Recognizing an Independent Tort Action Will Spoil a Spoliator's Splendor

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NOTE

RECOGNIZING AN INDEPENDENT TORT ACTION WILL SPOIL A SPOLIATOR’S SPLENDOR

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I. INTRODUCTION

"Contra spoliatorem omnia praesumuntur"
"All things presumed against the destroyer"

Spoliation is defined as "the failure to preserve property for another's use as evidence in pending or future litigation." This failure to preserve can take the form of losing, altering, destroying, discarding, or giving away evidence. Given the "win at all costs" attitude of the legal environment today, the pervasiveness of spoliation is alarming and quite possibly a regularly occurring problem in every attorney's practice.

2. Conning the IADC Newsletters, 63 DEF. COUNS. J. 567, 567 (1996); cf. BLACK'S LAW DICTIONARY, supra note 1, at 1401. Black's defines spoliation as: "The intentional destruction of evidence and when it is established, fact finder may draw inference that evidence destroyed was unfavorable to party responsible for its spoliation. ... The destruction, or the significant and meaningful alteration of a document or instrument." Id. (citations omitted). Black's incorrectly limits the term spoliation to an intentional act. See infra text accompanying notes 27, 75-78. Black's also incorrectly limits the remedies for spoliation to an adverse inference jury instruction. See infra Parts II.A, III.A; see also John K. Stipancich, Note, The Negligent Spoliation of Evidence: An Independent Tort Action May Be the Only Acceptable Alternative, 53 OHIO ST. L.J. 1135, 1136-40 (1992) (giving examples of other remedies such as criminal penalties, sanctions under Rule 37 of the Federal Rules of Civil Procedure, and an independent tort action). In a product liability scenario, spoliation has been defined as "the failure of a party in control or with potential to gain control, knowing a defect will be claimed, to prevent or deliberately cause the loss or alteration of the product to the prejudice of other parties." Michael E. Oldham, The Product Liability Case, COLO. LAW., Mar. 1997, at 3, 3. The Federal Rules of Evidence now concerns itself with the spoliation issue; a newly revised hearsay exception, Rule 804(b)(5), "admits hearsay when the declarant becomes unavailable due to the spoliation of an adverse party." 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE at vii (Supp. 1997). The Judicial Conference, however, chose to leave the definition of spoliation to the federal judges. See id.
4. See Terry R. Spencer, Do Not Fold Spindle or Mutilate: The Trend Towards Recognition of Spoliation As a Separate Tort, 30 IDAHO L. REV. 37, 38-39 (1993). "[C]laims of spoliation tend to permeate the prosecution of civil matters. One survey ... concluded that 50% of all litigators found spoliation to be either a frequent or regular problem." Id. (commenting on a survey completed by Harvard Law Professor Charles R. Nesson).

Although the effect of spoliation on an attorney's day-to-day handling of her practice is beyond the scope of this Note, the reader should be aware that there are tips available to alleviate the potential for spoliated evidence:

For the practitioner not in control of an allegedly defective product, there are a
"[I]t would be difficult to exaggerate the pervasiveness of evasive practices" employed by people who are in possession of evidence. Today, when a party’s appearance is relevant to a given case, a court may find that dressing up for court, changing a hairstyle, or shaving or growing facial hair is a form of spoliation. Traditionally, the courts have attempted to deal with spoliation in a number of different ways, via jury instructions, exclusion of testimony, summary judgment, directed verdict, and other sanctions. But these remedies are not appropriate or curative in every circumstance. The court’s remedial power under these traditional methods is severely limited when the spoliation is discovered after final judgment is entered or when the spoliation is done by a nonparty over whom the court has no jurisdiction. For this reason, some courts have recognized independent

number of steps he or she can immediately take to ensure that the protections courts recognize for spoliation of evidence in product liability lawsuits can be utilized:
- Upon receipt of notice of a product liability claim, immediately communicate the duty to preserve the evidence to opposing counsel.
- Ask to inspect the product in a formal request for production when suit is filed.
- Follow up initial requests with discovery motions to compel.
- When the product’s loss is established, file a motion for summary judgment to preserve the issue for appeal.

For the practitioner in control of the allegedly defective product, there are a number of steps he or she can take immediately to avoid the imposition of sanctions on an otherwise meritorious claim:
- Determine the chain of custody of the product since the accident and who has done what with the product.
- Communicate the duty to preserve the product to the individual or entity in possession of the product.
- Inform any experts or potential experts that they are not to undertake any destructive testing. Attend all testing or inspections and have the procedures thoroughly documented (even if the experts contend that their actions are routine).
- Establish, in writing, the terms and conditions of the product’s storage (even if with your own expert).

Finally, there may be instances in which practitioners on either side of the battlefield are not certain that they want a lost product found. With the judiciary’s tougher stance on spoliation, however, the presentation of a liability case with problems will have a better opportunity for success than a liability case without a product.

John T. Donovan & Joseph J. Hamill, Sabers Continue to Rattle in the Evidence Spoliation Battle, PROD. LIAB. L. & STRATEGY, SEPT. 1996, at 5, 6. “The preservation of the product is perhaps the most important action an attorney can take on behalf of his or her client, and as the growing body of case law unfortunately demonstrates, preservation of critical evidence is frequently neglected or treated cavalierly.” Oldham, supra note 2, at 3.

6. See 22 WRIGHT & GRAHAM, supra note 2, § 5163 n.28.3.
7. See infra Part I.A. For purposes of this Note, the word “traditional(ly)” includes all of those remedies available to a court in a jurisdiction which does not recognize an independent tort action for the spoliation of evidence.
Part II of this Note discusses the traditional remedies that are available to a court to deal with spoliated evidence. Section A reviews these traditional methods and Section B discusses their shortcomings. Part III.A outlines the independent tort action for the intentional and negligent spoliation of evidence that is available in a minority of jurisdictions. Part III.B analyzes the reasoning of those jurisdictions that have specifically refused to recognize a tort for spoliation. Part IV argues that an independent tort action is a necessary remedy for a party who is harmed by the spoliation of evidence. The independent tort is especially necessary when the spoliation is committed by a nonparty to a lawsuit, since the tort creates a duty of care to preserve relevant evidence for another's use in pending or potential litigation. The independent torts of intentional and negligent spoliation of evidence serve the public policies of deterring evidence destruction, increasing the accuracy of fact-finding, and giving the victim of spoliation an avenue to pursue compensation for her injury.

II. TRADITIONAL REMEDIES FOR THE DIFFERENT SPOILATION SITUATIONS THAT ARISE

A. Traditional Spoliation Remedies

Traditionally, courts have a number of remedies to redress situations in which a party is responsible for the spoliation of evidence. When selecting a remedy and deciding how severe the sanction should be, a court's decision is based on the balancing of several factors: (1) the degree of fault of the party who spoliated the evidence; (2) the degree of prejudice suffered by the opposing party; (3) the availability of a lesser sanction that will avoid substantial unfairness to the opposing party; and (4) the potential of the sanction deterring such conduct by others.  

8. See infra Part III.A. Courts have not addressed the question of a cause of action for reckless spoliation of evidence. A discussion of this distinction is beyond the scope of this Note.
9. See Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 79 (3d Cir. 1994); see also Donovan & Hamill, supra note 4, at 6 (relying on Schmid). Since a claim of spoliation can have serious repercussions to the outcome of the original lawsuit in which the claim arises, affirmative defenses to the spoliation claim can be offered by the accused spoliator. These affirmative defenses include: no duty was owed by the spoliator to the harmed party to preserve the evidence, the spoliator acted in good faith and did not intend to spoliate the evidence, the spoliation was inconsequential to the underlying lawsuit and therefore did not proximately cause the harm to the
The choice of remedy also depends on which party is responsible for the spoliation. Part II.A.1 discusses those remedies available when a plaintiff or a nonparty associated with the plaintiff spoliates evidence. Part II.A.2 analyzes a court’s options when the defendant or a nonparty associated with the defendant spoliates.

1. Spoliation by the Plaintiff

In the past, courts have responded in various ways to remedy the situation in which a plaintiff spoliates evidence, including: (1) an adverse inference jury instruction; (2) issue preclusion; (3) dismissal; (4) summary judgment for the defendant; and (5) criminal penalties. In federal court, the judge also has the authority to deal with the spoliator’s activity via the sanctions contained within the federal discovery rules and under the inherent powers of the court.

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10. See McGlynn, supra note 3, at 665-66. "If a party intentionally or willfully destroys or alters evidence, or does so in bad faith, there is justifiable risk that an ultimate order disposing of the case against such party will be entered." Conning the IADC Newsletters, supra note 2, at 567.


A person is guilty of tampering with physical evidence when:

1. With intent that it be used or introduced in an official proceeding or a prospective official proceeding, he (a) knowingly makes, devides or prepares false physical evidence, or (b) produces or offers such evidence at such a proceeding knowing it to be false; or

2. Believing that certain physical evidence is about to be produced or used in an official proceeding or a prospective official proceeding, and intending to prevent such production or use, he suppresses it by any act of concealment, alteration or destruction, or by employing force, intimidation or deception against any person.

Tampering with physical evidence is a class E felony.

Id. The Federal Rules of Evidence permit admission of evidence showing that a defendant attempted to obstruct justice in order to prove defendant’s consciousness of guilt. See United States v. Mendez-Ortiz, 810 F.2d 76, 79 (6th Cir. 1986) (interpreting Federal Rule of Evidence § 404(b)). In this context, evidence of spoliation can include evidence of threatening or bribing a witness. See id. Criminal remedies for the destruction of evidence are beyond the scope of this Note. While the reader should be aware that such remedies exist, the reader must also keep in mind that these recourses may bring with them a stricter burden of proof (i.e. beyond a reasonable doubt), as well as other procedural differences.


13. Courts have inherent powers that are “governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expedi-
a. Adverse Inference

The adverse inference jury instruction is widely used as a remedy for spoliated evidence.14 When courts employ the adverse inference, the jury is instructed to presume that the evidence, if produced, would have been adverse to the party who destroyed it.15 The adverse inference jury
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The adverse inference sanction is based on two public policy rationales—the first, remedial, restoring the prejudiced party to the same position as if the spoliation had not occurred, and the second, punitive, deterring others from committing the wrong. The adverse inference remedy is limited by many courts; these courts will not give an adverse inference instruction without the showing of bad faith or intentional behavior. The instruction allows a jury to infer that the spoliator destroyed the evidence to avoid damaging her case by having the evidence admitted at trial; mere negligence is not enough to infer such consciousness of a weak case. The Supreme Court stated that severe sanctions must be available to the district courts, "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." Reingold v. Wet 'N Wild Nevada, Inc., 944 P.2d 800, 802 (Nev. 1997) (citations omitted) (quoting Welsh v. U.S., 844 F.2d 1239, 1246 (6th Cir. 1988)).

There are two policy rationales for the adverse inference. First, the evidentiary rationale springs from the notion that "a party with notice of an item's possible relevance to litigation who proceeds nonetheless to destroy it is more likely to have been threatened by the evidence than a party in the same position who does not destroy it. The second rationale acts to deter parties from pretrial spoliation of evidence and serves as a penalty, placing the risk of an erroneous judgment on the party that wrongfully created the risk." Reingold v. Wet 'N Wild Nevada, Inc., 944 P.2d 800, 802 (Nev. 1997) (citations omitted) (quoting Welsh v. U.S., 844 F.2d 1239, 1246 (6th Cir. 1988)).

Mere negligence is not enough, for it does not sustain the inference of consciousness of a weak case. The Supreme Court stated that severe sanctions must be available to the district courts, "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." Reingold v. Wet 'N Wild Nevada, Inc., 944 P.2d 800, 802 (Nev. 1997) (citations omitted) (quoting Welsh v. U.S., 844 F.2d 1239, 1246 (6th Cir. 1988)).
Court of Connecticut, for example, has held that the trier of fact must be satisfied that four factors are proven before drawing an adverse inference against the spoliator: (1) the spoliation must have been done intentionally; (2) the spoliated evidence must be relevant to the issue for which the party seeks the inference; (3) the party seeking the inference (the non-spoliator) must have acted with due diligence with respect to the spoliated evidence; and (4) the trier of fact must be instructed that it is not required to draw the inference, unless the above factors are met.  

The Federal District Court for the Southern District of New York held to the contrary and gave an adverse inference instruction to a jury hearing a case in which evidence was destroyed negligently: "It makes little difference to the party victimized by the destruction of evidence whether that act was done willfully or negligently.... [T]he risk that the evidence would have been detrimental rather than favorable should fall on the party responsible for its loss."  

b. Issue Preclusion, Dismissal, or Summary Judgment for the Defendant

Issue preclusion, which remedies a claim of spoliation by forbidding a party from using certain evidence or bringing certain issues before the trier of fact, is available when a party negligently or intentionally spoliates evidence. 21 In a case in which the plaintiff's expert accidentally lost the allegedly defective product, the court allowed the expert to testify only to opinions she formed from the evidence admitted at trial and not from any tests or investigations she conducted on the evidence. 22 As a matter of public policy, "an expert should not be per-

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23. The term "issue preclusion" as used in the spoliation remedy context needs to be distinguished from the phrase "issue preclusion" as used in the Restatement (Second) of Judgments, which states: "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Restatement (Second) of Judgments § 27 (1982).

24. See Hamann v. Ridge Tool Co., 539 N.W. 2d 753, 757 (Mich. Ct. App. 1995); see also American Family Ins. Co. v. Village Pontiac GMC, Inc., 585 N.E.2d 1115, 1118-20 (Ill. App. Ct. 1992) (stating that the appropriate sanction against spoliating plaintiff was exclusion of plaintiff's expert witness; summary judgment was ultimately granted when plaintiff could not overcome its inability to produce evidence); Nally v. Volkswagen of America, Inc., 539 N.E.2d 1017, 1021 (Mass. 1989) (holding that when expert spoliated, expert should be precluded from testifying);
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mitted intentionally or negligently to destroy evidence and then substitute his or her own description of it.\footnote{25}

Dismissal with prejudice\footnote{26} is available in cases where evidence has been intentionally or negligently destroyed or altered.\footnote{27} One court held that the plaintiff’s actions necessitated the court to dismiss the case; the plaintiff failed to pay the storage fees to the salvage yard for the car at the heart of the case and subsequently the car was destroyed.\footnote{28}

There are several factors that a court may consider when determining whether dismissal is an appropriate sanction:

(1) the degree of willfulness of the offending party; (2) the extent to which the non-offending party would be prejudiced by a lesser sanction; (3) the severity of the sanction of dismissal relative to the severity of the discovery abuse; (4) whether any evidence has been irreparably lost; (5) the policy favoring adjudication on the merits; (6) whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney; and (7) the need to deter both the parties and future litigants from similar abuses.\footnote{29}

A majority of courts prefer to sanction a party for spoliation by granting summary judgment as opposed to granting dismissal.\footnote{30} A court may only grant a motion to dismiss if the motion is timely made during the pleading stage of the lawsuit.\footnote{31} A grant of dismissal with prejudice moots the significance of any evidence that the plaintiff uncovers after the dismissal is granted, even though the evidence would have helped to put forth her prima facie case. By denying the motion to dismiss and waiting until the defendant makes a summary judgment motion to decide the fate of the lawsuit, the court theoretically gives the plaintiff

\footnote{26. While dismissal with prejudice is an available remedy, some courts have seen this as too severe a sanction when the motion is timely made during the pleading stage of the lawsuit. See Sampson v. Marshall Brass Co., 661 A.2d 971, 971 (R.I. 1995) (finding that Rhode Island’s Rules of Civil Procedure do not allow dismissal with prejudice when the spoliation is not the result of any willful or intentional conduct on the part of the litigant); see also Transamerica Ins. Group v. Maytag, Inc., 650 N.E.2d 169, 171 (Ohio Ct. App. 1994) (ruling that dismissal with prejudice was too severe a sanction under the facts of the case).}
\footnote{28. See Jackson v. Nissan Motor Corp., 121 F.R.D. 311, 323 (M.D. Tenn. 1988).}
\footnote{29. Conning the IADC Newsletters, supra note 2, at 567-68.}
\footnote{30. See McGlynn, supra note 3, at 679.}
\footnote{31. See FED. R. CIV. P. 12(b).}
more time to uncover evidence and to establish a prima facie case.\textsuperscript{32} However, whether a court grants the defendant’s motion to dismiss or denies the motion and later rules on the defendant’s summary judgment motion, the result is usually the same—a victory for the defendant.\textsuperscript{33}

2. Spoliation by the Defendant

When the defendant spoliates, the court can give a rebuttable presumption jury instruction, direct a verdict for the plaintiff, issue a default judgment, or exclude an expert’s testimony.\textsuperscript{34} With a rebuttable presumption, the judge instructs the jury that unless the defendant offers a reasonable explanation, it will be presumed that the spoliated evidence was unfavorable to the defendant’s case.\textsuperscript{35} Such explanations may include a reasonable business practice of periodic document destruction or a reasonable belief that plaintiff was not going to file suit.\textsuperscript{36} In a tort action for negligence, some courts remedy the spoliation of evidence by shifting the burden of proof on both causation and negligence when a defendant has negligently or intentionally destroyed evidence that is central to the plaintiff’s case.\textsuperscript{37}

The remaining remedies available to the court when a defendant spoliates are based on the same principles and rationale as those measures available when a plaintiff spoliates. But, rather than dismissing a plaintiff’s case, granting summary judgment for defendant, or excluding expert testimony,\textsuperscript{38} a judge may enter a default judgment, direct a verdict for plaintiff, or exclude testimony when the defendant spoliates.\textsuperscript{39}

\begin{footnotes}
\footnotetext{32}{See McGlynn, supra note 3, at 679.}
\footnotetext{33}{See id.}
\footnotetext{34}{See id. at 684-89.}
\footnotetext{35}{See id. at 684. There is a difference between an adverse inference and a rebuttable presumption jury instruction. With an adverse inference, the jury may infer that the spoliated evidence would have been unfavorable to the plaintiff’s case. See id. The defendant merely needs to offer some proof that relevant evidence was spoliated by the plaintiff to trigger this instruction. See id. at 671-72. Conversely, with a rebuttable presumption instruction, the jury is instructed that unless the defendant rebuts the claim that she spoliated evidence by offering a reasonable explanation, the jury must presume that the evidence would have been detrimental to the defendant’s case. See id. at 684.}
\footnotetext{36}{See id. at 687.}
\footnotetext{37}{See Wendy E. Wagner, Choosing Ignorance in the Manufacture of Toxic Products, 82 CORNELL L. REV. 773, 806-07 (1997).}
\footnotetext{38}{See supra Part II.A.1.b.}
\footnotetext{39}{See McGlynn, supra note 3, at 688-89.}
\end{footnotes}
B. Shortcomings of the Traditional Spoliation Remedies

The traditional spoliation remedies suffer from numerous shortcomings: the remedies do not send a deterrence message to potential spoliators; the remedies are only geared to be used during a trial and not after; the remedies do not adequately address the situation when a non-party spoliates; and the remedies do not monetarily compensate the victimized litigant who usually bears the full cost of discovering the spoliation. Although the traditional remedies have been available to the courts for centuries, spoliation is still a major problem facing the legal system today. The spoliation of evidence can hardly be called a new problem, invented by the unscrupulous minds of the twentieth century; the legal profession has been dealing with spoliated evidence for at least two hundred and seventy-five years. Although the traditional remedies have been available to the courts for centuries, spoliation is still a major problem facing the legal system today. The spoliation of evidence can hardly be called a new problem, invented by the unscrupulous minds of the twentieth century; the legal profession has been dealing with spoliated evidence for at least two hundred and seventy-five years. Half of all litigators today still find that spoliated evidence is a frequent or regular problem. While it may be true that spoliation would be even more prevalent without the traditional remedies, the law need not be satisfied with partially solving a problem.

To understand why the traditional remedies fall short of deterring a potential intentional spoliator, it is helpful to examine the reasoning that a spoliator may use when deciding whether or not to spoliate evidence. Justice Oliver Wendell Holmes wrote that we must view the law from the vantage point of the “bad man,” which is defined as the person who considers only the material consequences of his actions. Unlike the good man, who is influenced by his conscience, the bad man does not consider the ethics or morality of his conduct. Instead, the bad man is a “pure cost-benefit calculator,” who calculates the risks against the advantages of a particular act; “the bad man will commit the tort or crime if the expected gain exceeds the expected loss.”

Under the framework of the traditional spoliation remedies, a party actually has the incentive to spoliate evidence that she knows will be damaging to her case. Analyzing spoliation from the bad man’s per-
pective, the slight risk of being caught compounded by the leniency of the penalties available if the spoliation is discovered does not outweigh the enormous benefits of withholding potentially damaging evidence. If the piece of evidence is truly "lethal" to a party's case (dispositive against her), that party knows that she will lose the lawsuit if the evidence is introduced at trial. For the plaintiff, this loss means that she will not receive her anticipated damages award; for the defendant, the loss means that she will be forced to part with the money that is awarded to the plaintiff. A nonparty, who is only keeping the evidence for the benefit of someone else, may spoliate after weighing the cost of storing, preserving, or guarding the evidence against the liability of spoliating it. Why not simply "misplace" that valuable piece of evidence? What does a party or nonparty have to lose? When the party spoliates evidence that is dispositive against her, the worst that can happen (if the spoliation is ever discovered) is that the party ends up in the same position that she would have been in had the evidence originally been disclosed.

In most situations, the chance of an opponent discovering the spoliation is slim, so playing the odds, a party is way ahead of the game when she spoliates. The spoliator's risk of being caught is further reduced by the fact that most civil cases settle before trial. Once a case is settled, there is virtually no chance of the spoliation being discovered thereafter because the victimized litigant has no occasion, incentive, or practical means to further investigate the case. After the settlement is reached, the case is closed and the spoliation is virtually hidden away. Even if a case is not settled and proceeds to trial, the chances of discovering the spoliation are not any better. During trial, since spoliation is so secretive and hard to detect, it is believed that someone associated with the spoliator would need to defect to the opposing side before the spoliation could be discovered and proved.

The traditional remedies are curtailed by the limited authority of the court which is constrained by the procedural rules of the jurisdiction. All of the traditional remedies are simply modifications of the underlying lawsuit and therefore tied to that opportunity. Sanctions under the federal rules must be made in a timely fashion; once these time periods have passed, the court is powerless to correct the effects of the discovered spoliation. For example, federal rules permit a trial judge to

45. See id. at 796.
46. See id.
entertain a motion for a new trial only if a party files such motion within ten days from the entry of the judgment; a victimized litigant needs to discover any evidence that has been negligently spoliated within this time period or she loses her opportunity to receive a new trial.\textsuperscript{48} Evidence which is unearthed up to a year after final judgment has been entered may still result in a new trial if the evidence could not have been discovered through due diligence in time for a motion for a new trial under Rule 59(b) or if there was fraud or other misconduct by an adverse party (intentional spoliation).\textsuperscript{49} Once a year elapses from the time final judgment is entered, the traditional spoliation remedies have no remedial value since these remedies are geared to be used only during a trial, not after. If these remedies are the only means available to the court or the harmed party, then the spoliator is home free.

Even when the spoliation is actually discovered before final judgment is entered, the penalty given by the judge often does not tend to send a deterrence message to future spoliators: "[M]any practitioners believe that the issue of spoliation is not worth pursuing because many judges treat such abuses mildly and seldom impose any meaningful sanctions on a violator."\textsuperscript{50} When the penalty imposed by the court is more lenient than actually terminating the lawsuit, the spoliator is merely faced with overcoming an adverse inference or rebuttable presumption or losing the use of an expert's testimony. While this is usually a heavy hurdle to overcome, these remedies still give the spoliating party an opportunity to win the lawsuit. The "bad man's" cost-benefit analysis is weighted heavily on the side of the benefits of spoliating; the spoliator has only a slight risk of being caught and she has a chance of winning the lawsuit even if the spoliation is discovered. When only the traditional remedies are available, there is no incentive for a harmed party to pursue a claim of spoliation since it is the harmed party who incurs the entire cost of proving that the spoliation occurred without any reimbursement for her efforts.\textsuperscript{51}

The traditional spoliation remedies are also geared to the parties before the court. However, the spoliation can be committed by a non-party who is outside the jurisdiction of the judge.\textsuperscript{52} This nonparty may

\textsuperscript{48} See Fed. R. Civ. P. 59(b).
\textsuperscript{49} See id. 60(b).
\textsuperscript{50} Ogg & Maloney, supra note 47, at 4.
\textsuperscript{51} See id.
include an attorney, an expert witness, or someone else who was entrusted with the job of preserving the evidence. Since under the traditional remedies a judge only holds a party before the court responsible for the spoliation, a nonparty's negligent or intentional spoliation is charged against the party who is "responsible" for the nonparty, rather than against the nonparty herself. This penalty, however, often punishes the wrong person; a party is held responsible for the acts of someone else. While there may be numerous circumstances in which a party may be responsible for the acts of the nonparty (i.e. agent/principal relationship, contractual relationship, etc.), scenarios arise where a party with no ability to control the spoliator will be penalized for the spoliator's conduct. 

53. See Donovan, supra note 4, at 6; see also Barker v. Bledsoe, 85 F.R.D. 545, 547-48 (W.D. Okla. 1979) ("When an expert ... conducts an examination [that] ... results in either negligent or intentional destruction of evidence, ... the Court would be not only empowered, but required to take appropriate action, either to dismiss the suit altogether, or to ameliorate the ill-gotten advantage.").

54. This Note does not consider the implications of an agency/principal relationship or a bailment situation.

55. See Townsend v. American Insulated Panel Co., 174 F.R.D. 1, 3 (D. Mass. 1997) (hearing a product liability case where the nonparty-employer spoliates and the plaintiff-employee is penalized in her action against defendant-manufacturer). Townsend can exemplify the problems/benefits of the different ways in which spoliation is handled by the courts. The plaintiff-employee alleged that a freezer manufactured by defendant contained a manufacturing defect which allowed the freezer's metal door to come in contact with the exposed electrical wiring of the freezer's mechanical system. See id. at 3. After the employee's expert examined the freezer, but before the manufacturer's expert had an opportunity, the nonparty-employer went out of business and the freezer's whereabouts were unknown, even to the nonparty. See id. Hypothetically, the loss of the freezer could have been intentional, where the nonparty knew that she should have kept the freezer but sold it anyway to raise more money in her liquidation sale. Or the spoliation could have been committed negligently, when the nonparty did not know that the freezer was integral to her employee's case and carelessly allowed the freezer to be included in the scrap metal she was selling as she vacated the premises. Since the plaintiff was the employee of the spoliator (and no other relationship existed), having only the traditional remedies to choose from posed a predicament for the court. To penalize the plaintiff-employee for the wrongful acts of her employer and allow the trier of fact to infer that the evidence would have been detrimental to her case would not make sense, since she was not in a position to control her employer's conduct. Part of the rationale behind the traditional remedies is to deter future spoliation by the wrongdoer and others, but penalizing the plaintiff-employee in this case, rather than the actual spoliator, does not achieve the stated goal of deterrence. See id. at 4-5. However, allowing the plaintiff to go unscathed puts the defendant in a dilemma if she does not have a cause of action against the nonparty. The defendant has lost access to crucial evidence, thus severely jeopardizing her chances of defending the action against the plaintiff. To make matters worse, the traditional remedies also fail to give the defendant recourse against the nonparty. See id. at 5. Placing the defendant in this predicament does not make sense and violates the traditional notion that for every wrong there is a remedy.

The reader should note that if a design defect is alleged, the loss (spoliation) of the actual product is not detrimental to a party's case, since a replacement product of the same design may be used. See Donohoe v. American Isuzu Motors, Inc., 157 F.R.D. 238, 244 (M.D. Pa. 1994).
action... '[t]here does not appear to be a basis for concluding that [traditional sanctions]... would be appropriate when no conduct on the part of the plaintiff is the cause of the destruction of the allegedly defective product.'

The punitive measures of the criminal law are also not an effective deterrent to a potential spoliator. Spoliation is a mere misdemeanor in some states. When faced with the choice between committing the minor crime of destroying evidence to cover up a more serious offense or to protect herself from a large civil monetary judgment, a spoliator would choose to commit the spoliation and face a minor criminal sanction. With today’s criminal justice system being overwhelmed with major felony cases, court dockets do not leave much room for spoliation prosecutions.

Relying on remedies that are time-sensitive, that fail a risk-benefit analysis, and that often place the liability of spoliation on a person who did not have control over the evidence, makes the traditional spoliation remedies unfit to deal with this massive problem.

Donohoe, the court stated:

[any other [product] of the same model will possess the same inherent defect and can be tested and examined for defects in the same manner as the [plaintiff's product]. Defendants will gain no more information as to the existence or non-existence of a design defect from testing the [plaintiff's product] than they will from testing exemplar [products].

Id.

56. Townsend, 174 F.R.D. at 4 (citing Gordner v. Dynetics Corp., 862 F. Supp. 1303 (M.D. Pa. 1994)). A party may correctly be held responsible for the conduct of a nonparty if the party negligently gave control of the relevant evidence to an incompetent person. Other legal theories (i.e. agency/principal relationship) may also give rise to a situation where it would be appropriate to hold a party responsible for the acts of a nonparty. Further discussion of this point is beyond the scope of this Note.

It is because of this nonparty scenario that a new independent tort needs to be adopted: "The rationale for the tort is that when a [nonparty] spoliates, the remedies used when a party to the lawsuit spoliates are not available, and therefore, a new theory of liability is necessary to compensate the wronged party." McGlynn, supra note 3, at 693 (emphasis in original).

57. See, e.g., ALA. CODE § 13A-10-129(c) (1994) ("Tampering with physical evidence is a Class A misdemeanor."); CAL. PENAL CODE § 135 (West 1988) ("Every person who, knowing that any... matter or thing, is about to be produced in evidence upon any trial... willfully destroys or conceals the same, with intent thereby to prevent it from being produced, is guilty of a misdemeanor."); HAW. REV. STAT. § 710-1076(3) (1993) ("Tampering with physical evidence is a misdemeanor."). But cf. N.Y. PENAL LAW § 215.40 (McKinney 1988) (declaring that tampering with physical evidence is a class E felony). For a complete listing of state statutes that criminalize the destruction of evidence, see JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE § 5.14, at 200-03 (1989).

58. See supra text accompanying notes 42-44.
III. THE INDEPENDENT TORTS OF INTENTIONAL AND NEGLIGENT SPOLIATION

A. The Current State of the Law

For all of the reasons mentioned in Part II.B, the quest for a better solution to the spoliation problem has continued.59 In 1984, the California Court of Appeals recognized the intentional spoliation of evidence as a cognizable tort action.60 The plaintiff, Smith, was blinded in a traffic accident in which a wheel of an oncoming van flew off and crashed through her windshield.61 The plaintiff alleged that Abbott Ford, a car/van dealership, promised to retain parts from the van, knew or should have known that the plaintiff would rely on the promise, intentionally lost, destroyed, or disposed of the essential evidence, and significantly prejudiced the plaintiff’s opportunity to be compensated for her injuries.62

Although the trial court ruled that a cause of action did not exist for the intentional spoliation of evidence, the appellate court overruled the decision and created a new tort.63 The court observed that “a large part

59. See generally Maurice L. Kervin, Comment, Spoliation of Evidence: Why Mississippi Should Adopt the Tort, 63 Miss. L.J. 227, 228 (1993) (discussing the adoption of an independent tort action).

The tort developed as a result of criticism that traditional remedies, such as criminal sanctions, discovery sanctions, and the spoliation inference, do not adequately protect wronged litigants. A primary contention in this area is the possibility that inadequate penalties may induce a person to destroy evidence rather than allow that evidence to be used against him.

Id. at 228-29 (footnotes omitted).

60. See Smith v. Superior Court, 198 Cal. Rptr. 829, 832 (Ct. App. 1984). In Smith, a claim was filed for “Tortious Interference with Prospective Civil Action By Spoliation of Evidence.” Id. at 831. To the extent that it was inconsistent, Smith was later disapproved of by the Supreme Court of California in Cedars-Sinai Medical Center v. Superior Court, 954 P.2d 511, 513 (Cal. 1998). The court held that there is no tort remedy for the intentional spoliation of evidence by a party to the cause of action to which the spoliated evidence is relevant, in cases in which . . . the spoliation victim knows or should have known of the alleged spoliation before the trial or other decision on the merits of the underlying action.

Id. at 521. The court did not decide whether a tort cause of action for spoliation is available in cases where the evidence is spoliated by a nonparty. See id. at 521 n.4. The court also left unresolved whether the spoliation tort is available when a party victimized by spoliation neither knows nor should have known of the spoliation until after the underlying case is decided on the merits.

See id.

61. See Smith, 198 Cal. Rptr. at 831.

62. See id. at 832.

63. See id.

*New and nameless torts are being recognized constantly, and the progress of the
of what is most valuable in modern life depends upon 'probable expectancies,' [and] as social and industrial life become more complex the courts must do more to discover, define and protect them from undue interference.'" A probable expectancy is the logical belief that a person will profit from an occurrence that is reasonably expected to take place.5

The California Court of Appeals recognized that Smith's right to bring a personal injury lawsuit should be a legally protected interest and that this interest was invaded by Abbott Ford's intentional spoliation of the evidence.6 The court analogized Smith's claim to a cause of action for intentional interference with a prospective business advantage.6 The intentional interference tort allows recovery even when there is no legally binding agreement or when the parties' expectations are only the subject of an unenforceable contract.6 "[T]he [California Court of Appeals] held that the intentional spoliation of evidence caused an 'unreasonable interference with the interests of others,' that is, with Smith's interest in having an opportunity to win her suit." The court concluded that a prospective civil action, such as Smith's product liability claim, is a valuable "probable expectancy" that the court must protect from the kind of interference alleged by the plaintiff.5

Keeping with the intentional interference with a business advantage analogy, the Smith court determined the elements of the new intentional spoliation tort to be the same as those of the previously recognized tort:

1. An economic relationship between the plaintiff and some third per-

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common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none had been recognized before. The law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to a remedy."  
Id. (emphasis in original) (quoting William L. Prosser, Handbook of the Law of Torts § 1, at 3-4 (4th ed. 1971)).
64. Id. at 836 (alteration in original) (quoting Prosser, supra note 63, § 130, at 950).
65. See Kervin, supra note 59, at 228 (interpreting Prosser, supra note 63, § 130, at 950).
67. See Smith, 198 Cal. Rptr. at 836.
68. See id.
69. Wilson, supra note 66, at 976 (footnotes omitted) (quoting Smith, 198 Cal. Rptr. at 832, 837).
70. See Smith, 198 Cal. Rptr. at 837.
son containing the probability of future economic benefit to the plaintiff; (2) knowledge by the defendant of the existence of the relationship; (3) intentional acts on the part of defendant designed to disrupt the relationship; (4) disruption of the relationship; and (5) damages proximately caused by the acts of defendant.\textsuperscript{71}

When determining whether or not to impose tort liability for spoliation, the court must weigh the seriousness of the harm to the injured party, the interests promoted by the spoliator’s conduct, character of the means used by the spoliator, and the wrongdoer’s motive.\textsuperscript{72}

Subsequently, other jurisdictions have elected to recognize the independent tort of intentional spoliation of evidence; however, this view is still in the minority.\textsuperscript{73}

\textsuperscript{71} Id. at 836.

\textsuperscript{72} See Restatement (Second) of Torts § 870 cmt. e (1979); see also Willard v. Caterpillar, Inc., 48 Cal. Rptr. 2d 607, 622-27 (Ct. App. 1995) (following the balancing process suggested by the Restatement); Conning the IADC Newsletters, supra note 2, at 569 (updating the development of the law on the spoliation of evidence).

\textsuperscript{73} In Alaska, the state Supreme Court held that a common law cause of action in tort existed in favor of an owner of a massage parlor against the municipality and the prosecutor for intentional interference with a prospective civil action by spoliation of evidence. See Hazen v. Anchorage, 718 P.2d 456 (Alaska 1986). The Hazen court recognized the tort on the grounds that a potential lawsuit is a valuable “probable expectancy” that must be protected from interference. See id. at 463-64.

In Florida, a court held that a wife, whose husband died during surgery, alleged a valid cause of action in negligence against the anesthesiologist and hospital for failing to provide her with requested medical records, thus causing her to lose her medical malpractice action. See Bondu v. Gurvich, 473 So. 2d 1307, 1313 (Fla. Dist. Ct. App. 1984).

Kansas courts will recognize the tort of spoliation when a duty is owed by defendant to plaintiff. See Foster v. Lawrence Mem'l Hosp., 809 F. Supp. 831, 838 (D. Kan. 1992). Accordingly, the courts refuse to adopt the independent tort in nonparty situations if no duty is owed. See Koplin v. Rosel Well Perforators, Inc., 734 P.2d 1177, 1183 (Kan. 1987).


A New Jersey court heard a case involving employee’s suit against employer and supervisors for fraudulently concealing information relevant to employee’s product liability suit against manufacturer. See Viviano v. CBS, Inc., 597 A.2d 543 (N.J. Super. Ct. App. Div. 1991). The Viviano court held that: (1) a cause of action exists in tort for willful concealment of evidence upon a showing of pending or probable litigation involving the plaintiff, knowledge on part of the defendant that litigation exists or is probable, and willful or, possibly, negligent concealment of evidence designed to disrupt the plaintiff’s case, and (2) substantial evidence of intentional wrongdoing by the employer supported an award of punitive damages to the employee. See id. at 549-50, 551-52.

In New Mexico, a distinct tort liability for spoliation was recognized in a case in which the
In 1985, the California courts went on to recognize an independent


In North Carolina, a patient's claim alleging that a physician and others created false and misleading entries in the patient's medical chart was sufficient to allege a civil conspiracy. See Henry v. Deen, 310 S.E.2d 326, 334-36 (N.C. 1984).

In Ohio, the high court answered a question that was certified by a federal district court, holding that:

(1) A cause of action exists in tort for interference with or destruction of evidence; (2a) the elements of [such cause of action] are (1) pending or probable litigation involving the plaintiff, (2) knowledge on part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of plaintiff's case, and (5) damages proximately caused by defendant's acts; (2b) such [cause of action] should be recognized between parties to the primary action and against third parties; and (3) such a claim may be brought at the same time as the primary action.


Other jurisdictions have discussed the independent spoliation tort but have refused to recognize it, usually based on the facts of the given case. See Talmadge v. State Farm Mut. Auto. Ins. Co., No. 96-8044, 1997 WL 73476, at *3 (10th Cir. Feb. 21, 1997) (unpublished table decision) (applying Wyoming law); Wilson v. Beloit Corp., 921 F.2d 765, 767 (8th Cir. 1990) (applying Arkansas law); Montello v. Dun & Bradstreet Corp., No. 94 Civ. 4383, 1996 WL 239890, at *3 n.1 (S.D.N.Y. May 9, 1996) (applying New York law); 5636 Alpha Rd. v. NCNB Texas Nat'l Bank, 879 F. Supp. 655, 665 (N.D. Tex. 1995) (stating that Texas has not recognized a claim for negligent spoliation of evidence); Moore v. United States Dep't of Agric. Forest Serv., 864 F. Supp. 163, 165 (D. Colo. 1994) ("[C]laims for intentional or negligent interference with prospective economic advantage based on alleged spoliation of evidence are not cognizable under Colorado law ...."); Edwards v. Louisville Ladder Co., 796 F. Supp. 966, 971 (W.D. La. 1992) (ruling that court would not recognize the independent tort of spoliation where defendant manufacturer filed third party claim against plaintiff's employer who disposed of allegedly defective ladder); Christian v. Kenneth Chandler Constr. Co., 658 So. 2d 408, 413 (Ala. 1995); La Raia v. Superior Court, 722 P.2d 286, 289 (Ariz. 1986) (en banc) (holding that "[t]here is no need to invoke esoteric theories or recognize some new tort" since there is already a remedy "within the realm of existing tort law"); Gardner v. Blackston, 365 S.E.2d 545, 546 (Ga. Ct. App. 1988); Boyd v. Travelers Ins. Co., 652 N.E.2d 267, 269-70 (Ill. 1995) (stating that a separate tort is not necessary, since plaintiff can bring action under existing negligence law); Murphy v. Target Prods., 580 N.E.2d 687, 690 (Ind. Ct. App. 1991) (holding that plaintiff's employer did not have a common law duty to preserve potential evidence for employee's use in third party action against product manufacturer); Monsanto Co. v. Reed, 950 S.W.2d 811, 815 (Ky. 1997); Miller v. Montgomery County, 494 A.2d 761, 767-68 (Md. Ct. Spec. App. 1985); Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc., 456 N.W.2d 434, 439 (Minn. 1990) (holding that even if spoliation of evidence is recognized as a separate tort, fire insurer's causes of actions were premature since they were based on speculative harm to insurer's prospective subrogation action from alleged negligent or intentional destruction of evidence of fire); Baugher v. Gates Rubber Co., 863 S.W.2d 905, 907-14 (Mo. Ct. App. 1993); Weigl v. Quincy Specialties Co., 601 N.Y.S.2d 774, 776-77 (Sup. Ct. 1993) (holding that tort of spoliation of evidence is not recognized in New York, but common law causes of action are recognized against employer for negligently and intentionally impairing employee's right to sue third party); Brewer v. Dowling, 862 S.W.2d 156, 160 n.5 (Tex. App. 1993) ("Texas does not recognize spoliation of evidence as an independent tort."); Austin v. Consolidation Coal Co., 501 S.E.2d 161, 162-65 (Va. 1998); see also cases cited supra note 60 (discussing California case law).
tort for the negligent spoliation of evidence. The Velasco court relied on the reasoning described in Smith and applied the same elements (substituting negligent acts for intentional ones) to state a cause of action for the negligent destruction of evidence that is needed for prospective civil litigation. As with any traditional tort based on negligence, a plaintiff must prove the fundamentals of a negligence claim: a duty owed to plaintiff by defendant, a breach of that duty (the negligent act of spoliating evidence) which proximately caused the plaintiff’s injury, and compensable injuries (damages).

75. See id. at 505-06; see also Continental Ins. Co. v. Herman, 576 So. 2d 313, 315 (Fla. Dist. Ct. App. 1990) (laying out the elements of a cause of action for negligent destruction of evidence). In recognizing the negligent spoliation tort, the Velasco court compared the spoliation tort with the previously recognized tort of negligent interference with prospective economic advantage which was recognized in J'Aire Corp. v. Gregory, 598 P.2d 60, 64 (Cal. 1979). See Velasco, 215 Cal. Rptr. at 506. The J'Aire court listed the criteria necessary in determining whether a cause of action had been stated:

(1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct and (6) the policy of preventing future harm.

J'Aire, 598 P.2d at 63. These criteria are used to make "[t]he determination whether in a specific case the defendant will be held liable to a third person not in privity" with him. Biakanja v. Irving, 320 P.2d 16, 19 (Cal. 1958) (in bank). This determination "is a matter of policy and involves the balancing of the various factors" set forth above. Id.

76. "The general rule is that there is no duty to preserve evidence; however, a duty to preserve evidence may arise through an agreement, a contract, a statute or another special circumstance." Boyd v. Travelers Ins. Co., 652 N.E.2d 267, 270-71 (Ill. 1995) (citations omitted). "[N]o wrong is actionable unless the putative defendant owed a duty to the party injured." La Raia v. Superior Court, 722 P.2d 286, 289 (Ariz. 1986) (en banc). See also Howell v. Maytag, 168 F.R.D. 502, 505 (M.D. Pa. 1996) ("A party which reasonably anticipates litigation has an affirmative duty to preserve relevant evidence."); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 358 (5th ed. 1984) ("But it should be recognized that 'duty' is not sacrosanct in itself, but is only an expression of the sum total of those conditions of policy which lead the law to say that the plaintiff is entitled to protection.") (footnote omitted).

77. In an action for spoliation, "a plaintiff must allege 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, 652 N.E.2d at 271 (emphasis in original). The Supreme Court of Illinois in Boyd went on further to say that:
A plaintiff need not show that, but for the loss or destruction of the evidence, the plaintiff would have prevailed in the underlying action. This is too difficult a burden, as it may be impossible to know what the missing evidence would have shown.
A plaintiff must demonstrate, however, that but for the defendant's loss or destruction of the evidence, the plaintiff had a reasonable probability of succeeding in the underlying suit. In other words, if the plaintiff could not prevail in the underlying action even with the lost or destroyed evidence, then the defendant's conduct is not the cause of the loss of the lawsuit. This requirement prevents a plaintiff from recovering where it
B. Reasoning Against Adopting an Independent Tort of Spoliation

The majority of jurisdictions do not recognize the destruction, alteration, or suppression of evidence as a cognizable tort action for various reasons. These reasons include: (1) alternative remedies are available; 79 (2) damages are too speculative; (3) the spoliator is a nonparty who does not owe a duty to the victimized litigant; (4) a person is entitled to do with her property as she chooses; (5) the spoliation is reasonable under the given facts of the specific case (i.e., destroying the property for safety reasons); and (6) the tort is potentially inconsistent with the policy favoring final judgments, since a plaintiff who lost the primary lawsuit may bring a second, separate suit by establishing that a piece of relevant evidence was spoliated. 80

While the California Court of Appeals did not see the damage portion of a spoliation case as a problem, 81 other courts have not supported
the California court's thinking. A federal court called the comparison between a spoliation claim and an "interference with a prospective business advantage" claim invalid because previously recognized compensable probable expectancies were always related to future contractual relations in a commercial setting. \(^2\) The prior business relationship between the parties makes it possible to better estimate with some fair amount of reasonability both the value of what has been lost and the likelihood that the victimized party would have received it if the other party had not interfered. \(^3\) Carrying liability for interference with a probable expectancy beyond such commercial dealings leaves the court with no way to calculate with any sufficient degree of certainty whether the plaintiff ever would have received the anticipated benefits. \(^4\) There is no way of knowing what the spoliated evidence would have shown or how it would have contributed to the party's ability to win the underlying lawsuit. Even though the spoliation is discovered, determining whether the victimized party would have won the trial if the evidence had been available is pure conjecture. \(^5\)

Opponents to the idea of holding a person responsible for discarding evidence claim that a person should be free to do with her property as she wishes and any deviation from this principle violates a person's property rights. \(^6\) Although a person has the legal right to dispose of her property, a spoliation claim could potentially impose liability on this individual for her actions. \(^7\) The independent tort places a party's due process right to have access to and use of all admissible evidence at trial against another's property right to do with her property as she wishes. \(^8\)

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\(^{2}\) See Edwards, 796 F. Supp. at 970.

\(^{3}\) See id. (citing W. PAGE KEETON ET AL., supra note 76, § 129, at 1006).

\(^{4}\) See id.

\(^{5}\) In Federated Mutual Insurance Co. v. Litchfield Precision Components, Inc., 456 N.W.2d 434, 438 (Minn. 1990), the court stated:

"Speculation is a prime concern in the context of a spoliation claim because: "it is impossible to know what the destroyed evidence would have shown.... It would seem to be pure guesswork, even presuming that the destroyed evidence went against the spoliator, to calculate what it would have contributed to the plaintiff's success on the merits of the underlying lawsuit. Given that plaintiff has lost the lawsuit without the spoliated evidence, it does not follow that he would have won it with the evidence."


\(^{6}\) See Koplin v. Rosel Well Perforators, Inc., 734 P.2d 1177, 1183 (Kan. 1987) (stating that the independent tort of spoliation intrudes on a person's property rights); Wilson, supra note 66, at 994 (stating that interference with property rights is the most common reason cited for opposing the adoption of the tort).

\(^{7}\) See Koplin, 734 P.2d at 1183; Wilson, supra note 66, at 994.

\(^{8}\) See Wilson, supra note 66, at 994.
Critics of the independent tort say that this forced retention of documents and other property for potential litigation creates a limitless duty, the scope of which extends to individuals who may be unknown at the time the evidence is spoliated.89

Opponents to the spoliation tort may also claim that spoliation is reasonable under certain circumstances. It is easy to spin hypotheticals in which the keeping of evidence may create a health or safety risk, thereby forcing the evidence to be discarded, destroyed, or materially altered. Some scenarios might include: a building is destroyed by fire and its shell poses a risk of collapsing and harming passersby; perishable items are at the heart of the underlying controversy but keeping the now rancid items is hazardous to one’s health; the contents of a flooded home are creating a stench and a health risk that becomes a public/private nuisance.

When final judgment is entered in a suit, the parties are usually collaterally estopped from pursuing additional claims that arose from the same matter.90 It is for this reason that a jurisdiction may require that a spoliation claim be brought prior to or during the underlying lawsuit.91 A claim brought after judgment is entered may be barred as a collateral attack on a final judgment.92 In the spoliation setting, an “attack on the veracity of evidence that formed the basis for a former judgment constitutes a collateral attack on the former trial, regardless of whether the litigants are expressly seeking to have the prior judgment set aside.”93

89. See id. at 994-95; see also Koplin, 734 P.2d at 1183 (noting the limitless scope of the new duty if created).
90. See Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 326 (1955) (stating that the doctrine of collateral estoppel “precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit”). Any procedural implications of recognizing an independent tort action for spoliation is beyond the scope of this Note.
92. See id.
93. Id.
IV. THE INDEPENDENT TORTS OF INTENTIONAL AND NEGLIGENT
SPOLIATION OF EVIDENCE SHOULD BE ADOPTED

A. A Duty Should Be Created Between a Spoliator and the Injured
Party

A duty between a spoliator and the party harmed by the spoliation
needs to be recognized. Although there is currently no general duty to
preserve evidence, an affirmative duty to preserve evidence may arise
by agreement, contract, statute, special circumstance, or conduct imply-
ing voluntary assumption of a duty.94 When a party to a lawsuit spoliates
evidence, the obligations imposed under the original underlying lawsuit
give rise to a duty owed to the non-spoliating party, i.e., if the underly-
ing action is a contract dispute, the duty imposed under the original
contract imposes a duty on the parties that can carry over to the spolia-
tion claim.95 Since the parties are before the court, they are under an ob-

For an example of a statutory duty to preserve evidence, see Rodgers v. St. Mary's Hospital, 597
N.E.2d 616, 619-22 (Ill. 1992) (analyzing Illinois' X-Ray Retention Act and its effect on a hospi-
tal's duty to a plaintiff to maintain evidence). The Act mandates that hospitals retain x-rays as part
of their regularly maintained records for a period of five years unless the hospital has been notified
in writing that litigation is pending that involves the particular x-ray as possible evidence. In that case, the hospital must keep the x-ray in its regular records until notified in writ-
ing by the plaintiff's attorney, with the approval of the defendant's attorney, that the case has been
concluded or for a period of 12 years from the date the x-ray was produced, whichever comes first.
See id.; 210 ILL. COMP. STAT. 90/1 (West 1993).

Implication [by a statute] of a private right of action is appropriate [when]: (1) plaintiff
is a member of the class for whose benefit the Act was enacted; (2) it is consistent with
the underlying purpose of the Act; (3) plaintiff’s injury is one the Act was designed to
prevent; and (4) it is necessary to provide an adequate remedy for violations of the Act.

Traditional tort law states that a person has a duty to aid another who is physically harmed
by the person's conduct. See RESTATEMENT (SECOND) OF TORTS § 322 (1965). A person who
knows or has reason to know that her conduct caused harm to another, thus putting the other per-
son in danger of incurring further physical harm, is under a duty to exercise reasonable care to
prevent that further physical harm from occurring to the other person. See id.; see also La Raia v.
Superior Court, 722 P.2d 286, 290 (Ariz. 1986) (en banc) (following and citing Restatement
§ 322). The traditional notion that creating the harm creates the duty can be used in the nonparty
spoliator scenario. Since it is the nonparty who spoliated the evidence and created the harm to the
party, the nonparty spoliator has a duty to that harmed party. Although the spoliator did not create
the original injury to the party, the spoliator did exacerbate the injury to the party by possibly tak-
ing away her chances of winning the underlying lawsuit. It is this "probable expectancy" of win-
ning the original case that is harmed by the nonparty spoliator, thus creating a duty. See supra text
accompanying notes 65-71.

95. See Boyd, 652 N.E.2d at 270. The spoliator would be held to a reasonable person stan-
dard. She would have a duty to reasonably preserve all evidence which is relevant to reasonably
foreseeable litigation. See id. at 271.
ligation to follow the court’s discovery rules. In the federal courts, a party is entitled to “obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action...” This is a duty to disclose imposed by the court itself onto the parties. But these remedies are not sufficient since their availability is limited in time (during the course of the actual underlying case) and also limited to the parties before the court.97

Currently, when there is no underlying duty owed to the harmed litigant by the spoliator (i.e. where the spoliator is a nonparty who has no relationship that gives rise to a duty owed to the harmed party), no duty will be imposed. If the nonparty is an expert witness hired by the defendant (or plaintiff) and it is the defendant (or plaintiff) that is harmed by the expert’s spoliation, the party could sue the expert and claim that the duty owed to them was created by the agreement between them. But what happens when the expert harms the opposing side rather than the party who hired her? Can the expert herself be sued by the harmed party? Since the spoliator is not a party to the underlying lawsuit, the traditional spoliation remedies have no deterrent effect on her and in no way make her legally responsible to the harmed party; her spoliation is “charged” against the party that is “responsible” for her involvement in the case.98 It is the charged party that pays for the wrongful acts of the nonparty.99 The United States Supreme Court has held that courts have the power to recognize duties to further justice where no duty previously existed.100 It is this judicially created duty that needs to be imposed on the spoliator in order to give the harmed party legal recourse for the injuries suffered from the spoliation. Such judicial recognition would ensure that for every spoliation wrong there is a remedy.

Even if there is currently no common law or statutory duty between the nonparty spoliator and the harmed party, as discussed above, state courts can recognize an independent tort action for spoliation and create

96. FED. R. CIV. P. 26(b)(1).
97. See supra Part II.B.
98. See id.
99. Subsequent liability of the nonparty to the charged party is possible if some cognizable tort, contractual, agency, or other relationship exists that would allow the charged party to recoup her loss from the nonparty. However, an in-depth discussion of this topic is beyond the scope of this Note.
100. “The duty of fair representation is a judicially created duty arising out of the statutory grant of exclusive representation to unions under the Railway Labor Act, and the National Labor Relations Act.” Woods v. Graphic Communications, 925 F.2d 1195, 1203 (9th Cir. 1991) (citations omitted) (interpreting the Supreme Court’s decision in Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) and Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944)).
the necessary duty of care to preserve evidence. The independent tort serves the public policy concerns of deterring evidence destruction (making for more accurate fact-finding), compensating the party for her legally protected property interest in a probable expectancy in litigation which is harmed by the spoliator, and giving the courts a viable supplement to the traditional spoliation remedies which have currently been unable to effectively curb the spoliation problem. This created duty solves the problem of the situation in which a party is harmed by a spoliator but no traditional duty currently exists between the two.

B. The Spoliation Claim and the Underlying Lawsuit Should Be Tried Separately and Spoliation Damages Are Not Too Speculative

Pertinent to the discussion of uncertainty of damages is the question of whether a party must try the underlying case and lose before bringing a claim for spoliation. Some courts require that the plaintiff present her spoliation claim at the same time as the underlying claim, while other courts force the plaintiff to wait and see if she loses the underlying lawsuit before bringing the spoliation claim. While trying the spoliation claim concurrently with the underlying case may sound like a convenient, workable solution, the real life application of trying the two claims together is not that easy. The jury may quickly become con-

103. Compare Smith v. Superior Court, 198 Cal. Rptr. 829, 837 (Ct. App. 1984) (stating that the spoliation claim should be heard with the underlying claim), with Kent v. Construzione Aeronautiche Giovanni Agusta, S.p.A., No. CIV. A. 90-2233, 1990 WL 139414, at *8 (E.D. Pa. Sept. 20, 1990) (“I do not see how a plaintiff can allege facts demonstrating actual harm from the spoliation of evidence until her underlying claim is resolved.”), and Federated Mut. Ins. Co. v. Litchfield Precision Components, 456 N.W.2d 434, 439 (Minn. 1990) (“We believe resolution of a plaintiff’s underlying claim is necessary to demonstrate actual harm and prevent speculative recovery in a spoliation action.”).
104. One federal district court judge, Joseph S. Lord, III, stated his opinion:
[I]t is only after litigation of the underlying claims that the extent to which plaintiff was prejudiced by the destruction of evidence become [sic] clear. It is entirely possible that with the benefit of an adverse inference instruction or issue-related sanctions, a plaintiff may be able to prevail on her underlying claims, in which case there would be no basis for recognizing an independent tort for intentional spoliation of evidence. . . . I shudder to think of the confusion and compromise that would be engendered by instructing a jury to consider simultaneously whether plaintiff has proven her underlying claims and, if not, whether there is a reasonable probability that plaintiff would have proven her case, had certain evidence not been destroyed. . . . [O]ne of the most troubling questions associated with the proposed tort of intentional spoliation of evidence is whether workable standards for proof of causation and damages can be developed. I believe that this question may be more ably addressed after disposition of the underlying claims.
fused as it attempts to decipher the evidence in deciding whether the plaintiff has proven her case, and if not, then if she would have proven it if a certain piece of evidence were not spoliated.

A person claiming that she was harmed by the spoliation of evidence (as with any other tort claim) needs to allege actual damages since a threat of future harm that is not yet realized is not actionable; a plaintiff must allege that “a defendant’s [spoliation] caused the plaintiff to be unable to prove an otherwise valid, underlying cause of action.” In theory, it is only after the plaintiff has actually lost the underlying case that she may then claim that the spoliation caused her harm. In reality, the trier of fact would need to first deliberate the underlying claim. Then, and only then, would the trier of fact begin deliberating anew to decide whether it would have decided the underlying case differently if the spoliation had not taken place. This two-tiered deliberation system, which considers different facts, liabilities, and elements of law, is best left to two different juries. If the claims are separately tried, the spoliation claim would resemble a legal malpractice suit. In order to successfully recover in a tort action for spoliation, the plaintiff would need to put on a case within a case.

A court considering a spoliation claim first needs to determine whether the spoliation was committed and then go on to determine what the outcome in the original case would have been with the benefit of the spoliated evidence in order to determine liability and to calculate damages. This calculation of damages would then proceed as with any other normal tort case.

Kent, 1990 WL 139414, at *7-8 (footnotes omitted) (citations omitted).


A plaintiff must first prove three elements in a legal malpractice action: (a) the attorney’s employment; (b) his neglect of a reasonable duty; and (c) proximate cause, i.e., that the lawyer’s act caused the client injury or damage. This latter element requires the “but for” test to be met: “but for” the lawyer’s negligence, the client would have prevailed in the underlying lawsuit. This requirement has resulted in a legal malpractice action being referred to as a “case within a case.” The fact that the client loses, standing alone, does not establish that the lawyer did not adhere to the requisite standard of care, because an attorney is not ipso facto a guarantor of his work.

Id. at 92-93 (citations omitted) (footnote omitted); see also Alva v. Hurley, Fox, Selig, Caprari & Kelleher, 156 Misc. 2d 550, 553 (N.Y. Sup. Ct. 1993) (“[T]he value of the underlying (usually lost) claim is the measure of damage in a legal malpractice action.”); Sola v. Clostermann, 679 P.2d 317, 318 (Or. Ct. App. 1984) (referring to a legal malpractice case as “a lawsuit within a lawsuit”).


As for the issue of compensatory damages, the question is always a difficult one. In tort actions, the wrongdoer is liable, in general, for any injur[ies] which [are] the natural and probable consequence of the wrong. These may include both the direct and indi-

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Some jurisdictions may refuse to recognize the independent tort of spoliation because the damages are too speculative; however, the speculative nature and difficulty of calculating damages has not always stopped the law from recognizing a new tort action in the past.\textsuperscript{108} There are many instances in which the law protects an injured person even though damages cannot be proven with certainty. For example, in wrongful death and personal injury cases, amounts of future earnings are uncertain but still recoverable.\textsuperscript{109} Other actions, such as patent or trademark infringement and tort actions, such as libel, slander, and invasion of privacy, have substantial damage awards even though there is often no proof of economic harm or emotional distress.\textsuperscript{109}

Plaintiffs must prove their damages with as much accuracy as reasonably possible, but when precision is not attainable because of the nature or circumstances of the claim, such precision is not ordinarily required.\textsuperscript{110} The United States Supreme Court has stated:

\begin{quote}
Where the tort is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result may be only approximate.\textsuperscript{112}
\end{quote}

\textsuperscript{108} See DAN B. DOBBS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION § 3.3 (2d ed. 1993) (suggesting the specific element approach in determining damages in a particular action as damages must vary with the kind of harm suffered); Thomas G. Fischer, Annotation, \textit{Intentional Spoliation of Evidence, Interfering With Prospective Civil Action, As Actionable}, 70 A.L.R.4th 984, 987-88 (1989).

\textsuperscript{109} See Fischer, supra note 108, at 987-88.

\textsuperscript{110} See id.

\textsuperscript{111} See id.

\textsuperscript{112} Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931) (hearing a suit arising under the Sherman Anti-Trust Act to recover damages resulting from an alleged conspiracy to monopolize interstate trade and commerce in vegetable parchment, thereby destroying plaintiff’s business).
The United States Supreme Court further explained that the plaintiff must have a basis for a reasoned conclusion as to the amount of her alleged damages.\footnote{See Palmer v. Connecticut Ry. & Lighting Co., 311 U.S. 544, 561 (1941) (hearing a case concerning the reorganization of a railroad company under section 77 of the Bankruptcy Act, wherein respondent sought damages from rejection of a lease).}

Courts also consider deterrence to be an important policy reason for allowing lawsuits even though damages cannot be proven with certainty.\footnote{See Fischer, supra note 108, at 988.} Since spoliation is so pervasive today, this policy should not be overlooked. Once a spoliator is not allowed to prosper from her wrongful act and instead is forced to pay for her conduct, she may well be deterred from spoliating in the future. Further, an intentional tort of spoliation may bring an award of punitive damages for the plaintiff. Although the mere fact that an intentional tort was committed does not automatically make an award of punitive damages permissible, a defendant's misconduct may make an award of punitive damages proper.\footnote{See Sufrin v. Hosier, 128 F.3d 594, 598 (7th Cir. 1997) (applying Illinois law); see also Stipancich, supra note 2, at 1149 (stating that courts justify punitive damages to punish and deter a tortfeasor, when there is substantial evidence of intentional wrongdoing (i.e., an “evil-minded act” or a “wanton and willful disregard” of another’s rights)).}

“The twin purposes of punitive damages—deterrence and punishment—are well served in a contract where one party commits an intentional tort like deceit.”\footnote{Grynberg v. Citation Oil & Gas Corp., 573 N.W.2d 493, 502 (S.D. 1997) (hearing an appeal from a breach of contract, fraud, and punitive damages jury award).}

When faced with the possibility of incurring additional punitive monetary penalties, an intentional spoliator would need to think twice before spoliating the evidence. In Justice Holmes’ “bad-man’s” thinking, the cost-benefit analysis may calculate out differently when punitive damages are contemplated in the equation. No longer is a spoliator, if caught, merely placed in the same position she would have been in had she not spoliated the evidence in the first place. The spoliator would be forced to pay punitive damages above and beyond what the evidence was actually worth to the non-spoliating party’s underlying case. As stated above, punitive damages are used to punish the intentional wrongdoer, deter her future tortious conduct, and overcompensate the
harm to the plaintiff. The "bad-man's" analysis would now weigh the risk of getting caught versus the cost of the value of the evidence to the opponent's underlying case plus the extra cost of punitive damages. This is a great leap forward in putting some teeth into the deterrence effect of the law of spoliation. Those jurisdictions that do not recognize an independent cause of action for spoliation fail to utilize this added deterrence effect.

C. Property Rights Would Not Be Infringed upon Unfairly

While it is true that recognition of an independent tort of spoliation could infringe upon the property rights of the holder of evidence, these rights have been infringed upon by the courts in other situations. There are many examples in which a person is forced to retain documents or other property against her will. Persons presently can be forced by the courts to testify or to produce evidence. While this may be an inconvenience that may result in a slight abridgment of a person's property rights, it is a small price to pay to further the judicial goal of affording every harmed plaintiff the chance to be made whole by having a fair and complete opportunity to prove her claim.

Critics also claim that recognizing a duty to preserve evidence would create an obligation that is too cumbersome and broad. But, there is no need to make this duty "limitless" in scope, applying for an unreasonably long period of time to all persons known and unknown. The scope may be limited in time where a nonparty in control of evidence that is relevant to a lawsuit or a potential lawsuit must preserve the evidence for as long as the statute of limitations runs for a party to bring the underlying action or until the time set forth in the applicable discovery rules expires. The duty can be limited by necessity where the

117. See Shell Oil Co. v. Babbitt, 125 F.3d 172, 176-77 (3d Cir. 1997) (holding that section 103(a) of the Federal Oil and Gas Royalty Management Act of 1982 creates a duty on plaintiff to maintain all documents necessary to demonstrate that it is complying with royalty requirements); Schorr v. Frontier Transp. Co., 942 P.2d 418, 419 (Alaska 1997) (stating that the Federal Motor Carrier Safety Regulations of the Federal Highway Administration requires drivers to keep precise records of their duty status); Attorney Grievance Comm'n v. Awuah, 697 A.2d 446, 454 (Md. 1997) ("[E]very lawyer is deemed to know the Rules of Professional Conduct, and is charged with ... the duty to maintain adequate records."); But see Waddill v. Anchor Hocking, Inc., 944 P.2d 957, 965 (Or. Ct. App. 1997) (holding that no duty was "extended for the benefit of users of chattels and imposed on the suppliers of chattels to keep records of past complaints in a particular way or for a particular period of time"; therefore fishbowl manufacturer did not owe a duty to customers to keep records of past complaints).

118. See FED. R. CIV. P. 45(a)(1), (d)(1), (e).

119. See supra text accompanying note 89.
The duty may extend in this case to having the nonparty notify the parties of her hardship and allow them to take possession of the evidence before the nonparty discards it. The duty can be further limited by applying it only in cases where a nonparty is aware that the evidence she possesses is relevant to an ongoing or potential lawsuit.\textsuperscript{121}

Opponents of the independent spoliation tort who claim that spoliation may be reasonable under certain circumstances are correct. There may be circumstances under which a spoliator’s conduct was reasonable, i.e., the evidence poses a health risk or a risk of further injury or the evidence is perishable and cannot be preserved. But these situations would not pose a liability problem to the person who spoliates this type of evidence. If, under the circumstances, the trier of fact determines that the evidence had to be spoliated to prevent a health, safety, or other risk to the spoliator or the community, then the spoliator will not be held liable for her conduct. An alleged spoliator can argue this “need to spoliate” as an affirmative defense. At some point (whether as a matter of law or a point for the trier of fact to decide), the “costs” to a spoliator or to others in the community outweigh the benefits to the harmed party thus eliminating the spoliator’s duty to preserve the given evidence. If the spoliator is aware of pending litigation before discarding the evidence, she should notify the court and the parties in the lawsuit and give them the option to preserve the evidence in other ways (i.e., photographs, videos, etc.). As long as the spoliator acts reasonably under the circumstances, she should not be held liable.

\textsuperscript{120} Although beyond the scope of this Note, the reader should consider that a nonparty who keeps evidence solely for the benefit of a party’s use in litigation can seek reimbursement from that party, possibly under contract law’s quantum meruit theory, for any costs incurred while maintaining or storing the evidence. See \textit{Black’s Law Dictionary}, supra note 1, at 1243 (defining the quantum meruit theory and its applicability as a source of recovery for services rendered).

\textsuperscript{121} In addition, if the nonparty “should be aware” that the evidence she possesses is relevant to potential or ongoing litigation, and she spoliates, a reckless or negligent spoliation claim should be recognized. Courts will entertain both an assertion of negligence as well as recklessness in the same lawsuit when appropriate. See, e.g., Clingerman v. Carter-Jones Lumber Co., No. 91-P-2309, 1992WL 28132, at *4 (Ohio Ct. App. Feb. 14, 1992) (hearing claims of negligent and reckless emotional distress).
D. Final Judgment in an Underlying Lawsuit Should Not Bar an Action for Spoliation

The spoliation tort can be a loophole in the finality rule but this is not necessarily a problem. If a party in the underlying lawsuit spoliates, whether she wins or loses the original case, she can still be sued for the additional tortious act she commits—the spoliation. If the spoliation is done by a nonparty, the same theory holds true; the nonparty can be sued for her wrongful destruction, alteration, or disposal of the evidence. The spoliator should not be allowed to escape from paying for her wrong simply because time has passed, especially since she committed the tortious act to escape discovery and liability in the first place.

If the spoliation claim can be brought after the original lawsuit is over, there is a question as to when the independent claim can be brought. There can be three answers: the claim cannot be brought at all (since the original claim’s judgment is final, as discussed above), the independent spoliation claim can be governed by its own statute of limitations period after which the claim cannot be brought, or the spoliation claim can be treated like a fraud or malpractice claim where the statute of limitations is tolled until the spoliation is actually discovered by the harmed party.\(^{122}\)

The spoliation tort can be compared to a fraud when the evidence is spoliated intentionally by a party or a nonparty. The destruction of relevant evidence, if intentionally done to hinder a party’s chances of winning a lawsuit, is comparable to an action in fraud and the time to bring an action should start to run from the discovery of that fraud.\(^ {123}\) In this way, the harmed party who is wrongfully kept from discovering or utilizing crucial evidence, despite her diligence to uncover all relevant evidence, can recover once the spoliation is eventually discovered.

When the spoliation is done negligently, it can be compared to a legal or medical malpractice case. Although the lawyer or doctor did not intend to commit a tort, the fact that the nature of her actions concealed

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122. See, e.g., ALA. CODE § 6-5-102 (1993) ("Suppression of a material fact which the party is under an obligation to communicate constitutes fraud."); CAL. CIV. PROC. CODE § 340.5 (West 1982) (stating that a medical malpractice action must be brought within three years from time of injury, or one year from its discovery); N.Y. C.P.L.R. 214-c (McKinney 1990) (stating that certain toxic tort actions can be commenced within three years of their discovery; adopting a "discovery of the injury" rule for toxic torts that result in delayed injuries).

123. See Newcomb v. Gonser, No. 01A01-9705-CIV-00220, 1997 WL 705858, at *3 (Tenn. Ct. App. Nov. 14, 1997) (enumerating elements of fraud as: "(1) an intentional misrepresentation of a material fact, (2) knowledge of the representation's falsity, ... (3) an injury caused by reasonable reliance on the representation," and (4) "the misrepresentation involve[s] a past or existing fact or, ... a promise of future action with no present intent to perform").
detection of her acts should not bar the harmed party from seeking compensation for any injuries received. For example, if a surgeon leaves a sponge inside a patient, the patient can sue for damages once the sponge is discovered.124 The same should be true for a person harmed by negligent spoliation of evidence. Since the spoliation is by its very nature hard to detect, the harmed party should be allowed to bring suit against the alleged spoliator once the negligent conduct is discovered.

There are other situations in which a spoliation claim is not violating the final judgment rule at all. When the spoliation claim is against a nonparty to the original suit, that nonparty is being sued for the actual spoliation of the evidence and not for the issue that was being adjudicated in the underlying case. The plaintiff is not necessarily seeking damages for losing the underlying case but may be seeking damages for the lost opportunity of potentially winning the underlying lawsuit.125 The plaintiff is also potentially seeking punitive damages for the actual act of spoliation, which has nothing to do with the issues involved in the original dispute.

V. CONCLUSION

The public policies of deterring the destruction of evidence, increasing the accuracy of fact-finding, and giving the victim of spoliation an avenue to pursue compensation for her injury will all be enhanced by supplementing the traditional remedies with the recognition of an independent tort action for the spoliation of evidence done intentionally or negligently. When appropriate to remedy a given spoliation situation, the traditional methods should still be used by the court. The traditional measures, however, fail to offer adequate remedies for the courts to compensate a party harmed by spoliation. Those remedies are limited to the parties before the court and also by the timing and finality of a jurisdiction’s procedural rules.

The independent tort, by creating a duty of reasonable care to preserve evidence for another’s use in pending or potential litigation, solves the problems that a person harmed by spoliation faces when only the traditional remedies are available. This duty, judged by a reasonable person standard, can create a duty of care between the parties of a law-

124. See § 340.5 (allowing suit once malpractice is discovered).
suit or, even more importantly, between a party and a nonparty who is in control of relevant evidence. This nonparty is often an opponent’s expert, attorney, or some type of storage facility, who otherwise owes no duty, and therefore no liability, to the party harmed by the destruction of the evidence. Recognition of the independent tort enables the harmed party to directly sue the nonparty spoliator.

Punitive damages for grossly wanton conduct would bolster the deterrence effect of the intentional tort. There would be a new factor in the cost/risk-benefit calculation. The potential spoliator would no longer believe that the analysis is weighted heavily in favor of spoliating evidence. The chances of being caught would increase if liability is extended to when the “fraud” is discovered. Economically, with potential compensatory and punitive damage awards, the cost of being found liable for the spoliation would be much greater.

Neither the idea of creating a new tort nor the concept of holding people responsible for destroying needed evidence is new. The legal system has criminalized the destruction of evidence. Tort law normally embraces victims of wrongful conduct. Allowing a harmed party to seek compensation via a civil tort action for an injury incurred by someone else’s intentional or negligent conduct is not untenable.

For all of the above reasons, independent torts for the intentional and negligent spoliation of evidence should be recognized, thus adding an effective and logical remedy for when relevant evidence necessary for pending or potential litigation is spoliated.

Jay E. Rivlin*

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