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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

<p>ARLENE MAXIM,</p> <p style="padding-left: 150px;">Plaintiff,</p> <p>vs.</p> <p>FP HOLDINGS, LP, d/b/a PALMS CASINO RESORT, and FCH1, LLC, d/b/a PALMS CASINO RESORT,</p> <p style="padding-left: 150px;">Defendant.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Case No. 2:13-cv-00415-GMN-GWF</p> <p>ORDER</p> <p>Plaintiff’s Motion for Sanctions for Spoliation of Video Surveillance Evidence - #25</p>
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This matter is before the Court on Plaintiff’s Motion for Sanctions for Spoliation of Video Surveillance Evidence (#25), filed on November 25, 2013. Defendant filed its Opposition to Plaintiff’s Motion for Sanctions (#27) on December 12, 2013. Plaintiff filed her Reply to Defendant’s Opposition (#28) on December 17, 2013. The Court conducted a hearing in this matter on December 30, 2013. At the conclusion of the hearing, the Court granted Plaintiff’s motion for sanctions. The Court hereby sets forth the basis and scope of its order.

BACKGROUND AND DISCUSSION

On October 25, 2011, Plaintiff Arlene Maxim slipped and fell on a liquid substance on the floor in the area near to the “Nove Podium” in Defendant’s Palms Casino Resort. A surveillance camera was located in the area where the accident occurred and a video recording showing Plaintiff’s fall and its aftermath was obtained and preserved by the Defendant’s personnel. The preserved video, however, only depicted the events from approximately 10 seconds before Plaintiff’s slip and fall accident until she was removed from the area by emergency medical technicians. It is undisputed that the Defendant generally erases surveillance video recordings

1 after 10 days, unless they are specifically ordered to be preserved. Defendant’s employees did not
2 preserve video of the area where Plaintiff fell prior to 10 seconds before the accident because they
3 were allegedly unaware that such evidence could be relevant to determining liability for the
4 accident. Defendant’s personnel responsible for investigating the accident also did not identify or
5 obtain statements from employees who were or may have been in the area prior to the accident and
6 may have had knowledge as to how or when the liquid came to be present on the floor.

7 Plaintiff’s counsel sent a letter to Defendant on or about November 7, 2011 requesting that
8 it “preserve any recorded data which may be relevant to this matter including, but not limited to,
9 video surveillance of the area where Ms. Maxim was injured.” *Motion (#25), Exhibit 9*. By the
10 time that letter was received by Defendant, however, any surveillance video of the area prior to 10
11 seconds before the Plaintiff fell had already been erased.

12 As stated in *LaJocies v. City of North Las Vegas*, 2011 WL 1630331, *1 (D.Nev. 2011):

13 Spoliation is the destruction or significant alteration of evidence, or
14 the failure to preserve property for another’s use as evidence in
15 pending or reasonably foreseeable litigation. *United States v. Kitsap*
16 *Physicians Serv.*, 314 F.3d 995, 1001 (9th Cir. 2002). The applicable
17 standard of proof in the Ninth Circuit appears to be by a
18 preponderance of the evidence. *Hammann v. 800 Ideas, Inc.*, 2010
19 WL 4943991, 7 (D.Nev. 2010) citing *In re Napster, Inc. Copyright*
20 *Litigation*, 462 F.Supp.2d 1060, 1072 (N.D.Cal. 2006). A party has a
21 duty to preserve evidence when it knows or has reason to know that
22 the evidence is ‘potentially relevant’ to litigation. *Id.* A party
23 engages in spoliation “as a matter of law only if they had some notice
24 that the documents were ‘potentially relevant’ to the litigation before
25 they were destroyed. *Akiona v. United States*, 938 F.2d 158, 161 (9th
26 Cir. 1991). A party must preserve evidence it knows or should know
27 is relevant to a claim or defense of any party, or that may lead to the
28 discovery of relevant evidence. *United States v. Kitsap Physicians*
Serv., 314 F.3d 995, 1001 (9th Cir. 2002). The duty to preserve
arises not only during litigation, but also extends to the period before
litigation when a party should reasonably know that evidence may be
relevant to anticipated litigation. *In re Napster*, 462 F.Supp.2d at
1067 (duty to preserve begins when a party should have known that
the evidence may be relevant to future litigation).

25 Where potentially relevant evidence is lost or destroyed prior to the commencement of
26 litigation or the service of a discovery request under the Federal Rules of Civil Procedure, the court
27 may sanction the party responsible for the destruction of the evidence pursuant to its inherent
28 authority. *LaJocies, supra*, at *2, citing *Leon v. IDX Systems Corp.*, 464 F.3d 951, 958 (9th Cir.

1 2006). The court may impose a range of sanctions for spoliation of evidence depending on the
2 culpability of the party responsible for its destruction and the prejudice caused to the opposing
3 party. Such sanctions may include the giving of an adverse inference jury instruction, precluding
4 the party from introducing evidence at trial, or in the most severe case granting the sanction of
5 dismissal or default. *LaJocies* further states:

6 [A] finding of bad faith is not a prerequisite for an adverse inference.
7 *Glover*, 6 F.3d at 1329. However, although a party's destruction of
8 evidence need not be in bad faith in order for the court to impose
9 sanctions, the party's motive or degree of willfulness or fault is
10 relevant to the severity of the sanction to be imposed. *Advantacare*
11 *Health Partners, supra, citing Glover v. BIC Corp.*, 6 F.3d 1318,
12 1329 (9th Cir. 1993); *Akiona v. United States*, 938 F.2d 158, 161 (9th
13 Cir. 1991), *cert. denied* 503 U.S. 962, 112 S.Ct. 1567, 118 L.Ed.2d
14 212 (1992); *Baliotis v. McNeil*, 870 F.Supp. 1285, 1291 (M.D.Pa.
15 1994). Generally, the court should choose the least onerous sanction
16 corresponding to the willfulness of the destructive act and the
17 prejudice suffered by the victim. *Id.* A district court's adverse
18 inference sanction should be carefully fashioned to deny the
19 wrongdoer the fruits of its misconduct yet not interfere with that
20 party's right to produce other relevant evidence. *In re Oracle Corp.*
21 *Securities Litigation*, 627 F.3d 376, 386–87 (9th Cir. 2010).

22 2011 WL 1630331, at *4.

23 Turning to the conduct of Defendant and its employees in this case, the Court begins with
24 the general duty owed by Defendant to its patrons. *FGA, Inc. v. Giglio*, 128 Nev. Adv. Op. 26, 278
25 P.3d 490, 496 (2012) states in this regard as follows:

26 [A] business owes its patrons a duty to keep the premises in a
27 reasonably safe condition for use. *Sprague v. Lucky Stores, Inc.*, 109
28 Nev. 247, 250, 849 P.2d 320, 322 (1993). Where a foreign substance
causing a slip and fall is made to be on the floor by the business
owner or one of its agents, then "liability will lie, as a foreign
substance on the floor is usually not consistent with the standard of
ordinary care." *Id.* Traditionally, where a foreign substance causing
a slip and fall results from "the actions of persons other than the
business or its employees, liability will lie only if the business had
actual or constructive notice of the condition and failed to remedy it."

Id. at 250, 849 P.2d at 322–23.

Defendant's security officers or other employees who are charged with investigating
accidents that occur on its premises should be instructed and should know that it is important to
obtain and preserve evidence in Defendant's possession, custody or control that may reasonably
show how, when and by whom a foreign substance came to be present on the floor of its premises.

1 Defendant's employees' failure to preserve all video recordings of the area where Plaintiff fell for a
2 reasonable period of time prior to the accident is at minimum negligent, if not grossly negligent.
3 There is no evidence, however, that Defendant or its employees intentionally destroyed surveillance
4 video that they knew was favorable to Plaintiff's potential negligence claim arising out of the
5 accident.

6 The Court therefore concludes that the appropriate sanction in this case is to instruct the
7 jury that they may infer, but are not required to find, that the surveillance video of the location
8 where Plaintiff fell would have been favorable to the Plaintiff on the issue of Defendant's
9 negligence by showing that Defendant had actual or constructive notice of the presence of the
10 liquid prior to the accident. The parties should submit appropriate proposed jury instructions
11 regarding the adverse inference prior to trial.

12 **IT IS HEREBY ORDERED** that Plaintiff's Motion for Sanctions for Spoliation of Video
13 Surveillance Evidence (#25) is **granted** in accordance with the provisions of this order.

14 DATED this 2nd day of January, 2014.

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17 GEORGE FOLEY, JR.
18 United States Magistrate Judge
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