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“SPOILIATION, WHY I SHOULD BE CONCERNED CONTINUED”

In our last newsletter we looked at a premises case where a store did not preserve a surveillance tape that presumably would have shown whether a wet floor sign had been placed prior to the Plaintiff falling.

We also looked at a trucking case where the trucking company, per its retention policies that mirrored the Federal Motor Carrier Safety Regulations, got rid of its driver’s logs after that driver had been involved in a fatality accident. In that case, witnesses claimed the driver was swerving prior to crossing the center lane and impacting the Decedent, in the oncoming lane of traffic.

We stated that, in our opinion, the Court will likely find that both of the companies should have anticipated a lawsuit and that the evidence at issue would be important. Likewise, the Court will likely find that the Plaintiffs are handicapped in presenting their case without the evidence.

SO WHAT’S THE PUNISHMENT?

In punishing the Defendant(s), the Court can either (1) impose a sanction on the spoliating party or (2) issue an instruction to the jury.

ISSUING SANCTIONS

There are two types of sanctions a Court can impose. One sanction is the entry of a default judgment, meaning the Court has found the company liable without the assistance of the jury. Another potential sanction is excluding evidence or testimony. Courts generally use the second sanction when the spoliating party is attempting to admit testimony or have evidence adduced from the destroyed evidence.

1. DEFAULT JUDGMENT SANCTION:

For the Court to choose the sanction of a default judgment, the spoliator's conduct must be egregious, the prejudice to the nonspoliating party great, and the imposition of a lesser sanction cannot cure the prejudice. The sanction of imposing a default judgment is rare, given the constitutional rights of the parties to have the merits of their case heard by a jury.

2. ***EXCLUDING EVIDENCE SANCTION:***

As for the sanction of excluding evidence, let's assume the surveillance tape was viewed by an employee prior to its destruction, and the employee claims the wet floor sign was in fact present at the time the Plaintiff slipped. The Court will likely exclude the employee's testimony about the contents of the video because the Plaintiff would be at a double disadvantage. She arguably cannot challenge the employee's account without inspecting the video.

Finally, as opposed to issuing either of the above two sanctions, the courts most often submit a spoliation presumption instruction to the jury.

ISSUING AN INSTRUCTION

Depending on the severity of prejudice resulting from the particular evidence destroyed, the trial court can submit one of two types of presumptions, a rebuttable presumption or an adverse presumption. The first and more severe presumption is a rebuttable presumption.

REBUTTABLE PRESUMPTION

This is primarily used when the nonspoliating party cannot prove one or more of the elements of its case without the destroyed evidence. The court begins by instructing the jury that the spoliating party has either negligently or intentionally destroyed evidence. Therefore, the jury should presume that the destroyed evidence was unfavorable to the spoliating party, on the particular fact or issue the destroyed evidence might have supported.

Next, the court instructs the jury that the spoliating party bears the burden to disprove the presumed fact or issue. In other words, the Court shifts the burden of proof on the particular issue to the Defendant. When the Defendant offers evidence rebutting the presumed fact or issue, the presumption does not automatically disappear. It is not overcome until the fact finder believes that the presumed fact has been overcome by whatever degree of persuasion the substantive law of the case requires.

2. ***ADVERSE PRESUMPTION***

The second type of presumption is less severe. It is merely an adverse presumption that the evidence would have been unfavorable to the spoliating party. The presumption itself has probative value and may be sufficient to support the Plaintiff's case. However, it does not relieve the Plaintiff of the burden to prove each element of his or her case. Therefore, it is simply another factor used by the jury in weighing the evidence.

HOW TO DEAL WITH A SPOLIATION RULING

If a Court determined that your company had destroyed evidence, the absence of which prejudices the Plaintiff's presentation of their case, you want to argue for the less severe of the two instructions, the adverse presumption. You should also attempt to find evidence to explain how the retention fell through the cracks in an effort to minimize the culpability of your company.

For a review of the last two articles on spoliation, see *Trevino v. Ortego* 969 S.W. 2d 950 (Tx. Sup. Ct. 1998).

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