

IN THE SUPREME COURT OF THE STATE OF NEVADA

WAL-MART STORES, INC.; AND
PHILLIPS, SPALLAS & ANGSTADT,
LLC,
Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK, AND THOMAS BIGGAR,
DISCOVERY COMMISSIONER; THE
HONORABLE VALERIE ADAIR,
DISTRICT JUDGE; AND THE
HONORABLE TIMOTHY C. WILLIAMS,
DISTRICT JUDGE,

Respondents,

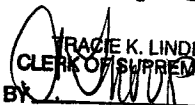
and

RICK MORA AND CATHERINE MORA,
Real Parties in Interest.

No. 48488

FILED

JAN 31 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

This is an original petition for a writ of mandamus challenging a district court order that adopted a discovery commissioner's report and recommendations that petitioners be sanctioned for evidence spoliation. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

In this original proceeding, petitioners Wal-Mart Stores, Inc. and Phillips, Spallas & Angstadt, LLC seek a writ of mandamus to compel reversal of the discovery commissioner's report and recommendations and the district court's order following those recommendations. The discovery commissioner recommended that Wal-Mart be held liable as a sanction under NRCP 37 and the district court's order established liability on the

08-02455

part of Wal-Mart for evidence spoliation on the basis of that recommendation.

Real parties in interest Rick Mora and Catherine Mora filed a complaint in district court seeking damages for injuries sustained by Rick when he slipped and fell on a trail of shampoo while placing his groceries onto the checkout conveyer belt at a Wal-Mart Store. The Moras filed a motion to strike Wal-Mart's answer for spoliation of evidence after they learned that several pieces of evidence, including the shampoo bottle, were lost or destroyed. The district court adopted the recommendations of the discovery commissioner concerning the spoliation of evidence and entered an order deeming Wal-Mart liable for Rick's slip and fall. The parties are familiar with the facts and we do not recount them here except as necessary for our disposition. Based upon the petition, the answer to the petition, and the parties' arguments before this court, we determine that the writ should be granted.

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust or station,¹ or to control an arbitrary or capricious exercise of discretion.²

In Bass-Davis v. Davis,³ this court retreated from its holding in Reingold v. Wet 'n Wild Nevada, Inc.⁴ The Bass-Davis court concluded

¹NRS 34.160.

²See Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

³122 Nev. 442, 134 P.3d 103 (2006).

⁴113 Nev. 967, 970, 944 P.2d 800, 802 (1997) (determining that an adverse inference should be applied where relevant evidence is destroyed).

that potentially relevant evidence that is lost, but not willfully destroyed, creates a permissible inference that the evidence was harmful to the party responsible for its production.⁵ Because the evidence in Bass-Davis was only negligently lost, “the district court should have given the adverse inference instruction, . . . or should have imposed another appropriate sanction.”⁶ Here, we must determine whether the district court abused its discretion when it found Wal-Mart liable as a sanction under NRCP 37(b)(2).⁷ While such a sanction is permitted under NRCP 37(b)(2), the district court’s discretion is tempered by that statute’s requirement that the imposition of sanctions be “just.” Therefore, our spoliation of evidence jurisprudence must be considered when imposing sanctions under NRCP 37(b)(2) for that reason.

In Bass-Davis, this court limited the application of the rebuttable presumption that the spoliated evidence would be adverse to the destroying party if produced to situations where the district court found that the party intentionally or willfully destroyed the evidence in an effort to harm the other party’s case.⁸ In situations where evidence was destroyed negligently, this court stated that only a permissive inference

⁵122 Nev. at 449-51, 134 P.3d at 107-09.

⁶122 Nev. at 452, 134 P.3d at 109.

⁷This court has determined that the sanctions enumerated in NRCP 37 may be applied to discovery abuses even if a court order has not been entered. See Fire Ins. Exchange v. Zenith Radio Corp., 103 Nev. 648, 747 Nev. P.2d 911 (1987).

⁸122 Nev. at 448, 134 P.3d at 107-08.

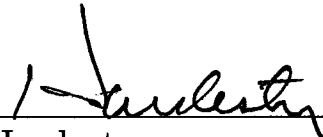
that the evidence was adverse to the destroying party would be created.⁹ Therefore, when the destruction of evidence is negligent but not willful or intentional the greater burden of a rebuttable presumption should not apply and only a permissive inference should be created.


Here, the discovery commissioner's recommendation for a sanction of liability, and the district court's order to impose that sanction, were not based on a willful destruction of the evidence by Wal-Mart with the intent to harm the other party. Rather, the sanction in this case arose out of the loss or negligent destruction of evidence and a determination by the discovery commissioner that a sanction of liability would deter Wal-Mart and similarly situated parties from willfully or negligently destroying evidence. This determination fails to recognize the limitations on the degree of sanctions to be imposed for negligent or willful spoliation of evidence under Bass-Davis. Accordingly, we

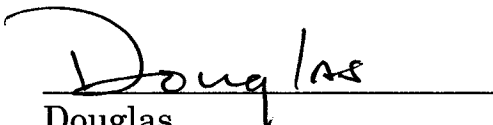
ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the

⁹Id.

district court to impose sanctions consistent with our holding in Bass-Davis.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Timothy C. Williams, District Judge
Hon. Valerie Adair, District Judge
Robert K. Phillips
Phillips, Spallas & Angstadt, LLC
Vannah & Vannah
Eighth District Court Clerk