[Cite as *Allstate Ins. Co. v. QED Consultants, Inc.*, 2009-Ohio-4896.]

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ALLSTATE INSURANCE COMPANY

Plaintiff-Appellant

-vs-

QED CONSULTANTS, INC. AND BERNARD DORAN

Defendants-Appellees

JUDGES:
Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. Patricia A. Delaney, J.

Case No. 09CA14

O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Knox County Court of Common Pleas, Case No. 08 OT 03-171
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 16, 2009

APPEARANCES:

For Plaintiff-Appellant
Allstate Insurance Company

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Hoffman, J.

{¶1} Plaintiff-appellant Allstate Insurance Company appeals the February 19, 2009 Judgment Entry of the Knox County Court of Common Pleas granting summary judgment in favor of Defendants-appellees QED Consultants, Inc and Bernard Doran.

STATEMENT OF THE FACTS AND CASE

{¶2} This matter arises out of a claim for subrogation filed by Appellant Allstate Insurance Company against Black and Decker, Inc. for insurance monies paid to Fred and Phyllis Hart for property damage caused by a fire occurring on May 7, 2005, in the Hart's home garage. At the time of the fire, Fred Hart was restoring a vintage automobile in his garage when the vehicle caught fire during the evening, causing significant damage to the vehicle, the garage and the Harts' personal property. The Harts were insured against fire and other casualty with a homeowner's policy issued by Allstate.

{¶3} On or about May 8, 2005, Fred Hart contacted Allstate's claims department to report the loss, and Allstate initiated an investigation relative to the claim. On May 12, 2005, Allstate's field claims investigator, Rick Gulley, contacted QED Consultants and Bernard Doran, a Certified Fire Investigator, (hereinafter collectively referred to as "Appellees") to conduct a site inspection and prepare a cause and origin report as to the Hart's claim. Bernard Doran obtained evidence samples from the scene, including component parts of a Black & Decker drill.

{¶4} Allstate's adjuster and the fire department indicated other possible sources of ignition included welding embers left unattended and a fluorescent shop light

fixture hanging from the ceiling over the area where the car was stored. Doran concluded the shop light was not the cause of the fire and disposed of the same.

{¶5} The drill components were subsequently examined at Doran's laboratory and by SEA, a forensic investigation service retained by Black & Decker, Inc. The drill switch components were examined by SEA in the presence of Doran, and Doran left the facility with the same in his possession.

{¶6} Doran produced two cause and origin reports stating the cause of the fire was a faulty switch on the portable Black & Decker Firestorm drill found lying in the back seat of the vintage vehicle. The drill was manufactured by Black & Decker, Inc.

{¶7} On December 12, 2005, Allstate filed a complaint in the trial court against Black & Decker, Inc. alleging claims for breach of implied warranty and for strict liability. On March 15, 2007, Allstate voluntarily dismissed the complaint pending further investigation of the evidence.

{¶8} In October of 2007, Allstate retained the services of Sadler Investigations and Larry Statler for further forensic testing. Statler then requested the drill switch components for testing, whereupon Allstate requested the evidence from Doran and QED Consultants. QED Consultants and Doran advised Allstate the evidence had been returned to the insureds. However, the Harts insisted they had not received the drill switch components. QED Consultants and Doran were unable to locate the evidence until March 10, 2008.

{¶9} On March 13, 2008, Allstate refiled the within action, including claims of spoliation of evidence against QED and Doran, alleging their case was severely compromised due to the delay in QED and Doran's returning the evidence.

{¶10} Allstate and Black & Decker reached a settlement agreement with regard to the claims and counterclaims between the parties, and the claims were dismissed with prejudice on February 2, 2009. Via Judgment Entry of February 19, 2009, the trial court granted summary judgment in favor of QED and Doran as to Allstate's spoliation of evidence claims.

{¶11} Allstate now appeals, assigning as error:

{¶12} "I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT-APPELLEES QED CONSULTANTS, INC. AND BERNARD DORAN, AS GENUINE ISSUES OF MATERIAL FACT REMAIN IN DISPUTE REGARDING THE CLAIM FOR SPOLIATION OF EVIDENCE."

{¶13} Initially, we note, Allstate did not raise a spoliation of evidence claim as to the fluorescent light in the trial court; therefore, we find the issue relative to it is waived on appeal.

{¶14} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court, *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35. This means we review the matter de novo, *Doe v. Shaffer,* 90 Ohio St.3d 388, 2000-Ohio-186.

{¶15} The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim, *Drescher v. Burt* (1996), 75 Ohio St.3d 280. Once the moving party meets its initial burden, the burden shifts to the non-moving party to set forth specific facts demonstrating a genuine issue of material fact does exist, *Id.* The

non-moving party may not rest upon the allegations and denials in the pleadings, but instead must submit some evidentiary material showing a genuine dispute over material facts, *Henkle v. Henkle* (1991), 75 Ohio App.3d 732.

{¶16} In *Smith v. Howard Johnson Co. Inc.* (1993), 67 Ohio St.3d 28, the Ohio Supreme Court recognized a cause of action for interference with or destruction of evidence:

{¶17} "A cause of action exists in tort for interference with or destruction of evidence; (2a) the elements of a claim for interference with or destruction of evidence are (1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts; (2b) such a claim should be recognized between the parties to the primary action and against third parties; and (3) such a claim may be brought at the same time as the primary action."

{¶18} Appellees maintain Allstate failed to allege "willful destruction of evidence" by QED and Doran. Rather, Allstate's amended complaint alleges failure to preserve evidence, failure to maintain a chain of custody of the evidence and intentional withholding of the evidence.

{¶19} The Ohio Supreme Court has not extended its holding in *Smith v. Howard Johnson,* supra, to cases where the spoliation claim asserted does not involve the willful destruction or alteration of physical evidence. See, *O'Brien v. Olmsted Falls*, 2008-Ohio-2658, citing *Patriot Logistics, Inc. v. Contex Shipping (NW), Inc.* (Sept. 13, 2007), N.D. Ohio App. No. 1:06CV552, citing *Tate v. Adena Regional Medical Center* (2003),

155 Ohio App.3d 524; *Pratt v. Payne,* 153 Ohio App.3d 450, 2003-Ohio-3777; and *Bugg v. Am. Standard, Inc .,* Cuyahoga App. No. 84829, 2005-Ohio-2613; see, also, *Moskovitz v. Mt. Sinai Med. Ctr.,* 69 Ohio St.3d 638, 650, 1994-Ohio-324 (alteration of medical records); *Meros v. Mazgaj* (Apr. 30, 2002), Trumbull App. No.2001-T0100 (destruction of contingent fee agreement); *McGuire v. Draper, Hollenbaugh and Briscoe Co., L.P.A.,* Highland App. No. 01CA21, 2002-Ohio-6170 (destruction of client file); *White v. Ford Motor Co.* (2001), 142 Ohio App.3d 384, 386-387 (destruction of car); *Carnahan v. Buckley,* Mahoning App. No. 99 CA 323, 2001-Ohio-3224 (lack of pre-operative photographs); *Matyok v. Moore* (Sept. 1, 2000), Lucas App. No. L-00-1077 (disposal of cracked staircase); *Williamson v. Rodenberg* (June 30, 1997), Franklin App. No. 96APE10-1395 (missing behavioral interviewing materials); *Cechowski v. Goodwill Industries of Akron, Ohio, Inc.* (May 14, 1997), Summit App. No. 17944 (destruction of documents); *Sheets v. Norfolk S. Corp.* (1996), 109 Ohio App.3d 278, 288-289 (destruction of dispatcher tapes); *Webster v. Toledo Edison Co.* (Nov. 1, 1996), Lucas App. No. L-95-342 (destruction of broken tire studs); *Cherovsky v. St. Luke's Hosp. of Cleveland* (Dec. 14, 1995), Cuyahoga App. No. 68326 (missing pathology slides); and *Tittle v. Rent-A-Wreck, a div. of Marhefka Chevrolet, Buick, Inc.* (Sept. 24, 1993), Belmont App. No. 92-B-51 (missing car parts).

{¶20} The evidence presented for summary judgment demonstrates QED and Doran stored and preserved the fire scene evidence in the same condition as after it was tested by Black & Decker's expert, SEA. Allstate does not present evidence of Appellees intentional or willful destruction or alteration of the evidence. Instead, the evidence was returned to Allstate in a preserved condition. While Appellees were tardy

in returning the evidence, disrupting the case presented by Allstate against Black & Decker, as a matter of law Allstate has not demonstrated a cause of action for spoliation of evidence under Ohio law. Accordingly, there is no genuine issue of material fact and reasonable minds can come to but one conclusion in favor of Appellees. The February 19, 2009 Judgment Entry of the Knox County Court of Common Pleas granting summary judgment in favor of Appellees is affirmed.

By: Hoffman, J.

Gwin, P.J. and

Delaney, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ALLSTATE INSURANCE COMPANY	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
QED CONSULTANTS, INC. AND BERNARD DORAN	:	
Defendants-Appellees	:	Case No. 09CA14

For the reasons stated in our accompanying Memorandum-Opinion, the February 19, 2009 Judgment Entry of the Knox County Court of Common Pleas granting summary judgment in favor of Appellees is affirmed. Costs to Appellant

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY