

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

LORENA CHIVERTON,	)	
	Plaintiff,	)
v.	)	CIVIL NO. SX-10-CV-575
WORLD FRESH MARKET, LLC d/b/a	)	ACTION FOR DAMAGES
PUEBLO SUPERMARKET,	)	
Defendant.	)	JURY TRIAL DEMANDED

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Plaintiff's Motion for Sanctions and Spoliation Inference, filed March 1, 2017; Defendant's Opposition thereto, filed March 13, 2017; Defendant's Motion for Spoliation Inference, filed March 13, 2017; and Plaintiff's Opposition thereto, filed March 23, 2017. Because Defendant's failure to retain more than sixty-two seconds of surveillance video footage from the period preceding Plaintiff's fall is *per se* unreasonable under the Supreme Court of the Virgin Islands holding in *Samuel v. United Corp.*, 64 V.I. 512 (V.I. 2016), Plaintiff's Motion will be granted. However, because Plaintiff, at the time she disposed of the shoes she wore on the day of the incident, had no notice that Defendant would seek to use them as evidence in this litigation, no spoliation inference is warranted and Defendant's Motion will be denied.

Background

Plaintiff's Amended Complaint alleges that on August 20, 2010, while shopping at Defendant's grocery store in Estate Golden Rock, St. Croix, Plaintiff suffered injuries when she slipped on a puddle of water that had leaked from nearby, malfunctioning equipment and accumulated on the floor. Complaint ¶ 4-8. Plaintiff further alleges that this accident resulted from: 1) Defendant's failure to properly inspect and maintain its premises, 2) Defendant's failure to properly train its employees to do so, and 3) Defendant's failure to have in place proper policies and procedures to prevent such accidents. *Id.*

On March 1, 2017, Plaintiff filed her Motion for Sanctions and Spoliation Inference, arguing that because Pueblo destroyed all but “62 seconds” of surveillance video recording of the time period leading up to Plaintiff’s fall, “the jury should be allowed to infer... ‘that the tenor of the evidence in the footage was unfavorable to [Pueblo’s] case.’” Plaintiff’s Motion, at 5 (citing *Bright v. United Corp.*, 50 V.I. 215, 225 (V.I. 2009)). On March 13, 2017, Defendant also filed a Motion for Spoliation Inference, arguing that Defendant is also entitled to a jury instruction on spoliation as a result of Plaintiff’s failure to preserve for trial the shoes she was wearing at the time of her fall.

Standard

As explained by the Supreme Court of the Virgin Islands in *Bright*, when one party has introduced evidence tending to show that an opposing party has “destroyed evidence relevant to the dispute being litigated,” the factfinder is permitted to infer “that the destroyed evidence would have been unfavorable to the position of the offending party.” *See Bright*, 50 V.I. at 225. The “key considerations” in determining whether a spoliation inference is appropriate are: “1) the degree of fault of the party who altered or destroyed the evidence; 2) the degree of prejudice suffered by the opposing party; and 3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future.” *Id.* (quoting *In re Hechinger Inv. Co. of Delaware, Inc.*, 489 F.3d 568, 579 (3d Cir. 2007)).

“Before the spoliation inference can be applied ‘it is essential that the evidence in question be within the spoliator’s possession or control,’ and ‘it must appear that there has been an actual suppression or withholding of evidence.’” *Id.* at 226 (quoting *Gumbs v. Int’l Harvester, Inc.*, 718 F.2d 88, 96 (3d Cir. 1983)). “Such a presumption or inference arises, however, only when the

spoliation or destruction [of evidence] was intentional, and indicates fraud and a desire to suppress the truth, and it does not arise where the destruction was a matter of routine with no fraudulent intent.” *Id.* (quoting *Gumbs*, 718 F.2d at 96).

Plaintiff’s Motion for Spoliation Inference

Here, the parties do not dispute that the surveillance video recording of Plaintiff’s fall was exclusively within the control of Defendant. Additionally, Plaintiff has introduced evidence demonstrating that Defendant, at the time of Plaintiff’s accident, had no policy in place concerning the preservation of surveillance footage of accidents occurring in Pueblo Supermarket. Rather, according to Defendant’s 30(b)(6) representative, when accidents occurred in the store security personnel would “try to get a clip that would show the incident,” on an *ad hoc* basis. Plaintiff’s Motion, at 5; Patterson Deposition II, at 11:14.

In opposition, Defendant asserts that the present case is factually distinguishable from *Bright* in that “inherent in the factual posture of the *Bright* case is the admission of [defendant] that there was actually a substance on the floor.” Defendant’s Opposition, at 3. However, Defendant fails to explain how or why the existence of a genuine issue of material fact regarding the presence of a slippery substance on the floor should preclude the Court from granting an otherwise justified spoliation inference. In fact, the existence of an additional dispute of material fact logically seems to increase rather than decrease the level of prejudice suffered by Plaintiff as a result of the destruction of the evidence. While it is possible that additional surveillance video footage would have had little or no probative value on the question of the presence or absence of liquid on the floor, it is equally possible that the video would have definitively supported or refuted Plaintiff’s theory of the case. Unfortunately, both the Court and the jury have been deprived of the

opportunity to evaluate precisely what any additional surveillance footage may have revealed because Defendant deliberately destroyed all but 62 seconds of video prior to Plaintiff's fall.

The Supreme Court's spoliation analysis in *Bright* is equally applicable to the present factual scenario:

After reviewing the footage, [Defendant]'s manager retained only the portion of the footage which he believed to be relevant, purportedly in accordance with the store's routine practice. It is clear, however, that [Defendant]'s routine practice regarding the destruction of surveillance footage capturing slip and fall accidents is flawed. Store managers should retain recorded footage of the area in which an accident occurred both prior to and following the accident. Obviously, such footage is likely to provide relevant and valuable evidence regarding the cause or timing of a spill resulting in a slip and fall accident. It is certainly not within the discretion of a store manager to determine what portion of the available recorded surveillance footage is relevant to anticipated litigation... To allow store managers unbridled discretion to determine what footage to retain would encourage the destruction of relevant evidence by allowing managers to destroy unfavorable footage under the pretext of routine practice... common sense dictates the retention of comprehensive surveillance footage of any accident, including a reasonable period of time preceding and following the accident.

50 V.I. at 230. Thus, the Supreme Court found that a spoliation inference was appropriate, concluding that Defendant's "destruction of the recorded surveillance footage prior to and after the fall indicates Plaza's bad faith and fraudulent intent to suppress the truth." *Id.*

Additionally, in *Samuel v. United Corp.*, the Supreme Court, recognizing the ambiguity of the "reasonable period of time" standard established in *Bright*, held that:

While [the factual scenario in *Samuel*] is distinguishable in that United retained 1 minute and 21 seconds of footage before Samuel fell — while in *Bright*, United retained none of the pre-fall footage — retaining only 1 minute and 21 seconds of footage unquestionably fails to comply with our holding that United was required to preserve "a reasonable period of time preceding and following the accident."

64 V.I. at 519.

Here, just as in *Bright* and *Samuel*, because "there is no evidence in this case of actual notice, the video surveillance footage was the only evidence that would have established whether

[Defendant] had constructive notice of the spill that caused [Plaintiff's] fall — either by showing how long the spill had been on the floor, or by showing how long that area of the store had gone without being inspected by a store employee.” *Id.* Also just like *Samuel*, “unless the [preserved portion of the] video showed the spill occurring — which would constitute strong evidence against a finding of constructive notice — such a short video could not establish whether United had constructive notice of the spill.” *Id.* Therefore, just as the Supreme Court Concluded in *Samuel* that 1 minute and 21 seconds of pre-incident video footage was insufficient, the Court here concludes that Defendant’s deletion of all but 62 seconds of pre-incident video footage is *per se* unreasonable as it “unquestionably fails to comply” with the law governing spoliation of evidence as articulated in *Bright* and *Samuel*. Accordingly, the Court finds that the deletion of the relevant surveillance footage indicates Defendant’s bad faith and fraudulent intent to suppress the truth, and that, in turn, Plaintiff is entitled to an instruction that the jury is “permitted, although not required, to apply an inference of spoliation in this case.” *Id.*

Defendant’s Motion for Spoliation Inference

By its Motion, Defendant argues that it is entitled to an inference of spoliation because “Plaintiff willfully destroyed her shoes, after this litigation was pending, in an attempt to hide the evidence of her own footwear which was the actual reason of her fall.” Defendant’s Motion, at 1. Specifically, Defendant argues that “the shoes are a necessary piece of evidence for an expert to review and give an expert opinion on whether the co-efficient of friction based on the makeup of the soles of the sandals was such that the footwear themselves caused the alleged fall.” *Id.* at 2-3.

In response Plaintiff argues that no spoliation inference is warranted because she did not have notice that Defendant “intended to place Plaintiff’s shoes at issue in this case” until Defendant

served Plaintiff with its Request for Production of Documents on March 21, 2012; a full year after Defendant filed its Answer and several months after Plaintiff disposed of the shoes.

In *Bright*, the Supreme Court of the Virgin Islands endorsed the Second Circuit's standard finding that the obligation to preserve evidence "usually arises when a 'party has notice that the evidence is relevant to litigation ... but also on occasion in other circumstances, as for example when a party should have known that the evidence may be relevant to future litigation.'" 50 V.I. at 227 (citing *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 107 (2d Cir. 2001)). Because it is clear from the record that Plaintiff only had actual notice of Defendant's intent to introduce Plaintiff's shoes as evidence after Plaintiff had already disposed of her shoes, a spoliation inference is only appropriate if Plaintiff "should have known that the evidence [would] be relevant to future litigation."

Defendant fails to cite any legal authority for the proposition that Plaintiff should have known that her shoes would be used as physical evidence in future litigation. While Defendant's Answer included a generically pled affirmative defense of contributory negligence, the Answer failed to indicate that Defendant's theory of Plaintiff's own negligence was in any way tied to her choice of footwear. Additionally, as Plaintiff points out in her Opposition, in the tropical climate of the Virgin Islands, it is certainly not uncommon for patrons to visit grocery stores wearing all manner of shoes and sandals, including the type of "sandal clogs" that Plaintiff was wearing at the time of her fall. Therefore the Court concludes that absent extenuating circumstances,¹ Plaintiff had no reason to believe that her choice of footwear was in any way uncommon or negligent, such

¹ While there may be certain factual scenarios in which a plaintiff should have known that her shoes would become relevant evidence—say, if her shoes were damaged prior to the incident, or were not properly fastened—Defendant has made no such allegations and the Court finds no evidence in the record to support such a conclusion.

that it might become relevant in future litigation, and accordingly Defendant's Motion will be denied.²

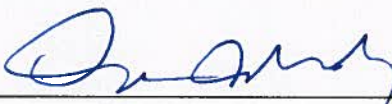
Therefore, on the basis of the foregoing, it is hereby

ORDERED that Plaintiff's Motion for Sanctions and Spoliation Inference is GRANTED.

It is further

ORDERED that Defendant's Motion for Spoliation Inference is DENIED.

March 28, 2017


DOUGLAS A. BRADY
Judge of the Superior Court

ATTEST:

ESTRELLA GEORGE
Acting Clerk of the Court

By: 

Court Clerk Supervisor 3/28/17

² Additionally, it is unclear what, if any, prejudice Defendant has suffered as a result of the loss of the shoes Plaintiff was wearing on the date of her fall. While Defendant asserts that the shoe itself is necessary to perform "coefficient of friction test," Defendant fails to demonstrate, by expert opinion or otherwise, why the coefficient of friction test could not be performed on the similar, exemplar shoe provided by Plaintiff at deposition. This argument is also belied by the fact that, despite the existence of other significant evidence concerning Plaintiff's choice of shoe such as the video recording of Plaintiff's fall, Plaintiff's sworn testimony describing the shoes, and the physical exemplar shoe provided by Plaintiff at deposition, Defendant has never sought any expert opinion on the matter.

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

IN RE:)
) MISC NO. DAB 011/2018
ORDER DESIGNATING CERTAIN)
OPINIONS FOR PUBLICATION.)

**TO: Clerk of the Court
Counsel of Record
Law Library / LexisNexis / Westlaw**

ORDER

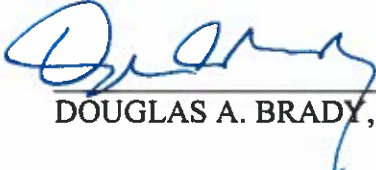
THE PREMISES considered, it is hereby

ORDERED that the following memorandum opinions issued in the below listed cases are hereby designated FOR PUBLICATION.

Pappas v. Hotel on the Cay Time-Sharing Ass'n, Inc., opinion dated April 27, 2015;
Estate of Burnett v. Kazi Foods of the V.I., SX-12-CV-139; opinion dated May 24, 2016;
FirstBank of Puerto Rico v. Prosser, SX-09-CV-520, opinion dated June 22, 2015;
James v. Guardian Insurance Company, SX-10-CV-435, opinion dated July 14, 2015;
Nurse v. Parris, SX-14-CV-011, opinion dated May 3, 2016;
Charles v. Arcos Dorados USVI, Inc., SX-13-CV-336, opinion dated August 18, 2016;
McGary v. J.S. Carambola, LLP, SX-13-CV-289, opinion dated October 7, 2016;
Whyte v. Bockino, SX-15-CV-083, opinion dated January 26, 2017;
Chiverton v. World Fresh Market, LLC, SX-10-CV-575, opinions dated March 10 & 28, 2017;
People v. Melendez, SX-16-RV-003, opinion dated March 22, 2017;
Edwards v. Hess Oil V.I. Corp., SX-15-CV-382, opinion dated June 28, 2017;
In re: Red Dust Claims, SX-15-CV-620, *et seq.*, opinion dated July 7, 2017;
Hamed v. Yusuf, SX-12-CV-370, *et seq.*, opinions dated July 21, 2017 and March 14, 2018;
Toutouyoute v. St. Croix Trading Co., Inc., SX-16-CV-457, opinion dated May 31, 2018.

Finally, it is ORDERED that a copy of this Order be served on counsel for the parties in the above-captioned cases (or the party if proceeding *pro se*), be filed in each of above-captioned matters, and forwarded to the Law Library for distribution to LexisNexis and Westlaw, FORTHWITH.

Dated: October 1, 2018.

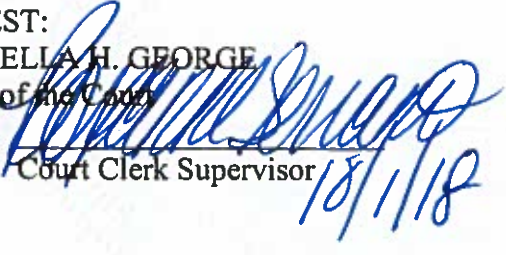

DOUGLAS A. BRADY, JUDGE

ATTEST:

ESTRELLA H. GEORGE

Clerk of the Court

By:


Court Clerk Supervisor 10/1/18