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Taking the *Bull* by the Horns

Third Circuit finds that absence of bad faith precludes a finding of spoliation

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In *Bull v. United Parcel Serv.*, 665 F.3d 68 (3d Cir. Jan. 4, 2012), the Third Circuit addressed the issue of when a party's failure to produce a document may constitute spoliation of evidence. The court clarified that, prior to imposing sanctions, a court must engage in a two-part analysis. First, it must determine whether spoliation has occurred. To make such a finding, a court must establish that the party acted in bad faith. Upon demonstrating that spoliation has occurred, a court may move to the second part of the analysis, which is to determine the appropriate sanction to impose.

The requirement that, as a prerequisite to a finding of spoliation, a party demonstrate bad faith is likely the most significant part of the *Bull* holding. District courts within the Third Circuit had previously split regarding "the requisite culpability of a purported spoliator." *Swindell Dressler Int'l Co. v. Travelers Cas. & Sur. Co.*, Civil Action No. 10-

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1150, 2011 U.S. Dist. LEXIS 125679 (W.D. Pa. Oct. 31, 2011). In *Bull*, the Third Circuit clarified that a court must find that the "purported spoliator" acted in bad faith.

The *Bull* case involved an allegation that the defendant United Parcel Service (UPS) had failed to accommodate plaintiff Lauren Bull's disability in violation of the New Jersey Law Against Discrimination. Bull had worked for UPS for over 20 years. However, after injuring her neck and shoulder on the job, her physical abilities were restricted by a doctor and orthopedic specialist. After a four-month medical leave, Bull returned to work with lifting restrictions. Five days after her return, her supervisor suggested that she seek permanent disability. In an attempt to be reinstated, Bull sought the advice of another specialist, Dr. Farber, who provided her with two notes that were faxed to UPS. These notes addressed whether Bull could return to work and how much weight she could lift.

At trial, the district court learned that, although she was in possession of the originals of these two notes, plaintiff had produced only a copy in discovery. As a sanction for Bull's failure to produce these original documents, the district court dismissed her case with prejudice. The *Bull* court determined that the district court's finding that Bull had intentionally withheld these docu-

ments from UPS was an abuse of discretion. Accordingly, it reversed the lower court's order and reinstated her case.

The *Bull* court noted that, although spoliation usually involves situations in which evidence has been altered or destroyed, "under certain circumstances, nonproduction of evidence is rightfully characterized as spoliation." The court stated that, to make a showing of spoliation, a party must demonstrate: (1) the evidence was in the party's control; (2) the evidence is relevant to the claims or defenses in the case; (3) there has been actual suppression or withholding of evidence; and (4) the duty to preserve the evidence was reasonably foreseeable to the party.

With regard to the third prong, the court held that, to demonstrate an actual suppression or withholding of evidence, there must be a showing of intent. The *Bull* court found that "a finding of bad faith is pivotal to a spoliation determination." In reliance on its prior holding in *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326 (3d Cir. 1995), the court noted that "[n]o unfavorable inference arises when the circumstances indicate that the document or article in question has been lost or accidentally destroyed, or where the failure to produce it is otherwise properly accounted for."

The *Bull* court noted further that, where a court finds that spoliation has occurred, it must determine the appropriate sanction to impose. The court relied on its prior holding in *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76 (3d Cir. 1994), which set forth the following factors to consider in a sanctions

analysis: (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that may be imposed.

In determining that the plaintiff had not engaged in an intentional act, the court noted that the defendant, UPS, had never made a specific discovery request for the original notes from plaintiff's doctor's office, and that UPS had "never raised the nonproduction of the originals in a motion to compel, or in any other communication." Accordingly, the court determined that any nonproduction of the originals resulted from inadvertence.

By examining pre- and post-*Bull* holdings, one can determine the potential impact of the *Bull* decision on applications for sanctions due to spoliation. Prior to *Bull*, many courts defined spoliation

to be "when a party has intentionally or negligently breached its duty to preserve potentially discoverable evidence[.]" *Kounelis v. Sherrer*, 529 F.Supp.2d 503 (D.N.J. 2008) (emphasis added). Accordingly, in *MOSAID Techs. Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 332 (D.N.J. 2004), the court rejected defendant Samsung's argument that, to find that there had been spoliation, the court had to make a finding of fraud or intentional conduct. Rather, the court stated that it had not found "any case law in this circuit that requires a finding of bad faith before allowing a spoliation inference."

In contrast, after the issuance of the *Bull* opinion, in a case where a corporate defendant failed to preserve the contemporaneous notes of work-related events kept on the computer of the individual who had terminated the plaintiff's employment, the court noted that

the plaintiff "ha[d] adduced no evidence that the notes were deleted willfully or in bad faith." *Dunn v. Mercedes Benz of Ft. Washington*, Civ. No. 10-1662, 2012 U.S. Dist. LEXIS 17089 (E.D. Pa. 2012). Although the court agreed that the defendants had breached their duty to preserve relevant evidence, it nevertheless declined to sanction them due to the absence of "bad faith or substantial prejudice." In so holding, the court relied in part on the *Bull* court's holding.

The *Bull* opinion clarifies the standard for determining whether spoliation has occurred and when a court may impose sanctions. Litigants would be wise to institute appropriate safeguards to ensure the preservation of relevant evidence. Nevertheless, those who unintentionally fail to do so can argue that, under *Bull*, their lack of bad faith precludes a finding of spoliation. ■