IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ANDREW P. BRANDES, Plaintiff, v. EBSCO INDUSTRIES, INC., a Delaware corporation, OUTDOOR SIGNS AMERICA, an Alabama company, SAM'S WEST, INC., a foreign corporation, t/a SAM'S CLUB, and WAL-MART STORES INC., a Delaware corporation, Defendants.	)	C.A. No. N10C-06-025-PLA

SUBMITTED: January 27, 2012
DECIDED: March 8, 2012

UPON DEFENDANT EBSCO INDUSTRIES INC.'S
MOTION IN LIMINE
DENIED
UPON DEFENDANTS EBSCO INDUSTRIES INC.'S
MOTION FOR SUMMARY JUDGMENT
DENIED
UPON PLAINTIFF ANDREW P. BRANDES'
MOTION TO MODIFY THE CASE SCHEDULING ORDER
GRANTED

Defendant EBSCO Industries, Inc. ("EBSCO") has filed a Motion in Limine to Preclude Plaintiff's Liability Expert from Testifying Due to Spoliation. For the reasons discussed hereafter, the Court will deny the motion to exclude the expert from testifying but will impose a lesser

sanction that should sufficiently cure the prejudice resulting from the missing sign that is the subject of this products liability lawsuit.

Facts

Plaintiff Andrew P. Brandes (hereafter "Brandes") was employed by Everest Auto Works. Brandes alleges that on June 30, 2008, while assembling and erecting a freestanding outdoor advertising sign, he was struck in the head by the sign's sharp edge, resulting in severe physical injury. In his Complaint, Brandes asserts that the sign was defective.

While this litigation was pending Brandes or his counsel had possession of the allegedly defective sign and was thus able to have plaintiff's liability expert, Gary Sheesley, P.E. of Consulting Engineers & Scientists, Inc. inspect the sign in order to render an opinion. After his examination of the sign, Mr. Sheesley wrote a written report in which he opined that the sign was defective because it had sharp exposed edges. On June 24, 2010, plaintiff's counsel forwarded a copy of Mr. Sheesley's report to defense counsel. A second copy of the report was included in plaintiff's Answers to Interrogatories and Requests for Production on March 7, 2011.

It was not until November 2011, seventeen months after the report was first forwarded to defendants, that plaintiff's counsel was contacted by the defense to arrange for an inspection of the sign so that defendants could

obtain their own expert report by the deadline for production of defense expert reports.

Plaintiff's counsel reports that he made several attempts to contact Brandes' former employer, Everest Auto Works, to arrange for defendants to inspect the sign. He was advised by the current owner that the business had been sold in April 2011 but that the original sign was still in his possession on the property.

According to defense counsel, while the defense expert was en route to the inspection that was scheduled to occur on November 22, 2011, Brandes' counsel advised defense counsel that he had just learned that the sign had been discarded within the last two weeks and was no longer available for inspection. Defense counsel thereafter provided Brandes' attorney with additional time to locate this critical piece of evidence, but it has never been found and is presumed to have been destroyed.

Upon learning of the missing evidence, Brandes' counsel ordered an exemplar freestanding outdoor advertising sign from Sam's Club that plaintiff claims is identical to the sign involved in plaintiff's injury. This substitute sign has been inspected by the expert, Mr. Sheesley, who has concluded that it contains the same defective condition and lack of protective guards as the actual sign involved in the incident. Thus, his

opinions remain the same as those outlined in his original expert report. Plaintiff offered defendants the opportunity to have the exemplar sign inspected but an inspection has never been arranged. Instead, defendants filed the instant Motion in Limine seeking relief due to plaintiff's spoliation of evidence.

Contentions of the Parties

By this motion, defendants ask this Court to preclude plaintiff from presenting the testimony of Gary Sheesley, P.E., plaintiff's liability expert, since defendants no longer have the opportunity to obtain a report from an expert of their choice. They contend that they are seriously prejudiced, since there are no eyewitnesses to the accident except Brandes, and only plaintiff and his expert can say that the sign had "sharp edges," a claim that defendants vigorously dispute. Defendants ask this Court to preclude Mr. Sheesley from offering his expert opinion, which would result in dismissal of this action since plaintiff would be without an expert in a products liability action, thereby lacking an essential element of his claims.

In his response, Brandes disagrees that defendants are severely prejudiced by the missing sign because defendants have offered to make available and still have access to an exemplar sign that is in the possession of plaintiff's expert. Brandes further contends that the sanctions requested

by defendants are inappropriate in a situation where plaintiff did not deliberately or intentionally suppress or destroy pertinent evidence. Plaintiff argues that, absent evidence of intentional conduct, neither dismissal nor preclusion of his expert testimony is warranted.[1] He points out that he never had control of the sign, that he no longer worked for Everest Auto Works, and that he was unaware that the business had been sold. Finally, plaintiff submits that, had defendants not waited seventeen months after receiving Mr. Sheesley's expert report, and had instead promptly and timely requested an inspection, the sign would most likely have still been available as the business was not sold until April 2011. Thus, he maintains that defendants' failure to take prompt action results in any prejudice being "self-inflicted." Finally, Brandes contends that even an adverse inference instruction would be inappropriate because he never physically had control of the sign.

[1]Defendants have separately filed a Motion for Summary Judgment in this case wherein they claim that, absent expert testimony (assuming this Motion in Limine is granted), Plaintiff cannot meet his burden of proving that the product was defective. To prevail under theories of either breach of implied warranty of merchantability, breach of express warranty, or negligence, an essential element of these claims is proof of a defect. The motion is premature and relies upon the Court precluding plaintiff's expert testimony. Defendants, in an abundance of caution, filed the Motion for Summary Judgment in order to comply with the dispositive motion deadline in the Trial Scheduling Order.

Discussion

A plaintiff in a products liability action has an affirmative duty to maintain and preserve relevant evidence,[2] and a party who fails to fulfill this duty may be sanctioned by the Court.[3] If that destruction is willful, in bad faith, or intended to prevent the other side from examining the evidence, the Court may impose the harshest sanction by dismissing the case or entering a default judgment. When the spoliation of evidence is due to plaintiff's negligence, the Court generally imposes a lesser penalty, such as an adverse inference instruction.[4] In *Brandt v. Rokeby Realty Company*, this Court identified three factors which the Court must take into consideration in determining whether to impose sanctions:

> 1) the degree of fault and personal responsibility of the party who destroyed the evidence;
> 2) the degree of prejudice suffered by the other party; and
> 3) the availability of lesser sanctions which would avoid any unfairness to the innocent party while, at the same time, serving as a sufficient penalty to deter the same type of conduct in the future.

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[2] *Brandt v. Rokeby Realty Company*, 2004 WL 2050519, at *11 (Del. Super. Sept. 8, 2004); *Burris v. Kay Bee*, 1998 WL 110097 at *1 (Del. Super. Jan. 12, 1998).
[3] *Moore v. Anesthesia Services*, 2008 WL 484452 at *4 (Del. Super. Dec. 21, 2007).
[4] *Brandt*, 2004 WL 2050519 at *11.

When Delaware Courts have confronted the spoliation issue they have taken into account whether the party claiming to be prejudiced had a meaningful opportunity to examine the evidence before it was discarded or destroyed.[5] In determining whether dismissal or preclusion of expert evidence is warranted, this Court has required that a party be acting in such a manner that it was intentionally trying to thwart its opponent's ability to prove its case.[6] Delaware law does not, however, require that the spoliation be intentional for the Court to give a jury instruction that an adverse inference may be drawn from the fact that the evidence is missing.[7]

As an example, the Court in *Burris v. Kay Bee*,[8] after taking all of these factors into consideration, granted the defendant's motion for an adverse inference jury instruction. In that case, the plaintiff had purchased an allegedly defective umbrella which he claimed had injured him when he opened it. Although the umbrella was originally retained by plaintiff's counsel, during the pendency of the litigation it was lost or stolen before defendant's expert had an opportunity to examine it.[9] The plaintiff's expert, on the other hand, had earlier inspected the umbrella, taken photographs of

[5] *In re Wescbsler*, 121 F. Supp. 2d 404, 415 (D. Del. 2000).
[6] *Collins v. Throckmerton*, 425 A.2d 146, 150 (Del. 1980); *Sears Roebuck and Co. v. Midcap*, 893 A.2d 542, 548 (Del. 2006).
[7] *Burris*, 1999 WL 1240863 at *1.
[8] 1998 WL 110097 (Del. Super. Jan. 12, 1998).
[9] *Id.* at *1.

it, and had filed his report. Although it recognized that similar umbrellas were available in the store as substitutes for the defense to examine, and that there was no allegation that the loss of the umbrella was intentional, the Court nevertheless granted defendant's motion for an instruction to the jury that they may infer from the absence of the umbrella that it would have been unfavorable to the plaintiff if it were available. The Court considered such an instruction to be the "least severe alternative available in sanctioning the plaintiff."

In applying the factors set forth in the *Brandt* case to the circumstances here, the Court is satisfied that plaintiff's counsel should have been on notice that the sign needed to be preserved, and that plaintiff breached his duty to maintain this critical piece of evidence. Yet, there is no suggestion in the evidence that plaintiff, or his attorney, deliberately or intentionally destroyed the sign. In fact, plaintiff's counsel was not even aware that the sign had been discarded until after defendant's expert was en route to the inspection.

Turning to the second factor, the Court is mindful that defendants are prejudiced because their expert cannot physically inspect the sign to prepare a report. As a result, plaintiff's expert's report currently represents the only opinion as to the condition of the sign. There is, at least at this juncture, no

similar opportunity for defendants to dispute the findings in that report by their own independent expert findings. And, while a reportedly identical substitute sign has been tendered by Brandes for defense inspection, defendants submit that this alternative is not acceptable because the sign at issue was actually assembled by the plaintiff, who, it is claimed, did not properly follow instructions in assembling the sign. Defendants argue that this issue cannot be resolved by simply supplying an alternative pre-assembled sign. Without the actual sign, the defense claims that it has no way to determine whether any part of the sign may have been damaged in transport, whether the sign was properly put together by plaintiff, whether markings on the sign exist to prove or disprove either theory, and whether the sharp edges alleged by plaintiff existed prior to or after the sign left the manufacturer's control.

While the Court has taken into consideration all of the difficulties now faced by defendants, the prejudice to the defendants is somewhat mitigated by the fact that photographs are available, and that an unassembled exemplar sign can be obtained for inspection to prove or disprove defendant's contention that it was plaintiff's faulty assembly that resulted in the sharp edge that caused the injury.

Then too, this Court cannot overlook the fact that the defendants are not entirely blameless. While it is true that Brandes or his counsel should have placed the custodian on notice of the need to preserve this critical piece of evidence, defendants must share some responsibility for this circumstance as they waited seventeen months after receipt of plaintiff's expert's report before contacting plaintiff's counsel to arrange an inspection, only a month or so before the deadline for submission of their expert report. Defendants' dilatoriness in failing to arrange a prompt inspection, particularly when the size of the sign made preservation more difficult, has to have contributed as much, if not more, to the predicament in which the parties now find themselves. Under these circumstances, it would be unfair to sanction Brandes by exclusion of his expert, a sanction that would ultimately result in dismissal, for not preserving the sign when the defendants could have prevented its destruction by taking steps more promptly to arrange an inspection sooner than the nearly year and a half they took to request one.

This same situation led the Court in *Brandt* to find that the non-spoliating party's failure to take steps to preserve the evidence for years, after being made aware that the plaintiff had sent the specimen for testing, made any prejudice suffered by that party "self-inflicted." While the length of time of inaction by defendants in *Brandt* was far longer, defendants here

never requested that the sign be preserved or safeguarded until almost a year and a half after it had been examined by plaintiff's expert, even though they knew the importance of the original sign and were fully aware of Mr. Sheesley's findings and conclusions.

Considering all of the foregoing factors, the Court concludes that an adverse inference jury instruction is sufficient to overcome the prejudice caused by plaintiff's unintentional failure to preserve the evidence. The defendants' request for an order foreclosing the expert from testifying would ultimately result in summary judgment or dismissal, a sanction that the Court believes is too severe under the circumstances. Plaintiff should not be left without any recourse merely because of his counsel's negligence. On the other hand, defendants should have some relief because the absence of the sign has placed them in the untenable position of being without an independent expert opinion and thus no legitimate professional basis to dispute the plaintiff's expert's conclusions. In a case such as this, where the condition of the sign at the time that plaintiff erected it is in issue, and where there is a question whether the sign was properly assembled by plaintiff in the first place, it would be unfair to defendants for this Court to impose no sanction. By allowing the jury to draw an appropriate adverse inference, the

Court will mitigate the prejudice to the defendants without unjustly punishing an innocent plaintiff for his counsel's negligence.

Turning next to defendants' Motion for Summary Judgment, summary judgment is obviously inappropriate at this juncture because the Court has ruled that Brandes may present the testimony of his expert witness. The premise of defendants' summary judgment motion is that plaintiff will not be able to meet his burden of proof that the sign was defective because the expert would not be permitted to testify as a sanction for spoliation. Since the Court has rejected the extreme sanction requested by defendants and instead has ruled that an adverse inference instruction is more appropriate, plaintiff's expert witness will be permitted to testify at trial. Therefore, the Motion for Summary Judgment is hereby denied.

Finally, the Court must consider the fact that the defendants have not yet availed themselves of an opportunity to inspect a substitute or examplar sign, despite the fact that the deadline for submission of their expert report has elapsed. Since the Court has ruled that the plaintiff's expert may testify, and since an exemplar sign has been offered and will be made available for inspection by a defense expert, the Court will extend the time for defendants to provide their expert report to April 30, 2012. Counsel are directed to confer promptly in an effort to schedule an inspection sufficiently in advance

of the April 30th deadline so that the expert will have sufficient time to prepare a report.

Accordingly, the Motion in Limine to Preclude Plaintiff's Liability Expert from Testifying is denied. Defendants' Motion for Summary Judgment is denied. The Motion to Modify the Trial Scheduling Order is granted.

IT IS SO ORDERED.

/s/ Peggy L. Ableman
PEGGY L. ABLEMAN, JUDGE

Original to Prothonotary
cc: James P. Hall, Esquire
Gary H. Kaplan, Es quire