presented false and incomplete information to the police.[1] Thus, Anel suffered clear prejudice from the destruction of the videos.

Plus, Defendants have no excuse for destroying this evidence. Defendants' HR Director admits they knew this was important evidence for an ongoing police investigation, and admits she had a duty to preserve this evidence. Given the extreme prejudice to Dr. Anel, this Court should order that Defendants engaged in spoliation by destroying highly relevant evidence, which they had a duty to preserve. *See Henderson v. Tyrrell*, 80 Wn. App. 592, 609-10 (1996). To remedy the prejudice, this Court should at a minimum prohibit Defendants from discussing any destroyed evidence at trial, and give the jury a curative instruction stating that Defendants' spoliation corroborates Dr. Anel's case and discredits their case. *Id.* at 606.

II. FACTS

A. Defendants lied about the contents of video evidence to the Gig Harbor Police Department in order to get a false criminal charge filed against Dr. Anel

[1] *Bender v. Seattle*, 99 Wn.2d 582, 596-97 (1983) (failure to provide exculpatory evidence is proof of "lack of probable cause" element); *Youker v. Douglas County*, 162 Wn. App. 448, 464 (2011) ("malice" element proven when defendant provided falsified or misleading information in reckless disregard of the truth).

THE BLANKENSHIP LAW FIRM, P.S.
1000 Second Avenue, Suite 3250
Seattle, Washington 98104
(206) 343-2700

This Court has been repeatedly briefed on the facts underlying Dr. Anel's case against Defendants. Defendants fired Dr. Anel for protesting the illegal withholding of wages. When he opened up his own nephrology practice, Defendants tried to stop Dr. Anel from competing with them, sending false "evidence" to the Gig Harbor Police Department ("GHPD"), hoping to get Anel charged with a crime he didn't commit. *See Dkt. 88 at 16-33.*

On March 6, 2014, Gill told Dean Field (VP of FHS) he had received "disturbing" messages sent to his FHS-issued pager. *Exh. E.*[2] Field instructed HR to begin investigating the messages that day. *Id.* The next day, Gill informed Field and Defendants' investigators he had filed a complaint about the messages with the police.[3] *Id.* Gill ultimately claimed he received "harassing" messages on five occasions: twice on March 6, once on March 11, once on March 31, and once on April 2, 2014. *Exh. F.*

FHS' HR Director, Vickie Lackman, was placed in charge of Defendants' internal investigation. *Exh. B* (Lackman 103:3-9). Lackman testified that her investigation located "harassing" messages sent to Gill and his wife (an FHS employee) through FHS' internal paging system on four occasions: twice on March 6, once on March 11, and once on March 31—but that Defendants have no record any message was sent on April 2. *Exh. B* (Lackman 130:4-133:8; 200:24-204:16); *Exh. F.* Defendants claim they were able to determine that the March messages were sent from computers in two "physician's lounges" located in FHS hospitals: one in St. Joseph Medical Center ("SJMC") and one in St. Anthony Hospital ("SAH"). *Exh. G.* No video cameras record events inside the lounges, but video cameras record the doorways leading in/out of the lounges, and track the exact time people enter/exit the lounges. *Exh. A* (Franciscan 103:11-15); *Exh. B* (Lackman 49:13-15).

---

[2] All exhibits are attached to the Declaration of Paul Woods.

[3] Gill testified that he called the Tacoma Police at the insistence of FHS manager Marla Fredericks. *Exh. D* (Gill 294:23-297:12). He did not file a report and testified he did not want to even call police. *Id.* Instead, he just asked the police for a case number because Fredericks told him he *had to* do so. *Id.*; *Exh. H.*

THE BLANKENSHIP LAW FIRM, P.S.
1000 Second Avenue, Suite 3250
Seattle, Washington 98104
(206) 343-2700

On March 13, 2014 FHS investigator Craig Kennedy reviewed select video footage, which showed when Anel entered the lounges on March 6 and March 11, and showed when he **left** the lounge on March 11. *Exh. I.* Kennedy did not gather these videos himself; rather, FHS employee Steve Powers only pulled the video footage that FHS asked him to pull. *Exh. A* (Franciscan 83:10-87:2). Notably, *FHS only asked Powers to pull videos of Anel*, proving they were targeting Anel as early as March 13, 2014. *Id.* It took until June 2015 before Defendants finally admitted they have no videos showing when Anel left the lounges on March 6. *Exhs. J, K.* Since no one checked videos of other people entering/leaving, Defendants have no basis to say who was in the lounges when messages were sent on March 6 and 11.

In fact, Defendants made an intentional choice to delete "badge swipe" data (without preserving a copy). That data would have revealed at least some of the people who entered the lounges around the times messages were sent. To enter a lounge, someone would have to swipe an electronic key card/"badge" to unlock the door, which creates a time-stamped record of whose badge was swiped. *Exh. B* (Lackman 42:13-43:9). In May 2014 (after this lawsuit was filed) Defendants deleted all their badge swipe data from March and April 2014. *Exh. A* (Franciscan 96:16-100:13). Despite claiming Anel had sent "harassing" messages in March and April—after instituting a criminal investigation and engaging in legal disputes with Anel, (*Exhs. L, M*) —Defendants only saved enough badge swipe data to show when *Anel* swiped his badge. *Exh. A* (Franciscan 89:15-92:2). For example, Defendants saved *no* badge data from March 11, and only saved 20 minutes of badge swipe data from SJMC on March 6—deleting the other data. *Exh. N.* This hid the identity of other suspects who were actually in the lounges.

This is especially problematic because a forensic review of the SJMC computer used to message Gill reveals that whoever sent the March 6 message was in the lounge more than an hour before the message was sent,[4] yet Defendants destroyed the data that could have helped

[4] Results from this review were only obtained this week because Defendants delayed producing the computer hard drive until after the close of discovery. *See Dkt. 94 at 1-4.*

THE BLANKENSHIP LAW FIRM, P.S.
1000 Second Avenue, Suite 3250
Seattle, Washington 98104
(206) 343-2700

identify this person. *Goodman Decl.* Defendants even testified that they ruled out the person who had logged into that computer as a suspect (Ellen Hardin) because she had not been on the computer "anywhere close to when" the message was sent, but forensic analysis shows that this is false. *Id.*; *Exh. B* (Lackman 107:18-109:23).

On April 7, Gill told Field he had received more "harassing" messages (on March 31 and April 2), and Field told Gill to call the police and seek a restraining order. *Exh. O.* By April 8, Defendants claimed they identified the computer used to send the March 31 messages, but admitted they had no evidence the April 2 message existed at all. *Exh. P.* Defendants never bothered to look at Gill's pager to see if he actually received the April 2 message. *Exh. B* (Lackman 52:11-14). Defendants' "system liaison" Shauneen Anderson testified that she told HR they *could have* tracked down any possible April 2 text (assuming it ever existed) by contacting the company that provided FHS' pager services (called "Spok"), but Defendants failed to do so and any such evidence has long since been destroyed. *Exh. A* (Franciscan 140:25-152:20). Thus, Defendants have *no evidence* that any message was sent at all on April 2. *Id.* Again, Defendants allowed key evidence to be destroyed that could have proved no message was sent, or that could have identified the true sender (which was not Anel).

By April 10, Lackman knew the GHPD was preparing to forward their investigation to the Prosecutor for potential charges. *Exhs. Q, R.* The day before, Lackman had given the GHPD a report ("The Report"), which falsely claimed Defendants had video and badge data that somehow proved Anel was in the lounge when every message was sent. *Exh. F*; *Exh. C* (Moore 263:12-264:22, 265:12-266:2). The Report fabricated fictional times when Anel supposedly left lounges to make him look guilty, claiming for example, that video and badge evidence proved he left the SJMC lounge one minute after messages were sent from that lounge on March 6—even though Lackman testified that Defendants had no proof of when he left the lounge. *Id.*; *Exh. B* (Lackman 216:19-219:2). It also falsely claimed that evidence proved no one other than Anel was in the lounge when a message was sent on March 11 (but didn't mention that

THE BLANKENSHIP LAW FIRM, P.S.
1000 Second Avenue, Suite 3250
Seattle, Washington 98104
(206) 343-2700

Defendants destroyed any such evidence). *Id.* Lackman admits her Report was false and misleading. *Exh. B* (Lackman 157:12-159:18, 219:3-221:1, 230:20-234:6, 268:13-269:20). Plus, forensic analysis of the computers proves Anel was not using the computers when messages were sent, further proving Defendants lied. *Goodman Decl.*

The GHPD forwarded Lackman's apparently damning Report to the Prosecutor, who filed a charge of "Cyberstalking" against Anel on May 14, 2014 based on that Report. *Dkt. 88 at 29-32.* Meanwhile, Defendants pursued multiple legal actions against Anel based on the false claims in Lackman's Report. On April 10, Mark Adams (FHS' Chief Medical Officer) filed an internal FHS complaint against Anel, seeking to strip his privileges to practice medicine at FHS facilities (*Exh. S*) based largely on the false claims in Lackman's Report. *Exh. T.* On April 11, 2014 this lawsuit was filed. *Dkt. 1.* Then on April 16, Adams' complaint was accepted for a hearing by the MEC. *Exhs. U, V.*

The MEC conducted its hearing on May 8, 2014. *Exh. W.* The MEC rejected Adams' complaint for a "lack of conclusive evidence to support the allegations," noting that Lackman's "Report" was clearly incorrect and that Anel providing "compelling testimony"—as opposed to Defendants. *Id.* Lackman herself testified that the Report contained massive inaccuracies—admitting that, contrary to the claim in her report, Defendants had no idea if Anel was still in the lounges when messages were sent on March 6 and March 31. *Exh. B* (Lackman 157:12-159:18; 219:3-221:1; 230:20-234:6; 268:13-269:20). And again, Defendants had no evidence the April 2 message existed. Defendants never bothered to tell the GHPD that Lackman's Report contained false information that wrongly implicated Anel. *Id.* at 230:20-234:6. Ultimately, the Prosecutor dismissed the Cyberstalking charge for "lack of evidence" after he learned the Report was false. *See Dkt. 88 at 33*; *Exh. X.*

THE BLANKENSHIP LAW FIRM, P.S.
1000 Second Avenue, Suite 3250
Seattle, Washington 98104
(206) 343-2700

B. Defendants admit they destroyed key video surveillance evidence, depriving Dr. Anel of any chance to rebut Defendants' false claims

During discovery, Anel requested that Defendants produce all videos showing the doorways in/out of the physicians' lounges on the days in which messages were supposedly sent to the Gills. *Exh. Y.* Defendants, however, could only produce seven videos, which show when Anel **entered** lounges on March 6, 11, and 31, and when he **left** on March 11. *See Dkt. 88 at 26-28.* The videos are a few seconds long and do not show who else entered/exited the lounges around the times messages were sent. *Id.*; *Exh. Z.* In a June 2015 30(b)(6) deposition, Defendants admitted they allowed all the other videos from those days to be deleted, except for three irrelevant videos showing Dr. Feng entering and exiting the SAH lounge hours *after* a message was sent on March 6. *Id.*; *Exh. A* (Franciscan 83:10-92:9). Thus, Defendants deleted the videos that (1) could have proven Anel had left and was not in the lounges when messages were sent, and (2) could have proven other suspects were in the lounges when messages were sent. In fact, Mr. Powers testified that Kennedy knew the videos would automatically delete 15 days after they were created, because Kennedy had "done several of these before where we need to download videos" to preserve them before they are deleted. *Exh. A* (Franciscan at 91:4-93:25). Defendants thus knew how to preserve the videos, yet Powers testified that they took no action to preserve the videos in this case. *Id.* This is spoliation.

Defendants have no excuse. Lackman admits they had a duty to preserve these videos as soon as they anticipated litigation was possible, and she admits she knew litigation was possible when the police were investigating Anel. *Exh. B* (Lackman 273:8-20, 280:25-282:1). By Lackman's admission, Defendants should have begun preserving evidence no later than March 7, when Gill said he had contacted the police. In fact, Defendants knew litigation with Anel was possible months earlier, as Defendants' attorneys were engaged in discussions with Anel's attorneys in January 2014 about various legal disputes. *Exhs. L-M.* Defendants could have easily preserved all the videos by simply copying them, yet they knowingly let them be erased and deleted. *Exh. A* (Franciscan 89:23-92:9).

THE BLANKENSHIP LAW FIRM, P.S.
1000 Second Avenue, Suite 3250
Seattle, Washington 98104
(206) 343-2700

Defendants also violated their own policies by deleting the videos. Lackman admits she was supposed to preserve all evidence related to the harassing messages, but she did not do so. *Exh. B* (Lackman 280:25-282:1). Plus, Defendants' were required to preserve evidence once they filed a complaint with the MEC, since FHS bylaws guaranteed that Anel could review all evidence from the investigation if the MEC ruled against him. *Exh. A*. Yet Defendants did not preserve the videos—they deleted them.

When Defendants were caught lying about the videos, they changed their story. Now they claim someone viewed videos that somehow proved Anel was in the lounges when each message was sent, but they also claim they deleted these videos. *Exh. B* (Lackman 217:8-219:2, 269:9-270:12). Lackman admits that this makes it impossible for Anel to rebut Defendants' claims about the contents of the now-destroyed videos. *Id.* at 233:12-235:23. Thus, Defendants continue to prejudice Anel with false claims about evidence they destroyed.

III. EVIDENCE RELIED UPON

Plaintiff relies upon the declarations of Allison Goodman and Paul S. Woods with attached exhibits, and the pleadings on file in this lawsuit.

IV. AUTHORITY

A. Defendants engaged in clear spoliation by destroying videos and badge data that would have proven Defendants lied about Dr. Anel sending harassing messages

Spoliation is the "[d]estruction or loss of potentially relevant evidence." *Henderson*, 80 Wn. App. at 604. Spoliation traditionally included the "intentional destruction" of evidence, and under Washington law, it includes a failure to preserve relevant evidence within one's control. *Id.* at 606, 609. Washington courts use a two-part test to determine if a party has committed spoliation. "Under this test, the trial court weighs (1) the potential importance or relevance of the missing evidence; and (2) the culpability or fault of the adverse party." *Homeworks Const., Inc. v. Wells*, 133 Wn. App. 892, 889 (Div. 2 2006), *citing Henderson*, 80 Wn. App. at 606. For the first element, the "importance" of the evidence "depends on the particular circumstances of the case," although one universal factor to consider is "whether the loss or destruction of the

THE BLANKENSHIP LAW FIRM, P.S.
1000 Second Avenue, Suite 3250
Seattle, Washington 98104
(206) 343-2700

evidence has resulted in an investigative advantage for one party over another...." *Henderson*, 80 Wn. App. at 607. Likewise, the courts must consider "whether the adverse party was afforded an adequate opportunity to examine [the destroyed evidence]." *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 381-82 (1999).

Here, the destroyed videos and badge swipe evidence are clearly "important/relevant." To prove malicious prosecution, Anel must establish (1) there was a lack of "probable cause" to believe he committed the crime of Cyberstalking, and (2) Defendants acted "maliciously" when they told police they had proof Anel sent the harassing messages. *Bender v. Seattle*, 99 Wn.2d 582, 593 (1983). "Lack of probable cause" is proven when a defendant lies about or withholds exculpatory evidence. *Id.* Anel may prove "maliciousness" by showing Defendants had doubted the truthfulness of the information they gave the GHPD and/or acted with "reckless disregard" for the truth. *Youker v. Douglas County*, 162 Wn. App. 448, 464 (2011).

The destroyed videos and badge data are highly relevant for these two key elements. Defendants claim that videos proved Anel was in the lounges when each message was sent (and at times alone in the lounges)—yet they destroyed videos and badge data that could have disproven these claims, establishing the "lack of probable cause" element. This would also have proven Defendants "doubted" the truthfulness of the "evidence" they gave police (and outright lied), proving maliciousness under *Youker*. Its importance is not diminished just because Defendants admit they no longer possess videos proving Anel was in the lounges. The evidence is more important now since Defendants changed their story and now claim the videos they destroyed would have somehow proven Anel was in the lounges. By destroying them, Defendants prevented Anel from having any opportunity to review this evidence or refute Defendants' claims about the now-destroyed videos. Thus, the evidence is of central importance to the two key elements of Dr. Anel's Malicious Prosecution claim. By destroying the videos, Defendants gave themselves an extremely prejudicial "investigative advantage" as forbidden by *Henderson*. 80 Wn. App. at 607. The videos are thus clearly "important."

THE BLANKENSHIP LAW FIRM, P.S.
1000 Second Avenue, Suite 3250
Seattle, Washington 98104
(206) 343-2700

The second element, the "culpability or fault of Defendants," is also present. A party that fails to preserve evidence is culpable if any *one* of three conditions is present: (1) the party acted intentionally, (2) the party acted in bad faith or with "conscious disregard" for the importance of the evidence, or (3) the party had a duty to preserve the evidence. *Homeworks*, 133 Wn. App. at 900, *citing Henderson*, 80 Wn. App. at 610. Under the third condition, "a party may be responsible for spoliation without a finding of bad faith," because "[a] party's actions are 'improper' and constitute spoliation where the party has a duty to preserve the evidence in the first place." *Homeworks*, 133 Wn. App. at 900. Under this third condition, failing to preserve evidence when on notice the evidence has "'potential relevance to the litigation' may justify [a] jury instruction" on spoliation. *Henderson*, 80 Wn. App. at 609, *citing Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993). Plus, a party's "obligation to preserve evidence arises…when a party should have known that the evidence may be relevant to future litigation." *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003).

There is no doubt that Defendants are "culpable" for failing to preserve the videos and badge data. They clearly knew about the importance of this evidence, since it formed the basis of their accusations against Anel. Nevertheless, they chose to let the videos be erased and selectively made self-serving printouts to implicate Anel, while actively deleting all electronic badge data—during a police investigation they instituted and after this lawsuit had already begun. They acted with intentional, conscious disregard for the importance of the evidence, proving culpability under the first and second *Homeworks* conditions. 133 Wn. App. at 900.

Defendants also violated several duties to preserve this evidence, proving the third condition of culpability. *Id.* Lackman admits she was supposed to preserve all evidence related to the allegedly harassing messages, but she ignored this duty and let the videos and badge data be destroyed. Plus, Defendants' bylaws guaranteed that Anel could review the video evidence if the MEC ruled against him. For that to happen Defendants would have had to preserve such evidence, but instead, Defendants destroyed the videos that supposedly provided the basis for

THE BLANKENSHIP LAW FIRM, P.S.
1000 Second Avenue, Suite 3250
Seattle, Washington 98104
(206) 343-2700

the MEC hearing. Finally, Lackman admitted Defendants had a duty to preserve evidence when they anticipated litigation. She admits litigation was anticipated when the police were investigating Anel for criminal charges (based on Defendants' false stories about the videos), yet she still did not preserve the videos. And Defendants destroyed badge data *after* this lawsuit was filed, clearly proving culpability. They violated multiple duties to preserve evidence and are thus "culpable," proving spoliation under *Homeworks*.

B. Dr. Anel is entitled to an inference that the destroyed evidence was favorable to his case and harmful to Defendants, and Defendants should be precluded from making any claims about what the destroyed evidence would supposedly show

Once a court rules that spoliation has occurred, it must craft appropriate sanctions. *Id.*; *Henderson*, 80 Wn. App. at 605. When a party engages in spoliation, "the only inference which the finder of fact may draw is that such evidence would be unfavorable to him." *Henderson*, 80 Wn. App. at 606, *citing Pier 67, Inc. v. King County*, 89 Wn.2d 379, 385-86 (1977). "[T]his rule is uniformly applied by the courts and is an integral part of our jurisprudence." *Id.* at 606-07. Historically, this inference was created by instructing the jury that "the adversary's conduct may be considered generally as tending to corroborate the proponent's case and to discredit that of the adversary." *Id.* at 605. Courts also preclude the party that committed spoliation from presenting evidence or argument about what the now-destroyed evidence supposedly would have shown. *Dillon v. Nissan Motor Co., Ltd.*, 986 F.2d 263, 269 (8th Cir. 1993) (party barred from presenting testimony or photographs of evidence it examined and then destroyed—evidence the adverse party was never allowed to examine).

This Court should follow *Dillon* and prohibit Defendants from offering any evidence or argument at trial about what the now-destroyed videos and badge data supposedly showed. It would be fundamentally unfair to let Defendants (1) knowingly destroy evidence that would have disproven criminal allegations against Dr. Anel, (2) get caught lying to police about what evidence they actually possessed, and yet (3) still be allowed to tell stories at trial about the evidence that they themselves destroyed. If parties were allowed to engage in this type of

THE BLANKENSHIP LAW FIRM, P.S.
1000 Second Avenue, Suite 3250
Seattle, Washington 98104
(206) 343-2700

behavior, then they could make up anything they wanted about non-existent evidence and turn the justice system into a complete farce. Indeed, the Best Evidence Rules (ER 1001-1008) are designed to prevent this exact scenario from occurring—parties are not allowed to testify or argue about the contents of evidence that they themselves destroyed. Under *Henderson*, *Dillon*, and the Best Evidence Rules, if Defendants wanted to testify about videos/badge data, then they had to preserve and produce the evidence for trial. Anything else is fundamentally unfair to Dr. Anel, who never had a chance to see the destroyed evidence.

This Court should also present a jury instruction, stating that Defendants destroyed video and badge evidence, and that the destruction of such evidence corroborates Dr. Anel's Malicious Prosecution claims. Under Washington law, the only possible inference to draw from Defendants' spoliation is that the videos and badge data were harmful to Defendants. *See Henderson*, 80 Wn. App. at 606. Indeed, at the time Defendants destroyed the evidence, they were relying on the supposed contents of that exact evidence to discipline Anel and to encourage law enforcement to charge Anel with a crime. If the evidence actually supported Defendants' claims about Anel, they would have preserved it and given it to police. Instead, Defendants destroyed it. This Court should apply the "only inference" allowed, and instruct the jury that Defendants' destruction of the videos and badge data is evidence supporting Dr. Anel's Malicious Prosecution claim—specifically that (1) Defendants lacked probable cause to believe he committed Cyberstalking, and (2) Defendants acted maliciously by telling police they had videos showing Anel was in the lounges when messages were sent.

V. CONCLUSION

For the reasons explained above, this Court should (1) find that Defendants engaged in spoliation, (2) prohibit Defendants from presenting argument or evidence about the destroyed videos at trial, (3) instruct the jury that Defendants' spoliation corroborates Anel's Malicious Prosecution claims, and (4) order any other remedies that this Court deems just and proper.

THE BLANKENSHIP LAW FIRM, P.S.
1000 Second Avenue, Suite 3250
Seattle, Washington 98104
(206) 343-2700

DATED this 13th day of August, 2015.

THE BLANKENSHIP LAW FIRM, P.S.

By: s/ Paul S. Woods

Scott C. G. Blankenship, WSBA No. 21431
Paul S. Woods, WSBA No. 42976
The Blankenship Law Firm, P.S.
1000 Second Avenue, Suite 3250
Seattle, WA 98104
Telephone: (206) 343-2700
Facsimile: (206) 343-2704
Email: sblankenship@blankenshiplawfirm.com
pwoods@blankenshiplawfirm.com
Attorneys for Plaintiff

DECLARATION OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the date listed below I caused to be served a copy of the attached document to the following attorneys for Defendants in the manner indicated below at the following addresses:

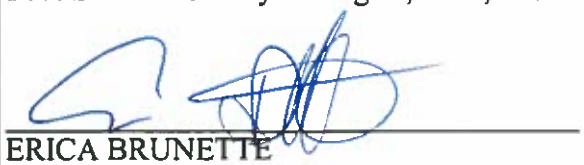
Michael Madden, WSBA No. 8747
Bennett Bigelow & Leedom, P.S.
601 Union Street, Suite 1500
Seattle, WA 98101-1363
Telephone: (206) 622-5511
Facsimile: (206) 622-8986
Email: mmadden@bbllaw.com

- ☒ by Electronic Mail
- ☐ by Facsimile Transmission
- ☐ by First Class Mail
- ☒ by Hand Delivery
- ☐ by Overnight Delivery
- ☐ by Notification via E-filing System

Sean Robert Gallagher, Admitted *Pro Hac Vice*
Megan-Elise Harry, Admitted *Pro Hac Vice*
Richard M. Murray, Admitted *Pro Hac Vice*
Polsinelli PC
1515 Wyncoop Street, Suite 600
Denver, CO 80202
Telephone: (303) 572-9300
Facsimile: (303) 572-7883
Email: sgallagher@polsinelli.com
mharry@polsinelli.com
rmurray@polsinelli.com

- ☒ by Electronic Mail
- ☐ by Facsimile Transmission
- ☐ by First Class Mail
- ☐ by Hand Delivery
- ☐ by Overnight Delivery
- ☐ by Notification via E-filing System

DATED this 13th day of August, 2015, at Seattle, Washington.



ERICA BRUNETTE
Paralegal

THE BLANKENSHIP LAW FIRM, P.S.
1000 Second Avenue, Suite 3250
Seattle, Washington 98104
(206) 343-2700