

**SUPERIOR COURT OF THE VIRGIN ISLANDS**  
**DIVISION OF ST. THOMAS AND ST. JOHN**

|                                              |   |                              |
|----------------------------------------------|---|------------------------------|
| <b>VELMA SAMUEL,</b>                         | ) |                              |
|                                              | ) |                              |
| <b>Plaintiff,</b>                            | ) |                              |
|                                              | ) |                              |
| <b>v.</b>                                    | ) | <b>CASE NO. ST-12-CV-457</b> |
|                                              | ) |                              |
| <b>UNITED CORPORATION d/b/a PLAZA EXTRA,</b> | ) |                              |
|                                              | ) |                              |
| <b>Defendant.</b>                            | ) |                              |
|                                              | ) |                              |

**MEMORANDUM OPINION**

Pending before the Court is Plaintiff's March 7, 2014, Motion For a Spoliation Inference at Trial.<sup>1</sup> For the following reasons, Plaintiff's Motion will be denied.

**FACTUAL AND PROCEDURAL HISTORY**

On August 16, 2012, Plaintiff Velma Samuel filed a Complaint alleging that on September 9, 2011, she slipped on some spilt milk and fell while shopping at Plaza Extra on St. Thomas, resulting in physical and psychological injuries. Pursuant to Plaintiff's discovery demands, Defendant produced segments of video footage from several video surveillance cameras located around the store. The segments range from approximately five minutes to sixteen minutes in length, showing Samuel on the premises approximately one minute and thirty seconds prior to her fall, the fall itself, and several minutes of Samuel on the premises after the fall. Plaintiff alleges that Defendant destroyed critical footage that preceded her fall tending to demonstrate that Defendant had actual or constructive notice of the substance on the floor. As a result of Defendant's alleged intentional destruction of relevant evidence, Plaintiff contends that the jury should be

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<sup>1</sup> Defendant responded to the Motion on April 11, 2014.

instructed that it is allowed to infer that the destroyed footage was adverse to Defendant's case.

### STANDARD

It is well established that "[t]o provide redress to the party harmed by spoliation, as well as to punish the spoliator, a court may impose appropriate sanctions [including an adverse spoliation inference] pursuant to the Federal Rules of Civil Procedure and the court's inherent powers."<sup>2</sup> But, before a court may consider applying a spoliation inference,<sup>3</sup> Plaintiff has the burden of demonstrating all of the following:

- (1) . . . that the evidence in question be within the party's control;<sup>4</sup>
- (2) . . . that there has been actual suppression or withholding of the evidence;<sup>5</sup>
- (3) the evidence destroyed or withheld was relevant to claims or defenses;<sup>6</sup>  
and
- (4) it was reasonably foreseeable that the evidence would later be discoverable.<sup>7</sup>

In *Bright v. United Corporation*, the Supreme Court of the Virgin Islands elaborated on two of these four elements. Specifically, the *Bright* Court explained that in order to show "actual suppression or withholding of evidence," the Plaintiff must demonstrate that the

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<sup>2</sup> *Kounelis v. Sherrer*, 529 F. Supp. 2d 503, 519 (D.N.J. 2008) (citing *Mosaid Tech. Inc. v. Samsung Elec. Co.*, 348 F.Supp.2d 332, 335 (D.N.J.2004)).

<sup>3</sup> When considering whether a spoliation inference is appropriate, courts consider the following three considerations: "(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." *Bright v. United Corp.*, 50 V.I. 215, 225-26 (V.I. 2008) (citing *Schmid v. Milwaukee Electric Tool Corp.*, 13 F.3d 76 (3d Cir. 1994)).

<sup>4</sup> *Mosaid*, 348 F. Supp. 2d at 336 (quoting *Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326, 334 (3d Cir. 1995) (citing *Gumbs v. Int'l Harvester, Inc.*, 718 F.2d 88, 96 (3d Cir.1983))).

<sup>5</sup> *Id.*; see also *Bright*, 50 V.I. at 226.

<sup>6</sup> *Mosaid*, 348 F. Supp. 2d at 336 (quoting *Scott v. IBM Corp.*, 196 F.R.D. 233, 248 (D.N.J. 2000) and *Veloso v. Western Bedding Supply Co.*, 281 F.Supp.2d 743, 746 (D.N.J.2003)).

<sup>7</sup> *Mosaid*, 348 F. Supp. 2d at 336 (citing *Scott*, 196 F.R.D. at 248; *Veloso*, 281 F.Supp.2d at 746).

destruction of evidence was intentional or fraudulent rather than as a matter of routine.<sup>8</sup>

Further, the *Bright* Court also adopted the Second Circuit Court of Appeals' "reasonably foreseeable" standard, stating that

an obligation [to preserve evidence] . . . 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.<sup>9</sup>

In other words, while notice clearly occurs when a party is formally served with notice of litigation, other actions, such as an email or an individual's conduct that indicates a reasonable potential for litigation, may constitute adequate notification.

#### ANALYSIS

While this case appears to be closely analogous to *Bright v. United Corporation*, the Court finds that the Defendant's conduct was far less egregious in this instance and does not give rise to a presumption of intentional or fraudulent destruction of relevant evidence.

In *Bright*, the Court found a presumption of fraud because (1) United Corporation intentionally preserved only the video footage of the victim's actual fall and failed to review or preserve any footage prior to and after the fall;<sup>10</sup> (2) it appeared that United Corporation either (A) had no routine procedure for retaining video footage of slip and fall accidents at the time of the accident or (B) had failed to follow their routine procedures, thereby permitting the store managers "unbridled discretion to determine

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<sup>8</sup> *Bright*, 50 V.I. at 226. Compare *Bright*, 50 V.I. at 226, n. 7 with *Kounelis*, 529 F. Supp. 2d at 519 ("Spoliation occurs when a party has intentionally or negligently breached its duty to preserve potentially discoverable evidence.") (emphasis added).

<sup>9</sup> *Bright*, 50 V.I. at 227.

<sup>10</sup> *Id.*

what footage to retain;”<sup>11</sup> and (3) although United Corporation should have known that the evidence would be relevant to future litigation and should have retained it because the victim immediately filed a formal incident report after the accident and had also previously been involved in several accidents,<sup>12</sup> United Corporation’s permitted their video recorder system to automatically record over the saved video surveillance every few weeks.<sup>13</sup>

As a result, the Supreme Court of the Virgin Islands provided United Corporation, the same Defendant in this case, a clear instruction to adopt adequate routine procedures that must be consistently followed whenever an accident occurs on their premises. Specifically, the Court instructed:

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. . . . While this Court does not find any statutory or case law indicating precisely what portion of surveillance footage capturing a slip and fall accident should be retained, common sense dictates the retention of comprehensive surveillance footage of any accident, including a *reasonable period of time preceding and following the accident.*<sup>14</sup>

Thus, it is equally clear to this Court that a failure to implement and follow the Supreme Court’s specific instructions after the date of the issuance of the *Bright* opinion, July 22, 2008, could give rise to a presumption of intentional or fraudulent destruction of relevant evidence.

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<sup>11</sup> *Id.* at 230.

<sup>12</sup> *Id.* at 220, 227-28.

<sup>13</sup> *Id.* at 220. The footage saved had to be manually copied to a digital hard drive in order to prevent it from being automatically recorded over. *Id.*

<sup>14</sup> *Id.* at 229-30 (emphasis added) (internal citations omitted).

While the Court is not fully satisfied with Defendant's current routine retention procedures, the Court finds that Defendant's specific conduct in this case does not amount to fraudulent or intentional destruction of relevant evidence such that the Court should apply a spoliation inference. Specifically, the testimony of Waheed Hamid, the corporate designee, indicates that Defendant follows a video retention policy which was developed in 1999 or 2000 that requires Defendant to review and preserve portions of surveillance tapes when an accident occurs. While the specific provisions of Defendant's video retention policy are unclear since neither Plaintiff nor Defendant provided the policy, Hamid noted that usually the reviewer "takes . . . a few minutes before [the accident] . . . happened and a few minutes after it happened," which is within the *Bright* Court's requirement that Defendant retain footage for a *reasonable* period of time preceding and following the accident.<sup>15</sup>

In this specific instance, the Court recognizes that Defendant only preserved approximately one minute and twenty-one seconds of video surveillance footage<sup>16</sup> prior to the fall from Camera 9, the camera pointed directly at the area of the fall, by manually burning the footage data to a jump drive.<sup>17</sup> However, unlike *Bright*, here it appears that Defendant followed its retention policy and saved *some* video surveillance of the area prior to the accident. Considering the Supreme Court's standard of "a *reasonable* period of time preceding and following the accident" is subject to interpretation, the Court does

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<sup>15</sup> Plaintiff's Motion for a Spoliation Inference at Trial, Mar. 7, 2014 (Deposition of Waheed Hamid, Exhibit 1, pp. 53-55); *see also id.* (Deposition of Nejeih Yusuf, Exhibit 3, p. 19), Defendant's Response to Plaintiff's Motion, Apr. 11, 2014 (Deposition of Carina Brathwaite, Exhibit D, pp. 18-19);

<sup>16</sup> Plaintiff's Motion for a Spoliation Inference at Trial, Mar. 7, 2014 (Exhibit 2, Camera 9, UC-VS 00033).

<sup>17</sup> Defendant's Response to Plaintiff's Motion, Apr. 11, 2014 (Deposition of Carina Brathwaite, Exhibit D, p. 24).

not find that the failure to preserve *more* than one minute and twenty-one seconds prior to the accident – without more – gives rise to a presumption of fraud in this instance.

Rather, the Court finds that the relevant footage was ultimately recorded over in accordance with Defendant's routine practice of recycling video surveillance data space every three to four months.<sup>18</sup> In fact, Carina Brathwaite, one of Defendant's security personnel familiar with the surveillance system, stated that the surveillance system program does not permit anyone using the program to erase footage.<sup>19</sup> Thus, footage that is not manually saved by burning it to a jump drive is lost only after it is automatically recorded over by the system.

Considering the Court has found that Defendant did not intentionally or fraudulently withhold evidence, the Court need not address the others essential factors when considering applying a spoliation interference. But, while the Court makes no finding on the degree of prejudice to Plaintiff, the Court finds it necessary to briefly address Defendant's flawed argument that the footage destroyed was not at all relevant to Plaintiff's claims or defenses because the video footage at the time of the fall does not clearly show any substance on the floor. As Defendant was previously instructed in *Bright*, video footage capturing images of the area where an accident occurs prior to the accident actually occurring is often relevant for the purposes of proving constructive

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<sup>18</sup> Unlike *Bright* where United Corporation recorded over previous video after only a few weeks, in this case, it appears Defendant upgraded to a system that records over previous video after three to four months. While the Court does not make any findings regarding whether it was reasonably foreseeable to Defendant that the evidence would later be discoverable, this increased length of time provides a potential plaintiff a more reasonable amount of time to place the defendant on notice of possible litigation.

<sup>19</sup> Defendant's Response to Plaintiff's Motion, Apr. 11, 2014 (Deposition of Carina Brathwaite, Exhibit D, pp. 16-18).

notice for some “minimum amount of time before the accident.”<sup>20</sup> A jury can find a defendant had constructive notice of a dangerous condition by circumstantial evidence.<sup>21</sup> Thus, even where no visible substance is on the floor in the video, conduct of other customers prior to the accident may allow a reasonable juror to infer that a substance was on the floor for a certain period of time. Where no substance is visible on the floor because, for instance, the substance is alleged to be the same color as the floor, “video evidence indicating that someone spilled anything on the floor prior to the fall” may be relevant to Plaintiff’s burden of proving constructive notice.<sup>22</sup>

The Court also finds it necessary to reiterate to Defendant that upon reasonably foreseeable notice that evidence may be relevant to discovery, “it is certainly not within the discretion of a store manager [or security officer] to determine what portion of the available recorded surveillance footage is relevant to anticipated litigation” even where a surveillance video does not clearly show the cause of an accident.<sup>23</sup> Additionally, while the Court did not find it to be the case here, routinely preserving only a minute and a half of footage prior to an accident teeters on the edge of being unreasonable. As a result, the Court urges Defendant to ensure its retention policy is consistent with *Bright*, and recommends that when future accidents are reported, Defendant should preserve *at least* a minimum of five (5) minutes of surveillance footage of the area prior to the accident. Each case must be interpreted on its own facts, however, and the reasonableness of

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<sup>20</sup> *Bright*, 50 V.I. at 224.

<sup>21</sup> *Id.*; see *Williams v. United Corp.*, 50 V.I. 191 (V.I. 2008).

<sup>22</sup> *Bright*, 50 V.I. at 221.

<sup>23</sup> *Id.* 50 V.I. at 229.

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Defendant's conduct will depend on the totality of the circumstances, of which, the length of the recording is but one factor.

Accordingly, Plaintiff's Motion to for a Spoliation Inference is denied. An Order consistent with this Opinion shall follow.

Dated: May ~~21~~, 2014

ATTEST: Estrella George  
Acting Clerk of Court \_\_\_\_/\_\_\_\_/\_\_\_\_

  
HON. MICHAEL C. DUNSTON  
JUDGE OF THE SUPERIOR COURT  
OF THE VIRGIN ISLANDS

for by: Paula Clayton  
Lori Boynes-Tyson  
Court Clerk Supervisor 5/22/2014



**SUPERIOR COURT OF THE VIRGIN ISLANDS**

**DIVISION OF ST. THOMAS AND ST. JOHN**

**VELMA SAMUEL,**

**Plaintiff,**

**v.**

**UNITED CORPORATION d/b/a PLAZA EXTRA,**

**Defendant.**

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) **CASE NO. ST-12-CV-457**  
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**ORDER**

The Court having issued a Memorandum Opinion on this date, it is

ORDERED that Plaintiff's March 7, 2014, Motion For a Spoliation Inference at

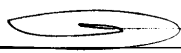
Trial is DENIED; and it is

ORDERED that copies of this Order and Memorandum Opinion shall be directed  
to counsel of record.

Dated: May 21, 2014

ATTEST: Estrella George  
Acting Clerk of Court \_\_\_\_/\_\_\_\_/\_\_\_\_

for by: Paula Claxton  
Lori Boynes-Tyson  
Court Clerk Supervisor 5/22/2014

  
HON. MICHAEL C. DUNSTON  
JUDGE OF THE SUPERIOR COURT  
OF THE VIRGIN ISLANDS