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Spoliation of Evidence in Illinois: The Law after *Boyd v. Traveler's Insurance Co.*

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Spoliation of Evidence in Illinois: The Law After *Boyd v. Traveler's Insurance Co.*

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I. INTRODUCTION

The doctrine of spoliation of evidence addresses the all too common

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Judge Frossard makes the following statement regarding this Article:

> By no statement contained in these materials or in discussions related to these materials do I intend to commit or appear to commit with respect to cases, controversies, or issues within cases that are likely to come before me in court.
>
> I take great effort to make sure that each litigant who appears before me is afforded every protection guaranteed by the Constitution. Our legal system is based on the principle that an independent, fair, and competent judiciary will interpret and apply the laws that govern us. As a member of the judiciary, I would never prejudge a case nor would I commit or appear to commit with respect to cases, controversies, or issues within cases that are likely to come before me.
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> Judge Margaret O'Mara Frossard

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problem of the destruction of evidence vital to prospective or ongoing litigation.[1] Without the evidence necessary to litigate a legal wrong, a wronged or injured party appears to lose a legal remedy.[2] Accordingly, an act of spoliation may deny a party evidence necessary to prosecute or defend a lawsuit.[3] An act of spoliation of evidence increases the likelihood that one party gains an unfair advantage in litigation. In order to prevent an unjust result, courts have provided redress to confront the problem of evidence destruction.

Several remedies have emerged to deter and punish the practice of destroying evidence. These remedies include criminal penalties,[4] unfavorable evidentiary presumptions,[5] discovery sanctions,[6] and the actual dismissal of lawsuits.[7] These remedies, however, fail to address the situation where a third party, not involved in the ongoing litigation, destroys the evidence. Consequently, several jurisdictions, including California and Florida, now recognize a new tort, spoliation of evidence, which allows injured parties to recover against those who intentionally or unintentionally, damage, lose, or destroy evidence necessary for an injured party to prosecute its case.[8]

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1. Robert W. Thompson, *To the Prevailing Party Goes the Spoils: An Overview of an Emerging Tort in California*, 18 W. ST. L. REV. 223, 225 (1990). Cases have dealt with spoliation problems in all types of litigation since the nineteenth century. *See, e.g.*, Fox v. Hale & Nocross Silver Mining Co., 41 P. 308, 322 (Cal. 1895) (referring to spoliation of evidence as a "tortious act"). In criminal cases, prosecutors may violate a defendant's constitutional and due process rights if they purposely destroy evidence material to guilt or innocence. *See* Arizona v. Youngblood, 488 U.S. 51, 57 (1988). In many cases, procedures for testing evidence often destroy the evidence and therefore prevent one party from performing its own tests. *See* Melissa A. Bruzzano, *Spoliation of Evidence in California*, 24 SW. U. L. REV. 123, 138-42 (1994). As long as there is litigation, courts will need to establish rules and procedures to address the spoliation of evidence problem.

2. *See* Boyd v. Traveler's Ins. Co., 652 N.E.2d 267 (Ill. 1995); *see also* Smith v. Superior Court, 198 Cal. Rptr. 829 (Ct. App. 1984); Bondu v. Gurvich, 473 So. 2d 1307 (Fla. Dist. Ct. App. 1984).

3. *See* American Family Ins. Co. v. Village Pontiac GMC, Inc., 585 N.E.2d 1115 (Ill. App. 2d Dist. 1992).

4. *See* Alisa Thorne-Cook, Note, *Altered or Absent Evidence: The Tort of Spoliation:* Wilson v. Beloit Corp., 43 ARK. L. REV. 453, 464-66 (1990).

5. *See infra* Part III.A (discussing adverse influences or presumptions in jury instructions).

6. *See infra* Part III.B (discussing various types of discovery sanctions).

7. *See infra* notes 87-88 and accompanying text.

8. *See* Hazen v. Municipality of Anchorage, 718 P.2d 456 (Alaska 1986) (recognizing intentional spoliation of evidence); Smith v. Superior Court, 198 Cal. Rptr. 829 (Ct. App. 1984) (recognizing the tort of intentional spoliation of evidence); Bondu v. Gurvich, 473 So. 2d 1307 (Fla. Dist. Ct. App. 1984) (recognizing the tort of negligent spoliation of evidence); Coleman v. Eddy Potash, Inc., 905 P.2d 185 (N.M. 1995) (dismissing claim for negligent spoliation of evidence and upholding claim for

Unlike courts in California and Florida, the Illinois Supreme Court recently refused to recognize a tort of intentional or negligent spoliation of evidence.[9] Instead, the court held that an injured party may state a cause of action under traditional common law negligence principles. This Article will examine the various remedies that are available when evidence has been damaged, lost, or destroyed.[10] These remedies will be reviewed in light of their effectiveness in rectifying wrongs committed through an act of spoliation of evidence.

First, this Article offers a background to the recurring problem of spoliation of evidence.[11] Next, this Article discusses the traditional remedies against a spoliator of evidence, as imposed by the courts of Illinois and other jurisdictions.[12] These remedies include a presumption against a spoliator and discovery sanctions against a spoliator. Then, this Article explores the tort of spoliation.[13] In exploring the tort of spoliation, this Article focuses on the development of the tort,[14] the elements of the tort,[15] the Illinois courts' response to the tort,[16] and the problems of duty and damages.[17] Finally, this Article concludes that the traditional remedies against spoliators and the tort of spoliation provide injured litigants with effective remedies.[18]

II. BACKGROUND: THE RECURRING PROBLEM OF SPOLIATION OF EVIDENCE

Spoliation, the act of damaging something,[19] occurs in everyday life. Spoliation may occur because of the human temptation to gain an advantage or to avoid responsibility. Simply, this type of conduct has

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intentional spoliation of evidence); Smith v. Howard Johnson Co., 615 N.E.2d 1037 (Ohio 1993) (holding that a cause of action exists for interference with evidence); Ortego v. Trevino, 938 S.W.2d 219 (Tex. Ct. App. 1997) (recognizing tort of spoliation of evidence "in an appropriate factual setting"). *See also infra* Part IV discussing the history and elements of the spoliation tort and explaining Illinois' response to the tort of negligent spoliation of evidence.

9. *See* Boyd v. Traveler's Ins. Co., 652 N.E.2d 267 (Ill. 1995) (affirming dismissal of claim for wanton and willful spoliation of evidence and reversing dismissal of negligent spoliation of evidence claim stated under existing negligence law).

10. *See infra* Part III.

11. *See infra* Part II.

12. *See infra* Part III.

13. *See infra* Part IV.

14. *See infra* Part IV.A.

15. *See infra* Part IV.B.

16. *See infra* Part IV.C.

17. *See infra* Parts IV.D-E.

18. *See infra* Part V.

19. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 2203 (1986).

been called the act of intentional spoliation of evidence. In prospective or ongoing litigation, the evidence damaged likely would harm or threaten the spoliator. Therefore, in a lawsuit, spoliation of evidence occurs when one party damages, loses, or destroys evidence. In many instances, the obvious explanation for this type of action is that, with the evidence available, the party accused of spoliation would not be held liable or responsible for prior the conduct that resulted in the lawsuit. On the other hand, a party seeking damages in a lawsuit may destroy evidence to prevent the opposing party from presenting a valid defense. The spoliation of evidence may undermine, if not prevent, the prosecution or defense of a lawsuit.

Occasionally a spoliator of evidence will not be a party to the litigation. A third party may destroy evidence central to litigation, even though that party may have little or no connection to the litigation. In this context, the third party often destroys evidence with no intention of disrupting or preventing the underlying lawsuit.[20] Of course, the spoliator's relationship to the underlying lawsuit does not always explain the motive for the act of spoliation. Therefore, just as a third party might intentionally destroy evidence to undermine an ongoing lawsuit for any number of reasons,[21] a party to a litigation might negligently destroy evidence as well.[22]

The sanctions for an act of spoliation vary. Traditionally, criminal penalties have existed for acts of destroying evidence.[23] In addition, courts have either instructed juries to presume or infer bad conduct from the act of spoliation in their deliberations,[24] or they have imposed discovery sanctions against the spoliator.[25] However, these types of sanctions only benefit the non-spoliator if, first, evidence still remained to prosecute or to defend the underlying lawsuit and, second, a party to the lawsuit committed the acts of spoliation. Consequently, jurisdictions have recently recognized acts of spoliation as distinct torts which serve to expand the remedies available when evidence is destroyed.

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20. *See* Velasco v. Commercial Bldg. Maintenance Co., 215 Cal. Rptr. 504 (Ct. App. 1985) (plaintiff sued building maintenance crew for accidentally destroying evidence while cleaning an attorney's office).

21. *See* Wilson v. Beloit Corp., 725 F. Supp. 1056 (W.D. Ark. 1989) (employer alleged to have intentionally destroyed machine parts that an employee needed for a products liability claim for injuries sustained during the course of employment), *aff'd*, 921 F.2d 765 (8th Cir. 1990).

22. *See* Boyd v. Traveler's Ins. Co., 652 N.E.2d 267, 269-70 (Ill. 1995).

23. *See infra* note 29.

24. *See infra* Part III.A.

25. *See supra* Part III.B.

Underlying all these forms of sanctions is the problem of measuring damages.[26] After an act of spoliation has occurred, courts must be careful to craft a balanced remedy to adequately punish the spoliator and provide fairness to the lawsuit without giving the injured party a large windfall.[27] It is often speculative whether the act of spoliation has any prejudicial effect on the non-spoliator. The destruction of evidence that possibly may have been helpful to a party to the lawsuit is not often reason alone for the courts to sanction the spoliator.

III. COURT-IMPOSED REMEDIES AGAINST A SPOLIATOR

Besides the tort of spoliation,[28] courts have developed several remedies to address the problem of spoliation. These remedies include: (1) imposing criminal penalties against a spoliator;[29] (2) jury instructions containing an adverse inference or adverse presumption against the offending party;[30] (3) preclusion of evidence as a discovery sanction;[31] and (4) dismissal of the complaint as a discovery sanction.[32]

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26. *See infra* Part IV.E.2 (discussing the problem of quantifying damages).

27. *See generally* Thorne-Cook, *supra* note 4, at 473-75 (discussing the process of proving damages in spoliation of evidence claims).

28. *See infra* Part IV (explaining the tort of spoliation of evidence).

29. *See* JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE § 5.14, at 200-03 (1989) (listing statutes that criminalize the destruction of evidence); *see also* 720 ILL. COMP. STAT. ANN. 5/31-4(a) (West 1993) (criminalizing the destruction of evidence in a pending criminal case).

30. When a party willfully or without reasonable excuse fails to produce evidence in its control, Illinois courts use Illinois Pattern Jury Instruction ("I.P.I.") 5.01. ILLINOIS PATTERN JURY INSTRUCTIONS, Civil, § 5.01 (West 1995). The jury is allowed to draw an adverse inference or presumption against the party who failed to produce the evidence. Instruction number 5.01 states:

> If a party to this case has failed [to offer evidence] within his power to produce, you may infer that the [evidence] would be adverse to that party if you believe each of the following elements:
>
> 1. The [evidence] was under the control of the party and could have been produced by the exercise of reasonable diligence.
> 2. The [evidence] was not equally available to an adverse party.
> 3. A reasonably prudent person under the same or similar circumstances would have [offered the evidence] if he believed it favorable to him.
> 4. No reasonable excuse for the failure has been shown.

Id. (brackets in original).

31. *See infra* Part III.B.

32. *See infra* Part III.B.

A. Adverse Inference or Presumption

Courts throughout the country have employed jury instructions to remedy the dilemmas created by acts of spoliation.[33] In the typical case, the court instructs the jury to infer or to presume that the destroyed evidence, were it available, would have helped the non-spoliator's case.[34] Through the adverse jury instruction, many courts use the terms presumption and inference interchangeably.[35] Consequently, whether a court tells the jury to presume the destroyed evidence negatively against the spoliator or to draw an adverse inference against the spoliator makes little difference.[36] For instance,

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33. *See* GORELICK, *supra* note 29, at 55 nn.122-23; *see also* Beers v. Bayliner Marine Corp., 675 A.2d 829, 832 (Conn. 1996) (in a civil context the majority of jurisdictions employ the adverse jury instruction against the spoliator); Brown v. Hamid, 856 S.W.2d 51, 56-57 (Mo. 1993) (en banc) (describing Missouri's history of "an inference unfavorable to the spoliator") (citations omitted); Fitzpatrick v. ACF Properties Group, Inc., 595 N.E.2d 1327, 1334 (Ill. App. 2d Dist. 1992) (Illinois Pattern Jury Instruction, Civil, 5.01 (West 1995) "provides that a presumption arises that the evidence a party fails to produce would be unfavorable to him").

34. *See* GORELICK, *supra* note 29, at 50. *See also* Bihun v. AT&T Info. Sys., Inc., 16 Cal. Rptr. 2d 787 (Ct. App. 1993), *overruled in part on other grounds by* Lakin v. Watkins Indus., 863 P.2d 179 (Cal. 1993). In *Bihun*, the trial court employed the following instruction to attempt to remedy the defendant's destruction of one of its employee's personnel file:

> If you find that defendant AT&T Information Systems, Inc. willfully suppressed the personnel file of Peter Fellows, you may draw an inference that there was something damaging to defendant's case contained in that personnel file. Such an inference may be regarded by you as reflecting defendant's recognition of the strength of plaintiff's case generally and/or the weakness of its own case. The weight to be given such circumstance is a matter for your determination.

Id. at 795. While this language went beyond the model language of the California Evidentiary Codes, the appellate court acknowledged that this was a correct statement of the law. *Id.* at 796.

Other jurisdictions have developed different forms of the adverse presumption or inference instruction. *See, e.g., Beers*, 675 A.2d at 832-33 (Conn. 1996) (adverse inference or presumption instruction appropriate only if: (1) act of spoliation was intentional; (2) destroyed evidence is relevant to the issue upon which adverse inference is sought; (3) non-spoliator acted with due diligence in obtaining the destroyed evidence; and (4) jury is told it may apply the adverse inference at its discretion, but only after finding that the three conditions were met); Watson v. Brazos Elec. Power Co-op., 918 S.W.2d 639, 643 (Tex. Ct. App. 1996) (unfavorable presumption arises when one party fails to produce evidence in its control to rebut harmful evidence from the other side).

35. *See* May v. Moore, 424 So. 2d 596, 603 (Ala. 1982) (stating that "spoliation is a sufficient foundation for an inference of . . . guilt or negligence").

36. *Compare Watson*, 918 S.W.2d at 643 (declaring that "spoliation presumption" applies when spoliator fails to rebut harmful evidence introduced against it with evidence it had in its control), *with Beers*, 675 A.2d at 832 (holding that court may instruct jury to apply an "adverse inference" against spoliator), *and* Dileo v. Nugent,

the Missouri Supreme Court labeled this negative jury instruction as the "spoliation doctrine in evidence law," and the court stated that it was based on the principle that "all things are presumed against a wrongdoer."[37] The court then concluded that the instruction allows the jury to draw an adverse inference against the spoliator.[38]

Courts impose this negative inference to both punish the spoliator and to provide fundamental fairness to the underlying litigation.[39] The majority of jurisdictions, therefore, will only give this instruction if the spoliator intentionally destroyed the lost evidence.[40] These courts reason that without this intentional act or some related act of bad faith, the spoliator should simply not be held responsible for the lost evidence.[41]

In Illinois, the decision whether to give the adverse presumption jury instruction[42] on a party's failure to produce evidence at trial is left to the discretion of the trial court.[43] The failure to produce evidence raises a presumption that the evidence, if produced, would have been adverse to the party in control of that evidence.[44] The presumption does not apply if the evidence is equally available to either party.[45]

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592 A.2d 1126, 1132 (Md. Ct. Spec. App. 1991) (holding that "destruction of evidence by a party gives rise to inferences or presumptions which are unfavorable to the spoliator"), *cert. granted*, 599 A.2d 90 (Md. 1991).

37. Brown v. Hamid, 856 S.W.2d 51, 56 (Mo. 1993) (Missouri Supreme Court refused to recognize a tort of spoliation on the facts presented to it).

38. *See Brown*, 856 S.W.2d at 57.

39. *See* GORELICK, *supra* note 29, § 1.12, at 16.

40. *See* Beers v. Bayliner Marine Corp., 675 A.2d 829, 832 (Conn. 1996) (citing majority of jurisdictions that require intentional spoliation of evidence in order for a court to apply an adverse jury instruction); *see also* Rodriguez v. Schutt, 896 P.2d 881, 884 (Colo. Ct. App. 1995), *aff'd in part and rev'd in part on other grounds*, 914 P.2d 921 (Colo. 1996) (en banc). The Colorado Appellate Court in *Rodriguez* stated that most courts will only give the adverse jury instruction if "the destruction of evidence was intentional." *Id.* at 884. However, the court also recognized that in limited circumstances, when a party unintentionally loses or destroys evidence, the adverse instruction "may be appropriate even in the absence of bad faith, in order to remedy the evidentiary imbalance created by the loss or destruction of evidence." *Id.*

41. *See Beers*, 675 A.2d at 833; *see also* Henderson v. Tyrrell, 910 P.2d 522, 533-35 (Wash. Ct. App. 1996) (concluding that without bad faith by the spoliator, there is no real evidence that the act of spoliation was done to destroy adverse evidence against the spoliator and thus the instruction is not necessary to address any wrong), *amended by* 1996 Wash. App. LEXIS 78 (Wash. Ct. App. March 14, 1996).

42. *See* I.P.I. No. 5.01.; *see also supra* note 30 and accompanying text.

43. *See* Roeseke v. Pryor, 504 N.E.2d 927, 933 (Ill. App. 1st Dist. 1987); Anderson v. Chesapeake & Ohio Ry. Co., 498 N.E.2d 586, 598 (Ill. App. 1st Dist. 1986). *See also* I.P.I. § 5.01.

44. Berry v. Breed, 36 N.E.2d 591, 593-95 (Ill. App. 2d Dist. 1941).

45. Flynn v. Cusentino, 375 N.E.2d 433 (Ill. App. 3d Dist. 1978).

Furthermore, while trial court discretion determines when the adverse presumption instruction will be given, one of two factors will trigger the application of this discretion: (1) a lack of a reasonable excuse for the nonproduction; or (2) a willful withholding of the evidence, both as determined by the court.[46] Similar to the majority rule, Illinois courts generally give this type of instruction only if the spoliator intentionally destroyed the evidence to gain an advantage.[47]

In *Haynes v. Coca-Cola Bottling Co.*,[48] for instance, the plaintiff's attorney lost a can of Coke that the plaintiff alleged contained the soft drink that injured her. The appellate court reasoned that because the evidence was accidentally lost, the trial court acted properly in not instructing the jury about the negative inference instruction against the spoliator.[49]

However, in a similar case involving lost evidence, the appellate court reversed the trial court's dismissal of a complaint due to the plaintiff's alleged spoliation.[50] In that case, *Wakefield v. Sears, Roebuck & Co.*,[51] the appellate court indicated that there was insufficient evidence that the plaintiff deliberately disregarded the court's order to produce the evidence. The case was remanded to the trial court so that it could impose an appropriate sanction less drastic than dismissal of the complaint, such as utilization of Illinois Pattern Jury Instruction No. 5.01[52] on a failure to produce evidence.[53] This case recognized jury instruction 5.01 as a possible remedy for spoliation in situations where it is not necessarily deliberate.

While it is clear the adverse inference or presumption instruction is the least severe of the remedies designed to address the spoliation

46. Coupon Redemption, Inc. v. Ramadan, 518 N.E.2d 285, 290 (Ill. App. 1st Dist 1987).

47. Fitzpatrick v. ACF Properties Group, 595 N.E.2d 1327, 1333 (Ill. App. 1st Dist. 1992); Haynes v. Coca-Cola Bottling Co., 350 N.E.2d 20, 26 (Ill. App. 1st Dist. 1976). In addition, before giving the adverse instruction, some courts require that the spoliator intended both to destroy the evidence and to perpetuate a fraud. *See* Brown & Williamson Tobacco Co. v. Jacobson, 827 F.2d 1119, 1134 (7th Cir. 1987); State v. Langet, 283 N.W.2d 330, 333 (Iowa 1979). Other courts only look to whether the act of spoliation itself was intentional. Beers v. Bayliner Marine Corp., 675 A.2d 829, 829 (Conn. 1996). Another approach crafts the jury instruction based on the intent or motive of the spoliator. *See* Dileo v. Nugent, 592 A.2d 1126, 1126 (Md. 1991); Henderson v. Tyrrell, 910 P.2d 522, 533 (Wash. Ct. App. 1996).

48. 350 N.E.2d 20, 26 (1976).

49. *Id.*

50. Wakefield v. Sears, Roebuck & Co., 592 N.E.2d 539, 543-44 (Ill. App. 1st Dist 1992).

51. 59 N.E.2d 539, 543-44 (1992).

52. *See supra* note 30 and accompanying text.

53. *Id.* at 543-44.

problem, it is less clear when such instructions will actually be given. Whether to give Illinois Pattern Jury Instruction No. 5.01 is a matter within the sound discretion of the trial court.[54] The factual circumstances surrounding the failure to produce evidence, of course, differ in each case.

Moreover, in the absence of a finding of willful withholding of the evidence, the adverse presumption instruction may nonetheless be applicable if a reasonable excuse for nonproduction is not offered.[55] The Illinois Appellate court has very recently held that the mere fact that defendants conducted a good faith search for records that were inadvertently lost did not constitute a reasonable excuse for nonproduction of the missing records.[56]

However, in several other cases, the trial court has refused to give the instruction because the spoliator provided a reasonable excuse for its failure to produce the destroyed or missing evidence. In *Singh v. Air Lines, Inc.*,[57] for instance, the record revealed a reasonable excuse for failure to produce all of decedent's W-4 forms. Consequently, the fact that the plaintiff could not locate these forms, and the fact that

54. *See* Roeseke v. Pryor, 504 N.E.2d 927, 927 (Ill. App. 1st Dist. 1987); Anderson v. Chesapeake & Ohio Ry. Co., 498 N.E.2d 586 (Ill. App. 1st Dist. 1986).

55. Bubrick v. Northern Illinois Gas, Co., 264 N.E.2d 560, 564-65 (Ill. App. 1st Dist. 1970) (court found that spoliator provided no reasonable explanation as to why records that had not been destroyed in the ordinary course of business were not produced, and that the lower court properly gave adverse inference instruction to jury).

56. Ivey v. Loyola Hosp., 1- 95-1657, Rule 23 Order (Ill. App. Ct. 1997). In that case, the defendants could not find tally sheets for sponges used during a surgical procedure of plaintiff where, as a result of the surgery, sponges were left in plaintiff's abdomen. *Id.* The plaintiff did not have access to these tally sheets and was severely prejudiced by the loss. *Id.* Therefore, although the defendant had no intent to destroy the evidence, the claim that a search was conducted for the tally sheets was not a reasonable excuse for their nonproduction. *Id. See also* Dugan v. Weber, 530 N.E.2d 1007, 1010 (Ill. App. 1st Dist. 1988) (holding that the mere loss of evidence does not constitute a reasonable excuse for nonproduction); Roeseke v. Pryor, 504 N.E.2d 927, 932-33 (Ill. App. 1st Dist. 1987) (holding that although the defendant did not intentionally destroy missing evidence, I.P.I. 5.01 was proper because the defendant produced no excuse for its nonproduction). *But see* Chiricosta v. Winthrop-Breon, 635 N.E.2d 1019 (Ill. App. 1st Dist. 1994). In *Chiricosta*, the plaintiff appealed the trial court's refusal to give the 5.01 jury instruction for the defendants' failure to produce results of a blood gas test and transfer logs and log sheets. *Id.* at 1039. The appellate court affirmed because the defendant had produced a reasonable excuse, which was that the evidence was lost. *Id.* The court also noted that the lost evidence was incorporated into other medical evidence and records which was produced to the plaintiff at trial. *Id.* Finally, qualifying its decision, the court cautioned "that [its] holding is not one which permits a party to avoid the impact of I.P.I. 5.01 by simply asserting that a record is lost. Some records may be of such importance that it would be unreasonable to accept a party's excuse that the records were lost." *Id.*

57. 520 N.E.2d 852, 859 (Ill. App. 1st Dist. 1988).

these forms were available to both sides, proved that the trial court correctly chose not to give the adverse presumption instruction.[58] In addition, in *Laport v. Lake Michigan Management Co.*,[59] the defendant provided a reasonable excuse for destroyed inspection reports.[60] The reports were destroyed in the normal course of business before the lawsuit was filed, and thus the trial court sin its discretion properly refused to give the adverse presumption instruction.[61] Clearly, what is determined to be a reasonable excuse depends on the facts of each case.

The adverse inference or presumption jury instruction is most helpful in cases where the lost evidence does not preclude a party from proving some essential fact of its case.[62] Through this type of negative instruction, the court tells the jury to infer that the evidence would have helped the party who wished to present it.[63] In this way, the spoliator can be held responsible for its conduct, and the fact-finder has a means to weigh or to apply the destroyed evidence.[64]

One problem with the adverse inference remedy is the situation of negligent destruction of evidence by a party to the litigation. Without the intent to destroy or, in essence, the intent to undermine the pending litigation, there seems no reason to provide a harsh punishment against the spoliator, such as an adverse jury instruction.[65] In this situation, an adverse inference may provide an unfair windfall to the injured

58. *Id.* at 859.

59. 625 N.E.2d 1, 5 (Ill. App. 1st Dist. 1991).

60. *Id.* at 5.

61. *Id.*; *see also* Myre v. Kroger Co., 530 N.E.2d 1122, 1125 (Ill. App. 1st Dist. 1988).

62. The evidence can be helpful to the plaintiff in proving its case to the jury, or the evidence can help the defendant in either countering the plaintiff's case or establishing an affirmative defense.

63. A party cannot use this presumption to prove an essential fact of its case, but a party can use this to demonstrate that the spoliator did not want the evidence because the evidence is harmful to the spoliator's case. *See* GORELICK, *supra* note 29, at 51-52.

64. When evidence is destroyed, the accuracy of the jury's decision will be affected. However, the negative inference against the spoliator attempts to even the field.

65. *See* Haynes v. Coca-Cola Bottling Co., 350 N.E.2d 20, 26 (Ill. App. 1st Dist. 1976). Once again, the court distinguished between deliberate destruction and careless mistake, and focused the jury upon the fact that the evidence was destroyed. *Id.* Here, the jury may use this to infer that one party is guilty or acted inconsistent with its position at trial, even though the party never intended to destroy the evidence. *Id.* at 26. More importantly, the destroyed evidence may have little materiality to the underlying proceeding, and it would be simply unfair to use the negligent destruction of this evidence against the spoliator. *Id.*

party based on mere speculation that potentially favorable evidence was negligently destroyed.[66]

The negative inference or presumption does seem to work fairly well where a party to the lawsuit intentionally destroys the evidence.[67] The jury is not only informed about the party's specific act of spoliation, but the judge also highlights the seriousness of this fact by allowing the jury to use it against the spoliator. As a result, the jury can be expected to attempt to provide some remedy to the non-spoliator in its decision.

The adverse jury instruction allows the jury not only to use the act of spoliation to evaluate the evidence, but also to determine the effect this spoliation act has on damages to the non-spoliator. For a defendant to a lawsuit, a jury finding in its favor is all the determination that is necessary for a just result. For a plaintiff in a lawsuit, however, the jury could evaluate the materiality of destroyed evidence and calculate damages in the context of the original action.[68] Thus, at the same time the jury is using the lost evidence against the defendant, it is also calculating the plaintiff's damages in light of both the evidence it has and the fact that it does not have the destroyed evidence.[69]

The adverse inference or presumption, however, provides no relief where the spoliator is a third party. For instance, when a third party destroys evidence, neither fairness nor punishment dictates an adverse instruction. No equitable jury instruction can be crafted to help the non-spoliator provide fairness to the underlying litigation and avoid any punishment to the party not responsible for the act of spoliation. Simply, in this case, the non-spoliator obtains too much of a benefit against its innocent opponent. Therefore, the victim of spoliation has to look beyond the underlying lawsuit to obtain a fair remedy.[70]

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66. Nevertheless, the non-spoliator should not be left without any remedy. In fact, this party was not at fault for the destruction of evidence that may have helped it prove its case. Hence, some courts have recognized negligent spoliation either as a separate tort or used traditional common law principles to help the non-spoliator.

67. *See* Miller v. Montgomery County, 494 A.2d 761, 768 (Md. 1985).

68. *See* Boyd v. Traveler's Ins. Co., 652 N.E.2d 267, 271 (Ill. 1995); *see also supra* notes 62-64 and accompanying text.

69. This type of damage calculation may require another jury instruction. To avoid speculation as to how the lost evidence would prove up damages, while at the same time allowing the jury to consider the act of spoliation, courts could tell juries or provide a formula as to how the lost evidence affects monetary loss or some other form of damages. In spoliation cases, the plaintiff's damages are often very difficult to calculate and are not conducive to a neat formula. *See infra* Part IV.E.2 (discussing the problem of quantifying damages).

70. *See infra* Part IV (discussing the tort of spoliation).

B. Discovery Sanctions

The act of spoliation may also constitute a violation of a discovery rule or court order. Different jurisdictions have designed different sanctions for violations of discovery rules or court orders ranging from fines to dismissal of the lawsuit.[71] The act of spoliation may be intentional, negligent, or accidental. Nevertheless, where discovery rules or court orders are violated or disregarded, courts will not hesitate to impose sanctions. Part of the justification for a discovery sanction is simply to enforce court rules.[72] When a party damages, loses, or destroys evidence in clear violation of the discovery rules or court orders, it should not only be punished for the acts of spoliation but for the violations of the discovery rules and court orders as well.

Furthermore, the type of discovery sanction typically mirrors the culpability of the spoliator.[73] Courts can impose monetary sanctions to attempt to remedy the spoliation problem. This type of fine works best when the destroyed evidence has minor relevance in the underlying litigation and when the lawsuit can continue despite the act of spoliation.

However, monetary fines, notwithstanding the amount, may not effectively deter or prevent spoliation when the destroyed evidence relates to a number of issues in the case. In an economic analysis, the benefit of the act of spoliation may outweigh any potential discovery fines, thereby rendering any fine meaningless.[74] Moreover, the non-spoliator, who loses access to valuable evidence and possible remedies, does not seem to obtain any fairness when the spoliator must simply pay a monetary fine to the court.

Consequently, courts can impose punitive discovery sanctions, such as barring a party from presenting evidence on an issue or dismissing

71. *See e.g.*, Graves v. Daley, 526 N.E.2d 679 (Ill. App. 3d Dist. 1988) (plaintiff's intentional destruction of evidence violated discovery rules and warranted dismissal of the lawsuit). Illinois Supreme Court Rule 219(c) lists several sanctions that a trial court may impose for a party's failure to comply with discovery rules, such as barring the filing of pleadings (ii), barring any witness from testifying (iv), and dismissal of all or parts of a lawsuit (vi). 73 Ill. 2d R.219(c). This newly amended rule also adds to the list of sanctions a trial court may impose a monetary penalty against a party or against that party's attorney as a result of the willful violation of the discovery rules, and the rule gives the trial court greater discretion to fashion an appropriate sanction against a party who has violated the discovery rules or orders. *Id.*

72. *See generally* Ralston v. Casanova, 473 N.E.2d 444 (Ill. App. 1st Dist. 1984) (court looked to Illinois Supreme Court Rule 219(c) and found that lower court did not abuse its discretion in barring plaintiff's testimony regarding condition of seat belt as discovery sanction for expert's destructive testing of seat belt in violation of protective orders preserving belt in its present condition).

73. *See* GORELICK, *supra* note 29, at 94.

74. *Id.*

the lawsuit, to remedy acts of spoliation.[75] Courts will usually impose this type of discovery sanction if the destroyed evidence relates to a number of critical issues in the case and the non-spoliator has been prejudiced.[76]

In general, Illinois courts focus upon the prejudice to the non-spoliator before imposing discovery sanctions.[77] In Illinois, a trial court is not required to find that a party intentionally destroyed evidence in order to bar testimony regarding that evidence.[78] The nature of the spoliation, whether intentional, negligent, or accidental, is of little importance to the analysis of whether sanctions should be imposed where prejudice is found.[79] Likewise, for cases using the prejudice standard, the point of time at which the act of spoliation occurred, and whether the evidence was damaged, destroyed, or lost

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75. *See* Rodgers v. St. Mary's Hosp., 597 N.E.2d 616, 619 (Ill. 1992) (Illinois statute imposes a duty on hospitals to preserve X-rays and other roentgen film for at least five years); *see also* X-ray Retention Act, 210 ILL. COMP. STAT. ANN. 90/1 (West Supp. 1996). Other jurisdictions have similar X-ray retention acts. *See, e.g.*, R.I. GEN. LAWS § 23-4.9-1 (1996).

76. Pursuant to Illinois Supreme Court Rule 219(c), Illinois courts have dismissed plaintiffs' lawsuits because of discovery violations. *See, e.g.*, Ralston v. Casanova, 473 N.E.2d 444 (Ill. App. 1st. Dist 1984) (holding that evidence of plaintiff's expert's test was not produced and therefore expert was prevented from testifying and summary judgment was granted); *In re* Estate of Soderholm, 469 N.E.2d 410 (Ill. App. 1st Dist. 1984) (holding that because the plaintiff failed to produce evidence which was in its control, default judgment was proper); Stegmiller v. H.P.E., Inc., 401 N.E.2d 1156 (Ill. App. 1st Dist. 1980) (holding dismissal appropriate because plaintiff was unable to comply with a production request and court order regarding evidence in its control).

77. *See* Shelbyville Mut. Ins. Co. v. Sunbeam Leisure Prods., 634 N.E.2d 1319 (Ill. App. 5th Dist. 1994). In *Shelbyville Mutual*, a grill exploded, causing injuries to the plaintiff. *Id.* at 1321. The plaintiff's investigators took parts of the grill for testing and unintentionally lost them. *Id.* at 1321-22. The trial court then barred plaintiff from presenting any evidence regarding the lost grill parts and thus granted summary judgment. *Id.* at 1322. The appellate court affirmed, reasoning that the destruction of evidence greatly prejudiced the defendant's ability to present a defense and justified dismissal of the lawsuit. *Id.* at 1322-23. As a result, the trial court properly barred the plaintiff from presenting any evidence on the lost grill parts and entered summary judgment. *Id.* at 1323. *See also* Shimanovsky v. General Motors Corp., 648 N.E.2d 91 (Ill. App. 1st Dist. 1994), *leave to appeal granted*, 1996 (holding that trial court erred in failing to hold a hearing to determine prejudice sustained by non-spoliator).

78. *See* Argueta v. Baltimore & Ohio Chicago Terminal R.R. Co., 586 N.E.2d 386 (Ill. App. 1st Dist. 1992). In this case, the trial court refused to admit the defendant's expert report into evidence. *Id.* at 392. The report contained test results on a piece of evidence that the defendant subsequently destroyed. *Id.* at 393. The court reasoned that the prejudicial effect of this destruction of evidence to the plaintiff's case outweighed the fact that defendant inadvertently destroyed the evidence. *Id.*

79. *See Stegmiller*, 401 N.E.2d at 1156. In *Stegmiller*, the evidence was not intentionally destroyed. *Id.* at 1157. However, the court found prejudice against the non-spoliator defendant. *Id.* at 1158. Therefore, the plaintiff's violation of discovery requests and a court order triggered the sanction of lawsuit dismissal. *Id.*

before or after the suit was filed, is of little importance to the decision to impose sanctions.[80]

In analyzing the nature of the prejudice, Illinois courts have found it helpful to focus on the type of evidence destroyed and how important that evidence would have been to the innocent party. Consequently, Illinois courts fashion discovery sanctions by examining both the type of evidence destroyed and the type of prejudice the non-spoliator sustained.[81] In *Farley Metals, Inc. v. Barber Coleman Co.*,[82] the trial court entered a protective order, requiring that no party conduct destructive testing or alter physical evidence from an explosion.[83] The plaintiff inadvertently destroyed the evidence, and the trial court dismissed the lawsuit pursuant to Illinois Supreme Court Rule 219(c).[84] Recognizing that Illinois courts look at the type of prejudice the spoliation act causes in crafting discovery sanctions, the appellate court rejected the plaintiff's argument that its lack of intent to destroy required a less harsh sanction.[85] The court noted that "[a] showing that plaintiff's noncompliance [with discovery rules] was reasonable does not hinge on intent; the critical issue is how important the undisclosed material was to the opposing party."[86]

Some courts relax or lessen the prejudice standard when the spoliation is in violation of a court order. In *Jones v. Goodyear Tire & Rubber Co.*,[87] the trial court granted the plaintiff's motion for a

80. *See* Graves v. Daley, 526 N.E.2d 679, 681-82 (Ill. App. 3d Dist. 1988). In *Graves*, the plaintiff sued the manufacturer of a furnace for damages caused in a fire. *Id.* at 680-81. During the discovery process, the manufacturer sought to inspect the furnace, but the plaintiff was unable to produce the evidence, which had been disposed of at the request of the plaintiff's insurer. *Id.* Because the plaintiff was unable to produce the evidence, the trial court issued discovery sanctions. *Id.* Specifically, the trial court barred "any evidence regarding the condition of the furnace." *Id.* The appellate court upheld the decision and consequently granted summary judgment. *Id.* at 682.

81. *See, e.g.*, Jones v. Goodyear Tire & Rubber Co., 137 F.R.D. 657 (C.D. Ill. 1991) (court held that amount of prejudice plaintiff must demonstrate was related to whether spoliator destroyed evidence in violation of protective order), *aff'd sub nom.* Marrocco v. General Motors Corp., 966 F.2d 220 (7th Cir. 1992); Farley Metals, Inc. v. Barber Coleman Co., 645 N.E.2d 964, 966 (Ill. App. 1st Dist. 1994) (court looked at prejudice resulting from inadvertent destruction of evidence).

82. 645 N.E.2d 964, 966 (Ill. App. 1st Dist. 1994).

83. *Id.* at 966.

84. *Id.* at 967.

85. *Id.* at 968.

86. *Id.*; *see also* Graves v. Daley, 526 N.E.2d 679 (Ill. App. 3d Dist. 1988). In this case, the nature of the spoliation, i.e. intentional or willful destruction, may have had an impact on the court's decision to dismiss the action even though the evidence was destroyed five months before the lawsuit. *Id.* at 681-82.

87. 137 F.R.D. 657 (C.D. Ill. 1991), *affirmed sub nom.* Marrocco v. General Motors Corp., 966 F.2d 220 (7th Cir. 1992).

directed verdict against Goodyear for an act of spoliation.[88] The court noted that the amount of prejudice that must be shown may vary depending upon whether the destruction of evidence is in violation of a protective order.

However, a number of Illinois cases have additionally held that the prejudice from an act of spoliation and a discovery violation did not warrant a harsh sanction, such as a default judgment or the barring of evidence. Once again, these Illinois cases focus on the type of prejudice the act of spoliation of evidence causes. [89]

Finally, some Illinois courts are imposing a duty on parties to preserve evidence, especially if they want to bring a lawsuit. The cases suggest that a party must preserve evidence when it knows or should have known that other parties would want to inspect the evidence. In these cases, courts have held that insurance companies have a duty, which predates the filing of a complaint, to preserve a product that is the basis of a product liability action the subrogating insurance company intends to file.[90]

Similarly, jurisdictions outside of Illinois have focused on the "duty" analysis when approaching a spoliation issue.[91] The Massachusetts Supreme Court noted a public policy rationale to

88. *Id.* at 664.

89. *See* Thomas v. Bombardier-Rotax Motorenfabrik, GmbH, 869 F. Supp. 551, 554 (N.D. Ill. 1994); H&H Sand & Gravel Haulers Co. v. Coyne Cylinder Co., 632 N.E.2d 697, 702 (Ill. App. 2d Dist. 1994).

Jurisdictions outside of Illinois have also focused on the prejudice sustained by the non-spoliator as the test for imposing sanctions. *See, e.g.*, Dillon v. Nissan Motor Co., Ltd., 986 F.2d 263, 267 (8th Cir. 1993); Puritan Ins. Co. v. Superior Court, 217 Cal. Rptr. 602, 608 (Ct. App. 1985) (barring the testimony of an expert because the expert misplaced the evidence and thus prevented the other side from testing the evidence); Patton v. Newmar Corp., 538 N.W.2d 116, 119 (Minn. 1995); Hirsch v. General Motors Corp., 628 A.2d 1108, 1128 (N.J. Super. 1993) (also recognizing that the intent of the spoliator is important in crafting the discovery sanction).

Similarly, jurisdictions outside of Illinois have focused on the intent of the spoliator and factor prejudice and the intent of the spoliator into their analysis. St. Mary's Hosp. v. Brinson, 685 So. 2d 33, 35 (Fla. App. Ct. 1996) (focusing on the spoliator's intentional disobedience of the court order); Fire Ins. Exchange v. Zenith Radio Corp., 747 P.2d 911, 914 (Nev. 1987).

90. *See, e.g.*, Allstate Ins. Co. v. Sunbeam Corp., 53 F.3d 804 (7th Cir. 1995) (recognizing the duty of an insurance company to preserve evidence); State Farm Fire & Casualty Co. v. Frigidaire, 146 F.R.D. 160, 162 (N.D. Ill. 1992) (in product liability case court imposed sanctions on plaintiff for failing to preserve evidence because "a plaintiff is obligated . . . to preserve the allegedly defective product which it knew, or reasonably should have known, would be material in the contemplated . . . action"); American Family Ins. Co. v. Village Pontiac GMC, Inc., 585 N.E.2d 1115, 1118-19 (Ill. App. 2d Dist. 1992) (focusing on the fact that "in anticipation of a subrogation claim [the insurance company] allowed the car to be destroyed").

91. Nally v. Volkswagon of America, Inc., 539 N.E.2d 1017, 1021 (Mass. 1989).

consider when resolving questions of spoliation, stating that as a matter of sound public policy, an expert should not be permitted intentionally or negligently to destroy evidence and then substitute his or her own description of it.[92]

Regardless of which standard is applied, courts have not been timid in entering judgments against parties when their acts of spoliation violate discovery rules or court orders.[93] Without any prejudice, the non-spoliator has not sustained any type of injury that requires a drastic sanction, such as evidence exclusion or case dismissal. In such circumstances, a monetary fine may be sufficient.[94] If, however, the spoliator is a third party, then the usual sanctions ranging from fines to dismissal may fail to provide relief to the non-spoliator.[95]

IV. THE SPOLIATION TORT

A. *The History of the Tort*

In the past fifteen years, many jurisdictions have expanded the available remedies for an act of spoliation to include a separate tort of spoliation. In light of the spoliation tort, individuals injured through an act of spoliation are now able to bring a lawsuit against the spoliator and recover monetary damages. In addition, courts have distinguished between intentional and negligent spoliation and thus have created and discussed the creation of two separate torts.

California first recognized the tort of spoliation in *Smith v. Superior Court*.[96] In that case, a part of a van sold by the defendant fell off the van and blinded the plaintiff in a car accident.[97] The defendant took control of the van after the accident and promised to preserve it as evidence. He ultimately lost the evidence. The plaintiff's lawsuit

92. *Id.*

93. As in Illinois cases, many courts also look to the relevance of the destroyed evidence. If the evidence relates to contested issues in the lawsuit, the dismissal of complaints and default judgments will be entered against the plaintiff. *See* Whitewater Valley Canoe Rental, Inc. v. Board of Franklin County Comm'rs, 507 N.E.2d 1001, 1007 (Ind. Ct. App. 1987); Merck & Co. v. Biorganic Labs., Inc., 196 A.2d 688, 690 (N.J. Super. Ct. App. Div. 1964).

94. *See* Iowa Ham Canning, Inc. v. Handtmann, Inc., 870 F. Supp 238, 244 (N.D. Ill. 1994) (defendants failed to establish prejudice because it produced no expert testimony concerning its need for the destroyed evidence).

95. *See supra* notes 20-21 and accompanying text.

96. 198 Cal. Rptr. 829 (Ct. App. 1984).

97. *Id.* at 831.

against the defendant thus included counts for negligent and intentional spoliation of evidence.[98]

Relying on the basic principle that where there is a wrong there is a remedy, the California appeals court established the tort of intentional spoliation of evidence.[99] The court recognized that the extent and amount of damages in a spoliation case is highly speculative.[100] Furthermore, the court noted that the plaintiff alleging spoliation would have difficulty demonstrating the effect the destroyed evidence would have had on the underlying lawsuit.[101] Nevertheless, the appellate court reasoned that the spoliation plaintiff must only allege a "reasonable probability" that, but for the destruction of the evidence, it would have successfully defended or prosecuted its lawsuit.[102]

Additionally, the California Supreme Court established the tort of negligent spoliation of evidence.[103] In *Williams v. State*,[104] a police officer investigated the scene of a car accident and took control of the critical evidence that allegedly caused the accident.[105] The police department, however, failed to preserve this evidence. The plaintiff then sued the police department because of its inability to bring a product liability lawsuit based on the destroyed evidence. The court held that because the officer voluntarily assumed responsibility of the care and maintenance of the evidence, the police department had a duty to preserve the evidence.[106]

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98. *Id.*

99. *Id.* at 837.

100. *See infra* notes 216-19 and accompanying text (discussing quantifying damages).

101. If the destroyed evidence is the only evidence available to a plaintiff to establish a prima facie case, then damages will be easier to prove. However, if the destroyed evidence simply constitutes one aspect of many pieces of evidence, then a plaintiff will have a harder time demonstrating actual damages. *See* Boyd v. Traveler's Ins. Co., 652 N.E.2d 267, 273 (Ill. 1995). In this context, the amount of damages, if any, relates to the type of prejudice the non-spoliator sustained. *See* H&H Sand & Gravel Haulers Co. v. Coyne Cylinder Co., 632 N.E.2d 697, 703 (Ill. App. 2d Dist. 1994) (holding that discovery sanctions against plaintiff for act of spoliation were not proper because defendant sustained no prejudice).

102. The model jury instruction for California provides for an intentional spoliation instruction. *See* California Jury Instruction BAJI 7.95 (8th ed., West 1994) (laying out the six elements required to establish intentional spoliation of evidence).

103. Williams v. State, 664 P.2d 137 (Cal. 1983). California also provides a jury instruction for negligent destruction of evidence. *See* California Jury Instruction 7.96 (8th ed., West 1993) (listing the seven elements of the negligent spoliation of evidence).

104. 664 P.2d 137 (Cal. 1983).

105. *Id.* at 138.

106. *Id.* at 143.

As in any other negligence action, the plaintiff must establish that the defendant had some duty to preserve the evidence. The court suggested that the mere negligence act of spoliation is not sufficient to establish the cause of action. Rather, for this tort, the spoliator must owe a duty to preserve evidence and breach this duty.[107]

Following California's lead, other jurisdictions established the tort of spoliation. Alaska recognized "the common cause of action in tort for intentional interference with prospective civil actions by spoliation of evidence."[108] Similarly, Florida recognized common law torts for both intentional and negligent spoliation of evidence.[109] The Florida Appellate Court reasoned that this cause of action was based on general public policy considerations, such as remedying the non-spoliator's "loss of an opportunity to litigate."[110]

Other jurisdictions, however, have rejected the spoliation of evidence tort.[111] For instance, the Connecticut Supreme Court recently held that the adverse jury instruction was the most appropriate remedy for a spoliation of evidence claim, and, consequently, the court did not recognize an action for spoliation of evidence.[112] Similarly, a

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107. *Id.*

108. *See* Hazen v. Municipality of Anchorage, 718 P.2d 456, 463 (Ala. 1986). The Alaska Supreme Court adopted the reasoning of *Smith v. Superior Court* in establishing the tort of intentional spoliation of evidence. *Id.* (citing Smith v. Superior Court, 198 Cal. Rptr. 829 (Ct. App. 1984)). The Alaska Supreme Court did not recognize the tort of negligent spoliation of evidence. *Id.*

109. *See generally* Miller v. Allstate, 573 So. 2d 24, 26 (Fla. Dist. Ct. App. 1990) (recognizing cause of action in contract for spoliation of evidence); Bondu v. Gurvich, 473 So. 2d 1307 (Fla. Dist. Ct. App. 1984) (recognizing tort of negligent spoliation).

110. *See* Continental Ins. Co. v. Herman, 576 So. 2d 313, 315 (Fla. Dist. Ct. App. 1990). Courts in Ohio have also recognized the tort of intentional spoliation of evidence. *See* Smith v. Howard Johnson Co., 615 N.E.2d 1037, 1038 (Ohio 1993) (affirmatively answering that Ohio will recognize a cause of action in tort for interference with or destruction of evidence).

111. *See, e.g.*, Brown v. Hamid, 856 S.W.2d 51, 56-57 (Mo. 1993) (refusing to recognize torts of intentional and negligent spoliation of evidence on the facts presented).

112. *See* Beers v. Bayliner Marine Corp., 675 A.2d 829, 832 (Conn. 1996); *see also* Brewer v. Dowling, 862 S.W.2d 156, 159-60 (Tex. Ct. App. 1993) (declaring that an adverse jury instruction, rather than a spoliation tort, was the just remedy). A recent Texas Appellate Court, however, recently recognized that Texas law supports a spoliation tort. *See* Ortego v. Trevino, 938 S.W.2d 219 (Tex. Ct. App. 1997). The Texas court concluded that the adverse jury instruction did not provide a "sufficient deterrent" to the spoliator and that "fundamental principles of justice" demanded the recognition of a spoliation tort.

In 1972, the Connecticut Supreme Court discussed a jury instruction regarding the failure of a party to produce a witness:

> The failure of a party to produce a witness who is within his power to produce and who would naturally have been produced by him, permits the inference that

Maryland appeals court rejected the spoliation tort, declaring that the negative inference jury instruction provided an adequate remedy to the non-spoliator.[113] Moreover, courts in Missouri, Michigan, and Arizona refused to create spoliation torts under the facts of the cases presented to them.[114] Refusing to recognize a new tort of spoliation, the Arizona Supreme Court held that common law tort principles already provided an available remedy to plaintiff's intentional spoliation tort claim.[115] These jurisdictions saw no need to expand on the traditional remedies or existing law to redress spoliation acts.

In addition, in *Coleman v. Eddy Potash, Inc.*,[116] the New Mexico Supreme Court recognized a cause of action for intentional spoliation of evidence, but in the same case refused to recognize a negligent spoliation cause of action.[117] According to the *Coleman* court, "generally speaking, liability for interference with prospective economic interests has been limited to cases of intentional interference."[118] Moreover, the court stated that creation of this new negligence tort would impose unnecessary duties on individuals to preserve evidence.[119] However, the court noted that a duty to preserve evidence for litigation may arise from traditional principles of

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> the evidence of the witness would be unfavorable to the party's cause. The party against whose cause an unfavorable inference is claimed, may, of course, offer evidence to explain the failure to produce the witness. There are two requirements for the operation of the rule: (1) The witness must be available; (2) he must be a witness whom the party would naturally produce.

Secondino v. New Haven Gas Co., 165 A.2d 598, 600 (Conn. 1972) (citing Ezzo v. Geremiah, 142 A. 461, 464). *See also* Rosalyn B. Bell, Maryland Jury Instructions and Commentary § 4.19 (1993). The Maryland instruction reads:

> In this case,_____(name of party) testified that [he or she] destroyed_____(whatever was destroyed). The destruction of evidence by a party gives rise to an inference which is unfavorable to the destroyer. That inference depends upon the intent of the party responsible for the destruction. Unexplained and intentional destruction of evidence by a party gives rise to an inference that the evidence would be unfavorable, but does not amount to proof that the evidence was unfavorable.
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> [If you find that_____(name of party) fraudulently tampered with or destroyed evidence, or intimidated the other side's witnesses, then you may also infer that_____(name of party) believes that [his or her] case is weak.]

113. *See* Miller v. Montgomery County, 494 A.2d 761, 768 (Md. Ct. Spec. App. 1985).

114. *See, e.g.*, La Raia v. Superior Court, 722 P.2d 286, 290 (Ariz. 1986); Panich v. Iron Wood Prods. Corp, 445 N.W.2d 795, 798 (Mich. Ct. App. 1989); Brown v. Hamid, 856 S.W.2d 51, 56-57 (Mo. 1993).

115. *La Raia*, 722 P.2d at 290.

116. 905 P.2d 185 (N.M. 1995).

117. *See id.*

118. *Id.*

119. *Id.*

negligence.[120] The court suggested that a new tort of negligent spoliation of evidence would be too expansive and impose an unreasonable duty on property owners to maintain their personal property.[121]

B. The Elements of the Tort of Spoliation of Evidence

Courts have established both the elements of intentional and negligent spoliation. Because parties often allege both acts of spoliation in their lawsuits, some courts have merged spoliation into one tort.[122] The majority of courts attempt to separate the negligent act from the intentional act of spoliation.[123]

1. Intentional Spoliation

While on its face intentional spoliation of evidence may seem the easier tort to define, courts have been unclear in establishing its elements.[124] Nevertheless, one commentator has delineated the following elements: (1) pending or probable litigation; (2) defendant's knowledge of the existence or likelihood of litigation; (3) an intentional act to destroy evidence and undermine the plaintiff's case; (4) actual disruption of the plaintiff's case; and (5) damages proximately caused by the act of spoliation.[125] Recently, the New Mexico Supreme Court

120. *Id.* at 190-91. The court indicated that, under traditional negligence principles, "special circumstances" may impose a duty to preserve evidence, such as an agreement, statute, or other circumstances. *Id.* The Illinois Supreme Court has recently adopted a similar approach in *Boyd v. Traveler's Ins.*, 652 N.E.2d 267 (Ill. 1995) (holding that a claim for negligent spoliation could be stated under existing tort law). *See infra* Part IV.C discussing *Boyd.*

121. *Coleman*, 905 P.2d at 190.

122. *See* Falvaloro v. Golden Gate, 687 F. Supp 475, 481 (N.D. Cal. 1987).

123. *See, e.g., Coleman*, 905 P.2d at 189 (holding that a cause of action exists for intentional spoliation, but not for negligent spoliation). California has separate jury instructions for both torts. *See* California Jury Instruction BAJI 7.95 (8th ed., West 1994) (intentional spoliation of evidence) and BAJI 796 (negligent spoliation of evidence).

124. *See* Bruzzano, *supra* note 1, at 129.

125. Comment, *Spoliation: Civil Liability for Destruction of Evidence*, 20 U. RICH. L. REV. 191, 200-01 (1985). The California Model Jury Instructions list the following elements for an intentional spoliation of evidence claim:

1. Plaintiff possessed "potential" claim or defense for a lawsuit;
2. Defendant knew of the existence of this claim or defense;
3. Defendant knew of the existence of evidence and was aware that it might constitute evidence in pending or potential civil litigation involving plaintiff;
4. Defendant engaged in acts or conduct intended to cause the destruction, damage, loss, or concealment of the evidence;
5. Defendant's act caused the damage or concealment of the evidence;

articulated these same elements when it recognized a cause of action for intentional spoliation of evidence.[126]

These elements highlight the uncertainty of establishing damages in this type of cause of action. A non-spoliator's injury can range from the inconvenience of obtaining alternative evidence to the actual preclusion of proving an element of its prima facie case. Courts have refrained from identifying in specific terms the type of damages that a plaintiff must plead and prove to prevail.[127]

2. Negligent Spoliation of Evidence

A Florida appellate court set forth the following elements for a prima facie case of negligent spoliation of evidence:[128] (1) existence of a potential civil action; (2) a legal or contractual duty to preserve evidence that is relevant to the potential civil action; (3) destruction of that evidence; (4) a causal relationship between the evidence and destruction and the inability to prove the lawsuit; and (5) damages.[129]

The difficult concept with the negligent cause of action is the concept of duty.[130] Courts do not want to impose unreasonable burdens on individuals or parties to preserve and to maintain

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6. As a result, Plaintiff sustained damage, namely Plaintiff's opportunity to prove its claim or defense was interfered with substantially.

California Jury Instructions BAJI 7.95 (8th ed., West 1994).

126. *See* Coleman v. Eddy Potash, Inc., 905 P.2d 185, 190 (N.M. 1995).

127. *Id.* (discussing the required allegations to state a cause of action); *see also* Smith v. Superior Court, 198 Cal. Rptr. 829, 836 (Ct. App. 1984) (recognizing the tort of spoliation and reciting the required elements).

128. *See* Continental Ins. Co. v. Herman, 576 So. 2d 313, 315 (Fla. Ct. App. 1990).

129. *Id.* In addition, The Model California Jury instructions, BAJI No. 7.96, list the following elements for a negligence cause of action:

1. Plaintiff possessed a defense or claim for damages against defendant, third party;
2. Defendant knew or reasonably should have known of this potential defense or claim for damages;
3. Defendant knew or reasonably should have known of the existence of the destroyed evidence and knew or reasonably should have known that it might constitute evidence in pending or potential litigation involving Plaintiff or other person;
4. Defendant knew or reasonably should have known that [he/she/it] did not act with reasonable care to preserve the evidence;
5. Defendant's failure to act with reasonable care caused the destruction, damage to, loss or concealment of such evidence;
6. As a result, Plaintiff sustained damage, namely Plaintiff's opportunity to prove its claim or defense was interfered with substantially.

BAJI No. 7.96.

130. *See infra* notes 167-87 and accompanying text.

evidence.[131] Nevertheless, a Florida appeals court has recognized a limited duty on doctors to preserve medical records based on Florida statutes and administrative rules.[132] In addition, a federal district court in the eastern district of Pennsylvania held that there was a duty of reasonable care to preserve evidence when the defendant's employee, a claims adjustor, voluntarily assumed custody of the evidence.[133] The claims adjustor was investigating an accident in a workmen's compensation case.[134]

Like the New Mexico Supreme Court's recent decision in *Coleman*, however, these cases suggest that there must be some special circumstance upon which to establish the duty to preserve evidence. Instead of "recognizing" new negligence torts, these courts may be able to rely on traditional common law negligence principles to support the spoliation cause of action. One commentator has suggested that, while California courts have stated that a separate tort for negligent spoliation of evidence exists, these courts essentially have created "another [common law] theory upon which a negligence cause of action may be stated."[135]

C. Boyd v. Traveler's Insurance: *Illinois' Answer to the Negligent Spoliation Tort*

The Illinois Supreme Court recently refused to recognize the distinct tort of spoliation of evidence. As have several other jurisdictions, the Illinois Supreme Court in *Boyd v. Traveler's Insurance Co.*,[136] held that a separate tort for spoliation was not necessary because a cause of action for this type of conduct could be stated under existing Illinois tort law.[137] In *Boyd*, the plaintiff was injured when a propane heater

131. *See infra* notes 167-87 and accompanying text.

132. Bondu v. Gurvich, 473 So.2d 1307, 1312-13 (Fla. Dist. Ct. App. 1984); *see also* Miller v. All State Ins. Co., 573 So. 2d 24, 27 (Fla. Dist. Ct. App. 1990) (recognizing that a defendant's duty to preserve evidence can arise from a contract between the defendant and the plaintiff).

133. Pirocchi v. Liberty Mut. Ins. Co., 365 F. Supp 277, 281-82 (ED.. Pa. 1973).

134. *Id.* at 279.

135. *See* Bruzzano, *supra* note 1, at 133.

136. 652 N.E.2d 267 (Ill. 1995).

137. *Id.* at 270. Other jurisdictions have similarly stated that a spoliation claim can be established under common law negligence principles. *See also* Federated Mut. Ins. Co. v. Precision Components, Inc., 456 N.W.2d 434, 436 (Minn. 1990); Weigl v. Quincy Specialties Co., 601 S.2d 774, 777 (N.Y. Sup. Ct. 1993). In *Federated Mutual*, the court did not unequivocally rule out the possibility of creating a new tort of spoliation of evidence. 456 N.W.2d 434, at 437 (Minn. 1990). Nevertheless, the court noted that an "action for negligent spoliation could be stated under existing negligence law without creating a new tort." *Id.* at 436. The court also recognized that Minnesota courts permit an unfavorable presumption against the spoliator of any evidence. *Id.* at

exploded at his place of employment.[138] The plaintiff filed a workers' compensation claim against his employer and his employer's insurance company.[139] Employees of Traveler's Insurance took possession of the heater to test it and eventually lost it, later admitting to the plaintiff that they never tested the heater.[140]

The plaintiff filed suit against the manufacturer of the heater. Later, the plaintiff joined Traveler's as a defendant and claimed that Traveler's loss of the heater irrevocably prejudiced their products liability action against the manufacturer.[141] After dismissing the spoliation of evidence claims as premature, the trial court certified the question of whether a spoliation action can be brought at the same time as the underlying action.[142]

While the Illinois Supreme Court refused to recognize an independent tort of spoliation,[143] the court held that an action for negligent spoliation of evidence can be established under existing negligence theories. To state a negligent cause of action, the plaintiff must plead the existence of a duty, breach of that duty, an injury proximately caused by the breach, and resulting damages.[144] The court then stated that there is no duty to preserve evidence under Illinois law.[145] The *Boyd* court, however, indicated that "a duty to preserve evidence may arise through an agreement, a contract, a statute . . . or another special circumstance."[146] Moreover, the court stated that "a

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436-37.

138. *Boyd*, 652 N.E.2d at 269.

139. *Id.* at 269.

140. *Id.*

141. *Id.* at 269.

142. *Id.*

143. *Id.* at 269-70. The court stated that, pursuant to Illinois Supreme Court rules, it was not necessary for it to answer the direct certified question. *Id.* at 270 (citing Illinois Supreme Court Rule 366(a)(5)). The court has discretion to enter any order that "ought" to have been given by the lower court. *Id.*

144. *Id.* at 270.

145 *Id.* Once again, the court addressed the issue of duty. As in any negligence action, if the defendant owes the plaintiff no duty, there is no cause of action. *See infra* note 162 and accompanying text.

146. *Id.* at 270-71. In California, where a spoliation tort exists, the California courts similarly examine the duty question in this manner. These courts also look to whether the defendant's duty to preserve the evidence originates because of a "special relationship" or a peril created by the defendant. *See* Reid v. State Farm Mut. Auto. Ins. Co., 218 Cal. Rptr. 913, 925 (Ct. App. 1985). Therefore, the difference between an actual negligence tort of spoliation and a spoliation cause of action under general negligence principles may simply be a matter of labeling. In addition, because Illinois has not officially recognized a new, distinct tort, the Illinois courts can deny any criticism that it is establishing new torts or laws in an undemocratic manner.

defendant may voluntarily assume a duty by affirmative conduct."[147] The court ultimately concluded that in any of the foregoing instances, "a defendant owes a duty of due care to preserve evidence if a reasonable person in defendant's position should have foreseen that the evidence was material to a potential civil action." [148] The court then held that because the Traveler's employees assumed custody of the heater to investigate the accident, they knew it was relevant to future litigation and assumed a duty to preserve it.[149]

The Illinois Supreme Court set forth a requirement, similar to those in California and Florida courts, for pleading and proving the elements of damages. The *Boyd* court stated that a threat of future harm is not actionable.[150] The plaintiff must demonstrate that the loss of evidence caused the plaintiff to be unable to prove an otherwise valid claim.[151] In *Boyd*, the court held that the plaintiff satisfied this test because the plaintiff sustained serious personal injuries, was precluded from ever proving that the heater was defective, and alleged a nexis between Traveler's loss of the heater and the inability to prove the underlying action.[152]

Dissenting, Justice Heiple contended that the court was imposing too much of a burden on the plaintiff.[153] Specifically, the dissent noted the inherent difficulty facing plaintiffs to prove that they would have succeeded in the underlying claim.[154] Upon examining the facts, the dissent stated that the heater could never be tested and thus there was no way to prove that the heater was defective.[155] The dissent argued that neither the plaintiff nor the manufacturer should be punished for the lost evidence.[156] Rather, the dissent argued that the only just result was to presume that the heater was defective and to assign the burden to the most culpable party.[157] The loss should

147. *Boyd*, 652 N.E.2d at 271.

148. *Id.*

149. *Id.*

150. *Id.* at 272 n.1. The court recognized that the plaintiff need only prove a "reasonable probability" that, but for defendant's loss or destruction of the evidence, the plaintiff would have prevailed in the underlying lawsuit. *Cf.* Smith v. Superior Court, 198 Cal. Rptr. 829, 836 (Ct. App. 1984) (stating that, in spoliation actions, the plaintiff must allege a "reasonable probability" of the denial of a successful prosecution or defense of a lawsuit).

151. *Boyd*, 652 N.E.2d at 272 n.1.

152. *Id.* at 271-72.

153. *Id.* at 274 (Heiple, J., dissenting).

154. *Id* (Heiple, J.; dissenting).

155. *Id.* (Heiple, J., dissenting).

156. *Id.* (Heiple, J., dissenting).

157. *Id.* (Heiple, J., dissenting).

therefore be assigned to the bailee who entered the bailment with full knowledge of the evidence and who without justification failed to return it.[158] Accordingly, the dissent concluded that it should be presumed that the heater was defective and the case should be tried only on the issue of damages.[159]

The majority reasoned that the type of evidentiary presumption espoused by the dissent would provide too much of a windfall to the injured party.[160] Specifically, the *Boyd* court stated, "we can envision several factual situations where a party has negligently lost or destroyed evidence, but that evidence is not critical or even material to a plaintiff's underlying case."[161] Second, the court declared, if Traveler's could illustrate that the plaintiffs would have lost the underlying claim even with the missing heater, then Traveler's had not caused any injury; thus the plaintiff should not be allowed to recover with an evidentiary presumption where it could be shown that the underlying suit lacks merit.[162]

With respect to the joinder issue, the court encouraged plaintiffs and trial courts to employ joinder in these cases because a single trier of fact was in the best position to hear and decide both cases.[163] The court reasoned that, for instance, if the plaintiff loses the underlying suit, only the trier of fact in that case would know the reason for the loss.[164] Thus, the trier of fact can best make a ruling on the spoliation issues.[165] In addition, the court reasoned that joinder would preserve valuable judicial resources.[166]

D. The Problem of Duty

Most negligent spoliation causes of action are dismissed because the defendant owed no duty to the plaintiff.[167] Most courts examine whether any "special circumstance" surrounds the spoliation act in order to impose a duty on a party to preserve evidence.[168] These types

158. *Id.* (Heiple, J., dissenting).
159. *Id.* (Heiple, J., dissenting).
160. *Id.* at 273.
161. *Id.*
162. *Id.*
163. *Id.* at 272.
164. *Id.*
165. *Id.*
166. *Id.* at 272.
167. *See* Thorne-Cook, *supra* note 4, at 464. *See also* Koplin v. Rosel Well Perforators, Inc., 734 P.2d 1177 (Kan. 1987).
168. *See* Reid v. State Farm Mut. Ins. Co., 218 Cal. Rptr. 913, 922 (Cal. Ct. App. 1985); Smith v. Superior Court, 198 Cal. Rptr. 829, 832-33 (Cal. Ct. App. 1984);

of circumstances can arise from a relationship between parties, statutes, regulations, cases, or parties' conduct.

Some commentators have theorized that criminal statutes can constitute a source of a duty to preserve.[169] Many states have criminalized the act of destroying evidence.[170] Several states, such as Illinois, however, do not have a specific crime for destruction of evidence, and thus no duty can arise from criminal statutes.[171] For other states, courts must examine whether the purpose of the statute can be interpreted to protect civil litigants.[172] Courts are always reluctant to impose new duties and new causes of action based on broadly worded criminal statutes.[173]

Another statutory source of duty are rules and regulations.[174] For instance, most states have rules that require hospitals to maintain complete medical records for each patient.[175] In Illinois, these records are to be preserved in accordance with the hospital policy announced by the American Hospital Association.[176] If doctors[177] or hospitals

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Miller v. All State Ins. Co., 573 So. 2d 24, 26-27 (Fla. Dist. Ct. App. 1990); Boyd v. Traveler's Ins. Co., 652 N.E.2d 267, 270-71 (Ill. 1995); *Koplin*, 734 P.2d at 1179.

169. *See* Thorne-Cook, *supra* note 4, at 465.

170. *See* GORELICK, *supra* note 29, at 199-203 (providing a state by state analysis of criminal statutes for spoliation acts).

171. Illinois' general obstruction of justice criminal statute covers the acts of destroying evidence in pending litigation. *See* 720 ILL. COMP. STAT. ANN. 5/31-4 (West Supp. 1996). However, the language of the statute seems only to criminalize destruction of evidence of a pending criminal case. *Id.* In contrast, many states have adopted the model penal code. MODEL PENAL CODE § 241.7 (1980). Section 241.7 of the Model Penal Code specifically outlaws the destruction of evidence necessary for either a criminal or civil case. *See* GORELICK, *supra* note 29, at 191 (citing MODEL PENAL CODE § 241.7 (1980)). The Model Penal Code states: "A person commits a misdemeanor if, believing that an official proceeding or investigation is pending or about to be instituted, he: (1) alters, destroys, conceals or removes any record, document or thing with purpose to impair its verity or availability in such proceeding or investigation." MODEL PENAL CODE § 241.7.

172. *See* Thorne-Cook, *supra* note 4, at 465.

173. *See* Coleman v. Eddy Potash, Inc., 905 P.2d 185, 188 (N.M. 1995).

174. For instance, the Federal Department of Transportation promulgates rules that require a truck driver and his employer to maintain records of duty status for up to seven months. *See* 49 C.F.R § 395.8(k)(1). Certainly, this type of rule imposes a duty of care on truck drivers and their employers to maintain driving records.

175. *See* Bondu v. Gurvich, 473 So. 2d 1307, 1309 (Fla. Dist. Ct. App. 1984); Fox v. Cohen, 406 N.E.2d 178, 181 (Ill. App. 1st Dist. 1980).

176. *Fox*, 406 N.E.2d at 181-82. Pursuant to 210 ILL. COMP. STAT. 85/2 (a) of The Hospital Licensing Act, the Illinois Department of Public Health has maintained the same rules and regulations that require a hospital to preserve its medical records for a period of time. 210 ILL. COMP. STAT. ANN. 85/2(a) (West Supp. 1996).

177. A doctor's duty to preserve evidence would not arise under the X-ray Retention Act because that Act only applies to hospitals. Miller v. Gupta, 672 N.E.2d 1229, 1233 (Ill. 1996). In *Miller*, the appellate court, relying on *Boyd v. Traveler's Ins. Co.*, 652

have a duty to preserve evidence by statute,[178] then the duty owed is extended to private individuals who need these records for pending litigation.[179]

In deciding whether negligence law imposes a duty to preserve, courts have also looked to the conduct of the spoliator or the relationship between the spoliator and non-spoliator. The spoliator may have promised or entered into a contract to preserve the evidence with the injured party or a third party.[180] Indeed, if the spoliator violated some contractual duty, then there may be a breach of contract case along with a tort action.[181] Moreover, a California appeals court held that the common carrier relationship between a bus driver and its passengers imposed a duty on the bus driver to preserve and maintain evidentiary information after a bus accident.[182]

Furthermore, a party may have an affirmative duty to preserve evidence. If an individual, public agency, or company takes control of evidence to investigate it or test it, courts will likely recognize a duty to preserve.[183] Cases such as *Boyd* and *Smith* are clear examples. In each of these cases, individuals took control of evidence to test it with knowledge of both prospective litigation and the importance of the evidence; yet they accidentally destroyed the evidence, thereby undermining the litigation.[184] In both cases, the Illinois and California courts held that the spoliator's assumption of responsibility of the evidence created a duty of ordinary care to preserve the evidence.

N.E.2d 267 (Ill. 1995), permitted the plaintiff to amend her complaint to reflect a spoliation count against the doctor defendant. *Id.* See *supra* Part IV.C for a discussion of the *Boyd* decision. The defendant allegedly destroyed the plaintiff's X-rays prior to any litigation. *Miller*, 672 N.E.2d at 1231. Affirming this decision, the supreme court noted that plaintiff must allege in her amended complaint for negligent spoliation of evidence a duty to preserve the evidence and that duty could not arise from the X-ray Retention Act. *Id.* at 1233. The court further stated that under the principles of *Boyd*, a duty to preserve evidence "can arise only through an agreement, a contract, a statute, or another special circumstance, or the defendant's affirmative conduct." *Id.*

178. *See supra* notes 169-76 and accompanying text.

179. *Fox*, 406 N.E.2d. at 182.

180. Smith v. Superior Court, 198 Cal. Rptr. 829, 832-833 (Ct. App. 1984).

181. If an injured party fears that a third party has evidence central to its prospective litigation, it might be advisable for them to enter into a contract to preserve. Of course, in order to have a valid and enforceable contract, there must be consideration. Therefore, the nature of the consideration would have to be predetermined.

182. *See* De Vera v. Long Beach Pub. Transp. Co., 225 Cal. Rptr. 789, 795 (Ct. App. 1986) (plaintiff recovered damages against bus company because bus driver failed to obtain name of third-party driver following the bus accident).

183. *See Smith*, 198 Cal. Rptr. at 834.

184. *See supra* notes 96-102 and accompanying text discussing *Smith*; *supra* notes 136-166 and accompanying text discussing *Boyd*.

The focus of each court on the duty issue suggests that a spoliation tort is just another negligence cause of action. Under common law negligence principles, courts will only impose affirmative duties if "special circumstances" exist. For instance, the duty to rescue or help another in distress only exists if the rescuer's affirmative conduct caused the situation or helped to create the peril.[185] In addition, other affirmative duties to act and disclose are imposed pursuant to rules or statutes.[186] Consequently, a duty to preserve evidence may simply be another special or distinct affirmative duty that tort law may impose on an individual. Indeed, many cases[187] in this area have held that the tort for negligent spoliation arises not simply from the defendant's destruction of evidence, but from additional conduct or circumstances that mandated the establishment of a duty to preserve the evidence.

E. The Problem of Damages

1. Proving "Injury" in a Spoliation Action

In any tort action, the plaintiff must plead and prove damages. The damages for spoliation of evidence is the inability to prove or defend a lawsuit. Some courts have required that the plaintiff demonstrate a "but for" test to recover. Under this approach, the plaintiff must prove that, but for the defendant's acts of spoliation, it would have won the underlying lawsuit.[188]

The *Boyd* court, however, rejected this "but for" standard.[189] In *Boyd*, the Illinois Supreme Court recognized that in many instances, a plaintiff could never demonstrate that "but for" the missing evidence, the plaintiff would have won the underlying lawsuit.[190] Rather, the

185. *See* Rhodes v. Ill. Cent. Gulf R.R., 665 N.E.2d 1260, 1270 (Ill. 1996); *see also* Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673, 675 (1994).

186. Illinois imposes a duty on a home seller to disclose a known defect or damage to a home that may substantially impair habitability before selling it. Residential Real Property Disclosure Act, 765 ILL. COMP. STAT. ANN. 77/20 (West Supp. 1996). The statute requires the seller to sign a statement that the home has no known defects or impairment. 765 ILL. COMP. STAT. ANN. 77/20 (West 1993). Thus, both the statute and the seller's promise establish an affirmative duty on the seller to disclose a defect.

187 *See Boyd*, 652 N.E.2d at 271; *Bondu*, 473 So. 2d at 1312-13; *Smith*; 198 Cal. Rptr. at 836; *Coleman*, 902 P.2d 185; *Miller v. Gupta*, 672 N.E.2d at 1229 (Ill. 1996).

188. Jackovich v. Gen. Adjustment Bureau, Inc., 326 N.W.2d 458, 462 (Mich. Ct. App. 1982).

189. Boyd v. Traveler's Ins. Co., 652 N.E.2d 267, 271-72 (Ill. 1995).

190. *Id.* The court stated in a footnote, however, that plaintiff need not meet this "but for" standard, because that was "too difficult a burden, as it may be impossible to know what the missing evidence would have shown." *Id.* at 271 n.2.

court held that the plaintiff must show that but for the loss or destruction of the evidence, the plaintiff had "a reasonable probability of succeeding in the underlying lawsuit."[191] Consequently, if the plaintiff could not have won the underlying lawsuit, even with the lost evidence, the defendant could not have caused any injury.[192] This requirement, the court reasoned, prevents a plaintiff from recovering where it could be shown that the underlying causes of action were meritless.[193]

Similarly, in *Smith v. Superior Court*,[194] the court discussed the plaintiff's difficulty in proving damages. The *Smith* court nevertheless reasoned that this should not be a bar to a spoliation claim.[195] Rather, the plaintiff must demonstrate a reasonable probability that the lost evidence undermined the ability to prosecute or defend the underlying lawsuit.[196] The *Smith* court further pointed out that "[t]here are many interests which the law seeks to protect wherein damages cannot be proved with certainty."[197]

Unlike the *Boyd* and *Smith* decisions, in *Continental Insurance Company v. Herman*,[198] the Florida appeals court held that the plaintiff had to sustain a "significant impairment" of her ability to prove the underlying lawsuit.[199] In *Continental Insurance*, the plaintiff had already obtained an arbitration award in the underlying lawsuit despite the act of spoliation, but then also received a high award in her spoliation cause of action.[200] The court reasoned that an award of damages prior to a spoliation action proved as a matter of law that the plaintiff sustained no damages because of the spoliator.[201] No reasonable jury therefore could hold otherwise.[202] All courts seem to recognize that a plaintiff faces a substantial burden to prove damages in a spoliation action.

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191. *Id.*
192. *Id.*
193. *Id.*
194. 198 Cal. Rptr. 829 (Ct. App. 1986).
195. *Id.* at 835.
196. *Id.*
197. *Id.* at 836.
198. 576 So. 2d 313 (Fla. Dist. Ct. App. 1990).
199. *Id.* at 315.
200. *Id.* at 314-15.
201. *Id.* at 315.
202. This case also suggests that the concept of res judicta precludes the jury in a spoliation action to reconsider already litigated claims. If the plaintiff wins an award despite the act of spoliation, that award may conclusively establish that the plaintiff was able to proceed with the underlying litigation. Thus, the first trier of fact determined the issue of "injury" of the spoliation action.

One way to help a plaintiff prove damages is the concept of joinder. The *Boyd* court pointed out that the same jury should hear both the spoliation issue and the underlying lawsuit. In this way, the jury can adequately judge how great an effect the acts of spoliation had on the underlying lawsuit; the jury knows first-hand what type of evidence was destroyed. The plaintiff is then relieved from attempting to prove uncertainty and speculation. Without one joint trial, a second trial on the spoliation issue would simply be a repeat of the factual issues of the first trial and an attempt to determine how much weight the jury gave to the missing evidence in finding for the spoliator.[203] Most courts would disfavor this kind of judicial inefficiency.

In addition, prior to *Boyd*, an Illinois court had held that a spoliation action is not properly litigated until after a decision in the underlying lawsuit.[204] In that case, the plaintiff brought a negligent spoliation claim against doctors and a hospital. She claimed that the defendants destroyed important medical records, thereby substantially impairing her malpractice claim.[205] The court held that the plaintiff could not prevail while the underlying medical malpractice action was still pending because injury at this stage of the proceeding was purely speculative.[206] The court noted that the plaintiff alleged that she would sometime in the future lose her medical malpractice claim because of the absence of the evidence.[207] Therefore, this spoliation lawsuit could not be maintained on pure speculation of some future injury.[208] This appellate court suggested that the plaintiff establishes no actionable injury until she actually loses the underlying lawsuit.[209]

The Illinois Supreme Court has recently noted that the only remedy available to some non-spoliators may be the single trial on the spoliation issue.[210] In *Miller v. Gupta*,[211] the defendant's acts of spoliation prevented the plaintiff from properly filing a medical negligence complaint.[212] The supreme court thus stated that, although

203. If the plaintiff wins any award in the underlying action or a defendant successfully defends its lawsuit, the spoliator then can possibly use this determination against the plaintiff in a spoliation action as conclusive proof of no "injury" and no "damages."

204. Fox v. Cohen, 406 N.E.2d 178 (Ill. App. 1st Dist. 1980).

205. *Id.* at 179.

206. *Id.* at 183.

207. *Id.*

208. *Id.*

209. *Id.*

210. Miller v. Gupta, 672 N.E.2d 1229, 1232-33 (Ill. 1996).

211. *Id.*

212. *Id.* at 1232-33.

the plaintiff's underlying claim was procedurally defective and required dismissal, the plaintiff could still proceed with the spoliation action against the same defendant.[213] In these circumstances—when the underlying trial is dismissed for procedural reasons because of the act of spoliation—only one trial will determine both the spoliation claim and the underlying action.[214]

The concept of proving damages thus raises complicated issues. If a plaintiff wins the underlying lawsuit, the victory could preclude her from proving damages from spoliation and also preclude her from re-litigating the issue of damages to a spoliation claim. On the issue of the plaintiff's procedural impairment to bring a lawsuit because of the related spoliation act, the jury may have already established that plaintiff is entitled to some form of favorable judgment despite the act of spoliation.[215] In this situation, the plaintiff's spoliation claim is probably moot.

Therefore, to proceed with the spoliation claim *after* the underlying lawsuit, the plaintiff must lose the underlying lawsuit or establish that the verdict is less than it would have been had the act of spoliation not occurred. The plaintiff then has sustained a cognizable injury which she can plead and prove. Nevertheless, if the plaintiff loses the underlying lawsuit, it seems she cannot use this adverse judgment against the spoliator on the issue of damages. Without a special verdict on the spoliation issue, the jury's verdict does not necessarily represent a factual finding on the spoliation issue. Instead, the jury could have found against the non-spoliator simply because it did not believe a witness. The fact-finder is not necessarily saying that the act of spoliation caused it to find for the spoliator. Without knowing the exact reasons for the verdict, litigants are forced to speculate as to the effect the spoliation had on the first jury's verdict. To prevent this bifurcated litigation and guess work as to prior fact-finder decisions, the *Boyd* court articulated perhaps the most just and efficient way to resolve a spoliation case. Under *Boyd,* the spoliation action and the underlying action need to be joined so that one jury or fact-finder can adjudicate these complex, overlapping issues.

213. *Id.* at 1233.

214. *Id.*

215. The type of judgment may be a monetary award for a plaintiff in an underlying lawsuit or a not guilty verdict in favor of the defendant. *See* Bruzzano, *supra* note 1, at 137.

2. Quantifying Damages

In addition, the jury may have difficulty arriving at a monetary figure. If the destroyed evidence was not central to the issue of damages, the jury could easily award the damages that the underlying lawsuit would have produced but for the spoliation acts. For instance, the jury could award an injured plaintiff the total value of the plaintiff's injuries. In addition, where the plaintiff in the spoliation action was a losing defendant in the underlying lawsuit, the jury could award the spoliation plaintiff the same amount of money damages awarded to the spoliation defendant in the underlying trial.

The more difficult question for the spoliation jury is how to quantify the destroyed evidence that is central to the issue of damages.[216] One possible solution is for the plaintiff to obtain a legal expert to establish the value of the lawsuit.[217] Similar to a legal malpractice action, the expert can tell the jury what the value of the underlying litigation would have produced if successfully won.[218] Other possible solutions are to give the plaintiff the maximum value of recovery based on all the evidence before the jury, to award the plaintiff its demand, or to award the plaintiff costs and attorneys fees because of the acts of spoliation.[219] Once again, courts must produce a balanced approach that provides the plaintiff with compensation and redress, and at the same time, courts must make sure that this amount does not turn into an unfair windfall.

V. CONCLUSION

Intentional and negligent spoliation torts are recent additions to remedies available to an individual facing the loss, damage, or destruction of crucial evidence.[220] The bringing of a spoliation lawsuit may both adequately punish the spoliator with damages and provide fairness to the victim. While some courts seem reluctant to recognize a "new" tort, these same courts nevertheless permit spoliation actions to proceed under traditional tort principles.[221]

Traditional remedies addressed the problem of a party to the action destroying, misplacing, or intentionally losing evidence.[222] Courts

216. *See* GORELICK, *supra* note 29, at 167.
217. *See* Thorne-Cook, *supra* note 4, at 475.
218. *Id.* at 475.
219. *See* GORELICK, *supra* note 29, at 168.
220. *See supra* Part IV.
221. *See supra* Part IV.
222. *See supra* Part III.

could sanction the party through pre-trial discovery sanctions, through jury instructions during the trial, or through lawsuit dismissal. The spoliation tort now permits a litigant to obtain damages against a third party spoliator.

The spoliation tort may not be a viable means for every victim of spoliation. Some litigants may choose to rely on the traditional discovery sanctions or jury instructions. Courts should not restrict the type of sanction or remedy available to the non-spoliator, or make certain sanctions exclusive depending on the type of spoliation problem. In addition, non-spoliators should not be limited to one type of remedy. Rather, victims of spoliation deserve the opportunity to evaluate each remedy for its costs and benefits and decide how to proceed. In this way, the non-spoliator has control over remedying the vary acts of destruction that undermined or precluded its prosecution or defense of a viable lawsuit.