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Spoliation Remedies in *Spotted Horse*: Dealing Effectively with the Last Refuge of a Scoundrel

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I. INTRODUCTION

The spoliation of evidence presents special problems in litigation that are often inadequately addressed by judges. Unless the judiciary becomes more willing to use default judgment as a sanction for spoliation, there will continue to be many cases where it is impossible to simultaneously punish the spoliator, deter future spoliation, and do justice to the party harmed. But until there is a clear test for when default judgment is appropriate in spoliation claims, it is unlikely district courts will be more inclined to use it. In *Spotted Horse v. BNSF R.R. Co.*[1], the Montana Supreme Court missed an opportunity to explain when and how default judgment is appropriately to be employed as both an effective deterrent and means of doing justice to the party harmed. Without that clear direction, district courts will likely continue to fashion spoliation sanctions that lack a sufficient remedial value and do little to deter spoliators.

II. FACTUAL AND PROCEDURAL BACKGROUND

Mark Spotted Horse filed suit under the Federal Employer's Liability Act in 2010, claiming that his fellow worker injured him as they worked in a BNSF Diesel Shop in Havre, Montana. Spotted Horse alleged that his co-worker let loose the rope he was using to lower a locomotive engine compartment hatch. The hatch struck Spotted Horse on his head, causing him headaches and neck pain. Spotted Horse immediately reported the incident to supervisors who saw that he was taken to the hospital.[2] On-site staff and supervisory personnel immediately began their investigation into Spotted Horse's injury even as he travelled to the hospital. The Senior Site Manager gathered Spotted Horse's hard hat, conducted reenactments of the injury, took photographs, interviewed witnesses, and took statements from Spotted Horse and his co-worker.[3] These BNSF staff members and supervisors were well versed in documenting workplace injuries and preserving evidence for their later adjudication.[4]

The Diesel Shop had a digital surveillance system that displayed and recorded the goings-on of various locations around the shop, twenty-

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[1] Spotted Horse v. BNSF R.R. Co., 350 P.3d 52 (Mont. 2015).
[2] *Id.* at 53–54.
[3] *Id*. at 54, 57.
[4] *Id*. at 54, 56.

four hours a day.[5] BNSF often used footage from this system to investigate injuries, workplace violations, and discipline employees.[6] If no one requested footage from the system within fifteen to thirty days, the system would automatically overwrite existing footage to conserve storage space. BNSF personnel routinely issued requests to preserve footage, and were familiar with the process required to do so.[7] Spotted Horse alleged that he requested footage from this system during his post-accident interview, and his counsel later requested footage in discovery. BNSF provided Spotted Horse with photographs but never surrendered any video footage. After Spotted Horse's counsel successfully moved the court to compel BNSF to turn over the video, BNSF responded that the video had been automatically overwritten due to the passage of time. The Resource Operations Center (ROC), BNSF's department charged with managing the video feeds and storage, never received a request to preserve videos from the accident in over forty-two days after the accident happened.[8]

The ROC never received a preservation request because BNSF General Foreman Paul McLeod, who conducted the initial investigation, took photographs, and staged reenactments after Spotted Horse left for the hospital, had personally reviewed footage from one of the cameras with other staff members and determined that there was no evidence to preserve.[9] McLeod acknowledged that he would have had no problem submitting a request to preserve the video footage, but he claimed that the feed from one camera thought most likely to show something relevant neither showed the injury occurring nor the general area where Spotted Horse was working. McLeod did not view footage from any of the other cameras, but admitted that they could have shown Spotted Horse and his co-worker working around the shop. Two other managers and supervisors claimed to have watched the video from the one camera with McLeod and agreed with him that there was nothing to see.[10]

Normally, when the BNSF claims department is notified of a pending claim where video evidence is involved, a claims representative will submit a request to the ROC to preserve the evidence. However, McLeod delayed submitting his findings to the claims department as BNSF had no policy in place mandating that supervisors must immediately notify a claims representative of an incident. This meant that no one from BNSF ever submitted a timely request to the ROC to preserve footage from any of the cameras at the worksite where Spotted Horse alleged he was injured.[11]

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[5] *Id.* at 54.
[6] *Id.*
[7] *Spotted Horse*, 350 P.3d at 54.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.* at 55.

Alleging spoliation of the video footage and other discovery abuses, Spotted Horse moved the District Court for default judgment on issues of liability, causation, and contributory negligence. The District Court denied the motion but prohibited BNSF from introducing evidence relating to or referring to the video footage unless Spotted Horse did so first.[12] If Spotted Horse mentioned the video footage first, BNSF could then tell the jury what the video purported to show—nothing, according to McLeod. Notwithstanding the Court's response, both parties presented evidence and testimony at trial concerning the footage's relevancy and unavailability. The Court gave the jury an instruction that read:

> If it appears that a party intentionally or recklessly destroyed or concealed evidence favorable to the other party, then you should view any contrary evidence presented by that party with distrust.[13]

The jury found in favor of BNSF and the case was dismissed with prejudice. When the Court denied him a new trial, Spotted Horse appealed. On appeal, the Montana Supreme Court framed the main issue as whether the District Court erred in refusing to grant Spotted Horse a default judgment because of the spoliation of the video footage.[14]

III. DISCUSSION

The Court first noted that spoliation claims between parties in litigation are properly handled through judicial sanctions under the holding of *Oliver v. Stimson*.[15] Under *Oliver*, default judgment is an appropriate sanction when circumstances justify it.[16] The circumstances justifying default judgment arise from extreme and willful misbehavior by the offending party.[17] The Court decided such misbehavior includes: (1) a "pattern of willful and bad faith conduct" amounting to a "blatant and systemic" abuse of the discovery process undermining the integrity of the entire proceeding;[18] (2) "evasive and woefully incomplete" discovery responses resulting in a "flagrant, complete and persistent disregard" of court orders;[19] and (3) an intention to "slow down discovery."[20] The Court stressed that merely encouraging parties to

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[12] *Id.*
[13] *Spotted Horse*, 350 P.3d at 55.
[14] *Id.* at 55–56.
[15] *Id.* at 56 (citing Oliver v. Stimson, 993 P.2d 11, 17 (Mont. 1999)).
[16] *Id*. (*see Oliver*, 993 P.2d at 17).
[17] *Id*. (citing Richardson v. State, 130 P.3d 634, 640 (Mont. 2006)).
[18] *Id*. (citing Culbertson-Froid-Bainville Health Corp. v. JP Stevens & Co. Inc., 122 P.3d 431, 436 (Mont. 2005)).
[19] *Spotted Horse*, 350 P.3d at 56 (citing Schuff v. A.T. Klemens & Son, 16 P.3d 1002, 1019 (Mont. 2000)).
[20] *Id*. (citing Stokes v. Ford Motor Co., 300 P.3d 648, 653 (Mont. 2013)).

cooperate is no sanction at all. The Court admonished district courts' past reluctance to dole out significant punishment for spoliators by emphasizing that discovery abuses merit stiff punishments sufficient to deter future transgressions.[21]

Although BNSF's spoliation occurred before litigation and the discovery process began, the Court found the failure to preserve evidence under such circumstances no less incendiary. The strict policy of preserving relevant evidence applied here "with equal force" because BNSF was no stranger to litigation in general and spoliation claims in particular.[22] The Court explored several past cases that exposed BNSF as "a seasoned and sophisticated corporate litigant well aware of its obligation [to retain relevant evidence] when responding to workplace violations and workplace injuries[.]" The Court discussed BNSF's systematic gathering of relevant information, even as Spotted Horse was driven to the hospital, as evidence of a company well versed in gearing up for complex litigation. Thus, the decision from those same investigators and supervisors to view, but not retain the video footage, was inexplicable and "disconcerting" to the Court because BNSF had no right to determine on its own which evidence was relevant.[23] BNSF's unilateral decision to discard evidence it had the means and foresight to preserve meant that the "search for the truth" surrounding Spotted Horse's allegations had been effectively subverted.[24]

Having established BNSF's spoliation as a fact, the Court next analyzed the propriety of the District Court's remedy. Unsurprisingly, the Court found the District Court erred in its instruction because the instruction actually rewarded BNSF while providing Spotted Horse with no relief.[25] But rather than grant Spotted Horse's request for default judgment, the Court instead remanded the case for a new trial and instructed the District Court to concoct a remedy that would be both palliative to Spotted Horse and commensurate with the severity of BNSF's "actions in allowing the video to be destroyed."[26]

Justice Wheat specially concurred. He found that the proper remedy was not a new trial, but default judgment—as Spotted Horse initially requested. Where there is a case of malicious misuse, he argued, the judicial system must protect its integrity by punishing the misuser, remedying the misuse, and deterring future misuse.[27] Spoliation, according to Wheat, is such a case of malicious misuse of the judicial system; it is especially pernicious in that it undermines the overall

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[21] *Id*. (citing *Schuff*, 16 P.3d at 1019).
[22] *Id.* at 56.
[23] *Id*. at 57.
[24] *Id.* at 58 (citing *Oliver*, 993 P2d at 17; and *Schuff*, 16 P.3d at 1019).
[25] *Spotted Horse*, 350 P.3d at 59.
[26] *Id*. at 59–60.
[27] *Id*. at 60–61.

integrity of civil litigation.[28] "There can be no truth, fairness or justice in a civil action where relevant evidence has been destroyed before trial." Wheat asserted also that spoliation of evidence is not only virulent, it is becoming increasingly prolific. Only a court system unafraid of wielding an adequate remedy can stem the tide. Wheat argued further that the courts are endowed with adequate remedies to prevent the spread of spoliation, of which default judgment is one. But until courts actually use it, he said, the system fails the spoliation victim and rewards the spoliator with an advantage in litigation that in fact provides an incentive for the spoliation cycle to continue.[29]

Justice McKinnon dissented for two reasons. First, she believed that BNSF was being punished for its past bad acts and not purely the facts and issues before the Court.[30] Secondly, she argued that in review of sanctions for an abuse of discretion, the trial court should be granted great latitude in crafting its remedy.[31] She asserted that a reviewing Court should be especially mindful that a trial on the merits is always preferred over a default judgment.[32] In the end, she simply was not convinced that the trial court had abused its discretion when it refused to issue a stronger sanction.[33]

IV. ANALYSIS

Although Justice McKinnon's dissent expressed concern that BNSF's prior bad acts were unfairly brought before the Court, these prior discovery abuses were not trotted out for their shock value alone. BNSF's past discovery abuses are evidence of an in-depth knowledge of litigation and discovery processes. This imputed corporate knowledge is telling when seeking to uncover evidence of bad faith conduct by a corporate litigant, especially when attempting to uncover a "pattern of willful and bad faith conduct."[34] Absent such knowledge and previous court-ordered admonitions, BNSF would have far less culpability here—a lack of prior wrongdoing would have been some evidence indicative of an innocent motive. Justice McKinnon's deference to the District Court would have come at the expense of justice to Spotted Horse. Although she saw value in allowing the instruction to stand and allowing the jury then to infer as it saw fit, whatever remedial value the instruction contained would have to be gained through cross-examination, forcing Spotted Horse's counsel to extract concessions from BNSF employees about their failure to preserve or fully review available evidence. She

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[28] *Id.* at 61.
[29] *Id.*
[30] *Id*. at 62–63.
[31] *Spotted Horse*, 350 P.3d at 62–63.
[32] *Id.* at 62 (citing Brilz v. Metro. Gen. Ins. Co., 285 P.3d 494, 498 (Mont. 2012).
[33] *Id.* at 63.
[34] *Richardson*, 130 P.3d at 649.

speculated that testimony from such cross-examination "could just as likely result in the negative inference that BNSF engaged in a cover up."[35] But what Justice McKinnon did not account for in this scenario was the burden placed upon Spotted Horse's counsel. Leaving the instruction as the District Court fashioned it placed the burden of remedy squarely upon the shoulders of Spotted Horse. At best, Spotted Horse's counsel could place doubt in the minds of the jury with effective cross-examination, but Justice McKinnon did not explain how this is just. If BNSF was indeed the bad actor here, there is no adequate explanation given as to why it is fair to place the burden of remediation on Spotted Horse instead of BNSF. Justice McKinnon's answer seems simply to be that although the district court exercised its discretion differently than the majority would have, that is not enough for a reviewing court to require an alternate remedy.[36] Justice McKinnon's argument that reviewing courts should be largely deferential to the discretion of district judges is a sound policy in theory, but it still does not provide criteria for when it *would* be an abuse of discretion for a District Court to refuse to grant default judgment upon finding spoliation.

The majority's analysis seemed to head in the direction of providing the roadmap Justice McKinnon's opinion lacked. But in the end, the majority opinion provided no clear direction either. The Court successfully explained why spoliation is a problem, and why it merits both punishment and remedy. The opinion also nicely dealt with the fact that default judgment is sometimes an appropriate sanction for spoliation and that it is reserved for those instances of spoliation that are willful, wanton, and wrought with bad faith. But it did not explain why what happened to Spotted Horse is not one of those instances. In fact, the opinion is confusing because it omits any talk at all of willfulness, wantonness, or bad faith in its final holding. The confusing, but key sequence of sentences in the holding is this:

> Although BNSF clearly knows better than to dispose of video footage of an accident scene, it is simply not possible to determine whether the destruction of the evidence was intentional or inadvertent. Given this circumstance, we do not find that the District Court's refusal to grant Spotted Horse's request for a default judgment was an abuse of discretion.[37]

There are two points that make this ruling questionable. First, the language suggests that if the destruction of the evidence was intentional, the District Court did indeed abuse its discretion by failing to

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[35] *Spotted Horse*, 350 P.3d at 63.
[36] *Id.*
[37] *Id*. at 59.

grant default judgment. Following that logic, the appropriateness of default judgment would then perhaps rest more upon intentionality than willfulness, wantonness, and bad faith. Earlier in the opinion though, the Court explained that default judgment is appropriate when there is willfulness, wantonness, or bad faith conduct, and cites several cases expounding on such conduct.[38] But here, the Court frames the key element purely as a question of intent. This is a crucial question that trial courts will no doubt wrestle with in future spoliation claims. If on one hand the issuance of default judgment rests on intentionality alone, then the proper analysis for reviewing a spoliation claim may become much like an intentional tort—where intent is analyzed in terms of an act as the external manifestation of the actor's will, and the foreknowledge of the results of that act.[39] But if on the other hand it is indeed bad faith or willfulness that is the demarcation point, the appropriate analysis may be more like assessing punitive damages, where the egregiousness of the offense or maliciousness of purpose is instead scrutinized. The truth is that in this context of determining culpability for spoliation of evidence, the two concepts are not that far apart. Intent in torts denotes a volitional act coupled with either purpose or substantial certainty that a consequence will result. Hardly ever is the volition of the act an issue, though. Rather, it is whether the actor had the purpose or substantial certainty that the consequence would occur. That substantial certainty of the consequences could well be read here as willfulness or bad faith. At the very least the opinion should have used consistent terms for clarity by omitting talk of intention and discussing bad faith instead. This was an opportunity for the Court to make these criteria clear: whether a court abuses its discretion by refusing to grant default judgment when the spoliation of evidence is determined to be intentional or in bad faith; and whether spoliation done intentionally necessarily means it was also done in bad faith. Answers to these questions would have given district courts a sense of when spoliation merits default judgment.

The other unfortunate aspect of this confusion lies in this: For Spotted Horse, a careful reading seems to reveal that it does not matter whether the necessity of a district court issuing default judgment turns on a showing of intentionality or bad faith. Under either showing, this case seemed ripe for default judgment. Clearly, there are facts of a case to which every reader of an appellate opinion is not privy. However, the facts revealed here show that there was both tortious intent and bad faith in BNSF's response to Spotted Horse's injury. There was the deliberate decision by McLeod to allow the video system to overwrite the recording: he knew he could have requested a copy of the footage; and he knew the system would overwrite the recordings if he did not. That

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[38] *Id.* at 56.

[39] RESTATEMENT (SECOND) OF TORTS §§ 2, 8A (1965).

level of knowledge settles the issue of whether the destruction of this evidence was volitional—it was. The issue then becomes whether it was done in bad faith, or with substantial certainty that the consequences of evidence irretrievably lost for future litigation would occur.

Here, the analysis is necessarily more nuanced, but the weight of the evidence is great. McLeod had used video recordings from this system before for investigations of workers in connection with workplace injuries.[40] He knew that preserving the footage was merely a matter of a simple phone call or email request to the ROC.[41] The Court described BNSF as "a seasoned and sophisticated corporate litigant well aware of its obligations when responding to . . . employee injuries and accidents."[42] The Court specifically identified one of those obligations as the duty to retain evidence relevant to injury claims.[43] As higher-level employees of BNSF, within minutes of Spotted Horse's injury, BNSF supervisors began the process of evidence gathering, preserving his hard hat, despite the fact that McLeod had determined it "had no evidence of a significant impact."[44] McLeod and others viewed the video footage within hours of the accident, but declared it irrelevant. But the fact they reviewed it at all shows they knew of its potential evidentiary value that should have triggered within them a sense of duty to preserve it, as they did with the hard hat. But unlike the undamaged hat that *was* preserved, McLeod and other BNSF staff "inexplicably" allowed the video evidence to be destroyed.[45] The Court saw this act as inexplicable, but there is indeed a likely explanation—that it was done to suppress the truth and gain an advantage in litigation. This simple explanation would mean that McLeod acted not only with substantial certainty of the results, but with a destructive purpose—meeting the criteria for intent and bad faith both, and removing the possibility conjectured by the majority that the footage was inadvertently destroyed.

Understanding this line of reasoning, Justice Wheat's specially concurring opinion of the three is the most incisive. Like the majority, Wheat recognized the vital importance of punishing spoliators to preserve the integrity of the civil justice system. But unlike the majority, Wheat sees that a policy is nothing if it is merely exhortatory—there must be substantive consequences when policies are violated for meaningful change to come about. This divergence is nicely illustrated in the majority opinion where the Court recognized that a willful, bad faith shielding of the truth and a pattern of willful, bad faith conduct are circumstances appropriate for default judgement, but then failed to

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[40] *Spotted Horse*, 350 P.3d at 54.
[41] *Id.*
[42] *Id*. at 57.
[43] *Id.*
[44] *Id*. at 58.
[45] *Id*. at 57.

impose default judgment on BNSF despite the actions of its General Foreman McLeod. Recall that he (1) had utilized the video recording system before in connection with injuries; (2) knew he could have requested a copy of the video footage; and (3) knew that the system would overwrite recordings with the passage of time. He knew the footage existed because he admitted to watching it and determining that it was not important. So there was at least a modicum of deliberation where he weighed the significance of the footage as it might relate to future litigation. In spite of that knowledge, he willfully allowed the footage to be destroyed. If that act and deliberation alone does not signal a bad faith shielding of the truth under the standards proffered by the Court for default judgment, then it is at least a link in the chain of BNSF's pattern of bad-faith discovery abuses—another clear marker that the imposition of default judgment would be appropriate and necessary. Justice Wheat did not provide either a test for when default judgment is appropriate for spoliation claims, but his opinion is premised upon the idea that although it may be unclear when default judgment is appropriate, it is appropriate here, where a savvy corporation conveniently disposed of video evidence to gain a litigation advantage. The majority opinion enumerated the right policy reasons to punish spoliators and preserve the integrity of the civil justice process, but it is Wheat's opinion that followed through with support for and an analysis of the sanction most likely to actually effectuate that policy.

V. CONCLUSION

The facts of this case provided the Court with an opportunity to create a roadmap showing when and how default judgment should be both an effective remedy and a deterrent in spoliation claims. Without this roadmap, and without the realistic threat of such a deterrent, seasoned corporate litigants have little incentive to prevent spoliation in the first place as punishments short of default judgment often leave them in a position where they nonetheless enjoy an advantage in litigation they would not otherwise have had if the evidence had not been destroyed. To borrow slightly from Learned Hand's negligence formula, the advantage can be viewed like this: if the evidence at issue definitively means liability, its loss or destruction means then that there is no longer a *definite* showing of liability.[46] When a spoliator analyzes potential punishments by the court for the loss of that definite liability, anything less than the implementation of liability—default judgment—means an inherent gain in the bottom line through a litigation advantage. Thus, adverse inferences, evidentiary presumptions and other remedies that are not default judgment leave those litigants to enjoy a better position they

[46] U.S. v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

would not have had absent the spoliation. Until a line is drawn that succinctly shows where judicial discretion ends and default judgment must be wielded, prospective litigants have little to lose when critical evidence is lost or destroyed.