



ISSUES ARISING FROM ALLEGED SPOILIATION OF EVIDENCE

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Spoliation of Evidence -- the destruction or material modification of evidence by in act or omission of a party. Spoliation can lead to adverse evidentiary inferences, adverse jury instructions, evidence preclusion or dismissal/default.

Policy factors: "The plaintiffs are not free to destroy crucial evidence simply because a court order was not issued to preserve the evidence." Graves v. Daley, 172 M. A o. Third 35, 526 N.E.2d 679 (1988).

vs.

"The precedential implications of overextending the spoliation doctrine are truly enormous. Future plaintiffs may likewise find themselves tossed out of court because they tossed out their junk. It could be a wrecked car, a severed body part, an item of clothing, a bandage, a dead cat. Who knows? Doubtless, resourceful defendants will find a I reasons for claiming that plaintiffs corruptly destroyed this or that item of physical evidence knowing full well that a lawsuit was being contemplated and that the evidence would be material." Graves v. Daley, supra, 526 N.E.2n at 682 (dissent).

The Graves court identified the following factors as potentially warranting sanctions against the plaintiffs:

1. Whether the evidence was destroyed after it was inspected by plaintiffs' expert;
2. Whether the plaintiffs willingly caused the evidence to be destroyed;
3. Whether the plaintiffs had possession and control over the evidence from the date of the incident until the time it was destroyed; and
4. Whether the plaintiffs knew or should have known that the evidence should have been preserved.

The Nevada Supreme Court has identified the following factors relevant to determining whether sanctions, including dismissal, should be imposed:

1. Whether the destruction of the evidence was willful;
2. The extent to which the other party's interests have been irreparably damaged so that no sanction less than dismissal is fair;
3. Whether the severity of dismissing the plaintiffs' case outweighs the severity of the alleged abuse of process by destruction of critical evidence;
4. Whether the evidence has been irreparably lost;

5. Whether the policy favoring adjudication on the merits, and disfavoring dismissal, should be overcome by the need to remedy an unfair litigation practice and deter similar abuses in the future;

6. Whether dismissal would unfairly operate to penalize a party for misconduct on the part of his attorney;

7. The need for deterrence of future parties and litigants from engaging in similar abuses. (Stubli v. Big D International Trucks, Inc., 107 Nev. 309, 810 P.2d 785

Evolving case law: In Barker v. Bledsoe, 85 F.R.D. 545 (W.D. Okl. 1979), the court noted that there is "an alarming lack of authority" concerning whether a party to a law suit can destroy an item of evidence after his expert has examined it but before the other party has done so. Lack of clear rules leads to unpredictable and inconsistent decisions in different courts within different jurisdictions. This is illustrated by two slip and fall cases, both decided by Texas courts, in which the object on which the plaintiff slipped had been cleaned up and discarded by the defendant, with one court ruling that this justified an adverse inference instruction against the defendant and the other court rejecting this request. (H.E. Butt Grocery Co. v. Bruner, 530 S.W.2d 340 (Tex. 1975); Newton v. Scurlock Supermarket, 546 S.W.2d 76 (Tex. 1977)).

Other relevant considerations:

1. Whether state or local fire marshals have determined cause (if so, preserve instrumentality whether or not your consultants agree);

2. Are there other potential sources of ignition within broadly defined area of origin (if so, preserve all relevant evidence);

3. Where focus of investigation is on spread factors (flammable building materials; malfunction of fire suppression system; etc.) and cause is undetermined, save evidence relating to potential causes for examination by prospective spread defendant;

4. If other interested parties, including prospective defendants, have conducted a site investigation, save physical evidence identified by them as being relevant;

5. Tag all physical evidence at the scene and ensure clear and concise chain of custody;

6. Avoid destructive testing of evidence, if possible, prior to notification to defendants (consider alternative methods such as x-ray photographs);

7. If destructive testing is necessary to conclude pre-suit investigation, photograph and/or videotape same.

Design vs. Manufacturing defects:

Where evidence has not been preserved and spoliation argument is made, distinguish manufacturing defects from design defects. Failure to preserve artifact unit containing alleged design defects is not fatal to plaintiffs' case where "the defendants may

examine their own product" in the form of exemplars. Quaile v. Carol Cable Company, Inc., 1993 WL 563 (E.D.Pa. 1993).

CONCLUSION:

Need to be overbroad in preserving evidence, in anticipation of spoliation motions, whether meritorious or frivolous, with increasing authority in support of such motions from different jurisdictions (state court decisions upholding imposition of dismissal or other sanctions include Pennsylvania, Illinois, Maine, Florida, California, Hawaii, Nevada, Oklahoma, and others).

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