New standards for spoliation – CT and NV

By Stephen P. Brown

In two different cases, Rizzuto v. Davidson Ladders, Inc., et al. in Connecticut and Bass-Davis v. Davis in Nevada, spoliation of evidence by the defense resulted in rulings by the court that were favorable to the plaintiffs. These cases reinforce the imperative duty to preserve all potential evidence during litigation.

Connecticut

The Connecticut Supreme Court recently recognized intentional spoliation of evidence as a separate and independent tort. Rizzuto v. Davidson Ladders, Inc., et al., 280 Conn. 225 (2006). The prior law of spoliation in Connecticut provided for an adverse inference against the defendant in the underlying case where evidence was destroyed. Beers v. Bayliner Marine Corp., 236 Conn. 769 (1996). In Rizzuto, the court established a rebuttable presumption in favor of the plaintiff that the defendant is liable for the damages if spoliation of evidence prevents a plaintiff from establishing a prima facie case.

In Rizzuto, the plaintiff asserted product liability claims for injuries sustained as a result of a defective ladder. The defendant’s expert inspected the ladder, opined that it was not defective and destroyed the ladder, never affording the plaintiff an opportunity for an inspection. The defendants’ inspection and the destruction of the ladder occurred after suit was filed and after plaintiff’s attorney repeatedly requested an opportunity to inspect the ladder.

In recognition of the independent tort, the court established the following essential elements: 1) defendant’s knowledge of a pending or impending suit; 2) defendant’s destruction of evidence; 3) in bad faith; 4) plaintiff’s inability to establish a prima facie case without the spoliated evidence; 5) damages. Upon establishing these elements, there arises a rebuttable presumption that but for the spoliation, the plaintiff would have recovered in the litigation. The burden then shifts to the defendant to establish that the plaintiff would not have prevailed, even if the lost or destroyed evidence had been available.

The court sought to remedy a problem with the prior law that allowed a defendant to destroy critical evidence knowing that the adverse inference would not be sufficient to sustain the plaintiff’s prima facie case. The court indicated that the risk of a windfall to the plaintiff is diminished by requiring a showing that the defendant intentionally spoliated the evidence in bad faith or with the intent to deprive the plaintiff of his cause of action.

The measure of damages looks to restore an injured party to the position he or she would have been in if the spoliation had not occurred.

This cause of action will likely be extended to any claim where the destruction of something will benefit the person who destroyed it. An example may be an insurance company that salvages and destroys a vehicle after a serious accident and prevents a plaintiff from utilizing an accident reconstructionist. Additionally, the cause of action may extend to a truck driver who does not properly maintain and preserve his driving log after an accident.

This decision looks to further public policy goals and deter acts of intentional spoliation. It reinforces the duty to preserve relevant evidence and provides additional remedies over and above the traditional adverse inference that a fact finder may draw. The question as to whether spoliation was intentional or merely negligent is a question left to the fact finder. This cause of action is brand new in Connecticut and attorneys will push its application to its logical conclusion.

Nevada

In Bass-Davis v. Davis, 134 P.3d 103 (Nev. 2006), the Nevada Supreme Court, sitting en banc, articulated a new standard for a jury assessing negligent and/or intentional spoliation of evidence relevant to litigation. In Bass-Davis, a plaintiff sued a convenience store for injuries sustained in an alleged slip-and-fall. Although the fall was not caught on the store’s surveillance videotape, as it occurred in an area of the store where the camera did not film, defendant franchisees forwarded
the videotape to the franchisor, whose insurer subsequently lost the tape. The court, reversing a defense verdict, held that the jury was entitled to an instruction permitting a negative inference that the videotape was unfavorable to the defendants who (through their insurer agents) negligently lost the tape. The court observed that defendants were on notice that the videotape was relevant to potential litigation at the time the tape was lost. The court held further that where an opposing party demonstrates that evidence was intentionally lost or destroyed to cause harm or gain a tactical advantage in litigation, a rebuttable presumption arises that the evidence is unfavorable to the party who destroyed it or intentionally “lost” it. The party that intentionally lost or destroyed the evidence would then bear the shifted burden of rebutting the presumption of adverseness by a preponderance of the evidence. The court concluded that because the evidence in this case was apparently negligently lost, the jury could infer it was unfavorable to the defense (and should be instructed as such at the new trial), but the burden of disproving adverseness would not shift to the defense. The lesson here is that parties need to be extremely careful to preserve potential litigation evidence.