IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

JIMMIE G. WARD,	)	
Plaintiff	)	
	)	**Civil No. 7:03cv00596**
v.	)	
	)	
TEXAS STEAK LTD. d/b/a	)	**MEMORANDUM OPINION**
TEXAS STEAKHOUSE & SALOON	)	
and	)	**By: Samuel G. Wilson**
BODDIE-NOELL ENTERPRISES, INC.,		**United States District Judge**
Defendants.	)	

In this premises liability action, plaintiff Jimmie G. Ward claims he suffered injuries when his chair collapsed while at the Texas Steakhouse and Saloon ("Texas Steakhouse"), a restaurant owned by the defendants. Ward is a resident of Virginia, and the defendants are incorporated in North Carolina and maintain their principal place of business in that state, and the amount in controversy exceeds $75,000; consequently, there is diversity jurisdiction pursuant to 28 U.S.C. § 1332. The defendants move for summary judgment, arguing that Ward cannot establish constructive notice of a dangerous condition. Because the defendants failed to preserve the collapsed chair, a clearly material piece of evidence, despite knowing that Ward intended to file a claim, the court imposes an adverse inference against the defendants due to their spoliation of evidence for purposes of this motion and accordingly denies the defendants' motion for summary judgment.

I.

On September 5, 2001, Ward went to the Texas Steakhouse for dinner.[1] Ward sat in a

[1]At the time, Texas Steakhouse was owned by Texas Steak, Ltd. Texas Steak, Ltd. later sold Texas Steakhouse to Boddie-Noell Enterprises, Inc.

wooden chair for over an hour without noticing any defects. The chair then collapsed, injuring Ward's lower back and right elbow. An employee of Texas Steakhouse Ltd. quickly replaced Ward's chair, and an assistant manager, Edward Mitchell, promptly placed the collapsed chair in a dumpster. Later that night, Mitchell helped Ward complete an incident report during which Mitchell asked Ward "whether or not you think claim will be made," to which Ward responded "[p]robably unless pain stop." Mithcell recorded Ward's answers and faxed the report to the corporate headquarters that same night. At no time did Mitchell or any other Texas Steakhouse Ltd. employee attempt to recover the collapsed chair, and Ward did not explicitly ask them to do so. In his deposition, Mitchell stated that it never occurred to him that the chair might be needed as evidence in a potential law suit. In the present action, Ward alleges that the defendants were negligent for failing to discover and warn him about the defect in his chair.

II.

The defendants argue Ward has failed to establish notice of a dangerous condition.[2] Under Virginia law, in order for a plaintiff to establish a prima facie case of negligence against a premises owner for passive conduct, he must establish evidence of actual or constructive notice of a dangerous condition on the part of the defendant, and a failure by defendant to reasonably react to such conditions. Ashby v. Faison & Assocs., 440 S.E.2d 603, 605 (Va. 1994). "If an ordinarily prudent

[2]The defendants also argue that Ward has failed to establish a negligent act on their part that was a proximate cause of Ward's injuries, or how and why the accident occurred. However, if Ward establishes constructive notice, then the defendants' failure to discover the dangerous condition which caused Ward's injuries and to take appropriate remedial actions constitutes a negligent act that proximately caused his injuries. Therefore, the court finds these are not independent grounds for summary judgment.

person, given the facts and circumstances [the defendants] knew or should have known, could have foreseen the risk of danger resulting from such circumstances, [the defendants have] a duty to exercise reasonable care to avoid the genesis of danger." Winn-Dixie Stores, Inc. v. Parker, 396 S.E.2d 649, 650 (Va. 1990). Ward has failed to produce evidence showing that the defendants had actual or constructive knowledge of a dangerous condition,[3] but claims that he has failed to do so because the defendants destroyed the chair and that the court should therefore impose an adverse inference against the defendants for spoliation of evidence. The court finds that Virginia law governs whether the court should impose an adverse inference and that, pursuant to Virginia law, Ward is entitled to an adverse inference for the purposes of this summary judgment motion.

A.

As a threshold matter, the court considers whether to apply Virginia or federal law to the spoliation of evidence issue. As this case illustrates, drawing an adverse inference because of spoliation can determine the outcome of litigation. Although the Court of Appeals for the Fourth Circuit has stated that "[t]he imposition of a sanction (e.g., an adverse inference) for spoliation of evidence is an inherent power of federal courts–though one limited to that action necessary to redress conduct which abuses the judicial process–and the decision to impose such sanction is governed by federal law," Hodge v. Wal-Mart Stores, Inc., 360 F.3d 446, 449 (4th Cir. 2004) (internal quotations omitted), it

[3]Ward has presented some evidence showing that the chairs used were old, that some chairs had broken before Ward's incident, and that the defendants did not conduct reasonable safety inspections of the chairs. Although Ward argues this evidence establishes constructive notice, nothing he has presented shows that the defect in his chair would have been discovered during a reasonable inspection. Ward has therefore failed to present evidence of constructive notice.

has never expressly addressed the question of whether a Federal Court in a diversity case has the inherent authority when the alleged spoliation occurred before the filing of suit or whether under such circumstances federal courts, as courts of limited jurisdiction, apply the law of the forum state.

Spoliation of evidence doctrines have arisen in a host of wide-ranging contexts with equally wide-ranging implications. Indeed, they function in ways that parallel res ipsa loquitur, which we consider substantive under Erie. Travelers Ins. Co. v. Riggs, 671 F.2d 810, 815 (4th Cir. 1982). Quite understandably, federal courts must have the power to sanction for *litigation* abuse and need not look to state law in fashioning appropriate sanctions. It is altogether a different matter, however, to sanction parties in a diversity suit for conduct occurring before suit was filed, and if that sanction is inconsistent with state law, create thereby the possibility of opposite outcomes for a state created cause of action, depending upon whether the controversy is adjudicated in state of federal court. See Guaranty Trust Co. of New York v. York, 326 U.S. 99, 109 ("the outcome of [diversity] litigation in the federal court should be substantially the same, so far as the legal rules determine the outcome of litigation, as it would be if tried in state court"). Recognizing that it is a court of limited jurisdiction, this court concludes that when spoliation of evidence does not occur in the course of pending federal litigation, a federal court exercising diversity jurisdiction in which the rule of decision is supplied by state law is required to apply those spoliation principles the forum state would apply. State Farm & Cas. Co. v. Frigidaire, 146 F.R.D. 160, 162 (N. D. Ill. 1992) ("[W]e can only conclude that the issue of State Farm's pre-suit duty to preserve material evidence is substantive and, as such, Illinois law governs"); see Keller v. United States, 58 F.3d 1194, 1197-98 (7th Cir. 1995) (citing cases).

B.

Virginia recognizes an adverse inference for spoliation of evidence. Thus, where one party destroys material evidence, the other party may be entitled to an inference that the evidence, "if it had been offered, would have been unfavorable to [the party destroying the evidence]." Wolfe v. Virginia Birth-Related Neurological Injury Compensation Program, 580 S.E. 2d 467, 475 (Va. Cir. 2003) (quoting Charles E. Friend, The Law of Evidence in Virginia § 10-17, at 338 (5th ed. 1999)). In Virginia,

spoliation 'encompasses [conduct that is either] . . . intentional or negligent.' Karen Wells Roby & Pamela W. Carter, Spoliation: The Case of the Missing Evidence, 47 La. B.J. 222, 222 (1999). A spoliation inference may be applied in an existing action if, at the time the evidence was lost or destroyed, 'a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action.' Boyd v. Travelers Ins. Co., 652 N.E. 2d 267, 270-71 (Ill. 1995).

Wolfe, 580 S.E. 2d at 582.[4]

In light of these principles, the court finds that an adverse inference against the defendants is appropriate for the purposes of this summary judgment motion. Ward told Mitchell that he would

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[4]Several states have held that the inference arising from spoliation of evidence "does not amount to substantive proof and cannot take the place of proof of a fact necessary to the party's case." Maszczenski v. Myers, 129 A.2d 109, 114 (Md. 1957) (citing cases). Indeed, when discussing the similar inference arising due to a party's failure to produce evidence, the Supreme Court of Virginia stated that such an inference would not "operate against a defendant when the plaintiff has not made a prima facie case." Jacobs v. Jacobs, 237 S.E. 2d 124, 127 (Va. 1977). However, two recent decisions from the Court of Appeals of Virginia strongly indicate that Virginia does not require such a showing by a plaintiff before a court may impose an adverse inference for spoliation of evidence. Wolfe, 2580 S.E.2d at 583 ("a claimant would be entitled to a spoliation inference on proof that the *absence of critical evidence* 'resulted from negligence or intentional behavior on the part of a[] treating physician.'") (quoting Kidder v. Virginia Birth-Related Neurological Injury Comp. Program, 560 S.E. 2d 907, 914 n. 6 (Va. Cir. 2002) (emphasis added). See West v. A.T.&T. Co., 311 U.S. 223 (1940) ("an intermediate appellate state court . . . is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.").

probably file a claim unless the pain stopped, and Mitchell's knowledge may be imputed to the defendants. See Magco of Maryland, Inc. v. Barr, 545 S.E.2d 548 (Va. 2001). Consequently, the defendants knew a potential dispute existed. Furthermore, the chair was clearly relevant evidence to the dispute. However, despite knowing of the potential dispute and that the chair would be relevant evidence in a dispute, the defendants made no effort to preserve the chair. Thus, for the purposes of this motion,[5] the court finds that defendants acted negligently by not attempting to preserve the chair and that Ward is entitled to an inference that, had the chair been preserved, it would have provided some evidence unfavorable to the defendants.[6]

III.

For the reasons stated, Ward is entitled to an adverse inference against the defendants for the purposes of this motion due to the defendants' spoliation of evidence, and the court accordingly denies the defendants' motion for summary judgment.

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[5]Depending upon the evidence, the court may decline to impose an adverse inference at trial.

[6]The defendants argue that the Fourth Circuit's holding in Hodge counsels against permitting an adverse inference in the present case. Hodge did not involve Virginia law, however, because the spoliation occurred after the commencement of the law suit in federal court. Furthermore, Hodge held that the district court did not abuse its discretion by denying an adverse inference for spoliation of evidence where the defendant failed to get an eyewitness's account of events and identification information. Hodge 360 F.3d at 450. The Fourth Circuit reasoned that, because the defendant "never *possessed* the witness' contact information or account, and since [the defendant] could not have forced the witness to tell her anything, [the defendant] did not have control of that information." Id. at 451 (emphasis in original). In the present case, however, there is no question that the defendants controlled the chair with the present controversy looming.

The defendants also emphasize the fact that Ward did not explicitly ask them to retain the chair immediately after accident. However, so long as a party knows about the existence of a dispute and the piece of evidence is clearly relevant, there is no requirement that the other party specifically request that a piece of evidence be preserved.

ENTER this May _____, 2004.

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UNITED STATES DISTRICT JUDGE

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TEXAS STEAK LTD. d/b/a	)	**ORDER**
TEXAS STEAKHOUSE & SALOON	)	
and	)	**By: Samuel G. Wilson**
BODDIE-NOELL ENTERPRISES, INC.,		**United States District Judge**
Defendants.	)	

In accordance with the Memorandum Opinion entered this day, it is hereby **ORDERED** and **ADJUDGED** that the defendants' motion for summary judgment is **DENIED.**

ENTER this May _____, 2004.

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UNITED STATES DISTRICT JUDGE