MondayMonday

The Drunken After-Hours Worker

March 17, 2014

There is a time for courageous judging, just as there is for courageous lawyering. That time is when a court has to step out from behind its comfort level and act to prevent injustice. We feel the time has come for such "courageous judging" on the issue of spoliation of evidence. Nice words and comprehensive decisions, citing *Zublake* and all the horrible acts of defendants in destroying evidence are hollow when, at the end of the decision, the worst sanction to befall a defendant is an adverse inference instruction to the jury. First of all, many of these cases never go to trial, and second, a defendant has an easy choice when the only question is: Do I destroy the evidence that will destroy me, or do I take my shot with the judge and the jury? Only a fool would choose the former.

We have faced this issue in state and federal courts alike, and we've had it. The decisions in the federal system are even worse than those in state courts, because the stakes are often far higher, as are the resources of the litigants and the bench. Witness the battles going on in the transvaginal mesh cases in the Southern District of West Virginia, where Ethicon is only saddled with monetary damages for years of so-called "negligent" document destruction. It matters not a jot whether "negligent" or "purposeful," as the ultimate sanction is always the same. To huge corporate defendants, such sanctions are only money and, in the light of attorneys' fees and other litigation costs, only chump change at that. One judge, in one court, in one case could eliminate the problem of large-scale corporate spoliation forever. Without such "courageous judging," corporate spoliation will continue to be endemic to corporate life, making fools of us all, including the courts that permitted it to occur.

In light of the publicity onslaught against the Labor Law now being conducted by the construction lobby, the Second Department's decision in *Feinberg v. Sanz*, 2014 NY Slip Op 01580 (3/12/14) surely dispenses one red herring. No Virginia, drunken workers are not reaping ill-gotten benefits under the Labor Law.

Decedent was a helper on a project to replace the roof of a 5-story building, together with its façade. The working hours, 8 AM-5 PM, were strictly limited so as not to disturb the building's tenants. There was no overtime and all activities were completed by 4:30 PM so as to allow for clean-up and closing down the job site down by 5 PM. On the day of decedent's fall from the roof of the building, a police lieutenant (who was there within minutes of decedent's fall) confirmed that the rooftop construction job had been closed up for the day and covered with tarps when he arrived. However, the police officer also confirmed that there were beer bottles and cans on the roof, which jibed with decedent's autopsy results showing a .20 blood alcohol level.

Defendants now prevail on their motion to dismiss decedent's Labor Law claims, with *prima facie* proof that the job was over at the time of decedent's fall at 7 PM and further, that decedent's intoxication was the sole proximate cause of his fall. The common law cause of action fails as well, since the absence of safety devices could scarcely be a proximate cause of what was a non-work-related fall.

When all the Lord gives you is lemons, you make lemonade. For those of you attending NYSTLA's Lobby Day this year, put *Feinberg v. Sanz* in your briefcase.