

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MILDRED VELLEK,)
)
Plaintiff,)
) C.A. No. 09C-02-120 MMJ
v.)
)
DOLLAR TREE, INC., a corporation of)
the State of Virginia, d/b/a DEAL\$,)
)
Defendant.)

Submitted: February 9, 2010
Decided: February 18, 2010

ORDER

*Upon Defendant's Motion for Certification by the Trial Court of
Interlocutory Appeal of the Court's Order Granting
Plaintiff's Motion in Limine for an Adverse Inference Instruction on the
Issue of the Surveillance Video*

and

*Defendant's Motion for Reargument and/or Reconsideration of the
Court's Order Granting Plaintiff's Motion in Limine for an
Adverse inference Instruction on the
Issue of the Surveillance Video*

1. Plaintiff filed a Motion in Limine requesting an adverse inference jury instruction on the issue of missing evidence. The Court granted the motion,

finding that defendant Dollar Tree failed to preserve the surveillance videotape of the incident in which plaintiff allegedly was injured.

2. Defendant moved for certification of an interlocutory appeal.

Defendant also seeks reargument and/or reconsideration of the Court's ruling.

During the hearing on the motion in limine, an account representative for defendant's risk management contractor testified regarding her efforts to locate the missing videotape. The Court found that the account representative was not at fault. Defendant argues that this should be considered indicia that defendant did not act willfully, recklessly or intentionally in failing to preserve the video evidence.

3. Defendant contends that interlocutory appeal is appropriate because the Court's order determined a substantial issue; involves substantial legal rights "as it directly limits [defendant's] ability to mount a full and proper defense;" review would serve considerations of justice; resolving the issue at this stage "may eviscerate the need to litigate post-trial motions related to this issue;" and it is important and urgent that the spoliation issue be fully resolved prior to the start of trial. Defendant also asserts that this is an issue of first instance in Delaware. Plaintiff opposes certification.

4. Supreme Court Rule 42(b) provides the criteria for determining whether an issue should be certified for interlocutory appeal. To consider whether certification is proper, one of the five criteria set forth in Supreme Court Rule 42(b)(i) - (v) must be satisfied. Under Rule 42(b)(i), the Court may look to the criteria established by Rule 41.

5. After considering plaintiff's motion in limine and having heard defendant's witness' testimony, the Court found that defendant had at least acted recklessly in failing to preserve the evidence. Plaintiff repeatedly had requested the videotape during the 60-day period in which defendant ordinarily preserved such surveillance. Although the risk management contractor did not appear to have acted willfully, recklessly or intentionally, the Court based its decision on the fact that it was the responsibility of defendant Dollar Tree (who was located at the site of the incident and had actual possession and control over the surveillance camera) to preserve and produce the videotape.

6. The Court's ruling was regarding a jury instruction. It is one of many discretionary rulings that the Court makes throughout the trial. Although the ruling does determine a substantial issue, the issue is not dispositive, and interlocutory review is not necessary in the interest of justice. Further, a determination of whether a spoliation instruction is appropriate, is not an issue of

first impression in Delaware. There is no reason why this issue should not be subject to appellate review at the conclusion of the litigation.

7. The Court also finds that defendant has failed to demonstrate that the Court overlooked a controlling precedent or legal principle, or misapprehended the law or facts in a way that would have changed the outcome of the underlying decision.

THEREFORE, defendant Dollar Tree, Inc. has failed to demonstrate that any Delaware Supreme Court Rule 42(b) criteria require that the Court exercise its discretion to certify interlocutory appeal. Defendant's Motion for Certification by the Trial Court of Interlocutory Appeal of the Court's Order Granting Plaintiff's Motion in Limine for an Adverse Inference Instruction on the Issue of the Surveillance Video is hereby **DENIED**. Defendant's Motion for Reargument and/or Reconsideration of the Court's Order Granting Plaintiff's Motion in Limine for an Adverse inference Instruction on the Issue of the Surveillance Video is hereby **DENIED**.

IT IS SO ORDERED.

/s/ *Mary M Johnston*

The Honorable Mary M. Johnston

