

original

No. 36088-8-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

Nikki Wilson, Appellant,

v.

Lawrence Frye, Guy Casey, and Gil Corporation
d.b.a. Friendly Duck Restaurant, Respondents.

v.

Pamela Peterson, Appellant,

v.

Lawrence Frye, Guy Casey, and Gil Corporation
d.b.a. Friendly Duck Restaurant, Respondents.

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

BRIEF OF APPELLANTS

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A. Assignments of Error

Assignments of Error

1. The trial court erred in allowing Blackburn to cross-exam Peterson as to any other altercations she was involved in since the night of the altercation at the Friendly Duck, overruling Peterson's objection to the introduction of specific conduct to show a propensity to get into fights.

2. The trial court committed reversible error when it allowed Blackburn to cross-exam Peterson about details of an incident that occurred at a bowling alley, subsequent to the altercation at the Friendly Duck, to show Peterson had a propensity to get into fights, over the objection of counsel.

3. The trial court committed reversible error when it allowed Wilson to be cross-examined about fights with other men prior to the altercation at the Friendly Duck, over the objection of counsel.

4. The trial court committed reversible error when it allowed Blackburn to impeach Wilson's character by introducing evidence of an incident which occurred two years after the altercation at the Friendly Duck, over the objection of counsel.

5. The trial court committed reversible error when it allowed Wilson to be impeached, through the introduction of extrinsic evidence of an arrest for assault, over the objection of counsel.

6. The trial court erred in denying Wilson's pretrial motion to compel production of security footage intentionally deleted from the hard drives of the Friendly Duck's computers. The motion was filed on December 21, 2005, and denied in open court on January 13, 2006.

7. Wilson and Peterson contend that the trial court erred in admitting evidence that violated Washington public policy against tampering with physical evidence, when it failed to exclude edited security footage of the altercation which occurred on the premises of the Friendly Duck. This is an issue of first impression in the State of Washington.

8. Wilson and Peterson contend that the trial court erred in admitting evidence that violated Washington public policy which requires a person who witnesses the commission of a violent offense to report it to law enforcement as soon as possible, when it failed to exclude the edited security footage. This appears to be an issue of first impression in the State of Washington.

Issues Pertaining to Assignments of Error.

No. 1. Blackburn cross-examined Peterson concerning any altercations she may have been involved in, that occurred after the incident at the Friendly Duck, in order to show Peterson had a propensity to get into fights. The trial court overruled Dickens' objection to the questions. Do the rules of evidence allow the introduction of specific instances of conduct of a witness, for purposes of showing the witness had a propensity to act in a certain fashion?

(Assignment of Error 1)

No. 2. Blackburn cross-examined Peterson about an incident that occurred at a bowling alley in order to show Peterson had a propensity to get into fights. The trial court overruled Dickens' objection. Do the rules of evidence allow the introduction of specific instances of conduct of a witness, for purposes of showing the witness had a propensity to act in a certain fashion? (Assignment of Error 2)

No. 3. Blackburn was allowed to cross-examine Wilson about fights with other men that may have occurred before the altercation at the Friendly Duck, in order to show she had a propensity to get into fights. The trial court overruled Dickens' objection. Do the rules of evidence allow the

introduction of specific instances of conduct of a witness for the purpose of showing she had a propensity to get in fights? (Assignment of Error 3)

No. 4. Blackburn and Froehling were allowed to cross-examine Wilson about an incident which occurred two years after the altercation at the Friendly Duck, in which Wilson was arrested for assault. Do the rules of evidence allow the introduction of specific instances of conduct of a witness for the purpose of showing she had a propensity to get in fights? (Assignment of Error 4)

No. 5. Blackburn and Froehling were allowed to use a Declaration for Determination of Probable Cause to impeach Wilson's credibility. Do the rules of evidence allow the introduction of extrinsic evidence, other than conviction of a crime, for the purpose of attacking a witness' credibility? (Assignment of error 5)

No. 6. Did the trial court err and abuse its discretion in denying Wilson's pretrial motion to compel production of the security footage Dong Kim, the owner of the Friendly Duck, intentionally deleted from his computer? (Assignment of Error 6)

No. 7. Kim deleted security footage of events leading up to and following the altercation between Peterson, Wilson, and Frye. Does Washington public policy against tampering with evidence, and fundamental justice,

require the exclusion of the edited security footage, in order to prevent Kim from profiting from the destruction of evidence of the commission of a felony on his premises? (Assignment of Error 7)

No. 8. Does Washington public policy requiring persons who observe the commission of a violent offense to report it to law enforcement, and fundamental justice, require the exclusion of the edited security footage? (Assignment of error 8)

No. 9. Is the introduction of evidence of alleged misconduct by Peterson that is not related to truthfulness, more prejudicial than probative? (Assignments of Error 1, 2, 3, 4, and 5)

No. 10. Is the introduction of evidence of alleged misconduct by Wilson that is not related to truthfulness, more prejudicial than probative? (Assignments of Error 1, 2, 3, 4, and 5)

B. Statement of the Case

a. Injuries to Wilson and Peterson

On February 5, 2004 Nikki Wilson received word from her mother that her youngest brother was involved in a serious car accident, and was hospitalized. She left work early and made arrangements to fly to Arizona the following day (RP at 340-341).

Holly Hunter, the bartender in charge of the lounge during the altercation, came on duty at 6:00 p.m. Wilson and Stotts were already seated when she arrived. (Ex 27 admitted at RP 171, RP 258).

At approximately 6:40 p.m. Peterson arrived at the Friendly Duck and joined Wilson and Stotts at their booth. When she arrived Casey was sitting at a table across the bar from them. At approximately 7:30 he was joined by Mike Gibbons. Shortly, thereafter, Lawrence Frye entered the Friendly Duck, and sat beside Casey (RP 199-202).

According to Wilson, Peterson, and the patrons interviewed by the police, Frye became verbally abusive toward Wilson, Peterson, and Stotts (RP 174-176, Ex 27). At one point Hunter took a drink out of Frye's hand and asked him to leave the premises, which he refused to do (RP 287-288). Thereafter, Wilson, Peterson, and Stotts paid their tab and attempted to leave the lounge. Frye blocked their exit. An altercation broke out (RP 143). During the altercation Wilson suffered a broken jaw, and Peterson was kicked in the mouth. Frye fled the scene.

The Emergency Medical Response Team was in the lounge treating Wilson for her injuries, when Patrolman Alred arrived (RP 130-132).

b. Testimony of Dong Kim

Hunter told Kim that a fight broke out at the Friendly Duck. She informed him that a patron's jaw was broken during the fight. Prompted by that news he watched the original security footage of the altercation between the parties. After viewing the footage he failed to notify the police he was in possession of the security video.

The Friendly Duck is a restaurant and lounge. The security cameras run 24 hours a day. They record what takes place in the lounge, as well as who enters and leaves the premises.

Kim kept the original, unedited, videos for four days. Then he decided to cherry pick which footage he'd keep, thereby determining what evidence he would make available to police. When he edited the evidence he deleted the parts of one video which showed the events leading up to the commencement of the fight in the lounge, including the actions of his bartender. Then he erased the footage of Frye entering the restaurant, and him fleeing the restaurant. (RP 254-258).

Furthermore, he failed to provide police with a business record, or bar log detailing the events that happened that night. A bar log which would have normally been prepared by Hunter. However, he stated on this occasion he didn't have her prepare one (RP 259-260).

c. Testimony of police officers

Patrolman Alred testified when asked if he would want to know what had happened prior to the point at which the edited security footage begins, said, "Absolutely." (RP 152).

When discussing the missing footage, Detective Davis stated, "I would like to have seen that if I'd had an opportunity." (RP 164-166).

The testimony of Guy Casey at trial was that Wilson and Peterson had approached their table first. He also testified that they had engaged in a mutual melee of throwing coasters and ice, back and forth with Frye. This conduct is alleged to have occurred immediately prior to the altercation seen on the edited version of the security footage. However, this testimony is inconsistent with the information he provided Detective Davis during their interview, three years earlier. The missing footage would have established without a doubt which version of events was the truth. (RP 435-437; Ex 27 admitted at RP 171)

d. Proceedings in the trial court

(i) Impeachment of Pamela Peterson through the use of specific conduct not related to truthfulness.

At trial, Peterson was asked about altercations she'd been in since the fight at the friendly Duck. She answered, before Dickens was able to

interpose an objection based on ER 608. Blackburn proffered the evidence citing ER 405, 607, and 608 claiming that they authorized her to impeach Peterson's character based on her "propensity to get in fights." Froehling joined in the proffer, claiming the questions were germane to her injuries and damages. The trial court overruled the objection stating that, "She already answered the question. The door is open." (RP 239-242).

Then Peterson was questioned concerning what happened during her 'next altercation after the barroom night'. Dickens objected. The trial court overruled the objection, stating that "Well, if there is a propensity, she is allowed to explore that." (RP 243-245).

(ii) Impeachment of Nikki Wilson through the use of specific conduct not related to truthfulness.

Wilson was asked about altercations she'd been in with men before the night of 'this incident'. Dickens objected. The trial court overruled the objection 'in accordance to the previous discussion' on propensity (RP 364).

Next Wilson was questioned about 'any altercations since the night of the Friendly Duck with any men?' Dickens objected. The trial court

overruled the objection ruling that ‘the defense has a right to bring out mitigating factors, if they are germane.’ (RP 366-369).

Then the trial court allowed Wilson to be impeached through the use of a Declaration for Determination of Probable Cause. The document concerned an incident that occurred two years after the altercation at the Friendly Duck. Dickens’ objected, arguing that extrinsic evidence was being used to show evidence of specific conduct. The trial court overruled the objection, stating “Now, it’s into impeachment. Go ahead.” (RP 370-379).

(iii) Admission into evidence of edited surveillance footage, in which material evidence concerning the commission of a felony was intentionally deleted.

On December 21, 2005 Wilson filed a pretrial motion to compel production of willfully and wrongfully deleted data from the Friendly Duck’s hard drives. Neither Boyle (previous attorney for Friendly Duck), nor Froehling prepared an opposing brief. The motion was argued on January 13, 2006 (CP 39-51). The motion was denied.

At trial a juror asked Kim to “describe what was on the part of the tape that was erased before the part we have seen.” (RP 276; CP 52). He responded, “I don’t remember.” (RP 277).

Casey testified that Wilson, Peterson, and Frye were throwing coasters and ice at each other prior to the point at which the edited video begins. This contradicted his prior statements to Detective Davis that it was Frye who started the altercation by using provocative words (Ex 27 admitted at RP 171, RP 433-467).

C. Summary of Argument

1. The trial court should not have admitted the testimony of Peterson concerning specific acts over the objection of Dickens.

Peterson alleges that the trial court committed reversible error when it allowed Blackburn to impeach her credibility by introducing evidence of her alleged propensity to get into fights.

2. The trial court's admission of evidence of allegations of specific misconduct by Wilson was more prejudicial than probative

Further, Wilson alleges that the trial court committed reversible error when it allowed Blackburn and Froehling to impeach her credibility by introducing evidence of her alleged propensity to get into fights. And, she contends that the trial court committed reversible error when it allowed Blackburn

and Froehling to introduce extrinsic evidence of her arrest for assault.

As a general rule, character evidence is not admissible to prove that a person acted in conformity with a character trait on a particular occasion. ER 404(a). While evidence of a victim's character may be admitted under ER 404(a) (2), the evidence may be introduced in the form of specific acts only if the requirements of ER 405(b) are met. Likewise, evidence of a witness's character may be admitted under ER 404(a) (3) only if the evidence meets the requirements of ER 607 and 608. Finally, evidence of specific acts of conduct is inadmissible to prove the character of a person, and whether the person acted in conformity with that character. ER 404(b), **State v. Bell**, 60 Wn.App. 561,564, 805 P.2d. 815 (1991).

3. Washington public policy prohibits a business owner from tampering with material evidence of a crime to avoid civil liability; thereby requiring exclusion of the edited security footage

Public policy and fundamental justice requires the exclusion of the edited videotape to prevent the Friendly Duck from profiting from the intentional destruction of evidence of the

commission of a felony on its premises. Further, the admission of the evidence is more prejudicial than probative given the conflicting testimony of the witnesses, and Kim's inability to recall what he viewed on the missing footage.

Under the totality of the circumstances surrounding Kim's destruction of the security footage, the only rational inference one can make is that Kim's destruction of the footage indicates that he believed it threatened the Friendly Duck's legal position in the event of a lawsuit, and he needed to cover it up.

D. Argument

The trial court should not have admitted the testimony of Peterson concerning specific acts over the objection of counsel.

Peterson contends that the purpose of introducing testimony concerning allegations of fights she'd been in, other than the one at issue, was for the sole purpose of impugning her character and discrediting her in the eyes of the jury. No showing was made by Froehling or Blackburn that the prior or subsequent altercations she was queried about had any effect on Peterson's disability. Therefore, the questions were misleading, in that they improperly implied that there was a superseding or intervening cause which contributed to her injuries. And

they invited the jury to engage in unfettered speculation about the cause of her injuries (RP 239-242).

Rule 608. Evidence of Character and conduct of witness

Specific Instances of Conduct

Rule 608 (b): Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of a crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which the character the witness being cross-examined has testified.

This rule allows the discretion of the court to be exercised in allowing this evidence to be inquired into on cross examination only if the specific instance is "probative of truthfulness or untruthfulness", which it wasn't in the instant case.

This appellate court has repeatedly stated that evidence of prior misconduct should not be admitted to impeach a witness. In **State v. Harper**, 35 Wn.App. 855, 861, 670 P.2d 296 (1983) this court in a case involving indecent liberties, stated the trial court properly refused to permit the defendant to cross-examine the victim about her prior check forgeries, for which she had never been charged or convicted. The court

held, "Evidence of previous forgeries attacks the witness's reputation for honesty; it does not attack her veracity. Accordingly, evidence of these previous acts of misconduct should not be admitted." And the court also stated that "specific instances of the witness's misconduct may not be proved by extrinsic evidence."

Additionally, in **Dickerson v. Chadwell, Inc.**, 62 Wn.App. 426, 814 P.2d 687 (1991), a bar patron brought action against the bar owner for injuries sustained in an altercation allegedly caused by the bar's negligent over service of another customer. After the jury entered a special verdict that the bar owner was not negligent, the Superior Court, King County, granted patron's motion for new trial, and the owner appealed.

The Court of Appeals, held that: (1) evidence of prior instances when patron slapped his girlfriend should not have been admitted; and (2) it was reasonably probable that erroneous admission of the slapping evidence affected the outcome of the trial. Likewise, in the instant case, the trial court admitted evidence of prior fights to be used for showing Ms. Wilson and Ms. Peterson had a propensity for getting into fights, and to thereby prove by inference, that it was more likely that they started the fight at the Friendly Duck. ER 404 (b) prohibits use of prior bad acts for this purpose.

Breimon v. General Motors, 8 Wn.App. 747, 509 P.2d 398

(1973) is a products liability action in which Mr. Breimon suffered permanent paraplegia, when his vehicle left the road in North Dakota, and he was thrown out. He had purchased the automobile in Vancouver, Washington. He claimed that the manufacturer was responsible for his injuries because of breach of warranty and negligence.

In **Breimon** the defense was precluded from introducing testimony by Mr. Breimon's ex-wife that, "He always was a fast driver." "And he always drove that way, dangerously." Even though a statement was previously made by Mr. Breimon that he never drove fast, the evidence was deemed inadmissible. Further, the court noted that a previous act of misconduct should not be admitted in a civil action to impeach a witness. **Id.** at 754.

Rule 405 (b) Specific Instances of Conduct.

In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

In civil cases, proof of specific instances under Rule 405 as proffered by Ms. Blackburn is limited to cases in which character is "in issue"; i.e., cases in which a person's character is an essential element of a

claim or defense. Neither, Wilson nor Peterson's character was an essential element of either of their claims.

However, even if the evidence of other fights was admissible, it should have been excluded under Rule 403, because any probative value is outweighed by the danger of unfair prejudice.

The trial court's admission of evidence of allegations of specific misconduct by Wilson was more prejudicial than probative

Likewise, Ms. Wilson contends that the purpose of introducing testimony she'd been in fights with her ex-husband, brothers, and sisters prior to the altercation at the Friendly Duck was for the sole purpose of impugning her character and discrediting her in the eyes of the jury (RP 363-364).

Further, the attack on her credibility through the admission of testimony concerning her arrest for an assault against a paramedic that occurred two years after the event at the Friendly Duck was also introduced for the purpose of maligning her character. Ms. Blackburn indicated she was going to introduce evidence "that we are not responsible for that mouth and subsequent problems with it." However, the evidence she introduced by way of impeachment failed to establish that Ms. Wilson's mouth was injured during the arrest. Rather it invited the jury to

speculate about the possibility her jaw may have been injured as a result of the arrest (RP 366-369). No corroborating evidence was offered to establish that Ms. Wilson's jaw was injured during the arrest.

Even though Ms. Wilson answered no to Ms. Blackburn's question concerning whether she had been in an altercation in which her jaw was injured, the trial court allowed Ms. Blackburn to introduce a Declaration for Determination of Probable Cause to impeach Ms. Wilson's credibility (RP 370-371). Then Mr. Froehling continued to use the document to conduct his cross-examination and impeachment of Ms. Wilson (RP 372-373).

Washington public policy prohibits allowing a business owner to tamper with material evidence of a crime to avoid civil liability

A central issue at trial concerned how the altercation that resulted in injuries to Ms. Wilson and Ms. Peterson commenced. According to Ms. Peterson's witnesses and the interviews recorded in the police report it was primarily Mr. Frye's conduct. Contrariwise, Mr. Frye's witnesses state it was Ms. Peterson and Ms. Wilson who started the altercation. The missing footage clearly provides the best evidence of how the altercation commenced.

Further, the deleted footage covering the entrance to the Friendly Duck showed Mr. Frye fleeing the scene of the crime. If this video was available for the jury to see, it would support Wilson and Peterson's version of the events.

Mr. Kim's intentional destruction of the footage that recorded the events preceding, and following the altercation prejudiced Ms. Wilson and Ms. Peterson's ability to have a fair trial. Furthermore, his actions, cast in their most charitable light, are an affront to the integrity of the judicial system. Knowing full well the significance of the taped recording of a violent assault committed inside the Friendly Duck, he willfully tampered with the evidence in order to gain an investigative advantage in any subsequent civil litigation; even though he knew his patron was seriously injured. And he did this with the full knowledge that there was an official police investigation in progress (RP 265-271).

In addressing an error raised, by the State of Washington, for the first time on review, the court in **State v. Card**, 48 Wn.App. 781, 784, 741 P.2d 65 (1987), stated that "Washington courts have allowed issues to be considered for the first time on appeal when fundamental justice so requires." In **Card** the state contended for the first time on appeal, that the trial court erred when it did not conduct a hearing for return of unclaimed

property to the defendant, under CrR 2.3(e). The state contended that the failure would allow Virginia Card to profit from her crime. The court concluded “public policy and fundamental justice require this court to review these issues.”

Likewise, public policy and fundamental justice require this court to review the issues surrounding a business owner tampering with material evidence of a felony committed against his patrons, on his premises, in order to avoid civil liability. This appears to be an issue of first impression with Washington courts.

In Unigard Security Insurance Company v. Lakewood Engineering & Manufacturing Corporation, 982 F.2d 363, 368 (9th Cir. 1992), the plaintiff insurance company brought subrogation claims against the manufacturer of an electric space heater. The heater allegedly caused a fire that destroyed a boat moored on Lake Union in Seattle, Washington. Investigators for the insurance company concluded that a portable space heater manufactured by Lakewood caused the fire. Unigard paid the claim brought by the insured. Believing that a subrogation claim was unavailable, the Unigard investigator in possession of the heater authorized its disposal.

Two years later, a new lawyer for Unigard, who disagreed with the prior assessment regarding the propriety of a subrogation claim, filed a complaint against Lakewood based on the fire. Lakewood counterclaimed for intentional spoliation of evidence, moved for summary judgment on its spoliation claim, and sought sanctions for spoliation.

The district court found that all evidence regarding the heater and vessel should be excluded and that, absent this evidence, Unigard could not prevail on its claims. Accordingly, it granted summary judgment against Unigard on all claims.

On appeal, the Ninth Circuit affirmed the grant of summary judgment. The **Unigard** court held the district court was within its discretion in determining that a rebuttable presumption was insufficient to cure the prejudice to the defendant. Accordingly, the appellate court held that the district court properly excluded evidence as an exercise of its inherent powers, when it concluded that evidence should be excluded and, given that defendants could not establish a prima facie case without this evidence, summary judgment was proper.

The appellate court concluded that a court has the inherent power “to exclude testimony of witnesses whose use at trial . . . would unfairly prejudice an opposing party.” **Id.** at 368. And the trial court erred in

declining to exclude expert testimony as a sanction because the allegedly offending party had not violated any court order. The court noted that courts have inherent power to sanction parties who are at fault in destroying evidence prelitigation.

Under Washington's tampering with evidence statute, it is a gross misdemeanor to tamper with physical evidence.

RCW 9A.72.150. Tampering with physical evidence

- (1) A person is guilty of tampering with physical evidence if, having reason to believe that an official proceeding is pending or about to be instituted and acting without legal authority, he:
 - (a) Destroys, mutilates, conceals, removes, evidence if, "having reason to believe that an official proceeding is pending or about to be instituted," the person "destroys, mutilates, conceals, removes, or alters physical evidence with the intent to impair its appearance, character, or availability in such pending or perspective official proceeding; or . . .
- (2) "Physical evidence" as used in this section includes any article, object, document, record, or other thing of physical substance."
- (3) Tampering with physical evidence is a gross misdemeanor.

Additionally,

RCW 9.69.100 Duty of witness of offense against child or any violent offense-Penalty

- (1) A person who witnesses the actual commission of:

(a) a violent offense as defined in RCW 9.94A.030 or preparations for the commission of such offense; . . .

(c) . . . shall as soon as reasonably possible notify the prosecuting attorney, law enforcement, medical assistance, or other public official.

(4) Failure to report as required by subsection (1) of this section is a gross misdemeanor. . .

These statutes demonstrate that Washington has a public policy which promotes the preservation of evidence of violent offenses against members of the public. The very policy that Kim violated when he tampered with the evidence, and delayed reporting to police he was in possession of video of the assault.

Conceding the testimony of Mr. Casey is at odds with the testimony of Ms. Peterson and Ms. Wilson, the missing video footage takes on even greater importance. The destruction of the footage was knowing and purposeful, with a view towards precluding a jury from examining its contents. The materiality and value of the suppressed evidence was critical to the Wilson and Peterson's ability to prepare their case for trial fully and fairly.

Wilson and Peterson assert that the lost evidentiary material would have supported the facts as set forth by the witnesses in the police report.

Further, the missing evidence would have substantiated their version of the events, while rebutting the account given by Mr. Casey at trial.

The traditional method for remedying spoliation of evidence in Washington is through an adverse inference instruction. However, in the instant case, as in **Unigard**, this remedy is inadequate.

Excluding the edited tape would serve to deter other businesses or individuals that might be tempted to engage in such conduct in the absence of such a deterrent. It would also promote the accuracy of the fact-finding process. Mr. Kim's conduct was willful, in bad faith, and designed to prejudice the case of the Wilson and Peterson in the event they brought a lawsuit (RP 254-258), in spite of his claims to the contrary. This observation is bolstered by the fact that he intentionally failed to have Ms. Hunter prepare a bar report detailing the incident (RP 259-260), even though preparation of the bar report was a normal business practice. And in response to Ms. Blackburn's questioning he made a self serving claim that he didn't know he was going to be sued (RP 263).

Finally, the probative value of the destroyed evidence to Ms. Wilson and Ms. Peterson's case was critical, because it established among other things the following: (1) the action and inaction of the employees of the Friendly Duck during the events that led up to the commencement of

the altercation; (2) the timeline between when they entered the lounge and the commencement of the altercation; (3) the amount of time the employees of the Friendly Duck had to intervene in the escalating situation between the parties; (4) the fact that Wilson and Peterson never threw any ice cubes or coasters at Mr. Casey or Mr. Frye, (5) the condition of Mr. Frye upon entering the restaurant, (6) how and when Mr. Frye and Mr. Gibbons left the Friendly Duck, and (7) the physical condition of Ms. Wilson and Ms. Peterson immediately following the altercation.

The adverse jury inference to sanction spoliation of evidence in this case is inadequate, because any adverse presumption as a sanction pales next to the impact of the edited videotape.

Wilson's pretrial motion to compel

Wilson moved the trial court for an order appointing an independent computer forensics expert to retrieve the missing footage from the Friendly Duck's hard drive, and to order the Friendly Duck to bear the cost of retrieving the wrongfully deleted material. If the motion had been granted it would have had the result of restoring Wilson to the same position she would have been in absent the wrongful destruction of evidence by the Friendly Duck (CP 39), thereby allowing her to properly prepare for trial.

The depositions of Dong Kim, and Lawrence Frye were submitted to the trial court as exhibits (CP 41-42). The court was apprised of Frye's version of events that led to the commencement of the altercation. The court was also apprised of the materiality of the evidence Wilson believed was deleted (CP 42-43).

Spoliation is the intentional destruction of evidence. Once the duty to preserve data arises, a party must preserve evidence that is relevant. The trial court should have engaged in a two-part analysis set forth in **Henderson v. Tyrrell**, 80 Wash.App. 592, 910 P.2d 522 (1996). First, it should have determined the importance of the missing evidence. Then it should have determined if the person who destroyed the evidence did so in bad faith, or conscious disregard of the importance of the evidence. Once the court decided that the facts in this case satisfied both prongs of the analysis set forth in **Henderson**, it should have imposed a sanction sufficient to insure that the Friendly Duck did not profit from its misconduct. The trial court has broad discretion in fashioning an appropriate sanction for discovery abuse, including the exclusion of evidence. **State v. Physicians Ins. Exch. & Ass'n v. Fisons Corp.**, 122 Wn.2d 299, 339, 858 P.2d 1054 (1990).

Fisons imposed the following burdens on a party responding to a request for production of documents:

- (1) Upon receipt of a request for production, a party has a duty to conduct a reasonable investigation to determine whether the document or other item exists, before denying that it exists;
- (2) In the event of a dispute regarding the scope of discovery the burden is on the party resisting discovery to obtain a protective order, rather than on the party seeking discovery to obtain an order to compel production.

Civil Rule 37 (b) (2) (A) (B) (C) gives the court a broad range of options when imposing sanctions.

The rule states that the court may enter:

- (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
- (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
- (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party; . . .

Wilson argued that the Friendly Duck had previously failed to comply with a court order issued on September 23, 2005 requiring them to

provide discovery (CP 49). Even so, the trial court denied Wilson's motion to compel.

Furthermore, Wilson and Peterson contend the trial court abused its discretion in failing to compel the Friendly Duck to produce the missing footage, or in the alternative to exclude the edited footage from evidence. In doing so the trial court placed the risk of Kim's erroneous judgment on Wilson and Peterson, rather than on the Friendly Duck where it belonged.

E. Conclusion

Wilson and Peterson respectfully request that this court find that the trial court committed reversible error in allowing the use of specific conduct to impeach their credibility. They also request that the lower court be directed to exclude the edited security footage from evidence. And they request that the case be remanded for a new trial.

August 26, 2007

Respectfully submitted,



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COURT OF APPEALS DIVISION II
STATE OF WASHINGTON

Nikki Wilson, Appellant,)	
)	
vs.)	No. 36088-8-II
)	
Lawrence Frye, et. al.,)	Proof of Service of
Respondents.)	Mailing Brief of
)	Appellants
vs.)	to Counsels of
)	Record
Pamela Peterson, Appellant,)	
)	
vs.)	
)	
Lawrence Frye, et. al.,)	
_____)	

I solemnly affirm that on August 27, 2007, the undersigned mailed the Brief of Appellants by first class U.S. mail, postage prepaid to the following named Attorneys of Record at following addresses:

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