

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
(Charlottesville Division)**

CANDISSE REYNOLDS,

Plaintiff

v.

Civil Action No: 3:01CV00016

MASTEC NORTH AMERICA, INC.

and

MASTEC, INC.,

Defendants

**PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR APPROPRIATE
RELIEF FOR SPOILIATION OF EVIDENCE**

Plaintiff, Candisse Reynolds, by counsel hereby submits her Brief is Support of Motion for Appropriate Relief for Spoliation of Evidence.

I. STATEMENT OF FACTS

This case arises out of the transportation of a PVC pipe by an employee of Mastec North America, Inc. (Mastec). Ms. Reynolds' alleges that the pipe was negligently transported causing a portion of the pipe to break and strike her. The portion of the pipe that remained attached to the vehicle is important evidence regarding negligence and the cause of the pipe breaking.¹

A. Mastec's Destruction of Evidence

This accident occurred on the evening of January 11, 2000. The following morning, the pipe was transported to the Mastec office in Culpepper, Virginia. On January 17, 2000, plaintiff's counsel sent

Mastec a certified letter notifying Mastec that the pipe was evidence and it was to preserve the evidence. (See letter attached as Exhibit A with signed receipt). Mastec's administrative assistant, Michele Foreman, testified that she received and read the letter, signed the receipt, showed the letter to her supervisor and forwarded it to Mastec's insurance department. (Foreman deposition at 15-17, attached in pertinent part as Exhibit B). She understood that the pipe was evidence. (Ex. B at 16). She promptly contacted the insurance division of Mastec and advised them that she thought Mastec was going to be sued. (Ex. B at 16). One of Mastec's employees working in the Culpepper shop, William Taylor, was told that the pipe related to the accident and needed to be kept. (Deposition of William Taylor at 16-19 attached as Ex. C). He recalled that the pipe remained intact until around December of 2000. (Ex. C at 20).

Notwithstanding having notice that the pipe was evidence, a Mastec employee cut off all but a few inches of the pipe and discarded the remainder of the pipe in the county dump. (See Mastec's Responses to Plaintiff's Fourth Set of Interrogatories attached as Ex. D and a photograph of remnants of the pipe attached as Ex. E). Mastec then placed this small piece of pipe in a grocery bag and labeled it "evidence."

¹ Plaintiff is in possession of about a dozen small pieces of the pipe that were found in her car after the accident. These pieces of the pipe are of no probative value as to the cause of the accident. In fact Mastec chose not to have its expert even examine these pieces of the pipe.

(See label attached as Exhibit F). Ms. Foreman testified that she received the bag with the cut pipe after receiving the letter from plaintiff's counsel advising Mastec that the pipe was evidence. (Ex. B at 23).

B. Prejudice Caused By The Destruction of the Pipe.

Mastec's destruction of the physical evidence has impaired Ms. Reynolds' ability to prove that the pipe broke because it was negligently secured and transported as opposed to a defect in the pipe. Both plaintiff's and defendant's experts agree that the lack of physical evidence impairs, if not renders it impossible, to formulate opinions about the causes of the failure of the pipe including the forces exerted upon the pipe.

Plaintiff's materials expert, Dr. Dana Elzey, notes in his report that he is unable to determine whether there were pre-existing cracks in the pipe which could have contributed to the accident. (See Dr. Elzey's report attached as Ex. G). Dr. Elzey was also unable to determine the precise point where the pipe broke which is relevant to proving the weight of the unsupported pipe, the forces that would have been applied to the unsupported pipe, and whether the pipe would have broken if it were properly secured.

Mastec's materials expert candidly acknowledges in his report the following limitations as a result of absence of physical evidence:

- * Marking on the pipe are insufficient to identify the model and product type;

- * Details surrounding the causes, manner, and location of the fracture of the pipe can not be ascertained;
- * Physical evidence is insufficient to determine if the pipe would have failed as a result of the manner in which it was secured to the pipe; and
- * Physical evidence insufficient to determine if an exemplar of the pipe would have failed in a similar manner as if it were secured to the truck in the same configuration. (See report of Dr. Ronald Kander attached as Ex. H).

As set forth below, Mastec can not take advantage of their neglect and destruction of the evidence by arguing that the physical evidence is inconclusive to prove any aspect of plaintiff's case.

II. LAW, ARGUMENT, AND POINTS OF AUTHORITY

Federal law of spoliation, not Virginia procedure, controls the imposition of sanctions for spoliation of evidence. *Silvestri v. General Motors, Corp.*, ___ F.3d ___, 2001 WL 1422137 (4th Cir. Nov. 14, 2001) (attached as Exhibit I).

A. Mastec Spoliation of Evidence

Mastec has spoiled the evidence by its failure to preserve the pipe for inspection and trial. "Spoliation is the willful destruction of evidence or failure to preserve potential evidence for another's use in pending or future litigation." *Trigon Insurance Co. v. United States*, ___ F.Supp.2d ___, 2001 WL 1456388 at 7 (E.D.Va. Nov. 9, 2001) (Attached as Ex. J). Spoliators are sanctioned as a "result of the judicial recognition that the 'spoliated physical evidence' is often the best evidence as to what has

really occurred and that there is an inherent unfairness in allowing a party to destroy evidence and then to benefit from that conduct.” *Id.* Furthermore when “intentional conduct contributes to the loss or destruction of evidence, the trial court has discretion to pursue a wide range of responses both for the purpose of leveling the evidentiary playing field and for the purpose of sanctioning improper conduct.” *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995). Proof that Mastec acted in bad faith is not necessary to support sanctions for the destruction of evidence. *See id.*

In the case at bar it is clear that Mastec’s conduct constituted spoliation as Mastec destroyed most of the pipe while it was in Mastec’s custody after having notice that the pipe was evidence.

B. Mastec’s Duty to Preserve the Evidence

Mastec was under a duty to preserve the pipe and prevent its loss or destruction. *Voldusek*, 71 F.3d at 155; *Trigon Insurance Company*, 2001 WL 1456388 at 6. “The duty to preserve evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.” *Silvestri, supra*, at 6. The duty required Mastec not to take any action that would result in the destruction of the physical evidence. *Trigon, supra*, at 9.

Mastec unquestionably knew that the pipe was relevant to this litigation. On January 28, 2001, Mastec received a certified letter from plaintiff's counsel stating "**We ask that you do not dispose of the pipe or alter it in any way, and that you carefully secure and store the pipe**, as the pipe will be important evidence." (Ex. A) (Emphasis in original).

C. Appropriate Remedies

As it is clear that Mastec has spoiled critical evidence, "the sanction chosen must achieve deterrence, burden the guilty party with the risk of an incorrect determination and attempt to place the prejudiced party in the evidentiary position it would have been in but for the spoliation." *Trigon, supra.* at 10.

In the case at bar, Mastec can not be permitted to benefit from its destruction of critical evidence regarding the causes of the accident. Therefore, the most appropriate remedy is for the Court to instruct the jury that the sole cause of the accident was the manner in which the Mastec employee secured the pipe to the vehicle and to bar Mastec from introducing any evidence regarding the forces that the pipe was subjected to prior to the accident. This proposed remedy is narrowly tailored to only correct the prejudice caused by Mastec's destruction of the pipe which has hampered plaintiff from proving the cause of the break in the pipe. Whether Mastec's employee was negligent in the

manner that he transported the pipe and Ms. Reynolds' damages would remain issues of fact for the jury.

Alternatively, Mastec's expert should be barred from testifying as the basis for his testimony is that there is insufficient physical evidence, Mastec should be barred from introducing any evidence of a prior defect in the pipe, and the jury should be instructed to draw an adverse inference against Mastec.

III. CONCLUSION

For all the foregoing reasons plaintiff respectfully requests that this Court find that Mastec has spoiled the physical evidence in this case and to bar the introduction of evidence that the incident was caused by any other factors other than the manner in which the pipe was transported, and to instruct the jury that the incident was caused by the manner in which the pipe was transported and for all other relief the Court deems proper.

CANDISSE REYNOLDS

By: _____
Counsel

Carolyn C. Lavecchia, VSB # 25236
Thomas W. Williamson, Jr. VSB #15699
Joshua D. Silverman, VSB # 43205
WILLIAMSON & LAVECCHIA, L.C.
6800 Paragon Place, Suite 233
Richmond, Virginia 23230
Phone: (804) 288-1661
Fax: (804) 282-1766
Counsel for Plaintiff

CERTIFICATE

I hereby certify that on this _____ day of November, 2001, I hand-delivered a copy of the foregoing please to David W. Hearn, Esquire, Sands, Anderson, Marks & Miller, P.O. Box 1998, Richmond, Virginia 23218-1998, Counsel for Defendants Mastec North America, Inc., and Mastec, Inc.
