Product Liability

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The Duty to Preserve Evidence – Revisited

Gathering and preserving evidence is a critical concern in any product liability case. Product destruction or alteration most always significantly impacts the outcome of the case. In the most recent appellate court opinion to address evidence spoliation in a product liability case, the court in *Brobbey v. Enterprise Leasing* determined whether a defendant may disclaim the duty to preserve evidence by simply providing notice to the plaintiffs of a product's availability for inspection prior to disposal. *Brobbey v. Enterprise Leasing Company of Chicago*, No. 1-08-3474, 2010 Ill. App. Lexis 899, (Ill.App. 1st Dist. August 27, 2010).

The plaintiff, John Brobbey, rented a 2003 Chevrolet Astro van from Enterprise Leasing to travel to a church retreat in Minnesota. At the time of rental, Brobbey noticed that the van "wobbled and jerked" whenever he applied the brakes. He expressed his concerns to an Enterprise rental agent who assured him that there was nothing wrong with the vehicle. An accident occurred on the third day of rental, April 20, 2003. While returning from Minnesota, the driver of the vehicle who took over for Brobbey noticed the wobbling and shaking of the vehicle at speeds exceeding 55 miles per hour. While exiting the highway at a speed of 75 miles per hour, the van rolled over several times causing serious injuries to the ten passengers inside, including Brobbey and several minors.

After the accident, Enterprise conducted a vehicle investigation and sent a letter on September 23, 2003 to Brobby and another plaintiff informing them that having found no defect or malfunction, "Enterprise would be releasing the van on September 30, 2003, unless the recipients responded." The plaintiffs were unable to respond because they were either still in the hospital or had suffered severe injuries. Enterprise released the van on October 17, 2003 and the van was destroyed on January 10, 2004. *Brobbey*, 2010 Ill. App. Lexis 899, at *4.

The plaintiffs brought an action for strict liability, negligence, and spoliation of evidence against Enterprise. They alleged that Enterprise supplied a van with a design defect which caused the driver to lose control of the vehicle and roll over, causing plaintiffs' injuries. The model van in question was in fact recalled by General Motors a year after the accident due to a defect in the suspension which could result in a loss of control.

Enterprise filed a motion for summary judgment on the negligence and strict liability claims and a motion to dismiss pursuant to 735 ILCS § 2-619 on the spoliation count of the plaintiffs' complaint. Defendants General Motors and City Chevrolet settled with the plaintiffs prior to the court's ruling on the motions. The circuit court granted summary judgment in favor of Enterprise on the strict liability and negligence claims and granted the defendant's motion to dismiss on the spoliation count. The plaintiffs appealed. On appeal, the Illinois Appellate Court, First District reviewed the trial court's ruling *de novo*, addressing each of plaintiff's claims separately.

Strict Liability Claim: "Actual Knowledge" Requirement of 735 ILCS § 5/2-621

On appeal, the plaintiffs maintained that the trial court erred in granting summary judgment on their strict liability claims on the grounds that Enterprise did not have notice of the alleged defect. The First District upheld the trial court's grant of summary judgment on the strict liability claims on

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different grounds. In addressing the requisite elements of strict liability, the court recognized the commonly known "seller's exception" to a strict liability claim under section 2-621 of the Code of Civil Procedure, 735 ILCS § 5/2-621 (West 2008). The "seller's exception" allows a non-manufacturer defendant to be dismissed from a strict product liability claim upon certifying the correct identity of the manufacturer of the allegedly defective product. The rationale behind the seller's exception is to enable the non-manufacturer defendant to defer liability to the ultimate wrongdoer, the manufacturer. *Saieva v. Budget Rent-A-Car of Rockford,* 227 Ill. App. 3d 519, 526, 591 N.E.2d 507 (2nd Dist. 1992). To avoid dismissal under the seller's exception, plaintiff must show that the non-manufacturer had significant control over the design or manufacture of the product, or had actual knowledge of the defect, or created the defect. 735 ILCS § 5/2-621(c).

Applying the seller's exception to the case at bar, the court held that plaintiff could only overcome dismissal upon a showing that Enterprise had "actual knowledge" of the specific defect, since it did not have control over the design or manufacture of the van. The court held that Enterprise did not have "actual knowledge" of the specific defect that was the subject of the recall until the recall bulletin one year after the incident. In upholding the trial court's ruling, the appellate court held that the plaintiffs' allegation that Enterprise was generally aware of a problem by virtue of the shaking and steering of the van prior to the accident was insufficient to show "actual knowledge" of the specific defect causing the accident.

Negligence and Notice of Potential Defect

The trial court granted summary judgment in favor of defendant on the plaintiffs' negligence claims because under *Restatement (Second) of Torts §388* pertaining to a supplier's duty to warn, Enterprise had no knowledge of a defect. But, the appellate court held that the trial court had improperly relied on *Section 388 of the Restatement (Second) of Torts*. The Court instead addressed Enterprise's liability under Restatements Section 408 which delineates duties of donors, lenders, and lessors of chattel. Unlike Section 388, which requires actual knowledge of the defect on the part of the supplier in order to establish liability, Section 408 sets forth a separate duty for lessors to exercise reasonable care. Section 408 states that: "[O]ne who leases a chattel as safe for immediate use is subject to liability to those whom he should expect to use the chattel, or to be endangered by its probable use . . . if the lessor fails to exercise reasonable care to make it safe for such use or to disclose its actual condition to those who may be expected to use it." *Restatement (Second) of Torts* § 408, at 366 (1965).

Contrary to the trial court's finding made in reliance on §388, the appellate court held that a question of fact existed as to defendant's negligence under §408. Section 408 created an issue of fact as to whether defendant failed to conduct a reasonable inspection of the van as recommended in the manual. The appellate court held that genuine issues of material fact existed as to the proximate cause of the accident and whether the defect was discoverable upon reasonable inspection. The plaintiffs' experts believed that Enterprise should have inspected the van at a 3,000 mile interval and that upon reasonable inspection the defect should have been discovered. The appellate court held that these factual issues concerning proximate cause were questions for the jury and therefore summary judgment as to negligence was improper.

Spoliation of Evidence

The court then turned to the spoliation issues. Under Illinois law, a party may allege a separate count for negligent spoliation of evidence. *Boyd v. Travelers Insurance Company*, 166 Ill. 2d 188, 652 N.E. 2d 267 (1995). Spoliation is seen as a form of negligence. To state a cause of action for spoliation of evidence, plaintiff must show: (1) that the defendant owed the plaintiff a duty to preserve evidence; (2) the defendant breached that duty; and (3) defendant's breach proximately caused the plaintiff to be unable to prove the underlying cause of action.

To determine whether a duty to preserve the evidence exists, the court employs a two-prong test. Under the first prong, the plaintiff must show that the duty arose through agreement, contract, statute, special circumstance, or voluntary undertaking. *Dardeen v. Kuehling*, 213 Ill.2d 329, 336, 821 N.E.2d 227 (2004). The second prong requires plaintiff to show that the duty extends to the evidence at issue. In other words, the second prong requires a finding that a reasonable person should have foreseen that the evidence was material to a **potential** civil action.

Enterprise advanced several defenses to the spoliation of evidence claim. First, Enterprise maintained that plaintiffs waived their right to inspect the van and were culpable for the evidence spoliation because they did not respond to Enterprises' letter. Enterprise's notice letter gave the ailing Plaintiffs one week to express their intent on inspecting the evidence. In response to Enterprise's argument, the court stated:

> [T]he letter sent to plaintiffs was dated September 23, 2003, and only provided plaintiffs until September 30, 2003, to request preservation of the can, thus providing plaintiffs with less than a week's time to

(Continued on next page)

Product Liability *(Continued)*

> respond. We find imposing such a short time-frame on plaintiffs to respond extremely troubling, especially given the severity of the accident and plaintiffs' injuries. Further, Enterprise offers no authority for finding a waiver of a clearly established duty to preserve evidence, nor has research revealed any.

Brobbey, 2010 Ill. App. Lexis 899, at *28.

The court observed that no authority was provided, and that it knew of no authority standing for the proposition that a party may waive or relieve another party of its duty to preserve evidence by not responding to a demand for notification of an intent to inspect evidence.

Enterprise also argued that "to the extent [p]laintiffs allege, and the circumstances show, that Enterprise assumed a duty to preserve the van, it is axiomatic that an undertaken duty is self-limited by the scope of the undertaking itself." *Id.* at *29 The court indicated that "[c]uriously, however, Enterprise cites no authority for this asserted 'axiomatic' proposition either. While generally this proposition is true for a voluntary undertaking, we find no such limitation in *Boyd* and its progeny regarding the duty to preserve evidence for potential litigants." *Id.*

Third, Enterprise contended that the manufacturer recall did not constitute a "special circumstance." Enterprise contended that it had no knowledge of the recall prior to the destruction of the van and thus it could have no duty to preserve the evidence.

In addressing the issue of what constitutes a "special circumstance" the court relied on the *Dardeen* holding which evaluated special circumstances from the lens of the *Miller v. Gupta* case which involved the disappearance of x-rays in a medical malpractice action. *Miller v. Gupta* 174 Ill.2d 120, 672 N.E.2d 1229 (1996). *Dardeen* held that unlike in *Miller*, the situation did not rise to the level of a special circumstance where the plaintiff never contacted the defendant to ask it to preserve evidence, never requested evidence from defendant and never requested that defendant preserve the evidence, a sidewalk, or even document its condition. *Dardeen*, 213 Ill.2d at 338. The *Brobbey* court, unlike *Dardeen*, found that Enterprise had a duty to exercise reasonable care to preserve the van for the benefit of plaintiffs as potential litigants.

Employing the *Dardeen* analysis, the appellate court found that facts of the case constituted "special circumstances." These facts included: the plaintiffs had complained before and after the accident about a defect causing the van to wobble, the steering wheel to shake, and the brakes to malfunction; Enterprise undertook to preserve the van to conduct an independent investigation of plaintiffs allegations; Enterprise was in possession and control of the van; and plaintiffs had requested to inspect the van although the request was made after the vehicle was destroyed. Brobbey, 2010 Ill. App. Lexis, 899 at *31. Such circumstances were deemed to be remarkable enough such that a reasonable person would preserve the evidence.

Lastly, Enterprise asserted that it had no relationship with the other nine passengers of the van because it did not lease the van to them. Enterprise argued that it did not owe a duty to the other plaintiffs. The First District emphasized Illinois case law which provides that any potential litigants are owed a duty to preserve evidence and rejected Enterprises' argument that the spoliation claim should be dismissed on that ground.

In summary, the *Brobbey* decision stands for the proposition that notice in and of itself, especially when it is likely insufficient to elicit a response, is insufficient to insulate a party from a claim of spoliation. A party must make reasonable efforts to evaluate the circumstances of a potential claim or lawsuit and preserve evidence as is necessary. Until a party has received confirmation that another party or any potential parties do not want to inspect or evaluate evidence, under the circumstances, there is a duty to preserve evidence.

Practice Pointers

- While there are no common law or statutory guidelines which govern the specific steps a party must undertake to preserve evidence, the informed practitioner (either plaintiff or defendant) should research and follow any industry standards and practices that address evidence inspections and preservation.

- In fire and explosion cases, the National Fire Protection Association (NFPA) and its publication NFPA 921, Guide for Fire and Explosion Investigations proscribes specific steps by which evidence should be evaluated, collected, and preserved. See, in particular, sections 11.3, 16.3, 16.4, and 16.11.

- For other product cases, involved counsel and their experts must consider the guidelines of ASTM E 860, the Standard Practice for Examining and Preparing Items that Are or May Become Involved in Criminal or Civil Litigation.