Recent Developments in Spoliation / Preservation and Sanction Cases

Old Topic That Keeps Coming Up

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What Needs to Be Preserved?

- Relevant evidence – request to preserve vs. obligation (foreseeability) to preserve
- Incident reports
- Statements
- Videos – capturing the event and not capturing the event
- Injury causing item: chair, bath mat, car, food, etc.
- Evidence that must be moved or cleaned up.

How Long?

Auto erase

What Happens if You Don't?

Different jurisdictions have different remedies / consequences

California

No First Party Tort for Intentional Spoliation

The California Supreme Court has held that there is no tort for "the intentional spoliation of evidence by a party to a case 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. Cedars-Sinai Med. Ctr. v. Superior Ct.**,** 74 Cal. Rptr. 2d 248, 258, 954 P. 2d 511 (Cal. 1998).

The Court in *Cedars-Sinai* found existing non-tort remedies existed to punish and deter the misconduct including (1) an evidentiary inference against the party who destroyed the evidence or rendered it unavailable; (2) discovery sanctions ranging from monetary and contempt sanctions to issue, evidence, and even terminating sanctions; (3) State Bar discipline against any attorney involved in the spoliation of evidence; and (4) criminal penalties. Cedars-Sinai, 74 Cal. Rptr. at 248, 954 P. 2d 511. See also**,** Rosen v. St. Joseph Hosp. of Orange Cty., 193 Cal. App. 4th 453, 122 Cal. Rptr. 3d 87 (2011)(patient's claims brought against physician and hospital were spoliation of evidence claims barred under California law).

In 2014, in an unpublished decision, the California Appellate Court, citing *Cedars-Sinai,* upheld the dismissal of a claim “sounding in” first party intentional spoliation of evidence. In Chu v. Glenborough, 2014 Cal. App. Unpub. LEXIS 2499, *1, 2014 WL 1384851 (Cal. App. 1st Dist. Apr. 9, 2014) the daughter of Li Ching Chu and Robert Ching Liang Hung (Plaintiffs) died after a fall from an upper floor of the office building where she worked. The coroner ruled the death a suicide, but Plaintiffs believe their daughter was murdered by coworkers. Plaintiffs also alleged that dangerous conditions in the office building contributed to her death, and that the building owner suppressed evidence of the murder. The trial court sustained demurrers to the causes of action against the building owner, including a claim for “obstruction of justice” based on alleged spoliation of surveillance video.

Plaintiffs alleged in their complaint that defendant either destroyed or intentionally withheld surveillance videotapes of the attack on Hung. Moreover, they alleged that Glenborough's security guards observed the attack on Hung but failed to summon assistance and—pursuant to a Glenborough "gag order" to its employees—falsely claimed to investigators that they knew nothing about what had happened to Hung, intentionally shielding the perpetrators from justice. Plaintiffs asserted that Glenborough engaged in obstruction of justice in violation of title 18 United States Code sections 1503 and 1510 by "destroying evidence, wrongful withholding of evidence and information in its possession and disseminating untrue, false and misleading written and oral statements concerning [Hung's] murder by defendants."

Defendant demurred, citing, *inter alia, Cedars-Sinai* and arguing: "both a plain reading of the text and also case law interpreting 18 U.S.C. §§ 1503 and 1510 demonstrate that there is neither an express nor implied right of private action in either of these sections of Title 18. Further, California does not recognize any private right of action for obstruction of justice under state law or under common law." Plaintiffs' obstruction claim was based solely on defendant's discovery response stating it was not aware of any surveillance video of the incident that led to Hung's death.

The trial court sustained the demurrer without leave to amend, explaining: "No private right of action exists that is based on the federal statutes cited . . . . Plaintiff cites no authority holding that a civil cause of action exists based on interference with a law enforcement investigation, or that Defendants owed any legally recognized duty of care to Plaintiffs to allow a criminal prosecution to occur. [Citation.] Finally, ***no civil cause of action exists based on incomplete or false responses to interrogatories***."

Third-Party Tort For Spoliation

The California Supreme Court held that there is no cause of action for intentional spoliation of evidence by a third-party. Temple Cmty. Hosp. v. Superior Court, 20 Cal. 4th 464, 976 P. 2d 223 (1999). The Court in *Temple* stated that the "burdens and costs of

recognizing a tort remedy for third-party spoliation are considerable- perhaps even greater than in the case of first-party spoliation. Temple, 20 Cal. 4th at 476, 976 P. 2d 223.

See also Reynolds v. Bordelon, 172 So. 3d 589 (LA. 2015)(The Supreme Court of Louisiana, citing Temple, held there is no cause of action for negligent spoliation of evidence).

Negligent Spoliation

The California Courts have also determined that there is no cause of action for negligent spoliation of evidence. See Farmers Ins. Exch. v. Superior Court, 79 Cal. App. 4th 1400, 95 Cal. Rptr. 2d 51 (2000);Strong v. State, 201 Cal. App. 4th 1439, 1458-59, 137 Cal. Rptr. 3d 249, 263 (2011)(The Court agreed with the reasoning of the court in *Coprich* that "it would be anomalous to impose liability for negligence with respect to conduct that would not give rise to liability if committed intentionally"); Coprich v. Superior Court, 80 Cal. App. 4th 1081, 95 Cal. Rptr. 2d 884 (2000)(policy considerations concerning intentional spoliation discussed by the court in *Cedars-Sinai* and *Temple Community* apply equally to negligent spoliation, but they do not preclude a cause of action for breach of a contractual duty to preserve evidence).

Florida

First Party Spoliation

In Martino v. Wal-Mart Stores, Inc., 835 So. 2d 1251, 1256 (Fla. Dist. Ct. App. 2003), the Court, citing Cedars-Sinai Med. Ctr. v. Superior Ct., 954 P. 2d 511 (Cal. 1998), held that an independent cause of action for spoliation of evidence is unnecessary and will not lie where the alleged spoliator and the defendant in the underlying litigation are one and the same.

The Supreme Court of Florida later reinforced this decision in Martino v. Wal-Mart Stores, Inc., 908 So. 2d 342 (Fla. 2005)(holding that the remedy against a first-party defendant for spoliation of evidence is not an independent cause of action for spoliation of evidence, and instead the available remedies are discovery sanctions and a rebuttable presumption of negligence for the underlying tort). See also, McGrath v. Ward N. Am., Inc., 955 So. 2d 25 (Fla. Dist. Ct. App. 2007)(the Court held that the removal of the chair that collapsed under the plaintiff did not give rise to an independent action for spoliation).

Third Party Spoliation

In Martino v. Wal-Mart Stores, Inc., 908 So. 2d 342, 346 (Fla. 2005), the Supreme Court of Florida held that their decision did not consider whether there is a cause of action against a third party for spoliation of evidence. The decision in *Martino* was limited to claims

for spoliation of evidence against first-party defendants. Martino, 908 So. 2d 342, footnote 2.

In subsequent cases the Florida courts have recognized an independent claim for spoliation against third-parties. In Gayer v. Fine Line Const. & Elec., Inc., 970 So. 2d 424 (Fla. Dist. Ct. App. 2007) the Court held that a special employer using a laborer from a help supply services company has a duty under section 440.39(7), Florida Statutes, to preserve evidence to the injured laborer's claim against a third-party tortfeasor. Id. at 425.

In *Gayer,* the Court cited to Flagstar Cos. v. Cole-Ehlinger, 909 So. 2d 320, 322-23 (Fla. 4th DCA 2005). To establish a claim for spoliation, 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, 970 So. 2d at 426.

In the Court's analysis, the Court stated that "a duty to preserve evidence does not exist at common law; the duty must originate either in contract, statute, or a discovery request. Gayer, 970 So. 2d at 426 (citing Royal & Sunalliance v. Lauderdale Marine Ctr., 877 So. 2d 843, 845 (Fla. 4th DCA 2004). The Court determined that Fine Line was an employer, as the term is used in section 440.39(7) of Florida Statutes and remanded the case for further proceedings on the spoliation claim. Gayer, 970 SO. 2d at 429.

Sanctions

In Managed Care Sols., Inc. v. Essent Healthcare, Inc., 736 F. Supp. 2d 1317 (S.D. Fla. 2010), the Court reiterated that sanctions for spoliation of the evidence "are intended to prevent unfair prejudice to litigants and to insure the integrity of the discovery process. Id. at 1323 (citing Flury v. Daimler Chrysler Corp., 427 F. 3d 939, 944 (11th Cir. 2005)). Sanctions may include "(1) dismissal of the case; (2) exclusion of expert testimony; or (3) a jury instruction on spoliation of evidence which raises a presumption against the spoliator." Managed Care Sols., 736 F. Supp. 2d at 1323 (quoting Flury, 427 F. 3d at 945)).

New York

Third-Party Negligent Spoliation

In Ortega v. City of New York, 9 N.Y. 3d 69, 876 N.E. 2d 1189 (2007), a motorist was seriously injured when the motor vehicle they were in caught fire. The motorist brought action against the city for spoliation of evidence, and contempt, after the city erroneously destroyed the vehicle and sold it as scrap, in violation of court order to preserve the vehicle.

In addressing whether New York recognizes the tort of third-party negligent spoliation of evidence left open in MetLife Auto & Home v. Joe Basil Chevrolet, 1 N.Y.S. 2d

754, 807 N.E. 2d 865 (2004), the Court in *Ortega* held that the tort is not cognizable in the state of New York. Ortega, 9 N.Y. 3d at 73. In *Ortega*, the Court joined "the majority of jurisdictions to consider the issue and decline to recognize spoliation of evidence as an independent cause of action." Ortega, 9 N.Y. 3d at 83. The Court reasoned that such a tort would require resort to "hypothetical theories or speculative assumptions about the nature of the harm incurred or the extent of plaintiff's damages." Id. at 81.

First Party Spoliation

Given the Court's reasoning and holding in Ortega, 9 N.Y. 3d 69, 876 N.E. 2d 1189 (2007), the Court in Hillman v. Sinha, 77 A.D. 3d 887, 888, 910 N.Y.S. 2d 116, 117 (2010), held that "we see no reason to hold otherwise with respect to proposed independent tort of first-party negligent spoliation."

As a result of the Hillman Court's ruling, an independent tort for first-party negligent spoliation of evidence was not cognizable under New York law.

Spoliation by Insurer

In Fada Indus., Inc. v. Falchi Bldg. Co., L.P., 189 Misc. 2d 1, 730 N.Y.S. 2d 827 (Sup. Ct. 2001), a commercial tenant had been sued by its co-tenant for damage allegedly caused by a leak from tenant's water heater. The commercial tenant brought a third party claim against its insurer for spoliation of evidence. The Supreme Court, Queens County held that an insured may assert a third-party claim against its insurer for negligent spoliation of evidence based upon the insurer's alleged loss or destruction of key evidence crucial to the insured's defense in the underlying action.

Sanctions

"Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under **CPLR 3126**." Samaroo v. Bogopa Service Corp., 106 A.D. 3d 713, 713-14, 964 N.Y.S. 2d 255, 256 (2013)(citing Holland v. W.M. Realty Mgt., Inc., 64 A.D. 3d 627, 629, 883 N.Y.S. 2d 555)). "The Supreme Court has broad discretion in determining what, if any, sanction to impose for spoliation of evidence." Samaroo, 106 A.D. at 714 (quoting Lentz v. Nic's Gym, Inc., 90 A.D. 3d 618, 618 933 N.Y.S. 2d 875)). It may, under appropriate circumstances, impose a sanction “even if the destruction occurred through negligence rather than willfulness, and even if the evidence was destroyed before the spoliator became a party, provided [the party] was on notice that the evidence might be needed for future litigation.” Samaroo, 106 A.D. at 716 (citing DiDomenico v. C & S Aeromatik Supplies, 252 A.D. 2d 41, 53, 682 N.Y.S. 2d 452)).

The nature and severity of the sanction depends upon a number of factors, including, but not limited to, the knowledge and intent of the spoliator, the existence of proof

of an explanation for the loss of evidence, and the degree of prejudice to the opposing party. Samaroo, 106 A.D. at 714.

CPLR § 3126 (3) lays out some of the sanctions available, including: an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

Texas

Spoliation As A Tort Cause of Action

Under Texas law, a cause of action for intentional or negligent spoliation of evidence is not recognized. Trevino v. Ortega, 969 S.W. 2d 950 (Tex. 1998).

Determining Spoliation

A spoliation analysis involves a two-step judicial process: (1) the trial court must determine, as a question of law, whether a party spoliated evidence, and (2) if spoliation occurred, the court must assess an appropriate remedy. Brookshire Bros. v. Aldridge, 438 S.W. 3d 9, 14 (Tex. 2014). To conclude that a party spoliated evidence, the court must find that (1) the spoliating party had a duty to preserve evidence, and (2) the party intentionally or negligently breached that duty by failing to do so. Id.

Spoliation findings-and their related sanctions-are to be determined by the trial judge, outside the presence of the jury, in order to avoid unfairly prejudicing the jury by the presentation of the evidence that is unrelated to the facts underlying the lawsuit. Id.

Sanctions

Upon a finding of spoliation, the trial court has broad discretion to impose a remedy that, as with any discovery sanction, must be proportionate; that is, it must relate directly to the conduct giving rise to the sanction and may not be excessive. Brookshire Bros., 438 S.W. 3d at 14. Key considerations in imposing a remedy are the level of culpability of the spoliating party and the degree of prejudice, if any, suffered by the nonspoliating party. Id.

After a court determines that a party has spoliated evidence by breaching its duty to preserve such evidence, it may impose an appropriate remedy. Id. at 21. Rule 215.2 of the Texas Rules of Civil Procedure enumerates a wide array of remedies available to a trial court in addressing discovery abuse, such as an award of attorney's fees or costs to the harmed party, exclusion of evidence, striking a party's pleadings, or even dismissing a party's claims. Id. (citing TEX. R. CIV. P. 215.2-.3). These remedies are available in the spoliation context and the trial court has discretion to craft other remedies it deems appropriate in light of the particular facts of an individual case, including the submission of

a spoliation instruction to the jury. Id. (citing Trevino v. Ortega, 969 S.W. 2d 950,953 (Tex. 1998)).

The harsh remedy of a spoliation instruction is warranted only when the trial court finds that the spoliating party acted with the specific intent of concealing discoverable evidence, and that a less severe remedy would be insufficient to reduce the prejudice caused by the spoliation. Brookshire Bros., 438 S.W. 3d at 14. A failure to preserve evidence with a negligent mental state may only underlie a spoliation instruction in the rare situation in which a nonspoliating party has been irreparably deprived of any meaningful ability to present a claim or defense. Id.

Spoliation Instruction as a Remedy

In Brookshire Bros., Ltd. v. Aldridge, the Supreme Court of Texas discussed the submission of an instruction to the jury to presume that the missing evidence would have been unfavorable to the spoliator. 438 S.W. 3d at 22. The Court in *Brookshire Bros.* stated that an improper use of a spoliation instruction can deprive either party of the right to a fair trial on the merits of the case and should be used cautiously. Id.

The Supreme Court of Texas held that a party must intentionally spoliate evidence in order for a spoliation instruction to constitute an appropriate remedy. Id. Although some Texas courts of appeals have approved spoliation instructions on the basis of negligent spoliation, this approach lacks a basis in Texas common law. Id.

In clarifying "intentional spoliation," the Court in *Brookshire Bros.* determined that "intentional spoliation" means that the party acted with the subjective purpose of concealing or destroying discoverable evidence. This includes the concept of "willful blindness," which encompasses the scenario in which a party does not directly destroy evidence known to be relevant and discoverable, but nonetheless "allows for its destruction. 438 S.W. 3d at 24-25 (citing Hebl, *Spoliation of Electronically Stored Information, Good Faith, and Rule 37(e)*, 29 N. Ill. U.L. Rev.. at 97-98)).

However, the Court in *Brookshire Bros*. did create a caveat authorizing instruction in the context of negligent spoliation. On rare occasions, a situation may arise in which a party's negligent breach of its duty to reasonably preserve evidence irreparably prevents the nonspoliating party from having any meaningful opportunity to present a claim or defense. In such circumstances, the destruction or loss of the evidence, regardless of motive, could completely subvert the fact finder's ability to ascertain the truth. Brookshire Bros., 438 S.W. 3d at 25.

"We do not believe a spoliation instruction would be excessive if the act of spoliation, although merely negligent, so prejudices the nonspoliating party that it is irreparably deprived of having any meaningful ability to present a claim or defense. We therefore conclude that, in this rare circumstance, a court should have the discretion to remedy such extreme and irreparable prejudice to the nonspoliating party with a spoliation instruction,

even if the trial court determines that the evidence was only negligently lost or destroyed. Id. at 25-26.

Nevada

First and Third Party Spoliation

In Timber Tech Engineered Bldg. Products v. The Home Ins. Co., 118 Nev. 630, 55 P. 3d 952 (2002) the Supreme Court of Nevada considered for the first time whether Nevada should recognize an independent tort for spoliation of evidence. The Court in *Timber* held: "we decline to recognize an independent tort for spoliation of evidence regardless of whether the alleged spoliation is committed by a first or third party. Timber, 118 Nev. at 633, 55 P. 3d at 954.

Duty To Preserve

In Fire Ins. Exchange v. Zenith Radio Corp, 103 Nev. 648, 747 P. 2d 911 (1987) the Supreme Court of Nevada stated "even where an action has not been commenced and there is only a potential for litigation, the litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action. Zenith, 103 Nev. at 651, 747 P. 2d at 914 (citing Wm. T. Thompson Co. v. General Nutrition Corp., 593 F. Supp. 1443, 1455 (1984); United States v. ACB Sales & Services, Inc., 95 F.R.D. 316, 318 (1982); United Nuclear Corp. v. General Atomic Co., 629 P. 2d 231, 309 (N.M. 1980).

Adverse Inference & Rebuttable Presumption

In Bass-Davis v. Davis, 122 Nev. 442, 134 P. 3d 103 (2006) the Supreme Court of Nevada, considering the potential consequences to the nonspoliating party, concluded that an NRS 47.250(3) rebuttable presumption only applies in cases involving willfully destroyed evidence. Bass-Davis, 122 Nev. at 454. However, the jury, when properly instructed, is permitted to draw an adverse inference when evidence is lost or destroyed through negligence. Bass-Davis, 122 Nev. at 454-55.

NRS 47.250(3): Evidence willfully suppressed would be adverse if produced.