

By: Keith Langley



Plaintiffs' filed a motion for spoliation and sanctions against Outback for the failure to preserve video of plaintiff's slip and fall in an Outback restaurant. *Nagy v Outback Steakhouse* - a decision from February 21, 2024, written by United States Magistrate Judge Douglas Arpert.

The area in the restaurant in which plaintiff slipped and fell was directly outside of the restaurant's kitchen, where Outback servers entered and exited carrying trays of food and beverages. Pointing to witness deposition testimony, the plaintiff contends that there was a greasy substance on the floor in the vicinity of where the plaintiff fell.

The manager on duty would be responsible for preserving surveillance footage, or, if a preservation letter is received, the managing partner would be responsible. The manager testified that Outback does not have a policy requiring the manager on duty to preserve *a particular amount of video footage* when an incident occurs. He also testified he does not know if Outback has a retention policy. The manager did take steps to preserve some of the video from the time period following plaintiff's fall. First, he preserved a 19 second video clip of the actual incident and sent that to the insurance adjusters. The following day, the claims adjuster's office called and asked the manager for more video, and he preserved footage that was 27 minutes in length total; that clip included 5 minutes and 36 seconds before plaintiff's fall and about 22 minutes after the fall. Because Outback surveillance camera operates on a seven-day loop, the remaining footage from that evening and day was overwritten five days before the preservation letter asking for Outback to keep video for the full day.

Plaintiffs' motion now asks the Court to find that Outback is liable for spoliation for failing to preserve more of the video footage.

The Court begins with the legal standard for spoliation, which is the destruction or significant alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation, which may give rise to sanctions pursuant to both the Federal Rules of Civil Procedure and the Court's inherent authority.

The Court then looked to Federal Rule of Civil Procedure 37(e) for failure to preserve, which states that spoliation occurs where "electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party fails to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery." For the Court to make a finding that spoliation occurred, plaintiffs bear the burden of showing that:

1. ESI should have been preserved in anticipation or conduct of litigation,
2. that ESI was lost,
3. that the information was lost because the parties failed to take reasonable steps to preserve it, and
4. the information cannot be recovered elsewhere, restored or replaced.



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The Court also notes that under Rule 37(e) there are two levels for spoliating ESI:

- a finding of prejudice to another party from the loss of the information, and
- a finding that the party acted with the intent to deprive.

Applying the facts to the Rule, the Court moved quickly to the key issue here, which really was whether Outback should have preserved more than five minutes of video footage from the time period immediately preceding the plaintiff’s fall. Citing case law, **the Court found that determining whether a party had a reason to believe that the evidence in question would be required in litigation is governed by “a flexible fact-specific standard that allows a district court to exercise the discretion necessary to confront the myriad factual situations inherent in the spoliation inquiry.”**

The fact that plaintiff fell in Outback’s restaurant and was taken away in an ambulance, and that Outback was aware of the severity of plaintiff’s injuries and need for surgery made litigation reasonably foreseeable and triggered Outback’s duty to preserve. The Court also noted that Outback clearly anticipated litigation immediately, as Outback claimed that the record of information reported by Outback’s manager on the day of the incident to its claims administrator was privileged because it was prepared in anticipation of litigation.

Because litigation was foreseeable, the Court found that Outback had a duty to preserve evidence that it knew or reasonably should have known would likely be requested in that litigation. The Court finds that Outback anticipated litigation instantly because it called the claims administrator and kept some video.

The Court found that Outback, a sophisticated business entity and experienced litigant working with an experienced claims administrator, *should have known* that more than five minutes of video footage prior to the plaintiff’s fall would be relevant and would be requested by a plaintiff in any potential litigation:

Indeed, it is hard to imagine evidence that would be more pertinent to Ms. Nagy’s claims in this case. The Court agrees with Plaintiffs that such footage would have been probative of issues such as whether a slippery substance was deposited on the floor and, if so, how long it was there, whether Defendants had notice of a condition that could have caused Ms. Nagy’s fall, and whether Defendants’ employees inspected the floor in accordance with Outback’s policies. Under the circumstances here, the Court finds that Outback had a duty to preserve the disputed video footage.



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The Court then turned to whether Outback acted with the intent to deprive plaintiffs of the video footage and noted that Because direct evidence of intent is typically not available, courts generally look to circumstantial evidence to infer a party’s intent. ... Factors that may be consider include the timing of the destruction, whether there was selective preservation, and what preservation policies the party had in place.

Just reading that language does not sound good for Outback. Reviewing the circumstances of the preservation, the Court found that the circumstantial evidence supported the conclusion that defendants acted with the requisite intent to deprive plaintiffs of access to relevant video footage, based on the following:

1. Video from the day of the incident was reviewed and selectively preserved. Both preserved video clips were also reviewed by an experienced claims administrator.
2. Preservation of the video was admittedly subjective and content-based with the most relevant portion of the video — the time period before the incident — being the shortest portion of the clip.

The Court found that the fact that the video was preserved in this manner rather than, for example, based on a more objective standard of saving 30 minutes before the incident or 30 minutes after, weighed against Outback when it came to the question of intent. Further, Outback assigned the task of saving the video footage to its restaurant manager, yet, as mentioned, it had no policy in place to guide the employee in the preservation of critical video evidence and instead relied solely on the manager’s judgment. According to the Court:

The lack of guidance is troubling and failure to provide it appears to the Court to be intentional, as Outback is no stranger to slip and fall litigation. At the time of the incident or immediately thereafter, Outback knew that litigation was reasonably likely and was aware of the importance of preserving evidence. It apparently had other policies in place to be followed by its managers in the event of a slip and fall incident. Indeed, [the manager] was required to call a ‘hotline’ to report the incident and answer a series of questions (which, as noted below, Outback states was done in anticipation of litigation). Immediately after plaintiff was taken from the premises by ambulance, the manager took photos of the area where the incident occurred. In this context, absent a policy to follow, the manager preserved some but not all of the most pertinent video evidence while allowing the rest to be overwritten.

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According to the Court:

the video at issue here was not merely overwritten in the normal course, but affirmatively not preserved after being viewed by an Outback employee and claims administrator, and it was allowed to be overwritten.

The Court notes that the video produced by Outback clearly shows plaintiff slipping and falling and that it seems self-evident that a person viewing and preserving the video would, at a minimum, want to see enough video footage to answer the most basic questions relevant to that incident, such as whether a slippery substance had been deposited on the floor and whether the floors were inspected according to the Defendants' policies. Yet video footage that would have answered these questions was not preserved. This, again, weighs against Outback on the question of intent.

The Court rejected Outback's argument that bad faith has *only* been shown where no video was produced and found that that was a distinction without a difference and that there was sufficient evidence to find intent to deprive:

Indeed, if the Court were to accept Outback's argument, a litigant such as Outback could avoid its preservation obligations by simply producing an incomplete video footage preserved by an untrained employee, rather than no video footage, without consequence. In this case, whether no video was produced or an incomplete selectively-preserved clip was produced, the result is the same: namely, that Plaintiffs are deprived of evidence relevant to the claims in this case. The Court finds sufficient evidence here to establish the intent to deprive Plaintiffs of video footage at the time period prior to Ms. Nagy's fall.

With prejudice and intent established, the Court turned to the appropriate sanction and settled on a permissive adverse inference instruction, finding that:

1. Outback was completely responsible for the loss of the evidence,
2. plaintiffs had been prejudiced because the video would have shown if there was a slippery substance on the floor, and
3. an adverse inference instruction is a lesser sanction than a dispositive one and is appropriate.

With that, the Court granted plaintiffs' motion to the extent that the jury may be instructed that Outback intentionally failed to preserve the disputed video evidence and that the jury may presume that the lost video footage was unfavorable to Outback.

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