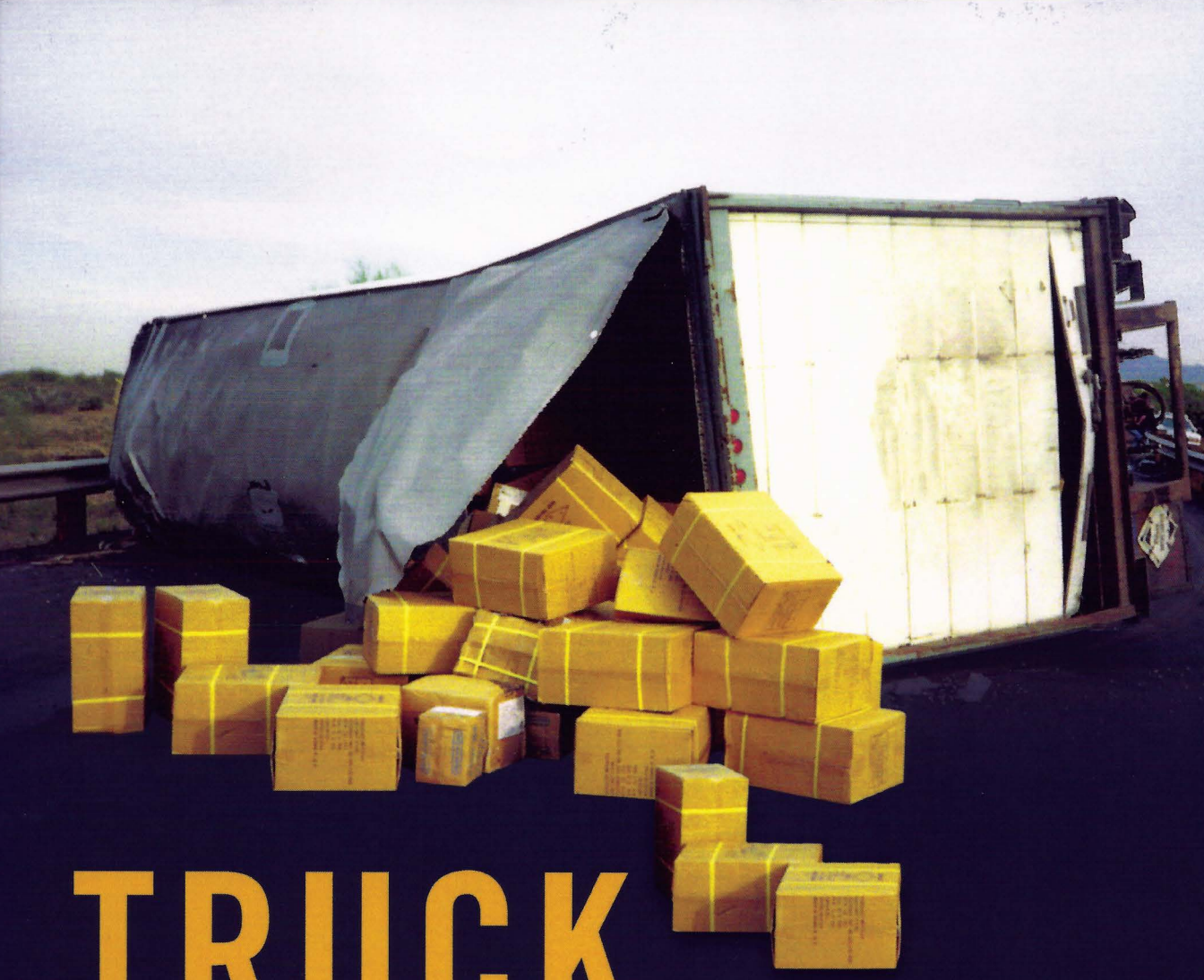

TRUCK ACCIDENT LITIGATION

THIRD EDITION

LAURA L. RUHL, ESQ.
MARY K. DOOLEY-OWEN, EDITORS

ABA

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CHAPTER 25

The Truck Accident Investigation and Spoliation of Evidence

By Kenneth J. Allen, Esq. and Bryan L. Bradley, Esq.

Omnia Praesumuntur Contra Spoliatorem:
All things are presumed against a wrongdoer

Overview

Spoliation is the destruction or material alteration of evidence, or the failure to preserve property for another's use as evidence, in pending or reasonably foreseeable litigation.[1] As such, spoliation is a direct affront to the integrity of our justice system, but remedies for victims of spoliation vary greatly, a fact made manifest by a survey of decisions across the country. The various states also differ dramatically on the issue of whether spoliation should be deemed an independent tort, an evidentiary presumption or a mere negative inference adverse to the spoliator. As to the states which recognize an independent claim for spoliation of evidence, the primary issue is whether the tort applies to first-party claims, third-party claims or both. The trend of most jurisdictions is to eschew a separate tort action in favor of a negative inference instruction in an extant case, except when the spoliation is committed by a third party. A summary of the various state holdings is included at the end of this chapter.

A duty to preserve evidence generally arises from one of the following: (1) a voluntary undertaking; (2) a bailment; (3) a request for preservation; (4) an agreement or independent duty to preserve, e.g., FMCSR § 379, Appendix A. In jurisdictions where breach of this duty is not deemed a separate tort, courts generally look to five factors in deciding the remedy for spoliation. Those factors are: (1) whether the party seeking sanctions was prejudiced as a result of the destruction of the evidence; (2) whether the prejudice could be cured;

(3) the practical importance of the evidence; (4) whether the party who destroyed the evidence acted in good or bad faith; and (5) the potential for abuse if expert testimony about the evidence was not excluded. Large motor carriers typically employ risk managers and compliance personnel well-versed in claims handling and litigation practices. Most trucking companies also provide their drivers with "accident kits" so that the scene can be documented and photographed, and the driver can take other steps to preserve evidence and advance the company's interests should the crash result in litigation. That trucking companies are generally experienced litigants with a clear understanding of the importance of preserving evidence therefore merits weighty consideration when critical, often irreplaceable, evidence is lost or destroyed.

Documents

Truck accident litigation is document- and data-intensive. Most truck accident cases include maintenance or driver issues; it is not uncommon for both issues to overlap in a single crash case. In circumstances where the issue of adequate tractor-trailer maintenance arises, it is vital to obtain and review all prior maintenance, inspection, and repair records for the equipment. Fortunately, the Federal Motor Carrier Safety Regulations (FMCSRs) impose a duty to preserve these records. The motor carrier is required to maintain copies of those records for a period of one year, if the tractor-trailer remains in its possession, and for six months after the tractor-trailer leaves its control.[2]

In cases involving driver fatigue and hours of service violations, there are a plethora of relevant documents which the motor carrier should preserve and which must be reviewed by plaintiff's counsel. The duty to preserve these documents is also statutorily imposed. Some examples of critical documentation which must be preserved under applicable state and federal regulations are: driver daily logs, trip sheets, dispatch records, fuel receipts, toll receipts, comchecks, bills of lading, and printouts from any satellite tracking data. Drivers also rely upon many of these documents to justify income tax deductions for business expenses and therefore often preserve them for tax purposes.

Motor carriers are required by the Federal Motor Carrier Safety Administration (FMCSA) to maintain large volumes of detailed records concerning their day-to-day operations and safety compliance.[3] Among these records are accident registers, accident reports, driver logs, driver qualification files, and maintenance records, to name a few. The FMCSRs prescribe minimum retention periods for motor carriers to preserve documents.[4] And it is no excuse that records were accidentally misplaced or destroyed. Motor carriers are required by federal regulation to safeguard and protect their records.[5] If the records are destroyed prior to the expiration of the prescribed retention period, the motor carrier must notify the Secretary of the FMCSA in writing.[6] Seldom is this done by the motor carrier who claims that its records were somehow "lost" after the crash.

Plaintiff's attorneys seeking production of documents within the minimum retention period who are told the documents are unavailable due to

destruction by flood or fire should always serve a Freedom of Information Act (FOIA) Request on the Secretary of the FMCSA to determine if the motor carrier reported the loss. Simultaneously, a request to produce should be served on the motor carrier requesting the letter it sent to the Secretary and any corroborating information, such as police or fire reports. The existence or absence of the corroborating documents listed above may assist a court in determining whether there is a prima facie case of spoliation.

On the other hand, a spoliation claim can be made even if the FMCSR would generally permit disposal of the records if litigation is commenced promptly. This is so because motor carriers and their counsel realize they must preserve all records relating to the driver and equipment at issue until litigation has concluded. Even if a lawsuit has not been filed, prudent motor carriers will preserve relevant documents until after the expiration of the applicable statute of limitations to avoid a spoliation claim.

Electronic Data

Since the mid-1990s tractor-trailers have been equipped with Event Data Recorders (EDR). Nearly all commercial motor vehicles manufactured after 2000 have EDR capability. Electronic Control Modules (ECM) commonly referred to as "black boxes" are a type of EDR. As technology has improved, so have the quantity and quality of data recorded by the ECM. ECM routinely note information concerning "hard stop" events, cruise control use, road speed, RPMs, and brake application. These systems, however, do not always preserve a treasure trove of information. Motor carriers are able to adjust parameters on the type of data recorded and preserved by the device, and manufacturers are often complicit. For example, Caterpillar engines often come from the factory with all recording parameters set to zero. Thus, the Caterpillar ECM will not capture data until the motor carrier initially programs those recording parameters, resetting it from the default zero. Moreover, if a tractor is placed back into operation after a crash without first downloading the data, the ECM data may be overwritten. It is therefore important to promptly download the ECM data, and to ensure that proper procedures are followed to avoid altering or overwriting the data.[7] There is an extensive discussion of commercial motor vehicle EDR elsewhere in this book and also in chapter 18 of Traffic Crash Reconstruction (2d ed. Northwestern University Center for Public Safety, 2010).

To maintain a viable spoliation claim, the plaintiff must establish why the black box data is critical to proving his or her case, and not merely cumulative. Witness testimony or reconstruction analysis which calls into question the defendant's stated speed is helpful in meeting this burden. On the other hand, when all the witnesses are in accord as to the tractor-trailer's speed or braking behavior, it may be more difficult to establish that the spoliated black box data is critical to the plaintiff's case. For example, in *Bulkmatic Transport Co. v. Taylor*, the court refused to give a negative inference instruction when the motor carrier failed to preserve the ECM data. The court found the plaintiff's ability

to establish a prima facie case was not hindered by the motor carrier's failure to preserve and produce black box data, holding that the black box data was merely cumulative since there was no reason to question the credibility of the witnesses who testified about the tractor-trailer's speed.[8]

Shippers routinely track the location of their trucked shipments. Motor carriers frequently advertise their ability to monitor the movement of loads hauled by global positioning satellite (GPS) devices. This tracking service is often provided by outside vendors, such as Qualcomm. Many motor carriers therefore have readily accessible, electronic or printed reports outlining the movements of their tractor-trailers during the time leading up to a crash. These reports are sometimes referred to as an electronic "footprint." Motor carriers often match this footprint against the driver's daily logs to determine if the driver accurately recorded his hours of service. GPS records are, however, not customarily maintained for very long. Yet even if the electronic data have been (routinely) destroyed, many motor carriers maintain printouts of the last two to four weeks of activity prior to the crash. Prudent motor carriers will preserve this data, since plaintiff's counsel may later seek an adverse inference if the data is destroyed—even if the destruction is routinely done in the ordinary course of business, or otherwise inadvertent.

Finally, most modern tractor-trailers are equipped with in-cab messaging capability. Often the GPS devices themselves facilitate messaging. Not only do many motor carriers require their drivers to submit routine reports via the in-cab messaging system, the truck driver's first report of the crash may be sent via electronic message. These messages should, of course, be preserved since they may contain critical communications between the driver and the driver's manager concerning hours of service, truck maintenance, performance, weather, or other issues relevant to the crash. For this reason, a motor carrier's spoliation of its in-cab messages was found to be sanctionable.[9]

Document Retention Policies and Procedures

In deciding claims of spoliation in commercial trucking cases, courts routinely pose these questions: Does the motor carrier have any policies in place stating how long documents and data should be maintained? If not, what is its custom and practice with regard to preserving documents and data? Did the motor carrier deviate from its policy, or custom and practice? If so, why? Failure by the motor carrier to preserve documents and data for at least its minimum customary period—even if that period is longer than the minimum retention required by the FMSCA—will likely support at least an inference of spoliation.

Compliance with routine retention practice does not, in itself, immunize a party from potential spoliation liability.[10] If the motor carrier knows of litigation or should reasonably anticipate litigation, courts have held the motor carrier ought to preserve related documents and data irrespective of its routine document retention practices.

For example, in *Bumstead v. Dillard*, a motor carrier was placed on notice of a potential claim and its severity within six months of the crash; nonetheless

the motor carrier destroyed the driver's logbook and trip documents pursuant to its normal operating procedure.[11] The FMCSRs require a motor carrier to maintain driver logs for a minimum of six months. Counsel for the plaintiff established that the documents were relevant and successfully argued they would have been helpful in proving that the tractor-trailer was both overloaded and operating at an unreasonable speed. Given its notice of the severity of the claim, the trial court reasoned, the driver's logbook and trip documents should have been preserved notwithstanding the motor carrier's normal document retention policy. The court therefore instructed the jury that these circumstances created an inference that the destroyed evidence was harmful to the motor carrier. The Texas Court of Appeals held that the jury was properly instructed and that an adverse inference arose from the motor carrier's spoliation.

Notice to Preserve/Motion to Preserve

Immediately upon retention, reasonably careful plaintiff's counsel should put the motor carrier and its insurer on notice of the claim. The notice should be sent by facsimile and certified mail with a return receipt, or some other commercial manner by which actual notice to the motor carrier and insurer can be established. A California appellate court held that a defendant charged with negligent spoliation has no duty to preserve evidence for a plaintiff's use against a third party absent a specific request to do so.[12] The Illinois appellate court has held that a mere request to preserve evidence is insufficient to impose a duty absent some further special relationship.[13]

The notice should direct the motor carrier and the insurer to preserve all documents and data, as well as the vehicles and their component parts. Itemize in detail all evidence you desire the motor carrier and its insurer to preserve. Merely asserting that the carrier should preserve "all relevant documents" leaves too much wiggle room. What is relevant to one side might be irrelevant to another. Specifying the precise documents, data, and evidence you desire preserved prevents creative interpretation and dispute over semantics. While the motor carrier may later object to the production of all of the itemized materials, your letter will succeed in preserving the materials until a court can later decide the issue. Should the motor carrier fail to preserve relevant materials, it will likely have difficulty avoiding a jury instruction that the destroyed evidence was presumptively adverse to the motor carrier.

Consider immediately filing a temporary restraining order to preserve the tractor-trailer and its data for inspection and download. The Georgia Court of Appeals barred an expert from testifying concerning his inspection of a plaintiff's car that had been rear-ended by defendant's tractor-trailer.[14] The trial court had previously entered an order on plaintiff's motion to preserve the car. Despite the trial court's order requiring the car be preserved, the motor carrier's insurer destroyed the car. Interestingly, all experts had previously inspected and photographed the car. The appellate court nevertheless affirmed the trial court's order barring the expert from testifying concerning

his inspection of the plaintiff's car. The court reasoned that the prejudice could not be cured, since plaintiff was deprived of the ability to show the car to the jury to support her theory of liability.

Experts & Spoliation

Early retention of an experienced expert is vitally important in truck crash litigation. The American Society for Testing and Materials (ASTM) has issued standards applicable to the collection, preservation, and testing of physical evidence. You should ensure that your expert is not only knowledgeable but conversant with the various ASTM standards concerning chain-of-custody (ASTM E 1492), preservation (ASTM E 1492), and testing (ASTM E 860). Counsel should take steps to ensure that any tests performed by retained experts do not preclude others from later performing similar testing. Remember, spoliation applies to both sides. Equally so, any destructive testing should not be conducted without notice to or consent by the opposing party—otherwise you might face sanctions as severe as dismissal.

Accident reconstruction experts routinely involved in truck litigation typically work with qualified crash scene investigators. While not as highly educated as reconstruction experts, scene investigators with specialized knowledge in heavy vehicle crashes know how to preserve the evidence via accurate photography, videography, measurement, and the use of a total station and/or laser scanner. Short of actually witnessing the crash, the best preservation of the scene is done by an on-site investigation performed as near in time as possible. Sun and precipitation will alter scene evidence. The surrounding vegetation will change, the roadway may be resurfaced or redesigned and other crashes may well occur in the same location. Tire, gouge marks and other accident artifacts will fade and ultimately disappear over time. A forensic specialist with the requisite skill and training can document and preserve all the evidence; one should therefore be dispatched as quickly as possible.

While local police will likely prepare a crash report, most police officers, even those primarily involved in traffic accident investigation and reconstruction, lack the expertise to perform heavy vehicle reconstruction. This is primarily due to the fact that articulated vehicles react much differently than automobiles or straight trucks. So make sure your expert has had sufficient experience reconstructing crashes involving heavy, articulated vehicles. Although the failure to conduct an on-site investigation is not likely to result in a claim of spoliation, it will deprive the party of critical evidence which may be helpful in either proving or rebutting a theory of liability.

Care must be taken in preserving the condition of the crash scene prior to the removal of any evidence. The specific location of any physical evidence should be photographed and measurements taken before moving items. If an experienced forensic expert is unavailable, make certain that photos are taken from all angles with measuring devices in place to assist your expert who may later need to perform photogrammetry. Make no mistake, preservation

of accident scene evidence is best left to qualified experts. Diligent counsel should therefore promptly retain an expert with heavy vehicle reconstruction experience or risk irrevocable harm by failing to do so.

Distinction Between First-Party and Third-Party Claims

Some courts permit a direct tort action for spoliation of evidence against a party which breaches the duty to preserve relevant evidence. However, courts often distinguish between first and third-party spoliators. In truck accident litigation against a motor carrier, the motor carrier is the "first party" and its insurer a "third party." Many states which refuse to recognize an independent claim for spoliation by a first party nonetheless permit claims against third parties, such as insurers. This is so because a first-party spoliator is subject to sanctions, perhaps as severe as default or dismissal; not so with third-party insurers over whom the court may exercise little or no control. Allowing the third-party spoliator to be sued in tort therefore makes judicial sense. Once an insurer has taken custody and control of tangible evidence, it will have difficulty later arguing that the evidence was of little value or that it did not know a claim was likely. The insurer's action in collecting the evidence will speak louder than its words.

Negative Inference

A negative inference or presumption against the spoliator is frequently employed by courts as a remedy to spoliation. Even those courts which are unwilling to recognize an independent claim for spoliation will likely be open to instructing the jury to draw a negative inference against the spoliator. However, before giving a spoliation or "missing evidence" instruction, most courts demand a threshold showing that the absent evidence was both relevant and in the sole possession of the spoliator. Generally, an adverse inference instruction requires a party to establish: (1) an obligation by the party who controlled the evidence to preserve it (duty); (2) a party's actual or constructive knowledge that the evidence should be preserved or unaltered; and (3) proof that the destroyed or altered evidence was relevant to the party's claim or defense.

In *Bence v. Denbo,* 183 N.E. 326, 328 (Ind.Ct.App. 1932) (en banc), the Indiana Court of Appeals upheld a jury instruction stating that "where a party has evidence under his control presumably favorable to him, and does not produce same, the jury has the right to presume that, if produced, it would have been unfavorable to that party." Similarly, Illinois has the following pattern jury instruction:

> If a party to this case has failed [to offer evidence] [to produce a witness] within his power to produce, you may infer that the [evidence] [testimony of the witness] would be adverse to that party if you believe each of the following elements:

1. The [evidence] [witness] was under the control of the party and could have been produced by the exercise of reasonable diligence.
2. The [evidence] [witness] was not equally available to an adverse party.
3. A reasonably prudent person under the same or similar circumstances would have [offered the evidence] [produced the witness] if he believed [it to be] [the testimony would be] favorable to him.
4. No reasonable excuse for the failure has been shown.[15]

Nearly all jurisdictions have similar pattern jury instructions. At the very least, such an instruction should be given when a motor carrier or other party spoliates evidence.

Spoliation in the Context of Pending Summary Judgment

Plaintiff's Failure to Preserve Evidence

The North Dakota Supreme Court held that preclusion of evidence and dismissal of a product liability action was the appropriate sanction where the product was destroyed. In Bachmeier a passenger was killed when the tractor-trailer in which he was riding crashed when a hub failed.[16] The decedent's family settled their wrongful death action against the owner of the truck. Following the settlement, the truck owner's insurer advised its metallurgical engineer to dispose of the failed hub. The decedent's family did not take steps to preserve the hub but filed a product liability action against the hub's manufacturer, PACCAR, alleging design defect. PACCAR argued that the hub had not been maintained or lubricated appropriately. In an attempt to fend off spoliation claims, the decedent's family stipulated that the hub had not been properly lubricated or maintained. The court held this concession insufficient, since PACCAR's ability to demonstrate causation was significantly impaired. The family had an opportunity to preserve the hub and did not. The decedent's family was therefore precluded from offering evidence in response to PACCAR's motion for summary judgment. The court held defendant's motion for summary judgment was appropriately granted since PACCAR was prejudiced by the failure to preserve the hub.

Defendant's Failure to Preserve Evidence

In *Porter v. Irwins Interstate Brick and Block Co.*,[17] the court reversed summary judgment because the defense had spoliated evidence before the commencement of the lawsuit. The defendant presented evidence that it had taken all reasonable steps in maintaining a truck whose driveline had failed. It had exchanged the driveline and other parts for rebuilt parts; the original parts

could not therefore be supplied to plaintiff's expert for testing. Under these circumstances, the court found that genuine issues of material fact precluded summary judgment. Its discussion of the spoliation issue is relevant here:

> In Indiana, the exclusive possession of facts or evidence by a party, coupled with the suppression of the facts or evidence by that party, may result in an inference that the production of the evidence would be against the interest of the party which suppresses it. *Westervelt v. National Manufacturing Co.*, 33 Ind.App. 18, 69 N.E. 169, 172 (1903). "While this rule will not be carried to the extent of relieving a party of the burden of proving his case, it may be considered as a circumstance in drawing reasonable inferences from the facts established." *Great American Tea Co. v. Van Buren*, 218 Ind. 462, 33 N.E.2d 580, 581 (Ind. 1941).
>
> The rule not only applies when a party actively endeavors to prevent disclosure of facts, but also when the party "merely fails to produce available evidence." *Morris v. Buchanan*, 220 Ind. 510, 44 N.E.2d 166, 169 (1942). These cases are directed to a party which has suppressed evidence believed to be in its control at the time of the lawsuit; however, we see no reason why they should not be applied where the party spoliates evidence prior to the commencement of a lawsuit that the party knew or should have known was imminent.[18]

Practical Considerations/Recommendations/Conclusions

Several axioms follow from the foregoing analysis of current trends in spoliation law:

(1) All parties to litigation or anticipated litigation should take every necessary step to preserve any potential evidence. Failure to preserve the critical evidence can result in extremely harsh results for the spoliator.
(2) Counsel should provide prompt, detailed notice to the other party itemizing every item of evidence sought to be preserved.
(3) Counsel should consider obtaining a temporary restraining order and preliminary injunction filing to preserve critical evidence.
(4) Prudent counsel will promptly select and employ an expert with heavy vehicle reconstruction background and experience to visit the crash scene, inspect the vehicles and supervise preservation of evidence.
(5) Always preserve evidence and potential evidence in your client's control. This includes protecting the evidence from the weather, theft, or destructive testing.
(6) Always provide notice to the other party prior to doing any destructive testing or other activities which may alter the condition of the evidence.

(7) Maintain a detailed chain-of-custody for all tangible, real evidence.
(8) When ECM data is downloaded, as it should be in most every case, videotape the entire process.

Alabama

Summary judgment may be an appropriate remedy when a party has intentionally spoliated evidence.[19] Alabama Supreme Court has five factors in analyzing spoliation of evidence. (1) The importance of the evidence destroyed; (2) the culpability of the offending party; (3) fundamental fairness; (4) alternative sources of the information obtainable from the evidence destroyed; and (5) the possible effectiveness of other sanctions less severe than dismissal.[20] If the trier of fact finds a party guilty of spoliation, it is authorized to presume or infer that the missing evidence reflected unfavorably on the spoliator's interest. Spoliation is a sufficient foundation for an inference of the spoliator's guilt or negligence.[21] The duty to preserve evidence can be "imposed upon the defendant through a voluntary undertaking, an agreement, or a specific request."[22] A specific request to preserve evidence must be accompanied by an offer to pay the cost or otherwise bear the burden of preserving.[23] A plaintiff in a third-party spoliation case must show a duty to a foreseeable plaintiff, a breach of that duty, proximate causation, and damage. A three-part test is used for determining when a third party can be held liable for negligent spoliation of evidence. In addition to proving a duty, a breach, proximate cause, and damage, a plaintiff in a third-party spoliation case must also show: (1) that a defendant spoliator had actual knowledge of pending or potential litigation; (2) that a duty was imposed upon the defendant through a voluntary undertaking, an agreement, or a specific request; and (3) that the missing evidence was vital to the plaintiff's pending or potential action. Once all three of these elements are established, there arises a rebuttable presumption that but for the fact of the spoliation of evidence the plaintiff would have recovered in the pending or potential litigation; the defendant must overcome that rebuttable presumption or else be liable for damages.[24]

Alaska

Alaska recognizes the tort of third-party spoliation of evidence. They refer to the tort as an Intentional Interference with a Prospective Civil Action by Spoliation of Evidence.[25] In *Hibbits*, a police officer waited several hours before giving a BAC test to a defendant motorcycle driver

involved in an accident.[26] The plaintiff in the underlying action wanted to use evidence of the motorcyclist's intoxication as evidence in the car crash case.[27] The party must plead and prove that the defendant intended to interfere in his civil suit.[28] The third party must act with intent to harm the party's ability to bring a civil suit against another party.[29] The underlying suit should be resolved before the spoliation victim may proceed to trial with an intentional third-party claim. Alaska recognizes the intentional third-party spoliation of evidence.[30] Alaska has not recognized the tort of negligent spoliation of evidence.[31] The court has not expressly declined to recognize it, but in every factual circumstance considered by the courts they have held that the remedy of burden shifting is a sufficient response to the loss or destruction of records.[32] The court should apply a rebuttable presumption of negligence on the party who negligently lost the records.[33] Two necessary factors: the hospital's negligence in losing the records, and the plaintiff's inability to prove causation without the records. An action based on the tort of spoliation is meritless unless it can be shown that a party's underlying cause of action has been prejudiced by the spoliation.[34] The defendant must have reduced the "probable expectancy" of the plaintiff's claim.[35] There are three elements of spoliation. (1) Defendant must have owed a duty to plaintiff; (2) the duty must have been breeched; (3) the injury to the plaintiff must have been proximately caused by the breech.[36]

Arizona

Arizona does not recognize a separate tort of first-party spoliation of evidence.[37] Arizona declined to recognize a tort of third-party negligent spoliation.[38]

Arkansas

In Arkansas, spoliation is defined as the intentional destruction of evidence. When it is established, the fact finder may draw an inference that the evidence destroyed was unfavorable to the party responsible for its destruction.[39] Arkansas does not recognize the tort of intentional spoliation of evidence.[40] Arkansas Model Jury Instruction (AMI) 106 correctly and adequately sets forth the law with respect to spoliation of evidence and the adverse inference to be drawn from it.[41]

California

California does not recognize intentional third-party spoliation of evidence as a separate tort.[42] California Penal Code § 135 creates criminal penalties for spoliation of

evidence. California does not recognize first-party intentional spoliation of evidence as a tort because there are preferable non tort remedies.[43] The plaintiff must establish prima facie evidence of causation before the burden shifts to the defendant when the defendant has spoliated evidence.[44] California does not recognize tort liability for negligent spoliation of evidence, whether by the litigants or by third parties.[45] In order to establish a tort for spoliation of evidence, a statute must expressly impose a spoliation remedy.[46] There is a public policy against creating derivative tort remedies for misconduct occurring during the course of litigation, creating endless litigation.[47] Non tort remedies that deter destruction of evidence include: evidentiary sanctions, an inference that the unavailable evidence was unfavorable to the party who destroyed or suppressed it, the victim of spoliation is also permitted to explain why essential evidence is missing, so it often will not be punished for failing to produce the evidence, plus there are criminal sanctions for spoliation.[48] Also it would be impossible to prove causation or damages because there would be no way to determine what the unavailable evidence would have shown, or even which party it would have helped.[49]

Colorado

Colorado courts can impose sanctions for spoliation of evidence, even if the evidence was not subject to a discovery order permitting sanctions under Colo. R. Civ. P. 37.[50] Punitive sanctions are permitted for both intentional and reckless spoliation of evidence.[51] No hearing is necessary prior to entering sanctions for spoliation.[52] An adverse inference is a proper sanction.[53] Possible sanctions include default judgment for bad faith conduct that may not be intentional or deliberate, if it is a flagrant disregard or dereliction of one's discovery obligations.[54] The court can impose an adverse inference against a spoliator when the destruction was intentional.[55] And additional sanction for bad faith and willful destruction of evidence, even in the absence of a specific discovery order is attorney fees.[56] A trial court has the inherent power to provide the jury in a civil case with an adverse inference instruction as a sanction for the spoliation or destruction of evidence. The trial court is not limited to imposing a sanction only for intentional spoliation, but may impose one based upon mere negligence. Whether to impose sanctions for the spoliation of evidence, even if the evidence was not subject to a discovery order, is within the court's broad discretion.[57]

Connecticut

The Connecticut Supreme Court recognized first-party intentional spoliation of evidence as an independent cause of action in *Rizzuto*.[58] The Supreme Court stated "the existing non-tort remedies are insufficient to compensate victims of spoliation and to deter future spoliation when a first party defendant destroys evidence intentionally with the purpose and effect of precluding a plaintiff from fulfilling his burden of production in a pending or impending case."[59] Third-party intentional spoliation of evidence was later recognized as a cause of action.[60]

Delaware

Courts in Delaware recognize the general rule that where a litigant intentionally suppresses or destroys pertinent evidence, an inference arises that such evidence would be unfavorable to his case.[61] The court refuses to recognize independent causes of action based on negligent or intentional spoliation of evidence.[62] It would be repetitive for the court to recognize new tort-based causes of action for tampering with or destroying evidence when a criminal statute has already been enacted to deter such acts.[63] A litigant who destroys relevant evidence may be sanctioned by the court, and if that destruction is willful, in bad faith, or intended to prevent the other side from examining the evidence, the court may dismiss the case or enter default judgment.[64] The relevant test for determining whether to impose sanctions takes into consideration three factors: (1) the degree of fault and personal responsibility of the party who destroyed the evidence; (2) the degree of prejudice suffered by the other party; and (3) the availability of lesser sanctions that would avoid any unfairness to the innocent party while, at the same time, serving as a sufficient penalty to deter the same type of conduct in the future.[65] When considering degree of fault, it must be clear that a party intended to thwart its opponent's ability to try its case.[66] However, Delaware law does not require the spoliation to have been intentional for an adverse inference to be drawn.[67] When looking at prejudice, the court should take into account whether that party had a meaningful opportunity to examine the evidence in question before it was destroyed.[68] The spoliation rule has no application until there is a factual foundation that there has been a destruction of evidence, and that it was intentional and in bad faith.[69]

District of Columbia

In order to prevail on a claim for the tort of negligent or reckless spoliation of evidence in a civil case, a plaintiff

must show, based on reasonable inferences derived from both existing and spoliated evidence: (1) the existence of a potential civil action; (2) a legal or contractual duty to preserve evidence which is relevant to that action; (3) the destruction of that evidence by the duty-bound defendant; (4) a significant impairment in the ability to prove the potential civil action; (5) a proximate relationship between the impairment of the underlying suit and the unavailability of the destroyed evidence; (6) a significant possibility of success of the potential civil action if the evidence were available; and (7) damages adjusted for the estimated likelihood of success in the potential civil action.[70] The District of Columbia recognizes an independent legal action for the negligent or reckless spoliation of evidence.[71] In order to demonstrate causation in an action for negligent or reckless spoliation of evidence, a plaintiff must demonstrate that: (1) the underlying claim was significantly impaired due to the spoliation of evidence; (2) a proximate relationship exists between the projected failure of success in the underlying action and the unavailability of the destroyed evidence; and (3) that the underlying lawsuit would enjoy a significant possibility of success if the spoiliated evidence were still in existence.[72] The elements of a cause of action for negligent or reckless spoliation of evidence are: (1) existence of a potential civil action; (2) a legal or contractual duty to preserve evidence which is relevant to that action; (3) destruction of that evidence by the duty-bound defendant; (4) significant impairment in the ability to prove the potential civil action; (5) a proximate relationship between the impairment of the underlying suit and the unavailability of the destroyed evidence; (6) a significant possibility of success of the potential civil action if the evidence were available; and (7) damages adjusted for the estimated likelihood of success in the potential civil action.[73] The doctrine of what has been termed spoliation of evidence includes two sub-categories of behavior: the deliberate destruction of evidence and the simple failure to preserve evidence. It is well settled that a party's bad faith destruction of a document relevant to proof of an issue at trial gives rise to a strong inference that production of the document would have been unfavorable to the party responsible for its destruction. Adverse inferences from the destruction of documents have both an evidentiary and a punitive rationale.[74] When the loss or destruction of evidence is not

intentional or reckless, by contrast, the issue is not strictly spoliation but rather a failure to preserve evidence. The rule that a fact finder may draw an inference adverse to a party who fails to preserve relevant evidence within his exclusive control is well established in this jurisdiction.[75] Like the spoliation rule, it derives from the common sense notion that if the evidence was favorable to the non-producing party's case, it would have taken pains to preserve and come forward with it.[76]

Florida

The Florida supreme court 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.[77] The court held that such misconduct should be addressed with sanctions or an adverse inference.[78] It is important to note that in this decision the court did not consider whether there is a cause of action against a third party for spoliation of evidence.[79] This decision is limited to claims for spoliation of evidence against first-party defendants.[80] The court has never rejected the idea of a third-party claim, and it seems that the way it is mentioned in dicta, the court would be more willing to accept it than a first party claim. The state does not recognize an independent cause of action for first party spoliation of evidence because presumptions and sanctions are available to discourage first party spoliation.[81] Because of the adverse inferences and the myriad of other available sanctions available to remedy the wrong suffered by a plaintiff as the result of the loss of evidence, an independent cause of action for spoliation of evidence is unnecessary and will not lie where the alleged spoliator and defendant in the underlying litigation are one in the same.[82] A Florida spoliation claim compensates a plaintiff for the loss of recovery in the underlying case due to the plaintiff's inability to prove the case because of the lost or destroyed evidence and not for the bodily injury actually sustained. Because of the nature of the claim, liability for spoliation does not arise until the underlying action is completed. The basis of a cause of action for spoliation of evidence is an intangible and beneficial interest in the preservation of the evidence.[83] Negligent spoliation of evidence is a tort claim based on a defendant's breach of duty to preserve evidence.[84] The damage that flows from such a breach is the resulting inability to prove a cause of action.[85] The employee's spoliation claim seeks compensation not for

the bodily injury he sustained in falling from the ladder, but rather for his loss of a probable expectancy of recovery in the underlying suit.[86] In order to properly plead a cause of action for spoliation of evidence, the plaintiff needs to plead facts that could establish the essential elements of the claim. The essential elements of a spoliation of evidence claim are: (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 in the ability to prove the lawsuit, (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit, and (6) damages.[87] Sanctions for the spoliation of evidence may be imposed when a party fails to preserve evidence in its custody.[88] The appropriate sanction varies according to the willfulness or bad faith, if any, of the party who lost the evidence, the extent of the prejudice suffered by the other party, and what is required to cure the prejudice.[89] Dismissal or default, the harshest of all sanctions, are reserved for cases in which one party's loss of evidence renders the opposing party completely unable to proceed with its case or defense.[90] Florida recognizes negligent spoliation of evidence as an independent tort. The elements of the tort are: (1) the 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) a significant impairment in the ability to prove the lawsuit, (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit, and (6) damages.[91] The entire liability should not shift from the manufacturer to the person who lost the evidence unless the loss of evidence has so fatally impaired the products liability claim that to bring a products liability action would be frivolous.[92] Only when the loss of evidence prevents the plaintiff from prevailing against the original defendant, can the plaintiff sue the third-party spoliator.[93]

Georgia

Sanctions may be imposed against a litigant based on a third party's spoliation of evidence if the third party acted as the litigant's agent in destroying or failing to preserve the evidence.[94] The court will not disturb a trial court's imposition of sanctions for evidence spoliation unless the court abused its discretion.[95] Moreover, the court will uphold a trial court's finding of willful discovery abuse

if there is any evidence to support it.[96] In determining whether to impose sanctions for evidence spoliation, trial courts routinely and necessarily make factual findings about whether spoliation occurred, whether the spoliator acted in bad faith, the importance of the compromised evidence, and so on.[97] Spoliation issues often arise before trial, and sanctions for spoliation may include the removal of certain evidence and issues from the jury's consideration. The trial court, not the jury, determines what evidence the jury may hear and which issues it must resolve.[98] Therefore, the court did not exceed its authority in this case by making factual findings necessary to determine whether to impose sanctions for spoliation. When considering a permissible jury charge regarding the presumption in a case of spoliation of evidence, it is appropriate to consider whether the party who destroyed the evidence acted in good or bad faith.[99] *Johnson* was overruled on different grounds by *Condra v. Atlanta Orthopaedic Group.*[100] This is a relevant consideration because one of the rationales for the presumption is that it deters 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.[101] But, a party should only be penalized for destroying documents if it was wrong to do so.[102] To remedy the prejudice resulting from the spoliation of evidence, a trial court may (1) charge the jury that spoliation of evidence creates the rebuttable presumption that the evidence would have been harmful to the spoliator; (2) dismiss the case; or, (3) exclude testimony about the evidence.[103] In Georgia, under Ga. Stat. Ann. § 24–4-22 a presumption from failure to produce evidence occurs if a party has evidence in his power and within his reach by which he may repel a claim or charge against him but omits to produce it, or if he has more certain and satisfactory evidence in his power but relies on that which is of a weaker and inferior nature, a presumption arises that the charge or claim against him is well founded; but this presumption may be rebutted. The Court of Appeals in Georgia joins the majority of jurisdictions and declines to recognize an independent third-party tort of evidence spoliation.[104] A vigilant litigant already has traditional means of securing evidence available.[105] Those means include, for example, a court order directing preservation, along with remedies for violation of that order, or a contractual agreement with the property owner.[106]

Hawaii

Hawaii had an opportunity to determine if it would recognize an independent tort of spoliation of evidence, but declined to do so because if it did recognize such a tort, the plaintiff would have to show in either an intentional or negligent spoliation of evidence claim: (1) the destruction of evidence; (2) the disruption or significant impairment of the lawsuit; and (3) a causal relationship between the destruction of evidence and the inability to prove the lawsuit.[107] Since the plaintiff could not prove a causal relationship between the destruction of evidence and inability to prove their lawsuit, the court declined to determine if it would recognize the new tort.[108] The circuit court has wide-ranging authority to impose sanctions for the spoliation of evidence.[109]

Idaho

The evidentiary doctrine of spoliation recognizes it is unlikely that a party will destroy favorable evidence.[110] Thus, the doctrine of spoliation provides that when a party with a duty to preserve evidence intentionally destroys it, an inference arises that the destroyed evidence was unfavorable to that party.[111] Spoliation is a rule of evidence applicable at the discretion of the trial court.[112] The spoliation doctrine is a general principle of civil litigation which provides that upon a showing of intentional destruction of evidence by an opposing party, an inference arises that the missing evidence was adverse to the party's position.[113] The spoliation doctrine is recognized as a form of admission by conduct.[114] By resorting to wrongful devices, the party is said to provide a basis for believing that he or she thinks the case is weak and not to be won by fair means.[115] Accordingly, the following are considered under this general category of admissions by conduct: destruction or concealment of relevant documents or objects.[116] As an admission, the spoliation doctrine only applies to the party connected to the loss or destruction of the evidence.[117] Of course, it is not enough to show that a third person did the acts charged as obstructive.[118] They must be connected to the party, or in the case of a corporation to one of its superior officers, by showing that an officer did the act or authorized it by words or other conduct.[119] Furthermore, the merely negligent loss or destruction of evidence is not sufficient to invoke the spoliation doctrine.[120] Moreover, the circumstances of the act must manifest bad faith.[121] Mere negligence is not enough, because it does not sustain the inference of consciousness of a weak case.[122] Even though Idaho courts have not

expressly adopted spoliation of evidence claim, they have recognized that spoliation of evidence is a tort.[123] Spoliation is its own intentional tort.[124] An intentional spoliation of evidence cause of action provides a framework for another cause of action based upon intentional conduct that unreasonably interferes with a party's prospective cause of action.[125] The tort of intentional spoliation of evidence has been alternatively identified by courts as the intentional interference with prospective civil action by spoliation of evidence.[126] It is closely aligned with the tort of intentional interference with a prospective business advantage.[127] The concept of spoliation requires a state of mind that shows a plan or premeditation.[128] Assuming arguendo that the tort of negligent spoliation of evidence is part of the law of Idaho, in any negligence action, the plaintiff has the burden of proving not only a duty, but also a breach of that duty, and that the breach was the proximate cause of the plaintiff's damage.[129]

Illinois

A spoliation claim can be stated under existing negligence principles. In order to state a negligence claim, a plaintiff must allege that the defendant owed him a duty, that the defendant breached that duty, and that the defendant's breach proximately caused the plaintiff damages.[130] 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.[131] Moreover, a defendant may voluntarily assume a duty by affirmative conduct. In any of the foregoing instances a defendant owes a duty of due care to preserve evidence if a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action.[132] As a threshold matter, a court will first determine whether such a duty arises by agreement, contract, statute, special circumstance, or voluntary undertaking.[133] If so, then the court will then determine whether that duty extends to the evidence at issue.[134] For example, whether a reasonable person should have foreseen that the evidence was material to a potential civil action.[135] A cause of action can be stated under existing negligence law, so the court does not create a new tort.[136] A claim for negligent spoliation of evidence under *Boyd* and dismissal of a complaint as a sanction under Ill. Sup. Ct. R. 219(c) pursuant to *Shimanovsky* are separate and distinct. *Shimanovsky* and *Boyd* present a party confronted with the loss or destruction of relevant, material evidence

at the hands of an opponent with two roads diverged in a wood.[137] He may either (1) seek dismissal of his opponent's complaint under Rule 219(c) or (2) bring a claim for negligent spoliation of evidence. The mode of relief most appropriate will depend upon the opponent's culpability in the destruction of the evidence.[138] The former requires conduct that is deliberate of contumacious or evidences an unwarranted disregard of the court's authority and should be employed only as a last resort and after all the court's other enforcement powers have failed to advance the litigation.[139] The latter requires mere negligence, the failure to foresee that the destroyed evidence was material to a potential civil action.[140] A spoliation claim can be stated under existing negligence principles.[141] In order to state a negligence claim, a plaintiff must allege that the defendant owed him a duty, that the defendant breached that duty, and that the defendant's breach proximately caused the plaintiff damages.[142]

Indiana

Indiana law does not recognize a claim for "first-party" negligent or intentional spoliation of evidence.[143] Existing under Indiana law are important sanctions that not only provide a remedy to persons aggrieved, but also deterrence to spoliation of evidence by litigants and their attorneys.[144] It is well established in Indiana law that intentional first-party spoliation of evidence may be used to establish an inference that the spoiliated evidence was unfavorable to the party responsible.[145] The common law of Indiana is that, if an alleged tortfeasor negligently or intentionally destroys or discards evidence that is relevant to a tort action, the plaintiff in the tort action does not have an additional independent cognizable claim against the tortfeasor for spoliation of evidence under Indiana law.[146] While not involving a separate tort action, intentional spoliation was the basis for granting a default judgment on liability in *Whitewater Valley Canoe Rental, Inc., v. Franklin County Comm'rs*, 507 N.E.2d 1001, 1008 (Ind. App. 1987). This court treads cautiously when deciding whether to recognize a new tort.[147] While the law must adjust to meet society's changing needs, we must balance that adjustment against boundless claims in an already crowded judicial system.[148] We are especially averse to creating a tort that would only lead to duplicative litigation, encouraging inefficient re-litigation of issues better handled within the context of the core cause of action.[149] We thus decline to recognize evidence spoliation as an

independent tort.[150] Notwithstanding the important considerations favoring the recognition of an independent tort of spoliation by parties to litigation, we are persuaded that these are minimized by existing remedies and outweighed by the attendant disadvantages.[151] We thus determine the common law of Indiana to be that, if an alleged tortfeasor negligently or intentionally destroys or discards evidence that is relevant to a tort action, the plaintiff in the tort action does not have an additional independent cognizable claim against the tortfeasor for spoliation of evidence under Indiana law.[152] Spoliation consists of the intentional destruction, mutilation, alteration, or concealment of evidence, usually a document.[153] If proved, spoliation may be used to establish that the evidence was unfavorable to the party responsible.[154] Indiana common law does not recognize an additional independent claim against a first-party tortfeasor for either intentional or negligent spoliation of evidence.[155] The Indiana Supreme Court declined to recognize third-party spoliation in *Glotzbach v. Froman*.[156] In *Glotzbach*, the court ruled that it was reluctant to recognize the existence of such third-party spoliation claims because proving damages in a third-party spoliation claim becomes highly speculative and involves a lawsuit in which the issue is the outcome of another hypothetical lawsuit and the jury is forced to engage in "guesswork."[157]

Iowa

Evidence of spoliation may allow an inference that a party who destroys a document with knowledge that it is relevant to litigation is likely to have been threatened by the document.[158] A spoliation inference should be utilized prudently and sparingly.[159] Such an inference may only be drawn when the destruction of relevant evidence was intentional, as opposed to merely negligent or the evidence was destroyed as the result of routine procedure.[160] Iowa has declined to create a new cause of action for negligent spoliation of evidence because it creates a generation of endless litigation, and is inconsistent with the policy favoring final judgment.[161] Iowa's remedies for spoliation of evidence include discovery sanctions, barring duplicate evidence where fraud or intentional destruction is indicated and instructing on an unfavorable inference to be drawn from the fact that evidence was destroyed.[162] Iowa Civil Jury Instruction 100.22, Spoliation of Evidence, is as follows: (Name of party asserting the conclusion) claims that (name of party) has intentionally destroyed

evidence consisting of (describe evidence). You may, but are not required to, conclude that such evidence would be unfavorable to (name of party). Before you can reach this conclusion, (name of party asserting the conclusion) must prove all of the following: 1. The evidence previously existed. 2. The evidence was within the possession or control of (name of party). 3. (Name of party)'s interests would call for production of the evidence if favorable to that party. 4. (Name of party) has intentionally destroyed the evidence without satisfactory explanation. For you to reach this conclusion, more than the mere destruction of the evidence must be shown. It is not sufficient to show that a third person destroyed the evidence without the authorization or consent of (name of party).

Kansas

Absent some independent tort, contract, agreement, voluntary assumption of duty, or special relationship of the parties, the new tort of intentional interference with a prospective civil action by spoliation of evidence should not be recognized in Kansas.[163] The court reasoned that such a rule runs counter to the basic principle that there is no cognizable independent action for perjury, or for any improper conduct even by a witness, much less by a party, in an existing lawsuit. Were the rule otherwise, every case would be subject to constant retrials in the guise of independent actions.[164] The federal court for the District of Kansas held that under certain circumstances, Kansas would recognize an independent cause of action for spoliation of evidence.[165] The court denied a motion for summary judgment by the defendant doctor who claimed that Kansas does not recognize a tort of spoliation of evidence.[166] The court held that under the circumstances, the Kansas supreme court would have created an independent cause of action.[167] The Kansas supreme court refused to recognize an independent tort of spoliation for claims by a defendant against codefendants or potential codefendants, including potential indemnitors under a theory of comparative implied indemnification.[168]

Kentucky

We decline the invitation to create a new tort claim. Where the issue of destroyed or missing evidence has arisen, we have chosen to remedy the matter through evidentiary rules and missing evidence instructions.[169]

Louisiana

The theory of spoliation of evidence refers to an intentional destruction of evidence for purpose of depriving opposing parties of its use.[170] A plaintiff asserting a claim

for spoliation of evidence must allege that the defendant intentionally destroyed evidence.[171] Allegations of negligent conduct are insufficient.[172] The Second and Third Louisiana circuits, who have addressed the spoliation of evidence cause of action agree that the general tort immunity given an employer in La. Rev. Stat. Ann. § 23:1032 does not shield an employer from an employee's tort cause of action against an employer for spoliation of evidence to be used in a tort suit against a third party.[173] The Second Circuit restricts that cause of action to a narrow list of sources of duty that must be specifically pleaded.[174] The Third Circuit has found that the cause of action will lie under the general tort principles of La. Civ. Code Ann. art. 2315.[175] In *Desselle,* the Fifth circuit does not recognize a spoliation tort. The Fourth Circuit recognizes the tort of spoliation in *Quinn.*[176] The theory of spoliation of evidence refers to an intentional destruction of evidence for purpose of depriving opposing parties of its use.[177] A plaintiff asserting a state law tort claim for spoliation of evidence must allege that the defendant intentionally destroyed evidence.[178] Allegations of negligent conduct are insufficient.[179] Where suit has not been filed and there is no evidence that a party knew suit would be filed when the evidence was discarded, the theory of spoliation of evidence does not apply.[180] The First Circuit recognizes the tort in Johnson. An employee's spoliation of evidence claim against his or her employer falls outside the general tort immunity granted by the workers' compensation statutes, because the claim is not "on account of an injury" for which the employee is entitled to compensation under those laws.[181]

Maine

Maine does not recognize spoliation of evidence as an independent tort.[182] Sanctions are the proper remedy for spoliation.[183]

Maryland

The four elements generally regarded as being prerequisites to a court's imposition of spoliation sanctions are: (1) an act of destruction; (2) discoverability of the evidence; (3) an intent to destroy the evidence; and (4) occurrence of the act at a time after suit has been filed, or, if before, at a time when the filing is fairly perceived as imminent.[184] Specific instances of spoliation or suppression of evidence, and other efforts at covering up are admissible as evidence of guilty knowledge.[185] This evidence is admitted as supporting an inference that the actor must

have been guilty of the misdeed with which he or she is charged, or he or she would not have taken those steps.[186] If a party has threatened a witness, proof of these acts will be admissible.[187] That proof will give rise not only to an inference that the testimony of the suppressed evidence would have been unfavorable to that party, but also that the party has "guilty knowledge" and believes that the missing evidence would have been unfavorable.[188] As might be expected, wrongdoing by the party in connection with his case, amounting to an obstruction of justice is also commonly regarded as an admission by conduct.[189] By resorting to wrongful devices he is said to give ground for believing that he thinks his case is weak and not to be won by fair means.[190] Accordingly, a party's false statement about the matter in litigation, whether before suit or on the stand, his fabrication of false documents, his undue pressure, by bribery or intimidation or other means, to influence a witness to testify for him or to avoid testifying, his destruction or concealment of relevant documents or objects, his attempt to corrupt the jury, his hiding or transferring property in anticipation of judgment are all instances of this type of admission by conduct.[191]

Massachusetts

The spectrum of remedies in a case involving spoliation includes allowing the party who has been aggrieved by the spoliation to present evidence about the pre-accident condition of the lost evidence and the circumstances surrounding the spoliation, as well as instructing the jury on the inferences that may be drawn from spoliation.[192] These remedies may be cumulative, as determined by the judge from the circumstances of each case, in the exercise of broad discretion.[193] There is no cause of action for spoliation of evidence under Mass. Gen. Laws ch. 93A.[194] The doctrine of spoliation permits the imposition of sanctions and remedies for the destruction of evidence in civil litigation.[195] The doctrine is based on the premise that a party who has negligently or intentionally lost or destroyed evidence known to be relevant for an upcoming legal proceeding should be held accountable for any unfair prejudice that results.[196] Persons who are actually involved in litigation or know that they will likely be involved have a duty to preserve evidence for use by others who will also be involved in that litigation.[197] Where evidence has been destroyed or altered by persons who are parties to the litigation, or by persons affiliated with a party, in particular, their expert witnesses, and another party's

ability to prosecute or defend the claim has been prejudiced as a result, a judge may exclude evidence to remedy that unfairness.[198] Thus, once a litigant or its expert knows or reasonably should know that the evidence might be relevant to a possible action, the supreme court imposes a duty to preserve such evidence in the interests of fairness.[199] In recognizing such a duty, the supreme court has crafted the remedy for spoliation within the context of an underlying civil action.[200] Sanctions in that action are addressed to the precise unfairness that would otherwise result.[201] Thus, an expert's testimony may be excluded so that the expert would not have the unfair advantage of posing as the only expert with first-hand knowledge of the item.[202] Such a sanction should go no further than to preclude tainted testimony.[203] The imposition of such a remedy must also take into account the party responsible for the spoliation.[204] Not only does the supreme court impose the sanction of excluding testimony to remedy spoliation, but it does so, recognizing that such exclusion of testimony may be dispositive of the ultimate merits of the case, thereby imposing the ultimate sanction on the party responsible for the spoliation.[205] If spoliation occurs in violation of a discovery order, various sanctions, including dismissal or judgment by default, may be imposed for that violation.[206]

Michigan

Spoliation may occur by the failure to preserve crucial evidence, even though the evidence was not technically lost or destroyed.[207] Even when an action has not been commenced and there is only a potential for litigation, the litigant is under a duty to preserve evidence that it knows or reasonably should know is relevant to the action.[208] While disassembling the motorcycle, plaintiffs' experts failed to test a certain part of the motorcycle that was essential to their ultimate theory of liability.[209] Because this test can no longer be duplicated because the bearing adjusting nut has been removed, the failure to conduct the test amounts to the failure to preserve evidence.[210] Defendant's claim of spoliation of evidence is not an affirmative defense required to have been pleaded in defendant's responsive pleading.[211] A trial court's imposition of sanctions for failure to preserve evidence will be reversed only upon a finding that there has been a clear abuse of discretion.[212] In some situations dismissal or default judgment are appropriate sanctions.[213] In cases involving the loss or destruction of evidence, a court

must be able to make such rulings as necessary to promote fairness and justice.[214] To deny the courts the power to sanction a party in such circumstances would only encourage unscrupulous parties to destroy damaging evidence before a court order has been issued.[215] Furthermore, regardless of whether evidence is lost as the result of a deliberate act or simple negligence, the other party is unfairly prejudiced because it is unable to challenge or respond to the evidence even when no discovery order has been violated.[216] Where the destruction of evidence is willful or there is evidence of fraud, then a presumption arises that the evidence would have been adverse to the party who destroyed it.[217] When the controlling party fails to produce evidence, then the jury may infer that the evidence was adverse to the party who failed to produce it.[218] In Panich, the court refused to create a new tort of intentional interference with an economic advantage.[219] The court acknowledged that some states permit an independent cause of action for interference with a civil action by reason of spoliation of evidence, but in *Panich*, the spoliator did not assume a duty to preserve the evidence.[220] The court held that although Michigan has not yet recognized the torts of negligent failure to preserve evidence for civil litigation or intentional interference with a prospective civil action by spoliation of evidence, that does not bar the state from recognizing them in the future.[221] Michigan does not yet recognize as a valid cause of action spoliation of evidence that interferes with a prospective civil action against a third party.[222]

Minnesota

Courts are authorized to sanction a party for the spoliation of evidence, even where the party has not violated a court order and even when there has been no finding of bad faith.[223] The power to sanction is tempered by a duty to impose the least restrictive sanction available under the circumstances.[224] Where there is an inadvertent spoliation of evidence, the standard to test the impact thereof is prejudice to the opposing party.[225] Implicit in that standard is the need to examine the nature of the item lost in the context of the claims asserted and the potential for re-mediation of the prejudice.[226] One challenging the trial court's choice of a sanction has the difficult burden of convincing an appellate court that the trial court abused its discretion, a burden which is met only when it is clear that no reasonable person would agree with the trial court's assessment of what sanctions are

appropriate.[227] Minnesota, like most jurisdictions, permits an unfavorable inference to be drawn from the failure to produce evidence in the possession and under the control of a party to litigation.[228] The jury then may infer that the evidence, if produced, would have been unfavorable to that party.[229] Further, destroying or obstructing access to evidence could subject an attorney to professional discipline.[230] We believe resolution of a plaintiff's underlying claim is necessary to demonstrate actual harm and prevent speculative recovery in a spoliation action.[231] Issues which have no existence other than in the realm of future possibility are purely hypothetical and are not justiciable.[232] Minnesota does not recognize an independent spoliation tort.[233] *Foust* was abrogated on different grounds by *Swanson v. Brewster*, 784 N.W.2d 264 (Minn. 2010). The use of an unfavorable inference instruction is a sanction permitted by Minnesota courts in spoliation of evidence claims.[234] Minnesota law does not differentiate between intentional and unintentional spoliation.[235]

Mississippi

An inference that the evidence was favorable to the defense exists only where the spoliation or destruction was intentional and indicates fraud and a desire to suppress the truth.[236] The Supreme Court of Mississippi refuses to recognize a separate tort for intentional spoliation of evidence against both first and third-party spoliators.[237] The reasoning of this court, and that of other jurisdictions, in refusing to recognize a separate tort of intentional spoliation included infringement on the rights of property owners, endless litigation, and uncertainty of the fact of harm.[238] Non-tort remedies for spoliation are sufficient in the vast majority of cases, and certainly, as the California courts have learned after fourteen years of experience with this tort, any benefits obtained by recognizing the spoliation tort are outweighed by the burdens imposed.[239] Mississippi did not recognize the tort of negligent spoliation in Richardson because the defendant was not under a duty to preserve the evidence.[240]

Missouri

Missouri enforces an evidentiary spoliation inference, omnia praesumuntur contra spoliatorem (all things are presumed against a wrongdoer).[241] The evidentiary spoliation doctrine applies when there is intentional destruction of evidence, indicating fraud and a desire to suppress the truth.[242] If applicable, destruction of evidence without a satisfactory explanation gives rise to an inference

unfavorable to the spoliator.[243] The court held that there was no need in this situation to create a new tort because the plaintiff filed a medical malpractice action, and she was already able to present her case to the jury.[244] Where one party has obtained possession of physical evidence which the party fails to produce or account for at the trial, an inference is warranted against that party.[245] Where one conceals or suppresses evidence such action warrants an unfavorable inference.[246] The standard for application of the spoliation doctrine requires that there is evidence of an intentional destruction of the evidence indicating fraud and a desire to suppress the truth.[247] Negligence, however, is not sufficient to apply the adverse inference rule.[248] Since the doctrine of spoliation is a harsh rule of evidence, prior to applying it in any given case, it should be the burden of the party seeking its benefit to make a prima facie showing that the opponent destroyed the missing evidence under circumstances manifesting fraud, deceit or bad faith.[249] Missouri does not recognize spoliation, either intentional or negligent, as the basis for tort liability against either a party or a non-party to the action in which the evidence is to be used.[250]

Montana

The tort of negligent spoliation of evidence consists of the following elements: (1) existence of a potential civil action; (2) a legal or contractual duty to preserve evidence relevant to that action; (3) destruction of that evidence; (4) significant impairment of the ability to prove the potential civil action; (5) a causal connection between the destruction of the evidence and the inability to prove the lawsuit; (6) a significant possibility of success of the potential civil action if the evidence were available; and (7) damages.[251] The plaintiff should not be allowed to benefit more from the spoliation that he would have in the underlying suit.[252] On the other hand, the defendant should be adequately punished for his offending conduct and should be required to adequately compensate the plaintiff for the loss of his ability to pursue the underlying suit.[253] Intentional spoliation of evidence consists of the following elements: (1) the existence of a potential lawsuit; (2) the defendant's knowledge of the potential lawsuit; (3) the intentional destruction of evidence designed to disrupt or defeat the potential lawsuit; (4) disruption of the potential lawsuit; (5) a causal relationship between the act of spoliation and the inability to prove the lawsuit; and (6) damages.[254] A plaintiff bringing a claim for intentional

spoliation of evidence is still required to prove a causal relationship between the act of spoliation and the inability to prove the lawsuit and damages.[255] Remedies already exist for parties to an action who have suffered a loss as a result of the spoliation of evidence by another party.[256] It is necessary to recognize the tort of spoliation of evidence, which may be negligent or intentional, as an independent cause of action with respect to third parties who destroy evidence.[257] In doing so, we are sensitive to the legitimate interests and rights of third parties who are in the possession of such evidence. Thus, we have attempted to craft a balanced remedy which will serve as a deterrent to any potential spoliator and provide suitable punishment against an actual spoliator as well as fair compensation to the victim of spoliation without creating a windfall.[258] Montana recognizes intentional/negligent spoliation of evidence only for third parties.

Nebraska — When intentional destruction of evidence is established, the fact finder may draw the inference that the evidence destroyed was unfavorable to the party responsible for its destruction.[259] Intentional destruction is said to indicate fraud and a desire to suppress the truth.[260]

Nevada — The Supreme Court of Nevada outlines two standards regarding the consequences for lost or destroyed evidence, one for the willful loss or destruction of evidence and one for the negligent loss or destruction of evidence.[261] When evidence is willfully lost or destroyed, Nev. Rev. Stat. § 47.250(3) provides for a rebuttable presumption that the evidence would be adverse if produced.[262] This presumption is triggered when the party seeking the benefit of the presumption demonstrates that the evidence was destroyed with the intent to harm.[263] However, when evidence is negligently lost or destroyed, common law will infer that lost or destroyed evidence is adverse to the party who lost or destroyed it.[264] This inference rests on an acknowledgment that the risk that evidence would have been detrimental rather than favorable should fall on the party responsible for its loss.[265] Thus, once a party has notice of a potential claim, that party has a duty to exercise reasonable care to preserve information relevant to that claim.[266]

New Hampshire — A trial court permitted a party to allege a count of negligent and intentional spoliation of evidence. The appellate court held that if it was in error to do that, such error

would be harmless because there was a third count of negligence. Any evidence of spoliation was relevant towards the negligence count.[267] Here the defendant destroyed a crucial piece of evidence shortly after the accident, giving rise to the litigation. The destruction was intentional and not a matter of routine.[268] New Hampshire only permits an adverse inference when the destruction of evidence was intentional and not a matter of routine.[269]

New Jersey

The best known civil remedy that has been developed for spoliation is the so-called spoliation inference that comes into play where a litigant is made aware of the destruction or concealment of evidence during the underlying litigation. Courts follow the rule omnia praesumuntur contra spoliatorem, which means all things are presumed against the destroyer.[270] Courts use the spoliation inference during the underlying litigation as a method of evening the playing field where evidence has been hidden or destroyed.[271] It essentially allows a jury in the underlying case to presume that the evidence the spoliator destroyed or otherwise concealed would have been unfavorable to him or her.[272] The elements of the tort of spoliation are as follows: (1) the existence of pending or probable litigation involving the plaintiff; (2) defendant's knowledge of the pendency or fact of the litigation; (3) intentional destruction of evidence by the defendant designed to disrupt the plaintiff's case; (4) disruption of the plaintiff's case; and (5) damages proximately caused by the defendant's acts.[273] The elements that must be established by a plaintiff in a fraudulent concealment of evidence action are: (1) that defendant in the fraudulent concealment action had a legal obligation to disclose evidence in offline 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; (5) that plaintiff was damaged in the underlying action by having to rely on an evidential record that did not contain the evidence defendant concealed.[274] The tort of fraudulent concealment may be invoked as a remedy for spoliation where the elements of fraudulent concealment exist. Such conduct cannot go undeterred and unpunished and those aggrieved by it should be made whole with compensatory damages and, if the elements of the Punitive Damages Act, N.J. Stat.

Ann. § 2A:15–5.12 are met, punitive damages for intentional wrongdoing.[275] A party's access to the remedies for spoliation will depend upon the point in the litigation process that the concealment or destruction is uncovered.[276] If it is revealed in time for the underlying litigation, the spoliation inference may be invoked.[277] In addition, the injured party may amend his or her complaint to add a count for fraudulent concealment.[278] Those counts will require bifurcation because the fraudulent concealment remedy depends on the jury's assessment of the underlying cause of action.[279] In that instance, after the jury has returned a verdict in the bifurcated underlying action, it will be required to determine whether the elements of the tort of fraudulent concealment have been established, and, if so, whether damages are warranted.[280] Further, the plaintiff may be awarded discovery sanctions if the court determines that they are justified in light of the outcome in the fraudulent concealment trial.[281] If spoliation is not discovered until after the underlying action has been lost or otherwise seriously inhibited, the plaintiff may file a separate tort action.[282] In such an action, plaintiff will be required to establish the elements of the tort of fraudulent concealment.[283] To do so, the fundamentals of the underlying litigation will also require exposition.[284] Unless such an action is allowed, a belatedly discovered spoliation claim would be without a meaningful remedy.[285] Obviously the plaintiff in such an action also could recover discovery sanctions if the court determines that they are warranted in light of the jury verdict.[286] Spoliation of evidence in a prospective civil action occurs when evidence relevant to the action is destroyed, causing interference with the action's proper administration and disposition.[287] Whether the spoliator acted negligently or intentionally does not affect the spoliator's liability, but merely is a factor to be considered when determining the appropriate remedy.[288] An appropriate remedy may even include an award of counsel fees in exceptional cases, particularly where there is a finding of intentional spoliation and where the non-spoliating party's ability to defend itself was compromised.[289] New Jersey does not recognize a separate tort action for intentional spoliation of evidence. Spoliation is a term that is used to describe the hiding or destroying of litigation evidence.[290] Various civil remedies are available where spoliation occurs.[291] One such remedy is an inference during the underlying litigation whereby

it is presumed the evidence the spoliator destroyed or otherwise concealed would have been unfavorable to him or her.[292] A second remedy is a discovery sanction.[293] Thus, where a party fails to comply with a discovery request, the court may order that designated facts be taken as established, refuse to permit the disobedient party to support or oppose designated claims or defenses, prohibit the introduction of designated matters into evidence, dismiss an action, or enter judgment by default, and may order the delinquent party to pay reasonable expenses resulting from his or her conduct, including attorney's fees.[294] New Jersey follows those jurisdictions which find that traditional negligence principles or an action for fraudulent concealment will suffice to address concealment or destruction of evidence during or in anticipation of litigation.[295] A claim for negligent spoliation of evidence was not a separate cause of action, but a claim that could be maintained under traditional concepts of negligence.[296] We refused to recognize negligent spoliation of evidence as a separate tort and held that negligent destruction of evidence against a third party may be resolved by applying traditional negligence principles of a duty of care, breach of that duty by defendant, and an injury to plaintiff proximately caused by defendant's breach.[297] We explained that a court could find a duty to preserve the evidence would exist if (1) the third party has knowledge of a potential lawsuit and accepts responsibility for preserving the evidence; (2) the third party voluntarily undertakes to preserve the evidence and a plaintiff reasonably and detrimentally relies thereon; (3) the third party agrees with plaintiff to preserve the evidence; or (4) plaintiff makes a specific request to the third party to preserve a particular item.[298]

New Mexico

The elements for the tort of intentional spoliation of evidence are: (1) the existence of a potential lawsuit; (2) the defendant's knowledge of the potential lawsuit; (3) the destruction, mutilation, or significant alteration of potential evidence; (4) intent on the part of the defendant to disrupt or defeat the lawsuit; (5) a causal relationship between the act of spoliation and the inability to prove the lawsuit; and (6) damages.[299] The New Mexico Supreme Court does not require the filing of a complaint or even express notice that a complaint is to be filed in order to trigger liability for intentional spoliation of evidence.[300] The relevant inquiry is knowledge on the part of the defendant of

a probability of a lawsuit in the future.[301] The New Mexico Supreme Court believes that spoliation, at least spoliation that is discovered prior to trial, shall be tried in conjunction with the underlying claim rather than in a bifurcated or separate trial.[302] A single trier of fact is in the best position to resolve all the claims fairly and consistently.[303] If a plaintiff loses the underlying suit, only the trier of fact who hears the case knows the real reason why.[304] The New Mexico Supreme Court holds that, to adequately protect such an interest, the tort of intentional spoliation of evidence must target wrongful activity occurring prior to the filing of a complaint.[305] At the directed verdict stage of a concurrent proceeding for intentional spoliation and the underlying claim, a plaintiff need only present evidence from which a reasonable jury, upon finding in favor of the defendant on the underlying claim, can conclude that the intentional spoliation of evidence causes the plaintiff's failure to satisfy the burden of proof in the underlying claim.[306] As a result, based on the differences between the torts of intentional spoliation of evidence and prima facie tort, and the similarities between the former and the tort of intentional interference with prospective business relations, the supreme court believes that the tort of intentional spoliation seeks to remedy acts taken with the sole intent to maliciously defeat or disrupt a lawsuit.[307] The tort of intentional spoliation of evidence necessarily requires more than mere negligence or failure to conform to standards of practice, and summary judgment in favor of a defendant is affirmed based on the absence of willful spoliation.[308] Where the actions of the spoliator fail to rise to the level of malicious conduct or otherwise meet the elements of the tort of intentional spoliation of evidence, the supreme court believes a more appropriate remedy is a permissible adverse evidentiary inference by the jury in the underlying claim.[309] This evidentiary inference can be accomplished through an instruction to the jury that it is permissible to infer that evidence intentionally destroyed, concealed, mutilated, or altered by a party without reasonable explanation is unfavorable to that party.[310] Trial courts, in determining whether to give this instruction, shall consider whether the spoliation is intentional, whether the spoliator knows of the reasonable possibility of a lawsuit involving the spoliated object, whether the party requesting the instruction acts with due diligence with respect to the spoliated evidence, and

whether the evidence is relevant to a material issue in the case.[311] By the requirement of intentional spoliation, the court does not mean that there must be an intent to perpetrate a fraud by the party, but, rather, that the evidence be disposed of intentionally and not merely destroyed inadvertently.[312] New Mexico recognizes a cause of action for intentional spoliation of evidence.[313] The tort of intentional spoliation of evidence is defined as the intentional destruction, mutilation, or significant alteration of potential evidence for the purpose of defeating another person's recovery in a civil action.[314] In order to prevail on an intentional spoliation of evidence theory, a plaintiff must allege and prove the following: (1) the existence of a potential lawsuit; (2) the defendant's knowledge of the potential lawsuit; (3) the destruction, mutilation, or significant alteration of potential evidence; (4) intent on the part of the defendant to disrupt or defeat the lawsuit; (5) a causal relationship between the act of spoliation and the inability to prove the lawsuit; and (6) damages.[315] A number of other courts that have been asked to recognize an independent tort of negligent spoliation of evidence conclude that traditional negligence principles have direct relevance and that adequate remedies exist under those principles to redress the negligent destruction of potential evidence.[316] The New Mexico Supreme Court agrees.[317] Thus, the supreme court declines to recognize the negligent destruction of potential evidence as a separate tort.[318] In general, states that have recognized a duty to preserve potential evidence have based such a duty on an agreement or contract between the parties, on applicable state statutes and regulations, or on other special circumstances.[319] The New Mexico Supreme Court agrees with this approach.[320] The Supreme Court holds that in the absence of such a circumstance a property owner has no duty to preserve or safeguard his or her property for the benefit of other individuals in a potential lawsuit.[321]

New York

One traditional method of dealing with spoliation of evidence in New York has been N.Y.C.P.L.R. 3126 where sanctions, including dismissal, have been imposed for a party's failure to disclose relevant evidence.[322] The appellate divisions have held that spoliation of evidence by an employer may support a common law cause of action when such spoliation impairs an employee's right to sue a third-party tortfeasor.[323] New York courts have specifically rejected a cause of action for spoliation of evidence

where a municipal employer had no duty to preserve a scaffold which allegedly caused plaintiff's injuries and the municipality was not on notice that an action was contemplated against a third party.[324] An employer has no duty to preserve a pallet jack which had rolled over the plaintiff's foot and no cause of action for spoliation of evidence could be brought because it was not on notice that the evidence would be needed for litigation.[325] A plaintiff cannot bring a third-party action against his employer for failure to preserve a truck destroyed in an accident where the employer was not on notice to preserve it.[326] Where a party destroys essential physical evidence and the party seeking that physical evidence is prejudicially bereft of appropriate means to confront a claim with incisive evidence, the spoliator may be sanctioned by the striking of its pleading.[327] Spoliation sanctions are not limited to cases where the evidence was destroyed willfully or in bad faith, since a party's negligent loss of evidence can be just as fatal to another party's ability to present a case or a defense.[328] Thus, while courts are reluctant to dismiss a pleading absent willful or contumacious conduct, it may be warranted as a matter of elementary fairness.[329] The courts of New York follow the majority view and do not recognize spoliation of evidence as a cognizable tort action.[330] While New York courts do not view spoliation of evidence as an actionable tort, New York courts do recognize a common-law cause of action against an employer for negligently and intentionally impairing an employee's right to sue a third-party tortfeasor notwithstanding the employee having received workers' compensation benefits.[331] A cause of action sounding in negligence requires the following elements: (1) the existence of a duty owing by the defendant to the plaintiff; (2) defendant's failure to discharge that duty; and (3) injury to plaintiff proximately resulting from such failure. The elements of a claim for a prima facie tort are the intentional infliction of harm resulting in damage without excuse or justification and by an act or series of acts that would otherwise be lawful.[332] The motive of defendant's act must be one of disinterested malevolence.[333] Courts routinely strike the pleadings of a spoliator whose destruction of proof results in a severe handicap to its opponents, regardless of whether the destruction was willful or simply negligent.[334] A party is not exempt from N.Y.C.P.L.R. 3126 sanctions because its destruction of evidence occurred before

it was a party to the lawsuit for which the evidence was sought.[335] New York declined to recognize an independent cause of action for intentional spoliation of evidence.[336]

North Carolina

The essence of the doctrine of spoliation of evidence is where a party fails to introduce in evidence documents that are relevant to the matter in question and within his control there is a presumption, or at least an inference that the evidence withheld, if forthcoming, would injure his case.[337] The foregoing refers to the well-established principle of spoliation of evidence.[338] Application of the principle presents a significant fact for the consideration of the jury and allows circumstantial proof against a party which withholds evidence in its possession because of the supposed knowledge that the truth would have operated against it.[339] The inference drawn from the spoliation of evidence principle does not supply the place of evidence of material facts and does not shift the burden of proof so as to relieve the party upon whom it rests of the necessity of establishing a prima facie case, although it may turn the scale when the evidence is closely balanced.[340] It is doubtful if the principle of spoliation of evidence was ever intended to mean anything except that an inference might be drawn against the spoliator.[341] Destruction of potentially relevant evidence obviously occurs along a continuum of fault ranging from innocence through the degrees of negligence to intentionality.[342] Although destruction of evidence in bad faith or in anticipation of trial may strengthen the spoliation inference, such a showing is not essential to permitting the inference.[343] If the evidence alleged to be withheld or destroyed is shown to be equally accessible to both parties, or there is a fair, frank and satisfactory explanation for non-production, the principle of spoliation of evidence is inapplicable and no inference arises.[344] On the other hand, if no satisfactory explanation is forthcoming, the maxim of the law will apply, and the jury must pass upon the case, aided by the inference, giving to it such force and effect as they may think it should have under all of the facts and circumstances.[345] Even though the adverse inference may be drawn from the principle of spoliation of evidence, it is permissive, not mandatory. If, for example, the fact finder believes that the documents were destroyed accidentally or for an innocent reason, then the fact finder is free to reject the inference.[346] Spoliation of evidence gives rise to an adverse inference as opposed to a presumption.[347]

North Dakota

Summary judgment may be appropriate as a sanction in situations of spoliation of evidence, or where the plaintiff has failed to provide key evidence in the action.[348]

Ohio

Spoliation claims may be brought at the same time as the primary action. "May" is permissive.[349] Claims for spoliation of evidence may be brought after the primary action has been concluded only when evidence of spoliation is not discovered until after the conclusion of the primary action.[350] A cause of action exists in tort for interference with or destruction of evidence.[351] However, a separate cause of action for spoliation of evidence is not the only way such conduct can be addressed and remedied.[352] A cause of action exists in tort for interference with or destruction of evidence.[353] The elements of a claim for interference with or destruction of evidence are: (1) pending or probable litigation involving the plaintiff; (2) knowledge on the 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 the plaintiff's case; and (5) damages proximately caused by the defendant's acts.[354] Such a claim should be recognized between the parties to the primary action and against third parties, and may be brought at the same time as the primary action.[355] Spoliation of evidence is recognized in Ohio as an independent tort.[356] The elements for evidence spoliation are: (1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of the defendant that litigation exists or is probable, (3) willful destruction of evidence by the defendant designed to disrupt plaintiff's case, and (4) damages proximately caused by the defendant's acts.[357] Under a spoliation of evidence claim, the party making the allegation must allege willful destruction of evidence.[358] Ohio does not recognize a cause of action for negligent spoliation of evidence. "Willful" reflects an intention and wrongful commission of the act which contemplates more than mere negligence.[359] In order to sanction a party with an adverse instruction, the trial court must determine that the spoliation of the evidence was prejudicial to the party seeking the instruction.[360] Once the party seeking the instruction demonstrates the other's malfeasance, that party enjoys a presumption that it was prejudiced by the spoliation.[361] The spoliating party then has the burden of rebutting this presumption by demonstrating that its

actions did not deprive the other party of favorable evidence not otherwise obtainable.[362]

Oklahoma

Neither spoliation of evidence nor prima facie torts for acts constituting spoliation of evidence have ever been recognized by Oklahoma as actionable.[363] If applicable, destruction of evidence without a satisfactory explanation gives rise to an inference unfavorable to the spoliator.[364] Oklahoma law has long recognized the existence of an adverse presumption that follows the destruction or spoliation of evidence.[365] The presumption varies in weight with the nature of the conduct complained of in a particular case, and likewise varies with the importance of the evidence in question.[366] The presumption arises if it is shown that a person has attempted to suppress or destroy evidence, because such conduct may be justly construed as an indication of his consciousness that his case or defense is lacking in merit.[367] However, the presumption arises only in cases of willful destruction or suppression.[368] This presumption is founded on the natural inference to be drawn from the fraudulent conduct of the party affected by it who has thought it expedient to resort to fraud and deceit.[369] In deciding whether to apply a rebuttable presumption in spoliation cases, two factors control: (1) the potential importance or relevance of the missing evidence; and (2) the culpability or fault of the adverse party.[370]

Oregon

Some jurisdictions have recognized a separate tort based on spoliation of evidence but none has recognized civil litigation as a relationship protected under the tort of intentional interference with a prospective economic advantage. *Allen* represents our Supreme Court's furthest extension of the tort of intentional interference with prospective economic advantage. Unlike in *Allen*, the relationship and resulting prospective interest here was not voluntary and, thus, the alleged interference did not implicate the tort's essential purpose. Unlike in *Allen*, where other courts had traditionally and consistently protected expectancies in inheritance, no reported decision has extended the tort to apply in this context. Given those distinctions, we decline to go further.[371] Oregon refuses to permit the tort of intentional interference with a prospective economic advantage to include prospective interests in the outcome of civil litigation.[372]

Pennsylvania

The Supreme Court of Pennsylvania adopts the Third Circuit's approach to the spoliation of evidence. In deciding the proper penalty for the spoliation of evidence, the Third Circuit found relevant (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party, and (3) the availability of a lesser sanction that will protect the opposing party's rights and deter future similar conduct.[373] An adverse inference instruction is a common penalty for spoliation, whereas other sanctions, such as striking a plaintiff's expert testimony, are much more extreme.[374] When reviewing a trial court's decision to grant or deny a spoliation sanction, an appellate court must determine whether the trial court abused its discretion.[375] A second component of fault for spoliation of evidence is the presence or absence of good faith.[376] Bad faith is not a necessary prerequisite to sanctions for spoliation.[377] Courts that have refused to recognize the tort of spoliation of evidence explain that there is no need for a separate cause of action because adequate remedies such as adverse inferences, burden shifting, and other sanctions exist to protect a litigant from another litigant's actions.[378] We decline to express a specific view on whether a separate tort is needed where an adverse party to litigation spoils evidence, since the issue is not presently before this court.[379] That being said, we are of the opinion that traditional remedies more than adequately protect the non-spoiling party when the spoiling party is a party to the underlying action.[380] 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.[381]

Rhode Island

The doctrine of spoliation provides that the deliberate or negligent destruction of relevant evidence by a party to litigation may give rise to an inference that the destroyed evidence was unfavorable to that party.[382] Under the doctrine of spoliation of evidence, the deliberate or negligent destruction of relevant evidence by a party to litigation may give rise to an inference that the destroyed evidence was unfavorable to that party.[383] Although a spoliation instruction is improper when the destruction was a

matter of routine with no fraudulent intent, it is appropriate when the act was intentional or intended to suppress the truth.[384] The doctrine of spoliation merely permits an inference that the destroyed evidence would have been unfavorable to the despoiler, and is by no means conclusive.[385] Courts have used five factors in determining an appropriate sanction for the spoliation of relevant evidence: (1) whether the defendant was prejudiced; (2) whether the prejudice can be cured; (3) the practical importance of the evidence; (4) whether the despoiler acted in good faith or bad faith; and (5) the potential for abuse if the evidence is not excluded.[386]

South Carolina

South Carolina does not recognize an independent tort for the negligent spoliation of evidence, third-party or otherwise.[387]

South Dakota

Generally, a spoliation instruction should not be given unless there is evidence that the missing material was disposed of intentionally or in bad faith.[388] Intentional destruction of evidence, a form of obstruction of justice, is called spoliation.[389] When it is established, a fact finder may infer that the evidence destroyed is unfavorable to the party responsible for its destruction.[390] Spoliation is more than simply the loss of evidence.[391] However, it is vital to understand that an adverse inference drawn from the destruction of evidence is predicated only on bad conduct.[392] A proper application of the rule requires a showing of an intentional act of destruction.[393] It is a general rule that the intentional spoliation or destruction of evidence relevant to a case raises a presumption, or, more properly, an inference, that this evidence will be unfavorable to the case of the spoliator.[394] Such a presumption or inference arises, however, only where the spoliation or destruction is intentional and indicates fraud and a desire to suppress the truth, and it does not arise where the destruction is a matter of routine with no fraudulent intent.[395]

Tennessee

The doctrine of spoliation of evidence permits a court to draw a negative inference against a party that has intentionally, and for an improper purpose, destroyed, mutilated, lost, altered, or concealed evidence.[396] In *Trumblo*[397] the court declined to determine whether Tennessee should recognize an independent tort of spoliation of evidence.[398] It is a general rule that the intentional spoliation or destruction of evidence relevant to a case raises a presumption, or, more properly, an inference, that the

evidence would have been unfavorable to the cause of the spoliator.[399] Such a presumption or inference arises, however, only where the spoliation or destruction was intentional, and indicates fraud and a desire to suppress the truth, and it does not arise where the destruction was a matter of routine with no fraudulent intent.[400] Furthermore, any presumption that may arise from the spoliation or destruction of evidence is not conclusive, but rather is rebuttable, the spoliation of evidence being a circumstance open to explanation.[401]

Texas

The Texas Courts of Appeals have generally limited the use of the spoliation instruction to two circumstances: (1) the deliberate destruction of relevant evidence and (2) the failure of a party to produce relevant evidence or to explain its non-production.[402] Under the first circumstance, a party who has deliberately destroyed evidence is presumed to have done so because the evidence was unfavorable to its case.[403] Under the second, the presumption arises because the party controlling the missing evidence cannot explain its failure to produce it.[404] The court treads cautiously when deciding whether to recognize a new tort.[405] While the law must adjust to meet society's changing needs, the court must balance that adjustment against boundless claims in an already crowded judicial system.[406] The court is especially averse to creating a tort that would only lead to duplicative litigation, encouraging inefficient re-litigation of issues better handled within the context of the core cause of action. The court thus declines to recognize evidence spoliation as an independent tort.[407] Recognizing a cause of action for evidence spoliation creates an impermissible layering of liability and would allow a plaintiff to collaterally attack an unfavorable judgment with a different fact finder at a later time, in direct opposition to the sound policy of ensuring the finality of judgments.[408] The inquiry as to whether a spoliation sanction or presumption is justified requires a court to consider: (1) whether there was a duty to preserve evidence, (2) whether the alleged spoliator breached that duty; and (3) whether the spoliation prejudiced the nonspoliator's ability to present its case or defense.[409]

Utah

The doctrine of spoliation of evidence, which holds that where a party to an action fails to provide or destroys evidence favorable to the opposing party, the court will infer the evidence's adverse content. Under the spoliation

	doctrine, such an inference will be drawn where one party wrongfully denies another the evidence necessary to establish a fact in dispute.[410] The Utah Supreme Court declined to adopt the tort of spoliation of evidence. Whether the Utah Supreme Court would adopt an independent cause of action for intentional third-party spoliation remains undecided.[411]
Vermont	Court affirmed the dismissal of a spoliation of evidence claim because the jury in the underlying action never got to the issue of proximate cause. Since the jury never reached that issue, then whether or not evidence was destroyed was irrelevant to the outcome of the case.[412] Also, a jury's verdict is preclusive under collateral estoppel.[413] An adverse inference is not warranted when a third party fails to preserve a memo, when he had no reason to preserve it.[414]
Virginia	The elements of a claim for spoliation of evidence are: (1) pending or probable litigation involving the plaintiff; (2) knowledge on the part of the defendant that litigation exists or is probable; (3) willful destruction of evidence by the defendant designed to disrupt plaintiff's case; (4) disruption of plaintiff's case; and (5) damages proximately caused by the defendant's acts.[415] An employer has no duty to preserve evidence for the benefit of an injured employee.[416] On a certified question, the Virginia supreme court declined to create a new spoliation of evidence tort.[417] Virginia law recognizes a spoliation or missing evidence inference, which provides that where one party has within his control material evidence and does not offer it, there is an inference that the evidence, if it had been offered, would have been unfavorable to that party.[418] Virginia permits a spoliation claim if a party in violation of an agreement to preserve evidence fails to do so.[419] A spoliation inference may be applied in an existing action if, at the time the evidence was lost or destroyed, a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential to a civil action.[420]
Washington	Spoliation is the intentional destruction of evidence.[421] Where relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would

be unfavorable to him.[422] To remedy spoliation the court may apply a rebuttable presumption, which shifts the burden of proof to a party who destroys or alters important evidence.[423] In deciding whether to apply a rebuttable presumption in spoliation cases, two factors control: (1) the potential importance or relevance of the missing evidence; and (2) the culpability or fault of the adverse party.[424] In weighing the importance of the evidence, the court considers whether the adverse party was afforded an adequate opportunity to examine it.[425] Culpability turns on whether the party acted in bad faith or whether there is an innocent explanation for the destruction.[426]

West Virginia

West Virginia does not recognize spoliation of evidence as a stand-alone tort when the spoliation is the result of the negligence of a party to a civil action.[427] It is a fundamental principle of law that a party who reasonably anticipates litigation has an affirmative duty to preserve relevant evidence.[428] However, when the alleged spoliator is a party to the underlying litigation, sufficient remedies already exist to compensate the party injured by the negligent spoliation.[429] Under appropriate circumstances, an adverse inference instruction may be given or sanctions levied where physical evidence was destroyed by a party to an action.[430] Before a trial court may give an adverse inference jury instruction or impose other sanctions against a party for spoliation of evidence, the following factors must be considered: (1) the party's degree of control, ownership, possession or authority over the destroyed evidence; (2) the amount of prejudice suffered by the opposing party as a result of the missing or destroyed evidence and whether such prejudice was substantial; (3) the reasonableness of anticipating that the evidence would be needed for litigation; and (4) if the party controlled, owned, possessed or had authority over the evidence, the party's degree of fault in causing the destruction of the evidence.[431] The party requesting the adverse inference jury instruction based upon spoliation of evidence has the burden of proof on each element of the four-factor spoliation test.[432] If, however, the trial court finds that the party charged with spoliation of evidence did not control, own, possess, or have authority over the destroyed evidence, the requisite analysis ends, and no adverse inference instruction may be given or other sanction imposed.[433] West Virginia recognizes spoliation of evidence as a stand-alone tort when the spoliation is the

result of the negligence of a third party, and the third party had a special duty to preserve the evidence.[434] Unlike a party to a civil action, a third-party spoliator is not subject to an adverse inference instruction or discovery sanctions.[435] Thus, when a third party destroys evidence, the party who is injured by the spoliation does not have the benefit of existing remedies.[436] Such a result conflicts with the policy of providing a remedy for every wrong and compensating victims of tortious conduct.[437] Accordingly, the negligent spoliation of evidence by a third party ought to be actionable in certain circumstances.[438] Recognizing a tort of negligent spoliation against a third party is problematic absent some type of affirmative duty to preserve the evidence.[439] Under tort law, in order to establish a prima facie case of negligence in West Virginia, it must be shown that the defendant has been guilty of some act or omission in violation of a duty owed to the plaintiff.[440] No action for negligence will lie without a duty broken.[441] However, there is no general duty to preserve evidence.[442] An additional problem arises where the destroyed evidence is the property of the alleged third-party spoliator.[443] A property owner normally has the right to control and dispose of his property as he sees fit.[444] The owner of the property may legitimately question what right a plaintiff has to direct control over such property.[445] In situations in which the evidence is owned by the third party, individual autonomy is a heavy factor in favor of the spoliator in negligent spoliation by a third party.[446] According to the individual autonomy theory, tort liability for spoliation interferes with individual property rights.[447] Tort liability against a third party in a negligent spoliation action would prohibit a third party from destroying or altering evidence, which the third party owns, for a justifiable reason such as safety concerns or a desire to control the costs of preservation.[448] The tort of negligent spoliation of evidence by a third party consists of the following elements: (1) the existence of a pending or potential civil action; (2) the alleged spoliator had actual knowledge of the pending or potential civil action; (3) a duty to preserve evidence arising from a contract, agreement, statute, administrative rule, voluntary assumption of duty, or other special circumstances; (4) spoliation of the evidence; (5) the spoliated evidence was vital to a party's ability to prevail in a pending or potential civil action; and (6) damages.[449] Once the

first five elements are established, there arises a rebuttable presumption that but for the fact of the spoliation of evidence, the party injured by the spoliation would have prevailed in the pending or potential litigation.[450] The third-party spoliator must overcome the rebuttable presumption or else be liable for damages.[451] A third party must have had actual knowledge of the pending or potential litigation. A third party's constructive notice of a pending or potential action is not sufficient to force upon the third party the duty to preserve evidence.[452] Not every piece of lost or destroyed evidence should lead to a cause of action for negligent spoliation.[453] Where the destruction or loss of evidence defeats any chance of the plaintiff's recovering in the underlying action, the plaintiff deserves recourse for such a loss.[454] Therefore, under a claim for negligent spoliation, the defendant's breach must be the proximate cause of the plaintiff's inability to file, or to win, the underlying lawsuit.[455] In order for a plaintiff to show proximate cause, the trier of fact must determine that the lost or destroyed evidence was so important to the plaintiff's claim in the underlying action that without that evidence the claim did not survive or would not have survived a motion for summary judgment.[456] If appellate courts use the summary-judgment standard as a guide, there will be no need for a plaintiff to waste valuable judicial resources by filing a futile complaint and risking sanctions for filing frivolous litigation. The plaintiff can rely upon either a copy of a judgment against him in an underlying action or upon a showing that, without the lost or destroyed evidence, a summary judgment would have been entered for the defendant in the underlying action.[457] The determination of damages in a claim for spoliation of evidence is generally considered to be a task fraught with uncertainty and speculation.[458] In fact, a strong counter argument to compensation in spoliation cases is the inherent difficulty of proving the fact of injury in a spoliation suit.[459] Courts have adopted a myriad of methods to assess damages.[460] In addressing the problem of damages, the general rule in awarding damages is to give compensation for pecuniary loss; that is, to put the plaintiff in the same position, so far as money can do it, as he would have been if the tort had not been committed.[461] Under the rebuttable presumption approach, the risk of a windfall to the plaintiff has been minimized.[462] Without the spoliated evidence, the plaintiff's probability of

success is too tenuous a measure to be consistently applied and that any attempt to apply it would constitute pure speculation.[463] Therefore, in determining damages, the appellate court rejects the use of probability of success as a benchmark, in favor of the use of compensatory damages that would have been awarded on the underlying cause of action, if the defendant cannot overcome the rebuttable presumption.[464] West Virginia recognizes intentional spoliation of evidence as a stand-alone tort when done by either a party to a civil action or a third party.[465] The reasoning for the need to hold third parties liable for negligently spoliating evidence is also applicable here.[466] That is, recovery under a separate tort is necessary because a third party is not subject to an adverse inference instruction or discovery sanctions.[467] In regard to a party to a civil action, intentional spoliation of evidence is misconduct of such a serious nature, the existing remedies are not a sufficient response.[468] Most states that have adopted the tort have agreed that intentional spoliation of evidence consists of the following elements: (1) pending or probable civil litigation, (2) knowledge of the spoliator that the litigation is pending or probable, (3) willful destruction of evidence, (4) intent of the spoliator to interfere with the victim's prospective civil suit, (5) a causal relationship between the evidence and the inability to prove the lawsuit, and (6) damages.[469] The tort of intentional spoliation of evidence consists of the following elements: (1) a pending or potential civil action; (2) knowledge of the spoliator of the pending or potential civil action; (3) willful destruction of evidence; (4) the spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action; (5) the intent of the spoliator to defeat a party's ability to prevail in the pending or potential civil action; (6) the party's inability to prevail in the civil action; and (7) damages.[470] Once the first six elements are established, there arises a rebuttable presumption that but for the fact of the spoliation of evidence, the party injured by the spoliation would have prevailed in the pending or potential litigation.[471] The spoliator must overcome the rebuttable presumption or else be liable for damages.[472] West Virginia recognizes spoliation of evidence as a stand-alone tort when the spoliation is the result of the negligence of a third party, and the third party had a special duty to preserve the evidence.[473]

Unlike a party to a civil action, a third-party spoliator is not subject to an adverse inference instruction or discovery sanctions.[474] Thus, when a third party destroys evidence, the party who is injured by the spoliation does not have the benefit of existing remedies.[475] Such a result conflicts with our policy of providing a remedy for every wrong and compensating victims of tortious conduct.[476] Accordingly, we believe that the negligent spoliation of evidence by a third party ought to be actionable in certain circumstances.[477]

Wisconsin

Not all destruction, alteration, or loss of evidence qualifies as spoliation.[478] The Court of Appeals of Wisconsin has adopted the *Struthers* process for evaluating the details, significance and sanctions concerning allegations of the destruction of evidence.[479] Under *Struthers*, in reviewing the conduct of the offending party, the trial court should consider not only whether the party responsible for the destruction of evidence knew, or should have known, at the time it destroyed the evidence that litigation was a distinct possibility, but also whether the offending party destroyed documents which it knew, or should have known, would constitute evidence relevant to the pending or potential litigation.[480] Courts have fashioned a number of remedies for evidence spoliation.[481] The primary remedies used to combat spoliation are pretrial discovery sanctions, the spoliation inference, and recognition of independent tort actions for the intentional and negligent spoliation of evidence. Wisconsin has recognized the first two remedies.[482] Where the evidence spoliation inference is applied, the trier of fact is permitted to draw an inference from the intentional spoliation of evidence that the destroyed evidence would have been unfavorable to the party that destroyed it.[483]

Wyoming

In a case in which one or more of the factors under consideration warrants imposition of a sanction against the spoliating party, the court may choose to instruct the jury on the spoliation inference. This means to inform the jury that the lost evidence is to be presumed unfavorable to that party; preclude the spoliating party from introducing expert testimony concerning testing on the missing product or other evidence concerning the product; or dismiss the plaintiff's claim or the defendant's defense or grant summary judgment to the innocent party.[484]

A chart listing available spoliation sanctions by each Federal Circuit Court can be found within: *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497 (D. Md., 2010).

Notes

1. *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422 (S.D.N.Y. July 20, 2004).
2. *See* 49 C.F.R. § 396.3.
3. *See* 49 C.F.R. § 379, et seq.
4. *See* 49 C.F.R. 379.3; Appendix A to 49 C.F.R. § 379.
5. 49 C.F.R. § 379.5; § 379.7.
6. *Id.*
7. *See* ASTM E 2493–07, Standard for the Collection of Non-Volatile Memory Data in Evidentiary Vehicle Electronic Control Units.
8. *Bulkmatic Transport Co. v. Taylor*, 860 So. 2d 436 (Fla. App. 2003).
9. *Ashton v. Knight Transp., Inc.*, 772 F. Supp. 2d 772 (N.D. Tex., 2010).
10. *Lewy v. Remington Arms Co., Inc.*, 836 F.2d 1104 (8th Cir., 1987). "Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y., 2003); *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311 (Fed. Cir., 2011); *Williams v. New York City Transit Auth.*, 2011 U.S. Dist. LEXIS 120768 *10 (E.D.N.Y. 2011); *Doe v. Norwalk Cmty. Coll.*, 248 F.R.D. 372, 377 (D. Conn. 2007); *Crown Castle USA, Inc. v. Fred A. Nudd Corp.*, 2010 U.S. Dist. LEXIS 32982 *29 (W.D.N.Y. 2010); *Rhoades v. YWCA*, 2009 U.S. Dist. LEXIS 95486 *22 (W.D. Pa. 2009); *Arteria Prop. Pty Ltd. v. Universal Funding V.T.O., Inc.*, 2008 U.S. Dist. LEXIS 77199 *14 (D.N.J. 2008); *E.I. du Pont de Nemours & Co. v. Kolon Indus.*, 803 F. Supp. 2d 469, 496; 2011 U.S. Dist. LEXIS 79406 *69–70 (E.D. Va. 2011); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 524; 2010 U.S. Dist. LEXIS 93644 *93–94 (D. Md. 2010); *Jones v. Comsys IT Partners., Inc.*, 2010 U.S. Dist. LEXIS 89115 *2 (W.D.N.C. 2010); *Powell v. Town of Sharpsburg*, 591 F. Supp. 2d 814, 819; 2008 U.S. Dist. LEXIS 105398 *9 (E.D.N.C. 2008); *Yelton v. PHI, Inc.*, 2011 U.S. Dist. LEXIS 140936 *39 (E.D. La. 2011); *Gaalla v. Citizens Med. Ctr.*, 2011 U.S. Dist. LEXIS 57317 *4–5 (S.D. Tex. 2011); *Maggette v. BL Dev. Corp.*, 2009 U.S. Dist. LEXIS 116789 *9–10 (N.D. Miss. 2009); *Toth v. Parish*, 2009 U.S. Dist. LEXIS 16116 *5–6 (W.D. La. 2009); *Consol. Aluminum Corp. v. Alcoa, Inc.*, 244 F.R.D. 335, 339; 2006 U.S. Dist. LEXIS 66642 *9 (M.D. La. 2006); *Tantivy Communs., Inc. v. Lucent Techs., Inc.*, 2005 U.S. Dist. LEXIS 29981 *7 (E.D. Tex. 2005); *John B. v. Goetz*, 2010 U.S. Dist. LEXIS 8821 *209 (M.D. Tenn. 2010); *Forest Labs., Inc. v. Caraco Pharm. Labs., Ltd.*, 2009 U.S. Dist. LEXIS 31555 *11 (E.D. Mich. 2009); *Kemper Mortg., Inc. v. Russell*, 2006 U.S. Dist. LEXIS 20729 *2–3 (S.D. Ohio 2006); *Gregg v. Local 305 IBEW*, 2008 U.S. Dist. LEXIS 99075 *2 (N.D. Ind. 2008); *Mintel Int'l Group, Ltd. v. Neergheen*, 2008 U.S. Dist. LEXIS 122591 *8 (N.D. Ill. 2008); *Trickey v. Kaman Indus. Techs. Corp.*, 2010 U.S. Dist. LEXIS 103004 *12–13 (E.D. Mo. 2010); *MeccaTech, Inc. v. Kiser*, 2008 U.S. Dist. LEXIS 122927 *21 (D. Neb. 2008); *Bd. of Regents v. BASF Corp.*, 2007 U.S. Dist. LEXIS 82492 *15 (D. Neb. 2007); *Educ. Logistics, Inc. v. Laidlaw Transit, Inc.*, 2012 U.S. Dist. LEXIS 2652 *9 (D. Mont. 2012); *AtPac, Inc. v. Aptitude Solutions, Inc.*, 2011 U.S. Dist. LEXIS 40043 *21 (E.D. Cal. 2011); *Kinnally v. Rogers Corp.*, 2008 U.S. Dist. LEXIS

93659 *17–18 (D. Ariz. 2008); *UMG Recordings, Inc. v. Hummer Winblad Venture Partners* (*In re Napster, Inc. Copyright Litig.*), 462 F. Supp. 2d 1060, 1070; 2006 U.S. Dist. LEXIS 79508 *26 (N.D. Cal. 2006); *Hous. Rights Ctr. v. Sterling*, 2005 U.S. Dist. LEXIS 44769 *8 (C.D. Cal. 2005); *Pinstripe, Inc. v. Manpower*, Inc., 2009 U.S. Dist. LEXIS 66422 *4 (N.D. Okla. 2009); *Semsroth v. City of Wichita*, 2004 U.S. Dist. LEXIS 30726 *7–8 (D. Kan. 2004); *Point Blank Solutions, Inc. v. Toyobo Am., Inc.*, 2011 U.S. Dist. LEXIS 42239 *36 (S.D. Fla. 2011); *Zhi Chen v. District of Columbia*, 2011 U.S. Dist. LEXIS 101474 *7 (D.D.C. 2011).

11. *Bumstead v. Dillard*, 171 S.W.3d 201 (Tex. App. 2005).
12. *Dunham v. Condor Insur. Co.*, 57 Cal. App. 4th 24 (Cal. App. 1997).
13. *Andersen v. Mack Trucks, Inc.*, 793 N.E.2d 962 (Ill. App. 2003).
14. *R.A. Siegel Co. v. Bowen*, 539 S.E.873 (Ga. App. 2000).
15. Illinois Pattern Jury Instructions (Civil), § 5.01, (2011).
16. *Bachmeier v. Wallwork Truck Center*, 544 N.W.2d 122 (N.D., 1996).
17. *Porter v. Irwins Interstate Brick and Block Company*, 691 N.E.2d 1363 (Ind. App. 1998).
18. *Porter, supra*, 691 N.E.2d at 1365–1365.
19. *Story v. RAJ Props.*, 909 So. 2d 797 (Ala. 2005).
20. *Id.*
21. *Vesta Fire Ins. Corp. v. Milam & Co. Constr.*, Inc., 901 So. 2d. 84, 93 (Ala. 2004).
22. *Smith v. Atkinson*, 771 So. 2d 429, 433 (Ala. 2000).
23. *Killings v. Enter. Leasing Co.*, 9 So. 3d 1216 (Ala. 2008).
24. *Id.*
25. *Hazen v. Anchorage*, 718 P.2d. 456, 463 (Alaska 1986).
26. *Hibbits v. Sides*, 34 P.3d 327, 330 (Alaska 2001).
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Sweet v. Sisters of Providence*, 895 P.2d. 484, 493 (Alaska 1995).
32. *Id.*
33. *Sweet v. Sisters of Providence*, 895 P.2d. 484, 493 (Alaska 1995); *Nichols v. State Farm Fire & Cas. Co.*, 6 P.3d 300, 304 (Alaska 2000).
34. *Id.*
35. *Id.*
36. *Estate of Day by Strosin v. Willis*, 897 P.2d. 78, 81 (Alaska, 1995).
37. *La Raia v. Superior Court*, 722 P.2d. 286, 289 (Ariz. 1986); *Tobel v. Travelers Ins. Co.*, 988 P.2d. 148, 156 (Ariz. App. 1999).
38. *Lips v. Scottsdale Healthcare Corp.*, 224 Ariz. 266 (Ariz. 2010).
39. *Union Pac. R.R. Co. v. Barber*, 149 S.W.3d 325, 345 (Ark. 2004).
40. *Jackson v. Kelly*, 44 S.W.3d 328, 331(Ark. 2001).
41. *Bunn Builders, Inc. v. Womack*, 2011 Ark. 231 (Ark. 2011).
42. *Temple Community Hospital v. Superior Court*, 976 P.2d. 223, 225 (Cal. 1999).
43. *Cedars-Sinai Med. Ctr. v. Superior Court*, 954 P.2d. 511, 512 (Cal. 1998).
44. *Galanek v. Wismar*, 68 Cal. App. 4th 1417, 1427 (Cal. 1999).
45. *Forbes v. County of San Bernardino*, 101 Cal. App. 4th 48, (Cal. App. 2002).
46. *Id.*
47. *Id.*
48. *Id.*

49. *Id.*
50. *Pfantz v. Kmart Corp.*, 85 P.3d 564, 568 (Colo. App. 2003).
51. *Id.*
52. *Id.*
53. *Id.*
54. *Newell v. Engel*, 899 P.2d. 273 (Colo. App. 1994).
55. *Id.*
56. *Lauren Corp. v. Century Geophysical Corp.*, 953 P.2d. 200, 204 (Colo. App. 1998).
57. *People ex rel. A.E.L. v. M.E.C.*, 181 P.3d 1186 (Colo. App. 2008).
58. *Rizzuto v. Davidson Ladders, Inc.*, 905 A.2d. 1165, 1183 (Conn. 2006).
59. *Id.* at 1178.
60. *Diana v. NetJets Servs.*, 974 A.2d 841, 856 (Conn. Super. Ct., 2007).
61. *Lucas v. Christina Skating Ctr.*, 722 A.2d. 1247, 1248 (Del. 1998).
62. *Id.* at 1251.
63. *Id.* at 1250.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Brandt v. Rokeby Realty Co.*, 2004 Del. Super. LEXIS 297 *30 (Del. Super. 2004); *In re Wechsler*, 121 F. Supp. 2d. 404, 415, (D. Del. 2000); *Burris v. Kay Bee Toy Stores*, 1999 WL 1240863 *1.
69. *Playtex, Inc. v. Columbia Casualty*, 1993 LEXIS 286 (Del. Super. 1993).
70. *Herbin v. Hoeffel*, 806 A.2d. 186, 191 (D.C. App. 2002).
71. *Holmes v. Amerex Rent-a-Car*, 710 A.2d. 846, 849 (D.C. App. 1998).
72. *Id.* at 852.
73. *Id.* at 854.
74. *Battocchi v. Washington Hosp. Center*, 581 A.2d. 759, 765 (D.C. App. 1990).
75. *Id.*
76. *Id.* at 766.
77. *Martino v. Wal-Mart Stores, Inc.*, 908 S0.2d. 342 (Fla. 2005).
78. *Id.* at 347.
79. *Id.*
80. *Id.* at *10.
81. *Id.* at 15.
82. *Safeguard Mgmt. v. Pinedo*, 865 So. 2d. 672, 674 (Fla. App. 2004).
83. *Shaw v. Cambridge Integrated Servs. Group, Inc.*, 888 So. 2d. 58, 63 (Fla. App. 2004).
84. *Id.*
85. *Id.*
86. *Id.* at 63.
87. *Royal & Sunalliance v. Lauderdale Marine Ctr.*, 877 So. 2d. 843, 845 (Fla. App. 2004).
88. *Fleury v. Biomet, Inc.*, 865 So. 2d. 537,539 (Fla. App. 2003).
89. *Id.*
90. *Id.*
91. *Continental Insurance Co. v. Herman*, 576 So. 2d. 313, 315 (Fla. App. 1990).
92. *Id.*
93. *Torres v. Matsushita Elec. Corp.*, 762, So. 2d. 1014, (Fla. App. 2000).
94. *Bouve & Mohr, LLC v. Banks*, 618 S.E.2d 650 (Ga. App. 2005).
95. *Id.*

96. *Id.*
97. *Id.*
98. *Id.*
99. *Johnson v. Riverdale Anesthesia Assocs., P.C.*, 547 S.E.2d 347, 350 (Ga. App. 2001).
100. *Condra v. Atlanta Orthopaedic Group, P.C.*, 285 Ga. 667, 669 (Ga. 2009).
101. *Id.*
102. *Id.*
103. *R.A. Siegel Co. v. Bowen*, 539 S.E.2d 873, 877 (Ga. App. 2000).
104. *Owens v. American Refuse Sys., Inc.*, 536 S.E.2d 782, 784 (Ga. App. 2000).
105. *Id.*
106. *Id.*
107. *Matsuura v. E.I. du Pont de Nemours & Co.*, 73 P.3d 687, 705 (Haw. 2003).
108. *Id.*
109. *Stender v. Vincent*, 992 P.2d. 50, 57 (Haw. 2000).
110. *Courtney v. Big O Tires, Inc.*, 87 P.3d 930, 933 (Ida. 2003).
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Ricketts v. E. Idaho Equip.*, 51 P.3d 392, 396 (Ida. 2002).
129. *Murray v. Farmers Ins. Co.*, 796 P.2d 101, 107 (Ida. 1990).
130. *Dardeen v. Kuehling*, 821 N.E.2d 227, 231 (Ill. 2004).
131. *Id.*
132. *Id.* at 231.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Boyd v. Travelers Ins. Co.*, 652 N.E.2d 267, 270 (Ill. 1995).
137. *Id.*
138. *Id.*
139. *Id.*
140. *Adams v. Bath & Body Works, Inc.*, 830 N.E.2d 645 (Ill. App. 1st Dist. 2005).
141. *Id.*
142. *Dardeen v. Kuehling*, 821 N.E.2d 227, 231 (Ill. 2004).
143. *Gribben v. Wal-Mart Stores, Inc.*, 824 N.E.2d 349, 355 (Ind. 2005).
144. *Id.* at 351.

145. *Id.*
146. *Id.*
147. *Gribben, supra* at 354.
148. *Id.*
149. *Id.*
150. *Id.* at 355.
151. *Id.*
152. *Id.*
153. *Cahoon v. Cummings*, 734 N.E.2d 535, 545 (Ind. 2000).
154. *Id.*
155. *Id.*
156. *Glotzbach v. Froman*, 854 N.E.2d 337, 341 (Ind. 2006).
157. *Id.* at 341. (Ind. 2006).
158. *Lynch v. Saddler*, 656 N.W.2d 104, 111 (Iowa 2003).
159. *Id.*
160. *Id.* at 111.
161. *Meyn v. State*, 594 N.W.2d 31, 34 (Iowa 1999).
162. *Id.* at 34.
163. *OMI Holdings v. Howell*, 918 P.2d 1274, 1284 (Kan. 1996).
164. *Id.* at 1283.
165. *Foster v. Lawrence Memorial Hosp.*, 809 F. Supp. 831, 838 (D. Kan. 1992).
166. *Id.*
167. *Id.*
168. *Superior Boiler Works, Inc. v. Kimball*, 259 P.3d 676 (Kan. 2011).
169. *Monsanto Co. v. Reed*, 950 S.W.2d 811, 815 (Ky. 1997).
170. *Desselle v. Jefferson Parish Hospital District No. 2*, 887 So. 2d 524, 534, (La. App. 2004).
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Pham v. Contico Int'l, Inc.*, 759 So. 2d 880, 883 (La. App. 2000).
176. *Quinn v. RISO Invs., Inc.*, 869 S0.2d 922, 927 (La. App. 2004).
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Johnson v. Evan Hall Sugar Coop.*, 836 So. 2d 484, 489 (La. App. 2002).
182. *Simpson v. Cumberland County*, 2011 Me. Super. LEXIS 73 (Me. Super. 2011).
183. *Id.*
184. *Hollingsworth & Vose Co., Connor*, 764 A.2d 318, 343 (Md. App. 2000).
185. *Id.*
186. *Id.*
187. *Shpak v. Schertle*, 625 A.2d 1037, 1042 (Md. App. 1993).
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.* at 1043.

192. *Gath v. M/A-COM, Inc.*, 802 N.E.2d 521, 527 (Mass. 2003).
193. *Id.*
194. *Id.* at 534.
195. *Keene v. Brigham & Women's Hosp., Inc.*, 786 N.E.2d 824, 833 (Mass. 2003).
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Fletcher v. Dorchester Mut. Ins. Co.*, 773 N.E.2d 420, 425 (Mass. 2002).
205. *Id.*
206. *Id.* at 426.
207. *Bloemendaal v. Town & Country Sports Ctr. Inc.*, 659 N.W.2d 684, 686–87 (Mich. App. 2002).
208. *Id.*
209. *Id.*
210. *Id.*
211. *Citizens Ins. Co. of Am. v. Juno Lighting, Inc.*, 635 N.W.2d 379, 382 (Mich. App. 2001).
212. *Id.*
213. *Id.*
214. *Id.*
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