IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

MARGARET M. AARON	)	
Plaintiff,	)	
v.	)	Case No.: 2:10cv606
KROGER LIMITED PARTNERSHIP I	)	
Defendant.	)	

REPLY BRIEF TO KROGER'S OPPOSITION TO PLAINTIFF'S MOTION FOR SANCTIONS RELATING SPOLIATION OF EVIDENCE

NOW COMES the Plaintiff, Margaret M. Aaron, by counsel, and in support of her Reply to Kroger's Opposition Memorandum, states as follows:

I.
Preliminary Statement

Is it getting to the point where a claimant must file an emergency injunction immediately after every accident to ensure that a store like Kroger honors its evidence preservation duties? The pattern is becoming so repetitive that it is predictable. After an accident, the store reviews the tapes and sees nothing. It then destroys the tapes. The store then tells the judge that the store's self-interested management saw nothing of value, and because the plaintiff cannot through clairvoyance state what information was erased, then the store gets away scott-free with conduct that in any other setting would be deserving of the most severe spoliation remedy available.

Even the cases that Kroger cited are illustrative of conduct taken from this tattered play book. It begs the question why retail stores pay so much for these sophisticated security systems

where for some reason they seem to miss virtually every fall on the premises, yet are properly aligned to record criminal conduct, employee dishonesty, or the occasional fall that the store can prove was the customer's fault. The cynic could conclude that the cameras are only useful when protecting the store's assets, but suddenly suffer from systemic failure every time the store's video may prove its culpability.

But in this case, the predictability of the store's conduct prompted Plaintiff's counsel to send an evidence preservation letter while the tapes still existed, directing that the tapes be retained. No question now, counsel presumed, that the tapes would be kept. True to form, the interested store management reviewed the tapes (the system had at least 29 cameras), claimed to have saw nothing useful (without even knowing what would be useful), and the tapes were destroyed, permanently and completely. The only twist here is that Manager A never told Manager B of the evidence preservation letter. That is certainly one way to avoid an evidence preservation letter. Don't show it to anybody who actually controls the evidence. So here we go again.

An injured party taken from the scene on a gurney by medical transport cannot investigate what happened contemporaneously and is dependent on the rules of fair play to preserve evidence from the scene from whatever means available. Video footage shows the store, potential witnesses, the conduct of the store employees before the accident, and thereafter. Kroger admitted that the tapes could be retained by "the push of a button" so there was no burden to it, and if the tapes were truly useless, then what was the harm of keeping them? Given the advances in technology and the ease of storing the data, saving the tapes should be the norm, not the exception. Premises liability cases are seemingly the only context where the defending

party is granted the exclusive prerogative of determining the relevance of evidence, even before the case begins.

Kroger's acknowledged receipt of the litigation hold letter distinguishes this case from every other case that it cited. If Kroger prevails under this fact pattern, then the message to injured claimants is that each must seek an emergency injunction before the store deletes the images. This message will be loud, clear, and inescapable. If a lawyer's letter is not enough to freeze the status quo, then judicial involvement is the only remedy left. Already crowded courts will have to resolve by decree what the rules of spoliation were once able to address. Is that the current state of the law? This Court will answer the question not only for the purposes of this case, but for countless cases that follow.

II.
Kroger's Admissions

Kroger's admissions in its Opposition Memorandum ("Kroger Br. at __") refute the very arguments that it proffers to explain why it destroyed evidence after having been expressly requested to preserve the store video. While interspersed throughout its Opposition Memorandum, Kroger has made the following concessions:

1. Mr. Harris, Kroger's Loss Prevention "specialist," was informed by the store manager "to look at the video." Kroger Br. at 1.
2. Mr. Harris "went to his office, and, by himself, began to review the video." *Id*.
3. Because "the plaintiff's fall was not caught on the store's surveillance system … he did not retain ***any*** of the store's video footage." *Id*. at 2 (emphasis added).
4. Kroger received counsel's evidence preservation letter. *Id*.

5. "At no point was Mr. Harris aware that plaintiff's counsel had hand-delivered a letter to the store on June 9, 2011 [sic], requesting the preservation of video footage." *Id.*

6. "Mr. Heath [the store manager] did not preserve video footage of the accident after receiving counsel's letter because 'there was no **[relevant]** video to retain." *Id*. (Kroger added "relevant" to Mr. Heath's quote, because there was obviously extensive video footage available at the time).

Kroger also makes other admissions to persuade the Court that the evidence that Kroger admittedly spoliated was not relevant, and Plaintiff respectfully requests the Court to keep these admissions in mind if Kroger later attempts to disavow these statements:

1. "Unlike other premise liability cases where 'notice' is an issue, it is not here because the alleged 'defect' is permanent." *Id*. at 4.

2. When plaintiff's counsel and expert saw the floor, "[T]he condition of the floor [is] in exactly the same condition that it was in on the date of plaintiff's fall."

3. "Kroger does not dispute that the plaintiff was able to walk adequately prior to her fall." *Id*. at 7.

4. "Kroger does not contend that the store management was unaware of the condition of the floor in the produce section." *Id*.

II.
Argument

A. KROGER DOES NOT CONTEST THAT SPOLIATION HAS OCCURRED

The threshold question is whether spoliation has occurred. *See, e.g., Samsung Electronics Co., Ltd. v. Rambus*, 439 F.Supp.2d 524, 540-41 (E.D.Va. 2006). At this stage of the

analysis, the moving party does not need to prove either (a) the degree of the actor's culpability or (b) resulting prejudice. *Id.* These latter elements are only considered when deciding on the appropriate sanction to impose. *Id.* As stated in both Plaintiff's Brief and in Kroger's Opposition, there is no question that Kroger has destroyed evidence from the day of Plaintiff's accident.

Kroger's arguments make sweeping statements such as "in contrast to most spoliation cases, there was no evidence that was lost or destroyed" (Kroger Br. at 3), or that "this is not a case where video footage was saved and then disappeared mysteriously—there was none to keep." *Id*. at 6. Despite its advocacy, copious video evidence from at least 29 store cameras was available, but is now gone.[1]

Kroger's own statements prove this point. Mr. Harris reviewed the video in his office (*Id.* at 1), proving that the video was under Kroger's exclusive possession and control. The fact that "he review[ed] the video" (*Id*.) further proved the obvious that video existed. There is no dispute that none of this video was "retain[ed]" using the store manager's and Harris' language. *Id.* It is therefore undisputed that evidence has been destroyed. Kroger instead blurs this element with its claim on relevancy, which is a separate factor. The unequivocal evidence is that Kroger destroyed all of the footage from the date of the accident, because the footage did not fit within the store's view of relevance.

B. KROGER"S CONDUCT WAS WILFULL

Kroger's conduct was also intentional. At page 2 of its Opposition Brief, Kroger stated "he [Mr. Harris] did not **retain** any of the store's video footage." Also, "Mr. Heath did not **preserve** video footage of the accident after receiving counsel's letter because 'there was no

[1] Mr. Harris acknowledged that the store has 32 cameras, but he believed that three may not have been working. Plaintiff's **Exhibit 1** at 30-31; 50-51.

[relevant] video' to retain." *Id*. Plainly whether to "retain" or "preserve" the video was a matter of choice. Kroger's stated decision to allow the tapes to erase themselves was therefore deliberate and intentional. "[F]or willfulness, it is sufficient that the actor intended to destroy the evidence." *E.I Du Pont De Nemours and Co. v. Kolon Industries, Inc.,* 2011 WL 1597528 *11 (E.D.Va. 2011). The evidence here was intentionally destroyed.

C. KROGER CANNOT UNILATERALLY DEFINE RELEVANCE

When reduced to its core, Kroger's argument is that because Mr. Harris, its Loss Prevention "Specialist," did not deem anything relevant from his review of the tapes, then Kroger's conduct in erasing all of the images was justified. The simplest response is that Kroger does not have the right to determine what evidence is relevant and what evidence can be summarily discarded. *Antonio v. Security Services of America, LLC*, 2010 WL 2858252 *4 (D.Md. 2010) ("the ultimate decision of what is relevant cannot be determined by a party's "subjective assessment filtered through its own perception of self-interest."). Mr. Harris was not present on the date of the accident Plaintiff's **Exhibit 6** (excerpts of Harris Dep. at 5-6) and because he viewed the video alone (Kroger Br. at 1) he could not have even identified Mrs. Aaron. His unilateral determination of what was relevant or not to the claim investigation was essentially valueless. *See, e.g., Woodard v. Wal-Mart Stores East, LP,* --- F.Supp.2d ----, 2011 WL 2711203 **9, 10 (M.D.Ga. 2011) ('Of course, the video might have showed any other number of things relevant to a premises liability case that [the manager reviewing the tapes] might not have taken note of at the time," and the manager "may not have known the significance of what he was viewing.").

The dispositive point here is that Plaintiff advised Kroger that she deemed the video footage to be relevant. Kroger therefore no longer was required to make a judgment call on

relevance. Plaintiff's position was articulated in advance that she expected the store to keep the tapes. Given that Kroger admitted that there would be no burden in saving the images (the video could be saved to its hard drive by "the push of a button," Plaintiff's **Exhibit 1** at 28-29), its entire argument is suspect.

Although Kroger is willing to concede certain points, such as (a) Mrs. Aaron's pre-accident functionality; (b) that Plaintiff did in fact fall where she said that she fell; (c) that the alleged "defect" was permanent; and (d) that its management was aware of the condition (but without admitting that the floor condition was hazardous) (Kroger Br. at 4, 7), Plaintiff has been substantially prejudiced for a number of reasons.

Kroger's primary defense on liability is based on Mr. Heath's version of what Mrs. Aaron supposedly told him right after she fractured her pelvis, when she was in shock, was "shaken up," and was in Mr. Heath's estimation "rambling." Plaintiff's **Exhibit 7** (excerpts from Heath Dep. at 73, 74). In fact, the centrality of Mr. Heath's statements that Plaintiff stated that she "essentially tripped and fell over her own two feet and that it wasn't [Kroger's] fault" is evident from its featured position in the very first paragraph of Kroger's Opposition Memorandum. Mr. Heath's credibility as a witness is therefore an integral evidentiary point in this case and Plaintiff has lost numerous opportunities to expose his testimony as incredible once he allowed the tapes to be destroyed.[2] Challenges to Mr. Heath's self-serving statements are foreclosed as a result of the video spoliation, an event in which he had direct and perhaps the ultimate decision-making

[2]If Kroger resists an adverse inference, then Mr. Heath should be precluded from testifying on purported statements made after the fall, which could be challenged either based on his credibility, by independent witness accounts on Mrs. Aaron's coherence and post-fall condition, whether other independent witnesses overheard these purported statements, or if Mr. Heath acted as he said he did. Plaintiff has been deprived of the right to effectively cross-examine Mr. Heath, so he should be foreclosed from testifying.

by withholding the evidence preservation letter from Mr. Harris and making no effort to comply with the directive that the videotapes be retained.

For example, Mr. Heath did not prepare an incident report at the time of the accident, so all witnesses that were not under his direct supervision were never identified. He specifically admitted that he made no effort to identify other customer witnesses at the time of the fall. Ex. 7 at 67. There is a critical third-party witness that Mrs. Aaron cannot identify, but who would have been clearly depicted in the video images. This witness saw Mrs. Aaron on the floor, and eventually lifted her into a chair that Mr. Heath had provided (but which Mr. Heath denies). Others in the store may have witnessed the fall, and counsel cannot track any of those people down. Plaintiff's ability to find independent witnesses to corroborate any disputed aspect of her case has been forever compromised by Kroger's intentional conduct.

Mr. Heath stated that he was the last person to inspect the floor within the store, and that his process included walking up and down each aisle, including examining this specific area in the produce section. (Ex. 7 at 76-78). Plaintiff does not believe him. The store video would have shown him conducting this alleged inspection, and when it did not, then Mr. Heath's credibility would begin to erode. Whether the jury credited this impeachment or not does not eliminate the relevance. Plaintiff is now foreclosed from this evidentiary point.

The authority that Kroger cited is inapposite. In *Stroupe v. Wal-Mart*, 2007 WL 3223224 (E.D.Va. 2007), the court decided that the store's destruction of video "in the regular course of business because they were found not to be relevant to plaintiff's case" did not justify an adverse inference. Here, unlike *Stroupe*, Plaintiff's counsel advised Kroger the tapes were relevant to her case and that they should be retained. Counsel specifically directed a litigation hold. This was not and could no longer be considered to be part of its regular course of business. At that point,

whether Kroger believed the tapes relevant or not was no longer the issue, because Plaintiff had identified them relevant to her case. In fact, Mr. Harris has already admitted that what he considered relevant may be "totally different" than what another party may deem relevant. Harris Dep. at 48.

The other case that Kroger cited, *Haliburton v. Food Lion*, 2008 WL 1809127 (E.D.Va. 2008) again did not involve a litigation hold directive from the opposing party, but also was decided on facts showing that the surveillance system was not even working on the date of the incident. Id. at * 4. Because Kroger has admitted that at least 29 of its 32 cameras were working on the day of the incident, and because it in fact reviewed whatever video footage that it chose to review, *Haliburton* has no value when deciding the present motion.

III.

Conclusion

For all the foregoing reasons, Plaintiff respectfully requests the Court (a) to grant her sanctions as a result of Kroger's intentional spoliation of evidence, either by striking Kroger's defense or by giving the jury an adverse inference instruction; (b) to award Plaintiff her fees incurred in preparing and presenting this motion, including fees incurred in taking the depositions necessary to develop this record; and (c) to award Plaintiff such other and further relief as is just and proper under the circumstances.

Respectfully submitted,

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