

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

BROCKTON DIV. SUPERIOR COURT  
CIVIL ACTION NO. 2083CV00503

ANTHONY RODRIGUES & another<sup>1</sup>

vs.

THE HOME DEPOT, U.S.A., INC., & others<sup>2</sup>

And

THE HOME DEPOT, U.S.A., INC.<sup>3</sup>

vs.

ANNETT HOLDINGS, INC. D/B/A TMC TRANSPORTATION<sup>4</sup>

**MEMORANDUM OF DECISION AND ORDER ON  
PLAINTIFFS’<sup>5</sup> MOTION FOR SANCTIONS FOR SPOILATION OF EVIDENCE BY  
DEFENDANT THE HOME DEPOT, U.S.A., INC.**

The Plaintiffs, Anthony Rodrigues (“Rodrigues”) and his wife Maria Rodrigues (together “the Plaintiffs”) filed this suit against the Defendants Home Depot U.S.A. (“Home Depot”) Nathan Kasozi Lumunye (“Lumunye”) and Providence Saint-Cyr (“Saint-Cyr”) alleging negligence<sup>6</sup> for the injuries suffered by Rodrigues at the Home Depot store located in Watertown. The Home Depot U.S.A., Inc. as a third-party plaintiff sued Annett Holdings, Inc, d/b/a TMC Transportation (“TMC”) as a third party-defendant for breach of contract and requested a declaratory judgment. For the reasons discussed below, Plaintiffs’ Motion for

<sup>1</sup> Maria Roderigues.

<sup>2</sup> Nathan Kasozi Lumunye (“Lumunye”) and Providence Saint-Cyr (“Saint Cyr”).

<sup>3</sup> Defendant and Third-Party Plaintiff.

<sup>4</sup> Third Party Defendant.

<sup>5</sup>TMC filed a separate “Third Party Defendant Annett Holdings, Inc. d/b/a TMC Transportation’s Motion for Sanctions As To Defendant The Home Depot, U.S.A., Inc. due To Spoliation Of Evidence” (Paper #51). For the sake of efficiency, the Court considers both motions together in this decision.

<sup>6</sup> There are three counts against all Defendants: negligence; negligent infliction of emotional distress; and loss of consortium.

AJF  
SEC  
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JS  
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JS  
AG

Sanctions for Spoliation is **ALLOWED**; in part and **DENIED** in part. TMC's Motion for Sanctions as to Defendant the Home Depot, U.S.A., Inc. Due to Spoliation of Evidence is **ALLOWED**, in part and **DENIED** in part.

### **BACKGROUND**

The Plaintiffs' Amended Complaint<sup>7</sup> alleges that Rodrigues was working for TMC as a truck driver. Rodrigues transported a load of lumber and other materials to the Home Depot located at 615 Arsenal Street in Watertown, on May 13, 2020. Rodrigues parked his truck at a delivery bay in the front of the store.<sup>8</sup> ("The incident occurred in the Home Depot unloading area located in *the front* of the store.")<sup>9</sup>. Rodrigues was responsible for unstrapping the cargo and removing a tarp that was covering the cargo. Defendants Lumunye and St. Cyr, Home Depot employees were operating forklifts, in order to unload Rodrigues' truck. The forklift trucks caused some lumber to fall from Rodrigues' truck to the floor. There are disputes as to pretty much the remainder of the facts. The Plaintiffs claim that Rodrigues was on the rear passenger's side of the truck when the material from the truck hit him causing him serious injury. The Defendants claim Rodrigues was on the driver's side of the truck, heard the crash and got under the truck. When he picked his head up to see the area, he hit his head and suffered his injuries<sup>10</sup>. Home Depot owns and maintains a closed-circuit television camera ("CCTV") in the front of the

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<sup>7</sup> Amended Civil Complaint and Jury Demand (Paper # 7).

<sup>8</sup> The Watertown Home Depot is one of the few Home Depots where the loading dock is located in the front of the store. However in the Plaintiffs' Complaint, the Plaintiffs state:

10. Mr. Rodrigues was tasked with parking the truck in a delivery bay in the rear of the Home Depot.

11. He had been to this location in the past.

<sup>9</sup> Third Party Defendant, Annett Holdings, Inc. d/b/a TMC Transportation's Memorandum Of Law In Support Of Its Motion For Sanctions As To Defendant The Home Depot, U.S.A., Inc. Due To Spoliation Of Evidence ("3<sup>rd</sup> Party Def Memo") p. 3.

<sup>10</sup> "Mr. Rodrigues sustained several injuries including but not limited to an acute C4 spinous process fracture, right lateral orbit, zygomatic arch, lateral maxillary fractures, central cord syndrome, scalp laceration, tetraplegia, cognitive disorder, concussion, post-concussive symptoms, pain/paresthesia in the extremities, and loss of motor function/sensation in the arms and legs." ¶22 AmdComp. (Paper # 7).

Watertown store. The camera captures the area of the incident. The incident happened prior to 10:30 p.m., because Home Depot Operations Manager, Robert Nelson called Operations Manager Stephanie Watts at home informing her of an incident. Home Depot, during discovery, produced a fifty-two second video obtained from the CCTV camera.

### **PROCEDURAL BACKGROUND**

The Plaintiffs' original Complaint<sup>11</sup> was filed with the Brockton Division of the Plymouth Superior Court on July 10, 2020. On August 5, 2020, the case was removed to the United States District Court<sup>12</sup>. On November 3, 2020, the case was remanded back to the Plymouth County Superior Court, sitting in Brockton. On November 30, 2020, the Amended Complaint was filed by the Plaintiffs<sup>13</sup>. On December 16, 2020, the Defendants filed their answers to the Plaintiffs' Amended Complaint<sup>14</sup>. On April 29, 2021, Defendant Home Depot filed a Motion for Leave to File Third Party Complaint Against Anett Holdings, Inc., d/b/a TMC Transportation<sup>15</sup>. On June 3, 2021, that motion was denied without prejudice after a hearing<sup>16</sup>. On August 3, 2021, Defendant Home Depot refiled its motion<sup>17</sup>. On August 23, 2021, that motion was allowed. On August 27, 2021, Home Depot filed its third-party complaint<sup>18</sup>. TMC filed its answer to the third-party complaint on September 23, 2021<sup>19</sup>. On September 7, 2022, Home Depot filed a motion for a Second Amended Third-Party Complaint against TMC<sup>20</sup>. On

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<sup>11</sup> See Paper # 1.

<sup>12</sup> See Paper # 5.

<sup>13</sup> See Paper # 7.

<sup>14</sup> See Papers # 8 (Home Depot); # 9 (Saint Cyr); # 10 (Lumunye).

<sup>15</sup> See Paper # 12.

<sup>16</sup> Hon. Sullivan, J (“[T]o allow defendant, if appropriate, to amend its proposed Third-Party Complaint to confirm with the theories of liability and potential causes of actions presented.”).

<sup>17</sup> See Paper # 18.

<sup>18</sup> See Paper # 19.

<sup>19</sup> See Paper # 21.

<sup>20</sup> See Paper # 31.

September 9, 2022, that motion was allowed. On December 1, 2022, the Plaintiffs filed a spoliation motion<sup>21</sup>. On January 17, 2023, TMC filed its answer to the Second Amended Complaint<sup>22</sup>. On January 19, 2023, Home Depot filed a Sur Reply to the Plaintiffs' Reply to Home Depot's Opposition to Plaintiffs' Motion for Spoliation of Evidence<sup>23</sup>. On January 24, 2023, TMC filed a Motion for Sanctions as to Defendant The Home Depot, U.S.A., Inc. Due to Spoliation of Evidence<sup>24</sup>. A hearing was held on the Spoliation Motion on January 26, 2023.

### **FACTS REGARDING THE CCTV CAMERA & VIDEO EVIDENCE**

All sides agree that there was a CCTV camera that was owned/controlled by Home Depot. All sides agree that it was located in the front of the store. All sides agree that the CCTV camera was operating on the evening of the incident, May 13, 2020. All sides agree that if nothing is done to preserve a recording made by the CCTV camera, it will be recorded over and lost forever. All sides agree that an agent of Home Depot, a Home Depot Operations Manager, Robert Nelson called Home Depot Operations Manager Stephanie Watts at home informing her of the incident. All sides agree that Ms. Watts saved a fifty-one second portion of that video<sup>25</sup>.

### **DISCUSSION**

Section 1102 of the Massachusetts Guide to Evidence: Spoliation or Destruction of Evidence provides: "A judge has the discretion to impose sanctions for the spoliation or destruction of evidence, whether negligent or intentional, in the underlying action in which the evidence would have been offered." Mass. G. Evid. § 1102 (2021). "A judge may impose

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<sup>21</sup> See Paper # 44.

<sup>22</sup> See Paper # 47.

<sup>23</sup> See Paper # 50.

<sup>24</sup> See Paper # 51.

<sup>25</sup> Q The 51-second video that we do have, which we'll look at shortly – you testified earlier that you're the one who saved that?

A That is correct sir. (Watts Depo A p.41)

sanctions for the spoliation of evidence if a party “negligently or intentionally loses or destroys evidence that the [party] knows or reasonably should know might be relevant to a possible action.”” *Zaleskas v. Brigham and Women's Hospital*, 97 Mass. App. Ct. 55, 75 (2020), quoting *Scott v. Garfield*, 454 Mass. 790, 798 (2009); accord *Westover v. Leiserv, Inc.*, 64 Mass. App. Ct. 109, 113 (2005); *Kippenhan v. Chaulk Services, Inc.*, 428 Mass. 124, 127 (1998)

Corporate Representative of Home Depot, Stephanie Watts<sup>26</sup>, knew that the incident was in a location that was recorded by a Home Depot controlled camera(s). Home Depot, through Watts, accessed the video, and viewed it. Watts saved “approximately two minutes to three minutes on the system.”<sup>27</sup> Whatever else she observed, Watts saw what she concluded was significant, as she attempted to forward two and a half to three minutes of the video recording to her superiors, but was unable to do so, and could only send fifty-two seconds of the recording<sup>28</sup>. Watts observed the video and thought that at least two and a half to three minutes was relevant enough to try to send to her superiors. She placed the two and a half to three-minute segment in special status to be saved. But alas, where Ms. Watts placed the two and a half to three-minute segment is written over if someone does not save that portion from the system. The recording would be overwritten after approximately three months, and hence the recording for that entire day was lost.<sup>29</sup> Home Depot policy requires that camera footage of such incidents be copied and saved<sup>30</sup>. Home Depot employs Sedgewick Claims Service (“Sedgewick”) an outside investigatory company to investigate accidents that happen at their various locations<sup>31</sup>. It was not the responsibility of Watts to secure or save any video of the incident, it was the

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<sup>26</sup> Watts testified at her depositions as a Corporate Representative of Home Depot. (Watt Depo A p.5).

<sup>27</sup> Watts Depo A pp 42-43.

<sup>28</sup> Watts Depo A pp 49-50.

<sup>29</sup> Watts Depo A pp 52-53.

<sup>30</sup> Watts Depo A pp 55-56.

<sup>31</sup> Watts Depo A pp 58-59.

responsibility of Sedgewick<sup>32</sup>. Sedgewick did not secure or save any of the recording from the camera that captured the incident. Watts opined that this was because Sedgewick, did not realize that the Watertown Home Depot had a camera in the front of the store that was pointed at the delivery location, as every other Home Depot delivery location was in the back of the store(s)<sup>33</sup>. The recording was written over<sup>34</sup>. All that is extant today is the fifty-two second portion sent by Watts to her supervisors<sup>35</sup>.

And the fifty-two second video clip is not in the same condition as the original video that Watts observed. Watts indicated that the video she observed was clearer and she could clearly observe Rodrigues' position in that video, unlike the video clip produced, which is of a much worse quality.<sup>36</sup>

The Court finds that Home Depot had knowledge of an extensive video that existed that captured the entire incident, from the time the TMC truck drove up to the unloading area, until after the EMTs and other rescue personnel arrived. Watts, an agent of Home Depot, not only knew of the existence of such a recording but accessed it on the night in question. It matters not what Watts deemed to be relevant or not. See *Zaleskas*, 97 Mass. App. Ct. at 75 (judge may impose sanctions for spoliation of evidence if party negligently or intentionally loses or destroys evidence that party knows or reasonably should know might be relevant to possible action). It was a recording that clearly contained information relating to Rodrigues' injuries. Home Depot has a policy that such recordings should be preserved. Ms. Watts recognized the significance of the recording of the recording and sought to send a two and a half minute excerpt of the video to her supervisors. When she discovered she could not, she sent a smaller fifty-two second version

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<sup>32</sup> Watts Depo A pp 59-60.

<sup>33</sup> Watts Depo A pp 57-58.

<sup>34</sup> Watts Depo A pp 69.

<sup>35</sup> Watts Depo A pp 70.

<sup>36</sup> Watts Depo B pp 12-13; 45-46; 48-49; 54

to two of her supervisors, Mike Powell<sup>37</sup>, regional director of operations, and Mike Attar<sup>38</sup>, the Watertown store district manager. Sedgwick, an agent of Home Depot, who is hired by Home Depot to investigate matters such as the underlying incident in this case, was aware that it is a policy of Home Depot to have unloading areas subject to videotaped monitoring and she failed to secure a copy of the tape. Home Depot was aware that the tape, if it was not saved, would be rewritten over. The tape was rewritten over. All that remains is a fifty-two second excerpt, that is not as clear as the original video. Home Depot should have saved the video. “Sanctions may be imposed where a duty arises and where a reasonable person in the spoliator’s position would realize, at the time of spoliation, the possible importance of the evidence to the resolution of the potential dispute.” *Kippenhan*, 428 Mass. 124, 127 (1998).

Having found that the spoliation occurred here, the Court must look to the appropriate sanction(s).

Indeed, Massachusetts affords a greater range of remedies for spoliation than the majority of jurisdictions, which limit relief to permitting an adverse inference against the responsible party. [*Fletcher v. Dorchester Mut. Ins. Co.*, 437 Mass. 544, 550 (2002)], citing *Kippenhan v. Chaulk Servs., Inc.*, [428 Mass. 124 (1998)] *supra* at 128. The spectrum of remedies includes allowing the party who has been aggrieved by the spoliation to present evidence about the preaccident condition of the lost evidence and the circumstances surrounding the spoliation, see *Kippenhan v. Chaulk Servs., Inc.*, *supra* at 126-128, as well as instructing the jury on the inferences that may be drawn from spoliation. See *Fletcher v. Dorchester Mut. Ins. Co.*, *supra*, at 550. See also Nesson, Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action, 13 *Cardozo L. Rev.* 793, 794, 806 (1991). These remedies may be cumulative, as determined by the judge from the circumstances of each case, in the exercise of broad discretion. See generally Nesson, *supra* (calling for more stringent sanctions for spoliation).

*Gath v. M/A-COM, Inc.*, 440 Mass. 482, 488 (2003). “The premise underlying the doctrine is that a party who culpably destroys evidence ‘should be held accountable for any unfair prejudice that results.’ *Keene v. Brigham & Women’s Hosp., Inc.*, 439 Mass. 223, 234 (2003).” *Santiago v Rich Products Corporation*, 92 Mass. App. Ct. 577 (2017). “As a general rule, a judge should impose

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<sup>37</sup> See Watts Depo A pp. 45-46.

<sup>38</sup> See Watts Depo B p. 12.

the least severe sanction necessary to remedy the prejudice to the nonspoliating party.” *Keene v. Brigham & Women’s Hosp., Inc.*, 439 Mass. 223, 235 (2003).

The spoliation in this case is indeed significant. Many of the contested issues would not be so if the recording were extant. Where was Rodrigues when the incident happened? Was he ever on the passenger side of the truck<sup>39</sup>? How long was he on the driver’s side of the truck? Did the forklift operators converse with him? Where and for how long?

The Court holds that the jury in this case will be instructed that they may infer that Home Depot prevented the preservation, collection and presentation of relevant evidence in this case “out of a realization that the [evidence was] unfavorable.” *Blinzler v. Marriott International, Inc.*, 81 F.3d 1148, 1158 (1st Cir. 1996). The Court further holds that the jury in this case will be instructed that they may make the inference that the missing video, may have demonstrated that Rodrigues was on the passenger side of the vehicle when the accident occurred. The Court further holds that at the trial of this matter, the facts and circumstances surrounding Home Depot’s spoliation of evidence that might have been discovered had Home Depot appropriately collected, preserved and presented the video, may be presented to the jury.

### **ORDER**

For the reasons stated herein, Plaintiffs Rodrigues and Maria Rodrigues’ Motion for Sanctions for Spoliation of Evidence by Defendant Home Depot, is **ALLOWED** in part, and **DENIED** in part, in the following respects:

1. the request that an entry of Default Judgment issue is **DENIED**;

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<sup>39</sup> That is, assuming he exited the cab on the driver’s side.

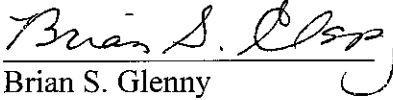


2. the request that the jury be instructed that they may make the inference that the missing video may have shown that Plaintiff, Rodrigues was on the passenger's side of the truck when the accident occurred is **ALLOWED**;
3. the request that that Defendant, Home Depot be precluded from arguing, testifying, implying, stating or in any way suggesting that Mr. Rodrigues hit his head while he crawled under the truck is **ALLOWED**;
4. the request that jury in this case will be instructed that they may infer that Home Depot prevented the presentation of relevant evidence in this case out of a realization that the evidence was unfavorable to Home Depot is **ALLOWED**;
5. the request that the Court order that Home Depot was negligent in unloading the lumber in an unsafe manner and failed to ensure that Rodrigues was outside the zone of safety before unloading the lumber is **DENIED**;
6. at the trial of this matter, the facts and circumstances surrounding Home Depot's spoliation of evidence that might have been discovered had the video been produced, may be presented to the jury.

For the reasons stated herein, Third Party Defendant, TMC' Motion for Sanctions for Spoliation of Evidence by Defendant Home Depot, is **ALLOWED** in part, and **DENIED** in part, in the following respects:

- 1 .the request that an entry of Default Judgment issue is **DENIED**;
- 2 the request that jury in this case will be instructed that they may infer that Home Depot prevented the presentation of relevant evidence in this case out of a realization that the evidence was unfavorable to Home Depot is **ALLOWED**;

3 at the trial of this matter, the facts and circumstances surrounding Home Depot's spoliation of evidence that might have been discovered had the video been produced, may be presented to the jury.

  
Brian S. Glenny  
Justice of the Superior Court

DATED: March 14, 2023