

**Rules Regarding Discovery Sanctions and
Motions to Withdraw or Amend an Admission**

By

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In *New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, (hereinafter *Albertsons*) Plaintiff John Shanahan sustained a severe brain injury in a slip and fall incident at Albertsons supermarket while shopping with his wife. The couple brought an action against New Albertsons, Inc. (“Albertsons”) for premises liability, loss of consortium, and negligent infliction of emotional distress.

Facts

The wife did not witness the incident, but testified that she went over to the next aisle after she heard a thud and found her husband laying on his back on the floor, bleeding profusely. She noticed that his lower left was wet, but she did not notice anything on the floor. She screamed for help and run to the next aisle to ask someone to call 911. When she returned to her husband an Albertsons employee was there yelling “Damn it. I told those guys to clean that mess up an hour ago.” According to wife no ice was brought to the scene. John Shanahan has no recollection of the incident, due to his severe brain injury.

Albertsons employees testified that there was nothing on the floor at the scene of the incident to cause a person to fall. Subsequent to the incident, one of the employees brought a bag ice for victim’s comfort. After use the bag was placed on the floor and later tossed away.

Litigation/Discovery

Plaintiffs’ attorney served a notice requesting preservation of all video recordings and photographs related to the incident from noon to midnight on the day of the incident. This notice was served on the same day as the complaint.

Plaintiffs served discovery requests on Albertsons. Request for Admission No. 3 asked to admit that Albertsons had a photograph showing a bag of ice on the floor where the incident occurred. Albertsons’ counsel prepared a draft response denying the request, while Albertsons’ claims administrator, who later testified that he believed to have seen a bag of ice on one of the photographs of the incident, changed it to “admit”. The “admit” response was served on Plaintiff.

Form interrogatory No. 12.4 asked Albertsons’ to identify all photographs concerning the incident. The inspection demand requested all such photographs. Albertsons produced seven photographs.

Albertsons employee who took the photographs of the scene of the incident, testified that he took 8-10 photographs. When shown the seven photographs provided by Albertsons, the witness confirmed taking them. Witness also testified that none of the supermarket's video cameras showed the snack aisle where the incident occurred.

Plaintiffs then served second set of inspection demands, requesting all photographs showing bag of ice at the scene of the incident. Albertsons responded that it was unable to comply as it had no such photographs.

Plaintiffs followed up with a third set of inspection demands, narrowing down the time period for the video recordings to the time period between 8:00 p.m. and 11:59 p.m. on the day of the incident. Albertsons produced a CD showing *portions* of the premises in the time period demanded.

The paramedics testified that the bag shown on one of the photographs taken after the incident appeared to be a cervical collar bag. Following this testimony Albertsons' served an "amended response" to request for admission No. 3, stating that the request was denied.

Plaintiffs' Motion for Discovery Sanctions

Plaintiffs filed a Motion for Discovery Sanctions under California Code of Civil Procedure Section 2023.010, arguing that Albertsons willfully destroyed video recordings and a photograph after Plaintiffs demanded production of that evidence. Plaintiffs argued that the video recordings would shown whether the floor was approximately 30 minutes before the fall as Albertsons claimed and showed when the bag of ice was brought to the scene of the incident. Plaintiffs also argued that none of the produced photographs showed a bag of ice and that according to the person who took the photographs 8-10 were taken. Plaintiffs argued that this photograph was a "smoking gun" and it existed at one time and was willfully destroyed by Albertsons. Albertsons opposed the motion.

Albertsons's Motion to Withdraw Its Admission

Together with its opposition, Albertsons filed a Motion to Withdraw an Admission. Albertsons argued that the admission was a result of its mistake, inadvertence, and excusable neglect and that it since learned that the object on the photograph was a cervical collar bag. And, since there is no legally cognizable prejudice to Plaintiffs the admission should be withdrawn as to prevent presentation of false evidence.

Declarations were filed stating that there were only seven photographs of the incident scene available.

Plaintiffs opposed the motion arguing that there was no showing of mistake, inadvertence, and excusable neglect and the withdrawal of admission was extremely

prejudicial to Plaintiffs whose theory of liability turned on the presence of the bag and with only five weeks before trial.

Trial Court's Decision

The court denied Albertsons motion to withdraw and issued the following sanctions: (1) to preclude Albertsons from entering into evidence or referring in any way any part of the video recordings; (2) to allow a jury instruction that Albertsons had destroyed the video recordings after receiving notice to preserve and that the jury may infer that the destroyed video recordings were unfavorable to Albertsons; (3) deny all other requested sanctions.

Albertsons promptly filed motions for reconsideration. Upon reconsideration, the court confirmed its prior rulings.

Appeals Court's Decision re Albertsons Motion to Withdraw Admission

The Appeals Court stated that because the law strongly favors trial and disposition on the merits, any doubts in ruling on a motion to withdraw or amend an admission must be resolved in favor of the party seeking relief. The Court further specified that the trial court's discretion in denying such motions is limited to circumstances where it is clear that the mistake, inadvertence, or neglect was *inexcusable*, or where it is clear that the withdrawal or amendment would *substantially prejudice* the party who obtained the admission.

The evidence showed that the photograph that Albertsons' claims adjuster believed showed a bag of ice actually shows a clear plastic bag. Such mistake is at least arguably excusable. Moreover, Plaintiffs pursued vigorous discovery in this action and the trial court had discretion to allow further discovery, if need be. Therefore, the Court concluded there was no substantial prejudice to the Plaintiffs in allowing Albertsons to withdraw its admission.

Issue and Evidence Sanctions were Unauthorized

The Appeals Court further held that even though the trial court may, after notice and opportunity for hearing, impose sanctions on a party, person or attorney for misuse of the discovery process, there are specific rules for imposition of issue and evidence sanctions.

An issue sanction is an order that designated facts are deemed established in favor of the party adversely affected by the misuse of the discovery process. An evidence sanction order prohibiting designated matters from being introduced in evidence.

Generally the trial court can impose an issue or evidence sanctions only if a party fails to obey a court order compelling discovery. However, there are exceptions to this rule. Where a party fails to produce requested documents and/or assures the other side that such do not exist and then later attempts to use them at trial, or is engaged in a

pattern of willful discovery abuse that causes the unavailability of evidence, the court can impose issue and evidence sanctions despite the absence of a prior order compelling discovery. Also sanctions (including terminating sanctions) are appropriate when they are allowed by a stipulation between the parties regarding discovery.

Preclusion of Video Recording Sanction

Here, the Court continued, the preclusion of video recordings from being introduced by Albertsons at trial is an issue sanction.

The Court explained that Plaintiffs waived their right to compel further responses when they did not file a motion to compel discovery when Albertsons responded “overbroad, burdensome and oppressive” to the first set of inspection demands. Furthermore, Albertsons’s employees testified that there were no recordings of the snack aisle where the incident occurred. Thus, there was no sufficiently egregious misconduct by Albertsons to justify imposing of sanctions in the absence of the discovery order.

Regarding Plaintiffs argument that the sanctions were justified by court’s inherent power to control litigation, the Court stated that the statutory restrictions (described above) on the exercise of the court’s inherent sanctioning power are binding rules unless they materially impair the court’s ability to ensure the orderly administration of justice.

In *Peat, Marwick, Mitchell & Co. v. Superior Court* (1988) 200 Cal.App.3d 272, where defendant accounting firm had merged with accounting firm plaintiff hired to be its expert, the court had power to impose sanctions by precluding the introduction of expert testimony on certain issues.

In *Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736, the court imposed terminating sanctions for confidential documents attained by plaintiff by misconduct that plaintiff was attempting to conceal. The court concluded that lesser sanction could not ensure a fair trial, and dismissed the action.

In *Williams v. Russ* (2008) 167 Cal.App.4th 1215, the court imposed terminating sanctions on plaintiff who intentionally destroyed evidence.

However, there was no evidence that Albertsons’ conduct egregious enough for trial court to impose sanctions as part of its ability to ensure the orderly administration of justice.

Jury Instruction Sanction

However, the Court proceeded that even though the sanctions was unauthorized it did not preclude an instruction that “if the jury finds that Albertsons intentionally destroyed evidence, it may infer that the evidence would have been unfavorable to Albertsons. ... If so instructed, the jury may consider all relevant and admissible evidence

in determining whether evidence was willfully suppressed, including the letter requesting the preservation of evidence.” *New Albertsons, supra*, 168 Cal.App.4th at 1434.

The Court inferred, that the trial court imposed the jury instruction sanction based on the language of the Evidence Code section 413 that allows a trier of fact to consider a party’s failure to explain or to deny by his testimony his willful suppression of evidence. Thus, the Court followed, imposing of this sanction depended on whether Albertsons willfully suppressed evidence.

The Court instructed the trial court to grant the motion to withdraw and to deny in full the motion for sanctions and impose any such conditions on the granting of the motion to withdraw as, in the circumstances, are appropriate, fair and just. The Court also awarded Albertsons its costs for the appellate proceeding.