IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY as subrogee of GUY W. WALKER, and GUY W. WALKER	)	
Plaintiffs,	)	
v.	)	C.A. No. 06C-10-225 RRC
DELMARVA POWER & LIGHT COMPANY,	)	
Defendant.	)	

Submitted: December 16, 2008
Decided: March 16, 2009

On Plaintiffs' "Motion for Sanctions Due to Defendant's Spoliation of Evidence."
DENIED.

MEMORANDUM OPINION

Shauna T. Hagan, Esquire, Aber, Goldlust, Baker & Over, Wilmington, Delaware, and Steven L. Smith, Esquire, Law Offices of Steven L. Smith, P.C., Swarthmore, Pennsylvania, *pro hac vice*, Attorneys for Plaintiffs.

Lisa C. McLaughlin, Esquire, Phillips, Goldman & Spence, P.A., Wilmington, Delaware, Attorney for Defendant.

COOCH, J.

I. Introduction

This subrogation case arises from a fire that occurred in August, 2005 at an apartment building owned by Guy Walker and insured by Nationwide Mutual Fire Insurance Company. The Delaware State Police received a 911 call alerting them to the fire, and the Fire Department responded to the scene. The Delaware State Police emergency call center contacted Delmarva, who dispatched troubleman Ron Axelson to the fire scene. Mr. Axelson was told by the fire marshal that he could enter the scene to disconnect the service cable. After doing so, Mr. Axelson placed the damaged cable in his truck and discarded it the following day. Plaintiffs claim that the service cable is a critical piece of evidence and that its case will be materially harmed because they will not have the opportunity to examine the cable.

The issue raised by Plaintiffs' "Motion for Sanctions Due to Defendant's Spoliation of Evidence" is whether Delmarva's disposal of the service cable was reckless, thus warranting an adverse inference instruction to the jury. For the following reasons, the Court finds that Delmarva's disposal of the cable was not reckless. Plaintiffs' request for an adverse inference instruction is DENIED.

II. Factual and Procedural History[1]

This action arises from a fire that occurred on August 4, 2005 at 226 Washington Street, Delaware City, Delaware, an apartment building (hereinafter the "Property") owned by plaintiff Guy Walker.

A. Terminology

It is necessary to begin with an explanation of the electrical system and the terminology used to describe it. Electricity runs along a continuous path, composed of a series of connected cables and devices, from the Delmarva substation to the circuit breaker panel or load center inside the building. This motion concerns only a portion of that path that began at the utility pole nearest the Property's apartment building and ended at the bank of electric meters mounted on the side of the building.

Delmarva's triplex aluminum cable was strung from the pole to the apartment building at the Property. The cable is referred to as the "service cable" or "service drop cable". It is the remainder of this cable that Delmarva retrieved from the scene on the evening of the fire and discarded the next morning. According to eyewitness Betty M. O'Bryan, a tenant in

[1] The following factual and procedural history at pp. 3-20 of this opinion was stipulated to by the parties, except as to a few matters that are so noted at footnotes. Stipulated Factual Record, Docket Item ("D.I.") 37 at 1-22. The parties have agreed, however, that even with lack of complete agreement as to the facts, the factual record in this case is appropriate for this Court to rule on this issue before trial.

one of the apartments, the cable ran just below a large branch of a tree that stood next to the building.

The next significant item in the electrical chain is the actual connection point at the structure. The connection point is a steel bracket mounted to the side of the Property's apartment building that permits the union of the service drop cable with the next cable in the electrical path. This point is variously referred to as the "service head," "service head connection," or "point of connection."

The last item of reference for this motion is the cable that runs from the service head to the meter bank. It is referred to as the "service entrance cable." The customer owns this cable.

B. The Disposal of Delmarva's "Service Drop Cable"

1. Ron Axelson

On the evening of August 4, 2005, a fire alarm for the subject fire was called in to the Delaware State Police 911 call center at 6:33 p.m. Subsequently, the Delaware State Police emergency call center contacted Delmarva. Delmarva dispatched troubleman Ron Axelson to the fire scene at 6:58 p.m.

Mr. Axelson testified to the following: he is a 36-year Delmarva employee and has been employed as a troubleman since 1998; over a ten-

year period, he would guess that he has responded to 25 to 50 automobile accident scenes, 25 to 50 fires, and 5 to 10 incidents in which a person came into contact with an energized electric cable.

At accident scenes, his job is to determine whether the scene is electrically safe for emergency responders and others and if not, to de-energize lines to make the scene electrically safe.

Mr. Axelson is not an investigator and has no training as such. He does not work for or with Delmarva's Claims Department. It is not his job to determine what items of Delmarva property should be saved for future litigation, and he does not know who at Delmarva has that job. Mr. Axelson has not been trained in how to determine what items should be saved for potential future litigation, or how to preserve them.

When, as part of his job, Mr. Axelson removes Delmarva cables and other equipment from accident scenes, it is because "it doesn't belong to the property owner, it belongs to Delmarva, so [he] just feels it's [his] responsibility. [He] wouldn't leave trash in somebody's yard, so [he] just take[s] it away." Mr. Axelson has never saved a piece of Delmarva property he removed from an accident scene. If a fire marshal asked him to save a piece of Delmarva equipment he would do so. There has never been a time

when he has responded to a fire incident where a firemen, fire chief, or fire marshal asked him to save a piece of Delmarva property.

Mr. Axelson works independently of the Delmarva Claims Department. He does not receive instructions from the Claims Department about what to do at an accident scene.

On the day of the fire, Mr. Axelson finished his normal shift at 1:30 p.m. He was called back to work at 6:15 p.m. to respond, first, to a breaker trip at a substation, and then was reassigned to the subject fire at 6:58 p.m. He arrived at the Property at 7:08 p.m. The only instruction he received from the dispatcher was to respond to the scene.

When he surveyed the scene, he observed the Delmarva service cable still attached at the nearest pole, but unattached at the house. That end of the cable was down on the ground. He knew from those observations that the service cable was still energized.

Mr. Axelson recalls two fire marshals being present, and one or both of them asking him "not to remove that wire that was on the ground until they told [him] to remove it." Mr. Axelson complied and asked the fire marshal to "get back to [him] when [he] could take it out of there." At some time between 7:08 and 8:02 p.m., the fire marshal told Mr. Axelson "that

they were finished with what they had to do and [that he] could disconnect it, clean it up."

Subsequently, Mr. Axelson climbed the utility pole, and while wearing rubber gloves, he cut the energized cable and taped the end that remained on the pole. He climbed back down and rolled up the length of service cable he had just cut, and placed it in the cargo area of his work truck. He took the cable with him to Delmarva's New Castle Regional Operations Center ("NCRO") because he knew it was "not going to be used anymore."

As to whether the service drop cable should be saved, Mr. Axelson did not have any conversations with the two Deputy Fire Marshals who were at the fire scene. Neither he nor they raised the subject. They never told him to save the cable, and they never told him to discard it. It was up to Mr. Axelson to decide whether he would save or discard the cable.

Mr. Axelson did not record the condition of the cable, or measure or photograph it. He recalls the detached end of the cable having three wires sticking up in the air. He could not tell if they were melted or cut. He described the size and type of wires. The only written record he generated states: "Service burned to ground. Service removed from pole." He testified that he used the term "burned" as "a generic term meaning 'service

wire laying on the ground.'" He did not mean to suggest the ends had melted.

Next, Mr. Axelson returned to NCRO to complete his overtime work. He could have discarded the cable that night, but it was late and he had been working since 5:12 a.m., so he decided to go home and discard it the next day. The next morning, Friday, he discarded the cable into Delmarva's trash dumpster 100 feet from his truck.

At no time during Mr. Axelson's activities was there any involvement by the Claims Department. He retrieved the cable, brought it back to NCRO, and put it in the dumpster without any contact with the Claims Department. [n. 1 from Stipulation][2]

Mr. Axelson testified that on Monday August 8, he was contacted by Delmarva's Claims Coordinator C. Larry Bishop and told him that he put the cable into the normal trash dumpster.

2. Deputy Fire Marshal Henry Alfree

The fire marshal assigned to this fire was Deputy State Fire Marshal Hank Alfree, a 9-year veteran.

[2] Delmarva answered Plaintiff's Interrogatory No. 17: "Ron Axelson was the only individual involved in the collection, retrieval, storage and disposal of property owned by defendant relating to this incident." Its answer to Interrogatory No. 19 Delmarva stated that Ron Axelson retrieved and disposed of the cable and decided what would be saved and what would be discarded. Delmarva confirmed on February 29, 2008 that "Ron Axelson took directions from no one regarding the disposal of the cable."

Deputy Alfree's Initial Crime Report reaches two different conclusions in two different sections. In the section titled "M.O. and Incident Overview", Deputy Alfree states: "An electrical malfunction in the *service entrance cable* ignited flammable plastic/combustible material causing moderate damage to occupied dwelling." In the section titled "Investigative Narrative," however, he states: "Based on the investigation it is the opinion of this investigator that this is an accidental fire caused by an electrical malfunction in the *service cable* at or near the service head connection on the rear of the dwelling."

In a sworn Affidavit secured by Delmarva during discovery, Deputy Alfree again opined that the electrical malfunction was "in the "service cable" at or near the service head connection on the rear of the home."

At deposition, Deputy Alfree testified to two different conclusions as to the origin of the fire. He testified that the origin of the fire was

> centered around the service cable, service entrance cable, and the service cable and the service head where it connected to the house. I couldn't tell one way or the other where the malfunction occurred, whether it was on the service head side of the cable or on the house side of, you know, the cable.

He testified that the malfunction occurred in the service entrance cable owned by the customer. But he also could not rule out the Delmarva service drop cable as the point where the fire started.

An eight to ten foot section of the Delmarva service drop cable closest to the apartment building was missing when Deputy Alfree arrived at the scene. He made this observation before Mr. Axelson arrived at the Property.

Whereas Mr. Axelson testified that the fire marshals asked him not to remove the cable until they gave him the okay, Deputy Alfree testified that he did not say anything to Mr. Axelson about waiting to do his work. Deputy Alfree took photographs of the fire scene, some of which show the Delmarva service drop cable together with other aspects of the fire scene. None of the Fire Marshal's photographs focuses on the remains of the "downed end" of the cable.

Deputy Alfree testified as follows: For his own investigative purposes, he can identify and save the property of others if, in his judgment, he needs it to conduct further investigation or to prove arson. On prior occasions, he has asked Delmarva to retain equipment involved in incidents, and Delmarva has "[f]ully cooperated" and "kind of helped [the fire marshal] out." In situations where he has no further need to retain and/or evaluate evidence, however, Deputy Alfree plays no role in a private party's evaluation of whether or not to save something.

Having determined that no further investigation by him was warranted, Deputy Alfree did not save any evidence. If he believes a piece

of utility equipment contributed to the cause of a fire, he requests that the equipment be retained. In this case, Deputy Alfree determined that it was not necessary to retain the Delmarva service drop cable because he had not determined that it contributed to the cause of the fire. He did not ask Nationwide to retain the service entrance cable or any other evidence. [n. 2 from Stipulation][3]

3. Larry Bishop - Delmarva Claims Department Coordinator

Mr. C. Larry Bishop was the Delmarva Claims Department Coordinator in August of 2005. He testified as follows: Delmarva's Claims Department did not learn about the fire until it was informed by an outside source—Nationwide Insurance—which insured the Property. Nationwide adjuster Frank Townsend called Mr. Bishop on Monday, August 8, four days after the fire, and asked to see the cable. Mr. Townsend's call to Mr. Bishop is what first prompted Delmarva's Claims Department to look into the whereabouts of its service drop cable.

[3] Delmarva objects to this sentence as stated for two reasons. First, it is not directly from the record. Deputy Alfree testified as follows:

> Q: Did you at the scene tell Nationwide or tell Delmarva that they should or should not save something?
>
> A: No, I didn't.

Second, Nationwide was not present at the Property at the same time as Deputy Alfree.

Mr. Bishop contacted Mr. Axelson by telephone that day. He also contacted Mr. Axelson's supervisor, Al Hopkins. [n. 3 from Stipulation][4] Mr. Bishop was told by either Mr. Axelson or Mr. Hopkins that the cable had been put in a bin used by Delmarva to collect cables to be sold for scrap or to be recycled. Mr. Bishop did not take any notes of these conversations.

Mr. Bishop did not direct Mr. Axelson to return immediately to the NCRO to check the trash dumpster. Specifically, Mr. Bishop testified:

> Q: When you first called Mr. Axelson and you don't know anything about what happened to this cable, those were the three possibilities you could have envisioned, right?
> A: What.
> Q: That it was still on the truck, tossed in some sort of trash bin, or brought inside?
> A: My first concern was the fact that it was still on the truck. That's what I was calling for.
> Q: He told you it wasn't?
> A: I found out eventually that it was not on the truck.
> Q: When you found out that it was not on the truck, did you take further steps to find the cable and save it?
> A: I believe I spoke to Ron [Axelson] and to Al [Hopkins] as to was there any way that we could locate the cable.
> Q: What did they tell you?
> A: I think they said it had been thrown away and then I think it was eventually identified that they did check – they were going to go and they did check the cable bin and they were unable to find it.
> Q: It had been emptied by the time they checked?
> A: It must have been emptied by that time.

[4] While Mr. Bishop testified that it was Mr. Hopkins that he called, Mr. Bishop characterized Mr. Hopkins as Mr. Axelson's supervisor. There are no notes or records to confirm whether it was Mr. Hopkins that Mr. Bishop called. Mr. Bishop was mistaken so far as Mr. Hopkins was not Mr. Axelson's supervisor in August 2005. Mr. Axelson's actual supervisor at the time was Gregg McCullough. Mr. Hopkins, the Lead Engineer for the area in which the Property is located, does get involved in dealing with accidents such as fires and does frequently call upon Ron Axelson for certain operations. There is no evidence in the record to suggest that Mr. Hopkins ever used Mr. Axelson to preserve evidence from accident scenes.

Q: So from the time that they first said it wasn't on the truck until the time that they checked the bin, did you tell them to like hurry up and go check that bin and if there was going to be some company coming to empty the bin they should be stopped so you could have more time to look in the bin for that cable?

A: I was not knowledgeable at that time of any emptying of the bin or anything like that. I just told them that I wanted to find this cable and I wanted to identify it, because we had Nationwide that was concerned as part of the investigation.

Q: Mr. Bishop, from the second you were told that the cable had been taken from the truck and placed in some sort of trash receptacle, you knew that there was a possibility that the receptacle, you knew that there was a possibility that the receptacle would be emptied?

A: That's paraphrasing – I know – that was all done before they got back to me.

Q: I'm talking about your knowledge, when someone first told you that this cable was in a trash receptacle somewhere, you knew that the trash receptacle could be emptied –

Q: -- and the trash carted away?

A: I'm not sure where we are going with this.

Q: Can you answer my question the way I asked it?

A: No. I'm not familiar with – I know trash bins are emptied.

Q: That's what I'm asking.

A: The fact is that I don't think it was ever presented to me that it was in a trash bin and they had to check that. I think it was the fact that they had checked the trash bin and that it had been emptied. It was not like where they said to me, no, it is not on the truck, and now – I think they said it is not on the truck and we checked the trash and the trash bin has been emptied. I think that's the way it came back to me. I'm not sure.

Mr. Bishop was not aware that the cable had been deposited into a trash dumpster (as opposed to a scrap bin) until he was told that the dumpster had been emptied.

Delmarva cannot say when the contents of the trash dumpster were hauled away, only that it was sometime after Mr. Axelson put the cable into the dumpster on Friday morning and before Mr. Axelson checked on it at the end of his shift on Monday.

4. Delmarva and Evidence Preservation

Delmarva has no formal written or oral policies, practices or procedures to identify and preserve evidence from accident scenes.

Mr. Bishop testified that he had no knowledge of any formal policies, practices, or procedures within Delmarva for identifying and preserving evidence from accidents for potential future litigation. Mr. Axelson testified that Delmarva troublemen are not trained in evidence preservation.

Delmarva did not have a set procedure for notifying the Claims Department of accidents when they occur. Mr. Bishop did not develop such a procedure; he never prepared any type of memorandum, directive, or written document telling the systems operations personnel when to notify the Claims Department of an incident. According to Mr. Bishop, the Claims Department had an "open door policy" for dispatchers to notify it of incidents. Delmarva did not create a formal policy requiring dispatchers to notify the Claims Department of incidents. The Claims Department left notification up to the individual dispatcher.

In this case, the 911 call came to Delmarva's dispatcher Curtis Mayfield of the New Castle dispatch unit. He placed an internal order for a troubleman to respond. Mr. Mayfield did not notify the Claims Department of the fire at the Property.

Delmarva claims "it is an unwritten practice at Delmarva to defer to authorities such as the fire marshal should such authority request that Delmarva refrain from disposing of any of Delmarva's property." Delmarva had discretion to save a piece of its property for future litigation, even if the Fire Marshal chose not to save it for his own purposes. [n. 4 from Stipulation][5]

[5] Although Mr. Hopkins was not present at the Property on the day of the fire, he was asked, over objection, the following:

Q: I want to ask you a couple of questions about that. Number 1, you said that you have been to so many [fires], but you told me in the last 10 years you have only been to two or three [fires]?

A: If you are talking fires specifically, yes. But we get calls for this all the time, equipment that fails, transformer fails or a service wire comes down. So we see the service wire down and we look and see it is a tree branch, so we know the tree brought it down. We go to those all the time. Fires are rare, but we have a lot of other kinds of failures.

Q: So you are at a fire scene and you see that the service cable that went from the nearest pole to the point of attachment on a structure has melted 8 to 10 feet on the structure side, would you deem that something that would be an important thing to save?

A: To save?

Q: Yes, for further litigation purposes.

A: Well, again, if we don't see a cause for it immediately, in my judgment I would probably think about saving equipment.

Q: Because, again, having 8 to 10 feet of the wire gone is kind of an unusual thing, right?

A: You say gone?

Q: Missing is the way the fire marshal put it.

A: That's rare. But, yeah, if a large portion of cable is missing, yes, I would probably want – if I can't figure out immediately what it is – you are saying save if it is missing?

Q: Save the rest of the cable.

A: The rest of it that's left?

Q: You can't save the part that burned away or got lost?

A: Right. I would probably make a judgment that I would probably look at saving something there.

According to Mr. Bishop, Delmarva would save its cable from an electrocution incident, and its transformer if a person became injured by contacting it. But in fire cases, Mr. Bishop expects the Fire Marshal to "tell us if they felt [a Delmarva cable] was important to the scene and they weren't going to keep it, they would tell us that we need to keep it to preserve it for themselves, for their own evidence later on."

Plaintiff's Interrogatory No. 20 states:

> Identify and describe defendant's policies, practices and procedures for deciding what tangible items of property owned by defendant should be removed, saved or discarded from the scenes of fires, explosions, electrocutions or other losses involving persons or property. If they are in written form, identify the writing and any draft. If they are unwritten, identify the individuals who formulated them and the individuals who are most knowledgeable as to them.

Subject to objection, Delmarva responded that it "has no formal policies which are responsive."

C. The Effect of Delmarva's Disposal of the Cable

Plaintiff's expert Don Stegner testified at the arbitration that examining the service drop cable "would have been helpful in our investigation." He could have looked for signs of abrasion from contact

between the cable and the tree. [n. 5 from Stipulation][6] As of the date of the arbitration, Mr. Stegner had not seen the fire marshal photos.

Mr. Stegner testified to the following: The electrical currents created by an electrical fault along Delmarva's service drop cable, probably due to abrasion of insulation from rubbing against the tree, overloaded the service entrance cable. The fault was allowed to develop because Delmarva's distribution system was not properly grounded, so the circuit breakers or fuses on Delmarva's transformer did not clear the fault. The fault current flowed downstream, i.e., toward the house, through the service drop cable and the service entrance cable. The excess current heated up the cables along the entire fault current path and caught the house on fire. Mr. Stegner testified:

> Q: I just want to stop you there. In terms of the tree, had you made a determination, to a reasonable degree of scientific certainty, as to what happened to those trees?
> A: Not at all.
> Q: You are just speculating?
> A: I saw a burned tree that was very near where the wires went or should have gone. Again, the wires weren't there.
> Q: To be clear, you are just speculating what happened to those trees; is that correct?

[6] Delmarva does not stipulate that this statement is factual and objects to its inclusion on the grounds that it is neither supportable nor identifiable in the present record; on the contrary, Delmarva contends that the statement is an inference made by plaintiffs' counsel. Delmarva raised this objection at a teleconference with Judge Cooch on December 11, 2008. The Court determined that the statement could be included along with Delmarva's objection.

A: I'm supposing or speculating, yes. A lot of our – you have to go with the facts that are available to you. As that's one of the facts that I saw was a burned tree.

* * *

Q: Did you make a determination, to a reasonable degree of scientific certainty, that that did in fact cause the fault?
A: No. I didn't see the wiring. But something in that tree –
Q: That's okay. You did not make that determination to a reasonable degree of scientific certainty, correct?
A: No.
Q: Is there any evidence, physical evidence that you've seen that supports your theory that the fault originated in the service drop cable?
A: I don't think it really originated in the service drop cable.
Q: You don't?
A: No. It originated at the service drop cable because the conductors were abraded and we had bare wires touching and arcing and sparking.
Q: What evidence did you see? Did you see any physical evidence of that?
A: No.

Mr. Stegner did not determine the point of origin of the fire. However, he does not dispute Nationwide's origin and cause expert's opinion that the point of origin of the fire was on the service entrance cable.

Delmarva's fire investigator Walter Rothfuss testified that the point of origin of the fire was on the customer-owned service entrance cable rather than Delmarva's service drop cable. Mr. Rothfuss stated that he "certainly" would criticize a utility for discarding a service drop cable within one week of the fire where the cable was potentially implicated as the site of an electrical malfunction that caused the fire; however, he was not aware that the service drop cable here was ever identified as potential evidence. In the following exchange with the Arbitrator, Mr. Rothfuss testified:

Q: Also, in you performing your investigation and your ultimate analysis, would having the service drop cable have been beneficial for you in ruling it out as a cause of the fire?
A: Sure. It's always beneficial to have more to look at than less.
Q: Sitting here today, can you rule out a failure in the service drop as a cause of the fire within reasonable degree of engineering or scientific certainty?
A: Yes.
Q: And how is that?
A: Based on the physical evidence as shown in the fire marshal's photographs . . .

Another Delmarva expert, electrical engineer Richard Martin, Ph.D., was asked at Arbitration whether he would like to have seen the Delmarva service drop cable in this case, and answered: "Of course . . . I like to see everything that's implicated in a fire or accident." Dr. Martin also testified that in this case he cannot rule out the possibility that an electrical fault occurred somewhere along the Delmarva cable. However, he concluded to a reasonable degree of scientific certainty that, while it is possible that a fault occurred somewhere on the service drop cable, any such fault was insufficient to cause the service entrance cable to overheat and fail. He does not need to see Delmarva's service drop cable to reach this conclusion. According to Dr. Martin, it is not possible for an electrical fault on the Delmarva service drop cable to cause fault current to flow toward the house. Any such electrical fault along the service drop cable would have caused the

transformer protections to have activated. To his knowledge, the protective devices on the transformer did not activate. [n. 6 from Stipulation][7]

Dr. Martin concluded that the point of origin of the fire was the customer-owned service entrance cable as a result of its being curved around a soffit on the apartment building. However, he cannot cite any provision of the National Electrical Code to say that the person who installed the service entrance cable used bending radiuses that were too tight.

Mr. Rothfuss examined the photographs of Guy Walker's service entrance cable and claims to have seen signs of abrasion.

If Delmarva's service drop cable had been preserved, Don Stegner, plaintiff's electrical engineer, could have looked for signs of abrasion on the Delmarva cable, such as abrasion from the tree the cable was routed through. He also could have examined the severed ends of the Delmarva cable for any signs of how the cable detached from the service head. The appearance of the detached end of the Delmarva cable may have looked different if the cable had melted off by electrical activity versus if it had been lopped off by a tree branch or some other object falling onto it. [n. 7 from Stipulation][8]

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[7] Mr. Rothfuss inspected the transformer and its protections and opined that the transformer never saw enough fault current to have operated any fuse or internal protection.

[8] Delmarva does not stipulate that the statements in the last two paragraphs are factual and objects to the inclusion of those paragraphs on the grounds that the statements contained therein are not contained in the present record; on the contrary, Delmarva

III. CONTENTIONS OF THE PARTIES

Plaintiffs contend that Delmarva acted "recklessly"[9] by failing to preserve the service cable. Consequently, Plaintiffs maintain that this Court should provide an adverse inference instruction to the jury at the conclusion of the trial.

In response, Defendant contends Delmarva did not act "recklessly,"[10] and argues that it did not have an obligation to preserve the service cable, and that it did not know, nor should it have known, that that the cable would be relevant to a legal dispute. Therefore, Defendant maintains that an

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contends that the statements are inferences made by plaintiffs' counsel. Delmarva raised this objection at a teleconference with Judge Cooch on December 11, 2008. The Court determined that the statement could be included along with Delmarva's objection.

[9] Plaintiffs have proposed the following definition of "reckless conduct" in the event an adverse inference were given:

> In the context of the preceding instruction on "destruction of evidence," "reckless conduct" is a knowing disregard of another party's right to examine, test or use items that are or are likely to be relevant evidence in a pending or future lawsuit. It amounts to an "I don't care" attitude. "Recklessness" is when a corporation unreasonably discards or disposes of evidence without regard for the consequences the disposal would have on depriving other parties of access to or the use of the items.

Pls.' Letter to Court, D.I. 34.

[10] Defendant has proposed the following definition of "reckless conduct" in the event an adverse inference were given:

> Reckless conduct reflects a knowing disregard of a substantial and unjustifiable risk that the suppression of facts relevant to a legal dispute will probably result. It amounts to an "I don't care" attitude. Recklessness occurs when a person, with no intent to cause harm, performs an act so unreasonable that he or she know, or should know, that the suppression of facts relevant to a legal dispute will probably result.

Def.'s Letter to Court, D.I. 35.

adverse inference instruction would be improper as unwarranted by the evidence.[11]

IV. DISCUSSION

The issue in this case is whether the disposal of a service cable by Delmarva's "troubleman" Ron Axelson constitutes "reckless" conduct warranting an adverse inference instruction to the jury for spoliation of evidence.

This case is squarely controlled by the Delaware Supreme Court's recent decision in *Sears, Roebuck and Co. v. Midcap.* In *Midcap,* the plaintiffs, widow and daughters of the decedent, brought wrongful death, survival, and subrogation claims against Sears for selling a propane stove that exploded, killing the decedent.[12] In an effort to support their argument that Sears, and not an independent contractor, installed the stove in the decedent's home, the plaintiffs sought documentation from Sears about the delivery and installation of the stove. Sears could not produce the requested documents because they had been either misplaced during a facility

[11] Given the Court's determination that Mr. Axelson's actions were not reckless, the Court need not determine the appropriate definition of "reckless" in this case, in the context of a requested spoliation instruction.

[12] *Sears, Roebuck & Co. v. Midcap,* 893 A.2d 542, 545 (Del. 2006) (reversing the decision of the trial court and holding that a finding that Sears intentionally or recklessly destroyed delivery document was a predicate to issuance of an adverse inference instruction).

relocation or destroyed as part of Sear's document retention policy. Consequently, the trial court gave an adverse inference instruction to the jury.[13] The jury returned a verdict against Sears in favor of the plaintiffs.

On appeal, the Delaware Supreme Court reversed the Superior Court judgment against Sears and stated that "[a]n adverse inference instruction is appropriate where a litigant intentionally or recklessly destroys evidence, when it knows that the item in question is relevant to a legal dispute or it was otherwise under a legal duty to preserve the item."[14] In reaching this decision, the Supreme Court explained:

> The standard that the trial court adopted would penalize businesses and individuals simply because they failed to retain documents they were under no legal obligation to preserve. In this case, for example, the explosion occurred four years after Sears sold the range in question. To fault Sears for failing to retain the record of that sale would create an inefficient incentive scheme, whereby all records that might ever become evidence in a legal dispute would have to be perpetually retained, in order to avoid an adverse inference instruction. In our view, the better balance is to continue to embrace an adverse inference standard that requires a

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[13] The trial court had instructed the jury:

> If a party acknowledges that it should have possession, custody, and control of a document or record that would have been produced and retained by it in the ordinary course of business, but fails to produce such document or record at trial without adequate explanation of the reasons for such nonproduction, then the jury is permitted to infer that had the document or record been produced by the party that should have possession, custody, or control of it, its contents would reveal information adverse to the party that failed to produce the document or record.

Id. at 547.

[14] *Id.* at 552; *see also Leslie v. Jones*, 2000 WL 33115730 (Del. Super.) (noting "Delaware's [spoliation] rule applies where the destruction of the evidence is intentional or reckless").

> showing that a party acted with a mental state indicative of spoliation. By this means, the bad faith destruction of probative evidence will be discouraged without penalizing innocent persons who simply seek to get rid of old files in the ordinary course of business that they have no duty to retain.[15]

Midcap requires a trial court to make a preliminary determination that "the evidence shows . . . intentional or reckless conduct" before giving the jury an adverse inference instruction.[16]

In *Equitable Trust Co. v. Gallagher*, the Supreme Court explained the rationale for an adverse inference instruction when a party intentionally destroys evidence: "[i]t is the duty of a court, in such a case as willful destruction of evidence, to adopt a view of the facts as unfavorable to the wrongdoer as the known circumstances will reasonably admit."[17] However, in this case there is no allegation by Plaintiffs of intentional spoliation.[18] Also, in a civil case, the trial court must conclude that conduct was intentional or reckless, not merely negligent, to warrant an adverse inference instruction.[19] Therefore, "spoliation requires wrongful conduct indicating a

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[15] *Id.* at 548.

[16] *Id.* at 550, 552.

[17] *Equitable Trust Co. v. Gallagher,* 102 A.2d 538, 541 (Del. 1954).

[18] Pls.' Mem. of law in Support of Mot. for Sanctions Due to Def.'s Spoliation of Evidence, D.I. 29 at 24.

[19] *Midcap,* 893 A.2d at 549.

desire to suppress the truth."[20] In contrast, in a criminal case, where due process right of an accused are implicated, the trial court will consider "the degree of negligence or bad faith involved" as part of a six-factor balancing test.[21] However, as the court noted in *Midcap*, "a criminal 'missing evidence' instruction is not equivalent to an adverse inference instruction in a civil case."

Plaintiffs rely on *Lucas v. Christiana Skating Center, Ltd.*, in support of their argument that Delmarva should have preserved the cable. In *Lucas*, the defendant preserved the rented roller-skate of an injured patron by tagging it with the date of the incident and the patron's name; however, the defendant could not produce the skate when the patron asked to examine it three years later.[22] Plaintiffs state that "[t]he Court approved the use of an adverse inference instruction . . . ."[23] However, the focus of the *Lucas* decision was whether the court should recognize spoliation of evidence as an

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[20] *Empire Fin. Serv., Inc. v. Bank of New York (Delaware)*, 2007 WL 625899, *3 (Del. Super.) (rev'd on other grounds) (citing *Midcap*, 893 A.2d at 549); s*ee also Pfantz v. KMART Corp.*, 85 P.3d 564, 568 (Col. Ct. App. 2004) (noting in the context of the propriety of sanctions for spoliation of evidence that "we discern no useful distinction among bad faith, recklessness, and gross negligence. All these terms describe conduct that is more than negligent and less than intentional.").

[21] *Deberry v. State*, 457 A.2d 744, 752 (Del.1983); *see also Lolly v. State*, 611 A.2d 956, (Del. 1992); *Hammond v. State*, 569 A.2d 81 (Del. 1989).

[22] *Lucas v. Christiana Skating Center, Ltd.*, 722 A.2d 1247, 1248 (Del. Super. 1998).

[23] Pls.' Reply Br. at 5.

independent tort action, and not a determination of the basis for giving an adverse inference instruction.[24] Furthermore, *Lucas* was decided prior to *Midcap* and *Lucas* contemplates an adverse inference instruction based on negligent conduct:

> If evidence of negligent or intentional spoliation by [defendant] is presented, the proper remedy would be for the Court to instruct the jury that an inference may arise that the skate would have been unfavorable to [defendant's] case, and not for the court to recognize a separate cause of action.[25]

Because *Midcap* makes it clear that an adverse inference instruction may only be given if a party's conduct is intentional or reckless, *Lucas* is inapposite.

The Delaware Pattern Jury Instructions for Civil Practice provides the following instruction for spoliation:

> There is evidence from which you may conclude that [person's name] may have [intentionally/recklessly] suppressed or destroyed the following relevant evidence [identify items destroyed or suppressed]. In you deliberations, if you conclude that this is the case, that is, that the loss of [identify items] was due to the [intentional/reckless] conduct of [person's name], then you may conclude that the missing evidence would have been unfavorable to [person's name]'s case.[26]

The Delaware Pattern Jury Instructions for Civil Practice also provides a definition for reckless conduct:

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[24] *Lucas*, 722 A.2d at 1250 (holding that there are no separate causes of action for negligent and intentional spoliation of evidence).

[25] *Id.*.

[26] Del. P.J.I. Civ. § 23.17 (2000).

> Reckless conduct reflects a knowing disregard of a substantial and unjustifiable risk. It amounts to an "I don't care attitude." Recklessness occurs when a person, with no intent to cause harm, performs an act so unreasonable and so dangerous that he or she knows, or should know, that harm will probably result.[27]

Recklessness also connotes a "conscious indifference to the rights of others."[28] Recklessness requires (1) an act; and (2) the foreseeability of harm resulting from the act that the actor perceived or should have perceived.[29]

Based on the facts set forth in the Stipulated Factual Record, the Court concludes that Delmarva did not act recklessly when it disposed of the service cable, and thus an adverse inference instruction is inappropriate. The evidence does not suggest that Mr. Axelson knew or should have known at the time he disposed of the service cable that it was relevant to a legal dispute. Mr. Axelson's job was to determine whether a scene is electrically safe for emergency responders and others and, if not, to de-energize lines to make the scene electrically safe.[30] When Mr. Axelson removed the service cable from the accident scene, he did so believing that the cable was trash

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[27] Del. P.J.I. Civ. § 5.9 (2000).

[28] *Jardel Co. v. Hughes*, 523 A.2d 518, 530 (Del. 1987) (reversing award of punitive damages to mall employee who was raped by third party because the defendant shopping mall did not act recklessly by providing only limited security).

[29] *Id.*

[30] Stipulated Factual Record, *supra* p. 5.

that belonged to Delmarva, and that it would be inappropriate to "leave trash in somebody's yard."[31] In disposing of the service cable, Mr. Axelson did not act in a manner "so unreasonable and so dangerous" that he knew or should have known that harm would probably result. At his deposition, Mr. Axelson testified that he has never once saved or been asked to save an object or item from the dozens of fires, motor vehicle accidents, electric contacts, and floods to which he responded during his ten years as a troubleman for Delmarva, and, to the best of Mr. Axelson's knowledge, neither he nor any of his fellow troublemen have ever been questioned or criticized for so disposing of such objects or items. Mr. Axelson was not instructed by the fire marshals to save the cable, though he indicated he would have done so if they had so instructed. Thus, based on Mr. Axelson's prior experience as a troubleman, he reasonably perceived that no risk of serious harm would result from his removal and disposal of the service cable.[32]

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[31] *Id.*

[32] For purposes of this motion, the four minor disputes (footnotes 2-5 from the Stipulation) in the factual record are resolved in favor of the Plaintiffs. Stipulation footnote 2: the Court assumes, without deciding, that Deputy Alfree did not ask Nationwide to retain the service entrance cable or any other evidence. Stipulation footnote 3: the Court assumes, without deciding, that Mr. Bishop contacted Al Hopkins and that Mr. Hopkins was Mr. Axelson's supervisor. Stipulation footnote 4: the Court assumes, without deciding, that Delmarva does have discretion to save a piece of its property for future litigation, even if the Fire Marshal chose not to save it for his own

Plaintiffs criticize Delmarva for its lack of a formal evidence preservation policy and contend that Mr. Axelson (and other first responders) should have received proper instruction and training that would have informed him to retain the cable. Plaintiffs argue that by failing to have enacted evidence preservation policies and to have trained its first responders in such procedures, Delmarva has a "plausible deniability" defense permitting Defendant to "blind [itself] to the item's potential relevance, or to alter, lose or destroy evidence before [the piece of evidence] could be deemed 'relevant.'"[33] However, the record does not support such a conclusion.[34] Mr. Bishop, Delmarva's Claims Coordinator for over twenty years, testified that he was not aware of any instances in which Delmarva was accused of spoliating evidence or discarding items it removed from an accident scene that were later sought by a third party.[35] Based on these facts, this Court concludes that Mr. Axelson and/or Delmarva did not act

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purposes. Stipulation footnote 5: the Court assumes, without deciding, that Plaintiffs' expert Don Stegner could have looked for signs of abrasion from contact between the cable and the tree if the cable had been preserved.

[33] Pls.' Reply Br., D.I. 33 at 3-4.

[34] Plaintiffs' reliance on out-of-state cases and on the national Fire Protection Association guidelines and ASTM International's standards, neither of which have been adopted in Delaware, are inapposite in light of *Midcap*.

[35] Def.'s Resp., D.I. 32, Ex. C at pp. 77-78.

recklessly and that an adverse inference instruction is not warranted under the facts of this particular case.[36]

V. CONCLUSION

For the foregoing reasons, Plaintiffs' "Motion for Sanctions Due to Defendant's Spoliation of Evidence" is DENIED.

oc: Prothonotary

[36] The Court need not reach the question of whether Mr. Axelson was negligent in his handling and disposing of the cable, and makes no determination as to that issue.