



Risk Manager

Watch out for Spoliation

By: Justin Ward. *This was posted Tuesday, December 21st, 2010*

Risk Management attorney [John Butler](#) has provided a spoliation primer.

Whether handling a claim or already involved in litigation, it is important to understand the basics and the law regarding spoliation. This is becoming a significant aspect in all litigation, including cases involving products, transportation or premises liability.

“Spoliation” means the intentional destruction of evidence and when it is established, the fact finder may draw inference that evidence destroyed was unfavorable to party responsible for spoliation.

In general rule, it should not be surprising that the courts disfavor a party who destroys evidence. The remedies available to a victim of spoliation include sanctions, an adverse inference instructions and possible dismissal. These are all potential road maps to victory for a party harmed by spoliation.

Spoliation of evidence can occur in a number of ways. Documents can be shredded or misplaced. Physical items can be repaired, destroyed, or otherwise disposed of. Evidence can also be sold, and thereby rendered unavailable. In each of these situations, a party can suffer due to the conduct of the spoliator.

Example 1 Person A has rented a trailer from a Company B and had Company B put a hitch on her vehicle. She is then rear-ended on the highway and sues the other driver and Company B for her injuries. She alleges that Company B was negligent in installing the hitch and trailer. However, after filing the lawsuit, and before discovery has taken place, she sells her vehicle to a third party.

Example 2 In a motor vehicle accident case, the issue will be whether or not Person A’s tail lights were working at the time of the accident. Prior to filing a lawsuit, Person A has taken the vehicle for a complete repair of the electrical system, including the lights.

Example 3 A trip and fall at a premises. An employee of the premises disposes of the item that was tripped over.

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The Supreme Court of Virginia has recognized that to impose sanctions based upon spoliation, the party must have acted in bad faith and the non-offending party must have been prejudiced. *Gentry v. Toyota Motor Corporation*, 252 Va. 30, 34 (1996).

In *Gentry*, the plaintiff's expert destroyed certain portions of an automobile which was the subject of the lawsuit and the judge dismissed the case due to spoliation of evidence. However, the Court overturned the decision of the trial judge because it found no evidence that the plaintiff acted in bad faith. *Gentry*, 252 Va. at 34. The Court also found that the defendant in that case was not prejudiced. *Id.*

The negligent or intentional loss, alteration, or destruction of material evidence may also be considered spoliation under certain circumstances. *Wolfe v. Virginia Birth-Related Neurological Injury Compensation Program*, 580 S.E.2d 467, 475 (Va. Ct. App. 2003). Sanctions are sometimes granted because a party should not be permitted to intentionally or negligently destroy evidence and then substitute its own biased description of the evidence in place of the actual evidence. *Id.* In the event sanctions are warranted for spoliation of evidence, they are intended to both remedy the prejudice to the innocent party and to punish the responsible party. *Gentry v. Toyota Motor Corp.*, 471 S.E.2d 485, 488 (Va. 1996).

A spoliation inference instruction may be given "if, at the time the evidence was lost or destroyed, 'a reasonable person in the [party's] position should have foreseen that the evidence was material to a potential civil action.'" *Wolfe* at 475.

In a relatively recent case, decided in January of 2008 by the United States District Court for the Eastern District of Virginia, the court held that although a retailer did not act in bad faith in disposing of an item that was tripped over by a customer, the item was disposed of intentionally. Thus, an adverse inference jury instruction was appropriate.

As the issue of spoliation can occur in small and large cases, it is important to understand the potential evidence and spoliation problems at the outset following any loss.

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