STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2021 CA 0582

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CALVIN ROUSSELL

VERSUS

CIRCLE K STORE, INC.

Judgment Rendered: DEC 2 2 2021

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On Appeal from the Thirty-Second Judicial District Court
In and for the Parish of Terrebonne
State of Louisiana
Docket No. 187119

Honorable Juan W. Pickett, Judge Presiding

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Circle K Stores, Inc.

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BEFORE: McCLENDON, WELCH, AND THERIOT, JJ.

McCLENDON, J.

In this personal injury suit, the defendant appeals a judgment of the trial court that granted the plaintiff's motion for adverse presumption. For the reasons that follow, we affirm the trial court's judgment.

FACTS AND PROCEDURAL HISTORY

This matter arises from a slip and fall accident outside of a Circle K gas station in Houma. On August 5, 2019, Calvin Roussell was walking across the parking lot on the premises, in the rain, when he stepped on a painted handicap parking logo, slipped, and fell. On September 11, 2019, Mr. Roussell's counsel sent a letter by certified mail to Circle K, requesting that it preserve any evidence relevant to Mr. Roussell's slip and fall.

On September 30, 2019, Mr. Roussell filed a Petition for Damages, naming Circle K Stores, Inc. (Circle K) as a defendant and alleging that the painted handicap logo was "unexpectedly very slippery as compared to the surrounding asphalt surface[,]" which caused him to slip and fall to the ground and suffer severe and disabling injuries. Mr. Roussell asserted that Circle K was liable for "[u]sing paint or other materials in creating the handicap logo that posed a slip hazard due to its lack of slip resistant properties[.]" Mr. Roussell alleged that Circle K had custody of the premises, knew or should have known of the unreasonably dangerous condition, and was liable for his damages.

On November 8, 2019, Circle K filed its answer to the petition, generally denying Mr. Roussell's allegations and asserting multiple affirmative defenses.[1] On that same date, a third-party vendor pressure washed, repainted, and restriped the parking lot, including the handicap parking logo. It is undisputed that the work order was placed

[1] Thereafter, on December 17, 2019, Mr. Roussell filed for leave of court to file a first amending and supplemental petition for damages, which was granted by the trial court. Therein, Mr. Roussell asserted a cause of action for Impairment of a Civil Action and requested damages from Circle K as a result of the repainting of the parking lot that "resulted in the intentional destruction of vital evidence and has materially impaired [Mr. Roussell's] ability to prosecute his claim to its fullest extent." In response, Circle K filed a peremptory exception raising the objection of no cause of action, asserting that Louisiana law does not afford a separate cause of action for spoliation. Following a hearing, the trial court denied the exception.

on October 31, 2019, approximately one month after suit was filed, and the work was completed on November 8, 2019.[2]

Subsequently, on October 19, 2020, Mr. Roussell filed a motion requesting "an adverse presumption as it pertains to the handicap demarcation and the parking lot that [Circle K] restriped after the accident occurred." Specifically, Mr. Roussell maintained that Circle K intentionally destroyed vital evidence in repainting the parking lot. He asserted that, despite having been put on notice after receiving the evidence preservation letter and the petition for damages, Circle K intentionally undertook the repainting of the parking lot, including the handicap demarcation, which materially impaired his ability to prosecute his claim. Circle K opposed the motion, arguing that it had a reasonable explanation for repainting the parking lot.

Following a hearing on December 14, 2020, the trial court took the matter under advisement. Later that day, the trial court signed a judgment granting Mr. Roussell's motion for adverse presumption. Circle K now appeals the judgment of the trial court.[3]

RULE TO SHOW CAUSE

The judgment signed by the trial court provides that Mr. Roussell's "Motion for Adverse Presumption due to [Circle K's] failure to give an adequate explanation for intentionally destroying evidence after receiving a written request from [Mr. Roussell] to preserve said evidence is GRANTED." On June 10, 2021, this court *ex proprio motu* issued a show cause order, stating that it appeared that the December 14, 2019 judgment was not a final, appealable judgment. After briefing of the issue by the parties, a different panel of this court referred the matter to the panel to which the

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[2] Mr. Roussell requested a site inspection of the store on November 18, 2019, after advising Circle K that he had an expert.

[3] Circle K also filed a notice of intent to seek writs. Circle K's initial writ application was not considered due to missing documentation. See **Roussell v. Circle K Store, Inc.**, 21-0060 (La.App. 1 Cir. 3/2/21), 2021 WL 796426 (unpublished writ action). However, a subsequent writ application, which included the documentation missing from the prior writ application, was denied without language. See **Roussell v. Circle K Store, Inc.**, 21-0357 (La.App. 1 Cir. 5/24/21), 2021 WL 2073788 (unpublished writ action). We note that although Circle K's writ application was denied, the denial of a writ application is merely a decision not to exercise the extraordinary powers of supervisory jurisdiction and does not bar reconsideration of, or a different conclusion on, the same question when an appeal is taken from a final judgment. **Guidry v. USAgencies Casualty Insurance Company, Inc.**, 16-0562 (La.App. 1 Cir. 2/16/17), 213 So.3d 406, 414, writ denied, 17-0601 (La. 5/26/17), 221 So.3d 81.

appeal was assigned, with one judge dissenting.[4] Thus, as a preliminary matter, we must address whether the trial court's judgment is properly before us for review on appeal.

In response to the show cause order, Circle K maintains that the judgment at issue is immediately appealable as a partial final judgment under LSA-C.C.P. art. 1915A(6). Article 1915A(6) provides:

> A. A final judgment may be rendered and signed by the court, even though it may not grant the successful party or parties all of the relief prayed for, or may not adjudicate all of the issues in the case, when the court:
>
> * * *
>
> 6) Imposes sanctions or disciplinary action pursuant to Article 191, 863, or 864 or Code of Evidence Article 510(G).

Although neither Mr. Roussell's motion nor the judgment cite the relevant authority for the imposition of the adverse presumption, Circle K argues that the adverse presumption granted herein is a sanction imposed pursuant to Article 191. Article 191 of the Louisiana Code of Civil Procedure provides that "[a] court possesses inherently all of the power necessary for the exercise of its jurisdiction even though not granted expressly by law." However, Mr. Roussell contends that the adverse presumption is an evidentiary ruling as opposed to a sanction and, accordingly, because the adverse presumption is not a sanction, the judgment is not a final appealable judgment under Article 1915A(6).

Spoliation of the evidence is an evidentiary doctrine that refers to an intentional destruction of evidence for the purpose of depriving the opposing parties of its use in pending or anticipated litigation. **Carter v. Hi Nabor Super Market, LLC**, 13-0529 (La.App. 1 Cir. 12/30/14), 168 So.3d 698, 703, writ denied, 15-0190 (La. 4/17/15), 168 So.3d 399; **BancorpSouth Bank v. Kleinpeter Trace, L.L.C.**, 13-1396 (La.App. 1 Cir. 10/1/14), 155 So.3d 614, 639, writ denied, 14-2470 (La. 2/27/15), 159 So.3d 1067. The theory of spoliation of evidence has its roots in the evidentiary doctrine of "adverse presumption," which allows for a jury instruction to be given that the destroyed

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[4] See **Roussell v. Circle K Store, Inc.**, 21-0582 (La.App. 1 Cir. 7/30/21). Judge Theriot dissented and would have dismissed the appeal.

evidence is presumed to have contained information detrimental to the party who destroyed the evidence unless such destruction is adequately explained. **BancorpSouth Bank**, 155 So.3d at 639. The obligation to preserve evidence arises from the foreseeability of the need for the evidence in the future. While it has roots in the common law, the evidentiary doctrine of spoliation of the evidence has been recognized in Louisiana since at least 1847. **Carter**, 168 So.3d at 703.

When a party has notice that certain evidence within its control is relevant to pending or imminent litigation, the party has an obligation to preserve the evidence. **BancorpSouth Bank**, 155 So.3d at 640. Once a trial court finds that a party has failed to produce evidence within its control, one possible sanction the trial court may impose is an instruction to the jury that it may infer that the evidence was detrimental to that party. This adverse inference is not applicable, however, when the party gives an adequate explanation for the failure to produce the evidence. **Carter**, 168 So.3d at 704.

Although an adverse inference jury instruction is a common sanction imposed, it is merely one of the possible sanctions that a trial court may impose when evidence has been destroyed or rendered unavailable by a party. **Id.** In **Carter**, this Court explained:

> A trial court has the authority to impose sanctions on a party for spoliation of evidence and other discovery misconduct under both its inherent power to manage its own affairs and the discovery articles provided in the Louisiana Code of Civil Procedure. Under La. C.C.P. art. 1471, when a party refuses or is unable to comply with a discovery order, the trial court in a pending action "may make such orders in regard to the failure as are just," thereby granting the trial court broad discretion to impose a range of sanctions. La. C.C.P. art. 1471(A); *see also* Fed.R.Civ.P. 37. Even without a discovery order, La. C.C.P. art. 191 authorizes trial courts to impose sanctions for spoliation of the evidence, since the destruction of evidence clearly interferes with the court's ability to fairly administer justice.

Carter, 168 So.3d at 703-04. Also, in **BancorpSouth Bank**, this Court determined that while the imposition of an adverse presumption would not be warranted under LSA-C.C.P. art. 1471, "an adverse presumption could nonetheless be imposed under the theory of spoliation of evidence." **BancorpSouth Bank**, 155 So.3d at 639.

Because the destruction of evidence clearly interferes with the court's ability to fairly administer justice, the trial court unquestionably has the authority to impose a sanction for spoliation of evidence pursuant to its inherent power under LSA-C.C.P. art. 191. See **Carter**, 168 So.3d at 704. Therefore, even though spoliation of the evidence is an evidentiary doctrine, because the judgment imposes a sanction pursuant to Article 191, it is a partial final judgment as provided in LSA-C.C.P. art. 1915A(6). Accordingly, we maintain the appeal.

DISCUSSION

Having determined that the trial court's judgment is final and appealable, we must now determine whether the trial court abused its discretion in granting the motion for the adverse presumption. See **BancorpSouth Bank**, 155 So.3d at 640. The September 11, 2019 letter requesting that Circle K "preserve any evidence relevant" to the slip and fall incident specifically identified the date of the incident and the location of the store in Houma. The letter further stated:

> [W]e specifically request any records, drawings, reports, correspondence, video tapes and all other documents relevant to this incident be maintained and preserved, and not destroyed, modified, altered, repaired, or changed in any manner, and further, that you immediately put any third-party vendor that provided services to Circle K Stores, Inc. or that has or controls this information, material, or documentation, on notice to maintain and preserve without change. Additionally, please refrain from making any changes to the premises or other physical evidence which could cause relevant information or evidence to be destroyed or otherwise disposed of.
>
> Further, please provide us with the identity of the individual or company that painted your parking lot, including the handicap demarcations directly in front of the entrance/exit to the store.

(Emphasis in original).

In its appeal, Circle K asserts that although the letter asked it to preserve relevant evidence, the letter did not give specific examples of what constituted relevant evidence. Circle K contends that it preserved the evidence it thought was relevant, such as surveillance film and photographs, but that it was not explicitly instructed to preserve the parking lot's paint.

Circle K also argues that it gave an adequate explanation for the destruction of the evidence. Specifically, Circle K asserts that in October 2019, a new facilities

director, James Wade, was named to manage the Houma area. In his affidavit, Mr. Wade stated that when he was assigned these stores, he inspected each store and identified several that needed to be pressure washed and repainted. Mr. Wade attested that when he submitted the work order, he did not know about Mr. Roussell's fall or that the painted handicap logo was the subject of a lawsuit. He also stated that he did not intend to destroy evidence or deprive Mr. Roussell the use of the evidence in his lawsuit. Mr. Wade expressed that his motive for ordering the pressure washing and repainting of the parking lot of the store at issue was to freshen up its exterior and to establish an annual schedule for it to be pressure washed and repainted.

In **Reynolds v. Bordelon**, 14-2362 (La. 6/30/15), 172 So.3d 589, 592, the Louisiana Supreme Court determined that no tort exists for negligent spoliation in Louisiana. The supreme court reviewed the policy considerations involved with imposing a duty to preserve evidence in the context of Civil Code Article 2315 and ultimately found that the factors weighed against such a duty. **Reynolds**, 172 So.3d at 597-99. In particular, the supreme court explained that "the act of negligently spoliating evidence is so unintentional an act that any recognition of the tort ... [would] act to penalize a party who was not aware of its potential wrongdoing in the first place." **Reynolds**, 172 So.3d at 597. However, while the Louisiana Supreme Court found that Louisiana law does not recognize the tort of negligent spoliation, it pointed out that there still exist "[a]lternative avenues of recourse ... within Louisiana's evidentiary, discovery, and contractual laws." **Reynolds**, 172 So.3d at 592. The supreme court explained:

> Discovery sanctions and criminal sanctions are available for first-party spoliators. Additionally, Louisiana recognizes the adverse presumption against litigants who had access to evidence and did not make it available or destroyed it. Regarding negligent spoliation by third parties, the plaintiff who anticipates litigation can enter into a contract to preserve the evidence and, in the event of a breach, avail himself of those contractual remedies. Court orders for preservation are also obtainable.

Reynolds, 172 So.3d at 600.[5]

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[5] Since **Reynolds**, this Court has noted that "Louisiana does not recognize a duty to preserve evidence in the context of negligent spoliation; however, an adverse presumption may arise when a litigant had access to evidence and did not make it available or destroyed it." **Boudreaux v. Papa Bear's Pizza, LLC**, 16-1173 (La.App. 1 Cir. 4/26/17), 220 So.3d 84, 91 n.3.

In the case before us, the judgment clearly shows that the trial court found Circle K's explanation for destroying the evidence, which Mr. Roussell asked to be preserved, to be inadequate. Initially, the preservation letter specifically requested that Circle K "refrain from making any changes to the premises or other physical evidence[,] which could cause relevant ... evidence to be destroyed." Additionally, although Circle K argued that the preservation letter was not explicit as to what relevant evidence Mr. Roussell wanted preserved, the letter also requested "the identity of the individual or company that painted your parking lot, including the handicap demarcations directly in front of the entrance/exit to the store." This specific request sought evidence regarding the paint used on the handicap parking logo and reasonably put Circle K on notice that the paint on the handicap parking logo was relevant to the litigation. Further, Mr. Roussell sent Circle K the preservation letter just over a month after his fall and approximately two weeks before his lawsuit was filed. Moreover, in his petition, which was filed more than a month before the repainting and pressure washing of the parking lot, Mr. Roussell specifically alleged that improper paint was used on the handicap parking logo. Thus, Circle K had knowledge of not only the preservation letter, but also the allegations of the petition before the parking lot was repainted. In addition, Circle K's decision to pressure wash and repaint the parking lot was not based on any safety concerns, but rather was undertaken to "freshen up" the premises. Consequently, we find no manifest error in the trial court's factual determination that Circle K failed to provide an adequate explanation for its destruction of the evidence. See **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989).

Accordingly, we cannot say that the trial court's decision to impose an adverse presumption based on spoliation of the evidence was an abuse of its discretion under the facts presented herein. Therefore, we affirm the trial court's judgment that Mr. Roussell is entitled to the adverse presumption that the missing evidence would have been unfavorable to Circle K.

CONCLUSION

Considering the above, we affirm the December 14, 2020 judgment, granting the adverse presumption in favor of Calvin Roussell, and we remand this matter to the trial court for further proceedings. Costs of this appeal are assessed to Circle K Stores, Inc.

APPEAL MAINTAINED; AFFIRMED AND REMANDED.