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The Land of Oz: Spoliation of Evidence in Louisiana

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INTRODUCTION

Take a trip down the yellow brick road. The Wizard decided to sell a new energy drink, Courage. The Cowardly Lion, in need of courage, bought and consumed the beverage. Shortly thereafter he became ill and incurred medical expenses from a week's stay in the hospital. The Lion's attorney quickly notified the Wizard of the Lion's intention to file suit against the Wizard, alleging that the Lion consumed Courage from a bad batch. Upon hearing of the potential litigation, the Wizard destroyed all of the samples from that particular batch. Without any "bad" Courage to test, the Lion was unable to prove the drink made him sick and could not recover damages.

The Wizard's actions are commonly known as "spoliation of evidence." Spoliation of evidence occurs when a party destroys, conceals, or alters evidence in order to disadvantage another party.[1] The Wizard's malicious intent qualifies his actions as intentional spoliation of evidence. In this situation, the Lion has a claim for intentional spoliation of evidence, which is most likely recognized by the courts of Oz.[2]

If the above scenario is altered slightly, the result varies greatly. Now, imagine that the Lion could not recover the allegedly "bad" batch of Courage, yet he could not prove that the Wizard intentionally destroyed it. Further, Oz Code article 1939 demands that manufacturers of beverages retain one finished product from each batch for at least four years after its creation. This situation should be actionable under a version of negligent spoliation that roots the duty to preserve the evidence in the statute. In many jurisdictions, however, despite the law creating a duty mandating that the Wizard keep such evidence, the Lion would be without a remedy.[3]

Finally, consider a slightly different scenario: On hearing of the Lion's sickness, the Wizard separated the bad batch from the rest and stored it in a closet. Then, at the time of trial, the Wizard learned that one of his employees mistakenly threw away the bad batch. In this situation, though it seems that the Lion should be entitled to

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1. Rachel A. Campbell, *Effect of Spoliation of Evidence in Tort Actions Other than Product Liability Actions*, 121 A.L.R. 5th 157, 157 (2004); Randolph v. General Motors Corp., 646 So. 2d 1019, 1027 (La. Ct. App. 1st 1994).
2. *See infra* Part I.B.
3. *See infra* Part I.B.

some recovery, this form of negligent spoliation of evidence is also not recognized by many jurisdictions.[4]

The Lion's predicament is the same as the dilemma facing Louisiana's doctrine of spoliation. As noted in *Lewis v. Albertson's Inc.*, "[t]he Louisiana Supreme Court has yet to address the potential tort right of spoliation stemming from negligence principles, including its requirements and the remedy for this cause of action; the issue is certainly ripe for consideration."[5] In Louisiana, negligent spoliation is controversial and disputed.[6] For instance, in *Arnold v. Brookshire Grocery Co.*, the Louisiana Third Circuit Court of Appeals enumerated the elements of spoliation as follows: "(1) the intentional or negligent destruction of evidence and (2) that the first element was for the purpose of depriving the plaintiff of its use."[7] In theory, the *Arnold* court found that a party may negligently deprive a party of evidence for a purpose. In reality, however, to do something negligently with a purpose is impossible.[8] This logical fallacy illustrates the lack of clarity in Louisiana law and, in particular, the difficulties of determining the elements of negligent or intentional spoliation of evidence. As neither the Louisiana Supreme Court nor the Louisiana Legislature has addressed this issue, the Louisiana courts, lawyers, and potential litigants direly need a coherent doctrine for consistent guidance, adequate preparation, and protection against injury, respectively.

This Comment proposes a treatment of spoliation that would offer clarity to courts on the issue. Specifically, this Comment contains two arguments. First, the Louisiana Supreme Court ought to accept the current theory of intentional spoliation found in the Louisiana appellate courts.[9] Second, this Comment argues for the

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4. *See infra* Part I.B.

5. Lewis v. Albertson's Inc., 935 So. 2d 771, 774–75 (La. Ct. App. 2d 2006).

6. *See infra* Part II.C.

7. Arnold v. Brookshire Grocery Co., 10 So. 3d 1279, 1280 (La. Ct. App. 3d 2009).

8. State v. Vinzant, 7 So. 2d 917, 922 (La. 1942).

9. Union Pump Co. v. Centrifugal Tech., Inc., Civil Action No. 05-0287, 2009 WL 3015076, at *5 (W.D. La. Sept. 18, 2009) ("All five Louisiana Circuit Courts of Appeal have recognized [intentional] spoliation as a valid tort claim. Accordingly, it is this Court's *Erie* guess that the Louisiana Supreme Court would find spoliation of the evidence to be a valid tort claim." (citations omitted)); Bertrand v. Fischer, No. 09-0076, 2011 WL 6254091, at *2–3 (W.D. La. Dec. 14, 2011) ("The Louisiana Supreme Court has not ruled on this issue, therefore federal courts must make an *Erie* guess to determine as best as it can what that court would decide. . . . [T]he Louisiana Supreme Court would only recognize spoliation based on intentional conduct." (quoting *Union Pump*, 2009 WL 3015076, at *5)).

Louisiana Supreme Court and Louisiana Legislature to recognize negligent spoliation. Negligent spoliation is the more controversial form of spoliation and the focus of this Comment. The Comment begins by looking at the origin of the tort of spoliation before analyzing the tort under Louisiana's legal precepts. Part I examines the doctrines of other states, starting with the origin of spoliation generally in California and then discussing some states that have recognized negligent spoliation. Part II discusses Louisiana's various approaches to spoliation. The Louisiana circuit courts vary on the elements of: (1) the knowledge of a potential suit, (2) the failure to produce needed evidence without explanation, and (3) the level of culpability required.[10] Because the most controversial issue is whether negligent spoliation is actionable, this Comment also examines in depth the evolution of three lines of reasoning regarding spoliation. Part III argues that Louisiana should recognize a cause of action for negligent spoliation. Such recognition would conform to existing Louisiana law and jurisprudence and is necessary to uphold the principles of judicial integrity, fairness, and truth.[11]

I. THE APPEARANCE OF THE RUBY SLIPPERS: BACKGROUND

A. Munchkinland: Spoliation's Infancy

Analyzing the inception of spoliation and the reasons for its creation validates the need to recognize negligent spoliation in Louisiana. The first court to recognize the tort of spoliation, specifically intentional spoliation, was a California appellate court in *Smith v. Superior Court*.[12] In *Smith*, the defendant's wheel flew off of his van and into the windshield of the plaintiff's vehicle, causing injury to the plaintiff.[13] Abbot Ford, the automobile dealer that customized the van before the defendant bought it, promised the plaintiff's counsel that he would keep the relevant van parts that would be needed as physical evidence.[14] Subsequently, the dealership "destroyed, lost or transferred" the requested parts, effectively eliminating the chance of success for any possible defect claim.[15] The plaintiffs then amended their petition to include a claim for "Tortious Interference with Prospective Civil Actions By

10. *See infra* Part II.A–C.
11. *See infra* Part III.C.
12. 198 Cal. Rptr. 829 (Cal. Ct. App. 1984); 18 Am. Jur. 3d *Proof of Facts* 515 (2013).
13. *Smith*, 198 Cal. Rptr. at 831.
14. *Id.*
15. *Id.*

Spoliation of Evidence."[16] The court held that it was appropriate to recognize a new tort to deal with intentional spoliation of evidence.[17] The court supported its decision with Dean Prosser's concept of protection against "interference with the interest of others."[18] The court expressed some reservation in recognizing the new tort action due to the difficulty of determining damages.[19] In dispelling this concern, the court discussed other actions that are recognized despite uncertain damages, such as libel, slander, wrongful death, and personal injury cases.[20] *Smith* opened the door for other courts to recognize intentional spoliation of evidence.

Soon after *Smith*, California also recognized negligent spoliation.[21] In *Velasco v. Commercial Building*, a cleaning staff member threw away critical evidence that was sitting on an attorney's desk.[22] The attorney then brought suit against the cleaning staff company for the destruction of the evidence. The attorney's claim was essentially a negligent spoliation claim, which had not yet been recognized by California courts.[23] In recognizing that a claim for negligent spoliation should exist, the *Velasco* court focused its analysis on the foreseeability of the harm that the destruction of evidence would cause the plaintiff.[24] The court noted that foreseeability of the harm is gauged by more than just the probability of a behavior resulting in the harm.[25] Rather, foreseeability that a person's actions could cause harm includes actions that a reasonable, thoughtful person would consider as

16. *Id.*
17. *Id.* at 832.
18. William Prosser served as the dean of UC Berkeley School of Law. He is best known for his work entitled *Privacy*, which described an individual's right to privacy. Paul M. Schwartz, *Privacy Firsts at Berkeley Law*, SFGATE, Feb. 26, 2012, http://www.sfgate.com/default/article/Privacy-firsts-at-Berkeley-Law-3361110.php; *Smith*, 198 Cal. Rptr. at 832 ("The law of torts is anything but static, and the limits of its development are never set. *When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant*, the mere fact that the claim is novel will not of itself operate as a bar to a remedy. . . . The common threat woven into all torts is the idea of *unreasonable interference with the interests of others*." (citing WILLIAM L. PROSSER, LAW OF TORTS § 1, at 3–4, 6 (4th ed. 1971))).
19. *Smith*, 198 Cal. Rptr. at 835.
20. *Id.* at 836.
21. Velasco v. Commercial Bldg. Maint. Co., 215 Cal. Rptr. 504, 506 (Cal. Ct. App. 1985) ("[W]e hold that a cause of action may be stated for negligent destruction of evidence needed for prospective civil litigation.").
22. *Id.* at 505.
23. *Id.*
24. *Id.*
25. *Id.*

guidance for practical behavior.[26] If a person creates a slight risk of injury to another, he may be held liable if a reasonably prudent person would not have done so.[27] Applying this reasoning to the facts, the *Velasco* court considered whether the person who destroyed the evidence would "be expected to believe that he or she would destroy valuable evidence which might decrease a client's chance of recovery in a product liability action" under the circumstances.[28]

Further, the *Velasco* court supported its recognition of negligent spoliation claims by looking to two previously recognized torts: "negligent interference with prospective economic advantage" and "intentional interference with prospective business advantage."[29] In both tort actions, the absence of the necessary component resulted in the loss of a future economic benefit to the plaintiff. Implicitly, the court was analogizing the harms created by negligent spoliation with an economic loss and stated "that both causes of action would reimburse victims for probable expectancies, which make up 'a large part of what is most valuable in modern life.'"[30] When negligent spoliation occurs, the wrongful destruction of evidence can result in the harmed party either losing a judgment that it would have been entitled to recover or paying a judgment for which it was not liable. In *Velasco*, the economic harm was the judgment amount that the plaintiff would have received in his products liability claim had the evidence not been destroyed. Nevertheless, despite the *Velasco* court's recognition of negligent spoliation as a valid tort claim, it found that the plaintiff in that case was unable to recover under that theory.[31]

Smith and *Velasco* paved the way for more widespread development of the tort of spoliation. Beginning in products liability cases, the doctrine then infiltrated other areas of the law and other states.[32] As with any new tort, some states were quick to follow suit, while others rejected the foreign concept.[33] In particular, only a few states subsequently recognized negligent spoliation.

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26. *Id.* at 506.
27. *Id.*
28. *Id.*
29. *Id.* at 505–06.
30. Sean R. Levine, *Spoliation of Evidence in West Virginia: Do Too Many Torts Spoliate the Broth?*, 104 W. VA. L. REV. 419, 425 (2002).
31. *Velasco*, 215 Cal. Rptr. at 506–07.
32. *See* Levine, *supra* note 30, at 425–26.
33. *Id.* at 426.

B. Follow the Yellow Brick Road: Later States to Recognize Negligent Spoliation

After the decisions in California, other states began to evaluate their own positions on intentional and negligent spoliation.[34] Some states settled the doctrine judicially,[35] while others passed statutes.[36] Nonetheless, most states have not formally recognized either form of spoliation as a tort action.[37] Specifically, the only jurisdictions to recognize negligent spoliation as of 2006 were Alabama, California, Indiana, Montana, West Virginia, and the District of Columbia.[38] Illinois and Pennsylvania found recognition of a separate tort unnecessary because the effects of negligent spoliation could be remedied under existing "general negligence principles."[39] Before advocating for the recognition of negligent spoliation, it is important to review the laws of other states that find negligent spoliation actionable in order to determine if their reasons are applicable in Louisiana.

Some states found it necessary to recognize negligent spoliation in order to allow an action to be brought against a third party who is not involved in the original litigation.[40] West Virginia is one of these states. It recognizes negligent spoliation against third parties but not against parties to original civil action.[41] The West Virginia Supreme Court found that sufficient remedies already existed for a party to a civil action to compensate the opposing party for evidence that was lost or destroyed.[42] These available solutions did not, however, address spoliation by a third party.[43] In recognizing a theory of negligent spoliation by a third party, the court discussed some concerns: namely, that a duty did not exist to preserve evidence and that, if the third parties were the owners of such evidence, the owners would normally have the right to handle their property as

34. MARGARET M. KOESEL ET AL., SPOLIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION 53, 56 (Daniel F. Gourash ed., 2000).

35. MASS. GUIDE TO EVID. § 1102, at 284 (2013), *available at* http://www.mass.gov/courts/sjc/guide-to-evidence/massguidetoevidence.pdf.

36. Smith v. Atkinson, 771 So. 2d 429, 432 (Ala. 2000).

37. KOESEL, *supra* note 34, at 55.

38. *Id.* at 50; Hannah v. Heeter, 584 S.E.2d 560, 573 (W. Va. 2003).

39. KOESEL, *supra* note 34, at 51.

40. *See Smith*, 771 So. 2d at 432–33; Oliver v. Stimson Lumber Co., 993 P.2d 11, 18 (Mont. 1999); *Hannah*, 584 S.E.2d at 566.

41. *Hannah*, 584 S.E.2d at 566 (establishing that the state courts do "not recognize spoliation of evidence as a stand-alone tort when the spoliation is the result of the negligence of a party to a civil action").

42. *Id.* at 567.

43. *Id.* at 568.

they see fit.[44] Nevertheless, the equity behind the tort of spoliation outweighed these concerns.[45] In recognizing spoliation, the court cited the state constitution, which guarantees the right to use the court system to seek justice and the general principle of searching for the truth that underlies the judicial system.[46] "Simply put, such highly improper and unjustifiable conduct ought to be actionable."[47] Thus, for the reasons of equity and justice, West Virginia recognized a form of negligent spoliation.

Similar to the West Virginia Supreme Court, the Supreme Court of Montana based its recognition of negligent spoliation against a third party on notions of truth and fairness.[48] Building on the idea that damages could be awarded against a party who destroyed evidence and impaired the investigation of an officer, the court found that "[r]elevant evidence is critical to the search for truth."[49] The Supreme Court of Montana specified that it was essential for the lower courts to take measures that would ensure "that the parties to the litigation have a fair opportunity to present their claims or defenses."[50] In order to protect the opportunities each party should be afforded, the court recognized negligent spoliation claims against third parties.[51]

Finally, select states have imposed the necessity of a narrow duty in order to limit the application of negligent spoliation.[52] This reasoning was present in Alabama's recognition of negligent spoliation.[53] Finding that the concept of negligent spoliation was consistent with Alabama's general negligence principles, the Alabama Supreme Court held that a plaintiff would similarly have to show a breached duty, proximate cause, and damages.[54] Alabama courts require a plaintiff to show "(1) that the defendant spoliator had actual knowledge of pending or potential litigation; (2) that a duty was imposed upon the defendant through a voluntary undertaking, an agreement, or a specific request; and (3) that the missing evidence was vital to the plaintiff's pending or potential action."[55] Thus, the court reasoned that the third party could decline

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44. *Id.*
45. *Id.*
46. *Id.* at 572.
47. *Id.*
48. Oliver v. Stimson Lumber Co., 993 P.2d 11, 17 (Mont. 1999).
49. *Id.* at 17.
50. *Id.*
51. *Id.* at 17–18.
52. *Id.* at 20; Hannah v. Heeter, 584 S.E.2d 560, 569 (W. Va. 2003); Smith v. Atkinson, 771 So. 2d 429, 432 (Ala. 2000).
53. *Smith*, 771 So. 2d at 432.
54. *Id.*
55. *Id.* at 432.

to take responsibility for the evidence, which would keep the burden of risk with the plaintiff, but if the third party agreed to take responsibility for the evidence, it formed a duty.[56] This type of negligent spoliation that requires such a specific duty curtails negligent spoliation to only claims where the "spoliator has acted wrongfully in a specifically identified way."[57] Establishment of these elements creates a rebuttable presumption that "but for the fact of the spoliation of evidence the plaintiff would have recovered in the pending or potential litigation."[58] Alabama's model is a limited form of negligent spoliation that hinges on an agreement between the parties.[59]

These states' approaches to negligent spoliation demonstrate that, unfortunately, there is no consensus on how to handle negligent spoliation claims.[60] The confusion created by the lack of guidance is exemplified in Louisiana, which has specifically grappled with defining and accepting the concept of negligent spoliation.

II. THE SEARCH FOR THE EMERALD CITY: LOUISIANA'S ADVENTURES

Spoliation of evidence is a relatively new tort concept to Louisiana, which grew out of the State's use of adverse presumptions.[61] Adverse presumptions or discovery sanctions are used to counter the negative effects of ruined evidence "by

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56. *Id.* at 433.

57. *Id*. (quoting Johnson v. United Servs. Auto. Ass'n, 79 Cal. Rptr. 2d 234, 241 (Cal. Ct. App. 1998)).

58. *Id.* at 432–33.

59. *Id.* at 433.

60. Arkansas implements an adverse presumption when the defending party has destroyed evidence but refuses to recognize spoliation as a separate tort. *See* Goff v. Harold Ives Trucking Co., Inc., 27 S.W.3d 387, 391 (Ark. 2000). Texas has not recognized spoliation as a separate tort, finding that spoliation does not harm a party outside of the cause of action from which it arose. *See* Brookshire Bros., Ltd. v. Aldridge, No. 12-08-00368-CV, 2010 WL 2982902, at *5 (Tex. App. July 30, 2010). Connecticut recognizes intentional spoliation and awards "the full amount of compensatory damages that he or she would have received if the underlying action had been pursued successfully." Rizzuto v. Davidson Ladders, Inc., 905 A.2d 1165, 1181 (Conn. 2006).

61. Karen Wells Roby & Pamela W. Carter, *Spoliation: The Case of the Missing Evidence*, 47 LA. B.J. 222, 224 (1999) ("The impact of the presumption on the quality of evidence significantly diminished with the reasonable explanation rule and the occasional notice and showing of intent requirements. Litigants in Louisiana who needed to advance or defend a case began seeking a remedy against a party who spoliated evidence. In *Williams v. General Motors* . . . third party plaintiff, General Motors, sought the recognition of a tort against an attorney and insurer for destroying evidence it needed to defend against the plaintiff's product liability claim.").

instructing the jury . . . that had the evidence in question been presented, it would be unfavorable to the party spoliator."[62] In other words, when a plaintiff's case is injured because the plaintiff is unable to prove a part of the case due to the defendant's failure to turn over evidence, the jury is instructed to assume that the evidence would have benefitted the plaintiff.[63] This mechanism attempts to level the playing field. Adverse presumptions are both compensatory and punitive in nature.[64]

Traditionally, only intentional acts of spoliation were actionable and thus eligible for an adverse presumption.[65] At common law, spoliation was based on the idea that a party is more likely to destroy evidence that is adverse or harmful to his or her case than to refuse to turn over evidence that would bolster the case.[66] The adverse presumption has been characterized in other jurisdictions as "*omnia praesumuntur contra spoliatorem*: all things are presumed against a wrongdoer."[67] Mere negligence was insufficient to support "the inference of consciousness of a weak case."[68]

Adverse presumptions, however, were applied inconsistently, which, as the *Louisiana Bar Journal* noted in 1999, resulted "in

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62. Guillory v. Dillard's Dept. Store, Inc., 777 So. 2d 1, 3 (La. Ct. App. 3d 2000); Edwards v. Louisville Ladder Co., 796 F. Supp. 966, 971 (W.D. La. 1992); Pham v. Contico Int'l, Inc., 759 So. 2d 880, 882 (La. Ct. App. 5th 2000); Roby & Carter, *supra* note 61, at 223 ("The adverse presumption was first applied in Louisiana in the 1910 case of *Varnado v. Banner Cotton*. In *Varnado*, the Louisiana Supreme Court applied the adverse presumption against corporate managers who refused to produce records of the corporation during a proceeding seeking the appointment of a receiver. The court held that the managers' refusal to produce the records suggested that the records would show that the corporation was being mismanaged thereby warranting the appointment of a receiver. During the *Varnado* era, the presumption had a strong impact on the quality of evidence presented. If a person had evidence and refused to produce it, the presumption would apply against him. The integrity of the judicial system was protected. More than 60 years after *Varnado*, parties began seeking the application of the presumption to matters where the evidence was lost, discarded or destroyed. Once the courts extended the adverse presumption to cases involving spoliated evidence, a conflict developed in the circuits regarding when it would apply.").

63. Robertson v. Frank's Super Value Foods, Inc., 7 So. 3d 669, 673 (La. Ct. App. 5th 2009); FRANK L. MARAIST, EVIDENCE AND PROOF § 4.3, *in* 19 LOUISIANA CIVIL LAW TREATISE 72 (2007) ("If a party knowingly destroys evidence (spoliates), there is a logical inference that he or she did so because the evidence would have been unfavorable to him or her.").

64. Kammerer v. Sewerage & Water Bd. of New Orleans, 633 So. 2d 1357, 1365 (La. Ct. App. 4th 1994) (Waltzer, J., concurring).

65. *Id.* at 1361.

66. *Id.*

67. Brookshire Bros., Ltd. v. Aldridge, No. 12-08-00368-CV, 2010 WL 2982902, at *4 (Tex. App. July 30, 2010).

68. *Kammerer*, 633 So. 2d at 1361 (Waltzer, J., concurring).

additional requests for the recognition of the tort of spoliation."[69] Further, adverse presumptions were ineffective against persons who were not parties to the litigation.[70] Such was the case in *Desselle v. Jefferson Hospital District No. 2*, when a plaintiff desired to bring suit against the manufacturer of a hospital gurney.[71] The plaintiff fell off of the gurney and was injured, either because the hospital employee "failed to set the brake or the brake failed."[72] The plaintiff claimed his case against the manufacturer was hindered by the hospital's disposal of the gurney.[73] The *Desselle* court allowed the plaintiff to bring a claim of spoliation against the hospital, though ultimately the plaintiff was unsuccessful.[74] To remedy similar situations, courts have allowed a claim of spoliation to be brought against third parties.[75] However, this tort is no longer exclusive to non-litigant parties.[76] Claims in Louisiana have been allowed against both the tortfeasor–defendant and third parties.[77]

The scope of the cause of action for spoliation is unsettled in Louisiana.[78] Although the Louisiana Supreme Court has yet to discuss either form of spoliation, all five state appellate circuit courts have recognized intentional spoliation as a valid tort claim and continue to battle over negligent spoliation.[79] Because the State as a whole lacks guidance from the Louisiana Supreme Court and the Louisiana Legislature, the circuits have attempted to sort out the doctrine by themselves. In doing so, they have established varying holdings within their circuits, overruled and reinstated cases at a rapid pace, and clearly ignored previous holdings. In particular,

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69. Roby & Carter, *supra* note 61, at 226 ("Consequently, with the continuing push by parties for an adequate remedy for the spoliation problem, the form and shape of the spoliation tort will inevitably occur. The recognition of this tort is necessary to preserve the integrity of the system.").

70. Desselle v. Jefferson Hosp. District No. 2, 887 So. 2d 524, 527, 534–35 (La. Ct. App. 5th 2004).

71. *Id.*

72. *Id.* at 527.

73. *Id.* at 534.

74. *Id.* at 535.

75. *See* Randolph v. General Motors Corp., 646 So. 2d 1019 (La. Ct. App. 1st 1994); Lewis v. Albertson's Inc., 935 So. 2d 771 (La. Ct. App. 2d 2006).

76. *See* Jackson v. Home Depot, Inc., 906 So. 2d 721 (La. Ct. App. 1st 2005); McCleary v. Terrebone Parish Consol. Gov't, No. 2009 CA 2208, 2010 WL 3822225 (La. Ct. App. 1st Sept. 30, 2010); Guillory v. Dillard's Dept. Store, Inc., 777 So. 2d 1 (La. Ct. App. 3d 2000); McCool v. Beauregard Mem'l Hosp., 814 So. 2d 116 (La. Ct. App. 3d 2002).

77. *See supra* notes 75–76.

78. *See* Bertrand v. Fischer, No. 09-0076, 2011 WL 6254091, at *2 (W.D. La. Dec. 14, 2011).

79. Union Pump Co. v. Centrifugal Tech., Inc., Civil Action No. 05-0287, 2009 WL 3015076, at *5 (W.D. La. Sept. 18, 2009).

Louisiana appellate courts have had disagreements regarding the concept of an adequate explanation, the required level of culpability, and the source of the duty.[80] Therefore, when handling a spoliation claim, the courts have little guidance. The results have left Louisiana with an unclear and disjointed delict.[81]

Courts have never followed an established set of elements for spoliation. Yet, the jurisprudence shows courts typically consider three "elements." These elements are not always clearly articulated within the cases, and the courts often blur the lines between them. This Part will outline Louisiana jurisprudence according to these unstated elements of spoliation. These elements are: (1) the knowledge of a lawsuit; (2) failure to produce needed evidence without an explanation; and (3) the requisite level of intent.

A. Knowledge of a Lawsuit

The first requirement found in the jurisprudence to hold a defendant liable for spoliation is that the defendant knew or should have known of a future or likely lawsuit.[82] This criterion narrows the instances in which a party has the heightened duty to protect or retain possible evidence to situations in which it is most likely that the evidence will actually be used or requested. The courts have implicitly accepted this element.[83]

The first element, the knowledge requirement, grew out of the "adequate explanation" exception to an adverse presumption.[84] In *Babineaux v. Black*, the Louisiana Third Circuit Court of Appeals considered whether the third-party defendant should be granted an adverse presumption against the defendant.[85] The third-party defendant, the manufacturer of the allegedly faulty product in question, claimed that the primary defendant, the seller of the product, spoliated evidence by not producing the product in question for "inspection prior to trial."[86] The court found that an adverse presumption was not warranted because the testimony explained the defendant's actions.[87] "When the [product] was discarded, this suit had not been filed, and the defendants obviously thought that installing the new [product] would solve the problem to the

80. *See infra* Part II.A–C.
81. *See Bertrand*, 2011 WL 6254091, at *2.
82. Quinn v. RISO Invs., Inc., 869 So. 2d 922, 927 (La. Ct. App. 4th 2004).
83. *Id.*
84. *See* Babineaux v. Black, 396 So. 2d 584, 586 (La. Ct. App. 3d 1981).
85. *Id.*
86. *Id.*
87. *Id.*

plaintiff's satisfaction."[88] The court intertwined the idea of knowledge of a lawsuit into the reasonable explanation exception.[89] Now, knowledge of the suit stands as a separate element for proving spoliation.[90] Thus, courts clearly stipulate that "[w]here suit has not been filed and there is no evidence that a party knew suit would be filed when the evidence was discarded, the theory of spoliation of evidence does not apply."[91]

B. Failure to Produce Needed Evidence

In order to have a claim for spoliation, there must be the loss or destruction of evidence that impairs the case of the claimant, which the other party cannot adequately explain.[92] Despite being addressed as a single concept, in actuality, these ideas are an element with two subparts and an affirmative defense, respectively. Therefore, these components should be evaluated independently.

1. Evidence Must Have Previously Existed

The courts have found that if the evidence never existed, then that is sufficient to defeat a claim for spoliation.[93] Although a claimant can allege spoliation for the destruction or loss of evidence, he or she cannot bring a spoliation claim for the failure to create evidence that would have been helpful.[94] Allowing spoliation in those circumstances would impose a duty that is far broader than the

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88. *Id.*

89. For discussion of the "reasonable explanation exception," see *infra* Part II.B.3.

90. Quinn v. RISO Invs., Inc., 869 So. 2d 922, 927 (La. Ct. App. 4th 2004).

91. *Id. See also* Desselle v. Jefferson Parish Hosp. Dist. No. 2, 887 So. 2d 524, 534 (La. Ct. App. 5th 2004); McCleary v. Terrebonne Parish Consol. Gov't, No. 2009 CA 2208, 2010 WL 3822225, at *3 (La. Ct. App. 1st Sept. 30, 2010).

92. Smith v. Superior Court, 198 Cal. Rptr. 829, 835 (Cal. Ct. App. 1984) ("Here, the destruction of the Smiths' physical evidence took place before the trial ever began, and the Smiths seek compensation for the alleged intentional destruction of important evidence to be used in the *forthcoming* litigation."); Guillory v. Dillard's Dept. Store, Inc., 777 So. 2d 1, 4 (La. Ct. App. 3d 2000) ("[B]oth causes of action are premised on the right of a plaintiff to be free from interference in pursuing and/or proving his or her lawsuit."); Arnold v. Brookshire Grocery Co., 10 So. 3d 1279, 1281 (La. Ct. App. 3d 2009) ("Ms. Romero's [destruction of the evidence] did not impair the plaintiff's cause of action."); Lewis v. Albertson's Inc., 935 So. 2d 771, 774 (La. Ct. App. 2d Cir. 2006); Hebert v. Richard, 72 So. 3d 892, 905 (La. Ct. App. 3d 2011).

93. *See* Clavier v. Our Lady of Lake Hosp., Inc., 112 So. 3d 881, 886 (La. Ct. App. 1st 2012); Jackson v. Home Depot, Inc., 906 So. 2d 721, 728 (La. Ct. App. 1st 2005).

94. *Jackson*, 906 So. 2d at 728.

policy intended behind the delict. In short, a complaint alleging spoliation of evidence that never existed is facially invalid.[95]

In *Jackson v. Home Depot*, Mr. Jackson's spoliation claim was based on the theory that Home Depot failed to preserve evidence because it did not fill out an accident report following the tort incident in question.[96] The court found that this allegation failed to meet the burden of a well-pleaded complaint.[97] "Mr. Jackson does not clearly refer to any *particular* piece of *evidence* that he alleges actually *existed* and which Home Depot *intentionally destroyed* in order to *deprive* him of its use."[98] Vague references, suppositions, and legal conclusions cannot take the place of succinct and definite facts upon which a cause of action must depend.[99] This finding rested on the fact that Home Depot could not destroy something that never existed.[100]

One case asserts that even if impairment is present, the mere lack of the evidence is not actionable if the evidence has not been destroyed or concealed but merely cannot be identified.[101] The court in *Pham v. Contico International, Inc.* held that the accused party must have destroyed or concealed the evidence for it to be actionable as spoliation.[102] In *Pham*, the claimant's assertion that his employer "failed to identify, set aside, or further preserve the particular collapsible crate needed as evidence" was insufficient to establish a cause of action.[103] The crate in question was still in use at the warehouse because it was a needed piece of operation equipment.[104] The plaintiffs were welcome to visit the warehouse and inspect the crate, but at the time of litigation, no one knew which crate was the one involved in the incident.[105] Thus, *Pham* formed the idea that unless the absence of the evidence is caused by concealment or destruction, it is not spoliation. In this case, the failure to identify the crate in question was not seen as being equivalent to destroying the evidence. Because spoliation is based on the destruction, alteration, or failure to produce evidence, it

95. Acadian Gas Pipeline Sys. v. Nunley, 77 So. 3d 457, 465 (La. Ct. App. 2d 2011) ("The district court did not abuse its discretion in accepting Mr. May's explanation that the hard data sought by the Nunleys never existed.").
96. *Jackson*, 906 So. 2d at 725.
97. *Id.* at 728.
98. *Id.*
99. *Id.*
100. *Id.*
101. Pham v. Continco Int'l., Inc., 759 So. 2d 880, 883–84 (La. Ct. App. 5th 2000).
102. *Id.* at 884.
103. *Id.*
104. *Id.*
105. *Id.*

seems contrary to its purpose to allow claims against evidence that was not destroyed, altered, or hidden.

2. The Failure to Produce Evidence Must Impair the Claimant's Case

The second element, the heart of spoliation and the reason claims arise, is the failure to produce evidence.[106] Yet, there is often an unmentioned sub-element related to this requirement: The failure to produce the evidence must impair the claimant's case.[107] Without impairment of the claimant's case, spoliation is not actionable.[108]

In *Arnold v. Brookshire Grocery Co.*, the Louisiana Third Circuit Court of Appeals found that the defendant's failure to produce evidence did not impair the plaintiff's claim.[109] In this case, Mrs. Arnold slipped and fell on broken eggs in the aisle of a grocery store.[110] Mrs. Arnold alleged spoliation because the employees cleaned up the eggs before the manager could photograph them.[111] The defendants did not contest the presence of the eggs.[112] Because there were three people who admittedly saw the floor and eggs, the court found that a photograph was unnecessary, though it would have been helpful.[113] Ultimately, the suit was dismissed.[114] Further, in *Crittion v. State*, the Second Circuit established that a spoliation claim is meritless if the party had a significant amount of time to utilize the evidence in question before it was destroyed.[115]

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106. Desselle v. Jefferson Hosp. Dist. No. 2, 887 So. 2d 524, 534 (La. Ct. App. 5th 2004) ("The theory of 'spoliation of evidence' refers to an intentional destruction of evidence for purpose of depriving opposing parties of its use."); Kammerer v. Sewerage & Water Bd. of New Orleans, 633 So. 2d 1357, 1362 (La. Ct. App. 4th 1994) (Waltzer, J., concurring) ("Essential to the fabric of the construction is the citizen's right of access to the evidence necessary to prove his case . . . ."). *See* Roby & Carter, *supra* note 61.

107. Daotheuang v. El Paso Prod. Oil & Gas Co., 940 So. 2d 752, 756–57 (La. Ct. App. 2d 2006) (The adverse presumption operates under the notion that the lack of evidence "has impaired the party's ability to institute or prove a civil claim due to negligent or intentional spoliation of evidence." (quoting McCool v. Beauregard Mem'l Hosp., 814 So. 2d 116, 118 (La. Ct. App. 3d 2002))).

108. Arnold v. Brookshire Grocery Co., 10 So. 3d 1279, 1281 (La. Ct. App. 3d 2009).

109. *Id.* at 1280.

110. *Id.*

111. *Id.*

112. *Id.* at 1281.

113. *Id.*

114. *Id.* ("[C]lean-up of the mess did not impair the plaintiff's cause of action . . . .").

115. *See* Critton v. State, 986 So. 2d 207, 209−10 (La. Ct. App. 2d 2008). The plaintiff in *Critton* asserted a claim for spoliation because the DOTD paved over

According to the *Critton* court, even if it can be shown that the defendant destroyed the evidence in question, if the plaintiff had ample time to utilize the evidence for its own purposes and failed to do so, the claim will fail.[116]

3. An "Adequate" Explanation for the Failure to Produce Evidence Will Defeat a Spoliation Claim

Next, the courts generally evaluate whether the defendant's affirmative defense can "adequately" explain the absence of the evidence.[117] What has been allowed to pass as an "adequate explanation" varies greatly.[118] In *Wilhite v. Thompson*, Geraldine Wilhite's family brought a medical malpractice case against Dr. LeFleur and Dr. Thompson.[119] Throughout the course of discovery, neither doctor could provide Mr. Wilhite's medical chart.[120] Dr. Thompson explained the nonproduction of the chart by claiming that he was unable to find it after he handed it over to his office manager.[121] The court found this explanation adequate and, thus, did not find an adverse presumption necessary.[122] Further, the court supported this conclusion by noting that the "testimony depicts the good faith efforts made by [d]efendants to make the chart available

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the section of the roadway where the plaintiff's daughter was involved in an accident. *Id.* The DOTD resurfaced the roadway two years after the lawsuit was filed. *Id.* In the three years after the accident, plaintiff failed to have any test conducted on the condition of the road. *Id.* The court declined to award the plaintiff an adverse presumption. *Id.*

116. *Id.*

117. *See* McCleary v. Terrebone Parish Consol. Gov't, No. 2009 CA 2208, 2010 WL 3822225, at *6 (La. Ct. App. 1st Sept. 30, 2010); Gladney v. Milam, 911 So. 2d 366, 369 (La. Ct. App. 2d 2005); Hebert v. Richard, 72 So. 3d 892, 905 (La. Ct. App. 3d 2011); Quinn v. RISO Invs., Inc., 869 So. 2d 922, 927 (La. Ct. App. 4th 2004); Desselle v. Jefferson Parish Hosp. Dist. No. 2, 887 So. 2d 524, 534 (La. Ct. App. 5th 2004).

118. *Compare McCleary*, 2010 WL 3822225, at *6, *with* Babineaux v. Blake, 396 So. 2d at 584, 586 (La. Ct. App. 3rd 1981), Wilhite v. Thompson, 962 So. 2d 493, 498–99 (La. Ct. App. 2d 2007), *and* Lewis v. Albertson's Inc., 935 So. 2d 771, 774 (La. Ct. App. 2d 2006).

119. *Wilhite*, 962 So. 2d at 497.

120. *Id.* at 497.

121. *Id.* at 498 ("Dr. Thompson testified that he last saw the chart when he handed it to his office manager after receiving notice of the malpractice claim. He instructed her to secure the chart. Both Defendants testified that, in 2001, their clinic had thousands of records. Dr. Thompson also testified that he instructed his staff to search the office for the missing chart without success.").

122. *Id.* at 499.

to [p]laintiffs during this litigation."[123] Not only did the court inject a "good faith" standard, which had not previously existed, but it also ignored the statute that expressly requires a physician to preserve medical records for six years after the patient's last visit.[124] Thus, *Wilhite* provides some indication that courts may be willing to find an excuse "adequate" when the behavior contributing to the loss of evidence is otherwise negligent.

In *Lewis v. Albertson's Inc.*, the court also found that the defendant's testimony adequately explained the absence of needed evidence.[125] In *Lewis*, the plaintiff was injured when a lawn chair on display in the Albertson's store collapsed.[126] After the accident, "the chair at issue was retained by Albertson's for a number of months."[127] The discovery phase of the subsequent lawsuit established that "the chair was mistakenly thrown away by an Albertson's employee who was cleaning out the closet that stored the item."[128] Subsequently, "an effort was made to find a chair similar to the previous one."[129] At this point, the plaintiffs amended their petition to include spoliation.[130] The court found that this explanation was enough to defeat the intentional spoliation claim.[131]

In addition to the preceding cases, a common theme among other cases where courts accept an explanation as adequate is the fact that the defendant had reason to believe that the matter at hand was previously resolved.[132] This was the case in both *McCleary v. Terrebone Parish Consolidated Government* and *Babineaux v. Black*.[133]

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123. *Id.* at 498.
124. *Id.*
125. Lewis v. Albertson's Inc., 935 So. 2d 771, 774 (La. Ct. App. 2d 2006).
126. *Id.* at 772.
127. *Id.* at 774.
128. *Id.*
129. *Id.*
130. *Id.* at 773.
131. *Id.* at 774.
132. McCleary v. Terrebone Parish Consol. Gov't, No. 2009 CA 2208, 2010 WL 3822225, at *6 (La. Ct. App. 1st Sept. 30, 2010). The plaintiffs in *McCleary* alleged spoliation over the defendants' failure to preserve a file the plaintiffs wished to review. *Id.* The defendants noted that as far as they were aware, the "matter had been finally and definitively adjudicated with the supreme court's writ denial in 1998." *Id.* The court explicitly deemed this as an adequate explanation for the defendants' failure to produce the documents. *Id. See also* Babineaux v. Black, 396 So. 2d 584, 586 (La. Ct. App. 3d 1981) (finding no spoliation and stating that "[w]hen the engine was discarded . . . the defendants obviously thought that installing the new engine would solve the problem to plaintiff's satisfaction").
133. *McCleary*, 2010 WL 3822225, at *6; *Babineaux*, 396 So. 2d at 586.

If the court finds the defendant's explanation adequate, it will deny the spoliation claim.[134] Unfortunately, there is no set standard by which courts evaluate these explanations. The idea of an "adequate explanation" is murky, but the haze surrounding the element of intent, analyzed next, is even worse.

C. Intentional or Negligent Conduct

The most debated aspect of spoliation in Louisiana is the requisite level of intent.[135] All of the state appellate courts have recognized intentional spoliation as actionable, but the courts largely disagree on whether to recognize a claim for negligent spoliation.[136] Normally, this type of disagreement in a state is deemed a "circuit split." However, this term does not accurately reflect the state's spoliation problem. This is circuit *chaos*. The three prominent viewpoints of spoliation found in the courts' analyses do not conform to the circuit boundaries.[137] It is true that some circuits are largely internally consistent in their approach, such as the Louisiana Fourth Circuit Court of Appeals.[138] On the other hand, the cases from the Louisiana Fifth Circuit Court of Appeals pay no more attention to the circuit's own prior cases than they do to cases of any other Louisiana appellate court.[139]

Not only do the courts disagree on whether to recognize negligent spoliation, but those that do recognize negligent spoliation also disagree as to the source of the duty to preserve evidence.[140] Through this disagreement, three prominent lines of reasoning have surfaced in the Louisiana appellate courts: 1) those courts that only recognize intentional spoliation; 2) the *Carter* camp, which cites the duty as originating under a statutory or contractual obligation;[141] and

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134. *See, e.g.*, *Babineaux*, 396 So. 2d at 586 (citing Monk v. Monk, 144 So. 2d 384 (La. 1962)); Veillon v. Sylvester, 174 So. 2d 189 (La. Ct. App. 3d 1965).

135. *See* Bertrand v. Fischer, No. 09–0076, 2011 WL 6254091, at *2 (W.D. La. Dec. 14, 2011) ("The Louisiana Circuit courts are split as to whether or not the act of spoliation must be intentional.").

136. *Id.*

137. *See infra* Part II.C.1–3.

138. *See infra* Part II.C.1.

139. *Compare* Little v. Boston Scientific Corp., 8 So. 3d 591 (La. Ct. App. 5th 2009) (reverting back to recognizing only intentional spoliation despite previous cases from the Fifth Circuit that recognized negligent spoliation), *with* Robertson v. Frank's Super Value Foods, Inc., 7 So. 3d 669, 673–74 (La. Ct. App. 5th 2009) (recognizing negligent spoliation on the same day *Little* was decided).

140. *See infra* Part II.C.1–3.

141. *See* McCleary v. Terrebonne Parish Consol. Gov't, No. 2009 CA 2208, 2010 WL 3822225, at *3 (La. Ct. App. 1st Sept. 30, 2010); Harris v. St. Tammany

3) the *Bethea* camp, which cites the duty as originating under Louisiana Civil Code article 2315.[142]

1. Intentional Only—Refusal to Recognize Negligent Spoliation

The strongest proponent of recognizing only intentional forms of spoliation is the Louisiana Fourth Circuit Court of Appeals. The Fourth Circuit has had a very steady line approach of endorsing only intentional acts of spoliation as punishable.[143] In 1992, the *Williams v. General Motors Corp.* court discussed the duty that a party owes to the claimant in a spoliation case but did not expressly state that negligent claims are allowed.[144] Then, the influential case of *Kammerer v. Sewerage and Water Board of New Orleans* required intentional destruction of evidence for a successful spoliation claim.[145] Subsequently, *Quinn v. RISO Investment, Inc*. explicitly endorsed only intentional claims.[146] This line of holdings, which requires intentional conduct for a spoliation claim, has been consistently followed within the Fourth Circuit.[147] Although this circuit has a clear standard, the First, Third, and Fifth Circuits do not.

In *Randolph v. General Motor Corp*., following the Fourth Circuit's lead, the First Circuit adopted an intent requirement for spoliation.[148] The Fifth Circuit followed suit in *Pham*, where the

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Parish Hosp. Serv. Dist. No. 1, Nos. 2011 CA 0941, 2011 CA 0942, 2011 WL 6916523, at *13 (La. Ct. App. 1st Dec. 29, 2011).

142. LA. CIV. CODE. art. 2315 (2013); Bethea v. Modern Biomedical Servs., Inc., 704 So. 2d 1227 (La. Ct. App. 3d 1997) ("Although there is no statutory duty imposed on the defendants in this case to preserve the evidence and avoid hindering plaintiffs' claim, we find a duty exists under La.Civ.Code art. 2315."); *Robertson*, 7 So. 3d at 673.

143. Kammerer v. Sewerage & Water Bd. of New Orleans, 633 So. 2d 1357 (La. Ct. App. 4th 1994); Quinn v. RISO Invs., Inc. 869 So. 2d 922, 927 (La. Ct. App. 4th 2004); Everhardt v. LA Dept. of Transp. & Dev., 978 So. 2d 1036, 1045 (La. Ct. App. 4th 2008); Williams v. Bickham, No. 2008-CA-0820, 2009 WL 282731, at *1 (La. Ct. App. 4th Jan. 28, 2009).

144. 607 So. 2d 695, 697 (La. Ct. App. 4th 1992) (citing Fischer v. Travelers Ins. Co., 429 So. 2d 538 (La. Ct. App. 4th 1983); Duhe v. Delta Air Lines, Inc., 635 F. Supp. 1414 (E.D. La. 1986)).

145. *Kammerer*, 633 So. 2d 1357.

146. *Quinn*, 869 So. 2d at 927 ("Allegations of negligent conduct are insufficient.").

147. *See id.*; *Everhardt*, 978 So. 2d at 1045; *Williams*, 2009 WL 282731, at *1.

148. Randolph v. General Motors Corp., 646 So. 2d 1019, 1027 (La. Ct. App 1st 1994) ("We find that the trial court imposition of liability upon the Parish under the theory of spoliation of evidence was clearly wrong since the record does

court held that the plaintiff did not meet the requirements to establish a cause of action because he had not pled an intentional tort.[149] In *Little v. Boston Scientific Corp*., the Fifth Circuit supported only intentional spoliation.[150] The Fifth Circuit decided *Little* on the same day as *Robertson*, another case within the same circuit, which supported negligent spoliation.[151] This exemplifies the indecisiveness toward the recognition of negligent spoliation. Later cases from both the Fifth and First Circuits support the intentional-spoliation-only doctrine.[152] With the exception of the Second Circuit, cases that support only intentional spoliation can be found in the remaining four circuits.[153]

Overall, there is a large amount of jurisprudence to support this first line of holdings that dictates that the courts should not recognize negligent spoliation.[154] This approach is a continuation of the traditional common law notion of spoliation. It continues to equate the destruction of evidence with the purpose of disadvantaging the other party in the trial. The doctrine of spoliation, however, has now grown to recognize the economic harm caused by the lack of evidence.[155] The intentional-only approach stubbornly ignores this evolution.

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not indicate there was an intentional destruction of evidence by the Parish for the purpose of depriving the opposing parties of its use.").

149. Pham v. Contico Int'l, Inc., 759 So. 2d 880, 884 (La. Ct. App. 5th 2000).

150. Little v. Boston Scientific Corp., 8 So. 3d 591, 601 (La. Ct. App 5th 2009).

151. Robertson v. Frank's Super Value Foods, Inc., 7 So. 3d 669 (La. Ct. App. 5th 2009).

152. Barthel v. State, Dept. of Transp. & Dev., 917 So. 2d 15, 20 (La. Ct. App. 1st 2005); Jackson v. Home Depot, Inc., 906 So. 2d 721, 728 (La. Ct. App. 1st 2005); Zurich Am. Ins. Co. v. Queen's Mach. Co., Ltd., 8 So. 3d 91, 97–98 (La. Ct. App. 5th 2009) (dismissing claim of spoliation because the court found that Queen's "failed to allege that either Zurich or Alpine intentionally destroyed the evidence"); Kemp v. CTL Distrib., Inc., No. 10-31132, 440 F. App'x 240, 247 (5th Cir. 2011) ("We further explicitly rejected the argument that spoliation of evidence 'may also be based on the negligent destruction of evidence.'" (citation omitted)).

153. *Barthel*, 917 So. 2d at 20; Arnold v. Brookshire Grocery Co., 10 So. 3d 1279, 1281 (La. Ct. App. 3d 2009); Kammerer v. Sewerage & Water Bd. of New Orleans, 633 So. 2d 1357, 1358 (La. Ct. App. 4th 1994); *Little*, 8 So. 3d at 601.

154. *See supra* notes 148, 151–52 and cases cited therein.

155. *See* Carter v. Exide Corp., 661 So. 2d 698, 704 (La. Ct. App. 2d 1995); Pham v. Continco Int'l., Inc., 759 So. 2d 880, 883 (La. Ct. App. 5th 2000) (stating that Workers' Compensation does not "shield the employer from a claim for *economic* injury that the employee may suffer as a result of the employer's post-accident conduct that may impair the employee's ability to recover tort damages for his injuries from third parties").

2. The Carter *Camp—An Express Duty*

Carter v. Exide Corp. established a second line of holdings on how Louisiana should approach negligent spoliation, in addition to the intentional-only line.[156] Unique at the time, *Carter* mandated that the defending party must have a specific duty to preserve the evidence.[157] In recognizing negligent spoliation, the court realized that other jurisdictions consistently held that the plaintiff had to show that the defendant breached "something more than the general tort duty to act reasonably under the circumstances."[158] In this case, the court found that the defendant could have a duty to preserve the evidence because he had explicitly promised the plaintiff he would do so.[159] Synthesizing past decisions on similar causes of action, the court pronounced the duty to preserve evidence for negligent spoliation as arising from "a statute, a contract, a special relationship between the parties, or an affirmative agreement or undertaking to preserve the evidence."[160] *Carter* laid the groundwork for other cases to accept negligent spoliation, at least in cases involving a statutory or contractual duty or special relationship.[161]

In the First Circuit, the court in *McCleary v. Terrebone Parish Consolidated Government* characterized the duty needed for negligent torts as one that arises out of the "foreseeability of the need for the evidence in the future."[162] This interpretation combined the "duty" element with the "knowledge of future lawsuit" element. Nonetheless, *McCleary* characterized the pertinent question as one of whether the defendant had a duty "'arising from a statute, a contract, a special relationship between the parties, or an affirmative agreement or undertaking to preserve the evidence.'"[163] *Harris v. St. Tammany Parish Hospital Service District No. 1* expanded this line

156. *Carter*, 661 So. 2d 698.
157. *Id.* at 705.
158. *Id.*
159. *Id.* at 700. The court ultimately allowed Carter 15 days to "amend his petition to allege with more particularity his claim against Firestone for failing to preserve the battery remains in accord with our discussion of this issue." *Id*. at 705.
160. *Id.* at 704. Further, as an economic injury, this cause of action would pierce the shield of Workers' Compensation exclusivity. *Id.*
161. *See infra* notes 169, 181.
162. McCleary v. Terrebonne Parish Consol. Gov't, No. 2009 CA 2208, 2010 WL 3822225, at *3 (La. Ct. App. 1st Sept. 30, 2010).
163. *Id.* (quoting Longwell v. Jefferson Parish Hosp. Serv. Dist. No. 1, 970 So. 2d 1100, 1104–05 (La. Ct. App. 5th. 2007)). Because the court found that this was not met, the plaintiff had no remedy. *Id.*

of reasoning and analysis.[164] In *Harris*, the First Circuit Court of Appeals allowed for recovery of a negligent act if an express duty existed.[165] The court discussed the duty needed as one "under a theory of general negligence" but further defined the duty needed as statutory or contractual.[166] Here, despite efforts to equate the duty of negligent spoliation with Louisiana's general tort duty, the court simply followed the "statutory duty" rule promulgated by *Carter*.[167]

In *Carter*, the Louisiana Second Circuit Court of Appeals was one of the first Louisiana jurisdictions to recognize a claim for negligent spoliation.[168] Almost all of the Second Circuit's cases discussing spoliation have upheld negligent spoliation.[169] Cases from other circuits are slowly following suit, though the other circuits as a whole do not consistently support this approach.

In the Third Circuit, the *McCool v. Beauregard Memorial Hospital* and *Daotheuang v. El Paso Production Oil & Gas Co*. courts recognized a statutory or contractual duty, straying from a Third Circuit case that placed the source of the duty in Louisiana Civil Code article 2315.[170] In *McCool*, the Third Circuit explicitly recognized a negligent cause of action for spoliation, necessitating a statutory duty.[171] The *Daotheuang* court followed suit.[172]

Unlike the Third Circuit, which has some consistency, the Fifth Circuit's holdings are erratic. It was not until 2007 that a court in the

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164. Harris v. St. Tammany Parish Hosp. Serv. Dist. No. 1, Nos. 2011 CA 0941, 2011 CA 0942, 2011 WL 6916523, at *15 (La. Ct. App. 1st Dec. 29, 2011).

165. *Id.*

166. *Id.*

167. *Id.* at *13–15. "[I]n Louisiana, courts have adopted a duty-risk analysis in determining whether to impose liability under the general negligence principles of LSA–C.C. art. 2315." *Id.* at *14. The court later held that the plaintiff "failed to show that STPH had a duty to preserve the evidence for plaintiff that arose from either a statute, a contract, a special relationship between the parties, or an affirmative agreement or undertaking to preserve the evidence." *Id.* at *15. After explicitly finding that spoliation did not apply here, the court noted that:

> Nonetheless, under general negligence principles, we find that STPH had a duty of care to plaintiff in the handling of the body. . . . STPH owed a duty to plaintiff to see that the body was sent for autopsy as ordered and pursuant to its own policies. Clearly, STPH blatantly breached that duty.

Id. The *Harris* court failed to connect the dots linking this general duty owed and breached to the theory of spoliation.

168. Carter v. Exide Corp., 661 So. 2d 698 (La. Ct. App. 2d 1995).

169. *Id.*; Lewis v. Albertson's Inc., 935 So. 2d 771, 775 (La. Ct. App. 2d 2006); Wilhite v. Thompson, 962 So. 2d 493, 498 (La. Ct. App. 2d 2007); Acadian Gas Pipeline Sys. v. Nunley, 77 So. 3d 457, 465 (La. Ct. App. 2d 2011).

170. McCool v. Beauregard Mem'l Hosp., 814 So. 2d 116, 119 (La. Ct. App. 3d 2002); Daotheuang v. El Paso Prod. Oil & Gas Co., 940 So. 2d 752, 757 (La. Ct. App. 3d 2006).

171. *McCool*, 814 So. 2d at 118–19.

172. *Daotheuang*, 940 So. 2d at 756–57.

Fifth Circuit was faced with a spoliation of evidence claim in which the defendant had a statutory duty to preserve the evidence in question.[173] Until that point, no case within the circuit had allowed negligent spoliation. The *Longwell v. Jefferson Parish Hospital Service District No. 1* decision marked the beginning of an acceptance of negligent spoliation within the Fifth Circuit.[174] In *Longwell*, the plaintiffs alleged that West Jefferson Medical Center (WJMC) was negligent for not saving images taken during an operation on Karen Longwell.[175] Louisiana law required that electronic images taken by the hospital be retained for three years after discharge of a patient.[176] Here, despite WJMC admitting negligence in their failure to save the pictures, the trial court granted WJMC's summary judgment on the spoliation issue because Longwell had not alleged or shown the act was intentional.[177] When the Louisiana Fifth Circuit Court of Appeals evaluated the case, it found that the plaintiff's spoliation claim failed under previous holdings, which required intent.[178] However, the court recognized that the breach of a statutory duty is actionable under a theory of negligence.[179] Thus, the court reversed the trial court's judgment to the extent that it was contrary to these findings.[180] This case joined the *Carter* line of holdings.

The *Carter* line of reasoning is most strongly associated with the Louisiana Second Circuit Court of Appeals, but it is not exclusive to this circuit.[181] This approach created a middle ground between the idea of only recognizing intentional spoliation and recognizing any negligent acts that may have led to spoliation. As such, many courts favor this approach because it offers a remedy without imposing a large burden on society to constantly consider what may be needed as evidence in the future.

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173. Longwell v. Jefferson Parish Hosp. Serv. Dist. No. 1, 970 So. 2d 1100 (La. Ct. App. 5th 2007).

174. *Id.* at 1106 ("We find the present case distinguishable from *Desselle* in that WJMC had a statutory duty to preserve the plaintiff's records which, when breached, became actionable under a theory of negligence.").

175. *Id.* at 1103.

176. *Id.* at 1102; LA. REV. STAT. ANN. § 40:2144 (2008).

177. *Longwell*, 970 So. 2d at 1104.

178. *Id.* at 1106.

179. *Id.*

180. *Id.*

181. Wilhite v. Thompson, 962 So. 2d 493, 498 (La. Ct. App. 2d 2007); Hebert v. Richard, 72 So. 3d 892 (La. Ct. App. 3d 2011); Pham v. Contico Int'l, Inc., 759 So. 2d 880, 883 (La. Ct. App. 5th 2000).

3. The Bethea *Camp—A General Tort Duty*

The Louisiana Third Circuit Court of Appeals is the birthplace of the third line of holdings.[182] The *Bethea v. Modern Biomedical Services* court championed this approach, redefining the concept of a defendant's duty in a spoliation claim and ignoring *Carter*.[183] The *Bethea* court turned to Louisiana Civil Code article 2315 and held that the duty to preserve evidence was found in general tort liability, not a specific statute or agreement.[184] The court reasoned as follows:

> Intentionally hindering a plaintiff's civil claim when there is no statutory duty to prevent this action is just as violative of our civilian notion of justice and fair play as when a statutory duty is imposed. For purposes of this issue, this court fails to see the benefit of making a distinction between a specific statutory duty and the far-reaching duty La.Civ.Code art. 2315 imposes.[185]

The holding eliminated the need for a specific duty to be identified.[186] This lessened the plaintiff's burden of proving negligent spoliation. Yet, many circuits and cases chose to avoid this avenue.[187]

The Third Circuit does not consistently follow *Bethea*. Later cases from the circuit have, at times, endorsed all three lines of holdings. [188] The next case to discuss spoliation in the Third Circuit,

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182. Bethea v. Modern Biomedical Servs. Inc., 704 So. 2d 1227 (La. Ct. App. 3d 1997).

183. *See id.* at 1233.

184. *Id.* ("Although there is no statutory duty imposed on the defendants in this case to preserve the evidence and avoid hindering plaintiffs' claim, we find a duty exists under La.Civ.Code art. 2315. The absence of a statutory duty is not tantamount to no duty. The parameters of what constitutes fault in Louisiana reach far and wide in order to hold people accountable for their harmful actions regardless of whether or not their actions are covered by a statutory provision.").

185. *Id.*

186. *Id.*

187. *See, e.g.*, Barthel v. State Dep't. of Transp. & Dev., 917 So. 2d 15, 21 (La. Ct. App. 1st 2005); Smith v. Jitney Jungle of Am., 802 So. 2d 988, 994 (La. Ct. App. 2d 2001); Guillory v. Dillard's Dep't. Store, Inc., 777 So. 2d 1, 4 (La. Ct. App. 3d 2000); Quinn v. RISO Invs, Inc., 869 So. 2d 922, 926–27 (La. Ct. App. 4th 2004); Desselle v. Jefferson Parish Hosp. Dist. No. 2, 887 So. 2d 524, 534 (La. Ct. App. 5th 2004).

188. *See* Bethea v. Modern Biomedical Servs., 704 So. 2d 1227, 1233 (La. Ct. App. 3d 1997); McCool v. Beauregard Mem'l Hosp., 814 So. 2d 116, 119 (La. Ct. App. 3d 2002); Daotheuang v. El Paso Prod. Oil & Gas Co., 940 So. 2d 752, 757 (La. Ct. App. 3d 2006); Hebert v. Richard, 72 So. 3d 892, 905 (La. Ct. App. 3d 2011).

Guillory v. Dillard's Department Store, Inc., took no notice of *Bethea*.[189] Despite laying the foundation for a general tort duty in the analysis, the court did not accept the plaintiff's argument that Louisiana Civil Code article 2315 set forth the duty to preserve the evidence.[190] However, the court may have dismissed the spoliation claim because the court found that the defendant was unaware of the alleged tort and the probability of a future lawsuit.[191] Regardless, this case only added to the confusion. The subsequent spoliation cases in the Third Circuit reverted back to the *Carter* notion of a more specific duty.[192]

However, *Bethea* was not forgotten. The Fifth Circuit in *Robertson v. Frank's Super Value Foods* returned to the *Bethea* notion of a general tort duty.[193] By citing *Bethea*, the court held that claims of negligent spoliation were allowed without a statutory or express duty.[194] "It has been held that a duty to preserve evidence can exist without the imposition of a statutory duty."[195] This holding rooted the duty for negligent spoliation in article 2315.[196]

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189. *Guillory*, 777 So. 2d at 4. It merely noted that when damage results from a party destroying evidence, the exact name of the claim was of little importance. *Id.* "[W]e believe that it is of little importance here, to determine an exact title to label plaintiff's claim for damages resulting from the acts alleged; for when a plaintiff alleges sufficient facts which indicate that he or she has suffered damages caused by another's fault, that plaintiff has asserted a claim actionable under Louisiana tort law." *Id.*

190. *Id.* ("The plaintiff alleges that pursuant to La.Civ.Code. art. 2315, a duty was imposed on Dillard's to preserve the keys on which Ms. Guillory allegedly slipped and fell. . . . Moreover, the plaintiff has failed to show that Dillard's had a duty to preserve the set of keys, simply because Ms. Guillory claimed she slipped and fell on them while in the department store.").

191. *Id.* at 6 ("We find nothing to suggest that at the time Dillard's received the keys and was notified of Ms. Guillory's accident under either account, it was under a legal duty to preserve the keys which belonged to an unknown person.").

192. *See, e.g.*, *McCool*, 814 So. 2d at 119; *Daotheuang*, 940 So. 2d at 757; *Hebert*, 72 So. 3d at 905.

193. Robertson v. Frank's Super Value Foods, Inc., 7 So. 3d 669, 673–74 (La. Ct. App. 5th 2009).

194. *Id.* ("In considering the defendant's exception of no cause of action on the latter claims, the court examined the issue under La. C.C. art. 2315 and it dictates that '[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.' In finding that the plaintiff did state a cause of action for negligent and/or intentional spoliation of evidence in the absence of a statutory duty, the court recognized that each individual is accountable for his or her actions as they affect fellow members of society.").

195. *Id.* Though the court said "statutory duty," it seemed as though it meant a duty other than those designated by *Carter* ("a statute, a contract, a special relationship between the parties, or an affirmative agreement or undertaking to preserve the evidence") could be upheld. *See* Carter v. Exide Corp., 661 So. 2d 698, 704 (La. Ct. App. 2d 1995).

196. *Robertson*, 7 So. 3d at 673–74.

In sum, there is a large and apparent disagreement within the Louisiana circuit courts on the issue of spoliation of evidence. The lines that distinguish the varying viewpoints do not neatly coincide with the circuits themselves as a "circuit split" would. There is no consistent theme of what elements must be met for a successful claim or what levels of culpability and fault are needed.[197] While the courts agree on some aspects, such as knowledge of the impending lawsuit, they are divided on whether to recognize negligent spoliation and, if so, where the duty for this delict originates.[198] This muddled doctrine has led to bad case precedent and results.[199] The Louisiana Supreme Court or Louisiana Legislature should answer the circuit chaos. The following Part suggests certain elements for the tort of spoliation that are in line with civilian tradition, uphold the integrity of the court system and Louisiana's contract and statutory law, and are consistent with the concepts of equity and truth.

III. THE GOOD WITCH DELIVERS AN IDEAL SET OF ELEMENTS FOR SPOLIATION OF EVIDENCE

The Louisiana Supreme Court or the Louisiana Legislature should establish the elements of spoliation and the burden of proof needed to succeed on the merits of a claim. At minimum, the *Carter* theory of negligent spoliation should be adopted in order to protect the integrity of Louisiana's contract and statutory law.[200] Further, equity, judicial integrity, and the concepts of truth and fairness support the adoption of the *Bethea* theory, at least in limited circumstances. In recognizing a cause of action for negligent spoliation, Louisiana would be a progressive leader among its sister states.[201]

A. Party Knew or Reasonably Should Have Known of the Future Lawsuit

The first element of spoliation should consider whether the defending party knew or reasonably should have known that a lawsuit would likely ensue. The idea that a court must evaluate

197. Bertrand v. Fischer, No. 09–0076, 2011 WL 6254091, at *2 (W.D. La. Dec. 14, 2011) ("The Louisiana Circuit courts are split as to whether or not the act of spoliation must be intentional.").

198. *Id.*

199. *See* Wilhite v. Thompson, 962 So. 2d 493, 496–98 (La. Ct. App. 2d 2007).

200. *See infra* Part III.C.

201. *See supra* Part I.B.

whether a party "should have known" about a future lawsuit automatically carries with it an objective reasonableness standard.[202] It should not suffice for an accused party to merely state that he or she was unaware of a pending or likely suit and thus avoid accountability for destruction of evidence. Because of the incentive to be dishonest, courts should expressly walk through an objective analysis—considering facts and circumstances, rather than weighing only testimony—when determining whether the party had knowledge. Following the standard set by Texas jurisprudence, the courts should analyze "whether a reasonable person would conclude from the severity of the accident and other circumstances surrounding it that there was a substantial chance for litigation."[203] Utilization of this standard will ensure these cases uphold the principles of truth and fairness upon which the judicial system is based.

This objective reasonableness approach was implicitly utilized by a Louisiana court in *Randolph*.[204] In *Randolph*, the trial court discussed whether the Terrebone Parish Consolidated Government (TPCG) should have anticipated a future lawsuit.[205] Finding that the TPCG knew the plaintiff had injured himself and that the cause of the injury was a malfunctioning piece of TPCG's equipment, TPCG "had enough information for it to know or presume that some type of claim for either workman's compensation, medical reimbursement, and/or personal injuries may [have been] made by Mr. Randolph."[206] The Louisiana First Circuit Court of Appeals, however, disagreed with this conclusion and overruled the trial court.[207] Despite the awareness of the plaintiff's injuries, the First Circuit reasoned that any expectation of a future suit was diminished by the fact that the plaintiff returned to "work within a few days and worked without interruption for over seven months."[208] Further bolstering the court of appeals's decision to disallow the plaintiff's spoliation claim was the fact that the plaintiff did not file suit until almost one year after the accident and did not request to inspect the faulty equipment until

202. WILLIAM SHELBY MCKENZIE & H. ALSTON JOHNSON III, INSURANCE LAW & PRACTICE § 5:5, *in* 15 LOUISIANA CIVIL LAW TREATISE 448 (4th ed. 2012) ("[T]he traditional tort inquiry that asks what consequences an objective reasonable person might expect from a deliberate act.").

203. Brookshire Bros., Ltd. v. Aldridge, No. 12-08-00368-CV, 2010 WL 2982902, at *6 (Tex. App. July 30, 2010).

204. Randolph v. General Motors Corp., 646 So. 2d 1019, 1027–28 (La. Ct. App. 1st 1994).

205. *Id.* at 1027.

206. *Id.*

207. *Id.* at 1028.

208. *Id.*

even later than that.[209] Despite the differing conclusions of the trial and appellate courts, both objectively evaluated the circumstances in order to establish whether it was likely that TPCG should have known litigation was probable. This is an example of a court openly evaluating the facts and circumstances to determine whether the party had knowledge of the impending suit. This type of discussion thwarts efforts of the defendants to avoid liability by falsely stating that they were not aware of the likelihood of litigation. An objective evaluation would uphold the integrity of our judicial system and refrain from implicitly condoning a defendant's dishonesty.

B. Party Fails to Produce Evidence

The second element of spoliation should be the failure of the defending party to produce the needed evidence. The three sub-requirements to this element are that: (1) the evidence existed at one time, (2) the absence of the evidence impairs the plaintiff's case, and (3) the defendant lacks an adequate explanation for the absence. These requirements are associated with the purpose of spoliation claims: to compensate the plaintiff for the economic injury to his or her suit due to the lack of requested evidence. This is the heart of the cause of action.

1. Evidence Must Have Previously Existed

It is perfectly logical that one cannot destroy or hide evidence that never existed; however, below the surface of this element lies injustice. Facially, the *Jackson*[210] decision was sound in holding that a party could not be charged with spoliating an accident report merely because the party failed to create it. But when applying this requirement to other situations, the outcome is inequitable.

In certain situations, the failure to create evidence should be actionable because society would expect those materials, such as an autopsy report, to be produced. Hence, an exception should be recognized. If a plaintiff had a reasonable expectation that documentation was being created in the normal course of business and the lack of documentation drastically hinders the plaintiff's case, spoliation should be allowed in cases where the evidence never existed.

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209. *Id.*
210. Jackson v. Home Depot, Inc., 906 So. 2d 721 (La. Ct. App. 1st 2005).

The need for an exception to this rule is exemplified in *Harris v. St. Tammany Parish Hospital Service District No. 1*.[211] In *Harris*, Mrs. Harris suddenly died while she was being transported from an operating room to a care unit.[212] Subsequently, Dr. Breaux ordered an autopsy in order to determine the cause of death.[213] The plaintiff, Mr. Harris, also requested an autopsy of his wife.[214] The hospital sent the body straight to a funeral home rather than to a coroner, and the autopsy never took place.[215] Under the false impression that an autopsy had taken place, Mrs. Harris was embalmed, making an autopsy impossible.[216] After the death, "an Adverse Drug Reaction Form was anonymously completed by [St. Tammany Parish Hospital] indicating that [a Certified Registered Nurse Anesthetist] had administered 50 milligrams of Brevibloc to Mrs. Harris and that the drug reaction was 'severe.'"[217] Mr. Harris filed suit against the hospital for negligence, including "contributing to the spoliation and/or destruction of evidence, including toxicology screen, blood work and other post-mortem diagnostic testing, which would have been undertaken and would have disclosed the cause of death had [the hospital] not released the body to Fielding [Funeral Home]."[218]

Under these facts, refusing recovery to Mr. Harris in his spoliation claim because an autopsy report was never created is contrary to the theory of spoliation. Spoliation is centered on the economic hindrance to a party's claim by the actions of the defendant.[219] The law does not want to give defending parties an incentive to hide evidence in order to be successful on a claim.[220] Nevertheless, the law should not disincentivize the creation of evidence, especially if it is procedural documentation in the normal course of business. Although it seems likely that Mrs. Harris had an adverse reaction to the drug administered to her, without an autopsy report this would be very difficult to prove. The lack of an autopsy report was a severe impairment to Mr. Harris's case, and accordingly,

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211. Harris v. St. Tammany Parish Hosp. Serv. Dist. No. 1, Nos. 2011 CA 0941, 2011 CA 0942, 2011 WL 6916523 (La. Ct. App. 1st Dec. 29, 2011).
212. *Id.* at *1.
213. *Id.*
214. *Id.*
215. *Id.* at *2.
216. *Id.*
217. *Id.*
218. *Id.*
219. *See* Smith v. Superior Court, 198 Cal. Rptr. 829, 835 (Cal. Ct. App. 1984) ("We appreciate that one who has suffered a legally recognized injury is usually entitled to an award of damages.").
220. *Id.* at 834–35 ("False testimony and subornation of perjury occur during the trial and do adversely affect the public at large by interfering with the judicial process as well as impacting on an individual plaintiff.").

he should have been allowed to apply the theory of spoliation of evidence. The court admitted that the hospital was negligent in the handling of the body and had a duty to Mr. Harris to handle the body with care, yet it failed to find a claim for spoliation.[221]

Therefore, the courts should allow spoliation of evidence claims in select cases where it is apparent that the defendant's failure to create evidence, which the plaintiff could have reasonably expected to have been created, impaired the claim. This exception should center around the plaintiff's reasonable expectation that certain evidence exists.[222] If the defendant would reasonably be expected to document transactions, whether by writing receipts, using security cameras, or taking notes, the plaintiff should not be deprived of these items because the defendant intentionally or negligently failed to document an occurrence. It is reasonable for a party to expect that banks have security cameras recording what happens on their premises or that a lawyer would document monetary damages while holding them for his client. These are routine and expected examples of documentation.

Allowing claims of spoliation in cases where intent or negligence causes a failure to create documentation might deter entities from routinely documenting events. This argument is similar to the reasoning behind the "work product" doctrine, a principle found in evidence law.[223] In creating the work product doctrine to protect a lawyer's notes from being subjected to scrutiny, the U.S. Supreme Court sought to avoid deterring lawyers from writing out their thoughts and strategies for a particular case.[224] Although well-founded, this principle does not present a real-world threat to the

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221. *Harris*, 2011 WL 6916523, at *15.

222. *See* Acadian Gas Pipeline Sys. v. Nunley, 77 So. 3d 457, 464 (La. Ct. App. 2d 2011). Acadian attempted to obtain a servitude over the Nunleys' property through a judicial decree in order to install a natural gas pipeline. *Id.* at 459–60. In an attempt to refrain from having the servitude granted, the Nunleys argued that the route chosen was done so "arbitrarily, capriciously or in bad faith." *Id.* at 461. The Nunleys claimed spoliation for the defendant's failure to produce hard data supporting its route selection process. *Id.* Such data had not been produced in the first place. *Id.* This was accepted as an adequate explanation despite the fact that the plaintiff's expert testified that "in a project of this size, failure to document the route selection process would be engineering malpractice." *Id.* at 465.

223. Hickman v. Taylor, 329 U.S. 495, 510 (1947).

224. *Id.* at 510−11 ("Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. . . . Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten.").

routine creation of documents in the ordinary course of business. It would be impractical for a coroner to never write an autopsy report but merely relay the findings orally. It would not be feasible for insurance companies to only enter into oral contracts with their insureds. Accordingly, it is fair to conclude that an entity has a duty to tender documentation where the plaintiff would reasonably expect it to be routinely produced. Therefore, in limited circumstances, Louisiana should allow spoliation claims in cases where the relevant evidence never existed.

2. The Failure to Produce Evidence Must Impair the Claimant's Case

A spoliation claim should only be successful if the missing evidence in some way impairs the plaintiff's case. Nevertheless, because tort liability allows for varying ranges of damages and fault, it should not be necessary that the missing evidence is the threshold for the case in order to be actionable. If the missing evidence does not bar the party from recovery but merely reduces the judgment amount, the plaintiff should be allowed to recoup the amount by which the spoliation diminished the recovery. Thus, if a party is rendered a judgment of $50,000 but would have been granted $150,000 if a key piece of evidence had been present, the plaintiff suffered a loss despite the award of damages. Because economic injury is the basis for spoliation, claims should be allowed where it can be shown that the missing evidence decreased a judgment recovered by the plaintiff.

3. An "Adequate" Explanation for the Failure to Produce Evidence Will Defeat a Spoliation Claim

While an adverse presumption can be rebutted by explaining the circumstance surrounding the act,[225] tort liability should not be absolved by a mere explanation of what led to the present damages. Louisiana jurisprudence has failed to clearly distinguish between a cause of action for the tort of spoliation and a request for an adverse presumption based on spoliation.[226] Because the two remedies are

225. *See* Roby & Carter, *supra* note 61, at 224.

226. *See, e.g.*, Randolph v. Gen. Motors Corp., 646 So. 2d 1019, 1026 (La. Ct. App. 1st 1994). Though the *Randolph* court only talked about the adverse presumption, after finding the third party liable for spoliation, the trial court imposed 50% liability on the party. *Id.* at 1023. This is not a presumption. In *McCleary*, despite the fact that the plaintiffs sought damages for spoliation as a separate tort action, the court discussed the adverse presumption and what is needed. McCleary v. Terrebone Parish Consol. Gov't., No. 2009 CA 2208, 2010

entangled in courts' analyses, the courts consider defendants' explanations when faced with the tort of spoliation. While applying this "affirmative defense" to the tort of spoliation is incorrect, it is important for a practicing lawyer to be aware of the courts' actions.

Any story as to why evidence cannot be produced should not be adequate to overcome an adverse presumption or monetary damages for impairment of a claim. This incentivizes defendants to lie and undermines the integrity of spoliation claims. The *Wilhite* case, which held the doctor's explanation of the missing medical chart adequate, is a bad model for the growth of Louisiana's doctrine.[227] The court allowed a doctor to merely state that a nurse had lost the file.[228] Not only did the doctor have a statutory duty to maintain medical records, but his explanation lacked any corroboration.[229] Regardless of the truth of the doctor's explanation, setting the bar so low as to what will alleviate a party from liability will incentivize future parties to recite a similar story that includes negligence, then an unsuccessful effort to find the lost evidence. Thus, every claim would be defeated immediately with such a story, and this would undermine the theory of spoliation. The courts should place a high burden on what is considered an "adequate" explanation because this defense obliterates the plaintiff's recovery.

A high burden does not necessarily mean an impossible burden. In fact, many explanations may reasonably justify the absence of evidence, such as the fact that the evidence was destroyed during part of routine business practice. Such was the explanation in *Kammerer*.[230] The evidence in question, a manhole cover, was the property of and maintained by the Sewage and Water Board of New Orleans.[231] After replacing the cover, the "cover in question was immediately destroyed by employees of the defendant."[232] This was normal procedure that was "implemented as a safety precaution."[233]

WL 3822225, at *1–2 (La. Ct. App. 1st Sept. 30, 2010). The court then found spoliation was not present because the explanation of the party was "adequate." *Id.* at *6. This confuses the tort and adverse presumption. In *Harris*, the plaintiffs sought damages for spoliation under the tort. Harris v. St. Tammany Parish Hosp. Serv. Dist. No. 1, Nos. 2011 CA 0941, 2011 CA 0942, 2011 WL 6916523 (La. Ct. App. 1st 2011). Yet, the court discussed the adverse presumption and said an adequate explanation eliminates liability. *Id.* at 18.

227. Wilhite v. Thompson, 962 So. 2d 493, 499 (La. Ct. App. 2d 2007).

228. *Id.*

229. *Id.*; LA. REV. STAT. ANN. 40:1299.96(A)(3) (2008).

230. Kammerer v. Sewerage & Water Bd. of New Orleans, 633 So. 2d 1357 (La. Ct. App. 4th 1994).

231. *Id.* at 1357.

232. *Id.* at 1358.

233. *Id.*

The supervisor testified that "he had replaced numerous manhole covers and that none of the other destroyed covers had become the subject of litigation."[234] The court found that these statements formed a good basis to accept the explanation as "adequate."[235] Judge Plotkin, dissenting, explained that "obviously, routine destruction of evidence could be a 'reasonable explanation' for a failure to produce evidence in certain cases. However, [he did] not believe that this is one of those cases."[236] Judge Plotkin warned that an exception based on the routine destruction of evidence "provides a disincentive to the defendant to preserve important evidence and therefore should not be sanctioned because it is against public policy."[237]

Destruction in the routine course of business might be an adequate explanation at times. However, the court should look at the explanation of the defending party in conjunction with the surrounding factors, such as familiarity with litigation. If it appears, as it did to Judge Plotkin in *Kammerer*, that the explanation is insufficient to justify the actions taken by the defendant and that a reasonably prudent person in the defendant's shoes would have acted differently, then the explanation should not be allowed to defeat a spoliation claim.

C. Level of Intent

The third element for spoliation is the level of culpability necessary. All Louisiana circuits accept intentional spoliation.[238] As such, the third element in an intentional spoliation action would be for the plaintiff to prove that the defendant intentionally destroyed, altered, or failed to preserve the evidence. At that point, the prima facie claim for intentional spoliation is complete. However, this is

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234. *Id.*
235. *Id.*
236. *Id.* at 1367 (Plotkin, J., dissenting).
237. *Id.* at 1368. Also, his finding that the Sewage and Water Board of New Orleans's explanation was inadequate came from the familiarity of the defendant with litigation. *Id.* "The defendant knew or should have known that the logical result of an accident involving personal injuries would be the filing of a civil lawsuit by the injured party. Further, the defendant knew or should have known that the manhole cover was crucial to the plaintiff's claim." *Id.*
238. Union Pump Co. v. Centrifugal Tech., Inc., Civil Action No. 05-0287, 2009 WL 3015076, at *5 (W.D. La. Sept. 18, 2009) ("All five Louisiana Circuit Courts of Appeal have recognized spoliation as a valid tort claim. . . . The tort of spoliation of the evidence is derived from the evidentiary theory of adverse presumption. In the evidentiary context, the concept of spoliation of the evidence is defined as an intentional destruction of the evidence for the purpose of depriving an opposing party of its use." (citations omitted)).

nothing new. The more difficult question is whether Louisiana should recognize negligent spoliation. Accepting negligent spoliation is progressive because few states have recognized the tort.[239] However, recognition of negligent spoliation is consistent with Louisiana's tort law and Civil Code article 2315. The Louisiana Supreme Court or the Louisiana Legislature should formally recognize negligent spoliation in order to protect our citizens and the integrity of our law.

1. Existing Law Supports the Recognition of Negligent Spoliation

The courts and Legislature need only look to the sound reasoning of *Carter* and *Bethea* to find support for negligent spoliation claims. However, if these cases themselves are not persuasive, one need look no further than the general principles of contract and statutory law, the Louisiana Constitution, and the Louisiana Civil Code for justification.

a. Negligent Spoliation is Necessary to Uphold the Integrity of Contract and Statutory Laws

Failing to recognize negligent spoliation, a concept consistent with Louisiana's civilian tradition, threatens the integrity of the State's statutes and contract law. At the very least, Louisiana should formally accept the *Carter* notion that where "a statute, a contract, a special relationship between the parties, or an affirmative agreement or undertaking to preserve the evidence" is present, then a duty exists on behalf of the defendant.[240] These duties should be upheld because they are part of a larger body of law whose stability is undermined by the failure to accept negligent spoliation. If the courts do not enforce statutory provisions that require the maintenance of documents, as was the case in *Wilhite*, then the argument to enforce them in other instances is severely weakened.[241] For this reason, it is necessary that Louisiana accept negligent spoliation where a statutory duty is found in order to maintain the integrity of its laws. The same idea can be applied to contracts.

If the courts refuse to enforce a contractual provision requiring a party to preserve evidence or "an affirmative agreement or

239. *See supra* Part I.B.
240. Carter v. Exide Corp., 661 So. 2d 698, 704 (La. Ct. App. 2d 1995).
241. Wilhite v. Thompson, 962 So. 2d 493, 498 (La. Ct. App. 2d 2007).

undertaking to preserve the evidence,"[242] which is essentially an oral contract, then this will open the door for the unenforceability of other contractual agreements without a sufficient basis in law or reason. In contract law, the court will not uphold clauses if they are illegal, unreasonable, or unjust.[243] But that is not the case here. In some instances, the parties have mutually agreed to form obligations between them through a document or oral agreement. If these agreements do not violate existing laws or the rights of either party, then under sound contract law, they should be upheld.

b. Negligent Spoliation Encompasses the Judicial Integrity and Fairness for Which the Louisiana Constitution Strives

The Louisiana Constitution supports negligent spoliation. The Constitution states that "[a]ll courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation or other rights."[244] This clause declares that Louisiana's judicial system is in place so that citizens may have a fair adjudication of their claims.[245] The Constitution supports the notion that any hindrance to a citizen utilizing the judicial system should be eliminated or compensable.

> Essential to the fabric of the construction is the citizen's right of access to the evidence necessary to prove his case, without which mere access to the courts would be vain and useless. . . . Whether judge or jury, the trier of fact's ability to accomplish its goals of fairness and truth depends on the quality of the evidence put before it. . . . Where material evidence has been lost, the veracity and justice of the ultimate decision will of necessity suffer. Where that evidence has been wrongfully and intentionally destroyed, the injury is not only to the prejudiced party but also to the justice system itself and to the public's confidence in that system.[246]

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242. *Carter*, 661 So. 2d at 704.

243. *See* Sanchez v. Commodore Cruise Lines, Ltd., 713 So. 2d 572, 576 (La. Ct. App. 4th 1998) (citing Lejano v. Bandak, 705 So. 2d 158 (La. 1998)) ("[T]he Supreme Court held that a forum selection clause should be enforced absent a clear showing that enforcement would be unreasonable and unjust, or that the clause is invalid for such reasons as fraud or overreaching . . . .").

244. LA. CONST. art. 1 § 22.

245. *Id.*

246. Kammerer v. Sewerage & Water Bd. of New Orleans, 633 So. 2d 1357, 1362 (La. Ct. App. 4th 1994) (Waltzer, J., concurring).

The West Virginia Supreme Court also looked to its state constitution and the notions of judicial fairness and access to support the recognition of negligent spoliation.[247] In order to maintain the fairness and confidence in Louisiana's judicial system that is discussed in the State's Constitution, Louisiana should formally recognize negligent spoliation.

c. Negligent Spoliation Is Supported by the Louisiana Civil Code

Looking to the concepts of fairness and justice, in limited circumstances, Louisiana should allow the duty for negligent spoliation to be found in article 2315 as the *Bethea* court suggests. Foremost, Louisiana Civil Code article 1757 states that "[o]bligations arise from contracts and other declarations of will. They also arise directly from the law, regardless of a declaration of will, in instances such as wrongful acts, the management of the affairs of another, unjust enrichment and other acts or facts."[248] When a person negligently destroys evidence that hinders the plaintiff's claim, then the source of the obligation is a juridical fact.[249] As civilian law very commonly accepts juridical facts as a source of obligations to other parties, it should be no different for negligent spoliation. Liability under tort law is "nonconsensual" and unrelated to "voluntary undertakings."[250] "*Smith* [the first case to recognize spoliation in general] should not be limited to cases in which custodians of potentially relevant evidence agree to preserve the matter until trial."[251] The Civil Code is a "solemn expression of legislative will."[252] Thus, Louisiana endorses imposing tort liability where no contractual agreement is present.

In recognizing negligent spoliation against third parties, the Alabama Supreme Court noted that the general principles of negligence law present in the state were sufficient to support such an action.[253] In the same sense, Louisiana's article 2315 lays the foundation for a negligent spoliation claim. *Bethea*'s motivation for recognizing a duty under article 2315 for negligent spoliation claims

247. Hannah v. Heeter, 584 S.E.2d 560, 572 (W. Va. 2003).
248. LA. CIV. CODE art. 1757 (2013).
249. ALAIN LEVASSEUR, LOUISIANA LAW OF OBLIGATIONS IN GENERAL: A PRÉCIS 4 (3d ed. 2006).
250. Lawrence B. Solum & Stepehn J. Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1102 (1987).
251. *Id.*
252. LA. CIV. CODE art. 2 (2013) ("Legislation is a solemn expression of legislative will.").
253. Smith v. Atkinson, 771 So. 2d 429, 432 (Ala. 2000).

is that it is a true representation of Louisiana law.[254] *Bethea* advocates that the Legislature promulgated article 2315 to cover specific wrongs that the drafters could not have imagined at the time.[255] The drafters "realized[] no one could foresee all possible types of civil injuries and accidents that might befall people."[256] Mostly, *Bethea* discussed Louisiana's notion of fault. "The parameters of what constitutes fault in Louisiana reach far and wide in order to hold people accountable for their harmful actions regardless of whether or not their actions are covered by a statutory provision."[257] Having a broad view of fault allows the courts the discretion to recognize an obligation arising from a fault previously overlooked.[258]

The Framers of Louisiana's Civil Code viewed fault broadly "as a breach of a preexisting obligation, for which the law orders reparation, when it causes damage to another, and they left it to the court to determine in each case the existence of an anterior obligation which would make an act constitute fault."[259]

The idea that fault is a broad concept was not novel to *Bethea*. The Louisiana Supreme Court in *Veazey v. Elmwood Planatation Associates*, *Ltd*. noted that instead of defining "fault" for every applicable situation, the Civil Code gives a broad notion, and the application is left to the courts.[260] *Veazey* looked to the Louisiana Civil Law Treatise, which states that:

> [F]ault is the mirror of our times: what we, people of Louisiana, decide to be fault, that is fault. As such, fault is a fluid term definable only with respect to its surroundings and thus, with the concept of fault, we can incorporate into our law a new situation without changing our definition of fault: fault remains the same; it is we, members of society who change.[261]

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254. Bethea v. Modern Biomedical Servs., 704 So. 2d 1227, 1233 (La. Ct. App. 3d 1997) ("This court's understanding and appreciation of the civilian legal system, and La. Civ. Code art. 2315 in particular, yields a different view than that espoused by other Louisiana courts on this issue.").

255. *Id.*

256. *Id.* (citing SHAEL HERMAN, THE LOUISIANA CIVIL CODE: A EUROPEAN LEGACY FOR THE UNITED STATES 52 (1993)).

257. *Id.*

258. *Id.*

259. *Id.* (citing Pitre v. Opelousas Gen. Hosp., 530 So. 2d 1151, 1156 (La. 1988)).

260. Veazey v. Elmwood Plantation Assocs., Ltd., 650 So. 2d 712, 717 (La. 1994).

261. FERDINAND STONE, TORT DOCTRINE § 60, *in* 12 LOUISIANA CIVIL LAW TREATISE 84 (1977).

Article 2315 was purposely construed broadly so that Louisiana's delictual law would not become stagnant. As society changes to find that certain conduct falls below a proper standard, that fault should become actionable through evolving law.[262] "[T]he Louisiana application of fault in Article 2315 may be described simply as a legal determination of whether or not one will be made to repair damage caused by his actions—regardless of whether the tortfeasor's damage causing conduct may be considered imprudent."[263] Louisiana should utilize the safeguard provided in article 2315 to handle evolving law and find that the act of negligent spoliation falls below society's standards of proper conduct.

Article 2315 states that "[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."[264] This article alone justifies allowing negligent spoliation claims where no statutory or contractual duty is present because spoliation causes the plaintiff to suffer harm. However, it is harsh to mandate that every member of society should, at all times, consider what may or may not be evidence for some future trial. Therefore, article 2315 should be used in limited circumstances. These circumstances may include negligent spoliation by entities or businesses that for all practical purposes should be familiar with the frequency of litigation or the *Carter* notion of "a special relationship between the parties." Another circumstance in which article 2315 might be utilized to hold a defendant responsible for negligent spoliation is a situation of gross negligence in which the defendant's actions were so imprudent that it is only fair to grant recovery. For instance, it was appropriate for *Velasco*, the California case that first recognized negligent spoliation, to find that a janitor should not be held liable under general negligence principles for spoliating evidence because the janitor threw away a paper bag that contained a broken bottle.[265] Additionally, it was inappropriate for the court in *Gladney v. Milam* to find that no spoliation occurred where the defendant knew of the claims of the allegedly defective Firestone tire and yet sold the vehicle to a salvage yard, making the tire unavailable for testing.[266] Because the defendant was a national insurance company and was aware of the allegations, it was grossly

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262. Weiland v. King, 281 So. 2d 688, 690 (La. 1973) ("[F]ault is a broad concept, embracing all conduct falling below a proper standard.").

263. Mark Fernandez, Case Note, Dual Drilling Co. v. Mills Equipment Investments, Inc.—*A Statement About Conversion or A Statement About the Concept of Fault?*, 60 LA. L. REV. 985, 990–91 (2000).

264. LA CIV. CODE art. 2315 (2013).

265. Velasco v. Commercial Bldg. Maint. Co., 215 Cal. Rptr. 504, 506–07 (Cal. Ct. App. 1985).

266. Gladney v. Milam, 911 So. 2d 366, 368–69 (La. Ct. App. 2d 2005).

negligent in selling the vehicle to a salvage yard. Ultimately, the Louisiana Supreme Court should articulate a standard for when article 2315 should supplant the statutory or contractual duty requirement in order to allow for equitable recovery by a plaintiff.

2. Negligent Spoliation Is Equitable

Further, if none of the prior arguments persuade the Louisiana Supreme Court, the Court should accept negligent spoliation because it is equitable. Though the defending parties may be doing so negligently, their failure to use reasonable care that results in destroyed evidence leads to unjust enrichment at the plaintiffs' expense.[267] To protect plaintiffs from harm, Louisiana should recognize negligent spoliation in order to uphold the notions of truth and fairness and eliminate the incentive to lie.

a. Promotes Truth and Fairness

In order to support the principles of fairness in the judicial proceedings and the truthfulness of the result, a claim for negligent spoliation should be allowed. "Destruction of evidence undermines two important goals of the judicial system—truth and fairness . . . . Destruction of evidence is unfair because it potentially creates inequality of access to information."[268] Our judicial system operates under the adversarial system, which is thought to promote true results because of the incentive each side has "to produce evidence favorable to its position."[269] When evidence is spoliated, it "stands the assumption of the adversary system on its head: the parties, instead of feeding the fact finder all relevant evidence, become engines of destruction, purging the record of the relevant material that is favorable to the other side."[270] Allowing a party to be disadvantaged in litigation due to the actions of another, even if negligent, reduces the overall fairness of our judicial process. "Controlling destruction of evidence promotes fairness in the same way that liberal discovery rules do: control enhances equality of access to information, and hence negates an undeserved advantage by the party who began with the greater share of evidence under his control."[271]

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267. LA. CIV. CODE. art. 2055 (2013) (" Equity . . . is based on the principles that no one is allowed to take unfair advantage of another and that no one is allowed to enrich himself unjustly at the expense of another.").
268. *See* Solum & Marzen, *supra* note 250, at 1138.
269. *Id.*
270. *Id.* at 1139.
271. *Id.* at 1140.

b. Eliminates Incentive to Lie

Finally, recognizing a claim for negligent spoliation would reduce the incentive to lie. Judge Waltzer, concurring in *Kammerer*, discussed in detail why an adverse presumption was in line with both civilian tradition and Louisiana jurisprudence.[272] In doing so, she justified the need for an adverse presumption by saying that without it, "there would be no loss to the destroying party, and a message would go out to the community that evidence germane to issues in the judicial process may be destroyed at will without negative consequence."[273] This message would negatively impact the effectiveness and fairness of adjudications.[274] This same logic justifies the need for negligent spoliation. By allowing a party to escape the consequences of disposing of evidence merely because they stated that it was an accident would send the message that Judge Waltzer so feared. A set of facts that would be completely actionable under intentional spoliation could quickly become completely non-actionable if the defending party merely states that its acts of spoliation were an accident. This instant loss of a claim by the parties is not in the best interest of our judicial system, nor our state.

CONCLUSION

As noted in *Lewis*, "this issue [of spoliation] is certainly ripe for consideration."[275] There is a drastic disparity in how Louisiana circuits treat the doctrine of negligent spoliation. The Louisiana Supreme Court or Louisiana Legislature must recognize negligent spoliation. At a minimum, negligent spoliation should be found when a statutory or contractual duty is present, and in limited circumstances, the duty should be found in article 2315. If negligent spoliation is not adopted, Louisiana will erode statutory and contract law, the judicial system will lose integrity, and the courts will condone lying by litigants. For the sake of Louisiana's citizens and its law, it is time for Louisiana to formally recognize negligent spoliation.

Danielle "Dani" Borel[*]

272. Kammerer v. Sewerage & Water Bd. of New Orleans, 633 So. 2d 1357, 1363 (La. Ct. App. 4th 1994) (Waltzer, J., concurring).

273. *Id.*

274. *Id.*

275. Lewis v. Albertson's Inc., 935 So. 2d 771, 774–75 (La. Ct. App. 2d 2006).

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