In The

Supreme Court of Virginia

RECORD NO. 161339

EMERALD POINT, LLC, and
THE BREEDEN COMPANY, INC.,

***Appellants*,**

v.

LINDSEY HAWKINS, PAUL HARMON,
THOMAS ZAMARIA, and WILLIAM GUIRE,

Appellees.

BRIEF OF *AMICUS CURIAE* VIRGINIA TRIAL LAWYERS ASSOCIATION IN SUPPORT OF APPELLEES LINDSEY HAWKINS, PAUL HARMON, THOMAS ZAMARIA, and WILLIAM GUIRE

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This brief *amicus curiae* is submitted by the Virginia Trial Lawyers Association (hereinafter, “VTLA”) in support of the Appellees Lindsey Hawkins, Paul Harmon, Thomas Zamaria, and William Guire (hereinafter, the “plaintiffs”).

NATURE OF THE CASE AND MATERIAL PROCEEDINGS

For the Court's convenience and in the interest of brevity, VTLA incorporates the Appellees' Nature of the Case and Material Proceedings from their Opening Brief (to be filed).

ASSIGNMENT OF ERROR

1. The Trial Court correctly held that it was not required to make a finding of find bad faith before granting an adverse instruction for spoliation because trial courts should have discretion to determine grant adverse instructions on a case-by-case basis, based upon their consideration of the facts, circumstances, and evidence in each case.

STATEMENT OF FACTS

VTLA incorporates by reference the facts described in the Petition for Appeal filed by the Appellants Emerald Point, LLC and The Breeden Company, Inc. (the "defendants"), the Appellees' Opposition thereto, and in the Briefs filed by both Appellants and Appellees in this appeal.

The facts and proceedings germane to this brief are as follows:

1. On or about November 27, 2012, the carbon monoxide sensor in the plaintiffs' apartment sounded (Joint Appendix ("App.") 17).

2. On that date, an employee from Virginia Natural Gas ("VNG") conducted an emergency inspection, found elevated carbon monoxide levels in the apartment, queried whether the source of the carbon monoxide was a cracked heat exchanger, "red tagged" the furnace, and ordered further work to be done (App. 23-26, 28, 63-66, 69).

3. The defendants' agent (a maintenance worker) removed the red-tagged furnace from the plaintiffs' apartment on January 4, 2013, and stored it at the defendants' apartment complex (App. 19, 28, 67-68).

4. On January 4, 2013, the defendants' agent (resident relations manager) stated in an incident report, "VNG came out and removed everyone from the apartment and shut down the furnace after reporting a cracked heat exchanger… The VNG technician reported that he believed

the heat exchanger in the furnace was cracked. Justice [defendants' agent] inspected the furnace immediately and told the residents that a new gas furnace would be purchased and installed in a few hours" (App. 70-71).

5. Defendants anticipated litigation on or before January 10, 2013 (App. 69). On that date, the defendants' agent (property manager) sent an email to the inspector stating that the plaintiffs are "young kids and it looks like they are trying to take advantage of the situation. We just want to cover all our tracks in case it ends up in court."

6. Plaintiffs' counsel advised defendants of his representation in connection with carbon monoxide poisoning arising from the apartment on or about April 26, 2013 (App. 19, 74-75).

7. On or about January 4, 2014, the defendants disposed of the furnace and photos that allegedly would have shown the cracked heat exchanger (App. 50).

8. On January 7, 2014, defendant Emerald Point, LLC's commercial liability carrier denied the plaintiffs' claim (App. 77).

9. Thereafter, the plaintiffs moved the Trial Court to sanction the defendants for spoliation by making a factual finding that the gas furnace that was the subject of the litigation had a "burned through" combustion chamber. If granted, that factual finding might have been determinative as

to an ultimate issue in the case; *i.e.*, that the furnace was the source of the carbon monoxide that poisoned the plaintiffs (App. 14).

10. The Trial Court denied the plaintiffs' motion. Instead, the Trial Court granted an adverse instruction permitting – but not requiring – the jury to infer that if the furnace had been available, it would have been detrimental to the defendants in the case (App. 48).

ARGUMENT

I. Virginia courts should be allowed to grant an adverse instruction against a party who did not act in bad faith, but instead acted intentionally, negligently or inadvertently if, in the court's discretion, the instruction is warranted by the facts and circumstances of that case. (Pertains to Assignment of Error 2).

A. Standard of Review

The Trial Court's imposition of sanctions and its determination that sufficient evidence existed to support and justify an adverse instruction are reviewed for abuse of discretion. *Nolte v. MT Tech. Enters.*, *LLC*, 284 Va. 80 (2012). The standard of conduct required for the granting of an adverse instruction and the standard of proof required for a motion for spoliation sanctions concern issues of law, which are subject to a *de novo* standard of review. *Collins v. Shepard*, 274 Va. 390, 397 (2007); *Cain v. Lee*, 290 Va. 129, 134 (2015).

B. Discussion

1. Spoliation is the intentional or negligent destruction of evidence.

The spoliation doctrine has existed in the Commonwealth since the 1700's. *See*, *e.g.*, *Austin v. Consolidation Coal Co*., 256 Va. 78 (1998); *Gentry v. Toyota Motor Corp*., 252 Va. 30 (1996); *Lee v. Tapscott*, 2 Va. 276 (1796); *Yates v. Salle*, 1792 Va. LEXIS 4 (June 1, 1792). In all that time, this Court has never defined spoliation to include bad faith. *See id.*

The definition of "spoliation" that is widely (if not universally) used by courts and litigants throughout the Commonwealth is set forth by the Court of Appeals in *Wolfe v. Va. Birth-Related Neurological Injury Comp. Program*:

> The textbook definition of "spoliation" is the intentional destruction of evidence. However, spoliation issues also arise when evidence is lost, altered or cannot be produced. **Spoliation encompasses conduct that is either intentional or negligent.**

Id., 40 Va. App. 565 at 581-82 (Va. Ct. App. 2003) (emphasis added; internal citations omitted); applied in *Waters v. TGI Friday's*, 2012 Va. App. LEXIS 129 (Va. Ct. App. 2012); *Angelopoulos v. Volvo Pento of the Ams.*, *LLC*, 92 Va. Cir. 257 (Norfolk 2016*); Bannon v. Bannon*, 89 Va. Cir. 274, 276 (Hanover 2014).

In this appeal, the defendants have adopted a definition of "spoliation" that was used by the Fourth Circuit Court of Appeals in a federal case from Maryland. *See Silvestri v. GMC*, 271 F.3d 583, 590 (4th Cir. Md. 2001). VTLA is unaware of any Virginia circuit or appellate courts that use the federal definition of spoliation in lieu of the definition provided by the Virginia Court of Appeals.

2. Spoliation sanctions serve several purposes.

The purpose of spoliation sanctions is to punish the offending party and deter others from acting similarly. *Gentry*, 252 Va. at 34. Other purposes include placing the risk of erroneous judgment on the party who wrongfully created the risk, and restoring the prejudiced party to the same position he or she would have been in absent the wrongful destruction of evidence by the opposing party. *See Howard Reg'l Health Sys. v. Gordon*, 952 N.E.2d 182, 189 (Ind. 2011).

3. Virginia courts have broad discretion to control the judicial process and to sanction parties for spoliation.

Courts have the inherent authority to control the judicial process and to impose sanctions for spoliation. *Chambers v. Nasco*, *Inc*., 501 U.S. 32, 115 L. Ed. 2d 27, 111 S. Ct. 2123 (1991).

The decision whether to impose sanctions, as well as the nature and severity of sanctions, are matters within the discretion of the trial court. *See Allied Concrete Co. v. Lester*, 285 Va. 295, 306-07 (2013) (holding that trial court did not abuse its discretion in refusing to grant a new trial as a sanction for spoliation), *see also Wolfe*, 40 Va. App. at 580-81; Va. Sup. Ct. R. 4:12 (identifying available sanctions for a party's noncompliance with a discovery order). In deciding whether to impose sanctions, trial courts are

vested with broad discretion. *See Walsh v. Bennett*, 260 Va. 171, 175 (2000)*; Erie Ins. Exch. v. Jones*, 236 Va. 10, 14 (1988).

Courts confronting the issue of spoliation have at their disposal a broad range of sanctions, including:

(1) an adverse instruction that allows – but does not require – the jury to find that the missing evidence would have been detrimental to the spoliator (the permissive inference") instruction;

(2) an adverse instruction that imposes a rebuttable presumption that the missing evidence was, in fact, detrimental to the spoliator (the "rebuttable presumption");

(3) ordering that a fact in issue shall be deemed established;

(4) prohibiting a party from opposing designated claims or defenses, or introducing designated matters into evidence; and,

(5) striking pleadings, dismissing an action, or rendering default judgment in the action (the "ultimate sanction").

Allied Concrete Co., 285 Va. at 306-07; *Gentry*, 252 Va. at 32; Va. Sup. Ct. R. 4:12; *see also Pub. Health Tr. v. Valcin*, 507 So. 2d 596, 598 (Fla. 1987) (holding a rebuttable presumption arises where negligent spoliation has occurred, and that an irrebuttable presumption arises from willful or intentional spoliation).

Possible sanctions for spoliation range from mild to severe. Here, the defendants argue that trial courts should be required to make a finding of bad faith before they have the authority to grant a permissive inference instruction, which is the least severe sanction available to a court.

4. Virginia courts should be allowed to grant an adverse instruction against a party who did not act in bad faith, but instead acted intentionally, negligently or inadvertently if, in the court's discretion, the instruction is warranted by the facts and circumstances of that case.

Trial courts have discretion to grant adverse instructions against spoliators who did not act in bad faith. In *Wolfe*, the Court of Appeals held that "a spoliation inference may be applied in an existing action if, at the time the evidence was lost or destroyed, a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action." *Id.* Neither this Court nor the Court of Appeals has ever held that bad faith is required before an adverse instruction can be granted.

The determination of whether a sanction should be imposed for the spoliation of evidence necessarily depends upon the unique circumstances of each case. A case-by-case determination is necessary because – as many courts have recognized – "the destruction of potentially relevant evidence occurs along a continuum of fault." *Greenwood v. Mepamsa*,

2013 Ariz. App. Unpub. LEXIS 162, at *48-50 (Ct. App. 2013); accord *WESCO Distribution*, *Inc. v. ArcelorMittal Ind. Harbor LLC*, 23 N.E.3d 682, 702-03 (Ind. Ct. App. 2014) (same); *Rest. Mgmt. Co. v. Kidde-Fenwal*, *Inc*., 986 P.2d 504, 508-09 (N.M. Ct. App. 1999).

Culpability can range along a continuum from destruction intended to make evidence unavailable in litigation to inadvertent loss of information for reasons unrelated to the litigation. Prejudice can range along a continuum from an inability to prove claims or defenses to little or no impact on the presentation of proof.

A court's response to the loss of evidence should take into account both the degree of culpability and the extent of prejudice. If a party intentionally destroys potentially relevant evidence, but the destruction does not result in prejudice, the court should take that into consideration. Likewise, if there is an inadvertent loss of evidence that results in severe prejudice to the opposing party, the court should take that into consideration, as well. *See WESCO*, 23 N.E.3d at 702-03.

There is no dispute that a spoliator's intentional conduct – even if not done in bad faith – can result in serious prejudice to its opponent. *See Angelopoulos*, 92 Va. Cir. at 258-59 (imposing spoliation sanctions where a party did not act in bad faith, but where the party's actions resulted in

prejudice); *see also Stender v. Vincent*, 992 P.2d 50, 59-60 (Haw. 2000) (holding that bad faith is not required in order to grant an adverse inference because whether evidence is destroyed or lost accidentally, intentionally, or in bad faith, the opposing party suffers the same prejudice).

Accordingly, trial courts should have the discretion to balance factors that are present in each case, such as:

(1) the spoliator's duty to preserve evidence;

(2) the culpability of the spoliator (whether the spoliation was inadvertent, negligent, intentional, or deliberately calculated to deprive its opponent of access to relevant evidence);

(3) whether the evidence was material to the issues in the case;

(4) the prejudicial effect of the spoliation upon the adverse party; and,

(5) whether, at the time the evidence was destroyed, the spoliating party knew or should have known that the evidence was relevant to pending or reasonably foreseeable litigation.

Designing an appropriate remedy for spoliation is not a one-size-fits-all analysis. Trial courts are in the best position to consider whether sanctions are appropriate under the facts and circumstances of each case and to craft an appropriate response. Requiring courts to find bad faith

before granting an adverse instruction in *every* case, regardless of the factual circumstances, is too rigid and restrictive to promote justice. *See*, *e.g.*, *Angelopoulos*, 92 Va. Cir. at 260 (reserving ruling on certain spoliation issues until the evidence was developed at trial and the trial judge could determine the effect of such evidence upon the case).

Moreover, the injustice of a bad faith standard would severely prejudice litigants on both sides of the table – plaintiffs and defendants – who are prejudiced by their opponents' failure to preserve or produce relevant evidence. *See*, *e.g.*, *Gentry*, 252 Va. at 34 (where plaintiff spoliated evidence, dismissal of the action was too severe a sanction); *Allied Concrete Co.*, 285 Va. at 308 (trial court did not abuse its discretion in denying the defendant a new trial as a sanction for plaintiff's spoliation of evidence); *Waters*, 2012 Va. App. LEXIS 129, at *17-18 (affirming trial court that disallowed a spoliation inference for defendant's spoliation of evidence); *Angelopoulos*, 92 Va. Cir. At 263 (where plaintiff spoliated evidence, defendants were entitled to a cautionary instruction if plaintiff introduced certain evidence at trial); *Bannon*, 89 Va. Cir. at 276 (plaintiff was entitled to spoliation sanctions because defendant had control of the records, and because a reasonable person in defendant's position should have foreseen that the digital devices at issue contained information that

was material to a potential civil action at the time the devices were lost, reformatted, or not produced).

5. The majority of jurisdictions that have considered this issue do not require courts to find bad faith before granting an adverse instruction.

According to VTLA's research, the majority of jurisdictions that have considered this issue do not require courts to find bad faith before issuing an adverse instruction. These jurisdictions include Alaska, Arizona, Arkansas, Colorado, Connecticut, the District of Columbia, Florida, Hawaii, Indiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Jersey, Nevada, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, and West Virginia.[1] Instead, these

[1] *See Todeschi v. Sumitomo Metal Mining Pogo*, *LLC*, 394 P.3d 562 (Alaska 2017); *Greenwood v. Mepamsa*, 2013 Ariz. App. Unpub. LEXIS 162 (Ariz. Ct. App. 2013); *Bedell v. Williams*, 386 S.W.3d 493 (Ark. 2012); *Aloi v. Union Pac. R.R. Corp*., 129 P.3d 999 (Colo. 2006); *Rizzuto v. Davidson Ladders*, *Inc*., 905 A.2d 1165 (Conn. 2006); *Brooks v. D.C. Hous. Auth*., 999 A.2d 134 (D.C. 2010); *Johnson Constr. Mgmt. v. Lopez*, 902 So. 2d 206 (Fla. Dist. Ct. App. 2005); *Stender v. Vincent*, 992 P.2d 50 (Haw. 2000); *WESCO Distribution*, *Inc. v. ArcelorMittal Ind. Harbor LLC*, 23 N.E.3d 682, 702-03 (Ind. Ct. App. 2014); *York Ins. Co. v. Snow Flake Holdings*, 2015 Me. Super. LEXIS 51 (Me. Super. Ct. 2015); *Cumberland Ins. Grp. v. Delmarva Power*, 130 A.3d 1183 (Md. App. 2016); *Keene v. Brigham & Women's Hosp.*, *Inc*., 786 N.E.2d 824 (Mass. 2003); *DeGregory v. Smith*, 1997 Mich. App. LEXIS 2475 (Mich. Ct. App. 1997); *Patton v. Newmar Corp*., 538 N.W.2d 116 (Minn. 1995); *DeLaughter v. Lawrence Cty. Hosp*., 601 So. 2d 818 (Miss. 1992); *Marmaduke v. CBL & Assocs.*

jurisdictions balance the factors that are present in each case and make their determination on a case-by-case basis.

According to VTLA's research, the majority of jurisdictions do not require trial courts to find bad faith before granting a *permissive inference instruction*. However, some jurisdictions like Nevada require a higher level of culpability before granting a *rebuttable presumption instruction* (*i.e.*, before instructing the jury to conclude that the missing evidence was detrimental to the spoliator unless the spoliator offers a reasonable explanation for the destruction of such evidence, also known as "burden-shifting"), and before striking a party's pleadings or defenses.

Mgmt., 2017 Mo. App. LEXIS 556 (Mo. Ct. App. 2017) (requiring bad faith, but holding that bad faith can be established by showing that the party had a duty to preserve evidence); *Spotted Horse v. BNSF Ry. Co*., 2015 MT 148, 379 Mont. 314, 350 P.3d 52 (MT 2015); *Bldg. Materials Corp. of Am. v. Allstate Ins. Co*., 38 A.3d 644 (N.J. Super. Ct. App. Div. 2012); *Bass-Davis v. Davis*, 134 P.3d 103 (Nev. 2006); *Rest. Mgmt. Co. v. Kidde-Fenwal*, *Inc*., 986 P.2d 504 (N.M. Ct. App. 1999); *Auffarth v. Harold Nat'l Bank*, 2016 NY Slip Op 31169(U) (Sup. Ct. 2016); *Arndt v. First Union Nat'l Bank*, 613 S.E.2d 274 (N.C. App. 2005); *Bachmeier v. Wallwork Truck Ctrs*., 544 N.W.2d 122 (N.D. 1996); *Barnett v. Simmons*, 197 P.3d 12 (Okla. 2008); *Almonte v. Kurl*, 46 A.3d 1 (R.I. 2012); *Stokes v. Spartanburg Reg'l Med. Ctr*., 629 S.E.2d 675 (S.C. Ct. App. 2006); *Tatham v. Bridgestone Ams. Holding*, *Inc*., 473 S.W.3d 734 (Tenn. 2015); *Brookshire Bros.*, *Ltd. v. Aldridge*, 438 S.W.3d 9 (Tex. 2014) (noting an exception to its rule requiring a requisite state of mind before granting an adverse instruction where a party's negligent breach of its duty to reasonably preserve evidence irreparably prevents the nonspoliating party from having any meaningful opportunity to present a claim or defense); *Tracy v. Cottrell*, 524 S.E.2d 879 (W. Va. 1999).

VTLA notes that the instruction at issue in this appeal is the permissive inference instruction, and not the rebuttable presumption. VTLA also notes that the plaintiffs moved the Trial Court to sanction the defendants by making certain findings of fact adverse to the defendants, but that the Trial Court denied the plaintiffs' motion. Instead, the Trial Court ordered the least severe sanction possible, the permissive inference instruction, which it believed to be more appropriate under the circumstances of the case.

6. Requiring trial courts to make a finding of bad faith in every case before granting an adverse instruction is unduly restrictive, when one considers that some jurisdictions to not require a finding of bad faith to support a claim of negligent spoliation.

As this Court has observed, some jurisdictions recognize the tort of negligent spoliation. *Austin*, 256 Va. at 84. Courts in those jurisdictions recognize that an adverse instruction might not always remedy the harm that results from a spoliator's inadvertent or negligent failure to preserve evidence.[2] VTLA is not asking this Court to create the tort of negligent

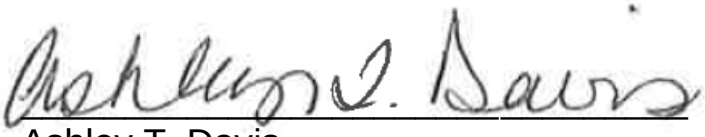
[2] Jurisdictions that recognize the tort of negligent spoliation of evidence include Alabama, the District of Columbia, Idaho, Illinois, and West Virginia. *See Brown Electro Mech. Sys. v. Thompson Eng'g*, 848 So. 2d 238 (Ala. 2002); *Aguilar v. RP MRP Wash. Harbour*, *LLC*, 98 A.3d 979 (D.C. 2014); *Cook v. State*, 985 P.2d 1150 (Idaho 1999); *Martin v. Keeley & Sons*, *Inc*., 979 N.E.2d 22 (Ill. 2012); *Mace v. Ford Motor Co*., 221 W. Va. 198, 653 S.E.2d 660 (W.Va. 2007).

spoliation in Virginia. However, VTLA notes that although litigants in other jurisdictions can bring *claims* for negligent spoliation without having to prove bad faith, the defendants in this appeal want a blanket rule that trial courts must find bad faith before granting an *adverse instruction*. VTLA submits that requiring trial courts to find bad faith in *every* case, regardless of the factual circumstances, is too rigid, that it is unnecessary, and that it would put litigants in Virginia (both plaintiffs and defendants) at a disadvantage when compared to litigants in other jurisdictions.

CONCLUSION

For the foregoing reasons, this Court should not impose a rigid and universal bad faith standard upon trial courts that are confronted with spoliation issues. Instead, Virginia courts should be allowed to grant an adverse instruction against a party who did not act in bad faith, but instead acted intentionally, negligently or inadvertently if, in the court's discretion, the instruction is warranted by the facts and circumstances of that case.

Respectfully submitted by *The Virginia Trial Lawyers Association*,

By: 
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CERTIFICATE OF SERVICE

This is to certify that undersigned counsel has complied with the requirements of Rule 5:30 and that on August 9th, 2017, three printed copies of the foregoing Brief of *Amicus Curiae* were hand-delivered to the Clerk of the Supreme Court of Virginia, and an electronic copy of the foregoing was emailed to Counsel for Appellants (Brian N. Casey and Christopher J. Wiemken, Taylor Walker P.C., 555 East Main Street, Suite 1300, Norfolk, Virginia 23510, bcasey@taylorwalkerlaw.com, cwiekman@taylorwalker.com; and Robert M. Tata and Wendy McGraw, Hunton & Williams LLP, 500 East Main Street, Suite 100, Norfolk, Virginia 23510, btata@hunton.com,wmcgraw@hunton.com) and to Counsel for Appellees (Edward F. Halloran, Armed Services Civilian Legal Center of Edward F. Halloran, P.C., 5233 Princess Anne Road, Virginia Beach, Virginia 23462, ehalloran@halloranlaw.com). An electronic copy in PDF format is being filed, via VACES, on August 24, 2017.

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