

SPOLIATION BY AN EMPLOYER

by Ted Babbitt

An employer of an injured plaintiff is ordinarily entitled to immunity from suit for its negligence because of the workers' compensation statutes. On the other hand, §440.39(7), Fla. Stat. (1997) requires an employer to cooperate with an employee in the maintenance of any suit against a third party. That obligation requires the employer to preserve evidence that would aid the employee in bringing suit against the third party. *General Cinema Beverages of Miami, Inc. v Mortimer*, 689 So.2d 276 (Fla. 3rd DCA 1995). This is only fair since the employer has the right to recover much of what it pays to its employee through a lien on the claim against the third party. What happens when an employer breaches that duty and fails to preserve vital evidence which would allow the employee to pursue the third party claim? The answer is provided in the recent case of *Builder's Square, Inc. v Shaw*, 24 F.L.W. D2166 (Fla. 4th DCA, Sept. 17, 1999).

In that case, the plaintiff, who was an employee of Builder's Square, was injured when using a ladder owned by Builder's Square and manufactured by the potential third party defendant. Builder's Square was aware of the injury either on the day it occurred or within three days thereafter yet destroyed or

disposed of the ladder thus making plaintiff's product liability suit against the manufacturer difficult, if not impossible. Plaintiff brought an action against the manufacturer as well as his employer including within his claim against the employer, a count of spoliation. Plaintiff then settled with the manufacturer and proceeded to trial against the employer.

Florida has joined the majority of States in holding that an independent cause of action for spoliation of evidence exists when one with a duty to preserve evidence destroys it. *St. Mary's Hospital v Brinson*, 685 So.2d 33 (Fla. 4th DCA 1997); *Brown v City of Delray Beach*, 652 So.2d 1150 (Fla. 4th DCA 1995); *Sponco Mfg., Inc. v Alcover*, 656 So.2d 629 (Fla. 3rd DCA 1995); rev. dismissed, 679 So.2d 771 (Fla. 1996); *Continental Ins. Co. v Herman*, 576 So.2d 313 (Fla. 3rd DCA 1990), rev. denied, 598 So.2d 76 (Fla. 1991); *Miller v Allstate Ins. Co.*, 573 So.2d 24 (Fla. 3rd DCA 1990, rev. denied, 581 So.2d 1307 (Fla. 1991); *Bondu v Gurvich*, 473 So.2d 1307 (Fla. 3d DCA 1984), rev. denied sub nom. *Cedars of Lebanon Hosp. Care Ctr., Inc. v Bondu*, 484 So.2d 7 (Fla. 1986).

Over the plaintiff's objection, the trial court allowed into evidence the amount and existence of the settlement between the plaintiff and the ladder

manufacturer and over Builder's Square's objection concluded that the facts were sufficient to raise a duty on the party of Builder's Square to preserve the evidence thus giving rise to the cause of action for spoliation. The jury found for the plaintiff and both sides appealed.

The appellate court concluded that a statutory cause of action for spoliation exists against an employer notwithstanding an employer's claim of immunity and that the employee does not have to specifically tell the employer to preserve evidence to give rise to a duty on the part of the employer to do so. The Court held:

The evidence shows that Builder's Square knew
on the day of the incident or within 3 days
thereafter that one of its ladders was actually

involved in the fall. Before it proceeded to dispose of any of them, the statutory duty of cooperation with its injured employee should certainly have suggested that it consult with the employee. We think that while actual notice of identified evidence is the clearest form, an employer can similarly be charged with notice when the circumstances are such that it should have known that certain evidence could conceivably be critical to an employee's claim. The failure of Builder's Square to consult with plaintiff before disposing of the ladder could have been understood by the jury as a violation of the duty to preserve. Thus, we agree that plaintiff presented a jury question as to the sufficiency of the notice.

The Court also concluded that the trial court had erred in disclosing to the jury the existence and amount of the settlement between the plaintiff and the third party tortfeasor. In analyzing this issue, the Court concluded that because the damages in the spoliation claim were identical to the damages the plaintiff would have recovered from the third party tortfeasor, spoliation is the same tort for the same damages as the underlying third party claim. In light of that, the spoliator and the third party are joint tortfeasors under Florida Statute 768.041(3) which specifically forbids allowing into evidence the facts concerning a release or settlement with a joint tortfeasor. Rejecting the argument of the defendant that the existence of the settlement was evidence as to whether or not the spoliation hampered the ability of the plaintiff to bring the third party action, the Court concluded that the appropriate remedy for the defendant was a set off following the verdict.

This case not only expands the tort of spoliation in Florida to encompass employers but sets the ground rules for the conduct of the trial.