

Title: The Short Life of a Tort: A Brief History of the Independent Cause of Action for Spoliation of Evidence in California

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**The Short Life of a Tort:
A Brief History of the Independent Cause of Action
For Spoliation of Evidence in California**

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Spoliation of evidence can cause courts to render decisions based on faulty evidentiary records, frustrate parties in the prosecution of their actions, and, in extreme cases, deny litigants their rightful legal remedy, even though they have suffered harm. When evidence is destroyed, altered, or hidden, both litigants and the civil justice system suffer. However, the remedies for such loss of evidence have changed over the years. This article briefly looks at the history of this tort, and the current state of the law.

The Birth of the Spoliation of Evidence Tort

The common law has long recognized the seriousness of spoliation of evidence and the problems it causes. For a period of almost fifteen years, California courts even recognized an independent tort cause of action for spoliation of evidence.

Starting in 1983, the California Supreme Court indicated in *Williams v. State of California* (1983) 34 Cal.3d 18, 35 that a negligence cause of action *might* exist for failure to secure evidence, but that no duty existed under the facts of the *Williams* case. Then, a year later, the Second District in *Smith v. Superior Court* (1984) 151 Cal.App.3d 491 became the first court fully to recognize independent causes of action for both negligent and intentional destruction of evidence. (See *Smith v. Superior Court* (1984) 151 Cal.App.3d 491, 496 ["we believe that a new tort may be appropriate to cover the intentional spoliation of evidence"].)

The torts of negligent spoliation of evidence and intentional spoliation of evidence were differentiated by the courts of California based on whether or not the perpetrator was a party to the action. Thus, the tort of first party spoliation – whether negligent or intentional – concerned destruction of evidence by a *party* to the underlying cause of action. Conversely, *third* party spoliation was the destruction or suppression of evidence by one who was *not* a party to the underlying cause of action to which the evidence was relevant.

Growth of the Claim

The courts also formulated the different elements necessary to state a cause of

action for spoliation. Intentional spoliation required "the destruction of an object which might constitute evidence in a lawsuit: (1) with the purpose of harming the lawsuit, or (2) when harm to the lawsuit is substantially certain to follow." (*Gomez v. Acquistapace* (1996) 50 Cal.App.4th 740, 747.) Negligent spoliation by a first party found its duty element in the obligations of the civil discovery rules which parties to a lawsuit are bound. Finally, the court in *Johnson v. United States Automobile Assoc.* (1998) 67 Cal.App.4th 626 articulated that the duty element for a cause of action for negligent spoliation by a *third* party existed when:

[T]here has [] been an agreement to preserve, or a specific request to preserve accompanied by an offer to pay the cost or otherwise bear the burden of preserving, or a voluntary undertaking to preserve which induces reasonable and detrimental reliance [or a] duty has been imposed by contract, statute, regulation or some analogous special relationship." (*Id.* at p. 629.)

The Death of the Tort

As the cause of action took root in California jurisprudence, the Supreme Court remained relatively silent. In 1998, however, the Court all but eliminated the tort of first party intentional spoliation of evidence in *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1. A year later, the tort was dealt its death blow by *Temple Community Hospital v. Superior Court* 20 Cal.4th 464.

Both the *Temple Community Hospital* case and the *Cedars-Sinai* case dealt with destruction of medical devices and medical records deemed crucial by plaintiffs to establishing liability in actions against the physician, device manufacturer and/or hospital. *Cedars Sinai* involved a malpractice action arising out of neonatal injuries. The plaintiffs sought compensatory and punitive damages against the hospital for tortious intentional spoliation of medical records, including the fetal monitoring strips. The Supreme Court explicitly rejected the spoliation tort cause of action, justifying its decision by listing the unwarranted consequences of the tort: the uncertainty of the fact of harm; the costs related to that uncertainty, inaccuracy, duplication and confusion in the judicial process; and the costs of preservation of evidence. The Court concluded that the nontort remedies were preferable

to derivative tort actions to rectify first party litigation-related misconduct.

A year later, in *Temple Community Hospital*, the plaintiff brought an action against a hospital, physicians and device manufacturers for professional and general negligence. Plaintiff also sued the hospital for first and third party intentional spoliation, alleging it failed to retain the tool which allegedly caused her injury, even after it had received notice to do so. The trial court granted the manufacturer's motion for summary judgment on the grounds that the warnings

were adequate as a matter of law, and that there was not enough evidence of product defect. Additionally, the first party spoliation claims were barred by the *Cedars Sinai* precedent. As for the third party spoliation claim, the divided Court extended the *Cedars Sinai* reasoning to the tort of third party intentional spoliation.

The only thing left of *Smith v. Superior Court* was the independent action for negligent spoliation of evidence, and that was quickly destroyed by subsequent Court of Appeal decisions in the Second, Third and Fourth Districts. (*Coprish v. Superior Court, Los Angeles County* (2000) 80 Cal.App.4th 1081, 1083; *Lueter v. State* (2002) 94 Cal.App.4th 1285, 1288; *Farmers Ins. Exchange v. Superior Court* (2000) 79 Cal.App.4th 1400, 1401.)

What Are the Alternatives?

The absence of an independent tort cause of action for spoliation of evidence leaves a person with greatly reduced options for the act of negligently or intentionally destroying evidence in a case. If you are dealing with a non party who intentionally destroyed evidence, the lack of ability to bring an independent claim against that person for their actions essentially prevents any remedy.

However, if the person is a party to the action on some other theory of liability, your ability to overcome the damage is greater. Chief among these is the evidentiary inference set down in Evidence Code section 4131, which allows the trier of fact to consider one party's suppression or destruction of evidence.

The discovery laws also provide a broad range of sanctions for conduct that amounts to misuse of the discovery process. These sanctions include monetary sanctions, contempt sanctions, issue sanctions ordering that designated facts be taken as established, and evidence sanctions prohibiting the offending party from introducing designated matters into evidence. The discovery section of the Code of Civil Procedure reads as follows:

§ 2023.030. Other Sanctions For Misuse Of Discovery:

(a) The court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process ... pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct.

(b) The court may impose an issue sanction ordering that designated facts shall be taken as established in the action in accordance with the claim of the party adversely affected by the misuse of the discovery process. The court may also impose an issue sanction by an order prohibiting any party engaging in the misuse of the discovery process from supporting or opposing designated claims or defenses.

(c) The court may impose an evidence sanction by an order prohibiting any party engaging in the misuse of the discovery process from introducing designated matters in evidence.

(d) The court may impose a terminating sanction by one of the following orders:

(1) An order striking out the pleadings or parts of the pleadings of any party engaging in the misuse of the discovery process.

(2) An order staying further proceedings by that party until an order for discovery is obeyed.

(3) An order dismissing the action, or any part of the action, of that party.

(4) An order rendering a judgment by default against that party.

(e) The court may impose a contempt sanction by an order treating the misuse of the discovery process as a contempt of court.

Other effective deterrents to spoliation include the involvement of lawyers in the preservation of their clients' evidence and the State Bar disciplinary sanctions that can be imposed on attorneys who participate in the spoliation of evidence. A client's act of spoliation may suggest that the lawyer was also somehow involved.

Finally, Penal Code section 135 creates criminal penalties for spoliation: "Every person who knowing that any book, paper, [or] record ... is about to be produced in evidence upon any trial ... willfully destroys or conceals the same with intent thereby to prevent it from being produced, is guilty of a misdemeanor." Although a civil attorney is prohibited from threatening criminal prosecution in the course of a civil case, such criminal remedies may also come to bear on the situation.

In short, while the basis discovery remedies under the law exists for spoliation of evidence, other than creating bad inferences in front of a jury, or obtaining issues sanctions of some measure, there is precious little that a party on the receiving end of spoliation can do to remedy the situation. n

1Evid. Code, § 413. Failure to Explain or Deny Evidence and Willful Suppression of Evidence: In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case.

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