White and Williams LLP

(215) 864-6322

Remedies for Spoliation

Certain exceptions may apply, and law is subject to change. Contact White and Williams LLP for additional information.

ALABAMA

A third party has no general duty to preserve evidence; however, such a duty may arise if: 1) the third party voluntarily assumes the duty to preserve evidence; 2) the third party agrees with the plaintiff that it will preserve the evidence; or 3) the plaintiff makes a specific request to the third party to preserve the evidence.

In addition to proving a duty, a breach, proximate cause, and damage, the plaintiff in a third-party spoliation case must also show: (1) that the defendant spoliator had actual knowledge of pending or potential litigation; (2) that a duty was imposed upon the defendant through a voluntary undertaking, an agreement, or a specific request; and (3) that the missing evidence was vital to the plaintiff's pending or potential action. Once all three of these elements are established, there arises a rebuttable presumption that but for the fact of the spoliation of evidence the plaintiff would have recovered in the pending or potential litigation; the defendant must overcome that rebuttable presumption or else be liable for damages.

The plaintiff must offer to bear the burden/cost of preserving the evidence, unless the third party holding the evidence offers or agrees to do so. After the agreement, the third party may later decline responsibility for preservation, thereby shifting the burden back to the plaintiff. Killings v. Enterprise Leasing Co., Inc., 9 So.3d 1216 (Ala. 2008).

When a party destroys evidence, the appropriate sanction depends upon five factors: (1) the importance of the evidence destroyed; (2) the culpability of the offending parties; (3) fundamental fairness; (4) alternative sources of information; and (5) the possible effectiveness of sanctions other than dismissal. Vesta Fire Ins. Corp. v. Milam & Co. Construction, Inc., 901 So.2d 84 (Ala. 2004). Sanctions can range from a jury instruction, Southeast Environmental Infrastructure, L.L.C. v. Rivers, 12 So.3d 32 (Ala. 2008), to dismissal of a case. Capitol Chevrolet, Inc. v. Smedley, 614 So.2d 439 (Ala. 1993).

ALASKA

If evidence is destroyed or is concealed until all remedies have expired, the affected party may recover in tort if the spoliating party intentionally interfered with the other party's ability to bring a civil cause of action and if if the affected party had a valid underlying cause of action which was prejudiced by the destruction. Punitive damages are available in such a claim. Allstate Ins. Co. v. Dooley, 243 P.3d 197 (Alaska 2010). Spoliation damages are recoverable in first-party and third-party cases. Hibbits v. Sides, 34 P.3d 327 (Alaska 2001). Alaska also recognizes the tort of fraudulent concealment, the elements of which are: (1) the defendant concealed evidence material to plaintiff's cause of action; (2) plaintiff's underlying cause of action was viable; (3) the evidence could not reasonably have been procured from another source; (4) the evidence was withheld with the intent to disrupt or prevent litigation; (5) the withholding caused damage to the plaintiff from having to rely on an incomplete evidentiary record; and, (6) the withheld evidence was discovered at a time when the plaintiff lacked another available remedy. Allstate v. Dooley. When a defendant negligently spoliates evidence, the burden shifts to it to prove the non-existence of the fact presumed. Sweet v. Sisters of Providence in Washington, 895 P.2d 484 (Alaska 1995).

ARIZONA

Independent tort of spoliation of evidence not recognized. Trial court may instruct the jury that it may infer that destroyed evidence would have been unfavorable to the position of the offending party. McMurtry v. Weatherford Hotel, Inc., 293 P.3d 520 (Ariz. App. 2013).

ARKANSAS

Third-party and first-party causes of action for tortious spoliation not recognized. Downen v. Redd, 242 S.W.3d 273 (Ark. 2006); Goff v. Harold Ives Trucking Co., Inc., 27 S.W.3d 387 (Ark. 2000). An aggrieved party can request that a jury be instructed to draw a negative inference against the spoliator, can request discovery sanctions or can seek to have a criminal prosecution initiated against the party who destroyed relevant evidence. Goff.

CALIFORNIA

No tort cause of action will lie against a party to litigation, or against a non-party, for the intentional destruction or suppression of evidence when the spoliation was or should have been discovered before the conclusion of the litigation. Temple Community Hospital v. Superior Court, 976 P.2d 223 (Cal. 1999); Cedars–Sinai Medical Center v. Superior Court, 954 P.2d 511 (Cal. 1998). No cause of action exists for negligent spoliation, either. Strong v. State, 137 Cal.Rptr.3d 249 (Cal.App. 2d Dist. 2011). A cause of action may exist for the breach of an express agreement to preserve evidence. Cooper v. State Farm Mut. Auto. Ins. Co., 99 Cal.Rptr.3d 870 (Cal.App. 4th Dist. 2009). The affected party may seek an inference that evidence suppressed by a party was unfavorable to the suppressing party, discovery sanctions, disciplinary sanctions against the spoliating/suppressing attorney and criminal sanctions. Temple Community; Cedars-Sinai.

COLORADO

No cause of action exists for spoliation of evidence. Johnson v. Liberty Mut. Fire Ins. Co., 653 F.Supp.2d 1133 (D.Colo. 2009). The affected party may seek an adverse inference instruction from the court. Aloi v. Union Pacific Railroad Corp., 129 P.3d 999 (Colo. 2006).

CONNECTICUT

The tort of intentional spoliation of evidence by a party defendant consists of the following essential elements: (1) the defendant's knowledge of a pending or impending civil action involving the plaintiff; (2) the defendant's destruction of evidence; (3) in bad faith, that is, with intent to deprive the plaintiff of his cause of action; (4) the plaintiff's inability to establish a prima facie case without the spoliated evidence; and (5) damages. Rizzuto v. Davidson Ladders, Inc., 905 A.2d 1165 (Conn. 2006). The tort extends to spoliation by non-parties. The non-party must must not only be aware of the pending or potential action but must intentionally, in bad faith, destroy the evidence. Diana v. NetJets Services, Inc., 974 A.2d 841 (Conn. Super. 2007).

An adverse inference may be drawn against a party who has destroyed evidence only if: (1) the spoliation was intentional; (2) the destroyed evidence was relevant to the issue or matter for which the party seeks the inference; and (3) the party who seeks the inference acted with due diligence with respect to the spoliated evidence. If the jury is the trier of fact, it must be instructed that it is not required to draw the inference that the destroyed evidence would be unfavorable but that it may do so upon being satisfied that these conditions have been met. Beers v. Bayliner Marine Corp., 675 A.2d 829 (Conn. 1996).

DELAWARE

No tort cause of action exists for intentional or negligent spoliation of evidence. Lucas v. Christiana Skating Center, Ltd., 722 A.2d 1247, 1250 (Del.Super. 1998). A party may ask the trial court to instruct the jury that the spoliated evidence would have been adverse to the spoliator only in instances in which the alleged spoliator acted intentionally or recklessly. Before giving such an instruction, the trial court must first make a preliminary finding of intentional or reckless conduct. No adverse inference is available in cases of negligent spoliation. Sears, Roebuck & Co. v. Midcap, 893 A.2d 542 (Del. 2006).

DISTRICT OF COLUMBIA

The elements of an independent cause of action for negligent or reckless spoliation of evidence against a non-party are: (1) existence of a potential civil action; (2) a legal (*i.e.*, existence of special relationship) or contractual duty to preserve evidence which is relevant to that action; (3) destruction of that evidence by the duty-bound defendant; (4) significant impairment in the ability to prove the potential civil action; (5) a proximate relationship between the impairment of the underlying suit and the unavailability of the destroyed evidence; (6) a significant possibility of success of the potential civil action if the evidence were available; and (7) damages adjusted for the estimated likelihood of success in the potential civil action. Holmes v. Amerex Rent-A-Car, 710 A.2d 846 (D.C. 1998).

When with gross indifference or reckless disregard, a party destroys evidence, the trial court must submit the issue of lost evidence to the trier of fact with corresponding instructions allowing an adverse inference. However, if the destruction was merely negligent, it is within the trial court's discretion not to instruct on missing evidence. Battocchi v. Washington Hospital Center, 581 A.2d 759 (D.C. 1990).

FLORIDA

When a party spoliates evidence, there is no independent cause of action for tortious spoliation. If the defendant intentionally spoliates, discovery sanctions may apply and a jury may infer that the evidence would have indicated the defendant's negligence. If the defendant's spoliation was negligent, a rebuttable presumption of negligence applies, shifting the burden of proof to the defendant. Martino v. Wal-Mart Stores, Inc., 908 So.2d 342 (Fla. 2005).

To establish a claim for spoliation by a non-party, the plaintiff must prove six elements: (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 and the ability to prove the lawsuit, (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit, and (6) damages. Gayer v. Fine Line Construction & Electric, Inc., 970 So.2d 424 (Fla. App. 4th Dist. 2007). An employee may sue his employer for spoliation if the employer destroys evidence that would have been material to the employee's action against a third party. Depending on appellate district, that cause of action may arise only if the employee has specifically requested that the evidence be preserved, Perez v. La Dove, Inc., 964 So.2d 777 (Fla. App. 3d 3 Dist. 2007), or it may arise even if no such request was made, because the request is presumed. Builder's Square, Inc. v. Shaw, 755 So.2d 721 (Fla. App. 4th Dist. 1999). A worker's compensation insurer is not entitled to recover its payments from the employee's settlement in such an action. Shaw v. Cambridge Integrated Services Group, Inc., 888 So.2d 58 (Fla. App. 4th Dist. 2004). Liability for spoliation does not arise until the underlying action is completed. Yates v. Publix Super Markets, 924 So.2d 832 (Fla. App. 4th Dist. 2005).

GEORGIA

No cause of action exists against a non-party for tortious spoliation. Owens v. American Refuse Systems, Inc., 536 S.E.2d 782 (Ga. App. 2000).

``When a party spoliates, spoliation or destruction of evidence creates the presumption that the evidence would have been harmful to the spoliator. Thomas v. Metropolitan Atlanta Rapid Transit Authority, 684 S.E.2d 83 (Ga. App. 2009). Spoliation may be found if the loss of the evidence occurs at a time when there is "contemplated or pending litigation." Kitchens v. Brusman, 303 Ga. App. 703 (2010).

HAWAII

No case on point as to whether spoliation of evidence is a tort. See Matsuura v. E.I. du Pont de Nemours and Co., 73 P.3d 687 (Haw. 2003), declining to address the issue. A trial court may impose discovery sanctions for spoliation, taking into account (1) the offending party's culpability, if any, in destroying or withholding discoverable evidence that the opposing party had formally requested through discovery; (2) whether the opposing party suffered any resulting prejudice as a result of the offending party's destroying or withholding the discoverable evidence; and (3) the inequity that would occur in allowing the offending party to accrue a benefit from its conduct. Sanctions do not generally lie until a discovery order has been violated. Stender v. Vincent, 992 P.2d 50 (Haw. 2000). Adverse inference instruction is available whether spoliation was intentional or negligent. Id.

IDAHO

Tort of spoliation not formally adopted but would likely be recognized under the appropriate facts. Ricketts v. Eastern Idaho Equipment, Co., Inc., 51 P.3d 392 (Idaho 2002); Cook v. State, Dept. of Transp., 985 P.2d 1150 (Idaho 1999). When a party with a duty to preserve evidence intentionally destroys it, an inference arises that the destroyed evidence was unfavorable to that party. Ada County Highway Dist. v. Total Success Investments, LLC, 179 P.3d 323 (Idaho 2008). The merely negligent loss or destruction of evidence is not sufficient to invoke the spoliation doctrine. Courtney v. Big O Tires, Inc., 87 P.3d 930 (Idaho 2003).

ILLINOIS

There is no general duty to preserve evidence; however, a duty to preserve evidence may arise through an agreement, a contract, a statute or another special circumstance. Moreover, a defendant may voluntarily assume a duty by affirmative conduct. Dardeen v. Kuhling, 821 N.E.2d 227 (Ill. 2004). While there is no tort of spoliation, under general negligence theories, a plaintiff may recover from a third-party spoliator if he alleges sufficient facts to support a claim that the loss or destruction of the evidence caused the plaintiff to be unable to prove an underlying lawsuit. Boyd v. Travelers Ins. Co., 652 N.E.2d 267 (Ill. 1995). A party which destroys material evidence may be liable for discovery sanctions, even if the destruction occurs before the complaint is filed. Shimanovsky v. General Motors Corp., 692 N.E.2d 286 (Ill. 1998).

INDIANA

In the absence of an independent tort, contract or agreement, or special relationship imposing a duty to the particular claimant, the claim of negligent or intentional interference with a person's prospective or actual civil litigation by the spoliation of evidence is not recognized. Glotzbach v. Froman, 854 N.E.2d 337 (Ind. 2006). When a party to litigation spoliates evidence, sanctions are available, including an inference that the spoliated evidence was unfavorable to the party responsible. Gribben v. Wal-Mart Stores, Inc., 824 N.E.2d 349 (Ind. 2005). However, if a defendant's liability insurer spoliates evidence after litigation has commenced, the plaintiff has an independent cause of action for spoliation against the insurer. Thompson v. Owensby, 704 N.E.2d 134 (Ind. App. 1998). The liability insurer cannot be held liable if at the time the evidence was destroyed the insurer did not have possession of it or if litigation was not then foreseeable. American Nat. Property and Cas. Co. v. Wilmoth, 893 N.E.2d 1068 (Ind. App. 2008).

IOWA

Negligent spoliation is not adopted as a tort. Remedies include discovery sanctions, barring duplicate evidence where fraud or intentional destruction is indicated and instructing on an unfavorable inference to be drawn from the fact that evidence was destroyed. Meyn v. State, 594 N.W.2d 31 (Iowa 1999).

KANSAS

The tort of spoliation of evidence is not recognized absent an independent tort, contract, agreement, voluntary assumption of duty, or special relationship of the parties. Superior Boiler Works, Inc. v. Kimball, 259 P.3d 676 (Kan. 2011). Court may give the jury an adverse inference instruction if a party had evidence in its possession which the party destroyed, concealed or failed to produce. Tichenor v. City of Topeka, 2012 WL 3136219 (Kan.App. 2012).

KENTUCKY

Kentucky does not recognize a tort cause of action for spoliation of evidence. Spoliation may be remedied through evidentiary rules and "missing evidence" instructions. Monsanto Co. v. Reed, 950 S.W.2d 811 (Ky. 1997). The missing evidence instruction allows, but does not require, the jury to infer that the destroyed evidence would be adverse to the party which destroyed it and favorable to the other party, if the jury finds that the evidence was lost intentionally and in bad faith. University Medical Center, Inc. v. Beglin, 375 S.W.3d 783 (Ky. 2011). Before a missing evidence instruction can be given, there must be some intentional conduct to hinder discovery on the part of the party who is unable to produce the requested evidence. Adams v. Lexington-Fayette Urban County Government , 2009 WL 350600 (Ky. App. 2009).

LOUISIANA

Tort of spoliation of evidence is recognized for intentional destruction of evidence. Whether tort exists for negligent destruction varies by circuit of the Court of Appeal. The Second and Third Circuits permit the tort for negligent destruction. See, e.g., Hebert v. Richard, 72 So.3d 892 (La.App. 3d Cir. 2011). The First, Fourth and Fifth Circuits do not. See, e.g., Clavier v. Our Lady of the Lake Hosp. Inc., 2012 WL 6725825 (La.App. 1st Cir. 2012). A federal court has predicted that the Louisiana Supreme Court would not recognize the tort in cases of negligent destruction. Union Pump Co. v. Centrifugal Technology, Inc., 2009 WL 3015076 (W.D.La. 2009). When a litigant fails to produce evidence within his reach, the courts have applied a presumption that the evidence would have been detrimental to his case. Clavier.

MAINE

There is no cause of action for tortious spoliation of evidence. Breen v. Lucas, 2005 WL 2736540 (Me. Super. 2005). Maine has not addressed the question of sanctions for spoliation of evidence in civil cases. However, see Rule 37 of the Maine Rules of Civil Procedure on discovery sanctions. In criminal cases, the State's failure to preserve evidence does not violate a criminal defendant's right to a fair trial unless (1) the evidence possesses an exculpatory value that was apparent before the evidence was destroyed, (2) the defendant would be unable to obtain evidence of comparable value by other reasonably available means, and (3) the State acted in bad faith in failing to preserve potentially useful evidence. State v. Kremen, 754 A.2d 964 (Me. 2000). In civil cases in federal court in Maine, sanctions for spoliation may include dismissal of the case, the exclusion of evidence, or a jury instruction on the spoliation inference. Driggin v. American Sec. Alarm Co., 141 F.Supp.2d 113 (D. Me. 2000).

MARYLAND

There is no tort for the spoliation of evidence. Goin v. Shoppers Food Warehouse Corp., 890 A.2d 894 (Md. App. 2006). The destruction or alteration of evidence by a party gives rise to inferences or presumptions unfavorable to the spoliator, the nature of the inference being dependent upon the intent or motivation of the party. Unintentional destruction by a party gives rise to an inference that the evidence would have been unfavorable to the party. Intentional destruction by a party gives rise to an inference that the evidence would have been unfavorable and that the party was aware that the evidence would have been unfavorable. Miller v. Montgomery County, 494 A.2d 761(Md. App. 1985).

MASSACHUSETTS

No cause of action exists for tortious spoliation against a nonparty, absent the violation of a subpoena or an agreement to preserve the evidence. Against parties, remedies for spoliation include an adverse inference against the spoliator, the preclusion of evidence and the dismissal of the case. Fletcher v. Dorchester Mut. Ins. Co., 773 N.E.2d 420 (Mass. 2002).

MICHIGAN

Michigan does not recognize the tort of spoliation of evidence. When a party destroys or loses material evidence, whether intentionally or unintentionally, and the other party is unfairly prejudiced because it is unable to challenge or respond to the evidence, the spoliating party may be sanctioned. If a party intentionally destroys relevant evidence, a presumption arises that the evidence would have been adverse to that party's case. Teel v. Meredith, 774 N.W.2d 527 (Mich. App. 2009).

MINNESOTA

Minnesota does not recognize an independent tort for spoliation of evidence. Spoliation sanctions are typically imposed where one party gains an evidentiary advantage over the opposing party by failing to preserve evidence. This is true where the spoliator knew or should have known that the evidence should be preserved for pending or future litigation; the intent of the spoliator is irrelevant. When the evidence is under the exclusive control of the party who fails to produce it, Minnesota also permits the jury to infer that the evidence, if produced, would have been unfavorable to that party. The propriety of a sanction for the spoliation of evidence is determined by the prejudice resulting to the opposing party. Prejudice is determined by considering the nature of the item lost in the context of the claims asserted and the potential for correcting the prejudice. Foust v. McFarland, 698 N.W.2d 24 (Minn.App. 2005).

MISSISSIPPI

No tort of spoliation exists either in cases of negligent or intentional destruction of evidence. Richardson v. Sara Lee Corp., 847 So.2d 821 (Miss. 2003). Proof of spoliation entitles the non-offending party to an instruction that the jury may infer that spoliated evidence is unfavorable to the offending party. Other remedies include discovery sanctions, criminal penalties, contempt sanctions and disciplinary sanctions imposed against attorneys who participate in spoliation. Dowdle Butane Gas Co., Inc. v. Moore, 831 So.2d 1124 (Miss. 2002).

MISSOURI

Missouri has not recognized intentional or negligent spoliation as a tort. Fisher v. Bauer Corp., 239 S.W.3d 693, 701 (Mo.App. E.D. 2007). If a party has intentionally spoliated evidence, indicating fraud and a desire to suppress the truth, that party is subject to an adverse evidentiary inference. If a party intentionally spoliates evidence, the party is subject to an adverse evidentiary inference. The standard for application of the spoliation doctrine requires that there is evidence of an intentional destruction of the evidence indicating fraud and a desire to suppress the truth. Although in some circumstances the destruction of evidence without a satisfactory explanation may give rise to an unfavorable inference against the spoliator, the party seeking the benefit of the doctrine must still show that the spoliator destroyed the evidence under circumstances manifesting fraud, deceit or bad faith. Simple negligence is insufficient to warrant the application of the spoliation doctrine. Prins v. Director of Revenue, 333 S.W.3d 17 (Mo.App. W.D. 2010).

MONTANA

The torts of intentional and negligent spoliation of evidence are not recognized as independent causes of action against a direct party. They apply only to nonparties to the litigation. Harris v. State, Dept. of Corrections, 294 P.3d 382 (Mont. 2013). A duty to preserve evidence may arise in relation to a third-party spoliator where: (1) the spoliator voluntarily undertakes to preserve the evidence and a person reasonably relies on it to his detriment; (2) the spoliator entered into an agreement to preserve the evidence; (3) there has been a specific request to the spoliator to preserve the evidence; or (4) there is a duty to do so based upon a contract, statute, regulation, or some other special circumstance/relationship. Some threshold showing of causation and damages is required. To prove causation, a plaintiff must show that: (1) the underlying claim was significantly impaired due to the spoliation of evidence; (2) a causal relationship exists between the

projected failure of success in the underlying action and the unavailability of the destroyed evidence; and (3) the underlying action would enjoy a significant possibility of success if the spoliated evidence still existed. The speculative nature of damages should not bar recovery. Oliver v. Stimson Lumber Co., 993 P.2d 11 (Mont. 1999). A party's concealment of evidence may result in the sanction of default judgment and other sanctions. Estate of Wilson v. Addison, 258 P.3d 410 (Mont. 2011); Oliver.

NEBRASKA

No cases have addressed whether Nebraska recognizes the tort of spoliation of evidence. The intentional spoliation or destruction of evidence relevant to a case raises an inference that this evidence would have been unfavorable to the case of the spoliator, on which the jury should be instructed. The inference does not arise where destruction was a matter of routine with no fraudulent intent because the adverse inference drawn from the destruction of evidence is predicated on bad conduct. McNeel v. Union Pacific R. Co., 753 N.W.2d 321 (Neb. 2008). Where an expert employed by a party conducts an examination of evidence without notice to the other party and negligently or intentionally destroys the evidence to the prejudice of the other party, evidence by the party employing the evidence may be precluded. In determining the appropriate sanction, the court should consider five factors: (1) whether the defendant was prejudiced as a result of the expert's conduct; (2) whether the prejudice can be cured; (3) the practical importance of the evidence; (4) whether the party employing the expert was in good or bad faith; and (5) the potential for abuse if the evidence is not excluded. In re Estate of Schindler, 582 N.W.2d 369 (Neb.App. 1998).

NEVADA

Nevada declines to recognize an independent tort for spoliation of evidence regardless of whether the alleged spoliation is committed by a first or third party. Timber Tech Engineered Bldg. Products v. The Home Ins. Co., 55 P.3d 952 (Nev. 2002). However, in Timber Tech the court left open the possibility that under the appropriate circumstances it might enforce a contract to preserve evidence. When a potential for litigation exists, the litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action. The court may instruct the jury that it can draw an adverse inference that destroyed evidence was unfavorable to the party that destroyed it. Banks ex rel. Banks v. Sunrise Hosp., 102 P.3d 52 (Nev. 2004). As a sanction for destruction or loss of evidence, dismissal should be used only in extreme situations; if less drastic sanctions are available, they should be utilized. GNLV Corp. v. Service Control Corp., 900 P.2d 323 (Nev. 1995).

NEW HAMPSHIRE

There are no civil cases on point, although a federal court has held that a tort action cannot be maintained by a party against a non-party for injury stemming from either the withholding or concealment of documentary evidence. Baker v. Cestari, 569 F.Supp. 842 (D.N.H. 1983). In the criminal context, in determining whether the loss of apparently relevant evidence has resulted in a denial of due process, the state has the burden to demonstrate that it acted both with good faith, in the sense that it was free of any intent to prejudice the defendant, and without culpable negligence. If the state carries that burden, the defendant may not claim any relief unless she demonstrates that the lost evidence was material, to the degree that its introduction would probably have led to a verdict of not guilty, and that its loss prejudiced her by precluding the introduction of evidence that would probably have led to a verdict in her favor. State v. Lavoie, 880 A.2d 432 (N.H. 2005).

NEW JERSEY

Although there is no tort for negligent spoliation, damages are recoverable for the intentional destruction of evidence, either by a party or by a non-party, under the theory of fraudulent concealment. The amount of damages is limited to additional costs or expenses suffered by the victim of the spoliation. The tort is available only if the party had notice of an actual or potential proceeding and had agreed to safeguard the evidence. Otherwise, a party may ask the trial court to instruct the jury that the spoliated evidence would have been adverse to the spoliator. Tartaglia v. UBS PaineWebber Inc., 961 A.2d 1167 (N.J. 2008); Viviano v. CBS, Inc., 597 A.2d 543 (App. Div. 1991).

NEW MEXICO

Recovery for the tort of intentional spoliation of evidence requires establishing: (1) the existence of a potential lawsuit; (2) the defendant's knowledge of the potential lawsuit; (3) the destruction, mutilation, or significant alteration of potential evidence; (4) intent on the part of the defendant to disrupt or defeat the lawsuit; (5) a causal relationship between the act of spoliation and the inability to prove the lawsuit; and (6) damages. The intent must rise to the level of a malicious intent to harm. When there is no malice, the jury can be instructed that they may infer that the evidence would have been unfavorable to that party that destroyed it. There is no cause of action for negligent spoliation of evidence. Torres v. El Paso Elec. Co., 987 P.2d 386 (N.M. 1999).

NEW YORK

The tort of spoliation is grounded in speculation and is not recognized. The victim of spoliation has a number of other remedies against a party-spoliatior, including an adverse inference instruction, a preclusion order, discovery sanctions, the recovery of costs associated with replacing evidence and the striking of pleadings. Ortega v. City of New York, 876 N.E.2d 1189 (N.Y. 2007).

NORTH CAROLINA

Although North Carolina does not recognize a cause of action in tort for spoliation of evidence, it does permit a common law cause of action for obstruction of justice. Such a cause of action arises for acts which obstruct, impede or hinder public or legal justice. Grant v. High Point Regional Health System, 645 S.E.2d 851 (N.C. App. 2007) (hospital's destruction of decedent's x-rays gave rise to cause of action of obstruction of justice). Where a party fails to produce certain evidence relevant to the litigation, the finder of fact may infer that the party destroyed the evidence because the evidence was harmful to its case. Panos v. Timco Engine Center, Inc., 677 S.E.2d 868 (N.C. App. 2009). Conduct giving rise to a spoliation inference might also support the imposition of sanctions under the Rules of Civil Procedure. Holloway v. Tyson Foods, Inc., 668 S.E.2d 72 (N.C. App. 2008).

NORTH DAKOTA

North Dakota courts have not addressed whether a tort for spoliation of evidence exists. See Simpson v. Chicago Pneumatic Tool Co., 693 N.W.2d 612 (N.D. 2005) and Schueller v. Remington Arms Co., LLC, 2012 WL 2370109 (D.N.D. 2012). Sanctions for spoliation of evidence should take into account 1) the culpability, or state of mind, of the party against whom the sanctions are being imposed; 2) the prejudice against the affected party and the degree of the prejudice; and 3) the availability of less severe alternative sanctions. Fines v. Ressler Enterprises, Inc., 820 N.W.2d 688 (N.D. 2012).

OHIO

(1) A cause of action exists in tort for interference with or destruction of evidence; (2) the elements of a claim for interference with or destruction of evidence are (a) pending or probable litigation involving the plaintiff, (b) knowledge on the part of defendant that litigation exists or is probable, (c) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (d) disruption of the plaintiff's case, and (e) damages proximately caused by the defendant's acts; (3) such a claim should be recognized between the parties to the primary action and against third parties; and (4) such a claim may be brought at the same time as the primary action. Smith v. Howard Johnson Co., Inc., 615 N.E.2d 1037 (Ohio 1993). In order to sanction a party with an adverse instruction, the trial court must determine that the spoliation of the evidence was prejudicial to the party seeking the instruction. Once the party seeking the instruction demonstrates the other's malfeasance, that party enjoys a presumption that it was prejudiced by the spoliation. The spoliating party then has the burden of rebutting this presumption by demonstrating that its actions did not deprive the other party of favorable evidence not otherwise obtainable. RFC Capital Corp. v. EarthLink, Inc., 2004 WL 2980402 (Ohio App. 10th Dist. 2004).

OKLAHOMA

Oklahoma has never recognized spoliation of evidence as a cause of action. Patel v. OMH Medical Center, Inc., 987 P.2d 1202 (Okla. 1999). Spoliation refers to the destruction or material alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. Spoliation occurs when evidence relevant to prospective civil litigation is destroyed, adversely affecting the ability of a litigant to prove his or her claim. Spoliation includes the intentional or negligent destruction or loss of tangible and relevant evidence which impairs a party's ability to prove or defend a claim. A litigant who is on notice that documents and information in its possession are relevant to litigation or potential litigation or are reasonably calculated to lead to the discovery of admissible evidence has a duty to preserve such evidence. Factors that should be considered in choosing a sanction include willfulness, prejudice, whether there was a warning that failure to cooperate could lead to dismissal, whether less drastic sanctions are appropriate, and the amount of interference with judicial process. Barnett v. Simmons, 197 P.3d 12 (Okla. 2008). Id.

OREGON

The tort of spoliation is not recognized. Classen v. Arete NW, LLC, 294 P.3d 520 (Or.App. 2012). It is presumed that evidence willfully suppressed would be adverse to the party suppressing it. Or. Evid. Code Rule 311(1)(c), O.R.S. § 40.135. See also Stephens v. Bohlman, 909 P.2d 208 (Or.App. 1996). Sanctions for discovery violations can include the striking of pleadings. Rule 46, Or. Rules Civ. Proc.

PENNSYLVANIA

No tort for spoliation against a third party which had custody of the evidence, absent some special relationship, such as a contractual obligation to preserve the evidence. Elias v. Lancaster Gen'l Hosp., 710 A.2d 65 (Pa. Super. 1998). When a party spoliates, trial court may instruct jury to infer that evidence would have been adverse to spoliator. Schroeder v. Commonwealth, 710 A.2d 23 (Pa. 1998). In a products case alleging manufacturing (rather than design) defect, summary judgment for defendant may be warranted if plaintiff spoliates, or if plaintiff fails to ensure that a third party protects the evidence. Creazzo v. Medtronic, Inc., 903 A.2d 24 (Pa. Super. 2006).

RHODE ISLAND

The destruction of evidence, whether deliberate or negligent, does not give rise to an independent cause of action. Malinou v. Miriam Hosp., 24 A.3d 497 (R.I. 2011). Such destruction may give rise to an inference that the destroyed evidence was unfavorable to the spoliating party. Although a showing of bad faith may strengthen the inference of spoliation, such a showing is not essential. An obligation to preserve evidence even arises prior to the filing of a complaint where a party is on notice that litigation is likely. Tancrelle v. Friendly Ice Cream Corp., 756 A.2d 744 (R.I. 2000).

SOUTH CAROLINA

South Carolina does not recognize a cause of action in tort for spoliation of evidence. Austin v. Beaufort County Sheriff's Office, 659 S.E.2d 122 (S.C. 2008). When evidence is lost or destroyed by a party an inference may be drawn by the jury that the evidence which was lost or destroyed by that party would have been adverse to that party. Kershaw County Board of Education v. U.S. Gypsum Co., 396 S.E.2d 369 (S.C. 1990). However, the party seeking the inference must be prepared to make a showing that the document or evidence might reasonably have supported whatever presumption is being requested of the fact finder. Pringle v. SLR, Inc. of Summerton, 675 S.E.2d 783 (S.C. App. 2009).

SOUTH DAKOTA

The S.D. Supreme Court has not addressed whether it would recognize a cause of action for either intentional or negligent spoliation of evidence, but a federal district court has predicted it would decline to do so. O'Neal v. Remington Arms Company, LLC, 2012 WL 3834842 (D.S.D. 2012).

Spoliation is the intentional destruction of evidence. When it is established, a fact finder may infer that the evidence destroyed was unfavorable to the party responsible for its destruction. Spoliation is established along with an unfavorable inference against the spoliator when substantial evidence exists to support a conclusion that the evidence was in existence, that it was in the possession or under the control of the party against whom the inference may be drawn, that the evidence would have been admissible at trial, and that the party responsible for destroying the evidence did so intentionally and in bad faith. Thyen v. Hubbard Feeds, Inc., 804 N.W.2d 435 (S.D. 2011). The spoliator must provide an explanation for the disappearance of any evidence. The burden is on the spoliator to show it acted in a non-negligent, good faith manner in destroying the evidence. If the trial court concludes the spoliator maliciously destroyed the document, it is unavailable because of negligence, or for some other reason evidencing a lack of good faith, the jury should be given an adverse inference instruction. The jury must then determine if the explanation given is reasonable, and if it finds it is reasonable, then the jury may not infer the missing evidence contained unfavorable information to the opposing party. Wuest ex rel. Carver v. McKennan Hosp., 619 N.W.2d 682 (S.D. 2000).

TENNESSEE

Tennessee does not recognize an independent tort of first-party spoliation. However, Tennessee would recognize a negligence claim based on destruction of the evidence, if the victim of the spoliation had to relinquish a cause of action against another party because of the spoliation. Benson v. Penske Truck Leasing Corp., 2006 WL 840419 (W.D. Tenn. 2006). The doctrine of spoliation of evidence permits a court to draw a negative inference against a party that has intentionally, and for an improper purpose, destroyed, mutilated, lost, altered, or concealed evidence. Bronson v. Umphries, 138 S.W.3d 844 (Tenn. App. 2003). In a criminal action, if the state has a duty to preserve the evidence, the reviewing court must conduct a balancing test based upon the following three factors: 1. The degree of negligence involved; 2. The significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and the sufficiency of the other evidence used at trial to support the conviction. If the trial court's consideration of these factors reveals that a trial without the lost or destroyed evidence would be fundamentally unfair, the trial court may dismiss the charges, provide a special jury instruction, or take steps necessary to protect the defendant's right to a fair trial. State v. Gilley, 297 S.W.3d 739 (Tenn. Crim. App. 2008).

TEXAS

Texas declines to recognize spoliation as a tort cause of action. To remedy the harm from spoliation, trial judges have broad discretion to take a range of measures including a jury instruction on the spoliation presumption – that the factfinder may deduce culpability from the destruction of presumably incriminating evidence. Trevino v. Ortega, 969 S.W.2d 950 (Tex.1998).

UTAH

The tort of spoliation of evidence is not recognized. However, in *dicta* the Supreme Court hinted that it might adopt a tort for intentional spoliation of evidence by a third party if the appropriate case came before it. Hills v. United Parcel Service, Inc., 232 P.3d 1049 (Utah 2010). The destruction and permanent deprivation of evidence is on a qualitatively different level than a simple discovery abuse and does not require a finding of willfulness, bad faith, fault or persistent dilatory tactics or the violation of court orders before a court may sanction a party. Sanctions under Rule 37 of the Utah Rules of Civil Procedure include the entry of default judgment against the spoliating party. Daynight, LLC v. Mobilight, Inc., 248 P.3d 1010 (Utah App. 2011).

VERMONT

No separate cause of action exists under Vermont law for spoliation of evidence. Naylor v. Rotech Healthcare, Inc., 679 F.Supp.2d 505 (D. Vt. 2009). However, in Menard v. Cooperative Fire Ins. Ass'n of Vermont, 592 A.2d 899 (Vt. 1991), the state Supreme Court hinted that it might permit a cause of action for tortious spoliation under different circumstances. Willful destruction of evidence gives rise to the presumption, and a jury instruction, that the evidence, if produced, would have been injurious to the one who destroyed it. Ellis J. Gomez & Co. v. Hartwell, 122 A. 461 (Vt. 1923).

VIRGINIA

There is no cause of action against an employer for tortious spoliation of evidence in the aftermath of a work-related injury. Austin v. Consolidation Coal Co., 501 S.E.2d 161 (Va. 1998). Virginia law recognizes a spoliation or missing evidence inference, which provides that where one party has within his control material evidence and does not offer it, there is an inference that the evidence, if it had been offered, would have been unfavorable to that party. The textbook definition of spoliation is the intentional destruction of evidence. However, spoliation issues also arise when evidence is lost, altered or cannot be produced. Spoliation encompasses conduct that is either intentional or negligent. A spoliation inference may be applied in an existing action if, at the time the evidence was lost or destroyed, a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action. Wolfe v. Virginia Birth-Related Neurological Injury Compensation Program, 580 S.E.2d 467 (Va. App. 2003).

WASHINGTON

Washington appellate courts have not yet recognized an independent tort of spoliation. Weaver v. Hanson, 2007 WL 2570337 (E.D.Wash. 2007). Spoliation is defined as the intentional destruction of evidence. In deciding whether to apply a sanction, courts consider the potential importance or relevance of the missing evidence and the culpability or fault of the adverse party. Ripley v. Lanzer, 215 P.3d 1020 (Wash. App. Div. 1 2009). To determine whether a sanction is appropriate, the trial court weighs (1) the potential importance or relevance of the missing evidence; and (2) the culpability or fault of the adverse party. Where relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him. Henderson v. Tyrrell, 910 P.2d 522 (Wash. App. Div. 3 1996). The more severe sanctions, such as entry of default judgment, are reserved for cases in which the violation is particularly deplorable. Cashman v. Pacific Scientific Co., 2010 WL 428807 (Wash. App. Div. 1 2010).

WEST VIRGINIA

West Virginia does not recognize spoliation of evidence as a stand-alone tort when the spoliation is the result of the negligence of a party to a civil action. West Virginia recognizes spoliation of evidence as a stand-alone tort when the spoliation is the result of the negligence of a third party, and the third party had a special duty to preserve the evidence. A duty to preserve evidence for a pending or potential civil action may arise in a third party to the civil action through a contract, agreement, statute, administrative rule, voluntary assumption of duty by the third party, or other special circumstances. The tort of negligent spoliation of evidence by a third party consists of the following elements: (1) the existence of a pending or potential civil action; (2) the alleged spoliator had actual knowledge of the pending or potential civil action; (3) a duty to preserve evidence arising from a contract, agreement, statute, administrative rule, voluntary assumption of duty, or other special circumstances; (4) spoliation of the evidence; (5) the spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action; and (6) damages. Once the first five elements are established, there arises a rebuttable presumption that but for the fact of the spoliation of evidence, the party injured by the spoliation would have prevailed in the pending or potential litigation. The third-party spoliator must overcome the rebuttable presumption or else be liable for damages. West Virginia recognizes intentional spoliation of evidence as a stand-alone tort when done by either a party to a civil action or a third party. Intentional spoliation of evidence is defined as the intentional destruction, mutilation, or significant alteration of potential evidence for the purpose of defeating another person's recovery in a civil action. The tort of intentional spoliation of evidence consists of the following elements: (1) a pending or potential civil action; (2) knowledge of the spoliator of the pending or potential civil action; (3) willful destruction of evidence; (4) the spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action; (5) the intent of the spoliator to defeat a party's ability to prevail in the pending or potential civil action; (6) the party's inability to prevail in the civil action; and (7) damages. Once the first six elements are established, there arises a rebuttable presumption that but for the fact of the spoliation of evidence, the party injured by the spoliation would have prevailed in the pending or potential litigation. The spoliator must overcome the rebuttable presumption or else be liable for damages. For intentional spoliation, punitive damages are available. Before a trial court may give an adverse inference jury instruction or impose other sanctions against a party for spoliation of evidence, the following factors must be considered: (1) the party's degree of control, ownership, possession or authority over the destroyed evidence; (2) the amount of prejudice suffered by the opposing party as a result of the missing or destroyed evidence and whether such prejudice was substantial; (3) the reasonableness of anticipating that the evidence would be needed for litigation; and (4) if the party controlled, owned, possessed or had authority over the evidence, the party's degree of fault in causing the destruction of the evidence. The party requesting the adverse inference jury instruction based upon spoliation of evidence has the burden of proof on each element of the four-factor spoliation test. If, however, the trial court finds that the party charged with spoliation of evidence did not control, own, possess, or have authority over the destroyed evidence, the requisite analysis ends, and no adverse inference instruction may be given or other sanction imposed. Hannah v. Heeter, 584 S.E.2d 560 (W.Va. 2003).

WISCONSIN

The tort of spoliation is not recognized. Johnston v. Metropolitan Property & Cas. Ins. Co., 2005 WL 3159558 (Wis.App. 2005). The primary remedies used to combat spoliation are pretrial discovery sanctions and the spoliation inference. Where the inference is applied, the trier of fact is permitted to draw an inference from the intentional spoliation of evidence that the destroyed evidence would have been unfavorable to the party that destroyed it. Estate of Neumann ex rel. Rodli v. Neumann, 626 N.W.2d 821 (Wis.App. 2001). The inference is reserved for deliberate, intentional actions and not mere negligence Jagmin v. Simonds Abrasive Co., 211 N.W.2d 810 (Wis. 1973).

WYOMING

Wyoming courts have not recognized an independent tort for spoliation of evidence. Coletti v. Cudd Pressure Control, 165 F.3d 767 (10th Cir. 1999). A party's bad-faith withholding, destruction, or alteration of physical evidence relevant to proof of an issue at trial gives rise to a presumption or inference that the evidence would have been unfavorable to the party responsible for its nonproduction, destruction, or alteration. Walters v. Walters, 249 P.3d 214 (Wyo. 2011). Other available sanctions include the preclusion of evidence and the striking of pleadings. Abraham v. Great Western Energy, LLC, 101 P.3d 446 (Wyo. 2004).

Monday through Friday
8:30 a.m. – 5:00 p.m.: (215) 864-6322

After Hours Contacts:
(If no response in 15 minutes, go to next number on list.)

Edward A. Jaeger, Jr. – (484) 432-5519 (cell)
Christopher Konzelmann – (609) 560-5153 (cell)