



Sam A. Elbadawi, Attorney  
Sugarman Law Firm, LLP  
360 S. Warren St., 5<sup>th</sup> Floor  
Syracuse, New York 13202  
Direct Dial: (315) 362-8917  
Fax: (315) 474-0235  
[selbadawi@sugarmanlaw.com](mailto:selbadawi@sugarmanlaw.com)

## **SPOLIATION**

### **A Summary of New York Case Law Concerning The**

#### **Failure to Preserve Key Evidence involved in Pending or Future**

In the context of product liability actions, spoliation is a relatively new area of litigation which has drawn the attention of New York courts in recent years. In general, there are two types of product liability claims. The first involves a claim based upon a manufacturer's defect. In these types of claims, establishing the condition of the product at the time of the accident (either directly or circumstantially) is the only way to prove or disprove the claim. The second involves claims based upon a design defect. Unlike manufacturer's defect claims, defective design claims do not always require proof of the condition of the product at the time of the accident. In either type of product liability case, if the condition of the product can not be proven directly or can only be proven circumstantially, issues regarding fairness and prejudice inevitably arise. This article will focus on claims arising from spoliated evidence and will explore and summarize recent judicial decisions, remedies, and tests which address spoliation claims in the context of New York civil practice.

Spoliation is the destruction or alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. Travelers Indemnity Co., v. CC Controlled Combustion, 2003 NY Slip Op. 51430(U). In New York, the duty of a party to preserve evidence, and the exposure of that party to statutory (CPLR 3126) or common law sanctions for failing to do so is well established. MetLife Auto & Home v. Basil Chevrolet, 303 AD2d 30 (4th Dept. 2002) (citations omitted). Penalties for a refusal to comply with disclosure requests are provided for in section CPLR 3126 which provide for such sanctions as:

- a) resolving the matter against the party who destroyed or failed to preserve the evidence;
- b) prohibiting the opposing party from supporting or opposing claims based on such spoliated evidence;
- c) striking the pleadings of the disobedient party.

Determination of the appropriate sanction for spoliation, is confined to the sound discretion of the court and the statute's proposed penalties were not intended to be exhaustive. DiDomenico v. C&S Aeromatik Supplies, Inc., 252 AD2d 41,49 (2d Dept. 1998). Even if the evidence in question was altered or destroyed before the alleged spoliator became a party, sanctions may be appropriate if it was on notice that the evidence in question might be needed for future litigation. Langer v. Well Done, Ltd., 11 Misc.3d 1056(A), 815 NYS2d 494, 2006 WL 462125, Sup. Ct., Nassau Co.,1/31/06) [plaintiff's loss of oven cleaner deprived the defendant manufacturer of its ability to confront the plaintiff's product liability claim with incisive evidence - complaint dismissed].

Spoliation sanctions are not limited to cases where the evidence was altered or destroyed willfully or in bad faith since a party's **negligent** loss, destruction or alteration of evidence can be just as damaging to another party's ability to present a case or defense. *Id*, see also, Mudge, Rose, Guthrie, Alexander & Ferdon v. Penguin Air Cond. Corp., 221 AD2d 243 (1st Dept. 1995) [dismissal of complaint warranted where plaintiff negligently lost key item of evidence before defendants could examine it].

The key test courts use to determine whether spoliation sanctions are warranted is whether the lost or missing evidence “*deprives the moving party of the ability to establish his or her defense or case.*” Enstrom v. Garden Place Hotel, 27 AD3d 1084 (4<sup>th</sup> Dept. 2006). Where the moving party fails to meet that test, the Fourth Department has held that an adverse inference charge at the time of trial is the more appropriate remedy. Id.

### **Tort of Spoliation**

In Ortega v. City of New York, 11 Misc.3d 848 (Sup. Ct., Kings Co., 2/16/06), the plaintiff commenced an action for spoliation and contempt for allegedly wrongful destruction of a vehicle involved in a motor vehicle accident. Prior to commencement of the action, the plaintiff had unsuccessfully sought pre-suit disclosure of the vehicle which was subsequently destroyed. The court recognized the tort of spoliation as a valid cause of action and cited with approval a Montana Supreme Court's elements which were the following:

1. Existence of a potential civil action; and
2. A legal or contractual duty to preserve the evidence which is relevant to the action; and

3. Destruction of that evidence; and
4. Significant impairment in the ability to prove the potential civil action; and
5. Causal connection between destruction of the evidence and inability to prove the claim; and
6. Significant possibility of success of the potential civil action if the evidence were available; and
7. Damages.

Although it is unclear whether the tort of spoliation and the Montana Supreme Court's elements will be adopted statewide, New York courts' recognition of an employee's right to directly sue his employer for spoliation of key evidence is well recognized. Monteiro v. R.D. Werner Co., Inc., 301 AD2d 636 (2d Dept. 2003), Ripepe v. Crown Equip. Corp., 293 AD2d 462 (2d Dept. 2002), Curran v. Auto Lab Serv. Ctr., 280 AD2d 636 (2d Dept. 2001), DiDomenico v. C & S Aeromatik Supplies, 252 AD2d 41 (2d Dept. 1998), Vaughn v. City of New York, 201 AD2d 556 (2d Dept. 1994), Coley v. Ogden Mem. Hosp., 107 AD2d 67 (3d Dept. 1985).

One of the key factors courts consider when determining whether an employee may pursue a direct cause of action based upon spoliation against his employer is whether the employer was on notice that the item in question was key evidence in future or pending litigation. Ripepe at 66, Balaskonis v. HRH Constr. Corp., 2003 NY Slip Op. 18159. In Travelers Indemnity Co. v. CC Controlled Combustion, 2003 NY Slip Op. 51430(U), the court described the movant's burden as follows:

*In order to sustain a claim of spoliation, the movant must demonstrate that the party alleged to have spoliated the evidence was on notice of a potential lawsuit. This notice creates a duty on the part of the party in possession of the evidence to see that it is preserved.*

### **Summary of Cases where Spoliation Sanctions were Imposed**

In Shea v. Spellman, 4 Misc.3d 1008(A) 2004 WL 1631192 (NY Supp.)

(Unpublished decision) (Sup. Ct., Bronx Co., 7/8/2004), the court provided a useful framework for determining the appropriate remedy for addressing cases involving spoliated evidence:

1. Control of the spoiled evidence prior to its destruction; and
2. Destruction of evidence (either negligently or intentionally) which precludes examination by an adverse party; and
3. The evidence which was destroyed was key and crucial evidence;  
and
4. If the destroyed evidence effectively prevents a party from completely prosecuting or defending a claim spoliation sanctions are warranted; and
5. If the destroyed evidence does not prevent a party from completely prosecuting or defending a claim, a preclusion Order precluding the spoliator from offering said evidence is warranted; and
6. The fact that the evidence previously destroyed was not requested prior to its destruction is not an excuse when the spoliator was on notice that it would be needed for future litigation and, as such, should be preserved.

Id.

In McRae v. Lackman Culinary Services, Inc., (236 NYLJ Sup. Ct. Nassau Co., 11/6/06), the court granted the plaintiff's application to Strike the defendant's Answer and affirmative defenses. The case involved a motor vehicle negligence

claim. At issue was whether the defendant's vehicle and its employee were involved in a motor vehicle accident in which a van struck the plaintiff who was crossing an intersection. The plaintiff identified the van through its license plate. Defendant's employee subsequently checked its log book (used to record usage of the van in question) to determine whether the van in question was signed out by one of its employees at the time of the accident and indeed involved in the accident. The log book was subsequently discarded (either negligently or intentionally) and the defendant's employee was unable to recall the relevant entries in the log book, if any. Even though production of the log book was never requested prior to its destruction and prior to commencement of the action, the court held that spoliation sanctions were warranted because the defendant was on notice "*that the evidence may be needed for future litigation.*" In McRae, the court held that destruction of the log book prevented the plaintiff from proving her case with "incisive evidence".

In Molinari v. Smith, ( 236 NYLJ, Sup. Ct., Richmond Co., 8/25/06 ), the court struck the defendant's Answer and affirmative defenses upon re-argument as a sanction for spoliation of evidence. The case involved a product liability claim involving a trampoline. Following the defendant's deposition, counsel for the plaintiffs requested an inspection of the trampoline which was subsequently discarded by the defendants. The court noted that the defendants were on notice of the plaintiffs' intention to inspect it and were aware that the inspection was integral to the plaintiffs' case. Although the court held that the defendants' actions were merely negligent (ie not intentional) and did not prevent the plaintiffs

from proving a prima facie case based upon deposition testimony and photographs of the trampoline which were disclosed, sanctions were imposed because the *“plaintiffs have been denied an opportunity for inspection by an expert, and further denied the persuasive act of presenting the actual trampoline to the jury for its evaluation.”*

## **CONCLUSION**

To prevent the specter of unpredictable litigation arising from spoliation of key evidence, attorneys and clients are well advised to identify all “key evidence” that may be relevant to pending or future litigation at the earliest opportunity. Once that “key evidence” is identified, it should be immediately secured and preserved so it is available for inspection and production. At the earliest opportunity, all interested parties should be placed on notice that the evidence has been preserved and is available for inspection. Lastly, the possessor of the key evidence should provide all interested parties with timely and meaningful access to same for the purpose of inspection. In cases where a potential party or an adverse party is in control of key evidence, that party must be placed on notice of possible future litigation, the fact that the evidence they possess is key evidence in pending or possible future litigation, and the fact that they have an obligation to preserve that key evidence and make it available for inspection.