



Arkansas Association of Defense Counsel

December 12, 2016

SPOILIATION IN ARKANSAS

John Elrod
Conner & Winters, LLP Fayetteville

The advent of electronic discovery has accelerated issues of “document” destruction. Instead of reaching into a file, wadding up a piece of paper and throwing it in the wastebasket one only has to hit the delete button. The problem is compounded by the natural human inclination to not expose stupidity, profanity and bad news. Emails have become treasure troves for those of us who litigate for a living. Litigation holds are standard. For all of these reasons accusations of email and document destruction will increase over time. It’s the world we live in and the consequences can be outcome determinative.

Five spoliation cases decided by the 8th Circuit and the Eastern District of Arkansas since 1993 are important in assessing whether a violation merits sanctions. *Dillon v. Nissan Motor Co.*, 986 F. 2d 263, (1993); *Chrysler Corp. v. Carey*, 186 F. 3d 1016 (1999); *Harrison v. Union Pac. R.R. Co.*, 2002 U.S. Dist. LEXIS 29004; *Stevenson v. Union Pac. R.R.*, 354 F.3d 739 (2004) and *Menz v. New Holland N. Am., Inc.*, 440 F.3d 1002 (2006). You are also referred to “*Linking the Culpability and Circumstantial Evidence Requirements for the Spoliation Inference*”, DUKE LAW JOURNAL, Vol. 51:1803.

Dillon involved the destruction of plaintiff’s car following an inspection by an expert witness, depriving Nissan of its own meaningful inspection. The destruction occurred before suit was filed and was done by an expert. The court stated that “...in determining that the findings in this case—a retained witness and counsel destroyed evidence that they knew or should have known was relevant to imminent litigation—

are sufficient for imposing sanctions.” The magistrate judge made a finding that the destruction was not made in bad faith, but even yet, he recommended that the retained expert not be permitted to testify. He was not permitted to testify and the jury returned a defense verdict. The court also held that sanction imposition may occur either under Rule 37 or through the inherent power of the court if there are no Rule 37 events to support the sanction.

In *Chrysler Corp.* the trial court struck defense pleadings and entered judgment for Chrysler four days into trial in a case brought by Chrysler against its former attorneys who had represented it in the past, broke away from the Thompson firm in St. Louis, formed their own boutique firm, and used the information they had gleaned in representing Chrysler by suing it and feeding information to other firms around the United States after soliciting their business. Subsequent proceedings of the Missouri Supreme Court tell us that the lawyers were later prohibited from the practice of law for a year subject to reinstatement on application and that in the underlying case the judgment against them in favor of Chrysler was for \$850K. Following an attempt by defense counsel to introduce a letter which had not been produced in discovery, and upon objection by Chrysler’s lawyers, the trial court suspended proceedings, took a hard look at prior interrogatories and requests to produce, gave the defense a brief right to be heard, and then 2 imposed as a sanction for willful violation of an order compelling discovery, striking the answer.

Harrison and *Stevenson* are both Arkansas cases and both involve pre-filing destruction of evidence pertinent to railroad crossing collisions. *Stevenson* in particular has some meat on its bones. It instructs that in order for the court to give an adverse

inference instruction “there must be a finding of intentional destruction indicating a desire to suppress the truth.” It notes that spoliation is defined as an intentional act.

Finally, in *Menz*, the plaintiff was injured when his tractor overturned while working on a levy. New Holland contended that the plaintiff committed spoliation by making post-accident repairs to the tractor, selling the loader and, interestingly, altering the scene of the accident by later returning to the site and completing his work with one arm, the other having been lost in the accident. The trial court dismissed the case. The 8th Circuit remanded, finding that the trial judge failed to determine that the spoliation was made in bad faith.

The thanks of the AADC go out to John Elrod of Conner & Winters, LLP for writing this article.



We welcome your articles and thoughts for future editions.

We Are Better Together: Support The AADC