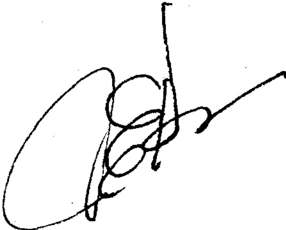
STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 CA 0529



JOHN CARTER, JR.

VERSUS

HI NABOR SUPER MARKET, LLC
AND LIBERTY MUTUAL GROUP, INC.

Judgment Rendered: DEC 3 0 2014

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket Number C599877

The Honorable Timothy E. Kelley, Judge Presiding

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Patrick Daniel **Lafayette, LA**	**Counsel for Plaintiff/Appellant,** **John Carter, Jr.**
Michael M. Thompson **Baton Rouge, LA**	**Counsel for Defendant/Appellee,** **Hi Nabor Super Market, LLC**

BEFORE: WHIPPLE, C.J., KUHN, McDONALD, WELCH, AND CRAIN, JJ.

CRAIN, J concurs in part and dissents in part and assigns reasons

Disposition: RULE TO SHOW CAUSE RECALLED; RECORD SUPPLEMENTED WITH APPELLATE RECORD IN DOCKET NUMBER 2013-CA-0530; SEPTEMBER 12, 2012 JUDGMENT AFFIRMED IN PART; MARCH 5, 2013 JUDGMENT REVERSED; AND REMANDED.

McDonald, J. dissents in part and agrees in part with reasons.

Whipple, C.J. concurring in part and dissenting in part and assigns reasons by JEW

Welch J. concurs in part and dissents in part for reasons assigned by C.J. Whipple.

KUHN, J.

This appeal is taken by plaintiff-appellant, John Carter, Jr., from a March 5, 2013 judgment of the trial court granting summary judgment in favor of defendant-appellee, Hi Nabor Supermarket LLC, dismissing Carter's claims, with prejudice. In conjunction with his appeal of that final judgment, Carter also challenges the trial court's September 12, 2012 interlocutory judgment denying his "Motion for Adverse Inference on Spoliation" of evidence. For the following reasons, we affirm the denial of the motion for adverse inference, reverse the summary judgment in favor of Hi Nabor dismissing Carter's claims, and remand to the trial court for further proceedings.

FACTS AND PROCEDURAL HISTORY

The record reflects that on April 27, 2010, Carter and his brother-in-law, Malcolm Spillers, were walking in Hi Nabor towards the deli area to purchase a plate lunch when Carter slipped and fell on a substance on the floor.[1] The fall was recorded on Hi Nabor's videotape surveillance system, which shows clear, color video of the exact area where Carter fell, as well as a small, dark object on the floor in front of the deli area where Carter slipped. After falling, Carter was assisted up off of the floor by Spillers and another man. Carter later testified in a deposition that at the time he slipped, he was looking at Spillers, that he did not notice anything on the floor, and that he initially thought he may have slipped in some type of liquid or water. However, Spillers stated in his deposition that Carter slipped on a grape, explaining that he saw the grape on the bottom of Carter's shoe and also saw where Carter smeared the grape on the floor when he stepped on it.

[1] At the time of the fall, Carter, who was employed by Capital Area Transit as a bus driver, was wearing his work uniform and work boots with rubber soles. Carter testified that due to injuries he sustained in the fall, he was unable to return to work as a bus driver and was receiving disability benefits.

After the fall, Carter told a cashier that he had slipped and fallen in the back of the store. After returning to his home, Carter also called the manager, Velta Walker, to report the incident, telling her that he slipped on a liquid.

Shortly after the accident, Carter's original attorney sent, by certified mail, a letter to Hi Nabor dated May 19, 2010, advising Hi Nabor that Carter was represented by counsel "in any and all matters concerning a slip and fall which occurred at [the] store on April 27, 2010." Thereafter, on March 7, 2011, Carter filed a suit for damages against Hi Nabor and its insurer, Liberty Mutual, alleging liability in that the failure to properly maintain the premises created a defect that constituted an unreasonably dangerous condition.

During the course of discovery, Carter eventually learned that portions of the videotape recording of the day of the accident, particularly those portions prior to Carter's fall, had been destroyed.[2] As a result, on April 11, 2012, Carter filed a "Motion for Adverse Inference on Spoliation," requesting that the trial court enter an adverse evidentiary inference instructing the jury that Hi Nabor had destroyed videotape evidence of the scene of his accident and that had this evidence been maintained, it would have been unfavorable to the defendant. Specifically, Carter requested that the trial court "enter an adverse inference instructing the jury that had Hi Nabor not destroyed videotape evidence of the scene of Plaintiff's accident, the videotape would have shown that the foreign object, the grape, was on the grocery store floor for such a time period that the defendant would have discovered it by the exercise of ordinary care."

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[2] The portion of the video surveillance maintained by Hi Nabor and introduced in the record contains thirty-two seconds of footage of Carter's slip and fall, including only the time immediately before, during, and after his fall.

Carter also filed a motion for partial summary judgment on the issue of liability, contending that Hi Nabor was "liable for the accident ... as a direct result of its failure to keep its premises free of any hazardous conditions."

Both motions were heard by the trial court on August 20, 2012, after which the trial court denied both the motion for adverse inference and the motion for partial summary judgment. In denying Carter's motion for partial summary judgment on liability, the trial court found that without an adverse evidentiary inference, there were genuine issues of material fact, especially as to the issue of actual or constructive notice, which precluded summary judgment in Carter's favor. A written judgment in accordance with these rulings was signed by the trial court on September 12, 2012.[3]

Thereafter, Hi Nabor filed a motion for summary judgment, seeking dismissal of Carter's case on the basis that, since Carter could not provide any evidence as to how the foreign object came to be on the floor or for how long it had been there, he would be unable to prove a necessary element of his case, i.e., that Hi Nabor possessed actual or constructive notice of its presence. After a hearing on February 19, 2013, during which the trial court noted that this court had denied the writ application taken from the trial court's denial of plaintiff's motion on spoliation, the trial court granted Hi Nabor's motion for summary judgment and dismissed Carter's case, with prejudice. The trial court signed written judgment so providing on March 5, 2013.

Carter now appeals the March 5, 2013 judgment of the trial court granting Hi Nabor's motion for summary judgment and dismissing Carter's claims, with

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[3] Carter initially filed a writ application with this court seeking review of the trial court's denial of his motion for adverse inference due to spoliation. By a plurality decision, the writ application was denied when this court declined to exercise supervisory jurisdiction, noting that the criteria for the exercise of supervisory jurisdiction set forth in ***Herlitz Construction Company v. Hotel Investors of New Iberia, Inc.***, 396 So. 2d 878 (La. 1981) had not been met and that relator had an adequate remedy by review on appeal after a final judgment on the merits. See ***John Carter, Jr. v. Hi Nabor Supermarket, LLC***, 12-1536 (La. App. 1st Cir. 10/30/12).

prejudice. He also challenges the September 12, 2012 judgment of the trial court, denying his motion for an adverse inference due to spoliation.[4]

DISCUSSION

Rule to Show Cause

A rule to show cause order was issued by this court *ex proprio motu* concerning the appealability of the September 12, 2012 judgment of the trial court. After briefing of the issue by the parties, the matter was referred to the merits of this appeal by a different panel of this court. Thus, as a preliminary matter, we will address whether the September 12, 2012 judgment is properly before us for review on appeal.

A judgment that does not determine the merits, but only determines preliminary matters in the course of the action, is an interlocutory judgment, which is appealable only when expressly provided by law. La. C.C.P. arts. 1841 & 2083(C). However, when, as in this case, an unrestricted appeal is taken from a final judgment, the appellant is entitled to seek review of all adverse interlocutory judgments rendered in the same case, in addition to the review of the final judgment. ***Welch v. East Baton Rouge Parish Metropolitan Council***, 10-1531 (La. App. 1st Cir. 3/25/11), 64 So. 3d 244, 247 n.2.

The September 12, 2012 judgment of the trial court denying both Carter's motion for an adverse evidentiary inference and his motion for partial summary judgment is an interlocutory judgment that does not determine the merits, but only addresses preliminary matters in the course of this action or is otherwise not a final judgment subject to review on appeal. La. C.C.P. art. 1841; ***Starkey v. Livingston Parish Council***, 12-1787 (La. App. 1st Cir. 8/6/13), 122 So. 2d 570, 573 n.1. However, because the March 5, 2013 judgment granting Hi Nabor's

[4] Although Carter generally states in his appellate brief that he also seeks review of the denial of his motion for partial summary judgment on liability, he did not specifically assign this ruling as error and did not brief the issue. Accordingly, we will not address that interlocutory ruling herein. See Uniform Rules—Courts of Appeal, Rule 2-12.4(3)(4).

motion for summary judgment and dismissing Carter's case, with prejudice, is a final judgment properly before us on appeal, Carter is entitled to seek review of all interlocutory rulings rendered against him in this case.[5] Accordingly, the rule to show cause is recalled and the appeal is maintained as to the judgment of September 12, 2012.

Spoliation of the Evidence

On appeal, Carter contends the trial court abused its discretion in denying his motion for an adverse inference and jury instruction against Hi Nabor in view of Hi Nabor's inadequate explanation for the destruction of the portion of the videotape showing the condition of the supermarket's floor preceding Carter's fall. In particular, Carter contends that, despite having knowledge of his slip and fall on a foreign object located on the floor, and despite specifically reviewing the videotape with knowledge of the pending claim, Hi Nabor unilaterally decided to limit how much of the videotape it would retain. He maintains that Hi Nabor's intentional purging of the videotape of the critical time period preceding his fall ultimately caused him to suffer irreparable injury.

Spoliation of the evidence is an *evidentiary* doctrine that refers to an intentional destruction of evidence for the purpose of depriving the opposing parties of its use in pending or anticipated litigation. ***BancorpSouth Bank v. Kleinpeter Trace, L.L.C.***, 13-1396 (La. App. 1st Cir. 10/1/14), ____ So.3d ____; ***Clavier v. Our Lady of the Lake Hospital Inc.***, 12-0560 (La. App. 1st

[5]Although Carter filed only one motion and order for appeal, seeking review of both the final judgment on the merits dismissing his claim on Hi Nabor's motion for summary judgment and the earlier interlocutory ruling denying his request for an adverse inference jury instruction based on spoliation, for reasons that are not clear, this matter was erroneously docketed as two separate appeals. Because neither of the two appellate records is complete, in that they do not each contain all transcripts, evidence, and judgments, in the interest of justice and for purposes of judicial economy, we hereby supplement the record in the instant appeal with the appellate record filed in Docket Number 2013CA0530, which appeal is being dismissed by another panel of this court as duplicative. See generally ***Larrieu v. Terrebonne Parish Sales and Use Tax***, 03-0934 (La. App. 1st Cir. 2/23/04), 872 So. 2d 1164, 1166 (on rehearing); ***Shuford v. Employers' Liability Assurance Corporation***, 141 So. 2d 850, 852 (La. App. 2d Cir. 1962).

Cir. 12/28/12), 112 So.3d 881, 885, writ denied, 13-0264 (La. 3/15/13), 109 So.3d 384. The duty to preserve evidence arises from the foreseeability of the need for the evidence in the future. ***Clavier***, 112 So.3d at 885. While it has roots in the common law, the evidentiary doctrine of spoliation of the evidence has been recognized in Louisiana since at least 1847.[6] See ***New Orleans Draining Company v. De Lizardi***, 2 La. Ann. 281, p. 6 (La. 1847). In an early case in which corporate managers refused to produce corporate records to interested stockholders, the Louisiana Supreme Court held that the manager's refusal justified a court and jury to draw "the most unfavorable inference, consistent with reason and probability, as to the nature and effect of the evidence which the opposite party has been precluded from using and examining as a means for the discovery of the truth." ***Varnado v. Banner Cotton Oil Co.***, 126 La. 590, 590-92, 52 So. 777, 777-79 (1910).

A trial court has the authority to impose sanctions on a party for spoliation of evidence and other discovery misconduct under both its inherent power to manage its own affairs and the discovery articles provided in the Louisiana Code of Civil Procedure. Under La. C.C.P. art. 1471, when a party refuses or is unable to comply with a discovery order, the trial court in a pending action "may make such orders in regard to the failure as are just," thereby granting the trial court broad discretion to impose a range of sanctions. La. C.C.P. art. 1471(A); see also Fed. R. Civ. P. 37. Even without a discovery order, La. C.C.P. art. 191 authorizes trial courts to impose sanctions for spoliation of the evidence, since the destruction of evidence clearly interferes with the court's ability to fairly administer justice. Specifically, La. C.C.P. art.

[6] The imposition of an adverse inference as a sanction for spoliation of the evidence is a sanction that has existed at common law as far back as 1722. ***New Orleans Draining Company, v. De Lizardi***, 2 La. Ann. 281, p. 6 (La. 1847), citing ***Armory v. Delamirie***, [93 Eng. Rep. 664 (K.B. 1722)]. See also ***Herbert v. Wal-Mart Stores, Inc.***, 911 F.2d 1044, 1046 n.4 (5th Cir. 1990) (*per curiam*).

191 provides that a trial court "possesses inherently all of the power necessary for the exercise of its jurisdiction even though not granted expressly by law."

The issue of spoliation of the evidence can be raised in the trial court through different procedural means. For instance, a party can file a rule for discovery sanctions under La. C.C.P. art. 1471 based on the destruction of evidence sought in discovery. Alternatively, a party can file a motion in limine seeking various sanctions on the party responsible for the destruction or inaccessibility of the evidence.

Once a trial court finds that a party had failed to produce evidence within his control, one possible sanction the trial court may impose is an instruction to the jury that it may infer that the evidence was detrimental to that party. This adverse inference is not applicable, however, when the party gives an adequate explanation for the failure to produce the evidence. See ***BancorpSouth Bank***, 13-1396 at p. 21, ____ So.3d at ____; ***Randolph v. General Motors Corporation***, 93-1983 (La. App. 1st Cir. 11/10/94), 646 So.2d 1019, 1026-27, writ denied, 95-0194 (La. 3/17/95), 651 So.2d 276.

Further, although an adverse inference jury instruction is a common sanction imposed, **it is merely one of the possible sanctions** that a trial court **may** impose when evidence has been destroyed or rendered unavailable by a party. "Under the federal and state rules of civil procedure that regulate discovery procedures, courts have broad discretion to impose a variety of sanctions against a party that fails to produce evidence in violation of the discovery rules." [Footnote omitted.] Margaret M. Koesel & Tracey L. Turnbull, *Spoliation of Evidence* 61 (Daniel F. Gourash ed., 3d ed. 2013). The purpose of such sanctions is to achieve evidentiary balance, fairness, and justice, as well as to deter improper conduct. While different sanctions may be appropriate under the facts of a given case, "courts agree that [a court] should

impose the least severe sanction necessary to remedy prejudice to the non-spoliating party." [Footnote omitted.] *Spoliation of Evidence* at 60. Any sanction to be imposed by the trial court should be tailored to the particular facts existing in the case. ***Reilly v. Natwest Markets Group Inc.***, 181 F.3d 253, 268 (2d Cir. 1999), cert. denied, 528 U.S. 1119, 120 S.Ct. 940, 145 L.Ed.2d 818 (2000); ***Gordon v. DreamWorks Animation SKG, Inc.***, 935 F.Supp.2d 306, 315 (D. Mass. 2013).

The range of possible sanctions include dismissing a case, rendering a default judgment, striking pleadings, striking a claim or defense, and excluding evidence. See La. C.C.P. art. 1471; *Spoliation of Evidence* at 61 & n.5. A determination as to what sanction is appropriate in a particular case is a matter within the province of the trial court, depending upon the facts present. As with other evidentiary and discovery rulings, the trial court has much discretion in deciding which sanction, if any, to impose. Cf. ***Hutchinson v. Westport Insurance Corporation***, 04-1592 (La. 11/8/04), 886 So.2d 438, 440 (*per curiam*); also see ***Adkins v. Wolever***, 554 F.3d 650, 653 (6th Cir. 2009). The appellate standard of review for a trial court's evidentiary ruling on this issue is whether the trial court abused its broad discretion. See ***BancorpSouth Bank***, 13-1396 at p. 22, ____ So.3d at ____; ***Paradise v. Al Copeland Investments, Inc.***, 09-0315 (La. App. 1st Cir. 9/14/09), 22 So.3d 1018; ***Everhardt v. Louisiana Department of Transportation and Development***, 07-0981 (La. App. 4th Cir. 2/20 /08), 978 So.2d 1036, 1045.

In the instant case, since a Hi Nabor employee witnessed the accident, Hi Nabor had immediate notice of Carter's fall when it occurred on April 27, 2010. Further, Carter told a cashier about his fall as he was checking out and, when he returned home, he telephoned Hi Nabor and reported the accident to a store manager. Hi Nabor also received the previously mentioned certified letter from

Carter's attorney, which advised Hi Nabor that Carter had retained counsel to represent him in all matters concerning his April 27, 2010 slip and fall

Jim Crifasi, Hi Nabor's corporate representative, testified in his deposition that after receiving notice of the accident, he reviewed the videotape footage of Carter's fall recorded by the supermarket's videotape surveillance system. However, he only retained on a CD the portion of the videotape that showed Carter approach the deli section and then slip and fall. According to Crifasi, Hi Nabor generally only retained videotape footage from the time period that an incident occurred. He explained that he did not retain the footage of the deli area in the time period preceding Carter's fall because Carter reportedly had slipped on water and Crifasi did not believe that water would be visible on the videotape. Crifasi further explained that the supermarket's surveillance system automatically purges recorded footage, which is overwritten after thirty days, as storage space is limited. He indicated that the additional footage recorded on the day of Carter's accident was purged by the system sometime after thirty days had elapsed from the accident.

In denying Carter's motion for an adverse inference and jury instruction, the trial court gave the following oral reasons for judgment:

> In this case, spoliation, whether negligent or intentional, is the application of a drastic remedy and that is either an exclusion of evidence or an adverse presumption. In this case, the adverse presumption is being sought. Spoliation will not lie where an adequate explanation is provided. In this case, certainly, the court finds an adequate explanation for not preserving as much of the video as plaintiff would have hoped, because at the time of the writeoff – write-over on the tape ... they did not have any knowledge that there was a claim that there was a grape there, as opposed to water. They had no knowledge of a lawsuit pending or an indication that one would be filed. Lawyers send letters saying, "can you help me with meds," without saying, "I'm going to file a lawsuit," all the time. So given the circumstances under which this occurred, they preserved as much of it as they thought that they needed to preserve, based upon the knowledge that they had at the time; and therefore, I'm going to deny the motion for an adverse inference on spoliation.

Based on our review, we find no abuse of discretion in the trial court's ruling accepting Hi Nabor's explanation for the destruction of the evidence as reasonable. Accordingly, the portion of the trial court's September 12, 2012 judgment that denied Carter's motion for adverse inference is affirmed.

Additionally, we observe that although we have reviewed this interlocutory judgment in conjunction with the appeal of the final judgment dismissing Carter's claims on summary judgment, the ruling remains an interlocutory judgment. Consequently, it is possible that the trial court may issue rulings inconsistent with the September 12, 2012 judgment as this litigation proceeds and additional relevant facts may be revealed.

Summary Judgment

Carter contends that the trial court erred in granting Hi Nabor's motion for summary judgment and dismissing his claim, with prejudice. We agree, finding that genuine issues of material fact exist that preclude summary judgment.

Appellate courts review summary judgments *de novo,* using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. ***In re Succession of Holbrook***, 13-1181 (La. 1/28/14), 144 So.3d 845, 847. A motion for summary judgment should be granted only if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B); ***In re Succession of Holbrook***, 144 So.3d at 847-48.

Carter argues that Hi Nabor had constructive notice of the foreign object on the floor. Although the time period need not be specific in minutes or hours, constructive notice to a merchant of a hazardous condition can be established only where the claimant proves that the condition existed for some period of

time prior to the fall. Additionally, whether or not the period of time in question is sufficiently lengthy that a merchant should have discovered the condition is necessarily a fact question. ***White v. Wal-Mart Stores, Inc.***, 97-0393 (La. 9/9/97), 699 So. 2d 1081, 1084-85.[7]

In this case, store manager, Velta Walker, testified in her deposition that Hi Nabor's policy was to perform a "floor sweep" inspection every thirty minutes. Moreover, her review of the inspection log sheet for the day of Carter's fall reflected that a floor inspection was conducted at 6:00 p.m. and another at 6:30 p.m. Because the videotape of Carter's fall reflects that it occurred at 6:32 p.m., she indicated it was possible that the inspection had begun on the other side of the store, but had not yet reached the area where Carter fell. On the other hand, Regina Chiszle, who worked in the Hi Nabor deli department, testified that it had been "about an hour" before the fall since she had last seen Kedron Franklin, the employee responsible for performing the floor inspections, near the area where Carter fell. During this period of time, however, Chiszle was waiting on customers at the meat counter and may have not seen Franklin even if he did pass through the area inspecting the floor.

Clearly, genuine issues of material fact existed as to: (1) the period of time that the foreign substance was on the floor preceding Carter's fall; (2) the period of time elapsed since the last floor inspection in the area of Carter's fall; and (3) whether the relevant periods of time (whatever the factfinder determines them to be) were sufficiently lengthy to constitute constructive notice to Hi Nabor of the hazardous condition. These factual issues cannot be resolved

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[7] Although the Supreme Court in ***White*** interpreted the version of La. R.S. 9:2900.6 prior to its amendment by 1996 La. Acts, 1st Ex. Sess., No. 8 §1, eff. May 1, 1996, the requirement in the statute that the plaintiff prove that the condition existed for "such a period of time" was not changed by the 1996 amendments. Thus, the analysis in ***White*** regarding the temporal element of La. R.S. 9:2800.6 is equally applicable to the instant case. See ***Williams v. Shoney's, Inc.***, 99-0607 (La. App. 1st Cir. 3/31/00), 704 So. 2d 1021, 1024 n.3.

without weighing the evidence and making credibility determinations, which are matters for the factfinder. In view of these unresolved issues of material fact, the trial court erred in granting summary judgment in favor of Hi Nabor, and the summary judgment must be reversed. La. C.C.P. art. 966(B).

CONCLUSION

For the reasons assigned, the record in this appeal is hereby supplemented with the appellate record filed in 2013-CA-0530. The portion of the September 12, 2012 judgment of the trial court that denied Carter's motion for an adverse inference based on spoliation of the evidence is hereby affirmed. The March 5, 2013 judgment of the trial court, granting Hi Nabor's motion for summary judgment and dismissing Carter's claims, with prejudice, is hereby reversed. This matter is remanded to the trial court for further proceedings consistent with this opinion. The costs of this appeal are assessed one-half to plaintiff-appellant, John Carter, Jr., and one-half to defendants-appellees, Hi Nabor Supermarket, LLC and Liberty Mutual Group, Inc.

RULE TO SHOW CAUSE RECALLED; RECORD SUPPLEMENTED WITH APPELLATE RECORD IN DOCKET NUMBER 2013-CA-0530; SEPTEMBER 12, 2012 JUDGMENT AFFIRMED IN PART; MARCH 5, 2013 JUDGMENT REVERSED; AND REMANDED.

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STATE OF LOUISIANA

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NGW by JEW

WHIPPLE, C.J., concurring in part and dissenting in part.

While I agree with the majority that the trial court's grant of summary judgment in favor of Hi Nabor should be reversed, I disagree with the majority's decision to affirm the denial of Carter's motion for adverse inference due to spoliation.

Spoliation of evidence generally refers to an intentional destruction of evidence for the purpose of depriving opposing parties of its use.[1] McCleary v. Terrebonne Parish Consolidated Government, 2009-2208, p. 2 (La. App. 1st Cir. 9/30/10) (unpublished opinion), writ denied, 2010-2807 (La. 2/11/11), 56 So. 3d 1003. The theory of spoliation of evidence has its roots in the evidentiary doctrine of "adverse presumption," which allows for a jury instruction to be given that the destroyed evidence is presumed to have contained information detrimental to the

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[1]However, this court has also previously alluded to a **negligence** theory of spoliation when addressing the application of an adverse presumption for spoliation of evidence. Paradise v. Al Copeland Investments, Inc., 2009-0315 (La. App. 1st Cir. 9/14/09), 22 So. 3d 1018, 1027. Further, in addition to the **evidentiary doctrine** of adverse presumption, some jurisprudence has also recognized a **cause of action** in tort for damages based on spoliation of evidence, and some courts have recognized such a cause of action based on either **intentional** spoliation or **negligent** destruction of evidence. See Harris v. St. Tammany Parish Hospital Service District No. 1, 2011-0941, 2011-0942 (La. App. 1st Cir. 12/29/11) (unpublished opinion), writs denied, 2012-0585, 2012-0678 (La. 4/20/12), 85 So. 3d 1275, 1277, McCleary v. Terrebonne Parish Consolidated Government, 2009-2208 (La. App. 1st Cir. 9/30/10) (unpublished opinion), writ denied, 2010-2807 (La. 2/11/11), 56 So. 3d 1003, and Robertson v. Frank's Super Value Foods, Inc., 2008-592 (La. App. 5th Cir. 1/13/09), 7 So. 3d 669, 673 (wherein the court noted that this cause of action has been recognized as the "tort of impairment of a civil claim").

For a discussion of the distinction between the evidentiary doctrine of adverse presumption for spoliation of evidence and the cause of action in tort, see Robertson, 7 So. 3d at 673. See also Clavier v. Our Lady of the Lake Hospital, Inc., 2012-0560 (La App. 1st Cir. 12/28/12), 112 So. 3d 881, 885-886, writ denied, 2013-0264 (La. 3/15/13), 109 So. 3d 384, wherein one panel of this court astutely cautioned that allowing a party to assert a separate cause of action for spoliation against a party to the underlying action, where other remedies such as the application of an adverse evidentiary presumption are available, would create "a plethora of problems." The Louisiana Supreme Court has not yet spoken as to the existence of a separate cause of **action in tort** based on spoliation of evidence. Robertson, 7 So. 3d at 673.

party who destroyed the evidence unless such destruction is adequately explained. Robertson v. Frank's Super Value Foods, Inc., 2008-592 (La. App. 5th Cir. 1/13/09), 7 So. 3d 669, 673.

As noted in the majority opinion, the evidentiary doctrine of "adverse presumption" was applied by the Louisiana Supreme Court in Varnado v. Banner Cotton Oil Co., 126 La. 590, 590-592, 52 So. 777, 777-778 (1910), wherein the Supreme Court applied the maxim, *omnia praesumuntur contra spoliatorem*, holding that the refusal of the managers of a corporation to produce the corporate books to interested stockholders justified a court and jury to draw "the most unfavorable inference, consistent with reason and probability, as to the nature and effect of the evidence which the opposite party has been precluded from using and examining as a means for the discovery of the truth."

Thus, as previously recognized by this court, when a litigant fails to produce evidence within his reach, a presumption that the evidence would have been detrimental to his case is applied, unless the failure to produce the evidence is adequately explained. Paradise v. Al Copeland Investments, Inc., 2009-0315 (La. App. 1st Cir. 9/14/09), 22 So. 3d 1018, 1027; Randolph v. General Motors Corporation, 93-1983 (La. App. 1st Cir. 11/10/94), 646 So. 2d 1019, 1026, writ denied, 95-0194 (La. 3/17/95), 651 So. 2d 276. One explanation for failure to produce evidence that has been deemed reasonable is the situation where suit has not been filed and there is no evidence that a party knew suit would be filed when the evidence was discarded, such that the need for the evidence was not foreseeable. Under such circumstances, the theory of an adverse presumption for spoliation of evidence does not apply. See generally Higgins v. Richard, 2008-2504, p. 4 (La. App. 1st Cir. 6/12/09) (unpublished opinion).

In the instant case, it is undisputed that Hi Nabor **knowingly** allowed the purging of a large portion of the video tape, intentionally electing to preserve only a short portion of the tape depicting the scene of the fall for the few seconds immediately preceding, during, and subsequent to Carter's fall. In justification and as an explanation of its actions, Hi Nabor's corporate representative, Jim Crisasi, testified that the video tape surveillance system was designed to override, and thereby "purge," automatically after thirty days; however, because Hi Nabor had notice of Carter's fall prior to the automatic purging date, the video tape was reviewed and a portion of the video tape of that particular date, i.e., the portion showing Carter approach the deli area, then slip and fall, was retained.[2] According to Crisasi, Hi Nabor generally only maintained video surveillance from the time period during which the incident occurred. Crisasi admitted that Hi Nabor elected to not retain the video footage of the area and circumstances preceding Carter's fall, but claimed that it did so because Carter had reportedly slipped on water, which he claims would not be visible on tape. However, Crisasi conceded that the video tape was reviewed by Hi Nabor and further conceded that if Carter had slipped on a grape, as reported by Spillers, the object causing the fall, i.e., a grape on the floor, would have "possibly" been visible on the surveillance tape. He also acknowledged that if surveillance of the entire day had been retained, it potentially would have identified how that condition came to be on the floor, i.e., whether a customer had dropped a grape. Importantly, Crisasi admitted that the deletion of the video precluded a showing of what caused the condition on the floor.

The record further reflects that: Hi Nabor had notice of the fall when it occurred on April 27, 2010; Hi Nabor was aware that Carter desired to file a claim, at least as of April 28, 2010, when he called the store and spoke to Ms. Walker; Hi

[2] Crisasi testified that when they elect to maintain video tape surveillance, they actually "burn" the retained portion to a compact disk.

Nabor completed and submitted a detailed incident report, including witness accounts, to its insurer, Liberty Mutual; and Hi Nabor was put on notice by certified letter from Carter's attorney, dated May 19, 2010 and received May 21, 2010, that Carter had retained counsel and was represented "in any and all matters concerning a slip and fall which occurred at [their] store on April 27, 2010." Notably, all of the above, including Hi Nabor's certified notice from Carter's counsel, was received within the thirty-day period preceding Hi Nabor's automatic purge date for the video surveillance at issue.

Nonetheless, the trial court refused to enter an adverse inference, (or a jury instruction on such), finding that Hi Nabor's explanation for its failure to preserve the evidence was adequate because Hi Nabor had no knowledge of a lawsuit or any indication that one would be filed. On appeal, Carter contends that the trial court erred in so ruling as the record does not support these underlying factual findings and conclusions. Thus, he contends that he is entitled to a jury instruction on the issue of adverse presumption as well as the application of an adverse evidentiary inference and presumption in his favor in the proceedings before the trial court. I agree.

On review of the record herein, I would find merit to Carter's contention that the record does not support the trial court's factual finding that Hi Nabor's actions were justified or excusable because it "had no knowledge of a lawsuit pending or an indication that one would be filed." As the record reflects, Hi Nabor had notice of the fall when it occurred on April 27, 2010; Hi Nabor was aware that Carter wished to file a claim, at least as of April 28, 2010, when he called the store and spoke to Ms. Walker; Hi Nabor completed and submitted a detailed incident report, including witness accounts, for its insurer, Liberty Mutual; and Hi Nabor was put on notice by certified letter from Carter's attorney dated May 19, 2010, and received May 21, 2010, that Carter had retained counsel and was represented "in any and all matters

concerning a slip and fall which occurred at [their] store on April 27, 2010." All of the above information, including Hi Nabor's certified notice from Carter's counsel, was received within thirty days of the incident, well within time to retain a sufficient portion of video surveillance. Thus, in my view, the record clearly establishes that Hi Nabor was, in fact, immediately aware of the accident, and was reasonably put on notice, as a merchant, that a subsequent claim for damages arising out of the incident was forthcoming or foreseeable. Considering the record before us, I would find that the trial court erred in determining otherwise.[3]

I would also find merit to Carter's contention that the record does not support the trial court's conclusion that Hi Nabor provided an "adequate explanation," as would preclude a jury instruction on or application of adverse inference, considering the evidence of record on this issue. In justification of its decision to purge the videotape, Hi Nabor's explanation to the trial court was that it made the decision to do so because it felt that water would not be seen by the video camera. Therefore, Hi Nabor explained, there was no "cause" to keep the portion of tape preceding the fall. However, the video itself lends no support for such an explanation and, in fact, preponderates in favor of a different conclusion.

As a merchant, it can be assumed that a defendant supermarket is aware of slip and fall lawsuits and that one of the elements in stating a cause of action against the merchant is the length of time that the dangerous condition existed on the floor and whether the merchant knew, or should have known, of the dangerous

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[3]See also Robertson v. Frank's Super Value Foods, Inc., 7 So. 3d at 675, n.3, where this court noted:

> It has been held in other jurisdictions that a duty to preserve evidence can arise in the absence of notice of suit if the spoliating party acted to protect itself. The duty to preserve evidence arises from the foreseeability of the **need** for the evidence and not necessarily from **notice** of suit. To hold otherwise would encourage a party to avoid liability by destroying evidence as quickly as possible. 101 A.L.R. 5th 61, § 20; County of Solano v. Delancy, 264 Cal.Rptr. 721 (App. 1st Dist. 1989). [Emphasis added.]

condition. See LSA-R. S. 9:2800.6. Hi Nabor does not dispute that it was in possession and control of the tape at all times and actually reviewed it with notice of Carter's pending claim. As the record further shows, Hi Nabor unilaterally decided that there was "no cause" to retain the portion of the tape preceding Carter's fall, and that it was justified in its decision to only retain seconds of footage before Carter's fall.

However, based on the record herein, and, in particular, the retained video footage itself, I agree with Carter that the factual findings underlying the trial court's ultimate refusal to grant a jury instruction on spoliation or to apply an adverse presumption are not borne out by the record. Considering the tape alone, Hi Nabor's explanation that it deleted the critical video tape because water would not be visible on the video tape is inadequate on the record before us, particularly in light of the fact that: (1) the video footage introduced herein, which Crisasi testified he viewed, clearly shows Carter stepping onto a small dark object on the floor prior to his fall; and (2) an eye witness to the fall had stated that the object was a grape. In sum, given the fact that Hi Nabor undisputedly reviewed the video prior to purging, Hi Nabor's claim that it destroyed the video of the critical time before the accident on the basis that it believed Carter slipped on water on the floor and water on the floor would not be visible on tape is belied by the retained surveillance footage itself, which shows the area prior to Carter's fall and clearly depicts a dark visible object on the floor.

Thus, I would find merit to Carter's claim that the trial court erred in its underlying findings and, accordingly, abused its discretion in refusing to grant the requested motion for a jury instruction and in refusing to enter or apply, as an evidentiary matter, the adverse inference sought by Carter herein. Instead, after reviewing the videotape, I note that the video surveillance of this incident that Hi

Nabor did choose to retain clearly shows Carter stepping on a small dark object and slipping. Thus, on the evidence before us, I would conclude that the explanation that the pertinent footage at issue herein was not retained because water would not be seen by the camera is neither credible nor supported in the record herein. Accordingly, while the majority is correct that interlocutory judgments are subject to further review by the trial court, under the facts of this case, Hi Nabor's explanation that it had no "cause" to preserve video prior to Carter's fall, because it assumed water would not be visible to the camera, appears to be inadequate, pretextual and unreasonable under the circumstances and facts as developed in the record thus far. See Salone v. Jefferson Parish Department of Water, 94-212 (La. App. 5th Cir. 10/12/94), 645 So. 2d 747, 750-751. As such, I would find that the trial court erred in refusing the requested jury instruction and in refusing to apply an adverse inference based on spoliation when determining the issues before the court. For these reasons, I dissent from the decision of the majority to affirm the portion of the September 12, 2012 judgment that denied Carter's motion for adverse inference.

With regard to the March 5, 2013 judgment granting Hi Nabor's motion for summary judgment, I agree with the majority that the trial court erred in rendering summary judgment in Hi Nabor's favor as a matter of law because genuine issues of material fact remain.

As the majority notes, Velta Walker was the store supervisor at Hi Nabor that day. Ms. Walker testified that Hi Nabor had a policy in place that floor inspections were routinely performed every thirty minutes and logged on a floor inspection sheet. Ms. Walker identified Kedron Franklin as the employee who would have been responsible for performing the sweeps around the floor at the time of the incident. Although the floor inspection sheet indicates that a spill was swept up at 6:30 p.m.

that day, Ms. Walker testified that Mr. Franklin had cleaned up a spill on the other side of the store at that time prior to this incident. She further testified that if Mr. Franklin began his inspection at 6:30 p.m. and had to clean up a spill on the other side of the supermarket, it is possible that he had not reached that area by 6:32 p.m.

Moreover, the evidence of record herein shows that it had been at least one hour since Kedron Franklin had inspected the area where the grape was shown on the floor and where Carter fell. Moreover, despite Hi Nabor's policy that a "floor sweep" be performed every thirty minutes, Regina Chiszle, a Hi Nabor employee working behind the deli counter, testified that it had been at least an hour since she had seen Franklin near the area where Carter fell. As the majority recognizes, though the time period need not be specific in minutes or hours, constructive notice can be shown to exist where the claimant proves the condition existed for some time period prior to the fall. White v. Wal-Mart Stores, Inc., 97-0393 (La. 9/9/97), 699 So. 2d 1081, 1084-1085.[4]

In the instant case, there are issues of material fact as to whether Hi Nabor had actual or constructive notice of the unreasonably dangerous condition, which cannot be resolved without weighing the evidence and making credibility determinations. Thus, summary judgment is not appropriate. Accordingly, I agree with the decision of majority that the March 5, 2013 judgment should be reversed and the matter remanded for further proceedings.

For these reasons, I respectfully concur in part and dissent in part.

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[4]Although the Supreme Court in White interpreted the version of LSA-R.S. 9:2900.6 prior to its amendment by 1996 La. Acts, 1st Ex. Sess., No. 8 §1, eff. May 1, 1996, the requirement in the statute that the plaintiff prove that the condition existed for "such a period of time" was not changed by the 1996 amendments. Thus, the analysis in White regarding the temporal element of LSA-R.S. 9:2800.6 is equally applicable to the instant case. See Williams v. Shoney's, Inc., 99-0607 (La. App. 1st Cir. 3/31/00), 704 So. 2d 1021, 1024 n.3.

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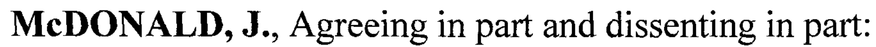

McDONALD, J., Agreeing in part and dissenting in part:

I agree with the majority to affirm the trial court denying the motion for an adverse inference based on spoliation. I believe the trial court was well within its discretion and I also find no abuse of this discretion in accepting Hi Nabor's reasonable explanation for failing to preserve any additional evidence. I respectfully dissent, however, from the majority decision to reverse the trial court's granting of the motion for summary judgment. I do not believe there are any genuine issues of material fact and would affirm the trial court.

JOHN CARTER, JR.

VERSUS

HI NABOR SUPER MARKET, LLC AND LIBERTY MUTURAL GROUP, INC.

STATE OF LOUISIANA

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CRAIN, J., concurs in part, dissents in part.

I concur in affirming the trial court's denial of plaintiff's motion seeking to impose an adverse presumption based on spoliation of evidence, and I dissent from the reversal of the trial court's judgment granting the defendant's motion for summary judgment. While I believe the determination of whether an adverse presumption is imposed based on spoliation of evidence should be resolved by the trier of fact, *BancorpSouth Bank v. Kleinpeter Trace, LLC*,13-1396 (La. App. 1 Cir. 10/1/14), ___ So. 3d ___, from which I dissented, holds that the trial court makes that determination. [1] But for the binding precedent of *BancorpSouth Bank*, I would remand this matter with instructions to allow a jury instruction relative to the application of the spoliation of evidence doctrine, thereby preserving for the jury, as the trier of fact, the authority to determine if an adverse presumption should be imposed; and, I would reverse the summary judgment because of that remaining factual issue.

The factual dispute in this case relative to the adequacy of the explanation for the alleged spoliation of evidence is even more pronounced than that presented in *BancorpSouth Bank,* and concerns the defendant's knowledge and the circumstances and motives surrounding its failure to preserve more of the pre-

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[1] *But see Boh Brothers Construction Company, Inc. v. Luber-Finer, Inc.*, 612 So. 2d 270, 274-75 (La. App. 4 Cir. 1992), *writ denied*, 614 So. 2d 1256 (La. 1993) (trial court erred in instructing jury to presume that discarded evidence would discredit party's claim; jury should have been instructed that party could rebut presumption by explaining its failure to produce the evidence); *see also Wilhite v. Thompson*, 42,395 (La. App. 2 Cir. 8/15/07), 962 So. 2d 493, 498-99, *writ denied*, 07-2025 (La. 2/15/08), 976 So. 2d 175 (after being instructed on availability of the adverse presumption, jury's implied finding that presumption did not apply because party's explanation was reasonable was not manifestly erroneous).

incident video. First, the alleged eyewitness did not tell Hi Nabor about a "grape" on the floor *before* the video equipment recorded over the tape from the day in question. In fact, there is no evidence in the record that Hi Nabor had any knowledge, at the time the video was taped over, of what caused Carter to slip other than the "water" that Carter first reported. Second, whatever may have caused Carter to slip is not clearly shown by the video that was preserved. Reviewing the preserved video reveals the extent of the information that can or cannot be gleaned from the video, and emphasizes the scope of the factual issues that must be resolved in determining the adequacy of Hi Nabor's explanation for not preserving more of the pre-incident video. For example, the video shows a black spot that Carter appears to step on. That black spot is indistinguishable from another one located at the bottom right corner of the same video frame. Following Carter's fall, several people appear in the video and step on the other black spot without any reaction by them. It cannot be determined from the video whether the second black spot is a grape, a nut, a marble, a permanent mark on the floor, a scuff mark, or simply a spot on the lens of the camera. That black spot on the video is no more definable from the video than the black spot where plaintiff stepped. Did Carter slip on a grape? Does the video show that? Did Carter slip in water? Does the video show that? Would more video show anything to assist in answering these questions? In light of all the facts and circumstances of the case, is Hi Nabor's explanation for not preserving more of the pre-accident video adequate?

Knowing that plaintiff first claimed to have slipped in "water," and after viewing the video and seeing the black spot on the floor where plaintiff stepped, I must conclude that a person could reasonably argue that someone could allow the video to be taped over without appreciating that the black spot visible in the video footage caused the fall, and that additional video footage would not have revealed

more. Whether that explanation, or any other, is adequate to explain the loss of the video is an unresolved question of fact. I believe the jury in this case should resolve that issue at trial.

However, *BancorpSouth Bank* holds that the trial court makes that determination, and, after a thorough review of the evidence, I agree that the trial court did not abuse its discretion in finding that Hi Nabor presented an adequate explanation for not preserving more of the pre-accident video. Therefore, I agree with affirming the trial court's judgment in that regard.

Having affirmed the trial court's decision to deny imposition of the adverse presumption, I disagree with the conclusion of the majority that factual issues exist regarding the plaintiff's ability to recover under Louisiana Revised Statute 9:2800, and believe that without the adverse presumption, the record is left bare of any facts that might establish the temporal element necessary to prove constructive notice of the condition. *See* La. R.S. 9:2800.6B(2) and C(1); *White v. Wal-Mart Stores, Inc.*, 97-0393 (La. 9/9/97), 699 So. 2d 1081, 1084. More specifically, the constructive notice requirement of Section 9:2800.6A(2) and C(1) requires the plaintiff to prove that the allegedly hazardous condition "existed for such a period of time" that the merchant should have discovered it in the exercise of reasonable care. The statute does not allow for the inference of constructive notice absent some showing of this temporal element. *White*, 699 So. 2d 1081, 1084. As explained by the supreme court in *White*:

> Though there is no bright line time period, a claimant must show that "the condition existed for such a period of time .... " Whether the period of time is sufficiently lengthy that a merchant should have discovered the condition is necessarily a fact question; however, there remains the prerequisite showing of some time period. A claimant who simply shows that the condition existed without an additional showing that the condition existed for some time before the fall has not carried the burden of proving constructive notice as mandated by the statute. Though the time period need not be specific in minutes or hours, constructive notice requires that the claimant

> prove the condition existed for some time period prior to the fall. This is not an impossible burden.

White, 699 So. 2d at 1084-85.

Without an adverse presumption relative to *when* any foreign object or substance was deposited onto the floor prior to the plaintiff's fall, the plaintiff cannot meet his burden of proof relative to the temporal element required by *White*. In the absence of that adverse presumption, the majority points to no evidence tending to prove the length of time any hazardous condition was on the floor. Instead, the majority focuses on the defendant's "floor sweep" procedures and when various employees may or may not have been in the area of the fall prior to the accident, and points out that conflicting evidence indicates that the floor inspection could have occurred anywhere from "about an hour" before the fall, to two minutes before the fall.

While the evidence regarding the adequacy and timing of the floor inspections may be relevant for proving a failure to exercise reasonable care to discover a hazardous condition, a delay in the performance of such procedures offers no proof of how long any such condition may have been on the floor, a separate and equally essential requirement of the plaintiff's burden of proof under Section 9:2800.6. Evidence that the employee responsible for inspecting the floors was not seen in the area of the fall for "about an hour" before the accident proves nothing more than the employee's *absence* from the area for one hour before the accident; it does not tend to prove either the *presence* of a foreign substance or object on the floor, or, just as critical, *when* any such substance or object was placed there. Neither would the fact that the floor inspection took place two minutes before the fall prove that the foreign substance was either on the floor at that time and missed by the person performing the inspection, or, just as plausible, that it was deposited onto the floor less than two minutes before the fall. Without

an adverse presumption, the plaintiff cannot meet his burden of proving *when* the hazardous condition was on the floor. Given the absence of a necessary element of the plaintiff's burden of proof, I believe the trial court properly granted summary judgment and dismissed the plaintiff's claims.