Spoliation of Evidence: How It Affects the Transportation Industry

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I. INTRODUCTION

Spoliation of evidence was historically defined as "[t]he intentional destruction, mutilation, alteration, or concealment of evidence."[1] In the civil litigation context, however, spoliation is more broadly understood to encompass both intentional and negligent "tampering with ... any form of potential evidence, when that destruction interferes with [a] ... civil action."[2] When evidence relevant to litigation is lost, destroyed or concealed, the consequences on the party that the evidence favored can be significant. Clearly, in extreme cases, the loss of critical evidence will result in a complete inability to prove a valid claim or develop a defense.

II. SANCTIONS FOR SPOLIATION

Courts have the inherent power to sanction a party that spoliates relevant and discoverable evidence.[3] There are a variety of remedies that courts employ for spoliation of evidence, ranging from discovery sanctions including an adverse inference or presumption against the spoliator or the preclusion of evidence or testimony, or, in extreme cases, the imposition of default. Although traditionally spoliation sanctions were limited to cases involving the intentional destruction of evidence, spoliation sanctions have more recently been extended by courts to also encompass the non-intentional (i.e. negligent) destruction of evidence.

There are generally three different types of sanctions that a court may impose upon a spoliating party:

1) An adverse inference;
2) The preclusion of evidence or testimony; or
3) The dismissal of a claim or defense.

While the appropriate remedy for spoliation of evidence will turn on the facts of each particular case, courts generally consider the following factors:

1) The degree of prejudice suffered by the nonspoliating party;
2) Whether such prejudice can be cured;
3) The degree of fault and personal responsibility of the spoliating party;
4) The practical importance of the evidence; and
5) The availability of lesser sanctions that would avoid any unfairness to the innocent party while, at the same time, serve as sufficient penalty to deter such conduct in the future.[4]

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A. The Adverse Presumption or Spoliation Inference Jury Instruction

One of the most common remedies employed by virtually all jurisdictions is to provide for a "spoliation inference" or "adverse presumption" jury instruction.[5] This rule allows the trier of fact to assume that the absent proof would have been unfavorable to the claims of the errant party. The theory behind this presumption is that a party would not ordinarily destroy evidence favorable to himself/herself/itself. In addition to the adverse inference, New Jersey also provides for a claim for fraudulent concealment in spoliation contexts.[6]

> "The elements that must be established by a plaintiff in a tort action for fraudulent concealment of evidence are: (1) that defendant in the fraudulent concealment action had a legal obligation to disclose evidence in connection with an existing or pending litigation; (2) that the evidence was material to the litigation; (3) that plaintiff could not reasonably have obtained access to the evidence from another source; (4) that defendant intentionally withheld, altered or destroyed the evidence with purpose to disrupt the litigation; and (5) that plaintiff was damaged in the underlying action by having to rely on an evidential record that did not contain the evidence defendant concealed…[The] tort of fraudulent concealment... may be invoked as a remedy for spoliation where those elements exist."[7]

B. Fleet Management Systems

Safely transporting pupils is the most important things a bus company does, yet achieving this goal is complex. Fleet and personnel are constantly on the move. Significant lag time exists in communicating. Detailed record keeping and keeping your employer informed is extremely important.

Workforce & Fleet Visibility

Inspections are important, but so are following planned routes and speed limits. Using a GPS (HD-GPS) system, the company now has the capability to:

- Quickly audit a route
- Pinpoint equipment failures
- Monitor arrival and departure times

Issue Resolution Made Easy

Responding to inquiries regarding a missed pick up or a speeding bus may now be recorded and preserved. Should an emergency or accident occur, one must be aware that all such data is and must be preserved.

Some solutions include:

- Electronic Vehicle Inspection Report (EVIR) – a simple tag and inspect systemthat ensures pre and post-trip inspection compliance, eliminates paperwork and expedites vehicle repair
- HD-GPS – a unique GPS system that captures a higher sample rate, in four dimensions, at every point, for more effective tracking and managing of assets
- Ground Traffic Control – a powerful web-based data management application that provides a real-time picture of your operations with unmatched visibility, ease and control

It is extremely important that each and every driver and safety supervisor be aware that these systems are evolving and that there is a continuing duty to preserve any and all relevant data.

C. Striking the Pleadings

Under certain circumstances, a court may dismiss a claim or a defense due to the spoliation of evidence.

In New York, for example, the most severe spoliation sanction, striking a party's pleading, may be imposed even though the spoliation was negligent, rather than intentional, "and even if the evidence was destroyed before the spoliator became a party, provided it was on notice that the evidence might be needed for future litigation."[8] However, New York courts will not impose such a severe sanction where the non-spoliating party is not deprived of a means of proving/defending their case. For instance, in a pending personal injury litigation in the New York Supreme Court arising out of a motor vehicle accident, the plaintiff moved to strike the defendants' answer and impose sanctions against the defendants where photographs taken by the defendant truck driver of damage to the subject vehicles were erased and a log book kept by the defendant trucking company was lost. In denying the plaintiff's Motion to Strike Defendant's Answer, the court concluded that the loss of the log book and the erasing of the photographs of the vehicles would not deprive the plaintiff of a means of proving his case.

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Similarly, in Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68 (S.D.N.Y. 1991), the United States District Court for the Southern District of New York found that an adverse inference was not an appropriate sanction for the destruction of maintenance records by the owner/operator of a bus involved in an accident, where there was insufficient evidence that the destruction was a deliberate attempt to prevent discovery of the records and no evidence that the destroyed records would have shown whether the bus brakes were in good working order.

> In order to remedy the evidentiary imbalance created by the destruction of evidence, an adverse inference may be appropriate even in the absence of a showing that the spoliator acted in bad faith. However, where the destruction was negligent rather than willful, special caution must be exercised to ensure that the inference is commensurate with information that was reasonably likely to have been contained in the destroyed evidence. Where, as here, there is no extrinsic evidence whatever tending to show that the destroyed evidence would have been unfavorable to the spoliator, no adverse inference is appropriate.[9]

III. INDEPENDENT CAUSE OF ACTION FOR INTENTIONAL SPOLIATION

A number of jurisdictions have, to date, declined to recognize the independent tort of spoliation, whether asserted to have been committed negligently or intentionally.[10] The Hawaii Supreme Court has not decided whether Hawaii law recognizes a separate cause of action for spoliation of evidence.[11] Likewise, the Nebraska Supreme Court has yet to decide whether the spoliation of evidence would be recognized as an independent cause of action.[12] Moreover, although the Idaho Supreme Court has not expressly adopted spoliation of evidence in Idaho, it has recognized that spoliation of evidence is a tort.[13] The North Dakota Supreme Court has not yet ruled whether North Dakota recognizes an independent tort for the spoliation of evidence.[14]

Under the evolving tort theory of intentional spoliation of evidence, courts recognizing the tort allow a non-spoliating party to recover money damages for the adversary's interference with the litigation by destruction, mutilation, transference, or alteration of evidence.[15] Those courts continue to narrow the scenarios in which such a claim will be recognized due to the speculative nature of the damages alleged with spoliation claims. As this specific theory of liability is in its infancy, "no general consensus has developed as to the basis, essential elements, or even existence of such a tort."[16] Thus, for the purpose of this article, we will address the tort's prima facie elements in a general sense, focusing on the overriding themes woven in the various elements among jurisdictions that recognize the independent tort.

Elements

1) The existence of a potential lawsuit at the time of the evidence destruction. A party usually satisfies this burden by pointing to some tortious conduct and subsequent injury that occurred prior to the loss of proof.[17]
2) The alleged spoliator's actual knowledge of the existence of or potential for the underlying lawsuit. This can usually be satisfied, for instance, upon proof that the spoliator was informed of a party's injury and the circumstances surrounding it, even though a formal complaint had not yet been filed.[18]
3) The destruction, loss, mutilation, or significant alteration of relevant evidence. Obviously, if the spoliator concedes that a relevant piece of evidence was lost or disposed of, this element will be met. In cases where the litigants dispute the evidence's loss, however, the non-spoliator must demonstrate with independent proof that spoliation occurred.[19]
4) The alleged spoliator's intent to disrupt or defeat the underlying lawsuit must be established. Proof that the evidence was intentionally tampered with is not always sufficient. Some courts require a showing of a bad purpose or bad faith by the spoliator.[20]
5) The loss of evidence must be shown to have adversely impacted a party's ability to succeed in the preceding lawsuit.[21]

Some courts require a minimal showing of causation before liability can be imposed; whereas, others require actual failure of the underlying case in order to demonstrate that the spoliation in fact denied the victim the expectancy of a favorable judgment. For instance, Ohio case law

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suggests that causation could only be demonstrated by the spoliator's victim's ineffective attempt to pursue the original civil action. Until the plaintiff brings suit on the initial claim and loses, a jury in a spoliation trial is unable to know if the plaintiff's claimed damages are legitimate.[22] On the other hand, the District of Columbia has found that a rule "[r]equiring plaintiffs to pursue futile lawsuits to completion" is too harsh.[23] Instead, taken an approach that a spoliation victim must show that the underlying lawsuit enjoyed a significant possibility of success.[24]

IV. NEGLIGENT SPOLIATION OF EVIDENCE AS AN INDEPENDENT CAUSE OF ACTION

As noted above, courts have only recently addressed separate claims for the negligent, rather than intentional, destruction or loss of evidence. Negligent spoliation of evidence is a tort claim based on a defendant's breach of a duty to preserve evidence.[25]

Elements

1) The existence of a pending or probable litigation involving the non-spoliator and the alleged spoliator;
2) The knowledge on part of the alleged spoliator that litigation exists or is probable;
3) Willful destruction of evidence by the alleged spoliator designed to disrupt the non-spoliator's case;
4) Disruption of the non-spoliator's case; and
5) Damages proximately caused by the alleged spoliator's acts.[26]

The District of Columbia recognizes the tort of negligent or reckless spoliation of evidence. In order to prevail on this claim, a plaintiff must show, on the basis of reasonable inferences derived from both existing and spoliated evidence, that (1) the plaintiff's ability to prevail in the underlying lawsuit was significantly impaired due to the absence of the spoliated evidence; and (2) there had been a significant possibility of success in the underlying claim against the third party.[27]

Under Florida law, elements of negligent spoliation of evidence are: (1) existence of a potential civil action; (2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action; (3) destruction of that evidence; (4) significant impairment in the ability to prove the lawsuit; (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit; and (6) damages.[28]

V. IMPLICATIONS FOR THE TRANSPORTATION INDUSTRY

There is undoubtedly a trend towards the recognition of the spoliation of evidence as a separate tort. As the number of cases alleging spoliation of evidence increases and more jurisdictions adopt spoliation of evidence as a specific tort, the preservation of evidence is an important consideration for truck accident lawyers and litigants alike.

Those in the transportation industry should preserve all information (i.e. potential evidence) that may be relevant in the event that a lawsuit is commenced following a motor vehicle accident. The following are examples of items to be preserved:

- Accident reports;
- Photographs/videotapes – including cell phone images;
- Vehicle inspection records;
- Maintenance and repair records;
- Driver's logs;
- Routing information;
- GPS/ECM data.

In addition to document preservation, it is important to retain tangible items including the vehicle itself and its parts. The old adage that it is better to be safe than sorry goes a long way in the context of spoliation claims.

[1] Blacks Law Dictionary (8th ed. 2004)
[2] Bart S. Wilhoit, Comment, *Spoliation of Evidence: The Viability of Four Emerging Torts*, 46 UCLA L. Rev. 631, 633 (1998)
[3] *See, e.g., Shaffer v. RWP Group, Inc.*, 169 F.R.D. 19 (E.D. N.Y. 1996); *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68 (S.D. N.Y. 1991)
[4] *Id.* at 830-834
[5] *Cedars-Sinai Medical Center v. Superior Court*, 18 Cal. 4th 1 (1998); *Collins v. Throckmorton*, 425 A.2d 146 (Del. 1980); *State v. Langlet*, 283 N.W.2d 330 (Iowa 1979); *State v. Council in Division of Resource Development of the Dept. Of Conservation & Economic Development*, 60 N.J. 199 (1972); *Trevino v. Ortega*, 969 S.W2d 950 (Texas 1998)
[6] *Rosenbilt v. Zimmerman*, 766 A.2d 749 (2001); See also State v. Council in Division of Resource Development of the Dept. Of Conservation & Economic Development, supra.
[7] *Rosenbilt v. Zimmerman*, 766 A.2d at 758.
[8] *DiDomenico v. C&S Aeromatik Supplies, Inc.* 252 A.D.2d 41 (2nd Dep't 1998); *Squitieri v. City of N.Y.*, 248 A.D.2d 291 (1st Dep't 1998)

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[9] *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. at 77

[10] *La Raia v. Superior Court In and For Maricopa County*, 150 Ariz. 118 (1986); *Wilson v. Beloit Corp.*, 921 F.2d 765 (8th Cir. 1990); Colorado has not adopted a separate cause of action for the spoliation of evidence, but trial courts in Colorado enjoy broad discretion to impose sanctions for spoliation of evidence, even if the evidence is not subject to a discovery order permitting sanctions under the Colorado Rules of Civil Procedure, Rule 37; *Beers v. Bayliner Marine Corp., supra*, (the trier of fact may draw an adverse inference from the intentional spoliation of evidence provided that certain criteria are met); *Collins v. Throckmorton*, 425 A.2d 146 (Del. 1980)(spoliation is a rule of evidence which warrants an evidentiary inference against the spoliator); *Gardner v. Blackston*, 185 Ga. App 754 (1988); *Welton v. Ambrose*, 351 Ill. App. 3d 627 (4th Dist. 2004), appeal denied 213 Ill. 2d 577 (2005); *Meyn v. State*, 594 N.W.2d 31 (Iowa 1999); see also *State v. Langlet*, 283 N.W.2d 330 (Iowa 1979)(fact finder may draw inference that evidence destroyed was unfavorable to party responsible for its spoliation); *State v. Hartsfield*, 681 N.W.2d 626 (Iowa 2004)(spoliation of evidence inference is not appropriate when the destruction of the evidence is not intentional); *Koplin v. Rosen Well Perforators, Inc.*, 734 P.2d 1177 (Kan. 1987)(absent some independent tort, contract, agreement, voluntary assumption of duty, or special relationship of the parties, the tort of 'the intentional interference with a prospective civil action by spoliation of evidence' is not recognized in Kansas); *Butler v. Mooers*, 2001 WL 1708836 (Me. Super. Ct. 2001); *Miller v. Montgomery County*, 64 Md. App. 202 (1985)(there is no separate cause of action for spoliation in Maryland; however, unexplained and intentional destruction of evidence by litigant gives rise to inference that evidence would have unfavorable to his cause); *Fletcher v. Dorchester Mut. Ins. Co.*, 773 N.E.2d 420 (2002); *Panich v. Iron Wood Prods. Corp.*, 445 N.W.2d 795 (Mich Ct. App. 1989) (under the facts of this case, the court declined to create an independent tort in Michigan); *Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434 (Minn. 1990) (holding that the matter was "prematurely" before the Supreme Court of the state); *Richardson v. Sara Lee Corp.*, 847 So. 2d 821 (Miss. 2003); *Baugher v. Gates Rubber Co., Inc.*, 863 S.W.2d 905 (Mo. Ct. App. E.D. 1993); *Timber Tech Engineered Bldg. Products v. The Home Ins. Co.*, 55 P.3d 952 (Nev. 2002); *Bush v. Thomas*, 888 P.2d 936 (N.M. Ct. App. 1994); *MetLife Auto & Home v. Joe Basil Chevrolet, Inc.*, 682 N.Y.S.2d 452 (2004) (although the New York Court of Appeals declined to permit an independent cause of action in the case before it, it did leave the door open to such a claim where the required elements are established); *Olson v. Grutza*, 631 A.D.2d 191 (Pa. Super Ct. 1993); *Poynter v. General Motors Corp.*, 476 F. Supp. 2d 854 (E.D. Tenn 2007) (applying Tennessee law); *Trevino v. Ortega*, 969 S.W2d 950 (Texas 1998).

[11] *Exotics Hawaii-Kona, Inc. V. E.I. Dupont De Nemours & Co.*, 104 Haw. 358 (2004); *Matsuura v. E.I. Dupont De Nemours & Co.*, 102 Haw. 149 (2003)

[12] *Trieweiler v. Sears*, 689 N.W.2d 807 (2004)(although Nebraska has yet to decide whether the spoliation of evidence would be recognized as an independent cause of action, court allows factfinder to draw the inference that the evidence destroyed was unfavorable to the party responsible for its destruction)

[13] *Cook v. State, Dept. of Transp.*, 985 P.2d 1150(1999); *Yoakum v. Hartford Fire Ins. Co.*, 923 P.2d 416 (1996)

[14] *Simpson v. Chicago Pneumatic Tool Co.*, 693 N.W.2d 612 (N.D. 2005)

[15] *See Hazen v Municipality of Anchorage*, 718 P2d 456 (Alaska 1986); *Smith v Howard Johnson Co.*, 615 NE2d 1037 (Ohio 1993)

[16] *Edwards v. Louisville Ladder Co.*, 796 F. Supp. 966 (W.D. La. 1992) (citing James Thompson, *Spoliation of Evidence: A Troubling New Tort*, 37 Kan. L. Rev. 563 (1989)

[17] 19 Causes of Action 2d 249 (2008)

[18] *Id.*

[19] *Id.*

[20] *Id; See also Quinn v. RISO Investments, Inc.*, 869 So.2d 922 (La. Ct. App. 4th Cir. 2004) (in Louisiana, a plaintiff asserting a state law tort claim for spoliation of evidence must allege that the defendant intentionally destroyed evidence. Allegations of negligent conduct are insufficient)

[21] *Id.*

[22] *Tomas v. Nationwide Mutual Insurance Co.*, 607 N.E.2d 944 (Ohio Ct. App. 1992)

[23] *Holmes v. Amerex Rent-a-Car*, 710 A.d.2d 846 (D.C. 1998)

[24] *Id.*

[25] *Humana Workers' Compensation Services v. Home Emergency Services, Inc.*, 842 So.2d 778 (Fla. 2003)

[26] *See Ed Schmidt Pontiac-GMC Truck, Inc. v. Chrysler Motors Co., LLC.*, 575 F. Supp. 2d 837 (N.D. Ohio 2008)(applying Ohio law)

[27] *Bell ex. rel. Albert R. Bell Living Trust v. Rotwein*, 535 F. Supp. 2d 1137(D.D.C. 2008)(applying District of Columbia law). See also Battocchi v. Washington Hosp. Center, 581 A.D.2d 759 (D.C. 1990)

[28] *Silhan v. Allstate Ins. Co.*, 236 F. Supp. 2d 1303 (N.D. Fla. 2002) (applying Florida law); *See also Continental Ins. Co. v. Herman*, 576 So. 2d 313 (Fla. Dist. Ct. App. 3d Dist. 1990); *Gayer v. Fine Line Const. & Elec., Inc.*, 970 So. 2d 424 (Fla. Dist. Ct. App. 4th Dist. 2007).