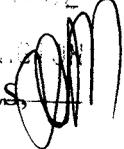


COURT OF APPEALS  
DIVISION II

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NO. 36019-5-II

STATE OF WASHINGTON  
BY   
~~COURT OF APPEALS~~  
DIVISION II

OF THE STATE OF WASHINGTON

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Marilyn Niebauer, Appellant,

v.

Swain's General Store, Respondent.

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**BRIEF OF APPELLANT**

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ORIGINAL

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**I. Introduction**

Marilyn Niebauer fell and injured herself in Swain's General Store in Port Townsend, Washington. Several of Swain's employees who were working at the time assisted Ms. Niebauer after her fall, and an incident report was completed. The employees' later recollections of Ms. Niebauer's slip and fall incident vary greatly, and the only written record of Ms. Niebauer's accident, the incident report, was lost by Swain's and/or never produced.

Given the varying accounts of Ms. Niebauer's accident from the eyewitnesses, and the importance of Ms. Niebauer's credibility to support her claim, the incident report was a crucial piece of evidence. The only inference which the finder of fact may draw when a party fails to produce relevant evidence without satisfactory explanation is that such evidence would be unfavorable to him. The trial court may use its discretion to craft an appropriate sanction. Here, the trial court abused its discretion by failing to sanction the defendant whatsoever, but merely allowing counsel to argue the matter of the missing incident report as an issue of credibility.

**II. Assignment of Error**

**A. Assignment of Error**

The trial court erred by denying Plaintiff's requested jury instructions regarding the negative inference to be drawn from Defendant's spoliation of the incident report evidence.

**B. Issue Pertaining to Assignment of Error**

Whether after weighing the potential importance of the incident report to Plaintiff's case and the culpability of the Defendant for failing to provide the incident report, the trial court should have sanctioned the Defendant by giving the proposed jury instructions on spoliation, and whether the trial court's failure to do so was an abuse of discretion.

**III. Statement of the Case**

**A. Relevant Procedural History**

Plaintiff Marilyn Niebauer filed a complaint against Defendant Swain's General Store (hereafter Swain's) in the Superior Court of Washington in Jefferson County on June 14, 2005.<sup>1</sup>

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<sup>1</sup>CP 1-3

Swain's brought a Motion for Summary Judgment that was heard on December 1, 2006.<sup>2</sup> The trial judge denied the motion.<sup>3</sup> The judge found that Ms. Niebauer was within a self-service area within Swain's, and that issues of material fact remained.<sup>4</sup> Swain's filed a Motion for Reconsideration, which was denied on December 26, 2006.<sup>5</sup>

The parties proceeded to trial. Both parties proposed instructions for the jury, and arguments and ruling on the instructions took place on January 11, 2007.<sup>6</sup> Plaintiff Ms. Neibauer proposed two alternative jury instructions regarding Swain's spoliation of the evidence, both of which were denied by the trial court.<sup>7</sup> On January 12, 2007, the jury returned a verdict for the Defendant, and the Court

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<sup>2</sup> CP 180 - 285; RP 3-11

<sup>3</sup> RP 9-11

<sup>4</sup> *Id.*

<sup>5</sup> CP 446-453; CP 460-461

<sup>6</sup> RP 280-310. Although the Plaintiff submitted a set of Proposed Jury Instructions, and those Instructions are discussed and argued in the Verbatim Report of Proceedings, they are unexplainably missing from the Superior Court Docket and therefore the exact language of the proposed instructions is not a part of the record.

<sup>7</sup> RP 298-303

entered Judgment on the Verdict on February 9, 2007.<sup>8</sup> Ms. Niebauer filed a Notice of Appeal on March 7, 2007.<sup>9</sup> Swain's filed a Notice of Cross Appeal on March 19, 2007.<sup>10</sup>

**B. Factual History**

On February 12, 2003, Marilyn Niebauer was in Swain's General Store in Port Townsend, Washington, and was walking down an aisle towards the U.S. Post Office located at the back of the store.<sup>11</sup> On one side of the aisle were racks of clothing, and on the other side were the end-caps of long display racks, with small displays of items for sale, including hats, gloves and socks.<sup>12</sup> Ms. Niebauer slipped on something in the aisle, which she determined to be a plastic hook, and fell to the ground severely injuring her left ankle.<sup>13</sup>

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<sup>8</sup> CP 174-175

<sup>9</sup> CP 176-177

<sup>10</sup> CP 462-464

<sup>11</sup> RP 133

<sup>12</sup> CP 297-298 (Dep. of Marilyn Niebauer, p. 13:19 - 14:21); CP 333 (Dep. of Brandi Hamon, p. 32:25 - 33:19).

<sup>13</sup> RP 141-144

Several Swain's employees came to Ms. Niebauer's assistance. The first to approach her was Tim Gronseth.<sup>14</sup> Brandi Hamon and Jodi Hellman were also nearby and offered assistance to Ms. Niebauer.<sup>15</sup> Brandi Hamon used her hand held radio to call for the store supervisor, Penney Allen, who arrived to assist and took information down for an incident report.<sup>16</sup> The store manager, Jim Reynolds, was out of state, but received the incident report a few days later when he returned to work.<sup>17</sup>

Ms. Niebauer gave detailed accounts both in deposition and trial testimony of her fall, the conditions of the store, and who assisted her.<sup>18</sup> The three employees of Swain's who testified about Ms. Niebauer's fall gave very different accounts of the incident, which varied widely on important facts such as who was present,

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<sup>14</sup>RP 143

<sup>15</sup>RP 20, 226, 231

<sup>16</sup>RP 94-96, 228-229

<sup>17</sup>RP 56-57

<sup>18</sup>See, RP 133-147, 192-203, CP 297-303

what type of shoes and clothes Ms. Niebauer was wearing, and what, if anything, was on the floor.<sup>19</sup>

Swain's employees testified that it is a standard business practice for incident reports to be completed any time a customer suffers an injury in the store.<sup>20</sup> Such a report is to summarize not only the victim's account of events, but also the account of each witness and employee on the scene.<sup>21</sup> Penney Allen testified that she completed such an incident report and submitted it to Jim Reynolds, the store manager.<sup>22</sup> Jim Reynolds testified that he received the incident report regarding Ms. Niebauer's fall, and kept a file and log of such reports.<sup>23</sup> Despite this, the report was never produced by Swain's. Swain's only justification was that Swain's General Store split into two separate business entities sometime in 2004, and as a result the report could not be located.<sup>24</sup>

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<sup>19</sup> See, summaries of testimony, *infra* at Section B

<sup>20</sup> See, RP 57, 97, 265-266, 277

<sup>21</sup> See, RP 57-58, 97, 270

<sup>22</sup> RP 104, 114

<sup>23</sup> RP 58-59

<sup>24</sup> RP 82, 301

#### IV. Summary of Argument

##### **It Was An Abuse of Discretion to Deny Plaintiff's Proposed Jury Instructions on Swain's Spoliation of Important Evidence**

When a party fails to produce relevant evidence without a satisfactory explanation, the finder of fact may infer that such evidence would be unfavorable to that party. Here, the incident report created after Ms. Niebauer's fall would have cleared up numerous discrepancies in testimony on important disputed facts, while its absence resulted in questions and doubts about Ms. Niebauer's credibility. It was a crucial piece of evidence and Swain's explanation for not producing the report was not satisfactory. Therefore, Swain's should have been sanctioned for failing to preserve the evidence, by means of the Plaintiff's proposed jury instructions on spoliation.

A trial court's decisions regarding sanctions for discovery violations and admission or rejection of evidence are discretionary, but here, the trial court's denial of either of Ms. Niebauer's proposed jury instructions regarding spoliation was an abuse of discretion.<sup>25</sup>

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<sup>25</sup> The standard of review on appeal is whether the trial court abused its discretion in making the decision to deny the proposed jury instructions. *See, Henderson v. Tyrrell*, 80 Wn.App. 592 at 604, 910 P.2d 522 (1996).

**V. Argument**

**A. Sanctions Should Be Imposed When a Party Fails to Produce Important Evidence Without a Proper Justification**

When a party fails to produce relevant evidence without satisfactory explanation, “the only inference which the finder of fact may draw is that such evidence would be unfavorable to him.”<sup>26</sup> In determining when spoliation requires a sanction, the factors to weigh are: (1) the potential importance or relevance of the missing evidence; and (2) the culpability or fault of the adverse party.<sup>27</sup> In this case, both factors weighed heavily in favor of sanctions against the Defendant, Swain’s.

The leading State Supreme Court case on spoliation is *Pier 67 v. King County*.<sup>28</sup> That decision involved allegations against King County of wrongly imposed tax assessments for the years 1963 through 1969.<sup>29</sup> Because the county had been put on notice of the pending litigation, the evidence was in the county’s control, and the

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<sup>26</sup> *Pier 67 v. King County*, 89 Wn.2d 379, 385, 573 P.2d 2, 6 (1977); see also *Lynott et al, v. National Union Fire insurance Company of Pittsburgh, PA*, 123 Wn.2d 678 at 689, 871 P.2d 146 (1994).

<sup>27</sup> *Henderson v. Tyrrell*, 80 Wn. App. 592, 910 P.2d 522 (1996).

<sup>28</sup> 89 Wn.2d 379, 573 P.2d 2 (1977).

<sup>29</sup> *Pier 67 v. King County*, 89 Wn.2d 379, 573 P.2d 2 (1977)

county could have maintained the records yet did not do so, the court held that “the only inference which may be drawn is unfavorable to . . . the respondents [King County].”<sup>30</sup>

The reasoning of the Supreme Court applies to this case as well. Swain’s knew Ms. Niebauer was injured in its store and that her injuries were serious enough to require an ambulance.<sup>31</sup> Swain’s had a standard procedure of creating incident reports for such occasions, and had a file system to maintain such records.<sup>32</sup> The evidence was in the control of the Swain’s, and Swain’s could have and should have maintained it, yet did not do so.<sup>33</sup> Swain’s apparently misplaced the file or sent it to another location during the corporate split, but still had access and ability to search all of the stores and files where it could have been sent.<sup>34</sup> Despite this, Swain’s still failed to produce the form. The only inference to be drawn is that the report was unfavorable to Swain’s.

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<sup>30</sup> *Pier 67 v. King County*, 89 Wn.2d. at 386.

<sup>31</sup> See, RP 21, 98, 237

<sup>32</sup> See, RP 57, 97, 265-266, 277

<sup>33</sup> See, *Homeworks Construction, Inc. V. Wells et al.*, 133 Wn.App 892 at 901, 138 P.3d 654 (2006)(stating that a party has a general duty to preserve evidence on the eve of litigation).

<sup>34</sup> RP 82

In *Henderson v. Tyrrell*, the Court of Appeals created the two-part test mentioned above for determining when sanctions are appropriate for spoliation.<sup>35</sup> The case arose from a single-car motor vehicle accident. Dozens of pictures of the car were taken after the accident and were available for evidentiary purposes, and the car was salvaged two years after the accident.<sup>36</sup>

Analyzing the first part of the two-part test, the potential importance or relevance of the evidence, the *Henderson* court considered whether its loss resulted in an investigative advantage for one party over another, or whether the adverse party was afforded an adequate opportunity to examine the evidence.<sup>37</sup> The Court found that the physical presence of the car was of questionable investigative value; there was other valuable evidence including the photographs; and neither side had hired an expert to physically examine the car prior to its destruction, despite having nearly two years to do so.<sup>38</sup>

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<sup>35</sup>*Henderson v. Tyrrell*, 80 Wn. App. 592, 910 P.2d 522 (1996)

<sup>36</sup>*Henderson v. Tyrrell*, 80 Wn. App. at 604

<sup>37</sup>*Henderson v. Tyrrell*, 80 Wn. App. at 607-608

<sup>38</sup>*Henderson v. Tyrrell*, 80 Wn. App. at 607-609

This reasoning does not apply to Ms. Niebauer's case. The evidentiary value of the incident report was extremely high given the discrepancies in the witnesses' testimony. And the absence of the report gave an unfair advantage to Swain's by leaving open questions as to Ms. Niebauer's credibility that could have been answered by the accounts of the accident given on the day it happened.

Weighing the second part of the test, the defendant's culpability, the *Henderson* Court examined whether the party acted in bad faith or conscious disregard of the importance of the evidence, or whether there was some innocent explanation for the destruction.<sup>39</sup>

In 2006, this Court subsequently explained:

[b]y noting that disregard can be sufficient to deserve a sanction, the *Henderson* opinion suggests that spoliation encompasses a broad range of acts beyond those that are purely intentional or done in bad faith.<sup>40</sup>

Therefore, a party need not have acted in bad faith to deserve sanctions for spoliation of evidence. Even a careless loss or

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<sup>39</sup>*Henderson v. Tyrrell*, 80 Wn. App. at 609-610

<sup>40</sup>*Homeworks Construction, Inc. V. Wells et al.*, 133 Wn.App 892 at 900, 138 P.3d 654 (2006)

misplacement of documents should not go without penalty if the documents are important to the litigation and could be favorable to the other party.

**B. The Incident Report Was A Crucial Piece of Evidence That Could Have Clarified the Numerous Inconsistencies in the Various Witnesses' Testimonies**

The credibility of Ms. Niebauer was of utmost importance in this case. One of the crucial elements of her case was her assertion that the object she slipped on and felt through her rubber-soled, flat-heeled shoes was a plastic hook, of the type used for display purposes throughout Swain's. The Swain's employees who witnessed her fall and/or assisted her after her fall gave widely varying accounts of the incident, including the shoes Ms. Niebauer was wearing, who assisted her, and whether there may have been such hooks present on the floor. The questions raised by these discrepancies in testimony could have easily been resolved through the written incident report that was completed on the day of Ms. Niebauer's fall, with the incident fresh in each person's mind.

**1. Ms. Niebauer's Testimony**

Ms. Niebauer testified that on February 12, 2003 she went to Swain's General Store to mail some letters at the Post Office, which

was located at the back of the store.<sup>41</sup> She was wearing a black skirt, black tights, black shoes, a black shirt and a grey coat.<sup>42</sup>

She produced the shoes she was wearing when she fell, and they were admitted as Plaintiff's Exhibit 1.<sup>43</sup> The shoes had rubber soles with traction ridges going across the rubber.<sup>44</sup> She knew they were the shoes she was wearing because she didn't wear them for a long time after her fall due to having a very negative association with them from the fall.<sup>45</sup> She denied wearing high heels into Swain's, and testified that she owned only one pair of high heels, a beige pair with a 1.5- or 2-inch "chunky" heel that she wore to her daughter's wedding.<sup>46</sup>

Ms. Niebauer testified that as she was proceeding through Swain's to the Post Office she put her left foot down and felt

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<sup>41</sup>RP 133

<sup>42</sup>RP 134-135

<sup>43</sup>See RP 135-136, 138

<sup>44</sup>RP 137

<sup>45</sup>RP 136-138; See also RP 198, Ms. Niebauer denies wearing a shoe with a small heel.

<sup>46</sup>RP 138

something under her shoe that caused her to slip, but she had no time to react and she fell immediately, severely injuring her left ankle.<sup>47</sup>

The first person to come help Ms. Niebauer was a young male employee named Tim Gronseth.<sup>48</sup> He asked what happened, and when Ms. Niebauer said she had slipped on something he began picking up items off of the floor including a little ball and six or seven little plastic hooks.<sup>49</sup> He asked if either of those objects were what she had slipped on, and when she saw the hooks she knew that was what she had felt under her shoe.<sup>50</sup>

Another employee, Brandi Hamon, then arrived to assist Ms. Niebauer.<sup>51</sup> Ms. Niebauer knew Brandi Hamon from chatting with her on numerous occasions in the store.<sup>52</sup> Ms. Niebauer was lying on the floor in pain.<sup>53</sup> She put her hand down to adjust her position and

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<sup>47</sup>RP 141

<sup>48</sup>RP 143 (Mr. Gronseth was not called as a witness at trial)

<sup>49</sup>RP 143

<sup>50</sup>RP 143-144

<sup>51</sup>RP 144

<sup>52</sup>RP 144

<sup>53</sup>RP 146

felt another plastic hook under her hand.<sup>54</sup> She found two in her vicinity on the floor and put them in her pocket.<sup>55</sup>

## **2. Swain's Employee Jodi Hellman's Testimony**

Jodi Hellman testified that she saw Ms. Niebauer fall, although a clothing display was partially obstructing her view.<sup>56</sup> She stated that the shoes Ms. Niebauer claimed she was wearing, Plaintiff's Exhibit 1, were not the same type of shoe Ms. Niebauer was wearing on the date of her fall.<sup>57</sup> Rather, Ms. Niebauer had on shoes with higher heels, which were worn through on the heel such that the cobbler's nail stuck out on the bottom.<sup>58</sup> Ms. Hellman testified that she was the first to respond to the scene when Ms. Niebauer fell, along with Brandi Hamon, and that Tim Gronseth was not present.<sup>59</sup>

## **3. Swain's Supervisor Penney Allen's Testimony**

Penney Allen testified that she assisted Ms. Niebauer after her

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<sup>54</sup>RP 146

<sup>55</sup>RP 146, 194

<sup>56</sup>RP 225-226

<sup>57</sup>RP 232

<sup>58</sup>RP 232-234

<sup>59</sup>RP 319, 226, 231, 236-237, 267

fall, along with the store manager, Jim Reynolds, and Brandi Hamon.<sup>60</sup> She was certain Jim Reynolds was present.<sup>61</sup> She did not recall Jodi Hellman nor Tim Gronseth being there. She retrieved an emergency response form to record each witness' account. In addition to questioning Ms. Niebauer about what happened, she recalled Brandi Hamon, Jim Reynolds and herself completing statements on the form.<sup>62</sup>

Ms. Allen testified that the shoes Ms. Niebauer submitted as Plaintiff's Exhibit 1 did not appear to be the shoes she was wearing when she fell.<sup>63</sup> Rather, she was wearing a sling-back pump-style shoe with a spiked heel that looked like an inverted golf tee.<sup>64</sup> She also recalled that Ms. Niebauer was wearing a dark pink outfit with a black and pink scarf.<sup>65</sup>

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<sup>60</sup>RP 96

<sup>61</sup>RP 118-119

<sup>62</sup>RP 97-99 (emergency response form is also referred to as an incident report)

<sup>63</sup>RP 102

<sup>64</sup>RP 102, 113

<sup>65</sup>RP 102-103

#### **4. Swain's Manager Jim Reynolds**

Mr. James Reynolds, Jr., aka Jim Reynolds, was the manager of Swain's at the time of Ms. Niebauer's fall. He testified that he was out of town on February 12, 2003, on a buying trip in Las Vegas, and did not witness Ms. Niebauer's fall.<sup>66</sup>

#### **5. Swain's Employee Brandi Hamon**

Brandi Hamon testified that she assisted Ms. Niebauer after her fall, along with Jodi Hellman, Tim Gronseth, and possibly Penney Allen.<sup>67</sup> Ms. Hamon recalled that one of Ms. Niebauer's shoes had apparently come off in her fall, and that she picked up the shoe and handed it to Ms. Niebauer.<sup>68</sup> She described it as a rubber-soled flat shoe with normal traction.<sup>69</sup> She never saw any nails coming out of the shoe.<sup>70</sup> She agreed that the shoes Ms. Niebauer claimed to be wearing, Plaintiff's Exhibit 1, appeared to be the same type of shoe Ms. Niebauer was wearing when she fell.<sup>71</sup>

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<sup>66</sup>RP 56-57

<sup>67</sup>RP 20

<sup>68</sup>RP 24

<sup>69</sup>RP 24

<sup>70</sup>RP 25

<sup>71</sup>RP 25

The numerous discrepancies in the eyewitness accounts, only a few of which are highlighted above, served to confuse the jury and create questions and doubts about Ms. Niebauer's credibility which could have been easily erased with the production of the incident report.<sup>72</sup> That report, with the accounts of each employee and Ms. Niebauer recorded immediately after the accident, could have eliminated the questions regarding which employees were actually present, what type of shoe Ms. Niebauer was wearing, and whether there was any debris on the floor. Instead, the report was lost, and in the years leading up to the trial memories faded, resulting in contradictory testimonies that made Ms. Niebauer's version of the event unnecessarily appear suspect.

The trial judge did not appear to appreciate the importance of the missing incident report. In his ruling denying the proposed jury instructions on spoliation he stated that such an instruction "would overemphasize the fact that there's an incident report missing which ... would have been useful probably in cross-examining. But, ... it

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<sup>72</sup>The witnesses' testimony also varied on whether the plastic hooks appeared frequently on the floor or were used at Swain's at all, who called the ambulance for Ms. Niebauer, whether Ms. Niebauer's ankle appeared swollen, whether her feet fit in her shoes, and numerous other facts. *See*, RP 14-52, 55-90, 92-117, 122-207, 217-280.

itself probably– it wouldn't have been admitted into 'evidence' anyway."<sup>73</sup>

The opportunity to cross-examine the store employees on the accuracies of their recollections with a piece of documentary evidence was a huge loss to Ms. Niebauer's case. Her claims were only as strong as her credibility as a witness. The presence of the incident report could have reinforced her version of events, but its absence led to questions and doubts about her credibility, and gave an unfair advantage to Swain's at trial. A corrective instruction could have leveled the playing field.

**C. Swain's Explanation for Its Non-Production of the Incident Report Is Not Satisfactory and Is Highly Suspicious**

The store manager, Mr. James Reynolds, Jr. testified that it was the practice of Swain's to complete an incident report in the event that a customer suffered an injury on the premises, and that such report would contain the date, the customer's name, the names of witnesses and an area for each witness and/or employee to write down the events as they had witnessed them.<sup>74</sup>

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<sup>73</sup>RP 302

<sup>74</sup>RP 57

Mr. Reynolds recalled seeing an incident report regarding Ms. Niebauer's fall when he returned from his business trip, and that it contained all of the standard information.<sup>75</sup> According to Mr. Reynolds, such reports are generated in the ordinary course of business and placed in an incident log, which consisted of a manila file folder that would have been filed and stored in the store's file cabinet.<sup>76</sup>

Ms. Allen, a store supervisor, testified that she completed an incident report regarding Ms. Niebauer's fall and turned it in to Mr. Reynolds.<sup>77</sup> She reiterated that the incident report would have been filed in a green hanging file folder with all of the other incident reports and incident report logs in Jim Reynolds' office or in the store's vault room.<sup>78</sup>

The only justification given for Swain's failure to produce the incident report came very briefly from Mr. Reynolds. He testified

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<sup>75</sup>RP 58

<sup>76</sup>RP 58-59

<sup>77</sup>RP 104, 114

<sup>78</sup>RP 104

that at the time of Ms. Niebauer's accident, Swain's was one entity, but the company split sometime in 2004.<sup>79</sup>

...[D]uring that time there was a lot of co-mingling of documentation and there was a lot of interaction between the, the office staff separating documentation between the two, the two corporations. And, um, it's my belief that that [sic], um, information on this fall was misplaced or, or sent to Port Angeles at that time, or something...<sup>80</sup>

Mr. Reynolds acknowledged that a request was made for the incident report and stated that he had tried to find it.<sup>81</sup> He stated that because of the corporate split, file cabinets had been transferred to Sequim, and Port Angeles.<sup>82</sup> He called the Port Angeles store general manager to ask him to look for the incident report, and said "we looked pretty hard for it."<sup>83</sup> He said that all stores and file cabinets were searched.<sup>84</sup>

The business entity split was the sole justification given for not being able to locate and produce the incident report regarding

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<sup>79</sup>RP 82

<sup>80</sup>RP 82

<sup>81</sup>RP 83

<sup>82</sup>RP 83

<sup>83</sup>RP 83

<sup>84</sup>RP 83

Ms. Niebauer's fall. In argument at trial regarding the proposed instructions on spoliation Plaintiff's counsel pointed out the following:

[E]vidence has been presented that tends to show that the incident report from Ms. Niebauer's fall in Swain's General Store was in the exclusive possession of Swain's General Store, that it would naturally be in Swain's interest to produce the incident report and that Swain's has failed to produce it. In such circumstances, the law presumes that such evidence would be unfavorable to Swain's General Store and you are bound by that presumption unless you find by a preponderance of the evidence otherwise.<sup>85</sup>

The Defendant's arguments in response to the proposed instruction were completely without merit. Defense counsel stated that due to the business breakup that there was no proof that the incident report was in the exclusive possession of Swain's General Store at the time it was requested, and furthermore that there was no prejudice to the Plaintiff's case.<sup>86</sup>

Contrary to what was asserted, the evidence shows that even with the corporate split, Mr. Reynolds was able to have all store locations and file cabinets searched, in Port Townsend, Port Angeles

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<sup>85</sup>RP 299

<sup>86</sup>RP 299

and Sequim.<sup>87</sup> Therefore, the document was never out of reach of the Defendant Swain's. And even if it was out of Swain's General Store control, that was due to the fact that Swain's had sent the file away. Either way, Swain's is not without fault. The document should have been in the files, and there is no justification for not producing the missing document, other than bad faith or a "disregard" of the importance of the evidence.<sup>88</sup> Also contrary to what defense counsel argued, the questions raised by the missing report regarding Ms. Niebauer's claims and her credibility were extremely prejudicial to her case.

Swain's gave no satisfactory justification for not producing the incident report that could have cleared up numerous questions of fact for the jury. This failure, combined with the importance of Ms. Niebauer's credibility to her case, gave an unfair advantage to the Defendant at trial, for which Swain's should have been sanctioned. The Plaintiff's proposed jury instructions regarding the negative inference to be drawn from the missing evidence were an appropriate

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<sup>87</sup>RP 83

<sup>88</sup>*Compare, Henderson v. Tyrrell*, 80 Wn. App. at 609 (citations omitted) and *Homeworks Construction, Inc. V. Wells et al.*, 133 Wn.App 892, 138 P.3d 654 (2006)

remedy, and the Court's failure to give the instructions was an abuse of discretion.

**D. Fees and Costs**

Pursuant to RAP 18.1, Appellant requests fees and costs for copies of the clerk's papers; preparation of this brief and any reply brief if filed (pursuant to RAP 14.3(b)); transmittal of the record on review; the filing fee; such other sums as provided by statute.

**VI. CONCLUSION**

Ms. Niebauer's credibility was crucial to her case. The incident report created after Ms. Niebauer's fall would have cleared up numerous discrepancies in testimony on important disputed facts, all of which must have left numerous questions in the jury's mind as to what actually happened on the date of her fall and whom to believe. Swain's excuse for not producing the report was not satisfactory. Therefore, Swain's should have been sanctioned for failing to preserve the evidence through Plaintiff's proposed instructions on spoliation and the negative inference to be drawn therefrom. Given the importance of the evidence and the poor excuse of Swain's for not producing the report, the trial court's

decision denying the proposed instructions was an abuse of  
discretion.

Dated this 19<sup>th</sup> day of July, 2007.

Respectfully submitted,

  
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