

EVIDENCE – SPOILATION AND LOSS

Summary

Appellant argued that lost evidence should create a rebuttable presumption that the evidence would have been harmful to the party that lost the evidence, and that presumption should be provided to a jury in the form of an instruction to that effect.² The district court refused to issue the instruction.

Disposition/Outcome

The Nevada Supreme Court concluded that Appellant was entitled to a jury instruction regarding the spoliation of evidence inference, and that the district court's refusal to so instruct the jury was grounds for a new trial.³

Factual & Procedural History

On January 11, 1999, Kimberly Bass-Davis slipped and fell on a wet floor inside a Las Vegas 7-Eleven convenience store. Following the fall, she sought medical attention and was diagnosed with numerous injuries.

Approximately one week after she fell, Appellant contacted the franchisees and requested copies of the store's incident report regarding her fall and the surveillance videotape from inside the store. She never received them. During discovery, Appellant learned that the franchisees could not locate the surveillance videotape, which had been forwarded to the franchisee's insurance carrier per company policy. Further, the employment records from the time of the accident and the original incident report prepared by the employee on duty at the time of the fall could not be found, and the franchisees were also unable locate an employee who was on duty at the time of the accident.

On June 25, 2002, Appellant moved the district court for partial summary judgment as to liability because the franchisees' willful failure to preserve evidence rendered it impossible for her to prove her case. The franchisees opposed Appellant's motion and argued that summary judgment was inappropriate because Appellant had failed to prove that the evidence was willfully lost.

At trial, the district court denied Appellant's instruction on the spoliation of evidence.⁴

¹ By Kenneth E. Hogan

² *Bass-Davis*, 117 P.3d at 207.

³ *Id.*

⁴ *Id.* At the conclusion of trial, Bass-Davis offered the following jury instruction:

Where relevant evidence . . . is within the control of the defendants . . . and they fail to do so without a satisfactory explanation, the jury may draw an inference that such evidence would have been unfavorable to the defendants.

Discussion

The court recognized that under NRS 47.250(3), “when evidence is willfully destroyed, the trier of fact is entitled to presume that the evidence was adverse to the destroying party.”⁵ The court further held that evidence is “willfully” destroyed even if the evidence is destroyed pursuant to an established company policy.⁶

Since there was no evidence of willful suppression, the court concluded that it would be improper to apply the statutory rebuttable presumption in this case. Nevertheless, the court agreed with Bass-Davis that based upon the facts of this case, the franchisees should be responsible for the fact that the evidence was lost.⁷

Though the franchisees did not lose the evidence themselves, they did provide the evidence to Southland,⁸ which forwarded the evidence to its insurer, which, in turn, lost the evidence. For the purposes of safeguarding the videotape evidence, both Southland and its insurer were agents of the franchisees. The franchisees could have preserved the evidence by copying it before they forwarded it to their agents. Since they failed to do so, they are responsible for their agents’ loss of the evidence.

The court adopted a rule from Texas common law: “Once a party has notice of a potential claim, that party has a duty to exercise reasonable care to preserve information relevant to that claim.”⁹ To hold otherwise would encourage potential defendants to forward damaging evidence to their agents who could “lose” the evidence without any negative effect on the potential defendants.

To avoid such an injustice, the court mandated the following jury instruction shall be given when evidence which should have been preserved for trial is lost or destroyed but there is no evidence of willful suppression:

"You may infer that lost or destroyed evidence is unfavorable to the party who could have produced it and did not, if the evidence was (a) under the party's control and reasonably available to it and not reasonably available to the adverse party, and (b) lost or destroyed without satisfactory explanation after the party knew or should have known of the existence of the claim."¹⁰

Conclusion

The court concluded that Appellant was entitled to a jury instruction regarding the spoliation of evidence inference and that the district court's refusal to so instruct the jury was grounds for a new trial. The court also supplied the text of the jury instruction which shall be given when evidence is lost without evidence of willful suppression.

⁵ *Id.* (citing *Reingold v. Wet 'n Wild Nevada, Inc.*, 944 P.2d 800, 802 (Nev. 1997)).

⁶ *Id.* (citing *Reingold*, 944 P.2d at 802).

⁷ *Id.*

⁸ Southland Corporation was d/b/a 7-eleven stores; Kathi and Christopher Davis were the franchisees.

⁹ *Id.* (citing *Offshore Pipelines, Inc. v. Schooley*, 984 S.W.2d 654, 666 (Tex. App. 1998) (quoting *Trevino v. Ortega*, 969 S.W.2d 950, 954, (Tex. 1988) (Baker, J., concurring)).

¹⁰ *Id.*