

Spoliation of Evidence: Considerations and Remedies

A recurring issue for many trial attorneys is spoliation, which occurs when evidence is altered, stolen or has become otherwise unavailable. Often, the effects of spoliation cannot be reversed or remedied by the use of alternate evidence. Given the unique obstacles that arise when a party is deprived of evidence, the New York courts have had to decide what remedies are warranted in order to compensate the aggrieved party.

Duty

In order to determine if a remedy is appropriate, the courts require a duty to preserve the evidence that is unavailable. A duty can be established by law or by virtue of the relationship between the parties. Specifically, the courts will ask if the alleged spoliator is a party to the action in which the evidence is needed. In addition, the courts will ascertain if the aggrieved party made an actual effort to preserve the evidence either by reaching out to the spoliator, the court or any other party to ensure the preservation of the evidence sought.

In the 2004 *Metlife Auto & Home v. Joe Basil Chevrolet Inc.* case, the Court of Appeals held that an automobile owner's insurer had no duty to preserve the insured's vehicle for another insurance company that was a party to the action.¹ After the insured's vehicle caught fire and caused damage to a home, the automobile insurer indemnified the insured for the fire, took the vehicle into storage and eventually disposed of the vehicle. Because the vehicle was destroyed, the homeowner's insurer—the third-party plaintiff—was unable to inspect it for purposes of the homeowner's own insurance claim.

The Court emphasized, and the homeowner's insurer conceded,

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that it could have easily prevented the disposal of the vehicle by obtaining a pre-action disclosure request for a temporary restraining order to preserve the vehicle, making a written request to the insurer or offering to cover the automobile insurer's cost to preserve it. While the homeowner's insurer had orally requested that the automobile insurer maintain the vehicle, the Court deemed this

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insufficient to establish a duty to preserve it.

Other cases also held that an alleged spoliator does not have a duty to preserve evidence if he or she does not receive notice of a pending lawsuit or if the party seeking the evidence waits an unreasonable amount of time to request or preserve the evidence.

For example, the Appellate Division, First Department, declined to impose any sanctions on the defendant landlord for destroying the stove that allegedly caused his former tenant's injuries because the landlord had no duty to preserve the stove after the tenant had moved out.² The tenant took no action to preserve the stove any time before commencing his lawsuit; did not notify the landlord that he was suing him; and neglected to request the stove from the

landlord until four years after the accident occurred.

Importance of the Evidence

Even if a party has a duty to preserve evidence, imposing sanctions for spoliation is not necessarily warranted unless the unavailable evidence was crucial to the underlying cause of action. Unavailable evidence can be deemed "crucial" to a case in one of two ways. First, the evidence can be crucial if the plaintiff cannot sustain his burden of proof without it. Second, the evidence can also be crucial in establishing a defense. Generally, if the absence of the evidence severely prejudices either or both parties, the evidence will likely be deemed crucial to the case or at least important enough to justify imposing sanctions for spoliation.

In *Dessources v. Good Samaritan Hosp.*, the Second Department refused to impose any spoliation sanctions where the hospital in a medical malpractice action failed to preserve the fetal monitoring strips.³ The court reasoned that even if the hospital's loss of the strips violated New York State Department of Health policies, the strips were not crucial to the plaintiff's claim that the doctor had negligently delivered the infant plaintiff and thus no remedy was warranted.

Remedies

If a sanction is warranted for spoliation, the courts will consider the importance of the evidence in determining the appropriate sanction. Where the evidence has value to the proceeding, but is not crucial, less harsh remedies such as an adverse inference or preclusion are typically more appropriate. For a court to resort to a drastic remedy like dismissal or striking a party's pleading, the evidence must be absolutely crucial to the case.

In the 2009 *Kugel v. City of New York* case, the Second Department held that crucial evidence was not destroyed and thus striking a company's pleading was not warranted where a towing » Page 7

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company president destroyed documents because he believed the corporation had dissolved.⁴ The court did, however, find that a lesser sanction was warranted which should be determined at the lower court's discretion.

Where the unavailable evidence is crucial to a case, even granting summary judgment dismissing the wrongdoer's case has been deemed an appropriate sanction for spoliation. In the 2008 *King v. Gregruss Mgmt. Corp.* case, the Second Department held that summary judgment for the defendant was warranted when the plaintiff in a products liability action destroyed a steel drum that allegedly exploded.⁵ The court held that because the absence of the drum would prevent the plaintiff from sustaining his burden, he had spoliated crucial evidence, and thus the court dismissed his complaint.

The Second Department ruled to the contrary in *Barnes v. Paulin* that same year.⁶ In *Barnes*, the court held that where the defendant destroyed the vehicle that he was driving when he allegedly struck the plaintiff, it was improper to preclude the defendant from raising a seat belt defense and/or introducing expert testimony because the existence of the defendant's vehicle was not crucial to the plaintiff's case or to the tes-

timony of the defendant's expert witness. However, the *Barnes* court did find that an adverse inference instruction to the jury regarding the unavailability of the defendant's vehicle was appropriate.

In *Weber v. Harley Davidson Motor Co. Inc.*, the court deemed both an adverse inference instruction against the defendant and preclusion of the defendant's evidence proper where the defendant in a products liability suit destroyed circuit breakers in a motorcycle it manufactured. The court deemed these remedies appropriate because the motorcycle was the very subject matter of the plaintiff's product liability suit and thus a key piece of evidence that was needed in the case.⁷ Since the destruction of the motorcycle severely prejudiced the plaintiff's ability to sustain his burden of proof, the court added an additional remedy of having the manufacturer produce any and all information it had about the motorcycle's circuit breakers such as data, tests and analysis that it had performed.

Both preclusion and an adverse inference instruction were also appropriate sanctions for spoliation in *Utica Mut. Ins. Co. v. Berkoski Oil Co.*⁸ In *Utica*, Utica Insurance Company paid out benefits to its insureds under a homeowner's policy because of a burst pipe in the insured's home and then sued the oil company that had installed the allegedly defective piping. However, Utica had negligently disposed of the very pipe that it claimed was defective in its suit against the oil company.

The Second Department modified the lower court's order which dismissed Utica's case, reasoning that this sanction was excessive. The court held that while the loss of the pipe did prejudice all the parties, only a negative inference instruction against Utica and preclusion of any evidence of Utica's inspection of the pipes were warranted because it did not destroy the pipe intentionally and the defendant could still sustain its defense that the piping was not defective.

The drastic remedy of dismissal was warranted in *Neal v. Easton Aluminum Inc.*, where the very bicycle at issue in a products liability case was stolen from the office of the plaintiff's attorney.⁹ After the bicycle disappeared, the defendant moved to dismiss the plaintiff's claim. In reversing the lower court, the Second Department found that the bike was crucial because mere photos of the bike could not substitute for an inspection and the bike's unavailability would be fatal to both parties. Even though there had been no intentional wrongdo-

ing on the plaintiff's part, the cruciality of the evidence made even a drastic remedy, such as dismissing the plaintiff's claim, proper.

The Second Department again imposed a drastic sanction for spoliation, this time summary judgment for the plaintiff in a Labor Law claim. In *Ederly v. Access Direct Systems Inc.*,¹⁰ the plaintiff maintenance worker was injured after his employer's ladder allegedly "kicked out" from under him, causing him to fall and sustain injuries. The plaintiff's employer inspected the ladder immediately after the plaintiff fell and concluded that the ladder had no "visible defects," although it appeared "old," and did not have any rubber shoes or stickers approved by the Occupational Safety and Health Administration. The plaintiff brought suit three months later, only to find that the defendant employer had already disposed of the ladder.

When the defendant moved for summary judgment, the plaintiff cross-moved for summary judgment and to strike the defendant's answer based on spoliation. The court precluded the defendant from introducing evidence contradicting the plaintiff's prima facie showing of a defect in the ladder. Based on the defendant's inability to controvert the plaintiff's claim, the court then granted summary judgment for the plaintiff.

The court opined that because the plaintiff was bleeding heavily at the time of the accident and

taken from the scene in an ambulance and the defendant immediately reported the incident to his insurance carrier, the defendant employer was on notice of the suit and should not have disposed of "key" evidence at a time when it "should have been obvious" that the plaintiff would sue.

Surveillance Tapes

While spoliation is a recurring issue in product liability cases, spoliation also frequently arises in slip and fall cases where tapes from cameras on the defendant's property become unavailable. While the analysis of whether to impose spoliation sanctions in these cases is the same, deciding the cruciality of the evidence often hinges upon whether the footage on the defendant's surveillance tape shows where the accident occurred or where an allegedly dangerous condition existed on the defendant's property. Typically, where the unavailable surveillance tape shows neither, a negative inference instruction is warranted, at best.

For example, in *Deveau v. CF Galleria at White Plains L.P.*, the Second Department held that a misplaced surveillance tape was not "central" to the plaintiff's slip and fall case where the tape did not even show the puddle that plaintiff allegedly slipped in or how long it had been on the floor.¹¹ The First Department agreed in the 2009 *Minaya v. Duane Reade Int'l Inc.* case, where defendant Duane Reade destroyed a surveillance video that did not show the dangerous condition in its stairwell which allegedly caused the plaintiff to fall.¹²

Even where a "missing" surveillance tape did show footage of the area where the plaintiff fell, the Second Department held in the 2008 *Barone v. City of New York* case that only a negative inference charge against the defendant was warranted because the plaintiff was perfectly able to recall and recount the incident and thus was fully able to proceed with her claim even without the surveillance tapes.¹³ Similarly, the Fourth Department held in *Tomasello v. 64 Franklin Inc.* that striking a defendant's affirmative defense was not warranted despite its loss of a surveillance tape of the premises where the plaintiff fell because the plaintiff was able to depose those who had viewed it.¹⁴

Often what saves spoliators from harsh sanctions is the fact that it is common practice to tape over older surveillance footage with newer footage, thus rendering destruction of the tapes accidental and done during the ordinary course of business. The First Department held in *Scansarole v. Madison Square Garden L.P.* that no remedy was warranted where a videotape was destroyed although it showed the scene where the plaintiff fell through Madison Square Garden's glass window, since the destruction of the tape was the result of an inadvertent and technical mishap done in the ordinary course of taping over old surveillance footage.¹⁵ But, as the First Department held in *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn, LLP*, where the videotape is destroyed intentionally and in bad faith, harsher remedies for spoliation such as dismissal are appropriate.¹⁶

Independent Tort

Typically, a sanction for spoliation of evidence is a remedy within itself. However, the Court of Appeals in *Ortega v. City of New York* addressed the issue of whether New York would recognize a cause of action for an independent tort when spoliation occurs.¹⁷

In *Ortega*, the plaintiff brought suit after his motor vehicle caught fire and caused him injury. The Court found that despite the fact that the City of New York was an uninvolved, non-party in the suit, it had a duty to preserve the vehicle because the plaintiff had obtained a court order requiring it to do so. The city ultimately violated the court order by destroying the vehicle and selling it for scrap metal before the plaintiff could examine it.

When the plaintiff attempted to bring an independent tort action for spoliation against the city, the Court held that such a cause of action against a non-party was not cognizable under New York law because causation and damages could not be proven without "resorting to speculation" regarding the very evidence that was destroyed. In other words, an independent tort for spoliation could not be proven without showing "that the jury in the underlying action would have found differently if the original, unaltered evidence had been before them. Such a showing requires proof of the very thing that can no longer be proved: the precise nature of the original item." The Court further asserted that current available remedies are sufficient to deter spoliation and compensate victims of spoliation, even if spoliation is done negligently by a non-party.

Conclusion

The courts consider a broad range of factors in deciding when and what spoliation remedies are appropriate. At the very least, there must be a duty to preserve evidence in order to sustain a spoliation claim and the court will then ask if the evidence is essential to the case and whether either party is prejudiced without it.

The courts generally impose a lesser sanction for spoliation when it would be substantially unfair to punish the spoliator to a harsher degree. The same factors considered in whether to award a remedy in the first place, such as cruciality, prejudice, intentionality or negligence of the spoliation, and the party versus non-party distinction, are also relevant in determining how harsh a sanction for spoliation should be. In addition, the decision comes down to balancing the interests of the parties and determining what if any other remedies or alternatives the aggrieved party has available to them.

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1. *MetLife Auto & Home v. Joe Basil Chevrolet Inc.*, 775 N.Y.S.2d 754 (N.Y. 2004).
 2. *Hennessey v. Rest. Assoc. Inc.*, 807 N.Y.S.2d 349 (1st Dept. 2006).
 3. *Dessources v. Good Samaritan Hosp.*, 885 N.Y.S.2d 113 (2d Dept. 2009).
 4. *Kugel v. City of New York*, 873 N.Y.S.2d 630 (1st Dept. 2009).
 5. *King v. Gregruss Mgmt. Corp.*, 870 N.Y.S.2d 103 (2d Dept. 2008).
 6. *Barnes v. Paulin*, 860 N.Y.S.2d 221 (2d Dept. 2008).
 7. *Weber v. Harley Davidson Motor Co. Inc.*, 871 N.Y.S.2d 698 (2d Dept. 2009).
 8. *Utica Mut. Ins. Co. v. Berkoski Oil Co.*, 872 N.Y.S.2d 166 (2d Dept. 2009).
 9. *Neal v. Easton Aluminum Inc.*, 790 N.Y.S.2d 70 (2d Dept. 2005).
 10. *Erdely v. Access Direct Systems Inc.*, 847 N.Y.S.2d 108 (2d Dept. 2008).
 11. *Deveau v. CF Galleria at White Plains L.P.*, 796 N.Y.S.2d 119 (2d Dept. 2005).
 12. *Minaya v. Duane Reade Int'l Inc.*, 886 N.Y.S.2d 154 (1st Dept. 2009).
 13. *Barone v. City of New York*, 861 N.Y.S.2d 709 (2d Dept. 2008).
 14. *Tomasello v. 64 Franklin Inc.*, 845 N.Y.S.2d 643 (4th Dept. 2007).
 15. *Scansarole v. Madison Square Garden L.P.*, 827 N.Y.S.2d 1 (1st Dept. 2006).
 16. *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn, LLP*, 743 N.Y.S.2d 72 (1st Dept. 2002).
 17. *Ortega v. City of New York*, 845 N.Y.S.2d 773 (N.Y. 2007).