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Court Clarifies Standards For Discovery Sanctions

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A trial court may not impose discovery and evidence sanctions for misuse of the discovery process absent a violation of a discovery order, this district's Court of Appeal has ruled.

Div. Two also clarified that that any doubts in ruling on a motion to withdraw or amend an admission must be resolved in favor of moving party in its opinion Wednesday.

The panel issued a peremptory writ of mandate directing Los Angeles Superior Court Judge Phrasel L. Shelton to allow supermarket proprietor New Albertsons Inc. to withdraw its response to a request for admission, and to deny sanctions against the company arising in the course of a slip-and-fall dispute.

While shopping at an Albertsons grocery store, Melissa Shanahan discovered her husband, John Shanahan, lying on his back on the floor of an aisle, bleeding from one ear and apparently unconscious.

She testified that an unidentified store employee came to the scene and exclaimed that he "had told those guys to clean that mess up an hour ago," but that she had not seen anything on the floor nearby.

Store employees also testified that they saw no indication of what may have caused John Shanahan's fall. According to their accounts, one employee brought a plastic shopping bag with ice to use to revive Shanahan, but Melissa Shanahan denied that any ice was brought to the scene and her husband had no recollection of the events.

The Shanahans filed a complaint against Albertsons for negligence and premises liability. They served a letter on Albertsons' agent for service of process demanding that all photographs, video recordings

and writing concerning John Shanahan's fall be preserved for potential use in litigation.

During the course of discovery, the Shanahans served Albertsons with an interrogatory inquiring if Albertsons knew of any photographs, films, or videos depicting John Shanahan's fall.

Albertsons responded that an employee had taken seven photographs of the floor after the incident, and also responded in the affirmative to a request for admission that one of those photographs showed a bag of ice in the aisle.

The grocery store objected to the Shanahans' demand for inspection of all photographs or recordings of the location where John Shanahan had fallen as "overbroad, burdensome and oppressive," but agreed to produce the seven photographs.

When the Shanahans served a second set of inspection demands requesting the production of every photograph showing the presence of a bag of ice in the aisle, Albertsons responded that no such photographs existed.

While being deposed, the store director for the Albertsons branch where the incident occurred testified that he had seen a photograph of a prepackaged, commercial bag of ice in the aisle.

He also said that he had checked the store's security cameras, but none of the cameras were trained on the aisle where John Shanahan had fallen. The employee said he copied parts of the recorded video showing employees sweeping the floor and the paramedics entering and leaving onto a compact disc, but that the video recordings themselves were only saved until the memory was full, and then the data was recorded over.

The Shanahans then filed a motion seeking discovery sanctions, claiming that Albertsons had willfully destroyed the security video recordings and a "smoking gun" photograph after the Shanahans demanded the production of that evidence.

Albertsons filed a motion to withdraw its admission regarding the bag of ice being in the aisle, arguing that it had since learned that the object shown in one of the photographs was an empty cervical collar bag left by the paramedics. It claimed that there was no evidence of a bag of ice

on the floor at the time of the fall and that there was no missing photograph.

The grocery store also maintained that it had no reason to preserve the video recordings because there was no recording of the accident location, and that it had no duty to preserve the recordings.

The trial court denied Albertsons' motion to withdraw its admission, and also precluded Albertsons from entering any of its security videotape into evidence. It ordered that the Shanahans were entitled to jury instruction that the store had destroyed video recordings and that the jury could infer the recordings contained evidence unfavorable to the store.

Writing for the appellate court, Justice H. Walter Croskey reasoned that Albertsons' admission that a photograph of an empty, clear plastic bag depicted a bag of ice was arguably excusable.

Because policy favors a trial on the merits, absent substantial prejudice to the Shanahans, Croskey concluded Albertsons' should have been allowed to withdraw its admission.

Croskey further concluded that Albertsons had no obligation to produce its video recordings because it had objected to the production demand and the Shanahans had not obtained an order compelling production.

Although sanctions were not warranted, Croskey explained, if the jury finds that Albertsons intentionally destroyed evidence, the instruction that the jury may find the destroyed evidence was unfavorable to Albertsons would be proper.

Justices Patti S. Kitching and Richard D. Aldrich joined Croskey in his opinion.

Albertsons was represented by David M. Axelrad and Karen M. Bray of Horvitz & Levy, and Frank J. D'Oro of Wesierski & Zurek. None of the attorneys could be reached for comment.

Jerome L. Ringler, Thomas A. Kearney, and Thomas H. Peters of Ringler Kearney Alvarez, with Stuart B. Esner and Holly N. Boyer of Esner, Chang & Ellis represented the Shanahans.

Ringler said that the court's opinion "is based on facts which are not part of the trial court

record, and as a result we need to bring this to their attention."

He said he plans to file a motion for reconsideration because "the appellate court either misunderstood or inadvertently misquoted the actual record which is uncontroverted, and as a result, the entire predicate for significant portions of their decision is factually inaccurate."

The case is *New Albertsons, Inc. v. Superior Court (Shanahan)*, 08 S.O.S. 6613.