

**CAUSE NO. 2006-54824**

<b>Ralph Clark</b>	§	<b>IN THE DISTRICT COURT OF</b>
	§	
<b>v.</b>	§	<b>HARRIS COUNTY, T E X A S</b>
	§	
<b>Randall's Foods</b>	§	<b>157<sup>th</sup> JUDICIAL DISTRICT</b>

**Order**

Defendant Randall's Foods has filed traditional and no evidence motions for summary judgment. Plaintiff replied and filed a motion for sanctions for spoliation. Additionally, plaintiff seeks a continuance of the summary judgment to obtain additional evidence. Based on the record before the Court, the Court denies the request for spoliation instruction and grants continuance of the motion for summary judgment.

Plaintiff slipped and fell at a Randall's store on March 3, 2005. Apparently, another customer's cart contained some liquid soap that was leaking. Plaintiff was in front of the pharmacy counter and slipped 3:00 p.m. By 4:00 p.m., Randall's had filled out an accident report that described the accident as "valid." The fall occurred in front of a security camera and the fall was captured on film. However, Randall's only preserved 6 minutes of the footage: one minute prior to the fall and 5 minutes after the fall.

Randall's moved for summary judgment, arguing that it had no notice or knowledge of the existence of the slippery substance on the floor, thus mandating summary judgment pursuant to *LMB, Ltd. v. Moreno*, 201 S.W.3d 686, 688 (Tex. 2006); *Wal-Mart Stores v. Reece*, 81 S.W.3d 812, 814 (Tex. 2002); *Wal-Mart Stores v. Gonzalez*, 968 S.W.2d 934, 936 (Tex. 1998).

Plaintiff argues that he is entitled to a spoliation instruction as a result of the destruction of two items of evidence. First, Randall's destroyed the soap in question. Second, although

Randall's preserved and produced the video footage of the fall, it only kept one minute of the footage prior to the fall, thus making it impossible to tell from the video camera (1) when the other shopper walked through the area to determine how long the soap had been on the floor, and (2) when the Randall's employee responsible for walking through the store to locate spills last went through the pharmacy area.<sup>1</sup> If the spoliation instruction is granted, summary judgment is not appropriate. *Aguirre v. S. Tex. Blood and Tissue Ctr.*, 2 S.W.3d 454, 457 (Tex. App.--San Antonio 1999, pet. denied).

Spoliation is the improper destruction of evidence, proof of which may give rise to a presumption that the missing evidence would be unfavorable to the spoliator. *Brumfield v. Exxon Corp.*, 63 S.W.3d 912, 919 n. 3, 920 (Tex. App.-Houston [14th Dist.] 2002, pet. denied). To raise the spoliation issue, the party seeking the presumption bears the burden of establishing that the alleged spoliator had a duty to preserve the evidence in question. *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 722 (Tex. 2003). This duty to preserve evidence arises when a party knows or reasonably should know that (1) there is a substantial chance that a claim will be filed, and (2) evidence in its possession or control will be material and relevant to that claim. *Id.*

A case remarkably similar is *Garcia v. Sellers Bros., Inc.*, 2006 WL 3360473 (Tex. App.-Houston. [14 Dist.] 2006, no pet. history)(not designated for publication). There, plaintiff slipped on a liquid cleaner in a grocery store and argued that spoliation precluded summary judgment because defendant (1) failed to preserve the soap container even though it anticipated litigation the same day plaintiff fell, and (2) knowingly or negligently removed a surveillance videotape of the area where she fell shortly after the incident. In that case, the court denied the spoliation instruction, which was affirmed by the court of appeals.

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<sup>1</sup> One Randall's employee was responsible for making hourly "sweeps" or "walkthroughs" to locate and clean up spills and fallen items. According to Randall's that employee last conducted a sweep at 2 p.m. on the day of the accident.

In this case, with regard to the soap container, there's no indication that the possession of the soap is particularly relevant. No one contests that the soap was slippery. The issue is how long the soap was on the floor and whether Randall's employees were aware of its presence. Having the bottle of soap would not answer those key questions. While plaintiff points out that having the bottle of soap would be relevant and perhaps interesting, even plaintiff agrees that its presence is not essential.

The video camera, on the other hand, might disclose relevant information. If Randall's had preserved, for example, an hour of the footage before the fall, it might have disclosed when the other shopper leaked the soap and might have disclosed when a Randall's employee "swept" the area looking for spills, debris and fallen items.

After the accident, Randall's apparently saved 6 minutes of the videotape and reused the remainder of the tape within 24 hours pursuant to its usual policy. The key issue, therefore, is whether Randall's was under a duty to preserve the tape. *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718 (Tex. 2003), is instructive. There, the court held that plaintiff had to show that Wal-Mart disposed of the evidence after it knew, or should have known, that there was a substantial chance there would be litigation and that the evidence would be material to it. *Id.* at 723; *citing* 1 WEINSTEIN & BERGER, 3 WEINSTEIN'S FEDERAL EVIDENCE § 301.06[4], at 301-28.3 (2d ed. 2003). Because plaintiff failed to muster such proof, a spoliation instruction was deemed improper. The Supreme Court held that the trial court abused its discretion in granting the spoliation instruction.

The same applies in this case. Here, there's no showing that Randall's knew or anticipated that litigation was imminent or likely or even possible. All Randall's knew was the accident was "valid" meaning that it wasn't staged or fabricated. Randall's had no idea that

plaintiff would sue. Indeed, suit was not filed until the following year after the accident. Randall's saved that portion of the video that it believed to be relevant and re-used the remainder. *Doe v. Mobile Video Tapes, Inc.*, 43 S.W.3d 40, 55 (Tex. App.-Corpus Christi 2001, no pet.)(video tapes recorded over in the normal course of business and before notice of claim provided no basis for exclusion of evidence based on alleged spoliation). As a result, the request for the spoliation instruction is denied.

In the event that the spoliation instruction is denied, plaintiff requests a continuance to conduct additional discovery. This request is granted.

Signed June 11, 2007.

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Hon. Randy Wilson