

## Repass v. Rosewood Hotels & Resorts

United States District Court for the Northern District of Texas, Dallas Division

September 17, 2015, Filed

Case No. 3:14-CV-1054-M

### Reporter

2015 U.S. Dist. LEXIS 181591

CHRISTINE REPASS, and DONALD CARR, Plaintiffs,  
v. ROSEWOOD HOTELS & RESORTS, L.L.C.,  
Defendant.

### Core Terms

golf cart, spoliation, repurposed, sanctions, duty to preserve, bad faith, inspection, notice, six-passenger, configuration, destroy[ed]

**Counsel:** [\*1] For Christine Repass, Donald Carr, Plaintiffs: Richard D Rusak, LEAD ATTORNEY, Brais & Associates PA, Miami, FL; John Jeremiah Shaw, Robert J Myers, Myers Law, Fort Worth, TX; Karina Mabel Cerda, PRO HAC VICE, Keith Steven Brais, Brais Brais & Rusak, Miami, FL.

For Rosewood Hotels & Resorts LLC, Defendant: Jeffrey Daniel Shelton, LEAD ATTORNEY, Jacqueline Ellise Montejano, Stephen C Carter, Steven E Holden, Holden & Carr, Dallas, TX.

**Judges:** RENEE HARRIS TOLIVER, UNITED STATES MAGISTRATE JUDGE.

**Opinion by:** RENEE HARRIS TOLIVER

### Opinion

#### ORDER

Pursuant to the District Court's *Order of Referral*, Doc. 28, Plaintiffs' *Motion for Sanctions Due to Defendant's Spoliation*, Doc. 25, has been referred to the undersigned for a ruling. Upon review, the motion is **GRANTED ONLY IN PART**.

#### **A. BACKGROUND**

On September 25, 2012, Plaintiffs Christine Repass and Donald Carr were invitees of Defendant's Resort in Antigua, when a golf cart carrying banquet tables

allegedly struck Plaintiff Christine Repass, causing her to fall and suffer injuries. Doc. 25 at 4. On March 24, 2015, Plaintiffs conducted an inspection of the Resort, including what was produced and represented to be a newer version/model of the subject six-passenger golf cart. Doc. [\*2] 25-1 at 46-47. Plaintiffs proceeded to inspect, photograph and measure this golf cart. Doc. 25-1 at 48. Plaintiffs returned to the Resort on March 25, 2015 and March 26, 2015 to complete depositions. Doc. 25 at 7. At the conclusion of these depositions, Defendant produced a different model of a six-passenger golf cart. Doc. 25-1 at 52. This golf cart model was smaller and much lower than the golf cart produced at the earlier and scheduled inspection of March 24th. Doc. 25-1 at 52. On March 30, 2015, the Monday after returning from Antigua, due to the fact Defendants were unable to confirm which of the two six-passenger golf carts shown was in fact an identical or substantially similar cart to the one involved in the incident, Plaintiffs propounded written discovery. Doc. 25-1 at 53-59. On April 15, 2015, Defendant advised for the first time that the subject six-passenger golf cart driven on the date of incident was "re-purposed" to a flat-bed with a hitch and remains in operation at the Resort. Doc. 25-1 at 69. On April 17, 2015, Defendant further advised that the cart was re-purposed "about two years ago" and that it was attempting to ascertain whether the cart could be put back to [\*3] its original configuration. Doc. 25-1 at 72. On April 27, 2015, Defendant advised that "the golf cart in question most likely can be put back to its original configuration." Doc. 25-1 at 73.

#### **B. SUMMARY OF SANCTIONS MOTION**

In its Motion for Sanctions, Plaintiffs allege that Defendant failed to produce the golf cart that allegedly struck Plaintiff Christine Repass. Doc. 25 at 4. Plaintiffs contends that it sent a notice and representation letter to Defendant on October 17, 2012, directing Defendant to "preserve and produce all physical evidence in anyway involved with or connected to the subject accident." Doc. 25 at 10. Despite this preservation letter, Defendant

repurposed the golf cart without sending notice to Plaintiffs. Doc. 25 at 10.

In its motion, Plaintiffs request that the Court impose one or more of the following sanctions: (a) strike Defendant's Pleadings and enter default judgment against Defendant; (b) issue an adverse jury instruction/inference stating that had the Defendant produced for inspection the originally configured six-passenger golf cart transporting banquet tables on September 25, 2012, an inspection of same would have confirmed that the tables loaded onto this [\*4] golf cart did in fact strike Plaintiff Christine Repass; (c) prohibit the Defendant from raising any defense that Plaintiff Christine Repass was not struck by banquet tables loaded onto the originally configured six-passenger golf cart; (d) compel the Defendant to purchase an identical six-passenger golf cart for use by the Plaintiffs in the prosecution of their claim and in an attempt to undo any prejudice created by the spoliation; (e) award monetary sanctions for the time and expense in conducting the March 24, 2015 inspection of a completely different golf cart; (f) award any additional sanctions this Court deems just and proper, including but not limited to, compelling a second inspection in Antigua at the full expense of the Defendant. Doc. 25 at 4.

### C. APPLICABLE LAW

Federal law governs spoliation arguments in diversity cases and controls the determination of whether sanctions are warranted. [King v. Ill. Cent. R.R., 337 F.3d 550, 556 \(5th Cir. 2003\)](#). The Fifth Circuit permits an adverse inference against the destroyer of evidence only upon a showing of "bad faith" or "bad conduct." *Id.* Spoliation is the "destruction or material alteration of evidence or . . . the failure to preserve property for another's use as evidence in pending or [\*5] reasonably foreseeable litigation." [Ashton v. Knight Transp., Inc., 772 F. Supp. 2d 772, 799 \(N.D. Tex. 2011\)](#) (Boyle, J.) (citing Black's Law Dictionary 1531 (9th ed. 2009)). Before finding that spoliation has occurred, a court must determine that (1) the destroying party had a duty to preserve the information, (2) there was a breach of that duty, and (3) the innocent party was prejudiced. [Ashton, 772 F. Supp. 2d at 800](#). "A duty to preserve arises when a party knows or should know that certain evidence is relevant to pending or future litigation." *Id.*

The duty to preserve evidence is a duty owed to the court, not to the party's adversary, and thus spoliation is an abuse of the judicial process. *Id.* Because the Court is proceeding pursuant to its inherent authority,

spoliation sanctions are appropriate only for "instances of bad faith or willful abuse of the judicial process." *Id.*; see also [Whitt v. Stephens County, 529 F.3d 278, 284 \(5th Cir. 2008\)](#) (holding that an adverse inference jury instruction for spoliation is appropriate only where a showing is made that the malfeasant party "intentionally destroy[ed] important evidence in bad faith [and] did so because the contents of those documents were unfavorable to that party.").

In order to satisfy the prejudice requirement, the party seeking sanctions must demonstrate that the spoliated evidence would have [\*6] been relevant to his case. *Ashton*, 722 F. Supp. 2d at 801. Prejudice to the innocent party can range from a complete inability to prove its claims to minimal effects on its presentation of proof. *Id.* Courts have wide discretion in creating a spoliation sanction that is "proportionate to both the culpable conduct of the spoliating party and resulting prejudice to the innocent party." *Id.* Possible sanctions include awarding attorney's fees, deeming certain facts admitted, giving the jury an adverse inference instruction, and dismissing the case entirely. *Id.* The remedy should be "no harsher than necessary to respond to the need to punish or deter and to address the impact on discovery." *Id.* (quotation omitted).

### D. ANALYSIS

Plaintiffs claim that Defendant had a duty to preserve the condition of the golf cart because of the written notice to Defendant requesting the preservation and production of all physical evidence involved with or connected to the incident. Doc. 25 at 11; Doc. 25-1 at 83. Plaintiffs also allege Defendant acted in bad faith when it repurposed the golf cart used in the incident without providing any notice to Plaintiffs. Doc. 25 at 11. Plaintiffs assert the original golf cart utilized on the date of [\*7] the incident is critical to any accident reconstruction that may be necessary and to rebut Defendant's contention that Plaintiff Christine Repass was not stricken by the table loaded on the golf cart. Doc. 25 at 9; Doc. 29 at 8.

Defendant argues that it did not owe Plaintiffs a duty to preserve the golf cart because it did not receive notice of Plaintiffs' claims until after the suit was filed, meaning the golf cart was repurposed prior to Defendant having notice of a claim or potential claim. Doc. 27 at 6. Assuming Defendant did receive notice of Plaintiffs' claims, Defendant asserts the golf cart was not destroyed in bad faith, but merely repurposed, and that it may be returned to its original configuration. Doc. 27

at 6; Doc. 27 at 9. Lastly, Defendant contends the golf cart is not unique or irreplaceable, and that Plaintiffs may measure and photograph an identical cart. Doc. 27 at 6. Thus, the unavailability of the golf cart does not negatively impact Plaintiffs' ability to present their case. Doc. 27 at 6.

#### a. Duty to Preserve

Before finding that spoliation has occurred, the Court must first determine whether the destroying party had a duty to preserve. [Ashton, 772 F. Supp. 2d at 800](#). The Court finds that Defendant [\*8] did have a duty to preserve the original condition of the golf cart. "A duty to preserve arises when a party knows or should know that certain evidence is relevant to pending or future litigation." *Id.* Here, Defendant's duty arose when it received the Notice and Representation Letter dated October 17, 2012. Doc. 25-1 at 83. The Court finds no merit in Defendant's argument that it did not receive the letter. There was sufficient evidence to show that Defendant did in fact receive the letter. Doc. 29-1 at 9-10. In the letter, Plaintiff specifically requested that Defendant "preserve and produce all physical evidence in anyway involved with or connected to the subject accident." Doc. 29-1 at 5. Thus, Defendant should have known that the original condition of the golf cart was relevant to future litigation.

#### b. Breach of Duty and Bad Faith

Defendant breached its duty and acted in bad faith when it failed to notify Plaintiffs of the repurposing of the golf cart. Counsel for the parties had multiple communications and at no time did Defendant notify Plaintiffs of the intent to repurpose the golf cart or that the golf cart had already been repurposed. It is immaterial that the repurposed golf [\*9] cart was not the only one repurposed and that it was repurposed one year prior to filing the suit, considering Defendant received notice of potential litigation on October 17, 2012. Defendant did not inform Plaintiffs of the repurposing until April 15, 2015, more than a year after the suit was filed.

#### c. Prejudice to the Innocent Party

Plaintiffs are prejudiced by Defendant's breach of its duty. The nonproduction of the golf cart in its original state will prevent Plaintiffs from conducting any type of accident reconstruction that may be necessary to support its position that Plaintiff Christine Repass was injured by a table protruding from the golf cart.

Defendant is incorrect in its contention that the original golf cart is only necessary to support a claim of defect or malfunction of the golf cart. In sum, the totality of the circumstances surrounding Defendant's actions would permit a reasonable fact finder to conclude that the production of the original golf cart for inspection would have aided Plaintiffs in proving their claims.

#### d. Sanctions

Having determined that Defendant had a duty to preserve the golf cart, that Defendant breached that duty in bad faith, and that Plaintiffs thereby [\*10] suffered prejudice, the lone matter remaining for the Court's consideration is fashioning the proper sanction. An appropriate sanction should: (1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party. *Ashton, 772 F. Supp. at 801*. The Fifth Circuit has instructed that an adverse inference jury instruction for spoliation is appropriate where a showing is made that the malfeasant party "intentionally destroy[ed] important evidence in bad faith [and] did so because the contents of those documents were unfavorable to that party." [Whitt v. Stephens County, 529 F.3d 278, 284 \(5th Cir.2008\)](#) (quoting [Russell v. Univ. of Tex., 234 Fed.Appx. 195, 207 \(5th Cir.2007\)](#)).

The Court finds that there are insufficient facts to warrant striking Defendant's pleadings, entering a default against Defendant, and/or giving an adverse jury instructions. The Court further finds that the following sanctions are appropriate under the facts of this case, and imposes the same:

Defendant is **ORDERED** to either return the repurposed golf cart to its original configuration or purchase a new golf cart with the substantially same dimensions as the one used [\*11] in the incident **by October 16, 2015**. Defendant is also **ORDERED** to pay to Plaintiffs, **by October 16, 2015**, all of the reasonable costs and fees that Plaintiffs' expert incurred in preparing for, traveling to and conducting the inspection of the golf cart presented in Antigua on March 24, 2015.

#### E. CONCLUSION

For the reasons set forth above, Plaintiffs' *Motion for Sanctions Due to Defendant's Spoliation*, Doc. 25, is **GRANTED IN PART** as stated herein. Any requested

relief not expressly granted herein is denied.

RENEE HARRIS TOLIVER

/s/ Renee Harris Toliver

UNITED STATES MAGISTRATE JUDGE

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