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## APPELLATE PRACTICE POINTER

American Hospitality Management Company of Minnesota v. Hettiger

Florida's Fourth District Court of Appeal has clarified certain situations when a rebuttable presumption of negligence due to spoliation should not be employed and has also set forth a suggested jury instruction to be used to apply an adverse inference remedy arising from spoliation.

In American Hospitality Management Company of Minnesota v. Hettiger, No. 4D03-2001 (Fla. 4th DCA June 1, 2005), the Fourth District determined that the trial court erred in instructing the jury as to a rebuttable presumption of negligence arising from the defendant's destruction of a ladder alleged to have caused the personal injury at issue. The Court held that the remedy of a rebuttable presumption of negligence arising from spoliation adopted by the Florida Supreme Court in Public Health Trust of Dade County v. Valcin, 507 So. 2d 596 (Fla. 1987) should not have been employed against the defendant. The Court noted that the Valcin remedy arose at least in part from the "unique duties of health care practitioners" to preserve a patient's medical records under Florida law, but that no such unique statutory or regulatory duties existed between a hotel operator and an injured repairman.

Instead, the Court recognized that: "In circumstances where the lost evidence was under the sole control of the party against whom the evidence might have been used to effect, and where the lost evidence is in fact critical to prove the other party's claim, an adverse inference instruction may be necessary to achieve justice in the jury's determination of the case." The Fourth District remanded the case for a new trial and suggested an adverse inference instruction to be used if the trial court determined such an instruction was warranted under this standard.

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