

**VICTOR VALLEY UNION HIGH SCHOOL DISTRICT v. The SUPERIOR COURT OF
SAN BERNANDINO**

(2023) 91 Cal.App.5th 1121

Court of Appeal, Fourth District, Division 2, California

The safe-harbor provision for the spoliation of electronic evidence does not shield a party from sanctions if the evidence was altered or destroyed when the party was objectively on notice that litigation was reasonably foreseeable.

FACTS/PROCEDURE

John Doe sued Victor Valley Union High School District for negligence and other causes of action arising from an alleged sexual assault while he was a high school student. School video cameras recorded John Doe and two other boys entering the cafeteria restroom. During discovery, the parties in interest learned that this video had been erased because the video system automatically erases video 14 days after it is captured, and the school district failed to save it. Upon this finding, John Doe and the real parties in interest moved the superior court for terminating sanctions or, in the alternative, evidentiary, issue, and monetary sanctions against the district under Code of Civil Procedure section 2023.030¹.

In their motion for sanctions, John Doe and the parties in interest argued that they were “severely prejudiced” in their ability to develop their case because witnesses no longer remembered details of the incident. They argued the trial court should impose a terminating sanction by striking the district’s answer and entering a default judgment because (1) the district knew the importance of preserving the video; (2) the district’s failure to preserve the video proved they had intentionally destroyed evidence; and (3) real parties in interest were prejudiced by the loss of crucial evidence. The request for terminating sanctions was denied, as the trial court found the erasure of the video was the result of negligence, not intentional wrongdoing. In the alternative, the trial court granted the request for evidentiary, issue, and monetary sanctions because it concluded that, even before the lawsuit was filed, the district should have reasonably anticipated that the alleged sexual assault would result in litigation; therefore, a duty was imposed upon the district to preserve all relevant evidence. The district then filed, in this court, a petition for writ of mandate and/or prohibition and requested an immediate stay of the proceedings in trial court.

The issues presented in this case are whether the district was shielded from sanctions for failure to preserve the video by the safe harbor provision of the Code of Civil Procedure section 2023.030, subdivision (f)². If not, were the sanctions awarded in this case appropriate?

HOLDING/DISCUSSION

This court holds that the safe-harbor provision of section 2023.030(f)³ does not shield a party from sanctions for the spoliation of electronic evidence if the evidence was altered or destroyed when the party was under a duty to preserve the evidence. Further, the duty to preserve

¹ Cal. Code Civ. Proc., § 2023.030.

² Cal. Code Civ. Proc., § 2023.030, subd., (f).

³ *Ibid.*

relevant evidence is triggered when the party is objectively on notice that litigation is reasonably foreseeable, meaning litigation is probable and likely to arise from an incident or dispute and not a mere possibility. The duty to preserve evidence includes the duty to suspend routine destruction of documents or video evidence. Whether litigation is ‘reasonably foreseeable’ is an objective standard, asking whether a reasonable party in the same factual situation would be aware the ESI would be relevant to anticipated future litigation; but not when there is no more than the mere existence of a potential claim or the distant possibility of litigation.

Next, the court considered what sanctions were appropriate for spoliation of ESI. In reaching their conclusion that terminating sanctions were not appropriate, the court relied on several federal court decisions that classified terminating sanctions as “drastic” sanctions that are only “merited when ‘less onerous methods will be ineffective or obviously futile.’”⁴ Moreover, adverse evidentiary presumptions are only appropriate if the trier of fact concludes the evidence was intentionally destroyed⁵.

Accordingly, the trial court was correct in denying the motion for terminating sanctions, but incorrectly awarded the real parties in interest an adverse evidentiary presumption because the trial court expressly ruled that the erasure of the video was negligent and not intentional. Thus, before awarding evidence sanctions, the trial court must consider whether some lesser form of sanction will remedy the discovery violation. The case is remanded to trial court to reconsider what sanction or sanctions are appropriate.

⁴ *Talavera v. Shah* (D.C. Cir. 2011) 638 F.3d 303, 311.

⁵ Fed. Rules of Civ. Proc., rule 37(e)(2)(A), (B), 28 U.S.C.A.; Cal. Evid. Code, § 413