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Common issues and defenses in premises-liability cases

A LOOK AT COMMON DEFENSES AND THE DIFFICULTIES OF MAKING A CASE FOR SPOLIATION OF EVIDENCE

Well, here we are 24 months into the pandemic and things are not back to normal like everyone thought they would be. I think things may never get back to normal, meaning how we litigated cases and tried cases before March 2020. I think this is our new normal. We never know now what the next day might bring — a new variant, a new shut-down or a new social-distancing protocol that makes it even harder to help our clients.

But at the end of the day our clients trust us with their cases and as lawyers we are hired to find a solution to their problem. COVID-19 is just another hurdle we must learn to clear.

I attended a fundraiser maybe 10 years ago in Beverly Hills. Then-Senator Joe Biden was a featured speaker. Something that now-President Biden said that day has stuck with me every day since. Mr. Biden said that, if it wasn't for trial lawyers fighting the good fight and going to trial to make a difference in people's lives, then "who would keep the dogs at bay?" He continued to tell the crowd that trial lawyers are "the last line of defense so the proverbial Man can't wipe away everybody's rights for their monetary gain."

Those words are as true today as they were 10 years ago. We have to stand and fight now more than ever. As President Biden said, who else is there to keep the Man from using COVID or some other excuse to their advantage by denying and delaying claims and by continually seeking to continue trials? We cannot allow justice to be delayed any further than it already has. The time is now for us to act.

I was very lucky to be asked to write a "boots-on-the ground" assessment of trends that I see in premises-liability litigation. Let me first break down some statistics from the U.S. Department of Justice, Bureau of Justice Statistics for 2019. In 2019 there were 26,928 real property, contract and tort trials in the United States and 60% were related to some form of personal injury. While no exact data is available, the Department of Justice estimated that in 2019, some 16,397 tort cases were tried nationally, based on data from courts across the country. Statistically, only four percent of personal-injury cases actually go to trial as most settle out of court. The Department of Justice also highlighted the nature of the personal-injury trials:

- 52% were a result of motor-vehicle accidents.
- 15% were in relation to medical malpractice.
- 5% were a result of products liability.

The remaining 28% covered "other" cases, such as premises-liability cases.

The report then looked at the results of cases that actually went to trial. Plaintiffs were successful in around 50% of cases:

- In motor vehicle-related incidents, plaintiffs were successful 61% of the time.
- In intentional-tort trials, plaintiffs were successful 50% of the time.
- In premises-liability trials, the success rate for plaintiffs stood at 39%.
- In product-liability trials, plaintiffs were successful in 38% of cases.
- Just 19% of plaintiffs were successful in medical-malpractice trials.

So, at best, based on the available data, the chance of winning a premises-liability trial is less than 40%. The Department of Justice also reported that the median award in premises-liability cases was $90,000.00.

These are sobering numbers. You may be asking yourself why you would want to jump into the rough waters of premises-liability litigation. Like anything else, there is a right and a wrong way to do it. I have found that, once you gain some experience and get comfortable with the process, there are always things that you pick up and improve on. So, if you stick with it and file some premises cases and try them if you have to, soon you will start achieving better results for your clients.

Defendants are using the open-and obvious defense more than ever

According to California law, there is not a duty to warn of an obviously unsafe condition. Lately, the defense is not disputing that a dangerous condition existed on the property. Instead, they now are just trying to shift blame onto our clients using the "open and obvious" doctrine.

The doctrine says: "If an unsafe condition of the property is so obvious that a person could reasonably be expected to observe it, then the [owner/lessor/occupier/one who controls the property] does not have to warn others about the dangerous condition." (*Johnson v. The Raytheon Co., Inc.* (2019) 33 Cal.App.5th 617, 632.)

The objective standard for whether a condition is open and obvious is whether a "reasonable person" in the plaintiff's position would have appreciated the danger, not whether the particular plaintiff knew or should have known that the condition was hazardous. The reasonable-person standard assumes the general experience of similarly situated individuals as the plaintiff.

Does this mean if a condition is open and obvious, then your client is out of luck then and the landowner gets a free pass? Of course not! But defense lawyers and adjusters try and pass this off as a complete defense and some plaintiffs' lawyers who don't know the fine points of the doctrine believe it is a complete defense and let the bad guys get away.

The law in California is that a premises owner is absolved of responsibility to warn of hazards that are open and obvious. The owner still has a duty to exercise reasonable care to diminish known hazards. A plaintiff may still succeed on a liability claim if he or she can show that a premises owner failed

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to take reasonable measures, respond to, or remedy a dangerous condition on the premises. The law is very clearly stated in CACI 1004, and as Brad Hamilton told Jeff Spicoli in the '80s classic Fast Times at Ridgemont High, "learn it, know it, live it.

CACI 1004 - Obviously Unsafe Conditions

If an unsafe condition of the property is so obvious that a person could reasonably be expected to observe it, then the [owner/lessor/occupier/one who controls the property does not have to warn others about the dangerous condition. However, the [owner/lessor/occupier/one who controls the property still must use reasonable care to protect against the risk of harm if it is foreseeable that the condition may cause injury to someone who because of necessity encounters the condition.

What happened to the video?

More than ever before, evidence is being spoiled**.** It should be your standard practice to send an evidence- preservation letter to the defendants as soon as you retain a premises liability case. This is done in pre-lit so that defendants know that they need to keep videos, photos, statements so they can be available to all parties in litigation. However, the law that applies greatly limits what plaintiffs' attorneys hope to accomplish with a preservation letter.

Under California law, there is no statute that provides for the preservation of evidence before a lawsuit is filed or before discovery requests are made. Code of Civil Procedure section 2023.030 provides that the court, after a noticed hearing, may impose monetary, issue, evidence, terminating, or contempt sanctions against anyone engaging in "conduct that is a misuse of the discovery process." The "discovery process," however, does not extend to pre-litigation activities and the Civil Discovery Act does not specifically prohibit spoliation of evidence before a lawsuit has been filed. (*Dodge, Warren & Peters Inc. v. Riley* (2003) 105 Cal.App.4th 1414, 1419.)

So, what is it that you can do, and what power does the court have to punish the bad actors?

One tool a party has is that litigants who destroy evidence in anticipation of litigation may be subject to an adverse inference jury instruction regarding the willful suppression of evidence. (See CACI No. 204; Evid. Code, § 413.)

CACI No. 204 – Intentional concealment

You may consider whether one party intentionally concealed or destroyed evidence. If you decide that a party did so, you may decide that the evidence would have been unfavorable to that party.

This little three-line instruction is very powerful. Once the cat is out of the bag and the jury sees that the defense is playing games, they will not feel great about finding for the defense. If you have this situation, please don't forget about CACI 204.

Motions and sanction orders

Unbelievably, some cases have held that a pre-lit preservation-of-evidence letter does not have much effect. A line of cases has held the duty to preserve evidence is not triggered until the party is served with discovery demands. (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1430-1431.) In *New Albertsons*, the court rejected sanctions for the destruction of video recordings of a slip and fall even though the plaintiff sent a pre-litigation preservation letter and the destruction occurred even after requests were made for their production.

That case held that a court may not impose an evidence or issue sanction for the intentional spoliation of evidence absent the failure to obey an order compelling discovery, and in that case there was no motion to compel and no failure to obey an order compelling discovery. The *New Albertsons* case also relied on Code of Civil Procedure sections 2031.310 (e) and 2031.320 (c), which authorize sanctions only where a party "fails to obey a court order compelling discovery."

The court did throw plaintiffs' attorneys a bone and also said "if it is sufficiently egregious, misconduct committed in connection with the failure to produce evidence in discovery may justify the imposition of nonmonetary sanctions even absent a prior order compelling discovery, or its equivalent. (*Id.*, 168 Cal.App.4th at p. 1426.) The *New Albertsons* case is required reading in these situations to get a full grasp on the status of the law in situations where sanctions were issued against parties who lost or destroyed evidence even absent a court order.

In *Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, the defendants failed to formally respond to the plaintiffs' inspection demands, but produced some documents informally and represented that that they did not have other requested documents. At his deposition, the defendant admitted that he did not search for the requested documents and believed that they had been stolen. The defendants then attempted to introduce at trial some of the documents that they had failed to produce earlier. The trial court granted the plaintiffs' motion for evidence and issue sanctions.

On appeal the *Vallbona* court held that the record supported the trial court's finding that the defendants had willfully misused the discovery process. The court also stated, "requiring plaintiffs here to seek a formal order to compel defendants to comply with discovery would have been similarly futile since Dr. Springer had claimed the requested documents were stolen."

If you find yourself in this situation, you need to read section 2023.030 and it should serve as your guide in these situations, it reads as follows:

> To the extent authorized by the chapter governing any particular discovery method or any other provision of this title, the court, after notice to any affected party, person, or attorney, and after opportunity for hearing, may impose the following sanctions against anyone engaging in conduct that is a misuse of the discovery process:

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(a) The court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct. The court may also impose this sanction on one unsuccessfully asserting that another has engaged in the misuse of the discovery process, or on any attorney who advised that assertion, or on both. If a monetary sanction is authorized by any provision of this title, the court shall impose that sanction unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.
(b) The court may impose an issue sanction ordering that designated facts shall be taken as established in the action in accordance with the claim of the party adversely affected by the misuse of the discovery process. The court may also impose an issue sanction by an order prohibiting any party engaging in the misuse of the discovery process from supporting or opposing designated claims or defenses.
(c) The court may impose an evidence sanction by an order prohibiting any party engaging in the misuse of the discovery process from introducing designated matters in evidence.
(d) The court may impose a terminating sanction by one of the following orders:
(1) An order striking out the pleadings or parts of the pleadings of any party engaging in the misuse of the discovery process.
(2) An order staying further proceedings by that party until an order for discovery is obeyed.
(3) An order dismissing the action, or any part of the action, of that party.
(4) An order rendering a judgment by default against that party.
(e) The court may impose a contempt sanction by an order treating the misuse of the discovery process as a contempt of court.
(f)(1) Notwithstanding subdivision (a), or any other section of this title, absent exceptional circumstances, the court shall not impose sanctions on a party or any attorney of a party for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system.
(2) This subdivision shall not be construed to alter any obligation to preserve discoverable information.

Beware the fallacy

I routinely talk to both lawyers and clients who think that a new cause of action for destruction of evidence is created in the plaintiff's favor when this situation arises. The controlling California authority on this subject is *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, in which the California Supreme Court ruled that there is no tort cause of action for spoliation of evidence against a party in the litigation. The Court instead laid out the path that the aggrieved party can take as remedies for spoliation.

They include:

- Terminating Sanctions under Code of Civil Procedure section 2023
- Disciplinary sanctions by the State Bar of California against the lawyers involved (Bus. & Prof. Code, §§ 6106, 6077; Rules Prof. Conduct, rule 5-220)
- Prosecution for the misdemeanor of willful destruction or concealment of evidence under Penal Code section 135.3.

The Court was very clear in its support of the public policy favoring use of non-tort remedies rather than new tort causes of action to correct litigation misconduct. The Court stated, "destroying evidence in response to a discovery request after litigation has commenced would surely be a misuse of discovery within the meaning of section 2023, as would such destruction in anticipation of a discovery request." The California Supreme Court in *Cedars-Sinai* discusses the wide range of sanctions provided in section 2023 for a misuse of the discovery process. Other deterrents to spoliation of evidence by a litigant, which presumably would include actions outside of the "discovery process," including the evidentiary inference that evidence made unavailable was unfavorable to the party responsible (Evid. Code, § 413, CACI 204); disciplinary sanctions by the State Bar of California against the lawyers involved (Bus. & Prof. Code, §§ 6106, 6077; Rules Prof. Conduct, rule 5-220); and prosecution for the misdemeanor of willful destruction or concealment of evidence under Penal Code section 135.3.

Even though the law is not great for us on this subject, it is imperative to still send preservation-of-evidence letters pre-lit and to document your file with all the communications concerning the evidence you seek to have preserved. The more the court has to look at the more the situation will be tuned in your clients favor once the litigation has commenced.

Keep grinding and keep trying cases, as Joe Biden said, we are the last line of defense for the people of this country. Hope to see you at the courthouse soon.

Mauro Fiore graduated from law school in 1998. He practices in the San Gabriel Valley with two associates, and his practice emphasizes wrongful death, premises liability and civil rights cases.