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Summary of Bass-Davis v. Davis, 122 Nev. Adv. Op. 39

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Bass-Davis v. Davis, 122 Nev. Adv. Op. 39 (May 11, 2006)[1]

EVIDENCE – REMEDY FOR SUPPRESSION OR SPOLIATION

Summary

In 1999, Ms. Bass-Davis slipped and fell in a 7-Eleven convenience store causing injuries that required her to incur medical bills in excess of $201,000. The incident was apparently captured on surveillance video. Within a week of the incident, Ms. Bass-Davis' sister contacted the Davis', the franchisees, and requested all reports and surveillance video documenting the fall. The franchisees referred her to the franchisor, 7-Eleven, Inc. (formerly Southland Corporation). The franchisor in turn never responded.

Ms. Bass-Davis sued the franchisees, claiming that her fall was the result of the store's failure to post a warning sign after mopping the floor. The surveillance video was relevant to show whether there was a warning sign posted at the site of Ms. Bass-Davis' fall. During discovery Ms. Bass-Davis learned that the franchisees could not locate the surveillance video. The franchisees testified that although they had no personal knowledge of the video, they believed it was mailed to the franchisor according to corporate policy. The franchisor testified that it had received the video but that it had been lost after it was forwarded to its insurer.

During the trial, Ms. Bass-Davis was asked whether she had received a paycheck during her leave of absence while recovering from her injuries. She answered that she had. Since Ms. Bass-Davis was seeking lost wages, her counsel objected to the question on grounds that it called for collateral source evidence. The objection was overruled.

Ms. Bass-Davis proposed the following jury instruction with regard to the surveillance video:

> Where relevant evidence which would properly be part of this litigation is within the control of the defendants whose interest it would naturally be to produce it, 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.[2]

The district court denied the proposed instruction and the jury returned a verdict for the defendants.

Ms. Bass-Davis appealed and the case was heard before a panel of the Nevada Supreme Court, which found in her favor. The franchisees petitioned for en banc reconsideration. The petition was granted.

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[1] By Charles R. Cordova, Jr.
[2] 122 Nev. Adv. Op. 39, at *6 (2006).

Issues and Disposition

Issues

1) What evidentiary presumptions apply to lost or destroyed evidence?

2) Is the Collateral Source Rule violated where the defendant elicits testimony on cross-examination that the plaintiff received a paycheck during her leave of absence while she was recovering from the injury?

Disposition

1) Where evidence is negligently lost or destroyed a permissive inference that the evidence would be adverse applies to the negligent party. When a party intends to harm another party by willfully suppressing evidence, the rebuttable presumption of Nev. Rev. Stat. § 47.250(3) applies.

2) The Collateral Source Rule is violated where the defendant elicits testimony on cross-examination that the plaintiff received a paycheck during her leave of absence while she was recovering from the injury. Nevada has a *per se* rule prohibiting evidence of collateral payment for injuries.[3]

Commentary

State of the Law Before *Bass-Davis*

In *Reingold v. Wet 'N Wild Nev., Inc.*, the court held that when evidence is not produced, the trial court may apply a permissive inference that the evidence would be adverse to the non-producing party.[4] Additionally, they appeared to hold that when evidence is intentionally suppressed the rebuttable presumption of Nev. Rev. Stat. § 47.250(3) applies.[5] *Reingold* was a case of personal injury at an amusement park where the company destroyed all records of injuries at the end of each season.[6] The court explained that a policy of destroying records prior to the expiration of the statute of limitations could constitute willful suppression.[7] In *Reingold* they determined that the records were "willfully or intentionally destroyed" and that "the record destruction policy was deliberately designed to prevent production of records in any subsequent litigation."[8] By this they implied that the intent to willfully destroy records could be adequate to trigger the rebuttable presumption of Nev. Rev. Stat. § 47.250(3). Similarly in *Bohlmann v. Printz*, the court seemed to embrace the application of the rebuttable presumption where the intent to suppress evidence was willful.[9]

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[3] *Procter v. Castelletti*, 911 P.2d 853, 854 (Nev. 1996).
[4] 944 P.2d 800, 802 (Nev. 1997).
[5] *Id.*
[6] *Id.* at 800-02.
[7] *Id.* at 802.
[8] *Id.* at 802 (internal quotation marks omitted).
[9] 96 P.3d 1155, 1158 (Nev. 2004).

Effect of *Bass-Davis* on Current Law

Bass-Davis makes clear that a permissible inference may apply when evidence is negligently lost or destroyed, and that to trigger the rebuttable presumption in Nev. Rev. Stat. § 47.250(3), the party must not only intend to destroy or make evidence unavailable but must do so with the intent to harm the other party (e.g. to obtain a competitive advantage in the proceeding).

Other Jurisdictions

Courts have generally provided remedies for spoliation of evidence.[10] Since jurisdictions may have unique rules or statutory provisions governing this issue, research on the question should be jurisdiction specific.[11] A more recent development has been whether to recognize an independent tort for the loss or destruction of evidence.[12] California was the first to recognize such a tort in 1984,[13] but more recently abandoned it stating that there are "existing and effective nontort remedies for [the] problem."[14] Nevada rejected the independent tort of spoliation of evidence because the benefit of deterrence and compensation are outweighed by the burden on the parties and the judicial system.[15]

Conclusion

The Nevada Supreme Court clarified the statutory presumption for spoliation of evidence. Where evidence is negligently lost or destroyed, a party may be entitled to an inference that the evidence would be adverse to the negligent party. Where a party causes evidence to be unavailable with the intent to harm the opposing party, the statutory rebuttable presumption is proper. The *per se* rule barring collateral source evidence prohibits questions regarding receipt of a paycheck by a litigant seeking lost wages.

[10] *Federated Mutual Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 436 (Minn. 1990).
[11] Rachel A. Campbell, Annotation, *Effect of Spoliation of Evidence in Tort Actions Other than Product Liability Actions*, 121 A.L.R. 5th 157, § 1(a).
[12] *Timber Tech Engineered Building Products v. Home Ins. Co.*, 55 P.3d 952, 953 (Nev. 2002).
[13] *Smith v. Super. Ct.*, 198 Cal. Rptr. 829, 831 (Cal. Ct. App. 1984).
[14] *Cedars-Sinai Med. Ctr. v. Super. Ct.*, 954 P.2d 511, 512 (Cal. 1998).
[15] *Timber Tech*, 55 P.3d at 954.