

Would you Please Reconsider?

Betsy Jefferis, Esq.

Although a Motion for Reconsideration is not formally established under the Federal Rules for Civil Procedure, its counterpart is an FRCP 59)(e) motion to alter or amend judgment. Schroeder v. McDonald, 55 F.3d 454, 459 (9th Cir. 1995). Should a Motion for Reconsideration be filed after 28 days from the judgment or it serves as a Motion for Relief from Judgment under FRCP 60, it will be treated as such. Hasbrouck v. Texaco, Inc., 879 F.2d 632 (9th Cir. 1989). The recent case of Fowler v. Walmart is an example that the Court will grant a Motion for Reconsideration when the magistrate judge fails to apply or misapplies relevant law, to which the district judge has the authority to review the magistrate judge's legal conclusions de novo. Fowler v. Wal-Mart Stores, Inc., No. 216CV450JCMGWF, 2017 WL 3174915, at *2 (D. Nev. July 26, 2017).

Initially, plaintiff filed a Motion to Strike was regarding her allegation of Defendant retailer Walmart's spoliation of evidence. "Spoliation" is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in

pending or reasonably foreseeable litigation. See, e.g., United States v. Kitsap Physicians Svs., 314 F.3d 995, 1001 (9th Cir. 2002). "This is an objective standard, asking not whether the party in fact reasonably foresaw litigation, but whether a reasonable party in the same factual circumstances would have reasonably foreseen litigation." Micron Tech., Inc. v. Rambus, Inc., 645 F.3d 1311, 1320 (9th Cir. 2011).

Plaintiff alleged although Walmart had notice of Plaintiff's slip and fall incident near the house and garden aisle of the store, it failed to take photographs of the offending spill in the main cross aisle, which amounted the failure to preserve relevant evidence. See Fowler at 1. Walmart opposed the Motion, stating there was no basis to believe the spill in the main cross aisle was the same substance as in the location where Plaintiff slipped. The Court sanctioned Walmart with an adverse inference jury instruction finding Walmart breached its duty to inspect and photograph the substance a store associate was shown cleaning up in the main cross-aisle as Plaintiff left the store. An adverse inference instruction may be given upon a finding that the evidence was destroyed after a party was on notice of the potential relevance of the evidence to the litigation. Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993). The Court further held the jury

should be instructed they can infer that the substance in the main cross aisle of the store was a part of the same spill in the location that caused Plaintiff's fall. See Fowler at 1.

Walmart filed a Motion for Reconsideration pursuant to LR IB 3-1(b) district judge may affirm, reverse, or modify, in whole or in part, a magistrate judge's order, as well as remand with instructions. In its Motion, Walmart argued that the magistrate judge erred in its finding Walmart was negligent for not taking additional photographs of the foreign substance when the the judge failed to consider whether the untaken photographs were relevant to Plaintiff's claims. See Fowler at 2. Walmart further cited:

"Trial courts have widely adopted the Second Circuit's three-part test, which provides that a party seeking an adverse inference instruction based on the destruction of evidence must establish: (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a culpable state of mind; and (3) that the evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would

support that claim or defense.”

Id. citing Apple Inc. v. Samsung Elecs. Co., 888 F. Supp. 2d 976, 989 (N.D. Cal. 2012); see also McCabe v. Wal-Mart Stores, Inc., No. 214CV01987JADCWH, 2016 WL 706191, at *2 (D. Nev. Feb. 22, 2016).

The Court granted Walmart’s Motion for Reconsideration stating Walmart’s failure to inspect and take photographs of the spill in the main cross aisle does not constitute spoliation of evidence as the law does not impose a duty on Walmart to preserve the spill in the main cross aisle nor take photographs. The Court then denied Plaintiff’s Motion to Strike in its entirety.

Takeaway:

In conclusion, although Courts do not always favor Motions for Reconsideration as they may view this procedural vehicle as a litigant’s “Hail Mary” attempt for a more favorable verdict, it can be a useful device to uphold the justifications of the moving party. The case study above illustrates when indispensable law is not applied at the original motion hearing which results in error, there is clearly a sound basis for filing a Motion for Reconsideration.

ABOUT THE AUTHOR

Betsy Jefferis is an Associate in the Las Vegas, NV office. Betsy specializes in insurance defense, personal injury, professional liability, and general civil litigation. Contact her at: (702) 724-2648 or bjeffers@tysonmendes.com.