

# Products Liability Case of the Month - December 2002

December 18, 2002

The Fourth DCA upheld a trial court's decision to strike a party's defenses for failing to preserve, without an intent to destroy, a braking mechanism alleged to have caused an accident. Rudy Smith was injured when a forklift he was climbing suddenly went into motion, trapping his foot. Smith's employer had leased the forklift from its owner, Nationwide Lift Trucks, Inc ("Nationwide"). Two months after the accident, Nationwide wrote the employer, requesting permission to remove the forklift in order to preserve it as evidence. In its letter Nationwide specifically noted that "no destructive testing will be allowed on this truck without a court order."

Nearly three years later, with the forklift still in its possession, Nationwide offered Smith the opportunity to inspect it—before returning it to operation—after the latter had filed suit against Nationwide for negligent maintenance. Specifically, Smith alleged a failure in the braking mechanism had caused the accident. When Smith's expert arrived to inspect the forklift, he was handed a box of brake parts allegedly removed from the forklift a year earlier. In reality, the brake parts in the box were not the actual brake parts that had been removed from the forklift. Nationwide could not account for the whereabouts of the removed brake parts. During an evidentiary hearing to decide whether sanctions should be imposed against Nationwide, the trial court found that Nationwide had repaired and reassembled the braking mechanism prior to the accident. The trial court concluded Nationwide's disassembly of the braking mechanism following the accident made it impossible to determine whether the braking mechanism had been improperly reassembled. In light of Smith's allegation that a failure in the braking mechanism had caused the accident, the trial court reasoned that Smith could not proceed with his claim and sanctioned Nationwide by striking its defenses.

On appeal, Nationwide argued that the sanction was too harsh without a finding that its conduct was willful. The Fourth DCA disagreed. To assess the appropriateness of sanctions for failing to preserve evidence, the Fourth DCA noted the following criteria must be examined: (1) willfulness or bad faith of the responsible party, (2) the extent of prejudice suffered by the other party, and (3) what is required to cure the prejudice. Contrary to Nationwide's argument, the Fourth DCA relied on several cases wherein a striking of a defense or pleading was upheld despite the inadvertent or negligent destruction of the evidence. Instead, the common denominator from these decisions was that the

lost or destroyed evidence was so essential to a party's claim or defense that it could not proceed without it. Applying the above criteria, because Smith was unable to proceed without the altered or lost evidence and Nationwide had not suggested a credible lesser sanction that would have been fair to Smith, the appellate court concluded the sanction was proper. Thus, notwithstanding the fact that the misplacing or destruction of the braking mechanism may have resulted from negligence rather than an intent to obstruct justice, a finding of willful misconduct was not essential.

Comments: In upholding the striking of Nationwide's defenses, the Fourth DCA dealt a harsh warning to parties facing sanctions for failing to preserve evidence. Based on this ruling, a party need only show that the evidence lost or destroyed by the responsible party was essential to prove his or her case, thereby making it impossible to proceed. Assuming such is established, inadvertent or excusable conduct on behalf of the responsible party will not suffice to overcome a sanction. From a practical standpoint, parties with control over potentially key evidence would be well-served to make such evidence available for inspection as soon as possible, within a prescribed period of time. This would not only lessen the risk that the evidence could be damaged or lost, but also place the onus on the opposing party to inspect the evidence within the time allotted instead of waiting three years like Smith in the present case.

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