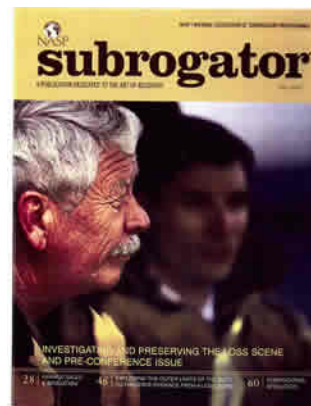


# **SUBROGATING SPOILIATION**

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## **I. Introduction**

Every subrogation professional, at one point in time, feels the heartbreak which gives rise to the following “war story” - illustrating the pitfalls of improper preservation of evidence - the danger of “spoliation”,

“it was the perfect claim, my cause and origin expert eliminated all of the other potential sources of ignition and concluded that the less than 1 year old [insert product here] caused the fire/water loss, if it wasn’t for the fact that [insert name of individual/company here] disposed of the [again insert product here] between the time our cause and origin expert made his determination and the time it took to notice the manufacturer and get them to the scene, we would have had a recovery of [insert large dollar amount here].”

*Black’s Law Dictionary* defines “spoliation” as, “the intentional destruction, mutilation, alteration, or concealment of evidence, usu. a document”<sup>1</sup>. Spoliation most commonly becomes an issue in product liability and negligent installation/servicing claims, where the defective product or the item negligently installed/serviced goes missing after the loss, thereby limiting and/or precluding plaintiff from being able to prove its claim. This loss is usually due to negligence, but in some instances the loss is occasioned by intentional and willful conduct.

The avoidance of spoliation - especially the negligent version - is often the paramount concern for subrogators and is regularly cited by subrogation professionals as the basis for the early investigation programs that have become common in our field.

Although most commonly used as a defense against liability, spoliation has been recognized by some jurisdictions as a valid independent cause of action.

The independent tort of intentional spoliation was first recognized in 1984 by the California Court of Appeal in Smith v. Superior Court<sup>0</sup>. The Smith Court attempted to fashion an appropriate vehicle of redress for a plaintiff who was injured in an automobile accident when a wheel on a passing vehicle separated from the vehicle and flew through plaintiff's windshield causing her injuries.

The wheel at issue, along with other parts of the passing vehicle, was towed to the lot of the automobile dealer who had installed the wheel at issue. It was alleged in the suit that, upon receiving the parts, the dealer made an agreement with plaintiff's counsel to preserve the parts for later examination by plaintiff's experts.

The dealer later destroyed or lost the parts to be preserved.

The plaintiff brought suit against the dealer for, amongst other things, the intentional spoliation of evidence.

In creating a cause of action for "intentional spoliation of evidence", the Smith court noted that this new tort was analogous to the already existing tort of intentional interference with a prospective business advantage, in that defendant intentionally interfered with plaintiff's "opportunity" to win her suit.<sup>0</sup>

Fourteen years later, the Smith cause of action was overruled by the California Supreme Court.<sup>4</sup> Notwithstanding, following the Smith case, several other jurisdictions considered the tort of spoliation and adopted the same.

Although the majority of the states that have considered the issue of whether "spoliation" can survive as an independent cause of action have refused to recognize it<sup>0</sup>, several states and the District of Columbia have recognized the action in either its negligent and/or intentional form. These states include: Indiana; Ohio; Connecticut; Florida; Louisiana; Montana; West Virginia; New Mexico; and Washington.<sup>0</sup> Others have allowed the tort to proceed under another already existing tort, like New Jersey's tort of "fraudulent concealment"<sup>0</sup>, as more fully discussed below.

## II. Elements of Spoliation

Within the jurisdictions which have recognized a separate independent tort, there is variation as to what acts are considered to be independently actionable spoliation and against whom an action may lay. The variances usually arise out of two categories: 1) spoliation committed by a party which is or should have been in the underlying suit for which the missing evidence was to be used (first party) versus committed by a third party whose only connection to the underlying suit was the loss of the evidence; and 2) whether the spoliation was intentional or negligent<sup>0</sup>. As the less culpable "negligent" spoliation claim is usually not recognized as a stand alone tort, and is usually disposed off via discovery sanctions (first party), this article will focus on the more affirmative and egregious intentional spoliation, which – as noted above – first gave rise to spoliation as an affirmative claim.

Although each jurisdiction adds its own nuances to the elements of an independent intentional spoliation claim, the following form the foundation for the claim: 1) pending or probable litigation involving the spoliation plaintiff; 2) knowledge on the part of the spoliation defendant that said litigation exists or is probable; 3) willful [intentional] destruction of evidence by defendant designed to disrupt the spoliation plaintiff's underlying case; 4) disruption of spoliation plaintiff's underlying case; and 5) damages proximately caused by spoliation defendant's acts.<sup>0</sup>

Now before you begin subrogating every instance of spoliation you run into, keep in mind that there is a reason that the tort is not widely recognized.<sup>10</sup> The independent action has an inherent problem with proof of damages and proof of proximate cause. Basically, in order to prevail in an intentional spoliation suit, one must prove that the item that was lost was actually the item that caused the underlying damages, and without the item the spoliation plaintiff cannot prevail, or is precluded from bringing, the underlying action. Unfortunately, as is more often the case, the item lost is the very item needed in the spoliation action to prove proximate cause (i.e. how can you prove the product is defective and therefore would have prevailed in the underlying products liability suit - manufacturing defect, if the product itself was never tested). The following case illustrates the principal of proximate cause in a spoliation lawsuit.

In Roesch v. Warren Distrib./Fleet Eng. Research<sup>10</sup>, the spoliation plaintiff was precluded from prevailing in his spoliation suit for want of proximate cause. Roesch involved a personal injury action where plaintiff was injured when an air pump he was using at defendant's gas station exploded. After the institution of suit, the pump, while still in defendant's possession, disappeared. Moreover, pictures of the pump which were turned over during discovery showed that the pump had been tampered with after the loss (the damaged portions of the pump appeared in pictures to have been painted over and cleaned). Accordingly, the Roesch plaintiff, in the underlying action, moved to amend his complaint to add a cause of action for "spoliation of the evidence". The trial court denied his request and plaintiff lost the underlying action on a directed verdict based on the court's finding that plaintiff was a "licensee" and not an "invitee" and therefore defendant owed no special duty to him.

Plaintiff appealed both the directed verdict and the denial of the motion to amend his complaint to add the "spoliation" tort. On appeal, the appellate court affirmed the directed verdict finding that plaintiff was a licensee and affirmed the denial of the motion to amend stating, with respect to the "spoliation" tort, "there must, at the very least, be some proximate relationship between the failure of success in the underlying action and the unavailability of the destroyed evidence."<sup>10</sup> The Roesch Court went on to hold, "The absence of the air pump had no bearing on the failure of appellant's negligence claim. The claim failed because Clark Oil owed no duty to appellant other than to avoid wanton and willful negligence. Appellant conceded that no wanton or willful negligence existed. Even if the air pump had been available, appellant could not have made a case against Clark Oil."<sup>10</sup>

### III. Spoliation Claims Against Third-Parties

The majority of the case law involving intentional spoliation suits involves spoliation by first parties, particularly the potential defendant, in the underlying or potential lawsuit which the spoliation limited and/or precluded. Courts have been less than willing to impose the same liability upon a third party without the presence of an agreement to preserve or other legal duty. As such, when pursuing a third party, a basis other than simply the third party's exclusive possession of the evidence must be found.

In Koplin v. Rosel Well Perforators, Inc.<sup>10</sup>, the Kansas Supreme Court precluded a spoliation claim made by an employee against his employer which had allegedly intentionally destroyed the defective product, a T-clamp, which caused his workplace injury in order to preclude him from prospective litigation. In holding that Kansas would not recognize a cause of action for intentional interference with a prospective civil litigation by spoliation, the Court noted that absent a [recognized] independent tort, contract, agreement, voluntary assumption of duty, or special relationship of the parties, the employer was acting within its absolute right to preserve or destroy its own property as it sees fit.<sup>10</sup>

### IV. Alternatives to the Spoliation Cause of Action

Even if you are in a jurisdiction that does not recognize "spoliation" as an independent cause of action, you may still be able to bring an action. Although the State of New Jersey explicitly does not recognize a separate cause of action for spoliation, its courts have recognized that an action for spoliation can be brought under the long recognized tort of fraudulent concealment.<sup>10</sup>

In fact, the elements of New Jersey's fraudulent concealment action are almost identical to those stated for intentional spoliation above. To prevail in a New Jersey fraudulent concealment action, plaintiff must show: 1) that defendant had a legal obligation to disclose evidence in connection with an existing or pending litigation; 2) that the evidence was material to the litigation; 3) that plaintiff could not reasonably have obtained access to the evidence from another source; 4) that defendant intentionally withheld, altered, or destroyed the evidence with purpose to disrupt the litigation; and 5) that plaintiff was damaged in the underlying action by having to rely on an evidential record which did not contain the evidence that defendant concealed.<sup>10</sup>

Additionally, depending on the circumstances involved in the loss of the evidence, you may also be able to bring your spoliation claim, first party or third party, under more traditional theories, like "negligence"<sup>10</sup> or breach of contract.

In Elias v. Lancaster General Hospital<sup>11</sup>, the Pennsylvania Superior Court declined to recognize negligent spoliation as an independent cause of action against a third party as it felt that the traditional negligence principles were available to the parties and that said principles were adequate remedies to redress the effects of the spoliation.

The plaintiff in Elias suffered a fall which caused his pacemaker's lead wire to sever and become lodged in his heart. The plaintiff was immediately taken to defendant hospital for treatment, and surgeons there performed a successful extraction of the wire from his heart. Two years after the surgery, the plaintiff requested the wire from the hospital, which had – by then – already disposed of the wire, in order to utilize it in a product liability suit against the pacemaker manufacturer. The plaintiff immediately started a suit against the hospital for negligent spoliation, a tort that had not yet been recognized by the Pennsylvania Courts<sup>111</sup>.

In declining to recognize negligent spoliation as an independent tort, the Superior Court stated that although it is true that the spoliation alleged could not have been addressed as a discovery sanction as defendant hospital would not have been a party to the product defect case, “traditional negligence principles are available and adequate remedies exist under those principles to redress the negligent destruction of potential evidence.”<sup>1111</sup> However, the Court ultimately noted that plaintiff could not prevail even under traditional negligence principles as defendant hospital was neither contractually obligated nor did it assume a duty to secure the lead wires for the plaintiff. Accordingly, the “duty” prong of the traditional negligence claim (duty; breach of duty; proximate cause; and damages) could not be made out.<sup>11111</sup>

## V. Conclusion

As subrogation professionals we are acutely sensitive to the negative effect spoliation can have on our claims. However, when spoliation does occur, it is our duty as professionals to do more than simply mark the claim “unrecoverable”, rather we should explore the possibility of subrogating the spoliation claim.

Additionally, in situations where spoliation by a first party or third party may occur, it may be prudent (in order to protect your potential spoliation claim) to attempt to secure, from the possessor of the evidence which may be used in your subrogation claim, a written agreement stating that he/she will preserve the evidence in the condition it was found for your mutual benefit and that said evidence will not be destroyed, mutilated, altered, or disposed of without your consent. Moreover, the payment of monies to a possessor of evidence for reasonable storage fees may also be beneficial down the road should you find yourself in the unfortunate situation of having to subrogate spoliation.

Note: The spoliation claim can be brought in a variety of ways, and the recognition of the claim varies from state to state and sometimes from jurisdiction to jurisdiction within one state. As such, you should always consult with a subrogation attorney practicing in that area to discuss the specific nuances in that jurisdiction.

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0.1 *Black's Law Dictionary* 1409 (Bryan A. Garner ed., 7<sup>th</sup> ed. West 1999).

2 151 Cal.App.3d 491 (2d Dist.1984).

0.3 Note: The Smith Court's recognition of an intentional spoliation claim was eventually overruled by the California Supreme Court in Cedars-Sinai Med. Ctr. v. Superior Court, 954 P.2d 511 (Ca. 1998). Today,

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California – the birthplace of the independent spoliation cause of action – does not recognize the tort as a stand alone claim.

4 Id.

0.5 The states that have declined to recognize spoliation (negligent, intentional or both) include: Colorado, New York, Texas, Virginia, Arizona, California, Florida (does not recognize first party spoliation as an independent action – as predicted by the Federal Courts), Indiana (does not recognize first party spoliation as an independent action), Maryland, Minnesota, Mississippi, New Jersey, Massachusetts, Pennsylvania (does not recognize an independent spoliation action against a third party) and Texas. See *Intentional spoliation of evidence, interfering with prospective civil action, as actionable*, 70 A.L.R.4<sup>th</sup> 984 (originally published in 1989).

0.6 For a survey of state law regarding spoliation, see *Intentional spoliation of evidence, interfering with prospective civil action, as actionable*, 70 A.L.R.4<sup>th</sup> 984 (originally published in 1989). See also Fada Industries, Inc. v. Falchi Building Co., 730 N.Y.S 2d 827, fn 3 (Supreme Court, Queens Co., 2001).

0.7 Rosenblit v. Zimmerman, 766 A.2d 749 (NJ 2001).

0.8 Alabama, Illinois, and Montana recognize an independent action for negligent spoliation.

0.9 As noted in Smith v. Howard Johnson Co., Inc., 615 N.E.2d 1037 (Ohio 1993).

0.10 The stated reasons for rejecting spoliation as an independent tort include “uncertainty of the existence or extent of damages; recognition of the tort interferes with a person’s right to dispose of his property as he chooses; destruction of the property may be reasonable under the facts of a specific case, i.e. destroying property for safety reasons; the tort may be inconsistent with the policy favoring final judgments; a plaintiff who loses his primary suit may bring a second suit by trying to establish that some relevant piece of evidence was not preserved.” Fada Industries, Inc. v. Falchi Building Co., 730 N.Y.S 2d 827, 836 (Supreme Court, Queens Co., 2001).

0.11 767 NE 2d 1187 (Ohio App. 2000).

0.12 Id. (citing Tomas v. Nationwide, 607 N.E.2d 944 (Ohio.App. 1992)).

0.13 Id. at 1192.

0.14 734 P.2d 1177 (KS 1987).

0.15 Id.

0.16 In re Tri-State Armored Services, Inc., 332 B.R. 690 (Bankr.D.NJ 2005).

0.17 Id.

0.18 See Elias v. Lancaster General Hospital, 710 A.2d 65, 68 (Pa.Super.1998) (“we do not find it necessary to create an entirely new and separate cause of action for a third party’s negligent spoliation of evidence because traditional negligence principles are available and adequate remedies exist under those principles to redress the negligent destruction of potential evidence.”).

11 710 A.2d 65 (Pa.Super.1998)

111 Pennsylvania still does not recognize negligent spoliation as an independent action.

1111 Id. at 68.

11111 Id.