

for admissions request the other party to admit that a document is authentic. For example, the parties might have a dispute about the amount due under a contract but should be willing to admit that they signed the contract and that it is authentic. These requests for admission reduce the length of trials.

Depositions

Depositions are the oral testimony of parties or witnesses that are taken under oath but outside the courtroom and before the trial. They can be taken long before a trial and help preserve a witness's or party's recollection. Depositions are also helpful in determining just how strong a case is. It is far better to discover damaging information in a deposition than to have surprises at trial.

Requests for Production

A **request for production** requires the other side to produce requested documents. For example, if a business is suing to recover lost profits, the defendant will probably want to request the income statements and perhaps the income tax returns of that business in order to prepare for the presentation of damages issues at trial. A request for production can include medical records as well as tangible evidence. In *Kroger Co. v Walters* (Case 4.2), the destruction of physical evidence is an issue in a case that provides an answer to the opening "Consider ..."

CASE 4.2

Pulte Home Corporation v Simerly
746 S.E.2d 173 (Ga.App. 2013)

Fooling Around with Documents and E-Mails: Costs and Consequences

FACTS

In January 2004, Pulte purchased property to develop single-family residences for what would become the Notting Hill and Fieldstone subdivisions. The Pulte Development discharged water into Harris Creek and was located upstream of the properties owned by Tim and Adele Simerly and Richard and Susan Trent (Plaintiffs). Pulte had purchased the property from Macauley Properties, which previously hired Lowe Engineering to complete a hydrology and storm-water management study. The Lowe Study was completed in January 2004, and Pulte relied upon the study to design and construct its development. The Lowe Study recommended that storm water discharges from future developments could be controlled with the construction of a weir on Harris Creek, which consisted of a partial wall across the creek, above Drew Campground Road located within Fieldstone.

Pulte began mass grading and other land-disturbing activities at Fieldstone in March 2004. Shortly thereafter, excessive amounts of storm water, dirt, sediment, and development debris were discharged into Harris Creek and ultimately into the ponds located on the Simerly and Trent properties. Investigations revealed that the discharged sediment and pollutants were caused by

Pulte's activities upstream and its failure to install and maintain erosion control devices required by law. The Pulte Development also caused a dramatic increase in the rate and flow of storm-water discharge into Harris Creek that caused flooding to the Simerly and Trent properties. During a subsequent study, it was discovered that the weir was inadequate to control the storm-water discharge from the Pulte Development because the Lowe Study, upon which Pulte had relied for storm-water management, was based upon flawed assumptions and analysis.

The Simerlys and Trents sued Pulte Home Corporation for trespass, nuisance, negligence, negligence per se, riparian rights, unjust enrichment, and ejectment based on the company's actions in causing excess storm water and sediment to enter the Simerlys' and Trents' properties.

The jury found in favor of the Simerlys, Trents, and Lawsons (collectively, the "Plaintiffs") and awarded them \$2.49 million in damages and attorney fees. The court had found evidence of spoliation by Pulte and excluded certain exculpatory evidence from the trial because of a finding of Pulte's counsel's misconduct. The trial court also allowed evidence of Pulte's conduct during discovery in its determination of attorney fees. Pulte appealed.

CONTINUED

JUDICIAL OPINION

MILLER, Judge

During litigation, the trial court found that Pulte had engaged in spoliation by deleting emails relevant to the litigation, and enjoined Pulte from engaging in further destruction of evidence. The trial court had appointed a Special Discovery Master to oversee compliance with the court's injunction and to resolve other discovery issues, including the attempted recovery of spoliated evidence through a computer forensic investigation. The Special Discovery Master issued a report outlining that the computer forensic investigation revealed that Pulte had engaged in further spoliation of electronic evidence after the trial court's order and recommended that Pulte be sanctioned for its violations. The trial court adopted the Special Discovery Master's report and recommendation.

The Special Discovery Master also informed the trial court that the Simerlys' counsel and Pulte's counsel had provided conflicting statements relating to Pulte's removal of discovery documents during a May 2009 document review at Pulte's offices. At a subsequent hearing before the trial court, Simerlys' counsel, Michael Carvalho, testified that he and an associate attorney, Christine Westberg, had a scheduled document review at Pulte's offices in May 2009. Carvalho testified that during the document review, he had stacked a number of documents in a pile that were deemed relevant in order to copy them. Before

taking a break for lunch, Carvalho informed Pulte's counsel that they planned to copy the documents in the stack. When Carvalho returned from lunch, he noticed that the stack of documents was smaller. Carvalho testified that he asked Pulte's counsel about the missing documents, and she told him that she took the documents because they were privileged. Following the hearing, the trial court found that Pulte's counsel had taken documents during the document review.

The trial court allowed Carvalho to testify about spoliation during the May 2009 document review, and would [not] allow Pulte to benefit from its discovery violations.

Plaintiffs were forced to undergo unnecessary trouble and expense to prosecute their claims in this case, and the evidence [of the spoliation] was properly admitted as it related to the issue of attorney fees.

Affirmed.

CASE QUESTIONS

1. Explain what the Special Master found about Pulte's behavior in the case.
2. What are the consequences when one side attempts to withhold or destroy evidence?
3. What management lessons should be learned and applied from this case?

Consider . . .

4.3

The obstruction of justice trial against the accounting firm of Arthur Andersen found the prosecution using the following types of evidence:

- Testimony from partners, employees, and consultants with Andersen
- E-mails among Andersen partners, employees, and consultants; both saved and deleted e-mails were introduced into evidence
- A videotape of a partner making a presentation to employees on the pending SEC investigation in which he urged employees to get rid of excess files so that "nosy plaintiffs' lawyers" wouldn't be able to find damaging evidence
- The statistics on the e-mail deletions by Andersen employees, including the peak in e-mail deletions following the presentation that was shown on video and the instruction to get rid of unnecessary files

- The articles clipped and saved by Andersen employees relating to Enron and SEC investigations

What would the government need to show to establish that Andersen had engaged in spoliation through their e-mail deletions?

THINK: In the *Pulte* case, the court found that the e-mails were destroyed after the court had ordered the company to stop destruction and that the documents were removed before the plaintiffs' lawyers could copy them and all this was done during discovery in the case.

APPLY: What is different in this Andersen situation? What is the same?

ANSWER: The evidence shows that the Andersen employees had been briefed on at least the investigations, a likely source of litigation. With the investigations pending, the destruction of e-mails and other documents at that time meets the test for spoliation, even though litigation had not actually begun.