

 KeyCite Yellow Flag - Negative Treatment
Distinguished by [Malmberg v. U.S.](#), N.D.N.Y., October 15, 2012

688 F.Supp.2d 95
United States District Court,
N.D. New York.

Cornelius MAHAR and Maureen Mahar, Plaintiffs,

v.

US XPRESS ENTERPRISES, INC.; US
Xpress Leasing, Inc.; Xpress Global
Systems, Inc.; and Gloria V. Morgan,
Defendants/Third-Party Plaintiffs,

v.

Polsinello Fuels and Polsinello
Fuels, Inc., Third-Party Defendants.

No. 1:06-cv-1297 (GLS*RFT).

|
Feb. 24, 2010.

Synopsis

Background: Colliding truck driver and his wife brought New York state court action against trucking company and its driver, whose vehicle had stalled in traffic lane, alleging negligence resulting in injuries to colliding driver, and to his wife derivatively, arising from accident involving two tractor-trailers. Defendants removed action and brought third-party action against colliding driver's employer. Parties moved for summary judgment, and plaintiffs further moved for leave to amend and for sanctions.

Holdings: The District Court, [Gary L. Sharpe, J.](#), held that:

[1] driver of stalled truck waived her defense of improper service;

[2] plaintiffs were entitled to leave to amend complaint to add claim for punitive damages and to increase ad damnum clause;

[3] fact issues existed as to parties' negligence related to accident;

[4] both drivers' employers were potentially liable under New York's doctrine of respondeat superior;

[5] colliding driver's employer was not liable for negligent hiring, training, or supervision, but fact issues precluded summary judgment as to similar claim against employer of driver of stalled truck;

[6] fact issues precluded summary judgment on third-party claims for towing and storage costs and loss of use damages;

[7] employer of driver of stalled truck was barred from seeking contribution for costs of cleaning up accident site; and

[8] plaintiffs failed to satisfy Rule 11's procedural prerequisite for motion for sanctions.

Motions granted in part and denied in part.

West Headnotes (45)

[1] **Automobiles**

Process

Driver of tractor-trailer stalled in traffic lane waived her defense of improper service in action of truck driver and his wife, alleging negligence resulting in injuries arising from accident involving truck and stalled tractor-trailer; driver waited approximately two years and nine months to assert defense and, in that time, joined with her employer in filing notice of removal, counterclaims, and motions, and engaged in discovery and pretrial conferences, defect in service could have been easily cured at various points in pretrial proceedings, and driver was clearly amenable to personal jurisdiction under New York's long-arm statute. [N.Y.McKinney's CPLR 302\(a\)\(2\)](#).

[1 Cases that cite this headnote](#)

[2] **Federal Courts**

Notice

Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied.

[Cases that cite this headnote](#)

[3] Federal Courts

🔑 Notice

Federal Courts

🔑 Waiver, estoppel, and consent

As a prerequisite to personal jurisdiction, the defendant must be amenable to service based on legislative authorization or consent.

[Cases that cite this headnote](#)

[4] Federal Courts

🔑 Personal Jurisdiction

Federal Courts

🔑 Waiver, estoppel, and consent

Lack of personal jurisdiction is a privileged defense, and it may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct.

[Cases that cite this headnote](#)

[5] Process

🔑 Waiver of defects and objections

Even where a defense of improper service is raised in a timely-filed answer, a defendant's significant delay in challenging by motion the inadequate service may nonetheless act as a waiver of that defense, particularly where a defendant's amenability to personal jurisdiction is clear, where the defendant participated in the litigation during the period prior to expiration of the statute of limitations, and where the defect in service could have been easily cured during the limitations period.

[Cases that cite this headnote](#)

[6] Federal Courts

🔑 Personal jurisdiction

Personal jurisdiction is controlled by the law of the state where the district court sits.

[Cases that cite this headnote](#)

[7] Federal Civil Procedure

🔑 Time for amendment in general

Federal Civil Procedure

🔑 Injustice or prejudice

Federal Civil Procedure

🔑 Form and sufficiency of amendment; futility

Motion to amend should be denied only for such reasons as undue delay, bad faith, futility of the amendment, and perhaps most important, the resulting prejudice to the opposing party. [Fed.Rules Civ.Proc.Rule 15\(a\)\(2\)](#), 28 U.S.C.A.

[2 Cases that cite this headnote](#)

[8] Federal Civil Procedure

🔑 Discretion of Court

While a court has discretion to grant or deny an opportunity to amend, outright refusal to grant the leave without any justifying reason is an abuse of discretion. [Fed.Rules Civ.Proc.Rule 15\(a\)\(2\)](#), 28 U.S.C.A.

[Cases that cite this headnote](#)

[9] Federal Civil Procedure

🔑 Time for amendment

Federal Civil Procedure

🔑 Nature and extent of relief sought

Truck driver and his wife were entitled to leave to amend negligence complaint, seeking to add claim for punitive damages in action against trucking company that employed driver who was involved in accident with truck driver; plaintiffs provided adequate explanation for delay in moving to amend, in that their claim was not substantiated until company's representatives were deposed and expert discovery was completed, in context of pretrial proceedings, no undue delay, untimeliness, or bad faith

occurred, plaintiffs supported claim with sufficient allegations that company was grossly negligent, wanton, and reckless in hiring, training, and supervising its driver, and, although discovery had already closed, new claim did not create any unforeseen prejudice or problems of proof. [Fed.Rules Civ.Proc.Rule 15\(a\)\(2\)](#), 28 U.S.C.A.

[1 Cases that cite this headnote](#)

[10] Federal Civil Procedure

[Time for amendment in general](#)

Federal Civil Procedure

[Injustice or prejudice](#)

Mere delay is not a sufficient basis to deny the right to amend, but prejudice may arise where the amendment is sought after discovery has closed and would create new problems of proof requiring additional discovery. [Fed.Rules Civ.Proc.Rule 15\(a\)\(2\)](#), 28 U.S.C.A.

[1 Cases that cite this headnote](#)

[11] Federal Civil Procedure

[Time for amendment](#)

Where there is an inordinate delay between the filing of the complaint and the motion to amend, then the party seeking to amend has the burden to provide a satisfactory explanation for the delay. [Fed.Rules Civ.Proc.Rule 15\(a\)\(2\)](#), 28 U.S.C.A.

[1 Cases that cite this headnote](#)

[12] Federal Civil Procedure

[Complaint](#)

Leave to amend may be denied where the movant appears to be raising a new claim in anticipation of an adverse ruling or to counteract a motion for summary judgment. [Fed.Rules Civ.Proc.Rule 15\(a\)\(2\)](#), 28 U.S.C.A.

[2 Cases that cite this headnote](#)

[13] Federal Civil Procedure

[Nature and extent of relief sought](#)

Truck driver and his wife were entitled to leave to amend negligence complaint, seeking to increase ad damnum clause in action against trucking company that employed driver who was involved in accident with truck driver; neither federal nor New York state rules required assertion of specific amount of relief, and amendment was not prejudicial to company, since it was already on notice that truck driver may have suffered serious injuries from accident and that injuries were still of developing nature. [Fed.Rules Civ.Proc.Rule 15\(a\)\(2\)](#), 28 U.S.C.A.

[Cases that cite this headnote](#)

[14] Federal Civil Procedure

[Nature and extent of relief sought](#)

Federal Civil Procedure

[Prayer for relief](#)

Amount of damages found by a jury is not limited to that amount set forth in the complaint as the requested relief, and thus amendments to increase an ad damnum clause are liberally permitted, absent prejudice to a party.

[Cases that cite this headnote](#)

[15] Automobiles

[Care required of following vehicle](#)

Under New York law, where a vehicle is lawfully stopped, there is a duty imposed upon the operators of vehicles traveling behind it in the same direction to come to a timely stop.

[Cases that cite this headnote](#)

[16] Automobiles

[Care required and liability in general](#)

Automobiles

[Care required of following vehicle](#)

Under New York law, in order to avoid colliding with stopped vehicles, a driver who approaches another vehicle from the rear is required to maintain a reasonably safe

distance, rate of speed, and control of his vehicle, to use reasonable care, and to take into account the weather and road conditions.

[Cases that cite this headnote](#)

[17] Automobiles

🔑 Rear-end collision

Under New York law, rear-end collision with a stopped automobile creates a prima facie case of liability, which imposes a duty on the operator of the moving vehicle to provide a non-negligent explanation for the cause of the collision.

[Cases that cite this headnote](#)

[18] Automobiles

🔑 Rear-end collision

Under New York law, the rear-ending driver's failure to rebut an inference of negligence entitles the driver of the stopped vehicle to judgment as a matter of law.

[Cases that cite this headnote](#)

[19] Automobiles

🔑 Comparative negligence and apportionment of fault

Where the frontmost driver, as well as the rear-ending driver, operates his vehicle in a negligent manner, the issue of comparative negligence is for a jury to decide.

[Cases that cite this headnote](#)

[20] Negligence

🔑 Reasonable care

Under New York law, a person is negligent when he fails to exercise that degree of care which a reasonably prudent person would have exercised under the same circumstances.

[Cases that cite this headnote](#)

[21] Negligence

🔑 Violations of statutes and other regulations

Unexcused violation of a statutory standard of care, if unexplained, constitutes negligence per se under New York law.

[1 Cases that cite this headnote](#)

[22] Negligence

🔑 Necessity of causation

Evidence of negligence is not enough by itself to establish liability under New York law, but it must also be proved that the negligence was the cause of the event which produced the harm alleged.

[2 Cases that cite this headnote](#)

[23] Negligence

🔑 Violations of statutes or other regulations

Even where the negligence charged is premised in part or in whole on a claim that a statute or ordinance has been violated, proximate cause is still an essential element of liability under New York law.

[1 Cases that cite this headnote](#)

[24] Negligence

🔑 Necessity of legal or proximate causation

Negligence

🔑 Natural and probable consequences

Negligence

🔑 Foreseeability

To state a negligence under New York law, the damage must be the proximate result of the negligent act and it must be such as the ordinary mind would reasonably expect as a probable result of the act.

[Cases that cite this headnote](#)

[25] Federal Civil Procedure

🔑 Automobile cases

Genuine issues of material fact existed as to negligence of colliding truck driver as to maintaining safe distance and speed and

use of reasonable case, of driver of truck stalled in traffic lane as to whether she performed statutory duty and whether that failure was cause of collision, and stalled driver's employer as to roadworthiness of its truck, precluding summary judgment in New York law action for negligence arising from collision. N.Y.McKinney's [Vehicle and Traffic Law §§ 1201\(a, b\)](#), [§ 1202\(a\)\(1\)\(j\)](#).

[Cases that cite this headnote](#)

[26] Labor and Employment

[Scope of Employment](#)

Labor and Employment

[Furtherance of Employer's Business](#)

Under the doctrine of respondeat superior, an employer may be vicariously liable under New York law for the tortious acts of its employees only if those acts were committed in furtherance of the employer's business and within the scope of employment.

[Cases that cite this headnote](#)

[27] Automobiles

[Employment-related issues](#)

Under New York law, employers of two truck drivers involved in accident were potentially liable under doctrine of respondeat superior for drivers' actions that resulted in accident that was subject of personal injury action; both drivers were acting within scope of their employment and neither employer suggested that its employee acted solely for personal motives or unforeseeably departed from normal method of performance.

[Cases that cite this headnote](#)

[28] Labor and Employment

[Negligent Hiring](#)

Labor and Employment

[Negligent retention](#)

Labor and Employment

[Scope of Employment](#)

In general, where an employee is acting within the scope of his or her employment, the employer is liable under the theory of respondeat superior and no claim may proceed against the employer for negligent hiring or retention under New York law.

[4 Cases that cite this headnote](#)

[29] Labor and Employment

[Negligent Hiring](#)

Labor and Employment

[Negligent training and supervision](#)

Limited exception exists to general rule under New York law, under which if an employee acts within the scope of his or her employment, the employer is liable under the theory of respondeat superior and no claim may proceed against the employer for negligent hiring or retention, where the injured party is seeking punitive damages from the employer based on gross negligence in hiring, training, or supervising the employee.

[4 Cases that cite this headnote](#)

[30] Damages

[Grounds for Exemplary Damages](#)

Punitive damages are only warranted where the conduct evidences a high degree of moral culpability, or is so flagrant as to transcend simple carelessness, or constitutes willful or wanton negligence or recklessness so as to evidence a conscious disregard of the rights of others.

[1 Cases that cite this headnote](#)

[31] Labor and Employment

[Negligent Hiring](#)

Labor and Employment

[Negligent training and supervision](#)

Necessary element for negligent hiring, training, or supervision claim under New York law is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury.

[3 Cases that cite this headnote](#)

[32] Labor and Employment

🔑 [Pleading](#)

While a party must plead conduct sufficient to warrant punitive damages, the party is not required to specifically plead punitive damages to sustain a cause of action for negligent hiring, training, or supervision under New York law.

[2 Cases that cite this headnote](#)

[33] Automobiles

🔑 [Employment-related issues](#)

Trucking company and its driver failed to provide any evidence that colliding truck driver had propensity to operate truck in negligent manner or that colliding driver's employer knew or should have known of such propensity, precluding New York law cross-claim of company and its driver for negligent hiring, training, or retention of colliding driver.

[Cases that cite this headnote](#)

[34] Federal Civil Procedure

🔑 [Automobile cases](#)

Genuine issues of material fact existed as to whether employer of driver of stalled truck in traffic lane was aware of mechanical problems with truck, and whether stalled driver conducted adequate pre-trip inspection, had been trained to respond to warnings and indications of mechanical problems, or was aware of steps to override shutdown and how to respond to shutdown, precluding summary judgment in colliding truck driver's New York law action against stalled driver's employer for negligent hiring, training, and supervision.

[Cases that cite this headnote](#)

[35] Federal Civil Procedure

🔑 [Automobile cases](#)

Genuine issues of material fact existed as to nature of \$66,558.69 of towing and storage costs allegedly incurred by defendant trucking company in preserving for evidentiary purposes truck involved in collision involving two trucks, precluding summary judgment on company's claim for preservation costs in driver's personal injury action against company.

[Cases that cite this headnote](#)

[36] Federal Civil Procedure

🔑 [Discovery and Production of Documents and Other Tangible Things](#)

Party is obligated to preserve evidence in its possession and not engage in spoliation when it has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.

[2 Cases that cite this headnote](#)

[37] Federal Civil Procedure

🔑 [Failure to Comply;Sanctions](#)

“Spoliation” is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.

[Cases that cite this headnote](#)

[38] Federal Civil Procedure

🔑 [Discovery and Production of Documents and Other Tangible Things](#)

In general, the presumption is that the party possessing evidence must bear the expense of preserving it for litigation, although this presumption may be overcome if the demanding party seeks preservation of evidence that is likely to be of marginal relevance and is costly to retain and preserve, or where a nonparty is in possession of the requested evidence.

[1 Cases that cite this headnote](#)

[39] Federal Civil Procedure**🔑 Automobile cases**

Genuine issues of material fact existed as to whether and to what extent trucking company was entitled to loss of use damages for time its tractor-trailer was out of service following accident involving two tractor-trailers, and to what extent each party was responsible for delay in repairing company's tractor-trailer, precluding summary judgment on company claim for loss of use damages in driver's personal injury action against company.

[Cases that cite this headnote](#)

[40] Contribution**🔑 Payment or discharge of common liability**

Trucking company entered into agreement with state of New York to pay cleanup costs at site of accident between two tractor-trailers, in exchange for release from any future claims for damage to state property, and thus, under New York law, company was barred from seeking contribution for \$3,671.88 of cleanup costs from injured truck driver or his employer. N.Y.McKinney's  [General Obligations Law § 15–108](#).

[Cases that cite this headnote](#)

[41] Contribution**🔑 Payment or discharge of common liability****Contribution****🔑 Defenses**

Under New York law, a settling tortfeasor is relieved from liability to any other person for contribution but, in exchange, is not entitled to obtain contribution from any other tortfeasor. N.Y.McKinney's  [General Obligations Law § 15–108\(c\)](#).

[Cases that cite this headnote](#)

[42] Federal Civil Procedure**🔑 Unwarranted, Groundless or Frivolous Papers or Claims**

Court has authority to sanction a party under Rule 11 if it determines that the party has made false, misleading, improper, or frivolous representations to the court. [Fed.Rules Civ.Proc.Rule 11\(b, c\), 28 U.S.C.A.](#)

[Cases that cite this headnote](#)

[43] Federal Civil Procedure**🔑 Unwarranted, Groundless or Frivolous Papers or Claims****Federal Civil Procedure****🔑 Duty of Reasonable Inquiry****Federal Civil Procedure****🔑 Evidence**

[Rule 11](#) explicitly and unambiguously imposes an affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading before it is signed, but sanctions should be imposed cautiously and only if it is patently clear that a claim has absolutely no chance of success, resolving all doubts in favor of the signing attorney. [Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.](#)

[Cases that cite this headnote](#)

[44] Federal Civil Procedure**🔑 Motions;time for filing**

[Rule 11](#)'s procedural prerequisite of filing motion for sanctions separately from any other motion was neither waived nor abandoned, so as to justify injured truck driver's failure to satisfy prerequisite by filing sanctions motion with summary judgment motion in his action against another truck driver and her employer for injuries sustained in accident involving two tractor-trailers. [Fed.Rules Civ.Proc.Rule 11\(c\)\(2\), 28 U.S.C.A.](#)

[1 Cases that cite this headnote](#)

[45] Federal Civil Procedure**🔑 Defensive pleadings;answers and replies**

Reliance of trucking company and its driver, whose tractor-trailer had stalled in traffic lane, on sudden emergency defense in colliding truck driver's personal injury action, arising from accident involving two tractor-trailers, was objectively reasonable, and thus imposition of sanctions, including request to strike answer, against trucking company and its driver for allegedly asserting defense without any factual support was unwarranted, even if colliding truck driver's motion for sanctions had been properly filed. [Fed.Rules Civ.Proc.Rules 11\(c\)\(4\), 26\(g\), 28 U.S.C.A.](#)

[Cases that cite this headnote](#)

Attorneys and Law Firms

***100** Flink, Smith Law Firm, [Edward Flink](#), Esq., [Christopher Guetti](#), Esq., Jennifer L. Dominelli–Lecakes, Esq., of Counsel, Latham, NY, for the Plaintiffs.

Rawle, Henderson Law Firm, [Diane Beckman Carvell](#), Esq., [Jon M. Dumont](#), Esq., [James A. Wescoe](#), Esq., of Counsel, New York, NY, Baker, Donelson Law Firm, [Kenneth S. Powers](#), Esq., of Counsel, Chattanooga, TN, for the Defendants.

Thuillez, Ford Law Firm, [Donald P. Ford, Jr.](#), Esq., of Counsel, Albany, NY, for the Third-Party Defendants.

MEMORANDUM–DECISION AND ORDER

[GARY L. SHARPE](#), District Judge.

I. Introduction

Plaintiffs Cornelius and Maureen Mahar brought this action against U.S. Xpress, Inc., U.S. Xpress Enterprises, Inc., U.S. Xpress Leasing, Inc., Xpress Global Systems, Inc., and Gloria Morgan for injuries and damages sustained in a tractor-trailer accident. (Am. Compl., Dkt. No. 5.) U.S. Xpress and Morgan filed a counterclaim against Cornelius Mahar, (Dkt. No. 8), and a third-party complaint against Polsinello Fuels and Polsinello Fuels, Inc., (3d-Party Am. Compl., Dkt. No. 24). Pending are: Polsinello's motions for partial summary ***101** judgment

and summary judgment; Morgan's motion for summary judgment; US Xpress and Morgan's motion for summary judgment; US Xpress's motion for summary judgment; and the Mahars' motions for summary judgment, leave to amend, and sanctions.

For the reasons that follow: (1) Polsinello's motion for partial summary judgment, (Dkt. No. 109), is granted insofar as U.S. Xpress's claim for New York State cleanup costs is dismissed, but is denied as to U.S. Xpress's claims for towing, storage, and loss of use damages; (2) Polsinello's motion for summary judgment, (Dkt. No. 111), is granted insofar as “Polsinello Fuels” is dismissed from the action and U.S. Xpress and Morgan's claim for negligent hiring, training, and supervision is dismissed, but is denied as to the claims of negligence and vicarious liability; (3) Morgan's motion for summary judgment for improper service, (Dkt. No. 113), is denied; (4) U.S. Xpress and Morgan's motion for summary judgment, (Dkt. No. 114), is denied as to the claims of negligence, vicarious liability, and negligent hiring, training, and supervision; (5) U.S. Xpress's motion for summary judgment, (Dkt. No. 115), is granted and U.S. Xpress Enterprises, U.S. Xpress Leasing, and Xpress Global Systems are dismissed from the action; (6) the Mahars' motion for summary judgment, (Dkt. No. 116), is denied as to the claims of negligence and vicarious liability; (7) the Mahars' motion for leave to amend is granted; and (8) the Mahars' motion for sanctions is denied.

II. Background

A. Facts

Defendant Gloria Morgan began her employment with defendant U.S. Xpress, Inc. on November 12, 2004. (See Pl. SMF ¶ 6, Dkt. No. 117:65.) Beginning on December 22, 2004, after obtaining her Commercial Driver's License (CDL) and receiving in-class and on-the-road training and testing, Morgan operated a 2004 Freightliner tractor numbered 40035, which was maintained by U.S. Xpress. (See Def. Resp. SMF ¶¶ 1–2, 51–60, Dkt. No. 132:2.) On January 3, 2005, Morgan was driving tractor 40035 with a trailer in tow on Interstate 87 South when she saw smoke in the front of her truck. (See *id.* at ¶ 9.) In response, Morgan pulled her tractor into a rest stop and performed a “pre-trip” inspection of her engine. (See Morgan Dep. at 92, Dkt. No. 117:5.) After checking the tractor's engine,

underside, and interior, and finding no smoke or other apparent problems, Morgan departed from the rest stop. (See *id.* at 92, 97.) Within thirty minutes of getting back on I-87, as Morgan was proceeding up a hill in Essex County, her tractor began slowing down and the “engine protect” light began to blink. (See *id.* at 113.) Morgan then merged from the middle lane into the rightmost lane of the highway, after which the engine light turned solid and the tractor stopped. (See *id.*) After coming to a stop in the right lane of traffic, Morgan turned on her hazard lights, called in the situation to Qualcomm, and exited the passenger side of the tractor, allegedly to put out hazard triangles. (See *id.* at 117–18.)

Immediately thereafter, Cornelius Mahar, who was driving a 1994 International tractor numbered 594 in the rightmost lane of I-87 South, collided with Morgan's tractor-trailer. (See Polsinello SMF ¶¶ 6, 29, Dkt. No. 111:9.) At that time, Mahar¹ was in the course of his employment with *102 Polsinello Fuels, Inc., which owned tractor 594 and the fuel tanker in tow. (See *id.* at ¶¶ 4–7.) According to Mahar, he began driving tractors in 1969, and since then logged two- to three-million miles pulling trailers and tankers. (See *id.* at ¶ 31.) As to tractor 594, Mahar had operated it since 1994. (See *id.* at ¶ 29.) During his employment with Polsinello, Mahar also trained and verified new drivers in loading and hauling fuel tankers. (See *id.* at ¶ 33.)

As to the conditions at the time of the accident, Morgan testified that she did not notice any fog or weather conditions that would have affected her visibility. (See Morgan Dep. at 117, Dkt. No. 117:5.) However, several individuals testified to encountering heavy fog precisely where Morgan's tractor-trailer had stopped, limiting the visibility in the area to between twenty and sixty feet. (See Tuz Dep. at 21–22, Dkt. No. 117:20; Nichols Dep. at 19–20, 28–30, Dkt. No. 117:21.) And according to Patricia Bashaw, an emergency medical technician (EMT) who was one of the first responders, she was “stunned” by how fast the fog came on as she approached the accident. (See Bashaw Dep. at 23–25, Dkt. No. 117:22.)

Upon arriving at the scene, Bashaw found Mahar in critical condition. (See *id.* at 27–30.) Bashaw and Leslie Fleury, another EMT, transported him to Elizabethtown Community Hospital, and then to Fletcher Allen Healthcare in Burlington, Vermont. (See *id.* at 27–44.) As a result of the collision, Mahar suffered serious

injuries, though the extent of those injuries are in dispute. (Compare Pl. SMF ¶ 13, Dkt. No. 117:65, with Def. Resp. SMF ¶ 13, Dkt. No. 132:2.)

B. Procedural History

On June 13, 2006, Mahar, and his wife, Maureen Mahar, filed suit against U.S. Xpress Enterprises, Inc., U.S. Xpress Leasing, Inc., Xpress Global Systems, Inc., and Morgan, in New York State Supreme Court, Rensselaer County, alleging negligence resulting in injuries to Mahar and derivative injuries to Maureen Mahar. (See Dkt. No. 1.) On October 25, the action was removed to the United States District Court for the Northern District of New York based on diversity jurisdiction under  28 U.S.C. § 1332(a)(1).² (See *id.*) On November 15, the Mahars amended their complaint to add U.S. Xpress as a party. (See Am. Compl., Dkt. No. 5.) The defendants filed an answer and a counterclaim against Mahar for negligence, (see Dkt. No. 8), and a third-party complaint against Polsinello Fuels and Polsinello Fuels, Inc. for contribution and indemnification and for property damage,³ (see Dkt. No. 24). In response, Polsinello filed a counterclaim for damages sustained to its property. (See Dkt. No. 25.)

After extensive discovery, a flurry of dispositive motions followed, including: Polsinello's motions for partial summary judgment and summary judgment, (Dkt. Nos. 109, 111); Morgan's motion for summary judgment, (Dkt. No. 113); US Xpress and Morgan's motion for summary *103 judgment, (Dkt. No. 114); and the Mahars' motions for summary judgment, leave to amend, and sanctions, (Dkt. Nos. 116, 117).

In addition, U.S. Xpress moved for summary judgment seeking dismissal of all claims against U.S. Xpress Enterprises, Inc., U.S. Xpress Leasing, Inc., and Xpress Global Systems, Inc. (See Dkt. No. 115.) By letter, both the Mahars and Polsinello conceded that these parties should be released and the claims against them dismissed. (See Dkt. Nos. 118, 130.) Accordingly, the court grants U.S. Xpress's motion for summary judgment insofar as it pertains to dismissal of all claims against U.S. Xpress Enterprises, Inc., U.S. Xpress Leasing, Inc., and Xpress Global Systems, Inc. Polsinello likewise moves to dismiss Polsinello Fuels from this action because it is not an existing legal entity and therefore is not a party capable of being sued. (See Polsinello Mem. of Law, Dkt. No. 111:10.) In light of U.S. Xpress and Morgan's

concession that Polsinello Fuels should be dismissed, (*see* Def. Resp. Mem. of Law at 9, Dkt. No. 131:4), and without affecting the claims against Polsinello Fuels, Inc., the court grants Polsinello's summary judgment motion insofar as it concerns the claims against Polsinello Fuels as a non-entity.

III. Standard of Review

The standard for the grant of summary judgment is well established, and will not be repeated here. For a full discussion of the standard, the court refers the parties to its previous opinion in *Bain v. Town of Argyle*, 499 F.Supp.2d 192, 194–95 (N.D.N.Y.2007).

IV. Discussion

A. Sufficiency of Service

[1] Morgan individually moves for summary judgment on the Mahars' claims based on an alleged failure to effectuate proper service. (*See* Dkt. No. 113.) However, because the failure to effectuate service is a matter related to personal jurisdiction, the defense to which Morgan has waived, and because the court prefers resolution of cases on their merits, Morgan's motion for summary judgment based on insufficient service of process is denied.

[2] [3] [4] [5] “Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied.”

Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 104, 108 S.Ct. 404, 98 L.Ed.2d 415 (1987), *superseded by statute on other grounds*, Futures Trading Practices Act of 1992 § 211, Pub.L. No. 102–546, 106 Stat. 3590 (1992). As a prerequisite to personal jurisdiction, the defendant must be amenable to service based on legislative authorization or consent. *See id.* at 104, 108 S.Ct. 404. But, because personal jurisdiction is a privileged defense, “[i]t may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct.” *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168, 60 S.Ct. 153, 84 L.Ed. 167 (1939) (citation omitted). And even where a defense of improper service is raised in a timely-filed answer, a defendant's significant delay in challenging by motion the inadequate

service may nonetheless act as a waiver of that defense.⁴

*104 *See* *Datskow v. Teledyne, Inc., Cont'l Prods. Div.*, 899 F.2d 1298, 1303 (2d Cir.1990) (citing *Burton v. N. Dutchess Hosp.*, 106 F.R.D. 477 (S.D.N.Y.1985) (three year delay), and *Vozech v. Good Samaritan Hosp.*, 84 F.R.D. 143 (S.D.N.Y.1979) (two year delay)). A finding of waiver is particularly appropriate where a defendant's amenability to personal jurisdiction is clear, where the defendant participated in the litigation during the period prior to expiration of the statute of limitations, and where the defect in service could have been easily cured during the limitations period. *See id.*

[6] Contrary to Morgan's contentions, and despite the subtle distinction between a defense based on personal jurisdiction and one based on insufficiency of service, *see Santos v. State Farm Fire & Cas. Co.*, 902 F.2d 1092, 1095 (2d Cir.1990), the court finds that Morgan has waived her defense to improper service. From the day defendants, including Morgan, filed their answer on December 12, 2006, to the day Morgan moved for summary judgment based on improper service on September 11, 2009, approximately two years and nine months passed. Prior to and during this time, and before the statute of limitations expired, Morgan joined in filing a notice of removal, joined in filing several counterclaims and motions, engaged in discovery and pretrial conferences, and was deposed. However, during this time she did not move to dismiss based on improper service of process. Furthermore, in addition to the fact that the defect in service could have been easily cured at various points in the pretrial proceedings, such as at her deposition, Morgan was clearly amenable to personal jurisdiction. Under the New York long-arm statute,⁵ at the time this action was instituted, specific jurisdiction existed over Morgan as a non-domiciliary because the cause of action arises from a tortious act she allegedly committed within New York State. *See N.Y. C.P.L.R. § 302(a)(2)*. Therefore, for the above reasons, Morgan's delay in asserting a defense for improper service constitutes waiver of that defense. Accordingly, Morgan's motion for summary judgment based on the Mahars' failure to properly serve her with process is denied.

B. Leave to Amend

[7] [8] Rule 15(a) provides that where a party seeks to amend his pleading before trial, “[t]he court should freely give leave when justice so requires.” FED. R. CIV. P. 15(a)(2). “A motion to amend should be denied only for such reasons as undue delay, bad faith, futility of the amendment, and perhaps most important, the resulting prejudice to the opposing party.”

Richardson Greenshields Sec., Inc. v. Lau, 825 F.2d 647, 653 n. 6 (2d Cir.1987) (internal quotation marks and citation omitted). While a court has discretion to grant or deny an opportunity to amend, “outright refusal to grant the leave without any justifying reason” is an abuse of discretion.

Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962).

*105 1. Punitive Damages

[9] First, the Mahars seek leave to file a second amended complaint to assert punitive damages. US Xpress counters that the motion to amend is untimely, futile, and filed in bad faith, and that granting the amendment would cause undue delay and result in prejudice.

[10] [11] [12] While mere delay is not a sufficient basis to deny the right to amend, prejudice may arise where the amendment is sought after discovery has closed and would create new problems of proof requiring additional discovery. See *State Teachers Ret. Bd. v. Fluor Corp.*, 654 F.2d 843, 856 (2d Cir.1981); see also *Finlay v. Simonovich*, No. 97 CIV. 1455, 1997 WL 746460, at *1 (S.D.N.Y. Dec. 2, 1997). Where there is “an inordinate delay” between the filing of the complaint and the motion to amend, then the party seeking to amend has the burden “to provide a satisfactory explanation for the delay.”

Cresswell v. Sullivan & Cromwell, 922 F.2d 60, 72 (2d Cir.1990) (citations omitted). Whether the movant seeks to assert mere variations of the original claims—including claims which the original complaint may have forecasted or claims arising from the same set of operative facts—or entirely new claims is of particular importance. See *Hanlin v. Mitchelson*, 794 F.2d 834, 841 (2d Cir.1986). Leave to amend may be denied where the movant appears to be raising a new claim in anticipation of an adverse ruling or to counteract a motion for summary judgment.

See *Ansam Assocs., Inc. v. Cola Petroleum, Ltd.*, 760 F.2d 442, 446 (2d Cir.1985); *Bymoan v. Herzog, Heine,*

Geduld, Inc., No. 88 Civ. 1796, 1991 WL 95387, at *1–2 (S.D.N.Y. May 28, 1991).

Here, while there was a considerable lapse in time from the date the Mahars filed their amended complaint, November 15, 2006, and the date they filed the pending motion to amend, September 11, 2009, U.S. Xpress and Morgan have been on notice of the Mahars' intentions to file a second amended complaint to include punitive damages since December 2008. (See Dkt. No. 90.) Although the delay between November 2006 and December 2008 is significant, the Mahars' have provided an adequate explanation to justify the delay—namely, that their claim for punitive damages was not substantiated until U.S. Xpress's representatives were deposed in August 2008 and the expert discovery had been completed in November 2008. (See Pl. Mem. of Law at 16, Dkt. No. 117:66.)

In addition, any delay is further softened when considered within the context of the pretrial proceedings. First, the court has repeatedly amended the Uniform Pretrial Scheduling Order and extended discovery deadlines and motion deadlines. Second, pursuant to its July 21, 2009 Order, 2009 WL 2227583, the court allowed the Mahars to withdraw their initial motion to amend their complaint, (see Dkt. No. 98), and renew the motion to amend when they filed their dispositive motions. (See Dkt. No. 106.) Third, while the Mahars ultimately filed their motion to amend on the day U.S. Xpress moved for summary judgment, they clearly contemplated amending long before the deadline for dispositive motions arrived. Thus, the defendants' claims of undue delay, untimeliness, or bad faith are without merit.

As to futility, the allegations contained in the proposed Second Amended Complaint satisfy the punitive damages standard. Contrary to U.S. Xpress's contention that the Mahars' proposed amendments do not contain any facts which would support a finding for punitive damages, the Mahars allege that U.S. Xpress was grossly negligent, wanton, and reckless in its ownership, maintenance, use, and operation of the tractor *106 by, among other things, failing to remedy known problems with the tractor, allowing a failing and defective truck to continue to operate, and ignoring numerous warnings, data, and information regarding the truck's operational problems. (See Proposed 2d Am. Compl. ¶¶ 54–57, Dkt. No. 117:37.) The Mahars further allege that U.S.

Xpress was “grossly negligent, wanton and reckless in the hiring, training, supervision, direction[,] control, and instruction of [Morgan]” and that U.S. Xpress put Morgan, as an inexperienced and improperly trained driver, behind the wheel of a truck that was known to be defective. (See *id.* at ¶¶ 57, 72.) These averments are sufficient to raise a claim for punitive damages as they adequately demonstrate a high degree of moral culpability or flagrance that transcends mere carelessness, or willful or wanton negligence or recklessness evidencing a conscious disregard of the rights of others. See *Evans v. Stranger*, 307 A.D.2d 439, 441, 762 N.Y.S.2d 678 (3d Dep’t 2003); see also *Rey v. Park View Nursing Home, Inc.*, 262 A.D.2d 624, 627, 692 N.Y.S.2d 686 (2d Dep’t 1999). Moreover, the Mahars have submitted sufficient evidence to permit a reasonable jury to return a verdict for punitive damages.⁶ Accordingly, U.S. Xpress’s claim of futility must be rejected.

Most importantly, although discovery has closed, the introduction of a punitive damages claim would not create any serious, unforeseen prejudice or problems of proof requiring extensive supplemental discovery. Rather, the claim of punitive damages derives from the same set of operative facts as the claim for negligent hiring, training, and supervision, which was pleaded shortly after removal in the First Amended Complaint. Thus, the Mahars’ original claim of negligent hiring, training, and supervision served as a forecast of the punitive damages claim, for, as the court will discuss further below, the limited exception that allows a party to sue an employer for negligence in hiring, training, or supervision essentially requires the party to establish entitlement to punitive damages. Accordingly, any prejudice is either minimal or nonexistent.

Therefore, for these reasons, the court grants the Mahars’ motion to amend their complaint to assert a claim for punitive damages.

2. Ad Damnum Clause

[13] Second, the Mahars move for leave to amend their complaint to increase the ad damnum clause. In response, U.S. Xpress contends that this motion should be denied as it is unnecessary because there is no requirement under either the Federal Rules of Civil Procedure or New York Civil Practice Law and Rules to assert a specific amount of relief in a personal injury action.

[14] “In the federal courts, the amount of damages found by a jury is not limited *107 to that amount set forth in the complaint as the requested relief.” *Roorda v. Am. Oil Co.*, 446 F.Supp. 939, 948 (W.D.N.Y.1978). Accordingly, “[a]mendments to increase an ad damnum clause are liberally permitted, absent prejudice to a party.” *Violette v. Armonk Assocs., L.P.*, 849 F.Supp. 923, 930 (S.D.N.Y.1994) (citations omitted); see, e.g., *Greenspon v. Supermarkets Gen. Corp.*, 744 F.Supp. 77, 78 (S.D.N.Y.1990) (finding amendment to ad damnum clause, increasing compensatory damages from one to four million dollars, not prejudicial because defendant had “always been aware that the plaintiff ... might have significant consequences” from the accident); *Varveris v. U.S. Lines Co.*, 141 F.Supp. 874, 875 (S.D.N.Y.1956) (finding no prejudice where amendment “merely raises the outer limits of recovery”).

Accordingly, because it would not be prejudicial to U.S. Xpress, who was already on notice that Mahar may have suffered serious injuries from the accident, and because of the developing nature of those injuries, the court grants the Mahars’ motion to amend their complaint to increase the ad damnum clause.

C. Negligence

1. Negligent Use and Operation

[15] [16] [17] Under New York law, “where a vehicle is lawfully stopped, there is a duty imposed upon the operators of vehicles traveling behind it in the same direction to come to a timely halt.” *Edney v. Metro. Suburban Bus Auth.*, 178 A.D.2d 398, 399, 577 N.Y.S.2d 102 (2d Dep’t 1991) (citations omitted). In order to avoid colliding with stopped vehicles, a driver who approaches another vehicle from the rear is required to maintain a reasonably safe distance, rate of speed, and control of his vehicle, to use reasonable care, and to take into account the weather and road conditions. See *Young v. City of New York*, 113 A.D.2d 833, 834, 493 N.Y.S.2d 585 (2d Dep’t 1985); *Mitchell v. Gonzalez*, 269 A.D.2d 250, 251, 703 N.Y.S.2d 124 (1st Dep’t 2000). Accordingly, “[a] rear-end collision with a stopped automobile creates a prima facie case of liability,” which imposes a duty on the operator of the moving vehicle to provide a non-negligent explanation for the cause of the collision. *Hurley v. Izzo*, 248 A.D.2d

674, 675, 670 N.Y.S.2d 575 (2d Dep't 1998) (citations omitted).

[18] [19] Failure to rebut an inference of negligence entitles the driver of the stopped vehicle to judgment as a matter of law. *See Arias v. Rosario*, 52 A.D.3d 551, 552, 860 N.Y.S.2d 168 (2d Dep't 2008); *see also*, e.g., *Rodriguez v. City of New York*, 259 A.D.2d 280, 686 N.Y.S.2d 394 (1st Dep't 1999) (holding that driver's failure to maintain a safe driving speed and distance on wet, foggy night was the proximate cause where no evidence that the driver of the car stopped in middle lane was negligent in failing to restart her vehicle or take other precautionary steps); *Warren v. Donovan*, 254 A.D.2d 201, 201, 679 N.Y.S.2d 120 (1st Dep't 1998) (finding explanation inadequate where driver testified that his vehicle hydroplaned in foggy and rainy weather conditions, which were "known adverse conditions that should have been compensated for"); *Crociata v. Vasquez*, 168 A.D.2d 410, 411, 562 N.Y.S.2d 536 (2d Dep't 1990) (finding explanation inadequate where driver testified that his attention was diverted when he suddenly saw the stopped car and slid into it because the roadway was wet). However, "[a] sudden, negligent, or unexplained stop of the lead vehicle can constitute a non-negligent explanation because the lead driver has a duty not to stop suddenly ... without proper signaling so as to avoid a collision when there is opportunity to give such signal." *John v. Leyba*, 38 A.D.3d 496, 496, 831 N.Y.S.2d 488 (2d Dep't 2007) *108 (citations omitted). "Thus, where the frontmost driver also operates his vehicle in a negligent manner, the issue of comparative negligence is for a jury to decide." *Id.* (citations omitted); *see*, e.g., *Purcell v. Axelsen*, 286 A.D.2d 379, 380, 729 N.Y.S.2d 495 (2d Dep't 2001) (upholding jury verdict of contributory fault due to disputes of fact regarding whether the driver of the lead vehicle stopped in the middle of the roadway without giving a proper signal, whether she pulled over to the shoulder, whether she activated her emergency flashers, and whether her brake lights came on); *Riley v. County of Broome*, 256 A.D.2d 899, 899–900, 681 N.Y.S.2d 851 (3d Dep't 1998) (denying summary judgment where driver who rear-ended street sweeper testified that she did not see the street sweeper due to the cloud of dust and dirt it created, which she believed was fog, and did not observe any illuminated lights or flashers); *De Cosmo v. Hulse*, 204 A.D.2d 953, 954, 612 N.Y.S.2d 279 (3d Dep't 1994) (denying summary judgment where defendant testified to observing plaintiff's vehicle at all times and where

plaintiff's vehicle came to a sudden stop for no apparent reason).

[20] [21] [22] [23] [24] New York common law provides that "a person is negligent when he fails to exercise that degree of care which a reasonably prudent person would have exercised under the same circumstances." *See Dance v. Town of Southampton*, 95 A.D.2d 442, 445, 467 N.Y.S.2d 203 (2d Dep't 1983). "[A]n unexcused violation of a statutory standard of care, if unexplained, constitutes negligence per se." *Dalal v. City of New York*, 262 A.D.2d 596, 597, 692 N.Y.S.2d 468 (2d Dep't 1999). For instance, where a section of the New York Vehicle and Traffic Law relates to the operation of a vehicle, it creates a statutory standard of care. *See id.*; *see also* *Martin v. Herzog*, 228 N.Y. 164, 168, 126 N.E. 814 (N.Y.1920). Still, "[e]vidence of negligence is not enough by itself to establish liability." *Sheehan v. City of New York*, 40 N.Y.2d 496, 501, 387 N.Y.S.2d 92, 354 N.E.2d 832 (N.Y.1976); *see also* *Dance*, 95 A.D.2d at 445, 467 N.Y.S.2d 203 ("Negligence per se is not liability per se...."). Rather, it must be proved that the negligence was the cause of the event which produced the harm alleged. *See Sheehan*, 40 N.Y.2d at 501, 387 N.Y.S.2d 92, 354 N.E.2d 832. And even where "the negligence charged is premised in part or in whole on a claim that a statute or ordinance ... has been violated," proximate cause is still an essential element of liability. *Id.* (citations omitted); *see also* *Martin*, 228 N.Y. at 170, 126 N.E. 814 ("To say that conduct is negligence is not to say that it is always contributory negligence."). Thus, "[t]he damage must be the proximate result of the negligent act. It must be such as the ordinary mind would reasonably expect as a probable result of the act...." *Hoffman v. King*, 160 N.Y. 618, 627, 55 N.E. 401 (N.Y.1899).

[25] Here, upon review of the pleadings, answers to interrogatories, depositions, affidavits, admissions on file, and other evidence, the court is satisfied that genuine issues of material fact remain as to the negligence of Mahar, Morgan, Polsinello, and U.S. Xpress.⁷

First, Morgan and U.S. Xpress have demonstrated that Mahar had a duty to maintain a reasonably safe distance and speed and use reasonable care, taking into account the weather and road conditions, and that Mahar may

have been negligent *109 because he breached that duty by rear-ending Morgan's stopped tractor-trailer. And the evidence is such that a rational trier of fact could find that Mahar's negligence proximately caused the accident and that the resulting harm was foreseeable. In response, Mahar has provided sufficient evidence to overcome an inference of negligence and allow a jury to conclude that he was not negligent in causing the collision due to the road conditions, the weather and visibility, and Morgan's negligent acts or omissions.

Second, in reliance on New York Vehicle and Traffic Law, Mahar has demonstrated that Morgan may have violated a statutory standard of care without explanation, that this breach of duty may have proximately caused the collision, and that the injuries Mahar suffered were foreseeable under the circumstances. Specifically, New York Vehicle and Traffic Law provides that “no person shall stop, park, or leave standing any vehicle ... upon the paved or main-traveled part of the highway when it is practicable to stop, park, or so leave such vehicle off such part of said highway” N.Y. VEH. & TRAF. LAWW § 1201(a). However, questions of material fact remain as to whether it was “practicable” for Morgan not to stop her tractor in the right lane of I-87. The statute also provides that if a vehicle is stopped, parked, or left standing, “an unobstructed width of the highway opposite a standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicles shall be available from a distance of two hundred feet in each direction upon such highway.” *Id.* Based on the fog and the additional circumstances particular to the stretch of highway in question here, it is disputed whether Morgan left other drivers with a clear view of her tractor-trailer from a distance of two-hundred feet. In addition, while there are exceptions where “it is impossible to avoid stopping and temporarily leaving such disabled vehicle in such position,” see N.Y. VEH. & TRAF. LAWW § 1201(b), or in the case of an emergency, see N.Y. VEH. & TRAF. LAWW § 1202(a)(1)(j), the parties dispute whether it was impossible for Morgan to avoid stopping in the right lane of travel and whether she was engaged in an emergency situation.

Third, genuine issues of material fact remain as to the roadworthiness of Morgan's tractor, whether Morgan and/or U.S. Xpress knew or should have known about the alleged patent and latent problems, and whether any of the alleged problems caused or contributed to the collision.

2. Vicarious Liability

[26] “Under the doctrine of respondeat superior, an employer may be vicariously liable for the tortious acts of its employees only if those acts were committed in furtherance of the employer's business and within the scope of employment.” *N.X. v. Cabrini Med. Ctr.*, 97 N.Y.2d 247, 251, 739 N.Y.S.2d 348, 765 N.E.2d 844 (N.Y.2002) (citation omitted); see also *Riviello v. Waldron*, 47 N.Y.2d 297, 303, 418 N.Y.S.2d 300, 391 N.E.2d 1278 (N.Y.1979) (“[T]he test has come to be whether the act was done while the servant was doing his master's work, no matter how irregularly, or with what disregard of instructions.” (internal quotation marks and citation omitted)). Thus, as long as the employee was not acting “solely for personal motives unrelated to the furtherance of the employer's business,” an employer may be held vicariously liable “even when the employee's actions are intentional.” *Vega v. Northland Mktg. Corp.*, 289 A.D.2d 565, 566, 735 N.Y.S.2d 213 (2d Dep't 2001) (citations omitted); see also *Flowers v. N.Y. City Transit Auth.*, 267 A.D.2d 132, 132, 700 N.Y.S.2d 27 (1st Dep't 1999) (holding that an employer cannot be vicariously liable where employee's actions constituted *110 “such a wide departure from [the] normal method of performance as not to be reasonably anticipated by defendant”).

[27] Here, there is no dispute that, at the time of the collision, Morgan was acting within the scope of her employment with U.S. Xpress and in furtherance of U.S. Xpress's business. Likewise, there is no dispute that Mahar was acting within the scope of his employment with Polsinello and in furtherance of Polsinello's business. Accordingly, under the broad doctrine of respondeat superior, and because neither employer suggests or offers any proof to suggest that its employee acted solely for personal motives or unforeseeably departed from the normal method of performance, the court concludes that U.S. Xpress and/or Polsinello may be held vicariously liable for the tortious acts committed by their respective employees, Morgan and Mahar, regarding the January 3, 2005 collision.

3. Negligent Hiring, Training, and Supervision

[28] [29] [30] [31] In general, “[w]here an employee is acting within the scope of his or her employment, the employer is liable under the theory of respondeat

superior and no claim may proceed against the employer for negligent hiring or retention.” [Rossetti v. Bd. of Educ. of Schalmont Cent. Sch. Dist.](#), 277 A.D.2d 668, 670, 716 N.Y.S.2d 460 (3d Dep’t 2000) (citations omitted). The rationale for this restriction is that if the employee is found negligent, then the employer must pay the judgment regardless of the reasonableness of the hiring, training, or supervision, whereas if the employee was not negligent, there should be no basis for imposing liability on the employer. *See Karoon v. N.Y. City Transit Auth.*, 241 A.D.2d 323, 324, 659 N.Y.S.2d 27 (1st Dep’t 1997); *see also Lee v. J.B. Hunt Transp., Inc.*, 308 F.Supp.2d 310, 312–13 (S.D.N.Y.2004) (“The application of the theory of independent negligence in hiring or retaining an employee becomes important in cases where the act of the employee was not, or may not have been, within the scope of his employment ... *where no liability would otherwise exist.*”). Nonetheless, a limited exception exists where the injured party is seeking punitive damages from the employer based on gross negligence in hiring, training, or supervising the employee. *See Karoon*, 241 A.D.2d at 324, 659 N.Y.S.2d 27. Punitive damages are only warranted where the conduct “evidences a high degree of moral culpability, [or] is so flagrant as to transcend simple carelessness, or constitutes willful or wanton negligence or recklessness so as to evidence a conscious disregard of the rights of others.” *Evans*, 307 A.D.2d at 441, 762 N.Y.S.2d 678 (citations omitted); *cf. Prozeralik v. Capital Cities Commc’ns, Inc.*, 82 N.Y.2d 466, 479, 605 N.Y.S.2d 218, 626 N.E.2d 34 (N.Y.1993) (holding in defamation action that an award of punitive damages requires “circumstances of aggravation or outrage, such as spite or malice, or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton”) (internal quotation marks and citation omitted). In addition, a necessary element for negligent hiring, training, or supervision is that the employer “knew or should have known of the employee’s propensity for the conduct which caused the injury.” [Kenneth R. v. Roman Catholic Diocese of Brooklyn](#), 229 A.D.2d 159, 161, 654 N.Y.S.2d 791 (2d Dep’t 1997).

[32] As a preliminary matter, despite the somewhat undefined nature of the exception for gross negligence in hiring, training, or supervision, the court is persuaded that while a party must plead *111 conduct sufficient to warrant punitive damages, the party is not required to

specifically plead “punitive damages” to sustain a cause of action for negligent hiring, training, or supervision.⁸ *See Gill v. Montgomery Ward & Co.*, 284 A.D. 36, 40, 129 N.Y.S.2d 288 (3d Dep’t 1954); *cf. Norfolk & Portsmouth Traction Co. v. Miller*, 174 F. 607, 610 (4th Cir.1909) (“While punitive damages need not be demanded *eo nomine* ... the facts showing a right to recover such damages must be set out ...”). The court finds support for this conclusion in the New York rule that “a demand for punitive damages does not amount to a separate cause of action for pleading purposes.” *Rose Lee Mfg., Inc. v. Chem. Bank*, 186 A.D.2d 548, 550, 588 N.Y.S.2d 408 (2d Dep’t 1992) (citations omitted).

[33] Notwithstanding this legal construction, U.S. Xpress and Morgan have failed to provide sufficient factual support for their claim of negligent hiring, training, and supervision. While their failure to plead “punitive damages” is inconsequential for the reasons just discussed, U.S. Xpress and Morgan have neither alleged nor provided adequate evidence to allow a rational jury to find that Polsinello negligently hired, trained, or supervised Mahar. The record is devoid of any evidence demonstrating that Mahar had a propensity to operate a tractor-trailer in the negligent manner alleged or that Polsinello knew or should have known of any such propensity. US Xpress and Morgan’s lone reliance on the testimony of Judith Polsinello, Director of Human Services for Polsinello, indicating that Polsinello as a motor carrier did not fully comply with federal regulations requiring an annual review and update of Mahar’s driving record and personnel file is insufficient to create a material question of fact, especially where there is no evidence suggesting that such a review would have revealed any stain on his record.⁹ And despite U.S. Xpress and Morgan’s attempts to construe Ms. Polsinello’s testimony to create a triable dispute, the court is unable to find any evidence demonstrating that Mahar may have lacked the appropriate qualifications and training or that Polsinello may have been grossly, willfully, or wantonly negligent in hiring, training, or supervising Mahar.

[34] In contrast, however, Mahar has submitted enough evidence on his claim against U.S. Xpress for negligent hiring, training, and supervision to survive the summary judgment stage. While the court has reviewed Mahar’s proposed pleadings and already determined that he has raised a material issue of genuine fact as to whether U.S. Xpress negligently hired, trained, and supervised

Morgan, further elaboration on this determination is warranted. The record evidence, viewed in the light most favorable to Mahar as the nonmoving party, could allow a reasonable jury to find that the tractor Morgan was operating had significant mechanical problems that U.S. Xpress was aware of or should have been aware of during the weeks leading up to the accident. Not only is there a question as to *112 what warnings Morgan and U.S. Xpress received or should have received in the days preceding the accident, there is evidence that: (1) U.S. Xpress was aware of the mechanical problems alleged to be at fault here, namely the failing cooling system fan; (2) U.S. Xpress continued to receive notices about the failing condition of the tractor during the days before the accident; and (3) the electronic control module (ECM) data, Detroit Diesel electronic controls (DDEC) data, and other diagnostic records may have revealed that the tractor was operating in an erratic, unstable, or alarming manner. In addition, a jury could conclude that U.S. Xpress, aware of these conditions, was grossly or wantonly negligent or reckless in putting the tractor on the road and under the operation of an inexperienced driver. Specific to Morgan's experience and training, there is evidence that raises questions as to whether Morgan was: (1) able to adequately perform a pre-trip inspection and assess the tractor's conditions; (2) properly trained to respond to the warnings and indications she received; (3) aware of the measures available to override the shutdown of her engine; and (4) familiar with the proper steps to be taken after her tractor shut down. Accordingly, these facts considered in the aggregate would allow a reasonable jury to find that U.S. Xpress knew or should have known that Morgan was prone to act negligently based on her deficient training and supervision, and that U.S. Xpress thereby acted with willful or wanton negligence or recklessness in conscious disregard of others' rights by authorizing Morgan to operate the tractor.

Therefore, Polsinello's motion for summary judgment on U.S. Xpress and Morgan's claim of negligent hiring, training, and supervision is granted. However, U.S. Xpress's motion for summary judgment on Mahar's claim of negligent hiring, training, and supervision is denied.

D. Collateral Damages Issues

1. Costs of Preservation

[35] US Xpress seeks damages for the costs incurred in preserving tractor-trailer 40035 in compliance with a

March 15, 2005 Order issued by Judge James P. Dawson of the New York State Supreme Court, Essex County. (See *Berstein Aff.*, Ex. J, Dkt. No. 109:12.) Specifically, U.S. Xpress seeks towing and storage costs in the amount of \$66,558.69. (See *Ford Aff.*, Ex. E, Dkt. No. 109:3.) In response, Polsinello moves for summary judgment on these costs based on, among other things, the fact that U.S. Xpress had a duty to preserve the tractor-trailer and accordingly was required to bear any expenses resulting from its compliance with the order and with discovery requirements.

[36] [37] A party is obligated to preserve evidence in its possession and not engage in spoliation¹⁰ when it “has notice that the evidence is relevant to litigation ... [or] when a party should have known that the evidence may be relevant to future litigation.” [Kronisch v. United States](#), 150 F.3d 112, 126 (2d Cir.1998) (citation omitted), *overruled on other grounds*, [Rotella v. Wood](#), 528 U.S. 549, 120 S.Ct. 1075, 145 L.Ed.2d 1047 (2000). Thus, every party has “a duty to preserve what it knows, or reasonably should know, is relevant in the action, ... is reasonably *113 likely to be requested during discovery and/or is the subject of a pending discovery request.” [Turner v. Hudson Transit Lines, Inc.](#), 142 F.R.D. 68, 72 (S.D.N.Y.1991) (internal quotation marks and citation omitted). This obligation may arise before a complaint is filed where a party is on notice that litigation is likely to be commenced, see [id.](#) at 73, or where a court orders that the evidence be preserved, see [MetLife Auto & Home v. Joe Basil Chevrolet, Inc.](#), 1 N.Y.3d 478, 484, 775 N.Y.S.2d 754, 807 N.E.2d 865 (N.Y.2004).

[38] In general, “the presumption is that the party possessing [evidence] must bear the expense of preserving it for litigation.” [Treppe v. Biovail Corp.](#), 233 F.R.D. 363, 373 (S.D.N.Y.2006); see also [Oppenheimer Fund, Inc. v. Sanders](#), 437 U.S. 340, 358, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978); [Clever View Invs., Ltd. v. Oshatz](#), 233 F.R.D. 393, 394 (S.D.N.Y.2006) (“[T]he party responsible for production generally bears the cost.”). This presumption may be overcome if the demanding party seeks preservation of evidence that is likely to be of marginal relevance and is costly to retain and preserve, or where a nonparty is in possession of the requested evidence. See [Treppe](#), 233 F.R.D. at 373; see also

Capricorn Power Co., Inc. v. Siemens Westinghouse Power Corp., 220 F.R.D. 429, 436 (W.D.Pa.2004). In these limited circumstances, the court may order preservation on the condition that the demanding party assume part or all of the related expenses. See *Oppenheimer Fund, Inc.*, 437 U.S. at 358, 98 S.Ct. 2380. To this end, both FED. R. CIV. P. 26(c) and N.Y. C.P.L.R. § 3103 allow a party to seek a cost-shifting protective order where that party can demonstrate undue or unreasonable expense. And motions for a protective order must be made in a timely manner, which ordinarily means that the motion must be made by the date set for the discovery or production unless there was no opportunity to so move. See *United States v. IBM Corp.*, 70 F.R.D. 700, 701 (S.D.N.Y.1976); see also *Ayers v. Cont'l Cas. Co.*, 240 F.R.D. 216, 221 (N.D.W.Va.2007); *Ehrlich v. Inc. Village of Sea Cliff*, No. CV04-4025, 2007 WL 1593241, at *4 (E.D.N.Y. June 1, 2007).

Here, U.S. Xpress was under a two-fold obligation to preserve tractor-trailer 40035. First, it is clear that U.S. Xpress should have known that the tractor-trailer was particularly relevant to future litigation and that it was therefore legally obligated to preserve the tractor in its post-accident condition. Second, Judge Dawson's March 15, 2005 Order provided U.S. Xpress with explicit notice of its duty to preserve the tractor-trailer. As a result, because the tractor-trailer was under its control and was constructively in its possession, U.S. Xpress is presumed to be responsible for any and all expenses incurred in preserving it for litigation. US Xpress had ample opportunity to move for an order of protection with Judge Dawson prior to removal or with this court after October 25, 2006. However, U.S. Xpress failed to file such a motion. And while U.S. Xpress stated in its opposition papers to the March 15 Order that it would suffer substantial economic losses if prevented to repair and use tractor 40035, this was insufficient to outweigh the parties' interests in preserving the evidence. Moreover, neither the state court nor this court was under any obligation to construe U.S. Xpress's opposition papers as a motion for a protective order. Furthermore, upon review of U.S. Xpress's current arguments, the court is unable to find any factual or legal reason, explanation, or excuse that would justify shifting the preservation costs to either Polsinello or Mahar.

Nevertheless, should U.S. Xpress ultimately prevail on its claims against Polsinello *114 and/or Mahar, it may be entitled to recover damages for reasonable storage and transportation costs inasmuch they were not the result of U.S. Xpress's delay or failure to mitigate. See *Mooney v. Nationwide Mut. Ins. Co.*, 172 A.D.2d 144, 149, 577 N.Y.S.2d 506 (3d Dep't 1991). Thus, because the nature of the towing and storage costs is in dispute, Polsinello's motion for summary judgment regarding these costs is denied.

2. Loss of Use

[39] US Xpress also seeks damages in the amount of \$129,584.00 for loss of use of tractor 40035 during the time it was out of service. (See Ford Aff., Ex. E, Dkt. No. 109:3.) Polsinello counters with a motion for summary judgment, contending that the loss of use was the result of either the preservation requirements or U.S. Xpress's subsequent delay in repairing or using the tractor. (See Polsinello Mem. of Law at 11, Dkt. No. 109:15.) Polsinello also asserts that U.S. Xpress has not provided adequate proof of damages for loss of use.

Where a party loses use of its vehicle as the result of an accident, it may be entitled to recover damages for loss of use. In order to prove a claim for loss of use, the owner must "offer expert testimony as to the cost of renting a replacement vehicle for the period reasonably required to make repairs to [the] damaged vehicle." *Roundtree v. Singh*, 143 A.D.2d 995, 995, 533 N.Y.S.2d 609 (2d Dep't 1988). As part of this showing, the owner must provide proof that the rental period was reasonable and that there was no undue delay in repairing or other failure to mitigate losses. See *id.*; see also *Hoover v. Montanus*, 108 Misc.2d 916, 918, 439 N.Y.S.2d 263 (N.Y.Sup.Ct.1981) (citing, *inter alia*, *Livingston v. Knight*, 90 Misc.2d 941, 943, 396 N.Y.S.2d 562 (N.Y.Sup.Ct.1976)). And while there is some dispute among New York courts as to whether a replacement vehicle must be utilized and whether actual losses must be suffered,¹¹ it is well settled that, unless the owner can prove that it was unable to obtain a suitable substitute, the reasonable rental cost of a replacement is the appropriate measure of loss of use damages. See *Kuwait Airways Corp. v. Ogden Allied Aviation Servs.*, 726 F.Supp. 1389, 1396-98 (E.D.N.Y.1989); see also *Koninklijke Luchtvaart*

Maatschaapij, N.V. v. United Techs. Corp., 610 F.2d 1052, 1055–58 (2d Cir.1979).

While the parties dispute what the appropriate measure for loss of use damages is, it seems clear that reasonable rental cost, and not lost profits, is the correct measure since U.S. Xpress does not offer any proof suggesting that it was unable to obtain a suitable substitute for the damaged tractor. However, questions of material fact remain as to whether and to what extent U.S. Xpress is entitled to loss of use damages and to what extent each party was responsible for the delay in repairing the tractor. Thus, Polsinello's motion for summary judgment is denied regarding loss of use damages.

3. Cleanup Costs

[40] US Xpress further seeks reimbursement for costs incurred in cleaning up the accident site. However, Polsinello contends that U.S. Xpress cannot recover *115 these costs because they arose out of a voluntary settlement agreement with New York State.

[41] Under New York law, “[a] tortfeasor who has obtained [its] own release from liability shall not be entitled to contribution from any other person.”  [N.Y. GEN. OBLIG. LAWW § 15–108\(c\)](#). Accordingly, “[t]he settling tortfeasor is relieved from liability to any other person for contribution but, in exchange, is not entitled to obtain contribution from any other tortfeasor.”

 [Gonzales v. Armac Indus., Ltd.](#), 81 N.Y.2d 1, 5, 595 N.Y.S.2d 360, 611 N.E.2d 261 (N.Y.1993) (citation omitted). Thus, a tortfeasor who pays to limit its exposure to liability may not press a contribution claim against another tortfeasor who was not a party to the release agreement. See  *id.* at 6, 595 N.Y.S.2d 360, 611 N.E.2d 261; see also [DMJ Assocs. v. Capasso](#), No. 97–CV–7285, 2008 WL 4515799, at *2 (E.D.N.Y. Oct. 2, 2008) (“Courts should bar third-party contribution claims brought by settling defendants who, by settlement with the plaintiff, effectively avoided any further litigation of the claims against them.” (internal quotation marks and citation omitted)).

Despite U.S. Xpress's characterization of the cleanup costs as “merely a reimbursement for damages sustained as a result” of the accident, (see Def. Resp. Mem. of Law at 8, Dkt. No. 133:4), it is clear that U.S. Xpress entered into

an agreement with New York State to pay the cleanup costs in exchange for a release from any future claims for damage to New York State property, (see Ford Aff., Ex. E, Dkt. No. 109:3). Specifically, under the agreement, which was titled “Release of Property Damage Claim,” U.S. Xpress paid \$3,671.88 in “consideration” for the “release, acquit[ta] and forever discharge ... from claims for damage to New York State Property as a result of [the] accident which occurred southbound on [Interstate] 87 milepost 114, Elizabethtown, Essex County, New York on January 3, 2005.” (*Id.*) As a settling tortfeasor who has obtained its release from liability for the cleanup, U.S. Xpress is barred from seeking contribution from Polsinello or Mahar. Therefore, Polsinello's motion for summary judgment is granted insofar as U.S. Xpress's New York State damage claim for \$3,671.88 is concerned.

E. Sanctions

[42] [43] A court has authority to sanction a party under [Rule 11\(c\)](#) if it determines that the party has made false, misleading, improper, or frivolous representations to the

court in violation of [Rule 11\(b\)](#). See  [Williamson v. Recovery Ltd. P'ship](#), 542 F.3d 43, 51 (2d Cir.2008). “[Rule 11](#) explicitly and unambiguously imposes an affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading before it is signed.”

 [Eastway Constr. Corp. v. City of New York](#), 762 F.2d 243, 253 (2d Cir.1985). However, sanctions should be imposed cautiously, see [Knipe v. Skinner](#), 19 F.3d 72, 78 (2d Cir.1994), and only if “it is patently clear that a claim has absolutely no chance of success ... resolv[ing]

all doubts in favor of the sign[ing attorney].”  [Rodick v. City of Schenectady](#), 1 F.3d 1341, 1350 (2d Cir.1993) (internal quotation marks and citations omitted). Thus, “[a] distinction must be drawn between a position which is merely losing, and one which is both losing and sanctionable.”  [Sec. Indus. Ass'n v. Clarke](#), 898 F.2d 318, 321 (2d Cir.1990) (internal quotation marks and citation

omitted), *overruled on other grounds*,  [Cooter & Gell v. Hartmarx Corp.](#), 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990).

*116 [44] At the threshold, “[a] motion for sanctions must be made separately from any other motion.” [FED. R. CIV. P. 11\(c\)\(2\)](#). Compliance with this procedural prerequisite is mandatory. See  [Williamson](#), 542 F.3d

at 51–52;  *Hedges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1328–29 (2d Cir.1995). Here, it is readily apparent that the Mahars have failed to satisfy the [Rule 11](#) requirements. While the court acknowledges plaintiffs' counsel's confusion created by his reading of the November 26, 2008 Order, (*see* Dkt. No. 87), the court is unable to give the Order any reading which would suggest that [Rule 11](#)'s mandatory prerequisites were waived or abandoned so as to justify the Mahars' failure to file the motion for sanctions separately from their motion for summary judgment.

[45] Nonetheless, upon review of the merits, the court denies the Mahars' motion for sanctions, including their request to strike U.S. Xpress's answer under [Rules 11\(c\)\(4\)](#) and [26\(g\)](#). The Mahars' motion for sanctions and to strike U.S. Xpress's pleading essentially boils down to a claim that U.S. Xpress's assertion of the “sudden emergency” defense is so lacking in factual support that it is unreasonable. Yet, in light of the evidence available, U.S. Xpress's reliance on the emergency defense is objectively reasonable. Moreover, the court is hard-pressed to find any acts or omissions by U.S. Xpress or its counsel that could be deemed sanctionable. Rather, it appears that the Mahars are simply trying to reargue their motion for summary judgment in the context of sanctions. Accordingly, the Mahars' motion for sanctions and to strike U.S. Xpress's answer is denied.

V. Conclusion

WHEREFORE, for the foregoing reasons, it is hereby

ORDERED that Polsinello's motion for partial summary judgment (Dkt. No. 109) is **GRANTED** insofar as U.S. Xpress's claim for New York State cleanup costs is **DISMISSED**; and it is further

ORDERED that Polsinello's motion for partial summary judgment (Dkt. No. 109) is **DENIED** in part as to U.S. Xpress's remaining claims for towing, storage, and loss of use damages; and it is further

ORDERED that Polsinello's motion for summary judgment (Dkt. No. 111) is **GRANTED** insofar as “Polsinello Fuels” is **DISMISSED** from the action and

U.S. Xpress and Morgan's claim against Polsinello for negligent hiring, training, and supervision is **DISMISSED**; and it is further

ORDERED that Polsinello's motion for summary judgment (Dkt. No. 111) is **DENIED** in part as to the claims of negligence and vicarious liability; and it is further

ORDERED that Morgan's motion for summary judgment (Dkt. No. 113) based on improper or insufficient service is **DENIED**; and it is further

ORDERED that U.S. Xpress and Morgan's motion for summary judgment (Dkt. No. 114) is **DENIED** as to the claims of negligence, vicarious liability, and negligent hiring, training, and supervision; and it is further

ORDERED that U.S. Xpress's motion for summary judgment (Dkt. No. 115) is **GRANTED** and U.S. Xpress Enterprises, Inc., U.S. Xpress Leasing, Inc., and Xpress Global Systems, Inc. are **DISMISSED** from the action; and it is further

ORDERED that the Mahars' motion for summary judgment (Dkt. No. 115) is **DENIED** as to the claims of negligence and vicarious liability; and it is further

*117 **ORDERED** that the Mahars' motion for leave to amend (Dkt. No. 116) is **GRANTED**; and it is further

ORDERED that the Mahars' Second Amended Complaint is to be filed with this court and served upon the parties within ten (10) days from the filing of this Order on March 8, 2010, after which U.S. Xpress and Morgan will be permitted twenty-one (21) days to file an answer and any related motions; and it is further

ORDERED that the Mahars' motion for sanctions is **DENIED**; and it is further

ORDERED that the Clerk provide a copy of this Memorandum–Decision and Order to the parties.

IT IS SO ORDERED.

All Citations

688 F.Supp.2d 95

Footnotes

- 1 As evidenced by the New York Driver Record Service Report, Mahar had a Class A CDL with endorsements for tanks and hazmat. (See Bookmyer Aff., Dkt. No 111:6.) In addition, this Record Service Report did not reveal any violations or suspensions of Mahar's license or any prior accidents. (See *id.*)
- 2 None of the parties dispute that New York law controls here. Accordingly, the court will apply New York State substantive law and federal procedural law. See [Gasperini v. Ctr. for Humanities](#), 518 U.S. 415, 427, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996); see also [Hanna v. Plumer](#), 380 U.S. 460, 473–74, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965); [Erie R.R. Co. v. Tompkins](#), 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); [McCarthy v. Olin Corp.](#), 119 F.3d 148, 153 (2d Cir.1997).
- 3 By Stipulation and Order, Count One of the Amended Third-Party Complaint was dismissed on the merits. (See Dkt. No. 100.) However, Count Two, the claim for property damage, remains. (See Am.3d-Party Compl. ¶¶ 21–27, Dkt. No. 24.)
- 4 The distinctions between waiver and forfeiture are of no moment here. See [United States v. Olano](#), 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (“Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.” (internal quotation marks and citations omitted)). Additionally, as the Second Circuit has noted, the issue of waiver or forfeiture is governed by federal procedural law. See [Hamilton v. Atlas Turner, Inc.](#), 197 F.3d 58, 61 (2d Cir.1999) (finding forfeiture where four years passed between the time when the defense was asserted in the answer and when the defense was raised in a motion, during which defendant joined other defendants in seeking transfer of action and considerable pretrial activity occurred including merits discovery and settlement conferences).
- 5 Personal jurisdiction is controlled by the law of the state where the district court sits, which is New York here. See [Arrowsmith v. United Press Int'l](#), 320 F.2d 219, 223–231 (2d Cir.1963). Consequently, service on an individual must be made by “following [New York] state law for serving a summons in an action brought in [New York] courts of general jurisdiction” FED. R. CIV. P. 4(e)(1).
- 6 Because the Mahars intended to amend prior to the time when dispositive motions became due, it is unclear whether the court must employ the Rule 12(b)(6) standard of review to the issue of futility, see [Ricciuti v. N.Y.C. Transit Auth.](#), 941 F.2d 119, 123 (2d Cir.1991), *superseded on other grounds*, [Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit](#), 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993), and thereby restrict itself to the facts alleged in the complaint and the documents attached as exhibits or incorporated by reference, see [Cosmas v. Hassett](#), 886 F.2d 8, 13 (2d Cir.1989), or whether the court should employ the standard for summary judgment, see [Milanese v. Rust-Oleum Corp.](#), 244 F.3d 104, 110 (2d Cir.2001). Regardless, the procedural distinction is of no consequence here since the Mahars' proposed amendment satisfies either standard.
- 7 While the parties engage in debates about the credibility of fact and expert witnesses, the reasonableness of the testimony, the nature of the evidence, and the conclusions that should be reached, such matters are better left to a jury to resolve.
- 8 The factual and legal circumstances presented here justify a limited departure from the general proposition that “any claim for punitive damages must be raised in the pleadings.” [Mendoza v. City of Rome, N.Y.](#), 872 F.Supp. 1110, 1125 (N.D.N.Y.1994) (citing FED. R. CIV. P. 8(a)) (finding waiver of pleading requirements where punitive damages issue had already been tried and the jury already returned a verdict on liability).
- 9 It is noteworthy that during her deposition, Judith Polsinello testified that Polsinello's insurance company does perform annual reviews of Polsinello's drivers. (See Wescoe Aff., Ex. B, Judith Polsinello Dep. at 17, Dkt. No. 131:2.)
- 10 “Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.” [West v. Goodyear Tire & Rubber Co.](#), 167 F.3d 776, 779 (2d Cir.1999) (citation omitted).
- 11 Compare [Mountain View Coach Lines, Inc. v. Gehr](#), 80 A.D.2d 949, 439 N.Y.S.2d 632 (3d Dep't 1981) (dismissing claim for loss of use where plaintiff did not hire a replacement vehicle and did not incur any lost profits or diminution of services to customers during repair period), with [Mountain View Coach Lines, Inc. v. Storms](#), 102 A.D.2d 663, 476

[N.Y.S.2d 918 \(2d Dep't 1984\)](#) (holding that plaintiff who did not hire a substitute bus but rather used one of its reserves could still recover for loss of use).

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.